2011 (I) ILR – CUT- 144

V.GOPALA GOWDA, CJ.

M.A. NO.789 OF 2000 (Decided on 10.12.2010)

ORIENTAL INSURANCE CO.LTD. …… Appellant.

.Vrs.

PURNAMI NAIK & ORS. ……. Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – SEC.122.

Jeep Parked at a dark place on the public road without the parking light on – A truck dashed with the Jeep – The Insurance Policy of the Jeep is an 'Act Policy' – Deceased was traveling in the Jeep free of cost – No rebuttal evidence given by the appellant to show that the deceased was traveling in the Jeep as a passenger – Held, there is negligence on the part of the Jeep driver and the Tribunal is justified in fastening the liability of 50% of the awarded compensation on both the vehicles on the basis of contributory negligence.

(Para 7)

Case law Referred to:-

2010 (I) ILR-CUT-248 : (The D.M., Oriental Insurance Co.Ltd.-V- Arati Mishra & Anr. , D.M., O.I.C.Ltd. -V- Ashok Ku. Satpathy & Anr., D.M.,I.I.C., Ltd.-V-Sarojini Satpathy & Ors. & D.M., O.I.C. Ltd.-V-Pabitra Mishra & Ors.).

For Appellant - M/s. G.P.Dutta, K.C.Narendra & A.Jena.
For Respondents - Mr. B.B.Routray-R-1,
M/s.Sabita Ranjan Pattnaik, Padmaja Patnaik, P.K.Swain, D.Pradhan, R.P.Patnaik & N.K.Senapati(R-10)

V.GOPALA GOWDA CJ. This Miscellaneous Appeal is directed against the Award/Judgment dated 12.10.2000 passed by the Member, Second M.A.C.T., Northern Division, Sambalpur, in Misc.(A) Case No.87 of 1996 (S) in allowing the application filed by the L.Rs. of the deceased Saukilal Naik by answering the contentious issue fastening the liability upon the appellant-Oriental Insurance Company and respondent no.10-National Insurance Company Ltd. urging various legal contentions.

2. The legal grounds urged in this Appeal against impugned Award are stated herein, there is no need to advert to the facts of this Judgment for the reason that the learned Member of the Tribunal has extensively referred to

the same in the impugned Award. The Appellant who was the opposite party no.4 before the Tribunal has filed this Appeal questioning correctness of the findings recorded on the issue no.1 at paragraph-9 of the Award against the Appellant holding that the contributory negligence on the part of the driver of the vehicle insured with the Appellant which is on fact and in law is not correct and further fastening the liability of 50% compensation upon this Appellant on the basis of contributory negligence at Rs.25,000/- towards the compensation awarded with interest by the Tribunal in favour of the L.Rs. of the deceased placing reliance upon the Ext.6. The Insurance policy of the Jeep is an 'Act Policy' and the deceased was traveling as a passenger in the said Jeep, which is not permissible under the terms and conditions of the policy and the deceased person has been termed as a "gratuitous passenger" in respect of whom the Hon'ble Supreme Court has stated that no liability can be fastened upon the Appellant-Insurance Company, for the reason that the deceased has travelled in the Jeep in violation of the terms and conditions of the Insurance policy issued in favour of the insured owner of the vehicle involved in the accident and further the deceased also could not have been considered as a third party by the Tribunal to cover the policy and awarded compensation. Therefore, the finding of the Tribunal fastening the liability of 50% of the awarded compensation upon the Appellant on the basis of contributory negligence is erroneous in the eye of law and therefore the same is liable to be set aside.

3. The Second ground of attack of the impugned Award by the learned counsel for the Appellant is that the learned Tribunal has erred in law in holding that the driver of the offending Jeep was rash and negligent in causing the accident and as such the award of 50% of the compensation payable by this appellant is bad in law and is liable to be set aside. Learned counsel for the Appellant in support of his contention has placed reliance on the decision of this Court in The D.M., Oriental Insurance Co-Ltd. v. Arati Mishra & Anr. , D.M., O.I.C.Ltd. v. Ashok Ku.Satpathy & Anr., D.M., I.I.C. Ltd. v. Sarojini Satpathy & Ors. & D.M., O.I.C. Ltd. v. Pabitra Mishra & Ors. 2010(I) ILR-CUT 248, wherein this Court interpreted the phrase 'Act Policy' with reference to Section 147 of the M.V. Act of 1988, after considering the catena of the judgments of the Supreme Court. Therefore, he submits that the said decision is applicable to the facts situation of the case on hand and therefore the learned counsel for the Appellant submitted that the findings recorded on Issue Nos.1 & 2 in the impugned Award may be set aside.

4. Learned counsel appearing for respondent nos. 1 to 9 to justify the award passed in favour of them contending that the Tribunal being the fact finding authority after appreciating the facts and legal evidence on record has rightly recorded the findings on the contentious issues and held that there is a contributory negligence on the part of both the drivers of the Jeep

and the Truck and therefore it has further held that the insurers of both the vehicles are liable to pay the compensation amount to the legal representatives of the deceased.

5. With reference to the above rival contentions urged at the Bar, I have examined the findings and reasons assigned in the Award with a view to find out as to whether the findings recorded on the contentious issues framed by the Tribunal are required to be set aside, on the grounds urged on behalf of the Appellant. The issues framed by the Tribunal in the claim case read as follows:

"(1) Whether the accident took place due to rash and negligent driving of the alleged vehicle causing death to Soukilal Naik?

(2) Whether the applicants are entitled for compensation, if so, to what extent and from whom?

(3) To what other relief, the parties are entitled for?"

Appellant and respondent no.10 contested the claim case of the claimants before the Tribunal. The Tribunal after considering the pleadings of the parties, evidence of A.Ws.2 and 3 and documents marked as Exts.1 to 6 has recorded its findings and reasons on the contentious issue no.1 referred to above in the impugned award against both appellant and respondent no.10 and in favour of the claimants by recording valid and cogent reasons. The contention urged on behalf of the appellant that since charge sheet was filed against the truck driver who is responsible for the cause of the accident on the fateful day against the parked Jeep in which the deceased was traveling, fastening the liability upon the appellant also in the impugned award to pay the compensation is erroneous and bad in law.

6. I have carefully examined the above legal contention of the appellant,s counsel with reference to the reasons assigned by the learned Member of the Tribunal at paragraphs-9 and 10 of the impugned award. Learned Member of the Tribunal in exercise of its original jurisdiction has properly appreciated the pleadings and evidence on record and recorded the findings of fact keeping in view the undisputed fact that the Jeep was parked at a dark place on the public road without the parking lights on. Therefore, the Tribunal has rightly applied the provisions of Section 122 of the M.V. Act and recorded its finding holding that there is contributory negligence on the part of the driver the Jeep and therefore fastened the liability for payment of compensation awarded both on the appellant and respondent no.10 equally.

7. So far as 'Act Policy' is concerned, learned counsel for the appellant has submitted that the deceased was traveling as a passenger in the Jeep unauthorizedly. In support of his contention, he pointed out that the findings

recorded at paragraph-13 of the impugned award, wherein the learned Member of the Tribunal has held that the deceased was a gratuitous passenger, which is contrary to the facts and evidence adduced by the claimants. The evidence of the claimants has been referred to by the learned Member of the Tribunal while answering to contentious issue no.1 at paragraph 9 and recorded the finding holding that the deceased person along with others was returning from a marriage party and it has been elicited from A.W.3 in his cross-examination, wherein he has stated that they took the Jeep free of cost from its owner and there were eight persons traveling back after attending the marriage. The very statement of the witness of the claimants that the Jeep was given 'free of cost' is relevant in support of the findings recorded by the Member of the Tribunal while answering contentious issue no.1, and rightly held the appellant is also liable to pay the compensation to the claimants at 50% awarded amount with interest. The Jeep was given free of cost to the deceased and others to attend the marriage and no rent or fare was collected from the deceased. There is no rebuttal evidence adduced by the appellant in this regard to show that the deceased was traveling as a passenger unauthorizedly in the Jeep, though such plea was taken in the counter statement filed by the appellant. Therefore, the learned Member of the Tribunal has answered the issue no.1 at paragraph-9 of the Award in favour of the claimants. The finding on the issue no.1 is correct as the same is based on facts and legal evidence on record and the compensation awarded at Rs.50,000/- with interest at 10% in favour of the claimants is also on the lower side. The Member of the Tribunal has rightly held that there is contributory negligence both on the appellant and opposite party no.10. Therefore, they have to contribute half each by paying Rs.25,000/- towards such compensation with 10% interest per annum till the payment is made which is legal and valid and the same cannot be termed as erroneous in law. The decision of this Court referred to supra upon which reliance placed by the appellant's counsel is totally inapplicable to the facts and circumstances of the case on hand and therefore the same is misplaced.

8. For the foregoing reasons, the appeal is dismissed. Since the claim case is pending for the last 14 years, the Insurance Company shall deposit or pay the compensation amount to the claimant-respondents 1 to 9 with interest within four weeks from the date of receipt of this judgment.

Appeal dismissed.

2011 (I) ILR – CUT- 148

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

WRIT APPEAL NO.148 OF 2010 (With Batch) (Decided on 29.10.2010)

STATE OF ORISSA & ANR. …….. Appellants.

.Vrs.

ALL ORISSA PRIVATE SECONDARY TRAINING SCHOOLS MANAGEMENT ASSOCIATION & ANR. ……..Respondents.

Education – C.T. Examination – Students of private C.T. Colleges filed writ petition to appear in C.T. Examination, 2009 – Learned Single Judge allowed their prayer – Order challenged in writ appeals.

State Government vide press Note Dt.11.05.1990 allowed students of unrecognized private C.T. Colleges to appear C.T. examination in 1990 as the "last chance" and no further opportunity would be given and the institutions should undertake not to admit any student in future – A Division Bench of this Court, in the case of Managing Committee Swarna Chuda Secondary Training School & others -V- State of Orissa and others, has upheld the decision of the Government – So the prayer of the petitioners basing on the existence of infrastructure and genuineness of the students can not be accepted – The issue raised in the present appeals have already been settled by the above Division Bench – The learned single Judge has ignored the "ratio decidendi" decided by the Division Bench which has the effect of a binding precedent – Held, the judgment of the learned single Judge is not legal hence set aside.

(Para 19 & 20)

Case law Relied on:-

.77 (1994) CLT 459 : (Managing Committee, Swarnachuda Secondary Training School & 39 Ors.-V-State of Orissa & Ors.).

Case laws Referred to:-

1.(1992) 4 SCC 435 : (State of Maharashtra -V- Vikas Sahebrao Roundale & Ors.)

2.(1986) 2 SCC 667 : (A.P.Christians Medical Education Society-V-Govt. of A.P.).

3.AIR 1971 SC 530 : (H.H.Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur & Ors.-V- Union of India).

4.AIR 1993 SC 43 : (Commissioner of Income Tax-V-M/s. Sun Engineering Works (P) Ltd.).

5.AIR 1982 SC 1302 : (Food Corporation of India & Anr.-V-Yadav Engineer & Contractor).
6.AIR 1960 SC 1118 : (Jai Kaur & Ors.-V-Sher Singh & Ors.).

For Appellants - Mr. A.K.Mohanty, Advocate General & Sr.Standing Counsel, School & Mass Education Department.
For Intervenor - M/s.Umesh Patnaik & D.Ray.
For Respondent No.1 – M/s. D.N.Mohanty, P.Das, S.Das & J.N.Choudhury.
For Respondent No.2 - M/s. Pradipta Mohanty, D.N.Mohapatra, P.K.Nayak, J.Mohanty & S.N.Dash.

I.MAHANTY, J. The present writ appeal has been filed by the State Government and other officers of the State Government, seeking to challenge the judgment dated 25.03.2010 passed by the learned Single Judge of this Court in W.P.(C) No.5640 of 2009 and connected writ petitions filed by the All Orissa Private Secondary Training Schools Management Association, (petitioner-respondent No.1) and others. The Association in the aforesaid writ petition had sought for a direction to the opposite parties therein, to allow the students of the member-institutions of the petitioner-association, who have completed their Certified Teachers Course (in short, 'the C.T. Course') in the sessions 1989-90, 1990-91 and 1991-92 to appear in the C.T. Examination, 2009 to be conducted by the Board of Secondary Education, Orissa, Cuttack.

2. This writ petition came to be allowed by the learned Single Judge vide order dated 25.03.2010, inter alia, by passing the following directions:-

> " This Court, therefore, while setting aside the orders passed by the Principal Secretary declining to entertain the claim of the member – institutions, disposes of the writ petition directing the Principal Secretary, School and Mass Education Departments to reconsider the reports of the Collectors which were called for and keeping in view the fact that previously the Government, as a matter of policy, decided to grant an opportunity to the students of the unrecognized Private Secondary Training Schools to appear in the C.T. examination on one time basis on two occasions and once pursuant to the orders passed by this Court in OJC No.5629 of 1991, it is felt appropriate that the Principal Secretary on reconsidering the report of the Collector, which were given pursuant to the orders of this Court, by the Collectors, at the first instance or subsequently, where the Collectors have given favourable reports with regard to infrastructure and staff and the attendance of the students, shall

allow such students till the session 1991-92 to appear the C.T. examination to be conducted by the Board of Secondary Education, Orissa. The Board of Secondary Education upon being communicated shall allow such students of the petitioner-institution of 1989-90, 1990-91 and 1991-92 to appear in the C.T. Examination, which should be conducted once for all latest by the end of 2010."

3. Mr. A.K.Mohanty, learned Advocate General appearing for the appellants raised the following grounds of challenge:-

i) The students of the institutions run by the Respondent Association are not eligible to appear in the C.T. Examination since the institutions in which they purportedly studied were opened without obtaining any opening permission from the concerned authority as required under the Orissa Education Act, 1969 nor were the institutions ever granted recognition by the State Government nor Board. Therefore, it is asserted that the students of the institutions which have not been permitted nor granted recognition cannot be permitted to appear in any examination conducted by the Board.

ii) Section 7-E of the Orissa Education (Amendment) Act, 1989 prohibits establishment and recognition of certain institutions, which reads thus:

"**Section-7E**:Notwithstanding anything to the contrary contained in this Act, on and after the commencement of Orissa Education (Amendment) Act, 1989 the State Government shall not accord permission for establishment of any Private Secondary Training School or Private Training College or recognize any such school or college established, if any, prior to the said date."

iii) Section 7-F of Orissa Education (Amendment) Act, 1989 stipulates that "Government is not bound to accord permission for establishment of or reorganize certain training schools and colleges claiming to have been established, prior to 14.8.1989 when the Orissa Education(Amendment) Act, 1989 came into force.

"**Section 7-F**: Notwithstanding anything contained in this Act or the rules made there under or in any Judgment, decree or order of any Court the State Government shall not be bound to accord permission for establishment of any Private Secondary Training School or Private Training College, or recognize any school or college established, if any, prior to the 14th day of August, 1989 and non-recognition of such school or college shall not be questioned in any Court of Law or otherwise be opened to challenge."

iv) The Chapter IX of Board of Secondary Education Regulation Act, 1955 stipulates that, no school, which is not recognized by the Board

shall be permitted to present candidates for any examination conducted by the Board and in the present case, since it is an admitted fact that, the respondents school is not recognized by the Board of Secondary Education, accordingly these institutions are not competent to present any students in the C.T. Examination conducted by the Board of Secondary Education Orissa.

v) The judgment of the learned Single Judge impugned hereinabove is contrary to the ratio decided in the case of **Managing Committee, Swarnachuda Secondary Training School and 39 others, v. State of Orissa and others,** reported in 77 (1994) CLT 459.

4. Mr. J.Pattnaik, learned Senior Advocate appearing for some of the respondents in the aforesaid batch of cases, raised a preliminary objection to the maintainability of the present writ appeal. He further submitted that in an earlier W.P.(C) No. 10372 of 2008 orders were passed therein on 24.9.2008, which was modified on 12.12.2008, directing the State Government to verify the infrastructure facilities of the members of the petitioner-association and to ascertain as to whether the students had completed their course in those schools. It was further directed that, if on enquiry, findings therein are in the affirmative, the Government may consider allowing such students to appear in future examination in the C.T. course and while considering these aspects, the Government should also take into account as to whether any prior approval or affiliation was necessary of any University or Board for imparting such course.

4.1 Thereafter in Misc. Case No. 6989 of 2009 the learned Single Judge vide order dated 3.8.2009 had directed the Board of Secondary Education Department, Orissa to accept the submission of forms along with the required examination fee and to permit the students to appear in the C.T. Examination, 2009 which was scheduled to be held on 8.9.2009, but their results were directed not to be declared without leave of this Court.

4.2 A writ appeal was filed by the State Government against the aforesaid direction i.e., Writ Appeal No. 146 of 2009 in which orders were passed limiting the holding of examinations only the “regular students of Government Secondary Training Schools” and in so far as students of Private Secondary Training Schools (Members of the Respondent No.1 Association were concerned), the learned Division Bench vide order dated 3.2.2009 quashed aforesaid directions and instead held that the rights of such students of unrecognized private institutions would be decided in course of the final decision in the writ application which were then pending before the learned Single Judge.

4.3 The learned Single Judge finally decided after hearing the parties and delivered its judgment on 25.3.2010 in W.P. (C) No. 5640 of 2009, which is the subject matter of challenge in the present writ appeal. In view of

the aforesaid facts, Mr. J.Pattnaik, learned Senior Advocate submitted that by dismissal of the Writ Appeal No. 146 of 2009, the judgment passed by the learned Single Judge in W.P. (C) No. 10372 of 2008 as confirmed and since the State Government had failed to implement the decision passed by the learned Single Judge, even though, the State claimed to have implemented the same and had carried out necessary enquiry, but had rejected the claim made by the members of the Respondent No.1 Association on different ground. It is submitted that the State Government was bound by the dismissal of its earlier writ appeal and therefore a subsequent writ appeal should not be entertained.

5. Mr. Routray, Mr. J.K.Rath, learned Senior Advocates and Mr. K.K.Swain, learned counsel for the respondents submitted that, the ratio of the **Swarnachuda's** case(supra) is that, the Secondary Training Schools having no infrastructure and ill-equipped institutions cannot be permitted to present their candidates in the C.T. Examination. It is asserted that in W.P. (C) No. 5604 of 2009 decided by the learned Single Judge and the dismissal of State's challenge in Writ Appeal No. 146 of 2009, affirmed the directions issued by the learned Single Judge to make enquiry regarding infrastructure of the schools and as to whether the students have prosecuted their studies in the schools or not, and further as to whether prior permission was necessary by the Board for presentation of such candidates to appear at the C.T. Examination. All the learned counsel asserted that since the reports of the inquiry at the behest of the State were in the affirmative, there was no justification for rejecting the prayer of the respondents seeking permission to appear at the ensuring C.T. examination.

6. It was further submitted that since no prior permission was necessary for private candidates to appear at the C.T. Examination and therefore, it cannot be said that the direction of the learned Single Judge to permit the students of the respondent association to appear at the C.T. Examination as private candidates was contrary to the ratio laid in Swarnachuda's case. It is asserted therefore that, the direction of the learned Single Judge passed in W.P.(C) No. 10372 of 2008, which was upheld by the Division Bench in the writ appeal and the subsequent order passed in W.P.(C) No. 5640 of 2009 which is the subject matter of the present writ appeal, is in the nature of implementation of an earlier order passed in W.P.(C) No. 10372 of 2008 and therefore it cannot be said to be contrary to the ratio in Swarnachuda's case in any manner, as the learned Single Judge took into consideration Swarnachuda's case and after considering the implication of the said judgment directed for enquiry with regard to infrastructure, prosecution of study by the students and also as to whether any recognition by the Board, for such candidates to appear in the C.T. examination was at all necessary.

7. It is further submitted on behalf of the respondents that the Orissa Secondary Education Act, 1953 under which the Board's Regulation has been framed i.e., Regulation-6 of Chapter 10-D stipulates, the eligibility criteria only for private candidates of "recognized" Secondary Training Schools to appear at the C.T. Examination. It is asserted that the said provision does not state anything about eligibility of the private candidates of "unrecognized" Secondary Training Schools. Reliance was also placed on Article 437 of the Orissa Education Code, which is quoted below for the purpose of asserting that candidates of "unrecognized" Secondary Training Schools can also be permitted to appear at the C.T. Examination.

> "**437. Schools under Private Management:-**
> School under private Management may recognize by the Director, Secondary Training Schools and may be permitted to send of students to the Teachers Certificate Examination."

8. In this respect the learned Advocate General submitted that though Writ Appeal No. 146 of 2009 had been dismissed on the ground of delay, the directions, issued in W.P.(C) No. 10372 of 2008 was limited to, directing the Secretary, Board of Secondary Education to undertake an enquiry. The Secretary, Education complied with such directions and on conclusion of such enquiry, rejected the prayer of the petitioners to be permitted to appear in the C.T. Examination, since their institutions were neither permitted nor recognized by the State nor the Board. The directions issued by the learned Single Judge, vide judgment dated 24.9.2008/12.12.2008 in W.P.(C) No.10372 of 2008, was not only limited to an obligation to conduct an enquiry, but was also to "take into account as to whether any prior approval or affiliation was necessary of any University or Board for imparting such course". In compliance of the aforesaid direction though enquiry as directed was duly conducted, the State authorities, rejected the respondents prayer since it was concluded the Respondent-institutions were neither permitted nor recognized as required under the Orissa Education Act and Rules thereunder. Therefore, the Respondent Association filed W.P.(C) No. 5640 of 2009, which came to be allowed vide order dated 25.3.2010 and hence, the present writ appeal filed by the State was maintainable, irrespective of the fact that the State's earlier Writ Appeal No. 146 of 2009 had been dismissed.

9. Mr. A.K.Mohanty, learned Advocate General placed reliance on a press note dated 11.05.1990, issued by the State Government in the Education Department which had permitted the students of unrecognized C.T. training institutions which had taken admission in 1988-89 or prior thereto and whose students had completed two years of study to appear at

the 1990 C.T. examination, as "private candidates" and other stipulations contained therein and it was also declared therein that, this opportunity was the "last chance" and that no further opportunity would be granted either to unrecognized private institutions or their students. Mr. Mohanty, further submitted that although a number of various writ applications had been filed against the aforesaid decision of the State Government, since the C.T. examination could not be held on the date as scheduled, this Court in various writ petitions held the cut-off date of 31.05.1990 as contained in the Press Note dated 11.05.1990, for making application to be unsustainable and extended the last date of application till 21.9.1991. While extending the period for application, the High Court, at the said time uphold the decision of the State Government dated 11.5.1990, that it would be the "LAST CHANCE" for private unrecognized institutions and students thereof to apply for the C.T. Examinations. Accordingly, learned Advocate General for the State submitted that, the C.T. examination for the year 1990 was ultimately held on 26.11.1991 and neither the member institutions of the Respondent Association nor their students made necessary applications within the time stipulated.

9.1 Thereafter on 11.3.1992 a resolution was passed in the Orissa Legislative Assembly to the following effect:-

> "That the House unanimously resolves that no body will be allowed to appear at the C.T. examination excepting the students of Government C.T. schools. Government will also take appropriate steps to deal with such fake C.T. schools including their illegal acquisition of huge assets."

10. Thus, the decision of the State Government dated 11.05.1990 directing holding of the last examination in 1990 and the Resolution of the Orissa Legislative Assembly, noted hereinabove came to be challenged by a number of institutions, inter alia, on the ground that, the decision of the Government not to hold further examination was unwarranted, particularly when the record of the petitioners institutions were being verified to find out whether the institutions were genuine or not as well as the genuineness of the students and the denial to hold further examination had affected a large number of students. Their further grievance was that restricting further opportunity to appear in subsequent C.T. examination only to those students who had appeared and failed in 1991 C.T. examination was illegal.

10.1 This contention of the petitioners was out rightly rejected by this Court in the case of Managing Committee, Swarnachuda (supra), by coming to hold as follows:-

> "On 11.5.1990 the State, as indicated above, decided to have Special C.T. Examination in the year 1990'once for all'. In January,

1991, that is 28.1.1991 to be precise, the State took a decision to allow only such students who had operated as private candidates and had failed. On 2.4.1991 a notification was issued extending the date of examination. On 1.5.1991 there was again postponement of the examination. In between the legality of the Government Order dated 28.1.1991 was assailed in this Court and it was held that those un-recognized schools which had fulfilled the conditions laid down in both the Government Orders were eligible to send their students. On 17.5.1991 the Director of Secondary Education wrote to the State Government that according to G.O. dated 11.5.1990, 67 un-recognized S.T. Schools had applied on or before 31.5.1990. This cut-off date was challenged in this Court. It was held that there was no justification for fixing up the date. The last date for filling up the forms was 16.9.1991 and 21.9.1991 was the last date for submission of forms with fine. The date of examination which was originally posted to 30.10.1991 was adjourned to 26.11.1991. There was, therefore, enough notice to the institutions about the Government decision of giving one chance to the students. The process started in the year 1990 and the examination commenced from 26.11.1991. Except in one case, i.e., Olavar S.T.School, petitioner in O.J.C. No. 7305 of 1992 in all other cases institutions moved this Court for the first time either on 26.9.1991 or subsequent there to. It is hard to believe that an institutions set up for imparting teaching and preparing students to take the examination would lie in deep slumber and not even take steps for filling up forms of the students and/or to take no effective steps in that regard. A feeble plea has been taken that applications were filed before the Director or the Inspector of Schools as the case may be. That is hardly of any consequence. The institutions were aware that there was only one chance which was being granted to the institutions to present their students. Effective steps were not taken. No explanation whatsoever has been offered for the inaction. That goes a long way to prove about the non-genuineness of the institutions and the students. It is unbelievable that the students whose careers are at stake would remain dormant and act as silent spectators. We, therefore, find no scope for interference in these writ applications."

10.2 Mr. A.K.Mohanty, learned Advocate General concluded by stating that in Swarnachuda's case, a Division Bench of this Court did not even permit entertaining applications beyond the last date fixed by the Court on 21.9.1991, therefore, no question of entertaining similar applications after a period of 17/18 years from the date of the said judgment should at all arise.

11. In the light of the contentions raised by the learned counsel for the respective parties as noted hereinabove, it becomes essential to note certain undisputed facts:

(i) The member institution of the Respondents Association are admittedly all institutions who have not been recognized by the State of Orissa in the Department of Education.

(ii) The Respondents Association claim their institutions were all established prior to 1989 i.e., prior to coming into force the Section 7-E and Section 7-F of the Orissa Education Act, 1969 but have never been accorded permission for establishment of the institution.

(iii) The learned Single Judge has directed the students who have joined various private unrecognized institutions in the year 1989-90, 1990-91, 1991-92, i.e., for a period beyond those covered by the Press Note dated 11.05.1990.

(iv) In W.P.C. No.1037 of 2008 judgment dated 24.9.2008 was modified on 12.12.2008 although directions had been issued by the learned Single Judge to conduct an enquiry, at the same time, the State Government had been also directed to take into account "as to whether any prior approval or affiliation was necessary."

(v) State Government decision published in Press Note dated 11.5.1990 granting "last chance" to institutions/students of unrecognized private C.T. Schools was known to all private unrecognized institutions and their students.

(vi) The Orissa Legislative Assembly on 11.3.1992 had resolved that, nobody will be allowed to appear at future C.T. Examination excepting the students of Government C.T. Schools in future.

11.1 In the light of the aforesaid facts that emanate from the pleadings of the parties and which remain uncontroverted, the main issue for consideration that arises in the present case is, as to whether students of unrecognized private institutions who claim to have prosecuted their studies for C.T. Examination ought to be permitted to appear in the C.T. Examination of 2010 as directed in the impugned order.

12. Now it becomes necessary to deal with the contentions advanced by the learned counsel for the respondents:

(a) In so far as the objection of maintainability is concerned, on the ground that and earlier Writ Appeal No. 146 of 2009 filed by the State Government had been dismissed and therefore the present writ appeal was not maintainable, deserves to be rejected. It is clear from the pleadings of the parties that an earlier Writ Appeal No. 146 of 2009 has been filed seeking to challenge the judgment rendered by the learned Single Judge in W.P.(C) No. 10372 of 2008. In the aforesaid writ petition, the learned Single

Judge had not only directed enquiry into the infrastructure and the genuineness of the students, at the same time, the learned Single Judge had also directed the State Government, to take a decision on the issue as to whether the Member Institution of the Respondent Association required approval and/or recognition from the State as well as the Board. Therefore, as consequence of the aforesaid direction although enquiry was carried out the State Government took a fresh decision that, the Members Institution of the respondent association could not be permitted to present their candidates in future C.T. examination, since the said institutions were neither permitted to be established nor recognized by the State or Board. This gave rise to a fresh cause of action, for which reason the Respondent Association once again filed W.P. (C) No. 5640 of 2010. This petition came to be disposed of by judgment dated 25.3.2010 and is the subject matter of the present appeal and, therefore, clearly maintainable in law. Therefore, the objection raised on the issue of maintainability of the present writ appeal stands rejected.

(b) The further contention raised by the respondent that the enquiry carried out by the State Government, pursuant to the direction issued in W.P.(C) No. 10372 of 2008, clearly establishes the "bonafide of the Member institutions of the respondent association" as well as their students and therefore the State ought not to have rejected the prayer of the respondent association to permit the students to appear at the ensuing C.T. examination for the year 2010. This objection of the respondent also deserves to be rejected.

In the case of Swarnachuda (supra) similar plea on behalf of the petitioners therein had been negatived by the Hon'ble Division Bench, upholding the decision of the State Government dated 11.5.1990 (Press Note) that the said opportunity was the "last chance" for the students for un-recognized private C.T. colleges to appear in 1990 C.T. examination and it had been made clear therein that, no further opportunity would be granted and that the institutions should undertake not to admit any students in future. This decision of the State Government has been up-held in Swarnachuda's case and the Hon'ble Division Bench has observed that, no further opportunity could be afforded to such students who while being fully aware of the decision of the State Government purportedly claim to have continued their studies. Apart from that the Court came to conclude that the unrecognized private schools as well as their students were fully aware of the aforesaid decision and therefore, prayer of the petitioners based on the existence of infrastructure and genuineness of the students cannot be accepted as the basis for granting relief to the respondents.

(c) A further contention of the respondents is that, Article 437 of the Orissa Education Code athorises the students of the C.T. schools under the

private management to appear as private candidates at the C.T. examination. Article 437 of the Orissa Education Code, specifically applies only to schools under private management which have been "recognized" by the Director, Secondary Training Schools. In the present case admittedly the member institutions of the respondent association have not been recognized either by the State Government or by the Director, Secondary Training Schools. Therefore the question of permitting such students under the guise of Article 437 of the Orissa Education Code does not arise.

(d) The further contention of the respondent and in particular the "intervenor" (the students of the opposite party respondent member institution) for being shown sympathetic consideration since they had concluded their education years ago and are not being permitted to appear at the C.T. examination has also no merit and has to be rejected. It is well settled by a series of judgments of the Hon'ble Supreme Court, in the case of **State of Maharashtra v. Vikas Sahebrao Roundale and others,** (1992) 4 SCC 435, where the Supreme Court held that, the students of unrecognized and unauthorized educational institutions could not have been permitted by the High Court on a writ petition being filed to appear in the examination since it would lead to "Slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of the education. Time and again, therefore, this Court had deprecated the practice of educational institution admitting the students without requisite recognition or affiliation. In all such cases the usual plea is the career of innocent children who have fallen in the hands of the mischievous designated school authorities. As the factual scenario delineated against goes to show the school has shown scant regards to the requirements for affiliation and as rightly highlighted by learned counsel for the CBSC, the infraction was of very serious nature. Though the ultimate victims are innocent students that cannot be a ground for granting relief to the appellant. Even after filing the undertakings the School non-challantly continued the violations. Students have suffered because of the objectionable conduct of the school. It shall be open to them to seek such remedy against School as is available in law, about which aspect we express no opinion.

It was also further well settled by the Hon'ble Supreme Court in the case of **A.P.Christians Medical Education Socieity v.Government of Andhra Pradesh** (1986) 2 SCC 667, where it has been held that:

> "We cannot by our fiat direct the University to disobey the statute to which it owes its existence and the regulations made by the University itself. We cannot imagine any thing more destructive of the rule of law than a direction by the court to disobey the laws."

In view of the aforesaid decisions of the Hon'ble Supreme Court this Court cannot entertain this contention of the intervenor and therefore the same stands rejected.

13. On perusal of the impugned judgment passed by the learned Single Judge it would be clear therefrom that the learned Single Judge did take note of the judgment in Swarnachuda's case but failed to discuss the same and held the same to be inapplicable merely by observing as follows in para-8:-

> "Much water has flown in between, from the date of the said judgment of this Court in the case of Managing Committee Swarnachuda Secondary Training School and 39 others (supra) and the position as on today. xx xx"

14. It is important to note herein that no other reason or ground is noted in the impugned judgment to try and distinguish the present case with the fact situation that arose for consideration in Swarnachuda case (supra).

15. We are of the considered view that, the learned Single Judge has failed to take into consideration the "ratio decidendi" of the judgment rendered by the Division Bench of this Court in Swarnachuda's case (supra). We are afraid that the facts of a case by themselves do not by themselves become the "ratio decidendi" of the case. No doubt, the Hon'ble Division Bench in the aforesaid judgment did refer to in adequate infrastructure and deficient teaching taking place in various schools, but this observation by itself does not form the ratio decidendi of the case. In our considered view, the conclusion of the Court was that, all private unrecognized institutions and their students had adequate notice of the Government decision published on 11.5.1990 giving one "last chance" to the students/institutions and the process had began in the year 1990 and the examinations were ultimately held on 26.11.1991. Moving the Court thereafter was not permissible, since the Court held that, it was hard to believe that an institution set up for imparting teaching and preparing students to take the examination would lie in deep slumber and not even take steps for filling up forms of the students and/or to take no effective steps in that regard. The institutions were aware that there was only one chance which had been granted to the institutions to present their students and effective steps were not taken. No explanation whatsoever has been offered for the inaction. This goes a long way to prove about the non-genuineness of the institution and the students. It is unbelievable that the students whose careers are at stake would remain dormant and act as silent spectators.

16. From the above it is clear that the "ratio decidendi" of the aforesaid case is that, since the institutions and the students had not availed the "last

chance", offered to them by the State Government, within the period as stipulated, no further opportunity could be afforded to such students, since granting such an opportunity would amount to once again granting another "God-sent" opportunity for the members of the respondent association to manipulate records to show that they had trained a large number of students in the past years, which was deprecated by this Court in Swarnachuda (supra). This, in our considered view is the ratio decidendi of Swarnachuda (supra) a judgment delivered by a Division Bench of this Court, which was binding on the learned Single Judge.

17. It is well settled by decision rendered by a Bench of the Hon'ble Supreme Court consisting of 11 Judges presided by Hon'ble Mr. M.Hidayatullah, Chief Justice of India (as his Lordship then was) in the case of **H.H.Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others v. Union of India** , reported in AIR 1971 SC 530 in particular para-138 it has been observed that:-

> "xx xx. It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in hat judgment."

The aforesaid decision has been referred to and cited in various later judgments including in the case of **Commissioner of Income Tax v. M/s. Sun Engineering Works (P) Ltd.**, AIR 1993 SC 43 in which, it is stated that the ratio decidendi is the principle underlying the decision and a word or sentence in a judgment cannot be held to be a law as declared.

18. We are further to note that, it is well settled principle of law that a judgment of the Division Bench of the High court is binding on a learned Single Judge. It has been settled by the Hon'ble Supreme Court in the case of **Food Corporation of India & another v. Yadav Engineer & contractor**, reported in AIR 1982 SC 1302, that "the Judicial Unity demands that a binding decision to which attention was drawn should neither be ignored nor overlooked." Further in the case of **Jai Kaur & others v. Sher Singh & others**, AIR 1960 SC 1118, particularly in para- 10, which reads thus:-

> " One would have thought that after the pronouncement by a Full Bench off the High Court, the controversy would have been set at rest for at least the Punjab Courts, Surprisingly, however, only a few years after the above pronouncement, the question was raised again before a Division Bench of the East Punjab High court in Mohinder Singh v. Kehr Singh. The learned Judges then choose to consider the matter afresh and in fact disregarded the pronouncement of the Full Bench, in a manner, which can only be said to be unceremonious."

19. In view of the law enunciated by the Hon'ble Supreme Court and the effect of a binding precedent, in the facts of the preset case, we are of the considered view that although the learned Single Judge has resulted the judgment of the Division Bench rendered in the case of Swarnachuda (supra), yet the "ratio decidendi" therein has been clearly ignored. The issues raised in the present appeal have already been settled by a Division Bench of this Court more than 17 years ago. The learned Single Judge chose to consider the matter afresh and in fact, clearly disregarded the pronouncement of Division Bench in the case of Swarnachuda (supra) in a manner which can only be said to be unceremonious.

20. Accordingly, we allow the writ appeals, consequently hold the judgment of the learned Single Judge is not legal and set aside the same and further direct dismissal of the writ petitions, but in the circumstances without costs.

Writ Appeals allowed.

2011 (I) ILR – CUT- 162

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

W.A.NO. 328 OF 2010 (With Batch) (Decided on 9.11.2010)

POLICY PLANNING BODY,
& ANR. ……..…….. Appellants.

.Vrs.

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

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT, 1987 (ACT NO.52 OF 1987) – SEC.10 (1) (k)
r/w Section 4 (6)(a) of Orissa Professional Educational Institution (Regulation of Admission and fixation of fees) Act, 2007.

Technical Education – Grant of approval for opening of Second shift B.Tech Course – AICTE is the competent authority to grant such approval where as Policy Planning Body Under Act of 2007 can only regulate admission and fee structure and other related matters – Learned single Judge rightly granted relief to the writ petitioners – Writ appeals filed by the Policy Planning Body – Their contention that opening of Second shift B.Tech course will affect technical education in the backward areas of the State of Orissa is not tenable as the students would prefer the colleges in the urban areas – Notification Dt.30.07.2010 of the Government of Orissa in Industries Department was rightly quashed by the learned single Judge as it was in contravention of the AICTE Act – Moreover notification can not override the permission granted by the AICTE – Held, the impugned order passed by the learned single Judge is legal & valid hence confirmed by this Bench.

(Para 14,15)

Case laws Referred to:-

1.AIR 2003 SC 355 : (T.M.A. Pai Foundation & Ors.-V-State of Karnataka & Ors)
2.AIR 2005 SC 3226 : (P.A.Inamdar -V- State of Maharashtra).
3.(1995) 4 SCC 104 : (State of Tamil Nadu & Anr.-V- Adhiyaman Educational & Research Institute & Ors.)
4.AIR 2000 SC 1614 : (Jaya Gokul Educational Trust -V-Commissioner & Secretary to Government High Education

Department Thiruvananthapuram & Anr.).
5.(1998)8 SCC 765 : (Government of A.P.-Vrs. M. Srinivasa Reddy & Ors.)

For Appellants - M/s. Subir Palit,A.K.Mishra, A.Mishra, A.Kajeriwal & D.N.Patnaik. Mr. Aditya Mohapatra, H.K.Mohapatra & H.K.Raitsingh.
For Respondents - Mr. S.K.Padhi, Sr.Advocate
M/s.Devi Prasad Dash, B.C.Mishra & S.R.Barik.
M/s.SaradaP.Sarangi,B.C.Mohanty,
P.P.Mohanty,P.K.Dash. & B.Dash.

V.GOPALA GOWDA, C.J. On 9.11.2010 after hearing the learned counsel for the parties, we passed the following orders:-

"……. The writ appeals are dismissed. Reasons to follow."

The following are the reasons in support of dismissal of the writ appeals.

The Writ Appeal Nos. 328, 329,330,331,332,and 333 of 2010 are filed by the Policy Planning Body (in short 'PPB') represented through the Member Secretary and Deputy Director (TE) and Writ Appeal Nos. 334, 335,336,337,338 and 365 of 2010 are filed by Biju Patnaik University of Technology (BPUT) being represented by its Vice-Chancellor have questioning the correctness of the common order dated 26.10.2010 passed in W.P.(C) Nos. 13272 of 2010 and connected writ petitions filed by the respective respondents-technical education institutions urging various facts and legal contentions.

2. There is no need for us to advert to the facts in the judgment except necessary facts that will be referred to while answering the points that would arise for consideration in these appeals.

3. The respondent educational institutions filed the writ petitions before this Court seeking for issuance of a writ of mandamus to the University for grant of affiliation for second shift in B.Tech. Courses for the academic session 2010-11 and to direct the JEE to include the second shift B.Tech. course in the ensuing counseling and further to extend the JEE counseling period and to permit the petitioner-institutions to fill up the 2nd shift seats through college level counseling.

4. The aforesaid prayers prayed by the technical educational institutions were opposed by the appellants herein inter alia contending that the Policy Planning Body is competent to regulate admission of students to various engineering courses in view of clause (a) of Sub-section (6) of Section 4 of he Orissa Professional Educational Institution (Regulation of Admission and

fixation of Fees) Act, 2007 which empowers it to regulate admission, conduct examination and supervise and guide the process of admission in respect of technical educational institutions in the State. It is further contended by the learned counsel appearing for the Policy Planning Body that a meeting was convened on 27.8.2010 and in the said meeting a decision was taken not to allow the Technical Educational Institutions in the State of Orissa to admit students in the second shift for the academic year 2010-11 for the reason that more than 17000 seats allotted by the AICTE to various colleges affiliated to the University are still unfilled. Therefore, the said decision is binding on the BPUT. It is further contended that there is no separate approval order passed by the AICTE to start the second shift engineering courses in favour of the educational institutions granting permission to start second shift engineering courses in the respective educational institutions from the academic year 2010-11. Therefore, they are not entitled for the relief. Further it is contended that the constitutional validity of the Act, 2007 was questioned before this Court on the ground that the said provision is repugnant to AICTE Act under Article 254 of the Constitution by some of the educational institutions. Further it is submitted that the Act, 2007 was challenged before this Court on the ground that it was hit by the Doctrine of Repugnancy under Article 254 of the Constitution of India. The Act was struck down on the ground that the provisions of the said Act were repugnant to the provisions of the Central Acts like AICTE, MCI etc. In SLP filed by the State of Orissa, the Apex Court in effect stayed the judgment of this Court and kept alive all the provisions of the Act save some modifications to sections 4 and 6 in respect of the constitution of Policy Planning Body and Fee Structure Committee. The educational institutions are the members of the association named OPECA, which is one of the parties in the Civil Appeal pending before the Supreme Court. Therefore, it is not open for the said educational institutions to individually come up before this Court challenging the validity of the said Act and seeking for the reliefs. This aspect of the matter has not been taken into consideration by the learned Single Judge while passing the impugned order granting reliefs. It is also further contended that the procedure required to be followed in submitting the applications to the AICTE; and processing the same is in accordance with the procedure laid down in the AICTE Approval Process Handbook. That procedure has not been followed by the AICTE for granting approval for opening of second shift in favour of the educational institutions without there being no objection certificate from the State Government and the University. This important aspect of the matter has not been considered by the learned Single Judge. Therefore, the grant of relief in favour of the educational institutions is not legal and valid and the same is liable to be set aside. Further the submission of application is after the last date of receipt as

mentioned in the time schedule. This important aspect of the matter has also not been considered by the learned Single Judge while granting reliefs in favour of the educational institutions. The procedure contemplated in clauses 27 and 28 was not followed by the Regional committee in evaluating the applications and by the Executive Committee in considering the application of the educational institutions. Therefore, the sanction of second shift in favour of the educational institutions by the AICTE is not legal and valid and this aspect has not been considered by the learned Single Judge and therefore the same is liable to set aside by this Court. It is further contended that the AICTE has not followed the procedure prescribed in the Handbook for guidance to process the application and grant of approval by AICTE either to a new college or for second shift seeking no objection certificate as the State Government has got say in the matter whether there is need for grant of additional or second shift to run the courses in the educational institutions. Without awaiting the views of the State Government, processing the application by the Regional committee and consideration of the same by the Executive Committee under the Rules and accepting the report of the Regional Committee and granting approval to start second shift for the academic session 2010-11 in the engineering courses is contrary to the procedure laid down in the guidelines. Therefore, the increase of intake capacity by permitting them to run second shift to impart education in the courses allocated to it is bad in law. Further, it is submitted that the views of the University-appellants in the connected appeals should have been taken into consideration along with other various relevant factors before granting the sanction for second shift in favour of the educational institutions. The approval granted by the AICTE as per the guidelines 2010 is subject to obtaining necessary affiliation from the University. That has not been done. Therefore, the educational institutions were not entitled for the relief. This aspect of the matter was overlooked by the learned Single Judge while granting the relief. Hence, the impugned judgment is liable to be set aside. Further, the learned Single Judge has erred in quashing the notification of the Industries Department dated 30.7.2010 in the absence of prayer to that effect. This notification was issued on the basis of the policy decision taken by the PPB which is in contravention of Act, 2007 for the reason that the PPB is competent statutory authority to regulate admission in the Technical Educational institutions in the State. The letter of approval has not been issued by the Member Secretary of the AICTE under the 2010 guidelines. The letter giving the details of total intake position of various courses in the educational institutions produced by the Senior Standing Counsel on behalf of the AICTE could not have been termed as letter of approval as the same is signed by Dr. S.G. Bhirud, who is a Director but not the Member Secretary. Therefore, the same cannot constitute as approval granted by the

AICTE in favour of the educational institutions to run their courses in the second shift.

5. The grounds urged by the University Counsel are that the writ petitions filed by the educational institutions are not maintainable in the absence of necessary parties to the proceedings in the writ petition. Therefore the impugned judgment is liable to be set aside. Learned Single Judge ought to have dismissed writ petition at the threshold for non-disclosure of material facts and suppression of material facts. Learned Single Judge failed to consider the submission made on behalf of the University that the University is a statutory body controlled and governed by the Act of State Legislature namely, the Biju Patnaik University of Technology Act, 2002, hereinafter called 'BPUT. Chapter VI of Part II deals with affiliation of colleges. There are two types of colleges under the University, one category is known constituent colleges and the second category colleges are known as affiliated colleges. To get affiliation of the University, the procedure prescribed under Chapter-VI is required to be strictly followed. Section 44 of the said Act mandates that college/institution applying for affiliation has to satisfy certain conditions laid down therein including no objection certificate from the Government of Orissa. Under Section 45 of the said Act the University, inter alia, has to be satisfied that the college/institution applying for affiliation has valid no objection certificate from the Government of Orissa. Therefore, obtaining valid no objection certificate from the State Government is an essential pre-requisite for grant of affiliation to the college/institution. Neither the copy of the said order nor the original order in favour of the institution to run the second shift is produced. This important aspect of the matter has not been considered by the learned Single Judge. Therefore, the impugned judgment is erroneous and the same is required to be set aside. The granting of relief in the impugned order is bad in law and the same is liable to be set aside. Another ground of attack of the impugned common order passed and the reliefs sought for in the writ petition is that under Section 51 of the Act for affiliation of new courses, the institutions have to satisfy the condition laid down under Section 44 of the said Act. The same has not been complied with. Therefore, the impugned order passed by the learned Single Judge is vitiated in law. It is further contended that the Policy Planning Body which is a statutory body has come into existence under Act 2 of 2007, the provision of sub-section (6) of the Section 44 of the Act has not been stayed by the Hon'ble Supreme Court while staying the operation of the judgment of this Court, it operates fully in force. Therefore it vests power in the PPB to take such a policy decision to regulate admission in the technical educational institutions in the State. Since the Supreme Court has stayed the judgment of this Court and kept alive all the provisions of the Act save some modification to Sections 4

and 6 in respect of the constitution of Policy Planning Body, and the matter is subjudice in the said Court, therefore, it is not open for the educational institutions to individually come up before this Court in writ petition and indirectly challenge the validity and propriety of the order of the Apex Court. This aspect has not been considered by the learned Single Judge and hence the impugned order is liable to be set aside. Further learned counsel for the PPB has also placed reliance upon **paragraph-8** of the judgment of the Supreme Court referred to in the impugned judgment is not correct as the same is contrary to the decision of the Supreme Court in the case of T.M.A. Pai Foundation & Ors Vs. State of Karnataka & Ors., reported in AIR 2003 SC 355 and P.A.Inamdar Vs. State of Maharashtra, reported in AIR 2005 SC 3226, which are admittedly of a larger bench decision than the two judgments referred to at paragraph-8 relied upon by the counsel appearing for the educational institutions. In the said decision, it has been clearly laid down that the State Legislature has got competence to enact the law to regulate technical educational institutions in the State as per Entry No.26 in the concurrent list. Not taking up this important matter, giving direction to the University to affiliate is not legal and valid and hence the same is required to be set aside.

6. Mr. S.K.Padhi, learned Senior Counsel appearing on behalf of some of the educational institutions, have sought to justify the order of the learned Single Judge inter alia contending that the AICTE is the competent authority in granting permission to the new technical educational institutions or second shift under the provision of the AICTE Act. Since both the appellants herein i.e. PPB and the University have not submitted their views though the applications along with necessary requisite documents were furnished to them, when the permission was sought for by the respondent-educational institutions from the AICTE, they cannot object to the grant of permission by the AICTE which is the competent authority under the AICTE Act, either for grant of affiliation to new educational institutions or to start second shift in the existing educational institutions. Further, it is submitted that since both the PPB and the University have not challenged the composite approval orders passed in favour of the educational institutions, the stand taken by them before the learned Single Judge are wholly untenable in law. Therefore, he submits that the appeals are liable to be dismissed. The impugned order of granting relief in favour of the educational institutions is passed by the learned Single Judge on the approval orders passed by the AICTE permitting the educational institutions to start second shift in engineering courses. Further, it is contended that the order passed by the learned Single Judge are in conformity with the judgment of the Hon'ble Supreme Court in the case of State of Tamil Nadu & Anr. Vs. Adhiyaman Educational and Research Institute & ors., reported in (1995)4 SCC 104 and

Jaya Gokul Educational Trust Vs. Commissioner and Secretary to Government Higher Education Department, Thiruvananthapuram & Anr., AIR 2000 SC 1614. He further submits that the reliance placed by the learned counsel for the PPB upon the judgments mentioned at paragraph-8 of the impugned order are wholly untenable and totally inapplicable to the fact- situation. Further it is contended that the procedure prescribed in the guidelines of the hand book issued by the AICTE for processing the application and granting approval order permitting the educational institutions to start second shift in the courses as mentioned in the order is strictly valid as the views of the State Government and the University was sought for, but they did not avail the same. Therefore, it is not open for them to turn down the request as both the PPB and the University have been given sufficient opportunity to submit their views and for not giving no objection certificate. For not submitting the views in time, the approval order granted by the AICTE cannot be said to be illegal. Further, it is contended that reliance placed upon the composite orders passed by Dr. S.G.Bhirud, Director and not by the Member Secretary is also wholly untenable in law. The composite orders are passed by the AICTE in favour of the respondent-educational institutions for the courses which are in existence for the academic year and for the courses under the second shift to be started by the very same institutions. Passing a composite orders is permissible in law as it is in relation to the same institutions and hence, the same cannot be found fault with by the appellants herein. It is contended that the Regional Council and the Executive Committee have strictly adhered to the procedure in processing the applications of the educational institutions and on the basis of the report submitted by the Regional Council, the same was examined by the AICTE with reference to the request made by the educational institutions after satisfying with the need and requirement and infrastructure available in the institutions, composite approval order was passed by the AICTE, the same has been relied upon by the learned Single Judge which granted reliefs in favour of the educational institutions. Therefore, the same cannot be interfered with by this Court as there is no substantial question of law involved in these appeals. Hence prayed for dismissal of the appeals.

7. Various procedural irregularities as pointed by the appellants' counsel is wholly untenable in law since no argument was advanced before the learned Single Judge in that regard. Therefore, it is not open for them to urge such additional grounds in these appeals.

8. Mr. Ishan Mohanty, learned Standing Counsel appearing for the AICTE was directed vide order dated 8.11.2010 to secure certain records. He made available those records and sought to justify the order passed by the learned Single Judge contending that the applications were received by the AICTE within the revised time schedule. The same have been processed

under the guidelines provided in the handbook prepared by the AICTE. After scrutiny of the applications by the Regional Committee reports were submitted to the Executive Committee which after proper application of mind to the claims of the educational institutions, seeking permission to establish second shift keeping in view the guidelines provided to start new second shift in the educational institutions. AICTE has exercised its power under the provisions of AICTE Act which authority alone is competent to grant approval to start second shift in the courses by the respondent educational institutions and that has been granted by the AICTE. In the instant case, both the State Government and the University have failed to submit their views basing on the claim of the institutions and their non-issuance of no objection certificate cannot be a criteria for the AICTE not to exercise the power of granting approval in favour of the educational institutions. The composite approval order granted in favour of the educational institutions is in accordance with the provisions of the AICTE Act and the law laid down on this aspect which are referred to at paragraph-8 in the impugned order and the learned Single Judge has rightly accepted the same for grant of relief in favour of the educational institutions which need not be interfered with as the appellants have failed to make out a case by showing that the impugned order passed by the learned Single Judge is vitiated either on account of erroneous reasons or error in law.

9. With reference to the above said rival legal contentions, the following points would arise for the consideration:-

(a) Whether the non-submission of no objection certificate by not submitting its views despite receipt of the applications of the respondent educational institutions would come in the way for AICTE for grant of the approval order to run the courses in the second shift by the educational institutions?

(b) Whether the grant of permission by the PPB or the State Government under the Act 2007 is a pre-requisite condition as required under Section 44 of the BPUT Act to affiliate the respondent educational institutions to run the courses in the second shift?

(c) Whether the impugned common judgment giving direction to the appellants herein is either erroneous or vitiated in law? Therefore the substantial question would arise for this Court to interfere with the common judgment. What order?

The aforesaid points are answered by assigning the following reasons :-

10. It is the case of the educational institutions that they have submitted the applications as per the procedure laid down in the guidelines provided in the handbook prepared by the AICTE in the revised schedule regarding time. It is an undisputed fact that copies of the applications of the

educational institutions were submitted to the State Government as well as the University. They have neither submitted their views nor issued no objection certificate. In the absence of the submission of the views by the both the appellants herein, the applications were taken up for affiliation by the Regional Committee and also the Executive Committee. The Regional Committee and the Executive committee have submitted their reports. The same has been examined by the AICTE.

11. We have carefully gone through the guidelines upon which reliance is placed by both the learned counsel for the parties. The relevant guidelines no.23 provides for additional programme/courses/ in the second shift working. Clause 25.4 provides that the views of the State Government and University will be taken into account by the Regional Committee while taking the decision whether the application is to be processed or not which reads thus:-

> "25.4. The views of the State Government /UT and the affiliating university will be taken into account by the Regional Committee while taking the decision whether the application is to be processed or not. In case the Regional Committee decides not to process the application further based on the views of the State Government/UT and/or the affiliating university, the same will be communicated by the Regional Officer concerned to the applicant Society/Trust along with reasons for such decision. In the absence of receipt of views from the State Government/UT and/or the affiliating University by the date as mentioned in time schedule, the Council will proceed for completion of approval."

12. In the instant case, the appellants did not submit their views. Therefore, they proceeded to process the applications on the basis of the documents required to be produced under Clause 25.5 and the same has been followed by the Scrutiny Committee and considered by the Executive Committee. Consideration of the Executive Committee reads thus :-

> "28.1 The concerned bureau at AICTE HQ shall cross check and verify the recommendations of the Regional Committee together with the certificate of the Regional Officer concerned and shall issue another certificate certifying that all the processes and parameters as prescribed in regulations and approval process hand book were followed by the Scrutiny Committee and the Regional committee. In case it is not the case, the concerned bureau head at AICTE HQ shall point out the deviations in the process or in the prescribed norms and standards.
>
> The recommendations of the Regional Committee shall be placed before Executive Committee of the Council. Executive

> Committee, after considering the recommendations of the regional committee and report/certificate of the concerned bureau of the council, shall take a decision at its meeting on grant of approval or otherwise."

13. After consideration of the report of the Executive Committee the Council granted approval. The same has not been challenged by the State Government or the PPB or by the University. Therefore, the case before the learned Single Judge in the writ petitions was that no approval for second shift is passed and the same is not passed by the Member Secretary and produced. The said submission is countered by the learned Standing Counsel on behalf of the AICTE before the learned Single Judge. Learned Standing Counsel for the AICTE has secured the documents and made submission that there is a grant of approval to the educational institutions. Pursuant to the direction, once again he has secured the composite orders of approval granted in favour of the educational institutions to run the second shift in the courses allocated to them in the composite orders. We have perused the same. The grant of approval either to new college or second shift is within the purview of the AICTE under the AICTE Act which is enacted by the Parliament in exercise of its legislative power from entry no. 66. The Hon'ble Supreme Court with regard to this aspect of the matter way back in the case of State of Tamil Nadu & Anr. Vs. Adhiyaman Educational & Research Institute & Ors., reported in (1995) 4 SCC 104 has decided the issue and the same was relied upon by the learned Single Judge which has been extracted at paragraph-15 of the impugned judgment. The same is extracted hereunder:-

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

With regard to the competent authority for grant of approval either to impart technical education in favour of the educational institutions or opening of second shift, the Apex Court has held that it is not the University under the University Act, but it is the Central Act and the Council created under it which will have jurisdiction. The composite approval order granted under the Act by the AICTE after following the procedure contemplated under the guidelines is not challenged. Therefore, neither the appellants nor the University can say before this Court in these appeals that as per clause (a), sub-section 6 of Section 4 of the Act, 2007, the Policy Planning Body can

regulate admission in technical education in the State which includes recommendation for second shift engineering programme during the academic session 2010-11. Opportunity was given to the State Government and the University to submit their views when the applications were there before them. It is not their case that they had no sufficient time for submitting their views to the claim of the educational institutions before the AICTE and challenged the said order. It is not open for them to say that the order passed by the learned Single Judge is bad in law. It cannot be said that the approval order could not have been granted without there being the views secured from the State Government and the University. There is no such procedure in submitting the views by the State Government. They have lost their say in the matter. Therefore, they cannot say that the composite approval order granted in favour of the technical education institutions is bad in law. Such contention is wholly untenable as the same is contrary to the aforesaid provisions of the Act, decision of the Supreme Court and the guidelines in the hand book. Further reliance has been placed on various judgments of the Supreme Court at paragraph-9 of the impugned judgment. The reliance placed in the case of Government of A.P. Vrs. M. Srinivasa Reddy & ors., reported in (1998) 8 SCC 765 is totally inapplicable to the fact situation. Therefore, reliance placed by the learned counsel for the appellants is misplaced. By careful reading of Entry No.25 which is the law enacted by the State Legislature under Act of 2007 to regulate technical education in the State regarding admission and fee structure and other related matter is subject to the law that is enacted by the Parliament under Entry No.66 of List. In this view of the matter, the provision of Act, 2007 cannot override the provision of AICTE Act. Therefore, the composite approval orders passed by the AICTE in favour of the Educational Institutions is legally permissible and the same is binding upon the appellants herein.

14. It is an undisputed fact, as urged by the learned counsel for the PPB, that more than 18000 seats allocated by the AICTE in various engineering courses are lying vacant. Therefore, there is no need for grant of permission in favour of the educational institutions in these appeals to start the second shift in various disciplines as it would affect imparting technical education in the backward areas of the State of Orissa since the students would prefer the colleges in the urban areas and therefore, grant of composite orders in favour of the educational institutions will defeat the object and intendment of the State Government to impart education in the backward areas of the State. This contention is wholly untenable in law in view of the fact that for the academic year 2010-11 the State Government in the Higher Education Department has issued No Objection Certificate to seven such educational institutions in the State. In this view of the matter , the contention that

composite orders issued for starting second shift in favour of the educational institutions cannot be found fault with either by the State Government or by the PPB.

15. We have carefully examined the legal grounds urged in this case with reference to powers of the AICTE and Policy Planning Body under Act, 2007 and the powers of the University regarding affiliation of the educational institutions on the basis of the approval granted in their favour to run the second shift courses for the academic sessions 2010-11. We are satisfied that the learned Single Judge after referring to certain relevant facts, legal contentions rightly accepted the case pleaded by the writ petitioners and rightly granted the reliefs as prayed for in the writ petitions. Therefore, the same cannot be said as erroneous or error in law. Further, the quashing of the notification dated 30th July, 2010 of the Government of Orissa in Industries Department is legal and valid as the same is in contravention of the AICTE Act and the composite orders of approval granted in favour of the educational institutions. For the reasons stated, the notification cannot override the permission granted by the AICTE, which is competent to regulate imparting technical education in the State. We do not find any error in quashing the said notification notwithstanding the fact that the same is not challenged. For the reasons stated supra, we are of the view that the point no.3 is also required to be answered in favour of the educational institutions and against the appellants as the reasons assigned by the learned Single Judge in the impugned common judgment is neither erroneous finding or error in law. On the other hand giving direction to both the State Government and the University in the impugned order is perfectly legal and valid. Granting affiliation to the 2nd shift, B-Tech course in favour of the technical educational institutions for the academic session 2010-11 and the direction to the OJEE to include the said course in the petitioners-institutions in the ensuing E-counseling is very much required otherwise, the composite approval orders granted in favour of the respondent-educational institutions by the AICTE will be arrested and further the direction given to the University is also in accordance with law to affiliate the educational institutions to run the second shift engineering courses for the academic session 2010-11 is perfectly correct.

16. We do not find any merit in these appeals and the same are accordingly dismissed.

Writ appeals dismissed.

2011 (I) ILR – CUT- 174

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

W.P. (C) NO.10448 OF 2010 (Decided on 07.12.2010).

BIMALA PARIJA & ORS. …….. Petitioners.

.Vrs.

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

BIHAR & ORISSA EXCISE ACT, 1915 (ACT NO.11 OF 1915) – SEC.22 (1-a) r/w Rule 34 of the Orissa Excise Rules, 1965.

Renewal of IMFL "OFF" shop – Challenged by the villagers basing on the restrictions imposed Under Rule 34 - Licence for "OFF" shop is meant for purchase from the shop and not for consumption where as "On" shop permits consumption on Vendor's premises.

In the instant case, privilege licence has been granted to O.P.5 for running "OFF" shop – No liquor is consumed in the premises of "OFF" shop – Held, the restriction imposed under Rule 34 has no application to the present case – Writ petition dismissed.

For Petitioner - M/s. R.K.Rath (Sr.Advocate) & J.Mohanty.
For Opp.Parties - Govt. Advocate.
M/s. Milan Kanungo, L.Kanungo, D.Pradhan, S.K.Mishra & S.N.Das. M/s. A.P.Bose (for Intervenors)

B.N.MAHAPATRA, J This writ petition has been filed for quashing Annexure-1 by which the opposite party No.3-Collector, Khurda has renewed the licence granted in favour of opposite party No.5-Debendra Sahoo for the year 2010-11 for operation of IMFL OFF Shop at Trinath Bazar, P.S. Balianta under Jagannathpur Grama Panchayat in the district of Khurda, on the ground that the same has been granted in violation of the mandatory provisions laid down in the Excise Laws and against the greater interest of the general public of the locality.

2. Mr. R.K. Rath, learned Senior Advocate appearing for the petitioners submits that the villagers of Jagannathpur G.P. are peace loving persons and they had protested the opening of IMFL OFF Shop in their locality at Trinath Bazar in the year 2006. The State Government considering the

grievance of the villagers decided to shift the IMFL OFF Shop from Trinath Bazar to Pahala near N.H.5 vide Government order No.121 dated 06.01.2007 (Annexure-2 series). Thereafter, no licence was granted to any person till March, 2010 for opening of IMFL OFF Shop at Trinath Bazar. The impugned licence granted now to opposite party No.5 under Annexure-1 to open the IMFL OFF Shop at Trinath Bazar is against public interest and the same has been granted illegally without complying with the procedure laid down in the Excise Laws. In spite of grant of impugned licence, opposite party No.5 could not be able to open the shop at Trinath Bazar due to serious protest by the public. Therefore, opposite party No.5 illegally ran the shop at different places other than Trinath Bazar which was also seriously objected by the local inhabitants. As a result of such protest, the shop was closed down by the Excise Department. Opposite party No.5 is now contemplating to open the shop at Trinath Bazar on the strength of licence issued under Annexure-1. Trinath Bazar is a busy area as the Engineering Colleges and temples are located within the said locality. Therefore, no IMFL OFF Shop should be opened in such locality. In spite of several representations made by the local people protesting opening of IMFL OFF Shop in that locality, opposite party Nos. 2 and 3 ignoring the statutory provisions, granted licence under Annexure-1. Therefore, the licence granted under Annexure-1 to opposite party No.5 should be quashed.

3. Learned Government Advocate referring to the counter affidavit dated 04.10.2010 filed on behalf of opposite party Nos. 3 and 4 submits that the Exclusive privilege for retail sale of IMFL OFF Shop at Trinath Bazar was not granted recently. The shop was initially sanctioned during the year 1997-98 and was settled by public auction. Annexure-1 attached to the writ petition is not a licence. It is the renewal endorsement for the year 2010-11. Therefore, the question of violating the mandatory provisions laid down in the Excise Law does not arise. The licence for opening of IMFL OFF Shop was not granted with reference to any particular plot. It was granted with reference to a particular locality free from any objections. The Exclusive privilege holder is responsible to find out a shop site free from objections by the local public in order to run the shop. In the past, since sale of IMFL in Trinath Bazar IMFL OFF Shop was deteriorated, on the request of Ex-E.P. holder Sri Debaraj Jena, Government of Orissa after observing the required formalities have allowed such shifting from Trinath Bazar to Pahal. After shifting the said IMFL OFF Shop during the year 2006-07, it was felt necessary to open the said shop again at Trinath Bazar during the year 2007-08 taking into consideration the feasibility of the said shop. Besides, in response to the office public notice No.101/Ex dated 14.01.2008 inviting objections for opening of Trinath Bazar IMFL OFF Shop, no objection was received. Since no objection was received, the Government of Orissa in its letter No.1742/Ex. Dated 20.03.2008

sanctioned opening of the shop in question at Trinath Bazar. Due to shortage of time to process for settlement of this shop at the fag end of the year 2007-08, the said shop could not be settled during the said financial year 2007-08 and was settled in favour of Smt. Urmila Sahu w.e.f. 17.03.2009 (for the part year 2008-09). Similarly, after following the required formalities like inviting public objection vide public Notice No.365/Ex. Dated 20.02.2008, the Exclusive privilege was granted to opposite party No.5 with effect from 15.03.2010 for opening of IMFL OFF Shop at Trinath Bazar (for the part year 2009-10). In spite of several attempts, since opposite party No.5 failed to find out a suitable shop site free from objections, he was unable to open his shop at Trinath Bazar. He could not open his shop at any other place than the approved locality. The entire revenue village of Trinath Bazar was allowed to the E.P. holder to open his shop and the E.P. holder has to find out a suitable site free from objections of the local public in order to operate his shop. The restricted place like religious and educational institutions as specified in Rule-34 of the Orissa Excise Rules, 1965 are applicable only in case of On shops. However, at the time of opening of an IMFL OFF Shop, the said restricted distances are being taken into consideration for the greater interest of local public.

4. Opposite party No.3 in his additional affidavit dated 03.11.2010 has submitted the enquiry report showing distance of nearby educational institutions and place of worship from the proposed site for operation of Trinath Bazar IMFL OFF Shop. It is stated that the proposed site is not such as to obtrude itself on the attention of the public or to render passersby subject to annoyance. The licence has been issued for consumption of liquor 'OFF' the shop premises and no consumption of liquor is permitted in the shop premises.

5. Opposite party No.5 in his counter affidavit dated 15.07.2010 has taken a stand that under Rule 3(5) of the Orissa Excise (Exclusive Privilege) Foreign Liquor Rules, 1989 an extract of the public notice shall be sent to the Chairman of Panchayat Samiti or Sarpanch of Grama Panchayat to raise objection. Therefore, the petitioners cannot have any grievance to the opening of "OFF Shop" at Trinath Bazar when they have not filed any objection for grant of the said licence at Trinath Bazar. It was submitted that the petitioners have been set up by the nearby licensee to file the present writ petition to oppose the grant of OFF Shop in question in favour of opposite party No.5. The petitioners have not raised any objection pursuant to the public notice issued by the opposite party no.3-Collector for the year 2009-10 as provided in proviso to Section 22(1-a) of Bihar and Orissa Excise Act read with Rule 3 of the Rules, 1989 for grant/renewal of OFF Shop licence at Trinath Bazar in favour of opposite party No.5. Therefore, the action of the petitioners is not bona fide. The Collector issued licence in

favour of opposite party No.5 on 15.03.2010 and he operated the shop at Trinath Bazar by lifting monthly MGQ as per the licence condition. As per the Excise Policy formulated by the State Government for the year 2010-11, all the existing IMFL OFF Shops could be renewed for the said year with 10% increase in licence fee. Accordingly, the opposite party No.5 submitted an application for renewal of his IMFL OFF Shop at Trinath Bazar for the year 2010-11 and deposited three months advance consideration money. The Collector, Khurda, renewed the IMFL OFF Shop at Trinath Bazar in favour of opposite party No.5 on 06.04.2010 for the year 2010-11 and he was allowed to operate the shop over plot No.288, Trinath Bazar area, village Anantapur, P.S. Balianta under Jagannathpur G.P. After receipt of the renewal licence under Annexure-1, opposite party No.5 operated the shop over the said plot at Trinath Bazar for the months of April and May, 2010 and accordingly paid the licence fee and excise duty on MGQ. Against grant of Trinath Bazar OFF Shop licence, one Pradip Kumar Bhol has earlier filed a writ petition bearing W.P.(C) No.8037 of 2010 before this Court to quash the licence granted in favour of present opposite party No.5 vis-à-vis for a direction to close down the shop. This Court vide order dated 03.05.2010, as an interim measure, directed that opposite party No.5 shall strictly operate the shop in respect of which licence has been granted and should not be permitted to open the shop other than the place at Trinath Bazar, for which licence has been granted. Pursuant to the said order, the Sub-Inspector of Excise all of a sudden on 22.05.2010 closed the shop. Opposite party No.5 appeared in the case and filed a Misc. Case No.8741 of 2010 for appropriate order directing opposite party Nos.3 and 4 to allow him to operate the shop. While the aforesaid writ petition was pending, another set of persons filed the present writ petition with self same prayer relying on common documents. The said writ petition was disposed of on 22.06.2010 with the observation that since the grievance of the petitioner have been meted out no further order is required to be passed specifically taking into consideration the submission of opposite party No.5 that he is not operating the shop at Bhimpur. Licence in IMFL OFF Shop has been granted by the State Government for the year 2010-11 after observing the provisions of law to meet the ascertained demand of foreign liquor and to counteract the supply through illicit sources as contemplated under Rule 32 of the Orissa Excise Rules, 1965. Since opposite party No.5 has been issued with licence of OFF Shop to sell liquor OFF the premises with bottles, the restriction provided under law is not applicable to OFF Shops but is applicable to ON Shops where liquor is consumed in the licensed premises.

6. Mr. A.P. Bose, learned counsel appearing for the intervenors submits that the intervenors came to learn from the petitioners that opposite party No.5-Debendra Sahoo in his counter affidavit filed in the present writ petition

has relied upon and also annexed a representation (Annexure-G/5) purportedly signed by the intervenors. The Intervenors verified Annexure-G/5 shown to them by the petitioners and they found that the said Annexure contains their forged signatures and the entire representation is fabricated by opposite party No.5. The intervenors have never endorsed their consent for opening of IMFL OFF Shop at Trinath Bazar. The intervenors along with other villagers represented the local MLA to shift the IMFL OFF Shop to any other place. Opposite party No.5 in course of hearing strongly opposed the averments made in the intervention petition and submitted that Annexure-G/5 does not contain forged signature and he is prepared to face any enquiry by any competent authority or any proceeding in any competent court in this regard.

7. The undisputed facts are that in response to public notices inviting objections against opening of Trinath Bazar IMFL OFF Shop vide No.101/Ex. dated 14.01.2008 and vide No.365/Ex. Dated 20.02.2008, no objection was filed by the present petitioners or opposite party Nos.6 and 7-Intervenors. The Government of Orissa in its letter dated 20.03.2008 sanctioned the shop in question afresh in favour of opposite party No.5 since no objection was received in response to public notice inviting objection against opening of the OFF Shop in question. Against the grant of Trinath Bazar IMFL OFF Shop licence in favour of opposite party No.5, one Pradip Kumar Bhol filed a writ petition bearing W.P.(C) No.8037 of 2010 before this Court to quash the licence granted in favour of opposite party No.5 and for a direction to close down the shop. This Court vide order dated 03.05.2010 as an interim measure directed that opposite party No.5 shall strictly operate the shop in respect of which licence has been granted and should not be permitted to open the shop other than the place at Trinath Bazar for which licence has been granted. Opposite party No.5 appeared in the case and filed a Misc. Case No.8741 of 2010 for appropriate order directing opposite party Nos.3 and 4 to allow him to operate the shop. The said writ petition was disposed of on 22.06.2010 with the observation that since the grievance of the petitioners having been meted out no further order is required to be passed specifically taking into consideration the submission of opposite party No.5 that he is not operating the shop at Bhimpur. The specific stand of opposite party No.3 in his additional affidavit dated 03.11.2010 is that the enquiry report showing distance of nearby educational institutions and place of worship from the proposed site for operation of Trinath Bazar IMFL OFF Shop, is not such as to obtrude itself on the attention of the public or to render passersby subject to annoyance.

8. Admittedly, the licence under Annexure-1 has been renewed for sale of liquor ‘OFF’ the shop premises. Needless to say that no consumption of liquor is permitted in the ‘OFF’ shop premises.

At this juncture, it is relevant to note what is contemplated in Rule 34 of the Orissa Excise Rules, 1965. The same is reproduced below:

> "**34. Licences for shops for <u>consumption of liquor on vendor's premises not to be granted at certain places</u>**; [(1) No New shop shall be licensed for consumption of liquor on the vendor's premises,-
>
> (a) in a market place, or
> (b) at the entrance to a market place, or
> (c) in the close proximity to a bathing-ghat, or
> (d) within at least 500 metres from a place of worship, recognized educational institution, established habitat especially of persons belonging to Scheduled Castes and labour colony, mills and factories, petrol pumps, railway stations/yard, bus stands, agricultural farms or other places of public resort, or
> (e) within at least one kilometer from industrial, irrigation and other development project areas, or
> (f) in the congested portion of a village:
>
> Provided that the restriction on the minimum distance as mentioned under Clauses (d) and (e) may be relaxed by the State Government in special circumstances.]
>
> (2) So far as practicable, an established liquor shop licensed for the consumption of liquor on the premises shall not be allowed to remain on a site which would not under sub-rule (1) be permissible for the location of new shop.
>
> (3) In areas inhabited by Scheduled Tribes, country spirit shop shall not be licensed to be placed immediately on the side of main road or any other prominent position that is likely to place temptation in their way."
>
> (*Underlined for emphasis*)

9. Perusal of Rule 34 of the Orissa Excise Rules makes it clear that licence for shop for consumption of liquor under the vendor's premises are not to be granted at certain places specified in Rule 34. The phraseology like 'consumption of liquor on vendor's premises' conveys that the said rule is applicable in respect of running of ON Shop meaning thereby consumption of liquor on vendor's premises. This Court in O.J.C. No.6662 of 1992 (Sarat Kumar Rath vs. State of Orissa and others), disposed of on 14.09.1993 held as follows:

> "As we understand, licence for 'OFF' shop is meant for purchase from the shop and not for consumption; whereas 'on' shop permits consumption also. This being the position, we are not satisfied that

the nearness to the temple merited closure of the petitioner's shop while allowing the 'on' shop in the Prachi Hotel."

10. In the instant case, the privilege licence has been granted to opposite party No.5 for running OFF Shop. No liquor is consumed in the premises of OFF Shop. Therefore, the restriction imposed under Rule 34 of the Orissa Excise Rules, 1965 has no application to the present case.

11. In the result, the writ petition is dismissed.

No order as to costs.

Writ petition dismissed.

2011 (I) ILR – CUT- 181

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

SUO MOTU CONTR NO.2 OF 2010 (Decided on 24.12.2010).

STATE ……..... Petitioner

.Vrs.

ALEKH CHANDRA PHAI AND ANOTHER. ……Opp.party

CONTEMPT OF COURTS ACT, 1971 (ACT NO.70 OF 1971) – SEC.14.

Cops in night duty stopped the private Car of an Hon'ble Judge of Orissa High Court who was returning from a Nursing Home – Behaviour of such Officers in raising a loud voice and shouting at Him in presence of public after the Hon;ble Judge disclosed His identity is contumacious – This Court took immediate cognizance of the matter by initiating Suo Motu Contempt proceeding.

Contemnors filed affidavit saying that as there was no insignia, chauffer or P.S.O. in the Car, they could not recognize that an Hon'ble Judge was traveling in the said Car – This fact can not be believed as there was no respect of the Contemnors after the Hon'ble Judge disclosed his identity, rather they continued their unwarranted behaviour - Since the contents in the affidavit hardly shown any repentance of the Contemnors, their prayer for acceptance of unconditional apology was rejected.

Held, this Court at present does not propose to award sentence on Sri Alekh Chandra Pahi, I.I.C. Madhupatna P.S. and as such deferred the same in order to watch his conduct for a period of two years and directed Sri Pahi to furnish a personal bond undertaking to maintain good conduct and not to repeat the above act and in case he maintains good, decent and disciplined behaviour during the aforesaid period, then the rules shall stand discharged on expiry of two years – In case he repeats such act which will tantamount to Contempt, he shall be called upon to appear before this Court to receive the sentence – So far as Sri Ranjan Kumar Nayak, ASI is concerned he is guilty of abetting and aiding the offence but instead of imprisoning or fining him this Court took a lenient view and admonished him to be more careful and decent in his behaviour towards the general public and not to repeat such activities in future.

Case laws Referred to:-

1.AIR 1970 Bombay 48 : (Abdul Jabbar Taj -V- R.K.Karanjia
2.1958 Delhi L.T.1 : (Surat Singh -V- Des Raj Chowdhury)

3.1984 Crl. L.J.1033 : (Laxmi Narayan Datta -V- Meera Rani Dey).
4.AIR 1952 ALI. 86 : (State -V-Krishna Madho).

For Appellant - ASC
Opp.party - In Person

Heard learned Additional Government Advocate for the petitioner-State and the contemnors in person.

The facts giving rise to this Suo Motu Contempt Proceeding are as follows :

In the night of 22/23.8.2010 at about 12.45 a.m. when Hon'ble Sri Justice P.K.Mohanty, a sitting Judge of this Court, was returning home by a car from Prime Nursing Home at Link road, Cuttack, where his uncle was under treatment, a police constable stopped the car to search at the Traffic Tower of Badambadi. When Hon'ble Justice P.K.Mohanty wanted to know the reason, Sri Alekh Chandra Pahi, Inspector in-Charge, Madhupatna Police Station immediately rushed in and getting annoyed shouted at top of his voice showing gestures in presence of the general public present. Even after some lawyers and journalists present there impressed upon the I.I.C. that the occupant of the car was Justice P.K.Mohanty of the High Court, Sri Pahi shouted loudly and answered in a very rough voice and made gestures and visual representations, which was not expected of him. Even after Justice Mohanty disclosed his identity, the police officer did not stop and continued with such behaviour. Thereafter, Justice Mohanty left the place. One Ranjan Kumar Naik, Assistant Sub-Inspector of Police, Badambadi Outpost, who was all along present with the I.I.C., never tried to prevent him from behaving in such a manner. As the action of such police officials amounts to tarnishing the image of Justice Mohanty and lowering the authority of this Court, this Court directed the Registry for initiation of proceeding under the Contempt of Courts Act against Sri Alekh Chandra Pahi, Inspector In-Charge, Madhupatna Police Station and Sri Ranjan Kumar Naik, Assistant Sub-Inspector of Police, Badambadi Outpost. Apart from that this Court also directed the Home Secretary and the D.G. & I.G. of Police of the State to make separate enquiry and file their independent reports regarding the performance of the I.I.C. at late hours of the night and general direction given to them in respect of their duties during night in dealing with public and the procedure followed by the police officers in detaining the citizens for the purpose of check up. On 23.8.2010, both the police officials appeared before this Court and were released on bail on their executing P.R bond of Rs.1000/- each and furnishing an undertaking to the effect that they will appear before this Court as and when required.

Thereafter, on 10.11.2010 both the contemnors appeared before the Court and filed their show cause affidavits and the Bench presided by Hon'ble Justice P.K.Mohanty passed orders for placing the matter before the Hon'ble ChiefJustice for its assignment to an appropriate Bench. The Hon'ble Chief Justice thereafter assigned the matter to this Bench.

Initially, the contemnors-Sri Alekh Chandra Pahi and Sri Ranjan Kumar Nayak filed their show cause affidavits on 8.10.2010. Sri Pahi in his affidavit has taken a stand that on the fateful night of 22/23.8.2010, the night blocking was going on at Badambadi near the Traffic Tower with the help of A.S.I., R.K.Nayak of Badambadi Out-Post and some recruit constables. It is a fact that in that night the private vehicle occupied by the Hon'ble Justice was also checked by the recruit constables unintentionally just as a routine manner alike other vehicles without being aware about the presence of Hon'ble Justice. It is further stated therein that in absence of insignia, P.S.O. and Chauffeur in the car, he could not recognize the Hon'ble Justice sitting inside the car. Sri Pahi was at a distance of about 40 feet and immediately he was not in a position to know the factum of presence of Hon'ble Justice in the said vehicle or about the vehicle belonging to Hon'ble Justice Sri P.K.Mohanty. Further stand has been taken that since he had only joined at Madhupatna Police Station on 6.7.2010 few days prior to the alleged incident and had no opportunity to see the Hon'ble Justice earlier, he could not know the Hon'ble Justice who was inside the car. However, with regard to the allegation of getting annoyed, shouting at the top of voice, showing gestures, visual representations and showing improper behaviour to undermine the prestige of Hon'ble Justice, he submitted that to his utter misfortune he could not recognize the Hon'ble Justice inside the car. Without the knowledge regarding the presence of Hon'ble Justice, Sri Pahi politely replied to certain questions. He has begged unconditional apology for such unintentional and unfortunate momentary aberrations which have caused inconvenience to the Hon'ble Justice. By exhibiting such bona fide mistake, he never intended to undermine the prestige of Hon'ble Justice. He submitted that as a Police Officer for the last 25 years, he was associated with various courts and Hon'ble Judges within his service career and had never shown any misbehaviour to any court or Judge and he even does not have such audacity to misbehave with Hon'ble Justice, for which he has prayed to pardon him.

In the show cause affidavit filed by Ranjan Kumar Nayak, A.S.I. of Police, Badambadi Out Post, the following stands have been taken :-

"A. That the humble contemnor had no previous knowledge about the identity of the Hon'ble Justice Sj.P.Mohanty of Orissa High Court.

B. That the humble contemnor was about 10 to 12 feet away from the I.I.C., A.C.Pahi, for which the interaction with the Hon'ble Justice was not audible to the humble contemnor due to noising atmosphere.

C. That as the humble contemnor is working as an A.S.I. (Too junior employee) in the police department, he did not venture to interfere in the matter of his immediate authority i.e. I.I.C., as a matter of discipline.

D. That the role of the humble contemnor in the night of 22/23.8.2010 was not deliberate, motivated and calculated attempt to bring down the image of the judiciary in estimation of the general public or to impair the dignity of the Hon'ble Justice in any manner."

The allegations, as indicated above and the show cause affidavits so filed confirm the entire incident of stopping the vehicle of Justice Mohanty and searching the same. The fact of shouting loudly and answering in a rough voice and making gestures and visual representations are neither specifically denied nor admitted by the contemnors. In the first show cause affidavit, an attempt has been made to get rid of the culpability by saying that in absence of insignia, chauffer and P.S.O. in the car, he could not recognize the Hon'ble Justice. A plea is taken that in absence of insignia, chauffer and P.S.O. in the car, Sri Pahi could not recognize Justice Mohanty. We may pause here for a moment and visualize the circumstances under which Justice Mohanty was returning home at the late hour of the night. He had visited a nursing home at late hour of the night to attend his ailing uncle and at that hour of night nobody would expect that a Judge would accompany by a chauffer or P.S.O. Further there is no embargo on the part of a Judge to move in a private car. The affidavit so filed read as a whole would indicate that as if the behaviour shown at the first instance to a sitting Judge was normal one, which usually shown to common man by the police officer. Had there been any insignia or anything to identify the Judge, the behaviour would have been better. Misbehaviour is a rule and expecting decent behaviour from a police officer is an exception. We may further make it clear that law does not permit to behave in an unbecoming and uncivilized manner to any common man, who requires the help and assistance of the police, which claims to be a so-called discipline force. The matter would have been ended there, were it been confined to checking of the vehicle, which Justice Mohanty has readily allowed. Behaviour of the officers in raising a loud voice and shouting at him in presence of the general public, even after Justice Mohanty disclosed his identity is uncalled for from the police officer. The conduct and the behaviour of this type of officers bring disrepute to the sincere, gentle and honest officers. Most of the time, the conduct of this type of officers goes un-noticed because general public dare not to bring this fact

to the notice of the authorities, which encourages them. The plea taken in the first affidavit of the I.I.C. is also to cover up and justify the outrageous action. The Officer with this mindset should not be posted in police station, which is a sensitive place and he has to come in contact with the general public now and then.

In the second show cause affidavit filed by Sri Alekh Chandra Pahi on 19.11.2010, he has tried to demonstrate that the incident is unfortunate and not deliberate at all. The statements made in paragraph-7 are as follows :-

> "7. That, it may be most humbly stated here that the aforesaid incident which had taken place on 22/23.8.2010 is an unfortunate and unintentional and not deliberate one and if at all even unknowingly I had acted in any manner so as to lower the image of the Hon'ble Justice or I had failed in discharging my duties if any on that day I would pray most humbly for a pardon from the Hon'ble Court in that regard."

Bare reading of paragraph-C of the affidavit of Sri Ranjan Kumar Nayak, A.S.I. vis-à-vis the plea taken by the I.I.C., we find the role played by Sri Ranjan Kumar Nayak, A.S.I. is not free from blame. Instead of dissuading Sri Pahi, I.I.C., said Ranjan Kumar Nayak has continuously enjoyed the situation created by the I.I.C. Now a stand has been taken that he could not dissuade the I.I.C. as it would have been treated as indiscipline. This plea cannot be accepted as a Police Officer is supposed to know the distinction between legal act and illegal act. When this outrageous act is committed by the I.I.C. in presence of the A.S.I., his silence amounts to imply consent to the said act and in other words, he has aided and abetted the offence. This shows the dark side of the police administration but all officers cannot be painted with same brush. There are large number of good officers, who have kept the head of the Police Department high for their honesty, integrity and public-friendly behaviour. From both the show cause affidavits filed, it is clear that the happening what has been narrated by Justice Mohanty has happened and now both the Officers have tendered the so-called unconditional apology alternatively taking various grounds justifying the action.

The word "Apology" means a regrettable acknowledgement of the offence necessarily implying a humble prayer to be excused for the work done. In the case of **Abdul Jabbar Taj vrs. R.K.Karanjia** (AIR 1970 Bombay 48), it is held that if an unreserved, unconditional and unqualified apology is not tendered immediately on the realization of the mistake committed but if after some discussion in the Courts and after getting a possible feeling that the matter may lead to grave consequence, an apology comes to be offered, it loses much of its grace. An apology should be evidence of real contriteness and manly consciousness of the wrong done, it

ceases to be so if it is belated, and it becomes instead the cringing of a coward shivering at the prospect of the stern hand of justice about to descend upon his head.

With the aforesaid background of facts, let us examine whether the contemnors are guilty of Contempt of Courts Act. The answer is yes and positive inasmuch as the aforesaid was the willful highhanded action of the contemnors towards a sitting Judge of the High Court. The utterance of the I.I.C. tends to lower the authority of this Court in the eye of public. Inasmuch as even after knowing the identity disclosed by Justice Mohanty, they have not shown any repentance and respect, rather the contemnor-Sri Alekh Chandra Pahi continued his unwarranted behaviour. The same is further fortified by the conduct of the contemnors in the affidavit filed in the Court at a belated stage justifying their action.

We are inclined to state here that the contemnors had appeared before this Court on 23.8.2010, on which date cognizance was taken and they were directed to show cause as to why they would not be held guilty of contempt of Court and suitably punished for having attempted to lower the authority of the Court. On the said date when the contemnors were first appeared, they could have filed their affidavits tendering apology or they could have at least apologized in the open Court itself. Instead of doing that, they filed the affidavits justifying their action and to cover up their culpability and Sri Alekh Chandra Pahi filed a second affidavit and the stand taken therein has been indicated in the foregoing paragraphs.

An apology by contemnor, in order to be a mitigating factor, must, among other things, be out-purring of a penitent heart moved by a genuine feeling of remorse and it must never be an apology or a convenient device to escape punishment. There cannot be both justification and apology, for they are incompatible. An apology is not a weapon to purge the guilt, it is merely meant to serve as an evidence of real contrition (See-**Surat Singh vrs. Des Raj Chowdhury, 1958 Delhi L.T.1)**.

In ***Re Hiren Bose*** (AIR 1969 Cal-8, Page-1) a Special Bench of the Calcutta High Court observed “it is also not a matter of course that a Judge can be expected to accept any apology. Apology cannot be a weapon of defence forged always to purge the guilty. It is intended to be evidence of real contrition, the manly consciousness of a wrong done, of an injury inflicted and the earnest desire to make such reparation as lies in the wrongdoer’s power. Only then is it of any avail in a court of justice”.

In **Laxmi Narayan Datta vrs. Meera Rani Dey, (1984 Crl. L.J-1033)** it has been held that the apologies tendered are of no avail if the same was

done half-heartedly at the last moment, with the hope that the contemnors be excused of any acts of violation, if found guilty of the acts complained.

When apology is not a free and frank confession of their guilt indicating a penitent attitude on their part, but an attempt to justify their conduct under the cover of bona fides, a haulting, hesitating and vacillating apology deserves to be rejected and thrown out (See-**State vrs. Krishna Madho,** AIR 1952 ALI. 86).

In this case, the contemnors have not tendered apology on the day when they appeared. The first affidavit filed by Sri Pahi is bereft of remorse because he has tried to justify his action by saying that as there was no insignia, chauffer or P.S.O. in the car, he could not recognize that an Hon'ble Judge was traveling in that car. The second affidavit was filed after deleting the aforesaid sentences at a belated stage. Alike the other contemnor has also in his affidavit hardly shown any repentance. So the prayer for acceptance of unconditional apology tendered by both the contemnors stands rejected.

However, considering the fact that the contemnors have not engaged any lawyer to conduct their case and they remained present in Court on each date fixed by this Court and taking a totality of the circumstances and the reports filed by the Home Secretary and Director General of Police including the outrageous incident into consideration, this Court at present does not propose to award the sentence on Sri Alekh Chandra Pahi, I.I.C. and defer it as we would like to further watch his conduct for a period of two years from today. Accordingly, we direct the contemnor-Sri Alekh Chandra Pahi, I.I.C., to furnish a personal bond to the Registrar (Judicial) of this Court in course of the day undertaking to maintain good conduct and not to repeat the act which he has committed. In case, he maintains orderly, good, decent and disciplined behaviour during the aforesaid period, then the rules shall stand discharged on expiry of two years. In case, he repeats such act, which will tantamount to Contempt, he shall be called upon to appear before this Court to receive the sentence.

So far as Sri Ranjan Kumar Nayak, A.S.I., is concerned, he is guilty of abetting and aiding the offence but instead of imprisoning or fining him, taking a lenient view, we admonish Sri Nayak to be more careful and decent in his behaviour towards the general public and not to repeat this type of act in future.

The Suo Motu CONTR is disposed of accordingly.

Application disposed of.

2011 (I) ILR – CUT- 188

L.MOHAPATRA, J & ARUNA SURESH, J.

O.J.C. NO.6205 OF 2000 (Decided on 23.11.2010).

RAMCHANDRA SUTAR ……. Petitioner.

.Vrs.

ROURKELA DEVELOPMENT AUTHORITY. ……. Opp.Party.

CONSTITUTION OF INDIA, 1950 – ART.226.

Correction of date of birth – Petitioner says his date of birth is 08.05.1948 but not 02.05.1942 – Allegation of manipulation of the date of birth in the service book – On verification of original service book it was found the Digit 8 has been interpolated – Moreover the petitioner relied on the transfer certificate which shows the date of birth 08.05.1948 where as the date of birth entered in the service book is 02.05.1948 – C.C.R. of the petitioner reflects his date of birth as 02.05.1942.

In this case there is anomaly in the date of birth appearing in the transfer Certificate as well as in the service book – These disputed question of fact can not be decided in a writ petition since the same requires evidence – Held, writ petition is liable to be dismissed.

(Para 5)

For Petitioner - M/s.J.R.Dash & Miss K.L.Dash.
M/s. A.K.Mishra, J.Sengupta, D.K.Panda, P.R.J.Dash & G.Sinha.
For Opp.Party - M/s. D.K.Mohapatra, & Miss. M.Mishra.

L.MOHAPATRA, J. The petitioner, who was working as a Roller Driver under the Rourkela Development Authority, has filed this writ application assailing the order in Annexure-1 dated 31.5.2010 issued by the Secretary, Rourkela Development Authority intimating him therein that he has retired from service and relieved of his duty with effect from 31.5.2000.

2. Case of the petitioner is that he was appointed as a Car Driver under the opposite party in the year 1974. In the year 1980-81, he was entrusted with the work of driving a roller and with effect from 27.3.1997 he was promoted to the post of Motor Mechanic. While working as such, he was served with a notice in Annexure-1 intimating him therein that he had retired from service with effect from 31.5.2000. According to the petitioner, his date of birth is 8.5.1948, which is supported by the School Transfer

Certificate in Annexure-2, and, therefore, he could not have been made to retire with effect from 31.5.2000 taking the date of birth to be 2.5.1942.

3. A counter affidavit has been filed by the opposite party. It is stated in the counter affidavit that the D.S.P.(Vigilance), Rourkela in his letter dated 1.5.1997 requested to conduct an inquiry so far as the petitioner is concerned on the basis of certain allegations. On the basis of the request of the D.S.P. (Vigilance) as well as S.P. (Vigilance), Sambalpur, the Secretary, Rourkela Development authority in his confidential letter dated 6.1.1998 directed the Planning Member, Rourkela Development Authority to enquire into the allegations and accordingly, an inquiry was conducted. The allegations relate to manipulation of the date of birth in the Service Book and upon conducting an inquiry, a report was submitted to the effect that the date of birth of the petitioner is 2.5.1942 but the same has been manipulated as 2.51948 in the Service Book. On the basis of such report, the petitioner was made to retire in Annexure-1.

4. The learned counsel appearing for the petitioner assails the order in Annexure-1 on three grounds.

The first ground of challenge is that there is no material on record to show that it is the petitioner, who manipulated date of birth in the Service Book. Therefore, he cannot be held responsible for any kind of manipulation as revealed from the inquiry report.

The second ground of challenge is that the Service book clearly indicates the date of birth to be 2.5.1948 and the same has also been signed by the then Assistant Town Planner and Zone Officer of the opposite party.

The third ground is that the inquiry was conducted behind the back of the petitioner and the petitioner had not been given any opportunity to meet the findings contained in the said inquiry report.

Shri Mohapatra, the learned counsel appearing for the opposite party, on the other hand, submitted that a bare perusal of the original Service Book clearly indicates that the 'Digit 8' appearing against the date of birth has been manipulated. Apart from the above, the other documents Annexure-B and Annexure-C series also indicate the date of birth of the petitioner as 2.5.1942 and not 2.5.1948 as reflected in the Service Book.

5. By order of the Court, Shri Mohapatra, the learned counsel appearing for the opposite party has produced the original Service Book of the petitioner. The entry relating to date of birth clearly indicates that the 'Digit 8' has been interpolated though the same has been signed by then Town Planner and Zone Officer. But it is clear that the endorsement and the signature of the said Officer appearing under the date of birth are in a different ink and to the naked eye it appears to have been entered

subsequently. Annexure-B is a Declaration and Nomination Form under the Employee's Provident Funds Scheme, 1952 wherein the date of birth of the petitioner has been mentioned as 2.5.42 and the same has also been signed by the petitioner. Similarly the C.C.R. of the petitioner from 18.12.1982 to 31.3.1983 reflects the date of birth as 2.5.1942. The C.C.R. for the period from 14.8.1990 to 31.3.1991 also indicates the date of birth as 2.5.1942. Therefore, there are prima facie materials placed before the Court to show the date of birth to be 2.5.1942. Apart from the above, Annexure-2, the Transfer Certificate on which much reliance has been placed by the petitioner indicates the date of birth to be 8th May 1948 whereas the date of birth entered in the Service Book is 2.5.1948. Therefore, there is anomaly in the date of birth appearing in the Transfer Certificate as well as the Service Book. These disputed questions of fact cannot be decided in a writ petition since the same require evidence. We are therefore of the view that since materials are available to show the date of birth of the petitioner to be 2.5.1942 and there appears to be manipulation in relation to 'Digit 8' in the Service Book of the petitioner in relation to the date of birth, it is not possible to decide the disputed questions of fact in a writ petition.

Accordingly, we decline to allow the prayer of the petitioner and dismiss the same.

Writ petition dismissed.

2011 (I) ILR – CUT- 191

L.MOHAPATRA, J & ARNA SURESH, J.

O.J.C. NO.615 OF 2000 (Decided on 23.11.2010)

NIRUPAMA TRIPATHY & ORS. ……. Petitioners.

Vrs.

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

SERVICE LAW – Petitioners filed OA before the Tribunal for regularization of service – O.A. dismissed – Order challenged in writ petition – This Court allowed writ petition directing regularization – Judgment challenged in the Apex Court – Apex Court remanded the matter to dispose of the writ petition in the light of the case Secretary, State of Karnataka & others -V- Uma Devi & others reported in AIR-2006 SC 1806.

In the present case petitioners were appointed on ad hoc basis which was extended from time to time – Their appointment was irregular as they have not been selected by the staff selection commission and they continued in the post by virtue of the interim order Dt.30.12.1994 passed by the Tribunal and are still continuing because of the interim protection granted by the Hon'ble Supreme Court – They did not have 10 years of service without intervention of the Court and accordingly they don't satisfy the requirement for the purpose of regularization as determined in the above decision – Held, claim made by the petitioners for regularization is dismissed.

(Para 6)

Case law Relied on :-

(2006) 4 SCC 1 : (Secretary, State of Karnataka & Ors.-V-Uma Devi & Ors.).

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

For Opp.Parties - Mr. Lalatendu Jena, M/s. Purnendu Prasad Ray, D.P.Ray, S.Pasayat & T.K.Jena.

L.MOHAPATRA, J. The petitioners were the applicants in O.A.Nos.748 of 1994, 749 of 1994, 750 of 1994 and 751 of 1994 before the Central Administrative Tribunal, Cuttack Bench, Cuttack seeking for regularization in

service. Their Original Applications having been dismissed by the Tribunal in a common judgment, they approached this Court in the present writ application. This writ application was allowed by judgment dated 30.6.2005 directing the opposite parties to consider their cases for regularization and also for giving them continuity of service as ad hoc employees. The order of termination passed on the basis of the judgment of the Tribunal was also quashed. The opposite parties challenging the said judgment approached the Hon'ble Supreme Court in Civil appeal No.240 of 2007. The Hon'ble Supreme Court by order dated 16.1.2007 set aside the order of this Court and remitted the matter back for hearing afresh in the light of the decision of the Hon'ble Supreme Court in the case of ***Secretary, State of Karnataka and others v. Uma Devi and others, reported in (2006) 4 SCC 1, corresponding to AIR Supreme Court 1806***.

2. The facts leading to filing of the Original Applications by the petitioners before the Tribunal are that the Regional Director, E.S.I. Corporation called for names of suitable candidates for filling up the posts of Lower Division Clerks on ad hoc basis. The Employment Exchange was requested to sponsor the names of at least 40 candidates. The age limit was mentioned as 18 to 25 years, the upper age limit being relaxable by 5 years in case of S.C. and S.T. candidates. In response to the said request made by the Regional Director, names were sponsored by the Employment Exchange including that of the petitioners and as it appears a type writing test followed by interview had been conducted and candidates were selected for such appointment by the Selection Committee including the petitioners. They were appointed on ad hoc basis initially for a period of three months but such appointments were extended from time to time. Ultimately in the year 1992, an order was passed extending their appointment for a further period of three months or till availability of regularly selected candidates whichever is earlier. Having continued for a long period on ad hoc basis, they approached the Tribunal for regularization of their services. Apprehending termination during pendency of the Original applications, the petitioners also sought for protection and the Tribunal by order dated 30.12.1994 directed that their services should not be terminated without the leave of the Tribunal.

3. All the Original Applications were heard together and were dismissed by a common judgment on 7.1.2000 on the ground that in absence of any averment on record with regard to holding of a type writing test it was not possible on the part of the Tribunal to come to a conclusion that the petitioners had in fact appeared in type writing test and came out successful and that later they were selected in the interview by the Selection

Committee constituted as per Head Office letter dated 13.3.1991 and 15.5.1991. The Tribunal further held that the petitioners having not come through a regular process of selection are not entitled to be regularized. Challenging the said order, the petitioners filed this writ application. While deciding the writ application in favour of the petitioners by judgment dated 30.6.2005 this Court came to a conclusion that names of at least 40 candidates were sponsored from Employment Exchange for recruitment on ad hoc basis by the Departmental Selection Committee. Naturally a competitive type writing test was held for those persons, who had been sponsored from the Employment Exchange. Only successful candidates in type writing test were called for interview and after being selected, they were given appointment. The petitioners are amongst those candidates who were not only sponsored by the Employment Exchange but also came out successful in the type writing test as well as interview. Therefore, this Court held that the findings of the Tribunal that the petitioners were not subjected to any type writing test was not correct and therefore, they having been given ad hoc appointment through a regular recruitment process are entitled to be considered for regularization and accordingly allowed the writ application. The Hon'ble Supreme Court while setting aside the judgment of this Court was of the view that the case of the petitioners had not been considered in the light of the judgment of the Hon'ble Supreme Court in the case of Secretary, State of Karnataka and others v. Uma Devi and others (supra) and accordingly remitted the matter back to this Court for rehearing with reference to the aforesaid judgment.

4. The Court is now therefore called upon to examine as to whether the petitioners were appointed as Lower Division Clerks on ad hoc basis having been selected through a selection process and as to whether the decision rendered by the Hon'ble Supreme Court in the aforesaid judgment stand on their way so far as claim of regularization is concerned or not. The Hon'ble Supreme Court while remitting the matter back to this Court did not set aside the findings available in the judgment but only because of non-consideration of the aforesaid judgment remitted the matter back for rehearing with reference to the said judgment.

The appointment letters so far as the petitioners are concerned have been annexed as Annexures-A/1, A/2, A/3 and A/4 to the counter affidavit filed by opposite party Nos.1 to 4. The appointment letters clearly show that the petitioners were selected and were offered appointment to the post of L.D.C. in the scale of pay of Rs.950-1500/-. Such appointments were subject to certain terms and conditions and one of the conditions was that the appointment will be on ad hoc basis as a stop gap arrangement and is

not expected to last for more than three months and that there is no chance of such appointment being made on regular basis. All the petitioners accepted such terms and conditions indicated in the appointment letter and joined the posts. Annexures-A/9 to A/12 to the counter affidavit of the aforesaid opposite parties also show that Regional Director approved the appointment of the petitioners as L.D.C. on ad hoc basis as a stop-gap arrangement which was not expected to last for more than three months with effect from 16.8.1991. It was also stipulated therein that such ad hoc appointment shall not confer any right for regular appointment to the post and the services of the petitioners can be terminated without any notice or without assigning any reason therefore. In paragraph-5 of the counter affidavit, the opposite parties admitted that names were called for from the Employment Exchanges and to short list the candidates sponsored by the Employment Exchanges, a type writing test followed by interview was conducted and candidates were selected. However, such selection was not in conformity with the Recruitment Regulations for the post of L.D.C. but the said method of recruitment had been devised to ensure fairness in selection. It also appears from paragraph-7 of the counter affidavit that selection of candidates for appointment to the post of L.D.C. is required to be done by the Staff Selection Commission but the Staff Selection Commission having failed to provide sufficient number of candidates, informed the E.S.I. Corporation by letter dated 22.3.1996 to make its own arrangement for recruitment to the post of L.D.C. Therefore, such a method was devised to meet the immediate requirement and the candidates including the petitioners were selected for appointment on ad hoc basis.

5. In the counter affidavit, the opposite parties in paragraph-5 having admitted to have conducted a type writing test followed by interview for the purpose of selecting the candidates, it cannot be said that the petitioners had not been subjected to any kind of selection process before appointment. Though there is no denial of the fact that such selection is required to be made by the Staff Selection Committee, due to inability of the Staff Selection Commission, the E.S.I. Corporation was requested to make its own arrangement for filling up the said post of L.D.C.

The next question for consideration is as to whether in view of the judgment of the Hon'ble Supreme Court in case of Secretary, State of Karnataka & others v. Uma Devi & others (supra), the claim of the petitioners for regularization can be entertained. Shri G.A.R. Dora, the learned Senior Counsel appearing for the petitioners placed reliance on paragraph-38 of the judgment which is quoted below:

> " When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

On perusal of the observation made by the Hon'ble Supreme Court in the above paragraph, it appears that when a person enters a temporary employment and such engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of such appointment being temporary and therefore, cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases in consultation with the Public Service Commission. Here is a case where admittedly the selection of candidates for appointment to the post of L.D.C. is required to be done by the Staff Selection Commission but because of the inability of the Staff Selection Commission to do so, the E.S.I. Corporation devised the method of recruitment to meet the immediate requirement. Therefore, the relevant rule or procedure for selection of candidates to the post of L.D.C. had not been followed and consequently the ad hoc appointments were made tenure appointments which were extended from time to time. The only exception made in the aforesaid judgment of the Hon'ble Supreme Court is stated in paragraph-44 of the judgment which is quoted below:

> " One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagrajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or

> more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

6. Hence we hold that the appointment of the petitioners was irregular, they having not been selected by the Staff Selection Commission. However, they continued in the post by virtue of the interim order dated 30.12.1994 passed by the Tribunal and are still continuing because of the interim protection granted by the Hon'ble Supreme Court. They did not have 10 years of service without intervention of Court and accordingly they also do not satisfy the requirement for the purpose of regularization as enumerated in the said paragraph of the judgment of the Hon'ble Supreme Court.

7. In view of the discussions made above, the claim of the petitioners for regularization cannot be allowed and accordingly the writ application is dismissed.

Writ petition dismissed.

2011 (I) ILR – CUT- 197

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

JCRLA NO.32 OF 2001 (Decided on 10.11.2010)

BHIMASEN BHOI ……. Appellant.

.Vrs.

STATE OF ORISSA ……. Respondent.

(A) **PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.302**.

Murder – Appellant gave three successive blows with a Tangia which severed the head of the deceased from the trunk – Evidence of P.W.2 corroborated with the evidence of the doctor (P.W.6) – Doctor opined that the injuries on the neck and body of the deceased could be possible by the Tangia – Evidence of P.W.10 shows that on the date of occurrence the appellant appeared before him with a blood stained Tangia and the cut head of the deceased and confessed his guilt – Chemical examination report shows that the said Taniga contained human blood which tallies with the blood group of the deceased – Held, there is no infirmity in the impugned judgment convicting the appellant U/s.302 I.P.C.

(Para 7)

(B) PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.300.

Conviction for murder. – Learned Counsel for the appellant relied on the injury report (Ext.12) of the appellant to prove that he had been assaulted by the deceased immediately prior to the incident and as such the offence was committed due to grave and sudden provocation – Injury report shows two bruises and two abrasions and all are simple injuries - P.W.2 is silent about any kind of assault at the instance of the deceased – Held, merely because the appellant had sustained some simple injuries it can not be presumed that he had been assaulted by the deceased immediately prior to the incident which gave rise to a grave and sudden provocation.

(Para-7)

For Appellant - Niranjan Singh
For Respondent - Addl. Government Advocate.

This appeal is directed against the judgment and order dated 31.01.2001 of the Addl. Sessions Judge, Boudh in S.T. No. 24 of 2000

convicting the appellant for commission of offence under Section 302 I.P.C. and sentencing him to imprisonment for life.

2. The prosecution case is that on 09.08.1999 at about 5.00 P.M. the deceased was passing on the village Danda and the appellant was also passing on a path near maize field of (P.W.2). At that time, the deceased was abusing the appellant. Immediately thereafter, the appellant came through the maize Badi to the village Danda being armed with a Tangia and dealt a blow on left side neck of the deceased. He gave three repeated blows on the neck of the deceased as a result of which the head of the deceased was completely detached from the body. The appellant thereafter carried the head of the deceased and left the spot towards the village tank along with the weapon of offence (Tangia). The daughter of the deceased informed about the incident to P.W.1, who came to the spot, saw the trunk of the deceased lying on the ground and lodged the information. On the basis of such information, investigation was taken up and on completion of investigation charge-sheet was submitted against the appellant for commission of offence under Section 302 I.P.C. In course of trial, the prosecution examined ten witnesses, but none was examined on behalf of the appellant.

3. The plea of the appellant is complete denial of the prosecution allegations.

4. Out of ten witnesses examined in course of trial. P.W.2 is the eye witness to the occurrence and P.W.1 is the informant. P.Ws.3 and 4 are post occurrence witnesses. P.W.6 is the Medical Officer, who conducted the post-mortem examination. P.W.7 is a witness to inquest and P.W.5 is a constable, who kept watch over the dead body. P.W.8 is the Grama Rakhi, who accompanied the informant to the Out Post and then to Kantamal P.S. and P.Ws. 9 and 10 are two Investigating Officers.

5. The trial court accepting the evidence of the sole eye witness (P.W.2) coupled with the evidence of the doctor (P.W.6) and the conduct of the appellant in carrying the head of the deceased to the Police Station and handing over the same to the I.O., found the appellant guilty of charge under Section 302 I.P.C. and convicted him thereunder.

6. Learned counsel for the appellant assailing the impugned judgment submitted that immediately prior to the assault on the deceased the appellant was also assaulted by the deceased and therefore out of grave

and sudden provocation the appellant having caused death of the deceased by dealing blows by means of a Tangia, he is liable for conviction under Section 304 Part-I of I.P.C. and not under Section 302 of said Code as held by the trial court.

Learned counsel for the State referring the evidence of P.W.2 and the doctor (P.W.6), submitted that the evidence of P.W.2 does not indicate anywhere that the appellant had been assaulted by the deceased immediately prior to the incident or that there was grave and sudden provocation at the instance of the deceased. The evidence of P.W.2 having been corroborated by the medical evidence, the trial court was justified in finding the appellant guilty of the charge.

7. We carefully examined the evidence of the witnesses. P.W.1 is the informant. He in his deposition has stated that after being informed about the incident by the daughter of the deceased he went to the spot and found the trunk of the deceased lying at the spot and the head was missing. He was informed by P.W.2 Bipin Majhi that the appellant had assaulted the deceased and had taken away the head. Thereafter he along with the Grama Rakhi (P.W.8) went to the Out Post and lodge the information. P.W.2 is the sole eye witness to the occurrence. He in his deposition has stated that on the date of occurrence about 4.00 P.M. he was working in the maize Badi. He found the appellant passing on a path near his maize Badi being followed by the deceased who was abusing the appellant in the village Danda. The appellant thereafter came to the maize Badi through the village Danda being armed with a Tangia and dealt a blow on the neck of the deceased. The appellant gave three successive blows on the deceased as a result of which the head was completely severed from the trunk. The appellant thereafter left the spot along with the Tangia and the head of the deceased and proceeded towards the village tank. Later on the police brought the head of the deceased and conducted inquest over the dead body and he also signed on the inquest report. There is nothing in the cross-examination of this witness to disbelieve his statement. The evidence of P.W.2 is corroborated by the evidence of P.W.6, the doctor, who conducted the post-mortem examination. P.W.6 was of the view that the cause of death was due to de-captioned with haemorrhage and upon query of the I.O. he had opined that the injuries on the neck and body of the deceased could be possible by the Tangia place before him by the I.O. Apart from the fact that the evidence of P.W.2 is corroborated by the evidence of P.W.6, we also found from the evidence of P.W.10, the I.O. that on the date of occurrence the appellant appeared before him with a blood stained Tangia and the cut

head of the deceased kept in a plastic bag and confessed his guilt. From the chemical examination report, we also found that the Tangia produced by the appellant contained human blood which tallies with the blood group of deceased. When such materials are available in support of the prosecution, learned counsel for the appellant in support of his contention that the offence was committed due to grave and sudden provocation relied on Ext.12, the injury report, so far as the appellant is concerned. From the injury report, we found that there are two bruises and two abrasions and all are simple injuries. P.W.2 is completely silent about any kind of assault at the instance of the deceased to the appellant. Merely because the appellant had sustained some simple injuries it cannot be presumed that he had been assaulted by the deceased immediately prior to the incident. We are therefore, of the view that such simple injuries sustained by the appellant cannot give rise to a presumption that the deceased had assaulted the appellant immediately prior to the incident which gave rise to a grave and sudden provocation.

For the reason stated, we find no infirmity in the impugned judgment and accordingly this appeal being devoid of merit is dismissed.
Appeal dismissed.

Appeal dismissed.

2011 (I) ILR – CUT- 201

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

O.J.C. NO.5077 OF 1999 (Decided on 30.11.2010).

PREM CHAND UPADHYAY ……Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.311 (2).

Departmental Proceeding – Petitioner while working as a driver in CRPF his vehicle met with an accident causing injury to CRPF Personnel as well as civilians and loss of property – He was found guilty of the charge and removed from service – Appeal preferred by him was rejected – Hence this writ petition.

In this case petitioner was not attached to the vehicle which met with an accident but on that day he was asked to drive that vehicle – Petitioner's case is that the vehicle was defective – Though MVI report was called for it could not be produced – Report of the Commandant shows at the time of accident there was heavy drizzling and the road was slopping down after a curve – In this circumstances it can not be said that the petitioner was rash and negligent in driving and was not careful enough to avoid the accident – Held, this Court feels the punishment of removal from service is grossly disproportionate – However since this Court can not substitute a punishment, it set aside the appellate order and remitted the matter back to the appellate authority to reconsider the question of punishment and impose such punishment which shall commensurate the allegations made in the memorandum of charge specially taking in to consideration the circumstances in which the accident took place.

(Para 4 & 5)

For Petitioner - M/s. Prasant Kumar Mishra & Smt. P.Mishra.
For Opp.Parties - Assistant Solicitor General

L.MOHAPATRA, J. The petitioner, who was working as a Constable-Driver in the Central Reserve Police Force, having been removed from service in pursuance of a disciplinary proceeding by order dated 7th January, 1998 in Annexure-8 and his appeal having been rejected in Annexure-10 dated 19th March,1999, this writ application has been filed challenging the order of punishment as well as the order passed by the appellate authority.

2. The petitioner joined as a Constable-Driver under 101 Bn. Group Centre, Durgapur, CRPF on 30th November, 1990. He was transferred to 39 Bn. under Group Centre, Bhubaneswar on 1.4.1993 and joined in the post. Along with the battalion he moved to different parts of the country and while posted as such at Halflong in the State of Assam, on 7.6.1996 he was assigned the duty of driving a CRPF vehicle bearing registration No.1363 of the Unit carrying about 18 CRPF personnel to Halflong Railway Station. On the way of the railway station, the vehicle met with an accident near Halflong (Assam) Police Station, as a result of which, some of the CRPF personnel and two civilians sustained injuries. Some articles and a police quarter at the accident place also got damaged. The vehicle also suffered damages. So far as injuries of two civilians are concerned, the matter was settled but a departmental proceeding was initiated against the petitioner in relation to the said accident.

The memorandum of charge is that the petitioner while functioning as Constable-Driver committed an offence of neglect of duty in his capacity as a member of the Force under Section 11(1) of CRPF Act, 1949 and had exhibited negligence and carelessness on 7.6.1997 by causing an accident while driving the CRPF vehicle carrying CRPF personnel from 39 battalion headquarter to Halflong Railway Station. In the said accident, eighteen CRPF personnel and two civilians sustained injuries. The vehicle and a police quarter with some valuable items were also severely damaged.

The petitioner submitted his reply to the said charges but not being satisfied with the reply submitted by the petitioner, a regular inquiry was directed to be conducted. An inquiry officer was appointed and on conclusion of inquiry, report was submitted before the disciplinary authority finding the petitioner guilty of the charge. On the basis of such inquiry report, the order of punishment was passed by the Commandant of 39 Bn. CRPF on 7.1.1999 in Annexure-8 removing the petitioner from service. The petitioner preferred an appeal against the said order of punishment, but the appellate authority rejected the appeal in Annexure-10.

3. Mrs. Mishra, learned counsel appearing for the petitioner assailed the impugned punishment on two grounds. The first ground taken by the learned counsel is that the petitioner was directed to drive the vehicle bearing registration No. DIL 1363 even though the vehicle had defects and, therefore, the accident occurred due to such defect in the vehicle cannot be attributed to the petitioner saying that due to rash and negligent driving on the part of the driver, the accident took place. The second ground of challenge is the quantum of punishment which according to the learned counsel is disproportionate and does not commensurate with the charge.

Learned Assistant Solicitor General appearing on behalf of the opposite parties submitted that there being no dispute about the fact that the petitioner was driving the vehicle on the fateful day and it met with an accident resulting in injuries of some of CRPF personnel and damage to the vehicle as well as a police quarter clearly indicate that the petitioner was rash and negligent in driving the vehicle. Therefore, he has been rightly found guilty of the charge by the inquiry officer, which was accepted by the disciplinary authority as well as the appellate authority. So far as question of punishment is concerned, it was contended by the learned Assistant Solicitor General that this Court has no jurisdiction to substitute the punishment and the quantum of punishment to be imposed in facts and circumstance of a particular case is within the domain of the disciplinary authority and the Court should not interfere with the quantum of punishment.

4. As rightly stated by the learned Assistant Solicitor General there is no dispute that the petitioner was working as Constable-Driver and on 7.6.1998 he was asked to drive the vehicle bearing registration No.DIL 1363. There is also no dispute that the said vehicle was carrying some CRPF personnel. There is also no dispute that the vehicle met with an accident on the way to the railway station and in the said accident, some of the CRPF personnel sustained injuries apart from two civilians. There is also no dispute that because of such accident, there was damage to the vehicle, a police quarter and some valuable items. Therefore, it cannot be said that the charge has not been proved against the petitioner but at the same time it appears from Annexure-1 that the vehicle lost control and fell into a Khud on the slope side of the road. There was heavy drizzling and the road was slopping down after a curve. The petitioner was not attached to the said vehicle and on the date of incident, he was asked to drive that vehicle. We had requested the learned Assistant Solicitor General to produce the MVI report before us at the time of final hearing of the writ application. It was intimated to the Court that the said report is not available. It is the specific case of the petitioner that the vehicle was defective and non-production of the report of the concerned MVI by the opposite parties forces us to take a adverse view against the department in this regard. Even accepting the submission of the learned Assistant Solicitor General that the charge has been proved and the vehicle had no defect, we cannot ignore the report submitted by the Commandant in Annexure-1 that at the time of accident, there was heavy drizzling and the road was slopping down after a curve. The vehicle lost control and fell into a Khud on the slop side of the road. Under these circumstances, the question of rash and negligent driving does not arise but it can be said that the petitioner was not careful enough to avoid the accident.

5. Having come to a conclusion that the petitioner was not careful enough to avoid the accident under the circumstances stated above, the order of punishment of removal from service appears to be disproportionate. Law is well settled that the quantum of punishment to be imposed is completely within the domain of the disciplinary authority and the Court cannot substitute a punishment. But when the Court feels that the punishment is shockingly disproportionate to the nature of allegation, it can always direct the disciplinary authority to reconsider the question of punishment. Accordingly having found that the punishment of removal from service is grossly disproportionate, we set aside the appellate order in Annexure-10 and remit the matter back to the appellate authority to reconsider the question of punishment and impose such punishment which shall commensurate the allegations made in the memorandum of charge specially taking into consideration the circumstances in which the accident took place. The appellate authority may reconsider and pass orders within two months from the date of communication of this order. .

The writ application is disposed of accordingly.

Writ petition disposed of.

2011 (I) ILR – CUT- 205

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

DSREF NO.3 OF 2010 & CRLA NO.345 OF 2010 (Decided on 21.12.2010)

STATE OF ORISSA …….. Complainant.

.Vrs.

RAJESH HEMBRUM …….. Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.320, 366.

Reference for confirmation of death sentence – Deceased is the grand daughter of the accused – P.W.8 who is none else but the wife of the accused stated in her evidence that the deceased was last seen together with the accused when she left to purchase chana – There was a short time gap when she returned and searched for the deceased and saw the accused coming with the severed head of the deceased – Thereafter she called other witnesses – P.W.4 is the son of the accused who has stated that on being asked his father told that in order to mix the blood with paddy he had killed his grand daughter – All the witnesses corroborated the statement of P.W.8 and no reason to discard her evidence .

No doubt the murder was brutal but not diabolic – Moreover there is no Criminal antecedent of the accused who is aged about 58 years – Held, conviction of the accused U/s.302 I.P.C. conformed – Imposition of capital punishment of death is set aside and the appellant was sentenced to undergo imprisonment for life.

(Para 13,14 & 16)

Case law Relied on:-

AIR 1980 SC 898 : (Bachan Sing -V- State of Punjab).

Case laws Referred to:-

1.AIR 1984 SC 1622 : (Sharad Birdhichand Sarda -V-State of Maharashtra)
2.2010 CRL.L.J.905 : (Dilip Premnarayan Tiwari & anr.-V-State of Maharashtra).

For Complainant - Mr. Saubhagya Ketan Nayak, Addl. Government Advocate
For Respondent - B.K.Ragada, L.N.Patel, N.K.Das & D.Sethi.

PRADIP MOHANTY, J. The reference under Section 366 Cr.P.C is made by the learned Additional Sessions Judge, Kuchinda for confirmation of the death sentence imposed by him on the accused while convicting him under Section 302, IPC in S.T. No.36 of 2009 whereas the criminal appeal is preferred by the accused himself challenging his conviction and sentence. Both the death reference and the criminal appeal were heard together and are being disposed of by this common judgment.

2. The case of the prosecution is that on 26.04.2009 at about 3.30 PM while the informant along with some other co-villagers was playing cards behind the house of the accused under a Mahua tree, the wife of the accused called the informant to ascertain as to if her husband had committed murder of her grand-daughter. The informant along with other witnesses and co-villagers rushed to the house of the accused and found blood marks on his verandah. In order to prevent the accused from absconding, they tied him by means of a rope. The wife of the accused brought the key from the accused and opened the bed-room. All of them found that the head of the deceased had been decapitated from her body and lying near a box in the bed-room. The rest part of her body was kept inside a gunny bag. Her blood was collected and stored in a steel utensil (Khuri) in which the deceased was taking her lunch. On being asked, the accused confessed that he had committed murder of his grand-daughter by means of axe with an intention to mix her blood with the paddy and sow blood mixed paddy in the field. They also found the bloodstained axe in the corner of the bed-room. The informant went to Gourpali Out-post and lodged FIR. The Inspector in-charge, Jamankira P.S., who was present in the Out-post, received the FIR, registered the case, took up investigation and after its completion filed charge-sheet against the accused under Section 302, IPC.

3. The plea of the accused is complete denial of the allegations. His further plea is that he had gone to sleep in his house but he was caught, assaulted and falsely entangled in this case.

4. In order to prove its case, the prosecution has examined as many as thirteen witnesses including the doctor and IO and exhibited fourteen documents and the defence has examined none.

5. The learned Additional Sessions Judge on conclusion of trial convicted the appellant under Section 302, IPC and imposed capital punishment besides fine of Rs.5,000/- with default sentence which has been directed to be merged with capital punishment.

6. Mr. Ragada, learned counsel appearing for the accused-appellant assails the impugned judgment on the following grounds:

(i) There is no eye witness to the occurrence and none of the circumstances, on which the prosecution has relied to bring home the charge to the accused, has been established.

(ii) The extra judicial confession said to have been made by the accused being a very weak piece of evidence and moreover the same having been made when the accused was tied by means of a rope and assaulted by the witnesses cannot be relied upon for any purpose;

(iii) Evidence of P.Ws.2, 4, 8, 9 and 10, who are alleged to be the post-occurrence witnesses, cannot be taken into consideration as the same is not only contrary to each other but also full of contradictions and they are highly interested for successful termination of the prosecution case. That apart, P.W.2 having developed the story in Court, his evidence cannot be relied upon. Furthermore, the decision in the village meeting that if the accused returns home his family members will be ousted from their locality being the reason behind P.W.8 and other family members of the accused deposing against him, no reliance can be placed on their evidence.

(iv) Presence of blood stains on the wearing apparels of the accused cannot be said to connect the accused in any manner with the alleged offence as because the factum of seizure has not been proved. When such a main link goes, the chain gets snapped and other circumstances cannot establish the guilt of the accused.

(v) P.Ws.8 and 9 have admitted that they are Christian by religion and they do not follow the custom of mixing blood with the paddy before it is sown in the field. Therefore, the motive behind the murder of the deceased, as alleged by the prosecution, has not been proved.

(vi) The accused is entitled to get benefit under Section 84, IPC, since evidence on record shows that at the time of occurrence he was found slightly mad and had lost his legal cognitive value.

(vii) This is not a rarest of rare case where capital punishment is warranted.

7. Mr. Nayak, learned Additional Government Advocate strongly contended that the evidence of P.Ws.2, 4, 8, 9 and 10 is very clear, cogent and unimpeachable. P.Ws.4 and 8 are none but the son and wife of the accused. Through the evidence of all these witnesses it is established that when they rushed to the house of the accused, they found blood stains on the verandah and the main door of the house was closed from outside. P.W.8 brought the key of the room and opened the door. When they entered inside, they found the head of the deceased had been separated from her body. The accused, who was present there, confessed before them to have cut the throat of the deceased (his grand daughter) and collected her blood to mix the same with paddy. The severed head of the deceased was found inside the bed room and the trunk was kept inside a gunny bag. Blood was collected and stored in a steel utensil. The medical evidence of the doctor (P.W.13) also corroborated the evidence of ocular witnesses. Therefore, the prosecution has been able to prove the chain of circumstances. The chemical reports also support the prosecution case. He further contended that the present is a rarest of rare case, since the accused had killed his own grand-daughter, who was a tender girl of only eight years of age, in a gruesome manner by severing her head from the body. The accused was not insane at the time of occurrence, but while he was in custody, he developed insanity as per his own statement recorded under Section 313 Cr.P.C. Therefore, learned Additional Sessions Judge has rightly passed the sentence and the death reference should be confirmed.

8. Perused the LCR and the decisions cited by the learned counsel for the parties.

P.W.1 is a post occurrence witness who after hearing about the occurrence from the village went to the spot and found the head of the deceased lying apart. The other portion of her body was tied in a gunny bag and blood was collected and stored in a steel utensil inside the house of the accused. P.W.1 is also a witness to the inquest and the seizure, who proved Exts.1, 2 and 3.

P.W.2 is another post occurrence witness, who specifically deposed that on the day of occurrence at about 3:00 PM, while he along with others were playing cards near the house of the accused, the wife of the accused (P.W.8) informed that her husband had done something to her grand daughter (deceased) and had closed the door from inside. He along with others went to the house of the accused and found blood on the verandah. The door of the room was closed from inside. Thereafter, they forcibly opened the door, entered inside the room and found that the head of the

deceased was separated from the body and lying apart in the bed room of the accused and other portion of her body was tied in a gunny bag and the blood was collected and stored in a steel utensil. They tied the accused by means of a rope and on being asked, he confessed to have cut the throat of his grand daughter and collected her blood to mix the same with paddy. In cross-examination, he admitted that they started playing cards from 12 noon and did not listen any untoward sound or any talking from inside the house of the accused. There is no material to be elicited from his mouth to demolish the above evidence.

P.W.3 is another post occurrence witness who corroborated the testimony of P.W.2. He further deposed that on being asked the accused pleaded his ignorance. Prosecution put some leading questions after declaring him hostile.

P.W.4 is another post occurrence witness and the son of the accused, who reached at the spot at about 5 pm from Sambalpur after getting information from his sister over telephone that his father had killed the deceased. He found blood on their verandah. He brought the key of the room from P.W.9 and opened the room and found the head of the deceased lying apart inside their bed room. The body of the deceased was kept inside a gunny bag and her blood was collected and stored in a steel utensil. When he arrived at his home, he found his father tied by means of a rope. Nothing more has been elicited from his cross-examination.

P.W.5 is a constable and witness to the seizure of bangles, gunny bag and nail clippings. He also proved Exts.4 and 5. In cross-examination, he has admitted that the seizure was made at the police station and he was not present at the time of collection of these articles.

P.W.6 is a Havildar and a witness to Exts.4 and 5, who specifically stated in cross-examination that seizure was made in his presence.

P.W.7 is another constable, who escorted the accused to the police station and the doctor gave him two vials, one containing the blood samples of the accused and the other containing his nail clippings.

P.W.8 is the wife of the accused and the grand mother of the deceased, who specifically stated in examination-in-chief that her grand-daughter was staying with her from childhood because at the early age, her elder daughter (mother of the deceased) became widow for which she was given in marriage. On the day of occurrence, she and her husband (accused) were present along with the deceased. At about 3:00 pm, while

her grand-daughter was taking lunch, the accused asked her (P.W.8) to bring Pachwai (Handia). On her refusal to go for handia, the accused gave her Rs.5/- to bring chana. When she returned with two packets of chana, she found that the door of the house was closed from inside. She called the deceased to open the door, but as there was no response from her, she searched for her grand-daughter but could not trace her nor heard any sound. She stood on a small heap of brick and entered the house from backside. When she called her grand-daughter, the accused told her not to make any shout and said that he was going away along with the head of his grand-daughter. She found blood marks on the verandah. She opened the door from backside and when she found that the accused was attempting to go away with the head of the deceased, she closed the door and called the persons playing cards at a close distance. All of them rushed to the spot, caught hold of the accused and tied him by means of a rope. On being asked by those persons, the accused confessed before them that he had cut the head of the deceased and kept that head apart and the rest part of her body inside a gunny bag. He had collected her blood and stored in a steel utensil in which she was taking rice. She also found an axe inside that room. Thereafter, she reported the matter to the police. In cross-examination, she also admitted that blood stains were lying on the verandah. She brought the Chana from the shop which was situated at a little distance from their house. The shop was adjoining to their outer verandah. She further admitted that she did not pull on well with the accused from the date of occurrence. Prior to the occurrence, they were pulling on well with each other and after the occurrence, she did not want to look at his face. She admitted that there was a meeting in their locality consisting of about 10 nearby villages wherein it was decided that if the accused returned home, they would be ousted from their locality. Except the above, nothing has been elicited to demolish her evidence.

P.W.9 is the informant and a co-villager of the accused. At the time of occurrence, he was playing cards along with others under the Mahua tree situated at the back side of the house of the accused. He specifically deposed that the occurrence took place at about 3.00 to 3:30 pm. While they were playing cards, p.w.8 came to them by saying “DAUDI ATA DHEKMA, BUDHA BERONIKA KE KATI DEICHI KI KANA”. He along with the others immediately rushed to the house of the accused and found that the house was closed from outside and p.w.8 closed the door in order to prevent escape of the accused from her house. After opening the door, they found blood stains on the verandah and the accused was present there. They tied the accused on seeing the blood stains and kept him inside one of his rooms. They found the head of the deceased in one room. The other

portion of her body was tied in a gunny bag and the blood of the deceased was collected and stored in a steel utensil. On being asked, the accused admitted to have cut the head of the deceased by means of axe. On further query, the accused said that he did so to mix the blood of the deceased with the paddy. In cross-examination, he admitted that they started playing cards from about 3 pm and if anybody raised alarm from inside the house of the accused, it would be audible to the place of their playing cards, but on that date, they had not heard any sound. He also admitted that on earlier occasion, the accused was found slightly mad and on account of his madness, the accused was being kept in his house all along closing him inside the room.

P.W.10 is also a post occurrence witness and witness to the inquest (Ext.2). He corroborated the statement of p.w.9. In cross-examination, he stated that the accused is Christian by religion and he had never heard any Christian family sowing paddy mixed with blood. He also admitted that such type of axe is available in each and every house of the village. Except the blood stains, there was no other special mark of identification on the seized axe. He further stated that he had seen the accused on earlier occasion utilizing the same axe.

P.W.11 is the medical officer, who treated the accused and found one swelling injury of size 1 and 1/2X1/4X1/4 inches at upper lip, lacerated injury of size 1X1/4 inches on left leg and lacerated injury of size 1x1/2x1/4 inches present over the left leg lateral malleolus. All the injuries were simple in nature. In cross-examination, he has also admitted that such injuries may be possible due to assault by lathi.

P.W.12 is the I.O, who registered the FIR, investigated into the matter, sent the dead body for post mortem, examined the witnesses, seized the wearing apparels of both the accused as well as deceased and ultimately filed charge-sheet against the accused under Section 302 I.P.C. In his cross-examination, nothing substantial has been elicited except that the defence has confronted him with some statements of the witnesses.

P.W.13 is the doctor, who conducted the postmortem examination on the dead body of the deceased and found the following injuries:

"(i) there was chop wound present at cervical vertebra C2 and C3 level encircling the whole neck including cervical vertebra, cervical muscle, neck vessel, nerve, spinal cord. The head was de-capitated at cervical level 2 and 3.

(ii) incised would of size 7 x 1cm x bone deep present 0.5 cm below the aforesaid injury; and

(iii) lacerated wound of size 3 cm x 1 cm x muscle deep present in chin.

He opined that all the above injuries were ante mortem in nature and the external injury no.(i) and its corresponding internal injuries would have been caused by sharp cutting moderate to heavy weapon. The cause of death was due to decapitation (separation). The time since death was within 24 hours of his examination and the death was homicidal in nature. He has stated that the weapon of offence, i.e., axe was produced before him and injury nos.(i) and (ii) could be possible by the said axe. In his cross-examination, he has admitted that the present injuries were caused purely from the back side. If one is assaulted from his back side, it is not expected of a person to raise alarm because such assault would cause him unconscious immediately. If the deceased knew that she was going to be assaulted then she should have raised alarm prior to assault. Post mortem report has been proved by this witness and marked as Ext.13.

9. The chemical examination report (Ext.12) reveals that the stained earth, stained cotton, the steel utensil, the gunny bag, the sample blood of the deceased and the frock of the deceased had contained 'AB' group blood. The seized lungi which was put on by the accused also found stained with 'AB' group of human blood.

10. The learned Additional Sessions Judge, who has tried the case, has come to a finding that the accused was very much present at the time of occurrence and basing upon the evidence of P.Ws.2, 3, 8, 9, 10 and the doctor (p.w.13) and the report of the chemical examiner, has passed the sentence of capital punishment.

11. The entire case is based upon circumstantial evidence. As per the decision of the apex Court in the case of ***Sharad Birdhichand Sarda V. State of Maharashtra; AIR 1984 SC 1622,*** the following conditions must be fulfilled before a case against an accused based on circumstantial evidence is accepted:

" (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.

(ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(iii) The circumstances should be of a conclusive nature and tendency.

(iv) They should exclude every possible hypothesis except the one to be proved, and

(v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

12. The above ratio has been followed by this Court recently in DSREF Nos.1 and 2 of 2010. By a plain reading of the above decisions, it is crystal clear that the following essential conditions must be satisfied. The various links in the chain of evidence led by the prosecution have been satisfactorily proved. The said suggestion points to the guilt of the accused with reasonable definiteness. The suggestion is in proximity to the time and situation. On this touchstone, this Court examines the evidence. In the instant case, P.W.8 is the wife of the accused and grand mother of the deceased. P.W.4 is the son of the accused and maternal uncle of the deceased. Other witnesses i.e. P.Ws.2, 3, 4, 8, 9 and 10 are co-villagers of the accused and all are post occurrence witnesses. Admittedly, there is no eye witness to the occurrence. All the above witnesses have deposed that the accused was present inside his house at the time of occurrence. It has been brought out from the mouth of P.W.8 that when she left the place for purchasing chana, the deceased was there inside the room and taking rice in a steel utensil in which her blood was collected and stored. After purchasing chana, when she returned, she found that the door of the house was closed from inside for which she gave a call for her grand daughter. As there was no response, she entered the house from the back side. She closed the door from outside and called the persons, who were playing cards in a nearby place. All of them have told that the accused confessed before them that he had killed his grand daughter by means of an axe by separating her head from body. In cross-examination, P.W.8 further clarified that any other person can come to their house from backside by jumping over the small heap of bricks, but cannot go back. P.Ws.2, 3, 9 and 10 also corroborated the statement of P.W.8 with regard to above

statement. Further, these witnesses have stated that the blood stained axe was very much there inside the room and they also tied the accused by means of a rope. All the witnesses stated that the accused made an extra judicial confession before them. P.W.4, who is the son of the accused, also corroborated the above statement. He specifically stated that he returned home from Sambalpur at about 5:30 pm after hearing about the occurrence from his sister over telephone and found that his father was tied by means of a rope. The trial court has relied upon the extra judicial confession but it is admitted by the prosecution witnesses that the accused was immediately roughed up by the witnesses. Thereafter, the accused made a statement before them about his implication in the crime. Some of the witnesses admitted that he was assaulted. P.W.11, the doctor, who examined the accused found three injuries and he has stated that such injuries could be possible due to assault by lathi. P.W.10 also admitted about the assault. The I.O. (P.W.12) also specifically stated that when he arrived at the spot, he found that the accused was tied by a plastic rope and was manhandled.

In view of the above evidence, the extra judicial confession was not voluntary but the same has been obtained under coercion. Therefore, this Court is not inclined to accept the extra judicial confession made by the accused.

13. The evidence of P.W.8 makes it very clear that the deceased was last seen together with the accused in their house when she left the place for purchasing chana before deceased's death. There was a short time gap when she reached her house and searched for the deceased. She immediately saw the accused coming with the severed head of the deceased. Blood stains were found on the inner verandah. Thereafter, she immediately called the other witnesses who were playing cards in a nearby place. They reached the spot, opened the door and found that the separated head of the deceased was lying apart. The other portion of her body was kept inside a gunny bag and her blood was collected and stored in a steel utensil. P.W.8 specifically stated that in that steel utensil, the deceased was taking rice while she went outside to purchase chana. There are some minor contradictions, which are not material. All the witnesses corroborated the statement of P.W.8 and there is no reason to discard the evidence of P.W.8, who is none other than the wife of the accused. Admittedly, at the time of occurrence, the son of the accused (P.W.4) was not present. He came to the spot from Sambalpur after getting information over telephone from his sister. Another strong clinching circumstance is that the blood found in the axe and the garments of the accused, was of same group as that of the blood group of the deceased and no explanation has been given by the

accused to that effect. P.W.3 has partly supported the material facts regarding the playing of cards at about 3.00 pm and their arrival in the house of the accused. The accused had cut the head of his grand-daughter, the said head of the deceased was lying apart inside the room and rest portion of her body was tied in a gunny bag. He also admitted that the accused was inside his house. But he did not support the rest part with regard to extra judicial confession. Therefore, he was declared hostile and some leading questions were put to him by the prosecution.

14. P.W.4 is none else but the natural son of the accused, who reached the spot from Sambalpur and found blood on the verandah. He asked his father (accused), who replied that in order to mix the blood with the paddy, he had killed his grand daughter. P.W.9 is the informant of the case, who reached the spot and found that the blood stained axe was kept inside the corner of the house. P.W.1 is a local inhabitant and a post occurrence witness, who has deposed that he along with others went to the house of the accused and found that the severed head of the deceased was lying apart and other portion of her body was tied in a gunny bag and her blood was collected and stored in a steel utensil. The weapon of offence i.e. the axe was also lying inside the corner of that room. P.W.13 is the doctor, who in cross-examination has admitted that the injuries were caused purely from the back side. If one is assaulted from back side, it is not expected of a person to raise alarm in such type of assault because such assault would cause him unconscious immediately. In face of such evidence of the doctor, it is crystal clear that there was no chance of raising alarm by the deceased before her death since the assault was from her back side.

15. The argument advanced by the defence with regard to time of occurrence has no leg to stand since most of the witnesses have stated that the occurrence took place at about 3:00 pm. These witnesses are labour class people and after taking lunch, they might have gone for refreshment by playing cards. It is nowhere brought out through cross-examination that it was beyond that coverage time. In order to get the benefit under Section 84 I.P.C., onus is on the defence to prove that at the time of occurrence, the accused was mentally sick. But, in the instant case neither P.W.4 (son of the accused) nor P.W.8 (wife of the accused) has stated that the accused was mentally sick. Moreover, during his statement recorded under Section 313 Cr.P.C.. the accused has stated that he had become mentally weak on account of his illness and he had explained that it had happened after his stay in jail.

Considering the above plea of the accused, this Court comes to a conclusion that he was not mentally sick at the time of occurrence and, therefore, the accused will not get the benefit under Section 84 I.P.C.

Even if the extra judicial confession of the accused is disbelieved, the other circumstances, as discussed above, have been fully established confirming a complete chain which is consistent with the hypothesis that it was the accused, who had committed the murder of his grand daughter. Therefore, this Court is of the considered view that the trial court has rightly convicted the accused under Section 302 I.P.C.

16. Now, the question arises as to whether the case comes under the rarest of rare category or not?

No doubt, the murder was brutal but not diabolic. In ***Bachan Sing V State of Punjab;*** **AIR 1980 SC 898**, the principle has been laid down and the said principle has also been followed by this Court in two recent cases i.e. DSREF Nos.1 and 2 of 2010 so also in ***Dilip Premnarayan Tiwari & Anr. V. State of Maharashtra***, *2010 CRL. L. J. 905.* While considering the punishment, the apex court in Para 39 of the judgment has held:

> "All murders are foul, however, the degree of brutality, depravity and diabolic nature, differ in each case. It has been held in the earlier decisions of this Court which we may not repeat that the circumstance under which the murders took place, differ from case to case and there cannot be a straight-jacket formula for deciding upon the circumstances under which the death penalty is a must."

It has also been held that the Court should not only confine its consideration principally or merely to the circumstances connected with the particular crime but also to the circumstances of the criminal. There is no criminal antecedent of the accused, who is aged about 58 years. By applying the ratio decided in the case of **Bachan Singh** (supra), this Court, while confirming the conviction of the accused made under Section 302 I.P.C. sets aside capital punishment of death and instead sentences the appellant to undergo imprisonment for life.

17. The reference made by the learned Additional Sessions Judge, Kuchinda under Section 366 Cr.P.C. is discharged and the criminal appeal of the accused (CRLA No.345/2010) is dismissed with modification of sentence as mentioned above. Reference discharged.

Appeal dismissed.

2011 (I) ILR – CUT- 217

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

W.P.(C) NO.16144 OF 2008 (Decided on 10.11.2010)

KALU CHARAN MISHRA …….. Petitioner.

.Vrs.

G.M.,(ELECTRICAL), ORISSA HYDRO POWER CORPORATION LTD. & ORS. …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Date of birth in service book – Representation for correction – In the service book date of birth of the petitioner has been mentioned as 14.04.1949 as well as 14.04.1951 – The date 14.04.1949 is mentioned without reference to any document but the date 14.05.1951 has been mentioned with reference to Transfer Certificate No.77/68-69 Dt.12.08.1969 issued by the H.M. Vijay High School, Raikia – Plea of the Opp.Parties that in the original service book the date 14.04.1949 was tampered and changed to 14.04.1951 is neither acceptable nor tenable as the original service book kept in the custody of the Opp.Parties – Moreover the Opp.Parties have not disclosed any reason while rejecting the representation of the petitioner – Held, impugned orders quashed – Direction issued to the Opp.Parties to accept the date of birth i.e. 14.04.1951 as reflected in the duplicate service book as well as original service book.

(Para 4)

For Petitioner - M/s. A.K.Chouhdury & K.K.Das.
For Opp.Parties - M/s. Sanjay Patnaik & R.K.Samal.

PRADIP MOHANTY,J. The petitioner, in this writ petition filed under Articles 226 and 227 of the Constitution of India, has prayed for quashing of Annexure-13, the impugned notice of retirement dated 20.10.2008, as well as Annexure-14, the order (communicated to him vide letter dated 24.10.2008) passed on his representation. He has further prayed to direct the opposite parties to correct his date of birth in the original service book as "14.4.1951" instead of "14.4.1949" as per the transfer certificate and the duplicate service book and allow him to continue in service by treating his date of birth as "14.04.1951".

2. The case of the petitioner is that on 21.03.1972 he joined as Helper Grade-III in the Orissa Hydro Power Corporation Ltd., Balimela. After a lapse

of 21 years, for the first time, the opposite parties vide letter dated 19.07.1993 called upon him to produce the original transfer certificate, which was submitted by the petitioner before opposite party no.3 on 22.07.1993. In the month of January, 1996, Senior General Manager (Electrical), Balimela Hydro Electric Project affixed a notice in the Notice Board indicating therein that the date of birth of the petitioner is 14.04.1949 instead of 14.04.1951, pursuant to which the petitioner submitted an application mentioning therein that his actual date of birth is 14.04.1951. He also moved an application on 14.03.1996 for necessary correction of his date of birth in the original service book. Since no steps were taken on the said application, he submitted another application on 07.09.2002 requesting the authorities to look into his grievance and take necessary action with regard to correction of his date of birth mentioned in the original service book taking into consideration the entries made in the transfer certificate and duplicate service book. On 14.09.2006, the General Manager (Electrical), Balimela Hydro Electric Project called upon the petitioner to produce his original transfer certificate and conduct certificate issued by Khariaguda High School, Ganjam and Vijay High School, Raikia, Phulbani for verification of the authenticity of his date of birth. Upon receipt of the same, the petitioner drew the attention of the authorities that in the duplicate service book, his date of birth has been mentioned as "14.4.1951" and for the fist time, he came to know from the Notice Board about the wrong entry of his date of birth in the original service book. On 12.04.2007, the Deputy Manager (HRD), vide his letter no.2578, moved the Headmaster, Vijay High School, Raikia to ascertain the authenticity of transfer certificate no.77/68-69 dated 12.08.1968 and after receiving the same, the Headmaster of the said school informed the Deputy Manager (HRD) that the transfer certificate is genuine and the date of birth of the petitioner is 14.04.1951. Despite submission of the transfer certificate and other relevant documents, again the General Manager (Electrical), Balimela Hydro Electric Project vide his letter no.7547 dated 17.10.2006 asked the petitioner to produce the original transfer certificate and conduct certificate of the school for verification. Several correspondences were made between the petitioner and opposite parties and when the grievance of the petitioner was not meted out, he was constrained to move this Court in W.P.(C) No.5292 of 2008 which was disposed of vide order dated 01.09.2008 with direction to the opposite parties to dispose of his representation dated 27.03.2006 by the end of October, 2008 and communicate the result thereof to him. But the opposite parties instead of taking a decision in consonance with the order of this Court dated 01.09.2008 passed in the aforesaid writ petition served the impugned notice of retirement upon the petitioner on 20.10.2008 (Annexure-

13) treating his date of birth as 14.04.1949 and subsequently on 24.10.2008 dismissed his representation dated 27.03.2006. Hence, the writ petition.

3. A counter affidavit has been filed on behalf of the opposite parties stating therein that initially the date of birth of the petitioner was recorded in his service book as 14.04.1949 and subsequently without the approval of the higher authority, it was tampered and changed to 14.04.1951 during the period when the project was under the control of erstwhile OSEB basing on the transfer certificate no.77/68-69 dated 12.08.1968 produced by the petitioner obtained from Vijay High School, Raikia. On 26.06.1993, the headquarter office of erstwhile OSEB instructed the P & C Division, Balimela Hydro Electric Project, Balimela to verify the authenticity of the said transfer certificate from the concerned school pursuant to which the Executive Engineer, P & C Division, Balimela wrote a letter (Annexure-B) to the Headmaster, Vijaya High School, Raikia for verification and upon receipt of the same, the Headmaster of the said school, vide his letter dated 01.09.1993 (Annexure-C) expressed his inability to verify the transfer certificate of the petitioner as the counterfoils of Transfer Certificate Issue Books from 1960 to 1970 had been eaten away by white ants since more than four years. After receipt of the letter of the Headmaster, the matter was forwarded to the head office for finalization of the date of birth of the petitioner and after due consideration, his date of birth was determined as 14.04.1949, which was initially recorded in his service book. On 14.03.1996, to change his date of birth the petitioner made a representation which did not yield any result. The petitioner then slept over and did not pursue the matter. Six years after he again made an application on 07.09.2002 to the Senior General Manager (Electrical), BHEP, Balimela, who on due examination by his letter dated 15.07.2006 referred the matter to the Deputy General Manager (HRD), OHPC. As directed, the petitioner produced the original transfer certificate Vijay High School, Raikia, Phulbani and duplicate transfer certificate of Khariaguda High School, Ganjam for verification on 25.09.2006. The Deputy General Manager (HRD), OHPC on 12.04.2007 again moved the Headmaster, Vijay High School to ascertain the authenticity of the transfer certificate no.77/68-69 dated 12.08.1969 and upon receipt of the same, the Headmaster informed that the date of birth of the petitioner is 14.04.1951 as per school records.

4. Keeping the pleadings of the parties in view, this Court carefully perused the records. In the prescribed column of the original service book (Annexure-A to the counter affidavit), as it appears, the date of birth of the petitioner has been mentioned as “14.4.1949” as well as “14.4.1951”. The date “14.4.1949” has been mentioned without reference to any document,

whereas "14.4.1951" has been mentioned with reference to transfer certificate no.77/68-69 dated 12.08.1969 issued by the Headmaster of Vijay High School, Raikia. Pursuant to the query made by the opposite parties, the Headmaster of Vijay High School, Raikia vide letter dated 22.07.2007 (Annexure-7 series), has clarified that the transfer certificate no.77/68-69 of the petitioner is genuine and his date of birth, i.e., 14.4.1951 is also correct. The plea of the opposite parties that in the original service book the date "14.4.1949" was tampered and changed to "14.4.1951" is not tenable, because the original service book was in the custody of the opposite parties and so the question of manipulation by the petitioner does not arise. The endorsement made on 27.02.1996 by the Executive Engineer in the original service book to the effect that the date of birth of the petitioner is 14.4.1949 referring to the letter dated 07.02.1996 of the Assistant to Chief Engineer & Member (Generation), OSEB (Annexure-D) is not acceptable in absence of any specific mention about the source of arriving at such conclusion. Furthermore, referring to the very same Annexure-D although date of birth of one Sarif Khan, Fitter Grade-II was accepted as 04.10.1941, the same was subsequently changed/corrected and said Sarif Khan was allowed to continue in service till 31.08.2007, as is evident from Annexure-15. Another strong circumstance in favour of the petitioner is the duplicate service book (Annexure-1) wherein the date of birth of the petitioner has been clearly mentioned as "14.4.1951". The said duplicate service book having been issued by the opposite parties themselves, there is no reason to disbelieve the same. This aspect has also not been specifically refuted by the opposite parties in their counter affidavit.

A specific plea has been taken by the opposite parties in their counter affidavit that how could the Headmaster, Vijay High School, Raikia certify the transfer certificate in question to be genuine and the date of birth of the petitioner as "14.4.1951" when in his earlier communication dated 01.09.1993 (Annexure-C) he had intimated that he was not able to verify the transfer certificate as the school records from 1960 to 1970 were eaten away by white ants. But, on perusal of Annexure-C it reveals that the Headmaster of Vijay High School had intimated that proper verification of the T.C. could not be made since the Admission Register of the school from 1960 to 1970 had been taken to this Court in connection with some other case and not returned despite repeated requests and that the counterfoils of T.C. Issue Books, Cancelled T.C. bundles, etc. from 1960 to 1970 kept in the wooden almirah had been eaten away by white ants since more than four years. From this, it can not be construed that the Headmaster had intimated that the school records from 1960 to 1970 were eaten away by white ants. This apart, the communication dated 22.07.2007 (Annexure-7 series) was made by the Headmaster pursuant to the query made by the

opposite parties. It is not the case of the opposite parties that letter dated 22.07.2007 (Annexure-7 series) was written by the Headmaster at the instance of the petitioner. On the other hand, in letter dated 22.07.2007 the Headmaster has specifically mentioned "For your kind reference a xerox copy of T.C. (counterfoil) is enclosed herewith." From this, it can be safely concluded that the communication (Annexure-7 series) was made by the Headmaster after crosschecking the transfer certificate in question with the counterfoils and admission register available in the school. Therefore, the plea of the opposite parties is not tenable.

Another important aspect which cannot be lost sight of is that in the order communicated to the petitioner vide letter dated 24.10.2008 (Annexure-14) passed on his representation pursuant to the direction of this Court in W.P.(C) No.5292 of 2008 no reason has been assigned and it appears to be a cryptic one. The opposite parties also in their counter affidavit have not disclosed any reason for rejecrion of the representation of the petitioner.

For the reasons aforesaid and for the further reasons that the date of birth, i.e., 14.4.1951, as claimed by the petitioner, is reflected in the duplicate service book as well as the original service book, there is no impediment in accepting the same which we hereby direct.

5. In view of the above, this Court quashes the impugned orders under Annexures-13 and 14. Necessary order shall be passed by the opposite parties within a period of two months from the date of receipt of this order or production of certified copy thereof.

6. The writ petition is accordingly disposed of.

Writ petition disposed of.

2011 (I) ILR – CUT- 222

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

W.P.(C) NO.17981 OF 2008 (Decided on 10.11.2010)

STATE OF ORISSA …….. Petitioner.

.Vrs.

BASANTA KUMAR BEHERA …….. Opp.Party.

C.C.S. (PENSION) RULES, 1972 – RULE 26(1).

Resignation submitted by the Opp.Party in order to undertake new assignment – Resignation not withdrawn by the appointing authority in public interest – The Opp.Party has forfeited the claim of counting his past service as qualifying service for the purpose of retirement benefits – Held, order passed by the Tribunal is erroneous and requires interference.

(Para 4,5 & 6)

For Petitioner - Addl. Government Advocate.
For Opp.Party - Mr. Bikram Keshari Mohanty

S.K.MISHRA, J. The State of Orissa assails the order dated 10.05.2007 passed by the learned State Administrative Tribunal in O.A. No.512 of 2006 and O.A. No. 558 of 2007 directing the State to finalise the pensionary benefits of the present opposite party by counting the past service, which he has rendered in the General Reserve Engineers Force (GREF).

2. The undisputed facts leading to filing of this writ application may be summarised as follows:-

The opposite party i.e. the petitioner before the learned Administrative Tribunal, was a Junior Engineer (Civil) in the cadre of Junior Engineer under the State of Orissa and retired as an Assistant Engineer on superannuation w.e.f. 30.04.2004. Prior to his joining as Sub-Assistant Engineer on 06.11.1973, the opposite party has rendered service as Superintendent, B.R. Grade-II in the G.R.E.F. w.e.f. 01.11.1968 to 15.10.1973. He resigned from the service in order to undertake the new assignment on his own request, which was accepted. The opposite party has represented to the Department to count his past service rendered under the G.R.E.F. towards pension, which was not accepted by the Sate of Orissa and such rejection was communicated to the opposite party vide letter dated 23.03.2006. Against such an order, the present opposite party

filed an Original Application, inter alia, praying for an order directing the respondents to sanction pension and other pensionary benefits by counting the period on 01.11.1968 to 15.10.1973 as qualifying service.

3. The petitioner appeared in that Original Application and filed counter affidavit, inter alia, averring that since the present opposite party on his own volition opted to switch over to a new assignment with certain terms and conditions, he is not entitled to any pension, gratuity and other terminal benefits for the period from 01.11.1968 to 15.10.1973. The instructions received from the Senior Record Officer for OIC records, Record Office, GREF vide letter dated 15.02.2006 postulates that it is a Central Government Department which is governed by Central Civil Services Pension Rules, 1972 and not by Army Rules and Regulations. The instruction further says that in accordance with Rule 26 (1) of CCS (Pension) Rules and Rule 39 (6) (ii) of OCS (Leave) Rules, the Government servant is not entitled for any pension, gratuity or terminal benefits when he resigned from a service or a post (unless it is allowed to be withdrawn in the public interest by the appointing authority). As such resignation entails forfeiture of past service. Since the resignation of the opposite party was accepted w.e.f. 15.10.1975 at his own request and not in the public interest, he is not entitled to any pension, gratuity and terminal benefits. In view of the aforesaid instructions, since the present opposite party opted to switch over to a new assignment on his own will and request, which is not for public interest, the claim of the opposite party to count his past service period for the pensionary benefits was rejected, which is legal and justified. On such pleadings, the petitioner prayed to dismiss the Original Application. However, the learned Tribunal came to the conclusion that the present opposite party is entitled to the pension by taking into consideration the qualifying service he has rendered in the GREF. Such order of the learned tribunal has been assailed in this writ application.

4. The important question which arises in this writ application for adjudication is that, whether the petitioner's past service rendered in the GREF shall be counted as a qualifying service for the purpose of calculating pension upon his retirement on superannuation from the State Government service. To appreciate the matter on dispute, it is appropriate to take note of Rule 26 of the CCS (Pension) Rules, which reads as follows:-

> *"26.* ***Forfeiture of service on resignation-*** *(1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of past service.*

(2) A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies."

5. A reading of the aforesaid Rules reveals that a resignation submitted to take up another appointment without permission entail forfeiture of past service. Admittedly, in this case no such permission was taken from the appointing authority. Rather, the opposite party submitted his resignation on the ground of personal difficulty. The disqualification for counting the past service has also not been condoned by the appointing authority and as such question of counting the period of GREF service does not arise. Thus, on a bare reading of Rule 26 of the CCS (Pension) Rules it is clear that the opposite party having resigned from the past service has forfeited the claim of counting such service as qualifying service for the purpose of retirement benefits.

6. The learned Tribunal has placed much weight age on the fact that the pay of present opposite party has come up for protection after joining in the State service. However, grant of pay protection shall not over-ride the statutory provision. Rule 26 is framed under the authority of the Constitution, whereas grant of pay protection is an executive action. Thus, the provision of law shall prevail over any executive action and in such a situation, this Court is of the opinion that the reasoning resorted to by the learned Tribunal is erroneous and requires interference.

7. In the result, the writ application is allowed and the order passed on 10.5.2007 in O.A. No. 512 of 2006 is quashed.

Writ petition allowed.

2011 (I) ILR – CUT- 225

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

JCRLA. NO.91 OF 2001 (Decided on 16.11.2010)

SANJIB BHOI …….. Appellant.

.Vrs.

STATE OF ORISSA ……. Respondent.

EVIDENCE ACT, 1872 (ACT NO. 34 OF 1872) – SEC.8.

Motive – Conviction U/s.302 I.P.C - Based on circumstantial evidence – Principle guiding circumstantial evidence is that each circumstance must be established firmly by credible evidence and there is no scope of making a presumption in such cases.

In the present case trial Court inferred that the deceased was in possession of a lot of money, which he was carrying for contacting labourers and such fact was known to the accused persons which might have motivated them to kill the deceased for the lust of money.

There is no evidence on record that the deceased was carrying a large sum of money with him nor there is evidence that the appellant was aware of such fact nor there is evidence that the appellant had declared before any body that he would grab that money from the deceased – The learned trial Court has proceeded purely on conjectures and surmises – Held, the order of conviction & sentence recorded by the learned trial Court is completely erroneous which is set aside.

(Para 9 & 11)

For the Appellant - Miss Deepali Mohapatra
For the Respondent - Addl. Government Advocate

S.K.MISHRA, J. The appellant in this Jail Criminal Appeal assails his conviction and sentence under Section 302 of the Indian Penal Code, 1860, hereinafter referred as "I.P.C." for brevity, in Sessions Case No. 49/31 of 2000 of the court of Addl. Sessions Judge, Sonepur.

2. In short, the case of the prosecution is that one Sura Bharasagar (deceased) was working as a labour Sardar (labour contractor). In order to contact labourers, he had come to Ufla, where the present appellant and the co-accused were residing. On 09.01.2000, he stayed in the house of the accused persons and he was also seen moving with the appellant, the co-accused Ranjit Bhoi (since acquitted) and their brother Ajit Bhoi (absconder) for contacting labourers for the purpose of working in brick kilns. In the night

of 9/10.01.2000, the deceased died in mysterious circumstances. Suman Kumar Jagdala, Gramarakhi lodged a report before the concerned Police Station. In course of investigation, the present appellant along with one of his brother was arrested. Ultimately, charge-sheet was submitted against the present appellant and his brothers Ranjit Bhoi and Ajit Bhoi, showing co-accused Ajit Bhoi as absconder. The charge-sheet was laid under section 302/34, I.P.C.

3. In course of trial, the prosecution had relied only upon circumstantial evidence as direct evidence was not forthcoming. Taking into consideration the evidence led, learned Addl. Sessions Judge, Sonepur has come to the conclusion that the prosecution has proved its case beyond all reasonable doubt against the present appellant and he proceeded to convict the present appellant and acquit his brother Ranjit Bhoi of the charges under sections 302/34 of the I.P.C. The present appellant is sentenced to imprisonment for life.

4. Learned counsel for the appellant argued that the learned trial Judge has committed grave error on record by pressing into service the principles of "last seen theory" when the prosecution has not successfully proved the same. Secondly, it was contended that the proof of motive is also not forthcoming and the learned trial has presumed such a motive in absence of any cogent evidence. Thus, the learned counsel for the appellant submits that the impugned judgment is erroneous and is liable to be set aside. The learned Addl. Standing Counsel, on the other hand, supports the findings recorded by the trial court and prays to dismiss the appeal.

5. On examination of the evidence on record and the impugned judgment, it reveals that the trial court has come to the conclusion that the prosecution has proved its case beyond all reasonable doubt taking three circumstances into consideration in addition to homicidal nature of death of the deceased. As far as homicidal nature of death is concerned, the appellant does not dispute the same either at the stage of trial or at the appellate stage. Therefore, the other question remains whether three other circumstances have been properly established in this case or not. The three circumstances, on which the prosecution relies in this case are as follows:

(i) The appellant was last seen with the deceased before the dead body of the deceased was found;

(ii) The appellant was prompted to commit the crime upon lure of money the deceased was carrying for the purpose of contacting labourers; and

(iii) There were blood-stains in the wearing apparels of the present appellant.

6. In a case based entirely on circumstantial evidence, the prosecution shall be held to have proved its case beyond reasonable doubt, if the following conditions are satisfied regarding the circumstances, on which it relies;

(i) Each of the circumstances on which the prosecution relies must be credibly and cogently established by the unimpeachable evidence;

(ii) It should not be consistent with any hypothesis of innocence of the accused or in other words, such circumstance must be consistent with the theory of guilt of the accused;

(iii) Each of the circumstances taken by itself may not be enough to prove the guilt of the accused but taken together, it must be forming a complete chain of circumstances unerringly pointing towards the guilt of the accused.

Only when the circumstances are established on the touch-stone of the above three conditions, prosecution based entirely on circumstantial evidence, shall succeed otherwise not. Keeping in view such principle of law, it is to be seen whether the prosecution in this case, has proved its case beyond all reasonable doubt.

7. The deceased was killed in the night of 9/10.01.2000. His dead body was found in the deserted house of Narasingh Jagadala. The trial court has come to the conclusion that the prosecution has proved that the accused was last seen with the deceased. However, examination of the evidence of the witnesses leads to a different conclusion. For example, P.W. 3, the informant Suman Kumar Jagadala has stated that on the previous day of occurrence he did not see the accused persons moving with the deceased. In cross-examination, he has also stated that prior to the occurrence he did not know the accused persons. P.W. 1 Anjali Haripal is a witness to the inquest on the dead body of the deceased. P.W. 2 Chandala Haripal has stated that he learnt from Narendra Bhoi that both the accused had come to his village for contacting labourers. In cross-examination, he has denied the suggestion that he stated before the Investigating Officer that Narendra told him that the deceased was moving with Ajit for contact labourers. Thus, P.W. 2 has not seen the deceased moving with the appellant before the occurrence took place. If at all Narayan Bhoi told him, it shall not be admissible in evidence being hearsay. It is important to note that Narayan Bhoi has not been examined in this case. P.W. 4 Sudam Bhoi is a witness to the inquest. Similarly, P.W. 5 Khetra Bhoi is a witness to the seizure. P.W. 6 Karunakar Majhi has deposed that Narayan told him that the deceased was

moving prior to death with Ajit Bhoi. P.W. 9 Ajatna Bhoi and P.W. 10 Chakradhara Khura have been treated as hostile witnesses by the prosecution. P.W. 9 has admitted that he stated before the police that on 9.1.2000 in the evening at 4.00 P.M., Sura and co-accused Ajit came to him. This witness therefore does not implicate the present appellant Sanjib to be in the company of the deceased. Similarly, Chandrasekhar Khura has stated in cross-examination by the prosecution that he had stated before the Investigating Officer that on 09.01.2000 evening labour Sardar and accused Ranjit Bhoi had come to him and requested to take advance for going to Bhubaneswar for preparation of brick. The evidence of these witnesses also does not conclusively implicate the appellant to be moving in the company of the deceased just prior to his death.

Evidence of P.W. 11 is also not helpful to the prosecution and is only a seizure witness. Rest of the witnesses are official witnesses.

8. The principle of last seen theory in appreciation of evidence, in a murder case, can be resorted to only if the person accused of crime and the deceased were last seen alive together and within a short period thereafter, the deceased was found dead. The time gap between the last seen alive and the discovery of the dead body of the deceased should be of such short durations as would exclude any reasonable chance of any other person coming to the company of the deceased. In this case, neither there is evidence that the accused and the deceased were last seen together nor there is any material to show that immediately thereafter, within a short span of time, the deceased was found dead. Thus, the principle of last seen theory cannot be resorted to in this case.

9. The trial court has given much emphasis on the circumstance of existence of a motive in this case. However, as found out, there is no evidence regarding such a motive. The trial court has inferred that since the deceased was in possession of a lot of money, which he was carrying for contacting labourers and the said fact was known to the accused persons that might have motivated the accused persons of killing the deceased for the lust of money. The trial court has overlooked the first principle guiding circumstantial evidence that each circumstance must be established firmly by credible evidence. There is no scope of making a presumption in such cases. There is no evidence on record regarding the fact that the deceased was carrying a large sum of money with him nor there is evidence that the appellant was aware of the fact that the deceased has such quantity of money, nor there is evidence that the appellant had declared before anybody that he wanted to grab that money from the deceased. The learned trial court

has proceeded purely on conjectures and surmises and has come to the conclusion that the appellant was driven by a greed to grab the money of the deceased.

10. The third circumstance is that on chemical examination blood patches were found from the full pant of the accused-appellant. A scrutiny of the forwarding report and the chemical examination report reveals that full pant of the appellant Sanjib Bhoi has been marked as C-I, while forwarding the material objects for chemical examination. The chemical examination report Ext.11 reveals that full pant marked as C-I was stained with few small patches of blood, the original of which could not be determined nor there can be any grouping because of deterioration. The trial court has come to the conclusion that since there is no suggestion by the defence that this blood was not human blood, the prosecution has proved its case by clear, cogent and convincing evidence. The simple fact of finding few patches of blood which is not determined to be human blood or belonging to the same group as that of the deceased, will not enhance the case of the prosecution. So this circumstance is not incriminating and, therefore, such circumstance also has to be ignored by this Court.

11. Thus, on a conspectus of the evidence on record and the impugned judgment in the light of the argument advanced by the learned counsel for the appellant as well as the learned counsel for the State, this Court comes to the conclusion that the order of conviction recorded by the learned trial court is completely erroneous. The prosecution has failed to prove its case that the present appellant has committed murder of the deceased. Accordingly, we allow the appeal, set aside the judgment of conviction and order of sentence. The appellant be set at liberty forthwith, if his detention is not required in any other criminal proceeding.

Appeal allowed.

2011 (I) ILR – CUT- 230

M.M.DAS, J.

CRLMC. NO.826 OF 2008 (Decided on 2.09.2010)

SURENDRA HOTA & TWO ORS. ……. Petitioners.

.Vrs.

STATE OF ORISSA ……..Opp.Party.

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

Quashing of order taking cognizance – Offence U/s.498-A, 406,34 IPC & Section 4 of D.P.Act.

Complaint petition itself does not disclose commission of any offence to have been committed by the petitioners, rather it reflects the anguish of the complainant for having been impleded as an Opp.Party in the case filed for an award of compensation due to death of her husband in a vehicular accident and none return of the articles which were alleged to have been given at the time of her marriage to the deceased husband – Since the complaint petition does not disclose commission of any offence to have been committed by the petitioners this Court introspecting the facts with care and caution comes to the conclusion that continuance of the Criminal Proceeding would be an abuse of the process of law and result in failure of justice – Held, impugned order is quashed.

(Para 7)

Case laws Referred to:-

1.AIR 1960 SC 866 : (R.P.Kapur -V-State of Punjab)
2.1992 (Supp.) 1 SCC 335 : (State of Haryana -V-Bhajanlal).

For Petitioner - Mr. Digambara Mishra
For Opp.Party - Addl. Standing Counsel

M.M.DAS J. In this application under Section 482 Cr.P.C., the petitioners, who are accused persons in G.R.Case No.644 of 2007 corresponding to Kesinga P.S. Case No.140 of 2007 pending on the file of learned S.D.J.M., Bhawanipatana, have called in question the order of taking cognizance of the offences under Sections 498-A/406/34 I.P.C. read with Section 4 of the D.P.Act.

2. Facts reveal that one Sasmita Hota got married to Sujit Hota, son of petitioner nos.1 and 2 and brother of petitioner no.3 on 16.4.2006. The said Sujit Hota expired in a road accident on 17.1.2007. Admittedly thereafter Sasmita Hota was taken back by her father to his village at Utkalapada. On 29.102007, the said Sasmita Hota as complainant filed I.C.C. No.53 of 2007 before the learned S.D.J.M., Bhawanipatna, Kalahandi, inter alia, making allegation of commission of offence under Sections 406/468/498-A/509/34 I.P.C. read with Section 4 of the D.P. Act against the petitioners. The learned S.D.J.M., Bhawanipatna sent the complaint petition to the concerned P.S. for investigation by treating the complaint petition as an F.I.R. The police upon completion of the investigation filed charge-sheet against the petitioners upon which the learned S.D.J.M,.Bhawanipatna passed the impugned order on 2.1.2008 on the charge-sheet dated 30.12.2007 taking cognizance of the offence under Sections 498-A/406/34 I.P.C. read with Section 4 of the D.P.Act against the petitioners and directing issuance of process to the petitioners.

3. The main thrust of the allegation made in the complaint petition filed by the complainant is that during the time of marriage as per the demand made by the petitioner no.1,7 totas of gold ornaments and other household articles along with a Hero Honda Passon Motor Cycle were given as dowry. Subsequently, a further demand of Rs.50,000/- was made by the petitioner no.1, which was also paid by the father of the complainant. After death of the husband of the complainant, she was tortured by the accused persons for which she was brought back by her father to her paternal house. Thereafter, the petitioner no.1 went to the village Mursing where the complainant was staying with her uncle and asked her uncle to send her back to their house to which her uncle replied that after she gets over the trauma and shock due to the untimely death of the husband, she would go back. It is alleged that one day thereafter the complainant was abused by the petitioner nos.2 and 3 over telephone. The complainant has further alleged that she received a notice in MAC No.37 of 2007, which was a case filed for compensation on account of death of the husband of the complainant in a vehicular accident where the complainant was arrayed as an opp.party. Again on telephonic discussion between the petitioner no.1 and the father of the complainant, the petitioner no.1 abused him and flatly denied to return the articles given during marriage. The further allegation made in the complain petition is that the ownership of the motor-cycle given to the deceased husband of the complainant at the time of marriage has been changed by the petitioner no.1.

4. Mr. Mishra, learned counsel for the petitioners submits that a bare reading of the complaint petition would go to show that it does not disclose any offence whatsoever to have been committed by the petitioners and the

learned Magistrate without due application of mind has passed the impugned order taking cognizance of the offences against the petitioners.

5. It is well settled in law that while deciding a petition filed for quashing the F.I.R. or a complaint or the order of taking cognizance of the offences, the Court should be extremely careful and circumspect, if the allegations contained in the FIR or complaint disclose commission of some crime and if the same discloses any short of offence to have been committed, the Court should keep its hands off and also refrain from passing any order which may impede the trial. The Court should not go into the merits and demerits of the allegations simply because the accused persons allege malus animus against the author of the F.I.R. or the complaint and the Court should not take an imaginary journey in the realm of possible harassment which may be caused to the petitioners on account of continuance of the proceeding. Only when the Court is satisfied that the complaint does not disclose commission of any offence or prosecution is barred by limitation or that the proceedings of criminal case, if allowed to continue, would result in failure of justice, then it may exercise inherent power under Section 482 Cr.P.C. In the case of ***R.P.Kapur -v- State of Punjab,*** AIR 1960 SC 866, the Supreme Court considering the question whether in exercise of its power under Section 561A of the Code of Criminal Procedure, 1898 (Section 482 Cr.P.C. is pari materia to Section 561A of the 1898 Code) laid down the following proposition:

> "The inherent power of High Court under Section 561A, Criminal P.C. can not be exercised in regard to matters specifically covered by the other provisions of the Code. The inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of any Court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction."

6. Again in the case of State of ***Haryana –v- Bhajanlal***, 1992 (Supp.) 1 SCC 335, the Supreme Court while considering the scope and the power of the High Courts under Section 482 Cr.P.C. and Article 226 of the Constitution, to quash the F.I.R. registered against the respondent therein, referring to several judicial precedents identified the cases where the F.I.R. or the complaint can be quashed, which are mentioned in paragraph-108 of the said decision. The decision in the case of State of Haryana-v- Bhajanlal

(supra) has been thereafter followed in various subsequent judgments of the Apex Court.

7. Applying the above ratio to the facts and circumstances of the present case and going through the complaint petition, it appears that the complaint petition itself does not disclose commission of any offence to have been committed by the petitioner, rather it reflects the anguish of the complaint for having been impleaded as an opp.party in the case filed for an award of compensation due to death of her husband in a vehicular accident and none return of the articles which were alleged to have been given at the time of her marriage to the deceased husband. Since the complaint petition does not disclose commission of any offence to have been committed by the petitioners, this Court introspecting the facts with care and caution comes to the conclusion that continuance of the criminal proceeding would be an abuse of the process of law and result in failure of justice.

8. In view of the above conclusion, the order dated 2.1.2008 passed by the learned S.D.J.M., Bhawanipatna, Kalahandi in G.R. Case No.644 of 2007 stands quashed and G.R. Case No.644 of 2007 corresponding to Kesinga P.S. Case No.140 of 2007 is also quashed in its entirely. The CRLMC is accordingly allowed.

Application allowed.

2011 (I) ILR – CUT- 234

M.M.DAS, J.

W.P.(C) NO.16504 OF 2010 (Decided on 04.01.2011)

PREMANANDA ROUT ……..Petitioner.

.Vrs.

THE COMMISSIONER FOR WORKMEN'S COMPENSATION-CUM-ASST. LABOUR COMMISSIONER,BBSR & ORS. …….. Opp.Parties.

WORKMEN'S COMPENSATION ACT, 1923 (ACT NO.8 OF 1923) – SEC.21(2).

Petitioner filed W.C. Case No.2 of 2008 before the Asst. Labour Commissioner-cum-Commissioner of Workmen's Compensation, Bhubaneswar for Compensation – Delay in disposal of the case – In the meantime Court of the Commissioner for workmen's compensation established at Jajpur Road in the district of Jajpur – Since the accident in which the petitioner was injured occurred at Jajpur the petitioner filed an application U/s.21(2) of the Act for transferring the case to the Commissioner a Jajpur Road – No order passed on such application – Hence the writ petition.

Held, direction issued to the Commissioner at Bhubaneswar that if the accident for which the compensation case has been filed occurred within the jurisdiction of the Court of the Commissioner now established at Jajpur, he shall take necessary steps to transfer the records to the Commissioner at Jajpur Road for disposal of the Case.

For Petitioner - B.N.Rath
For Opp.Parties -

Heard learned counsel for the petitioner.

The sole grievance of the petitioner is that he has filed an application under section 3 of the Workermen's Compensation Act, 1923 (for short "the Act") for grant of compensation due to the injuries sustained by him in course of his employment, before the Assistant Labour Commissioner-cum-Commissioner of Workmen's Compensation, Bhubaneswar, which has been registered as W.C.Case No.2 of 2008.

It is stated by the learned counsel for the petitioner that even though the case is pending from 2008 and the matter is ready for hearing, the

Commissioner is not proceeding with the matter. He further submits that in the meantime, the court of the Commissioner of Workmen's Compensation has been established at Jajpur Road in the district of Jajpur and the accident in which, the petitioner was injured, occurred at Jajpur, which now comes under the territorial jurisdiction of the said Commissioner, whose court has been established at Jajpur road. Accordingly, the petitioner has filed an application before the Commissioner at Bhubaneswar in W.C. Case No.2 of 2008 under section 21 (2) of the Act for transferring the case to the Commissioner at Jajpur Road within whose jurisdiction, the accident occurred. But no orders have been passed in the said application. The said application has been annexed at Annexure-3 to the writ petition.

Sub-section (2) of Section-21 of the Act stipulates that if a Commissioner is satisfied that any matter arising out of any proceeding pending before him, can be more conveniently dealt with by any other Commissioner whether in the same state or not, he may, subject to rules made under the Act, order such matter to be transferred to such other Commissioner either for report or for disposal and if he does so, shall forthwith transmit to such other Commissioner all documents relevant for the decision of such matter and where the matter is transferred for disposal, shall also transmit in the prescribed manner any money remaining in his hand or invested by him for the benefit of any party to the proceeding.

Since a petition has been filed before the Commissioner at Bhubaneswar by the petitioner for transfer of the case to the Commissioner at Jajpur Road, this writ application is disposed of directing the Assistant Labour Commissioner-cum-Commissioner of Workmen's Compensation, Bhubaneswar to dispose of the application filed by the petitioner for transfer of W.C. Case No.2 of 2008 to the court of the Commissioner of Workmen's Compensation, Jajpur Road within a period of three weeks from the date of communication of this order or production of certified copy of this order before him keeping in view the provision of Sub-section (2) of Section 21 of the Act and, if, in fact, he finds that the accident for which the compensation case has been filed, occurred within the jurisdiction of the court of the Commissioner now established at Jajpur Road, he shall take necessary steps to transfer the records to the said Commissioner at Jajpur Road for disposal of the case.

Writ petition allowed.

2011 (I) ILR – CUT- 236

R.N.BISWAL, J.

W.P.(C) NO.11665 OF 2010 (Decided on 16.11.2010)

RAGHUNATH NAYAK & ORS. ..... Petitioners.

.Vrs.

STATE & ANR. ..... Opp.Parties.

EDUCATION – Admission to B.Ed Course for the Session 2010-11 – Guide lines under Annexure-3 stipulating institution-wise admission challenged.

It appears from Annexure-3 that there is no bar either for fresh or in service candidates to apply to as many institutions as they like - When the demand of B.Ed Course is very high, a Candidate desires of taking admission in such Course most likely shall apply to all available institutions – So the oblique motive of the State Govt. to select candidates district wise is unconstitutional – Held, writ application allowed and Annexure-3 is quashed.

(Para 7 to10)

Case law Relied on:-

Vol.108(2009) CLT 923 : (Anil Kumar Das & 12 Ors.-V-State of Orissa & Ors.)

Case law Referred to:-

1995 Vol.2 OLR 145 : (Miss Alakha Das -V- The Director, T.E. & SCERT Orissa & Anr.).

For Petitioner - M/s. B.Routray, D.K.Mohapatra, P.K.Sahoo, S.Das, S.Jena.

For Opp.Parties – M/s. Mr. B.P.Tripathy (Standing Counsel)

R.N.BISWAL,J. The petitioners, who intend to take admission in B.Ed course for the session 2010-11 as fresh and in-service candidates, have filed the writ application challenging the guideline under Annexure-3 stipulating institution-wise admission.

2. According to the petitioners, in the year 2009-10 the selection for admission to B.Ed course was done taking State as a unit. The Governments of different States like Haryana, Madhya Pradesh, Chhatisgarh and Andhra Pradesh have also adopted the State-wise selection to B.Ed course. Copy of the notification made by Osmania University, Hyderabad for

selection to B.Ed course by competitive examination and the news paper publication in the Times of India on 9.5.2010 are filed as Annexures-4 and 5 respectively. According to the petitioners, if institution-wise selection is allowed to be made it will create serious prejudice to the petitioners and a large number of candidates. There are 14 B.Ed colleges in the State of Orissa with total intake capacity of 1140 candidates. In view of the guidelines under Annexure-3, a candidate shall have to apply to a number of institutions. In case of in-service candidates, it is required to obtain recommendation from the District Inspector of Schools/Circle Inspector of Schools to apply for admission to B.Ed course. So, they are to obtain several recommendations, which is harassment to the candidates both mentally and financially. If the senior-most in-service candidate does not apply for the course in all 14 institutions, he may not get a seat, whereas a candidate having less period of service may get it in a particular institution. Some of the colleges have only 50 intake capacity. In some reserved category 1% seats have been kept reserved. In those colleges where there are only 50 seats the reserved of seat would be 1/2 for those candidates and if it is rounded up to one, then it would affect the number of seats allotted to other reserved categories. In the rejoinder affidavit filed on behalf of the petitioners, it has been stated that merely because there is some resentment among some prospective candidates who are not able to get admission in B.Ed course in their nearby Govt. Institutions and that there is apprehension of Law and Order problem, Government cannot adopt institution based selection. If such selection is allowed to continue, then no student can be admitted beyond his local area, particularly in such courses, where the demand to take admission is very high. The State Government admits that number of trained teachers in the State is much less than the required strength and it is necessary to provide training to the intending candidates. It is also a fact that where trained teachers are not available, untrained teachers are being appointed subject to the condition that they shall acquire training within a stipulated period and are paid untrained scale till they acquire such qualification. In the last year it was the aim and object of the State to provide training to the untrained teachers, who were appointed against TGT yardstick. So, the Opposite Parties can not make a departure from the said principle in the guise of new policy. It is the further case of the petitioners that regular B.Ed course cannot be equated with B.Ed course through Distance Education Programme. A regular course is only of ten months duration, whereas training through Distance Mode of Education is two years duration. Admission fees in regular course is much less than the course in Distance Mode of Education.

3. Furthermore, it is the case of the petitioners that even if the guideline under Annexure-3 is allowed to be adopted, the State Government cannot

achieve its goal in selecting the local candidates, since it is open for all eligible candidates throughout the State to apply to any of the institutions and even to all the institutions. The candidates who are not sure to get seats in their respective nearby colleges may apply to other districts where the demand and competition is less. So, no fruitful result will be achieved by adopting institution-wise selection. Under such circumstances, the petitioners pray to allow the writ application.

4. Opposite Party No.2 in his counter affidavit contended that as a matter of policy, the Opposite Parties decided to adopt institution based selection in B.Ed course and other Teacher Education Courses for the academic session 2010-11, taking into consideration certain circumstances which were experienced during State-based selection in 2009-10. Some candidates in some of the districts of the State could not compete with others in the State Level Selection process, as a result of which there was less representation of the candidates from those districts. The Collector, Koraput vide his letter No.189 dated 5.2.2010 intimated the Principal Secretary to Government, Department of School and Mass Education expressing concern for the prevailing law and order situation in the district due to less representation of candidates in the B.Ed Colleges situated in that district. The candidates selected from other districts and admitted in those institutions at Koraput District also felt unsafe to study there. Some of the students belonging to other districts admitted in the B.Ed colleges at Jeypore wrote to the Director, TE and SCERT explaining the problems including physical torture faced by them. They felt unsafe and insecure to study there. Furthermore Jeypore Citizen Committee submitted a representation highlighting the deprivation of local candidates from being selected in and B.Ed and C.T. courses because of state level selection conducted in 2009-10. A meeting of the C.T and B.Ed Central Selection Boards was convened and all these issues were discussed in presence of the Principal Secretary to Government, Department of School and Mass Education, wherein it was resolved that Institution based selection and admission to Teacher Education Courses is the only possibility to overcome the crisis. Accordingly decision was taken to submit the proposal of institution based admission to Teacher Education courses for the academic session, 2010-11 and the draft proposal was submitted to the Govt. for approval. It is the further case of Opposite Party No.2 that as appears from the cause title of the writ petition, petitioner Nos.4 to 9 are working in different High Schools and as such they claim to avail admission on in-service quota. There is no scope for untrained teachers to work in Government as well as in Government aided schools in view of the rule-VII of the Orissa Subordinate Education (Method of Recruitment and Condition of Service) Rules, 1993. So, they are not entitled to take admission in B.Ed courses as in-service candidates. Moreover, the Government has already permitted IGNOU to run B.Ed course through Distant Education Programme

in 13 districts having 1300 seats exclusively for in-service teachers. This has been done keeping in view that, if untrained teachers avail B.Ed. course through Distant Education Programme, it would not affect the study of students in the High Schools since the Distance Education Programme is conducted during holidays/ vacations.

5. The untrained teachers, who should not have been posted against the posts of Trained Graduate Teachers get double benefit since they get 1300 seats in IGNOU and 171 seats in regular course against only 1140 seats in regular B.Ed course in all the 14 B.Ed Colleges of State. As regards fresh candidates, they are not prejudiced by institution-based selection, since they are free to apply to any of the institutions through out the State, if they so like. Since there is no compulsion in conducting entrance test for admission to Teacher Education Course no provision for entrance test is made in the impugned guidelines. So, OP No.2 prays to dismiss the writ petition.

6. Learned counsel for the petitioners submitted that the stand taken by Govt. in para 3 of the Counter affidavit that the impugned guideline is only an inter-departmental communication and cannot be construed as an order since it has not yet been finalized, is absolutely incorrect as the same guidelines has already been approved on 17.6.2010.On perusal of Annexure-3 it is found that it has already been approved by the Govt. in their School and Mass Education Department letter no.10249(XII-SME-Trg-55/10/SME dated 17.6.2010.So,it cannot be said that it is at the formative stage.

7. Learned counsel for the petitioners further submitted that the institution-wise selection has been introduced since there was resentment among the local candidates and in some of the districts like Jeypore some goons threatened the students taking admission in their nearby institutions. As per the guideline, when a candidate can apply to any B.Ed college and even all the B.Ed colleges of the State, the object cannot be achieved. No local candidate can get preference to take admission, since selection will be made on the basis of marks and a candidate of a particular district if applies to an institution of another district he may be selected there. So on this ground alone the impugned guideline under Annexure-3 should be quashed.

On the contrary, learned Standing Counsel appearing for School and Mass Education Department contended that some candidates might not apply to the institutions situated at far of places. In that event the local candidates of the far of institutions can be selected for taking admission.

As it appeasers from Annexure-3, there is no bar either for fresh or in-service candidates to apply to as many institutions, as they like. When the demand of B.Ed course is very high, a candidate desirous of taking admission in such course most likely shall apply to all available institutions.

So, the object of the State cannot be achieved. If the submission of learned Standing Counsel is held to be correct, then the oblique motive of the State Government is to select candidates district-wise which is unconstitutional as has been held by this Court in the case of **Miss Alakha Das** Vs. **the Director, T.E. and SCERT Orissa and another** reported in 1995 Vol.2 OLR 145. It has been held in that case that:

> "District-wise reservation of seats in B.Ed course in the State is unconstitutional and void. Direction was given to State Government to frame appropriate rules for selection on the basis of merit."

8. Learned counsel for the petitioners further submitted that if institution based selection is allowed to continue and the distribution of seats to reserved categories as per the impugned guideline is followed there would be problem of its implementation. In last State-wise selection,seats reserved on percentage basis for children of Green Card Holders, Ex.Servicemen, Physically handicapped candidates had been deducted from the total number of 1140 seats. As per the new guideline, it would be impracticable to deduct such seats from the total number of seats of a college, where the in-take capacity is 50 seats only. This Court is one with the submission of learned counsel for the petitioners in this regard.

10. Learned counsel for the petitioners, next submitted that the affidavit filed by the State Government pursuant to the order of this Court dated 8.10.2010 reveals that the draft guideline is still in formative stage, on the ground that there is possibility of admission of in-service candidates in IGNOU. But as a matter of fact such stipulation is very much available in the impugned guideline itself.As the operation of the same is stayed by this Court and some time is elapsed in between, the opp. parties are taking the benefit of the same.

The impugned guideline shows that in case the proposal for reservation of seats for untrained teacher in B.Ed distant Education Programme of IGNOU is not approved/does not materialize, 15% of the available seats in each of the categories of UR,SC,ST and OBC/SEBC shall be reserved for in-service candidates. In other words if the IGNOU accepts the proposal there will be no reservation of seats for in-service candidates. The Distant B.Ed course cannot be equated with regular B.Ed course. It takes minimum two years to complete the course by Distant Education Programme, whereas it takes only one year to complete the regular B.Ed course. In the case of **Anil Kumar Das and 12 others Vs. State of Orissa and others,** Vol. 108(2009) CLT 923 this Court held that distant B.Ed course cannot be compared with regular B.Ed Course.

If the IGNOU accepts the proposal and accordingly reservation of seats for in-service candidates is not allowed, then it would be against the decision rendered by this Court in the aforesaid case.

Accordingly, the writ petition is allowed and Annexure-3 is quashed. No cost.

Writ petition allowed.

2011 (I) ILR – CUT- 242

INDRAJIT MAHANTY, J.

CRLMC. NO.2972 OF 2006 (Decided on 08.10.2010)

CHIRANTAN SAHU ……. Petitioner.

.Vrs.

STATE OF ORISSA ……. Opp.Party.

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

Quashing of proceeding in G.R.Case –Offence U/s.399, 402 I.P.C. – Petitioner remained as an absconder – No prima facie case against the petitioner – Co-accused persons who faced trial have been acquitted – Moreover in this case P.W.11 a police-sub-Inspector was the informant as well as Investigating Officer – Natural justice require that in the event police officer becomes the informant he should not conduct the investigation as he has to give evidence as a witness in course of trial – Moreover the prosecution evidence regarding the alleged "preparation of dacoity" is based on the alleged confession of a co-accused which evidence is clearly not admissible – There exists no other evidence to show that the accused persons were making any preparation of committing dacoity apart from the confession of the co-accused – Held, no real purpose would be served by directing the continuance of the Criminal Proceeding against the petitioner since the chance of conviction of the petitioner is totally bleak – Impugned Criminal Proceeding in the G.R.Case is quashed against the petitioner.

(Para 5,6 & 7)

Case law Relied on:-

1979 Criminal Law Journal 1090 : (Chaturi Yadav & Ors.-V- State of Bihar).

Case law Referred to:-

2005(II) OLR 386 : (Kanhu Behera-V- State of Orissa).

For Petitioner - Mr. B.B.Routray
For Opp.Party - Addl. Govt. Advocate.

I. MAHANTY, J. This application under Section-482 Cr.P.C. has been filed by the petitioner-Chirantan Sahu with a prayer to quash the proceeding in G.R. Case No.223(A) of 2003 (Arising out of Sohela P.S. Case No.103 of 2003) pending before the learned J.M.F.C., Sohela inter alia on the ground that two of the co-accused persons who have faced trial for offences under Sections.399, 402 I.P.C. and had been acquitted by the learned Assistant

Sessions Judge, Padmapur vide judgment dated 8.10.2004 in S.T. Case No.150 of 2004.

2. Mr. B.B. Routray, learned counsel appearing for the petitioner placed reliance on a judgment of this Court in the case of Kanhu Behera v. State of Orissa, 2005(II) OLR 386 and stated that since no prima facie case has been made out against the petitioner and the co-accused persons who faced trial have been acquitted, chance of conviction of the petitioner being totally bleak, the order of cognizance and the proceeding against the petitioner in the aforesaid criminal proceeding pending before the J.M.F.C., Sohela may be quashed.

3. The learned Standing Counsel appearing on behalf of the State submitted that the petitioner though was named as a co-accused in the F.I.R. and was also named as an accused in the charge sheet submitted in the case, he remained as an absconder and, therefore, did not face trial and should not be permitted to take advantage of an order of acquittal passed in the case of co-accused persons.

4. Considering the submissions made by the learned counsel for the respective parties and also on perusing the judgment in S.T. Case No.150 of 2004 dated 8.10.2004, rendered by the Assistant Sessions Judge, Padmapur, I am of the considered view that even though an absconder ought not to be normally extended the benefit of the judgment rendered in the case of a co-accused, but on perusing the judgment, as noted hereinabove, it is found that, P.W.11, a Police Sub-Inspector not only was the informant but was also the Investigating Officer. This fact itself is adequate for the purpose of quashing the criminal proceeding. It is well settled in law that no police officer ought to be permitted to act both as an “informant” as well as the “Investigating Officer”, since the rules of natural justice clearly require that in the event of police officer become the informant, he should not conduct the investigation into the said case, since the said case police officer would have to give evidence as a witness in course of trial. In this case P.W.11’s evidence and his F.I.R. as well as the filing of charge sheet on completion of the investigation becomes the basis of the trial.

5. Apart from the above, the trial court has taken into account the fact that, the prosecution evidence regarding the alleged “preparation of dacoity” is based on the alleged confession of a co-accused, Shankar (who had faced trial) which evidence is clearly not admissible. There exists no other evidence to show that the accused persons were making any preparation of committing dacoity apart from the confession of the co-accused. Reliance was correctly placed by the learned counsel for the petitioner on a judgment of the Supreme Court in the case of Chaturi Yadav and others v. State of Bihar, 1979 Criminal Law Journal 1090 in this regard. Further, since P.W.11

admitted that he had first effected the seizure of iron rod and iron pipes at the cremation ground on the alleged confession of the accused Shankar leading to recovery of the said articles, obviously the F.I.R. itself had not been drawn up at that point of time and, therefore, no investigation could be said to have been taken prior to filing of the F.I.R. Therefore, since the said co-accused Shankar was admittedly not in the custody of police as an "accused" at the time of leading to recovery as required under law, any recovery or confession before the police regarding the occurrence is clearly not admissible under Section 27 of the Evidence Act.

6. Considering the aforesaid circumstances and the evidence of the present case, I am of the considered view that no real purpose would be served by directing the continuance of the criminal proceeding against the present petitioner, since the chance of conviction of the petitioner is totally bleak. Apart from the aforesaid fact, from the judgment passed by the trial court as referred in above, it is clear therefrom that, no prima facie case has been made out against the petitioner for the alleged offences and the principal accused persons who purportedly made the confession before the P.W.11-Investigating Officer and had purportedly led to the recovery of various material objects connected to the alleged crime have already been acquitted, after a full fledged trial.

7. Therefore, the G.R. Case No.223(A) of 2003 (Arising out of Sohela P.S. Case No.103 of 2003) pending before the learned J.M.F.C., Sohela is directed to be quashed against the present petitioner-Chirantan Sahu.

Accordingly, the CRLMC is allowed in terms of the direction noted hereinabove.

Application allowed.

2011 (I) ILR – CUT- 245

INDRAJIT MAHANTY, J.

CRLMC NO.189 OF 2010 (Decided on 08.10.2010)

RABINARAYAN ACHARYA ……. Petitioner.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.202, 311.

If a Court exercises its power U/s.311 Cr.P.C. while conducting an enquiry U/s.202 Cr.P.C. and calls witness to give evidence or to produce material objects or documents which in turn goes against the complainant's allegations, in such a fact situation alone, opportunity should be given to the complainant either to cross-examine the Court witness or to afford an opportunity to explain the evidence.

In the present case there being no substance in the case put forth on behalf of the complainant- petitioner the impugned order passed by the learned S.D.J.M. is affirmed.

(Para 6 & 7)

Case law Relied on:-
AIR 1928 Madras 135 : (H.J.E. Maccarthy -V- Lord Shannen).

Case law Referred to:-
(1994) 7 OCR 229 : (Sk. Siraj -V- State of Orissa & Ors.).

For Petitioner - M/s. R.C.Sarangi, L.Pradhan, S.Das, C.Tripathy, P.K.Singh, M.K.Pattanaik, S.S.Mohanty & N.Ray.
For Opp.Party - Addl. Government Advocate.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioner-Rabinarayan Acharya, who has sought to challenge the order dated 25.11.2009 passed by the learned S.D.J.M., Bhubaneswar in G.R. Case No.240 of 2008, by which order the application filed by the petitioner for recall of witness-Tusar Kanta Mohapatra for further examination during course of enquiry under Section 202 Cr.P.C. has been rejected.

2. Mr. R.C. Sarangi, learned counsel for the petitioner submitted that the learned court below has committed a grave illegality by not permitting the counsel for the petitioner to participate in the proceeding during course

of the enquiry under Section-202 Cr.P.C. He asserted that, there is no law which prevents participation of the complainant in the proceeding and the learned S.D.J.M., Bhubaneswar committed the same mistake as that of his predecessor, by rejecting the petition under Section 311 Cr.P.C. He further asserted that undisputedly an enquiry under Section 202 Cr.P.C. is made by the Magistrate for its own satisfaction, but it does not mean that a Magistrate can ignore the material aspect of the case so as to subsequently come to a conclusion that materials do not satisfy him to issue process.

3. On perusal of the petition to recall the witness-Tusar Kanta Mohapatra, Notary Public, Bhubaneswar, it appears that in the said application, it was pleaded that the learned S.D.J.M. had directed the complainant to deposit the cost for examination of witness-Tusar Kanta Mohapatra under Section 202 Cr.P.C. The said person had been summoned and examined by the Court. It is alleged that, since the complainant was not permitted to intervene and to explain what the questions are ought to have been put to the witness, the same resulted in, the trial court asking questions and accordingly, answers given by the said witness were only recorded.

3.1 Mr. Sarangi placed reliance upon the judgment of this Court in the case of Sk. Siraj v. State of Orissa and others, (1994) 7 OCR 229 and in particular, the observations of the Court in Para-12 thereof as well as a decision of the Hon'ble Madras High Court in the case of H.J.E. Maccarthy v. Lord Shannen, AIR 1928 Madras 135.

4. The learned counsel appearing for the State supported the impugned order dated 25.11.2009 and submitted that the petitioner had filed an earlier application under Section 311 Cr.P.C. seeking the self-same remedy to recall the witness for re-cross-examination and the same had been refused. Accordingly, it is submitted that the subsequent application filed by the petitioner was a renewed attempt by him to recall the same witness. Since the order passed under Section 311 Cr.P.C. by the predecessor of the present S.D.J.M. was not challenged, it had attained its finality and there was no occasion for permitting the self-same prayer which is renewed in a different form. Apart from the above, the learned counsel asserted that, the fact situation that arose for consideration by this Court in the case of Sk. Siraj (Supra) as well as the judgment of the Madras High Court in the case of H.J.E. Maccarthy (Supra) are distinct from the case at hand.

5. On consideration of the submissions noted hereinabove, it is the well settled principle of law that, an "order of cognizance", means application of mind by the Judge/Magistrate to the facts constituting an offence for the purpose of initiating a judicial proceeding against the offender and at the stage of taking cognizance, a Magistrate has to simply satisfy himself

whether the allegation against the accused, prima facie, makes out a case for trial or not and nothing beyond that. In the case at hand, Tusar Kanta Mohapatra, who was cited as a witness on behalf of the complainant and was summoned and examined by the Magistrate under Section 202 Cr.P.C., no final decision either taking cognizance or not, is yet to be passed. In the case of Sk. Siraj (Supra), this Court held that where the court in exercise of its power under Section-311 Cr.P.C. examines a witness as a "court witness", even in course of an enquiry under Section-202 Cr.P.C. It is in this context, this Court in Paragraph-9 of the judgment came to hold as follows:

"The objection of Section 311 Cr.P.C. is to put the discretion act only from the point of view of the accused and the prosecution but also from the point of view of the orderly society. If a witness called by Court and gives evidence against the complainant, he should be allowed an opportunity to cross-examine."

5.1 In the present case at hand, Tusar Kanta Mohapatra was cited as a witness by the complainant and duly examined under Section 202 Cr.P.C. by the Magistrate. He was neither summoned under Section-311 Cr.P.C. nor examined as a court witness for considering the complaint. Therefore, this judgment has no bearing on the fact situation that arises for consideration in the present case.

5.2 In the case of H.J.E. Maccarthy (Supra), the Madras High Court held that where the Magistrate after examining the complainant on oath *"sent for some records from the police and for some records from a private individual, perused them and came to the conclusion that the counter-petitioner (accused) had acted under a bona fide claim of right and, therefore, no offence was committed by him".* In the present case the issue as to whether the Magistrate has taken cognizance of an offence complained of is not the subject matter of challenge before this court. On the other hand, in the case of Sk. Siraj (Supra), as well as in the case of H.J.E. Maccarthy (Supra), the learned Magistrate having summoned the documents from both the police as well as private individuals, had failed to afford an opportunity to the complainant therein to explain his case and, therefore, the Magistrate was directed to afford an opportunity to the complainant, if in course of such enquiry facts emanate before him opposes the allegation of the complainant, the complainant was given an opportunity to explain or to meet such evidence.

6. On consideration of both the judgments cited by Mr. Sarangi, learned counsel for the petitioner, the principle that emanates therefrom is that if a Court exercises its power under Section-311 Cr.P.C., while conducting enquiry under Section-202 Cr.P.C and calls witness to give evidence or to produce material objects or documents, which in turn, goes against the

complaint's allegation, only then, in such a fact situation alone, opportunity should be given to the complainant to either cross-examine the court witness or to afford an opportunity to explain the evidence.

7. In view of the aforesaid conclusion arrived at on the question of law as noted hereinabove, I do not find any substance in the case put forth on behalf of the petitioner and accordingly, the order dated 25.11.2009 passed by the learned S.D.J.M., Bhubaneswar in G.R. Case No.240 of 2008 is affirmed.

Application dismissed.

2011 (I) ILR – CUT- 249

H.S.BHALLA, J.

W.P.(C) NO.120 OF 2011 (Decided on 05.01.2011)

BALASORE ALLOYS LTD. & ANR. …….. Petitioners.

.Vrs.

NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LTD. & ORS. …….. Opp.Parties

ELECTRICITY ACT, 2003 (ACT NO.36 OF 2003) – SEC.42 (5) & (6).

Petitioners are consumers of electricity – Failed to pay consumption charges to the licensee – Disconnection notice issued – Writ petition filed challenging the said notice – Availability of alternative remedy – Writ petition not maintainable.

However Since the petitioners undertake to approach the Grievance Redressal Forum, Balasore within seven days this Court protected the petitioners for a period of four weeks and during that period electricity supply shall not be disconnected subject to payment of current dues

(Para 3 to 5)

For Petitioners - M/s. Ashok K.Parija, S.Pr.Sarangi, P.P.Mohanty, D.K.Das, P.K.Dash, & A.Pattnaik.
For Opp.Parties - M/s. P.K.Mohanty & Associates (Opp.Party-caveator)

H.S.BHALLA, J. Heard Mr. Ashok K.Parija, learned Senior Counsel along with Mr.Sarangi, for the petitioners and Mr. Mohanty for the intervenor-opposite party.

2. The petitioner in this writ petition has challenged the disconnection notice dated 16.12.2010 issued by the Executive Engineer, Central Electrical Division, Balasore under Section 56 (1) of the Electricity Act, 2003 read with the Regulation 100 of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 directing to pay a sum of Rs.157,79,38,200/- as the outstanding dues up to the month of November, 2010.

3. During the course of argument, learned counsel for the petitioner has undertaken to file a petition before the Grievance Redressal Forum,

Balasore within a period of seven days from today. The petitioners are also at liberty to move the Grievance Redressal Forum for the interim relief.

4. In view of the aforesaid undertaking, it is directed that in case the petitioner files a petition along with a petition for interim relief, the Grievance Redressal Forum shall consider and dispose of the same within a period of fifteen days after giving opportunity of hearing to the parties.

5. Keeping in view the facts and circumstances of the case, the petitioners are protected for a period of four weeks and it is made clear that the electricity supply shall not be disconnected for that period. This order shall be effective subject to payment of current dues.

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

Writ petition disposed of.

2011 (I) ILR – CUT- 251

H.S. BHALLA, J.

MISC.CASE NO.1812 OF 2009 (Decided on 01.12.2010)

D.M. NEW INDIA ASSURANCE CO.LTD. ……. Appellant.

.Vrs.

SALMA KHATOON & ORS. ……. Respondents.

MOTOR VEHICLES, ACT, 1988 (ACT NO.59 OF 1988) – SEC.173 (1).

Delay in filing appeal – Appellant is required to explain each day's delay – "Sufficient Cause" means appellant has to establish that inspite of all care and diligence it was not possible on its part to prefer the appeal in time.

In the present case there is delay of 644 days which could not be adequately explained – The Insurance Company as a litigant could not claim a status or right to condone the delay without showing at least a reasonable care and diligence in pursuing its case – The matter was not given the attention it deserved and every thing appeared to have been handled in a leisurely fashion – Moreover delay can not be condoned mechanically on the ground of administrative exigencies – Held, application for condonation of delay is dismissed.

(Para 3,5 & 7)

Case laws Referred to:-

1.AIR 2000 SC 2306 : (State of Bihar & Ors.-V- Brij Bihari Prasad Singh).
2.AIR 2009 SC 2577 : (State of Karnataka -V- Y.Moideen Kunhi(dead) by L.Rs. & Ors.).
3.AIR 1996 SC 1623 : (State of Haryana -V-Chandra Mani & Ors.).

For Appellant - M/s. M.Sinha & associates.
For Respondents – None.

H.S.BHALLA, J. Heard learned counsel for the appellant.

2. Prayer made in the application is for condonation of delay of 644 days in filing the appeal.

3. It is incumbent on a person preferring an appeal under Section 173(1) of the Act to take all care to see that the appeal is filed within time and unless he shows ' sufficient cause' which prevented him from preferring the appeal in time in spire of care and diligence, the appellate Court will not be inclined to entertain an appeal preferred out of time. The satisfaction of

the court under the Second proviso to Section 173 (1) of the Code will naturally have to depend on the appellant establishing that in spire of all care and diligence it was not possible for it to prefer the appeal in time. The appellant is required to explain each day's delay. The discretion to condone the delay is to be exercised judicially, that is one is not be swayed by sympathy or benevolence. Discretion can be exercised in favour of a person if sufficient cause is pointed out. In the instant case, I find that there were series of delay which the Insurance Company could not adequately explain. The Insurance Company as a litigant could not claim a status or right to condone the delay without showing at least a reasonable amount of care and diligence in pursuing its case. The case in hand showed a complete lack of application on the part of the Insurance Company. Everything appeared to have been handled in a leisurely fashion. The matter was not given the attention it deserved and filing of an appeal was delayed for about 644 days without any sufficient cause.

The ground which is sought to be made out for condoning the delay is of administrative exigencies.

4. Learned counsel for the appellant has referred to the cases of State of Bihar and others v. Brij Bihari Prasad Singh AIR 2000 SC 2306, State of Karnataka v. Y.Moideen Kunhi (dead) by L.Rs. and others, AIR 2009 SC 2577 & State of Haryana v. Chndra Mani and others, AIR 1996 SC 1623 in course of his contention. A reading of these authorities would show that they bear no resemblance to the facts in the instant case and do not in any manner support the point canvassed in the context of the nature and circumstances of the present case.

5. If the delay is to be condoned mechanically on the ground of administrative exigencies, then in almost all cases the Court has to condone the delay. That is never the intention of the Supreme Court while laying down the law for condoning the delay on the ground of administrative exigencies.

6. In view of the above discussion, I do not find any substance or merits in this application for condoning the delay of 644 days in filing the appeal against the award passed by the learned Tribunal.

7. For the reasons stated above, the petition filed by the appellant for condonation of delay of 644 days is dismissed. Accordingly, the appeal filed by the appellant is dismissed being barred by time.

8. It is pity that main appeal is not being heard on merit seeing the conduct of the appellant and thereby making a considerable delay of 644 days in filing the appeal.

Appeal dismissed.

2011 (I) ILR – CUT- 253

SANJU PANDA, J.

W.P.(C) NO.15349 OF 2008 (Decided on 03.11.2010)

PRASANTA KUMAR JENA ……. Petitioner.

.Vrs.

DR. MINATI MISHRA & ORS. ……. Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF 1908) – ORDER 9, RULE 13.

Exparte decree in a probate proceeding - Section 263 of the Indian Succession Act, 1925 has got nothing to do with the case where a grant of probate has been made exparte – Held, Provisions under Order 9 Rule 13 C.P.C. is applicable to setaside such exparte decree.

(Para 15)

Case Relide on

AIR 1971 Patna 391 : (Mst. Tribeni Kuer & another -V-Shankar Tiwari & others).

Case laws Referred to:-

1.AIR 1976 Patna 186 : (Bindheshwari Pandey -V- Kari Devi)
2. AIR1967 Orissa 41 : (Mst.Puinbasi Majhiani -V- Shiba Bhue & another).
3..1984(1) CHN 182 : (Smt. Anima Dutta -V-Bhanumati Dutta & anr).
4.AIR 1985 Clcutta 275 : (Bimalakanta Sengupta -V- Sarojini Koner)
5.1991(II) OLR 525 : (Janardan Jena -V- Sara @ Saraswati Dei).
6.AIR 1977 SC 1348 : (M/s. Jajpur Mineral Development Syndicate,Jajpur -V- The Commissioner of Income Tax, New Delhi).

For Petitioner - M/s. Samareshwar Mohanty & P.R.Sutar.
For Opp.Parties - M/s. Dr.A.K.Rath, A.K.Panda, A.K.Nath & S.S.Dash.

S. PANDA, J. In this writ petition, the petitioner has challenged the order dated 29.9.2008 passed by the learned District Judge, Cuttack in CMA No.115 of 2006 allowing an application for condonation of delay and setting aside the ex parte order passed by the said court in OS No.1 of 2006 granting Probate of Will in favour of the present petitioner.

2. The facts leading to the present writ petition are as follows:

The petitioner filed a Test Case before the learned District Judge, Cuttack for grant of Probate of Will in his favour by one Gopinath Das son of late Kasinath Das. He died on 25.9.2003. The Will in question was annexed to the said application. It was stated that the same was the last Will of the testator-Gopinath Das who was residing at Bhasakosh Lane, Cuttack. The execution of the Will was made on 6.10.2002 in the presence of witnesses who duly attested the Will. The petitioner is the sole executor named in the Will and the opposite parties are near relations of the testator. General citation had been issued under Section 283 of the Indian Succession Act calling upon the persons to appear and file objection, if any. The said case was registered as Test Case No.22 of 2004. In pursuance of issuance of general citation, the opposite parties appeared through advocate and filed their written statement denying the claim of the petitioner. The court below appointed the petitioner as administrator of the estate at the initial stage. However, on the objection being filed by the opposite parties, he was discharged and the opposite parties were appointed as the administrator of the estate vide order dated 7.10.2005 with a direction to maintain and submit accounts each year. After obtaining permission from the court, the parties disposed of certain properties vide registered sale deed dated 20th January, 2006. However, since the opposite parties did not take any step in the proceeding, they were set ex parte on 25.4.2006 and the said case was converted to an Original Suit and renumbered as O.S No.1 of 2006. The petitioner as plaintiff examined himself as P.W.2 and one of the attesting witnesses as P.W.1 and filed some documents which were marked Exts.1 and 2. After hearing the parties, the court below decreed the suit ex parte on 12.5.2006 granting Probate in favour of the plaintiff in respect of the Will executed by Gopinath and vacated the order of appointment of administrator pendente lite of the estate.

3. The power-of-attorney holder of opposite parties filed an application under Order 9 Rule 13 read with Section 151 of the Civil Procedure Code for setting aside the ex parte order dated 12.5.2006 passed in O.S. No.1 of 2006 with the allegations that the present petitioner was working in the house of late Gopinath as a servant and taking advantage of his closeness and the old age of Gopinath, he fabricated and manufactured a forged Will in his favour. After the death of Gopinath, he filed a case for grant of Probate. The opposite parties appeared and filed their written statement contesting the case. However, as the advocate looking after the case on behalf of the opposite parties did not take any step in the case, they were set ex parte. When they came to know about the ex parte order on 21.6.2006 at Nanpur after receiving the notice from the Land Acquisition Officer, they filed an application under Section 5 of the Limitation Act for condonation of delay in

filing the application under Order 9 Rule 13 of the Civil Procedure Code which was registered as CMA No.115 of 2006.

4. The petitioner filed an objection to the said application denying the allegations of the power of attorney holder of the opposite parties and taking a specific stand that the application under Order 9 Rule 13 of the Civil Procedure Code was not maintainable for setting aside the ex parte order under the Indian Succession Act. The opposite parties never came forward with sufficient cause which prevented them to appear while the matter was called for hearing and the opposite parties had full knowledge about the order dated 12.5.2006 when the ex parte order was passed. As the opposite parties did not take any step within the statutory period, they were set ex parte. Therefore, the ex parte order need not be set aside by condoning the delay. The petitioner challenged the appearance of the opposite parties in the proceeding, as the opposite parties had filed an application under Order 1 Rule 10 of the Civil Procedure Code before the learned District Judge to implead them as parties in Test Case No.22 of 2004. Since the said proceeding was a proceeding under the Indian Succession Act, they appeared by filing a caveat as provided under Sections 280 and 286 read with Schedule-V of the Indian Succession Act to resist the probate proceeding. The application was rejected by the court below on 19.2.2005. Therefore, they had no locus standi to oppose the grant of Probate in favour of the petitioner.

5. However, the learned District Judge, after hearing the parties, allowed the application and set aside the ex parte order by condoning the delay in filing the application. Hence this writ petition.

6. Learned counsel appearing for the petitioner submitted that since the point of law raised by the petitioner against setting aside of the ex parte order had not been taken into consideration by the learned District Judge, the impugned order is liable to be set aside. He further submitted that the application under Order 9 Rule 13 read with Section 151 of the Civil Procedure Code is not maintainable in a probate proceeding for setting aside the ex parte order and in view of the specific provisions contained in the Indian Succession Act for setting aside the ex parte order, the general provision of the Civil Procedure Code is not applicable. Therefore, the impugned order is liable to be reversed. In support of his contention, he cited the decisions in the case of **Bindheshwari Pandey v. Kari Devi** reported in **AIR 1976 Patna 186**, **Mst. Puinbasi Majhiani v. Shiba Bhue and another** reported in **AIR 1967 Orissa 41** and **Mst. Tribeni Kuer and another v. Shankar Tiwari and others** reported in **AIR 1971 Patna 391.**

7. Learned counsel appearing for the opposite parties submitted that the rules laid down under Order 9 Rule 13 of the Civil Procedure Code are procedural in nature. Section 141 of the Civil Procedure Code provides that the procedure laid down in the Code of Civil Procedure in regard to suits shall be followed as far as it can be made applicable to all proceedings under the Code of Civil Procedure. Therefore, the court below rightly passed the impugned order. Hence, the same need not be interfered with. In support of his submissions, he cited the decisions reported in **1984 (1) CHN 182 (Smt. Anima Dutta v. Bhanumati Dutta & another)** and **AIR 1985 Calcutta 275 (Bimalakanta Sengupta v. Sarojini Koner).** He also cited a decision of this Court in the case of **Janardan Jena v. Sara alias Saraswati Dei** reported in **1991 (II) OLR 525** wherein it has been held that though a proceeding for Probate or Letters of Administration is not a suit, the proceeding is to be treated as a regular suit and the provisions of Code of Civil Procedure are applicable to such proceeding.

8. Law is well settled that every Court is constituted for the purpose of doing justice according to law and must be deemed to possess as a necessary corollary and inherent power in its very constitution all or such power as may be necessary to do the right and to undo a wrong in course of administration of justice. The inherent power is to be exercised where the prejudice would be such that the same cannot be eradicated. The inherent power can be exercised by a Court to recall or set aside its earlier order and an ex parte judgment which was rendered in ignorance of the fact that the estate was not represented. The Courts have power to pass an order as may be necessary for ends of justice or to prevent the abuse of process of court as held by the apex Court in the case of **M/s. Jaipur Mineral Development Syndicate, Jaipur v. The Commissioner of Income Tax, New Delhi** reported in **AIR 1977 SC 1348.**

9. Further contention of the learned counsel for the petitioner is that the opposite parties did not file a caveat as required under the Indian Succession Act is not sustainable as opposite parties filed an application before the learned District Judge though the nomenclature of the said application was not as required by the Indian Succession Act. The Court has the jurisdiction to accept the said petition and can pass appropriate order. It is not appropriate that if a party is entitled to a relief, his application is not to be rejected by a court of law because of the incorrect nomenclature of the said application.

10. Admittedly, in the present case, the opposite parties did not appear when the matter was called on for hearing. Consequently, the Court proceeded with the case ex parte and the decree was made directing

probate to be issued in favour of the present petitioner. It has specifically been provided under Order 9 Rule 13 of the Civil Procedure Code that in a case in which a decree is passed ex parte against the defendant, he may apply to the court by which the decree was passed for an order to set it aside. If the Court is satisfied that the grounds were not duly served on or he was prevented by sufficient cause from appearing when the suit was called on for hearing, the court has to make an order setting aside the decree passed against him. Since the present opposite parties contended that they had been prevented by sufficient cause from appearing when the matter was called on for hearing and the said plea of the opposite parties was accepted by the court below as sufficient cause for setting aside the ex parte decree, this Court fails to see why such an application cannot be maintained under Order 9 Rule 13 of the Civil Procedure Code. Therefore, this Court is of the view that the rules laid down under Order 9 relating to hearing of a case ex parte as well as an application for setting aside an ex parte decree are matters of procedure i.e. applicable to a proceeding under the Indian Succession Act also. Hence, it cannot be said that the Court has to exercise his jurisdiction only under Section 263 of the Indian Succession Act. The provisions of Indian Succession Act are also very clear that in the matters of procedure, the Code of Civil Procedure must apply. Part IX of the Indian Succession Act, as indicated by the heading, deals with 'Probate, Letters of Administration and Administration of Assets of Deceased' and comprises of Sections 217 to 369. Section 217 provides as follows:

> "217 Application of Part – Save as otherwise provided by this Act or by any other law for the time being in force, all grants of probate and letter of administration with the will annexed and the administration of the assets of the deceased in cases of intestate succession shall be made or carried out, as the case may be, in accordance with the provisions of this part."

11. Chapter I of Part IX is headed "Grant of Probate and Letters of Administration". Chapter II deals with "Limited Grants". Chapter III is heading "Alternation and Revocation of Grants" and comprises of Ss.261, 262 and 263. Section 261 deals with what errors may be rectified by Court. Section 262 provides that where a codicil is discovered after the grant of Letters of Administration with a will annexed, it may be added to the grant on due proof and identification. Section 263 which deals with the revocation or annulment of grant of Probate or Letters of Administration for just cause is extracted below:

> "263. Revocation or annulment for just cause.-The grant of probate or letters of administration may be revoked or annulled for just cause
>
> Explanation-Just cause shall be deemed to exist where-

(a) the proceeding to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, thought such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

10. Illustrations (i) and (ii) only are relevant for our purpose in this case and are as under:

(i) The Court by which the grant was made had no jurisdiction

(ii) The grant was made without citing parties who ought to have been cited"

12. This Section has not made any provision for setting aside of an ex parte order granting probate on sufficient cause being shown by the defaulting party for its absence at the hearing of the case. It cannot be said that in this case the proceedings were defective in substance.

13. Chapter IV of Part IX of the Indian Succession Act deals with the procedure to be followed and the Chapter heading is "of the practice in granting and revoking probates and Letters of Administration." Sections 266, 268 and 295 of Chapter IV are important for our purpose:

266. District Judge's powers as to grant of probate and administration.- The District Judge shall have the like powers and authority in relation to the granting of probate and letters of administration, and all matters connected therewith, as are by law vested in him in relation to any civil suit or proceeding pending in his Court.

268. Proceedings of District Judge's Court in relation to probate and administration- The proceedings of the Court of the District Judge in relation to the granting of probate and letters of administration shall, save as hereinafter otherwise provided, be regulated, so far as the

> circumstances of the case permit, by the Code of Civil Procedure, 1908.
>
> 295. Procedure in contentious cases- In any case before the District Judge in which there is contention, the proceeding shall take, as nearly as may be the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be the defendant.

14. In view of the above provisions, the right to have a grant of Probate or Letters of Administration revoked is concerned, the grounds may have been defined exhaustively under Section 263 of the Act. Therefore, setting aside an ex parte decree is not coming under the said provision and only the procedure laid down in the Code of Civil Procedure was available to a party in a probate proceeding for setting aside such an ex parte decree. The Calcutta High Court in the case of **Smt. Anima Dutta v. Smt. Bhanumati Dutta & another** reported in **1984 (i) CHN 182** has held as follows:

> "In our opinion, in view of the clear provisions of Ss.268 and 295 of the Indian Succession Act, and S.141 of the Code of Civil Procedure, the Court has to follow the procedure laid down in the Code of Civil Procedure for the purpose of granting probate but the substantive rights are all governed by whatever has been provided by the Indian Succession Act. Section 263 does not deal with the procedure but has given certain rights to have the grant of a probate or letters of administration revoked in certain circumstances. Section 263, in our opinion, has got nothing to do with the case where a grant of probate has been made ex parte and an application has been made for setting aside of that ex parte order by a party who alleges that he was prevented by sufficient cause from appearing at the hearing. This will be governed by the provisions of Order 9 Rule 13 of the Code of Civil Procedure and there cannot be any question of conflict between the provisions of S.263 and the provisions of the Code of Civil Procedure in this regard.

15. In the case of **Mrs. Tribeni Kuer & another v. Shankar Tiwardi & others** reported in **AIR 1971 Patna 391** the question of applicability of Order 9 Rule 13 of the Civil Procedure Code to a probate proceeding came up directly for consideration. The Division Bench of the Patna High Court held that the provisions of Order 9 Rule 13 of the Code of Civil Procedure were applicable to a probate proceeding.

16. In view of the above discussions and as substantial justice has been done by the learned District Judge allowing the application of the opposite parties to contest the case, this Court is not inclined to interfere with the impugned order because the dispute between the parties has to be decided on its own merits in accordance with law and not on technical grounds.

The writ petition is accordingly dismissed.

Writ petition dismissed.

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2011 (I) ILR – CUT- 261

B.P.RAY, J.

CRLMC. NO.176 OF 2007 (Decided on 16.7.2010)

SUN GRANITE EXPORTS LTD. & ANR. …… …. Petitioners.

.Vrs.

STATE OF ORISSA & ANR. ……Opp.Parties.

(A) ORISSA FOREST ACT, 1972 (ACT NO.14 OF 1972) – Ss.34 & 37.

Prohibition order having not been issued by the State Govt. U/s.34 of the Orissa Forest Act, the initiation of the proceeding U/s.37 of the Act is without authority of law.

In the present case no notification of the Forest Department U/S 34 of the Act was brought on record so as to attract the mischief of Section 37 of the Act – Held, order taking cognizance is indefensible and is hereby quashed.

(Para 8)

(B)**CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974) – S.473.**

Offence U/s.37 of the Orissa Forest Act – Order taking cognizance having passed after lapse of two years was barred U/s.468 Cr.P.C. – Application filed to condone the delay – No explanation what so ever has been offered by the prosecution for condonation of delay except vaguely stating that there has been delay in obtaining sanction and in preparation of papers – No plausible explanation has been offered so as to invoke the jurisdiction of the Magistrate for exercising his discretion for condonation of delay U/s.473 Cr.P.C.

Held, order taking cognizance is indefensible and is liable to be quashed.

(Para 5)

Case law Referred to:-

AIR 2000 SC 297 : (State of Himachal Pradesh -V- Tara Dutta & Anr.).

For Petitioners - M/s. Milan Kanungo, S.Satpathy, S.Nanda, S.Das & D.Pradhan.

For Opp.Parties - M/s. C.A.Rao, S.K.Behera, S.K.Purohit, P.K.Sahoo G.B.Panda.

B.P.RAY, J. In this application u/s. 482 of the Code of Criminal Procedure the petitioner challenge the legality of the order dated 23.06.2004 passed in 2(b)cc No. 24 of 2004 by learned J.M.F.C., Patrapur, Ganjam taking cognizance of offence u/s. 37 of Orissa Forest Act.

2. Prosecution case in brief is that the petitioner company was granted a lease for granite quarry by the State Government by execution of a lease deed on 20.5.1996 for a period of ten years. During subsistence of the lease, on 10.12.2002 while the petitioners were loading granite stones, one Siba Ram Nanda, Forest Guard seized around 12 truck load of granite stones with a truck bearing Registration No. OR-02-C-4302 from the petitioner no.2 and submitted a Prosecution Report on 23.6.2004 and the learned Magistrate took cognizance of the offence u/s.37 of the Orissa forest Act on 23.6.2004 fro violation of the Provisions contained in Section 34 of the Orissa Forest Act. The impugned order has been challenged mainly on the grounds; (a) the lease in question having been executed in favour of the petitioner by the State Government, the Forest Authority has no jurisdiction to initiate penal action against the petitioner-company; (b) there being prohibition order purported to have been issued by the State Government U/s.34 of the Orissa Forest Act, the initiation of the proceeding U/s.37 of the Act is without authority of law. The alleged forest offence having taken place on 10.12.2002 and the order taking cognizance having passed after lapse of two years without any explanation whatsoever, is barred under Section 468 of the Code. Therefore, the prosecution U/s.37 of the Forest Act is without jurisdiction and is grossly barred by law of limitation.

3. Learned Counsel for the State vehemently urgen that in view of the prohibition contained in Section 2 of the Forest (Conservation) Act, 1980, the operation of quarry by the petitioners without prior approval of the Central Government is unauthorized. Therefore, the petitioners are liable to be prosecuted U/s.37 of the Orissa Forest Act.

4. Admittedly the lease was granted by the State Government in favour of the petitioners for a period of 10 years and during subsistence of the said lease, the aforementioned forest offence report has been submitted by the Forest Department. There is serious dispute as to whether the land in question is under the protected reserved forest area of the same is under the Revenue Department recorded as forest land. Be that as it may, if the land has been recorded as forest land within the mischief of Section 2 of the Forest (Conservation) Act, 1980, it will not come to into play. For the limited purpose of deciding as to whether the order of cognizance for offence u/s.37 of the Orissa Forest Act is valid or not, I do not want to delve into the said aspect, as in my considered view, if the land in question is recorded as forest

land whether it is within the protected forest area or not, there must be prior approval of the central Government in terms of Section 2 of the Forest (Conservation) Act, 1980. In order to appreciate the submission made by the learned counsel for the parties, it is relevant to refer to Section 37(1)© of the Orissa Forest Act which reads as follows;

> "37. Penalties for acts in contravention of notification under sec.34 or of Rules under Sec.36.-(1) Any person who-
>
> (a)……
>
> (b)……
>
> (c) Contrary to any prohibition under Sec.34 breaks up or clears for cultivation or any other purpose any land in any protected forest or cultivate or attempts to cultivate any such land in any manner."

Apparently in order to have operation of Sec. 37(1) (c) there has to be prohibition in terms of Sec.34 of the Act. The said provision deals with powers to issue notification reserving trees, etc. It is also apparent that Sec.37(1) (c) relates only to protected forest. What is prohibited in terms of Sec. 37(1) (c) is breaking up or clearing for cultivation or any other purpose any land in any protected forest of cultivating or attempting to cultivate any such land in any manner. Sec. 33 deals with protected forest. The said provision prescribes that by notification the State Government may declare the provisions of Chapter IV to be applicable to any land which is not included in a reserved forest, but which is the property of Government or over which the Government have proprietary rights. Therefore, in order to be declared as protected forest the land has to be one which is not included in a reserved forest. Therefore, in the case of unreserved forest a notification declare the provisions of Chapter IV applicable has to be issued in terms of Sec. 34 of the Act.

5. Section 37 of the Orissa Forest Act provides maximum punishment for a period of one year or with fine. Section 468, Cr.P.C. provides that no court shall taken cognizance of an offence punishable for a maximum period of 1 year after expiry of one year. Section 473, Cr.P.C. provides that if an application for condonation of delay is filed explaining the delay, the court may condone the delay in filing the prosection report and thereafter may take cognizance of the offence and issue process. In the instant case the alleged forest offence was detected on 10.12.2002 and the P.R. was prepared by the Forester on 30.6.2003, the Range Officer approved and sent the same to the D.F.O. on 5.7.2003 and the D.F.O. sanctioned the P.R. and sent it to the Court on 31.3.2004 and the same was filed in Court on 23.6.2004. On the same day learned Magistrate took cognizance of the offence by accepting

the application for condonation of delay. Therefore, the question arises for consideration by the Court is; (a) whether the prosecution report submitted u/s.37 of the Orissa Forest act is valid; (b) whether the learned Magistrate had exercised its jurisdiction u/s. 473, Cr. P.C. by condoning the delay in filing the prosecution report after the statutory period.

6. A conjoint reading of the provisions of Sec. 34 and Sec. 37 (1) of the Orissa Forest Act Makes it clear that the land in respect of which the notification is to be issued was a protected reserved forest. Admittedly, no notification was brought on record to show any declaration that the land where the alleged act was committed was a protected one.

7. Indisputably there is delay of more than six months in filing the prosecution report. The Hon'ble Apex Court in the case of ***Sate of Himachal Pradesh V. Tara Dutt and another*** reported in AIR 2000 SC 297 has held that:

> " Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore, in respect of the offences for which a period of limitation has been provided in S. 468, the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognized principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence.
>
> xx xx xx
>
> We have already indicated in the earlier part of this judgment as to the true import and construction of Section 473 of the Code of Criminal Procedure. The said provision being an enabling provision, whenever a Magistrate invokes the said provision and condones the delay, the order of the Magistrate must indicate that he was satisfied

on the facts and circumstances of the case that the delay has been properly explained and that it is necessary in the interest of justice to condone the delay."

8. I have carefully gone through the records and found that even though there was an application for condonation of delay no explanation whatsoever has been offered by the prosecution for condonation of delay except vaguely stating that there has been delay in obtaining sanction and in preparation of papers. No plausible explanation whatsoever has been offered so as to invoke the jurisdiction of the Magistrate for exercising his discretion for condonation of delay u/s. 473 Cr.P.C. Indisputably no notification of the Forest Department u/s. 34 of the Act was brought on record so as to attract the mischief of Section 37 of the Act.

9. For the reasons aforesaid, the order of cognizance is indefensible and is hereby quashed.

Accordingly, the CRLMC is allowed.

Application allowed.

2011 (I) ILR – CUT- 266

B.P.RAY, J.

W.P.(C) NO.12872 OF 2008 (Decided on 27.08.2010)

ANANDA CH. MOHANTY & ORS. …….. Petitioners.

.*Vrs.*

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

INDIAN TELEGRAPH ACT, 1885 (ACT NO.13 OF 1885) – SEC.10 & 16.

Notification to draw 400 K.V. double circuit transmission line from Meramundali to Duburi – Construction of tower and to draw power line on the land of the petitioner – Though objections invited petitioners have not lodged any objection – Scheme prepared for greater public interest – Completion of 80% work – No specific allegation by the petitioners as to which portion of their land would be damaged – Held, petitioners may invoke Sections 10 & 16 of the Act to claim compensation for their inconvenience.

(Pare,3,4,5)

For Petitioners - M/s. Subir Palit, A.K.Mahana, H.K.Ratsingh & A.Mishra.

For Opp.Parties – Mr. B.K.Das (C.G.C. for OP.1)
M/s.P.K.Mohanty,N.Mohapatra, Smt.J.Mohanty,C.R.Nayak, S.N.Dash, (for OP.3,5,6)
M/s. S.Mohanty, S.Pattnaik, Sandeep Pattnaik, R.Mohanty, S.Das, J.R.Mohapatra (O.P.4).

B.P.RAY, J. In this writ application filed under Articles 226 & 227 of the Constitution of India the petitioners have sought for issuance of a writ of mandamus to the opp. Parties not to construct any tower on the land of the petitioners and not to draw electric line over the same while drawing 400 K.V. D/C (Double Circuit) transmission line from Meramundali to Duburi.

2. According to the petitioners, they are the land owners in respect of an area measuring Ac. 2.54 decimals under Khata No. 48, Hal Plot No. 1476 in Mauza Nimapalli. The land is home stead one and was adjacent to Express High Way. The petitioners came to know in December, 2007 that the construction of transmission line in question was being undertaken, which

according to the petitioners, is dangerous to human life and properties. It was the further case of the petitioners that the tower line was sought to the undertaken in violation of the rights guaranteed under Article 300-A of the Constitution of India inasmuch as the land over which the power line was drawn has not been acquired under Indian Telegraph Act. On the basis of these pleadings the petitioners have filed the present writ petition to restrain the opp.parties from undertaking construction of Rengali-Meramundali-Duburi 400 K.V. D/C line.

3. Opp. Parties 5 to 7 have filed a detailed and elaborate counter affidavit enclosing therein the notification dated 8.1.1996 issued by the Orissa State Electricity Board (in short, "the Board") under Annexure-A/6. From the said notification it would appear that a scheme has been prepared u/s 29 of the Electricity (Supply) Act, 1948 and published under Annexure-A/6 inviting objections to the proposed transmission line in respect of various schemes including Rengali-Meramundali-Duburi 400 K.V. D/C line. The transmission line has been augmented for supplying electricity to the general public and various industrial units for industrial growth of the State. It was also further stated that in pursuance of notification under Annexure –A/6 a general notice was also published in he Oriya daily "The Samaja" in the publication dated 13.1.1996 reiterating the same. The objections were required to the filed within two months from the date of publication of the advertisement. But no objection was received in pursuance of the notification issued. It was further stated in the said counter affidavit that pursuant to the scheme in question 279 E.H.T. towers in total were planned to be set up and erected in 279 locations as per the drawing and design prepared by the Board long since. Out of them, foundations in 226 locations for erection of towers have been completed and 197 towers have already been erected and in the mean time there has been substantial progress of drawing of line from Duburi side and thus 80% of the work has been completed. It was further stated in the counter affidavit that it was very much essential to complete 400 KV Meramundali-Duburi line for providing stable electricity to the command area for meeting expansion of industrial progress in the State. It was also stated that Orissa Power Transmission Corporation Ltd. Being the successor of the Board automatically by operation of Section 185(2) of the Electricity Act was competent to execute the work as per the scheme. It was also stated that since the scheme was prepared in the year 1996 for greater public interest, the petitioners' interest has to be sacrificed inasmuch as the petitioners have not specifically alleged over which portion of the land the construction of tower would cause damage. It was also stated in the counter affidavit that in the event any damage was caused, the appropriate remedies have been provided under Schemes 10 & 16 of the Indian Telegraph Act to claim compensation. The opp. Party No. 3, namely,

Power grid Corporation of India has also field a separate counter affidavit stating that a miniscule portion of the land of the petitioners would be utilized for the scheme without affecting cultivability of the land. It was also stated that the scheme having been implemented since 1996, the petitioners can have no valid objection to the implementation of the scheme in view of the fact that for use of the petitioners' land, compensations have been provided under proviso(d) to Scheme 10 of the Indian Telegraph Act. Accordingly, it was stated that the writ petition is devoid of merit and is liable to be dismissed.

4. I have heard learned counsel for the parties and perused the materials on record. The law on the subject is no more res integra. A Division Bench of this Court in a judgment dated 7.3.1989 passed in O.J.C. No. 398 of 1989 (**Chema Behera and others V. State Electricity Board & others)** has negetived the identical contention as that of the petitioners while dealing with the writ petition in which challenge was made to the High Tension Line drawn from Bhanjanagar to Chandaka via Nayagarh. A single Bench of this Court while disposing of O.J.C. No. 2868 of 1998 vide judgment dated 29.8.2000 (**Bairagi Charan Nayak V. State of Orissa & others)** has held that for the inconvenience caused to a private individual while erecting tower and drawing H.T.L. such person is to get compensation as envisaged under Sections 10 & 16 of the Indian telegraph Act and having held thus the writ petition was dismissed. Similarly in another writ petition bearing W.P.(C) No. 11408 of 2007 decided on 12.11.2007 (**Sanghamitra Biswal V. O.P.T.C.L. & others**) it was held that while erecting towers inconvenience is bound to be caused to the concerned individual to some extent and therefore, keeping in view the said fact legislation has provided remedy to such person to claim compensation as envisaged under Sections 10 & 16 of the Indian Telegraph Act and on such finding the writ petition was also dismissed.

5. In view of the law as laid down by this Court in the aforesaid decided cases, I would dispose of the writ petition with the observation that in case any inconvenience is caused to the petitioners while erecting towers on their land, the petitioners are free to invoke the provisions of Schemes 10 & 16 of the Indian Telegraph Act to claim compensation.

6. Subject to the aforesaid observations, the writ petition is dismissed.

Writ petition dismissed.

2011 (I) ILR – CUT- 269

B.P.RAY, J.

W.P. (C) NO.10629 OF 2003 (Decided on 21.09.2010)

KAILASH CHANDRA MAHANTA ……. Petitioner.

.Vrs.

CHIEF GENERAL MANAGER,
S.B.I. & ANR. ……. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.14.

Petitioner was an employee in the Mayurbhanj State Bank – Mayurbhanj State merged with the State of Orissa by virtue of a merger agreement – Pursuant to such merger petitioner was granted compensatory pension by the State Govt. – After merger petitioner got appointment in the State Bank of India – On retirement petitioner received pension from the State Bank of India as well as compensatory pension from the Govt. – Denial of compensatory pension is challenged in this writ petition.

Petitioner asserts that 12 employees of Mayurbhanj State Bank are receiving compensatory pension as well as superannuation pension which is not disputed by the SB I – Petitioner to make a representation to the appropriate authority who shall examine the factual aspect and if persons similarly situated like the petitioner were paid both categories of pension the same shall be made available to the petitioner.

(Para 5)

For Petitioner - M/s. K.K.Swain, P.N.Mohanty, B.Jena, S.C.D.Dash, P.K.Mohanty.

For Opp.Parties – M/s. P.V.Ramdas & P.V.Balakrishna (for O.P.1)
Addl.Govt. Advocate (for O.P.2).

B.P.RAY J. The petitioner has filed this writ petition under Articles 226 and 227 of the Constitution of India assailing the order under Annexure-7 dated 4.4.2002 passed by the Asst. General Manager, S.B.I. in which it was stated that the Government Pension was being credited to Branch Sundry Deposit Account, since the petitioner was not eligible to receive both the pensions i.e. pension from the State Government as well as from the State Bank of India in short the 'Bank'.

2. According to the petitioner, he was employed in the Mayurbhanj State Bank. The Mayurbhanj State was merged with the State of Orissa

pursuant to a Merger Agreement executed on 17.10.1948 between the king of Mayurbhanj State and the Governor General of India. It is alleged in the writ petition that in the Merger Agreement the interest of the employees of Mayurbhanj State was given full protection with regard to financial benefits. It is also asserted in the writ petition that the Mayurbhanj State Bank was taken over by the State Bank of India in the year 1960 and resultantly all the employees including the petitioner were retrenched since the petitioner was found surplus. It appears from Anenxure-2 dated 3.5.1961, the petitioner was given appointment in the State Bank of India as a Clerk and the appointment of the petitioner was a fresh one. In the appointment order, under Annexure-2, it was stated that since the petitioner was over 35 years of age, he was not eligible to be admitted to the membership of State Bank of India Employees' Pension Fund. However, the petitioner was admitted as a member of the Employees' Provident Fund of the State Bank of India under Annexure-5 subject to the petitioner surrendering gratuity and other terminal benefits availed by him. It was further asserted that the petitioner has surrendered all the benefits. The petitioner stated that pursuant to the Merger Agreement, he was granted compensatory pension by the State Government after his retrenchment from the Mayurbhanj State Bank. The petitioner has retired from service of the State Bank of India on 24.4.1983 on attaining the age of superannuation. It appears that from the date of retirement i.e. 24.4.1983 till the impugned order under Annexure-7 dated 4.4.2002, the petitioner was receiving pension from the State Bank of India as well as the compensatory pension. By virtue of the impugned order, the compensatory pension which was being paid by the State Government is credited to Branch Sundry Deposit Account. To put it differently the compensatory pension, which the petitioner was being paid, has been denied to the petitioner by issuance of the impugned order under Annexure-7, which is assailed in the present writ application.

3. The Bank has filed a counter affidavit as well as an additional counter affidavit. The State Government which has been impleaded as opp. Party No. 2 has also filed a counter affidavit. The petitioner has also filed a rejoinder to the counter affidavit filed by the State Bank of India. The Bank in its counter affidavit has stated that the petitioner was receiving pension from the Government of Orissa as well as the Bank. In the additional counter affidavit of the Bank, it is stated that it has been decided that while the total service rendered by the petitioner in both the Banks, namely, the Mayurbhanj State Bank as well as the State Bank of India would be taken into account for payment of pension by the State Bank of India, the pension already received by the petitioner would be deducted from the arrears of pension payable to him on suitable authorization by such employee and only the net amount shall be paid. It is further stated that the future pension

payable by the Govt. of Orissa shall be appropriated by the State Bank of India. The ultimate idea of the Bank is to appropriate pension paid by the State Government in lieu of paying full bank pension to the petitioner. Accordingly, it is stated in the additional counter affidavit that it has been decided to pay only the net amount i.e. the Bank Pension less the Govt. Pension at the end of each month. The State Govt. in his counter affidavit has stated that the petitioner cannot get dual pensions for a particular service rendered in different organizations inasmuch as it is stated that the petitioner has been paid pension taking into account the service rendered in the State Bank of Mayurbhanj as well as the service in the State Bank of India and therefore, the petitioner was not eligible to avail further benefit of compensatory pension from the Govt. of Orissa. In the rejoinder, the petitioner has reiterated the facts stated in the writ application

4. The main thrust of argument of Mr. Swain, learned counsel appearing for the petitioner is that the compensatory pension which was being paid to the petitioner cannot be taken away unilaterally by the State Bank of India particularly, in view of the provisions contained in the Merger Agreement. The second submission of Mr. Swain is that 12 numbers of employee of the erstwhile Mayurbhanj State Bank, who were similarly placed alike the petitioner having availed compensatory pension from the Govt. of Orissa as well as regular pension from State Bank of India, the petitioner cannot be denied the said benefits and such action of the authorities violates Article 14 of the Constitution of India. In this connection, emphasis has been laid on the averments made in paragraph 8 of the writ application wherein six persons have been named in support of such contention of the petitioner. Although, the State Bank of India has filed a counter affidavit as well as an additional counter affidavit, yet there is no denial to the said assertion of the petitioner. Nonetheless, it is evident from the averments made in paragraph 7 of the additional counter affidavit filed by the State Bank of India that the State Bank of India while calculating the pension of the petitioner has counted the past service rendered by the petitioner in the Mayurbhanj State Bank. At the same time, the State Govt. in its counter affidavit has stated that eh pension is being paid to the petitioner counting the service rendered by him in Mayurbhanj State Bank as well as the service rendered in the State Bank of India. It was further stated in the counter affidavit of the State Govt. that the petitioner was not eligible to avail further benefit of compensatory pension from the Govt. of Orissa inasmuch as, according to the State Govt., one cannot get dual benefit for a particular service rendered in two different organizations.

5. Undisputedly, the past services of the petitioner render in Mayurbhanj State Bank have been taken into account for the purpose of making

available the superannuation pension to the petitioner by the State Bank of India. Therefore, I do not find any illegality or irregularity in the action of the State Bank of India so far it relates to superannuation pension. But at the same time, the assertion of the petitioner that 12 nos. of employee of Mayurbhanj State Bank who are similarly placed alike the petitioner having been granted compensatory pension as well as superannuation pension which fact having not been disputed by the State Bank of India, without entering into the arena of controversy, I would permit the petitioner to make a representation to the appropriate authority of the State Bank of India highlighting these aspects and the competent authority of the State Bank of India shall examine such factual aspect and if it is found that the persons similarly situated like the petitioner were being paid both categories of pension, the same shall be made available to the petitioner without a person of one month from the date of receipt of the representation of the petitioner. I have so directed keeping in view the fact that the petitioner is presently 88 years old and is in the fag end of life.

6. It appears from paragraph 7 of the additional counter affidavit filed by the State Bank of India that the State Bank of India has decided to pay only the net amount i.e. the Bank Pension less the Govt. Pension at the end of each month inasmuch as it is stated that the State Bank of India had decided to appropriate the pension paid by the State Govt. in lieu of full pension to the petitioner. Such decision of the State Bank of India, in my considered opinion, is impermissible for the reasoning that the State Bank of India cannot appropriate the compensatory pension and again deduct the same from the Bank Pension payable to the petitioner. It the petitioner is not entitled to receive the compensatory pension, the same may not be made available which shall be subject to the outcome of the representation made by the petitioner pursuant to the direction herein about. But at the same time, the said amount cannot be appropriated by the State Bank of India and again it cannot be deducted from the superannuation pension payable to the petitioner, which has been arrived at by taking into consideration the length of service rendered by the petitioner in the Mayurbhanj State Bank as well as the State Bank of India.

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

Writ petition disposed of.

2011 (I) ILR – CUT- 273

B.K.PATL, J.

W.P.(C) NO.6760 OF 2010 (Decided on 10.12.2010)

ANJALI PRADHAN ……. Petitioner.

.Vrs.

SUB-COLLECTOR,
PALLAHARA & ORS. ……. Opp.Parties.

SERVICE – Anganwadi worker – Appointment of the petitioner in the post – Sub-Collector approved his selection – O.P.4 challenged the appointment in appeal before the Sub-Collector – Petitioner's selection was declared void – Hence the writ petition.

Guidelines for engagement of Anganwadi worker – Clause (g) of the guidelines provided that in case the Chairman of the selection committee does not finalise the list within the stipulated time the same will be put up to Sub-Collector for approved in case of rural projects – Clause (i) of the guidelines provided that the Collector shall be the appellate authority in case Sub-Collector/ADM have approved the selection.

In the present case Sub-Collector had approved the selection of the petitioner as A.W.W. and as such he had no authority to entertain the appeal filed by O.P.4 – Held, the impugned order is quashed – O.P.4 is at liberty to file appeal before the competent authority.

(Para 14,15)

Case laws Referred to:-

1.1960-1 (SCR) 580 : (Gullapalli Nageswara Rao etc.-V-The State of Andhra Pradesh & Ors.)
2.(1993) 4 SCC 10 : (Rattan Lal Sharma –V-Managing Committee, Dr.Hari Ram (Co-Education) Higher Secondary School & Ors.)
3.(1984) 4 SCC 103 : (J.Mohapatra & Co. and Anr.-V-State of Orissa & Anr.)
4.AIR 1960 SC 468 : (Mineral Development Ltd.-V-The State of Bihar & Anr.).

For Petitioner - M/s. S.K.Rath, S.N.Biswal & A.K.Behera.
For Opp.Parties - Mr. Partha Sarathi Nayak
(for O.P.4)
Addl. Govt. Advocate

(for O.Ps.1 to 3)

B.K. PATEL, J. The petitioner in this writ petition has assailed the legality of order dated 31.3.2010 passed by Sub-Collector,Pallahara in Misc.Appeal Case No.7 of 2009.

2. Pursuant to advertisement dated 12.2.2009 issued by the opposite party no.3-C.D.P.O., Pallahara petitioner, opposite party no.4 and another submitted applications along with requisite documents for engagement as Anganwadi Worker (for short 'A.W.W.') of Barakalapal Dangamanga Anganwadi Centre (for short, 'A.W.C.') of Pallahara block in the district of Angul. After verification of applications and documents, candidature of opposite party no.4 and the petitioner only were found to be valid. Accordingly, notification dated 8.6.2009 was issued notifying names of applicants and inviting objections. In response to the notification, objection was received against candidature of the petitioner on the ground that she is a resident of village Godaramunda which is not included within the operational area of the A.W.C. An enquiry was conducted on the objection and report was submitted to the opposite party no.1-Sub-Collector, Pallahara for information and necessary action. Considering the relevant merits of the two candidates and report of the Committee, petitioner was engaged as A.W.W. by order dated 9.10.2009 which was assailed by the opposite party no.4 in Misc.Appeal No.7 of 2009 impleading the petitioner as opposite party no.2 mainly on the ground that she does not reside within the service area of Barakalapal Dangamanga A.W.C.. By the impugned order petitioner's selection as A.W.W. was declared void. Operative portion of the impugned order reads:

> " xxx Hence, the selection of O.P.No.2 is hereby declared void. CDPO, Pallahara is directed to take suitable action for cancellation of the order of engagement of O.P.No.2 Smt. Anjali Pradhan as Anganwadi Worker of Barakalapal A.W. Centre and engagement of the new Anganwadi Worker to the next candidate in order of merit after observing all formalities.
>
> The Tehsildar, Pallahara is directed to take necessary step for cancellation of the resident certificate of O.P.No.2 issued in her favour under due formalities. Informed all concerned."

3. It is obvious from the impugned order that petitioner's engagement as A.W.W. was cancelled on the ground that she is not a resident of the operational area of A.W.C. though she had obtained residential certificate as a resident of Barakalpal.

4. Though in assailing the impugned judgment learned counsel for the petitioner raised contentions against finding of fact recorded by the Sub-

Collector to the effect that the petitioner is not a resident within the operational area of the A.W.C., it is not found appropriate to enter into the factual controversy in view of another contention relating to the vital question of jurisdiction of Sub-Collector in passing the impugned order.

5. It was contended that during the period of selection of the petitioner as A.W.W. guidelines dated 2.5.2007 issued by the Government of Orissa was in force. As per the guidelines 15 days time was to be given to the candidates to submit applications for engagement. On the16th day applications and documents were required to be verified upon which another 7 days time was to be given for filing of objection, if any, by the community on the issue of nativity, educational qualification and caste certificate submitted by the candidates. On expiry of the period of filing objection, Selection Committee was given 7 days time to verify the objections after which Selection Committee was required to notify names of candidates selected on the same day.

6. Clause (g) of the guidelines provided that in case the Chairman of the Selection Committee does not finalize the list within the stipulated time, the same will be put up to Sub-Collector for approval in case of rural projects. Clause (i) of the guidelines provided that the Collector shall be the appellate authority in case Sub-Collector/ADM have approved the selection.

7. Upon reference to the above provisions in the guidelines and report of the Enquiry Committee at Annexure-3 it was contended by the learned counsel for the petitioner that in the present case it was the Sub-Collector who had approved the selection of the petitioner as A.W.W. Therefore, Sub-Collector could not have entertained the appeal filed by the opposite party no.4. The impugned order has been passed in contravention of the guidelines. It was further contended that, guidelines apart, the Sub-Collector having himself participated in the decision making process of the selection, entertainment of appeal by him renders the impugned order tainted with bias.

8. In course of hearing learned counsel for the State produced the file relating to the selection of A.W.W. which also indicated that the enquiry report on the objection against the petitioner was submitted to the Sub-Collector, Pallahara for information and necessary action.

9. Neither learned counsel for the State appearing for the opposite parties 1 to 3 nor learned counsel appearing for the opposite party no.4 disputed the factual contention that Sub-Collector had approved petitioner's selection as A.W.W.

10. Learned counsel for the opposite party no.4 submitted that no bias can be attributed to the Sub-Collector. Though he had approved selection of the petitioner, he has passed a reasoned order concluding that the petitioner does not belong to the operational area of A.W.C. though she had managed to obtain certificate indicating that she belongs to village Barakalapal.

11. Matters relating to recruitment of A.W.W. is not covered by any statute. Engagements are made pursuant to the scheme framed by the Central Government. The State Government have issued guidelines from time to time and prescribed procedures for selection of A.W.W. Guidelines dated 2.5.2007 provided that when selection of A.W.W. has been approved by the Sub-Collector, it is the Collector who shall be the competent authority to hear appeal against selection.

12. It is well settled principle that if a thing is required to be done in a particular way it should be done in that way or it should not be done at all. Other methods of performance are impliedly or necessarily forbidden.

13. Moreover, two well settled principles of the doctrine of bias that applies equally to judicial as well as quasi-judicial tribunals are, (1) that no man shall be a judge in his own cause and that (2) justice should not merely be done but must also appear to be done. The deciding authority must be impartial and without bias. A predisposition to decide for or against one party without proper regard to the true merits of the dispute is bias. In this context, decisions of the Hon'ble Apex Court in **Gullapalli Nageswara Rao etc. –v- The State of Andhra Pradesh & others**: 1960-I (S.C.R.) 580; **Rattan Lal Sharma –v- Managing Committee, Dr.Hari Ram(Co-Education) Higher Secondary School and others**: (1993) 4 SCC 10; **J.Mohapatra and Co. and another –v- State of Orissa and another**: (1984) 4 SCC 103 and **Mineral Development Ltd. –v- The State of Bihar and another** : AIR 1960 S.C.468 may be referred to.

14. Therefore, the Sub-Collector had no authority to entertain the appeal in which selection of the petitioner as A.W.W. was assailed. Exercise of the authority by the Sub-Collector is in contravention of the guidelines and against the principles of natural justice. The impugned order is not sustainable.

15. Consequently, the writ petition is allowed and the impugned order is quashed. Opposite party no.4 is at liberty to file appeal before the competent authority in which event the appellate authority shall dispose of the appeal on merit after giving opportunities to the parties of being heard without being influenced by any observation made by the Sub-Collector in the impugned order.

Writ petition allowed.

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B.K.PATEL, J.

O.J.C. NO.5637 OF 2002 (Decided on 2.11.2010)

JHULLA SAHOO (DEAD) HIS LEGAL HEIRS SABITRI SAHOO & ORS. …….. Petitioners.

.Vrs.

MINATIBALA BEHERA & ORS. …….. Opp.Parties.

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

Amendment of written statement when the suit was remanded for fresh disposal by the lower appellate Court – Defendant No.1 filed amendment petition withdrawing admissions made in his written statement – Application rejected – Revision filed but dismissed –Hence the writ petition.

Once the pleadings contain an admission infavour of an adversary by amendment such admission can not be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of such adversary and which would cause him irretrievable prejudice – Held, there is no tenable ground to interfere with the impugned order rejecting the proposed amendment.

(Para18 & 25)

Case laws Referred to:-

1.(1976)4 SCC 320 : (M/s. Modi Spinning & Weaving Mills Co.Ltd. & Anr.-V- M/s.Ladha Ram & Co.)
2.(1996) 11 SCC 690 : (Shrimoni Gurdwara Committee -V- Jaswant Singh).
3.AIR 1998 SC 618 : (Heeralal -V- Kalyan Mal & Ors.).
4.(2008) 7 SCC 85 : (Gautam Sarup -V- Leela Jetly & Ors.).
5.(2009) 10 SCC 84 : (Revajeetu Builders & Developers -V- Narayanaswamy & Sons & Ors.).
6.2009(3) Supreme 460 : (Vimal Chand Ghevarchand Jain & Ors.-V-Ramakant Eknath Jajoo).
7.AIR 2007 SC 1663 : (Usha Balashaheb Swami & Ors.-V- Kiran Appaso Swami & Ors.).
8.2006 (II) OLR SC 561 : (Rajesh Kumar Aggarwal & Ors.-V- K.K.Modi & Ors.).
9.AIR 2006 SC 2832 : (Baldev Singh & Ors.-V- Manohar Singh & Anr.).
10.56 (1983) CLT 400 : (Hundari Bewa -V- Keluni Dei & Ors.).
11.AIR 1983 SC 462 : (Panchdeo Narain Srivastava -V- Km. Jyoti Sahay

& Anr.).
12.AIR 1974 Orissa 36 : (Gobinda Sahoo -V- Ram Chandra Nanda & Anr.).

For Petitioner - M/s. P.K.Rath, R.C.Jena, P.K.Satpathy, R.N.Parija, & A.K.Rout.
For Opp.Parties - M/s. A.Mohanty, J.P.Patra, S.P.Nayak, M.K.Rout, H.K.Tripathy, J.Sahu & J.K.Samantaray M/s. M.M.Basu, D.Dey.

B.K. PATEL, J. In this writ petition, petitioners have assailed the legality of order dated18.4.2002 passed by Additional District Judge, Fast Track Court No.2, Bhubaneswar in Civil Revision Nos.26 of 2001 (12 of 2002) by which order dated 9.7.2001 passed by learned Civil Judge (Senior Division), Bhubaneswar in O.S. No.190 of 1984-I rejecting petitioner's application under Order 6 Rule 17 read with 151 of the C.P.C. for amendment of written statement was confirmed.

2. Petitioners are legal heirs of defendant no.1 whereas opposite party nos.1 to 3 are legal heirs of the plaintiff and opposite party no.4 is the defendant no.2 in the suit. Government of Orissa in the General Administration Department has been impleaded as defendant no.3.

3. Defendant no.1 being the lessee of the Government in respect of the suit land entered into registered agreement for sale dated 6.1.1973 with the plaintiff for a consideration of Rs.4,800/-. As per the agreement defendant no.1 received advance of Rs.2,900/-, handed over possession of the suit land to the plaintiff and undertook to execute registered sale deed within one year after obtaining requisite permission from the State Government and on receipt of the balance consideration amount. It is also not disputed that defendant no.1 has executed registered tripartite document dated 20.8.1984 with defendant nos.2 and 3 to lease out the suit land in favour of defendant no.2.

4. Plaintiff has filed the suit for specific performance of contract dated 1.6.1973 by directing execution of registered sale deed, for declaration that the tripartite lease deed executed by the defendants is void and for permanent injunction restraining the defendants from interfering with peaceful possession over the suit land. It is asserted that tripartite lease deed executed by the defendants is a sham document which does not convey any right, title or interest in favour of defendant no.2.

In his written statement stand of defendant no.1 is that taking benefit of his simplicity and illiteracy the plaintiff did not incorporate in the agreement dated 61.1973 specific stipulation made by defendant no.1 to the effect that in case balance consideration amount was not paid within six months, the

agreement would be invalid and advance consideration amount paid by the plaintiff would be forfeited. As plaintiff did not pay the balance amount within the stipulated time, the agreement became ineffective. Thereafter, defendant no.1 being in need of money transferred the suit land in favour of defendant no.2 on the strength of tripartite agreement entered into among the defendants.

Defendant no.2 filed written statement supporting the stand of the defendant no.1 making counter claim for a decree to deliver possession of suit land to him.

5. It is pertinent to note that the suit culminated in pronouncement of judgment and decree dated 30.7.1994 and 18.8.1994 and defendant no.2 as well as plaintiff preferred appeals against the said judgment and decree before the learned District Judge, Khurda at Bhubaneswar in T.A. No.1/44 of 1997/94 and 2/48 of 1997/94 respectively. In the common judgment passed on 17.5.1997 learned District Judge, Khurda observed that in the suit material issues, such as whether the plaintiff since the date of contract was continuously ready and willing to perform his part of the contract; whether the defendant no. 2 was a bona fide purchaser for value without notice; whether the defendant no. 2 was dispossessed by the plaintiff while in possession over the suit land; whether the suit was barred by limitation; and whether defendant no. 2 is entitled to the relief of recovery of possession as per his counter-claim were omitted to be framed. No finding was recorded and no evidence was adduced on these issues. Both the appeals were allowed and the suit was remanded for retrial "after framing additional issues strictly on the pleadings of the parties and for considering the counter claim filed by defendant no.2". When the suit was pending for fresh disposal after remand defendant no.1 filed application for amendment under Order 6 Rule 17 read with 151 of the C.P.C. Plaintiff did not file objection against the amendment petition. However, defendant no.2 filed objection.

6. Material amendments sought to his written statement by defendant no.1 are as follows:

(i) Paragraph 7 of the written statement reads:

> "That the allegations of para 3 of the plaint are not wholly correct. As has been stated earlier the plaintiff persuaded this defendant to dispose of the suit property to him, and as per his instruction the prices was settled at Rs.4,800/- and he paid an advance of Rs.2,900/- and the terms and conditions of the agreement were neither read over nor explained to this defendant, with the connivance of his scribe he wrote the agreement in which this defendant has only signed without reading the contents. It was settled between the plaintiff and this defendant that he will arrange to

obtain permission from P & S Department for transfer and if he will not pay the entire balance consideration money within 6 months the agreement will be ineffective and the amount advanced will be forfeited and this defendant will be at liberty to dispose of the land to anybody he likes. Though this defendant was insisting for one month the plaintiff persuaded him to grant him 6 months time as it will take some time to get the permission from P &n S Department as it was a Government lease hold land. In good faith this defendant has not only signed the agreement but also given his signature, in 6 to 7 blank papers as per the instruction of the plaintiff as it would be necessary for getting permission from the P & S Department.

It is mischievously false to say that time was not the essence of the contract, but the transfer of the suit plot. On the other hand time was the essence of the contract and it was agreed as has been stated earlier if within 6 months he will not pay the money the contract will be cancelled and the agreement will be invalid and the money advanced will be forfeited."

Defendant no.1 seeks to delete and substitute the underlined portion by the words "the alleged agreement was written".

(ii) Paragraph 16 of the written statement reads:

"That the allegations of para 13 of the plaint are not correct. The tripartite lease deed executed by the defendant no.1 in favour of defendant no.2 is genuine, legal and valid. As the lesser the Government is a party to the deed the defendant no.2 has acquired valid title over the suit property.

That this defendant has given possession of the suit property to the defendant no.2 on the date of execution of tripartite lease deed. It is not correct that in furtherance of the agreement dt.6.1.73 the plaintiff is in possession of the suit property.

The suit property has not been undervalued and the plaintiff has no right to challenge the same when both the lesser and the lessee agree regarding valuation.

That the documents executed by this defendant in favour of defendant no.2 is legal, valid and binding in the eye of law."

Defendant no.1 seeks to delete the entire paragraph and substitute the same by the following:

"That the facts stated in para-13 of the plaint are not correct. The defendant no.1 has never made any tripartite lease deed in favour of defendant no.1. It is true that no possession has been ever delivered to defendant no.2 and plaintiff also never in possession

over the disputed land in furtherance to the alleged agreement dt.1.6.73. The defendant no.1 is all along in possession over the disputed land."

(iii) Paragraph 17 of the written statement reads:

"That the allegations of para 14 of the plaint are totally false and baseless. The plaintiff has never performed his part of the contract and as per the agreement as he did not fulfill his part of the contract in time so he forfeited his right to enforce the contract after lapse of 13 years of execution of the agreement.

The plaintiff will not suffer any loss if the contract is not fulfilled. As the plaintiff did not fulfill his part of the contract it has long since being lost its effect as per law and this defendant correctly with the permission of the lesser alienated the same in favour of defendant no.2.

Defendant no.1 seeks to delete the underlined portion. And

(iv) Paragraph 19 of the written statement reads:

"That the real fact of the case is that the suit property is a Govt. lease hold property and this defendant was a lessee and the suit plot was leased out to this defendant in the year 1970 by way of a registered lease deed. This defendant was in peaceful possession of the same and he had approved the plan for making construction but due to paucity of funds he could not proceed with the construction and in the meantime the plaintiff persuaded this defendant to transfer the land in his favour and accordingly the price was fixed at Rs.4,800/- and it was settled between the parties that he will pay Rs.2,900/- immediately and the balance he will pay within 6 months failing which the agreement will be invalid and the advance given by him will be forfeited and this defendant will be at liberty to transfer the same to whom so-ever he likes. That the plaintiff is a clever and Mamaltaker man. The defendant is anilliterate man and he knows only how to give his signature. Taking advantage of this the defendant scribed the agreement by his Mohariar, the contents of the agreement were not read over and explained to this defendant and on good faith as per the instruction of the plaintiff this defendant signed on the agreement at places where the plaintiff indicated. The plaintiff also took the signature of this defendant in 6 & 7 blank papers saying that it will be required for obtaining permission from the P & S Deptt. And on good faith this defendant gave the signature. After some days of execution of this agreement the plaintiff came to this defendant and persuaded him to hand over the

original lease deed and the approved plan, so that he will show it in the P & S Department and obtain permission. So this defendant gave those documents to him. This defendant was always insisting the plaintiff for transfer of the land but with some plea or other he was delaying the matter. It was decided at the time of agreement that the plaintiff will arrange the permission of transfer from the P & S Deptt. Though this defendant was always ready to perform his part of the contract but the plaintiff with some ulterior motive did not turn up. So as per the agreement after expiry of 6 months from the date of execution of the agreement became ineffective and the plaintiff forfeited the advanced money which he handed over to this defendant. This defendant was all along in possession of the suit property and he made construction gradually, and while in possession he was urgent need of money so he wanted to sale this property to defendant no.2 for Rs.15,000/-. As it is a lease hold land the defendant no.2 got the permission of transfer and after the permission for transfer was obtained the tripartite lease deed was executed on 1.8.84 and this defendant received the entire consideration of Rs.15,000/- and gave delivery of the possession of the suit property to the defendant no.2 and since then the defendant no.2 is in possession of the same. That the tripartite lease deed by this defendant in favour of defendant no.2 and the Government is legal valid and the defendant no.2 has acquired title.

So under the above circumstances, the plaintiff suit should be dismissed with cost."

Defendant no.1 seeks to delete the entire pleadings regarding real fact of the case and substitute the same by following:

"The defendant no.2 is the adjacent owner of the defendant no.1's plot who has good relation with defendant no.1. As disputed was going on between plaintiff and defendant no.1, the defendant no.2 disguise him as a well wisher of defendant no.1 asked the defendant no.1 that he will settle every thing.

After some days he came to defendant no.1 and asked him to came to the Sub-Registrar Office to make a cancellation deed so that the alleged agreement made in favour of plaintiff will be cancelled.

The defendant no.1 in good faith came to Sub-Registrar Officve on 20.8.1984 with defendant no.2 where the defendant no.2 asked the defendant no.1 to sign on stamp papers written in English. The defendant no.1 is an illiterate person do not know English. Only on good faith on defendant no.2 he signed on those stamp papers.

> Recently he came to know that actually defendant no.2 by making fraud on him taken his signature on tripartite lease deed and claiming the disputed land. Sign upon that deed. The defendant no.1 has never made any lease deed in favour of defendant no.2 and never delivered possession to him. The alleged lease deed written in English never read over and explained to him in Oriya and no consideration has ever given to him by defendant no.2. Neither the plaintiff nor the defendant no.2 is in possession over the disputed land. The defendant no.1 is all along in possession over the disputed land.
>
> So under the above circumstances, the plaintiff is not entitled to the relief of specific performance and the suit is liable to be dismissed with cost."

7. It was not disputed at the Bar, and in fact it was conceded by the learned counsel for the petitioners, that amendment to his pleadings in the written statement sought by the defendant no.1 has the effect of totally wiping out categorical and unambiguous admissions made in favour of defendant no.2.

8. It was strenuously argued by the learned counsel for the petitioners that in his application for amendment the petitioners have explicitly pleaded that defendant no.1 entrusted defendant no.2 with the task of engaging a lawyer on his behalf and instructed him to assail the genuineness of the tripartite agreement in his written statement. However, taking undue advantage of defendant no.1's innocence and illiteracy defendant no.2 got the written statement drafted and signed by defendant no.1 to serve his own interest by practicing fraud. Therefore, even though amendments in the written statement would displace admissions made in favour of defendant no.2, the learned courts below ought to have allowed the application in the interest of justice and for effective adjudication of the dispute among the parties. Placing reliance upon a number of decisions of the Hon'ble Apex Court and this High Court it was argued that there is no legal bar against withdrawal of admissions by way of amendment of pleadings as it is well settled that amendment to pleadings should be liberally allowed, and more so in case of amendment to pleadings in written statement since procedural obstacles ought not to impede dispensation of justice.

9. In reply, learned counsel appearing for the opposite party no.4 strenuously contended that in his written statement defendant no.1 has admitted regarding voluntary execution of tripartite agreement to transfer the suit land in favour of defendant no.2. By way of amendment at a belated stage, that too after the matter was remanded for fresh disposal by the Appellate Court, defendant no.1 seeks amendment of written statement on

the ground of fraud without pleading particulars thereof. New pleadings seek to substitute candid admissions by blatant denial. Pleadings in the written statement and proposed amendments are mutually destructive and inconsistent. None of the decisions relied upon by the learned counsel for the petitioners supports the proposition that admission made in the pleadings can be allowed to be completely withdrawn in exercise of power under Order 6 Rule 17 of the C.P.C. Placing reliance on a number of decisions of the Hon'ble Supreme Court and this Court it was argued that the learned courts below rightly rejected the application for amendment.

10. It is obvious that defendant no.1 does not deny to have filed the written statement. Counter claim made by defendant no.2 gets support from the admissions made by the defendant no.1 in the written statement. Suit was filed in the year 1984. Amendment petition withdrawing admissions made in the written statement has been filed in the year 2001 by defendant no.1 not only after full length trial culminating in passing of judgment and decree in the year 1984 but also after the matter was remanded in the year 1997 for fresh trial by the first appellate court.

11. It is evident that by way of amendment defendant no.1 is seeking to displace defendant no.2 completely from the admissions made in his favour in his written statement.

12. It has been held by a Bench of three Judges of the Hon'ble Supreme Court in **M/s. Modi Spinning & Weaving Mills Co. Ltd. and another –vrs.- M/s. Ladha Ram & Co**.: (1976) 4 SCC 320:

> "10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paragraphs 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial Court."

13. In **Shrimoni Gurdwara Committee –vrs.- Jaswant Singh** : (1996) 11 SCC 690, it has been held:

> "It is settled law that the defendant can raise mutually inconsistent pleadings in the written statement but it is for the court to consider whether the case can be properly considered in deciding the issue. But in this case the plea in the written statement is mutually destructive. In the first written statement, they have denied the title of himself. Therefore, they cannot set up a title in him and plead gift made by in favour of the petitioner-Committee. Under

these circumstances, the High Court has rightly refused to grant the plaint. Moreover, there is no explanation given as to why they came forward with this plea at the belated stage after the parties had adduced the evidence and the matter was to be argued. Under these circumstances, there is no error of jurisdiction or material irregularity in the exercise of jurisdiction warranting inereference."

14. In **Heeralal –vrs.-Kalyan Mal and others**: AIR 1998 SC 618, it has been held that decision of the Bench of three Judges in **M/s. Modi Spinning & Weaving Mills Co. Ltd. and another –vrs.- M/s. Ladha Ram & Co.** (supra) is a clear authority for the proposition that once the written statement contains an admission in favour of the plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn is such withdrawal would amount to totally displacing the case of the plaintiff and which would cause him irretrievable prejudice. While granting amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff's case and cause him irretrievable prejudice.

15. In **Gautam Sarup –vrs.- Leela Jetly and others**: (2008) 7 SCC 85, it has been pointed out that "an admission made in a pleading is not to be treated in the same manner as an admission in a document. An admission made by a party to the lis is admissible against him proprio vigore". Upon reference to a number of decisions it was further held in **Gautam Sarup – vrs.- Leela Jetly and others** (supra):

"What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other."

16. In **Revajeetu Builders and Developers –vrs.- Narayanaswamy and Sons and others**: (2009) 10 SCC 84, it was observed as follows:

"21. The respondents relied on the decision of this Court in *Usha Balashaheb Swami v. Kiran Appaso Swami* wherein the Court has held that by way of amendment, admission made in pleadings and particularly in the plaint cannot be sought to be omitted or got rid of. The Court further observed that a prayer for amendment of the plaint stands on a different footing. The relevant observations of the Court are set out as under :

"19……..a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so

as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be onjectionable.

20. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case."

22. The learned counsel for the respondents further relied on the decision in *Heeralal v. Kalyan Mal* wherein the Court proceeded on the basis that the earlier admissions of the defendant cannot be allowed to be withdrawn. The Court examined the facts and held that the defendant cannot be permitted to withdraw any admission already made.

23. The respondents have also relied on the decision in *Gautam Sarup v. Leela Jetly*. In the said case, it was held that by amendment the admission in the original pleadings cannot be sought to be got rid of.

24. In *Modi Spg. & Wvg. Mills Co. Ltd v. Ladha Ram & Co.* the trial court while rejecting an application under Order Rule 17 said that the repudiation of clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law. The High Court in revision affirmed the judgment of the trial court and held that by means of amendment the defendant wanted to introduce an entirely different case and if such amendments were permitted it would prejudice the other side."

At paragraph 41 of the decision it was pointed out:

"….The test as to whether the amendment should be allowed, is whether or not the defendants can amend without placing the plaintiff in such a position that he cannot be recouped, as it were, by any allowance of costs, or otherwise."

17. In another decision of the Hon'ble Supreme Court in **Vimal Chand Ghevarchand Jain & Ors. –vrs.- Ramakant Eknath Jajoo**: 2009(3) Supreme 460 the principle has been reiterated. It has been held:

"…… Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise

> alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him proprio vigore. [(See Ranganayakamma & Anr. V. K.S. Prakash (D) By Lrs. & Ors. [2008 (9) SCALE 144]"

18. Thus it is now well settled that even though in certain cases, under the facts and circumstances, admission made by the parties may be allowed to be withdrawn or may be allowed to be explained away by way of amendment, the principle is that once the pleadings contain an admission in favour of adversary, by amendment such admission cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the case of such adversary and which would cause him irretrievable prejudice. The test as to whether the amendment should be allowed is whether or not such amendment would place the other side in such a position that he cannot be recouped by any allowance of costs or otherwise. That being the position of law it is difficult to appreciate how the decisions on which strong reliance is placed by the learned counsel for the petitioners are of any assistance to him.

19. In **Usha Balashaheb Swami and others vs. Kiran Appaso Swami and others**: AIR 2007 SC 1663, relied upon by the learned counsel for the petitioners, it was observed that the proposed amendment did not amount to withdrawal of admission made in the written statement. At paragraph 26 of the decision it was pointed out:

> " Therefore, it was neither a case of withdrawal of admission made in the written statement nor a case of washing out admission made by the appellant in the written statement. As noted herein earlier, by such amendment the appellant had kept the admissions intact and only added certain additional facts which need to be proved by the plaintiff and defendant Nos. 2 to 8 to get shares in the suit properties alleged to have been admitted by the appellants in their written statement. Accordingly, we are of the view that the appellants are only raising an issue regarding the legitimacy of plaintiff and defendant Nos. 3 to 7 to inherit the suit properties as heirs and legal representatives of the deceased Appasao".

20. In **Rajesh Kumar Aggarwal and others vs. K.K.Modi and others**: 2006 (II) OLR SC 561, it was pointed out that a reading of the entire plaint and the prayer made thereunder and the proposed amendment would go to

show that there was no question of any inconsistency with the case originally made out in the plaint. In such circumstances, amendment was allowed.

21. In **Baldev Singh and others vs. Manohar Singh and another**: AIR 2006 SC 2832 also it was pointed out that the amendment simply proposed an additional plea without having the effect of withdrawal of admission. At paragraph 13 of the decision it was pointed out:

> "In view of this decision, it can be said that the plea of limitation can be allowed to be raised as an additional defence by the appellants. Accordingly, we do not find any reason as to why amendment of the written statement introducing an additional plea of limitation could not be allowed. The next question is that if such amendment is allowed, certain admissions made would be allowed to be taken away which are not permissible in law. We have already examined the statements made in the written statement as well as the amendment sought for in the application for amendment of the written statement. After going through the written statement and the application for amendment of the written statement in depth, we do not find any such admission of the appellants which was sought to be withdrawn by way of amending the written statement."

22. In **Hundari Bewa vs. Keluni Dei and others** : 56 (1983) CLT 400 amendment was proposed to the written statement with regard to the time of partition with reference to plaintiff's father's brother's death on the ground that original pleading was made by inadvertence or erroneously. On the facts and circumstances of the case it was held that as the admission was made by inadvertence or erroneously and there was no mala fide on the part of the applicant, it would be denial of justice not to permit the party to withdraw the admission or correct the mistake.

23. It was also rightly contended by the learned counsel for the opposite party no. 4 that in **Panchdeo Narain Srivastava vs. Km. Jyoti Sahay and another**: AIR 1983 SC 462, it has not been laid down that a party may be allowed to amend pleadings to withdraw or explain away admission without considering the nature and extent of prejudice which would be caused on the other side. Rather, in the said decision the Hon'ble Supreme Court did not find any tenable reason on the part of the High Court to interfere with the order allowing amendment of the plaint passed by the trial court.

24. Decision of this Court in **Gobinda Sahoo vs. Ram Chandra Nanda and another**: AIR 1974 Orissa 36 also relates to amendment in order to remove admission made by inadvertence or erroneously in ignorance of law due to the fault of the advocate.

25. While remanding the suit for retrial the learned first appellate court has directed fresh disposal clearly indicating the additional issues to be framed strictly on the pleadings of the parties and for considering the counter claim made by defendant no. 2. The learned revisional court has rightly refused to interfere with the order passed by the learned trial court rejecting the amendment petition by observing that defendant no. 2 cannot be allowed to withdraw the admission by introducing a new story and bringing a new cause of action at such an inordinately belated stage without any prudent explanation. There appears no tenable ground to interfere with the impugned orders rejecting the proposed amendment and proceeding with the suit in accordance with specific directions made by the first appellate court while remanding the suit for retrial.

Therefore, considering the facts and circumstances of the case, nature of pleadings by the parties and legal principles referred to above, the writ petition is dismissed.

Writ petition dismissed.