2013 (I) ILR - CUT- 180

V. GOPALA GOWDA, CJ.

ARBP NO. 61/2010 & 26/2011 (Dt.28.09.2012)

M/S. MONNET ISPAT & ENERGY LTD. & ANR. ……. Petitioner

.Vrs.

M/S. ORISSA MANGANESE & MINERAL PVT. LTD. & ANR. …….Opp.Parties

ARBITRATION & CONCILIATION ACT, 1996 –Ss.11(6)(c), 14(1)(a) & 14(2).

Appointment of substitute Arbitrator – Petitioners prayed to terminate the Arbitrator (O.P.2) invoking Section 14(1)(a) of the Act on the ground that he became defacto and unable to perform his functions and to appoint another Arbitrator in his place U/s.11 (6) (c) of the Act – Allegations are seriously disputed by O.P.2.

Held, since disputed question can not be decided by the Hon'ble Chief Justice in exercise of statutory power U/s.11 (6) (c) of the Act the petitions are not maintainable before this Court – The petitioners may approach the competent Civil Court U/s.14 (2) of the Act for termination of the mandate of the Arbitrator. (Para 43,44)

ARBITRATION & CONCILIATION ACT,1996 – Ss.2(e),14(2).

"Court" – Meaning of – The word "Court" referred in Section 14(2) and the definition of "Court" U/s.2(e) means the Principal Civil Court of original jurisdiction in a district which includes the High Court as an appellate Court. (Para 41,42)

Case laws Referred to:-

1.2007(Suppl)Arb.LR.7(SC) : (Nimet Resources Inc. & Anr.-V- Essar Steel Ltd.)

2.AIR 2011 AP 136 : (M/s. V.V.S. Constructions, Engineering Contractors, Visakhapatnam-V- M/s.IVRCL Infrastructure & Projects Ltd., Hyderabad)

3.2011(4)Arb. LR 160(Allahabad) : (Rakesh Jain-V- WellwonBuilders(India) Pvt.Ltd.)

4.AIR 2006 SC 450 (P-5,7,8) : (M/s. S.B.P. & Co.-V- M/s.Patel Engineering Ltd.&Anr.)
4.(2000)8 SCC 151 (P-6 & 19): (Datar Switchgears Ltd.-V-Tata Finance Ltd. & Anr.)
5.2008(1) Raj 682(Del.) : (Indo Pacific Aviation Pvt. Ltd.-V- Pawan Hans Helicopters Ltd.)
6.2006(4) Arb. LR.1 (SC) : (National Highway Authorities of India-V- Bhumihiways DDB Ltd.)
7.(2010) 2 SCC 385 : (NBCC Ltd.-V- J.G. Engineering Private Ltd.)

For Petitioner - M/s. S.Agarwal, R.R.Swain, S.Mohanty & S. Pattnaik.

For Opp.Parties- M/s. R.K.Rath (Sr. Adv.), S.P.Sarangi, P.P.Mohanty, D.K.Dora & P.K.Das.

For Petitioner - M/s. S.Mohanty, S.Patnaik, P.K.Muduli, Ms. Suruchi Agarwal.

For Opp.Parties - M/s. R.K.Rath(Sr.Adv.),D.K.Das (for O.P.1)
P.K.Das.
M/s. Y. Mohanty (Sr.Adv.)
P.K.Biswal, S.K.Behura (for O.P.2)

V.GOPALA GOWDA, C.J. The facts of both the cases are common and grounds taken are similar. Therefore, both the petitions are heard together and disposed of by this common judgment.

2. Both the petitions are filed under Sections 11(6)(c) read with 14 and 15 of the Arbitration & Conciliation Act, 1996 (for short, "the Act, 1996") for appointment of an arbitrator in place of Justice P.K. Mohanti as he is unable to perform the functions of an Arbitrator urging various facts and legal contentions.

2. Necessary brief facts stated in both the petitions are as follows.

3. It is stated that the parties herein entered into an agreement dated 6.3.2006, wherein it was agreed that the respondent would sell the entire quantity of manganese ore produced from the lease hold area exclusively to the petitioners-company and the petitioners in turn agreed to purchase from the respondent the entire quantity of all grades of manganese ore in terms of the agreement.

4. It is stated that since dispute arose between the parties, the parties have appointed an Arbitral Tribunal in terms of Clause 18 of the said agreement comprising of Justice P.K. Mohanti the Nominee Arbitrator of the petitioners, Shri Himadri Mohapatra Nominee Arbitrator of the respondent. In view of Section 10 of the Act, 1996, which provides for uneven number of Arbitrators, an application was filed for appointment of the Presiding Arbitrator. Consequently, the Presiding Arbitrator Justice D.P.Mohapatra was appointed as Presiding Arbitrator. Justice P.K. Mohanti, the Nominee Arbitrator of the petitioners has been impleaded as opp. party no.2 in both the petitions.

5. It is stated that in view of physical as well as mental state of Shri P.K. Mohanti, the Nominee Arbitrator of the Petitioners who is unable to perform his functions, the petitioners approached him on 24.5.2009 to resign from the Arbitratl Tribunal. The said Arbitrator did not accede to the request of the petitioners. Once again on 13.11.2010 learned counsel of the petitioners Ms. Suruchi Aggarwal upon instructions personally requested Justice Mohanti to resign as he was incapable of performing his functions. It was pointed out that the said Arbitrator is not able to actively and effectively participate in the arbitration proceedings and is unable to apply his mind or even does not contribute in any manner whatsoever due to his old age and debility. Despite his presence at the sittings of the Tribunal, due to his inability to read properly the subject matter being discussed/argued at the proceedings or to follow proceedings when arguments take place, the Tribunal is in effect functioning as Two-Member Tribunal.

6. It is stated that the proceedings have not progressed in more than two years as the said Member of the Tribunal holds up the proceedings not being able to cope up with the pace of arguments or even the marking of documents. One person is required to open the pages of the documents and mark them for the said Arbitrator as he is not able to understand or even follow what has been filed or marked or exhibited. There have been instances when the Tribunal had to disperse and consequently the proceedings were called to a halt for the day, when the said Arbitrator had got exhausted after an hour or so of the proceedings. There have also been instances when the proceedings had to be adjourned when he suddenly fell ill. The petitioners and their counsel had to travel to Bhubaneswar from Delhi on the said date. Further, on one occasion the said Arbitrator had fallen ill during the proceedings and the proceedings had to be halted. A copy of the said proceedings dated 9.9.2009 is produced marked as Annexure-2.

7. It is stated that the hearings take place at the residence of the Nominee Arbitrator of the petitioners due to the immobility of the said Nominee Arbitrator. He is not able to take any decision on legal matters and does not even appreciate facts and law due to old age. While mater was at the stage of evidence and cross-examination of one of the witnesses of the petitioners was listed for the next date of hearing, i.e., 8.1.2011, the said Arbitrator was unable to contribute in the cross-examination, which is a very crucial stage of the proceedings. Further, the proceedings are getting delayed due to his inability to pick up matters and understand them.

8. It is stated that a Two-Member Tribunal is not permissible under the Act, 1996. Due to the said Arbitrator, who is unable to apply his mind at all being hard of hearing due to old age, the Tribunal is forced to function as such.

9. It is also stated that the petitioners have also informed the presiding Arbitrator as well as the third Arbitrator that a request has been made to the said Arbitrator to resign due to his inability to perform. Hence, the petitioners in both the petitions have requested for termination of the Nominee Arbitrator of the petitioners and to appoint another Arbitrator in his place to continue the arbitral proceedings in both the cases as the dispute between the parties could not be resolved expeditiously, which is the object and intendment of the A & C Act.

10. These petitions are seriously contested by learned Senior Counsel Mr R.K. Rath appearing on behalf of opp. party no.1 without filing any counter on the jurisdictional issue. He contended that this Court has no jurisdiction to entertain the petitions filed under Sections 11(6) (b) read with Sections 14 and 15 of the Act, 1996 by placing reliance upon the judgment of the Supreme Court in the case of ***Nimet Resources Inc. and Anr. V. EssarSteel Ltd***., reported in *2007 (Suppl) Arb. LR 7 (SC)*; the judgment of the Andhra Pradesh High Court in the case of ***M/s. V.V.S. Constructions, Engineering Contractors, Visakhapatnam v. M/s. IVRCL Infrastructure & Projects Ltd., Hyderabad****,* reported in *AIR 2011 AP 136,* and the decision in the case of ***Rakesh Jain v. Wellwon Builders (India) Private Ltd***. reported in *2011 (4) Arb. L.R. 160 (Allahabad).*

11. With reference to Sections 14(2) and 15 read with Section 11(6) (c) of the Act, 1996 the definition of "Court", which is occurred in Section 14(2) means the principal Civil Court having original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction having jurisdiction to decide the question forming the subject matter of

arbitration having jurisdiction as defined under Section 2(c) of the Act, if the same has been the subject matter of suit. Clauses (a) and (b) of sub-section (1) of Section 14 provide that the mandate of an arbitrator shall terminate, if he becomes *de jure or de facto* unable to perform his functions or for other reasons fails to act without undue delay; and he withdraws from his office or the parties agree to the termination of his mandate. Sub-section (2) of Section 14 provides that if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to Court to decide on the termination of the mandate. In this regard, learned Senior Counsel placed reliance upon the following two judgments in the case of ***M/s. S.B.P. & Co. v. M/s. Patel Engineering Ltd. and Anr.,*** reported in *AIR 2006 SC 450 (paras-5,7 and 8)*, and in the case of ***Datar Switchgears Ltd. v. Tata Finance Ltd. and another****, (2000) 8 SCC 151 (paras-6 and 19)*.

12. Mr Rath further contended that in the Arbitration proceedings six hundred and odd questions have been recorded by him and counter affidavit has also been filed by him traversing the averments made in the arbitration petitions. Therefore, he has prayed for dismissal of the petitions holding that they are not maintainable before this Court.

13. During pendency of the proceedings in both the Arbitration Cases Misc. Case No.25 of 2011 and 26 of 2011 were filed under Chapter VI Rule 27 of the High Court of Orissa Rules to implead the Nominee Arbitrator as opp. party no.2 as he is proper and necessary party to the proceedings. The said Misc. Cases were allowed and the Arbitrator Justice P.K. Mohanti (Retd.) has been impleded as opp. party no.2. Opp. Party no.2-Justice Mohanty has filed his counter affidavit through his lawyer, which is at Flag-D. The gist of the said affidavit is stated briefly as hereunder.

14. He has raised the plea of jurisdiction of this Court and requested not to entertain the petitions filed by the petitioners placing strong reliance upon Section 11(6)(c) read with Sections 14 and 15 of the A & C Act.

15. Mr Y. Mohanty learned Senior Counsel appearing on behalf of opp. party no.2 contended that the aforesaid provisions of the Act, 1996 certainly do not include the Chief Justice of this High Court because the said Court does not exercise any ordinary civil original jurisdiction. Hence, he submitted that these petitions are not entertainable in law by the Chief Justice of this Court.

16. In so far as allegations made against opp. no.2 are concerned, at para-3.1 of the affidavit it is stated by him that the allegations are vague and

indefinite regarding the alleged incapacity of opp. party no.2 to perform his duty as an Arbitrator not being actively and effectively participating in the arbitration proceeding and the allegation of inability to apply his mind or even to contribute to the Arbitration proceedings and not able to cope up with the pace of argument and other such allegations made in the both the petitions are vehemently denied as false. Having so denied he stated that there is no iota of truth in the averment that opp. party no.2 has either become *de facto or de jure* unable to perform his functions as such as an Arbitrator. He further submitted that as a matter of fact there is not even whisper by their pleadings that opp. party no.2 has become legally either incapacitated or unable to perform his functions as an Arbitrator by operation of law or by an order of the competent court of law.

17. It is stated at para-3.2 of the said affidavit that the allegations of categorized and catalogued by the petitioners are by no means pleadings to establish a *de facto* inability or incapacity of opp. party no.2 to perform his functions as such as an Arbitrator. The opp. party no.2 not only signed all the day to day orders passed in ARBP No.2/2008 but also has signed some other orders on some specific issues simultaneously with the other two Arbitrators, contributing to it and in fact had always corrected the draft orders as and when necessary before procurement of the said orders because the Arbitral Tribunal in this case is comprised of three members including the Presiding Arbitrator, who is a retired Jude of the Supreme Court of India. When the performance of the functions of opp. party no.2 is so long at par with the other two Arbitrators who has contributed equally to the preparation of all orders passed by them such orders being consensual and unanimous, it is frivolous to characterize that opp. party no.2 has become *de facto* unable to perform his functions. On record, when the other two Arbitrators have not contributed anything more than what this opp. party no.2 has contributed in the Arbitration proceedings, the allegations catalogued by the petitioners have to be treated as canards and malicious because if a word out of those allegations is believed, then the other two Arbitrators will be deemed to have become *de facto* unable to perform their functions.

18. It is stated at paragraph-3.3 of the said affidavit that the yardstick which is fulfilled by the other two Arbitrators to escape the allegations of the petitioners have also been fully met or fulfilled by opp. party no.2. So the allegations of the petitioners are denied untrue and incorrect.

19. There is also no pleading in these petitions to claim relief under Section 14(1)(a) to justify that for other reasons opp. party no.2 failed to act

without undue delay. There is not a single syllabus by way of pleadings in this petition which will indicate that this Arbitrator failed to act without undue delay and therefore his mandate was liable to be terminated.

20. It is further stated that all the day to day orders passed in the proceedings on a specific issue have been passed by all the Arbitrators on the same day because all the orders are consensual and unanimous in nature. Therefore, opp. party no.2 has not lacked in the matter of expedition in discharge of his duties when compared to the other two Arbitrators. It is therefore stated that these petitions under Section 14(2) of the Act, 1996 are totally devoid of all the contingencies and eventualities mentioned under Section 14(1)(a) of the Act,1996 and the present petitions are not entitled to be entertained for want of pleadings and proof in relation to Section 14(1)(a) of the A & C Act.

21. It is further stated that the expectation of the petitioners from opp. party no.2, if their allegations are of any indications, is not concomitant with the neutrality or impartiality, which are obvious, attributes an Arbitrator while conducting a proceeding, even though he might have been nominated by a particular party.

22. Strong reliance is placed upon sub-section (1) of Section 15 of the Act, 1996, which contemplates provisions for termination of the mandate of an Arbitrator and substitution of the said Arbitrator, in the circumstances referred to in Sections 13 & 14 besides Section 15(1)(a) and (b). Further, reliance is also placed upon sub-section (2) of Section 15, which provides that the rules that are applicable for appointment of the Arbitrator being replaced shall govern the appointment of a substitute Arbitrator as and when the mandate of the Arbitrator being replaced.

23. It is stated that sub-sections (3) and (4) of Section 15 have no application or relevance to the purported controversy raised in this petitions at this stage inasmuch as mandate of the Nominee Arbitrator is yet to be terminated.

24. It is stated that Clause 24 of the agreement dated 6.3.2006 provides for Arbitration route to be the only mode and manner for resolution of disputes arising out of the said agreement dated 6.3.2006 and also the mode and manner for constitution of an Arbitral Tribunal for the said purpose. In other words, Clause 24 provides the rules that are applicable to the appointment of the Arbitrator.

25. It is stated that Section 11(6)(c) of the Act, 1996 clearly provides that the Chief Justice of this High Court is not vested with power or authority to appoint an Arbitrator in place of the Arbitrator sought to be replaced as has been fraudulently and mischievously prayed for, the reason being that such an authority or power is vested in this case on the petitioners in view of Section 15(2) so also Section 11(6)(c) of the Act, 1996. Further, Section 11(6)(c) only enables a party to request the Chief Justice or any person or institution designated by him to take necessary measures unless the agreement on the appointment procedure provided other means for securing the appointment which is an integral part of the said Section 11(6)(c) and that provision when read with Section 15(2) of the Act,1996 which lays down that the rules that are applicable to appointment of the Arbitrator sought to be replaced shall also be the rule for appointment of a substitute Arbitrator as and when the mandate of an Arbitrator is terminated, which makes it abundantly clear that the Chief Justice has no role to play in these cases.

26. Learned Senior Counsel Mr Mohanty in support of his contention placed reliance upon the decisions in the case of ***Indo Pacific Aviation Pvt. Ltd. v. Pawan Hans Helicopters Ltd***. reported in *2008 (1) Raj 682 (Del)*, wherein it is held as hereunder:

> "before there could be a failure to act or to failure to perform as required under clauses (a) and (c) of Sub-section (6) of Section 11 of the said Act, it must be shown that the Arbitration Clause was invoked by one party. If, upon such invocation, the Respondent failed to act as per the agreed procedure or the Chairman-Cum-Managing Director failed to nominate a person to act as sole Arbitrator, then the power u/s 11(6) could be exercised, not otherwise. A letter raising the claim with a threat to initiate appropriate legal proceeding does not amount to invocation of the Arbitration Clause. There was no request from the petitioner to the respondent in term of the Arbitration clause of the Agreement, calling upon the question of the respondent failing to act as per the agreed procedure."

27. Further, the Apex Court in the case of ***National Highway Authorities of India v. Bhumihiways DDB Ltd***., *2006 (4) Arb.LR. 1 (SC),* has held as hereunder:

> "The relief claimed by invoking Section 11(6) is wholly erroneous when prior to filing of the petition, the respondent only sought a

clarification from the Indian Road Congress and without making a reference to them, immediately filed the petition u/s 11(6) on the purported ground that the Indian Road Congress has failed to make the appointment within the stipulated time. In the instant case, after resignation of the appointed Arbitrator, the process of appointment has restarted as per clause 15(2) of the Act. However, the concerned Institution, i.e., Indian Road Congress being restrained by a High Court from making the appointment, there was no failure on the part of the concerned institution so as to justify invocation of Section 11(6) of the Act."

28. With reference to the meeting with the learned counsel Ms Suruchi Aggarwal on 13.11.2010, opp. party no.2 says that she does remember correctly. Further, it is stated that if opp. party no.2 was incapable to perform his functions as an Arbitrator, as alleged in paragraph-5 of ARBP No.26 of 2011, it was expected of the petitioners or learned counsel Ms Suruchi Aggarwal to have brought the said fact to the notice of the other two Arbitrators much prior to 13.11.2010, if actually Ms Aggarwal had met opp. party no.2 on 13.11.2010.

29. It is further stated that the Arbitral Tribunal in ARBP No.2/2008 conducted proceedings on 13.11.2010 as well as on 11.12.2010. If Ms Aggarwal, as per instructions, requested opp. party no.2 to resign from the Arbitral Tribunal for whatever reason, it may be, she could have disclosed to the Tribunal in presence of the other two Arbitrators as well as the lawyers for the opp. parties. She has not pleaded to have so done nor she has pleaded to have informed the Presiding Arbitrator and the 3rd Arbitrator about the so called request purportedly made to opp. party.

30. Further, opp. party no.2 has clarified that neither the Presiding Arbitrator nor the 3rd Arbitrator have spoken or enquired from him if actually Ms Suruchi Aggarwal ever made such request to this dependent as has been stated in Para-5 of the petition (ARBP No.26/2011). Therefore, the allegations of the petitioners including its Advocate Ms Suruchi Aggarwal should be discarded as false and frivolous.

31. Further, the allegations made at paragraph-6 of the petition that there have been instances when the Tribunal had to disperse and consequently proceedings were halted for the day when opp. party no.2 got exhausted after an hour or so of the commencement of the proceedings and that there have been instances when proceedings had to be adjourned

when opp. party no.2 suddenly fell ill are all false, frivolous and cantankerous allegations and there is no proof to the said effect.

32. Insofar as Annexure-2 to this petition is concerned, it may be stated that the said document merely indicates that the proceedings were deferred for unavoidable reasons. It does not indicate that the proceedings of that day were adjourned because of the illness of opp. party no.2.

33. It is stated that the allegations that on one occasion opp. party no.2 fell ill during the proceedings for which the proceedings had to be abandoned, is a mere concoction because Annexure-2, which is filed in support of the aforesaid outrageously false statement, will go to show that the proceedings on 9.9.2009 was adjourned for unavoidable reasons. As a matter of fact, none of the Arbitrators including opp. party no.2 appears to have not been paid any fees for that date (9.9.2009), which indicates that the parties were intimated in advance of such a contingency and, despite that, Ms Suruchi Aggarwal chose to come as it was entirely her choice. Therefore, the counsel appearing for the parties are responsible for procrastination which has taken place in conducting the arbitration proceedings for their blame worthy conduct, yet the same has been foisted on opp. party no.2 even though none of the sittings of the proceedings was ever adjourned on account of opp. party except once in between 2008 and 2011.

34. Further, it is emphatically stated that there was no adjournment on account opp. party no.2 between 2008 and 2011 as has been falsely alleged. An examination of the order sheets of ARBP No.2/2008 on different dates will go to indicate how the petitioners and their counsel applied for time/adjournments at their sweet will.

35. It is stated that the statements made by the petitioners alleging adjournments of the arbitration proceedings on account of opp. party no.2, as stated earlier, are all false and frivolous which will appear from the facts, which are as follows:

"(i) On 8.2.2008 – the claimant filed an application for time for appointment of 3rd Arbitrator.

(ii) On 29.3.2008 – M.R. Mohanty, Advocate for the claimant filed application for time to allow the claimant to file a panel of names for appointment of 3rd Arbitrator.

(iii) On 29.4.2008 – Application filed by the claimant for further time to file statement of claim.

(iv) On 10.5.2008 – Ms. S. Aggarwal, Advocate for the claimant filed an application to defer the present arbitration proceedings and adjourn the matter till decision by the Court on the issue of consent.

(v) On 20.6.2008 – Ms. S. Aggarwal, Advocate for the claimant prayed for a short adjournment to file a copyof the memorandum dated 5.6.2008 together with a letter dated 10.5.2008.

(vi) 12.10.2008 – No claim statement filed by the claimant. Adjourned to 31.10.2008 for the said purpose.

(vii) On 8.12.2008 – claimant's Advocate prayed for grant of time till 19.12.2008 for filing rejoinder, if any.

(viii) On 19.12.2008 – M.R. Mohanty, Advocate for the claimant applied for time to file rejoinder. Time till 1.1.2009 is granted for the said purpose.

(ix) On 2.1.2009 – claimant filed for extension of time for filing rejoinder. The allowed till 4th January, 2009 for the said purpose.

(x) On 8.6.2009 – Advocate for the claimant filed an application for issue a direction to the respondents to produce certain documents.

(xi) On 9.6.2009 – Advocate for claimant filed a period for time to produce documents.

(xii) On 4.7.2009 – Advocate for the claimant took time for producing of certain documents.

(xiii) On 1.11.2009 – Ms. S. Aggarwal further submitted that the documents mentioned in order dated 31.10.2009 may be marked as Exhibits on behalf of the claimant after response, if any, is filed by the respondent. Also Mr. Aggarwal sought for time for production of Sunil Kumar Mittal on the next date.

(xiv) On 14.11.2009 – Mr M.R. Mohanty, Advocate for the claimant prayed for adjournment to the ground of illness of Ms. Suruchi Aggarwal, leading Advocate for the claimant.

(xv) On 13.2.2010 – claimant took time for filing of Affidavit Evidence of one more witness.

(xvi) On 20.3.2010 – Mr Aggarwal, Advocate for the claimant prayed for time for filing affidavit evidence of the witness, she intends to examine in support of the claimant's case.

(xvii) On 11.4.2010 – Mr. M.R. Mohanty, Advocate for the claimant prays for adjournment for unavoidable absence of Ms. S. Aggarwal, Advocate due to her personal illness.

(xviii) 11.12.2012 – Ms. Suruchi Aggarwal took time on the ground that Rakesh Goyal, who is being examined as witness has suddenly fallen ill."

36. Further, it is stated that Ms Aggarwal, Advocate for the claimant examined one Sunil Kumar Mittal as P.W.1. The evidence on affidavit of S.K. Mittal was filed on 22.8.2009 but in order to prove certain documents to him and also for his cross examination, his further examination and cross examination were conducted on 23.12.2009, 24.12.2009, 16.1.2010, 17.1.2010. Therefore, the claimant took about five months' time for further examination and cross-examination of this witness.

38. Further, it is stated that the evidence on affidavit of one Rakesh Goyal was filed by the claimant on 1.5.2010. A large number of documents have been produced through this witness on 12.6.2010, 10.7.2010, 17.7.2010, 7.8.2010, 5.9.2010, 25.9.2010, 23.10.2010, 13.11.2010.

39. Therefore, it is submitted by the learned Senior Counsel Mr Y. Mohanty that both the ARBP petitions are completely devoid of any merit and are liable to be rejected in limine and at the threshold on the ground of maintainability and also for want of pleadings.

40. With reference to the above rival legal contentions urged on behalf of the learned counsel for the parties, the questions that would arise for consideration by this Court are as follows:

i) Whether this Court has got jurisdiction to entertain these petitions in view of the objections raised by opp. party no.2 to the grounds urged under Sections 14(1)(a) and Section 14(2) of the A & C Act?

ii) Whether the dispute between the petitioners and opp. party no.2 is required to be resolved under Section 14(2) of the Act, 1996 that the

petitioners required to apply to the Court as defined under Section 2(c) of the Act to decide the termination of the mandate?

iii) Whether the petitioners are entitled to relief to hold that opp. party no.2 de jure and de facto unable to perform his functions and substitute him by appointing another Arbitrator by the Chief Justice of this Court under Section 11 (6)(c) of the Act, 1996?

iv) What order?

41. The question no.(i) is required to be answered against the petitioner for the following reasons. It is an undisputed fact that opp. party no.2 was appointed as Nominee Arbitrator on behalf of the petitioners in the Arbitral Tribunal to resolve the dispute between the parties. It is the case of the petitioners that opp. party no.2 is in fact unable to perform his functions as an Arbitrator in the Arbitral Tribunal as averred at paragraphs-3, 4 and 5 in ARBP No.61 of 2010. Similar averments are also made in the connected ARBP No.26 of 2011. The said allegations have been denied by opp. party no.2 in his affidavit filed after he was impleaded as proper and necessary party to the proceedings, wherein the allegations have been extensively adverted. A detailed affidavit has been sworn to by opp. party no.2 traversing various allegations made at paragraphs-3 to 5 in the ARBP petitions and vehemently contending that he has been functioning as the Arbitrator in the Arbitral Tribunal and discharging his functions. Further, he has categorically stated at paragraph-15 of the counter that the arbitration proceedings have been adjourned not at the instance of opp. party no.2-Arbitrator but at the instance of the lawyer appearing on behalf of the parties. Therefore, the contentions urged by the learned counsel for the petitioners that the petitions filed Sections 11(6)(c) read with 14 and 15 of the Act, 1996 are seriously disputed by opp. party no.2. Sub-section (2) of Section 14 is attracted to the facts situation of the case. Having regard to the fact that opp. party no.2 is contesting the ground urged under Section 14(1)(a) of the Act, 1996 that the mandate of the Arbitrator shall be terminated if the Arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, is seriously disputed. Therefore, the petitioners are required to apply to the competent court as defined under Section 2(e) of the Act, 1996 to decide on the question of termination of the mandate. The definition of “Court” under Section 2 (e) of the Act, 1996 is defined as under:

> “(e) ‘Court’ means the principal civil Court of oribinal jjrisediction in a district, and includes the High Court in exercise of its ordinary original

civil jurisdiction, having jurisdiction to decide the questions forming the subject matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil Court of a grae inferior to such principal civil Court, of any Court of Small Causes;"

42. Learned counsel Ms S. Aggarwal has placed strong reliance upon the judgment in the case of ***Cinevistaas v. Prasar Bharati***, reported in *2008 (4) ARBLR 112 (Delhi)*, wherein the Chief Justice of Delhi High Court was pleased to appoint an Arbitrator in a similar situation, wherein the already appointed Arbitrator was sought to be replaced by the petitioner therein. The application filed under Section 11(6) of the of the Act, 1996 was allowed and a retired Judge was appointed as the Arbitrator. She has also placed reliance upon the judgment in the case of ***NBCC Limited v. J.G. Engineering Private Limited****, (2010) 2 SCC 385,* wherein at paragraph-27 of the said judgment it has been categorically held that it is clear from a bare reading of sub-section 1(a) of Section 14 of the Act, 1996 the mandate of arbitrator shall terminate if he fails to act without undue delay. This decision has no application to the facts situation of the present case in view of the undisputed fact that the Nominee-Arbitrator in support of whom the averments to attract the grounds under Section 14(1)(a) is seriously challenged by him by swearing an affidavit. Therefore, the ground urged under sub-section 1(a) of Section 14 of the Act, 1996 to terminate the mandate of the Arbitrator is seriously contested. Therefore, Section 14(2) is attracted. The petitioner is required to approach the civil court is the contention urged by the learned Senior Counsel Mr Rath and Mr Mohanty referring to decision of the Supreme Court in the case of ***Nimet Resources INC and another v. Essar Steels Ltd.***, *2007 (Suppl.) Arb. LR 7 (SC),* wherein the Supreme Court after referring to Section 14(2) of the Act and the definition of Section 2(e) has held that "Court" means the principal civil Court of original jurisdiction in a district, and includes the High Court as an appellate Court.

43. In the said case, the reliance placed upon by the learned Senior Counsel Mr Rath was sought to be distinguished by the petitioner's counsel contending that this case is distinguishable for the reason that the said case was decided in an appeal arising out of an appeal under Section 34 of the Act, 1996. Therefore, this decision has no application to the facts situation of the present case and cannot be accepted by this Court in view of the clear provision of sub-section (2) of Section 14 of the Act, 1996 that the parties are required to apply to the Court to decide the termination of the mandate. The "Court" referred to in sub-section (2) of Section 14 of the Act, 1996 is the "Court" which has got original jurisdiction. Therefore, the said dispute

between the petitioner and opp. party no.2 that opp. party no.2 has either become *de jure or de facto* unable to perform his functions is seriously contested. This aspect of the matter requires to be determined by the competent Civil Court, which has got original jurisdiction by recording evidence. Though the petition is filed under Sections 14(1) and Section 15 of the Act, 1996 when the averments and allegations made by the petitioners against opp. party no.2 with regard to the grounds urged under Section 14(1((a), which is disputed, the disputed question cannot be decided by me in exercise of my statutory power under Section 11(6)(c). Therefore, the interpretation to the definition of "Court" under sub-section (2) of Section 14 of the Act, 1996 in terms of Section 2(e) has been succinctly held in the case of the *Nimet Resources INC and another v. Essar Steels Ltd.* referred to supra. The said decision is aptly applicable to the facts situation of the present case. Hence, I have accepted the argument advanced by the learned Senior Counsel appearing on behalf of opp. party nos.1 and 2 and unable to accept the legal contention urged by the learned counsel for the petitioners placing reliance upon the decisions of the Delhi High Court in the case of ***Cinevistaas v. Prasar Bharati,*** and the decision of the Supreme Court in the case of ***NBCC Limited v. J.G. Engineering Private Limited*** referred to supra and under Section 14(2), the definition of Section 2(e) of the Act, 1996 regarding the "Court" has not been extensively considered. Therefore, the reliance placed by the learned counsel for the petitioners upon the said decisions cannot be applied to the facts situation of the present case. Therefore, I hope, the petitions are not maintainable before this Court. Since point no.(1) is answered against the petitioner, the question of accepting the case of the petitioner that the mandate of opp. party no.2, as an Arbitrator as he is unable to perform his functions as Arbitrator, invoking the grounds under Section 14(1)(a) is not applicable to the facts situation of the case as opp. party no.2 has seriously contested. This matter requires adjudication by the competent civil court with regard to termination of the mandate of the Arbitrator.

44. Therefore, I cannot accept the case of the petitioner pleaded and appoint an Arbitrator in place of opp. party no.2. The petitioners are at liberty to work out their rights before the competent Civil Court.

With the aforesaid observations, both the arbitration petitions are disposed of.

Petitions disposed of.

2013 (I) ILR - CUT- 195

V. GOPALA GOWDA, CJ & B.K.MISRA, J.

W.P.(C) NO. 14450 OF 2012 (Dt.03.10.2012)

BALAKRISHNA SANDHA & ORS. ……..Petitioners

.Vrs.

UNION OF INDIA & ORS. …….Opp.Parties

P. I. L. – Issuance of B.P.L. Card – Preparation of list of B.P.L. beneficiaries without following the guidelines in that regard – People above poverty line managed to get B.P.L. Cards where as actual poor persons who are really below poverty line are deprived of – Action of the statutory authorities challenged – Held, direction issued to the State Government to see that the scheme/policy/guidelines of the Government for issuance of B.P.L. Cards to the beneficiaries of the State are implemented strictly and Cards are issued to persons really entitled by conducting proper survey & enquiry and it is the duty of every public authority to see that public money is not wasted but utilized in proper manner.

For Petitioners - M/s. Manoj Kumar Pati
For Opp.Parties - None

Heard learned counsel for the petitioners and learned Addl. Government Advocate.

2. This writ petition, in the nature of Public Interest Litigation, has been filed challenging the action of the statutory authorities in not identifying and preparing the proper list of B.P.L. beneficiaries following the guidelines and scheme in that regard for which the innocent poor beneficiaries are being deprived from their rights.

3. The present petitioners are the residents under the Titilagarh Block in the district of Bolangir.

4. Learned Addl. Government Advocate has produced a copy of the parawise report filed by the Block Development Officer (BDO), Titilagarh, wherein it is stated by the said Officer that due to less target some of the families including the petitioners have been left out which will be covered under the P.L.O. (Poor Left out) after receipt of new target under P.L.O.

Card. It is further stated that the Block & G.P. officials had no malafiede intention in finalization of P.L.O. families. Therefore, it is prayed by the said authority for rejection of the writ petition.

5. The stand taken by the BDO is wholly untenable and the reasons assigned are unacceptable. Therefore, he is directed to take immediate steps to grant BPL Cards in favour of the petitioners.

6. It is the statutory duty of the State Government as well as its responsible officers to see that the list of BPL beneficiaries is prepared strictly in accordance with the scheme & guidelines for that purpose and keeping in view the observation made by the Supreme Court by conducting proper survey. However, it is brought to the notice of this Court several times that, those systems are not implemented in true letter and spirit. It is also brought to our notice that some poor people those who are really entitled for BPL Card are deprived from that, however, the people those who are above the poverty line and not entitled for the same are managed to get the BPL Card, which defeats the intent and purpose of the Scheme.

7. Therefore, we issue mandamus to the State Government, particularly to the Commissioner-cum-Secretary, Panchayatiraj Department and Commissioner-cum-Secretary, Food Supplies & Consumer Welfare Department to see that the Scheme/Policy/guidelines of the Government for issuance of BPL Cards to the beneficiaries of the State are implemented strictly and the Cards are issued to the beneficiaries those who are really entitled, by conducting proper survey & enquiry. The Gram Panchayat Authorities/Sarpanches must be directed to function statutorily and they must conduct the Palli Sabha/Grama Sabha properly in presence of P.R.I. Members strictly in accordance with the guidelines and identify and recommend the names of actual beneficiaries. In this regard strict instructions may be issued to the every District Collectors and other responsible officers of the State. If any complaint is received that persons who are not entitled have managed to get the Card, necessary enquiry be conducted immediately and necessary action shall be taken against the responsible person(s), if it is found to be true.

8. Government is allocating huge budget for this purpose. Therefore, it is the duty of the each and every public authority to see that the public money must be utilized in proper manner and it must not go wasted.

9. We hope and trust that our order is implemented by the aforesaid authorities in true spirit.

A status report in this regard be filed within six weeks.

The writ petition is accordingly disposed of.

10. Though the petition is disposed of, Registry is directed to list this matter immediately after six weeks to report compliance of the order.

A free copy of this order be given to Mr. D. Panda, learned Addl. Government Advocate for immediate communication.

Writ petition disposed of.

2013 (I) ILR - CUT- 198

V. GOPALA GOWDA, CJ.

M. A. NO. 511 OF 2002 (Dt.24.08.2012)

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

.Vrs.

PRATAP BISWAL & ORS. … …..Respondents

A. MOTOR VEHICLES ACT, 1988 – S.141 (3) (b).

Motor Accident – Death of a ten month child – Award of Rs.50,000/- passed U/s.140 of the Act – Further Rs.50,000 awarded U/s.166 of the Act – Since the first mentioned compensation U/s.140 of the Act is equal to the Second mentioned compensation U/s.166 of the Act the appellant-Insurance Company prayed that he is not liable to pay the second mentioned compensation in view of Section 141 (3) (b) of the Act – Held, the Counsel for the appellant is perfectly right in placing reliance upon Section 141 (3) (b) of the Act. (Para -6)

B. MOTOR VEHICLE ACT, 1988 – S. 168.

Just compensation – Death of ten month child – Tribunal should have awarded compensation under the head "shock and agony" sustained by the parents of the child – Claimants not filed any appeal or Cross-objection – However this Court while examining the legality and validity of the impugned judgment in the appeal filed by the Insurance Company, exercised power Under Order 41 Rule 33 C.P.C. and held that the amount of compensation awarded by the Tribunal U/s.166 of the Act be treated as compensation towards shock and agony – Held, Insurance Company is liable to pay the amount awarded U/s.166 of the Act over and above the amount awarded U/s.140 of the Act. (Para 6 & 7)

(**Case laws Referred to:-**

1.2007 ACJ 2816 : (Oriental Insurance Co. Ltd.-V- Syed Ibrahim & Ors.)
2.AIR 2000 SC 43 : (Basanti Devi-V- Delhi Electricity Corporation Ltd.)

For Appellant - M/s. S.S.Rao & B.K.Mohanty.
For Respondent- M/s. Ranjan Ku. Nayak, F.R. Mohapatra, J.K. Mohanty.

GOPALA GOWDA, C.J. This appeal is directed against the award dated 22nd March, 2002 passed by the Second Motor Accident Claims Tribunal, Cuttack in Misc. Case No. 495 of 1995 wherein the Tribunal has awarded Rs. 50,000/- with 6% interest from the date of filing of the claim, i.e., 4.7.1995 till the date of realisation placing strong reliance on section 141(3)(b) of the Motor Vehicles Act, 1988 (for short 'the Act').

2. Mr. S.S. Rao, learned counsel appearing for the appellant-insurance company contended that during pendency of the claim petition, the claimant-parents filed an application, i.e., Misc. Case No. 489 of 1995 under section 140 of the Act seeking for grant of interim relief which was allowed by the Tribunal vide order dated 22.10.2001. The said order was challenged before this Court in M.A. No. 421 of 2002 on various legal grounds which was disposed of on 10.8.2011 holding that the appeal having been filed against the interim award passed under section 140 of the Act, the same had become infructuous. Mr. Rao placing strong reliance upon the provision contained in section 141(3)(b) of the Act submits that in absence of the material evidence required to be placed on record by the parentclaimants regarding pecuniary loss on account of the death of ten months old child, they are not entitled to any damages under the head of shock and agony. He further submits that the Tribunal has awarded Rs. 50,000/- to the claimants placing strong reliance upon section 141(3)(b) of the Act. That has already been granted in favour of the claimants by way of interim award. Therefore, further direction should not have been given in the impugned judgment holding the insurance company liable to pay the said sum which is contrary to the statutory provision referred to supra. Mr. Rao in support of his contention, placed reliance upon the decision of the apex Court in *Oriental Insurance Co. Ltd. v. Syed Ibrahim and others,* 2007 ACJ 2816 wherein the apex Court in similar situation, did not interfere with the award where the Tribunal had awarded Rs. 50,000/- placing strong reliance upon section 140 of the Act.Therefore, Mr. Rao submits that the impugned judgment requires interference by this Court.

3. Mr. Nayak, learned counsel for the claimants sought to justify the award contending that the impugned judgment is perfectly legal and valid for the reason that the Tribunal examining the case on merit and placing strong reliance upon section 140 of the Act under no fault liability, awarded compensation of Rs. 50,000/- despite the fact that there was interim award of Rs. 50,000/-. According to him, the Tribunal has erred in not awarding any compensation for the shock and mental agony on account of death of the claimants' precious child of ten months old with reference to paragraph-

7 of the impugned judgment. No doubt the claimants have not filed any appeal or cross-objection against the same, though in course of hearing, they sought for enhancement of compensation under that head. He also submitted that justice has been done by the Tribunal by exercising its original jurisdiction. Hence this Court in exercise of its appellate jurisdiction, need not interfere with the same.

4. (I) With reference to the above said rival legal contentions, this Court is to examine as to whether the impugned judgment and award requires interference in this appeal filed by the appellant ?

(ii) What order ?

5. In my considered view, after examining the relevant legal contentions (supra) and on perusal of the facts of the case and the finding recorded by the learned Member of the Tribunal at paragraph-7 of the impugned judgment, the Tribunal is justified in referring to the shock and agony of the appellants who lost their precious child of ten months old. But, having referred to the same, the Tribunal has not awarded any compensation on that head. Not awarding any compensation on that head, really caused injustice to the parents. No doubt they are not before this Court by filing an appeal for enhancement or cross-objection. But while examining legality and validity of the impugned judgment in the appeal filed by the insurance company, this Court is to examine its order under Order 41 Rule 33 C.P.C., though the cross-appeal has not been filed, on the basis of the decision of the apex Court in the case of *Basanti Devi v. Delhi Electricity Corporation Ltd.*, AIR 2000 SC 43 wherein after referring to its earlier decisions at paragraphs 17 & 18 observation has been made as follows :

> "17. In our approach we can also draw strength from the provisions of Rule 33 of Order 41 of the Code of Civil Procedure which is as under :
>
> "33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court not withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the

decrees, although an appeal may not have been filed against such decrees :

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

18. This provision was explained by this Court in Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528 : (AIR 1988 SC 54) in the following words (at P. 58 of AIR) :

" The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities."

(emphasis laid by the Court)

6. Aforesaid principle must be applied to the fact situation for the reason that the Tribunal has not awarded compensation under the head "shock and agony sustained". It is the common knowledge that the parents will be drastically affected on account of losing of a ten months old baby in an accident which is of relevant consideration for the Tribunal and this Court to award compensation. That has not been done in this case by the

Tribunal. Therefore, the amount of ` 50,000/- compensation awarded can be treated as compensation towards agony and shock. The Tribunal is required to award compensation, is the cardinal principle of awarding damages in tortious liability of the owner of the vehicle whose vehicle is insured with the appellant-insurance company. Therefore, in my considered view, Mr. Rao, learned counsel for the appellant is perfectly right in placing reliance upon section 141(3)(b) of the Act.

7. In view of the foregoing reasons, the insurance company is liable to pay the amount awarded under section 166 of the Act over and above the amount awarded under section 140 of the Act.

I do not find any good reason for interference in the impugned award. The appeal is devoid of merit and is dismissed accordingly.

Apeal dismissed.

2013 (I) ILR - CUT- 203

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

W. P. (C) NO. 12566 OF 2005 (With Batch) (Dt.24.09.2012)

BAIRAGI CHARAN NAYAK & ORS. ……Petitioners

.Vrs.

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

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION ACT,1987 - S.10 (k). r/w Section 3 of the UGC Act, 1956.

"Deemed University" established U/s.3 of the UGC Act – Whether it is required for a "Deemed University" to obtain prior approval of AICTE to conduct technical education courses of its choice – Held, prior approval of AICTE is not required for a "Deemed University" to start any new department or course or programme in technical education – However Universities are bound to conform the standards and norms laid down by the AICTE following the guidelines/regulations issued by the Central Government.

(Para 9,10)

For Petitioners - M/s. Bijan Ray, Sr.Advocate,
Pradeep Ku. Sahoo, S.Das, Manoj Ku. Mishra.

For Intervenors - M/s. Saswata Patnaik, L.Mishra, Om. Prakash Mishra, S.K.Singh.
M/s. S.N.Rath, P.K.Rout, D.N. Rath & C.K.Rajguru.
M/s. BudhadeV. Routray, B.B.Rout, R.P.Dalai, P.K.Das, B.N.Satpathy.
M/s. B.P.TripathV. R.N.Mohanty, Ram Das Acharya, A.Pdsatra, S.R.Parija. Mr. Janmejaya Katikia.
M/s. Dusmanta Nayak, S.Patra, P.P.Swain. Mr. Sangram Jena.
M/s. Achyutananda Routray, U.R.Bastia,,
Mrs. M.Rout, B.N.Dora.

For Opp.Parties - M/s. Prasanta Ku. Ray, P.K.Panda (for O.P.5)
Mr. J.K.Mishra, ASG (for O.P.Nos.2 & 4).
M/s. R.K.Bose, G.Bhoi, J.Nayak (for O.P>6).

For Intervenor - Mr. R.N.Mohanty, Amrita Patra.

For Opp.Parties - Mr. P.K.Ray for IASE University (for O.P.1 & 2)

Mr. R.K.Mohapatra, Govt. Advocate(for O.P>No.4).
Mr. J.K.Mishra, Sr. Advocate, for UGC (O.P.No.5).
For Petitioner - M/s. S.K.Padhi, Mrs. M.Padhi, S.K.Mohapatra, G.Mishra.
For Opp.Parties -M/s. J.K.Mishra, Sr.Advocate (for O.P.1 to 3)
M/s. G. Bhoi, J.Nayak (for O.P.4)

For Petitioner - M/s. B.Routray, P.K.Dash, D.Mund, D.Routray, R.P.Dalai.
For Opp.Parties -M/s. J.K.Mishra, Sr.Advocate (for O.P.1 & 2)
M/s. Manoj Ku. Mishra, P.K.Das, J.Panda (for O.P.No.3).

V. GOPALA GOWDA, C.J. These writ petitions have been filed by some public spirited persons; Students Union who are studying their technical education in the institutions under the Deemed Universities established under the Notification issued under Section 3 of the Universities Grant Commissions Act, 1956 and imparting education in professional courses; and two Technical Colleges seeking following reliefs:

> "1. Issue a writ of mandamus or any other appropriate direction to the opposite party Nos. 4 & 6, University Grants Commission (UGC) and Indira Gandhi National Open University (IGNOU) respectively to constitute a High Power Committee consisting of experts and to enquire into the matter with regard to validity of the establishment and continuance of study centres under O.P. No.5.
>
> 2. Issue a direction to the State Government to protect the interest of the students inasmuch as who are prosecuting their studies in different study centers permitted by opposite party No.5 as well as the interest of the study centres;
>
> 3. The opposite parties may be directed to take immediate steps to secure the future of almost 60,000 students all over the country and almost 35,000 students in Orissa whose future are at stake by either immediately obtaining the approval of the UGC and the Distance Education Council (DEC) for the technical and vocational courses and approval for their study centres along with the NOC from the respective State Government with restrospective effect or to take immediate steps and measures for alternate absorption of the enrolled students in any DEC and UGC approved system which is offering valid/recognized/approved Distance Education Programmes.

> 4. For issuance of a direction to the UGC and the DEC to grant approval to the Deemed University (O.P. No.1 in W.P.(C) No. 12431 of 2005) with restrospective effect as the University has already applied for the ex-post facto approval with requisite fees and details."

2. UGC and AICTE have filed their statement of counter traversing the petitioners' averments.

3. Learned counsel on behalf of the opp.party No.5 has placed strong reliance upon the judgment of the Supreme Court in the case of Bharathidasan University & Anr. v. All-India Council for Technical Education & Ors. reported in (2001) 8 SCC 676, wherein the provisions of Sections 10(1)(k), 2(h) (i) and 23 of the All India Council of Technical Education Act, 1987 fell for consideration and the Hon'ble Supreme Court has interpreted that the definition of Universities which a 'Deemed University' under the UGC Act and categorically held that the Act does not require a university to obtain prior approval of AICTE for starting a department or unit as an adjunct to the university itself to conduct technical education courses of its choice. Regulations framed under the Act requiring the University to obtain such approval is held to be void and unenforceable. While stating so, the apex Court has further clarified that the University obliged to conform to the standards and norms laid down by the AICTE under the All India Council for Technical Education (Grant of Approval for Starting New Technical Institutions, Introduction of Courses or Programmes and Approval of Intake Capacity of Seats for the Courses or Programmes) Regulations, 1994. Further, at paragraph 15 of the said judgment the apex Court interpreting Section 10 and definition of "technical institution" under Section 2(h) of the AICTE Act held that the 'technical institutions' cannot include a 'university. The clear intention of the legislature is not that all institutions whether university or otherwise ought to be treated as "technical institution" covered by the Act. If that was the intention, there was no difficulty for the legislature to have merely provided a definition of "Technical institution" by not excluding "university" from the definition thereof and thereby avoided the necessity to use alongside both the words "technical institutions" and "university" in several provisions of the Act. The definition of "technical institution" excludes from its purview a "university". When by definition a "university" is excluded from a "technical institution", to interpret that such a clause or such an expression wherever the expression "technical institution" occurs will include a "university" will be reading into the Act what is not provided therein. The power to grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned is covered by Section 10(*k*) which would not cover a "university" but only a "technical institution". If Section

10(*k*) does not cover a "university" but only a "technical institution", a regulation cannot be framed in such a manner so as to apply the regulation framed in respect of "technical institution" to apply to universities when the Act maintains a complete dichotomy between a "university" and a "technical institution".

4. Further at paragraph 10 of the said judgment, the apex Court has held that the AICTE created under the Act is not intended to be an authority either superior to or supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that it is imparting education by teaching technical education or programmes in any of its departments or units. A careful scanning-through of the provisions of the AICTE Act and the provisions of the UGC Act in juxtaposition, will show that the role of AICTE vis-à-vis the universities is only advisory, recommendatory and a guiding factor and thereby subserves the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself, except submitting a report to UGC for appropriate action. In this regard the apex Court has succinctly laid down the law at paragraph 10 of its judgement. Paragraph 10 is extracted below :

> **"10.** Since it is intended to be other than a university, the Act defines in Section 2(*i*) "university" to mean a university defined under clause (*f*) of Section 2 of the University Grants Commission Act, 1956 and also to be inclusive of an institution deemed to be a university under Section 3 of the said Act. Section 10 of the Act enumerates the various powers and functions of AICTE as also its duties and obligations to take steps towards fulfilment of the same. One such as envisaged in Section 10(1)(*k*) is to "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned". Section 23, which empowers the Council to make regulations in the manner ordained therein emphatically and specifically, mandates the making of such Regulations only "not inconsistent with the provisions of this Act and the Rules". The Act, for all purposes and throughout maintains the distinct identity and existence of "technical institutions" and "universities" and it is in keeping tune with the said dichotomy that wherever the university or the activities of the university are also to be supervised or regulated and guided by AICTE, specific mention has been made of the university alongside the technical institutions and wherever the university is to be left out and not to be roped in merely refers to the technical institution only in Sections 10, 11 and 22(2)(*b*). It is necessary and would be useful to advert to Sections

10(1)(*c*), (*g*), (*o*) which would go to show that universities are mentioned alongside the "technical institutions" and clauses (*k*), (*m*), (*p*), (*q*), (*s*) and (*u*) wherein there is conspicuous omission of reference to universities, reference being made to technical institutions alone. It is equally important to see that when AICTE is empowered to inspect or cause to inspect any technical institution in clause (*p*) of sub-section (1) of Section 10 without any reservation whatsoever, when it comes to the question of universities it is confined and limited to ascertaining the financial needs or its standards of teaching, examination and research. The inspection may be made or cause to be made of any department or departments only and that too, in such manner as may be prescribed as envisaged in Section 11 of the Act. Clause (*t*) of sub-section (1) of Section 10 envisages AICTE to only advise UGC for declaring any institution imparting technical education as a deemed university and not do any such thing by itself. Likewise, clause (*u*) of the same provision which envisages the setting up of a National Board of Accreditation to periodically conduct evaluation of technical institutions or programmes on the basis of guidelines, norms and standards specified by it to make recommendation to it, or to the Council, or to the Commission or to other bodies, regarding recognition or de-recognition of the institution or the programme. All these vitally important aspects go to show that AICTE created under the Act is not intended to be an authority either superior to or supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that it is imparting teaching in technical education or programmes in any of its departments or units. A careful scanning-through of the provisions of the AICTE Act and the provisions of the UGC Act in juxtaposition, will show that the role of AICTE vis-à-vis the universities is only advisory, recommendatory and a guiding factor and thereby subserves the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself, except submitting a report to UGC for appropriate action. The conscious and deliberate omission to enact any such provision in the AICTE Act in respect of universities is not only a positive indicator but should be also one of the determining factors in adjudging the status, role and activities of AICTE vis-à-vis universities and the activities and functioning of its departments and units. All these vitally important facets with so much glaring significance of the scheme underlying the Act and the language of the various provisions seem to have escaped the notice of the

learned Judges, their otherwise well-merited attention and consideration in their proper and correct perspective. The ultra-activist view articulated in *M. Sambasiva Rao case*[1] on the basis of supposed intention and imagined purpose of AICTE or the Act constituting it, is uncalled for and ought to have been avoided, all the more so when such an interpretation is not only bound to do violence to the language of the various provisions but also inevitably render other statutory authorities like UGC and universities irrelevant or even as non-entities by making AICTE a superpower with a devastating role undermining the status, authority and autonomous functioning of those institutions in areas and spheres assigned to them under the respective legislations constituting and governing them."

5. Further, at paragraphs 13 and 15 of the said judgement the apex Court with reference to Section 10 (k) of the Act held that Section 10(k) does not cover a "university" but only a "technical institution". It is further held that when the language is specific, unambiguous and positive, the same cannot be overlooked to give an expansive meaning under pretext of a purposive construction to perpetuate an ideological object and aim, which also, having regard to the statement of objects and reasons for the AICTE Act, is no warranted or justified. Therefore, it is clearly held that, the Regulations insofar as they compel the universities to seek for and obtain prior approval and not to start any new department or course or programme in technical education under Regulation 4 and empower itself to withdraw such approval, in a given case of contravention of the Regulations (Regulation 12), are directly opposed to and inconsistent with the provisions of Section 10(1)(k) of the Act and consequently void and unenforceable.

6. Learned counsel on behalf of the opp.party No.5 also placed strong reliance upon the Notification issued by the Government of India, Ministry of Human Resource Development, Department of Secondary & Higher Education (U & HE Bureau) dated 5th April, 2006 in exercise of power vested under Section 10(1) of the UGC Act, 1956 and Section 10(1) of the AICTE Act, 1987 directing the UGC and the AICTE to publicize the clarification issued under the said Notification for the information of the general public.

7. In the said Notification it is clarified that the institutions notified by the Central Government under Section 3 of the UGC Act as 'Deemed to be University' are empowered to award degrees as specified and notified under Section 22 of the UGC Act, 1956. While stating so, following further clarifications have been issued, which read thus :

- "It is not a pre-requisite for an institution notified as a 'Deemed to be University' to obtain the approval of the AICTE, to start any programme in technical or management education leading to an award, including degrees in disciplines covered under the AICTE Act, 1987. However, institutions notified as 'Deemed to be University' are required to ensure the maintenance of the minimum standards prescribed by the AICTE for various courses that come under the jurisdiction of the said Council. It is expected that the institutions notified as 'Deemed to be University' maintain their standards of education higher than the minimum prescribed by the AICTE.
- In accordance with provisions under Section 11 (1) of the AICTE Act, 1987, the AICTE may cause an inspection of the relevant departments of the institution declared as 'Deemed to be University', offering the courses that come under the jurisdiction of the AICTE Act, 1987 in order to ensure the maintenance of standards by them.
- However, while the AICTE would not issue any directions to the institutions notified as 'Deemed to be University' on the basis of inspection report of the Council's Expert Committee, the Council may bring the findings and recommendations of its Expert Committee to the notice of the University Grants Commission, which after considering the report of the Expert Committee of the AICTE and recommendations, if any, may issue necessary directions for appropriate action.
- Section 12 (d) of the UGC Act, 1956 empowers the UGC to recommend, to any University including institutions notified as 'Deemed to be University', the measures necessary for the improvement of University education and advise them for all such actions as are necessary for the purpose of implementing such recommendations."

8. In the said Notification it has made clear that with reference to Section 11 (1) of the AICTE Act, 1987, the AICTE may cause an inspection of the relevant departments of the institution declared as 'Deemed to be University', offering the courses that come under the jurisdiction of the AICTE Act, 1987 in order to ensure the maintenance of standards by them. It has been further clarified that the AICTE would not issue any directions to the institutions notified as 'Deemed to be University' on the basis of inspection report of the Council's Expert Committee, the Council may bring the findings and recommendations of its Expert Committee to the notice of the University Grants Commission, which after considering the report of the Expert Committee of the AICTE and recommendations, if any, may issue

ecessary directions for appropriate action. Further, Section 12 (d) of the UGC Act, 1956 empowers the UGC to recommend, to any University including institutions notified as 'Deemed to be University', the measures necessary for the improvement of University education and advise them for all such actions as are necessary for the purpose of implementing such recommendations.

9. In view of the aforesaid decision of the Supreme Court in Bharathidasan University (supra) and the aforesaid Notification dated 5th April, 2006 issued by the Central Government in the Ministry of Human Resource Development clarifying that it is not required for a 'Deemed University' established under Section 3 of the UGC Act to obtain prior approval of AICTE for starting a department or unit as an adjunct to the university itself to conduct/introduce technical education courses or programmes of its choice, the apprehension of the petitioners in these writ petitions do not arise. Therefore, after the decision rendered by the Supreme Court in Bharathidasan University (supra) and aforesaid Notification issued by the Central Government clarifying the matter, it is not necessary on the part of this Court again to issue a direction as sought for in these writ petitions.

10. With the aforesaid observations, referring to the decision of the Supreme Court and the Notification of the Central Government referred to above, all these writ petitions are disposed of holding that prior approval for a 'Deemed University' to start any new department or course or programme in technical education is not required, but the Universities are bound to conform the standards and norms laid down by the AICTE following the guidelines/regulations, and clarification issued by the Central Government referred to above.

Writ petitions disposed of.

2013 (I) ILR - CUT- 211

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

W.P.(CRL) NO. 712 OF 2012 (Dt.19.10.2012)

PRADEEP SAHU .....Petitioner

.Vrs.

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

NATIONAL SECURITY ACT, 1980 – S.3 (2).

Order of detention – Grounds of detention do not disclose any material construed as violation of public order – Order of detention is liable to be quashed.

NATIONAL SECURITY ACT, 1980 – Ss.3(2), 12(1).

Advisory Board submitted report saying that there exists sufficient cause for detention of the detenu – Appropriate Government may confirm the order – Use of the word "may" indicates that the appropriate Government need not blindly accept the report but exercise its power independent of the report submitted by the Board.

In this case upon receipt of the report from the Advisory Board with regard to the detention of the detenu the file ultimately placed before the Chief Minister who only put his signature – No such independent consideration has been done and the detention order was confirmed basing only on the report of the Advisory Board – Held, there was total non application of mind by the State Government while approving the order of detention – Order of detention and the order of confirmation by the State government are quashed.

(Para 17,18,19)

Case laws Referred to:-

1.2012(I) OLR (SC) 550 : (Yumman Ongbi Lembi Liema-V- State of Manipur)
2.AIR 1998 SC 1013 : (Smt. Tarannum-V- Union of India)
3.80(1995) CLT 804 : (Sri Sadasiva Apat @ Sada-V- State of Orissa & Anr.)
4.AIR 1966 SC 740 : (Ram Manohar Lohia-V- State of Bihar)
5.AIR 1970 SC 1228 : (Arun Ghose-V- State of West Bengal)

6.1972 SC 2686 : (Dipak Bose @ Haripada-V- State of West Bengal)
7.AIR 1974 SC 155 : (Kuso Sah-V- State of Bihar).
8.AIR 1994 SC 133 : (Amin Mohammed Qureshi-V-Commissioner of Police, Greater Bombay)
9.AIR 1982 SC 146 : (Fitrat Raza Khan-V- State of U.P. & Ors.)
10.AIR 1990 SC 1196 : (Dharmendra Sugarchand & Anr.-V-Union of India)

For Petitioner - M/s. Asim Amitabh Das, B. Ray, A.K.Behera, R.Verma, B.K.Parida & S.Mohanty.

For Opp.Parties- Mr. S.D. Das, Asst. Solicitor General (for O.P.No.1) Govt. Advocate (for O.Ps.2 to 4).

V.GOPALA GOWDA, C.J. In exercise of power conferred under sub-section (2) of Sectional 3 of the National Security Act, 1980, the District Magistrate, Sambalpur passed order dated 8.4.2012 (Annexure-1) directing detention of the petitioner Pradip Sahu in the Circle Jail, Sambalpur until further orders with a view to preventing him from acting in any manner prejudicial to the maintenance of public order. On 10.4.2012, the order of detention was served on the petitioner-detenu in Circle Jail, Sambalpur where he was in intermediate judicial custody in connection with Thelkuli P.S.Case No.42 dated 25.3.2012 under sections 387/341/429/506/34 IPC. The detention order was approved by the State Government on 19.4.2012. Thereafter, the petitioner made a representation to the State Government which was rejected by the State Government on 16.5.2012 which was communicated to the petitioner on 21.5.2012 vide Annexure-3. Copy of the representation and para-wise report was sent to the Government of India on 21.5.2012 which was rejected by the Central Government on 30.5.2012. The detention order was confirmed by the State Government on 12.6.2012.

2. In this writ petition, the petitioner has prayed for quashing the order of detention Annexure-1 as well as the order of the State Government rejecting his representation and confirming the order of detention, vide Annexures-3 and 5 respectively on the ground that the order of detention has been passed without application of mind and without regard to the procedure laid down under law and without considering his representation; the grounds of detention do not make out a case of disturbance of public order warranting detention under section 3(2) of the National Security Act; and since the detenu was already in intermediate judicial custody, there was no necessity of the order of preventive detention.

3. Mr.A.A.Das, learned counsel for the petitioner contends that one of the grounds on the basis of which the order of detention dated 8.4.2012 has been passed by the Collector-cum-District Magistrate, Sambalpur that there is possibility of the petitioner being released on bail, is not sustainable in law. Another ground of challenge of the detention order is that it discloses 20 cases against the petitioner starting from the year 2002 onwards, out of which one is under Section 110, two cases are mere Station Diary entries, in five cases the petitioner has not been named in the F.I.R., but subsequently impleaded on the basis of the 161 statement, three cases registered due to family rivalry, in six cases the petitioner has been implicated at the instance of one company, namely, M/s. Aryan Ispat Ltd. in three cases he has been implicated due to political rivalry relating to Gram Panchayat Election etc., in two cases, the police has implicated him on the allegation of preparation of dacoity although there is no antecedents regarding commission of dacoity, in two cases the petitioner has been acquitted by the competent courts, in one case under Section 302/34, IPC criminal appeal has been filed before this Court, wherein he has been granted bail and against the said order, the Special Leave Petition has been preferred for cancellation of bail at the instance of the informant, but not by the State Government. The narration of the facts and grounds mentioned in the order of detention, would reveal that except a few cases, in all other cases, the offences are triable by Magistrate First Class. It is further contended by him that the Home Department received information regarding detention on 11.4.2012 along with relevant materials and on 19.4.2012 the order of detention was approved and the said order was communicated to the Ministry of Home, Government of India and Secretary, National Security Advisory Board. Therefore, there is no application of mind on the part of the State Government while confirming the order of detention. Hence, the impugned order is liable to be quashed.

5. In support of the aforesaid contention, he has placed reliance upon the judgment of the Supreme Court in Yumman Ongbi Lembi Liema v. State of Manipur, 2012(I) OLR (SC) 550, wherein the apex Court has held that where the grounds of detention do not disclose any material, which were before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases to support the order of detention amounts to deprivation of his life and personal liberty and as such, violative of Articles 21 and 22(2) of the Constitution of India (para-13). In the said case, the apex Court also referred to another decision of the supreme Court in Haradhan Saha v. State of West Bengal (1975) 3 SCC 198 wherein it is held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Thus, he submitted that the detention order has been

passed by the District Magistrate on the allegation of involvement of the petitioner in number of criminal cases, but no material is forthcoming in the report of the Superintendent of Police or the materials available before the detaining authority that there is likelihood of committing breach of public order. According to Mr.Das, the aforesaid judgment is applicable to the case in hand and requests this Court to quash the detention order.

6. He further contended that the detention order must satisfy three cumulative and additive nature of requirements as held by the Supreme Court in Huidrom Konungjao Singh v. State of Manipur, (2012) 7 SCC 181, they are:

(i) The authority was fully aware of the fact that the detenu was actually in custody;

(ii) There was reliable material before the said authority on the basis of which it could have reason to believe that there was real possibility of his release on bail and being released he would probably indulge in activities, which are prejudicial to public order;

(iii) Necessity to prevent him for which detention order was required.

According to Mr.Das, the detaining authority has not stated the aforesaid cumulative requirements as observed by the Supreme Court in the case referred to supra and since the observations made in the detention order, particularly, para 21, do not at all meet the requirement of law laid down by the apex court in the aforesaid two cases and, therefore, the same cannot stand to the scrutiny of this Court and therefore, is liable to be quashed.

7. He further submitted that neither the detaining authority at the time of passing of the order nor the State Government while confirming the same took into consideration the nature of allegations and offences alleged in the grounds of detention to examine whether the same relates to 'public order' and the normal law cannot take care of such offences and that the acts of the detenu mentioned in the grounds of detention are prejudicial to maintenance of public order or they only relate to "law and order'. Therefore, the detention order is not legal and valid and is liable to be quashed. In support of the said contention, he has placed reliance upon the decision of the Supreme Court in AIR 1998 SC 1013 (Smt.Tarannum v. Union of India).

8. He has also placed reliance upon the decision of this Court in **Sri Sadasiva Apat @ Sada Vs. State of Orissa and another**, 80(1995) CLT 804, wherein this Court referring to the decisions of the Supreme Court in

Ram Manohar Lohia v. State of Bihar, reported in AIR 1966 SC 740, **Arun Ghose v. State of West Bengal**, reported in AIR 1970 SC 1228, **Dipak Bose @ Haripada v. State of West Bengal**, reported in 1972 SC 2686 and **Kuso Sah v. State of Bihar**, AIR 1974 SC 155 formulated that the following factors to be borne in mind when determining whether the disturbance or disorder amounts to breach of 'law and order' or 'public order'.

(i) The contravention of law always affects order, but before it can be said to affect the public order, it must affect the community or the public at large.

(ii) Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality.

(iii) It is the degree of disturbance and its effect on the life of the community in the locality, which determine whether that disturbance amounts to breach of law and order or public order.

(iv) Any act by itself is not determinant of its own gravity. In its quality, it may not differ from another, but in potentiality it may be very different.

(v) Whether a man has committed breach of law and order or has acted in a manner likely to cause disturbance of the public order is a question of degree and the extent of the reach of the act on the society.

(vi) Every assaulting a public place like a public road and terminating in the death of a victim is likely to cause horror and even panic and terror in those who are the spectators. But that does not mean that all such incidents do necessarily cause disturbance or dislocation of the community life of the localities in which they are committed.

(vii) It is well established that stray and unorganized crimes of theft and assault are not matters of public order since they do not tend to affect the even flow of public life.

(viii) Whether disturbance or disorder has led to breach of law and public order is a question of fact, in which case there is no formula by which one case can be distinguished from another.

Placing reliance upon the aforesaid proposition of law, Mr.Das, learned counsel appearing for the petitioner submitted that the present case makes

out a case of only 'law and order' and not 'public order'. Therefore, the observation made in para 22 of the detention order that after the petitioner is released on bail, he will create frequent lawlessness, affecting normal life and causing frequent disruption of public order, which would be detrimental to the maintenance of public order, should be held to be bad in law and is liable to be quashed.

9. Mr.D.Panda, learned Addl. Government Advocate sought to justify the order of detention urging that the grounds urged challenging the order of detention are totally irrelevant. He further submitted that the order of detention has been passed after careful application of mind by the detaining authority on the basis of the materials available on record as well as on the request made by the Superintendent of Police, Sambalpur. He further submitted that the procedural safeguards contained in the detention law has been complied with and both the State as well as the Government of India have dealt with the representations expeditiously and no extraneous consideration has been taken into account in the grounds and all the materials on which reliance has been placed by the detaining authority has been supplied along with the grounds of detention order to the petitioner. In reply to the contention urged on behalf of the petitioner that the incidents narrated in the grounds of detention do not make out a case of breach of 'public order', he submitted that the past criminal activities have been narrated in the grounds of detention, particularly, ground nos.14 to 19, show that the detenu has a propensity for committing crimes and ordinary laws of the land are insufficient to curb his criminal actions. Therefore, it will certainly affect public order. Hence, the order of detention is justified.

10. Further, learned Addl. Government Advocate sought to justify the detention order contending that the detaining authority was aware of the subsisting custodial detention of detenu and that he had moved bail. Neverthless she was satisfied that it was necessary to detain him under preventive detention laws. In support of the said contention, he has cited the decision in the case of Amin Mohammed Qureshi v. Commissioner of Police, Greater Bombay, AIR 1994 SC 133, wherein the apex Court has held that where the detenu is of a desperate character and has been indulging regularly in committing offences like robbery, extortion, criminal intimidation etc. the magnitude of acts is such as would disrupt maintenance of public order. He has also placed reliance upon the decision of the Supreme Court in Fitrat Raza Khan v. State of U.P. and others, AIR 1982 SC 146, wherein it has been held that the past conduct or antecedent history of a person can appropriately be taken into account in making a detention order and it is usually from prior events showing tendencies or

inclination of a man that an inference can be drawn whether he is likely in the future to act in a manner prejudicial to the maintenance of public order. Reliance is also place on the decision of the Supreme Court in Dharmendra Sugarchand and another v. Union of India, AIR 1990 SC 1196 in support of the proposition of law , wherein the apex Court after reviewing all earlier decisions held that an order of detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds must show that the detaining authority was aware of the fact of detenu being in custody and despite that compelling reasons existed to justify his detention. "Compelling Reasons" has been held to imply that cogent materials must be there before the detaining authority to hold that there is likelihood of his release from custody in the near future and that on such release, he would continue to indulge in prejudicial activities. The reliance placed upon the decision of this Court in Rabi @ Rabindra Behera @ Chicken Rabi, 2003(II) OLR (NOC) 74, has no application to the facts situation as evident from the grounds urged at para 22 thereof. Therefore, he has submitted that the writ petition is liable to be rejected.

11. On the basis of the aforesaid factual and legal contentions, the following questions would arise for consideration by this Court.

(i) Whether the grounds on which the detention order is passed against the petitioner satisfy the legal requirements that the detention order is to prevent the petitioner from acting in any manner which will be prejudicial to the maintenance of public order?

(ii) Whether the confirmation order passed by the State Government as required under Section 12 (1) of the National Security Act is in conformity with law and application of mind?

(iii) To what order?

Point No.(i)

12. From the grounds of detention annexed as Annexure-2 to the writ petition, it appears that the detaining authority took note of the various criminal cases registered against the petitioner, which is sought to be explained by the petitioner to have been registered on account of family dispute, political rivalry and at the instance of the company M/s.Aryan Ispat Ltd. and in some of the cases he has not been named in the FIR but subsequently included on the basis of 161 Cr.P.C. statement. The detaining authority also took note of the fact that although the detenu was arrested

and forwarded in several cases including Thelkuli P.S.Case No.36 dated 28.4.2011, he was released on bail in each of the cases and immediately after release without caring the court orders, he indulged in series of sensational crimes affecting the peace and tranquility as well as public order. The detenu was again arrested and remanded in connection with Thelkuli P.S. Case No.42 dated 25.3.2012 and was in intermediate judicial custody in Circle Jail, Sambalpur by the time of consideration of his case by the detailing authority. He had also filed bail application No.224 of 2012 in the said case before the Sessions Judge, Sambalpur and the Court had posted the said case for consideration on 10.4.2012. Apprehending that there is possibility of the petitioner being released on bail, the detaining authority at paragraph 22 has stated thus:

> "From the past experience it may not be out of place to circumspect that in the event of your release on bail, you will increase such activities creating frequent lawlessness, affecting normal life and causing frequent disruption of public order, which would be detrimental to the maintenance of public order."

13. Thereafter, the detaining authority after referring to several instances has further stated thus:

> "In spite of being arrested repeatedly and forwarded in custody in several criminal cases of heinous nature, your activities which are prejudicial to maintenance of public order continued unabated. On being convicted and released in a heinous case like murder and also released in other cases, on Court bail and violating the conditions imposed by Hon'ble Courts, on each occasion, you have been committing further offences and creating havoc and panic by terrorizing the general public leading to frequent disruption of public order in Sambalpur Town. You have no stones unturned to scuttle the criminal justice system by terrorizing and intimidating the informants and prosecution witnesses of different cases, instituted against you. Due to such activities, of late, people out of fear do not venture to report against you regarding your dreaded criminal and anti-social activities before police or Court. You are not only in a habit of repeatedly threatening the complainants and witnesses but also goes to the extent of physically assaulting them with intention of tempering with the prosecution evidence as well as to paralyze the process of criminal justice system."

14. The grounds of detention only indicate that the detaining authority was apprehensive that in case the detenu was released on bail, he would

again carry on his criminal activities and on such apprehension passed the order of detention. Such detention will be contrary to the judgment of the Supreme Court in Yumman Ongbi Lembi Liema (supra), wherein the apex Court referring to the earlier decision of the Supreme Court in Haradhan Saha (supra), held that the extra ordinary powers of detaining an individual in contravention of the provisions of Article 22(2) of the Constitution where the grounds of detention do not disclose any material which was before the detaining authority other than the fact that there is every likelihood of the detenu being released on bail in connection with the cases in respect of which he had been arrested to support the order of detention. It is also held that preventive detention is not to punish a person for something he has done but to prevent him from doing it. Only on the apprehension of the detaining authority that after being released on bail, the petitioner-detenu will indulge in similar activities, which will be prejudicial to public order, order under the Act should not ordinarily be passed. In fact, the reasons assigned in para 22 of the detention order that after release on bail, the petitioner has violated the terms and conditions of the bail and he has intimidated the complainants and prosecution witnesses by creating havoc and panic by terrorizing the general public leading to frequent disruption of public order at Sambalpur town is without any material and the same is on the basis of conjectures and surmises.

15. We have perused the grounds of detention dated 10.4.2012 annexed as Annexure-2 to the writ petition. It transpires from the grounds of detention that the petitioner is accused in 19 cases starting from the year 2002. It further appears from the grounds of detention vide ground no.2 that the petitioner has been convicted under section 302/34 I.P.C. in S.T.No.44/16 of 2004 and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.1000.00. He has filed appeal against the said order in this Court and while admitting the appeal this Court has granted him bail. Most of the cases relate to law and order and not public order. Learned Additional Government Advocate submitted that ground nos.14 to 19 relate to disturbance of public order. They are also proximate in point of time to the order of detention. On a careful reading of the allegations made in the aforesaid grounds, we are of the view that they do not make out case of disturbance of public order. The cases mentioned at ground nos.15 and 16 were registered on the report of the IIC himself. No information of commission of any lawlessness leading to disturbance of public order has been lodged in these two matters although the occurrence in ground no.15 is said to have taken place at the worksite of Ramkay Infrastructure Pvt. Ltd. and the occurrence in ground no.16 is said to have taken place at the work site of Gamon India Limited where number of persons must have been

working. It is therefore difficult to believe that in the aforesaid incidents, there was disturbance of public order. The allegation in ground no.17 is against one Sonu Ghosh but it is said that the involvement of the petitioner was well proved. We failed to understand how this ground can be utilized against the petitioner. Similarly the criminal act attributed to the petitioner under ground no.18 was against some individual and it has nothing to do with disturbance of public order. After going through the allegations in ground no.19, we are not satisfied that the acts complained of in the said ground can be said to have disturbed public order. All these grounds can at best be said to be instance of law and order to tackle which the ordinary law of the land is sufficient. Therefore, the reason in support of the grounds urged in the detention order in para 22 is wholly without any factual foundation. Hence, the detention order is contrary to the judgment of the Supreme Court and personal liberty guaranteed under Articles 21 and 22 of the Constitution of India. Further, regarding grant of bail in Criminal Appeal by this Court, it can be said that the said order was passed by this Court after going through the judgment of the court below and being satisfied that the petitioner is entitled to be released on bail pending disposal of the appeal against the judgment convicting and sentencing the petitioner. Therefore, the same could not have been a ground for passing detention order. It is clearly opposed to the judgment of the Supreme Court referred to supra and therefore, the reliance placed by the learned counsel for the petitioner on the aforesaid decision of the Supreme Court is applicable to the facts and circumstances of the case. Hence, conclusion reached by the detaining authority after referring to the pending criminal cases against him as indicated in the grounds of detention that the antecedents of the petitioner warrant preventive detention, is contrary to the legal principles laid down by the apex Court in the aforesaid cases as the same would infringe the fundamental rights of a person guaranteed under Articles 21 and 22(2) of the Constitution.

16. Further, learned counsel for the petitioner has rightly placed reliance upon the other two judgments of the Supreme Court in AIR 1998 SC 596 and 2004(I) OLR 551. Hence, we are of the view that the allegations in the criminal cases on the basis of which the detention order was passed relate to violation of law and order and that cannot be construed as violation of public tranquility and public order, which is the requirement as provided under Section 3(2) of the Act to pass an order of detention against the detenu. While passing the order of detention, the detaining authority is required to see that the public interest is safeguarded, which is not forthcoming in the order of detention though elaborately number of facts regarding criminal cases against the petitioner are referred to in the order of

detention. Accordingly, we hold that the reasons for passing the detention order as indicated above, are wholly unsustainable in law and the same are wholly contrary to the judgments of the Supreme Court, referred to above. Thus, point no.(i) is answered against the State and in favour of the petitioner.

Point No.(ii)

17. Section 12(1) of the Act provides that where the Advisory Board is of the opinion that there exists sufficient cause for the detention of a person, the appropriate Government 'may' confirm the detention order and continue the detention of the person concerned for such period as it thinks fit. Such confirmation in our view requires application of mind by the State Government to the facts of the case. In this case, it is worthwhile to refer to the Orissa Government Rules of Business, which has been enacted by the Governor in exercise of the powers conferred by clause (3) of Article 166 of the Constitution of India. Rule 7 of the said Rules of Business provides that the Council of Ministers shall be collectively responsible for all executive orders issued in the name of the Governor. Rule 9 states that without prejudice to the provision of Rule 7, the Minister-in-charge or the Minister of the State-in-charge of a Department or a branch or branches thereof shall be primarily responsible for the disposal of business appertaining that department or branch. Rule 11 states that all orders or instruments made or executed by order or on behalf of the Government of Orissa shall be expressed to be made by or by order of or executed in the name of the Governor of Orissa. Rule 12 is the procedure, which prescribes as follows :
"Every order or instrument of the Government of the State shall be signed either by a "Principal Secretary, a Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary or an Under-Secretary or such other officer as may be specifically empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instrument.

18. A careful reading of the aforesaid provisions, more particularly, Rule 9, it is clear that the Minister who is the political executive of the Home Department is required to apply his mind by examining the correctness of the detention order passed by the detaining authority before approving the same in exercise of power under Section 3 (4) of the Act. In order to verify whether the business transaction rule has been strictly adhered to by the political executive of the State Government as the order of detention that would be passed will have serious consequences for in the event the detention order is confirmed, he will be liable to be detained for a period of one year and his personal liberty will be affected, which will be in violation of the fundamental rights guaranteed under Articles 19, 21 and 22 of the

Constitution of India. We have called for the entire file relating to the petitioner from the concerned Department of the State Government for our perusal. On perusal of the original file, we find that upon receipt of the report from the Advisory Board with regard to the petitioner-detenu, the Joint Secretary after referring to the report of the District Magistrate, Sambalpur and Sections 12(1) and 13 of the Act put up a note dated 30.5.2012 to the Special Secretary for obtaining approval of the Government for confirmation of the order of detention and to detain the detenu for a period of 12 months under section 12(1) read with Section 13 of the Act. The Special Secretary in turn submitted the file to the Principal Secretary with the note 'For kind approval'. Thereafter the Principal Secretary submitted the file to the Chief Minister who only put his signature on 8.6.2012. So, the aforesaid note from the original file clearly indicates total non-application of mind by the political executive, who is required to pass an order in conformity with Rule 9 of the Rules of Business of the State Government. The manner in which approval of confirmation has been made does shows that there was non-application of mind to the facts of the case by the political executive. Use of the word 'may' indicates that the exercise of power of the appropriate Government for confirmation of the order of detention is independent of the report of the Advisory Board stating that there is sufficient cause for the detention. No such independent consideration appears to have been done and only on the basis of the report of the Advisory Board confirmation of the order of detention has been made. Therefore, we answer point no.(ii) in favour of the petitioner holding that there was total non-application of mind by the State Government while approval for confirmation of the order of detention on account of which, the fundamental rights guaranteed under Articles 14,19, 21 and 22(2) of the Constitution are affected.

19. Having answered point nos.(i) and (ii) in favour of the petitioner, the writ petition must succeed. Accordingly, the writ petition is allowed and the order of detention and the order of confirmation by the State Government are hereby quashed. Issue Rule. The petitioner-detenu be released forthwith if he is not required in any criminal case/cases pending against him.

Writ petition allowed.

2013 (I) ILR - CUT- 223

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

W.P.(C) NO. 15962 OF 2010 (Dt.07.08.2012)

M/S. JINDAL STAINLESS LTD.
(NOW JSL LTD.) .....Petitioner

.Vrs.

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

A. ODISHA VAT ACT, 2004 – Ss. 41, 42.

Audit assessment – Audit visit report – If audit visit report is submitted by an officer, who is neither a part of nor is the head of the audit team, the said report is vitiated in law. (Para 35)

B. ODISHA VAT ACT, 2004 – S.41 (4).

Submission of audit visit report to be within time specified U/s.41(4) of the Act – AVR becomes invalid if submitted in contravention of Section 41(4).

It is unfortunate that while Section 41(4) of the OVAT Act provides for submission of audit visit report within seven days from the date of audit and audit assessment is to be completed within six months from the date of receipt of AVR by the assessing authority, the action of the Authorized Officer in submitting the AVR to the Assessing Authority after six months from the date of audit visit not only violates the statutory provisions contained in Section 41(4) but also is against the scheme and spirit of audit visit and audit assessment provided under the OVAT Act. (Para 31,32 ,33)

C. ODISHA VAT ACT, 2004 – S.42(5).

Assessment – Penalty – Section 42 (5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed U/s.42 (3) or (4) of the OVAT Act is constitutionally valid – It is not arbitrary, unreasonable, oppressive or hit by Article 14 or in any way ultra vires the Constitution of India. (Para 30)

D. **ODISHA VAT ACT, 2004 – S.77.**

Appeal – Pre-deposit – Section 77 (4) of the OVAT Act requiring deposit of 20% of the tax or interest or both in dispute as a

precondition for entertaining an appeal against the order enumerated U/s.77 (1) of the OVAT Act does not make the right of appeal illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of Article 14 of the Constitution of India. (Para 23)

E. **ODISHA VAT ACT, 2004 – 77.**

Appeal – Remedy by way of appeal not absolute – Appeal is a creation of the statute and it cannot be created by acquiescence of the parties or by order of Court – Right of appeal/revision cannot be absolute and the legislature can put conditions for maintaining the same. (Para 22)

Case laws Referred to:-

1.2011 (6) S. 596 : (Smt. Har Devi Asnani-V- State of Rajasthan & Ors.)
2.(2004)4 SCC 311 : (Mardia Chemicals Ltd. & Ors.-V-Union of India & Ors.)
3.AIR 1988 SC 2010 : (Vijay Prakash D. Mehta & Jawahar D. Mehta -V- Collector of Customs (Preventive), Bombay)
4.AIR 1999 SC 2213 : (Kondiba Dagadu Kadam-V- Savitribai Sopan Gujar & Ors.)
5.(1999)4 SCC 468 : (Gujarat Agro Industries Co.Ltd.-V- Municipal Corporation of the City of Ahmedabad & Ors.)

For Petitioner - Mr. B.K.Mahanti, Sr. Advocate
M/s. A.N.Das, N.Sarkar & E.A.Das.

For Opp.Parties- Mr. R.P. Kar,
Standing Counsel (Revenue).

B.N.MAHAPATRA,J. This writ petition has been filed with the following prayers:

"(i) Admit and allow the present writ petition,

(ii) Strike down Section 77(4) of the Orissa Value Added Tax Act, 2004 read with the proviso to Rule 87 of the Orissa Value Added Tax Rules, 2005 as *ultra vires* the Constitution of India and declare it as unconstitutional and violative of Articles 14,19, 21 and 265 of the Constitution of India,

(iii) Strike down Section 42(5) of the Orissa Value Added Tax Act, 2004

read with Rule 49(6) of the Orissa Value Added Tax Rules, 2005 as *ultra vires* the Constitution of India and declare it as unconstitutional and violative of Articles 14,19,21 and 265 of the Constitution of India,

(iv) Quash the impugned audit assessment order dated 20.10.2008 for the assessment year 2005-06 and consequent demand notice(s) under the Orissa Value Added Tax Act, 2004,

(v) Quash the impugned communication notice No.2177 dated 16.05.2008 under the OVAT in form VAT 306 issued by the Assessing Authority and the enclosed audit visit report dated 31.03.2008",

(vi) Pass such other orders as may be deemed fit in the bonaffide interes Ofjustice"

2. Petitioner's case in a nutshell is that it is a company incorporated and registered under the Companies Act, 1956, having its registered office at O.P. Jindal Marg, Hisar,-125005 (Haryana) and its unit within the State of Orissa at Kalinganagar Industrial Complex, Duburi, P.O. Danagadi, Dist: Jajpur, Odisha State. The petitioner is engaged in setting up of an integrated Stainless Steel Plant as well as manufacture of Ferro Alloys. It is a registered dealer under the Odisha Value Added Tax Act, 2004 (for short, "OVAT Act"). It is paying substantial amount of tax and is listed as a Large Tax Unit (LTU).

3. The officers of the Investigation Wing of the Commercial Taxes Department visited the business premises of the petitioner on 01.10.2007 without disclosing their identity and authorization. On objection and protest, the petitioner was threatened with various coercive actions. The petitioner therefore, under duress, protest and compulsion, rendered necessary assistance to the said persons and provided all informations and documents sought for from it. Documents and files were seized and removed from the petitioner' premises. No seizure list of documents and files seized and removed from the petitioner's premises was prepared and a copy thereof was handed over to the petitioner. Audit was completed on the same day. On or about 1st Week of January, 2008, the petitioner received a notice in VAT 306 enclosing copy of Audit Visit Report indicating the date of appearance before the Assistant Commissioner of Sales Tax, Jajpur Range, Jajpur Road on 10th June, 2008. Pursuant to the above notice, the petitioner appeared and provided details required under the notice. The details were provided on various dates and last most important dates being 24.10.2008 and 15.11.2008. On or about 19/20.11.2008, the petitioner received the assessment order dated 20.10.2008 (Annexure-2). Being aggrieved by the said assessment order, the petitioner has filed the present writ petition.

4. Mr. B.K. Mahanti, learned Senior Advocate appearing on behalfof the petitioner challenging the vires of Section 77(4) of OVAT Act readwith the proviso to Rule 87 of the Orissa Value Added Tax Rules, 2005 (for short, "OVAT Rules) submitted that the condition precedent of pre-deposit of 20% of the tax or interest or both, in dispute, is *ab initio* void for entertaining an appeal (which effectively is the first available opportunity to approach the adjudicating authority) under the Scheme of OVAT is unreasonable, oppressive and violative of and *ultra vires* Article 14 of the Constitution of India. Lack of any provision in the statute and lack of any power in the hands of the statutory authority for relieving the assessee of the burdensome and onerous provision of pre-deposit (especially when the tax amount in full is deposited at the time of filing the return), renders the provision of pre-deposit unreasonable and hit by and *ultra vires* Article 14 of the Constitution of India. The scheme of assessment under the OVAT being that of self assessment and the entire admitted tax being deposited for acceptance of the return and the return to be valid, the stage of the first appeal is the first available opportunity to the petitioner to agitate against and raise any grievance against an impugned assessment order like in the present case wherein an audit assessment under Section 42 of the OVAT Act has been done. A condition of deposit of admitted tax in full and twenty per centum of tax or interest or both, in dispute, at the threshold bereft of any relieving provision renders the provision as oppressive and onerous, unreasonable and unsustainable in law. Such situation militates against the very spirit and concept of OVAT and defeats the very purpose of the Statute. Such a provision especially in cases of unsustainable demands makes the provision unreasonable, illegal and *ultra vires* Articles 14, 19, 21 and 265 of the Constitution of India. The workability of the statute is defeated and the entire appeal provision is rendered illusory and nugatory as the opposite parties artificially and on flimsy grounds inflate the assessed amount and thereby burden the assessee and realize twenty percent of the inflated tax or interest or both through the provision of predeposit in appeal and the balance of tax, interest and penalty for conditional stay at the stage of hearing of the interim stay petition. Such provision circumvents and defeats the very spirit and legislative intent of introducing OVAT and repealing Orissa Sales Tax Act. The provision thwarts, defeats obliterates and eclipses a substantive right of appeal of the petitioner by imposing such an unreasonable and oppressive provision. The concept of pre-deposit and artificially inflated demand in cases like the present militates against and defeats the fiscal regime and causes severe harm to perspective planning and defeats any fiscal discipline causing sever harm to the economy.

5. Mr. Mahanti, further submitted that the petitioner challengesthe constitutional validity of sub-section (5) of Section 42 of the OVAT Act read with sub-rule (6) of Rule 49 of the OVAT Rules being arbitrary, unreasonable, fatally hit by gross and flagrant violation of the principles of natural justice. Section 42(5) of the OVAT Act and Rule 49(6) of OVAT Rules are ultra vires the Constitution of India and also hit by doctrine of double jeopardy. Section 42(5) of the OVAT Act provides that without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under subsection (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections. There is no provision to show cause as to whether penalty should be imposed or not and therefore, this provision is rendered illegal, unconstitutional and *ultra vires* the Constitution.

6. Challenging the impugned notice dated 16.05.2008 (Annexure- 1) vide communication No.1677, the enclosed audit visit report dated 31.03.2008 and the consequent audit assessment order dated 20.10.2008 (Annexure-2) for the assessment year 2005-06 and issuance of the demand notice to the petitioner, Mr. Mahanti, submitted that those notices and orders issued /passed by the opposite parties are not sustainable in law. No notice intimating the date of audit visit in terms of Rule 42 of the OVAT Rules was issued to the petitioner. Such fatal infirmity vitiates the entire audit proceedings rendered unsustainable in law and the same is without jurisdiction and non-est in law. Lack of any notice to the petitioner has rendered the opposite party No.5 lack of the jurisdiction to proceed with and take steps for making audit assessment. There exists no case for satisfaction of the mandate of Rule 41(3) of the OVAT Rules and no case can possibly be made out for dispensing with prior notice of tax audit under Section 42 of the OVAT Act read with Rule 41 of the OVAT Rules. There exists no revenue risk either on the basis of objective analysis or on the basis of any intelligence report. The petitioner verily believed that no prior approval of the next higher authority has been taken in terms of Rule 44(3) of the OVAT Rules. The condition precedent for acquisition of jurisdiction under Rule 41 of the OVAT Rules does not exist and therefore, exercise of jurisdiction to dispense with the pre-requisite notice of audit isit is an arbitrary exercise of power and is grossly vitiated and fatally hit by inherent lack of jurisdiction in the hands of opposite party No.6. The contents, findings and prejudicial material in the audit visit report and lack of any opportunity to the petitioner to contend, rebut and reply to the allegations in the said materials clearly violate the principles of natural justice and render the consequent

prejudicial finding leading to the audit visit report and the assessment order unsustainable in law.

7. The notice in Form VAT-306 itself is contrary to the provisions of Section 42(2) of the OVAT Act insofar as the mandatory statutorily prescribed period of thirty days granted therein illegally and in gross violation of the principles of natural justice has been reduced to around twenty five days. The audit visit report has been submitted by a person who was neither a part of nor is the head of the team of audit visit on 01.10.2007. The approval of the audit visit report has been given by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur on a report submitted by the Sales Tax Officer, Investigation unit, Bhubaneswar as head of the audit team.

8. Section 41(4) of the OVAT Act provides a period of seven days to the authorized officer to submit the audit report to the Assessing Authority. But in the instant case, the audit report was submitted on 31.03.2008 i.e. after a period of six months from the date of completion of the audit. Therefore, audit report and consequential assessment order are unreasonable, unsustainable, non-est and void ab initio in law. The time period provided under Section 42(6) of the OVAT Act is six months from the date of receipt of the audit report. Section 41(4) of the OVAT Act having been clearly violated, the authorized officer signed the audit report on 31.03.2008, i.e. exactly on completion of six months. The impugned audit assessment order dated 20.10.2008 would also be barred by limitation and the statutory bar would be fatal to the order/proceedings. Therefore, there exists no jurisdiction in the hands of the assessing officer to proceed with the assessment order under Section 42 of the OVAT Act. The assessment order travels beyond the materials available in the audit visit report. The said assessment officer also relies on extraneous and irrelevant material which is neither on record nor is a part of the audit visit report. He has also conveniently ignores materials on record. Hence the impugned assessment order is liable to be quashed and the assessing officer has no jurisdiction to travel beyond the mandate of the audit visit report and cannot rely on any material which is extraneous and alien to the audit visit report.

9. Mr. Mahanti, further submitted that the petitioner strongly believes that after completion of six months as provided under Section 42(6) of the OVAT Act, no extension of time for completion of assessment has been granted by the Commissioner. The audit visit dated 01.10.2007 was followed by a report dated 31.03.2008. The report reveals that the entire audit was for the period April, 2005 till March, 2006. The notice in Form 306 enclosing the

audit visit report is for the period 01.04.2005 to 31.03.2007 (i.e. 2005-06, 2006-07and 2007-08) [upto 30.09.2007].The notice thus travels/transgresses beyond the period in the audit visit report and it is therefore, ab initio void and non-est in the eye of law and without jurisdiction. This clearly demonstrates that the order has been antedated and the assessment order dated 20.10.2008 is fabricated document inasmuch as in the order dated 20.10.2008 the materials submitted on 24.10.2008 and 15.11.2008 are incorporated. The interpretation of the provisions relating to the input tax credit and disallowance thereof are wholly misconceived and are based on an erroneous interpretation of law and therefore the same ought to be deleted. The impugned assessment order ignores the details submitted to opposite party No.6 which clearly favours the petitioner and proceeded contrary to the materials available on record and reaches a perverse and unsustainable conclusion and saddles the petitioner with the extra demand and therefore, learned Senior Advocate Mr. Mahanti, prays to allow this writ petition by granting the reliefs as prayed in this writ petition.

10. Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue submitted that an alternative and efficacious remedy by way of appeal is available to the petitioner and the petitioner itself admits that it has filed appeal against the impugned order of assessment before the First Appellate Authority. Therefore, the petitioner cannot avail parallel roceedings against the impugned order of assessment passed under Annexure-1.

Mr. Kar further submitted that the assertion of the petitioner that the audit assessment order has been passed without giving opportunity of hearing to the petitioner and thereby principles of natural justice is violated is contrary to its own averments made in paragraph 2(t) of writ petition, wherein it is averred that the petitioner appeared, assisted and complied with the direction of opposite party No.6 and provided all material data for the purpose of assessment.

11. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Smt. Har Devi Asnani vs. State of Rajasthan & Others, 2011 (6) Supreme 596,* Mr Kar submitted that the provisions of pre-condition to deposit 20% of the tax or penalty or both in dispute to maintain appeal is constitutionally valid. Provision of Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed is constitutionally valid. Therefore, Mr. Kar, prays for dismissal of the writ petition.

12. On the rival, factual and legal contentions urged on behalf of the parties, with reference to prayer made in the writ petition the following

questions fall for consideration of this Court:

(i) Whether the condition precedent for pre-deposit of 20% of tax or interest or both in dispute in addition to 10 payment of admitted tax for entertaining an appeal as provided under Section 77(4) of OVAT Act read with proviso to Rule 87 of OVAT Rules is unreasonable, oppressive, violative and *ultra vires* of Article 14 of the Constitution of India?

(ii) Whether the provisions of sub-section (5) of Section 42of the OVAT Act, 2004 read with sub-rule (6) of Rule 49 of the OVAT Rules, 2005 authorizing imposition of penalty equal to twice the amount of tax assessed under Section 42(3) and (4) of the OVAT Act are arbitrary, unreasonable, oppressive and *ultra vires* the Constitution of India?

(iii) Whether the Authorized Officer has not submitted audit visit report to the Assessing Authority within seven days from the date of audit as provided under Section 41(4) of the OVAT Act and thereby the impugned audit report dated 31.03.2008 and audit assessment dated 20.08.2008 would be non est / unsustainable in the eye of law?

(iv) Whether the audit visit report is vitiated on the ground that the same has been submitted by an officer who was neither a part of nor is the head of the team of audit?

(v) Whether statutory period of 30 days allowed in Section 42(2) of the OVAT Act, 2005 has not been extended to the petitioner in Form VAT 306 and thereby the audit assessment proceedings are vitiated?

(vi) Whether the Investigation Wing of the Commercial Taxes Department without disclosing their identity and authorization in their favour visited the business premises of the petitioner on 01.10.2007 and on objection and protest the petitioner was threatened with various coercive actions as a result of which the petitioner under duress, protest and compulsion rendered necessary assistance to the Investigating Officer and provided all materials and documents sought for from him?

(vii) Whether the documents filed were seized and removed by the Investigating Officials from the business premises of the petitioner without preparing and handing over any seizure list to the petitioner?

(viii) Whether there exists no case for dispensing with prior notice on tax audit under Section 42 of the OVAT Act, 2004 read with Rule 42 of the OVAT Rules, 2005 ?

(ix) Whether the pre-condition of an intelligence or information regarding evasion of tax was not satisfied as required under Rule 41(3) of the OVAT Rules before an order was passed by the Commissioner for audit under that Rule?

(x) Whether no prior or post facto approval of the next higher authority as provided under Rule 44(3) of the Rules has been taken for directing audit under Rule 41(3) of the OVAT Rules.

(xi) Whether approval of the report by Assistant Commissioner of Sales Tax, Enforcement Range Berhampur renders the approval of report to be vulnerable and a case of mechanical exercise of power without any application of mind?

(xii) Whether AVR reveals that the entire audit is for the period April, 2005 till March, 2006, but the notice is for the period from 01.04.2005 to 31.03.2007 and thus the notice travels/transgresses beyond the period in audit visit report and therefore without jurisdiction and non est in the eye of law?

(xiii) Whether the contents, findings and materials in the audit visit report were not disclosed to the petitioner and reasonable opportunity of hearing was not afforded to him to rebut the same?

(xiv) Whether the impugned order of assessment dated 20.10.2008 has been antedated and materials submitted by the petitioner on 24.10.2008 and 15.11.2008 are incorporated in the said order of assessment dated 20.10.2008 and the impugned audit assessment order ignores the details submitted by the petitioner to opposite party No.6 which clearly favours the petitioner and therefore the assessment order is not sustainable in law?

(xv) Whether assessment order relies on extraneous and irrelevant materials which are neither on record nor as a part of audit visit report and it also ignores the materials on record, therefore, the impugned order of assessment is liable to be quashed?

(xvi) Whether in response to notice/direction given by the Assessing Officer, the petitioner appeared and complied with the direction of

opposite party No.6 and provided all materials/data for the purpose of assessment and therefore, in law the best judgment cannot be permissible?

13. Many points have been urged on behalf of the petitioner and many decisions have also been cited in the written argument submitted on behalf of the petitioner. It is not necessary to burden this judgment by referring to all the decisions cited.

14. Question No.(i) is with regard to requirement of pre-deposit of 20% of tax or interest or both in dispute in addition to payment of admitted tax for entertaining the appeal. Section 77(4) of the OVAT Act provides that no appeal against any order shall be entertained by the appellate authority, unless it is accompanied by satisfactory proof of payment of admitted tax in full and twenty per centum of the tax or interest or both in dispute.

According to Mr. Mahanti, learned Senior Advocate, this provision is very harsh. There is no relieving provision as no power is vested with the appellate authority to grant any relaxation in the matter of predeposit of 20% of tax or interest or both in dispute. In case of raising arbitrary demand, it is difficult to maintain an appeal as it is mandatory as per the existing provision to deposit of 20% of the tax or interest or both in dispute to maintain appeal. According to Mr.Mahanty, such a provision is arbitrary, unreasonable and hit by Articles 14 and 19(1)(g) of the Constitution of India. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of ***Mardia Chemicals Ltd. and others vs. Union of India and others, (2004) 4 SCC 311,*** Mr. Mahanti submitted that the Hon'ble Supreme Court declared that the provision of Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 requiring deposit of 75% of the demand is constitutionally invalid. The Hon'ble Supreme Court has further held that the amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of onesided claim alone cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute.

15. Situation is different in case of filing of an appeal before the First Appellate Authority under Section 77 of the OVAT Act. Under the OVAT Act, the First Appeal is preferred only after the assessment under the OVAT Act is completed. Thus, the first adjudicating authority is the Assessing Officer

where ample scope was given to the assessee to defend its case. Only against the assessment order, appeal is preferred before the First Appellate Authority. Therefore, payment of 20% of the tax or interest or both in dispute is not a requirement at the initial stage but is a requirement at the appellate stage. Hence, the decision of the Hon'ble Supreme Court in the case of ***Mardia Chemcials Ltd. (supra***) is distinguishable so far as maintaining appeal before the First Appellate Authority under the OVAT Act is concerned.

16. According to Mr. Kar, in view of the judgment of the Hon'ble Supreme Court in the case of ***Smt. Har Devi Asnani (supra)*** that right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the statute. Therefore, precondition of depositing 20% of tax or interest or both in dispute is constitutionally valid.

17. Needless to say that appeal is a creation of the Statute and it cannot be created by acquiescence of the parties or by order of Court.

Law is well-settled that right of appeal/revision cannot be absolute and the legislature can put conditions for maintaining the same.

18. In ***Vijay Prakash D. Mehta & Jawahar D. Mehta vs. Collector of Customs (Preventive), Bombay***, AIR 1988 SC 2010, the Hon'ble Supreme Court held as under:-

> **"**Right to appeal is neither an absolute right nor an ingredient of natural justice, the principles of which must be followed in all judicial and quasijudicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant….. The purpose of the Section is to act in terrorem to make the people comply with the provisions of law."

19. In ***Kondiba Dagadu Kadam vs. Savitribai Sopan Gujar & Ors., AIR 1999 SC 2213,*** the Hon'ble Supreme Court held as under:

> "It has to be kept in mind that the right of appeal is neither a natural nor an inherent right attached to the litigant being a substantive statutory right it has to be regulated in accordance with law in force at the relevant time. The conditions mentioned in the section must be strictly fulfilled before an appeal can be maintained and no Court has the power to add to or enlarge those grounds. The appeal cannot be decided on merit on merely equitable jurisdiction."

20. In ***Gujarat Agro Industries Co. Ltd. vs. Municipal Corporation of the City of Ahmedabad & Ors., (1999) 4 SCC 468,*** the Hon'ble Supreme Court held that right of appeal, though statutory, can be conditional/qualified and such a law cannot be held to be violative of Article 14 of the Constitution. An appeal cannot be filed unless so provided under the statute and when a law authorizes filing of an appeal, it can impose conditions as well.

21. The Hon'ble Supreme Court in the case of ***Smt. Har Devi Asnani (supra),*** referring to its earlier decision held that

> "10…..this Court has taken a consistent view that the right of appeal or right of revision is not an absolute right and it is a statutory right which can be circumscribed by the conditions in the grant made by the statute. Following this consistent view of this Court, we hold that the proviso to Section 65(1) of the Act, requiring deposit of 50% of the demand before a revision is entertained against the demand is only a condition for grant of the right of revision and the proviso does not render the right of revision illusory and is within the legislative power of the State legislature."

22. Therefore, it becomes crystal clear that appeal is a statutory remedy and the same is maintainable provided that the Statute enacted by a competent Legislature provides for it. Further, there can be no quarrel that the right of appeal cannot be absolute and the Legislature can put conditions for maintaining the same.

For the reasons stated above, the decisions relied upon by the petitioner are of no help to the petitioner as those decisions are rendered in respect of particular facts of that case.

23. In view of the above, we are of the considered view that the provisions of Section 77(4) of the OVAT Act requiring deposit of 20% of the tax or interest or both in dispute as a precondition for entertaining an appeal against the order enumerated under Section 77(1) of the OVAT Act does not make the right of appeal illusory and such a condition is within the legislative power of the State Legislature and cannot be held to be unreasonable and violative of Article 14 of the Constitution.

24. Question No.(ii) is with regard to imposition of penalty under Section 42(5) which is equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) of Section 42 of the OVAT Act which according to the

petitioner is arbitrary, unreasonable, oppressive and ultra vires the provisions of Articles 14, 19(1)(g), 21 and 265 of the Constitution of India.

25. Section 42 of the OVAT Act deals with "Audit Assessment".

Section 42(5) provides that without prejudice to any penalty or interest that may have been levied under any provision of this Act, an amount equal to twice the amount of tax assessed under sub-section (3) or sub-section (4) shall be imposed by way of penalty in respect of any assessment completed under the said sub-sections.

26. The constitutional validity of sub-section (5) of Section 42 of the OVAT Act is under challenge basically on two grounds:

(i) this provision mandates imposition of penalty without prejudice to any penalty, or interest that may have been levied under any provisions of the Act; and

(ii) without any show cause to the affected assessee.

27. VAT is indirect tax on consumption of goods. It is the form of collecting sales tax under which tax is collected in each stage on the value added to the goods. The basic object of VAT Scheme is to provide voluntary and self compliance. It goes without saying that to plug the leakage of revenue, the Legislature enacted law authorizing imposition of penalty for infraction of any statutory provision. We are conscious that generally penalty proceedings are quasi judicial in nature. Therefore, before imposing penalty, opportunity of hearing should be provided to the affected assesseedealer. In the OVAT Act, various Sections provide for imposition of penalty for infraction of statutory provisions. In most of those Sections opportunity of being heard is provided to a dealer before imposition of penalty. Those Sections are Section 28(1), Section 31(9), Section 34(3), Section 54(6), Section 61(5), Section 62(6), 65(2), Section 73(10), Section 73(12(e), Section 73(13), Section 76(3), Section 76(8), Section 101(4) and Section 107(4). The present position is entirely different. Quantification of penalty is dependant on the tax assessed under Section 42 of the OVAT Act. For the purpose of assessing tax, opportunity of hearing was afforded to the assessee, the explanation of the assessee and its books of account were examined and considered. Penalty is only quantified on the basis of the tax assessed. No discretion is left with the Assessing Officer for levying any lesser amount of penalty. Therefore, even if further opportunity will be given to the assessee before imposing penalty that will be a futile exercise. Penalty

is not independent of the tax assessed. If the tax is assessed, imposition of penalty under 42(5) is warranted.

Mr. Mahanti, learned Senior Advocate has not brought to our notice any other provision of the OVAT Act authorizing imposition of penalty in the nature of penalty envisaged under Section 42(5). If the nature of the penalty elsewhere provided under the Statute that is different from the nature of penalty envisaged under Section 42(5) of the OVAT Act. Therefore, the question of double jeopardy does not arise.

28. The matter may be looked into from different angle. Section 42 of the OVAT Act deals with "Audit Assessment". As stated above, imposition of penalty is dependent upon the quantum of tax assessed in audit assessment under Section 42 of OVAT Act. If such a penal provision is not provided then fraudulent dealers would seriously venture to evade tax and whenever they will be caught hold of they will simply pay the tax and escape. Therefore, the provision for imposing penalty twice the amount of tax assessed, under Section 42 of the OVAT Act has been made so that a dealerassessee would refrain himself from taking any step to avoid payment of legitimate tax. If, however, any dealer indulges himself in any fraudulent activities to evade tax, then in addition to tax assessed he would pay penalty which is twice the amount of tax assessed and therefore, it cannot be said that the provision in this regard is arbitrary and unreasonable.

29. Against the assessment of tax and penalty there is a provision for appeal. In appeal, if the amount of tax assessed under Section 42 of the OVAT Act is reduced, the quantum of penalty will also be reduced automatically. Therefore, it is not an unreasonable provision as contended by Mr. Mahanti, learned Senior Advocate appearing for the petitioner.

30. In view of the above, we are of the considered view that Section 42(5) of the OVAT Act authorizing imposition of penalty equal to twice the amount of tax assessed under Section 42(3) or (4) of the OVAT Act is constitutionally valid. It is not arbitrary, unreasonable, oppressive, or hit by Article 14 or in any way *ultra vires* the Constitution of India.

31. Question No. (iii) is whether the Authorized Officer has not submitted audit visit report to the Assessing Authority within seven days from the date of audit as contemplated under Section 41(4) of the OVAT Act and thereby the impugned audit visit report dated 31.03.2008 and audit assessment dated 20.08.2008 would be non est / unsustainable in the eye of law. Normally, it is a mixed question of fact and law. But the documents annexed to the writ petition reveal that there is infraction of the provision and time provided under Section 41(4) has not been adhered to. Section 41(4)

provides that after completion of tax audit of any dealer under subsection (3), the officer authorized to conduct such audit shall, within seven days from the date of completion of the audit, submit the audit report to the assessing authority in the prescribed form along with the statements recorded and documents obtained evidencing suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit and evasion of tax, if any, relevant for the purpose of investigation, assessment or such other purposes.

32. In the instant case, notice issued in form VAT 306 and the accompanying audit visit report reveal that the audit of the business of the petitioner was undertaken by the officers of the audit unit on 01.10.2007 and audit visit report was to be submitted within seven days from 01.10.2007 as contemplated in Section 41(4). But the audit visit report was submitted on 31.03.2008, i.e., after six months of the completion of the audit. This is in clear violation of the statutory provision contained in Section 41(4) since there is a time limit prescribed for submission of audit visit report and the same has not been complied with. Therefore, the said audit visit report has no validity.

33. It is unfortunate that while under OVAT Act Section 41(4) provides for submission of audit visit report within seven days from the date of audit and audit assessment is to be completed within six months from the date of receipt of AVR by assessing authority, the action of the Authorised Officer in submitting the AVR to Assessing Authority after six months from the date of audit visit not only violates the statutory provisions contained in Section 41(4) but also is against the scheme and spirit of audit visit and audit assessment provided under the OVAT Act.

34. Question No.(iv) is whether the audit visit report is vitiated on the ground that the same has been submitted by an Officer who was neither a part of nor is the head of the team of audit.

Mr.Mohanti, learned Senior Advocate submitted that the audit visit report has been submitted by a person who was neither a part of nor is the head of the team of audit visit on 01.10.2007. The audit visit report has been submitted under the seal and signature of Sales Tax Officer, Investigation Unit, Bhubaneswar as head of the audit team. But as a matter of fact the said Officer was never a part of the audit team and the audit visit report also does not disclose the said Officer to be a part of the audit visit team. Therefore, the Sales Tax Officer, Investigation Unit, Bhubaneswar cannot be the head of the audit team and has no jurisdiction and competence to sign the audit visit report. Moreover, the approval of the audit visit report has been given by the Assistant Commissioner of Sales Tax on a report

submitted by the Sales Tax Officer Investigation Unit, Bhubaneswar as head of the audit team. It is a matter of record that the audit at Bhubaneswar office of the petitioner was under the supervision of the Assistant Commissioner of Sales Tax, Enforcement Range, Balasore whereas the report has been approved by the Assistant Commissioner, Enforcement Range, Berhampur. This renders the approval of the report vulnerable and a case of mechanical exercise of power without application of mind by an incompetent and unauthorized officer. Therefore, the report and their approval are void and *non est* in the eye of law; therefore liable to be quashed.

35. To deal with the above question, it is necessary to refer Section 41(4) of the OVAT Act read with Rule 45(3) of the OVAT Rules. Section 41(4) envisages that after completion of tax audit of any dealer, the officer authorized to conduct such audit shall within seven days from the date of completion of the audit, submit the audit visit report. Rule 45(3) says audit report in Form VAT-303 shall be submitted by the officer-in-charge of the audit team conducting audit to the Assessing Authority within seven days of completion of the audit. Conjoint reading of Section 41(4) of the OVAT Act and Rule 45(3) of the OVAT Rules makes it clear that after completion of the tax audit of any dealer, the officer-in-charge authorized to conduct such audit shall within seven days from the date of completion of the audit submit the audit visit report in Form VAT-303 to the Assessing Authority.

Therefore, an audit visit report if submitted by an officer, who is neither a part of nor is the head of the team of audit, is vitiated in law.

36. The audit visit report attached to the writ petition under Annexure-1 reveals that on 01.10.2007, an Investigation Audit under Rule 41(3) of the OVAT Rules was preferred by the Enforcement Wing of Commercial Taxes, Government of Odisha, simultaneously, at both the factory premises as well as the registered office premises of the company located at Jajpur and Bhubaneswar. While a team of officials led by ACSTEnforcement Range, Berhampur visited the factory premises, the registered office premises was visited by STO(I), Berhampur and ASTOs of Investigation Unit of Bhubaneswar under the supervision of the A.C.S.T. Enforcement Range, Balasore. Thus, the ACST, Enforcement Range, Berhampur was in-charge of the audit team conducting audit in factory premises. But the audit visit report reveals that the same has been submitted by the S.T.O., Investigation Unit, Bhubaneswar as head of the audit team. Thus, the audit visit report has not been submitted by the officer-in-charge of the audit team authorized to conduct the audit in the factory premises as required under Section 41(4) of the OVAT Act read with Rule 45(3) of the OVAT Rules. Therefore, the said

report is vitiated in law.

Further, irregularity noticed from the audit visit report is that while the registered office premises was visited by STO (I), Berhampur and ASTO's of Investigation Unit, Bhubaneswar under the supervision of ACST, Enforcement Range, Balasore, the said audit visit report has been approved by the Assistant Commissioner of Sales Tax, Enforcement Range, Berhampur. This is also not permissible under the law.

37. Question No.(v) is as to whether statutory period of 30 days allowed in Section 42(2) of the OVAT Act, 2005 has not been extended to the petitioner in Form VAT 306 and thereby the audit assessment proceedings are vitiated. Section 42(1) provides that where the tax audit conducted under sub-section (3) of Section 41 results in the detection of suppression of purchases or sales, or both, erroneous claims of deductions including input tax credit, evasion of tax or contravention of any provisions of this Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under Section 39 or Section 40, serve on such dealer a notice in the form and manner prescribed along with a copy of the Audit Visit Report, requiring him to appear in person or through his authorized representative on a date and place specified therein and produce or cause to be produced such books of account and documents relying on which he intends to rebut the findings and estimated loss of revenue in respect of any tax period or periods as determined on such audit and incorporated in the Audit Visit Report.38. Section 42(2) provides that where a notice is issued to a dealer under sub-section (1) he shall be allowed time for a period not less than 30 days for production of relevant books of account and documents. In the instant case, notice in Form VAT 306, which has been attached to the writ petition as Annexure-1 reveals that such notice though was dated 30.04.2008 has been issued vide Issue No.2177 dated 16.05.2008 fixing date of appearance and production of the books of account on 10.06.2008. Thus, the notice in Form VAT 306 itself shows that 30 days time as provided under Section 42(2) has not been allowed to the petitioner. Petitioner's case is that the notice in Form VAT 306 was served in first week of June, 2008 and thus the petitioner barely had 4-5 days to appear and comply with the direction in the notice and thereby the cardinal principle of natural justice is violated. Thus, this is a case of clear violation /infraction of the mandatory provisions of Section 42(2) of the OVAT Act.

39. Law is well-settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio*

unius est exclusion alteris", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. (*See Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615*).

40. In the fact situation, completion of audit assessment on the basis of AVR which has been submitted in violation of statutory provision of Section 41(4) of the OVAT Act read with Rule 45(3) of the OVAT Rules and upon issuance of notice in Form VAT 306 in violation of Section 42(2) is not sustainable in law. Accordingly, we set aside the impugned assessment order dated 20.10.2008 and the consequent demand notice.

41. In view of the answer to question Nos.(iii), (iv) and (v) there is no need to answer other questions.

42. In the result, the writ petition is allowed in part to the extent indicated above.

Writ petition allowed in part.

2013 (I) ILR - CUT- 241

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

W.P.(C) NOS.12328, 12553 OF 2012 (Dt.20.11.2012)

PRABIR KUMAR DAS …….Petitioner

.Vrs.

STATE OF ODISHA & ORS. …….Opp.Parties

TORT – Wall of an Anganwadi Centre collapsed – Death of 7 Children below 5 years – Loss of precious life due to tortuous act of the State or its functionaries – Writ petition claiming compensation – Held, direction issued to the State to pay Rs.5.00 lakhs to the parents of each of the deceased children and to bear all medical expenses of the injured children – Further directions issued to take adequate safety measures in future. (Para 26,27 & 30)

Case laws Referred to:-

1.(1964) AC 465 (HL) : (Hedley Bryne & Co. Ltd.-V- Heller & Partners Ltd.)
2.(1970) All ER 294 (HL) : (Home Office-V- Dorset Yacht Co. Ltd.)
3.1971 MP LJ 706 : (Madhya Pradesh State Road Transport Corporation & Anr. -V- Mst. Basantibai & Ors.)
4.AIR 1996 SC 2426 : (Paschim Banga Khet Mazdoor Samity & Ors.-V- State of West Bengal & Anr.)
5.AIR 1995 SC 922 : (Consumer Education & Research Centre & Ors.- V- Union of India & Ors.)
6.AIR 1983 SC 1086 : (Rudul Sah-V- State of Bihar & Anr.)
7.AIR 1992 SC 2069 : (Kumari Smt.-V- State of Tamil Nadu & Ors.)
8.AIR 1962 SC 933 : (State of Rajasthan-V- Mst. Vidhyawati).

For Petitioner - In person.
For Opp.Parties - Advocate General
For Petitioner - M/s. J. Katikia, B. Mishra, A.Mohanty, P.Mohanty.
For Opp.Parties - Advocate General.

B.N.MAHAPATRA, J. The above two writ petitions have been filed in the nature of Public Interest Litigation with following prayers.

W.P.(C). No.12328 of 2012

"The Hon'ble Court may kindly direct the State to (i) conduct a high level enquiry for fixing responsibility for the negligence which led to the death of children due to the collapse of the wall on 09.07.2012; (ii) constitute a task force to look into the safety standards/norms/conditions of Anganwadi Centres and Schools with a view to ensuring the safety of children; (iii) take necessary steps to repair/restructure dilapidated/damaged buildings in which Anganwadi Centres operate and to make alternative arrangements; (iv) take steps for construction of new buildings for Anganwadi Centres that lack own buildings; The Hon'ble Court may kindly monitor the implementation of these directions through appropriate mechanisms/procedures. The Hon'ble Court may kindly direct the State to initiate criminal proceedings against the guilty persons/officials. The Hon'ble Court may further direct the State to adequately compensate the bereaved parents by paying Rs.Ten Lakh for each deceased child. The Hon'ble Court may kindly issue further directions/guidelines for periodic visits by the members of the State Commission for Protection of Child Rights and District Child Welfare Committees for ensuring the welfare and safety of children in the Anganwadi Centres. It is therefore, prayed that this Hon'ble Court may graciously be pleased to admit this PIL writ petition, issue RULE NISI calling upon the opposite parties to show cause, and if the opposite parties fail to show cause or show insufficient cause, the said rule be made absolute in granting the reliefs prayed for; And may further be pleased to pass any other order(s) as deemed fit and proper; And for this act of kindness the petitioner shall as in duty bound ever pray."

WP(C) 12553 of 2012

"It is therefore, prayed that this Hon'ble Court may graciously be pleased to admit this Writ Petition, issue notice to Opp. Parties and after hearing from the counsel of both the parties issue the following directions to the Opp. Parties:

1. To have a quick review of condition of buildings and shelters under which anganwadi centres are functioning now, all across the State, within a stipulated time frame, at the level of the project in rural and urban areas, and where the buildings are found to be unsafe, alternative arrangement be made to prevent any future occurrence of similar kind of disaster. And to bring out the white paper of the review to the public domain.

2. To devise a proper Accountability Mechanism for ICDS Management. Officers placed under various ladders of decision making be made accountable for any kind of commission and omission at their level.

3. To constitute a Taskforce with Government and Civil Society Representatives to review the situation and to devise a plan for infrastructure development.

4. To codify proper Building standard/norms and that is to be followed strictly.

5. To make and strengthen adequate infrastructure and physical environment in anganwadi centres.

6. To bear all the medical expenses of the injured children till they are out of the hospital, after fully recovered.

7. To give Compensation amount of Rs.10,00000/-(Ten lakh) to each of the deceased children's family.

8. To initiate Criminal proceeding against those found guilty.

Any other relief/relieves, order/orders, direction/directions as this Hon'ble court deems fit and proper.

And for this act of kindness, the petitioner as in duty bound ever pray."

2. Bereft of unnecessary details, the facts leading to filing of the above two writ petitions are as follows.

On 9th July 2012, at about 11 A.M., a wall of the Anganwadi Centre operating at Nelia Upper Primary Centre at Suansia under Ranpur Block in the district of Nayagarh collapsed causing death of seven children, who were below 5 years. Hence, the present writ petition.

3. Mr. J. Katikia, appearing for the petitioner in W.P.(C) No.12553 of 2012 submitted that the Anganwadi Centre was running in a very old and dilapidated house separately attached to the Primary School of Suansia village. Though the Primary School building was constructed under Sarva Sikshya Abhiyan, the Anganwadi Centre was a house having mud and brick wall with tin roof running in a very dilapidated condition. The condition of wall of the house was precarious. On the very day, the children of the Anganwadi

Centre were sitting and waiting for their meal. When the Anganwadi Worker had gone to bring food for them wall of the said house collapsed. After this incident, the Sub-Collector reached the spot and suspended the Anganwadi Worker and Helper along with the Headmistress of the Primary School.

4. Mr. J. Katikia submitted that Government of India implements Integrated Child Development Scheme, which is the oldest programme for the children below six years. The said Scheme is implemented without any accountability at any level. There is a clear governance deficit in respect of regulation of Early Childhood Care and Education even though it is a part of the Directive Principles of State Policy under Article 45 of the Constitution read with Section 11 of Right to Education Act, 2009.

5. It is further submitted that on 7th September, 2011, a four year old pre-school going girl child lost her life after falling into the main water channel in Sutahat area of Cuttack city when she was in the local pre-School centre. As the Centre had no boundary wall she was believed to have slipped into the large open water channel while she had gone to relieve herself in the open air. The petitioner had also brought the issue to the attention of the Chairperson, National Commission for Protection of Child Rights, stating that protection of children in School environment which is one of the fundamental obligation of the State as per Article 6 of United Nations Convention on Rights of the Child (UNCRC) read with Article 19 must be taken care of. ICDS is the oldest flaxy programme which caters the early development of children. Even though it was launched in the year 1975, till date the Government has not given attention for the infrastructure development of Anganwadi Centres. ICDS caters six types of services to the children and women. Supplementary Nutrition Programme (SNP), Health Immunization, Nutrition & Health Education, Pre-School Education and referral Services are the services given through the Network of Anganwadi Centres. Despite the same, the Government has closed its eyes for the infrastructure development of the Anganwadi Centres which is a matter of great concern. The Government of India is a signatory to the State "Education for all Declaration 2000" and it is committed for expansion and improvement of Early Childhood Care and Education service. But the mishap of this kind certainly dissuades the parents from sending their children to Anganwadi Centres which is in contravention to the declaration for Education to all. Section 11 of the Rights of Children to Free and Compulsory Education Act, 2009 (for short, "Education Act, 2009") provides for contemplation of policy on Early Childhood Care and Education by the appropriate Government. However, due to inaction by the State with regard to formulation of the above mentioned policy, there has always been a deficit

in governance so far as the best interest of young children below the age of 6 years is concerned. Therefore, relief in the form of a direction to the State Government is required to be made for immediate action under Section 11 of the Right to Education Act.

6. Petitioner's Organisation, on behalf of National Campaign for early Childhood Care and Education Right, has approached several times through representation raising the issue of poor infrastructure in the Anganwadi Centres, but the Government did not take the issue seriously and has responded to the petitioner's Organisation in a lackadaisical way. As per the Government record, 71,000 Anganwadi Centres are functioning in the State out of which only 30,000 Anganwadi Centres have their own buildings. 20,000 Anganwadi Centres are functioning in Primary Schools and others are in rented houses. As per the provisions and norms of the Education Act, 2009, the State Government is mandated to improve the quality of infrastructure of Primary Schools.

7. It was further submitted that had the Government been serious for proper implementation of the Education Act, 2009, such type of incidents would have been avoided. There is no inter-departmental coordination between the Department of Women and Child Welfare Development (WCWD) and School and Mass Education as a result there is no fixed regulated mechanism to monitor the ICDS.

8. Mr. Prabir Kumar Das, the petitioner in the W.P.(C) No.12328 of 2012, submitted that School building in question was constructed in 1939 and declared unsafe. In spite of the same, the said building was allowed to be used as Anganwadi Centre. It was submitted that though incessant rain was cited as a reason for collapse of the wall it is stated that the dilapidated building should not have been allowed for running of the Anganwadi Centre ignoring the safety aspect of the children. The authorities concerned did not take any action in this regard. A high level enquiry has become imperative to fix responsibility and take stringent action against the guilty persons/officials. Though adequate funds are sanctioned by the Central Government for construction of buildings of Anganwadi Centres, about 80% of 71,000 Anganwadi Centres do not have their own buildings. Out of total 71,134 Anganwadi Centres functioning in the State only 17,554 Centres have their own buildings whereas 16,974 Centres operate in the nearby Schools. In Nayagarh district, 1544 Centres are operating. Out of 240 Anganwadi Centres operating in Ranpur block only two such Centres have their own buildings. A high level taskforce must be constituted to study the safety of such buildings located all over the State. Necessary correctional measures

are required to be taken for preventing/averting such tragic incidents in future. The State Government has declared Rs.1.00 lakh as ex-gratia to be paid to the parents of the deceased children but the loss of precious life of a child is irreparable. The State being liable for ensuring safety of the children when they were at Anganwadi Centres, suitable compensation should be paid to the bereaved parents for its failure and negligence in this regard. Petitioner has sent letters to the Chief Secretary, Commissioner-cum-Secretary, Women and Child Welfare Development Department and Commissioner-cum-Secretary, School and Mass Education Department of the State Government with regard to the said sad incident. Paramount concern of the petitioner is the safety of the Anganwadi Centres.

8. Learned Advocate General, Mr. Ashok Mohanty, submitted that the Government always takes various steps for development of the children and for implementation of beneficial statutes in their proper perspective. After the incident, concerned Anganwadi Worker, Helper and the Headmistress were placed under suspension. Collector/B.D.O. concerned were directed to conduct enquiry into the incident and find out as to who are responsible for this tragic incident and action will be taken after receiving such report. Immediately Rs.10,000/- ex-gratia has been given by the District Red Cross Society and Rs.1.00 lakh by the State Government to each of the victims. Learned Advocate General was fair enough to submit that the Government is willing to pay any reasonable compensation that may be awarded by this Court.

Referring to counter affidavit dated 31.07.2012 filed by the Collector, Nayagarh, it is further submitted that though it is a fact that the accidental death of seven children is an unfortunate incident, Government of Odisha in Women and Child Development Department communicated instructions to operationalise all Anganwadi Centres in the School building/Community buildings which are earmarked as store rooms vide letter No.15227/WCD dated 02.09.2009. Keeping in view such letter, instruction was given to all the Headmasters/Headmistresses by Collector & Chairman, Sarva Sikshya Abhiyan, Nayagarh vide office letter No.1758 dated 25.06.2010 to run all the Anganwadi Centres in the School building. All the Headmasters/Headmistresses were specially instructed to hand over the key of one class room to the Anganwadi Worker to facilitate running of the centre from 7 A.M. to 10 A.M. Besides that, instruction was also given to provide facilities like toilet, drinking water, dining space and kitchen room to be used by Anganwadi Worker for the benefits of small children who attend such Centres. Copies of such letter/instructions were forwarded to all Block Development Officers, all Child Development Project Officers, School

Inspectors, BRCCs and all Anganwadi Workers. In the instant case, it is reported by the Anganwadi Worker that the Headmistress of Suansiasahi Primary School did not allow the AWC to function in the school building nor allowed to spare the verandah for functioning of the AWC. So, under duress, the AWWs of Suansiasahi and Kadambasahi were functioning in the corridor of the old dilapidated GI sheet room and the cooking of food was organized in the room the wall of which has collapsed. All the supervising Officers like BRCC, CRCC, S.I. of Schools, CDPO, Supervisor of ICDS Project used to visit the school and were aware of the dilapidated condition of the school building.

To prevent any future occurrence of such events, various instructions have been issued to the District Administration.

10. On the rival contentions, following questions fall for consideration by this Court.

(i) Whether the death of seven children on 09.07.2012 was caused due to negligence and lack of care by the State authorities while implementing the ICDS project?

(ii) Who is responsible to pay compensation to the parents of the deceased children and what should be the just compensation?

(iii) What order?

11. Undisputed fact is that on 09.07.2012, while the children below the age of six years were waiting for their food, the wall of the Anganwadi Centre in question collapsed on them and in such incident seven children died and some children were injured.

12. Article 45 of the Constitution speaks as follows:-

> "**45**. **Provision for early childhood care and education to children below the age of six years.—** The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

Section 11 of the Education Act, 2009 reads as follows:-

> "With a view to prepare children above the age of 3 years for elementary education and to provide early childhood care and education for all children until they complete the age of 6 years, the appropriate government may make necessary arrangements for providing free Pre-School education for such children."

13. A conjoint reading of Article 21, Article 39(f) and Article 45 of the Constitution read with Section 11 of the Education Act, 2009 makes it clear that it is the duty and responsibility of the Government to make necessary arrangement for providing early childhood care and education for all children until they complete the age of 6 years and to prepare the children above three years for elementary education. While doing so, State shall take all appropriate steps for safety of the children.

14. Government of India implements ICDS programme for children below the age of 6 years. Where such welfare Scheme is implemented, care must be taken for safety of the children. Unless adequate safety measures are taken in the Anganwadi Centres, parents would not sent their children to Pre-School under Anganwadi Centres which will result in failure of ICDS programme that caters early development of children. Needless to say that it is the primary solemn duty of the State to protect the life of the children studying in the Schools and ensure their education with dignity.

15. In the instant case, there is no doubt that due to negligence of the State authorities who are in charge of running and maintaining Anganwadi Centres 7 children died on 09.07.2012. Therefore, the State immediately placed the Anganwadi Helper, Worker and the Primary School Headmistress under suspension.

16. In view of the above, this Court is of the opinion that due to negligence and lack of care on the part of the State functionaries seven children lost their life on 09.07.2012.

17. Question No.(ii) is as to who is responsible to pay compensation to the parents of the deceased children; and what should be the just compensation?

18. The present case is governed by the legal maxim respondeat superior and thus, the State is liable for the wrong done by its employees.

19. Negligence as a tort is defined by Winfield as “the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff.” The existence of a duty-situation or a duty to take care is, therefore, essential before a person can be held liable in negligence. In the classical words of Lord Atkin:

> “At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving

> rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, who is my neighbour, receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be— persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

It is now an obsolete view that "the duty to be careful only exists where the wisdom of our ancestors has decreed that it shall exist". In Donoghue v. Stevenson itself the House of Lords recognized a new duty situation and a manufacturer was held to owe a duty of care not only to the wholesale dealer, but also to the ultimate consumer of his product. As stated by Lord Macmillan in that case:

> "The conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. [p.619]."

Then in ***Hedley Bryne and Co. Ltd. V. Heller and Partners Ltd.*** (1964) AC 465 (HL), again a new duty-situation was recognized. It was held that the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care and that a negligent, though honest, misrepresentation in breach of this duty may give rise to an action for damages apart from contract or any fiduciary relationship. Lord Pearce in that case said:

> "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the Courts' assessment of the demands of society for protection from the carelessness of others.[p.536]."

The principles governing the recognition of new duty-situations were more recently considered in the case of ***Home Office v. Dorset Yacht Co. Ltd.*** (1970) All ER 294 (HL). In that case, some Borstal trainees escaped due to the negligence of Borstal Officers and caused damages to a yacht. The owner of the yacht sued the Home Office for damages and a preliminary issue was raised whether on the facts pleaded, the Home Office or its servants owed any duty of care to the owner of the yacht. It was held that the causing of damage to the yacht by the Borstal trainees ought to have been foreseen by the Borstal Officers as likely to occur if they failed to exercise proper control or supervision and, therefore, the officers prima facie owed a duty of care to the owner of the yacht. It was argued in that case that there was virtually no authority for imposing a duty. This argument was rejected and in that connection, Lord Reid made the following pertinent observations:

> "About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the Courts had from time to time recognized new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The learned Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation. In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognized principles apply to it. Donoghue v. Stevenson may be regarded as a statement of principle. It is not be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."
>
> [See *Madhya Pradesh State Road Transport Corporation and another vs. Mst. Basantibai and others*, 1971 MP LJ 706]

20. The Hon'ble Supreme Court in the case of ***Paschim Banga Khet Mazdoor Samity and others vs. State of West Bengal and another***, AIR 1996 SC 2426, held as under:

> "9. The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. In the present case there was breach of the said right of Hakim Seikh guaranteed under Article 21 when he was denied treatment at the various government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention. Since the said denial of the right of Hakim Seikh guaranteed under Article 21 was by officers of the State, in hospitals run by the State, the State cannot avoid its responsibility for such denial of the constitutional right of Hakim Seikh. In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution. (See: Ruddul Sah v. State of Bihar, (1983) 3 SCR 508 : (AIR 1983 SC 1086); Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 : (1993 AIR SCW 2366); Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42 : (1995 AIR SCW 759)."

21. At this juncture, it is profitable to refer to the decision of the Hon'ble Supreme Court with regard to the award of compensation for contravention of human rights. The Hon'ble Supreme Court in Smt. Nilabati Behera @ Lalita Behera vs. State of Orissa and others, AIR 1993 SC 1960, held:

> "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based

> on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution."

22. In ***Consumer Education and Research Centre & Ors. Vs. Union of India & Ors.,*** AIR 1995 SC 922***,*** the Hon'ble Supreme Court held:

> "In public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and protection of fundamental and human rights. The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the constitution or the law".

23. The Hon'ble Supreme Court in the case of ***Rudul Sah v. State of Bihar and another***, AIR 1983 SC 1086, observed that in appropriate cases, the Court discharging constitutional duties can pass orders for payment of money in the nature of compensation consequent upon deprivation of a fundamental right to life and liberty of a person as State must repair the damage done by its officers to such person's right.

24. In ***Kumari Smt. vs. State of Tamil Nadu and others***, AIR 1992 SC 2069, the Hon'ble Supreme Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding

compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years' old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Hon'ble Supreme Court directed the State to pay compensation.

25. The Hon'ble Supreme Court in the case of ***State of Rajasthan v. Mst. Vidhyawati,*** AIR 1962 SC 933, held as under:

> "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortuous act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India……."

26. In view of the above, the parents of the deceased children are entitled to compensation for the death caused due to negligence on the part of the State functionaries and the opposite party State is liable to pay compensation to them.

27. Keeping in view the peculiar facts and circumstances of the case, we direct the opposite party-State to pay Rs.5.00 lakh (rupees five lakh) to the parents of each of the deceased children on proper identification within a period of four weeks from the date of receipt of a copy of the this judgment; otherwise they shall be entitled to interest @ 6% per annum on the amount of compensation awarded above till the date of payment. The amount which has been paid as compensation voluntarily and by way of interim direction by opposite party-State shall be deducted from the aforesaid awarded compensation of Rs.5.00 lakh (Rupees Five lakh) awarded in favour of each of the parents of the school children died due to collapse of the wall of the dilapidated building.

28. Since steps have already been taken by the State to investigate into the matter and take appropriate action against the persons responsible for death of seven children there is no need to give any further direction in this regard.

29. In their affidavit dated 21.08.2012, Commissioner-cum-Secretary to Government of Odisha, Women and Child Development Department stated that following the Nayagarh incident, instructions were issued to all the districts to carry out an immediate survey of all buildings housing Anganwadi Centres, whether running in own building or housed in School buildings, community buildings or rented buildings, etc. and wherever there was slightest doubt that the building may be unsafe, alternative arrangements should be made immediately for shifting the Anganwadi Centres to safe building. Further, Hon'ble Chief Minister of the State also issued instructions to the districts to (i) form teams to check building conditions and safety of all the Anganwadi Centres, School buildings and Hospital buildings, (ii) complete the whole exercise within next seven days and wherever required, repairs or other alternative arrangements must be made, (iii) take block-wise reviews of this and report to Government by 25th July, 2012, (iv) do the exercise every year before onset of monsoon and (v) to view this as an important responsibility of the Revenue Divisional Commissioners and Collectors every year. This was followed with a Video Conference taken up by the Chief Secretary where the District Collectors were asked to submit and forward a certificate along with the signature of the concerned Executive Engineer and District Social Welfare Officer towards shifting of Anganwadi Centres to safer buildings with provision of safe clean drinking water to the shifted Anganwadi Centres.

The CDPOs have been instructed to hold pre-school classes in their own building wherever available from 9 A.M. to 2 P.M. and where own buildings are not available in other buildings, i.e., School building, Community buildings, rented house and Kotha ghar from 7 A.M. to 12 noon;

The District Project Coordinator and B.D.Os. have been instructed to assess the dilapidated buildings existing in the School campus keeping in view the durability of the buildings through their technical consultants and engineering personnel and suggest for repair, restoration and demolition of the buildings. They have been instructed to direct the BRCCs, CRCCS and S.I. of Schools to impress upon all the Headmasters/Headmistresses not to use any dilapidated/unsafe building existing in their campus for class room transaction for pre-school and formal school children and providing Mid-Day-Meal and SNP in those buildings.

The kitchen of the school should be provided for preparation of SNP for the children of AWCs functioning in the school. The BRCCs, CRCCs and Inspector of Schools have been directed to visit the AWCs in course of their supervision to schools and ascertain the difficulties from the Anganwadi

Worker in functioning of AWC and implementation of ICDS package services.

30. In view of the above, this Court directs the State to ensure that instructions as stated above issued by it should be implemented in letter and spirit and to take adequate safety measures so that no child dies/ suffers injuries in any incident like the present one. The State is directed to take proper action against its functionaries, who are responsible for the said shocking incident in accordance with law. The State is further directed to bear all the medical expenses of the injured children.

31. With the above observations and directions, the writ petitions are allowed to the extent indicated above.

Writ petitions allowed.

2013 (I) ILR - CUT- 256

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

W.P.(C) NO.15519 OF 2010 (With Batch) (Dt.09.10.2012)

TATA STEEL LTD. & ORS. …….. Petitioners

.Vrs.

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

A. CONSTITUTION OF INDIA, 1950 – ART. 286.

Whether the imposition of entry tax on goods purchased from out side the Country is ultra vires the Constitution – Held, No.

Restriction under Article 286 of the Constitution is on authorizing imposition of tax on sale or purchase of goods by which the State legislature has a power, which is derived from Entry 54 of list II of the Seventh Schedule of the Constitution – However, power to legislate and levy of entry tax is derived from Entry 52 of the said list – The two fields of legislations are distinct and separate – So the restriction contained in Article 286 of the Constitution cannot be applied to the legislative field contained in Entry 52 of list II of the Seventh Schedule of the Constitution. (para-10)

B. CONSTITUTION OF INDIA, 1950 – ART. 286.
r/w Section 3 of Odisha Entry Tax Act.

Entry Tax in essence a tax in lieu of Octroi duty - When the goods imported out of the country, the incident of import ends the moment it crosses the custom barriers – So Entry tax can be imposed on the goods which are imported from outside the territory of India.

In this case as the entry tax has been levied on the goods which cross custom barriers by invoking the powers conferred on the State legislature covered Under Entry 52 of List II of the Seventh Schedule, there is no encroachment of the powers of the parliament – Held, imposition of tax on goods purchased from outside the country does not violate the ban imposed under Article 286 of the constitution to enact law under Entry 52 of list II of the Seventh Schedule.

(Para-14,15,18,19,40)

C. ODISHA ENTRY TAX ACT, 1999 – S.3.

Levy of tax – Whether entry tax is leviable on goods imported from out side the country – Held, Yes.

The measure of levy cannot be used to interpret the nature and scope of charging section – The legislature has no intention that imported goods are intended to be left out from the charging section – Held, entry tax is leviable on the goods imported from outside the country. (Para 21,27,36)

D. ODISHA ENTRY TAX ACT, 1999 – S.3.

Whether plant and machinery which are brought from USA to establish a factory at Balgopalpur are liable to entry tax – Held, Yes.

In this case Plant and machinery brought from USA to the plant site of the petitioner in the state of Orissa in knock down condition does not change the nature of the goods – As per the dictionary meaning "plant" is a combination of various machinery used in manufacturing of product – Interpretation of taxing statute – While interpreting the words in taxing statute, nothing to be added or subtracted – Held, plant brought from USA in knock down form comes within the definition of machinery hence it is liable to entry tax.
(Para 39, 40)

E. **ODISHA ENTRY TAX ACT, 1999 – S.3.**

Whether the raw materials and spares as described in the case of M/s. IFGL Refractories-V- State of Orissa and others which have been imported and purchased from other states out of the country are liable for entry tax as they are not included in the schedule appended to the Act – Held, they are not liable for entry tax. (Para 40)

Case laws Referred to:-

1.(2007)6 VST 587 (Jharkh.) : (Tata Iron & Steel Co.Ltd.-V-State of Jharkhand & Ors.)

2.(1999)115 STC 591 (Ker.) : (FR. William Fernandex-V-State of Kerala & Ors.)

3.(2007)7 VST 293 (Ker) : (Thressiamma L. Chirayil-V- State of Kerala)

4.(2008)16 VST 85 (Ori) : (Reliance Industries Ltd.-V- State of Orissa)

5.(2007)9 VST 528 (Gau.) : (Primus Imaging Pvt. Ltd.-V- State of Assam)

6.1999 (113)ELT 753 (SC) : (Kiran Spinning Mills -V- Collector of Customs)

7.(1960)11 STC 186(SC) : (J.V. Gokal & Co. Pvt. Ltd.-V- Assistant Collector of Sales Tax (Inspection).

8.AIR 1995 Rajasthan 225 : (Gulabdas Jagannath-V- The State of

Rajasthan)

9.(2005)139 STC 537 : (Godfrey Phillips India Ltd.-V- State of U.P.)

10.AIR 1958 SC 341 : (Central India Spinning & Weaving & Manufacturing Co. Ltd.-V- Municipal Committee, Wardha)

11.(1978)41 STC 409(SC) : (Polestar Electronics (Pvt.) Ltd.-V- Addl. Commissioner of Sales Tax)

12.(1976)37 STC 77 (SC) : (Muralidhar Mahabir Prasad-V- B.R. Vad)

13.(1985)60 STC 1 (SC) : (Govind Saran Ganga Saran-V- Commissioner of Sales Tax)

14.(2004)135 STC 480 : (Tamil Nadu Kalyana Mandapam Association-V- Union of India)

15. 1995 (77) ELT 22 (SC) : (Garware Nylons Ltd. Vs. Pimpri Chinchwad Mahanagar,)

16.(1989) Supp. 1 SCC 347 : (Shroff and Co. Vs. Municipal Corporation of Greater Bombay,)

17.AIR 1965 SC 1358; : (Commissioner of Income Tax vs. Ajax Products Ltd.,)

18. AIR 1969 SC 812; : (Commissioner of Income Tax vs. Kharwar,)

19. (1997) 106 STC 433 (SC) : (Calcutta Jute Manufacturing Co. Vs. Commercial Tax Officer,)

20.(1975) 35 STC 413 (SC) : (In Commissioner of Sales Tax vs. Parson Tools and Plants,)

21. (1989) 74 STC 102(SC) : (Federation of Hotels and Restaurants Association Vs. Union of India,)

For Petitioners - Mr. S. Ganesh (Senior Advocate)

M/s Jagabandhu Sahoo, N.K. Rout, and P. Mohapatra , M/s Satyajit Mohanty, R.R. Swain, S. Pattanaik , N.K. Dash, M/s Bibeka Mohanty, S.K. Mishra, S.K. Jena, N.R. Mohanty, C.R. Dash, M.Roul & M. Wright M/s. Pranaya K. Harichandan, CH.M.R. Mishra B. Behera, M/s Subash Chandra Lal, Sumit Lal , Sujit Lal M/s Sidhartha Ray , S. Dey M/s S. Kanunga, CH.S. Mishra, N. Pattnaik, N.R. Mohanty, M/s Bibek Mohanty, S.K. Mishra, & B.K. Sahool

For Opposite parties -Mr. A. Mohanty (Advocate General)
and Mr. R.P. Kar

S.K.MISHRA, J. The following questions arise for determination in this bunch of writ petitions:-

(i) Whether the entry tax under Orissa Entry Tax Act, 1999, can be levied and/or imposed on the value of the goods imported by the petitioners from outside the country ?,

(ii) Whether such entry tax under the aforesaid Act can be levied and/or imposed on import of plant and machinery for establishing a plant in the State of Odisha ?

(iii) Whether the entry tax can be levied on certain raw materials and goods imported from outside the country and purchased from outside the State when such materials have not been listed in the schedule appended to the Orissa Entry Tax Act ? and

(iv) Whether the Orissa Entry Tax Act, 1999, hereinafter referred to as 'the Act' for brevity, is violative of Entry 83 of List I of Seventh Schedule and Article 246 of the Constitution of India.

2. The petitioners, in all these writ petitions except a few, whose cases shall be described separately below, are operating different industries for which they are importing coal from outside the country for being used as raw materials for production of various products. The petitioners, in order to carry out their manufacturing activity both inside the State and the factories located outside the State, import raw materials from outside India, for which they obtained necessary license from the appropriate authority. They have been registered under the OVAT Act, CST Act and the Orissa Entry Tax Act, 1999 and have been allotted TIN number by the Sales Tax Officer. They bring various goods including scheduled goods for their plants from within the State and also from outside the territory of India by way of import. The materials so purchased from various countries are duly supported by bills and other documents, which have been incorporated in the accounts of the petitioner-Companies.

3. The petitioners claim that Section 3 of the Act is the charging Section which only conveys a definite charge of tax on happening of taxable event and not bereft of the said provisions. Section-2 (j) defines 'purchase value', which can be termed as measure of tax provided for procedure for ascertaining purchase value for quantification of tax. A conjoint reading of both the provisions indicate that the goods imported from outside the

country are not contemplated for taxation under Section 3 of the Act. Section 3 of the Act may not be controlled by the above provision. It is contended that various clauses of Section 2 are inalienable limbs of Section 3, which are not measure of tax but define expression to make impost with element of certainty and definiteness. The petitioners claim that under Article 286 of the Constitution of India there has been a restriction for imposition of tax on the sale or purchase of goods, where such sale or purchase takes place in course of import of goods, into or export of the goods out of the territory of India [Article 286(i)(b)]. It is contended that Entry 52 of List-II of the Seventh Schedule, which provides for tax on entry of goods into the local area for consumption, use or sale, does not include any import made from outside the country and accordingly, the assessment of the taxing authority on the imports so made is contended to be illegal.

4. In course of hearing, the learned Senior Advocate Mr. S. Ganesh, appearing for one of the petitioners placed reliance on the reported cases of ***Tata Iron & Steel Company Ltd. Vs. State of Jharkhand and others,*** (2007) 6 VST 587 (Jharkh), ***FR. William Fernandez Vs. State of Kerala and others,*** (1999) 115 STC 591(Ker), ***Thressiamma L. Chirayil Vs. State of Kerala***, (2007) 7 VST 293 (Ker) as well as the judgment rendered by the Full Bench of the Orissa Sales Tax Tribunal in the case of ***Hindustan Aeronautics Ltd. Koraput Vs. State of Orissa*** and contended that in all the above cases the various High Courts as well as the Sales Tax Tribunal of the State of Odisha has come to the conclusion that entry tax cannot be levied upon imports made from outside the country. Therefore, the petitioners pray that the entry tax levied on the imports should be exempted and the State should be directed to refund the tax collected from them on account of entry tax.

5. Some of the cases have different set of facts, and therefore, they are discussed separately with proper heading as follows:-

In W.P.(c) No.13978 of 2008 (M/s Emami Paper Mills Ltd. vs. State of Orissa and others), the petitioner claims that it is an incorporated company and has a paper manufacturing plant at Balgopalpur in the district of Balasore. They are producing newsprint, various writing and printing paper by using 100% recycled waste papers. The company has stopped rice straw from April, 2006 and, therefore, now using 100% waste paper as raw materials for manufacturing paper. They decided to expand their plant. Thus, for additional capacity they have placed orders for a major plant and machinery. In pursuance of such expansion program, they entered into agreement and placed order for a paper plant and other machinery on a company namely “Global Equipment and Machinery Sales Inc.,

Montgomeryville, Pennsylvania, USA". Pursuant to such agreement and orders, the petitioner has imported into India a paper manufacturing plant in knock down condition with spares from USA (after dis-assembling the same as the entire plant cannot be rooted out from USA and established in India). Besides that the petitioner also imports other machinery from the other countries and the said imported machinery and spares parts entered into the country through different ports and are released by the petitioner on payment of the import duty.

The petitioner claims that the plant and machinery are brought in a knock down condition in ships and are unloaded in Calcutta Port and or other ports and are released after payment of import duty levied under the Customs Act. After the said plant and machinery were unloaded from the ships and cleared of the customs duty, the said plant and machinery were transported to the factory premises at Balgopalpur causing entry into the local area of Balasore under way bills prescribed under Orissa Sales Tax Rules and Orissa VAT Rules. The petitioner claims that even though the company is not liable to pay entry tax in respect of paper making plants and machinery imported from USA and other countries, by letter dated 25.03.2006 the opposite party no.3 called upon the petitioner to submit a statement showing the name of goods imported by the petitioner from the USA. This fact is subject matter of W.P.No.12622 of 2006 and the same is pending consideration before this Court. The petitioner protested that it is not liable to pay entry tax on the plant and machinery brought from USA in course of import and, further, since the plant is not a schedule good, the same cannot be subjected to entry tax under Orissa Entry Tax Act, 1999. The opposite parties denied to give way bills and 'C' forms and perpetrated other type of harassment if the petitioner will not pay entry tax on the plant and machinery so imported from USA. The petitioner had no other alternative than to make ad hoc payment through challans towards Orissa Entry Tax under protest.

The demand of entry tax on imported plant and machinery was not authorized by the Act and such demand was arbitrary and the petitioner is before this Court in W.P.(C) No.12622 of 2006, which was admitted by order dated 08.10.2006 and further direction was given that the petitioner should not be asked to pay any amount on entry tax in view of the payment of the customs duty by the petitioner.

Petitioner claims that the paper plant is a mega plant and it had to purchase different types of machinery, its spare parts from different manufacturers in other States of the Country. These machinery and spare parts are of definite specifications and are neither manufactured in Orissa

nor available otherwise. Therefore of necessity, the petitioner has to purchase the same from different parts of the Country (other than Odisha) and these are not manufactured in Odisha. The petitioner claims that the spare parts have a definite commercial identity of its own and bear a different name and as such are not scheduled goods under the Schedule of Act. The petitioner further submits that even though it is not liable to pay entry tax on the goods purchased from different States in as much as those are neither scheduled goods nor can those goods be subjected to levy of entry tax, the opposite party no.3 has assessed the petitioner to tax in respect of these goods both imported from outside the Country and purchased from outside the States (CST Goods) and imported into the local area of Balasore. The opposite party no.3 has completed assessment of the years, 2005-06 and 2006-2007 under the Act and in the said order of assessment the opposite party no.3 has assessed the petitioner to pay entry tax on these goods (CST Goods). However, no demand has been raised in respect of goods imported from outside the country in view of the interim order of stay passed by this Court. The petitioner, therefore, prays in this writ petition to give necessary directions not to collect entry tax on goods, machinery and plants imported from USA and also not to assess entry tax on spare parts and machinery, both imported from outside the country and purchased from outside the State as they are not included in the Schedule of the Act.

6. In W.P.(c) No.7 of 2008 (M/s IFGL Refractories Vs. State of Orissa and others), the Company is established as an import expand project. Commercial production was started in March, 1993. Since then, the petitioner has been continuously expanding capacity thereof by installing and erecting plants and machinery both indigenous and imported. The petitioner's policy is to identify the customers' need, design and develop products and successfully manufacture and supply at competitive price to achieve customer satisfaction. Nearly 60% of the products manufactured are presently exported outside the country.

For manufacture of refractory products, the petitioner from time to time requires imported raw materials, stores and spares, trading items and capital goods which are released by the custom authorities after the petitioner effects payment of duty levied thereon as per the provision of the Customs Act. Generally said imported items are received either at Kolkata Port or at Kolkata Airport wherefrom they are transported to the petitioner manufacturing facilities under way bills in the Orissa Sales Tax Rules/VAT Rules by opposite party no.3

For carrying manufacturing activity and production of item referred above, i.e. Ladle Shrouds, Sub entry Nozzels, Monoblock Stopper, Tundish Nozzle, Slide Gate Plates etc, some of the raw materials and ancillary goods are not available nor are they manufactured in India. Consequently, the petitioner has to import the same from different countries of the world on payment of the custom duty. These materials are Fused Silica, Lime stabilize Fused Zirconia, Fused Magnesia, Sintered Magnesia, Silicon Metal, Natural PVC, Refractory Glaze, Furfular Alchohal and Micro Silica. The petitioner-company claims that it is not liable to pay entry tax in respect of the said imported items. The opposite party no.3 has been collecting the same and the petitioner has been effecting payment thereof under protest. The petitioner claims that the company is not liable to pay entry tax as the same is not falling within the definition of scheduled goods as identified in the Act, but the opposite party no.3 has threatened to stop issuing way bills and 'C' forms for which the company has been paying entry tax on purchase.

Besides, the raw material imported from other countries, the petitioner also uses raw materials available in other States of the country, which are not manufactured in Odisha. These raw materials are Mag Alumina Spinel, Zircon sand/Flour, Bauxite (Rotary Kiln/Calcined), Tabular Alumina, Brown Fused Alumina, While Fused Alumina, Reactive Alumina, Dead Burn Magnesia, Silicon Carbide, Borax, Allu Metal, Carbon Black. The petitioner has no other alternative but to effect payment of entry tax on these items and the company should be exempted from the payment of entry tax and tax already paid should be refunded to it.

7. In W.P.(C) No.5764 of 2007 (M/s Maheswari Coal Services (P) Ltd. Vs. State of Orissa and others), the petitioner-company is a dealer in coal. It not only purchases coal from Mahanadi Coal Ltd, but also imports Steam (Non-coke) coal from different sellers under high seas agreements beyond the customs barrier of the country. Thus, it is submitted that the major quantity of Steam (Non-coke) coal is received by the petitioner at Paradip Port in the State of Orissa in course of import into the country. The petitioner claims that after customs clearance, it stores the said coal on the plot of land rented to it by Paradip Port Trust and the coal is sold to buyers by delivering the same at Paradip. The Steam (Non-Coke) coal so received in the ships in course of import, do not enter into the local area of Paradip from any other local area in the State or from any other States of the country. The petitioner was reluctant to pay entry tax demanded by opposite party no.3 on the imported coal at Paradip Port but opposite party no.3 stopped supplying way bills to the petitioner and threatened to take further harassive attitude. The petitioner has to pay a token sum of Rs.5,000/- on 27.01.2005

so that supply of way bills by the opposite party no.3 would remain unhindered. In the same manner, the petitioner has also paid huge sum amounting to almost Rs.20,00,000/- towards entry tax. The petitioner claims that it is not liable to pay such entry tax and necessary directions be passed for refunding the tax already collected from it.

8. In all the cases, a common defence has been taken by the State of Odisha. It is submitted by the State that the Orissa Entry Tax Act, 1999 is a destination based tax, which is enacted within the field of legislation envisaged in Entry 52 of List II of Seventh Schedule to the Constitution and tax is exigible on entry of goods into the local areas for consumption, use or sale therein. The place of origin of goods has no impact on the levy.

Against the contention of the petitioners that entry tax is not leviable on goods imported from outside the country, inasmuch as, it is hit by Article 286 of the Constitution, on behalf of the State Government learned Advocate General submits that the challenge is untenable on the face of the said Article, which contemplates rider "tax on sale or purchase of goods" which "takes place in course of import into the territory of India" but, not in respect of "taxes on entry of goods into a local area" as per Entry 52 of List II of the Seventh Schedule.

The State submits that incidence of import ends once the goods cross the customs barrier. After crossing of customs barrier, the goods enter into the local area for consumption, use or sale.

On behalf of the State Government learned Advocate General further submits that the observation made with reference to terminal tax is not applicable to entry tax. So, it is erroneous to submit that as because imported goods do not mingle with mass of domestic goods, the levy of entry tax on imported goods would be out of purview of domain of the State.

The learned Advocate General submits that Section 2(j) of the Act, which defines purchase value, does not expressly provide for including the import duty. However, it provides for all other charges incidental to the purchase of such goods. Therefore, it includes import duty. Furthermore, it is contended that purchase value means the value of schedule goods as ascertained from original invoice or bill. In case of imported goods the bill of indent includes import duty and, therefore, it is included in the definition within the purchase value. The State Government very emphatically submits that charging Section governs the levy and is not controlled by the measure of tax. Charging Section, i.e. Section 3 of the Act contemplates that the tax is levied on the goods brought into local area for consumption, use or sale

therein. Taxable person is the dealer or the person, who brings or causes to be brought into the local area scheduled goods on its own account or on account of its principal or customer or takes delivery or is entitled to take delivery of such goods. No invidious distinction is made between the goods brought from other local areas or outside the State or those brought from outside the country. The State Government further pleads that Entry 52 of List II of Seventh Schedule read with definitions of "entry of goods". Section 2(d) and "local area" Section 2(f) contemplates the taxable event is entry of goods into local area for consumption, use or sale therein. "Importer" as defined in Section 2(e) of the Act may be taken note of. The Customs Act takes care of levy of import of goods. So, taxable event for levy of custom duty and entry tax are different and distinct. It is further submitted that looking to the "pith and substance" and "aspect" of levy, both the imposts are different and distinct and there is no overlapping. It is further brought to the notice of the Court that the order passed by this Court in **Reliance Industries Limited Vs. State of Orissa**, (2008) 16 VST 85 (Ori) has been stayed by the Supreme Court by order dated 30.10.2009 in I.A. No. 327-651 in SLP "C" No.14454-14778 of 2008. It is further submitted that the decision rendered by the Sales Tax Tribunal in Hindustan Aeronautics Ltd case is under challenge before this Court in STREV Nos.34 and 35 of 2011. Hence, such findings recorded by the Tribunal has not become final and is not applicable to the case. As far as the plant is concerned, learned Advocate General submits that whether such plant is scheduled good or not is the subject matter for adjudication by the statutory authorities.

9. Thus, to reiterate the questions framed in all these cases for adjudication by this Court are as follows:-.

I. Whether the imposition of tax on goods purchased from outside the country is ultra vires the Constitution?

II. Whether the interpretation of the provisions of Orissa Entry Tax Act, 1999 itself shows that the entry tax is not leviable on goods imported outside the country ?,

II. Whether the plant, which has been brought into the local area of Balgopalpur in knock down condition is leviable with entry tax or not ? and

IV. Whether different raw materials, as described earlier in the case of M/s IFGL Refractories vs. State of Orissa and others in W.P.(c) No.7 of 2008 are liable for entry tax as they are not included in the schedule appended to the Act and to what relief the petitioners are entitled to.?

10. The first question relates to ban imposed under Article 286 of the Constitution of India on the legislative power of the State legislation to impose tax on sale or purchase of goods where such sale or purchase takes place in course of import of goods into the country. Article 286 of the Constitution reads as follows:-

> "**286. Restrictions as to imposition of tax on the sale or purchase of goods**.- (1) No law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place-
>
> (a) outside the State; or
>
> (b) in the course of the import of the goods into, or export of the goods out of, the territory of India.
>
> (2) Parliament may by law formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in clause (1).
>
> (3) Any law of a State shall, in so far as it imposes, or authorizes the imposition of,-
>
> (a) a tax on the sale or purchase of goods declared by Parliament by law to be of special importance in inter-State trade or commerce;
>
> (b) a tax on the sale or purchase of goods, being a tax on the nature referred to in sub-clause (b), sub-clause (c) or sub-clause(d) of clause (29-A) of Article 366,
>
> be subject to such restrictions and conditions in regard to the system of levy, rates and other incidents of the tax as Parliament may by law specify."

Restriction under Article 286 of the Constitution is on authorizing imposition of tax on sale or purchase of goods by which the State legislature has a power, which is derived from Entry 54 of List II of the Seventh Schedule of the Constitution. However, power to legislate and levy on entry tax is derived from Entry 52 of the said List. The two fields of legislation are distinct and separate. So, the restrictions contained in Article 286 of the Constitution cannot be applied to the legislative field contained in Entry 54 (sic Entry 52) of List II of the Seventh Schedule of the Constitution. This aspect arose before the Kerala High Court in ***Fr. William Fernandez Vs. State of Kerala,*** (1999) 115 STC 591 (Ker) and has been answered against

the petitioner though on a different aspect, the Kerala High Court has come to the conclusion that entry tax on goods imported from outside the country is not within the ambit of the Kerala's Act. It is apt to quote the exact word used by the Kerala High Court with regard to the constitutionality of entry tax in respect of Article 286 of the Constitution.

> "12. It was urged that the limitations in Article 286 have not been surmounted and as such the Act is applicable to the appellants, who had imported vehicles from abroad. These submissions seem to us to be untenable. We do not agree that there are any limitations upon the State's power to legislate, which is covered by item 52 of List II of the Seventh Schedule of the Constitution as has been correctly held. Tax is due upon entry of goods into the local areas. …..xxx"

11. So far as the scope of imposition of entry tax on goods imported from outside the country is concerned, that aspect will be taken up by us later in this judgment. The aforesaid view was taken by the Gauhati High Court in the case of ***Primus Imaging Pvt. Ltd. Vs. State of Assam***, (2007) 9 VST 528 (Gau). At paragraph-12 of the said case, the Gauhati High Court has held as follows:-

> " **12**. From a reading of Article 286 of the Constitution, it becomes clear that this article does not permit States to levy tax on the sale or purchase of goods, which takes place in the course of import into, or export out of the territory of India. The restriction, imposed on the State, is, thus, in respect of levy of tax on the sale or purchase of goods, which takes place in the course of import into, or export out of, the territory of India. The power to levy sales tax is derived from entry 54 of List II of the Seventh Schedule to the Constitution of India; whereas the power to levy *entry tax* is derived by entry 52 of the List II of the Seventh Schedule to the Constitution. Under entry 54, the point of levy is purchase or sale, but under entry 52, the point of levy is the point of entry into a local area. Therefore, taxable event under the Entry Tax Act is entry of specific goods into a local area for consumption, use or sale therein. Viewed thus, it is clear that levy of tax on sale or purchase, on the other hand, and the levy of tax on entry of goods into a local area, on the other, are covered by different entries in the Constitution and the incidence of taxation in both the cases is different. The restriction, imposed by article 286 (1)(b) of the Constitution, is in respect of the levy of tax on sale or purchase of goods and not as regards entry of the goods into a local

area for consumption, use or sale therein and, hence, the contention of the petitioners that levy of entry tax on goods imported from outside the State is hit by article 286 (1) (b) of the Constitution of India has no force and is misconceived. xxx"

12. In course of hearing, the petitioners have submitted that Entry 83 of List I of the Seventh Schedule of the Constitution confers exclusive power on the Indian Parliament to legislate on duties and customs including export duty and the levy of entry tax on imported goods would be encroaching on the exclusive legislative domain of the Indian Parliament conferred by Article 246(1) of the Constitution of India. It is apt to take note the exact words used in the relevant Entries of the Seventh Schedule of the Constitution. Entry 83 of List I of the Seventh Schedule reads as follows:-

"83. Duties of customs including export duties."

However, Entry 52 of List II of VII Schedule of the Constitution reads as follows:-

"**52.** Taxes on the entry of goods into a local area for consumption, use or sale therein".

Taking recourse to Article 246 of the Constitution, it is urged on behalf of the petitioners that the State legislature cannot infringe the legislative power of the Parliament and levy of entry tax imposed on imported goods is directly in conflict with the exclusive legislative power of the Union of India. Article 246 of the Constitution reads as follows:

" **246.** Subject-matter of laws made by Parliament and by the Legislatures of States.-

(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List-I in the Seventh Schedule (In this Constitution referred to as the "Union List").

(2) xxx xxx xxx xxx

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

13. The legislative power of the Union and the State cover altogether different fields of legislation and the incidence of both taxes are distinct and

separate. The Parliament has enacted Customs Act, 1962 in super-session of the "Sea" Customs Act, 1878. Section 12 of the Customs Act, 1962, levies duties on goods imported into India as may be specified in the Customs Tariff Act, 1975. The incidence of customs duty is on importation of goods into the territory of India. The word "import" has been defined in Section 23 of the Customs Act, 1962. It is apposite to quote the same.

> " '**Import**' will all its grammatical variations and cognate expressions, means bringing into India from a place outside India."

From the scheme of the Act it is seen that the point of levy of custom duty is a condition precedent for importation of goods to the country, i.e., before its clearance and before the goods are allowed to cross the custom barriers. On the other hand, the levy of entry tax, as per Section 3 of the Act, is that entry of goods into a local area for the purpose of consumption, use or sale therein. In ***Kiran Spinning Mills Vs. Collector of Customs,*** 1999 (113) ELT 753 (SC), the Hon'ble Supreme Court has examined this aspect at Paragraph-6 and held as follows:-

> " **6.** Attractive, as the argument is, we are afraid that we do not find any merit in the same. It has now been held by this Court in *Hyderabad Industries Ltd. and Anr. v. Union of India and Others* [1999 (108) E.L.T. 321 (SC) = JT 1999 (4) SC 95] that for the purpose of levy of additional duty Section 3 of the Tariff Act is a charging section. Section 3 sub-section (6) makes the provision of the Customs Act applicable. This would bring into play the provisions of Section 15 of the Customs Act which, *inter alia,* provides that the rate of duty which will be payable would be on the day when the goods are removed from the bonded warehouse. That apart, this Court has held in Sea Customs Act-1964 (3) SCR 787 at page 803 that in the case of duty of customs the taxable event is the import of goods within the customs barriers. In other words, the taxable event occurs when the customs barriers is crossed. In the case of goods which are in the warehouse the customs barriers would be crossed when they are sought to be taken out of the customs and brought to the mass of goods in the country. xxx"

14. In ***J.V. Gokal & Co. Pvt. Ltd. Vs. Assistant Collector of Sales Tax (Inspection),*** (1960) 11 STC 186 (SC), the Supreme Court has held as follows:-

> " What does the phrase " in the course of the import of the goods into the territory of India" convey ? The crucial words of the phrase

> are "import" and "in the course of ". The term "import" signifies etymologically "to bring in". To import goods into the territory of India therefore means to bring into the territory of India goods from abroad. The words "course means "progress from point to point". The course of import, therefore, starts from one point and ends at another. It starts when the goods cross the customs barrier in a foreign country and ends when they cross the customs barrier in the importing Country."

Having taken note of the ruling of the Supreme Court in the aforesaid two cases, this Court comes to the conclusion that when the goods imported out of the country, the incident of import ends the moment it crosses the custom barriers. It is also brought to the notice of this Court that in ***Gulabdas Jagannath Vs. The State of Rajasthan,*** AIR 1995 Rajasthan 225, the imposition of octroi duty, which is levied under Entry 52 of List-II of the Seventh Schedule to the Constitution on goods imported from outside the country, is held to be valid.

15. The petitioners, in all these cases, placed reliance on the ratio decided in ***Godfrey Phillips India Ltd. Vs. State of Uttar Pradesh,*** (2005) 139 STC 537 (SC). The ratio decided in the above case is distinguishable and is not applicable to the present cases and the same is demonstrated as follows:-

In Godfrey Phillips India Ltd.(Supra) the assesses were either manufacturer or dealer of tobacco products. They assailed the levy of luxury tax on tobacco and its products under Uttar Pradesh Tax on Luxuries Act, 1995; the Andhra Pradesh Tax on Luxuries Act, 1987; and the West Bengal Tax on Luxuries Act, 1994. While interpreting Entry 62 of List II of the Seventh Schedule to the Constitution, the Supreme Court held that the word "Luxury" takes colour from the words 'entertainment, amusement, betting and gambling' and therefore, the legislature has no jurisdiction to levy tax on "tobacco" (a goods) in the garb of luxury by describing Tobacco as a luxury goods. In the reported case, the Supreme Court, further, held that since tobacco is declared as a goods, it may be liable for additional duty on excise to be imposed in lieu of sales tax by different States. Further, levy on sale of tobacco in the name of luxury tax is not permissible although an attempt was made to show storage. Tax on the goods under the Luxury Act was held to be impermissible under Entry 62 of List II. The Hon'ble Apex Court after holding that tobacco as a good, further, held that it cannot be taxed as luxury by interpreting Entry 62, List II. In paragraph-99 of the Judgment the Supreme Court, further, held that the scope of Entry 62 is not answered on other issues in the appeal and were left open. In the reported case in

question, it was held that tobacco as an article could not be said to be luxury. The Supreme Court, further, held that the word "luxury" in Entry 62 of List II means the activity of enjoyment or indulgence in that which is costly and generally recognized as being beyond necessary requirement of average number of the society and not article of luxury. Thus, on the basis of such view taken by the Supreme Court in the aforesaid case, it cannot be held that entry tax cannot be levied under the Act pursuant to Entry 52 of List II since the custom duty is levied on the imported goods under Entry 83 of List I.

Entry 62 of List II of the Seventh Schedule reads as follows:-

> " **62.** Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling."

The taxable event of the Act is entry of goods into local area whereas custom duty on import of goods into territory of India. When the former is a subject matter of legislation by the State in Entry 52 of List II of the Seventh Schedule, the latter relates to Entry 83 of List I of the Seventh Schedule. There is no overlapping in the exercise of legislative power. Since imposition of custom duty ends once the goods cross the custom barriers, the custom duty is levied prior to crossing of barriers. But, in the context of levy of entry tax under the Act, it is levied on the entry of the scheduled goods into the local area. Taxable events in respect of the levies, viz., "custom duty" and "entry tax" are different and distinct and there is no overlapping. Thus, there is no conflict between legislative power under Entry 83 of List I and Entry 52 of List II. The ratio decided in Godfrey Phillips India Ltd. (supra) does not render any aid to the petitioners' contention. Therefore, it is held that entry tax can be imposed on the goods, which are imported from outside the territory of India. The ratio decided in the aforesaid case is not applicable to the present case.

16. Relying upon in ***Central India Spinning and Weaving and Manufacturing Company Ltd. Vs. Municipal Committee, Wardha,*** AIR 1958 SC 341, the petitioners contended that the activity of importation does not end up on the crossing of the custom barriers but continues till the imported goods reach the godown of the importer in course of which goods have also to enter one or several local areas. Thereupon, it is urged that the entry tax leviable on entry of goods into the local area is essentially a tax on import of goods which is authorized only under Entry 83 of List I of the Seventh Schedule to the Constitution. The ratio decided in the aforesaid can be distinguished and is not applicable to the present case. In that case, the Hon'ble Supreme Court was dealing with levy of "terminal tax" at the point of

exit from a local area. There the question was whether goods passing through Wardha Municipality by road dispatched from Yeotmal to their destination at Nagpur without being unloaded or reloaded at Wardha are liable to export terminal tax on the point of exit from the local Wardha Municipality. In the reported case, the goods in question were not imported from outside the country but the word "import" has been used to mean movement of goods from outside Wardha Municipality. In that context, the Supreme Court has held that movement of goods from Yeotmal to Nagpur through Wardha Municipality cannot attract levy of "terminal tax" at exit point of local area. Thus, the said case cannot be applied to the present fact situation to accord with the contentions raised by the petitioners. As has been noted in ***Kiran Spinning Mills*** & ***J. V. Gokal & Co. Pvt. Ltd*** (Supra) the import ends the moment goods brought from outside the country crosses the custom barrier. Therefore, the levy of entry tax on imported goods is permissible.

17. Furthermore, the provisions of Orissa Entry Tax Act does not reflect that the legislature has no intention of imposing tax on goods, which cross the custom barriers and are imported to the local area of the State. Entry 52 of List II of Seventh Schedule to the Constitution provides for taxes on entry of goods into a local area for consumption, use or sale therein. Thus, the incidence of levy of tax as per Entry 52 is entry of goods into a local area. There is nothing in that entry to suggest that legislature intended to exclude levy of tax on the imports from other country.

18. This problem can also be seen from another angle. The Act is a tax in lieu of octroi incident of which are similar to that of entry tax. When the levy of octroi on imported goods was upheld by different courts, there is no reason why entry tax on the imported goods cannot be upheld. Now, it is seen that prior to introduction of the Act, the levy of octroi was invoked by virtue of powers conferred on the municipality and other local bodies under Section 131 (1) (kk) of the Odisha Municipal Act, 1950. However, on passing of the Act, the octroi has been abolished. Clause (3) of the Statement and objects and reasons as appended to the Tax provides that the bill further seeks for abolition of octroi duty levied and collected under the Odisha Municipal Act, 1950 by repealing clause (kk) of sub-section (1) of Section 131. By virtue of Section 41, such clause (kk), as described above to the Municipality Act, was repealed. Section 36 of the Act further provides for assignment of proceeds of tax among the local authorities. Rule 33-A of the OET Rules and procedure prescribes the method of distribution of entry tax collected to each local authority every year. The entry tax is, thus, in

essence a tax in lieu of octroi duty. Therefore, the decisions rendered in the context of levy of octroi are applicable to this case.

19. Thus, on the basis of the aforesaid discussion, this Court comes to the conclusion that the contention of the petitioners that levy of a tax on import of goods is within the exclusive legislative domain of the Parliament, and this power conferred on the Parliament by the Constitution cannot be encroached upon, directly or indirectly, by any State Legislature. In the cases at hand, as the entry tax has been levied on such goods which cross custom barriers by invoking the powers conferred on the State Legislature covered under Entry 52 of List II of the Seventh Schedule, there is no encroachment of the powers of the Parliament.

20. The next question that arises for determination is whether the interpretation of provision of the Orissa Entry Tax Act itself shows that entry tax is not leviable on the goods imported from outside the country. For this aspect of the case, it is appropriate to take note of Section-3, which provides for levy of tax. It reads as follows:-

> "3. **Levy of Tax.-**
>
> (1) There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale *therein* at such rate not exceeding twelve percentum of the purchase value of such goods from such date as may be specified by the Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed.
>
> ***Provided that*** the State Government may direct that in such circumstances and under such conditions and for such period as may be prescribed, a dealer shall pay in lieu of tax payable under this Act a sum fixed in the prescribed manner, and in such a case the tax shall be deemed to have been compounded.
>
> (2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who bring or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:
>
> ***Provided that*** no tax shall be levied under this Act on the entry of scheduled goods into a local area if it is proved to the satisfaction of the assessing authority that such goods have already been

subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.

Explanation.-

Whether the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area.

(3) Notwithstanding anything contained in sub-sections (1) and (2), but subject to the provisions of this Act, there shall be levied and collected a tax on the entry of any motor vehicle into any local area for use or sale therein which is liable for registration in the State of Orissa under the Motor Vehicles Act, 1988 (59 of 1988), and rate of tax shall be at such rate or rates as may be specified by the State Government by notification on the purchase value of such motor vehicles.

Explanation.-

For the removal of doubts, it is hereby declared that where any scheduled goods have been subjected to the levy of octroi under the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950), prior to the commencement of this Act for entry into any local area, those goods shall not be subjected to the levy of entry tax under this Act for their entry into that area on or after such commencement."

21. From the plain reading of the above provision, it is clear that the legislature has no intention that imported goods are intended to be left out from the charging Section. The entry tax is leviable on scheduled goods brought into a local area for consumption, use and sale therein.

22. In ***Polestar Electronics (Pvt) Ltd. Vs. Additional Commissioner of Sales Tax,*** (1978) 41 STC 409 (SC), it is held that :

" xxx it is only from the language of the Statute that the intention of the legislature must be gathered, for the legislature means no more and no less than what it say. It is not permissible to the Court to speculate as to what the Legislature must have intended and then to twist or bend the language of the statute of the statute to make it accord with the presumed intention of the legislature.

23. Similar view has been expressed by the Supreme Court in the case of ***Muralidhar Mahabir Prasad vs. B.R. Vad*** (1976) 37 STC 77 (SC), wherein it has been held that:

> " xxx equitable construction may be admissible in relation to other statutes, but such an interpretation is not permissible to a charging or taxing provision of a statute."

24. Thus, it is clear from the aforesaid cases that the plain language of the charging provision has to be taken into consideration. In the schedule of goods also there is no exclusion from levy of tax on imported goods. Section 6 of the Act has provided the State Government to notify to exempt any scheduled goods either in part or full in public interest from levy of entry tax or to exempt any class or classes of persons engaged in charity or social services from such levy. The State Government has not issued any notification exempting any scheduled goods from levy of entry tax on their being brought from foreign countries.

25. The learned counsel for the petitioners has relied heavily on the definition of "purchase value" of the goods on which tax is to be calculated and it is submitted that since the purchase value does not include customs duty, the legislature intended that the goods imported from outside the country are not to be subjected to the entry tax.

26. The Supreme Court in **Govind Saran Ganga Saran Vs. Commissioner of Sales Tax,** (*1985*) 60 STC 1 (SC) has laid down that the levy of tax to be operative four elements are to be provided.

(i) Character of imposition known by its nature, which prescribes the taxable event attracting levy,

(ii) Clear indication of the person on whom levy is imposed and who is obliged to pay the tax,

(iii) The rate of tax at which the tax is imposed,

(iv) The measure or value to which the rate will be applied for computing the tax liability.

27. Charging Section 3 is the prime purpose of taxing legislation and the other three components are subservient of main purpose of levy. The charging section shall control the other three components including the measure of levy and not vice versa. The measure of levy cannot be used to interpret the nature and scope of charging section. This view has been

expressed in the case of ***Tamil Nadu Kalyana Mandapam Association Vs. Union of India,*** (2004) 135 STC 480 (SC). At paragraph-44 the Supreme Court has held that it is well settled that the measure of taxation cannot affect the nature of taxation and, therefore, the fact that service tax is levied as a percentage of gross charges for catering cannot alter or affect the legislative competence of Parliament in the matter.

28. Viewed in a slightly different context, it is seen that purchase value has been defined under Section 2(j) of the Act and it reads as follows:-

> "(j) **"Purchase Value"** means the value of scheduled goods as ascertain from original invoice or bill and includes insurance charges, excise duties, countervailing charges, sales tax, [value added tax or, as the case may be, turnover tax] transport charges, freight charges and all other charges incidental to the purchase of such goods;
>
> **Provided that** where purchase value of any scheduled goods is not ascertainable on account of non-availability or non-production of the original invoice or bill or when the invoice or bill produced is proved to be false or if the scheduled goods are acquired or obtained otherwise than by way of purchase, then the purchase value shall be the value or the price at which the scheduled goods of like kind or quality is sold or is capable of being sold in open marked;"

A plain reading of the above provision reveals that "purchase value" of the goods has to be derived from invoice of goods and any subsequent levies thereafter to form part of purchase value for the purpose of levy of entry tax. The invoice of the imported goods purports to indicate the custom duty on such goods and the said duty has to form part of the sale price and deemed to have been passed on to the purchaser. Section 28C of the Customs Act lays down that the price of goods to indicate the amount of duty paid thereon. It reads as follows:-

"**28C.Price of goods to indicate the amount of duty paid thereon.-**

> Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold.

29. Thus, the customs duty is bound to be indicated in the original invoice or bills. The value of goods is ascertainable from the invoice itself, which is inclusive of the customs duty. The purchase value, which includes other kinds of levy such as insurance, excise duty, countervailing duty, sales tax, value added tax, turnover tax. Even on top of it the clause "all other charges incidental to the purchase of such goods" would take within its sweep any other duties including the customs duty as well.

30. In ***Garware Nylons Ltd. Vs. Pimpri Chinchwad Mahanagar,*** 1995 (77) ELT 22 (SC), the Supreme Court considered the question whether custom duty is included while determining the value for charging of octroi, and held that octroi is leviable on imported goods and the custom duty shall form part of the value of the goods. In doing so, the Supreme Court has relied upon the reported case of ***Shroff and Co. Vs. Municipal Corporation of Greater Bombay,*** (1989) Supp. 1 SCC 347. In that case, the Supreme Court has held that octroi duty is leviable on imported goods and the countervailing duty will form part of value for purpose of levy. Thus, the argument of the petitioners that since customs duty is not specifically mentioned in the definition of purchase value in Section 2(j) of the Act, it will give rise to the inference that legislature intended not to levy entry tax on imported goods is without substance.

31. The learned counsel for the petitioners submits that the definition of entry tax as defined in sub-Section 2(d) of the Act does not include "from outside the country" and, therefore, the tax on imported goods is clearly beyond the ambit of entry tax. However, if we adopt the literal construction of statute, as has been discussed in the earlier paragraphs, without adding anything, "outside the State " means any place outside the State and includes all places outside the State as well as outside the country. Had the legislature intended to exclude imported goods from the net of taxation, the words "except goods brought from outside the country" would have been mentioned in the above definition. The two phrases "any place outside that local area" and "any place outside the State" were used to signify that entry tax will be levied on (a) when goods move into the local area from another local area within the State and (b) when the goods are brought into the State.

32. By applying the principle of interpretation of the taxing law that charging section is not to be controlled by subservient components, the definition "entry of goods" cannot be taken help to urge that the entry tax on imported goods cannot be levied.

33. As has been pointed out earlier, in a taxing Act, the Court has to look merely at what is clearly said. There is no room for adding or subtracting anything from the statute. There is also no equity about a tax and there is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. In this connection, the reported cases of ***Commissioner of Income Tax vs. Ajax Products Ltd.,*** AIR 1965 SC 1358; ***Commissioner of Income Tax vs. Kharwar,*** AIR 1969 SC 812; ***Calcutta Jute Manufacturing Co. Vs. Commercial Tax Officer,*** (1997) 106 STC 433 (SC) are relied upon.

34. In ***Commissioner of Sales Tax vs. Parson Tools and Plants,*** (1975) 35 STC 413 (SC), the Supreme Court has held that where the legislature clearly declares its intent in the scheme and language of a statute, it is the duty of the Court to give full effect to the same without scanning its wisdom or policy, and without engrafting, adding or implying anything which is not congenial to or consistent with such expressed intent of the law-giver; more so if the statute is a taxing statute.

35. The Supreme Court in ***Federation of Hotels and Restaurants Association Vs. Union of India,*** (1989) 74 STC 102(SC) has applied the principle of pith and substance to interpretation of the statute and laid down that the true nature and character of the legislation must be determined with respect to the question of power of legislature. The consequence and effect of the legislation are not same thing as the legislative subject matter. The true nature and character of the legislation but not the ultimate result that matters.

36. Thus, on the basis of the discussions resorted to above, this Court comes to the conclusion that the argument advanced by learned counsel for the petitioners that entry tax is not leviable on the goods imported through buyers is attractive but is without substance.

37. The next question that requires adjudication is, whether the plant, which has been brought into local area of Balgopalpur in knock down condition, is leviable with entry tax or not. This question is to be decided in the writ petition filed by M/s Emami Paper Mills Vs. State of Orissa (W.P.(c) No.13978 of 2008). The learned counsel for the petitioner, in this case, has submitted that since the aforesaid plant and machinery were brought in knock down condition, as it was impossible to move the plant from USA to the site on which the plant is to be established, the said plant and machinery brought in knock down condition were transported in parts. As such it is

contended that since the plant is not a scheduled item in the entry tax Act, the petitioner is not liable to pay entry tax on the same.

38. Part-II of Schedule-1 Entry 9 reads as follows:-

> " Machinery and equipments including earthmovers, excavators, bulldozers and road-rollers and spare parts and components used in manufacture, mining, generation of electricity, or for execution of work of contract or for any other purpose"

39. Thus, it is to be seen whether the plant and machinery, which are brought from USA to establish a factory at Balgopalpur for production of papers, are liable to entry tax or not. As Plant has not been defined separately in the Act, we have to go by the grammatical definition of 'Plant'. 'Plant', as per the Concise Oxford Dictionary, means 'a place where an industrial manufacturing process takes place' and 'machinery used in an industrial or manufacturing process'. So, plant is a combination of various machinery, which are used in a manufacturing of product. As has been mentioned earlier, in a taxable statute, nothing has to be added or subtracted from the plain meaning of words appearing in the statute. We are of the opinion that the plant, which is brought in knock down condition, is a combination of machinery in a systematic manner so as to produce goods and, therefore, it is coming within the definition of machinery and, hence, it is liable for entry tax.

40. The next question relates to certain raw materials and spares, as described in paragraph-6 of our judgment, which have been imported and purchased from other States out of the country by M/s IFGL Refractories (W.P.(c) No.7 of 2008). Having carefully examined the items described in the 3rd sub-paragraph of paragraph 6, we come to the conclusion that the items like Ladle Shrouds, Sub entry Nozzels, Monoblock Stopper, Tundish Nozzle, Slide Gate Plates and raw materials like Fused Silica, Lime stabilize Fused Zirconia, Fused Magnesia, Sintered Magnesia, Silicon Metal, Natural PVC, Refractory Glaze, Furfular Alchohal and Micro Silica, etc are not included in the schedule. Similarly, the raw materials described in the 4th sub-paragraph of paragraph-6, at page-9, like Mag Alumina Spinel, Zircon sand/Flour, Bauxite (Rotary Kiln/Calcined), Tabular Alumina, Brown Fused Alumina, While Fused Alumina, Reactive Alumina, Dead Burn Magnesia, Silicon Carbide, Borax, Allu Metal, Carbon Black are not included in the Ist schedule. Therefore, they are not liable for entry tax. Accordingly, this question is decided in favour of the petitioner.

Thus, on the basis of aforesaid discussion, this Court comes to the conclusion that the imposition of tax on goods purchased from outside the country does not violate the ban imposed under Article 246 (sic Article 286) of the Constitution to enact law from Entry 52 of List II of Seventh Schedule. It is further held that the provisions of Orissa Entry Tax Act itself do not reveal the intention of the legislator not to tax goods, which has been purchased from outside the country. The paper plant, which is brought in a knock down condition by Emami Paper Mills, comes within the definition of machinery and is liable for entry tax. Lastly, the various raw materials and spares, as described in the case of IFGL Refractories Ltd. Vs. State of Orissa, are not liable for entry tax. Accordingly, the issues are decided and all the writ petitions, except W.P.(C) No.7 of 2008, are dismissed in the light of above observations. W.P.(C) No.7 of 2008 is allowed to the extent indicated above. All the Misc. Cases, arising out of the writ petitions, are disposed of.

Writ petitions dismissed
except W.P(C) No. 7of 2008.

2013 (I) ILR - CUT- 281

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

O.J.C. NO. 2219 OF 2001 (Dt.07.08.2012)

ALEKHA PRADHAN ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

ORISSA ESTATES ABOLITION ACT, 1951– Ss.7, 8.

Settlement U/s.7 of the Act – It is necessary to find out if the intermediary was in khas possession over the land in question on the date of vesting.

In this case Order of the OEA Collector shows that general proclamation inviting public objection was issued in OEA Case and no objection was received from any quarters resisting the claim of O.P.2 for settlement – It is therefore apparent that the present petitioner did not file any objection before the OEA Collector but filed OEA appeal before the ADM challenging the settlement in favour of O.P.2 on the ground that in the OEA Case no notice issued inviting public objection – Whether on the date of vesting of the property the plaintiff or O.P.2 was in possession has not been directly addressed by the Civil Court – The finding of possession in favour of the petitioner by the Civil Court was primarily based on the admission of O.P.2 in its w.s. filed in the suit where in no relief was claimed against O.P.2 although admission is the best piece of evidence against the maker there of but it is always explainable in any other proceeding – Held, since the original authority i.e. the OEA Collector has never considered the claim of O.P.2 vis-à-vis the objection of the petitioner it is a fit case that the matter should be remanded back to the OEA Collector. (Para 6,7)

For Petitioner - M/s. B.H.Mohanty.

For Opp.Parties- Addl. Govt. Advocate(fpr Opp.Party No.1)
Mr. B.N.Rath (for Opp.Party No.2)
Mr. D.Mohapatra (for Opp.Party No.3(a) to 3(f).

B.K.NAYAK, J. In this writ application the petitioner challenges the order dated 04.11.1993 (Annexure-2/A) passed by the O.E.A. Collector-cum-Additional Tahasildar, Puri (opposite party no.8) in O.E.A. Claim Case No.707 of 1989 directing for settlement of the case land along with other

lands in favour of Sri Jagannath Mahaprabhu, Bije, Puri-opposite party no.2 and the appellate order dated 28.11.2000 (Annexure-3) passed by the Additional District Magistrate, Puri in O.E.A. Appeal No.4 of 1996, confirming the order of the OEA Collector.

2. The case of the petitioner as per the averments made in the writ application, the rejoinder and additional affidavits is as under :

(a) The case land appertaining to Plot No.1267, Ac.3.12 under Khata no.1 in mouza-Samangara, P.S. Puri Sadar formed part of the 'SATESIHAZARI' estate of Sri Jagannath Mahaprabhu-opposite party no.2. It was a fallow sandy track of land and the petitioner fenced the same and possessed it by planting casurina and cashewnut trees and also utilised a portion of the same for agriculture. Subsequently opposite party no.2, instead of taking any step for eviction of the petitioner, fixed rent for his possession and collected the same at yearly interval and granted receipts. It is stated that since the petitioner is a settled rayat of the village where the land situates, he acquired occupancy right over the case land by virtue of acceptance of rent and acknowledging the petitioner as a tenant by opposite party no.2.

(b) In the year 1987 some persons belonging to Goplapur Barapatna threatened and attempted to dispossess the petitioner from the case land for which the petitioner filed Title Suit No.113/213 of 1990/1987-I in the court of learned Munsif, Puri seeking relief of permanent injunction restraining the said persons from interfering with his possession over the case land. In the said suit the present opposite party no.2 (Sri Jagannath Mahaprabhu) was arrayed as proforma defendant no.11. While defendant nos. 1 to 10 contested the suit, defendant no.11 (opposite party no.2) filed a separate written statement admitting the possession of the petitioner over the case land and receipt of rent from him. By judgment dated 25.01.1992 (Annexure-2), the suit was decreed restraining the defendants from entering into the case land and cutting and carrying away trees standing thereover.

(c) Aggrieved by the judgment passed in the suit, opposite party no.2 filed Title Appeal No.14 of 1992 in the court of District Judge, Puri, which on transfer to the Court of the learned Adhoc Additional District Judge (FTC-II), Puri was registered as Title Appeal No.26/14 of 2001/1992. Defendant nos. 1 and 2 also filed separate Title Appeal

No.9 of 2011 of 2001/1992. It is alleged that while the suit was pending before the trial court, opposite party no.2 filed Claim Case No.707 of 1989 under Sections 6 and 7 of the Orissa Estates Abolition Act (in short 'OEA Act') for settlement of the case land along with other lands in its favour and by order dated 04.11.1993 under Annexure-2/A the O.E.A. Collector-cum-Additional Tahasildar, Puri settled the land in favour of opposite party no.2 ignoring the finding of the Munsif in the title suit judgment regarding the title and possession of the petitioner. Aggrieved by the order of the O.E.A. Collector, the petitioner filed OEA Appeal No.4 of 1996 before the Additional District Magistrate, Puri (opposite party no.9) who by his order dated 28.11.2000 (Annexure-3) illegally and arbitrarily dismissed the appeal and confirmed the order of the O.E.A. Collector.

(d) The title appeal filed by opposite party no.2 was disposed of analogously with the title appeal filed by defendant nos. 1 and 2 by a common judgment dated 05.08.2003 under Annexure-4, whereby the appeal filed by opposite party no.2 was allowed and the title appeal filed by defendant nos. 1 and 2 was dismissed. Challenging the appellate judgment passed in favour of opposite party no.2, the petitioner filed R.S.A. No.427 of 2003.

(e) During the pendency of the title appeal, the petitioner filed the present writ application. This writ application was initially disposed of on 19.06.2008 holding that Sri Jagannath Mahaprabhu-opposite party no.2 is deemed to be the owner of the disputed land, but the question as to whether the petitioner or the intervenors are tenants under the deity shall be decided in the Regular Second Appeal. This finding was recorded on the assumption that the question of title to the disputed land had already been adjudicated by the Consolidation Authorities in favour of opposite party no.2. The operative portion contained in paragraph-3 of the order is quoted hereunder :

"After going through the materials this Court finds that the Addl. District Magistrate, Puri has not committed any error in setting the lands in favour of Sri Sri Jagannath Mahaparabhu, Bije, Puri. The question of title to the disputed land has also been adjudicated the Consolidation Authorities, vide Annexure-1. In view of the aforesaid facts, the question of ownership of the land no longer stands in dispute. Accordingly this writ petition is disposed of holding that Sri Sri Jagannath Mahaprabhu is to be deemed to be the owner of the disputed land, but then the question as to whether the present

petitioner or the invernvenors are tenants under the deity shall be decided in RSA No.423 of 2003".

(In the above order RSA No.423 of 2003 has been wrongly typed in place of RSA No.427 of 2003).

(f) After disposal of the writ application as aforesaid, RSA No.427 of 2003 was disposed of by judgment dated 23.10.2008 confirming judgment of the lower appellate court passed in favour of opposite party no.2 with further observation that the party found in possession of the disputed property shall not be dispossessed without due process of law and liberty was granted to the appellant (writ petitioner) to seek declaration of his status in respect of the disputed property before the competent court/authority. Operative portion of the judgment of the second appeal in paragraph-14 thereof reads as under :

"After going through the counter-affidavits and the judgments of the courts below as well as judgment of this Court in the aforesaid writ application as well as the evidence, both oral and documentary and considering the aforesaid submissions of the learned counsel for the parties, this Court is not inclined to interfere with the impugned decree passed in the Title Appeal filed by defendant no.11. It is needless to say that the decree of permanent injunction passed against defendants 2 to 10 having not been assailed has attained finality. This Court, therefore, disposes of the RSA confirming the impugned decree, but with observation that the party found in possession of the disputed property shall not be dispossessed without due process of law. This Court grants liberty to the appellant to seek declaration of his status in respect of the disputed property and in that event the court/authority concerned shall decide the issue strictly in consonance with law."

3. In the meantime, the petitioner filed RVWPET No.118 of 2008 for reviewing the order dated 19.06.2008 passed in this writ application on the ground that the said order was passed on the wrong assumption by the court that the title of opposite party no.2 (Sri Jagannath Mahaprabhu) has been adjudicated by the Consolidation Authorities, who have the jurisdiction to do so. The review was allowed and this writ application was revived by order dated 29.01.2010 for fresh hearing and disposal. Simultaneously, the petitioner had also filed RVWPET No.205 of 2008 for reviewing the judgment passed in the second appeal which had primarily been based on the earlier final order dated 19.06.2008 passed in this writ application. RVWPET

No.205 of 2008 was disposed of by order dated 09.02.2012 directing only deletion of paragraph-10 of the judgment in RSA No.427 of 2003. However, the operative portion in paragraph-14 of the judgment in the second appeal and other findings were not interfered with. Thus, the judgment in the second appeal except paragraph-10 thereof has become final and binding on the parties.

4. It is the contention of the learned counsel for the petitioner that in the suit opposite party no.2 admitted the possession of the petitioner over the disputed land as tenant in respect thereof and receipt of rent from him, and that on the basis of such admission both the trial court and the lower appellate court in the title suit and in the title appeal have found possession in favour of the petitioner and, therefore, passed decree of injunction against defendant nos.1 to 10 and, therefore, the land cannot be said to be in possession of opposite party no.2 on the date of vesting and as such the original as well as the appellate authorities under the O.E.A. Act have gone wrong in directing for settlement of the land in favour of opposite party no.2, the Deity under Section 7 of the O.E.A. Act. It is also contended by him that though the question of status of the petitioner as Bhagchasi under opposite party no.2 was held to be not entertainable by the lower appellate court in the title appeal, in view of admission by opposite party no.2 in the written statement about such status of the petitioner, the petitioner would automatically become a tenant under the State from the date of vesting by operation of law under Section 8 (1) of the O.E.A. Act and, therefore, the OEA authorities went wrong in settling fair and equitable rent in respect of the land in favour of opposite party no.2

5. It is the contention of the learned counsel for opposite party no.2 that question of title to the disputed land was not an issue and, therefore, the finding of the trial court in this respect was set aside by the lower appellate court and that the admission of opposite party no.2 in the written statement in the suit was only to the limited extent that the petitioner was in charge of the disputed property by way of lease only for a period of five years which came to an end since long and that on the date of vesting in the year 1974, the petitioner was not in possession of the property.

6. There is no quarrel over the proposition that for a settlement under Section 7 of the OEA Act, it is necessary to find out if the intermediary was in khas possession over the land in question on the date of the vesting. It appears from the order of the OEA Collector under Annexure-2/A that general proclamation inviting public objection was issued in OEA Case and that no objection was received from any quarters resisting the claim of opposite party no.2 for settlement. It is, therefore, apparent that the present

petitioner did not file any objection before the OEA Collector, but filed the OEA Appeal before the Additional District Magistrate challenging the settlement made in favour of opposite party no.2, mainly contending that in the OEA Case no notice by way of proclamation was issued inviting public objection. Apart from the above ground, before the Additional District Magistrate the petitioner also raised the claim that he has acquired occupancy right being in possession of the disputed land as a tenant under opposite party no.2 as per finding in the Title Suit. The Additional District Magistrate has stated in his order that confirming occupancy right of the petitioner by the Civil Court over the disputed land (vested land) was without jurisdiction as per Section 39 of the O.E.A. Act, without being alive to the fact that the suit of the petitioner was for permanent injunction simplicitor against defendant nos.1 to 10 and not against defendant no.11 (the present opposite party no.2). Indisputably declaration of occupancy right of the petitioner by the learned Munsif was beyond the scope of the suit and the said finding and declaration has been set aside by the learned lower appellate court in Title Appeal No.213 of 1987. Of course, for the purpose of grant of injunction against defendant nos. 1 to 10 both the Munsif and the lower appellate court found possession in favour of the plaintiff. But the question whether on the date of vesting of the property the plaintiff was in possession or opposite party no.2 was in possession, has not been directly addressed by the civil court. The finding of possession in favour of the petitioner by the civil court was primarily based on the admission of opposite party no.2 in its written statement filed in the suit, wherein no relief at all was claimed against opposite party no.2. Undoubtedly admission is the best piece of evidence against the maker thereof but it is always explainable in any other proceeding. The original authority, i.e., the O.E.A. Collector has never considered the claim of opposite party no.2 vis-à-vis the objection of the petitioner.

7. In the aforesaid circumstances, it is in the fitness of things that the matter should be remanded back to the O.E.A. Collector, Puri to decide the question of settlement of the property in favour of opposite party no.2 afresh.

8. Accordingly, we set aside the orders passed by the O.E.A. Collector and the Additional District Magistrate, Puri under Annexure-2/A and 3 respectively and remand the matter back to the OEA Collector, Puri to decide the claim application of opposite party no.2 afresh giving opportunity of hearing to both, opposite party no.2 and the petitioner after considering all evidences or materials to be produced by the parties in respect of their respective claims. The writ application is accordingly disposed of. No costs.

Writ petition disposed of.

2013 (I) ILR - CUT- 287

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

JCRA NO. 6 OF 2006 (Dt.31.08.2012)

DEBEN @ DEBENDRA MUNDA & ANR. …….Appellants

.Vrs.

STATE OF ORISSA ……..Respondent

A. EVIDENCE ACT, 1872 – S.45.

Medical evidence – Value of – Inconsistency between the evidence of eye witness and medical evidence – Testimony of eye witness would be preferred to medical evidence unless the medical evidence completely rules out the version of the eye witness.

Ordinarily the value of medical evidence is only corroborative – It proves that the injuries could have been caused in the manner alleged by the prosecution and nothing more – Defence used to prove medical evidence that the injuries could not possibly have been caused in the manner alleged and there by discredit the eye witness – Evidence of a Medical Officer is relevant U/s.45 of the Evidence Act consists of two parts, i.e. (i) direct evidence and (ii) opinion evidence – Direct evidence is what the Medical Officer saw himself over the corpse/dead body and opinion evidence is that part of evidence, which relates to the weapon with which the injuries he saw might have been inflicted and the manner in which the deceased might have sustained the injuries.

In the present case direct evidence of the Medical Officer shows that the injury found on the dead body may be caused by the weapon like M.O.I but his opinion is to the effect that unless the weapon like M.O.I is fitted with a long handle, the injuries sustained by the deceased may not be possible – Held, this Court cannot dismiss the version of the eye witness basing on the opinion of the Medical Officer.

(Para 8)

B. EVIDENCE ACT, 1872 – S.134.

Plurality of evidence is not the sine - qua - non to sustain a charge in a Criminal Trial.

In the present case P.W.9 is admittedly the solitary eye-witness to the occurrence and he has been corroborated by the evidence of

P.Ws.2,3 & 5 – Evidence of P.W.9 is enough to convict the appellant – Held, appeal being without merit is dismissed. (Para 6 & 9)

Case law Referred to:-

AIR 1983 SC 484 : (Solanki Chimanbhai Ukabhai-V- State of Gujarat)

For Appellant - Mr. Ambika Prasad Ray, Advocate
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 28.10.2001 passed by learned Adhoc Addl. Sessions Judge (F.T.C.), Baripada in S.T. No.29/74 of 2005, convicting both the appellants for offence under Sections 302/34, I.P.C. and sentencing each of them to suffer imprisonment for life and to pay fine of Rs.5,000/- (five thousand) each, in default, to suffer imprisonment for a further period of six months each.

2. The occurrence happened on 31.10.2004(Sunday), at about 6.30 P.M. when deceased Kala Moharana and his brother Niranjan Moharana (P.W.9) were returning to their village in two separate bicycles from Angarpada Hata (weekly market). Near the spot, both the appellants, who had ambushed themselves, suddenly came over and mounted assaults on both deceased and P.W.9. While appellant no.1 Deben @ Debendra Munda assaulted the deceased Kala Moharana with a Bhala (M.O.-I) held by him, appellant no.2 Sunaram Munda assaulted P.W.9 by a 'Thenga'. Throwing the bicycle there, P.W.9 ran for his safety and looking back from a distance, found both the appellants assaulting the deceased. He informed the matter to the villagers including the daughters of the deceased namely, Nilandri Moharana (P.W.3) and Surubudi Moharana (P.W.5) and also the Grama Rakhi namely Karna Bindhani (P.W.2). The villagers coming over the spot, found the deceased lying dead with injuries on his body. P.W.9 lodged report at the police station on the same day. On completion of investigation by P.W.14 in part and then by P.W.15 in part, P.W.15 submitted charge-sheet implicating the appellants under Section 302/34, I.P.C.

3. Prosecution has examined 14 witnesses including the witnesses introduced supra in the preceding paragraph. Besides the aforesaid witnesses P.W.11 is the Medical Officer, who had conducted the autopsy and P.W.10 is the Medical Officer, who had examined P.W.9 on police requisition.

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

4. Learned Trial Court, on consideration of the evidence on record and especially the eye-witness account of P.W.9, found both the appellants guilty under Section 302/34, I.P.C. and accordingly recorded the conviction thereunder.

5. Learned counsel for the appellants submits that there being contradictions in the evidence of P.W.9 and the Medical Officer (P.W.11), it is not safe to make the evidence of P.W.9 the sole basis of conviction. Elaborating his submission, learned counsel for the appellants submits that P.W.9 is alleged to have seen appellant no.1 Deben @ Debendra Munda assaulting the deceased Kala Moharana by a 'Bhalla' (M.O.-I); said M.O.-I on production before the Medical Officer (P.W.11) and on being confronted to him, he (P.W.11) opined that the injuries found on the dead body of the deceased cannot be possible by M.O.-I unless it is attached with a long handle. In view of such opinion of the Medical Officer (P.W.11), learned counsel for the appellants wants us to disbelieve P.W.9, who is the sole eye witness in the case. Learned counsel for the appellant also draws our attention to some more peripheral contradictions in the evidence, some of which, if addressed, cannot be held to be sufficient to throw the prosecution case over board.

6. In view of the provision in Section 134 of the Evidence Act, it is admitted at the Bar that plurality of evidence is not the sine-qua-non to sustain a charge in a criminal trial. In the present case, P.W.9, who is admittedly the solitary eye-witness to the case, has been corroborated by the evidence of P.Ws.2, 3 and 5 inasmuch as immediately after the occurrence he (P.W.9) rushed to the village and informed the matter to P.W.2, who is the Grama Rakhi and P.Ws.3 and 5, who are none other than the daughters of the deceased. Further, P.Ws.3 and 5 have testified that deceased Kala Moharana and their uncle Niranjan Moharana (P.W.9) had gone to the Weekly "Hata" together. P.W.9 has testified that he had seen both the accused persons in the weekly market, but by the time he and the deceased left the "Hata", both the appellants had already left by then. P.Ws.3 and 5 have testified that at about 5.00 P.M. both the appellants returned and hurriedly went somewhere taking with them something from their house in a concealed manner. About one hour thereafter, i.e., at about 6 / 6.30 P.M., P.W.9 rushed to the village to inform about the incident. If we look at the entire evidence of P.Ws.3, 5 and 9 in their entirety, it would be found that both the appellants had come back to their house prior to the deceased and

P.W.9 and again they went to the spot where they had ambushed themselves. Conduct of P.W.9 in rushing to the village to inform about the occurrence immediately after the occurrence gets corroboration in material particular, from the evidence of P.Ws.2, 3 and 5. P.W.9 is further corroborated by the Medical Officer (P.W.11) to the extent that the injuries sustained by the deceased were caused by a weapon like M.O.-I, a sharp cutting weapon.

7. Submission of learned counsel for the appellants is to the effect that P.W.9 should be disbelieved on the ground that the Medical Officer (P.W.10), who examined him on police requisition, did not find any external injury on his body. P.W.9 is testified to have been assaulted by appellant no.2 Sunaram Munda by a lathi. On being so assaulted, he (P.W.9) ran for his safety by throwing the bicycle he was riding on the spot. Appellant no.1 Deben @ Debendra Munda having singled out deceased Kala Moharana for the fatal assault, it seems P.W.9 was never the target of the appellants. Appellants also did not chase P.W.9 for further assault when he ran away for his safety. In such situation, the appellants might not have got chance or scope to attack P.W.9 with the intensity with which they assaulted deceased Kala Moharana. In view of such situation, absence of injury on the person of P.W.9, though he complained of pain over his left hip joint, left thigh on lateral aspect, upper 1/3rd of left leg and pain of whole left side back over scapula in course of his examination by P.W.10, cannot be a ground to disbelieve him. Further at times, assault by lathi may not leave any mark of injury except pain.

8. On the point of inconsistency between the Medical Officer (P.W.11) and the eye witness P.W.9, it is settled law (*see* **Solanki Chimanbhai Ukabhai *v.* State of Gujarat**; A.I.R. 1983 S.C. 484) that testimony of eye witness would be preferred to medical evidence unless the medical evidence completely rules out the eye witness version. Generally, the evidence of a Medical Officer is dismissed as opinion evidence. But such evidence relevant under Section 45 of the Evidence Act consists of two parts, i.e., (i) direct evidence and (ii) opinion evidence. Direct evidence is what the Medical Officer saw himself over the corpse / dead body, and opinion evidence is that part of his evidence, which relates to the weapon with which the injuries he saw might have been inflicted, the manner in which the deceased might have sustained the injuries, time since death, the time by which the deceased might have taken food from his death, etc. All these facts are opinion of the particular Medical Officer on the basis of certain indicators. In the present case, direct evidence of the Medical Officer is indicative of the fact that the injury found on the dead body may be caused

by weapon like M.O.-I, but his opinion is to the effect that unless the weapon like M.O.-I is fitted with a long handle, the injuries sustained by the deceased may not be possible. Whether the handle fitted to M.O.-I by the time it was produced before P.W.11 was the same when M.O.-I was used for assault or whether by the time it was produced before the Medical Officer (P.W.11), the handle was already broken in course of assault or in course of transit after seizure, are factors on which there are no materials to throw light. In view of such fact, we do not feel persuaded to accept the contention of learned counsel for the appellants and dismiss the eye witness account of P.W.9 on the basis of opinion by the Medical Officer (P.W.11).

9. In the result, we do not find any merit in the appeal and the same is accordingly dismissed.

Appeal dismissed**.**

2013 (I) ILR - CUT- 292

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

W.P.(C) NO.20501 OF 2011 (Dt.10.04.2012)

ELLEY PATTNAIK ……Petitioner.

.Vrs.

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

ODISHA GOVERNMENT LAND SETTLEMENT ACT,1962 – S.7-A(3).

Original lease granted in the year 1974 – Revisional Authority initiated suo motu Revision in 1998 – Under the 2nd proviso to Section 7-A(3) of the Act no proceeding can be initiated after expiry of fourteen years from the date of order granting lease – Held, the suo motu lease revision case is without jurisdiction hence the impugned order is set aside. (Para 9,10)

For Petitioner - M/s. Sarada Pr. Sarangi, P.P.Mohanty, P.K.Dash, B.P.Das, A.Pattnaik & G.Senapati.
For Opp.Party - Addl. Govt. Advocate.

B.K.MISRA, J This is the second round journey of the present petitioner in challenging the order of the Additional District Magistrate, Bhubaneswar in Lease Revision Case No. 422 of 1998 dated 30.5.2011 (Annexure-8) wherein the Addl. District Magistrate, Bhubaneswar set aside the settlement of the case land in favour of one Digambar Behera in W.L. Lease Case No. 2036 of 1973.

2. The case of the petitioner is that one Digambar Behera was granted lease of Ac. 0.500 decimals of land appertaining to Hal Plot No. 266/1044/1132 under Hal Khata No. 239/35 corresponding to Sabik Plot No. 1044 under Sabik Khata No. 281 in Mouza-Giringaput by the Government after considering all the statutory formalities. A lease deed was executed in the year 1974. The original lessee, namely, Digambar Behera transferred the said Ac.0.500 decimals of land to one Trilochan Behera after obtaining permission from the Revenue Officer, Bhubaneswar transferred the case land measuring Ac.0.500 decimals to one Rama Krushna Parida on 18.10.1985. It is the further case of the petitioner that thereafter the said Rama Krushna Parida transferred the case land which he purchased from Trilochan Behera in favour of the present petitioner. The petitioner alleges

that on 29.4.1998 i.e. almost after 13 years of his purchasing the case land the Addl. District Magistrate, Bhubaneswar namely, the present opposite party No.1 initiated a Sou Motu Revision Case under Section 7-A(3) of the Orissa Government Land Settlement Act, 1962 and after examining, the lower court record set aside the settlement of the case land by his order dated 29.4.1998 and directed the Tahasildar, Bhubaneswar to cancel the lease granted by the State Government in favour of Digarmbar Behera and to correct the records and take over possession of the land in question. This order of the Additional District Magistrate, Bhubaneswar was challenged by the present petitioner before this Court in W.P(C)No.13765 of 2008 and this Court while setting aside the order of settlement of the Revisional Authority directed the Additional District Magistrate, Bhubaneswar to dispose of the case afresh after giving opportunity of hearing to the petitioner and also to consider the question of limitation. It is the further case of the petitioner that she appeared before the Additional District Magistrate, Bhubaneswar and after hearing the Additional District Magistrate, Bhubaneswar passed the impugned order at Annexure-8.

3. Learned counsel appearing for the petitioner contended that the Revenue Authority cancelled the lease granted in favour of Digambar Behera without issuing any show cause notice indicating the grounds for cancellation of the lease granted to him and the petitioner had also no knowledge of such cancellation of lease and though he is entitled to a show cause notice, no notice was issued to him and therefore, the impugned order smacks transparency and there has been gross violation of the principles of natural justice. It was also equally argued that Suo Motu Revision Proceeding initiated by the Additional District Magistrate, Bhuabaneswar i.e. after long lapse of 25 years is without any jurisdiction and the reasoning assigned are totally fallacious and cannot be sustained in the eyes of law. Thus, it is contended by the learned counsel for the petitioner that the impugned order should be quashed.

4. The opposite party No.1 files his counter affidavit denying all the allegations of the petitioner and while praying for dismissal of the writ petition it has been specifically averred that Digambar Behera the original lessee is neither a member of the Scheduled caste or Scheduled Tribe community but he availed the benefit under Section 3(2) of the O.G.L.S. Act, 1962 by impersonating him as a member belonging to the Scheduled Tribe community with an ulterior motive to grab the said land accordingly when such a fact came to the notice of the Revisional Authority, a Sou Motu Revision was initiated which was in accordance with law and no fault can be found with the Revisional Authority in passing the impugned order at Annexure-8.

5. Learned Additional Government Advocate appearing on behalf of the State contended that the impugned order at Annexure-8 is a speaking order and when by misrepresentation of facts and playing fraud the land was leased out to Digambar Behera on the notion that he belongs to the Scheduled Tribe community, the competent authority on considering such fraud and misrepresentation initiated Sou Motu Revision and in doing that there has been no violation of any statutory provision and limitation of 14 years is not applicable to the facts and circumstances of this case.

6. We have heard the matter at length. Section 7-A(3) of the Orissa Government Land Settlement Act reads as follows:-

> "The Collector may, of his own motion or otherwise, call for and examine the records of any proceeding in which any authority, subordinate to it has passed an order under this Act for the purpose of satisfying himself that any such order was not passed under a mistake of fact or owing to a fraud or misrepresentation or on account of any material irregularity of procedure and may pass such order thereon as he thinks fit.
>
> Provided that no order shall be passed under this sub-section unless the person affected by the proposed order has been given a reasonable opportunity of being heard in the matter.
>
> Provided further than no proceeding under this sub-section shall be initiated after the expiry of fourteen years from the date of the order".

7. In the instant case, the impugned order (Annexure-8) nowhere reveals that the Additional District Magistrate, Bhubaneswar if at all made any attempt to comply with the mandate of the first provision of Section 7-A (3) of the Act by calling for information from the office of the Sub. Registrar as to whether the lease hold property or any portion thereof has been alienated by the original lessee to any other party. Had such report been called for, the Revisional Authority could have ascertained that the petitioner had purchased the lease hold land from the original lessee and should have issued notice to the petitioner as well as to Digambar Behera the original lessee who are the affected parties. But no such step appears to have been taken by the Additional District Magistrate before passing the impugned order.

8. In a similar case, this Court in the case of ***Rama Chandra Pandav –v- State of Orissa and others*** in W.P.(C) No.14364 of 2006 held that since the petitioner had purchased the lease hold land from the original lessee the order of the Addl. District Magistrate is not sustainable as no notice has been issued to the purchaser before cancellation of lease.

9. Further we find that the original lease was granted long back in the year 1974 whereas the Revisional Authority initiated the Suo Motu Revision in 1998 i.e. after a long lapse of 25 years. Under 2nd Proviso to Section 7-A(3) of the Orissa Government Land Settlement Act no proceeding can be initiated after expiry of fourteen years from the date of order granting lease. While prescribing the period of limitation the legislature while drafting the Orissa Government Land Settlement Act in their wisdom prescribed the period of limitation for initiation of a proceeding in examining the correctness of the order passed under the act and also to find out if any fraud or misrepresentation etc. was practised in obtaining an order. Being cognizant of such contingencies the period of limitation of 14 years has been prescribed. The reasons assigned by the Additional District Magistrate, Bhubaneswar about the fraudulent declaration made by Digambar Behera that he belongs to the Scheduled Tribe community and fraud was practised to get the land settled in his favour can be decided by the Revisional Authority as per terms of the provision but within the period of limitation.

10. In view of the aforesaid provision of law when the Suo Motu Lease Revision Case No. 422 of 1998 which has been initiated after a long lapse of 25 years and in view of the 2nd proviso to Section 7-A(3) of the Orissa Government Land Settlement Act,1962 such Suo Motu Lease Revision case is without jurisdiction and resultantly, the impugned order at Annexure-8 cannot be sustained and is set aside accordingly. Accordingly, the writ petition stands disposed of.

Writ petition disposed of.

2013 (I) ILR - CUT- 296

PRADIP MOHANTY, J & B.N. MAHAPATRA, J.

JCRLA NO.132 OF 2003 (Dt.03.08.2012)

MANU BINDHANI ……Appellant

.*Vrs.*

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S.304-II.

Murder – Prosecution has not adduced any evidence to prove intention of the appellant to commit murder of the deceased – Prosecution case is that the arrow was struck on the right leg of the deceased just above the knee, which is not a vital part of the body – The injury was not grievous and the cause of death was due to profuse bleeding – It can not be inferred that the appellant had done the act with the intention of causing death or with the knowledge that the act was likely to cause death of the deceased – Held, conviction of the appellant U/s.302 I.P.C. is altered to one U/s.304 Part-II I.P.C.

(Para 8)

Case law Relied on:-

63 (19870 CLT 302 : (Bamadev Pradhan-V- State of Orissa)

For Appellant - Jitendra Tewari, Advocate.
For Respondent - Mr. Sk. Zarafulla,
Addl. Standing Counsel.

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment and order dated 28.07.2003 passed by the learned Additional Sessions Judge, Baripada in Sessions Trial No.12/60 of 2001 convicting the appellant for commission of offence punishable under Section 302, I.P.C. and sentencing him to undergo imprisonment for life.

2. Prosecution case in brief is that on 29.07.2000 at about 9 A.M. the deceased had been to the shed of one Biswanath Bindhani (P.W.5) of village-Arpata for work. At about 5 P.M. the informant (P.W.14) got information from Biswanath that the deceased lying in a serious condition inside Daundia reserve forest. He along with Biswanath immediately rushed to the place of occurrence and saw the deceased lying senseless on the ground with piercing injury on his right side leg above the knee joint and his

cycle was kept by his side. The informant with the help of others first took the deceased to the house of Biswanath and while making arrangement to shift him to his (informant's) house in a trolley, the deceased died. Suspecting foul play the informant reported the matter at Barsahi Police Station consequent upon which a case was registered and investigation taken up. During the course of investigation, the I.O. visited the spot, examined the witnesses and recorded their statement, seized the cycle, a pair of chapel along with blood-stained earth and sample earth from the spot in presence of the witnesses. On getting information from confidential source, the I.O. interrogated one Sadhu Bindhani, Padmolochan Bindhani and Pabana Bindhani and came to learn that one Padmini Bindhani (P.W.11) is the eye witness to the occurrence. When she was examined by the I.O., in her statement she disclosed to have seen the accused-appellant shooting the deceased by means of bow and arrow inside the forest. On the strength of her statement, the accused-appellant was arrested and while in custody he made disclosure statement admitting to have shot the deceased and concealing the arrow in a branch of a tree and gave recovery of the arrow to the police in presence of the witnesses. The I.O. also recovered the bow and thread of the bow from the house of the accused-appellant. On completion of investigation the I.O. laid charge-sheet against the accused-appellant and Saiba Bindhani (since acquitted) for commission of offence punishable under Section 302/34, IPC.

3. Upon receipt of charge-sheet, cognizance was taken and the case was committed to the Court of Session where the present appellant and the acquitted accused Saiba Bindhani faced trial. During trial they took the plea of complete denial and false implication. The prosecution, in order to prove the charge, examined as many as 24 witnesses including the I.O. and the doctor and exhibited 16 documents in evidence. But the accused persons did not choose to adduce either any oral or documentary evidence. The learned Additional Sessions Judge on assessment of the evidence on record convicted the accused-appellant for commission of offence punishable under Section 302, IPC and sentenced him to undergo imprisonment for life *inter alia* basing upon the eyewitness account of P.W.11 and the evidence with regard to leading to discovery of the weapon of offence. He, however, acquitted co-accused Saiba Bindhani of the charge.

4. Mr. Tewari, learned counsel for the appellant assails the impugned judgment on the following grounds:

(i) There are material contradictions in the evidence of prosecution witnesses.

(ii) Prosecution has not proved the intention or motive of the accused-appellant.

(iii) P.W.11, who is the only eyewitness to the occurrence, disclosed the fact 7 to 8 days after the occurrence. Therefore, her evidence is not believable.

(iv) Leading to discovery has not been proved by the prosecution for which the conviction of the appellant is bad in law.

5. Mr. Sk. Zafuralla, learned Additional Standing Counsel vehemently contends that the contradictions, if any, in the evidence of prosecution witnesses are minor. Evidence of P.W.11, who is a witness to the occurrence, is clear, cogent and trustworthy. Immediately after the occurrence she disclosed about it before P.W.5 and P.W.12, the uncle of the deceased. According to her, she saw from a close distance the appellant shooting the deceased by an arrow. The accused while in custody made disclosure statement before the I.O. in presence of P.Ws.15 and 16 and also led them to the place of concealment and gave recovery of the weapon offence (arrow), which was seized by the I.O. under Ext.5 in presence of P.Ws.15 and 16. The medical evidence also supports the evidence of the ocular witness (P.W.11) inasmuch as P.W.21, the doctor, on examination of the deceased found one stab injury on his right knee. Therefore, there is no material to interfere with the impugned judgment of conviction and sentence passed by the learned Additional Sessions Judge, Baripada.

6. Perused the L.C.R and gone through the evidence of the witnesses minutely. P.Ws.1 and 2, the co-villagers, are the witnesses to the seizure of a cycle, a pair of 'chapal', sample earth and blood stained earth. P.W.3 is a witness to the seizure of wearing apparels of the deceased. P.W.4 is a co-villager who simply stated that hearing 'hullah' he went to the place of occurrence and saw the deceased lying with bleeding injury on his leg and moaning out of severe pain. Some persons enquired about the incident from the deceased but he could not hear what he replied. His evidence is no way helpful to the prosecution. P.W.5 is the employer of the deceased. He stated that on being heard from his daughter-in-law (P.W.6) about the death of the deceased he immediately rushed to the spot and found the deceased lying with bleeding injury near his right knee. The deceased disclosed before him that someone shot at him by an arrow, but he could not mark him. He went to the house of the informant (P.W.14), the brother-in-law of the deceased, and informed him about the incident. He and P.W.14 returned to the spot and brought the deceased to his (P.W.5's) house. In cross-examination he

admitted that he went to the spot directly from his house after he was informed by P.W.6. Nobody was present at the spot when he arrived there. It was already sunset. He also admitted that he had not disclosed about the incident to anybody except the informant. The deceased was able to talk till he came to his house and left for the house of the informant in a trolley. No villagers had come to see the deceased till he was sent to the house of the informant. P.W.6 is the daughter-in-law of P.W.5. She in her examination-in-chief stated that on the day of occurrence she along with her father-in-law and others left their house for agricultural field while the deceased was working in the 'Kamara Sala'. She returned at 3 P.M. and served 'Handia' to the deceased. She again went to the field and at 4 P.M. all of them returned home and found the deceased absent. Somebody informed her that the deceased was lying somewhere inside the forest. She informed P.W.5, who proceeded to the spot. The deceased was brought to her house. She saw bleeding injury near his right side knee. The brother-in-law of the deceased took him to his house. In cross-examination she admitted that she could not say the name of the person who informed her that the deceased lying in the forest. She had not disclosed the fact to anybody except P.W.5. P.Ws.7, 8, 9 & 10 are the witnesses to the seizure of the wearing apparels of the deceased.

P.W.11 is a co-villager of both the accused and the deceased. In her examination-in-chief she stated that on the date of occurrence she went to the agriculture field to attend cultivation work. She returned home at about 3 P.M. and after taking lunch she again went to the forest area to collect leaves. She saw the accused moving with bow and arrow inside the forest. After sometime she saw the accused shooting the deceased by an arrow while the deceased was going towards his village. The arrow hit on his right leg above the knee and stuck to it. The deceased fell down on the ground and tried to remove the arrow. The accused left the place. The deceased removed the arrow and left the place leaving the same on the ground. Accused came to the spot, collected the arrow and left the place. She returned home but out of fear did not disclose the fact to anybody in the village. Only after 2 to 3 days of the occurrence she disclosed the incident to her uncle (P.W.12). In cross-examination she admitted that the deceased was not her relative nor had she any close acquaintance with him. She also admitted that she had not talked to the accused when she saw him moving inside the forest. The accused stood at a distance of about 100 yards from the place where she was collecting leaves. She further admitted that she had not disclosed the incident to anybody in the village and even to her aunt and neighbours who were available in the village at that time. A suggestion was given by the defence that she had not seen the accused but she denied the

same. P.W.12 is the uncle of P.W.11. In examination-in-chief he stated that his niece (P.W.11) disclosed before him that while she was collecting leaves in the forest saw the accused shot a person. In Cross-examination he admitted that he returned to the village about 8 days after the occurrence. On the following day he went to the police station and informed the Officer in-charge about the facts that he had heard from his niece. Villagers were unaware of the incident till then.

P.W.13 is a co-villager who was declared hostile and cross-examined by the prosecution at length. But, he did not support the prosecution case. P.W.14 is the brother-in-law of the deceased and informant of this case. In examination-in-chief he stated that the deceased was working in the 'Kamara Sala' of P.W.5. On the concerned day at about 5 P.M. P.W.5 came and informed him that the deceased was lying in the forest with injuries. He went there and found the deceased lying on the ground inside the forest with piercing injury on his right side leg above the knee joint. He brought him to the shed of P.W.5 and thereafter brought him to his house in a trolley. While he was making arrangement to shift him to hospital he died. Thereafter, he went to the police station and got the report drafted by one person known as Moharana. After finding the correctness of the report he put his L.T.I. on it and presented the same to the police. P.Ws.15 & 16, who are the co-villagers of the accused, did not support the prosecution case with regard to leading to discovery. P.Ws.17, 18 and 19 did not support the prosecution case. P.W.20 is a seizure witness. He stated that police called him and obtained his signature on a blank form. He did not know anything about the case nor about the seizure of anything. However, he proved his signature marked Ext.8. P.W.22 is a witness to the seizure of a bow and proved the seizure list Ext.8/1 and his signature Ext.8/2.

P.W.21 is the doctor who conducted autopsy over the dead body of the deceased and found a spindle shaped stab, i.e., penetrating injury of size 3 cm x 1 cm x 7.5 cm just behind the right knee piercing the major popliteal artery and vain. On dissection he found all the internal organs like brain, heart, lungs, livers, spleen, kidneys and intestines were intact but pale. He opined that the death of the deceased was due to profuse bleeding from the above wound, leading to shock and death. The death was caused within 24 hours of his post-mortem examination. He also replied in positive to the query of the I.O. whether the injury sustained by the deceased could be caused by shooting of arrow. He also proved his opinion report as Ext.10 and signature as Ext.10/1.

P.W.23 is the A.S.I. of police of Bhimda Beat House who received the FIR and sent the same to the O.I.C. Barasahi Police Station. P.W.24 is the O.I.C. of Barasahi Police station and I.O. of this case. He registered the case and took up investigation. During investigation he visited the spot, examined witnesses, recorded their statements, prepared the spot map, seized a cycle, a pair of 'chapal', blood stained earth and sample earth from the spot in presence of witnesses and prepared seizure list. He also seized wearing apparels of the deceased. He held inquest over the dead body of the deceased and sent the same to Udala hospital for postmortem examination. He searched the house of the accused and recovered a bow and thread of the bow in presence of the witnesses and prepared seizure list Ext.8. He arrested the accused-appellant on 02.08.2000. He further deposed that the accused-appellant while in custody made disclosure statement and gave recovery of an arrow from the place of concealment, i.e., a Sal tree and he seized the same in presence of the witnesses under Ext.5. On completion of investigation he filed charge-sheet.

7. On scanning the evidence of witnesses this Court finds that P.W.11 is a co-villager who had seen the occurrence from a short distance. Her evidence is on the date of occurrence she had been to the forest for collecting leaves. She saw the accused moving with a bow and arrow inside the forest. After sometime, while she was collecting leaves, she saw the accused shooting the deceased by an arrow while the deceased was going towards his village. The arrow hit on the right leg of the deceased above the knee and stuck to it. The deceased fell down on the ground, removed the arrow and left the place leave the same on the ground. Subsequently, the accused came to the spot, collected the arrow and left the place. Nothing has been elicited in cross-examination to demolish her evidence. She also stated that after returning home out of fear she did not immediately disclose the incident to anybody, but, however, only 2 to 3 days after the occurrence she disclosed the incident to her uncle (P.W.12). This part of her evidence is corroborated by her uncle (P.W.12). The medical evidence supported the ocular testimony of P.W.11. The bow and its thread were recovered from the house of the accused under Ext.8. The accused while in custody made disclosure statement, led the police and the witnesses to the place of concealment and gave recovery of the weapon of offence, i.e., the arrow, which was seized by P.W.24 under Ext.5.

The contradictions appearing in the evidence of the prosecution witnesses are minor in nature and bound to occur in case of truthful witnesses due to efflux of time. Since there is clear, cogent and clinching evidence against the accused, failure on the part of the prosecution to

establish any motive to commit the crime is of no consequence. The ocular evidence of P.W.11 having been found to be clear, cogent, unimpeachable and fully corroborated by the medical evidence, the same cannot be discarded on a flimsy ground like delayed disclosure of the occurrence, especially when P.W.11 in her evidence stated that out of fear she could not immediately disclose the incident to anybody. Since the evidence of investigating officer, who recovered the weapon of offence (M.O.I), is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses (P.Ws.15 and 16) do not support the prosecution version.

Thus, there is no dispute that the present appellant is the author of crime.

8. Now, it is to be seen whether the act of the appellant whereby death of the deceased was caused is punishable under Section 302, IPC or Section 304 Part-I or Part-II, IPC. In the instant case, prosecution has not adduced any evidence to prove intention of the appellant to commit murder of the deceased. As per prosecution version the arrow was struck on the right leg of the deceased just above the knee, which is not a vital part of the body. The injury was not grievous one and the cause of death was due to profuse bleeding. So, it cannot be inferred that the appellant had done the act with the intention of causing death, or with the knowledge that the act was likely to cause death of the deceased. Therefore, having regard to the attending circumstances conviction of the appellant under Section 302, IPC is altered to one under Section 304 Part-II, IPC in the light of ratio decided in ***Bamadev Pradhan Vrs. State of Orissa,*** 63 (1987) CLT 302.

9. In the result, therefore, the appeal is allowed in part. The judgment dated 28.07.2003 passed by the learned Addl. Sessions Judge, Baripada in S.T. Case No.12/60 of 2001 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life is set aside and instead the appellant is convicted under Section 304 Part-II, IPC and sentenced to undergo rigorous imprisonment for ten years.

It is stated at the Bar that the appellant has already remained in custody for more than eleven years. If that be so, the appellant (Manu Bindhani) be set at liberty forthwith, unless his detention is required otherwise.

Appeal allowed in part.

2013 (I) ILR - CUT- 303

M. M. DAS, J.

W.P.(C) NO. 30213 OF 2011(Dt. 23.08.2012)

SK. SAMIRUDDIN ……Petitioner

.Vrs.

NAJBOON BIBI & ORS. ……..Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-1, R-10 & O- 22, R-3

Implition of Party – Once an application for substitution under Order 22 Rule 3 C.P.C. is rejected the legal heirs cannot take recourse under Order 1 rule 10 C.P.C. to be impleaded as parties in the suit.

Case laws Referred to:-

1.40 (1974) CLT 885 : (Durga Charan Parida-V-Basant Kumar Parida & Ors.)
2.70(1990)CLT 190 : (Abhiram Naik-V- Krushna Chandra Naik).

For Petitioner - Mr.Debasis Tripathy
For Opp.Parties - M/s Bhaskar Chandra panda ,S.Mishra , J.N.Panda & L.Das

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W. P. (C) NO. 30213 OF 2011

Heard learned counsel for the petitioner and the learned counsel for opp. parties 1 to 6 who have been allowed to be impleaded as parties to the suit, by the impugned order.

One of the defendants has filed this writ petition challenging the order dated 4.8.2011 passed by the learned Civil Judge (Junior Division), Kendrapara in C.S. No.316 of 2001 allowing an application under Order 1, Rule 10 C.P.C. filed by the legal heirs of the deceased plaintiff no.1, i.e., Usman Khan. The orders annexed as Annexure-1 disclose that when the plaintiff no.1 – Usman Khan expired, an application for substitution under Order 22 was filed. The said application was rejected and thereafter, the legal heirs of the said deceased plaintiff filed an application Order 1, Rule 10 C.P.C. to be impleaded as parties. The petitioner filed an objection stating that the said petition is not maintainable as the suit has already abated against the deceased plaintiff and, therefore, provisions of Order 1, Rule

10 C.P.C. cannot be made applicable for impleading the legal heirs of the deceased plaintiff as parties. The learned court below recording that this is a suit for partition and the suit has not been decided on merit by that date and , further, the defendants have not questioned that the petitioners in the application under Order 1, Rule 10 C.P.C. are not the legal heirs of eceased plaintiff Usman Khan, inasmuch as the application under Order 22 for substitution of the legal heirs has been rejected on technical grounds, the provisions of Order 1, Rule 10 C.P.C. is squarely applicable and allowed the said application. Being aggrieved, the defendant has filed the present writ petition.

Law is well settled that when an application for substitution under Order 22 is rejected, a fresh suit being barred on the same cause of action, the legal heirs cannot take recourse under Order 1, Rule 10 C.P.C.

In the case of Durga Charan Parida v. Basant Kumar Parida and others, 40 (1974) CLT 885, this Court considering the said question, held as follows:-

> "…….Order 22, Civil Procedure Code makes provision for substitution of the legal representatives of a party to the suit who dies during the pendency of the suit. It also provides that in the event of non-substitution of the legal representative of a deceased party, the suit abates as against the deceased party. There is no dispute that in some cases this partial abatement against the deceased party may amount to a dismissal of the entire suit. The said Order also provides that once a suit abates due to non-substitution of the legal representative of a deceased party, a fresh suit is barred on the same cause of action. Order 1, Rule 10, Civil Procedure Code empowers the Court to enable it to effectively and completely adjudicate upon the settle all questions involving in the suit to add anybody as a party to the suit either as plaintiff or defendant. The jurisdiction conferred on the Court under Order 1 Rule 10 Civil Procedure Code is quite distinct from the jurisdiction conferred under Order 22, Civil Procedure Code. Under Order 22, Civil Procedure Code, when a suit abates against a deceased defendant, a fresh suit is barred on the same cause of action, and therefore, a valuable right accrues to the legal representatives of the deceased defendant against the plaintiff. It can never be the intention of the Code to take away this valuable right accrued to the legal representatives of the deceased defendant by taking resort to the provision contained in Order 1, Rule 10, Civil Procedure Code. To hold otherwise would amount to going against the scheme of the Code and would put the

> litigants to great hardship and prejudice. Therefore, I am of opinion that the trial court having dismissed the plaintiffs application for substitution, it had no jurisdiction to entertain an application under Order 1, Rule 10, Civil Procedure Code and to allow the same. By allowing the application under Order 1 Rule 10, Civil Procedure Code, the Court has simply annulled its very own order previously passed while rejecting the plaintiff's application for substitution……..."

Again this Court had the occasion to deal with the said question in the case of Abhiram Naik-v- Krushna Chandra Naik, 70 (1990) CLT 190 and relying upon the decision in the case of Durga Charan Parida (supra) held that there can be no doubt that on rejection of an application under Order 22, Rule 3 C.P.C., another application cannot be filed to implead the legal heirs as parties under Order 1, Rule 10 C.P.C.

In view of the above, position of law, the learned trial court fell into error in passing the impugned order and allowing the application under Order 1, Rule 10 C.P.C. filed by the opposite parties 1 to 6. The impugned order is, therefore, set aside and the said applicants, i.e., opposite parties 1 to 6 shall not be impleaded as parties in the suit.

The writ application is accordingly allowed. Interim orders passed on 22.11.2011 in Misc. Case Nos.17731 and 17730 to 2011 stand vacated. The learned trial court shall proceed with the suit, i.e., C.S. No.316 of 2011 and shall make all efforts to dispose of the same by the end of March, 2013.

Writ petition allowed.

2013 (I) ILR - CUT- 306

M. M. DAS, J.

W.P. (C) NO. 16037 OF 2005 (Dt.04.10.2012)

SANTOSH KU. SAHOO ……Petitioner

.Vrs.

RADHANATH SAHOO & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – Ss.151, 152.

Correction of final decree – Wrong description of suit property – Mistake is bona fide as it occurred in the plaint and compromise petition – Both parties agree for correction – If correction is allowed it would not affect the right occurred in favour of any of the parties rather if it will not be corrected it may give rise to further proceedings – Held, learned trial Court is wrong in rejecting the application for correction – Direction issued to the learned Trial Court to allow amendment of the plaint and compromise petition and correct the final decree upon filing of the consolidated copy of the plaint and fresh compromise petition.

Case law Relied on:-

(2009) II SCC 308 : (Peethani Suryanarayana & Anr.-V- Repaka Venkata Ramana Kishore & Ors.)

For Petitioner - Mr. Kalyan Patnaik.
For Opp.Parties - Mr. Ranjit Samal.

Heard Mr. Pattnaik, learned counsel for the petitioner and Mr. Samal, learned counsel appearing for the opposite parties.

2. This writ petition arises out of an order passed by the learned Civil Judge (Sr. Division), First Court, Cuttack in C.S. No.234 of 2003, which was filed for partition. The defendants are opposite parties, who have entered appearance through their learned counsel. The suit was finally decreed on compromise before the Permanent and Continuous Lok Adalat. Basing on the said decree, when the parties wanted to mutate their respective lands allotted to them in the final decree, they found that there was a mistake in the description of the suit property mentioned in the final decree drawn up in the stamp paper in respect of the khata number. An application was filed for correction of the final decree. The learned Civil Judge rejected the said prayer by the impugned order on the ground that the final decree has been

drawn up in stamp paper and the said mistake is not a mistake of the court while drawing up the final decree, which is drawn up in accordance with the compromise petition, which forms a part of the decree and in that event, any correction made would be beyond the parameters of law.

3. The petitioner and the opposite parties contend before this Court that since the correction is not prejudicial to any of the parties and is an outcome of a bona fide mistake which occurred in the pleadings and thereafter in the compromise petition, this is a fit case where the court should have allowed the petition to correct the Khata numbers of the suit property and to insert the khata number where it was left blank.

4. Mr. Pattnaik, learned counsel for the petitioner relied upon the decision in the case of Peethani Suryanarayana and another –v- Repaka Venkata Ramana Kishore and others, (2009) II SCC 308. The Supreme Court in the said case was dealing with a similar situation where in a final decree, a Town Survey number was required to be corrected, which was also mentioned in the plaint. The Supreme Court in such situation held that the power of court to allow such an application for amendment of the plaint is neither in doubt nor in dispute. Such a wide power on the part of the court is circumscribed by the factors viz. (i) the application must be bona fide; (ii) the same should not cause injustice to the other side and (iii) it should not affect the right already accrued to the defendants.

5. Applying the above ratio to the facts of the present case, it is seen that all the factors as mentioned above are satisfied in the present case as the mistake is a bona fide one and since both the parties agree for such correction, it cannot cause injustice to any of them inasmuch as by correcting the plaint and the compromise petition by way of amendment as well as the final decree, the same would not affect the right accrued in favour any of the parties. Rather incorrect description of the property would lead to a complex situation which may give rise to further proceedings inasmuch as the incorrect final decree neither can be worked out nor will beneficial to any of the parties.

6. I, therefore, find that the trial court is not correct in rejecting the applications under Section 151 and 152 C.P.C. for correction. In that view of the matter, the trial court is directed to allow the amendment of the plaint and the compromise petition as well as correction in the final decree. A consolidated copy of the plaint shall be filed by the petitioner after correction along with a fresh compromise petition giving correct description of the property after being signed and sworn to by the parties except Radhanath

Sahu, who was the original defendant no.1 and has expired in the meantime and no substitution is necessary as all his legal heirs are already on record. Upon filing of the consolidated copy of the plaint and fresh compromise petition, the trial court shall correct the final decree which shall be resubmitted for carrying out such correction. Parties may thereafter approach the revenue authorities for mutating their names in respect of their lands which have fallen to their respective shares as per the corrected final decree. This writ petition is accordingly disposed of.

Writ petition disposed of.

2013 (I) ILR - CUT- 309

M. M. DAS, J.

W.P.(C) NO. 28815 OF 2011 (Dt.12.11.2012)

BASANT KUMAR BEHERA ……Petitioner

.Vrs.

CHANDINI BEHERA ……. Opp.Party

HINDU MARRIAGE ACT, 1955 – S.24.

Interim maintenance – Method of determination – No fixed guidelines for granting any percentage of income of a spouse to the other spouse – Discretion vested in a matrimonial Court which should be exercised judiciously and justifiably – Held, the Court is required to take into consideration the materials produced before it to come to a reasonable conclusion with regard to the income of the party required to pay interim maintenance and must remember that as far as practicable the quantum of maintenance should be such that the spouse to be paid maintenance can maintain the same status and life style as the other spouse. (Para 10)

Case laws Referred to:-

1AIR 1969 Orissa 12 : (Prasanna Kumar Patra-V- Smt.Sureswari Patrani)
2.(1936)1 All ER 271 : (Chichester -V- Chichester)
3.AIR 1987 Delhi 43 : (Renu Jain -V- Mahavir Prasad)
4.AIR 1977 Maharashtra LJ 144 : (Gangu -V- Pundlik)

For Petitioner - M/s. Biraja Prasanna Das, A.Ekka & J.S.Maharana.
For Opp.Party - M/s. B.H.Mohanty, B.Das, D.P.Mohanty, T.K.Mohanty.

M. M. DAS, J. The method of determination of interim maintenance to a spouse under section 24 of the Hindu Marriage Act, 1955(for short, 'the Act') is the question involved in the present writ petition.

2. The petitioner as husband has filed an application under section 13 of the Act for dissolution of marriage and grant of a decree of divorce against the opp. party – wife, which is pending adjudication before the learned Civil Judge (Senior Division), Dhenkanal. The said case has been

registered as MAT Case No. 420 of 2009. The opp. party – wife filed an application under section 24 of the Act for grant of interim maintenance and litigation expenses during the pendency of the said MAT Case on the ground that the petitioner – husband is not maintaining her or paying any amount to her towards maintenance. The said application was registered as I.A. No. 133 of 2009. The learned Civil Judge by his order dated 20.8.2010 directed to pay a monthly maintenance of Rs. 3000/- per month with effect from 19.11.2009, i.e., the date of application and Rs. 5000/- towards litigation expenses during pendency of the MAT Case. The petitioner – husband being aggrieved by the said order approached this Court in W.P. (C) No. 16751 of 2010. The said writ petition was disposed of by order dated 21.7.2011 observing and directing as follows:-

> "In the matter of grant of maintenance or interim maintenance, it is incumbent upon the Court to find out prima facie the income of the husband and his expenditure including the expenditure of the dependants while assessing the amount of maintenance that may be payable to the claimant. There being no finding by the Trial Court with regard to the income of the husband-petitioner and only because the market price of the commodities are growing the grant of maintenance of Rs. 3000/- is not justified.
>
> In the circumstances, I allow this writ petition and set aside the impugned order to the extent it granted interim maintenance of Rs. 3000/- in favour of the O.P. and the matter is remanded to the Trial Court to reconsider the question of interim maintenance . So far as grant of litigation expenses of Rs. 5,000/- is concerned, the same stands confirmed. The Trial Court shall reconsider the matter of interim maintenance and dispose of the petition within a period of six weeks from the date of production of certified copy of this order by either of the parties after giving opportunity of hearing to the parties."

3. After the matter was remitted back to the learned Civil Judge to reconsider the matter with regard to interim maintenance , the learned Civil Judge heard both the parties again and appreciating the materials produced and the witnesses examined before him, by his order dated 15.10.2011 directed the petitioner husband to pay a monthly maintenance of Rs. 10,000/- per month from the date of application, i.e., 19.11.2009 along with the litigation expenses of Rs. 15,000/- already incurred by her till the date of the order.

4. Learned counsel for the petitioner raised the following two questions before me while challenging the impugned order:

(i) The learned court below has mis-appreciated the materials produced before him in coming to the conclusion that the monthly maintenance should be paid @ Rs. 10,000/- per month to the opp. party – wife; and

(ii) The learned court below has committed an error in directing payment of Rs. 15,000/- as litigation expenses already incurred by the opp. party – wife.

5. Learned counsel for the opp. party – wife, however, submitted that the learned court below has taken the materials produced before him into consideration and has rightly appreciated the same concluding that the monthly maintenance of Rs. 10,000/- should be paid to the opp. party – wife and Rs.15,000/- which has been spent by her towards litigation expenses should be reimbursed to her.

6. Coming to the question as to what should be the para meter in determining the quantum of monthly maintenance to be paid by a spouse to the other during pendency of a matrimonial dispute, under section 24 of the Act, it would be profitable to refer to the case of ***Prasanna Kumar Patra v. Smt. Sureswari Patran***i, AIR 1969 Orissa 12. In the said case, this Court, while dealing with the question of interim maintenance under Section 24 of the Act, relied upon a decision of the Rajasthan High Court, in which it was held that as far as maintenance pendente lite is concerned, courts generally allow it at one-fifth the income of the husband after necessary deduction. Under the Divorce Act, the maximum alimony pendent elite has been fixed at one-fifth the net income. Under the Hindu Marriage Act, no such limit has been prescribed. In the absence of special circumstances, maintenance should be allowed at one-fifth the net income of the husband. As regards litigation expenses, it should be reasonable.

7. The right of a wife for maintenance is an incident of her status or estate of matrimony. The husband, therefore, in general is bound to make good the wife's cost of any proceeding under the Act and to provide maintenance to support her, pending disposal of such proceeding. The doctrine of alimony which is an incident of British Law, in this sense means allowance due to wife from husband. It has its basis in social conditions in England under which a married woman is economically dependent and almost in a position of tutelage to the husband and was intended to secure justice to her while prosecuting or defending proceedings under matrimonial law. Under section 24 of the Act, as it applies to both the spouses, if it is found that the wife has separate means sufficient for her defence and subsistence, she should not be entitled to alimony/maintenance or cost of

the proceeding. Similarly, if the husband has neither any property nor earning capacity, the court would not award any interim maintenance. Section 24 of the Act while adopting these principles goes a step further by prescribing that any such order can be made not only in favour of the wife but also in favour of the husband.

8. If we refer to the English Law with regard to quantification of alimony and maintenance pendente lite, we would see that the more recent trend in England is not to lay stress on any such arithmetical rule but have regard to the disposable income of the husband and the income of the wife and assess the amount after taking into consideration all the facts and circumstances of the case including the conduct of the parties . The English Law, at the same time, has been developed to the extent that order directing payment of pendent elite maintenance should not work out as a penalty (See ***Chichester v. Chichester*** (1936) 1 All ER 271).

The High Courts in India have also expressed their views in several decisions that the Courts in India do not accept any rigid and unreasonable rule to assess interim maintenance. The Delhi High Court in ***Renu Jain v. Mahavir Prasad***, AIR 1987 Delhi 43, held that the court in the exercise of its discretion can consider the financial position of the parties and also may record evidence on that point. Whether income will include capital assets like lands and **hereditaments** is a debatable question.

9. It can be safely held that the court exercises a wide discretion in the matter of granting alimony pendente lite but such discretion should be exercised judiciously and not arbitrarily and capriciously. It is to be guided on social principles of matrimonial law and to be exercised within the limit of the provisions of the section and having regard to the object of the Act. The Bombay High Court in the case of ***Gangu v. Pundlik***, AIR 1977 Maharashtra LJ 144, came to the conclusion that as a general rule, the court deems it prudent to adhere to the principle that a marriage de facto carries a right to alimony pendente lite and primarily has regard to the means of the parties.

10. Considering the law as it stands with regard to grant of interim maintenance during pendency of a matrimonial dispute, it would be seen that there is no fixed guidelines for granting any percentage of income of a spouse as maintenance to the other spouse. Rather, as stated earlier, the quantum of maintenance should be arrived at by exercising the discretion vested in a matrimonial court judiciously and justifiably. The Court is required to take into consideration the materials produced before it to come

to a reasonable conclusion with regard to the income of the party required to pay interim maintenance and must remember that as far as practicable, the quantum of maintenance should be such that the spouse to be paid maintenance can maintain the same status and life style as the other spouse.

11. In the instant case, the learned court below is found to have meticulously considered the materials produced before him with regard to the income of the petitioner – husband where the petitioner did not examine himself or any witness to counter the evidence adduced by the opp. party – wife. But, however, the finding of the learned court below that Rs.10,000/- should be paid as monthly maintenance by the husband, appears to be excessive on the materials produced before him. On examining the said materials and the evidence adduced by the wife, this Court finds that the interim maintenance per month to be paid by the petitioner to the opposite party – wife if fixed at Rs.7,000/- per month, would be reasonable.

12. With regard to the entitlement of the opp. party – wife to the sum of Rs. 15,000/- allegedly spent by her towards litigation expenses till the date of passing of the impugned order cannot be granted, more so when this Court in the previous writ petition has confirmed the quantum of Rs. 5000/- towards litigation expenses which was earlier arrived at by the learned court below.

13. The writ petition is, therefore, disposed of confirming the order of the learned court below with regard to the direction for payment of interim maintenance to the opp. party – wife by the petitioner –husband, but the quantum of Rs.10,000/- directed to be paid as monthly maintenance to the opposite party – wife from 19.11.2009 stands modified to Rs.7,000/- per month, which would be payable by the petitioner to the opposite party from 19.11.2009 during pendency of the MAT Case. The arrear amount of such maintenance, if any, should be paid by the petitioner to the opp. party - wife within a period of two months hence, before the learned court below and the petitioner is directed to continue payment of current maintenance at the rate of Rs.7,000/- per month till disposal of the MAT Case. The order of the learned court below, directing to pay Rs.15,000/- towards litigation expenses said to have already been spent by the opposite party – wife is set aside and as confirmed earlier, the petitioner shall pay the litigation expenses of Rs.5,000/- to the opposite party – wife, if not already paid.

Writ petition disposed of.

2013 (I) ILR - CUT- 314

INDRAJIT MAHANTY, J.

CRLMC. NO. 2044 OF 2012 (Dt.24.07.2012)

KALI @ RADHAKANTA DAS ADHIKARI ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.243 (2).

Evidence for defence – While the accused has a right to enter his defence, discretion vested with the Magistrate to refuse the same in writing if the application is made for the purpose of vexation or delay or for defeating the ends of justice.

In this case defence witness No.5 is the prosecutrix who had already been examined and Cross examined as P.W.1 before entering defence so attendance of such witness shall not be compelled under this section unless the Magistrate is satisfied that it is necessary for the ends of justice – No reason also given in the application as to why the prosecutrix, her husband and family members have been cited as defence witnesses – Held, mere listing of the said names in the list of defence witness does not satisfy the requirement of law for the purpose of issuing process – Impugned order passed by the trial Court needs no interference. (Para 6,7,8)

For Petitioner - M/s. M. Chand, B. Parida, R.R.Mishra & M.B.Patro.
For Opp.Party No.1 - Addl. Standing Counsel.
For Opp.Party No.2 - None

I. MAHANTY, J. This matter was listed at item No.168 of this week's weekly list and on the prayer of Mr. M. Chand, learned counsel for the petitioner, the matter was taken up out of turn today on account of urgency, on the consent of the learned counsel for the State.

02. The present application under Section 482 Cr.P.C. has been filed by the petitioner seeking to challenge the order dated 09.07.2012 passed in S.T. Case No.30/157 of 1995, whereby, the learned Additional Sessions Judge, Balasore has been pleased to reject a petition filed by him under

Section 243 (read with Section 233(3) read with Section 311 Cr.P.C.) for issuance of summons to five witnesses named in the said petition.

In course of hearing, Mr. Chand, learned counsel for the petitioner placed a copy of the above said petition before this Court for perusal and the same is taken on record.

03. Mr. Chand, learned counsel for the petitioner submits that no opportunity was ever afforded to the accused-petitioner to lead any defence evidence and for the first time the defence sought to adduce evidence and for such purpose, a petition came to be filed, as referred hereinabove. He further submits that, rejection of the said petition amounts to denying the accused with an adequate effective means of defending himself, which an accused is entitled to in law.

04. Perused the petition filed on behalf of the accused-petitioner. It would interesting to note herein that from the names of the five defence witnesses sought to be summoned, witness No.5-Sumati Das is the prosecutrix and/or victim. The said prosecutrix has been examined by the prosecution as P.W.1 and has also been cross-examined on behalf of the accused-petitioner. In the said witness list, defence witness No.1 happens to be the husband of prosecutrix and witness Nos.2, 3 & 4 are stated to be the relatives of the said prosecutrix.

05. From the impugned order dated 09.07.2012, it is clear that the statement of the accused was recorded under Section 313 Cr.P.C. on 09.07.1996 and immediately thereafter a petition under Section 311 Cr.P.C. was filed to recall the victim girl, who had been examined on 02.07.1996. The said victim girl has sought to be recalled by the defence as witness No.5 in the petition from which the impugned order arises.

It is most important to note that a petition under Section 311 Cr.P.C. filed much earlier was rejected and challenge to the same was made by the accused-petitioner in Criminal Revision No.310 of 1996. The Criminal Revision came to be dismissed vide order dated 27.06.2011. It appears that, after dismissal of the Criminal Revision, to achieve the self same object, which the accused petitioner failed to achieve by way of filing a petition under Section 311 Cr.P.C., the same is now sought to be achieved by filing a petition under Section 243 Cr.P.C.

06. I have perused the impugned order and in particular, paragraphs-8 & 9 as well as the mandate of Section 243 Cr.P.C. No doubt the accused has a right to enter upon his defence and to produce evidence on his behalf. From the records of the proceeding, it appears that the trial court had fixed

30.07.1996 for defence evidence and the accused-petitioner had moved this Court in Criminal Revision No.310 of 1996. It is the mandate of Section 243 Cr.P.C. and in particular Sub-Section 2 thereof that while an accused has a right to enter his evidence but discretion is vested in the Magistrate to refuse the same, if he considers the application having been made for the purpose of vexation or delay or for defeating the ends of justice and such grounds are required to be recorded by him in writing. On perusal of paragraphs-8 and 9, I am satisfied that the learned Additional Sessions Judge, Balasore has exercised his discretion appropriately in the circumstances and I find no justifiable reason to entertain challenge thereto. In support of the conclusion reached by him in the impugned order I may further add that Rule of law mandates an early conclusion of trial and it should be the endeavour of every court to ensure conclusion of trial at an early date. This Court also notes that when the accused makes a prayer under Section 311 Cr.P.C and ultimately failed in his said endeavour, this second attempt was made by the accused under Section 243 Cr.P.C. and in effect amounts to an attempt at abusing the process of the Court. While affording defence with adequate opportunity of evidence is a sine qua non of law, but from the names of the witnesses mentioned in the list appended to the petition under Section 243 Cr.P.C., it is clear that the accused is trying to achieve the self same objective, which he was denied by rejecting his application under Section 311 Cr.P.C.

07. In this case, the so-called defence witness No.5, had already been examined and cross-examined as P.W.1 before entering defence. In such event it is mandatory that the attendance of such witness shall not be compelled under this Section, unless the Magistrate is satisfied that it is necessary for the ends of justice. In the present case since Sumati Das-Prosecutrix (victim) has been examined and cross-examined, the mandate of law as found in the proviso to Section 243 Cr.P.C. is clear and in my consideration ends of justice did not make or justify any direction for further examination of the said witness. Apart from the above, it is also relevant to note herein that not a whisper has been stated in the petition under Section 243 Cr.P.C as to the reasons if at all why the prosecutrix and her family members have been cited as defence witnesses. In the present case, it appears that whereas defence witness No.1 is the husband of the prosecutrix and others are stated to be relatives of the prosecutrix. Therefore, the mere listing of the said names in the list of defence witness does not satisfy the requirement of law for the purpose of issuing process.

08. In view of the aforesaid conclusions/findings arrived at in the case, I find no justifiable reason to entertain the present application and

accordingly, the CRLMC stands dismissed. Nothing stated in this order shall be construed as a determination of any question or issue raised on merits and the trial court is free to proceed with the trial without in any manner being influenced by any of the observation made herein.

Application dismissed.

2013 (I) ILR - CUT- 318

INDRAJIT MAHANTY, J.

CRLMC. NO.4615 OF 2011 (Dt.10.07.2012)

CHANDRA KANTA BEHERA & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA …….Opp.Party

CRIMINAL PROCEDUDRE CODE, 1973 – Ss.11,12, 14.

"Competent Judicial Magistrate" – Meaning of – It necessarily relates to the territorial jurisdiction of the SDJMs to whom a trial may be transferred.

In this case the entire cause of action arose at Phulbani block in the district of Kandhamal – Although C.J.M. Berhampur is competent to try the case he transferred the case to the Court of the learned S.D.J.M., Berhampur instead of the learned S.D.J.M.,Phulbani – Held, transfer must be to a Court which is territorially competent to deal with the offence – Impugned order quashed – Matter remitted back to the learned C.J.M. Berhampur to act in accordance with law.

For Petitioner - M/s. Gyanaloka Mohanty
For Opp.Party - Mr. P.K.Pani (Vig.)

Heard Mr.G.Mohanty, learned counsel for the petitioners and Mr.P.K.Pani, learned Addl. Standing Counsel (Vigilance) for the State.

In the present application under Section 482 Cr.P.C. the petitioners have challenged to the order dated 9.5.2011 passed by the learned C.J.M., Berhampur in G.R. Case No.26 of 2009 directing transfer of the case to the court of learned S.D.J.M., Berhampur for disposal in accordance with law. Mr.Mohanty, learned counsel for the petitioner asserts that the alleged occurrence took place at Alami Gram Panchayat under Phulbani Block in the district of Kandhamal and the learned C.J.M., Berhampur who is otherwise competent to conduct the trial of the case, instead of doing so has directed the transfer of trial of the case to the court of learned S.D.J.M., Berhampur.

In this respect, Mr. Pani, learned Addl. Standing Counsel (Vigilance) submits a memo along with the Notification of this Court dated 30th/27 June, 1993 which reads as follows:

"No.256/A- In exercise of the powers conferred by Sub Section(2) of Section 12 of the Code of Criminal Procedure, 1973 (Act II of 1974), and in supersession of Court's notification No.242-A, Dated 30.6.1975, the High Court of Orissa do hereby appoint the Chief Judicial Magistrate in the district of Ganjam on whom the powers of a Magistrate of the First Class have been conferred under Sub-Section (3) of Section 11 of the said code in Court's Notification No.257/A dated 2.7.93 as Additional Chief Judicial Magistrate in the district of Kalahandi, Koraput, Malkangiri, Nowrangpur, Rayagada, Gajapati and Phulbani to receive police reports in respect of cases instituted and investigated by the State Vigilance Branch. He shall transmit the charge sheets in respect of offence under Section 5(2) of the Prevention of Corruption Act and Section 161 and 165 of the Indian Penal Code to the concerned Special Judge and on those in respect of other offences he shall take cognizance and may either himself try or commit for trial or transfer them to competent Judicial Magistrates except the Chief Judicial Magistrates of the aforesaid districts for hearing and disposal. In respect of the own district, he shall follow the same procedure."

The memo along with the Notification of this Court is taken on record.

Placing reliance on the above, Mr.Pani, learned Addl. Standing Counsel (Vigilance) submits that there cannot be any controversy over the fact that the learned C.J.M., Berhampur is competent to try this case. Apart from the above, he submits that in support of aforesaid notification, that the learned C.J.M. is also empowered to transmit the charge-sheet of all cases (apart from P.C. Act) to the concerned Spl. Judge and in respect of other offences, he is required to take cognizance either by himself or commit for trial or transfer the said case to a "competent judicial magistrate" in the districts of Kalahandi, Koraput, Malkangiri, Nowrangpur, Rayagada, Gajapati and Phulbani. Relying on the above, it is submitted on behalf of the Vigilance Department that the learned S.D.J.M., Berhampur being an officer subordinate to the learned C.J.M., Ganjam is also duly competent to conduct the trial of the case and no objection to the same ought to be entertained.

Mr. Mohanty, learned counsel for the petitioners, on the other hand, submits that while the learned C.J.M. is empowered to either try the case himself or commit for trial he has also been empowered to transfer the same to a "competent Judicial Magistrate". In this respect, it is claimed that the word "competent Judicial Magistrate" necessarily relates to the territorial jurisdiction of the various different S.D.J.Ms. to whom a trial may be transferred. It is stated that since th e entire cause of action is at Phulbani,

the learned C.J.M. ought to have transferred the case to the learned S.D.J.M., Phulbani, since no part of the cause of action arose within the territorial jurisdiction of learned S.D.J.M., Berhampur. Therefore, it is submitted that the impugned order dated 9.5.2011 may be set aside.

Having heard the learned counsel for the respective parties and on perusing the notification as extracted hereinabove, I am of the considered view that as per the notification extracted hereinabove, that while the learned C.J.M., Ganjam is competent to transfer the trial of the case to any court of the district noted in the Notification and is also competent to try such cases himself. But, instead of trying the case himself, if the learned C.J.M. decides to transfer of the case, the transfer must be to a court which is territorially competent to deal with the offence. Therefore, I have no hesitation in directing setting aside the impugned order dated 9.5.2011 passed by the learned C.J.M., Berhampur in G.R. Case No.26 of 2009. I order accordingly and remit the matter back to the learned C.J.M., Berhampur with a further direction to act in accordance with law. With the aforesaid observation and direction, the CRLMC is disposed of.

Application disposed of.

2013 (I) ILR - CUT- 321

INDRAJIT MAHANTY, J.

CRLMC. NO. 1371 OF 2012 (Dt.25.07.2012)

BULU @ DEBABRATA KHATUA & ORS. ……Petitioners

.Vrs.

STATE OF ORISSA & ANR. …….Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.482.

Inherent power – High Court can quash Criminal Proceeding involving non-compoundable offences.

In this case the dispute between the petitioner No.1-husband and O.P.2-wife resolved by a decree of divorce and O.P.2 has received Rs.10 lakhs towards permanent alimony - O.P.2 has also given a statement before the learned ACJM (Spl.) Cuttack that she does not want to continue with the Criminal Proceeding against her husband – Held, Criminal Proceeding pending before the learned ACJM (Spl.) in ST Case No.248 of 2011 is quashed. (Para 7,8)

Case law Relied on:-

(2003) 25 OCR (SC) 99 : (B. S. Josi & Ors.-V- State of Hariyana & Ors.).

Case Laws Referred to:-

1.(2003) 25 OCR 447 : (Sridhar Pani-V- State of Orissa & Anr.)
2.(2005)II OLR 386 : (Kanhu Behera-V- State of Orissa)

For Petitioner - M/s. Soura Chandra Mohapatra, B.K.Dash & P.M.Mohapatra.
For Opp.Parties - M/s. S.K.Nayak, Addl. Govt. Advocate (O.P.No.1)
M/s. B. Pradhan, O.P.Mohanty, Smt. D.Mishra Mr. S.Mohapatra (O.P.No.2).

I.MAHANTY,J. The present application under Section 482, Cr.P.C. has been filed by the petitioners to quash the criminal proceeding pending before the learned Addl.Chief Judicial Magistrate (Special), Cuttack in S.T.Case No.248 of 2011 arising out of Cuttack Mahila P.S.Case No. 29 of 2010 corresponding to G.R.Case No. 753 of 2010 of the court of learned

S.D.J.M., Cuttack for commission of offence under Sections 498-A, 307, 406/34, IPC and Section 4 of the D.P. Act.

2. The facts of the case, in nutshell is that, petitioner no.1 married to opposite party no.2 on 27.2.2002 as per the Hindu rites and customs. Due to the dissention cropped up between the parties, opposite party no.2 lodged an F.I.R. before the I.I.C., Mahila Police Station, Cuttack, which was numbered as Cuttack Mahila P.S.Case No. 29 of 2010 and after due investigation charge-sheet was filed against the petitioners in G.R.Case No. 753 of 2010 of the court of learned S.D.J.M., Cuttack for commission of offence under Sections 498-A, 307, 406/34, IPC and Section 4 of the D.P. Act and thereafter, the case was committed to the learned Addl.Chief Judicial Magistrate (Special), Cuttack in S.T.Case No.248 of 2011. During the pendency of the said criminal proceeding, though efforts were made by the friends and relatives of both the parties to settle the matter amicably, but the same yielded no result and both the parties finally agreed to settle the dispute by way of dissolution of marriage. Accordingly, both the petitioner no.1 and opposite party no.2 filed an application before the learned Judge, Family Court, Cuttack under Section 13(B) of the Hindu Marriage Act for mutual divorce. Thereafter, learned Judge, Family Court, Cuttack by order dated 29.3.2012 passed a decree of divorce (Annexure-3).

3. Learned counsel for the petitioners asserts that since both the petitioner no.1 and opposite party no.2 have agreed to approach the courts for settlement of the criminal case and both parties agreed to co-operate each other to terminate the criminal proceeding, the petitioners have filed the present application for quashing the criminal proceeding initiated at the behest of the opposite party no.2.

4. Mr.B.Pradhan, learned counsel appearing for the informant-opposite party no.2 submits that the dispute between petitioner no.1 and opposite party no.2 has been resolved by way of a decree of divorce granted by the learned Judge, Family Court, Cuttack and in pursuance of which Rs.10 lakhs has been received by opposite party no.2 towards permanent alimony and the opposite party no.2 does not want to continue with the criminal proceeding.

5. Considering the facts and circumstances of the case, this Court by order dated 2.7.2012 directed the I.I.C., Mahila P.S. to produce the informant-opposite party no.2 before the learned A.C.J.M.(Spl.), Cuttack in the aforesaid S.T.Case to get her statement recorded under Section 164, Cr.P.C. and the learned A.C.J.M. was also directed to send the said statement to this Court.

6. Pursuant to the aforesaid direction of this Court, learned A.C.J.M. (Spl.), Cuttack has forwarded the statement of the informant-opposite party no.2, which was recorded on 12.7.2012. The informant-opposite party no.2 in her statement has vividly stated that she married the petitioner no.1 as per the Hindu rites and customs on 27.11.2002 and as it was not practically possible on her part to remain with her husband due to family dispute and misunderstanding, she filed the case. She also stated that she had filed a case before the learned Judge, Family Court, Cuttack for mutual divorce, which was also decreed and her husband has paid Rs.10 lakhs towards permanent alimony. She also stated that she has got no demand on her husband and she is not interested to continue with the criminal proceeding against her husband. She further stated that she has no objection, if the aforesaid criminal case is dropped.

7. In the case of **B.S. Josi and others v. State of Hariyana and others** reported in (2003) 25 OCR (SC) 99, the Apex Court observed that quashing of the proceeding in respect of non-compoundable offences by the High Court is permissible in appropriate cases. The apex Court have clearly observed that in exercise of jurisdiction under Section 482, Cr.P.C., the High Court can quash the proceeding where the parties approach for compounding the offence even in a non-compoundable offence as in such situation the chances of conviction becomes bleak. In the cases of **Sridhar Pani v. State of Orissa and another,** (2003) 25 OCR 447 and **Kanhu Behera V. State of Orissa** reported in **(2005) II OLR 386,** this Court has also taken the similar view. So, there is no doubt that inherent power under Section 482, Cr.P.C. can be invoked to quash the proceeding involving non-compoundable offences.

8. In the present case, no doubt the dispute between the petitioner no.1-husband and opposite party no.2-wife has been resolved by way of a decree of divorce granted by the learned Judge, Family Court Cuttack and the opposite party no.2 has already received Rs.10 lakhs towards permanent alimony. That apart, the opposite party no.2 has also given statement before the learned A.C.J.M. (Spl.), Cuttack, where the proceeding is pending, that she does not want to continue with the criminal proceeding against her husband. Therefore, in order to ensure that the parties, who fail to marry, are relieved of their obligations against each other in terms of the decree for divorce, this Court in exercise of the power under Section 482, Cr.P.C. and keeping in view the judgments referred to supra, feels that the aforesaid criminal proceeding should be quashed.

9. In the result, the CRLMC is allowed and the criminal proceeding pending before the learned A.C.J.M.(Spl.), Cuttack in S.T.Case No.248 of 2011 is quashed. Application allowed.

2013 (I) ILR - CUT- 324

S. PANDA, J.

W.P. (C) NO.7669 OF 2012 (Dt.30.11.2012)

LAXMIPRIYA MISTRI & ANR . ……..Petitioners

.*Vrs*.

PADMA LOCHAN RANA & ORS. ……. OPP.Parties

(A) CIVIL PROCEDURE CODE,1908 – O. 23, R.1 & O. 23, R.1A

Final decree proceeding filed by Defendant No.1 – Subsequent petition for withdrawal of such proceeding – Petition allowed – Order challenged in writ petition – Held, Duty of the Court to feel satisfied that there exist proper reasons/grounds for granting permission for withdrawal – Moreover, stating that grant of permission will not prejudice the defendants is not sufficient compliance of the provision – Impugned order granting permission for withdrawal of the final decree proceeding is set aside. (Para- 9,11)

(B) CIVIL PROCEDURE CODE,1908 – O. 23, R.1.A

Transposition of parties – Suit for partition – Prayer for transposition of a partly should be allowed where it is necessary for a complete adjudication of the suit and to avoid multiplicity of proceedings. (Para- 8)

(C) CIVIL PROCEDURE CODE,1908 – O. 23, R.1.A

Transposition of parties – Suit for partition – Defendant No.1 filed final decree proceeding – During pendency of such proceeding Defendant No.1 was continuing with some construction work over the suit property – When status quo order passed by the learned trial Court he filed a petition for withdrawal of the said proceeding – Defendant Nos.3 and 4 while resisting such prayer made an application under Order 1, Rule 10 read with O.23, R.1-A C.P.C. for transposing them as decree holders to continue the proceeding on the ground that D-1 being colluded with the original plaintiff is not taking steps in the proceeding – Application rejected – Hence the writ petition.

In a suit for partition position of plaintiff and defendant is almost similar – Since share of the parties have been decided in the preliminary decree a right has already been accrued in favour of

Defendant Nos.3 & 4 by virtue of the preliminary decree and it is only left to be carved out in the final decree proceeding – Held, impugned order is set aside – Application filed by Defendant Nos.3 and 4 for transposing them as decree holders is allowed. (para-9,10,11)

For Petitioners : M/s. Samir Ku. Mishra, J.Pradhan & D.K.Pradhan
For Opp. Parties : Mr.J.K.Mishra (2)

S. PANDA, J. The petitioners in this writ petition challenges the order dated 20th April, 2012 passed by the learned Addl. Civil Judge (Senior Division), Balasore in Civil Suit No.93/1985-I F.D. rejecting the petition filed by them under Order 1 Rule 10 read with Order 23, Rule 1-A of the Civil Procedure Code to transpose defendant nos.3 and 4 as the decree holders.

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

Opposite party no.1 who was defendant no.1 filed final decree proceeding arising out of Title Suit No.93/89-I to execute the decree in a suit for partition. A commissioner was deputed for the said purpose. However, the final decree proceeding could not be completed. During pendency of the said proceeding, a receiver was appointed in pursuance of the order dated 30.10.2006 passed by this Court in WP(C) No.2941 of 2005. Thereafter, the court below by order dated 18.4.2012 in Interim Application No.17 of 2002 under Order 39 Rules 1 and 2 of the Civil Procedure Code directed the parties to maintain status quo.

While the matter stood thus, opposite party no.1 to defeat the order passed by the court filed an application to withdraw the final decree proceeding on the ground that he was suffering from various diseases and final decree had been continuing for a considerable length of time and due to formal defects. The said application was resisted by the petitioners. They also filed an application under Order 1 Rule 10 read with Order 23 Rule 1-A of the Civil Procedure Code to transpose them as decree holders and continue the proceeding. They also stated that since the final decree proceeding is continuing for a considerable length of time and the original plaintiff and defendant no.1 have colluded with each other, it will be proper to transpose defendant nos.3 and 4 as decreed holders for giving finality to the proceeding. The said application was rejected by the court below by the impugned order.

3. Learned counsel for the petitioners submitted that in a suit for partition, there is no distinction between the plaintiff and the defendant and

any of the parties can take position of the plaintiff. He further submitted that share of the parties have already been decided in a preliminary decree. Therefore, in the final decree proceeding, the same is to be carved out only. Thus, the court below should not have allowed the application for withdrawal of the final decree proceeding. Therefore, the impugned order is liable to be quashed. In support of his contentions, he has cited the decisions of this Court in the case of Gokulananda Jena v. Jadunath Jena and others reported in **2002 (II) OLR 453,** Mahitosh Sinha v. Shyamapada Sinha and others reported in **2005 (Supp.) OLR 958**, Bholanath Mohanta & others v. Sridhar Mohanta & others, **82 (1996) CLT 582**, Natabar Majhi & others v. Bata Majhi & others reported in **2007 (II) CLR 741**.

4. Learned counsel for opposite party no.1, however, supporting the impugned order submitted that since opposite party no.1 has filed the final decree proceeding, the court below rightly permitted opposite party no.1 to withdraw the same and it is open to the other parties to the said proceeding to initiate the final decree proceeding. In support of his contention, he has cited a decision of the apex Court in the case of M/s. Hulas Rai Baij Nath v. Firm K.B. Bass and Co. reported in **AIR 1968 SC 111**.

5. From the rival submissions of the parties and on perusal of the record, it appears that this Court on 9.5.2012 stayed the further proceeding of the final decree. On 19.10.2012, this Court directed the parties to maintain status quo as on date over the disputed property since opposite party no.1 was continuing with some construction work over the disputed property. From the narration of facts, as stated in the above paragraphs, it is clear that the suit was filed for partition in which preliminary decree was passed. Opposite party no.1 has filed the final decree proceeding. While the final decree proceeding was continuing, status quo order was passed by the court below on 18.4.2012. Being aggrieved by the said order of status quo, opposite party no.1, who has filed the final decree proceeding, made an application for withdrawal of the proceeding on various grounds.

6. Law is well settled that in a suit for partition, the position of plaintiff and defendant is almost similar. The Court decrees the suit in preliminary form declaring the share of the parties. Accordingly, the parties are at liberty to effect partition or to ask for appointment of a Commission for partition to draw a final decree in terms of the aforesaid shares. Law is also well settled that at the time of allotment of shares, steps should be taken that the existing possession of the parties is maintained as far as practicable.

7. Since the plaintiffs and the defendants have same right to claim partition, it is not material as to what manner the parties are arrayed as

plaintiffs and the defendants in the suit. Even the defendants can be transposed as plaintiffs and can continue the suit, if they feel that the plaintiffs are not continuing the suit in their interest and the plaintiffs have no absolute right to withdraw the suit/proceeding.

8. This Court in the case of Gokulananda Jena's case (supra) and Mahitosh Sinha's case (supra) held that in a suit for partition of immovable property, the plaintiff has no absolute right to withdraw a suit. While rendering the said decision, this Court has also taken into consideration the decision of the Privy Council in the case of Bhupendra Narayan Sinha V. Rajeshwar Prosad, **AIR 1931 P.C** 161 wherein it was held that transposition of a party under Order 1 Rule 10 of the Civil Procedure Code should be allowed where it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings.

9. In the case of Natabar Majhi's case (supra) this Court has also held that in a suit for partition, the plaintiffs and the defendants have the same right to claim partition and in such a situation, plaintiffs have absolutely no right to withdraw as the defendants can be transposed as plaintiffs and can continue the suit if they feel that the plaintiffs are not interested to continue the suit. Thus, under such a situation, plaintiffs have absolutely no right to withdraw the suit under Order 23 Rule 1(3) of the Civil Procedure Code. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting such permission for withdrawal by merely stating that grant of permission will not prejudice the defendants, is not sufficient compliance with the statutory mandate. The Court is to discharge the duty mandated under the provision of Code after taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order 23 Rule 1 is filed by the plaintiffs in a belated stage during final decree proceeding after the preliminary decree was passed. Defendants accrue a right by virtue of preliminary decree. To grant leave in that stage would result in giving opportunity to plaintiffs to avoid the decree against him and seek a fresh adjudication of the controversy on a clean slate. It may also result the defendants to loose the advantage of adjudication of dispute by the Court.

10. The said view was also taken by the apex Court in Hulas Rai Baij Nath's case (supra), cited by the opposite parties, wherein it was held that in a suit for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the

rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed.

11. In view of the above position of law and since the court below erroneously allowed the application filed by opposite party no.1 to withdraw the final decree proceeding and rejected the application to transpose the petitioners as the decree holders, this Court sets aside the impugned order and allows the application of the petitioners to transpose them as decree holders and directs the court below to proceed with the final decree proceeding in accordance with law. The writ petition is accordingly allowed. No costs.

Writ petition allowed.

2013 (I) ILR - CUT- 329

B. N. MAHAPATRA, J.

W.P. (C) NO.16460 OF 2012 (Dt.19.10.2012)

CHELLI DAMODAR DASU NAIDU ……Petitioner

.Vrs.

B.D.O.- CUM-ELECTION OFFICER, & ANR. ……Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 – O.26, R.1.

Pleader Commissioner – Appointment – Discretion of the Court – Ordinarily witnesses are to be examined in Court and by that process trial Court gets an opportunity to assess the truth of the case and conduct of the witnesses – Held, vital witnesses should not ordinarily be examined on commission.

In this case petitioner is the returned candidate whose election challenged on the ground that he does not know how to read and write Oriya – Held, the petitioner being a vital witness the learned Election Tribunal has rightly rejected his application for his examination on commission. (Para 11)

B. CIVIL PROCEDURE CODE, 1908 – O.26, R.1.

Application for appointment of Pleader Commissioner on the ground of sickness – Medical Certificate – Certificate should contain the name of the disease, condition of the patient so that the Court can feel that it would be risky for a patient to attend the Court.

In this case the petitioner filed OPD ticket in support of his illness – It does not show the exact health condition of the patient – Held, the Election Tribunal has rightly held that the petitioner is not completely bed ridden and rejected the application and directed the petitioner to remain present personally in the Court to adduce evidence. (Paras 10,11)

Case laws Referred to:-

1.AIR 2004 SC. 3682 : (Mohit Kumar-V- Dato Mohan Swami)
2.2010(Supp.1)OLR 968 : (Manoranjan Panda-V- Sailendra Narayan Praharaj & Anr.)
3.AIR 1980 Calcutta 78 : (Octovious Steel & Co.Ltd.-V-Endogram Tea Co.

Ltd.)
4.AIR 1967 Orissa 203 : (Sankar Narayan Naik-V- State of Orissa)

For Petitioner - M/s. J.R.Dash, K.L.Dash & S.K.Rath.
For Opp.Parties - M/s. Prasanna Ku.Mishra & S.K.Dash,
(for Caveator-O.P.No.2)

B.N.MAHAPATRA,J. This Writ Petition has been filed with a prayer to quash Order dated 24.08.2012 (Annexure-3) passed by the Civil Judge (Junior Division), Paralakhemundi (for short, 'Election Tribunal') in Election Petition No.06/2012 by which the petitioner's prayer to appoint an Advocate Commissioner for examination of the petitioner as a witness has been rejected.

2. Petitioner's case in a nutshell is that petitioner, opposite party No.2 and another person, namely, Chakradhar Barik contested for the office of 'Sarapanch', Saradhapur Gram Panchayat for which nomination was filed during the period from 7th to 12th January, 2012. At the time of scrutiny of nominations, opposite party No.2 objected to the acceptance of the nomination of the petitioner on the ground that he is not able to read and write Odia. Further, the said objection could not sustain and ultimately the polling took place on 11.02.2012 and the final result was declared on 21.02.2012. The present petitioner was declared elected by a margin of 245 votes and opposite party No.2 polled votes next to the petitioner. Challenging the election of the present petitioner as Sarapanch, opposite party No.2 filed Election Dispute under Section 30 of the Grama Panchayat Act, before the Civil Judge (Junior Division), Paralakhemundi bearing Election Petition No.06/2012 which was proceeded according to law. While the proceeding was continuing in the Court below, the petitioner filed a petition under Section 37(g) of Orissa Grama Panchayats Act read with Order 26, Rule 1, CPC for appointment of Advocate Commissioner for examination of the petitioner on the ground of his ailment, who was advised to take bed rest for a period of 45 days by his treating Physician. Petitioner submitted OPD ticket in support of his illness before the Court below. Because of problem in his spine, the petitioner was unable to sit and stand. Therefore, a prayer was made for appointment of Advocate Commissioner for examination of the petitioner. To the above petition, an objection was filed by opposite party No.2 specifically saying that the ground of ailment of the petitioner is false since no doctor is named and further it is confirmed over telephone that no MRI test has been conducted. After hearing both parties, learned Election Tribunal passed the impugned order rejecting the petitioner's prayer for appointment of Advocate Commissioner for

examination of the petitioner. Hence, the present writ petition.

3. Mr.J.R.Dash, learned counsel appearing for the petitioner submits that the learned Tribunal has erred in rejecting the petitioner's petition by not accepting the medical certificate (Annexure-1) which is a public document issued by a Medical Officer of the Government Hospital. As per the usual practice, the medical certificate contains the signature of the treating doctor. Law requires that the petition must be supported by an affidavit. Since the petitioner was taking bed rest because of his illness he was not in a position to come and swear the affidavit. Therefore,, the affidavit has been sworn in by his relative Ramakrishna Rao. As per the medical ticket (Annexure-1), the petitioner was advised for six weeks' rest and not for six days as observed by the lower Court. Paralakhemundi is situated at a distance of more than 20 kilometres from petitioner's village. Therefore, the lower Court is not justified to hold that Paralakhemundi is situated at a little distance. No MRI facility is available at Prarlakhemundi. It is only available at Vijaynagaram or Berhampur. If the Commissioner is deputed, the petitioner is willing to bear the cost. Therefore, opposite party will in no way be prejudiced. As per the usual practice, an Advocate Commissioner is deputed in the interest of justice and to avoid delay in the proceeding.

4. Mr.P.K.Mishra, learned counsel appearing for opposite party No.2 submits that there is no infirmity and illegality in the order of the learned Tribunal. The petitioner being the returned candidate is a vital witness and the allegation in the writ petition is that he is disqualified to be a member of the Grama Panchayat as he does not know how to read and write Odia. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Mohit Kumar v. Dato Mohan Swami*, AIR 2004 SUPREME COURT 3682, Mr.Mishra submitted that the judge may liberally exercise his power of recording evidence on commission except material witnesses as per discretion of Court. Further placing reliance on the judgment of this Court in the case of *Manoranjan Panda Vs. Sailendra Narayan Praharaj and another*, 2010 (supp.-1) OLR 968, he submitted that when the Trial Court considered the materials before it regarding illness of opposite party No.1 (present petitioner) and it was not satisfied that the said witness should be examined on commission, this Court was not inclined to interfere with the same. Further placing reliance on the decision of the Calcutta High Court in the case of *Octovious Steel and Co. ltd. Vs. Endogram Tea Co. Ltd.,* AIR 1980 CALCUTTA 78, Mr. Mishra submitted that the Court cannot act on medical certificate unless it contains the name of the disease, the condition of the patient and other relevant particulars on the basis of which the Court can come to a finding that it would be risky for the patient to attend the Court.

5. On the rival contentions taken by the parties, the only question that falls for consideration by this Court is as to whether the order passed by the Civil Judge (Junior Division), Pralakhemundi under Annexure-3 rejecting petitioner's prayer for appointment of Advocate Commissionerer is justified.

6. Petitioner's case is that he is suffering from spine problem and advised by the doctor to take bed rest. Therefore, he made a petition under Section 37(g) of the Orissa Grama Panchayat Act read with Order 26, Rule 1, CPC for appointment of Advocate Commissioner for examination of the petitioner. The said petition was rejected by the Trial Court on following grounds.

(i) Petition under Order 26, Rule 1, CPC has been filed supported by an affidavit which has been sworn in by one of the relatives of the writ petitioner, i.e., Ramkirshna Rao, but not by the present petitioner and the affidavit does not reveal as to how Ramkrishna Rao is related to the petitioner;

(ii) No medical certificate as required under Order 26, Rule 1, CPC, explanation has been filed in support of ailment of petitioner. On the other hand, OPD ticket of District Headquarters Hospital, Paralakhemundi has been filed which does not reveal the name of the medical practitioner;

(iii) Petitioner has not specifically mentioned the ailment he is suffering from nor he has mentioned the name of the doctor who is treating him;

(iv) Petitioner has not undertaken MRI test nor he is treated as an indoor patient;

(v) The OPD ticket produced reveals that the petitioner is advised to take bed rest for six days

(vi) Petitioner is a resident of village Saradhapur, which is at a little distance from Paralakhemundi;

(vii) The ailment as mentioned in the OPD ticket is of Sciatica, which is not a major disease;

7. Under Order 26 Rule 1, CPC power is vested with Civil Court to issue a Commission for the examination on interrogation or otherwise of any person resident within the local limits of its jurisdiction, who is exempted under CPC from attending Court or who is, suffering from sickness or infirmity, unable to attend it. Proviso says that such Commission shall not be issued unless the Court for reasons to be recorded thinks it necessary to do so. Explanation to Order 26, Rule 1, CPC envisages that the Court may, for

the purpose of the this rule, accept a certificate purporting to be signed by the medical practitioner as evidence of sickness or infirmity of any person, without calling the medical practitioner as a witness.

8. Hon'ble Supreme Court in the case of Mohit Kumar (supra) held as follows:-

> "The Court may liberally exercise his power of permitting recording of evidence on Commission excepting for such witness who are very material and who the learned Judge, in his discretion, feels necessary must appear before him that the demeanour of any witness may need to be watched."

9. This Court in the case of ***Sankar Narayan Naik Vs. State of Orissa***, AIR 1967 ORISSA 203 held as follows:-

> 6. One significant principle must be borne in mind in deciding a question of this nature. Ordinarily witnesses are to be examined in court. The reason is obvious. The trial court must assess the truth or otherwise of the versions of the witnesses by taking into consideration the demeanour and the conduct of such witnesses while deposing in court. The court is deprived of this opportunity when they are examined on commission. This is the reason why examination on commission would not be allowed unless a case is strictly made out as provided for under Order 26 Rule 4."

10. In the instant case, the petitioner suffers from Sciatica as mentioned in OPD ticket. In the OPD ticket bed rest has been advised to the petitioner. From such OPD ticket (Annexure-1), it does not reveal that the petitioner cannot move. Had it been so, the patient would have been treated as an indoor patient. Had the ailment been very serious, the petitioner must have gone for MRI test. No medical certificate purporting to be signed by medical practitioner as evidence of sickness and infirmity has been filed as required under Order 26, Rule 1, CPC. Only OPD ticket has been filed. The OPD ticket dated 18.08.2012 (Annexure-1) does not reveal as to whether the petitioner has been advised for bed rest for six weeks or six days. The OPD ticket is of 18.08.2012. Assuming that the treating doctor advised bed rest for six weeks, the same expires in 1st week of October. The exact health condition of the patient does not reveal from the OPD ticket. Therefore, learned Election Tribunal has not believed that the disease of the petitioner is so serious that he could not be able to attend the Court which is situated at a distance of 20 kilometres from his residence.

11. Further, it is not in dispute that the petitioner is a vital witness. Perusal of the impugned order reveals that the learned Election Tribunal after taking into consideration every aspect of the case came to the conclusion that the petitioner is not completely bedridden and accordingly rejected the petition filed by the petitioner under Order 26, Rule 1, CPC read with Section 37(g) of the Grama Panchayat Act and directed him to remain personally present to adduce his evidence in the Court on 21.08.2012 without fail. For the reasons stated above, this Court does not find any infirmity or illegality in the impugned order passed by the learned Tribunal.

12. Law is well-settled that appellate Court/writ Court should not interfere with the finding of facts recorded by the Court below unless there are compelling circumstances (see *Jaenendrakumar Phoolchand Daftari v. Rajendra Ramsukh Mishra and others*, AIR 1994 SC 586).

13. In the fact situation, this Court is of the view that it is not a fit case where interference of this Court in exercise of its extra-ordinary power under Article 226 of the Constitution of India is called for.

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

Writ petition dismissed.

2013 (I) ILR - CUT- 335

B. N. MAHAPATRA, J.

W.P.(C) NO.10309 OF 2012 (Dt.23.11.2012)

PUNAMA SABARA ……Petitioner

.Vrs.

BORSO BONI RAITO & ANR. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O.8, R.6-A.

Counter claim – No provision in G.P. Act – Election petitioner while challenging the election of the returned candidate made a prayer to declare him elected – Returned candidate filed an application to amend his written statement to include counter claim on the ground that the election petitioner does not know how to read and write odia and she was below 21 years on the date of filing nomination – Application rejected – Order challenged.

In this case if allegations of the returned candidate are true and the counter claim is refused and in the event the election of the returned candidate is declared invalid and the election petitioner who is otherwise disqualified U/s.25 of the G.P. Act will be declared elected the result would be disastrous since it is not the intention of the legislature – Held, Tribunal should have allowed the counter claim.

(para -29,30)

Case laws Referred to:-

1.AIR 1982 SC 938 : (Jyoti Basu & Ors.-V- Debi Ghosal & Ors.)
2.AIR 1994 SC 135 : (Surjit Kaur-V- Garja Singh & Ors.)
3.AIR 2005 SC 2441 : (Kailash-V- Nanhku & Ors.)
4.AIR 1989 Ori. 50 : (Mangulu Pirai-V- Prafulla Kumar Singh & Ors.)
5.AIR 1987 SC 1395 : (Mahendra Kumar & Anr.-V- State of M.P. & Ors.)
6.AIR 2003 SC 2508 : (Ramesh Chand Ardawatiya-V- Anil Panjwani)
7.AIR 1996 SC 2222 : (Mohan Chawla & Anr.-V-Dera Radha Swami, Satsang & Ors.)

For Petitioner - M/s. Prasanna Kumar Mishra, S.K.Dash.
For Opp.Parties - M/s. Harmohan Dhal, B.B.Swain & A.K.Pattnayak (for O.P.No.1)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to set aside the order dated 05.05.2012 passed by the Civil Judge (Junior Division),

Parlakhemundi in Election Petition No.2 of 2012 rejecting the prayer of the petitioner to amend the written statement for inclusion of the counter claim to declare the election petitioner disqualified to be elected as Sarapanch.

2. The fact of the case in a nutshell is that the election petitioner has contested for the post of Sarapanch, Siyali Grama Panchayat under Kasinagar block in the district of Gajapati and respondent No.1 before the Election Tribunal was also a candidate for the office of Sarapanch in the said Grama Panchayat. The election to the office of Sarapanch, Siyali Grama Panchayat was held on 13.02.2012 and respondent No.1 was declared elected having secured majority of votes. Challenging the election of respondent No.1, who is petitioner in the present writ petition, the election petitioner filed an election case seeking a declaration that the election of respondent No.1-petitioner as Sarapanch is void and the election petitioner has been duly elected as Sarapanch, Siyali Grama Panchayat. Respondent No.1-petitioner filed counter to Election Petition No.2 of 2012. Thereafter respondent No.1-petitioner filed a petition under Order-VI Rule, 17, read with Section 151, CPC to amend the counter filed by her. The said petition to amend the written statement for inclusion of counter claim to declare the election petitioner disqualified to be elected as Sarapanch was rejected. Hence, the present writ petition.

3. Mr.P.K.Mishra, learned counsel appearing for respondent No.1-petitioner submits that the Lower Court failed to apply its judicial mind and illegally rejected the amendment petition for inclusion of the counter claim, which is very much essential for complete adjudication of the case. The prayer of the election petitioner in the election petition was two fold, i.e., (i) to declare election of the returned candidate void, and (ii) to declare election petitioner as elected Sarapanch in place of the returned candidate. By way of counter claim the petitioner wanted to bring a prayer that the election petitioner is not qualified to be declared as elected Sarapanch as she is not able to read and write Odia as required under Section 11 of the Orissa Grama Panchayat Act (hereinafter referred to as 'the Act') and hence is not entitled to hold the post of Sarapanch.

4. Mr.Mishra further submitted that the learned Court below failed to appreciate the very intention of the Legislature in introducing the provision for counter claim to reduce the multiplicity of the proceeding and to deliver a judgment which would be complete in all respect. Since the claim of the election petitioner is to declare her as elected Sarapanch in addition to the prayer for declaring the election of respondent No.1-petitioner as invalid, it is very much necessary to decide whether or not the election petitioner is

entitled to hold the post, in the event the election of the returned candidate is declared invalid. Learned Court below has committed serious error of law in holding that there is no provision in the Grama Panchayats Act to entertain a counter claim. Section 35 of the Act authorises the learned Civil Judge (Junior Division) to try the Election Petition as nearly as may, in accordance with the procedure laid down in the CPC. Thus, power is vested with the learned Civil Judge (Junior Division) to entertain application other than the power specifically mentioned in Section 37 of the Act. No objection was filed by the election petitioner at the time of scrutiny of nomination paper. Learned Court below is not justified to reject the petition for amendment of written statement of Respondent No.1-Petitioner by observing that there is no provision in the Act to entertain the counter claim.

5. Per contra, Mr.H.M.Dhal, learned counsel appearing on behalf of the election petitioner submitted that there is no illegality or infirmity in the order passed by the learned Election Tribunal. The Orissa Grama Panchayats Act is a special statute in which procedure for filing election petitions and disposal thereof has been provided in Sections 30 to 43. Section-30 provides that only election of a person can be challenged by filing an election petition. Respondent No.1-petitioner has won the election and therefore the election petitioner is only competent being the only contestant of Respondent No.1-Petitioner to maintain an election petition. Respondent No.1-Petitioner having been declared elected as Sarapanch is not entitled to file election petition and consequentially cannot maintain a counter claim. Therefore, within the scope and ambit of the G.P. Act, since there is no provision for filing counter claim, the learned Civil Judge is absolutely justified in rejecting the counter claim filed by Respondent No.1-petitioner as not maintainable. The Code of Civil Procedure is the common law which has no application to the special statute since the provisions of the C.P.C. are not applicable for filing and disposal of election petitions under the G.P.Act. Right to elect is neither a fundamental right nor a common law right. It is purely a statutory right. Therefore, the right to dispute an election ought to be within the framework of the statute. An election petition is not an action at common law. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute provides apply. In support of his contention, Mr.Dhal relied on the decisions of the Hon'ble Supreme Court in the cases of *Jyoti Basu and others Vs. Debi Ghosal and others*; AIR 1982 SC 983 and *Surjit Kaur Vs. Garja Singh and others,* AIR 1994 SC 135.

6. Mr. Dhal further submitted that although Section-35 provides that subject to the provisions of the Act and Rules the election petition shall be tried by the Civil Judge in accordance with the procedure applicable under

C.P.C. for trial of the suits yet Section 37 specifically states which of the provisions of C.P.C. shall be made applicable. Therefore, only those procedures which specifically find place in Section 37 of the Act are applicable for trial of the election petitions and not other provisions of CPC. In view of the provisions contained in Section 38 of the Act, it is only the election petitioner who alone can be granted relief and none else. Learned Civil Judge is competent to declare the election of returned candidate void on the ground mentioned in Section 39 of the Act, which grounds are not available to a respondent. Therefore, the counter claim is wholly uncalled for and not maintainable and therefore, it is an otiose.

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

(i) Whether procedures which specifically find place in Section 37 of the Act are applicable for trial of the election petition and not provisions of the CPC?

(ii) Whether CPC being the common law, it has no application to the G.P. Act, which is a special statute and therefore, the concept of counter claim provided in Order 8 Rule-6A of CPC has no application in trial of election cases under the G.P. Act ?

(iii) Whether in view of Section 30 which provides that only election of a person can be challenged by filing an election petition, elected candidate is not entitled to file election petition and consequentially cannot maintain a counter claim?

8. Since question Nos. (i) and (ii) are inter-linked they are dealt with together.

9. To deal with questions Nos.(i) and (ii), it is necessary to refer to Sections 35(1) and 37 of the Grama Panchayat Act, which are reproduced below:

> "**35. Procedure before the Civil Judge (Junior Division)**- (1) Subject to the provisions of this Act and the rules made thereunder every election petition shall be tried by the Civil Judge (Junior Division) as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits."
>
> 37. **Powers of Civil Judge (Junior Division)-** The Civil Judge (Junior Division) shall have the powers which are vested in a Court

under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely:

(a) discovery and inspection;

(b) enforcing the attendance of witness, and requiring the deposit of their expenses;

(c) compelling the production of documents;

(d) examining witnesses on oath;

(e) granting adjournments;

(f) reception of evidence taken on affidavit;

(g) issuing commissions for the examination of witness and may summon and examine *suo motu* any person whose evidence appears to him to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898)."

10. Section 35(1) starts with the expression "subject to the provisions of this Act and the rules made thereunder" every election petition shall be tried by the Civil Judge (Junior Division) as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure, 1908. Therefore, if any provision is available under the Grama Panchayat Act and Rules made thereunder there is no need to take aid of CPC. Further, the provisions contained in the Grama Panchayats Act and Rules made thereunder shall prevail over the provisions/procedure of CPC. Under Section 37 certain powers exercisable by the Civil Court are specifically vested with the Election Tribunal. If the contention of the petitioner is accepted that the CPC will be applicable only to the extent enumerated under Section 37 then there was no need to enact Section 35 which would otherwise render redundant.

11. Therefore, conjoint reading of Sections 35 and 37 makes it clear that in addition to powers enumerated under Section 37, the Election Tribunal shall apply the other provisions of CPC as nearly as may be subject to provisions of Grama Panchayat Act while trying an Election petition.

12. Further contention of Mr.Dhal is that the Grama Panchayat Act being a special statute, the concept of counter claim as provided in CPC has no application for trial of Election petition. Such a stand cannot be sustainable in law since Section 35(1) of the Grama Panchayats Act itself provides that every election petition shall be tried by the Election Tribunal as nearly as

may be in accordance with the procedure applicable under the Code of Civil Produce, 1908, of course subject to provisions of the Grama Panchayat Act.

13. The Hon'ble Supreme Court in the case of Kailash V. Nanhku and others, AIR 2005 SC 2441 held as under:-

> "8. Sub-section (6) of Section 86 of the Act requires trial of an election petition to be continued from day to day until its conclusion, so far as is practicable consistently with the interests of justice in respect of the trial, unless the High Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded. Sub-section (7) requires every election petition to be tried as expeditiously as possible with an endeavour to conclude the trial within six months from the date of presentation of the election petition. Thus, the procedure provided for the trial of civil suits by the CPC is not in its entirety applicable to the trial of election petitions. The applicability of the procedure is circumscribed by two riders; firstly, the CPC procedure is applicable "as nearly as may be"; and secondly, the CPC procedure would give way to any provisions of the Act and of any rules made thereunder.
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> xx xx xx
> 45.
> xx xx xx
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> (ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.
>
> (iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.
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> xx xx xx"

14. Mr.Dhal in support of his contention that Election case has to be tried strictly in accordance with the provisions of Election law and common law

has no application, relied upon paragraph 8 of the judgment of Hon'ble Supreme Court in the case of Jyoti Basu (supra).

In paragraph 8 of the judgment in the case of ***Jyoti Basu (supra)***, the Hon'ble Supreme Court held as under:-

> 8. A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, Is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act, 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self-contained code within which must be found any right claimed in relation to an election or an election dispute. We are concerned with an election dispute. The question is who are parties to an election dispute and who may be impleaded as parties to an election petition. We have already referred to the Scheme of the Act. We have noticed the necessity to rid ourselves of notions based on Common Law or Equity. We see that we must seek an answer to the question within the four corners of the statute. What does the Act say?

15. Judgment of the Hon'ble Supreme Court in the case of *Jyoti Basu (supra)* is of no help to opposite party No.1. In that case, the question was as to who are parties to an election dispute and who may be impleaded to be a party to an Election petition. The Representation of the People Act provides who are the parties of an election petition. The same must be strictly complied with. However, in that judgment, the Hon'ble Supreme Court no where stated that the provisions of CPC have no application if any provision relating to trial of Election petition is absent in the Representation of the People Act. On the other hand, learned Hon'ble Supreme Court in Jyoti Basu (supra) held as under :-

> "10. It is said, the Civil Procedure Code applies to the trial of election petitions and so proper parties whose presence may be necessary in order to enable the court "effectually and completely to adjudicate upon and settle all questions involved" may be joined as respondents to the petitions. The question is not whether the Civil Procedure Code applies because it undoubtedly does, but only "as far as may be" and subject to the provisions of the Representation of the People Act, 1951 and the Rules made thereunder. Section 87(1) expressly says so. The question is whether the provisions of the Civil Procedure Code can be invoked to permit that which the Representation of the People Act does not. Quite obviously the provisions of the Code cannot be so invoked."

16. Learned counsel for the petitioner further placed reliance on paragraphs 8 and 9 of the judgment of the Hon'ble Supreme Court in *Surjit Kaur (supra)*. The facts of that case are completely different from the fact of the case at hand. Therefore, it has no application to the present case.

17. It is true that in the Grama Panchayats Act there is no provision for filing of the counter claim. Order VIII, Rule 6A, CPC provides for filing of counter claim. At this juncture it may be beneficial to refer to some of the decisions of the Hon'ble Supreme Court with regard to filing of counter claim.

18. Counter-claim must have to be filed before or after filing of the suit but before expiry of time limited for delivering the defence by the defendant. (See ***Mangulu Pirai vs. Prafulla Kumar Singh and others***, AIR 1989 Ori. 50).

19. Counter-claim can be filed even after written statement is filed and also can be brought into by way of amendment to written statement. (See

Mahendra Kumar and another vs. State of Madhya Pradesh and others, AIR 1987 SC 1395).

20. The Hon'ble Supreme Court in the case of ***Ramesh Chand Ardawatiya v. Anil Panjwani****, AIR 2003 SC 2508*, held as under:

> "28. Looking to the scheme of O. VIII as amended by Act No. 104 of 1976, we are of the opinion, that there are three modes of pleading or setting up a counter-claim in a civil suit. Firstly, the written statement filed under R. 1 may itself contain a counter-claim which in the light of R. 1 read with R. 6-A would be a counter-claim against the claim of the plaintiff preferred in exercise of legal right conferred by R. 6-A. Secondly, a counter-claim may be preferred by way of amendment incorporated subject to the leave of the Court in a written statement already filed. Thirdly, a counter-claim may be filed by way of a subsequent pleading under R. 9. In the latter two cases the counter-claim though referable to R. 6-A cannot be brought on record as of right but shall be governed by the discretion vesting in the Court, either under O. VI, R. 17 of the C. P. C. if sought to be introduced by way of amendment, or, subject to exercise of discretion conferred on the Court under O. VIII, R. 9 of the C. P. C. if sought to be placed on record by way of subsequent pleading. The purpose of the provision enabling filing of a counter-claim is to avoid multiplicity of judicial proceedings and save upon the Court's time as also to exclude the inconvenience to the parties by enabling claims and counter-claims, that is, all disputes between the same parties being decided in the course of the same proceedings."

21. Counter claim is expressly treated as a cross suit including the duty to aver his cause of action and also on payment of requisite court fee thereon. It could be decided in the suit without relegating a party to file fresh suit. Plaintiff shall be given an opportunity to file written statement to answer counter claim of the defendant within such period as may be fixed by the Court. Counter claim is governed like the Rules of pleading of the plaint. (See ***Jag Mohan Chawla and another, v. Dera Radha Swami, Satsang and others***, AIR 1996 SC 2222).

22. In the present case, perusal of the counter-claim filed by Respondent No.1 (Annexure-2) clearly shows that the written statement contains counter claim. Paragraph-7 of the written statement which contains such counter claim, is extracted below:

> "7. That the Respondent No.1 further submits that the petitioner does not know reading and writing Oriya and she did not attain 21 years of age as per See 11 (b) of Orissa Gram Panchayat Act, 1964. The petitioners' date of birth is 04.10.1991 as per the School Register Admission No.364, dtd. 9.7.2011 of S.Rautpur School, PS: Garabandha, Dist: Gajapati. The Respondent No.1 through her relative take steps to obtain the copy of the extract of the Admission Register through her relative taken steps to obtain the copy of the extract of the Admission Register through R.T.I. and the Respondent No.1 is relying upon such entry."

23. The above pleading is nothing but a counter claim which is in the light of Order VIII, Rule 1 read with Rule 6A of C.P.C.

24. The writ petitioner by way of filing the petition for amendment of the written statement under Order 6 Rule 17 C.P.C. read with Rule 151, C.P.C. wanted to bring the counter claim in detail in its written statement by amending the pleadings and prayer portion of the written statement.

25. In view of the above settled legal position of law and in the facts and circumstances of the case, the reasons given by the learned Election Tribunal for rejecting the amendment petition are not legally sustainable. In any event, if the written statement filed by the defendant has already contained counter claim in the light of Order VIII, Rule 6A, the learned Tribunal should have allowed the amendment petition.

26. The other reason assigned by the learned Civil Court that in view of Section 40 of the Act since the sole ground of challenge of election of returned candidate is that at the time of filing of nomination and election, Respondent No.1-petitioner was unable to read and write Odia and the Election Petitioner has not taken any other stand to challenge the election of Respondent No.1, in case Respondent No.1 is found disqualified to be the Sarapanch, in her place the election petitioner cannot be declared to be the Sarapanch and according to Section 38(2)(a) of the G.P. Act a casual vacancy will be created is not sustainable in law. Section 40 clearly provides that if the Election Tribunal is of opinion that in fact election petitioner or such other candidate received the majority of valid votes he shall after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be, to have been duly elected. As it appears, the Election Tribunal has failed to notice that in between clause '(a)' and '(b)' in Section 40, there is 'or'. Similarly, he has also not noticed that the word 'either' appears before clause (a) starts and

there is 'or' in between clause '(a)' and '(b)' in Sub-section (2) of Section 38 of the G.P. Act.

27. At this juncture, it is relevant to refer to Section 97 of the Representation of the People Act, 1981, which deals with recrimination when seat claimed. Section-97 of the Representation of the People Act provides as under;-

> "97. **Recrimination when seat claimed**.—(1) When in an election petition a declaration that any candidate other than the returned candidate has been duly elected is claimed, the returned candidate or any other party may give evidence to prove that the election of such candidate would have been void if he had been the returned candidate and a petition had been presented calling in question his election:
>
> Provided that the returned candidate or such other party, as aforesaid shall not be entitled to give such evidence unless he has, within fourteen days from the date of commencement of the trial, given notice to the High Court of his intention to do so and has also given the security and the further security referred to in sections 117 and 118, respectively.
>
> (2) Every notice referred to in sub-section (1) shall be accompanied by the statement and particulars required by section 83 in the case of an election petition and shall be signed and verified in like manner."

28. Section 44-I of the Panchayat Samiti Act also contains provision similar to that of Section 97 of the Representation of the People Act. However, there is no such similar provision in the Grama Panchayats Act, but Order 8 Rule 6A, CPC provides a procedure for filing of counter claim by the defendant.

29. The matter can be looked at from a different angle. The contention of the election petitioner is that since Section 30 only entitles a defeated candidate to file an Election petition to declare the election of the returned candidate void, the returned candidate has no right to file an Election petition and consequentially counter claim. If such an argument is accepted then a defeated candidate who is otherwise disqualified shall hold the post of Sarapanch or the Ward member, as the case may be. To illustrate, let us take the claim and counter claim of the present case. If the counter claim of the returned candidate that the election petitioner does not know how to read and write Odia and she was below 21 years old on the date of filing

nomination is true and in the present case, the election of the returned candidate shall be declared invalid and the petitioner will be declared as elected Sarapanch then in spite of the fact that he is disqualified under Section 25 of the Grama Panchayat Act he will hold the office of Sarapanch. This is certainly not the intention of the Legislature. Therefore, in the interest of justice a counter claim should have been permitted. In all fairness, the election case should also be decided in its entirety to avoid multiplicity of proceedings. This is more necessary when the election petitioner's prayer is two fold, i.e., to declare election of the returned candidate to be void and after declaring election of the returned candidate void to declare the Election petitioner as elected Sarapanch. If counter claim is not allowed, the result would be disastrous, when there are only two contesting candidates and the Election Tribunal declares the returned candidate disqualified, removes him from the office of Sarapanch and allows another disqualified candidate to hold the office.

30. In view of the above, the impugned order dated 05.05.2012 passed by the Civil Judge (Junior Division), Parlakhemundi in Election Petition No.2 of 2012 rejecting the prayer of the respondent-1- petitioner to amend the written statement for inclusion of the counter claim to declare the election petitioner disqualified to be elected as Sarapanch is set aside. The Election Tribunal is directed to consider the Respondent-petitioner's application to amend the written statement for inclusion of her counter claim in the light of the observation/finding of this Court made supra within a period of two weeks from the date of production of certified copy of this judgment.

31. In the result, the writ petition is allowed with the aforesaid observation and direction.

Writ petition allowed.

2013 (I) ILR - CUT- 347

B. K. PATEL, J.

F.A.O. NO. 53 OF 2012 (Dt.10.09.2012)

MOCHI BISOYI & ORS. ……Appellants

.Vrs.

UNION OF INDIA …….Respondent

RAILWAYS ACT, 1989 – Ss.123 (c), 124-A.

Untoward incident – Deceased died due to accidental fall from the running train – Direction issued to the Railway administration to pay compensation to the claimants.

In this case deceased boarded Malwa Express on 6.1.2008 from New Delhi to Jammu Tawi – On 7.1.2008 at 1.30 A.M. he went to toilet and did not return to his seat – Information received that a man had fallen from Malwa Express and died and a companion of the deceased identified the dead body of the deceased kept in mortuary by the police – Held, impugned order rejecting the claim petition of the claimants is set aside. (Para 9,10,11)

For Appellants - M/s. Rama Pr. Mohapatra, D.Mohapatra, S.Parida.
For Respondent - M/s. A.K.Mishra, H.M.Das, A.K.Sahoo.

B.K. PATEL, J. This appeal is directed against the impugned order dated 30.11.2011 passed by the Member (Technical), Railway Claims Tribunal, Bhubaneswar Bench (for short 'the Tribunal') rejecting claim application bearing Case No.OA/71/2008.

2. Appellants-claimants filed the claim application claiming compensation of Rs.4,00,000/- along with interest and cost on account of death of deceased Maheswar Bisoyi (for short 'the deceased'). Claimants are wife (A.W.1) and minor children of the deceased respectively.

3. Claimants' case is that on 4.1.2008 the deceased purchased valid ticket to travel from Bhubaneswar to Jammu Tawi. He along with three companions boarded the Purushottam Express from Bhubaneswar and reached New Delhi on 6.1.2008. On the same day the deceased and his companions boarded the Malwa Express from New Delhi station to go to

Jammu Tawi. Around 1.30 A.M. on 7.1.2008 the deceased went to the toilet, but did not return back to his seat. On 8.1.2008 at Jammu Tawi railway station, deceased's companions got information that a man had fallen down from Malwa Express and died near Kathua railway station. His dead body was kept by police in mortuary. A.W.2, one of his companions, went there and identified the dead body of the deceased. Police case was instituted and enquiry was conducted in connection with deceased's death. Claimants filed the claim application claiming that they are entitled to get compensation as the deceased died due to an untoward incident within the meaning of Section 123 (c) of the Railways Act, 1989 (for short 'the Act').

Respondent-Railway Administration filed written statement resisting the claim and pleading that claim of the applicants does not fall within the provisions under Sections 123 (c), 124 and 124-A of the Act.

4. In order to substantiate the claim, claimants examined the deceased's wife as A.W.1 and one of the co-passengers as A.W.2. Also, Daily Diaries dated 7.1.2008 and 9.1.2008 prepared in course of enquiry in the police case as well as the train ticket of the deceased along with English translation of Daily Diaries were relied upon by the claimants. No evidence was adduced by the Railway Administration.

5. Considering the rival pleadings, the Tribunal settled the following issues:

1) Whether the applicants are the sole dependents of the deceased?

2) Whether the deceased was a bona fide passenger under section 124-A of Railways Act, 1989?

3) Whether the incident was an untoward incident as provided in the said Act?

4) Whether the applicants are entitled to get compensation under relevant sections of the Act?

5) If so, what reliefs?

6. In answering issue nos.1 and 2 it was held by the Tribunal that the applicants are dependants of the deceased and that deceased was traveling in the train with a valid ticket from Bhubaneswar to Jammu Tawi. Therefore, is not disputed that the deceased was a bona fide passenger. However, upon reference to certain documents and statements stated to be available in the enquiry report of the PC/RPF/JAT (Jammu Tawi) it was held by the Tribunal that claimants failed to establish that the deceased died due to

untoward incident as pleaded in the claim application. Accordingly, the claim application was disallowed.

7. In assailing the impugned order it was strenuously contended by the learned counsel for the appellants-claimants that evidence of A.W.2 regarding death of the deceased due to accidental fall from Malwa Express in the night of 6/7.1.2008 has not been rebutted or contradicted by the Railway Administration in any manner. No evidence was adduced from the side of the Railway Administration. On the contrary, Daily Diaries in the police enquiry corroborate the evidence of A.W.2 that deceased's dead body was found in the railway track near Kathua station as pleaded by the claimants. Also, in the final report of the police enquiry it has been categorically concluded that while travelling in Malwa Express the deceased suddenly slipped, fell down and died at the spot. In such circumstances, the claimants are entitled to get compensation on account of death of the deceased.

8. In reply, it was argued by the learned counsel appearing for the respondent-Railway Administration that in view of discrepancies and inconsistencies between the version of the claimants with regard to date and time of alleged untoward incident and the version of Railway personnel in course of enquiry with regard to time of running of the Malwa Express, the Tribunal has rightly held that the claimants failed to substantiate their claim.

9. Admittedly, Railway Administration has not adduced any evidence. A.W.2 was travelling with the deceased. He testified that after arrival at New Delhi station on 6.1.2008, he along with deceased and others boarded the Malwa Express. The compartment was over crowded. In the early morning at about 1.30 A.M. of 7.1.2008 deceased went to latrine attached to the compartment asking him to look after his luggage. A.W.2 never saw the deceased thereafter. As the deceased did not arrive at Jammu Tawi, A.W.2 went to Chaki Bank Railway Station and informed the station authority regarding missing of the deceased. As advised by the station authority, he went to Kathua Railway Station where Railway Police informed him that dead body of an unidentified man who had fallen down from Malwa Express in between Kathua and Budhi Railway Station on 7.1.2008 had been kept in mortuary. A.W. 2 went to the mortuary and identified the dead body of the deceased. Evidence of A.W.2 remained unrebutted. It also finds corroboration from Daily Diaries dated 7.1.2008 and 9.1.2008 in P.P.G.R.P., Budhi. In Daily Diary dated 7.1.2008 it has been mentioned that one unidentified male person fell down from Malwa Express train and died on the spot. That apart, in the final report of the police investigation it has been mentioned that on 7.1.2008 at about 1.30 P.M. information was received

regarding falling of one unknown person from running Malwa Express train which was coming to Jammu Tawi. It has been concluded in the police report that during the course of investigation it was found that the deceased was travelling in the Malwa Express train and he suddenly slipped from the door, fell down and died on the spot. Therefore, it is well established that the deceased died due to accidental fall from running train in the night of 6/7.1.2008 while travelling from New Delhi to Jammu Tawi.

10. Perusal of the impugned order reveals that the Tribunal did not accept the evidence adduced on behalf of the claimants upon to certain statements of some Railway personnel and some documents which are extraneous to record. Such statements and documents were not admitted into evidence and were not brought to the attention of the claimants. Proceeding before the Tribunal being a quasi judicial proceeding, the Tribunal could not have placed reliance on materials beyond the record in order to find fault with the evidence adduced on behalf of the claimants which remained unrebutted. On an appraisal of the evidence on record this Court is of the considered view that claimants' case regarding death of the deceased due to untoward incident in the night of 6/7.1.2008 has been cogently established by evidence of A.W.2 which is corroborated by Daily Diaries and documents including final report prepared by police in course of enquiry into the death of the deceased. In such circumstances, claimants are entitled to get compensation of Rs.4,00,000/- (Rupees four lakhs only) with interest from the date of filing of the claim application.

11. In the result, the appeal is allowed. The impugned order is set aside. Respondent-Railway Administration is directed to deposit compensation of Rs.4,00,000/- (Rupees four lakhs) along with interest at the rate of 6 per cent per annum from the date of filing of the claim application till payment before the Tribunal within two months. In case the respondent fails to pay the amount within the time stipulated, the compensation amount would be payable with interest at the rate of 9 per cent per annum from the date of filing of the claim application to the claimants. On deposit of the compensation amount with interest, the Tribunal shall keep 40% of the amount in the name of the wife of deceased, and 20% of the amount in the name of each of the children of the deceased in fixed deposit in any nationalized bank for a period of five years, and disburse the balance amount to the wife of the deceased.

Appeal allowed.

2013 (I) ILR - CUT- 351

B. K. NAYAK, J.

CRLMC. NO.1590 OF 2010 (Dt.06.11.2012)

ASHOK KU. MISHRA ……..Petitioner

.Vrs.

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

PENAL CODE, 1860 – S.294.

Cognizance taken U/s.294 I.P.C. – Ingredient of the offence is that it must occur in a "Public Place" – In this case offence alleged has been committed in the office room of the petitioner who is the Managing Director of IFCAL – Whether the office room of the MD., IFCAL is a public place when a member of the public can only enter into his office room with his prior permission – Held, office room of the petitioner is not a public place hence the impugned order taking cognizance U/s.294 I.P.C. is quashed. (Para 7,8)

Case law Referred to:-

AIR 1961 Gujarat 182 : (State-V- Dohana Jamnadas & Ors.)

For Petitioner - M/s. Deepak Kumar & P.K.Mishra.
For Opp.Parties - Addl. Govt. Adocate (for O.P.No.1)
M/s. Patitapaban Panda & B.B.Mohanty, (for O.P.No.2)

B.K.NAYAK, J. The petitioner in this application under Section 482, Cr.P.C. challenges the order dated 12.04.2010 passed by the learned J.M.F.C., Jajpur Road in I.C.C. Case No.59 of 2010 taking cognizance of the offences under Sections 323/294/506 of the I.P.C. and directing issuance of process against the petitioner.

2. Opposite party no.2, who was the Secretary of the Jajpur Road Bar Association, filed a complaint before the learned J.M.F.C., Jajpur Road against the present petitioner with the allegations that on 24.10.2007 he had addressed a letter to accused-petitioner, who was the Managing Director of IFCAL, Jajpur Road and gave the same to the P.A. of the petitioner. In order to discuss with the petitioner about the subject matter of the aforesaid letter, the complainant along with the witnesses went to the office of the petitioner on 31.10.2007 at about 12.30 P.M. after getting appointment and when they

started discussing about the subject matter of the letter given earlier, the petitioner suddenly got angry and asked the complainant to vacate his office or else he would be forced to get them out. When the complainant protested against such action, the petitioner again asked him to leave the place immediately or else he would kill the complainant by firing, and so saying the petitioner stood up from his chair and gave a push on the chest of the complainant and asked his Darwan (door keeper) to drive the complainant and his companions out of the gate and again abused them sayng "SALA OKILA DAKHEIHEUCHU MORA HIGH COURT JUDGE SABU SANGA JAA MORA KANA TADIBA KANA KARIPAKEBA".

3. The complaint petition was forwarded by the learned J.M.F.C. to the local police station for registration of F.I.R. and accordingly Jajpur Road P.S. Case No.150 dated 03.11.2007 was registered. After investigation the police submitted a final report, whereupon the complainant filed a protest petition on the basis of which his statement under Section 200, Cr.P.C. was recorded. The J.M.F.C., conducted enquiry and by the impugned order took cognizance of the offences under Sections 323/294/506 of the I.P.C.

4. During the course of hearing the learned counsel for the petitioner challenges the order of cognizance only in respect of offence under Section 294 of the I.P.C. on the ground that even assuming the allegations of abuse etc to be true, the place of occurrence is the office room of the petitioner, which is not a '*public place*', prima facie commission of offence under Section 294 of the I.P.C. cannot be said to have been made out and hence no cognizance thereof could have been taken.

The learned counsel appearing for opposite party no.2 submits that for opening of a new court of Senior Civil Judge at Jajpur Road, on the request of Jajpur Road Bar Association and the Collector, Jajpur, the predecessor-in-office of the petitioner had agreed to spare a quarters of his Company for occupation of the Presiding Officer of the proposed court and in connection therewith a letter had been given to the petitioner through his P.A. and in order to discuss about the aforesaid matter the complainant and some members of the Bar went to the office of the petitioner, when the occurrence took place. It is submitted by him that the office of the petitioner must be held to be a public place and, therefore, cognizance of the offence under Section 294 of the I.P.C. has been rightly taken.

5. The sole question, therefore, is whether the office room of the Managing Director of the Company, Indian Ferro-Chrome and Alloys Limited (IFCAL), which is a Public Limited Company, is a '*public place'* or not.

A public place is any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not.

In the decision reported in AIR 1961 GUJARAT 182; ***State v. Dohana Jamnadas and others,*** a division bench of Gujarat High Court has laid down the following test for ascertaining whether a place is a public place or not :

> "The test of a place being a public place within the meaning of S.12 is whether it is open to the members of the public or not, even though there may be certain conditions attached to the entry or the use thereof."

6. A public place must be held to be a place which is open to the members of the public though in some cases access to it by members of the public may be on fulfilling certain conditions. But the right of access to such place must not be limited to any determinate section of public and the person in charge of the place should have no right or discretion to deny access to any member of the public as long as such member is ready to fulfill the conditions attached for access.

7. In the light of the above test it is to be seen whether the office room of the Managing Director of the company is a '*public place'*. There may be a condition that a member of the public can enter into the office room of the Managing Director with his prior permission for some purpose, but it cannot be said to be open to the public in the sense that every member of the public has a right of access to it. The Managing Director must be deemed to have a right or discretion to refuse permission to any member of the public to have access to his office room. The Managing Director having a choice not to allow entry or access to his office room to any member of the public whom he does not wish to permit, it cannot be said that his office room is a place, which is open to every member of the public.

8. I, therefore, hold that the office room of the petitioner cannot be said to be a public place. A necessary ingredient of the offence under Section 294 of the I.P.C., is that it must occur in a '*public place',* which is lacking in the instant case. Therefore, the cognizance of the offence under Section 294 of the I.P.C. in the impugned order is bad. I, therefore, quash the order of cognizance only in respect of the offence under Section 294 of the I.P.C. The CRLMC is thus partly allowed.

Application allowed in part.

2013 (I) ILR - CUT- 354

C. R. DASH, J.

CRLMC NO. 1838 OF 2009 (Dt.14.11.2012)

SATYANARAYAN AGARWALA ……Petitioner

.Vrs.

STATE OF ORISSA …. …..Opp.Party

PENAL CODE, 1860 – Ss.306 & 107.

Suicide – It implies an act of self killing – Allegation of abatement – Abatement involves a mental process of instigating a person or intentionally aiding a person to do a thing – Intention of the accused to aid or to instigate or to abet the suicide must be proved – Without a positive act on the part of the accused to instigate or aid in committing suicide conviction can not be sustained.

In this case suicide note reveals that the deceased was irregular in his duty for which the petitioner being his superior officer scolded him and deducted his salary – The petitioner must have taken such steps to maintain discipline in the office but not to drive the deceased to commit suicide – Held, there being no credible material against the petitioner to attract Sections 306 & 107 I.P.C. the impugned order taking cognizance against the petitioner under the above section is quashed.

Case laws Referred to:-

1.(2010)47 OCR (SC),376 : (S.S.Chheena-V- Vijay Kumr Mahajan & Anr.)
2.(2009)16 SCC 605 : (Chitresh Kumar Chopra-V- State(Govt. of NCT of Delhi)
3.(2009)9 SCC 618 : (Ramesh Kumar-V- State of Chhatisgarh)
4.1995 Supp.(3) SCC 731 : (Mahendra Singh-V- State of M.P.)
5.(2010)8 SCC 628 : (Madan Mohan Singh-V- State of Gujarat & Anr.)
6.(2005)2 SCC 659 : (Netai Dutta-V- State of W.B.).

For Petitioner - M/s. H.S.Mishra, A.K.Mishra, T.K.Sahoo, A.S.Behera.
For Opp.Parties - Addl. Standing Counsel.

C.R. DASH, J. The petitioner, who at the relevant time was working as Sub-Divisional Officer of Minor Irrigation, Patnagarh, has moved this Court

under Section 482, Cr.P.C. for quashing of cognizance taken by learned S.D.J.M., Patnagarh under Section 306, I.P.C. vide order dated 23.06.2008 passed in G.R. Case No. 500 of 2007.

2. One Giri Rout was working as a Peon in the petitioner's office at Patnagarh. He was irregular in his duty and was not attending the office regularly owing to his ill health for quite sometime. For such absence on the part of said Giri Rout in the office, there was deduction of his salary on account of unauthorized absence. As the aforesaid Giri Rout was receiving a low salary, he was sustaining his family by taking loan from outside. He was unhappy with the situation and behaviour of the petitioner, who is a superior officer. He committed suicide on 08.11.2007. Patnagarh U.D. Case No.38 dated 08.11.2007 was initiated and enquiry was taken up. In course of enquiry, police could find a suicidal note written by said Giri Rout describing his financial condition and loan taken from outside and his unhappiness with the behaviour of the petitioner. On the basis of such suicidal note, the petitioner was arrested and forwarded to jail custody. Subsequently he was released on bail. On filing of charge-sheet under Section 306, I.P.C., learned S.D.J.M., Patnagarh had taken cognizance under Section 306, I.P.C. obliging the petitioner to move this Court under Section 482, Cr.P.C. for quashing of cognizance.

3. In course of enquiry in the U.D. Case, the I.O. seized a suicide note written by deceased Giri Rout on production by the relatives of the deceased. From the suicide note, as revealed from the F.I.R., it came to light that deceased Giri Rout was working as a Peon in the office of the present petitioner since long; he was quite irregular in attending to his usual office work owing to his ill-health and the present petitioner was deliberately abusing the deceased for his prolonged illness and absence in duty, for which the deceased was quite unhappy. It is further alleged in the said suicidal note that the petitioner himself was not regular in attending the office and though other employees like Satrughna Bhoi and Giri Sankar Kar were also not attending the office regularly, the petitioner was not scolding them or not taking any action against them. It is also alleged in the suicide note that due to paucity of funds the petitioner had taken loans from outside to sustain his family by borrowing money from different persons of the locality. On the basis of such suicide note, the I.O. in the F.I.R. has come to a conclusion that the deceased committed suicide being dissatisfied with the unpleasant behaviour of the present petitioner.

4. Hon'ble Supreme Court in the case of **S.S. Chheena *vs.* Vijay Kumar Mahajan & Another,** (2010) 47 OCR (SC) – 376 has taken into

consideration the provision of Sections 306 and 107, I.P.C. and in paragraph-28 of the judgment held thus :-

> "28. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306, I.P.C. there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

5. Hon'ble Supreme Court in the case of **Chitresh Kumar Chopra *vs.* State (Govt. of NCT of Delhi)**, (2009) 16 SCC 605 had occasion to deal with the aspect of abetment. The Court dealt with the dictionary meaning of the word 'instigation' and 'goading'. Hon'ble Supreme Court in the case opined that there should be intention to provoke, incite or encourage to doing an act by the latter. Each person's suicidability attitude is different from others. Each person has his own idea of self-esteem and relf-respect. Therefore, it is impossible to lay down in straight jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

6. Learned counsel for the petitioner has placed reliance on yet another case of Hon'ble Supreme Court rendered in the case of **Ramesh Kumar *vs.* State of Chhattisgarh,** (2009) 9 SCC 618. In that case, a three judges bench of Hon'ble the Supreme Court had occasion to deal with a case of suicide. In a dispute between husband and wife, the appellant – husband uttered "you are free to do whatever to wish and go wherever you like". Thereafter the wife of the appellant committed suicide. Hon'ble Supreme Court in paragraph-20 of the judgment has examined different shades of the meaning of the word 'instigation' by holding that …… "instigation is to goad, urge forward, provoke, incite or encourage to do 'an act'. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which

case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation."

7. In case of **Mahendra Singh *vs.* State of M.P.** 1995 Supp (3) SCC 731, the allegations leveled were as under :–

> "My mother-in-law and husband and sister-in-law (husband's elder brother's wife) harassed me. They beat me and abused me. My husband Mahendra wants to marry a second time. He has illicit connections with my sister-in-law. Because of these reasons and being harassed I want to die by burning."

Hon'ble Supreme Court on the aforementioned allegations came to a definite conclusion that by no stretch the ingredients of abetment are attracted on the statement of the deceased.

8. In the case of **Madan Mohan Singh *vs.* State of Gujarat and another,** (2010) 8 SCC 628, the deceased driver committed suicide alleging harassment against one Madan Mohan Singh, who was working as D.E.T. in the Microwave Project, a Department of Ahmedabad Bharat Sanchar Nigam Ltd. The deceased had left a suicidal note making allegation against the appellant Madan Mohan Singh. Hon'ble Supreme Court, on consideration of the materials on record, in paragraph-11 of the judgment came to hold thus :-

> "…….it cannot be said that the accused ever intended that the driver under him should commit suicide or should end his life and did anything in that behalf. Even if it is accepted that the accused changed the duty of the driver or that the accused asked him not to take the keys of the car and to keep the keys of the car in the office itself, it does not mean that the accused intended or knew that the driver should commit suicide because of this."

On consideration of the materials on record, Hon'ble Supreme Court in paragraph-13 of the judgment held thus :-

> "It is absurd to even think that a superior officer like the appellant would intend to bring about suicide of his driver and, therefore, abet the offence. In fact, there is no nexus between the so-called suicide (if at all it is one for which also there is no material on record) and any of the alleged acts on the part of the appellant. There is no proximity either. In the prosecution under Section 306, I.P.C., much

> more material is required. The courts have to be extremely careful as the main person is not available for cross-examination by the appellant-accused. Unless, therefore, there is specific allegation and material of definite nature (not imaginary or inferential one), it would be hazardous to ask the appellant-accused to face the trial. A criminal trial is not exactly a pleasant experience. The person like the appellant in the present case who is serving in a responsible post would certainly suffer great prejudice, were he to face prosecution on absurd allegations of irrelevant nature."

In a similar case, in the case of **Netai Dutta *vs.* State of W.B.**, (2005) 2 SCC 659, Hon'ble Supreme Court had quashed the proceedings initiated against the accused.

9. With the aforesaid law in the background, whether it would be just and fair in the present case to compel the petitioner to face the rigmarole of a criminal trial in absence of any credible material against him is the only question that has to be examined.

10. As found from the F.I.R., which contains the substance of the suicide note, the deceased himself has written in the suicidal note that he was irregular in his duty, for which the petitioner being the superior officer was scolding him. Such an act on the part of the petitioner cannot be brought within the ambit of abetment as defined in Section 107, I.P.C. in as much as the petitioner being the superior officer has to keep discipline in the office and in order to keep such discipline, he has to ensure that the subordinate staff are working properly and attending to their duties properly. Even by making deduction of the salary of the deceased, assuming arguendo such a fact, the petitioner cannot be held to have subjected the deceased to harassment, as the petitioner must have taken such step to ensure discipline in the office and not to drive the deceased to commit suicide or to single out him to face harassment.

Government in the Water Resources Department, after careful examination of the matter has decided not to take any disciplinary action against the petitioner vide Annexure-3 to the petition for his alleged action against the deceased, who was regularly irregular in attending to his duties.

11. Taking into consideration the facts in its entirety, it cannot be held that the action of the petitioner falls within the scope of Section 107, I.P.C. or in other words any ingredients of Section 107, I.P.C. is satisfied.

12. From the order of cognizance dated 23.06.2008, it is found that learned S.D.J.M., Patnagarh passed the following order :-

> "C.S. No.36 dt.6.2.2008 u/s.306, I.P.C. is received against the accused Satyanarayan Agrawal (1966), s/o. late Biharilal Agrawal of Daily Marketpada, Bolangir P.S, Town Bolangir. Perused the same. Cog. Of the offence u/s. 306, I.P.C. is taken. The accused is on court bail. Issue summon for his appearance. Office to prepare P.P. for supply in the meantime fixing date 24.9.08."

13. The order itself shows that learned Magistrate has not at all applied his mind to the ingredients of Sections 107 and 306, I.P.C. before taking cognizance of the matter and has mechanically taken cognizance on the basis of the charge-sheet filed by police.

14. In view of the above and in view of the fact that the ingredients of Section 306 and 107, I.P.C. are not attracted to the present case, cognizance taken by learned S.D.J.M., Patnagarh dated 23.06.2008 in G.R. Case No.500 of 2007 is hereby quashed. The Criminal Misc. Case is accordingly disposed of.

Application disposed of.

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B. K. MISRA, J.

W.P.(C) NO. 2996 OF 2012 (Dt.16.11.2012)

PRASANTA KU. MOHAPATRA ……...Petitioner

.Vrs.

DR. JANAKI BALLAV MOHARANA …… Opp.Party

CONSTITUTION OF INDIA, 1950 – ART.226.

Party approaching Court suppressing facts – Misleading the Court – Abuse of the process – Party not entitled to any extraordinary or discretionary relief.

Truth constituted an integral part of the justice delivery system and people should feel proud to tell truth in the Courts irrespective of the consequences – In the present case the petitioner challenged the Execution Proceeding by raising plea like unexecutability of the decree on false grounds – Held, the writ petition is totally misconceived hence dismissed. (Para 5,6)

Case laws Referred to:-

1.AIR 1996 SC 2687 : (Dr. Buddhi Kota Subbarao-V- K.Parasaran & Ors
2.(2010)2 SCC 114 : (Dalip Singh-V- State of Uttar Pradesh & Ors.)

For Petitioner - M/s. A.P.Bose, R.K.Mahanta, N. Hota & S.S.Routray.

For Opp.Party - M/s. A.R.Dash, S.K.Nanda, B.Mohapatra, S.N.Sahoo, K.S.Sahoo & L.D.Achari.

B.K.MISRA, J. The present petitioner, who was the judgment debtor in Execution Case No.69 of 2008, pending in the court of learned Civil Judge (Sr.Divn.), 1st Court, Cuttack questioning the executability of the decree in Civil Suit (1) No. 43 of 2007 filed a petition under Section 47 read with Order 21 Rule 58, Order 21, Rule 97 of the Civil Procedure Code (hereinafter referred to as "C.P.C."). Further, another petition was filed on 7.1.2012 by the present petitioner as the judgment debtor (J.Dr.) in the aforementioned Execution Proceeding for issuance of summons to the Court Process Server as well as one Aditya Ranjan Das for their evidence. The learned Civil Judge (Sr.Divn.), 1st Court, Cuttack rejected such prayers of the judgment debtor,

namely the present petitioner. The said order of the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack (Annexure-1) was challenged by the present petitioner in a Civil Revision before the District Judge, Cuttack. When the said Civil Revision was dismissed being aggrieved the petitioner has approached this Court for quashing the impugned orders at Annexures-1 and 2.

2. Before adverting to the cases of the parties for better appreciation of the matter, it would be worthwhile to mention some admitted facts. The present opposite party had instituted a suit i.e., Civil Suit (1) No. 43 of 2007 against the present petitioner as defendant praying therein for eviction of the defendant from the suit house, realization of arrear house rent, damages and for permanent injunction. The said suit was decreed on contest against the defendant. Against the judgment and decree in Civil Suit (1) No. 43 of 2007 the loosing defendant namely, the present petitioner preferred an appeal before this Court which was registered as R.F.A. No. 237 of 2008. The said First Appeal was disposed of on 29.3.2011 in terms of the compromise effected in between the parties and it was directed that the terms and conditions of the compromise should form a part of the order in disposing of the First Appeal. As per the terms and conditions of the compromise effected in between the parties, the present petitioner as the defendant-appellant was to handover the vacant possession of the suit premises to the plaintiff-respondent i.e., the present opposite party on or before 31.5.2011 and also to pay Rs.10,800/- towards arrear house rent for the months from August to November, 2006 as per the judgment and decree and also pay the arrear house rent at the rate of Rs.2700/- to the present opposite party for the period from 27.11.2006 to 31.5.2011, etc.

3. It is seen from Annexure-1 that Execution Case No. 69 of 2008 was levied against the present petitioner by the present opposite party when the petitioner did not give the vacant possession of the suit premises despite the judgment and decree and compromise entered into between the parties. In that Execution Proceeding the present petitioner filed a petition contending therein that the decree is un-executable and cannot be enforced against him on the ground that he did not take the suit premises in his individual capacity, but had taken the same as the President of Vivekananda Sikhya Kendra. It was also his case that he is no longer functioning as the President of Vivekananda Sikhya Kendra as the General Body of the Society have reconstituted the Managing Committee of which one Sri Manoj Kumar Nath is functioning as President and management of the school has been vested with ‘Pradhan Acharya’ of the school, namely, Smt. Arnapurna Mohanty.

4. Learned Civil Judge (Sr.Divn.), 1st Court, Cuttack by the impugned order at Annexure-1 rejected the prayers of the present petitioner. Needless to mention here that the order passed by the learned Civil Judge (Sr.Divn.), 1st Court in C.M.A. No.607 of 2011 arising out of Execution Case No.69 of 2008 was challenged in a Civil Revision before the District Judge, Cuttack and the learned Distrrict Judge,Cuttack by his order at Annexure-2 dismissed the same.

5. I have heard the learned counsel for the parties and similarly perused the materials placed before this Court i.e judgment in Civil Suit (1) No. 43 of 2007 (Annexure-A), the final order passed by this Court in R.F.A. No.237 of 2008 dated 29.3.2011 (Annexure-D) so also the further order of this Court in Misc. Case No.321 of 2011 arising out of R.F.A.No.237 of 2008 dated 3.2.2012, the compromise petition filed in R.F.A.No. 237 of 2008 (Annexure-C). Without delving into the detailed analysis of this case, suffice is to say that the concurrent findings of the court below is that it was the present petitioner who took the tenanted premises on rent to run an institution, namely Vivekananda Sikhya Kendra. When that fact has attained its finality and when the present petitioner in the suit as well as in the appeal did not raise the point that he had not taken the tenanted premises in his individual capacity, but took it as the President on behalf of the school, I am at a loss to understand as to how the present petitioner in utter derogation of the judgment and decree of the competent Civil Court including of this Court without delivering the vacant possession of the tenanted premises on or before 31.5.2011 as per the compromise entered into in between the parties in R.F.A. No.237 of 2008 and complying with the directions of the competent Civil Court, challenged the Execution Proceeding by raising pleas like un-executability of the decree on fallacious grounds. The learned Civil Judge (Sr.Divn.), 1st Court, Cuttack in his order in Annexures-1 has categorically come to the conclusion that only with a view to delay the Execution Proceeding the judgment debtor, namely, the present petitioner has raised the question for the first time that he did not take the tenanted premises in his individual capacity, but had taken the same as the President of Vivekananda Sikhya Kendra and therefore the decree passed against him in Civil Suit (1) No.43 of 2007 is un-executable. The reasonings assigned by the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack while disallowing the prayer of the present petitioner in C.M.A No.607 of 2011 (Annexure-1) so also the finding of the learned District Judge, Cuttack while dismissing the Civil Revision No.1 of 2010 as at Annexure-2 in my humble view cannot be interfered with. I have no hesitation in my mind to conclude that the petitions filed by the judgment debtor, namely, the present petitioner in Execution Case No.69 of 2008 is a totally misconceived one and the same amounts to

abuse of process of the Court. It is to be remembered that "no litigant has a right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner as he wishes. Access to justice should not be misused as a licence to file misconceived and frivolous petitions." ***(AIR 1996 S.C. 2687, Dr. Buddhi Kota Subbarao –v- K.Parasaran and others).***

6. Thus, after giving my careful consideration to the submission made at the Bar as well as those contained in the memorandum of application, I am of the opinion that the present writ petition is totally misconceived, untenable and has no merit whatsoever and accordingly, the same stands dismissed.

7. Before I part with the case record, I feel tempted to quote the observations of the Apex Court in the case of ***Dalip Singh –v- State of Uttar Pradesh and others (2010) 2 SCC 114.***

> "For many centuries Indian society cherished two basic values of life i.e., "satya" (truth) and "ahimsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain there values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, the post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

Writ petition dismissed.