A. K. GOEL, CJ & DR. A. K. RATH, J.

O.J.C. NO. 13765 OF 1996 (Dt.11.12.2013)

ABDUL RASHID ……...Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 226 & 21

Public law proceedings – Award of compensation to victim of offence – Writ petition filed by father alleging that while his son, aged about 15 years was working in a Bidi Company he was beaten to death by the owner – Accused persons sent up for trial were acquitted – Compensation can be awarded U/s.357 Cr. P.C. only if the offender is convicted of the offence with which he is charged – Introduction of Section 357-A in Cr. P.C. and Odisha Victim Compensation Scheme, 2012 – Obligation of the state to compensate victims of violent crimes fairly and quickly irrespective of the fact whether offenders are apprehended or punished – Held, in this case crime having admittedly taken place the petitioner is entitled to interim compensation without prejudice to the claim for final compensation being preferred at an appropriate forum – Direction issued for payment of Rs.50,000/- (Rupees fifty thoushand) to the petitioner by way of Bank Draft as interim compensation. (Para 11)

Case laws Referred to:-

1.(2013) 6 SCC 770 : (Ankush Vhivaji Gaikwad-V- State of Maharashtra)
2.(1998) 7 SCC 392 : (State of Gujarat & Anr.-V-Hon'b;e High Court of Gujarat)
3.AIR 1998 SC 2127 : (Hari Krishan & State of Haryana-V- Sikhbir Singh)
4.(1985) 4 SCC 337 : (Savitri-V- Govind Singh Rawat)
5.(2008) 9 SCC 632 : (Shail Kumari Devi-V- Krishan Bhagwan Pathak)

For Petitioner - None.
For Opp.Parties- Mr. R.K. Mohapatra, Govt. Advocate
For O.P.Nos.1 to 4.

JUDGMENT AND ORDER

A.K.GOEL, CJ.

1. This petition seeks a direction for an independent enquiry into the death of a child labour beaten to death.

[

2. The case of the petitioner is that on 14.11.1996, one Rajunu Khan

was working in a Bidi Company in Seikh Bazar was beaten to death by the owner and died on the spot. The matter was published in the daily newspaper "The Samaj" on 18.11.1996. The parents of the deceased are poor and did not take remedies. The Magistrate conducted the enquiry by getting the deadbody from the grave and found injuries on the deadbody. The deadbody was buried by the owner of the Bidi Company without informing the parents of the victim. On postmortem being conducted, the case was found to be homicidal death.

3. A counter affidavit has been filed on behalf of the State of Odisha by the Inspector-in-charge, Lalbag Police Station. According to the said affidavit, on 15.11.1996, the Inspector-in-charge started enquiry and found that Nanda @ Rajun Khan, son of Mohammad Khan of Seikhbazar, aged about 15 years was working in Tarabidi Company at Seikhbazar and expired on 14.11.1996 and was buried at *Idga Kabarstan* by his kith and kin and others. A case was registered and inquest was held in the presence of the Magistrate. The deadbody was recovered from the grave and sent for Postmortem. According to Postmortem report, the injuries were antemortem and could have been caused by blunt forcetuma. The injuries were fatal to cause death in ordinary course of nature. The brother of the deceased made a statement that deceased expired due to fall from the top of the building to the watchman at the burial ground.

4. The matter has been pending for the last seventeen years. In the meanwhile, after investigation, three accused were sent up for trial, but the witnesses examined by the prosecution did not support the prosecution version and stated that they did not have any direct knowledge. Accordingly, the accused who were sent up for trial were acquitted vide judgment dated 17.7.2002 in Sessions Trial No. 218 of 2001 (State Vrs. Apu @ Md. Afsar & ors.) rendered by Addl. Sessions Judge, Fast Track No.1, Cuttack.

5. Though none appears for the petitioner, we have heard learned Government Advocate. He submitted that the investigation was proper and the State was not guilty of failure of its duty and thus, no compensation was payable.

6. Question for consideration is whether the responsibility of the State ends merely by registering a case, conducting investigation and initiating prosecution and whether apart from taking these steps, the State has further responsibility to the victim. Further question is whether the Court has legal duty to award compensation irrespective of conviction or acquittal. When the State fails to identify the accused or fails to collect and present acceptable evidence to punish the guilty, the duty to give compensation remains. Victim of a crime or his kith and kin have legitimate expectation that the State will

punish the guilty and compensate the victim. There are systemic or other failures responsible for crime remaining unpunished which need to be addressed by improvement in quality and integrity of those who deal with investigation and prosecution, apart from improvement of infrastructure but punishment of guilty is not the only step in providing justice to victim. Victim expects a mechanism for rehabilitative measures, including monetary compensation. Such compensation has been directed to be paid in public law remedy with reference to Article 21. In numerous cases, to do justice to the victims, the Hon'ble Supreme Court has directed payment of monetary compensation as well as rehabilitative settlement where State or other authorities failed to protect the life and liberty of victims. For example, Kewal Pati Vs. State of U.P. (1995) 3 SCC 600 (death of prisoner by co-prisoner), Supreme Court Legal Aid Committee Vs. State of Bihar, (1991) 3 SCC 482 (failure to provide timely medical aid by jail authorities, Chairman, Rly. Board Vs. Chandrima Das, (2000) 2 SCC 465 (rape of Bangladeshi national by Railway staff), Nilabati Behera Vs. State of Orissa, (1993) 2 SCC 746 (Custodial death), Khatri (I) Vs. State of Bihar (1981) 1 SCC 623 (prisoners' blinding by jail staff), Union Carbide Corporation Vs. Union of India, (1989) 1 SCC 674 (gas leak victims).

7. Expanding scope of Article 21 is not limited to providing compensation when the State or its functionaries are guilty of an act of commission but also to rehabilitate the victim or his family where crime is committed by an individual without any role of the State or its functionary. Apart from the concept of compensating the victim by way of public law remedy in writ jurisdiction, need was felt for incorporation of a specific provision for compensation by courts irrespective of the result of criminal prosecution. Accordingly, Section 357A has been introduced in the Cr.P.C. and a Scheme has been framed by the State of Odisha called 'The Odisha Victim Compensation Scheme, 2012'. Compensation under the said Section is payable to victim of a crime in all cases irrespective of conviction or acquittal. The amount of compensation may be worked out at an appropriate forum in accordance with the said Scheme, but pending such steps being taken, interim compensation ought to be given at the earliest in any proceedings.

8. In Ankush Shivaji Gaikwad Vs. State of Maharashtra, (2013) 6 SCC 770, the matter was reviewed by the Hon'ble Supreme Court with reference to development in law and it was observed :

> "33. The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach

towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid 1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the law makers and courts going back in a great measure to what was in ancient times common place. *Harvard Law Review (1984) in an article on "Victim Restitution in Criminal Law Process: A Procedural Analysis"* sums up the historical perspective of the concept of restitution in the following words:

"Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the state gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."

34. With modern concepts creating a distinction between civil and criminal law in which civil law provides for remedies to award compensation for private wrongs and the criminal law takes care of punishing the wrong doer, the legal position that emerged till recent times was that criminal law need not concern itself with compensation to the victims since compensation was a civil remedy that fell within the domain of the civil Courts. This conventional position has in recent times undergone a notable sea change, as societies world over have increasingly felt that victims of the crimes were being neglected by the legislatures and the Courts alike. Legislations have, therefore, been introduced in many countries including Canada, Australia, England, New Zealand, Northern Ireland and in certain States in the USA providing for restitution/reparation by Courts administering criminal justice.

35. England was perhaps the first to adopt a separate statutory scheme for victim compensation by the State under the Criminal Injuries Compensation Scheme, 1964. Under the Criminal Justice Act, 1972 the idea of payment of compensation by the offender was

introduced. The following extract from the *Oxford Handbook of Criminology* (1994 Edn., p.1237-1238), which has been quoted with approval in *Delhi Domestic Working Women's Forum v. Union of India and Ors.* (1995) 1 SCC 14 is apposite: (SCC pp.20-21, para-16)

*"16……*Compensation payable by the offender was introduced in the Criminal Justice Act 1972 which gave the Courts powers to make an ancillary order for compensation in addition to the main penalty in cases where 'injury', loss, or damage' had resulted. The Criminal Justice Act 1982 made it possible for the first time to make a compensation order as the sole penalty. It also required that in cases where fines and compensation orders were given together, the payment of compensation should take priority over the fine. *These developments signified a major shift in penology thinking, reflecting the growing importance attached to restitution and reparation over the more narrowly retributive aims of conventional punishment. The Criminal Justice Act 1982 furthered this shift. It required courts to consider the making of a compensation order in every case of death, injury, loss or damage and, where such an order was not given, imposed a duty on the court to give reasons for not doing so. It also extended the range of injuries eligible for compensation. These new requirements mean that if the court fails to make a compensation order it must furnish reasons.* Where reasons are given, the victim may apply for these to be subject to judicial review…...

The 1991 Criminal Justice Act contains a number of provisions which directly or indirectly encourage an even greater role for compensation.'" *(emphasis supplied)*

36. In the United States of America, the Victim and Witness Protection Act of 1982 authorizes a federal court to award restitution by means of monetary compensation as a part of a convict's sentence. Section 3553(a)(7) of Title 18 of the Act requires Courts to consider in every case "the need to provide restitution to any victims of the offense". Though it is not mandatory for the Court to award restitution in every case, the Act demands that the Court provide its reasons for denying the same. Section 3553(c) of Title 18 of the Act states as follows:

"If the court does not order restitution or orders only partial restitution, the court shall I nclude in the statement the reason thereof." (Emphasis supplied)

37. In order to be better equipped to decide the quantum of money to be paid in a restitution order, the United States federal law requires that details such as the financial history of the offender, the monetary loss caused to the victim by the offence, etc. be obtained during a Presentence Investigation, which is carried out over a period of 5 weeks after an offender is convicted.

38. Domestic/Municipal Legislation apart even the UN General Assembly recognized the right of victims of crimes to receive compensation by passing a resolution titled *"Declaration on Basic Principles of Justice for Victims and Abuse of Power, 1985"*. The Resolution contained the following provisions on restitution and compensation:

"Restitution

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

9. Governments should review their practices, Regulations and laws to consider restitution as an available sentencing option in criminal cases, in addition to other criminal sanctions.

10. In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community.

11. Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under whose authority the victimizing act or omission

occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims.

Compensation

12. When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

13. The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm."

39. The UN General Assembly passed a resolution titled "*Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2005"* which deals with the rights of victims of international crimes and human rights violations. These Principles (while in their Draft form) were quoted with approval by this Court in *State of Gujarat and Anr. v. Hon'ble High Court of Gujarat* (1998) 7 SCC 392 in the following words:

"94. In recent years the right to reparation for victims of violation of human rights is gaining ground. United Nations Commission of Human Rights has circulated draft Basic Principles and Guidelines on the Right to Reparation for Victims of Violation of Human Rights, (see Annexure)."

40. Amongst others the following provisions on restitution and compensation have been made:

"12. Restitution shall be provided to reestablish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires inter alia, restoration of liberty, family life citizenship, return to one's place of residence, and restoration of employment or property.

13. Compensation shall be provided for any economically Assessable damage resulting from violations of human rights or international humanitarian law, such as:

(a) Physical or mental harm, including pain, suffering and emotional distress;

(b) Lost opportunities including education;

(c) Material damages and loss of earnings, including loss of earning potential;

(d) Harm to reputation or dignity;

(e) Costs required for legal or expert assistance, medicines and medical services."

41. Back home the Code of Criminal Procedure of 1898 contained a provision for restitution in the form of Section 545, which stated in Sub-clause 1(b) that the Court may direct

"payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court".

42. The Law Commission of India in its 41st Report submitted in 1969 discussed Section 545 of the Code of Criminal Procedure of 1898 extensively and stated as follows:

"46.12.. Section 545- *Under Clause (b) of Sub-section (1) of Section 545, the Court may direct "in the payment to any person of compensation for any loss or injury caused by the offence when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court." The significance of the requirement that compensation should be recoverable in a Civil Court is that the act which constitutes the offence in question should also be a tort. The word "substantial" appears to have been used to exclude cases where only nominal damages would be recoverable. We think it is hardly necessary to emphasise this aspect, since in any event it is purely within the discretion of the Criminal Courts to order or not to order payment of compensation, and in practice, they are not particularly liberal in utilizing this provision. We propose to omit the word "substantial" from the clause."* (Emphasis supplied)

43. On the basis of the recommendations made by the Law Commission in the above report, the Government of India introduced the Code of Criminal Procedure Bill, 1970, which aimed at revising Section 545 and introducing it in the form of Section 357 as it reads today. The Statement of Objects and Reasons underlying the Bill was as follows:

"Clause 365 [now Section 357] which corresponds to Section 545 makes provision for payment of compensation to victims of crimes. At present such compensation can be ordered only when the Court imposes a fine the amount is limited to the amount of fine. Under the new provision, compensation can be awarded irrespective of whether the offence is punishable with fine and fine is actually imposed, but such compensation can be ordered only if the accused is convicted. The compensation should be payable for any loss or injury whether physical or pecuniary and the Court shall have due regard to the nature of injury, the *manner of inflicting the same, the capacity of the accused to pay and other relevant factors."*

(Emphasis supplied)

44. As regards the need for Courts to obtain comprehensive details regarding the background of the offender for the purpose of sentencing, the Law Commission in its 48th Report on "Some Questions Under the Code of Criminal Procedure Bill, 1970" submitted in 1972 discussed the matter in some detail, stating as follows:

"45. Sentencing .- It is now being increasingly recognised that a rational and consistent sentencing policy requires the removal of several deficiencies in the present system. *One such deficiency is a lack of comprehensive information as to the characteristics and background of the offender.*

The aims of sentencing--themselves obscure--become all the more so in the absence of comprehensive information on which the correctional process is to operate. The public as well as the as the courts themselves are in the dark about judicial approach in this regard.

We are of the view that the taking of evidence as to the circumstances relevant to sentencing should be encouraged, and both the prosecution and the accused should be allowed to cooperate in the process." (Emphasis supplied)

45. The Code of Criminal Procedure of 1973 which incorporated the changes proposed in the said Bill of 1970 states in its Objects and Reasons that Section 357 was *"intended to provide relief to the proper sections of the community"* and that the amended CrPC empowered the Court to order payment of compensation by the accused to the victims of crimes *"to a larger extent"* than was previously permissible under the Code. The changes brought about by the introduction of Section 357 were as follows:

(i) The word "substantial" was excluded.

(ii) A new Sub-section (3) was added which provides for payment of compensation even in cases where the fine does not form part of the sentence imposed.

(iii) Sub-section (4) was introduced which states that an order awarding compensation may be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

46. The amendments to the Code of Criminal Procedure brought about in 2008 focused heavily on the rights of victims in a criminal trial, particularly in trials relating to sexual offences. Though the 2008 amendments left Section 357 unchanged, they introduced Section 357A under which the Court is empowered to direct the State to pay compensation to the victim in such cases where

"the compensation awarded Under Section 357 is not adequate for such rehabilitation, or where the case ends in acquittal or discharge and the victim has to be rehabilitated."

Under this provision, even if the accused is not tried but the victim needs to be rehabilitated, the victim may request the State or District Legal Services Authority to award him/her compensation. This provision was introduced due to the recommendations made by the Law Commission of India in its 152nd and 154th Reports in 1994 and 1996 respectively.

47. The 154th Law Commission Report on the Code of Criminal Procedure devoted an entire chapter to 'Victimology' in which the growing emphasis on victim's rights in criminal trials was discussed extensively as under:

"1. Increasingly the attention of criminologists, penologists and reformers of criminal justice system has been directed to victimology,

control of victimization and protection of victims of crimes. Crimes often entail substantive harms to people and not merely symbolic harm to the social order. Consequently the needs and rights of victims of crime should receive priority attention in the total response to crime. One recognized method of protection of victims is compensation to victims of crime. The needs of victims and their family are extensive and varied.

xx xx xx xx xx

9.1 The principles of victimology has foundations in Indian constitutional jurisprudence. The provision on Fundamental Rights (Part III) and Directive Principles of State Policy (Part IV) form the bulwark for a new social order in which social and economic justice would blossom in the national life of the country (Article 38). Article 41 mandates inter alia that the State shall make effective provisions for "securing the right to public assistance in cases of disablement and in other cases of undeserved want." So also Article 51A makes it a fundamental duty of every Indian citizen, inter alia 'to have compassion for living creatures' and to 'develop humanism'. If emphatically interpreted and imaginatively expanded these provisions can form the constitutional underpinnings for victimology.

9.2 However, in India the criminal law provides compensation to the victims and their dependants only in a limited manner. Section 357 of the Code of Criminal Procedure incorporates this concept to an extent and empowers the Criminal Courts to grant compensation to the victims.

xx xx xx xx

11. In India the principles of compensation to crime victims need to be reviewed and expanded to cover all cases. The compensation should not be limited only to fines, penalties and forfeitures realized. The State should accept the principle of providing assistance to victims out of its own funds.....”

48. The question then is whether the plenitude of the power vested in the Courts Under Section 357 & 357-A, notwithstanding, the Courts can simply ignore the provisions or neglect the exercise of a power that is primarily meant to be exercised for the benefit of the victims of crimes that are so often committed though less frequently punished by the Courts. In other words, whether Courts have a duty

to advert to the question of awarding compensation to the victim and record reasons while granting or refusing relief to them?

xxx xxx xxx xxx

66. To sum up: While the award or refusal of compensation in a particular case may be within the Court's discretion, there exists a mandatory duty on the Court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order Under Section 357 Code of Criminal Procedure would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family.

67. Coming then to the case at hand, we regret to say that the trial Court and the High Court appear to have remained oblivious to the provisions of Section 357 Code of Criminal Procedure. The judgments under appeal betray ignorance of the Courts below about the statutory provisions and the duty cast upon the Courts. Remand at this distant point of time does not appear to be a good option either. This may not be a happy situation but having regard to the facts and the circumstances of the case and the time lag since the offence was committed, we conclude this chapter in the hope that the courts remain careful in future."

9. In Rohtash @ Pappu Vs. State of Haryana (Crl.A. No. 250 of 1999 decided on 1.4.2008, a Division Bench of the Punjab & Haryana High Court observed:

"18. May be, inspite of best efforts, the State fails in apprehending and punishing the guilty but that does not prevent the State from taking such steps as may reassure and protect the victims of crime.

Should justice to the victims depend only on the punishment of the guilty? Should the victims have to wait to get justice till such time that the handicaps in the system which result in large scale acquittals of guilty, are removed? It can be a long and seemingly endless wait. The need to address cry of victims of crime, for whom the Constitution in its Preamble holds out a guarantee for 'justice' is paramount. How can the tears of the victim be wiped off when the system itself is helpless to punish the guilty for want of collection of evidence or for want of creating an environment in which witnesses can fearlessly present the truth before the Court? Justice to the victim has to be ensured irrespective of whether or not the criminal is punished.

19. The victims have right to get justice, to remedy the harm suffered as a result of crime. This right is different from and independent of the right to retribution,
responsibility of which has been assumed by the State in a society governed by Rule of Law. But if the State fails in discharging this responsibility, the State must still provide a mechanism to ensure that the victim's right to be compensated for his injury is not ignored or defeated.

20. Right of access to justice under Article 39-A and principle of fair trial mandate right to legal aid to the victim of the crime. It also mandates protection to witnesses, counselling and medical aid to the victims of the bereaved family and in appropriate cases, rehabilitation measures including monetary compensation. It is a paradox that victim of a road accident gets compensation under no fault theory, but the victim of crime does not get any compensation, except in some cases where the accused is held guilty, which does not happen in a large percentage of cases.

21. Though a provision has been made for compensation to victims under Section 357 Cr.P.C., there are several inherent limitations. The said provision can be invoked only upon conviction, that too at the discretion of the judge and subject to financial capacity to pay by the accused. The long time taken in disposal of the criminal case is another handicap for bringing justice to the victims who need immediate relief, and cannot wait for conviction, which could take decades. The grant of compensation under the said provision depends upon financial capacity of the accused to compensate, for which, the evidence is rarely collected. Further, victims are often unable to make a representation before the Court

for want of legal aid or otherwise. This is perhaps why even on conviction this provision is rarely pressed into service by the Courts. Rate of conviction being quite low, inter-alia, for competence of investigation, apathy of witnesses or strict standard of proof required to ensure that innocent is not punished, the said provision is hardly adequate to address to need of victims.

In *Hari Krishan and State of Haryana v. Sikhbir Singh* AIR 1998 SC 2127, referring to provisions for compensation, the Hon'ble Supreme Court observed:-

"10. ..... This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

22. It is imperative to educate the investigating agency as well as the trial Judges about the need to provide access to justice to victims of crime, to collect evidence about financial status of the accused. It is also imperative to create mechanisms for rehabilitation measures by way of medical and financial aid to the victims. The remedy in civil law of torts against the injury caused by the accused is grossly inadequate and illusory.

23. This unsatisfactory situation is in contrast to global developments and suggestions of Indian experts as well. Some of the significant developments in this regard may be noticed as under:-

1) UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, highlighting the following areas:-

(i) Access to Justice and fair treatment;

(ii) Restitution;

(iii) Compensation;

(iv) Assistance.

2) Council of Europe Recommendation on the Position of the Victim in t

he Framework of Criminal Law and Procedure, 1985.

3) Statement of the Victims' Rights in the Process of Criminal Justice, i ssued by the European Forum for Victims' Services in 1996.

4) European Union Framework Decision on the Standing of Victims in Criminal Proceedings.

5) Council of Europe Recommendations on assistance to Crime victims adopted on 14.6.2006.

6) 152nd and 154th report of the Law Commission of India, 1994 and 1996 respectively, recommending introduction of Section 357-A in criminal procedure code, prescribing, inter-alia, compensation to the victims of crime.

7) Recommendations of the Malimath Committee, 2003.

24. The subject matter has been dealt with by experts from over 40 countries in series of meetings and a document has been developed in cooperation with United Nations Office at Vienna, Centre for International Crime Prevention and the compilation under the heading "***Handbook on Justice for Victims"*** which deals with various aspects of impact of victimization, victims assistance programmes and role and responsibility of frontline professionals and others to victims. The South African Law Commission, in its "Issue Paper 7" (1997) under the heading "Sentencing Restorative Justice: Compensation for victims of crime and victim empowerment" has deliberated on various relevant aspects of this issue.

xx xx xx xx

27. In ***Malimath Committee Report*** (March 2003), it was observed:-

"6.7.1 Historically speaking, Criminal Justice System seems to exist to protect the power, the privilege and the values of the elite sections in society. The way crimes are defined and the system is administered demonstrate that there is an element of truth in the above perception even in modern times. However, over the years the dominant function of criminal justice is projected to be protecting all citizens from harm to either their person or property, the assumption being that it is the primary duty of a State under rule of law. The State does this by depriving individuals of the power to take law into their own hands and using its power to satisfy the sense of revenge through appropriatesanctions. The State (and society), it was argued,

is itself the victim when a citizen commits a crime and thereby questions its norms and authority. In the process of this transformation of torts to crimes, the focus of attention of the system shifted from the real victim who suffered the injury (as a result of the failure of the state) to the offender and how he is dealt with by the State. Criminal Justice came to comprehend all about crime, the criminal, the way he is dealt with, the process of proving his guilt and the ultimate punishment given to him. The civil law was supposed to take care of the monetary and other losses suffered by the victim. Victims were marginalized and the state stood forth as the victim to prosecute and punish the accused.

6.7.2 What happens to the right of victim to get justice to the harm suffered? Well, he can be satisfied if the state successfully gets the criminal punished to death, a prison sentence or fine. How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury? In principle, that should be the logical consequence in such a situation; but the State which makes the law absolves itself.

6.8.1 The principle of compensating victims of crime has for long been recognized by the law though it is recognized more as a token relief rather than part of a punishment or substantial remedy. When the sentence of fine is imposed as the sole punishment or an additional punishment, the whole or part of it may be directed to be paid to the person having suffered loss or injury as per the discretion of the Court (Section 357 Cr.PC). Compensation can be awarded only if the offender has been convicted of the offence with which he is charged.

xxx xxx xxx

6.8.7 Sympathizing with the plight of victims under Criminal Justice administration and taking advantage of the obligation to do complete justice under the Indian Constitution in defense of human rights, the Supreme Court and High Courts in India have of late evolved the practice of awarding compensatory remedies not only in terms of money but also in terms of other appropriate reliefs and remedies. Medical justice for the Bhagalpur blinded victims, rehabilitative justice to the communal violence victims and compensatory justice to the Union Carbide victims are examples of this liberal package of reliefs and remedies forged by the apex Court. The recent decisions in Nilabati Behera V. State of Orissa (1993 2 SCC 746) and in

Chairman, Railway Board V. Chandrima Das are illustrative of this new trend of using Constitutional jurisdiction to do justice to victims of crime. Substantial monetary compensations have been awarded against the instrumentalities of the state for failure to protect the rights of the victim.

6.8.8 These decisions have clearly acknowledged the need for compensating victims of violent crimes irrespective of the fact whether offenders are apprehended or punished. The principle invoked is the obligation of the state to protect basic rights and to deliver justice to victims of crimes fairly and quickly. It is time that the Criminal Justice System takes note of these principles of Indian Constitution and legislate on the subject suitably.""

10. In Re: State of Assam & 2 Others (PIL (Suo Motu) No. 26/2013) vide judgement dated 24.4.2013, a Division Bench of Gauhati High Court observed :

"We have heard learned counsel for the parties on the issue whether in absence of any prohibition under the scheme, interim compensation ought to be paid at the earliest to the victim irrespective of stage of enquiry or trial, either on application of the victim or suo motu by the Court.

In **Savitri v. Govind Singh Rawat,** (1985) 4 SCC 337, question of interim maintenance under Section 125 Cr.P.C. was considered and it was observed :

"**3.** It is true that there is no express provision in the Code which authorises a Magistrate to make an interim order directing payment of maintenance pending disposal of an application for maintenance. The Code does not also expressly prohibit the making of such an order. The question is whether such a power can be implied to be vested in a Magistrate having regard to the nature of the proceedings under Section 125 and other cognate provisions found in Chapter IX of the Code which is entitled "Order For Maintenance of Wives, Children and Parents". Section 125 of the Code confers power on a Magistrate of the first class to direct a person having sufficient means but who neglects or refuses to maintain (i) his wife, unable to maintain herself, or (ii) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or (iii) his legitimate or illegitimate child (not being a married daughter) who

has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself or (iv) his father or mother, unable to maintain himself or herself, upon proof of such neglect or refusal, to pay a monthly allowance for the maintenance of his wife or such child, father or mother, as the case may be, at such monthly rate not exceeding five hundred rupees in the whole as such Magistrate thinks fit. Such allowance shall be payable from the date of the order, or, if so ordered from the date of the application for maintenance. Section 126 of the Code prescribes the procedure for the disposal of an application made under Section 125. Section 127 of the Code provides for alteration of the rate of maintenance in the light of the changed circumstances or an order or decree of a competent civil court. Section 128 of the Code deals with the enforcement of the order of maintenance. It is not necessary to refer to the other details contained in the above-said provisions.

6. In view of the foregoing it is the duty of the court to interpret the provisions in Chapter IX of the Code in such a way that the construction placed on them would not defeat the very object of the legislation. In the absence of any express prohibition, it is appropriate to construe the provisions in Chapter IX as conferring an implied power on the Magistrate to direct the person against whom an application is made under Section 125 of the Code to pay some reasonable sum by way of maintenance to the applicant pending final disposal of the application. It is quite common that applications made under Section 125 of the Code also take several months for being disposed of finally. In order to enjoy the fruits of the proceedings under Section 125, the applicant should be alive till the date of the final order and that the applicant can do in a large number of cases only if an order for payment of interim maintenance is passed by the court. Every court must be deemed to possess by necessary intendment all such powers as are necessary to make its orders effective. This principle is embodied in the maxim “ubi aliquid conceditur, conceditur et id sine quo res ipsa esse non potest” (Where anything is conceded, there is conceded also anything without which the thing itself cannot exist). [Vide Earl Jowitt's Dictionary of English Law, 1959 Edn., p. 1797.] Whenever anything is required to be done by law and it is found impossible to do that thing unless something not authorised in express terms be also done then that something else will be supplied by necessary intendment. Such a construction though it may not always be admissible in the present case however would advance the object of the legislation

under consideration. A contrary view is likely to result in grave hardship to the applicant, who may have no means to subsist until the final order is passed. There is no room for the apprehension that the recognition of such implied power would lead to the passing of interim orders in a large number of cases where the liability to pay maintenance may not exist. It is quite possible that such contingency may arise in a few cases but the prejudice caused thereby to the person against whom it is made is minimal as it can be set right quickly after hearing both the parties. The Magistrate may, however, insist upon an affidavit being filed by or on behalf of the applicant concerned stating the grounds in support of the claim for interim maintenance to satisfy himself that there is a prima facie case for making such an order. Such an order may also be made in an appropriate case ex parte pending service of notice of the application subject to any modification or even an order of cancellation that may be passed after the respondent is heard. If a civil court can pass such interim orders on affidavits, there is no reason why a Magistrate should not rely on them for the purpose of issuing directions regarding payment of interim maintenance. The affidavit may be treated as supplying prima facie proof of the case of the applicant. If the allegations in the application or the affidavit are not true, it is always open to the person against whom such an order is made to show that the order is unsustainable. Having regard to the nature of the jurisdiction exercised by a Magistrate under Section 125 of the Code, we feel that the said provision should be interpreted as conferring power by necessary implication on the Magistrate to pass an order directing a person against whom an application is made under it to pay a reasonable sum by way of interim maintenance subject to the other conditions referred to therein pending final disposal of the application. In taking this view we have also taken note of the provisions of Section 7(2)(a) of the Family Courts Act, 1984 (Act 66 of 1984) passed recently by Parliament proposing to transfer the jurisdiction exercisable by Magistrates under Section 125 of the Code to the Family Courts constituted under the said Act."

Above view has been reiterated, inter alia, in ***Shail Kumari Devi v. Krishan Bhagwan Pathak***, (2008)9 SCC 632.

We are of the view that above observations support the submission that interim compensation ought to be paid at the earliest so that immediate need of victim can be met. For determining the amount of interim compensation, the Court may have regard to the facts and

circumstances of individual cases including the nature of offence, loss suffered and the requirement of the victim. On an interim order being passed by the Court, the funds available with the District/State Legal Services Authorities may be disbursed to the victims in the manner directed by the Court, to be adjusted later in appropriate proceedings. If the funds already allotted get exhausted, the State may place further funds at the disposal of the Legal Services Authorities."

11. In view of the above, we are of the view that crime having admittedly taken place, the petitioner is entitled to interim compensation without prejudice to claim for final compensation, if any, being preferred at an appropriate forum. Accordingly, we direct payment of interim compensation of Rs.50,000/- (Rupees Fifty Thousand) to the petitioner, who is the father of the deceased by way of a Bank Draft. The payment may be made within two months from the date of receipt of a copy of this order which will be the responsibility of the Home Secretary to the State of Odisha. The petition is disposed of. Free copy of this order be given to the learned Government Advocate for compliance

Writ petition disposed of.

2014 (I) ILR - CUT- 221

A. K. GOEL, CJ & DR. A. K. RATH, J.

W.P.(C) NOS.21320/12 & 17155/13 (Dt.16.12.2013)

I.G., OF REGISTRATION-CUM-STAMP COLLECTOR, ODISHA, CTC & ORS. .....Petitioners

.*Vrs.*

M/S. BRIGHT PROJECTS PVT. LTD. .....Opp.Party

STAMP ACT, 1899 – S. 47-A

Provision U/s. 47-A of the Act comes into operation only when the value of the property has not been genuinely set forth and was

under valued and not merely when the value of the transaction was less than the "Bench Mark Valuation".

In this case since the valuation of the transaction was approved by the State authorities including the R.D.C. there is no doubt about the genuineness of the consideration which excludes the scope of invocation of Section 47-A of the Act – Held, the Collector can not interfere with the genuine valuation of the impugned transaction only on the ground that the same was less than the market value calculated with reference to the "Bench Mark Valuation" fixed by the State.

(Paras 5,9,12)

Case laws Referred to:-

1.(2009) 14 SCC 716 : (Residents Welfare Association, Noida-V- State of U.P. & Ors.)
2.(1981) 4 SCC 173 : (K.P. Varghese-V- Income Tax Officer, Ernakulam & Anr.)
3.(1996) 1 SCC 609 : (State of Punjab & Ors.-V- Mohabir Singh & Ors.).
4.(1999) 5 SCC 62 : (Ramesh Chand Bansal & Ors.-V- District Magistrate/Collector, Ghaziabad & Ors.)
5.(2004) 2 SCC 9 : (R. Sai Bharathi-V- J. Jayalalitha & Ors.).

For Petitioners - Mr. B.N. Bhuyan, Addl. Govt. Advocate.
For Opp.Party - Mr. Sandipani Misra

JUDGMENT AND ORDER

A.K.GOEL, CJ.

1. Since both these petitions are between the same parties and involve same question of law, both are taken together. Question for consideration is whether the Collector can interfere with genuine valuation of a transaction only on the ground that the same was less than the market value calculated with reference to the 'Bench Mark Valuation' fixed by the State.

2. In W.P.(C) No. 21320 of 2012, filed by the IG of Registration, challenge has been made to the order dated 24.12.2011, Annexure-6, passed by the District Judge, Bhubaneswar in FAO No. 68 of 2011 quashing action of Collector demanding 'deficit' stamp duty and registration fee. On the other hand, the petitioner in W.P.(C) No. 17155/2013 has challenged the proceedings, for realization of the dues towards deficit stamp duty and registration fee, initiated in violation of the order of the District Judge, which has been impugned in the first writ petition.

3. The Managing Committee of Shree Jagannath Temple sold the land in question in favour of M/s. Bright Projects Pvt. Ltd.-opposite party for a sum of Rs. 2,86,37,500/- by way of negotiation. The land was earlier sought to be sold by way of public auction, but in absence of sufficient bidders, the auction was not held and by way of negotiation the land was sold to the opposite party for amount higher than the reserve price. 50% of the amount was deposited on 08.10.2007 and the remaining amount on 18.12.2007. The sale deed was executed after approval of the competent authority, on 29.02.2008. Even though the stamp duty was paid with reference to the said consideration money, the registering authority took recourse to Section 47-A of the Indian Stamp Act, 1899 (hereinafter called 'the Act') on the ground that the said consideration was less than the market value with reference to the 'Bench Mark Valuation' and the Collector determined the market value of the land at Rs. 4,58,20,000/- and asked the opposite party to deposit the deficit stamp duty with reference to the said valuation. The opposite party preferred an appeal before the District Judge, Bhubaneswar questioning the order of the Collector on the ground that the valuation has been duly approved by the Collector and the State Government while approving the transaction in question under the provisions of Shree Jagannath Temple Act, 1965. The transaction being genuine, the Stamp duty will be attracted on the consideration money and not on the Bench Mark Valuation notified in accordance with the Orissa Stamp Rules, 1952. Mere fact that consideration was less than market value was no ground to invoke Section 47-A in absence of under valuation. Upholding the said plea, the learned District Judge observed:

> "6. There is no dispute that the land sold belongs to Shri Shri Jagannath Mahaprabhu Bije, Puri and the sale has been effected by public auction. It has been conducted by the concerned Collector and the valuation has been approved by the State Government. The Bench Mark Valuation is also determined by the State Government with the help of a Committee headed by the Collector. Therefore, the valuation of the land fixed in this case by the Collector is deemed to be the valuation fixed by the State Government, after the two public auctions had failed due to unavailability of bidders. The sale deed has been executed on 29.2.2008. The Bench Mark Valuation followed in this case came into force on 28.2.2008. Had the sale deed been executed in time, the Bench Mark Valuation could not have affected the same. Therefore, it is due to the authorities that the execution of the sale deed has been delayed. As submitted by the appellant if the demand is accepted, the entire auction process and the sale of the land by public auction will be seriously disturbed

and shall stand nullified. Since, the entire process of auction sale was allowed to take place without any objection, the learned Stamp Collector cannot do so at this stage."

4. We have heard the learned counsel for the parties.

Learned Addl. Government Advocate, for the petitioner, submits that the order of the Collector was based on three different sale deeds in respect of adjacent land and the market value so arrived at could not be interfered with by the District Judge as the appellate authority. He submits that Bench Mark Valuation, which came into force prior to registration of the sale deed, was binding and the sale price mentioned in the sale deed being lesser than the said valuation, the deficit stamp duty was required to be paid.

5. We are unable to accept this submission.

The basic fallacy in the submission is to treat the Bench Mark Valuation as conclusive to assume that there was under valuation and further to assume that even a genuine transaction and consideration attracted invocation of Section 47-A if the consideration was less than market value. Doing so is putting the cart before the horse. The submission is based on erroneous understanding of Section 47-A of the Act. The said provision comes into operation only when the value of the property has not been genuinely set forth and was under valued and not merely when the said consideration was less than the value determined with reference to the Bench Mark Valuation. Once the genuine consideration has been set forth, as in the instant case, even if the same was less than the value determined as per the Bench Mark Valuation, Section 47-A of the Act is not attracted. The Stamp duty is to be paid, under the charging provision of Section 3, as per the value of instrument. Section 47-A applies to the case of under valuation. The said provision is not attracted otherwise. The said statutory provision is as follows:

"47-A. Instruments under-valued how to be dealt with – (1) Where the registering officer under the Registration Act, 1908, while registering any instrument of conveyance, exchange, gift, partition or settlement has reasons to believe that the market value of the property which is the subject matter of such instrument has not been rightly set forth in the instrument or is less than the minimum value determined in accordance with the rules made under this Act, he shall, before registering such instrument, refer the matter to the Collector, with an intimation in writing to the person concerned, for

determination of the market value of such property and the proper duty payable thereon.

(2) On receipt of a reference under Sub-Section (1), the Collector shall, after giving the parties an opportunity of making their representations and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject-matter of such instrument, and the duty as aforesaid and the deficient amount, if any, shall be payable by the person liable to pay the duty.

…… (Underlining supplied)

6. The matter is no longer res-integra. In Residents Welfare Association, Noida Vs. State of Uttar Pradesh & Ors., (2009) 14 SCC 716, it was observed :

"19. From a bare perusal of sub-section (1) of Section 47-A of the Act, it is clear that if the market value of any property, which is the subject-matter of an instrument on which stamp duty is chargeable, as set forth in the instrument, is less than even the minimum value determined in accordance with the Rules made under this Act, the registering officer shall request the person to pay the deficit stamp duty and present the instrument again for registration. *At the same time, it should be kept in mind that it is not enough for the authorities for the purpose of invoking Section 47-A that the consideration amount stated in the instrument of sale is less than the prevailing market value but they must be satisfied that there is an attempt of undervaluation*. (emphasis added).

20. It is pertinent to mention that if the registering authority finds that the market value of the property presented for registration is higher than the one shown in the document, in that case, the registering authority after presentation of such instrument and before accepting the document for registration would ask the person liable to pay the required stamp duty, to pay the deficit amount as computed on the basis of the minimum value determined in accordance with the Rules and return the instrument for presenting the document again in accordance with Section 23 of the Registration Act.

44. A plain reading of Article 63 of Schedule 1-B to the Stamp Act would, however, show that the stamp duty chargeable to a document

is not on the market value of the property but on consideration indicated in the same. It is only the rate of duty, which is to be taken from Article 23. Therefore, if Article 63 of the Stamp Act is to be applied, duty shall be paid on the consideration of the amount of consideration shown in the deed itself and not on the market value of the land or the construction thereon. Therefore, it is clear from a reading of Article 63 that it would apply in case of a transfer of lease by way of an assignment and Article 23 applies in case of a conveyance by way of sale."

7. In K.P. Varghese Vs. Income Tax Officer, Ernakulam & Anr., (1981) 4 SCC 173, the question for consideration was whether Section 52 (2) of the Income Tax Act, 1961 will be attracted only when there is understatement of consideration or where the market value exceeded the consideration declared by the assessee.The said provision authorized the I.T.O. to substitute value of transaction for the declared value for calculating capital gain, where value declared was less than the market value. Language of the said provision was as follows:

"52. (1) xx xx xx.

(2) Without prejudice to the provisions of sub-section (1), if in the opinion of the Income Tax Officer the fair market value of a capital asset transferred by an assessee as on the date of the transfer exceeds the full value of the consideration declared by the assessee in respect of the transfer of such capital asset by an amount of not less than 15 per cent of the value declared, the full value of the consideration for such capital asset shall, with the previous approval of the Inspecting Assistant Commissioner, be taken to be its fair market value on the date of the transfer."

Having regard to the scheme of the law, it was held that interference with the valuation was permissible only for the purpose of checking evasion of tax. The Income Tax Officer could determine the market value only if there was undervaluation. Mere fact that value mentioned in the document was less than the market value was not enough to invoke the power by the Income Tax Officer to determine the market value. In paragraph 13 of the judgment, the Court observed:

"**13.** Thus it is not enough to attract the applicability of sub-section (2) that the fair market value of the capital asset transferred by the assessee as on the date of the transfer exceeds the full value of the consideration declared in respect of the transfer by not less

than 15 per cent of the value so declared, but it is furthermore necessary that the full value of the consideration in respect of the transfer is understated or in other words, shown at a lesser figure than that actually received by the assessee. Sub-section (2) has no application in case of an honest and bona fide transaction where the consideration in respect of the transfer has been correctly declared or disclosed by the assessee, even if the condition of 15 per cent difference between the fair market value of the capital asset as on the date of the transfer and the full value of the consideration declared by the assessee is satisfied. If therefore the Revenue seeks to bring a case within sub-section (2), it must show not only that the fair market value of the capital asset as on the date of the transfer exceeds the full value of the consideration declared by the assessee by not less than 15 per cent of the value so declared, but also that the consideration has been understated and the assessee has actually received more than what is declared by him. There are two distinct conditions which have to be satisfied before sub-section (2) can be invoked by the Revenue and the burden of showing that these two conditions are satisfied rests on the Revenue. It is for the Revenue to show that each of these two condition is satisfied and the Revenue cannot claim to have discharged this burden which lies upon it, by merely establishing that the fair market value of the capital asset as on the date of the transfer exceeds by 15 per cent or more the full value of the consideration declared in respect of the transfer and the first condition is therefore satisfied. The Revenue must go further and prove that the second condition is also satisfied. Merely by showing that the first condition is satisfied, the Revenue cannot ask the court to presume that the second condition too is fulfilled, because even in a case where the first condition of 15 per cent difference is satisfied, the transaction may be a perfectly honest and bona fide transaction and there may be no understatement of the consideration. The fulfilment of the second condition has therefore to be established independently of the first condition and merely because the first condition is satisfied, no inference can necessarily follow that the second condition is also fulfilled. Each condition has got to be viewed and established independently before sub-section (2) can be invoked and the burden of doing so is clearly on the Revenue. It is a well-settled rule of law that the onus of establishing that the conditions of taxability are fulfilled is always on the Revenue and the second condition being as much a condition of taxability as the first, the burden lies on the Revenue to show that there is understatement of the consideration and the second

condition is fulfilled. Moreover, to throw the burden of showing that there is no understatement of the consideration, on the assessee would be to cast an almost impossible burden upon him to establish the negative, namely, that he did not receive any consideration beyond that declared by him."

8. The above reasoning fully applies to the interpretation of Section 47-A of the Act.

9. In State of Punjab & Ors. Vs. Mohabir Singh & Ors., (1996) 1 SCC 609, it was held that Bench Mark Valuation was only to alert the registering authority regarding genuineness of the value. If the value has been otherwise truly set forth, mere fact that the value of the transaction was less than the Bench Mark Valuation was not enough to invoke Section 47-A. The Court observed:

> **"5.** The guidelines provided by the State would only serve as prima facie material available before the Registering Authority to alert him regarding the value. It is common knowledge that the value of the property varies from place to place or even from locality to locality in the same place. No absolute higher or minimum value can be predetermined. It would depend on prevailing prices in the locality in which the land covered by the instrument is situated. It will be only on objective satisfaction that the Authority has to reach a reasonable belief that the instrument relating to the transfer of property has not been truly set forth or valued or consideration mentioned when it is presented for registration. The ultimate decision would be with the Collector subject to the decision on an appeal before the District Court as provided under sub-section (4) of Section 47-A.
>
> **6.** It would thus be seen that the aforesaid guidelines would inhibit the Registering Authority to exercise his quasi-judicial satisfaction of the true value of the property or consideration reflected in the instrument presented before him for registration. The statutory language clearly indicates that as and when such an instrument is presented for registration, the Sub-Registrar is required to satisfy himself, before registering the document, whether the true price is reflected in the instrument as it prevails in the locality. If he is so satisfied, he registers the document. If he is not satisfied that the market value or the consideration has been truly set forth in the instrument, subject to his making reference under sub-section (1) of Section 47-A, he registers the document. Thereafter, he should

make a reference to the Collector for action under sub-sections (2) and (3) of Section 47-A. Accordingly, we hold that the offending instructions are not consistent with sub-section (1) of Section 47-A. It would, therefore, be open to the State Government to revise its guidelines and issue proper directions consistent with the law."

10. Again in Ramesh Chand Bansal & Ors. Vs. District Magistrate/Collector, Ghaziabad & Ors., (1999) 5 SCC 62 it was observed:

"**5.** The object of the Indian Stamp Act is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. This is to protect the State revenue. It is a matter of common knowledge that in order to escape such duty by unfair practice, many a time undervaluation of a property or lower consideration is mentioned in a sale deed. The imposition of stamp duty on sale deeds is on the actual market value of such property and not the value described in the instrument. Thus, an obligation is cast on the authority to properly ascertain its true value for which he is not bound by the apparent tenor of the instrument. He has to truly decide the real nature of the transaction and value of such property. For this, the Act empowers an authority to charge stamp duty on the instrument presented before it for registration. The market value of a property may vary from village to village, from location to location and even may differ from the sizes of area and other relevant factors. This apart there has to be some material before such authority as to what is the likely value of such property in that area. In its absence it would be very difficult for such registering authority to assess the valuation of such instrument. It is to give such support to the registering authority that Rule 340-A is introduced. Under this the Collector has to satisfy himself based on various factors mentioned therein before recording the circle rate, which would at best be the prima facie rate of that area concerned. This is merely a guideline which helps the registering authority to assess the true valuation of a transaction in an instrument. This gives him material to test prima facie whether the description of valuation in an instrument is proper or not. Under Section 47-A introduced by the U.P. Act 11 of 1969 conveys how a registering authority is to deal in a case where there is a divergence in the valuation between what is described in an instrument and in the circle rate."

11. In the case of R. Sai Bharathi Vs. J. Jayalalitha & Ors., (2004) 2 SCC 9, the Court observed:

"*22*. … The authorities cannot regard the guideline valuation as the last word on the subject of market value. …

* * *

24. … It is clear, therefore, that guideline value is not sacrosanct as urged on behalf of the appellants, but only a factor to be taken note of, if at all available in respect of an area in which the property transferred lies….."

12. In the present case, the valuation had been duly approved by the State authorities. As the Managing Committee of Shree Jagannath Temple itself is controlled by the State and valuation was also approved by the Revenue Divisional Commissioner (RDC), who is the Chief Administrator of Shree Jagannath Temple, there could be no question about the genuineness of the consideration. This excluded the scope of invocation of Section 47-A of the Act.

In view of the above, there is no merit in the first writ petition i.e. W.P.(C) No. 21320 of 2012 filed by the IG Registration and accordingly the same is dismissed.

13. In W.P. (c) No. 17155 of 2013, the grievance of the petitioner, who is the opposite party in the first writ petition, is that in spite of judgment of the appellate authority i.e. District Judge, Bhubaneswar, recovery certificate was issued and property of the petitioner was attached for recovery of deficit stamp duty by order of the Collector even when the order of the Collector has been set aside in the appeal.

14. Documents annexed to the writ petition clearly support the stands of the petitioner. It is rather surprising that the State authority has chosen to act in flagrant violation of law and taken steps to implement the order of the Collector which has been set aside in appeal. This action being clearly illegal and contemptuous has to be quashed. Since the order of the appellate authority has already been upheld above in W.P.(C) No. 21320/2012, the second petition i.e. W.P.(C) No. 17155 of 2013 has to be allowed. Both these petitions stand disposed of accordingly.

Writ petitions disposed of.

2014 (I) ILR - CUT- 231

M. M. DAS, J

CRLMC. NO. 150 OF 2009 (Dt.29.07.2013)

BINOD BIHARI TRIPATHY & ANR. .....Petitioners

.Vrs.

PRAVATI RANI TRIPATHY & ORS. .....Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.482

Quashing of proceeding U/ss 18, 19, 20 of the protection of women from Domestic Violence Act, 2005 – Ground is, the cause of action for the complaint arose in the year, 2002 where as the Act came in to force in 2006.

Considering the wide nature of redressal provided under the Act as defined in Section 3 thereof this Court finds that the nature of the complaint lodged by the respondents in the present Case can not be thrown out just because such allegations commenced from the year, 2002 when the act did not come in to force but the omissions or commissions as alleged in the application are continuing in nature so as it continued even on the date of filing of the application and it cannot be said that the application should be thrown out in limini – Held, this Court is not inclined to quash the impugned proceeding.

For Petitioners - M/s. Trilochan Nanda & S.N. Mishra.

For Opp.Parties - M/s. S. Mishra, B. Mohanty, A.K. Mahakud.

M. M. DAS, J. The petitioners in this application have sought for quashing the criminal proceeding, being CMC No. 175 of 2008, pending before the learned S.D.J.M., Baragarh filed by the opposite parties under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act'). It is contended by the petitioners that a bare reading of the complaint filed under Section 12 of the Act would go to show that the opposite parties as petitioners have prayed for Residence Order under Section 19 of the Act and/or direction to the respondents (present petitioners) to pay monetary reliefs under Section 20 of the Act and pass such interim orders as the court may deem just and proper. It is further contended that a partition suit was filed by the opposite parties claiming their share of the joint family property, which has been decreed against which the

first appeal (RFA No. 167 of 2007) has been filed before this Court to which a cross appeal has also been filed. The said RFA has been disposed of by judgment passed today.

2. Learned counsel for the petitioners submitted that since a share has been allotted in favour of opposite party no. 1-complainant, it cannot be said that they have no source of income in any manner whatsoever. He further submits that on 12.7.2002 i.e. on the 14th day of death of Durga Charan Tripathy, who is the husband of opposite party no. 1, she expressed her willingness to visit her parents' house for a few days and also took the young child (opposite party no. 2) with her and stayed back at Bargarh in her parents' house in spite of repeated requests by the petitioners to come back to their house. She filed a suit for partition, being T.S. No. 75 of 2002, before the learned Civil Judge (Senior Division), Bolangir in the year 2002. As per the decree passed, she is entitled to a share in the joint family property and the share out of the amount payable on the insurance policy of her deceased husband with the L.I.C. As stated earlier, an appeal was preferred against the said decree, which has been disposed of by judgment passed today. Applications have been filed seeking reliefs under Sections 18, 19, 20, 21 and 22 of the Act. It is contended by the petitioners that the conditions precedent for maintaining an application under the Act are that on the date of filing of the complaint, the female must be living in a relationship and in view of the severance of status by means of partition, there is no relationship in existence between the complainant and the respondents for continuing the proceeding. Further, in view of the partition of the properties and in view of the separate residence of the complainant, Sections 18 and 19 have no application for prosecution of the present case. It is further submitted that Section 20 of the Act deals with monetary relief including the maintenance. Sub-section 1(a), (b) and (c) have no application to the present case. Sub-section 1(d) deals with maintenance. As per Hindu Adoption and Maintenance Act and as per Section 125 Cr.P.C., the maintenance is to be claimed against the husband and not against the father-in-law and mother-in-law. Such maintenance cannot be granted as the complainants have succeeded to their share both in the immoveable properties as well as over proceeds of the L.I.C. policy. A further plea has been raised that according to the complainants-opposite parties, the cause of action/incident arose on 12.7.2002 whereas the Act came into force on 26.10.2006. The case under the said Act was filed on 20.9.2008. Therefore, the complaint itself is not maintainable.

3. Learned counsel for the opposite parties, on the contrary, submitted that Sections 18, 19, and 20 clearly show that appropriate Protection Order

can be passed under Sections 18 and 19, and maintenance can be awarded under Section 20 of the Act. "Domestic Violence" has been elaborately defined in Section 3 of the Act which includes overt act amounting to omission or commission or conduct of the respondent causing harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand, which has the effect of threatening the aggrieved person or any person related to her by any conduct, otherwise injures or causes harm, whether physical or mental. The phrases "Physical Abuse", "Sexual Abuse" and "Verbal and Emotional Abuse" have also been defined in the said section.

4. Considering the wide nature of redressal provided under the Act as defined in Section 3 thereof, I find that the nature of the complaint lodged by the respondents in the present case cannot be thrown out just because such allegations commenced from the year, 2002 when the Act did not come into force as I find that the omissions or commissions as alleged in the application are continuing in nature and therefore, as it continued even on the date of filing of the application, it cannot be said that the application should be thrown out in limini. I am, therefore, not inclined to quash the said proceeding numbered as CMC No. 175 of 2008 pending before the learned S.D.J.M., Bargarh, but, however, I direct that while hearing the case, the learned S.D.J.M., Bargarh shall take into consideration the fact that in the partition suit filed by the opposite parties-complainants, a decree has been passed allotting the share of the complainants both in the immoveable properties as well as with regard to the amount under the Insurance Policy. The CRLMC is accordingly disposed of.

Application disposed of

2014 (I) ILR - CUT- 233

M. M. DAS, J.

R.S.A. NO. 140 OF 2011 (Dt.05.09.2013)

THE DEPUTY GENERAL MANAGER (HR),INDIAN OIL CORPORATION LTD.(MD) & ANR. …. …. Appellants

.*Vrs.*

ANUP KUMAR PANDA & ANR. ……Respondents

A. CIVIL PROCEDURE CODE, 1908 - S.11

Writ petition disposed of without any finding with regard to the actual date of birth of respondent No.1 – Moreover, question of determination of the date of birth being a disputed question of fact, could not have been decided in a writ petition – Held, filing of suit for the said purpose shall not operate as resjudicata. (Para -14)

B. SPECIFIC RELIEF ACT, 1963 - S.34

Suit for declaration of status – Date of birth being a matter relating to the status of a person, the suit for correction of the date of birth is maintainable in the Civil Court but not the writ petition under Article 226 of the Constitution. (Paras 14,15)

Case laws Referred to:-

1.108 (2009)CLT 267 : (Anup Kumar Panda-V- Board of Secondary Education & Ors.)
2.2009(Supp-I)OLR 702 : (Union of India, represented by the Chief Post Master General Cuttack & Ors.-V- Sri Gourananda Deo).
3.AIR 2004 SC 2186 : (Escorts Farms Ltd., previously as Escorts Farms (Ramgarh) Ltd.-V- Commissioner, Kumaon Division, Nainital, U.P.)
4.AIR 2009 SC 2301 : (Madhvi Amma Bhawani Amma & Ors.-V- Kunjikutty Pillai Meenakshi Pillai & Ors.).

For Appellants - M/s. Dr. A.K. Rath, D. Mohanty, R.R.Sahoo, S.M. Patnaik, A.K. Nath & S. Nanda.
For Respondents- M/s. S.P. Mishra, Sr. Advocate, S. Honda, B. Mohanty, B. S. Panigrahi, A.K. Dash & A.P. Mishra (For Res.No1)
M/s. P.K. Mohanty, Mrs. J. Mohanty, D.N. Mohapatra, P.K. Nayak & S.N. Dash, (for Res.No.2).

M.M.DAS, J. This Second Appeal has been filed against a reversing judgment, which has been admitted on the following substantial question of law:-

> "Whether the learned lower appellate court is justified in declaring the date of birth of the plaintiff as 23.4.1975 instead of 23.4.1979 as reflected in the High School Certificate since the same issue has

been conclusively decided by this Court by judgment dated 3.7.2009 passed in W.P. (C) No. 2161 of 2007 and operate as res judicata" ?

2. In order to appreciate the contentions and submissions of the respective parties, it is necessary to state in brief the history of the proceeding, from which the present appeal arises. On 08.11.1994, the appellants Indian Oil Corporation Limited (in short "IOCL") made a requisition to the District Employment Officer, Balasore for recommending the names to fill up the post of Junior Operator (F). In response to the said letter, the District Employment Officer sponsored the name of the respondent No.1 – plaintiff by letter dated 17.01.1995. On 21.06.1995, the respondent No.1 filled up an application form for employment along with an attestation form marked as Exts. A and B, in his own handwriting indicating that his date of birth is "23.04.1975". He also submitted a Provisional Certificate-cum- Mark-sheet purportedly issued on 02.07.1993 by the Board of Secondary Education, Odisha marked as Ext. D. The respondent No.1 received the original Board of Secondary Education Certificate on 31.08.1995, wherein his date of birth has been mentioned as "23.04.1979" (Ext. C).

3. The respondent No.1 joined IOCL as Junior Operator (F) on 26.05.1996. On 31.10.2005, a complaint was addressed to the Superintendent of Police, C.B.I., Bhubaneswar with a copy endorsed to the Central Vigilance Commission, New Delhi as well as the Hon'ble Chief Justice of this Court alleging that the respondent No.1, Emp. No.32411 working at Indane Bottling Plant, Balasore of the IOCL has secured an employment as Junior Operator giving a forged certificate, in which his date of birth has been mentioned as "23.04.1975", though his actual date of birth is "23.04.1979" in the original Board Certificate. The complainant further stated that the respondent No.1 has joined duty at Balasore Bottling Plant at the age of 16 years, which was not permissible. The said complaint was forwarded by the Superintendent of Police, C.B.I. to the Chief Vigilance Officer, IOCL, New Delhi requesting to take necessary action. It was registered as VM-51/05 – ER and forwarded to the Deputy General Manager (Vigilance) Mktg. (ER) for detailed investigation. The case was allotted to one Debasis Choudhury, Senior Vigilance Officer, who has been examined as D.W.1 in the suit, for necessary investigation.

4. During the investigation, he found that the actual date of birth of the petitioner is "23.04.1979" and not "23.04.1975". The Assistant Secretary, Board of Secondary Education also by his letter dated 30.11.2005 (Ext.G) confirmed the date of birth of the respondent No.1 to be "23.04.1979". The Headmaster of Nilagiri Road High School, by his letter dated 09.12.2005 also confirmed this fact. The Investigating Officer, therefore, recorded the

finding that the date of birth of the respondent No.1 is "23.04.1979" and not "23.04.1975" and further at the time of appointment, the respondent No.1 has given a fake/manipulated provisional certificate of High School Examination showing his date of birth as "23.04.1975". On the above finding, the Vigilance Department of IOCL recommended for initiation of a disciplinary proceeding against the respondent No.1 for major penalty under the Certified Standing Orders as applicable to him. Accordingly, charges were framed registering a disciplinary proceeding against the respondent No.1. The respondent No.1 submitted his explanation to the charges framed denying the same, which was found to be unsatisfactory. However, in his explanation, he admitted to have submitted the Provisional Certificate-cum-Mark-sheet. The respondent No.1 approached the State Consumer Disputes Redressal Commission, Odisha in C.C. No. 67 of 2006 claiming deficiency in service on the part of the Board of Secondary Education with regard to mentioning the wrong date of birth in his certificate. The said dispute was disposed of by the State Consumer Disputes Redressal Commission granting liberty to the respondent No.1 to file a fresh representation within a week before the Board of Secondary Education, which was directed to dispose of the same by the end of February, 2007 and communicate its decision. Such a representation was made by the respondent No.1 for correction of the date of birth, which was rejected by the Secretary, Board of Secondary Education, Odisha on 12.01.2007 in terms of Clause –39 of Section – VI of Chapter – X of the Board's Regulation. Being aggrieved by such action of the Board of Secondary Education, the respondent No.1 filed W.P.(C) No.2161 of 2007 making the following prayers :-

> "…….. Issue a Rule Nisi in the nature of certiorari calling upon the opposite parties toshow cause as to why the impugned charge sheet dated 23.08.2006 vide Annexure – 14 and letter dated 12.01.2007 vide Annexure – 17 issued by the Deputy General Manager (HR), Indian Oil Corporation Ltd. (MD), Eastern Region, Kolkata, Opposite party No.7 and the Secretary, Board of Secondary Education, opposite party No.1 shall not be quashed and if the opposite parties fail to show cause or show insufficient cause make the said Rule absolute.
>
> Issue a writ in the nature of Mandamus directing the Secretary, Board of Secondary Education, Orissa, opposite party No.1 to correct the petitioner's date of birth from 23.04.1979 to 23.04.1975……"

5. The Board of Secondary Education, DGM (HR) IOCL along with the Inspector of Schools, Balasore Circle, the District Inspector of Schools, Balasore and the Headmasters of three High Schools were impleaded as

opposite parties in the said writ application. Counter affidavits were filed on behalf of the appellants, who were opposite parties, as well as by the Board of Secondary Education

6. This Court disposed of the said writ application, i.e., (W.P.(C) No. 2161/2007) by judgment dated 03.07.2009, reported in 108 (2009) CLT 267 ***(Anup Kumar Panda v. Board of Secondary Education and others),*** in paragraphs – 5 & 7 whereof, it has been held as follows:-

> "5. …… the petitioner had filled up the application form in his own hand writing, for appearing in the High School Certificate examination, 1993 conducted by the Board, wherein the date of birth of the petitioner had been mentioned as 23.04.1979. The said application of the petitioner had been forwarded by the Headmaster of the concerned institution after due verification from the records of the school and on the basis of such details furnished in the application, the Board had recorded the same in its permanent records of Tabulation register and certificate register and certificate had been issued by the Board on the basis of such entry. Further as the petitioner was aware of his date of birth as 23.04.1979, as recorded in his admit card, provisional certificate cum memorandum of marks of original pass certificate supplied by the board in the year 1993, there is no possibility of the petitioner not knowing his date of birth, as recorded in those documents. Moreover, Clause – 39 of Section VI of Chapter – X of the Board's Regulation provides only for correction of clerical error or printing mistake in the certificate, which can be carried out within three years from the date of passing the examination. No objection having been raised by the petitioner with regard to his date of birth as recorded in the certificate issued by the Board till the year 2006, there was no scope for correcting the certificate at the belated stage. 7. Considering the submissions of the learned counsel of the parties and keeping in view the averments made in the counter affidavit filed on behalf of the Board – Opposite party No.1, the decision of the Board, rejecting the prayer of the petitioner for correction of date of birth cannot be faulted. So far as the challenge to the initiation of disciplinary proceeding by the Indian Oil Corporation Ltd., by issue of charge sheet against the petitioner, the same is premature. The writ petition is devoid of merits, the same is accordingly dismissed and the interim order dated 09.03.2007 stand vacated."

7. After disposal of the writ application, the respondent No.1, who was the petitioner, filed Misc. Case No.8469 of 2009 for modification of the

judgment. When the said Misc. Case was taken up, learned counsel for the respondent No.1, who was the petitioner, wanted to withdraw the said Misc. Case petition expressing his intention to seek remedies in the civil court. This Court disposed of the said Misc. Case with the following order:-

"Heard.

> This petition has been filed for modification of the judgment dated 3.7.2009. In course of the hearing, Mr. Mishra wants to withdraw this petition expressing his intention to seek remedies in the civil court. Law is well settled that there is no bar if the remedies are otherwise available.
>
> Without expressing any opinion, this Misc. Case is disposed of as withdrawn."
>
> Thereafter, the respondent No.1 filed Civil Suit No.756 of 2009– before the learned Civil Judge (Senior Division), Balasore with similar prayer as made in the writ application earlier. During pendency of the suit, the respondent No.1 filed interim application under Order – 39, Rule – 1 CPC, being, I.A. No.358 of 2009, to injunct the IOCL from taking any coercive action against him.

8. The learned trial court dismissed the said interim application, against which the respondent No.1 filed FAO No.99 of 2009 before the learned District Judge, Balasore. The learned Additional District Judge, Balasore heard the said FAO and by his order dated 07.12.2009, set aside the order of the learned trial court and directed the IOCL not to take any coercive action against the plaintiff till disposal of the suit and further directed the learned trial court to dispose of the suit within four weeks. The IOCL assailed the said order before this Court in W.P.(C) No.1395 of 2010 and this Court, by order dated 26.02.2010, set aside the order passed by the learned lower appellate court in the FAO and directed the learned trial court to dispose of the suit within four months holding that it is open to the authorities to proceed with the disciplinary proceeding, but final order in the said proceeding shall not be passed for a period of four months from that date or till completion of the trial, whichever is earlier and it is open to the authorities to pass final order thereafter. Subsequently, a Misc. Case was filed by the respondent No.1 in the aforesaid writ application for extension of time for disposal of the suit and for directing the IOCL not to take any coercive action against him till disposal of the suit. This Court, however, did not entertain the said Misc. Case, which was dismissed by order dated 30.06.2010. The IOCL proceeded with the disciplinary proceeding where the respondent No.1 was found guilty and the second show cause notice was served on him. On

considering the materials, ultimately the IOCL terminated the respondent No.1 from service. On such termination, the respondent No.1 sought for an amendment of the plaint by inserting a prayer to declare that the order of dismissal from service is a nullity and for a mandatory declaration for reinstatement in his original post. Such amendment was carried out and the suit was thereafter tried by framing as many as eight issues. Issue No.3 was, as to whether the suit is hit under the principle of res judicata and estoppel. It is the finding on this issue, which is under challenge by the appellants and the substantial question of law has been framed in this regard.

9. Dr. A.K. Rath, learned counsel for the appellants contended that the finding of this Court in W.P.(C) No.2161 of 2007, wherein this Court conclusively held that the date of birth of the respondent No.1 was mentioned as "23.04.1979" in the certificate granted by the Board of Secondary Education and such date of birth was mentioned in the application filled up by the respondent no. 1 to appear in the said examination, which was forwarded by the Headmaster of the concerned institution after due verification from the record of the School and on that basis, such date of birth has been recorded in the permanent records of the Tabulation Register and certificate register and certificate has been issued by the Board on the basis of such entry which is a conclusive finding, there was no scope for the civil court to readjudicate this issue, as the same was barred by res judicata. Dr. Rath, learned counsel, therefore, submitted that the learned trial court rightly dismissed the suit, but the learned lower appellate court, on a wrong notion of law, came to the conclusion that this Court only declined to correct the certificate in its judgment passed in the writ application, at a belated stage, as no prayer for correction of the certificate was made till 2006 and the civil suit for declaration is not barred by res judicata, which is very much maintainable. It was further contended by him that the learned lower appellate court misread the law laid down in the case of ***Union of India, represented by the Chief Post Master General, Cuttack and others v. Sri Gourananda Deo***, 2009 (Supp.-I) OLR 702.

10. Mr. S.P. Mishra, learned senior counsel appearing for the respondent No.1, however, on the contrary, contended that question of applying the principle of res judicata in the facts of the present case does not arise at all. He submitted that the learned trial court in paragraph – 20 of the judgment, while dealing with the issue No.4 erroneously held that the judgment of this Court pronounced in the writ application will stand as a bar for the civil suit as well as it will act as res judicata and principle of estoppel will apply. While supporting the judgment of the learned lower appellate court, Mr. Mishra submitted that this Court, in the earlier writ application, has not decided the

actual date of birth of the respondent No.1, but accepting the order of rejection of the representation of the respondent No.1 by the Board of Secondary Education, dismissed the writ application. Hence, the factual issue with regard to the date of birth of the respondent No.1 was never decided by this Court in the earlier writ application. He further contended that res judicata is the doctrine, which is applied to give finality to a lis. The doctrine in substance means that an issue or a point decided and attaining finality should not be allowed to be reopened and re-agitated in a subsequent lis. The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject matter or "status" and "res judicata" literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment."

11. Section – 11 of CPC engrafts this doctrine with a purpose that "a final judgment rendered by a Court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". This view has been fortified in the case of ***Escorts Farms Ltd., previously known as Escorts Farms (Ramgarh) Ltd. v. Commissioner, Kumaon Division, Nainital, U.P.,*** AIR 2004 SC 2186.

12. Question of applicability of the doctrine of res judicata is always a mixed question of fact and law. The issue raised between the same parties in an earlier lis requiring the factual finding, if adjudicated by a competent court of law having jurisdiction to decide such issue, the same cannot be re-agitated in a subsequent proceeding. With regard to the applicability of the principle of res judicata, it has been held in the case of ***Madhvi Amma Bhawani Amma and others v. Kunjikutty Pillai Meenakshi Pillai and others***, AIR 2000 SC 2301 as follows:-

> "In order to apply the general principle of res judicata Court must first find, whether an issue in a subsequent suit, was directly and substantially in issue in the earlier suit or proceeding, was it between the same parties, and was it decided by such Court. Thus there should be an issue raised and decided, not merely any finding on any incidental question for reaching such a decision. So if no suchissue is raised and if on any other issue, if incidentally any finding is recorded, it would not come within the periphery of the principle of res judicata".

13. It may be mentioned here that in the writ application filed before this Court, i.e., W.P.(C) No.2161 of 2007, the respondent No.1 was the petitioner

challenging the order passed by the respondent No.2 rejecting the prayer to correct the date of birth in the Board certificate as "23.04.1975" instead of "23.04.1979". In the writ application, the Board/present respondent No.2, having appeared, filed the counter affidavit with a plea of limitation stating that Clause – 39 of Section – VI of Chapter – X of Board's Regulation provides only for correction of clerical error or printing mistake in the certificate, which can be carried out within three years from the date of passing of the examination. It was also stated that no objection having been raised by the writ petitioner with regard to his date of birth as recorded in the certificate issued by the Board till the year 2006,there was no scope for correcting the certificate at a belated stage. Considering the aforesaid averments, this Court confirmed the order of the Board rejecting the prayer of the respondent No.1 to correct the date of birth. However, after dismissal of the writ application, the respondent No.1 approached this Court by filing a Misc. Case registered as Misc. Case No.8469 of 2009 for modification of the order dated 03.07.2009 dismissing the writ application. This Court, by order dated 24.07.2009, disposed of the said Misc. Case with the observation that law is well settled that there is no bar, if the remedies are otherwise available. The aforesaid observation was made, as the respondent No.1, in his application for modification, prayed for liberty of this Court to approach the civil court. Thereafter, the present suit was filed.

14. The writ application was disposed of, but there was no finding on the issue with regard to the actual date of birth of the respondent No.1. That apart, the question of determination of the date of birth being a disputed question of fact, the same could not have been decided by this Court in exercise of its certiorari jurisdiction under Articles 226 or under Article 227 of the Constitution of India.

15. There being no finding on the actual date of birth of the respondent No.1, the subsequent civil suit, seeking for a declaration, is not barred by res judicata and is very much maintainable. Section – 34 of the Specific Relief Act provides for a declaration of the status of a person and the date of birth, being a matter in relation to status of a person and appertaining to his legal character, the present suit for correction of the date of birth is maintainable in the civil court and such declaration cannot be made in a writ application. The decision in the writ application having not been with regard to the issue as to which is the actual date of birth of the respondent No.1, the same shall not operate as res judicata in the present suit**.**

16. In the result, therefore, this Court finds that the substantial question of law should be answered in the affirmative as no error can be found in the

judgment of the learned lower appellate court in declaring the date of birth of the plaintiff as "23.4.1975" instead of "23.4.1979". The Second Appeal is, therefore, dismissed, but in the circumstances without any cost.

Appeal dismissed.

2014 (I) ILR - CUT- 242

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

W.P.(C) NO. 4397 OF 2011 (Dt.25.07.2013)

GANAPATI SUNANI ……..Petitioner

.Vrs.

D.M., L.I.C. OF INDIA, GANJAM & ORS. ……..Opp.Parties

SERVICE LAW – Removal from service – Petitioner was appointed as Sub-staff (Class-IV) in the office of the L.I.C. of India – Certificate submitted by him was not genuine – Punishment challenged on the ground that two persons of the same office facing identical charges were awarded lesser punishment – Held, delinquent officers similarly situated should be dealt with similarly if charges leveled against such employees is identical – Impugned order of removal and order of the Chairman L.I.C. of India are set aside – Direction issued to Opp.Parties to consider the question of awarding such other punishment against the petitioner as would be deem fit and proper - It is also made clear that the petitioner shall not be entitled to back wages for the period he was out of service.

Case law Relied on:-

2007 (8) Supreme 713 : (Akhilesh Ku. Singh-V- State of Jharkhand & Ors.).

For Petitioner - M/s. Pratyush R. Patnaik.
For Opp.Parties - M/s. S. Mohanty.

Heard Mr. Biswamohan Pattnaik, learned Senior Advocate for the petitioner and Mr. Sailelsh Chandra Samantaray for the opposite parties.

The petitioner calls in question the legality and propriety of the order of removal from service by the opposite parties.

The case of the petitioner, sans details, is that he was working as Badli Worker in the Branch Office of L.I.C. of India at Bhawanipatna. While the petitioner was continuing as such, the matter was referred to the National Industrial Tribunal for regularization of his service. Pursuant to the decision dated 17.4.1986, the opposite parties decided to give regular appointment to the part time workers, who had worked at least 70 days during the period from 1.1.1982 to 25.5.1985. Thereafter he filed an application before opposite party no.1 for regular appointment in class-IV post. It is stated that he was selected in the test examination held on 30.7.1989 and on the basis of such test appointment order was issued on 28.8.1989 appointing him as Sub-staff (Class-IV). It is further stated that he was prosecuting his studies in Radha Krishna High School, Santpur in the district of Kalahandi. He left the school on 2.8.1984 while prosecuting studies in class-X. Thereafter he obtained his transfer certificate. At the time of making application he had submitted the transfer certificate issued from Radha Krishna High School. While matter stood thus, a notice was issued on 18.4.1990 by the Branch Manager, L.I.C. of India, Bhawanipatna, asking him to submit his reply. It is stated therein that the Divisional Office in their letter dated 6.3.1990 had advised the petitioner to submit his reply within fifteen days from the date of receipt of the said letter. On 8.5.1990 the petitioner submitted his explanation stating therein that he had never submitted any certificate from Krupasindhu High School, Charbahal, but had submitted his School Leaving Certificate No. 44/2 dated 2.2.1985 from Radha Krishna High School, Santpur, wherein he studied up to Class-X. Being not satisfied with the explanation submitted by the petitioner, opposite party no.1 issued a charge sheet-cum- show cause on 15.5.1990 as per Regulation 39(1) of the L.I.C. of India (Staff) Regulation, 1960 (here-in-after referred to as 'the Regulation'). On a conspectus of the charge sheet, it is evident that the petitioner submitted an application on 22.7.1989 for the post of Sub-staff enclosing therein the Xerox copy of the transfer certificate No. 47 dated 7.7.1989 from Krupasindhu High School, Charbahal in support of his qualification and date of birth. At the time of interview he had also produced the original certificate and the same was compared with the Xerox copy. On verification, it was found that the transfer certificate was not genuine and was false. By producing such false certificate, the petitioner fraudulently gave wrong information about his age and qualification and thereby misleading the Corporation obtained appointment. The charges were framed on two counts namely, the petitioner failed to maintain absolute integrity and that he acted in a manner prejudicial to good conduct and detrimental to the interest of the Corporation and thus violated Regulation(21) and 39(1) of the Regulation. In

reply to the same, he submitted show cause denying the charges leveled against him. In reply a simple ground was taken that he had never submitted any certificate of Krupasinghdu High School, Charbahal, rather he had submitted transfer certificateNo.44/2 dated 2.2.1985 of Radha Krishna High School, Santpur. By order dated 10.7.1990 an Enquiry Officer was appointed to conduct an inquiry into the charges framed against the petitioner since the explanation submitted by the petitioner was found not satisfactory. The Enquiry Officer after affording opportunity of hearing to the petitioner submitted the enquiry report on 5.12.1991 stating therein that the petitioner had submitted Xerox copy of the Transfer certificate of Krupasindhu High School, Charbahal along with his application for the post of Sub-staff. While the matter stood thus, on 27.6.1992 a second show cause notice was issued to the petitioner by the Senior Divisional Manager (Disciplinary Authority). After considering the aforesaid enquiry report as well as show cause reply, the Senior Divisional Manager (Disciplinary Authority) in his order dated 25.9.1992 imposed the penalty of reduction of two steps in the time scale in terms of Regulation 39(1)(d) of the Regulation. But the Zonal Manager, who was the Reviewing Authority reviewed the order passed by the Disciplinary Authority on 24.3.1993 and held that the punishment imposed by the disciplinary authority does not commensurate with the gravity of misconduct on the part of the petitioner. Thereafter he issued show cause notice to the petitioner asking him to show cause as to why the penalty of removal from service shall not be imposed on him. The petitioner submitted a detailed show cause reply on 17.5.1993 before the Zonal Manager. The Zonal Manager by its order dated 28.9.1993 removed the petitioner from service. The Memorial made by the petitioner before the Chairman, LIC of India was also rejected by order dated 18.6.1994(Annexure-16).

Pursuant to issuance of notice, opposite parties entered appearance and filed a counter affidavit. A preliminary objection is taken that the writ petition is filed after a lapse of 17 years and as such the writ petition is liable to be dismissed. It is further stated that the petitioner had submitted the Xerox copy of the transfer certificate issued by Krupasindhu High School, Charbahal along with his application for recruitment to the post of Sub staff in support of his age and qualification. But the same was found to be a fabricated one and thereafter a disciplinary proceeding was initiated. The Disciplinary Authority after affording reasonable opportunity of hearing to the petitioner, imposed penalty of reduction of 2 steps in the time scale in terms of Regulation 39(1)(d) of Regulation. But then the Reviewing Authority not being satisfied with the order of punishment passed by the Disciplinary Authority, issued show cause notice to the petitioner for enhancement of the punishment. After considering the explanation submitted by the petitioner

and taking a holistic view of the matter, the Zonal Manager, who was the Reviewing Authority, removed the petitioner from the services.

On perusal of paragraph-18 of the writ application, we are satisfied that the petitioner was prevented by sufficient cause in approaching this Court. He was suffering from various diseases. Further more his only son was attacked by sickle cell disease since June, 2002 and was being treated in different hospitals. While matter stood thus, his son died on 16.1.2009. The petitioner belongs to lower rung of the society. Under such circumstances, it is not expected from a person like the petitioner to approach the Court with utmost promptitude.

In paragraph-15 of the writ application it is further stated that several other persons, who were indulged in such type of misconduct, faced disciplinary proceedings. Two of such persons are Ramanath Lakra and Stephen Khalko. In the disciplinary proceeding initiated against Ramanath Lakra , punishment of reduction of pay by one stage permanently was awarded against him. So far as Stephen Khalko is concerned, the basic pay was reduced by two stages. According to the petitioner, he is similarly circumstanced with that of Ramanath Lakra and Stephen Khalko in as much as the charges leveled against them are almost identical.

Learned counsel appearing for the opposite parties submits that since the charges framed against the petitioner are serious, the Zonal Manager, who was reviewing authority, was quite justified in removing the petitioner from service and the punishment awarded against the petitioner commensurate to the gravity of the charges.

We are at a loss to understand the submission made by the opposite parties. The L.I.C. of India is a Government of India Undertaking. It is expected of an ideal employer to treat its employees equally, who are on similar footing. Treating the employees according to its whim or caprice is least expected from an ideal employer. Two employees, who were facing charges identical to that of the petitioner, were awarded lesser punishment. Thus, there is no rhyme or reason as to why the petitioner would be awarded a severe punishment like removal from service.

In **Akhilesh Kumar Singh v. State of Jharkhand and others**, 2007(8) Supreme 713, the Hon'ble apex Court held that delinquent officers similarly situated should be dealt with similarly provided the charges leveled against the employees are identical and it is desirable that they should be dealt with similarly. The ratio of the case in **Akhilesh Kumar Singh** applies with full force to the facts of the present case.

In view of the analysis made above, we are of the opinion that the petitioner should have been similarly dealt with as has been done by the management in the cases of Ramanath Lakra and Stephen Kalko. We set aside the order of removal from service of the petitioner vide Annexure-13 and the order of the Chairman, LIC of India vide Annexure-16. We direct the opposite parties to consider the question of awarding such other punishment against the petitioner as would deem fit and proper. We make it clear that the petitioner shall not be entitled to back wages for the period he was out of service. The Zonal Manager (Reviewing Authority) shall take a decision within a period of three months from the date communication of this order. The writ petition is disposed of accordingly.

Writ petition disposed of.

2014 (I) ILR - CUT- 246

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

W.P.(C) NO. 1692 OF 2010 (Dt.09.10.2013)

SATYA NARAYAN MISHRA .....Petitioner

.*Vrs.*

COMMISSIONER-CUM-SECRETARY, GOVT. OF ORISSA, DEPT. OF WATER, RESOURCES, BBSR & ANR. .....Opp.Parties

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

Disciplinary Proceeding – Dismissal from service – Tribunal confirmed the order – Hence the writ petition – Report of the Enquiry Officer did not contain any reason on which his conclusion based rather it based on mere surmises and conjecturers – The disciplinary authority has merely accepted the said report and imposed the punishment without assigning any reason – Held, impugned orders of the Tribunal and the disciplinary authority are quashed – Direction issued to reinstate the petitioner – However the petitioner is not entitled to salary for the period he was out of service but that period shall be calculated towards his seniority and retiral benefits.

(Paras 8,9)

Case law Referred to:-

AIR 1996 SC 484 : (B. C. Chaturvedi -V- Union of India & Ors.)

For Petitioner - M/s. B. P. Tripathy, S. Hidayatullah, R. Achary, S.R. Parija & Prasanta Parida.

For Opp.Parties - Addl. Govt. Advocate (for O.Ps.1 & 2)

DR. A.K. RATH, J. The petitioner has called in question the legality and propriety of the order dated 09.12.2009 passed by the learned Orissa Administrative Tribunal, Bhubaneswar (hereinafter referred to as "the Tribunal") in O.A. No.1238 of 2002 whereby and whereunder, the learned Tribunal dismissed the application and thereby upheld the punishment of dismissal passed by the disciplinary authority.

2. Shorn of unnecessary details, the short fact of the case of the petitioner is that he was working as a peon in Water Resources Department. A disciplinary proceeding was initiated against him in the year 1999 on the allegation that while he was discharging his duties as a Treasury peon during November and December, 1990, he manipulated Government records and presented two bills for non-refundable advance from G.P.F. Account of one Shri C.S. Patra, Ex-Asst. Executive Engineer (Mechanical) against a single sanction order, as a result of which Rs.65000/- was encashed twice on 20.11.1990 and 01.12.1990 and he mis-appropriated the said amount. He was charged with the mis-appropriation of money and mis-conduct contrary to the Rules 3 and 4 of the Government Servants Conduct Rules, 1959. An Enquiry Officer was appointed on 5.12.2000. He submitted an application before the Enquiry Officer for supply of the copy of the forged bill by which the alleged defalcation had been committed, but the same was not supplied to him. However, the Enquiry Officer submitted a report to the disciplinary authority holding, inter alia, that the charges had been proved. On the basis of the said enquiry report, the disciplinary authority dismissed the petitioner from services. Thereafter he filed O.A. No.1238 of 2002 before the learned Tribunal and by order dated 09.12.2009, the learned Tribunal dismissed the said application.

3. Pursuant to issuance of notice, counter affidavit has been filed by the opposite parties. The case of the opposite parties is that the petitioner was entrusted with Treasury work after decentralization of Accounts Section. Rs.65000/- was encashed twice and the same was noticed in the year 1998. After preliminary enquiry, a regular disciplinary proceeding was initiated and concluded against the petitioner, but no disciplinary proceeding could be conducted against the DDO and Cashier as they had retired from the

service. Furthermore, the office copy of the forged duplicate bill was supplied to the petitioner.

4. In course of hearing, Shri R. Achary, learned counsel for the petitioner submitted that the finding of the Enquiry Officer is perverse and consequently the order of punishment passed by the disciplinary authority on the basis of the said report is not sustainable in the eye of law.Per contra, the learned Additional Govt. Advocate supported the order of the learned Tribunal.

5. We are shocked in the manner in which the disciplinary proceeding was initiated against the petitioner. It reveals from the enquiry report vide Annexure-5 that the Director of Treasuries and Inspection had made a thorough enquiry and concluded that the OSD-cum-Deputy Secretary being the DDO, who had drawn the second bill, was squarely responsible for the mis-appropriation. The Finance Department had recommended to initiate disciplinary action against the concerned officer, but then, the said DDO had retired from the service, for which no proceeding was initiated. The report further reveals that the involvement of the AG staff could not be ruled out. The Enquiry Officer further came to the conclusion that "most probably both the bills were signed by the DDO and placed for drawal. If the forged bill bears the genuine signature of the DDO, then it becomes easier for the delinquent to manipulate by cutting his own entries only and put the bill again for drawal. In any case, involvement of the treasury staff is definitely there, otherwise, it could not have happened. May be even the AG staff are involved, otherwise, why it was not reflected in the Annual Account slip of the same year. The most unfortunate part is that the victim of this nefarious mischief is not the Govt. but an Asst. Engineer."

6. We are of the opinion that the findings are based on mere surmises and conjectures. Having come to the conclusion that the OSD-cum-Deputy Secretary being the DDO, who had drawn the second bill, was squarely responsible for the mis-appropriation, and involvement of the treasury staff was definitely there, otherwise, it could not have happened, the Enquiry Officer ought to have exonerated the petitioner. The Enquiry Officer was appointed to enquire into the charges levelled against the delinquent employee. On the basis of the materials available on record, both oral and documentary, it is the bounden duty of the Enquiry Officer to come to a definite conclusion as to whether the charges are proved or not. The Enquiry Officer cannot submit a report on mere surmises and conjectures. The findings of the Enquiry Officer, which have been quoted above would, inter alia, show that the same is not only perverse, but no reasonable man

can come to such conclusion on the basis of the materials available on record.

7. The scope of judicial review has been succinctly stated in ***B.C. Chaturvedi V. Union of India and others,*** AIR 1996 SC 484. Their Lordships in paragraphs 13 and 14 held as follows:-

> "13. The disciplinary authority is the sole judge of facts. Where appeal is presented, the appellate authority has co-extensive power to reappreciate the evidence or the nature of punishment. In a disciplinary inquiry the strict proof of legal evidence and findings on that evidence are not relevant. Adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court/Tribunal. In Union of India v. H.C. Goel (1964) 4 SCR 718 : (AIR 1964 SC 364), this Court held at page 728 (of SCR) : (at p.369 of AIR), that if the conclusion, upon consideration of the evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued.
>
> 14. In Union of India v. S.L. Abbas (1993) 4 SCC 357 : (1993 AIR SCW 1753), when the order of transfer was interfered by the Tribunal, this Court held that the Tribunal was not an appellate authority which could substitute its own judgment to that bona fide order of transfer. The Tribunal could not, in such circumstances, interfere with orders of transfer of a Government servant. In Administrator of Dadra & Nagar Haveli v. H.P. Vora (1993) Supp. I SCC 551 : (1992 AIR SCW 2830), it was held that the Administrative Tribunal was not an appellate authority and it could not substitute the role of authorities to clear the efficiency bar of a public servant, recently, in State Bank of India v. Samarendra Kishore Endow (1994) I JT (SC) 217 : (1994 AIR SCW 1465), a Bench of this Court to which two of us (B.P. Jeevan Reddy & B.L. Hansaria, JJ) were members, considered the order of the Tribunal, which quashed the charges as based on no evidence, went in detail into the question as to whether the Tribunal had power to appreciate the evidence while exercising power of judicial review and held that a Tribunal could not appreciate the evidence and substitute its own conclusion to that of the disciplinary authority. It would, therefore, be clear that the Tribunal cannot embark upon appreciation of evidence to substitute its own findings of fact to that of a disciplinary/appellate authority."

8. We are conscious that adequacy of evidence or reliability of evidence cannot be permitted to be canvassed before the Court. But then, in view of

the authoritative pronouncement of the Hon'ble Supreme Court in ***B.C. Chaturvedi*** (supra) that if the conclusion upon consideration of evidence, reached by the disciplinary authority, is perverse or suffers from patent error on the face of the record or based on no evidence at all, a writ of certiorari could be issued. The enquiry report must contain the reasons on which the conclusion is based. In the instant case, the same is based on mere surmises and conjectures. The order of the disciplinary authority basing on the report of the Enquiry Officer is bereft of reasons and a laconic one. The disciplinary authority has merely accepted the report of the Enquiry Officer and imposed punishment of dismissal without assigning any reason.

9. In view of the discussions made in the foregoing paragraphs, we quash the order dated 09.12.2009 passed by the learned Tribunal in O.A. No.1238 of 2002 under Annexure-1 as well as the order of punishment dated 5.1.2002 passed by the disciplinary authority dismissing the petitioner from services. Consequently, the petitioner is entitled to be re-instated in service. The opposite parties are directed to re-instate the petitioner in service within a period of eight weeks from today. But then, the petitioner will not be entitled to any salary for the entire period, since he was out of service. The said period shall be calculated towards his seniority and retiral benefits.The writ petition is accordingly allowed. There shall be no order as to costs.

Writ petition allowed.

2014 (I) ILR - CUT- 250

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

W.P.(CRL) NO. 697 OF 2013 (Dt.28.10.2013)

AMULYA KU. JENA …….Petitioner

.Vrs.

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

HINDU MARRIAGE ACT, 1955 – Ss. 5, 8

Marriage duly solemnized under the provisions of the Act may on an application made in accordance with the Rules be registered by the Registrar.

In this case, even though AMOFOI was not authorized by the State Government U/s.8 of the Act to register marriages, it has conducted several marriages of minor girls basing on false affidavits, without the consent of their parents on receiving considerable amount of fees – Held, certificates issued by AMOFOI cannot be treated to be valid certificates of marriage – AMOFOI, having caused social injustice is liable to pay cost of rupees two lakhs which is to be deposited in the Chief Mister's relief fund.

For Petitioner - M/s.Sidharthe Das.
For Opp.Parties - M/s.Khirod Ku. Rout.

Since the Lawyers have abstained from Court work, the petitioner appears in person.

Pursuant to the order dated 20.08.2013, Sri Biswanath Rama Chandra CST Voltire Secretary of AMOFOI Organization, on receiving notice, has appeared in person. He submits that the said AMOFOI is a registered society under the Indian Societies Registration Act, 1860 and the society is conducting marriages in Gandharba form under the Hindu Law. However, he is unable to satisfy the Court as to under what provision of law, the said Organization is authorized to perform such marriages.

In the instant case, we find that the marriage took place with the aid and advice of the AMOFOI at AMOFOI on 26.03.2013. By that date, the victim was a minor, i.e. below 18 years of age.

Section 5 of the Hindu Marriage Act, 1955 prescribes the conditions to be fulfilled for solemnizing the marriage between two Hindus. Sub-section (iii) thereof provides that bride-groom must have completed the age of 21 years and the bride must have completed the age of 18 years at the time of marriage. A Hindu marriage can be solemnized in accordance with the customary rights and ceremonies of either parties thereto as envisaged in Section 7 of the said Act.

No doubt, a Gandharba form of marriage is a form of marriage recognized by the Hindu Law. But, however, the power to register a Hindu marriage as per the Hindu Marriage Act, 1955 vests with the authorized marriage officer, who is duly authorized by the State Government as prescribed under Section 8 of the Act, which provides that for the purpose of facilitating the proof of Hindu Marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered in such manner and subject to

such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose. Even the marriage solemnized and registered under Section 8 of the Act has to comply with the conditions of Section 5 of the Act.

The State of Odisha has framed a set of rules called "The Orissa Hindu Marriages Registration Rules, 1960". Under the said Rules, the State Government may, by notification from time to time, appoint any officer to be a Registrar for the purposes of the said Rules having jurisdiction over such local area as may be specified in the notification. A marriage duly solemnized in accordance with the provisions of the Act, may, on an application made in accordance with the said Rules be registered by the Registrar and the Registrar is required to maintain a Register, which shall be a bound book and the pages of such Register shall be machine numbered in the form set out in Appendix as Form-A. Procedure for making application in Form-B under the Rules has been prescribed and also the procedure to be followed by the Registrar is also prescribed under the Rules. No registered society has been notified to function as the Registrar for the purposes of the Act and the Rules, far less, the Society called "AMOFOI".

In view of the above position of law, with regard to Hindu Marriage, first of all, we find that AMOFOI is not an organization authorized by the State Government under Section 8 of the Act to register marriages and grant marriage certificates. The certificate granted to the victim stating that she has got married to Bunu Behera by the AMOFOI is an invalid certificate and it is not only contrary to Section 5 of the Act but also the said AMOFOI is not authorized to grant marriage certificates as has been done in the instant case.

It has come to the notice of this Court that many minor girls are being allowed to get married by the AMOFOI and certificates are being granted by the said society contrary to law as discussed above. Such certificates cannot be treated to be valid certificates of marriage. It also creates disruption in families of the girl as well as boy due to such marriage, which are definitely without the consent of their respective parents.

No doubt, if the couple satisfies the condition as enumerated in Section 5 of the Act, they have the liberty to approach the authorized marriage officer for registration of their marriages, but not a society like AMOFOI. Mr. B. Rama Chandra designating himself as CST Voltire Secretary of AMOFOI also submits before us that the said organization is conducting marriages between many couples and to ascertain the age of the bride and the groom, they are only insisting upon affidavits. In the instant case also, an affidavit was filed before them by the victim girl stating that she is 19 years of age. But on verifying her Matriculation Certificate, we find that

she was a minor on the date, when such marriage was performed by the AMOFOI, i.e., 20.08.2013 and a certificate was granted by the said AMOFOI..

Finding that all such marriages conducted by the AMOFOI are contrary to law and at their instigation, on receiving considerable amount of fees, as admitted by Mr. B. Rama Chandra, the AMOFOI is performing such marriages and granting certificates, we are of the view that such action is causing social injustice and frequent disturbances in the houses of the respective bride and bride-groom. For such illegal action, having been committed by the AMOFOI, we direct that the AMOFOI shall pay a cost of Rs.2,00,000/- (Rupees two lakhs). Considering the recent devastation due to natural calamities in the State, we feel it appropriate and direct that such cost shall be deposited in the Chief Minster's Relief Fund within a week and a receipt to that effect should be filed before the Registry of this Court, which shall be put up along with this record before us on 18.11.2013.

However, as we find that after attaining the age of 18 years, the victim has got married to one Bunu Behera and the marriage has been registered by the Marriage Officer, Dhenkanal on 31st July, 2013 and a marriage certificate to that effect is produced by the victim and the said marriage is a valid marriage and further the victim states before us that she wants to accompany her husband, we direct the Investigating Officer to give custody of the victim to her husband Bunu Behera, who is also present in Court.

The personal appearance of the Investigating Officer is dispensed with.

The documents produced by Mr. B. Rama Chandra be kept on record. The certified copy, if applied for, of those documents be granted, Xerox copy of the High School Certificate Examination, the Marriage Certificate granted by the AMOFOI as well as granted by the Marriage Officer, Dhenkanal also be kept on record. Put up this matter on 18.11.2013

Writ petition disposed of.

2014 (I) ILR - CUT-254

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

W. A. NOS.386 & 389 OF 2013 (Dt.27.09.2013)

CHAIRMAN, ODISHA JOINT ENTRANCE EXAMINATION COMMITTEE & ANR. ……Appellants

.Vrs.

RAJASHREE NAYAK ……...Respondent

EDUCATION – Admission in MBBS Course, 2012 – It is not disputed that candidates below the rank of the petitioner have been given admission basing on prioritization policy which was adopted by the Policy Planning Body for the Academic Session-2009-10 but not for any subsequent year – Moreover cut-off date cannot be used as a tool to deny admission to meritorious students – No justifiable ground to interfere with the order passed by the learned single Judge – Impugned judgment reported in 2013 (I) I.L.R Cut. 688 is affirmed.

(Para 12)

Case laws Referred to:-

1.AIR 2002 SC 1618 : (Sansar Chand Atri-V- State of Punjab & Anr.)
2.AIR 2013 SC 1115 : (Faiza Choudhary-V- State of Jammu & Kashmir & Anr.)
3.AIR 2012 SC 3396 : (Asha-V- Pt. B.D. Sharma, University of Health Sciences & Ors.)

For Appellants - M/s. S. Palit, A.K. Mahana, A.Mishra, R. Tripathy, A. Parija.

For Respondent - M/s. A. Mohapatra (Sr. Advocate)

For Appellants - M/s. D.K. Sahoo-1, B.K. Behera.

For Respondent - M/s. A. Mohapatra (Sr.Advocate) T. Das, S.S. Mohapatra, S.K.Mishra, S.K. Barik, S. Samal, S.P. Mangaraj, S. Nath.

I. MAHANTY, J. The aforesaid writ appeals have been filed by the Chairman, Orissa Joint Entrance Examination Committee and the Rajya Sainik Board respectively, seeking to challenge the judgment dated 30.11.2012 passed by the learned Single Judge in W.P.(C) No.16218 of 2012, whereby, the learned Single Judge have directed as follows:

> *"*12. Accordingly, the writ petition is allowed. The Chairman, Joint Entrance Examination, 2012, Odisha and Director, Medical Education and Training, Odisha-opposite party Nos.2 & 3 respectively are directed to give admission to the petitioner in MBBS course as per her rank under the category of Ex-Serviceman quota seat forthwith."

2. The aforesaid judgment passed by the learned Single Judge have been challenged by the Chairman, OJEE on various grounds, inter alia, that the circular of the Ministry of Defence vide D.O. No.3547 AS(R) 94 dated 03.06.1994 providing for classification of priorities and fixing prioritization is distinct and different from the concept of reservation and consequently the learned Single Judge has erroneously placed reliance on the decision of the apex Court reported in the case of **Sansar Chand Atri v. State of Punjab and Another,** A.I.R. 2002 S.C. 1618 as well as the decision in the case of Indra Sawhney vs. Union of India, A.I.R. 1993 S.C. 477. It is further contended on behalf of the appellant that the impugned judgment was not in consonance with the latest judgment of the Hon'ble Supreme Court in the case of **Faiza Choudhary v. State of Jammu and Kashmir and Another,** A.I.R. 2013 Supreme Court 1115.

Mr. D.K. Sahoo-1, learned counsel appearing for the Rajya Sainik Board reiterated the arguments advanced on behalf of the Chairman, OJEE.

3. Learned counsel for the Respondent, on the other hand, while supporting the judgment passed by the learned Single Judge submitted that the purported prioritization issued by the Government of India in the Ministry of Defence dated 03.06.1994 cannot be held to be a policy decision of the Government of India since the said communication was issued by the Additional Secretary in the Department of Defence since different States were prescribing different preferences for wards of Defence Personnel. In para-2 of the said circular it has been noted that even though the education is a State subject, for the purpose of standardization of prioritization was recommended. It is therefore contended that the said communication was neither a policy decision nor a directive of the Union of India and at best a recommendation for the purpose of standardization of procedure amongst various States and nothing more.

It was submitted that the Government of Orissa in the Industries Department vide its circular No. 9829 dated 08.07.2009 declared that in pursuance of the provision of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short Act 2007), the State Government have reserved….. 03% seats in

Government Medical Colleges in MBBS and BDS courses for Children/Widows of Ex-Serviceman, who are native of Orissa. It further stipulates that the prioritization policy adopted for admission to the seats reserved for above categories was placed before the Policy Planning Body (P.P.B) in its meeting held on 01.07.2009 and after detailed deliberation, the Policy Planning Body (P.P.B.) recommended that prioritization prescribed by the Ministry of Defence, Government of India for Ex-Serviceman communicated vide their D.O. No.3547 AS(R) 94 dated 03.06.1994 may be followed. Thereafter, the Government directed that after careful consideration of the aforesaid recommendation of the Policy Planning Body, it is decided that the following prioritization will be followed during the academic session 2009-10 for admission in Government Medical Colleges in MBBS and BDS courses.

The Chart of Prioritization is quoted hereunder:

"Priority-I	Children/widows of Ex-Servicemen killed in action
Priority-II	Children of Ex-Servicemen disabled in action
Priority-III	Children/widows of Ex-Servicemen who died in peace time with death attributable to military service.
Priority-IV	Children of Ex-Servicemen disabled in peace time with disability attributable to military service.
Priority-V	Children of Ex-Servicemen who are in receipt of Nerve Gallantry Awards.

1) Param Vir Chakra
2) Ashok Chakra
3) Sarvottam Yudh Seva Medal
4) Maha Vir Chakra
5) Kirti Chakra
6) Uttam Yudh Seva Medal
7) Vir Chakra
8) Shaurya Chakra
9) Yudh Seva Medal
10) Sena, Nau Sena, Vayu Sena Medal
11) Mention-in-Des

Priority-VI	Children of Ex-Servicemen"

4. It would be worthwhile to note herein that whereas the Government of India guidelines referred to hereinabove referred to wards of "Defence Personnel", the decision of the Government of Orissa dated 08.07.2009 for

reasons which left unexplained, limited to the children and widows of "Ex-serviceman" and, in fact, in the said communication omitted priority-VII as suggested by the Ministry of Defence pertaining to the Wards of serving personnel.

5. The Act 2007 prescribes that the admission in Professional Educational Institutions shall be as provided under Section 3, which is quoted hereunder:

> "**3. Method of admission in professional educational institutions-** Subject to the provisions of this Act, admission of students in all private professional educational institutions, Government institutions and sponsored institutions to all seats including lateral entry seats, shall be made through JEE conducted by the Policy Planning Body followed by centralized counseling in order of merit, in accordance with such procedure as recommended by the said body and approved by the Government."

6. It is admitted by Mr. Palit, learned counsel appearing for the appellant in W.A. No.386 of 2013 that there is no further decision by the Policy Planning Body created under the 2007 Act for any subsequent year beyond the academic year 2009-10 regarding prioritization, but it is asserted that the same practices continued thereafter. It is the admitted fact pleaded by both the counsel for the appellants that OJEE had sent list of candidates, who had applied under the Ex-Serviceman category to the Rajya Sainik Board and the Rajya Sainik Board in turn sent the list of prioritization to the OJEE on 13th June, 2013. It would be most relevant herein to take note of a letter of the Rajya Sainik Board to the Secretary, Employment, Technical Education and Training Department, Government of Orissa raising the following query:

> "2. It is submitted that the above Govt. Order was valid for the academic session 2009-10. But no further Govt. Order notifying the prioritization to be followed from the academic session 2010-11 onwards for admission of the children of Ex-servicemen in Engineering and Govt. Medical Colleges is available in this office. In absence of Govt. Order the same prioritization policy has been followed over the years.
>
> 3. In view of the above, you are requested to kindly confirm whether the above Govt. Order is still in force or revise Govt. Order notifying the prioritization procedure has been published. If so, a copy of the same may kindly be provided to this office at the earliest which is

> required to be produced before the Hon'ble High Court, Odisha as one of the Ex-serviceman has filed Writ Petition (W.P.C. 16218/2012) challenging the prioritization policy."

It appears that in response to the aforesaid query, the State of Orissa through its Additional Secretary to Government in the Department of Employment and Technical Education and Training vide its letter dated 23.07.2013 responded as follows:

> "1. The prioritization prescribed vide order No.9829 dt. 08.07.2009 is being followed since academic session 2009-10 and the said prioritization policy vide above mentioned order is also applicable for this academic session."

7. In the light of the aforesaid communication, it would be clear therefrom that there has been no decision by the Policy Planning Body for any prioritization for Ex-Serviceman category beyond the academic year 2009-10. In the present case, it would be even more important to take note of the fact that even the communication by the Additional Secretary of the Department of Employment and Technical Education and Training dated 23.07.2013 while being wholly without jurisdiction/competence and in clear violation of Section 3 of the Act 2007. In fact, the classification was issued post facto i.e. after 13th of June, 2007, by which date the Rajya Sainik Board had already sent the prioritization list to the OJEE for the year 2013.

8. In the light of the aforesaid facts as noted hereinabove, we are of the considered view that there, in fact, exists no policy decision either by the Policy Planning Body under Section 3 of the Act 2007 or the State of Orissa beyond the academic year 2009-10 and, therefore, giving effect to such prioritization for the year 2013 is wholly without sanction/authority of law.

9. We have perused the judgment passed by the learned Single Judge, which is impugned before us. It would be relevant at this point to take note of the fact that although the writ petitioner had appeared in 2012 OJEE and being aggrieved by the prioritization made for the said year had originally filed the writ petition, yet, during pendency of the challenge to the 2012 OJEE and the result thereof, the petitioner appeared at the 2013 OJEE and thereafter had sought for amendment of the prayer in the present writ application covering 2013 admission, which had been allowed.

10. The Hon'ble Supreme Court in the case of **Faiza Choudhary** (supra) relied upon by the appellants has laid down that the medical seat of one academic year cannot be carry forward to next academic year. In the case at hand, the learned Single Judge found that the writ petitioner though was

eligible for admission into the year 2012 could not be granted during the said year due to the pendency of the proceeding and during the interregnum, the petitioner had also appeared in the 2013 NEET exam. On consideration of her position in the 2013 examination and the position of the other candidates in the category for "Ex-Servicemen", directions had been issued on 19.07.2013 by the learned Single Judge to keep one seat vacant in first year MBBS course 2013 in any of the Government medical colleges. Pursuant to such direction, it is stated on behalf of the OJEE that one seat at Burla Medical College has been kept reserved as the cut off date for admission into 2013 i.e. 30.09.2013 was not over.

11. Therefore, in the facts and circumstances of the present case, we are of the considered view that the principle laid down by the Hon'ble Supreme Court in the Case **Faiza Choudhury** (supra) would not have been any application for the fact situation of the present case, since the writ petitioner was also a candidate for the NEET 2013 and the impugned directions had been issued to admit the respondent in the academic year 2013 itself, therefore, no question of carry over arises.

It would be appropriate at this stage to refer to the judgment of the Hon'ble Supreme Court in the case **of Asha vs. Pt. B.D. Sharma, University of Health Sciences and others,** AIR 2012 SC 3396. The Hon'ble Supreme Court in the case of **Asha** (supra) after taking note of its earlier judgment in the case of ***Mriduldhar (minor and another) (supra)*** held as under:

> "31. There is no doubt that 30th September is the cut-off date. The authorities cannot grant admission beyond the cut-off date which is specifically postulated. But where no fault is attributable to a candidate and she is denied admission for arbitrary reasons, should the cut-off date be permitted to operate as a bar to admission to such students particularly when it would result in complete ruining of the professional career of a meritorious candidate, is the question we have to answer. Having recorded that the appellant is not at fault and she pursued her rights and remedies as expeditiously as possible. We are of the considered view that the cut-off date cannot be used as a technical instrument or tool to deny admission to a meritorious students. The rule of merit stands completely defeated in the facts of the present case. The appellant was a candidate placed higher in the merit list. It cannot be disputed that candidates having merit much lower to her have already been given admission in the MBBS course. The appellant had attained 832 marks while the students who had attained 821, 792, 752, 740 and 731 marks have already

been given admission in the ESM category in the MBBS course. It is not only unfortunate but apparently unfair that the appellant be denied admission. Though there can be rarest of rare cases or exceptional circumstances where the courts may have to mould the relief and make exception to the cut-off date of 30th September, but in those cases, the Court must first return a finding that no fault is attributable to the candidate, the candidate has pursued her rights and legal remedies expeditiously without any delay and that there is fault on the part of the authorities and apparent breach of some rules, regulations and principles in the process of selection and grant of admission. Where denial of admission violates the right to equality and equal treatment of the candidate, it would be completely unjust and unfair to deny such exceptional relief to the candidate. "

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

ANSWERS

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

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

(c) & (d) Wherever the court finds that action of the authorities has been arbitrary, contrary to the judgments of this Court and violative

of the Rules, regulations and conditions of the prospectus, causing prejudice to the rights of the students, the Court shall award compensation to such students as well as direct initiation of disciplinary action against the erring officers/officials. The court shall also ensure that the proceedings under the Contempt of Courts Act, 1971 are initiated against the erring authorities irrespective of their stature and empowerment.

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

12. In the light of the aforesaid discussions and considering the submissions advanced, we find no justifiable ground to interfere with the order impugned, though for additional reasons as noted hereinabove in support of the conclusion arrived at by the learned Single Judge. Hence, both the writ appeals stand dismissed and consequently, the appellant-OJEE is directed to ensure admission of the respondent in the MBBS course at Burla Medical College in the seat reserved by them pursuant to the interim direction of the learned Single Judge dated 19.07.2013 forthwith since the cut off date for admission for 2013 MBBS course is 30th September, 2013.

Appeals dismissed.

2014 (I) ILR - CUT- 261

INDRAJIT MAHANTY, J & RAGHUBIR DASH, J.

W.P.(C) NO. 17474 OF 2008 (Dt.10.10.2013)

DILIP KUMAR PATTANAIK ……..Petitioner

.Vrs.

THE BHUBANESWAR DEVELOPMENT AUTHORITY & ANR. ……..Opp.Parties

LEASE OF LAND – Cancellation of alloted plot with an order to refund the money on the ground that the plots have been wrongly carved-out – Illegal action of B.D.A for no fault of the petitioner - B.D.A. should have ensured that the land allotted is free from litigation and a duty cast on B.D.A. to offer an alternative plot – Held, direction issued to B.D.A. to allot Plot No.249 having an area measuring 3019 sq. ft. at Prachi Enclave Plotted Development Scheme, Chandrasekharpur, in favour of the petitioner. (Para 13)

Case law Relied on :-

2013 (1) ILR-CUT-73 : (Dusmanta Kishore Swain-V- Cuttack Development Authority & Ors.)

For Petitioner - In person
For Opp.Parties - Sri Buddhadev Tripathy
(Asst. Law Officer, BDA)

I. MAHANTY, J. The present writ application has been filed by the petitioner challenging the legality of office order dated 10.9.2008 issued by the Bhubaneswar Development Authority-Opposite Party No.1 (in short the 'B.D.A.') in cancelling the letter of allotment dated 18.2.2000, wherein, Plot No.72 (A), measuring 1529.40 sq. ft. had been allotted to the petitioner at District Centre Self Financing Commercial Complex, Chandrashekharpur, Bhubaneswar.

2. It appears that the B.D.A. had published an advertisement inviting applications for allotment of approximately 144 constructed shop-cum-residence units, 96 constructed Pindis, 290 Commercial Plots of different sizes for the purpose like clinic, petrol pump, restaurant, nursery schools, hotel etc. The objective of B.D.A. was to create self-financing commercial units at Chandrashekharpur area of Bhubaneswar town for an area of more than 35 acres and the petitioner had applied for allotment of a commercial plot of 3500 sq.ft. under the Self Financing Commercial Complex at Chandrashekharpur, Bhubaneswar.

3. The petitioner made the necessary application and the B.D.A. vide its letter dated 29.12.1999 informed the petitioner that it had decided to allot the vacant plots through a Lottery, scheduled to be held on 3.1.2000 at 11.00 A.M. Accordingly, the petitioner attended the said lottery on the said due date and time and after he was successful in the said lottery, he was allotted with a Plot bearing No.-72(A), measuring 1529.40 sq.ft. subject to payment of Rs.1,07,058/- after receiving the intimation of his success in the lottery. Accordingly, letter of allotment was issued vide letter dated 18.2.2000,

pursuant to which the petitioner deposited the demanded amount within the time stipulated. Since possession of the plot was not handed over to the petitioner, he made a representation to the B.D.A. on 1.8.2002 seeking delivery of possession. Thereafter, it appears that several communications were made by the petitioner and ultimately on 5.6.2004, the opposite party-B.D.A. purportedly handed over physical possession of the plot in question to the petitioner under Possession Certificate dated 9.6.2004 indicating delivery of possession of the plot on 5.6.2004. But, in spite of such Possession Certificate granted by the B.D.A., it appears that the petitioner while constructing the boundary wall of the plot, was prevented from doing so by one individual, namely, Janakar Sahu of village Gadakana claiming that on the very plot, the B.D.A. has no right/ title or interest and claimed that the Records of Right stands in his name.

This development was brought to the notice of the B.D.A. by the petitioner. The B.D.A. took no steps whatsoever in spite of various representations requesting the B.D.A. to settle the matter and ultimately, by letter dated 2.6.2008, the Allotment Officer of the B.D.A. informed the petitioner "that Plot No.72(A) was carved out wrongly in Mouza-Gadakana instead of Chandrashekharpur District Centre Scheme area and therefore, it is difficult on their part to allot the petitioner a commercial plot as per the agreed terms and requesting the petitioner to submit the original challan to take refund of the deposited amount." The petitioner, on receipt of the letter dated 2.6.2008, requested the B.D.A. under cover of his letter dated 28.6.2008 to allot an alternative/similar plot to the petitioner, in view of the admitted default by the B.D.A. itself. It appears that there was no response to the petitioner's request and by office order dated 10.9.2008, allotment of the plot in question made by letter dated 18.2.2000 was cancelled and it was directed that the amount deposited by the petitioner shall be refunded in favour of the petitioner. Thereafter, vide letter dated 25.9.2008, the B.D.A. in enclosing the cheque of the Oriental Bank of Commerce dated 23.9.2008 for an amount of Rs.1,07,058/- intimated that the aforesaid amount relates to refund of the deposited amount against which the plot had been allotted eight years ago.

4. In Paragraph-13 of the writ application, it is averred that though the petitioner has received the cheque, yet he did not encash the same and sought to challenge the illegal action of B.D.A. by filing the present writ application.

5. The petitioner who appears in person, submits that the opposite parties having allotted the plot in question in the year 2000, have sought to cancel the same eight years thereafter but without giving any opportunity to

him and there being no fault on his part. The order of allotment culminated in a completed contract by the petitioner depositing the demanded amount and the petitioner purportedly being given possession of the disputed plot in question. Since the B.D.A. later denied that it had no title to the property allotted to the petitioner, it was the bounden duty of the B.D.A. to offer the petitioner with the reasonable alternative plot, rather than to deprive the petitioner from any opportunity to construct a house during his life time. Accordingly, the petitioner submits that the order of cancellation dated 10.9.2008 under Annexure-12 may be quashed and the opposite party-B.D.A. may be directed to allot a plot to him either at Chandrashekharpur Bhubaneswar or at any similar location in lieu of cancellation of plot in his favour.

6. In the counter affidavit filed by the B.D.A., the facts as enumerated hereinabove, are not denied and in fact, in Paragraph-8.3 of the said affidavit, it is admitted that in the present case, the plots have been wrongly carved out under Mouza- Chandrasekharpur which were actually falling under Mouza-Gadakan beyond the allotted area of the G.A. Department, Govt. of Odisha to the B.D.A. It appears from the counter affidavit that certain attempts have been made by the B.D.A. to call Mr.Janakar Sahu who claimed ownership over the said plot to settle the dispute but, it appears that no such settlement was reached and consequently, the B.D.A. was compelled to cancel the allotment made in favour of the petitioner and to attempt to refund the deposited amount in his favour.

7. It appears from the records of this case that in course of hearing, the B.D.A. had filed a further affidavit in compliance of this Court's order dated 23.8.2010 and 4.9.2010. In such affidavits, the B.D.A. has stated that even though the advertisement had been made for auction sale of certain residential plots under "Prachi Enclave Plotted Development Scheme" and eight number of plots under the said scheme were lying vacant for allotment through auction, it is stated that the auction notice for allotment of the aforesaid plots were injuncted on account of interim order passed in W.P.(C) No.1495 of 2011.

8. It would be material here to state that W.P.(C) No.1495 of 2011 has come to be dismissed by this Court vide separate judgment delivered today and consequently, the interim orders no longer remain in operation.

9. The B.D.A. has also filed a further affidavit dated 23.9.2013 and while admitting the pleadings made by the writ petitioner submitted in Paragraph-7 which is as follows:

> " xx xx xx However, the allotment of any residential plot under Prachi Enclave Plotted Development Scheme measuring area 1529.40 sq. ft. can be considered for allotment in favour of the petitioner, which will require a change in lay-out plan of the aforesaid Scheme, which can only be done after a special resolution to be made by the 'BDA Authority', which would require a reasonable time, as the Authority consists of a group of indivisuals. The next meeting of the Authority is tentatively scheduled to be held in the month of October 2013 xx xx xx."

10. It is well settled by the judgment of this Court in the case of **Dusmanta Kishore Swain v. Cuttack Developoment Authority & others,** reported in 2013 (1) ILR-CUT-73, that it is the duty of all development authorities to ensure that the land allotted to applicants are free from litigation and consequent failure to discharge such duty entitles the allottee for allotment of an alternate plot.

11. In the light of the circumstances as noted hereinabove, we are of the considered view that in the present case, no default at all was caused by the petitioner. He had made an application for a commercial plot in question and since the petitioner had been allotted with a commercial plot by the B.D.A. which he had obtained through lottery conducted by the B.D.A., it was the duty of the B.D.A. to ensure that the land allotted to the petitioner is free from litigation. Therefore, the B.D.A. having failed to ensure that the land allotted to the petitioner is free from litigation, consequently, responsibility is being cast on the B.D.A. to offer an alternative plot to the petitioner. As noted in Paragraph-7 hereinabove, it appears therefrom that the B.D.A. is willing to offer a residential plot consisting of an area measuring 1529.40 sq. ft. under Prachi Enclave Plotted Development Scheme subject to the procedure noted hereinabove. It is also admitted by the B.D.A. that pursuant to the advertisement made for allotment of land under Prachi Enclave Plotted Development Scheme, no bids were in fact, received purportedly on account of interim order passed in W.P.(C) No1495 of 2011.

In the present circumstances, since the aforesaid writ application stands dismissed by this Court vide judgment delivered today, no such impediment will exist any further.

12. In course of submission, the petitioner in person submitted that the B.D.A. may consider allotting Plot No.249 under Prachi Enclave Plotted Development Scheme at Chandrashekharpur in his favour and though the area of plot measures 3019 sq. ft., the petitioner is willing to pay for the

additional area measuring 1489.60 sq.ft. (at the offset price fixed by the B.D.A.) in the advertisement under Annexure-14 to Misc. Case No.8253 of 2012. We see no legal impediment in issuing such direction.

13. Accordingly, we direct the opposite party-B.D.A. to allot Plot No.249 having an area measuring 3019 sq.ft. at Prachi Enclave plotted Development Scheme, Chandrashekharpur in favour of the petitioner. Since the original plot allotted to the petitioner was 1529.40 sq.ft., an additional demand shall be raised by the B.D.A. in respect of the excess land i.e. 1489.60 sq.ft., at the offset price fixed in the tender notice, within a period of two weeks from the date of receipt of copy of this judgment and on the petitioner depositing such amount, fresh allotment letter for the said plot and possession thereof may be handed over to the petitioner forthwith along with the necessary registration of land in his favour. It is further made clear that since we have directed allotment of the entire Plot No.249 in favour of the petitioner, consequently, there is no requirement of change of layout plan of the Scheme concerned.

14. With the aforesaid observations and directions, the writ application is allowed.

Writ petition disposed of

2014 (I) ILR - CUT- 266

SANJU PANDA, J.

W.P.(C) NO. 9314 OF 2010 (Dt.28.06.2013)

PRAVAKAR ROUT ……..Petitioner

.Vrs.

M.D., INDUSTRIAL DEVELOPMENT CORPORATION OF ORISSA LTD. & ANR. …….Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.226

Claim for arrear service benefits – Petitioner was working in Baripada Spinning Mill which was subsequently taken over by A.B.S. Spinning Orissa Ltd. – Held, A.B.S. Spinning Orissa Ltd. Being the

successor-in-interest of Baripada Spinning Mill is directed to pay the service benefits to the petitioner. (Para 5)

Case laws Referred to:-

1.2011 (Supp.I) OLR 727 : (Nayeem Md. Latif -V- The Industrial Development Corporation of Orissa Ltd. & Anr.)
2.1962-II LLJ 621 : (Ankpall Co-operative Agricultural & Industrial Society -V- Its Workmen)

For Petitioner - M/s. S.D. Das, H.S. Satpathy, A.N. Sahu, N. Parida, D. Mohanty, M.M. Swain, S. Biswal & N. Afreen.
For Opp.Party Nos.1 & 2 - M/s. R.K. Rath, N. R. Rout & Pami Rath.

S.PANDA, J. This Writ Petition has been filed by the petitioner with a prayer to direct the opposite parties to release his arrear salary along with cumulative service benefits within a stipulated period.

2. The brief facts of the case are that the petitioner joined as a Typist in Industrial Development Corporation of Orissa Ltd., (hereinafter referred to as "IDCOL) in the month of April, 1981. Thereafter, he was posted in Baripada Spinning Mill, Ambika Road, Baripada on 01.5.1981, which was a sister unit of IDCOL at that time. While working at Baripada Spinning Mill, Baripada the petitioner made several representations to the Chairman-cum-Managing Director, IDCOL with a prayer to withdraw him from Baripada Spinning Mill and repost in IDCOL but the same were not considered. It appears that on 01.4.1990 IDCOL transferred the ownership of Baripada Spinning Mill to a newly formed separate Corporate entity ABS Spinning Orissa Ltd. It further appears that on 17.9.2001 Baripada Spinning Mill was closed down. It is stated that due to closure of Baripada Spinning Mill the petitioner became jobless and as the opposite parties have not released his salary and other allowances his children were deprived of higher studies. The petitioner again filed representations before the Chairman-cum-Managing Director of IDCOL to release his salary / allowances for maintenance of his family or to post him in any other similar establishment but the same were not considered. It is stated that on 16.2.2008 the petitioner received a letter from A.B.S Spinning Mill to appear in an interview on 26.2.2008 at Corporate Office of IDCOL, Bhubaneswar for assessment of his suitability for deployment on deputation in other subsidiary Company. According to the petitioner though he has appeared in the said interview but no intimation was given to him about the result of the interview. It is stated that after ABS Spinning Orissa

Ltd., a subsidiary Unit of IDCOL has been winded up and sold, though similarly situated persons to that of the petitioner were transferred to other Units of IDCOL and are still continuing in service the case of the petitioner has not been considered by the opposite parties in spite of repeated requests made by him. The petitioner claims his arrear salary and other consequential service benefits w.e.f. 01.4.1986 to 31.3.2010, the date of his superannuation in the revised scale. It is further stated that the petitioner was appointed by IDCOL, Bhubaneswar and worked at Baripada Spinning Mill as per the direction given by the Welfare Officer, IDCOL on 29.4.1981, and on closure of the said Unit the petitioner has not received his arrear salary and the service benefits as applicable to the employees of IDCOL. It is stated that as the opposite parties have not considered the representations filed by the petitioner for release of his arrear salary and other consequential service benefits, he has approached this Court by filing this Writ Petition for redressal of his grievance.

3. After receiving notice, the opposite parties have filed a counter affidavit admitting the fact that the petitioner was appointed as a Typist in Baripada Spinning Mill, the erstwhile unit of IDCOL in the year 1981 and he as worked in the said establishment as such till 01.4.1990. Thereafter, vide agreement dtd.16.2.1990, IDCOL transferred the entire Unit of Baripada Spinning Mill along with Aska Spinning Mill to Sonepur Spinning Mill Ltd. w.e.f. 01.4.1990, a separate subsidiary Company registered under the Companies Act, 1956 and enjoying separate legal entity status in the eye of law. As per the said agreement, Sonepur Spinning Mill Ltd. took over all the assets, liabilities and personnel of Baripada Spinning Mill and Aska Spinning Mill. Subsequently the name of Sonepur Spinning Mill Ltd. was changed to ABS Spinning Orissa Ltd. In compliance of the said agreement the services of the petitioner, who was continuing in Baripada Spinning Mill as a workman as on 01.4.1990 got transferred to ABS Spinning Orissa Ltd. as per notice No.G-4731 dtd.30.3.1990 issued under Section 25-FF of the Industrial Disputes Act, 1947 along with the services of all other permanent employees of Baripada Spinning Mill and Aska Spinning Mill. Thus all such employees are legally in the roll of ABS Spinning Orissa Ltd. The petitioner has continued to work in Baripada Spinning Mill by remaining in the roll of ABS Spinning Orissa Ltd. Since the three Spinning Mills of ABS Spinning Orissa Ltd. have become sick, the Company was referred to BIFR for its revival. However, as BIFR could not find out any prospect of its viability, ultimately recommended for winding up of the Company in public interest and Company Act Case No.4 of 2002 was registered before the Court. In the winding up proceeding all the assets of ABS Spinning Orissa Ltd. have been sold as per orders of the Company Judge and the entire sale proceeds have

been deposited with the Official Liquidator for disbursement in accordance with the mandatory provisions of the Companies Act, 1956. As per order dtd.15.10.2009 the Company was wound up and the liabilities of the Company are to be settled by the Official Liquidator out of the sale proceeds as per law. In view of the above, it is stated that the petitioner instead of approaching this Court should have approached the Official Liquidator, who has invited claims from the employees and creditors by notice dtd.19.2.2010 and as such this Writ Petition is not maintainable.

4. Considering the rival submission of the parties and after going through the materials available on record, it appears that the petitioner was appointed by IDCOL and he was posted at Baripada Spinning Mill as per order of the Welfare Officer of IDCOL and it was also not disputed that the petitioner was entitled to his arrear salary and consequently service benefits. The opposite parties also not disputed that similarly situated employees are continuing in other units of IDCOL. However, the case of the petitioner has not been considered by the opposite parties though he has made several representations. This Court in the case of **Nayeem Md. Latif Vs. The Industrial Development Corporation of Orissa Ltd., & another** reported in **2011 (Supp.-I) OLR 727** relying on a decision of the Supreme Court in the case of **Ankpall Co-operative Agricultural & Industrial Socieity Vs. its Workmen** reported in **1962-II LLJ 621** held that the subsequent purchaser of an industrial unit is the "successor-in-interest" of the previous owner and liable to take over the assets and liabilities and also liable to pay the service benefits to the employees of the previous owner.

5. In view of the above settled position of law and considering the fact that ABS Spinning Orissa Ltd. being the successor-in-interest of Baripada Spinning Mill has taken over all its liabilities and as the petitioner has worked under it he is entitled to get his service benefits, this Court disposes of this Writ Petition directing ABS Spinning Orissa Ltd. – opposite party no.2 to pay all the service benefits of the petitioner till his superannuation i.e. 31.3.2010, as expeditiously as possible, preferably within a period of three months from the date of production certified copy of this judgment.

Writ petition disposed of

2014 (I) ILR - CUT-270

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

MATA NO. 89 & 90 OF 2010 (Dt.25.09.2013)

RAJANI KANTA ACHARYA & ANR. ……..Appellants

.Vrs.

JYOTSHNA RANI TRIPATHY & ANR. ……...Respondents

HINDU MARRIAGE ACT, 1955 - Ss. 5(i), 11,12

Marriage with person having living spouse – Marriage is null and void and not voidable.

In this case at the time of marriage of Respondent No.1 with Subhakanta she had a living spouse – Held, the marriage between them is declared null & void – However, the child is a legitimate child.

(Para 23)

Case laws Referred to:-

1.2013 AIR SCW 168 : (Deoki Panjhiyara-V- Shashi Bhushan Narayan Azad & Anr.)
2.AIR 1988 SC 644 : (Smt.Yamunabai Anantrao Adhav-V- Anantrao Shivram Adhav & Anr.).

For Appellants - Mr. Prasanta Ku. Panda
For Respondents - Mr. Sabyasachi Tripathi (R.1)
Mr. H.K. Panigrahi, (R-2)

S. PANDA, J. Challenge has been made in MATA No.89 of 2010 by the legal heirs of one Subhakanta Acharya to the judgment dated 11.11.2010 passed by the learned Judge, Family Court, Ganjam, Berhampur in Civil Proceeding No.268 of 2010 with a prayer to declare the marriage between Subhakanta and respondent no.1 (hereinafter referred to as "J") as null and void.

2. The aforesaid appellants have also filed MATA No.90 of 2010 challenging the judgment dated 11.11.2010 so far as Civil Proceeding No.271 of 2010 is concerned. As both the appeals arise out of common judgment, they were heard together and are being disposed of by this common judgment.

3. The respective pleas of the applicants in the aforesaid civil proceedings are as follows:

It is contended by the applicant in Civil Proceeding No.268 of 2010 that Subhakanta Acharya married to "J" on 6.3.2003 as per Hindu customs. Out of their wedlock, a daughter born. It came to the knowledge of Subhakanta that prior to his marriage, "J" married to respondent no.2 (hereinafter referred to as "N") on 24.12.2002. "J" and "N" were married under the Special Marriage Act before the Marriage Officer following the statutory provision. During subsistence of the said marriage and having lived in spouse, "J" again married to him. As such, his marriage with her was a void marriage and to be declared the same as such. During pendency of the aforesaid application, Subhakanta died. After receiving notice, "N" who was defendant no.2 before the court below, neither filed any written statement nor contested the case. "J", who was defendant no.1 before the court below, filed her written statement contending that "N" is her cousin being son of her mother's sister and he is coming within the prohibited degree of relationship. Therefore, the alleged marriage is voidable. She also contended that "N" fraudulently created the documents which were treated as marriage documents though there was actually no marriage and they never resided as husband and wife. Subhakanta-husband demanded dowry for which the dispute arose and he filed a false case. Hence, she prayed for dismissal of the proceeding.

4. In support of their respective pleas, 'J' examined three witnesses including herself as P.W.1. The parents of Subhakanta examined two witnesses in C.P No.271 of 2010. The father of Subhakanta was examined as D.W.2.

5. "J" filed C.P. No.271 of 2010 after receiving notice in C.P. No.268 of 2010 and filed her written statement. She contended that "N" being her cousin had access to her family. They were in visiting terms. On 24.12.2002, they went to Bhubaneswar to meet a friend but his friend was absent at Bhubaneswar. "N" brought some forms and at his instance, she signed on those papers in good faith. Practicing fraud, "N" created documents only to harass her. As they were within the prohibited degree of relationship and the alleged marriage was void, "J" prayed for declaration of the said marriage as null and void. "J" married to one Subhakanta Acharya on 6.3.2003 and a daughter born out of the said wedlock. She was residing with her husband and girl child. "N", by playing mischief, informed Subhakanta that he married "J" earlier for which disturbance was started thereof. She was able to know all these fraudulent acts of "N" after receiving notice on divorce from said Subhakanta. "J" could know that her signatures were utilized by preparing a

marriage certificate dated 24.12.2002. Hence, she filed an application to declare the alleged marriage with "N" to be void.

6. "N" filed his written statement in C.P No.271 of 2010 contending that the allegations were false and 'J' wanted to marry him. She collected all required papers and produced witnesses before the Marriage Officer for the said purpose. At that time, she was aged about 26 years. She is an educated lady. "N" disclosed her at that time that the papers were marriage papers and he promised not to disclose anyone about her signatures on those papers. "N" further took a stand that till he is unmarried, as 'J' betrayed him.

7. "J" filed documentary evidence, which was marked as Ext.1-A, certified copy of marriage certificate. Defendants filed documentary evidence, which were marked as Ext.1 to 10, those are application form, money receipt, public notice, declaration with photo script, application filed in the post, order passed, relevant entry in marriage certificate, notice in entry, signature of the party in the application form of marriage and marriage invitation card. The learned Judge, Family Court formulated as many as five issues in C.P No.268 of 2010 and eight issues in C.P No.271 of 2010. The learned Judge, Family Court taking issues of C.P No.271 of 2010 recorded the findings that there was no fraud. There was a meeting of mind followed by marriage. Parties had in acquaintance terms and the allegation, that the marriage was not consummated, was not believable. "J" and "N" are within the prohibited degree of relationship. Therefore, there cannot be a valid marriage between them as per Section 4(d) of the Special Marriage Act. There is no pleading regarding any custom to marry a cousin by the parties. As per Section 24 of the Special Marriage Act, the marriage becomes void, since condition of Section 4(d) is not fulfilled. As there is violation of the provision contained in Section 4(d), the said marriage is void. Therefore, the marriage between "J" and Subhakanta cannot be held null and void on the ground of her marriage with "N" as the marriage between "J" and "N" is found void. Accordingly, C.P No.271 of 2010 was allowed and C.P No.268 of 2010 was dismissed. Subhakanta died during pendency of the application. Hence, the learned Judge, Family Court came to the conclusion that since Subhakanta died, the mischief was against him and no other person can question such status without having any special personal interest.

8. Learned counsel for the appellants submitted that since "J" pleaded fraud, however, she failed to prove the said fraud during trial and the court below also recorded that there was no fraud. Therefore, her application is coming under the purview of Section 25 of the Special Marriage Act. The application is liable to be dismissed as it was filed beyond one year. Hence,

the judgment needs to be set aside. He further submitted that since "J" married during subsistence of her earlier marriage with 'N', the court below should have declared the subsequent marriage of "J" with Subhakanta in the year 2003 as null and void in view of Section 5(1) read with Section 11 of the Hindu Marriage Act. The aggrieved person, i.e., Subhakanta himself filed the suit. After his death, since his parents were substituted, they had the locus standi to continue the proceeding to protect the status and prestige of their son. "J" being a wrong doer, she should not have taken advantage of her own wrong.

9. Learned counsel for "J", however, supporting the impugned judgment contended that only a marriage certificate was issued in respect of the marriage between "J" and "N". Hence, it cannot conclusively be said that actual marriage took place and they were living as husband and wife. Therefore, the court below rightly annulled the said marriage certificate and passed the judgment which need not be interfered with. In support of his contention, he has cited a decision of the apex Court in the case of Deoki Panjhiyara v. Shashi Bhushan Narayan Azad and another reported in **2013 AIR SCW 168.**

10. Respondent no.2-N has appeared through counsel. However, he did not contest at the time of hearing of the appeal.

11. In view of the above pleadings and contentions of the counsels of the parties, this Court has to consider whether the marriage between "J" and "N" was held by practicing fraud and whether the marriage between "J" and Subhakanta is valid?

12. For better appreciation, Sections 4(d), 24 ad 25 of the Special Marriage Act is quoted below to answer first question:

> **4. Conditions relating to solemnization of special marriages**.- Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:-
>
> xxx xxx xxx
>
> (d) the parties are not within the degrees of prohibited relationship:

Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and

xxx xxx xxx

24. Void marriages-(1) Any marriage solemnized under this Act shall be null and void [and may, on a petition presented by either party thereto against the other party, be so declared] by a decree of nullity if-

(i) any of the conditions specified in clauses (a), (b), (c) and (d) of section 4 has not been fulfilled; or

(ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) Nothing contained in this section shall apply to any marriage deemed to be solemnized under this Act within the meaning of section 18, but the registration of any such marriage under Chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (e) of section 15:

Provided that no such declaration shall be made in any case where an appeal has been preferred under section 17 and the decision of the District Court has become final."

25. Voidable marriages.- Any marriage solemnized under this Act shall be voidable and may be annulled by a decree of nullity if-

(i) the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party in the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872:

Provided that, in the case specified in clause (ii), the Court shall not grant a decree unless it is satisfied-

(a) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(b) that proceedings were instituted within a year from the date of the marriage; and

(c) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree:

Provided further that in the case specified in clause (iii), the Court shall not grant a decree if-

(a) proceedings have not been instituted within one year after the coercion had ceased or, as the case may be, the fraud had been discovered; or

(b) the petitioner has with his or her free consent lived with the other party to the marriage as husband and wife after the coercion had ceased or, as the case may be, the fraud had been discovered."

13. In view of the above provision of law and as per Section 4(d) of the Special Marriage Act, in case the parties are not within the degree of prohibited relationship, marriage can be solemnized between two persons.

14. However, the proviso thereof stipulates that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.

15. In the present case, there is no evidence on record to show the custom governing at least one of the parties allowing such marriage between the prohibited relationship. However, respondent no.1 has not taken that ground in the application; rather her application was under Section 25 of the Act. The marriage was not consummated and the consent was obtained by fraud. The proceeding has not been instituted within one year as provided in the 2nd Proviso to Section 25(a) of the Special Marriage Act.

16. For better appreciation, Section 5(1) and 11 of the Hindu Marriage Act is quoted below :

"5. Conditions for a Hindu marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:-

(i) neither party has a spouse living at the time of the marriage;

xxx xxx xxx

11. Void marriages.- Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, [against the other party], be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of section 5."

17. So far as C.P No.271 of 2010 is concerned, "J" filed the proceeding against "N". In the said proceeding, "N" filed written statement and traversed the allegations made by "J" and contended that "J" wanted to marry him. She collected all required papers and produced witnesses before the Marriage Officer. By that time, she was 26 years old. She is an educated lady. He disclosed before her that the papers were relating to marriage. "N" is still unmarried as "J" has betrayed him.

18. The court below only considered the evidence adduced by "J" and her witnesses, i.e., father and uncle. Ext.9, the notice in Entry No.688102 for marriage under the Special Marriage Act, reveals that the parties did not disclose before the Marriage Officer that they were within the prohibited decree of relationship. The court below accepted the version of P.Ws.2 and 3 as they were only competent to speak about the relationship of the parties. However, the court below did not discuss the evidence of D.Ws.1 and 2 which were on record. As such, the conclusion reached by the court below that the parties are in prohibited degree of relation is perverse.

19. D.W.1, the Junior Clerk in the Office of District Sub-Registrar-cum-Marriage Officer, Bhubaneswar, produced the record relating to marriage between 'J' and 'N' and those documents were marked as Exts.1 to 9. D.W. 2, father of Subhakanta, specifically in his evidence on affidavit stated that "J's" mother had no sister nor such a person attended the marriage between "J" and Subhakanta. The story of prohibited degree of relationship was created for the purpose of presenting the case as Subhakanta filed the application to declare marriage as null and void. The said witness was cross-examined and nothing substantial was brought out to discard his evidence. Therefore, the finding of the court below that 'N' is the cousin of "J" is not sustainable as the said fact for the first time was disclosed after filing of C.P No.271 of 2010.

20. So far as C.P No.268 of 2010 is concerned, the husband filed the application to declare the marriage as void since during subsistence of the

earlier marriage, i.e. marriage between 'J' and 'N' in the year 2002, "J" married to him in the year 2003. However, during pendency of the said proceeding he died and his parents were substituted in his place. The court below allowed them to continue the proceeding and none of the parties challenged the said order in the higher forum. The provision of Section 13(2) of the Special Marriage Act, 1954 is clear regarding the marriage certificate issued by the Marriage Officer and the said certificate shall be deemed to be conclusive evidence of the fact that a marriage under the Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with. Therefore, the marriage certificate dated 24.12.2002 clearly proves that "J" married to "N" and during subsistence of such marriage, she again married to Subhakanta in the year 2003. As marriage held in the year 2003 is coming within the purview of Section 5(i) of the Hindu Marriage Act and in view of Section 11 of the said Act on the application filed by either party thereto against other party the marriage so declared by a decree of nullity if it contravenes any of the conditions specified in Section 5(i), the same shall be declared as null and void.

21. As the parents are continuing in the proceeding filed by Subhakanta and the court below did not take into consideration the said settled position of law, the dismissal of the said proceeding by the court below is liable to be reversed.

22. Section 5(i) of the Act stipulates that for a lawful marriage, the necessary condition that neither party should have a spouse living at the time of the marriage. A marriage in contravention of this condition, therefore, is null and void. The plea that the marriage should not be treated as void because such a marriage was earlier recognized in law and custom cannot be accepted. By reason of the overriding effect of the Act as mentioned in Section 4, no aid can be taken of the earlier Hindu Law or any custom or usage as a part of that Law inconsistent with any provision of the Act. Such a marriage cannot also be said to be voidable by reference to Section 12. So far as Section 12 is concerned, it is confined to other categories of marriages and is not applicable to one solemnized in violation of Section 5(i). Section 12(2) puts further restrictions on such a right. The cases covered by this section are not void *ab initio*, and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriages covered by Section 11 are void *ipso jure*, that is, void from the very inception and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a

formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16 also throw light on this aspect. Section 16(3) prominently brings out the basic difference in the character of void and voidable marriages as covered respectively by Sections 11 and 12. It is also to be seen that while the legislature has considered it advisable to uphold the legitimacy of the paternity of a child born out of a void marriage, it has not extended a similar protection in respect of the mother of the child. Hence, the marriage of a woman in accordance with Hindu rites with a man having living spouse is complete nullity in the eye as law as held by the apex Court in the case of Smt. Yamunabai Anantrao Adhav v. Anantrao Shivram Adhav and another, **AIR 1988 SC 644**.

23. Applying the above principle, this Court comes to the conclusion that at the time of marriage of "J" with Subhakanta, she had a living spouse. Subhakanta filed Civil Proceeding No.268 of 2010 for annulment of the marriage with "J" and that marriage is coming under the purview of Section 5(i) read with Section 11 of the Act. Therefore, the marriage is declared as null and void from the very inception, however, the child is a legitimate child.

24. The apex Court in the case of Deoki Panjhiyara (supra) has held that when the appellant wife has disputed the fact of her first marriage in the absence of any valid decree of nullity or the necessary declaration, the Court will have to proceed on the footing that the relationship between the parties is one of the marriage and not in the nature of marriage. Any determination of the validity of marriage between the parties could be made only by a competent Court in an appropriate proceeding by and between the parties and in compliance with all other requirements of law. Mere production of a marriage certificate issued under Section 13 of the Special Marriage Act, 1954 in support of the claimed first marriage of the wife was not sufficient for any of the Courts, to render a complete and effective decision with regard to the marital status of the parties and that too in a collateral proceeding for maintenance.

25. Hence, the said decision is not applicable to the facts of the present case as the parties in the instant case filed an application to declare earlier marriage as null and void. 'N' filed his written statement admitting the factum of marriage and issuance of marriage certificate under the Special Marriage Act.

26. Accordingly, the findings of the court below are not sustainable. As such, the same is liable to be reversed.

In view of the above findings, we allow both the appeals. C.P Nos.268 of 2010 is allowed and 271 of 2010 is dismissed.

Appeals allowed.

2014 (I) ILR - CUT- 279

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

W.P.(C) NO. 24465 OF 2012 (With Batch)(Dt.03.10.2013)

ABIT PILOO MODY COLLEGE OF ARCHITECTURE & ORS. .....Petitioners

.*Vrs.*

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

CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition – Alternative remedy available to the parties – Appeal U/s.91 (2) of the Odisha Development Authorities Act is pending before the appellate authority and the State government is in seisin of the matter and the contentions raised in the writ petition can be well adjudicated in appeal – Since the matter is sub-judice before the appellate authority, liberty is granted to the petitioner to raise all these questions as raised before this Court, in the appeal, which shall be considered by the appellate authority in accordance with law – If the petitioner is apprehensive of any malfeasance or misfeasance of the Opp.Parties, he is at liberty to move the appellate authority seeking interim relief which shall be considered in accordance with law.

(Para 17)

Case laws Referred to:-

1.62(1986) CLT 71 : (Sakuntala Garabadu & Ors.-V- State of Orissa & Ors.)
2.(112) 2011 CLT 753 : (M/s. Hindustan Concrete Product-V- State of Orissa & Ors.)
3.AIR 1954 SC 207 : (K.S. Rashid & Sons-V- Income Tax Investigation

Commission & Ors.)
4.AIR 1955 SC 425:1955(2)SCR 1 : (Sangram Singh-V- Election Triunal, Kotah & Anr.)
5.AIR 1957 SC 882 : (Union of India-V- T.R. Varma)
6.AIR 1988 SC 616 : (S.T. Muthusami-V- K. Natarajan & Ors.)
7.(2000)6 SCC 293 : (Kerala State Electricity Board & Anr.-V- Kurien E. Kalathil & Ors.)
8.(2007)7 SCC 695 : (A.Venkatasubbiah Naidu-V- S. Chellappan & Ors.)
9.(1995)5 SCC 75 : (Rajasthan State Road Transport Corporation & Anr.-V- Krishna Kant & Ors.)
10.(2001)6 SCC 634 : (L.L.Sudhakar Reddy & Ors.-V- State of A.P. & Ors.)
11.(2001)8 SCC 509 : (Shri Sant Sadguru Janardan Swami(Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha & Anr.-V- State of Maharashtra & Ors.)
12.(2003)1 SCC 72 : (G.K. N. Driveshafts (India) Ltd.-V- Income Tax Officer & Ors.)
13.(2002)7 SCC 484 : (Pratap Singh & Anr.-V- State of Haryana).

For Petitioners - M/s. Bijan Ray, C. Choudhury, B. Mohanty, D.Chhotray, S. Mohanty, B. Mohanti, A.K. Mohanty. Mr. B. Routray, Sr. Advocate.
For Opp.Parties -M/s. Dayananda Modhapatra, M. Mohapatra, G.R.Mohapatra, S.P.Rath (for C.D.A)
Addl. Govt. Advocate for the State.

B.R.SARANGI, J. In W.P.(C) No.24465 of 2012 the petitioner has assailed the letter No.22811/CDA dated 12.12.2012 issued by the CDA calling upon the petitioner for taking steps to vacate the land unauthorisedly occupied by the Institution in excess of the allotted area for demarcation of which necessary assistance shall be extended on a date and time convenient to the parties.

In W.P.(C) No. 11910 of 2003 the petitioner-Ajay Binay Institute of Technology, has challenged the demand raised by the Cuttack Development Authority, in short, 'CDA' in its letter dated 3.2.2003 under Annexure-4 in respect of Ac.10.00 of land in Sector-1 of Bidanasi Project Area and also sought for a direction to allot further Ac.10.17 of land and to refund the sum paid in excess of the actual cost of the land to the petitioner.

In W.P.(C) No. 3748 of 2008 the petitioner has sought to quash the order dated 4.3.2008 passed by the learned District Judge, Cuttack in FAO

No.17 of 2008 under Annexure-9 and the order dated 12.2.2008 passed by the learned Civil Judge (Junior Division) 1st Court, Cuttack in I.A.No.21 of 2008 under Annexure-7 rejecting its application for interim injunction.

In W.P.(C) No. 15758 of 2008 the petitioners have sought for a declaration for allotment of land measuring Ac.20.17 in Sector-1, Abhinaba Bidanasi Project Area, which is in possession of the petitioners and are deemed to have been leased out in their favour and sought for a direction to execute formal lease deed in respect of Ac.20.17 dec. of land in their favour.

2. The sum total of the reliefs sought by the petitioner in the above mentioned writ petitions are

(i) to declare that the petitioner-Institute is in possession of the land measuring Ac.20.17 in Sector-1, CDA;

(ii) to direct the CDA to execute formal lease deed in respect of the very same land i.e., Ac.20.17 in Sector-1, CDA;

(iii) to restrain the CDA from interfering in the peaceful possession of the petitioner-Institute over the said land;

(iv) to quash the order of demolition issued by the CDA; and

(v) to refund the amount paid in excess of the dues admissible to the CDA.

3. The petitioner, Ajay Binay Institute of Technology, hereinafter to be referred to as “petitioner-Institute”, in short, is a society, registered under the Societies Registration Act. The petitioner-Institute applied to the Revenue Divisional Commissioner for allotment of land for establishment of technical institution on 27.8.1994. The Collector, Cuttack intimated the petitioner-Institute that its application was under active consideration by way of lease vide letter dated 12.9.1994. On 29.9.1995 the State Government leased out the contiguous land to the Law College free of premium. However, so far as it relates to the petitioner, on 5.12.1996, CDA only agreed to allot 10 acres of land at prevailing market rate in Sector-1 of Abhinab Bidanasi Scheme, CDA at the relevant point of time, i.e. 1994-95, which was varied between Rs.11 lakhs to 16 lakhs per acre. During the year 1996, Plot Nos.11/1/A, 11/1/B and 11/1/C in Sector-1 of Abhinab Bidanasi Scheme, CDA comprising an area Ac.20.17 were allotted by the CDA to be possessed by the petitioner-Institute. On 12.3.1997 the lease of land in favour of Kendriya Vidyalaya was granted free of premium. On 29.8.1998 the CDA allotted 10

acres of land in favour of the petitioner-Institute in Sector-13, Bidanasi Project Area. The petitioner-Institute being an 'industry', the Government in Industries Department intimated the CDA to provide land at concessional rate to the petitioner-Institute in the rate as per IPR, 1996 of the Government. Even though such letter has been received by the CDA, no steps have been taken for allotment of land in concessional rate in favour of the petitioner-Institute. However, on 27.1.2001, the CDA acknowledged receipt of Rs.1,74,24,000.00 towards the cost of 10 acres of land allotted in favour of the petitioner in Sector-1, Bidanasi Project Area. When the matter stood thus, on 20.3.2001 the CDA cancelled the allotment in favour of the petitioner-Institute on the ground that the land was required for public utility purpose and the letter of possession handed over to the petitioner was purported to be resumed by CDA. Finding no other alternative, the petitioner-Institute had to approach the State Government and on consideration of the grievances, the Chief Secretary directed status quo ante to be maintained pursuant to the letter dated 23.4.2002. It is not out of place to mention here that the CDA had no locus standi till that date as the State Government had not handed over the land in its favour. Therefore, the entire action taken till that date by the CDA authorities was without jurisdiction. However, the Government sanctioned advance possession of the Government land measuring Ac.32.89 in Khata No.1/1 in Plot Nos.1/5,1/6, 1/9 and 1/10 of mouza Subarnapur, Cuttack. Clause (b) of the letter dated 26.6.2002 clearly indicates that the CDA will utilize the aforesaid land for the purpose of housing scheme and for allotment to institutions on merit. Therefore, effectively the land was transferred in favour of CDA by the State Government with effect from 26.6.2002. By virtue of the order passed by the Chief Secretary on 23.4.2002 to restore the status quo ante and in view of fixation of land premium by the Government in Revenue Department at Rs.48.80 lakhs per acre, the CDA revoked the letter of cancellation of allotment on 11.7.2002 and intimated that final cost of the land in favour of the petitioner-Institute shall be worked out and will be intimated for deposit. As per the demand raised by CDA, the petitioner-Institute paid a sum of Rs.3.48 crores pursuant to the letter dated 8.10.2002 in respect of the total cost of the land measuring Ac.20.17 including the ground rent to the CDA. However, on 3.2.2003 suddenly the CDA demanded total consideration of Rs.8.85 crores stating that the Revenue Department has fixed the price of the land @ Rs.48.00 lakhs per acre and Rs.200/- per square feet in respect of development cost. Therefore, when the petitioner had deposited a sum of Rs.3.48 crores, the CDA demanded to deposit the balance of Rs.5.36 crores. Challenging such demand, the petitioner-Institute filed W.P.(C) No.11910 of 2003 and this Court vide order dated 19.1.2004 stayed realization of the demand raised by the CDA and also directed not to

interfere with the possession of the petitioner-Institute for non-payment of the demand. The petitioner paid ground rent of Rs.4,39,302.60 paise for the aforesaid land which the CDA has acknowledged towards the entire land of Ac.20.17 at the rate of Rs.4356/- per acre vide letter dated 31.3.2006. This clearly indicates that acceptance of rent without demur creates a tenancy in favour of the petitioner-Institute.

4. While the said writ petition was pending, an advertisement was issued by the CDA for allotment of land for commercial purposes in Sector-1 even though the State Government had specifically directed in its letter dated 26.6.2002 while sanctioning advance possession that the aforesaid land shall be utilized for the purpose of housing scheme and for allotment to institutions. In violation of the said order of the State Government, the CDA issued the advertisement inviting applications for allotment of land in Sector-1 for commercial purposes. On 5.2.2008 the CDA issued a notice to the petitioner threatening to dispossess the petitioner alleging occupation of excess land by the petitioner-Institute though the said letter does not indicate the extent of excess land possessed by the petitioner. Therefore, finding no other alternative, the petitioner filed C.S.No. 19 of 2008 before the learned Civil Judge (Junior Division) 1st Court, Cuttack for appropriate injunction to restraining the CDA from interfering with their possession. Learned Civil Judge (Junior Division) 1st Court, Cuttack rejected the prayer for injunction sought by the petitioner. Challenging such order, the petitioner filed FAO No. 17 of 2008 before the learned District Judge, Cuttack and the learned District Judge, Cuttack by order dated 13.2.2008 in FAO No. 17 of 2008 passed an interim order restraining the CDA and directing maintenance of status quo. But on final hearing by judgment dated 4.3.2008 learned District Judge, Cuttack dismissed the FAO as well as the interim application by confirming the order passed by the learned Civil Judge (Junior Division) 1st Court, Cuttack. Against the said order, the petitioner approached this Court in W.P.(C) No. 3748 of 2008 and vide order dated 2.4.2008 this Court directed the parties to maintain status quo in respect of the disputed land. In the meantime the advertisement issued by the CDA for allotment of land for commercial purposes has been stayed by this Court by order dated 24.4.2008 in a public interest litigation bearing W.P.(C) No. 6183 of 2008. Apart from the above while government sanctioned the advance possession vide letter dated 26.6.2002 specifically stated that the land shall be utilized for the purpose of housing scheme and allotment to institution. Therefore, there is bar for allotment of the land for commercial purpose.

5. The petitioner preferred an appeal on 21.7.2008 to the State Government indicating the State's assurance to grant lease of 20 acres of land and that on 5.12.1996 the CDA permitted the petitioner-Institute to possess 20 acres of land. At this juncture, the CDA wrote a letter to the AICTE for withdrawal of approval in favour of the petitioner-Institute, which was challenged in W.P.(C) No. 15758 of 2008. However, in gross violation of this Court's order granting status quo on 2.4.2008, the CDA dumped building materials for construction of road. However, on 25.3.2009 the petitioner appeared before the State for hearing of the appeal pursuant to the notice issued by the State. Pending final decision on the appeal, the Government directed the petitioner to clear the dues vide order dated 4.7.2009. In consideration of the Government direction in the appeal, the petitioner paid a sum of Rs.2,51,36,000/- for the entire Ac.20.17 of land on 13.7.2009. But the CDA did not encash the cheque. Then the Government again called upon the petitioner to attend the hearing of the appeal on 18.12.2009. Despite compliance of the order in the appeal, the CDA called upon the petitioner to remove the encroachment from the CDA's land without indicating the nature and extent of encroachment. Accordingly, W.P.(C) No.24465 of 2012 was filed challenging such letters dated 12.12.2012 and 18.12.2012 respectively and entertaining the said writ petition, this Court passed interim order on 21.12.2012 staying operation of the aforesaid two letters.

6. The CDA filed its counter stating therein that on 20.4.1996 the petitioner-Institute applied for 10 acres of land in Bidanasi Project Area for establishment of the institution. On consideration of the same, the CDA vide letter dated 5.12.1996 required the petitioner to submit willingness to pay the cost of the land at the market rate and to submit the lay out plan and the project report. However, the petitioner requested to expedite the proposal for allotment. But at no point of time the petitioner ever prayed for allotment of land at any specific sector or place. However, the CDA considered the proposal for allotment of land in its 51st meeting and decided to allot 10 acres of land in OTM surplus land at Choudwar, which has been communicated to the petitioner on 16.2.1998 requiring their willingness. But the petitioner vide letter dated 20.3.1998 requested the Secretary for allotment of land at Bidanasi Housing scheme and on consideration of the same, vide letter dated 29.8.1998 the CDA intimated approval of allotment of 10 acres of land in favour of the petitioner-Institute in Sector-13 subject to the stipulation that the cost of the land would be intimated at the time of allotment of the land. The petitioner-Institute agreed for the proposal of the CDA and consented for the same and requested to deliver possession immediately in its letters dated 25.9.1998 and 26.1.1999. However, vide

letter dated 18.7.1999 the petitioner-Institute requested the Vice Chairman to allot at least 5 acres of land in Sector-1 immediately, which was referred to the allotment committee of the CDA. On consideration, the allotment committee in its meeting held on 16.7.1999 decided to change the purpose for use of five acres of land from recreational purpose to public and semi public use. And further decided that the rest 5 acres of land may be allotted in Sector-13 and the said proposal has been approved by the allotment committee in its 59th authority meeting held on 13.8.1999. It is stated that the petitioner has been intimated the cost of five acres of land allotted in Sector-1 at a tentative cost of Rs.1,74,24,000/- excluding the additional charge for situational advantage and such assessment was made keeping in view the average premium of Rs.34,84,800/- in respect of other sectors. Accordingly, the willingness of the petitioner-Institute was sought for and it was required to deposit the cost of the land within two months. In response to the said letter, the petitioner expressed its willingness in its letter dated 3.9.1999 with a token deposit of Rs.2 lakhs. Therefore, vide letter dated 7.10.1999 the CDA directed for payment of rest of the amount by 30.10.1999. The petitioner failed to deposit the said amount in time and went on paying installment on 3.9.1999 of Rs.2 lakhs and again Rs.10 lakhs on 25.9.1999 and requested to allow time for 2-3 years to deposit the rest amount. In the meantime, lot of correspondence were made between the parties and by letter dated 14.7.2000, C.D.A. informed the petitioner-institute to deposit the amount within one month along with interest at the rate of 18%. However, the petitioner vide letter dated 21.7.2000 intimated the C.D.A. to allot the land on concessional rate as per IPR, 1996 of the Government of Orissa with reference to the letter of the General Manager dated 10.5.2000 to which the CDA in its letter dated 3.8.2000 refused his request for allotment under IPR, 1996. It is further stated by the CDA that at no point of time any assurance was given for allotment of Ac.20.17 dec. of land in favour of the petitioner. On the other hand, the petitioner has only been allotted Ac.5.00 of land for which lease deed has been executed and further Ac.5.00 dec. of land is in possession of the petitioner, for which steps have been taken for vacation of the same as the same is in unauthorized occupation and out of that 20 acres of land some portions were allotted in favour of the State Administrative Tribunal as well as other institutions and some portions are left for allotment for commercial purpose. Therefore, though the petitioner is in possession of Ac. 12.17 decimals of land at this moment, but only lease has been executed in respect of 5 acres of land and so far as excess possessions of 5 acres or Ac. 7.17 decimals is concerned the petitioner is in unauthorized possession of the same, for which the petitioner is liable to be vacated.

7. Mr. Bijan Roy, learned Senior Counsel appearing for the petitioner in all the cases strenuously urged that under the scheme of Orissa Development Authorities Act, the Government is the controlling authority. Section 103 of the said Act stipulates that all directions of the State are to be carried out by the C.D.A. and the decision of the State Government or any dispute between the authority and State Government shall be final. Apart from the same, the scheme of the Act provides that under Section 91 (2) of the O.D. Act, orders passed by the C.D.A. under Sub-section (1) of Section 91 are appealable and the decision of the State Government shall be final. He further urged that C.D.A. has agreed to allot 10 acres of land at the prevailing market rate and such prevailing market rate existing in 1996 varies between 10 lakhs to 16 lakhs. Therefore, on 3.2.2003 while confirming the lease of 10 acres of land, the petitioner was called upon to pay at the enhanced rate of Rs.48.00 lakhs per acre which C.D.A. ought not to have done. However, such enhancement is under challenge in this proceeding. Before obtaining property from the State Government, on 5.12.1996 the C.D.A. agreed to allot 10 acres of land but delivered possession of Ac.20.17 decimals with an understanding that the balance Ac.10.17 decimals shall be allotted in due course after obtaining Government orders.

8. The petitioner informed the Government that it is in possession of 20 acres of land with effect from 5.12.1996 and such assertion has no where been denied or controverted by the C.D.A. Therefore, applying the principle of doctrine of non-traverse, the petitioner is in possession Ac. 20.17 decimals of land. Apart from the same, Mr. Ray urged that the petitioner deposited the annual rent for Ac. 20.17 decimals for the period 2001-2006, which has been duly acknowledged by C.D.A. That itself creates a tenancy right and as such, in view of the provisions contained in Section 115 of the Evidence Act, the C.D.A. is estopped to take a different stand at subsequent stage. When this Court passed status quo order in respect of land in possession of the petitioner which includes Ac. 20.17 decimals, there is violation of the status quo order in view of the fact that in 2011-12 the C.D.A. allotted 2 acres of land in favour of Orissa Administrative Tribunal and 15,600 sqft. on 26.3.2012 in favour of the M.A.C.T. out of the disputed land. Apart from the same, it is further urged by Mr. Ray that C.D.A. has issued an advertisement for allotment of the disputed plots for commercial purposes, which is in gross violation of the Government direction, which is a statutory direction and as such under Section 75 of the O.D. Act, the C.D.A. cannot resort to any regulation to allot the land for commercial purposes. Apart from the same, the petitioner-institute preferred an appeal under Section 91 (2) of the O.D. Act before the State Government against the

repeated direction of C.D.A. without notice for removal of occupation of excess land and pending final decision of the appeal, the Government directed the petitioner to clear up the dues. In compliance to the same, the petitioner deposited a sum of Rs.2.51 crores for the entire Ac. 20.17 decimals. He has relied upon a judgment of this Court in **Sakuntala Garabadu and others v. State of Orissa and others,** 62 (1986) CLT 71. Mr. Ray, learned Senior Counsel appearing for the petitioner further urged that in respect of the Law College, Kendriya Vidyalaya, which are coming within the said locality, the Government has been pleased to allot the land free of premium whereas in the present case the C.D.A. has demanded exorbitant rate contrary to Government direction. Mr. Ray also relied upon judgments in **M/s.Hindustan Concrete Product v. State of Orissa and others** (112) 2011 CLT 753 stating that the petitioner being entitled to get the benefit under the IPR 1996, the same not having been granted, the ratio decided by this Court in the said case with regard to payment of concessional rate for allotment of land has not been followed.

9. Mr. B. Routray, learned Senior Counsel appearing for the petitioner in W.P.(C) No.11910 of 2003 also supported the contention raised by Mr. B. Ray, learned Senior Counsel and also strenuously contended that the C.D.A. authorities have acted in excess of their jurisdiction and tried to cause harassment to the petitioner by issuing letters time and again at different point of time taking different stand coercing the petitioner to deposit at higher rate which itself amounts to arbitrary and unreasonable exercise of power by the authorities.

10. Mr. D. Mohapatra, learned counsel appearing for the C.D.A. reiterated the contentions raised in the counter affidavit filed by the C.D.A. and emphasized that there is compliance of the provisions of law inasmuch as the C.D.A. has never violated any order passed by this Court and more so the petitioner having remained in possession of land in excess of the land allotted in its favour, as per the provisions of law appropriate action has been taken against them for eviction and therefore the C.D.A. has not committed any error or irregularity. Therefore, the action taken is well within its jurisdiction and this Court may not interfere with the same.

11. On consideration of the pleading available on record and the rival contentions of the parties, it is now to be determined whether this Court can exercise the power invoking the extraordinary jurisdiction when alternative remedy is available to the parties.

12. The issue of exhausting statutory remedy has been considered time and again by the Supreme Court. The Constitution Bench of the Supreme Court, in ***K.S. Rashid & Son Vs. Income Tax Investigation Commission & Ors.,*** AIR 1954 SC 207, held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. The said power is limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Apex Court in ***Sangram Singh Vs. Election Tribunal, Kotah & Anr.***, AIR 1955 SC 425 : 1955 (2) SCR 1, holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion.

13. Again a Constitution Bench of the Supreme Court, in ***Union of India Vs. T.R. Varma,*** AIR 1957 SC 882, held that it is well settled that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Apex Court held that existence of another remedy does not affect the jurisdiction of the Court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs and where such remedy is exhausted, it will be a sound exercise of discretion to refuse to interfere in a petition under Article 226 of the Constitution unless there are good grounds therefor.

14. In ***S.T. Muthusami Vs. K. Natarajan & Ors.,*** AIR 1988 SC 616, the Supreme Court held that the High Court cannot be justified to exercise the power in writ jurisdiction if an effective alternative remedy is available to the party.

15. In ***Kerala State Electricity Board & Anr. Vs. Kurien E. Kalathil & Ors.*** (2000) 6 SCC 293, while dealing with a similar issue, the Apex Court held that the writ petition should not be entertained unless the party exhausted the alternative/statutory efficacious remedy.

16. In ***A. Venkatasubbiah Naidu Vs. S. Chellappan & Ors.,*** (2007) 7 SCC 695, the Supreme Court deprecated the practice of exercising the writ jurisdiction when efficacious alternative remedy is available. The Court observed as under:-

> "Though no hurdle can be put against the exercise of Constitutional powers of the High Court, it is a well recognized principle which

gives judicial recognition that the High Court should direct the party to avail himself of such remedy, one or other, before he resorts to a Constitutional remedy."

Similar view has been reiterated in ***Rajasthan State Road Transport Corporation & Anr. Vs. Krishna Kant & Ors.,*** (1995) 5 SCC 75, ***L.L. Sudhakar Reddy & Ors Vs. State of A.P. & Ors.,*** (2001) 6 SCC 634, ***Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha & Anr. Vs. State of Maharashtra & Ors.,*** (2001) 8 SCC 509, ***G.K. N Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors.,*** (2003) 1 SCC 72; and ***Pratap Singh & Anr. Vs. State of Haryana***, (2002) 7 SCC 484.

17. In view of the aforesaid position of law laid down by the apex Court and keeping in view the admitted fact that appeal is pending before the appellate authority under Section 91(2) of the O.D. Act and the State Government is in seisin of the matter, the contentions raised in this writ petition can well be adjudicated by the appellate authority in appeal. Therefore, in fitness of things, instead of exercising jurisdiction under Article 226 of the Constitution, since the matter is sub judice before the appellate authority, liberty is granted to the petitioner to raise all these questions as raised before this Court, in the appeal, which shall be considered by the appellate authority in accordance with law. We further observe that if the petitioner is apprehensive of any malfeasance or misfeasance of the opposite parties, it is at liberty to move the appellate authority seeking interim relief, which shall be considered in accordance with law.

18. With the aforesaid observation and direction, the writ petitions are disposed of.

Writ petition disposed of.

2014 (I) ILR - CUT- 289

B. N. MAHAPATRA, J.

F.A.O. NO. 424 OF 2012 (Dt.23.08.2013)

EXECUTIVE ENGINEER (ELECTRICAL), SOUTHCO & ORS. ……..Appellants

.Vrs.

R. WARA LAXMI & ORS. ……Respondents

WORKMEN'S COMPENSATION ACT, 1923 - S. 4, 4-A

Accident took place on 28.05.2010 – Deceased expired on 29.05.2010 – Amendment brought to Section 4 w.e.f. 31.05.2010 i.e. two days after the death of the deceased enhancing the ceiling of Rs.4000/- to Rs.8,000/- – Amendment has no retrospective effect – Held, Commissioner should have taken the wages of the deceased at Rs.4,000/- which was prevalent on the date of accident.

(Para-17)

Case laws Referred to:-

1.AIR 1999 SC 3502 : (Kerala State Electricity Board-V- Valsala K.)

2. 2002(2) T.A.C. 359 (SC) ,: (M.Parameswaran Pillai Vs. Union of India & Anr.)

3. 1975 STPL (LE) 7986 SC : (Pratap Narin Singh Deo vrs. Srinivas Sabata & Anr.,)

4. 2001(2) T.A.C. 250 (S.C.) : (2001) 3 SCC 714 :(Rathi Menon vs. Union of India,)

5. 1998 (I) Ker LT 951 (FB) : (United India Insurance Co. Ltd. vs. Alavi,)

For Appellants - M/s. P. Mohanty, D.N. Mohapatra, J.Mohanty, P. K. Nayak, S.N. Dash.

For Respondents - M/s. B. N. Samantaray, N.Ch.Tripathy, R.K. Parichha, D.Pattnaik & P. Jena, (for Res. Nos.1 to 4)

B.N. MAHAPATRA, J. This appeal has been directed by the appellants under Section 30 of the Employees' Compensation Act, 1923 challenging correctness of the judgment dated 30.06.2012 passed by the Commissioner for Employees' Compensation, Ganjam, Berhampur (for short, "Commissioner") in W.C. Case No.48 of 2011.

2. The case of the claimant-respondents before the Commissioner in a nutshell is that the husband of respondent No.1, namely, late R. Nagaraja was working as a Helper under opposite party No.3-Junior Engineer (Electrical), SOUTHCO, At/P.O./P.S. K. Nuagaon, District-Kandhamala. On 28.05.2010 at about 4.30 P.M. while her husband was assisting the Lineman in an electric pole for repairing 33/11 KV supply electric line of Daringibadi at K. Nuagaon sub-station, all of a sudden he got electric shock and fell down from the electric pole. As a result of such accident, the deceased sustained burn injuries all over his body. The deceased was immediately shifted to K.

Nuagaon hospital for treatment. Thereafter, he was referred to Baliguda hospital and then he was shifted to M.K.C.G. Medical College & Hospital, Berhampur for better treatment. The deceased died next day, i.e., on 29.05.2010 at about 7.30 A.M. during treatment.

Further case of the claimant-respondents is that the deceased was getting Rs.18,000/- per month and was aged about 53 years at the time of his death. With these averments, the claimant-respondents filed claim petition before the Commissioner claiming compensation of Rs.10,00,000/- (rupees ten lakhs)

3. Being noticed by the Commissioner, opposite parties, who are the present appellants, filed their written statement. Opposite party No.1 filed Form II stating therein that the deceased while working as a Helper in K. Nuagaon Electric Section, Baliguda met with an accident on 28.05.2010, as a result of which he died on 29.05.2010. The deceased was getting salary of Rs.10,030/- per month. The deceased was electrocuted while he was replacing 33 KV horn gap fuse (Y phase) without knowledge and consent of the Lineman and without isolating 33 KV AB switch in a careless and negligent manner. The Helpers are not authorized to replace the Horn gap fuse. The duty of a Helper is only to assist the lineman. The deceased had not used the discharge rod and gloves at the time of attempting to replace 33 KV Horn gap fuse.

4. On the rival pleadings of the parties, the Commissioner framed the following issues:

> "Issue No.1:- Whether the deceased R. Nagaraja @ R.Nagaraju was a workman within the meaning of E.C. Act, 1923 & died in an accident arising out of & in course of his employment ?
>
> Issue No.2:- Whether the quantum of compensation claimed is due or any part thereof & if so by whom payable ?"

5. The Commissioner taking into consideration the argument advanced by both the parties and the evidence of witnesses produced before him, came to the conclusion that the deceased R. Nagaraja @ R. Nagaraju was a workman within the meaning of Employees' Compensation Act, 1923 and died in an accident arising out of and in course of employment. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *M. Parameswaran Pillai Vs. Union of India & Another, 2002(2) T.A.C. 359 (SC),* the Commissioner accepted the wages of the deceased at Rs.12,931/- per month and limited the same to Rs.8,000/- for the purpose of calculating the compensation amount. Accordingly, he determined th e amount of

compensation at Rs.5,70,720/- along with interest @ 7.5% per annum for the period from 16.09.2011 to 28.06.2012, i.e., 9 months 12 days which was calculated at Rs.33,530/-. Accordingly, the Commissioner directed the opposite party No.1-Executive Engineer (Electrical), SOUTHCO to deposit the awarded amount before him within one month from the date of the judgment, failing which 50% penalty with 12% interest per annum shall be charged on the awarded amount from the date it fell due. Being aggrieved by the judgment and order of the Commissioner, the appellants have filed the present appeal.

6. Mr. P. Mohanty, learned counsel appearing on behalf of the appellants-Executive Engineer (Electrical) submitted that the impugned judgment passed by the Commissioner is contrary to law and evidence on record. The Commissioner is not correct to hold that the deceased had done the work with the direction of appellants herein. Computation of compensation taking the wages at Rs.8,000/- per month in view of the amendment to the quantum which was brought into force to the Act with effect from 31.05.2010 while the death occurred on 29.05.2010, is bad in the eye of law. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Kerala State Electricity Board v. Valsala K.*, AIR 1999 SC 3502, it was submitted that the amended provision has no retrospective effect since the workman was attempting to replace 33 KV horn gap fuse on 29.05.2010. The deceased died in the accident for his own negligence as he was replacing 33 KV horn gap fuse without instruction of the superior/competent authority. Therefore, the appellants are not liable to pay any compensation to the claimant-respondents in view of Section 3(1)(b)(iii) of the Workmen's Compensation Act, 1923.

7. Mr. B.N. Samantaray, learned counsel appearing on behalf of the claimant-respondents submitted that respondent No.1, in order to prove the case has been examined as P.W.1 and filed certain documents in respect of their stand. The appellants could not prove that the deceased died due to his own negligence. The appellants have examined one witness through the Lineman, Man Mohan Bastia, as O.P.W.1 under whom the deceased was working as Helper who admitted the employment of the deceased under the present appellants. It is further stated that he does not know whether the deceased had put on the hand gloves and discharge rod while shifting 33 KV Horn Gap Fuse. Mr. Samantaray emphatically argued that even if for the sake of argument it is accepted that the deceased died due to his own negligence, the claimants cannot be deprived of getting compensation, because the death of deceased occurred/arose out of and in course of his employment. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Pratap Narin Singh Deo vrs. Srinivas Sabata and*

Another, 1975 STPL (LE) 7986 SC, Mr. Samantaray submitted that the Hon'ble Supreme Court has awarded compensation where the appellant had pleaded that the accident had taken place solely because of the own negligence of the deceased. Further, placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Rathi Menon vs. Union of India, 2001(2) T.A.C. 250 (S.C.) : (2001) 3 SCC 714,* it was submitted that the Rules prevailing at the time of making order for payment of compensation should be considered. It is further submitted that in the case of *M. Parameswaran Pillai (supra),* the Hon'ble Supreme Court has observed that the claimants are entitled to the benefit of amendment raising quantum of compensation. Therefore, the Commissioner has rightly applied the amended provisions while accepting the monthly wages of the deceased. Placing reliance on the cases of *Pratap Narin Singh Deo (supra)* and *National Insurance Co. Ltd. vs. Musabir Ahmed and Another, 2007 (2) TAC 3 (SC), Oriental Insurance Co. Ltd. vs. Mohd. Nasir and another, 2009(3) TAC 598(SC) and Oriental Insurance Co. Ltd. vs. Siby George and others, 2012 (4) TAC 4 (SC),* it was submitted that interest is to be awarded from the date of filing of the claim petition till the date of payment.

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

> (i) Whether the deceased was replacing 33 KV Horn gap fuse without instruction of the Superior/Competent Authority for which he died due to his own negligence and thus, the appellants are not liable to pay compensation to the claimants ?
>
> (ii) Whether the Commissioner is justified to accept the salary of the deceased at Rs.12,961/- per month and limited it to Rs.8,000/- for the purpose of calculating compensation amount which was brought into force by way of amendment of the Act w.e.f. 31.05.2010 while the death of the deceased occurred on 29.05.2010 ?

9. So far question No.(i) is concerned, undisputedly the appellants have not proved by way of adducing any evidence that the workman was replacing 33 KV Horn gap fuse (Y Phase) without instruction of the superior/competent authority. No evidence/document was also produced either by the respondents or OPW 1 before the Commissioner that on the date of accident, the Lineman under whom the deceased was working as a Helper had gone to Mahasingi to take meter reading which is 6 KMs away from the place of accident.

10. At this stage, it is appropriate to extract the relevant portion of the impugned judgment:

> "……The O.Ps admitted in their W/S as well as in written argument that the deceased R. Nagaraju was working as a helper under SOUTHCO in K. Nuagaon electrical section & while he was attempting to replace 33 KV Horn gap fuse, he got electric shock & sustained electrical burn injuries on 28.05.2010 at about 4.30 P.M. & succumbed to injuries on 29.05.2010 at about 7.30 A.M. while undergoing treatment at M.K.C.G. Medical College & Hospital, Berhampur. The O.P.W.1 also stated that the deceased R. Nagaraju was working as a helper on the date of accident & he was attached with him to assist the work. the O.P.W.1 came to know after enquiry that the deceased while shifting the 33 KV Horn gap fuse had not used the hand gloves & discharge rod & by which he was electrocuted & died due to his own fault. On the date of accident the O.P.W.1 had gone to Mahasingi to take meter reading which is 6 kms far from the accident spot. In this connection neither the O.Ps nor O.P.W.1 submitted any document before this Court that the O.P.W.1 had been directed by the O.Ps for taking electrical meter reading at Mahasingi. It clearly speaks that the lineman was present at the spot on 28.05.2010 at about 4.30 P.M. & as per the direction of the lineman, the deceased R. Nagaraju was replacing the 33 KV horn gap fuse & while doing so, he got electric shock & fell down & sustained electrical burn injuries. No sub-ordinate staff will do the abovesaid hazardous work without any directions/instructions of their higher authorities. Perhaps for hiding of the truth, the O.P.W.1 deposed falsely before this Court. Further after hearing the news about the electrical accident of R. Nagaraju, the O.P.W.1 could have informed/lodged the F.I.R. before the concerned police, but the O.P.W.1 did not do that & remained silent. It was the duty of the lineman (Man Mohan Bastia) to inform his higher authorities as well as to the police regarding the electrical accident of R. Nagaraju, Helper.
>
> It is seen from the police report, W/S of O.Ps & Form-II that the deceased R. Nagaraju was working as a helper under SOUTHCO at K. Nuagaon Electrical Section. On 28.05.2010 at about 4.30 P.M. as per the directions of the lineman, the deceased R. Nagaraju, helper was replacing the 33 KV Horn gap fuse & got electric shock as a result of which he sustained electrical burn injuries in all over his body & died on 29.05.2010 at about 7.30 A.M. while undergoing

> treatment at M.K.C.G. Medical College & Hospital, Berhampur. In the above facts and circumstances, it is of my opinion that the deceased R. Nagaraja @ R. Nagaraju was a workman within the meaning of E.C. Act, 1923 & died in an accident arising out of in course of his employment. Hence, issue no.1 is answered accordingly."

11. Nothing has been brought to the notice of this Court to show that the above findings/observations of the Commissioner are wrong/perverse.

12. In view of the above, this Court is of the considered view that the appellants are liable to pay compensation to the claimants.

13. So far question No.(ii) is concerned, the facts which are not in dispute are that the accident took place on 28.05.2010 and the deceased died on 29.05.2010. Section 4 of the W.C. Act, 1923 provides that for the purpose of computation of compensation where monthly wages of the workman exceeds Rs.4,000/- his monthly wages for the purpose of Clauses (a) and (b) of Section 4 of the Act, 1923 shall be deemed to be Rs.4,000/- only. However, ceiling of Rs.4,000/- has been enhanced to Rs.8,000/- w.e.f. 31.05.2010, i.e., after two days of the death of the deceased. It is also not in dispute that the monthly wage of the deceased is more than Rs.8,000/-. In this background, the Commissioner relying upon the judgment of the Hon'ble Supreme Court in the case of *M. Parameswaran Pillai (supra),* limited the wages of the deceased at Rs.8,000/- per month for the purpose of calculating the amount of compensation.

14. At this juncture, it is relevant to refer to the judgment of the Hon'ble Supreme Court in the case of *Valsala K (supra),* wherein the Hon'ble Supreme Court has held as under:

> "ORDER :- The neat question involved in these special leave petitions is whether the amendment of Ss. 4 and 4A of the Workmen's Compensation Act, 1923, made by Act No. 30 of 1995 with effect from 15-9-1995, enhancing the amount of compensation and rate of interest, would be attracted to cases where the claims in respect of death or permanent disablement resulting from an accident caused during the course of employment, took place prior to 15-9-1995?
>
> 2. Various High Courts in the country, while dealing with the claim for compensation under the Workmen's Compensation Act have

uniformly taken the view that the relevant date for determining the rights and liabilities of the parties is the date of the accident.

xx xx xx

5. Our attention has also been drawn to a judgment of the Full Bench of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi, 1998 (1) Ker LT 951 (FB) wherein the Full Bench precisely considered the same question and examined both the above noted judgments. It took the view that the injured workman becomes entitled to get compensation the moment he suffers personal injuries of the types contemplated by the provisions of the Workmen's Compensation Act and it is the amount of compensation payable on the date of the accident and not the amount of compensation payable on account of the amendment made in 1995, which is relevant. The decision of the Full Bench of the Kerala High Court, to the extent it is in accord with the judgment of the larger Bench of this Court in Pratap Singh Narain Singh Deo v. Srinivas Sabata (AIR 1976 SC 222 : 1976 Lab IC 222) (supra) lays down the correct law and we approve it.

6. Having answered the question posed in the earlier part of the judgment in the negative, we shall take up this batch of special leave petitions for consideration.

7. Insofar as these special leave petitions are concerned, we find that the accident took place long time back. Compensation became payable to the workmen, as it is not disputed that the accidents occurred during the course of employment, as per the law prior to the amendment made in 1995. Keeping in view the peculiar facts and circumstances of these cases, pettiness of the amounts involved in each of the cases and the time that has since elapsed, we are not inclined to interfere with the impugned orders, decided on the basis of the 1995 amendment, in exercise of our jurisdiction under Art. 136 of the Constitution of India and, therefore, dismiss the special leave petitions, but, after clarifying the law, as noticed above."

[underlined for emphasis]

15. *Rathi Menon's* case *(supra*), which has been followed by the Hon'ble Supreme Court in the case of *M. Parameswaran Pillai (supra)* was under the Railways Accidents and Untoward Incidents (Compensation) Rules, 1990 where as the present dispute is under the Workmen's Compensation Act,

1923. *Valsala K's case (supra)* is under the Workmen's Compensation Act, 1923. The Hon'ble Supreme Court in the case of *Valsala K (supra)* taking note of its earlier judgment in *Pratap Narin Singh Deo (supra)* approved the law laid down by the Full Bench of the Kerala High Court in ***United India Insurance Co. Ltd. vs. Alavi, 1998 (I) Ker LT 951 (FB)*** as correct law in which the Kerala High Court held that it is the amount of compensation payable on the date of accident and not the amount of compensation payable on account of the amendment made in 1995.

16. In ***Rathi Menon's*** *case (supra*), the Hon'ble Supreme Court has taken note of its earlier judgment in *Pratap Narin Singh Deo (supra) and Valsala K. (surpa)* and observed as follows:

> **"32.** In the other two decisions referred to by the Division Bench the claims made under the Workmen's Compensation Act, 1923 ("WC Act" for short) were the subject-matter. In *Pratap Narain Singh Deo*[1] the claimant workman sustained injuries and one of his arms was amputated in the course of his employment on 6-7-1968. The Commissioner under the Act passed an order on 6-5-1969 directing the employer to pay compensation together with penalty and interest for delayed payment. The employer challenged the said order before the High Court contending that penalty and interest could not be awarded as his liability to pay had arisen only when the Commissioner passed the order and not earlier. The High Court repelled such a contention. Against this the employer approached this Court by special leave. A four-Judge Bench of this Court held thus: (SCC p. 291, para 7)
>
> "The employer therefore became liable to pay the compensation as soon as the aforesaid personal injury was caused to the workman by the accident which admittedly arose out of and in the course of the employment. It is therefore futile to contend that the compensation did not fall due until after the Commissioner's order dated 6-5-1969 under Section 19."
>
> On the aforesaid order this Court further held that the Commissioner under the Act was fully justified in making the order for payment of interest and penalty. In *Maghar Singh* v. *Jashwant Singh*[3] the claim made under the WC Act was dealt with and the findings or the observations therein have no bearing on the question involved in this appeal.

> **33.** The scheme of the provision under the WC Act is materially different from the scheme indicated in Chapter XIII of the Railways Act. In the former, compensation payable is fixed in the Act itself through the Schedule incorporated thereto. Section 4 of the WC Act shows that such compensation is to be linked with the monthly wages of the workman concerned. It also provides that the liability to pay compensation on the employer would arise not when the Commissioner passes the order but on the date of sustaining the injury itself. A provision is made in Section 4-A of the WC Act that where any employer is in default of paying the compensation due within one month the Commissioner shall direct the employer to pay not only interest but in appropriate cases a penalty ranging up to 50% of the amount payable. The said scheme cannot be equated with the scheme in Chapter XIII of the Railways Act, as the principles involved have differences.
>
> *[underlined for emphasis]*

17. In view of the above, this Court is of the view that the Commissioner is not justified in taking the wages of the deceased at Rs.8,000/- per month as per the amendment brought to Section 4 w.e.f. 31.05.2010 i.e. two days after the death of the deceased. The Commissioner should have taken the wages of the deceased at Rs.4,000/- which was prevalent on the date of the accident since amendment brought to Section 4 of the Act has no retrospective effect.

18. The Commissioner has calculated the amount of compensation at Rs.5,70,720/- taking the monthly wages at Rs.8,000/- and also accordingly calculated the interest at Rs.33,530/- on the amount of compensation for the period from 16.09.2011 to 28.06.2012. Since for the reasons stated above, the monthly wages is to be taken at Rs.4,000/-, accordingly, the amount of compensation and interest shall be reduced by 50%. Thus, the appellants are liable to pay 50% of the amount of compensation as well as interest to the respondent which comes to Rs.2,85,360/- and Rs.16,765/- respectively totaling to Rs.3,02,125/-.

19. So far payment of interest on the compensation amount is concerned, the Commissioner directed opposite party No.1-Executive Engineer (Electrical) to deposit the awarded compensation and interest before him within one month from the date of his order, failing which 50% penalty with 12% interest per annum would be charged over the awarded amount from the date it falls due. Admittedly, the claimant-respondents have not filed any appeal or cross appeal challenging the order of the Commissioner. In the fact situation, this Court does not think it proper to

interfere with the order of the Commissioner with regard to payment of interest.

20. This Court vide order dated 31.08.2012 passed in Misc. Case No.528 of 2012 directed that the compensation amount deposited by the appellants before the Commissioner in W.C. Case No.48 of 2011 shall not be disbursed without leave of this Court.

21. In view of the above, learned Commissioner is directed to pay the compensation amount of Rs.3,02,125/- along with interest accrued thereon to the claimant-Respondents and the balance amount along with interest shall be refunded to the appellants within a period of one month from the date of production of certified copy of this judgment.

22. In the result, the appeal is allowed to the extent indicated above.

Appeal allowed.

2014 (I) ILR - CUT- 299

B. N. MAHAPATRA, J.

M.A.C.A. NO. 590 OF 2007 (Dt.27.09.2013)

UNITED INDIA INSURANCE CO. LTD. ……..Appellant.

.*Vrs.*

SUNITA NAIK & ORS. ……..Respondents

MOTOR VEHICLES ACT, 1988 - S.168

Quantum of compensation – Compensation towards future prospects – Deceased had a stable job with future promotion and increment of salary – His annual salary was Rs.2,68,027 and he was 29 years at the time of accident – Held, 50% of his annual salary is taken towards future prospects, so his total annual income comes to Rs.4,02,041/- - Deducting 1/3 of the total income towards personal expenses and applying 17 multiplier, the amount of compensation comes to Rs.45,56,460 – He is also entitled to Rs.20,000/- under general

damages – Direction issued to the Insurance Company to deposit Rs.45,76,460/- along with 6% interest P.A. from the date of filing of the claim petition. (Paras 16,17)

Case law Relied on:-

(2009) 2 TAC 677 : (Sarla Verma-V- Delhi Transport Corporation)

Case law Referred to:-

(2003) 2 SCC 148 : (Abati Bezbaruah-V- Geological Survey of India)

For Appellant - M/s. A.K. Mohanty, Sr. Advocate
M.C. Nayak & D.C.Dey.
For Respondents - M/s. Damodar Pati, S.K. Mishra,
S.N. Sharma, (for R-1 to 4)

B.N.MAHAPATRA, J. This appeal has been directed at the instance of the United India Insurance Company Limited under Section 173 of the Motor Vehicles Act, 1988 challenging the Award dated 09.05.2007 passed by the Member, 2nd Motor Accidents Claims Tribunal (hereinafter referred to as 'the Tribunal'), Northern Division, Sambalpur in Misc. (A) Case No.267 of 2002(S).

2. Respondent Nos. 1 to 4, who were the petitioners/claimants before the Tribunal, filed the claim petition under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act'). Claimants' case before the Tribunal in a nutshell is that the deceased-Alok Kumar Naik was serving as an Engineer in Indian Petro-Chemicals Limited (for short, 'IPCL') and was getting monthly salary of Rs.24,000/- at the time of death. On 08.07.2002 at about 3.30 PM, while returning home with his colleagues from his place of work at Bharuch, Gujarat in a Bus bearing Registration No.GJ-6W-5131 at Dhahaj road near a Petrol Pump, a truck bearing Registration No.GJ-17T-7084 came in a high speed from the opposite direction and hit the bus on its face, as a result of which many persons were severely injured including the deceased. The deceased was removed to a hospital at Bharuch where he was declared dead. Further case of the claimants was that the deceased was 23 years old at the time of accident. With these facts the claimants filed the claim petition claiming compensation of Rs.50,00,000/-.

3. Owners of the bus and the truck (opposite parties 1 and 2) did not appear before the Tribunal after notice and the Tribunal directed to hear the claim petition ex-parte as against them. The United India Insurance Company Limited (for short 'the Insurance Company'), which is the insurer of both the vehicles, i.e., the bus and the truck involved in the accident, appeared as opposite party No.3 and filed its written statement. Before the Tribunal, though the Insurance Company

admitted itself to be the insurer of both the vehicles and the policies were to be valid on the date of accident but denied its liability to pay the amount of compensation on the ground that the drivers were not having valid licence. It also challenged the quantum of compensation claimed as high and excessive.

4. On the pleadings of the parties, learned Tribunal framed following four issues:

(a) Whether, the claim petition is maintainable?

(b) Whether, Alok Kumar Naik died due to accident involving Bus No. GJ-6W-5131 and Truck No. GJ-17T- 7084 which took place on 8.7.2002 ?

(c) Whether, the accident occurred due to rash and/or negligent driving by the drivers of both the vehicles?

(d) Whether the petitioners are entitled to compensation? If so, to what extent and from which of the opp. parties ?

5. After taking into consideration both oral and documentary evidence, learned Tribunal held that death of the deceased was caused due to rash and negligent driving of both the vehicles and the claimants being the widow, parents and children of the deceased are entitled to get compensation. The deceased was serving as a Senior Manager in IPCL at Bharuch. The annual income of the deceased from salary was Rs.2,68,027/- at the time of accident. The Tribunal further held that at the time of death, the deceased was 29 years old. The learned Tribunal further held that the deceased would have got promotion on 31.03.2006 and his income at that time would have been Rs.4,68,662/- and on 01.04.2008 his annual salary would have been Rs.7,90,942/-. Thus, taking into consideration his qualification, nature of service, age and future prospects, learned Tribunal determined the annual income of the deceased at Rs.4,00,000/-. Deducting 1/3rd towards personal expenses, loss of dependency per annum was determined at Rs.2,66,667/. Applying 18 multiplier the learned Tribunal determined the amount of compensation at Rs.48,00,006/-. Learned Tribunal has also awarded Rs.10,000/- towards loss of consortium, Rs.2,000/- loss of estate and Rs.5,000/- for funeral expenses. Thus, total amount of compensation was determined at Rs.48,17,000/-. Learned Tribunal held that though a plea is taken by opp. party no.3 that the drivers of both the vehicles had no driving licence, the same could not be proved. On the other hand, police papers filed and admitted in evidence proved that both the drivers had valid driving licence. Leaned Tribunal further held that the opposite party-Insurance Company, i.e., the United India Insurance Company Ltd. being the insurer of

both the vehicles, is liable to pay the amount of compensation and accordingly directed the Insurance Company to pay the amount of compensation along with 6% interest per annum from the date of filing of the claim application till realization. Hence, the present appeal.

6. Despite issuance of notice to all the respondents none appears except respondent Nos. 1 to 4.

7. Mr. A.K.Mohanty, learned Senior Advocate appearing for the appellant-Insurance Company submitted that the Tribunal without appreciating the case and evidence on record has awarded the compensation of Rs.48,17,000/- in a most arbitrary and whimsical manner. The Tribunal has gone beyond its jurisdiction by taking into consideration the future notional income and promotional prospects of the deceased as the same is not permissible under law. Since the accident took place on 08.07.2002 and the deceased died in that accident by which time his annual salary was Rs.2,68,027/-, the Tribunal is not correct in determining the annual income of the deceased at Rs.4,00,000/-. In view of the decision of the Hon'ble Supreme Court in the case of ***Sarla Verma Vs. Delhi Transport Corporation***, (2009) 2 TAC 677, the appropriate multiplier should have been 17 instead of 18 as applied by the Tribunal. In view of the decision of the Hon'ble Supreme Court in the case of *Oriental Insurance Company Ltd. Vs. Jashuben*, 2008 AIR SCW 2393 no future prospects should have been taken into consideration for the purpose of determining the gross amount of compensation. According to Mr.Mohanty, Rs.30,47,139/- would be the just and proper compensation as fixed deposit of Rs.30,00,000/- would earn interest of Rs.2,40,000/- whereas family contribution of the deceased was Rs.1,78,685/- at the time of his death.

8. Mr.D.Pati, learned counsel appearing on behalf of respondents 1 to 4 submitted that PW-3 Manager, Human Resource, IPCL stated about income of the deceased; police papers submitted in evidence remained unchallenged, the deceased was highly qualified and had a bright future; Exhibit No.2 is salary certificate which reveals that the deceased was to get promotion on 31.03.2006 and 01.04.2008 and his annual income would have been Rs.4,68,662/- and Rs. 7,90,942/- respectively. Therefore, the Tribunal is fully justified in determining the annual income of the deceased at Rs.4,00,000/- and amount of compensation at Rs.48,00,000/- besides Rs.17,000/- towards loss of consortium, loss of estate and funeral expenses. Concluding his argument Mr. Pati submitted for dismissal of appeal.

9. On the rival contentions of the parties, the only question that falls for consideration by this Court is whether the learned Tribunal is justified to

determine the amount of compensation at Rs.48,17,000/-? If not, then what would be the just compensation in the instant case?

10. Undisputedly the deceased-Alok Kumar Naik was serving in IPCL as an Engineer with monthly salary of Rs.24,000/- as on the date of accident, i.e., 08.07.2002; he was 29 years of age; the appellant-Insurance Company which is the insurer of both the vehicles was held liable by learned Tribunal to pay the compensation to the claimants. These facts/findings of the Tribunal have not been challenged before this Court by the appellant-Insurance Company.

11. Law is well-settled that if the deceased is in a permanent job, his future prospects should be taken into consideration for the purpose of determination of the compensation. Hon'ble Supreme Court in the case of ***Sarla Verma (supra)*** held as under:

> "**Question (i)-Addition to income for future prospects:**
> **20.** Generally the actual income of the deceased less income tax should be the starting point for calculating the compensation. The question is whether actual income at the time of death should be taken as the income or whether any addition should be made by taking note of future prospects.
>
> **21.** In ***Susamma Thomas*** this Court held that the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand (annual contribution to the dependants); and that where the deceased had a stable job, the court can take note of the prospects of the future and it will be unreasonable to estimate the loss of dependency on the actual income of the deceased at the time of death. In that case, the salary of the deceased, aged 39 years at the time of death, was Rs.1032 per month. Having regard to the evidence in regard to future prospects, this Court was of the view that the higher estimate of monthly income could be made at Rs.2000 as gross income before deducting the personal living expenses.
>
> **22**. The decision in Susamma Thosmas was followed in ***Sarla Dixit v. Balwant Yadav*** where the deceased was getting a gross salary of Rs.1543 per month. Having regard to the future prospects of promotions and increases, this Court assumed that by the time he retired, his earning would have nearly doubled, say Rs.3000. This Court took the average of the actual income at the time of death and

the projected income if he had lived a normal life period, and determined the monthly income as Rs.2200 per month.

23. In ***Abati Bezbaruah v. Geological Survey of India*** (2003)2 SCC 148) , as against the actual salary income of Rs.42,000 per annum (Rs.3500 per month) at the time of the accident, this Court assumed the income as Rs.45,000 per annum having regard to the future prospects and career advancement of the deceased who was 40 years of age.

24. In ***Susamma Thomas*** this Court increased the income by nearly 100%, in ***Sarla Dixit*** the income was increased only by 50% and in ***Abati Bezbaruah*** the income was increased by a mere 7%. In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words "actual salary" should be read as "actual salary less tax"). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

12. As regards application of multiplier the Hon'ble Supreme Court in ***Sarla Verma*** case (supra) held as under:

"42 We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years."

Thus in the present case, the deceased being 29 years old at the time of accident, the appropriate multiplier would be 17.

13. As regards entitlement of claimants towards 'loss of estate', 'funeral expenses' and 'loss of consortium', the Hon'ble Supreme Court in *Sarla Verma case (supra*) held as under :

> "50. In addition, the claimants will be entitled to a sum of Rs.5000 under the head of "loss of estate" and Rs.5000 towards funeral expenses. The widow will be entitled to Rs.10,000 as loss of consortium."

14. Mr. Mohanty seriously contended that without taking into account the future prospects of the deceased for the purpose of determining the compensation it would be just and proper to determine the amount of compensation at Rs.30,47,139/- because if Rs.30 lakhs will be kept in fixed deposit that will earn annual interest of Rs.2,40,000/- whereas annual family contribution of the deceased was Rs.1,78,685/- at the time of death. This contention of Mr. Mohanty is wholly misconceived because while determining the amount of compensation, the future prospect of the deceased has to be taken into consideration if the deceased was in a permanent job with future promotion and increment of salary, as held by the Hon'ble Supreme Court in the case of ***Sarla Verma*** (supra).

15. Since Mr. Mohanty, learned counsel relied upon the decision of the Hon'ble Supreme Court in the Sarla Verma case, for the purpose of applying multiplier, it would be just and proper to determine the amount of compensation in the light of the said judgment of the Hon'ble Supreme Court.

16. As regards the annual income of the deceased, the learned Tribunal has taken into consideration the appointment order, salary certificate and evidence of PW-3, the Manager (HR) of the Company who is the most competent to say about the income of the deceased. In his evidence, PW-3 has stated that the annual salary of the deceased late Alok Kumar Naik was Rs.2,68,027/-. The deceased being 29 years, 50% of the annual salary is taken towards future prospects. Thus, the total annual income comes to Rs.4,02,041/-. Deducting 1/3rd towards personal expenses and applying 17 multiplier, the amount of compensation comes to Rs.45,56,460/- (Rs.04,02,041/- x 2/3 x 17). The claimants shall be further entitled to Rs.20,000/- (Rs.5,000/- towards loss of estate, Rs.5,000/-for funeral expenses and Rs.10,000/- for loss of consortium). Thus, the claimants are

entitled to total compensation of Rs.45,76,460/- (Rs.45,56,460/- + Rs.20,000/-).

17. In view of the above, the appellant-United India Insurance Company Ltd. is directed to deposit Rs.45,76,460/- along with interest at the rate of 6% per annum from the date of filing of the claim petition till the date of payment before the Tribunal within eight weeks from today. The Tribunal is directed to disburse the same in the manner it has directed in its award.

18. On production of receipt showing deposit of the amount of compensation and interest before the Tribunal as directed above, the Registrar (Judicial) shall refund the statutory amount and the amount of compensation and interest deposited by the appellant before him pursuant to order of this Court dated 20.11.2009 along with the interest accrued thereon to the appellant-United India Insurance Co. Ltd.

19. The Appeal is allowed to the extent indicated above.

Appeal allowed.

2014 (I) ILR - CUT- 306

B. N. MAHAPATRA, J.

W.P.(C) NO. 32710 OF 2011(With Batch) (Dt.23.11.2012)

PARBATI PRADHAN & ORS. .....Petitioners

.*Vrs.*

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

SERVICE LAW – Disengagement of petitioners as Anganwadi helpers, challenged – No adverse remark against them – Although C.D.P.O. is their appointing/terminating authority, Collector passed the order of disengagement on the allegation of irregularity in the selection basing on the joint inquiry report submitted by the Addl. Sub-Collector and D.S.W.O., without confronting the same to the petitioners – No opportunity of hearing was given to the petitioners before passing of the order of dis-engagement – Law is well settled that no material can

be utilized to the detriment of any person unless it is confronted to him/her and the person to be affected is given an opportunity to rebut the allegations raised against him – Held, impugned order of disengagement and the direction of the Collector to C.D.P.O. to go for fresh selection are illegal and not sustainable in law – Direction issued that the Opp.Party-authority competent as per guidelines to disengage the Anganwadi helpers may do the same after confronting the adverse materials to each of them and after giving them an opportunity of hearing. (Paras 16,19,20,21)

Case laws Referred to:-

1. (1978)1 SCC 248 : (Maneka Gandhi-V- Union of India)
2. (1980)4 SCC 379 : (S.L. Kapoor-V- Jagmohan)
3. (1994)1 WLR 521 : (Mercury Energy Ltd.-V- Electricity Corporation, Newzealand)
4. (2008)14 SCC 151 P-157 : (Sahara India (Firm) Lucknow-V- Commissioner of Income Tax, Central-I & Anr.)
5. (2007)2 SCC 181 : (Rajesh Kumar-V- Dy. C.I.T.)
6. (1991)Supp-1 SCC 600 : (Delhi Transport Corporation-V- D.T.C. Mazdoor Congress)
7. (1998)8 SCC 194 : (Basudeo Tiwary-V- Sido Kanhu University).
8. (125)1980 ITR 713 (SC) : (Kishinchand Chellaram-V- Commissioner of Income-tax, Bombay City-II).
9. (1997)105 STC 112(Ori.) : (Kanak Cement Pvt. Ltd.-V- Sales Tax Officer, Assessment Unit, Rajgangpur).

For Petitioners - Mr. J.K. Mishra-2,
M/s. S.S. Das, R. Sahoo, K.C. Mohapatra, J.K. Swain,
M/s. Md. G. Madani & P.S. Nayak,
M/s. A.P. Bose, R.K. Mahanta, M.R. Nayak, N.Hota & M. Pradhan.
Mr. Debasis Samal.
M/s. A.K. Acharya & S. Mishra
M/s. B. C. Ghadei & S.K. Sahoo,
M/s. R.K. Kar & S.K. Perai,

For Opp.Parties – Addl. Govt. Advocate, (In all the cases).

B.N.MAHAPATRA,J. In all these writ petitions a common prayer is made for quashing the order No. 2092 dated 7.12.2011 passed under

Annexure-3 by the Collector, Bhadrak wherein he has instructed the C.D.P.O., Dhamnagar to issue disengagement order to 61 Anganwadi Helpers already engaged and further to go for fresh selection strictly by adhering to the guidelines issued by the Women and Child Development Department, Odisha giving liberty to said 61 Anganwadi helpers to participate.

2. Since the issues involved in all the above writ petitions are identical in nature, they are disposed of by this common judgment at the admission stage.

3. Petitioners' case in a nutshell is that a decision was taken at the Government level sanctioning one Helper post to each Anganwadi centre. In the year 2010 the C.D.P.O., Dhamnagar published an advertisement for the post of Anganwadi Helper as per guideline/instruction of the Government. Accordingly, the candidates had applied for the post of Anganwadi Helper at different Anganwadi Centres. After following due process of selection, the petitioners were issued with the order of appointment pursuant to which they joined in different centres as Anganwadi Helpers. The petitioners were paid their salary regularly. While the matter stood thus, the Collector, Bhadrak vide his order dated 07.12.2011 (Annexure-3) instructed the C.D.P.O.,Dhamnagar to disengage the petitioners and to go for fresh selection. Hence the present writ petitions.

4. The grounds of challenge advanced by the learned counsel appearing for the petitioners in different writ petitions are almost similar. They are as follows:

The impugned order of disengagement dated 7.12.2011 is per se illegal, arbitrary, mala fide and without jurisdiction and liable to be quashed. From the date of joining of Anganwadi Helpers till the impugned order of disengagement is passed, there is no complaint against the petitioners. As per sub-clause (iv) of clause (I) of the guideline dated 24.11.1997, the C.D.P.O. is the appointing as well as the terminating authority. Therefore, the Collector has no power to direct the C.D.P.O. to pass order for disengagement of the petitioners. The Collector passed the order of disengagement on the basis of a joint inquiry report submitted by Additional Sub-Collector and D.S.W.O., Bhadrak without confronting the same to the petitioners. According to the petitioners, law is well settled that no material can be utilized to the detriment of any person unless he/she is confronted with the adverse material. All the petitioners have completed more than one year continuous service and there has been no adverse remark against the

performance of the petitioners. Therefore, without giving an opportunity of hearing, the petitioners should not be disengaged unilaterally by Opp. Party-authorities. It is not at all a fact that selection of the petitioners has been made in absence of A.N.M. without due process of selection. The allegation in the joint inquiry report that the selection of Anganwadi Helpers was made in absence of A.N.M. is not correct. Learned counsel appearing in W.P.(C) No. 31955 of 2011 specifically submitted that the appointment order bearing no.678 dated 23.10.2010 indicates that in the selection process the A.N.M., namely, Smt. Sunita Rani Sahoo was present along with one Nirupama Sethi, the Supervisor and C.D.P.O. In the said selection seven Anganwadi Helpers were duly selected by a common selection test held on 21.10.2010. However, out of seven selectees only one, namely, Kabita Behera was disengaged on the ground that irregularity has been committed.

5. Mr. Biswal, learned counsel appearing on behalf of Opp. Parties referring to the counter affidavit filed by opp. Party nos. 3 and 4 submitted that the Collector, Bhadrak has passed the order of disengagement on the ground that selection of Anganwadi Helpers has not been made in accordance with the guideline. Since the petitioners were not disengaged because of any laches on the part of the petitioners no opportunity of hearing was afforded to them. Mr. Biswal further submitted that as per the guideline, the selection of Anganwadi Helper should have been made by a properly constituted Selection Committee and the A.N.M. of the project is one of the members of the Selection Committee. As the petitioners were engaged by a committee in absence of A.N.M., they were disengaged. Challenging the entire process of selection of Anganwadi Helpers some of the unsuccessful candidates who were in the fray filed a writ petition bearing W.P.(c) No.881 of 2011 in this Court which was disposed of on 9.3.2011 with a direction to opposite party no.1 to take a decision on inquiry report of the Addl. Sub-Collector, Bhadrak and the D.S.W.O., Bhadrak. After engagement of Anganwadi Helpers complaints were lodged before the Collector, Bhadrak regarding the irregularities committed by the selection committee in making selection. Upon receipt of such complaints, the Collector directed the Addl. Sub-Collector, Bhadrak to cause an inquiry into the allegations and furnish a report. The Addl. Sub-Collector and D.S.W.O., Bhadrak conducted a joint inquiry and submitted a report to the Collector. It is submitted that the Collector after considering the joint inquiry report with reference to the available record relating to the selection process of 109 Anganwadi Helpers found that the selection made in respect of 61 Anganwadi centres is irregular and inconsistence with the government guideline and declared the same as void and instructed the CDPO to issue disengagement order and to go for fresh selection strictly adhering to the guidelines issued by the government.

Pursuant to the said order of the Collector, the CDPO issued the disengagement order.

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

(i) Whether the petitioners, who were engaged as Anganwadi Helpers in different Anganwadi Centres after following process of selection can be disengaged without giving opportunity of hearing to them?

(ii) Whether the petitioners, who were engaged as Anganwadi Helpers can be disengaged on the basis of the joint inquiry report submitted by the Sub-Collector & D.S.W.O., Bhadrak without confronting the said adverse material to the petitioners?

(iii) What order?

7. Since question Nos. (i) and (ii) are interlinked, they are dealt with together.

The undisputed facts are that pursuant to the advertisement for filling up the post of Anganwadi Helpers in different Anganwadi Centres the petitioners along with others applied for the same. The selection committee after due consideration of all the applications issued the order of engagement in favour of the petitioners to join as Anganwadi Helpers and pursuant to such order of engagement, the petitioners joined in different Anganwadi Centres as Anganwadi Helpers. There is no allegation against the petitioners with regard to their functioning as Anganwadi Helpers.

8. Further, complaints were lodged before the Collector, Bhadarak alleging irregularity committed by the selection committee in making the selection. Upon receipt of the said complaint the Collector directed the Addl. Sub-Collector, Bhadrak to cause a joint inquiry into the allegation and furnish report. Pursuant to such direction of the Collector, the Addl. Sub-Collector and D.S.W.O., Bhadrak conducted a joint inquiry and submitted a report to the Collector. Some of the unsuccessful candidates challenging the process of selection also approached this Court vide W.P.(c) No.881 of 2011 and this Court vide order dated 9.3.2011 dispose of the writ petition with a direction to opp. Party no.1 to take a decision on the inquiry report of Addl. Sub-Collector and D.S.W.O., Bhadrak. The impugned order of the Collector dated 7.12.2011 reveals that the Collector after careful consideration of the joint inquiry report with reference to the record available relating to selection process of 109 Anganwadi Helpers under Dhamnagar ICDS Project found that the selection

made in respect of 61 Anganwadi Centres is irregular and inconsistent with the guideline of the Government. Accordingly, the Collector, Bhadrak passed the impugned order.

9. On the above backdrop, the question arises whether the Collector can utilize the joint inquiry report of Addl. Sub-Collector and D.S.W.O., Bhadrak against 61 Anganwadi Helpers and disengage them without confronting the said joint inquiry report to the affected 61 Anganwadi Helpers.

10. Needless to say that the impugned order of the Collector directing disengagement of the Anganwadi Helpers has civil consequence as right accrues in favour of the petitioners to work as Anganwadi Helpers pursuant to the order of the engagement issued in their favour after following due process of selection. Therefore, before disengagement, they are entitled to get an opportunity of hearing.

11. ***In Maneka Gandhi vs. Union of India,*** *(1978) 1 SCC 248,* the Hon'ble Supreme Court held that the decision rendered in violation of *audi alteram partem* is null and void. In ***S.L. Kapoor vs. Jagmohan,*** *(1980) 4 SCC 379,* it was extended to orders passed by quasi judicial authorities. In ***Mercury Energy Ltd. vs. Electricity Corporation, Newzealand, (1994) 1 WLR 521,*** the court declared an order of the Minister to be a nullity, if it was passed without hearing. [Also See *Bhagawan vs. Ramchand, AIR 1965 SC 1767, State of Orissa vs. Binapani Dei, AIR 1967 SC 1269, SDO vs. Gopal Chandra, AIR 1971 SC 1190, State of Kerala & Ors. Vs. K.G.Madhavan Pillai & Ors. (1988) 4 SCC 669].*

12. In ***Sahara India (Firm) Lucknow Vs. Commissioner of Income Tax, Central-I and another, (2008) 14 SCC 151 at page 157 and Rajesh Kumar vs. Dy. C.I.T., (2007) 2 SCC 181,*** the Hon'ble Supreme Court held that giving an opportunity of hearing is a must, where the Assessing Officer asks for special audit having regard to the nature and complexity of the accounts of the assessee and the interest of the revenue. The Hon'ble Supreme Court in catena of cases held that administrative order, if it operates to the prejudice of assessee and entails civil consequences, opportunity of hearing should be given to the assessee. The Court further held that natural justice implies a duty to act fairly, i.e., fair-play in action.

13. The expression 'civil consequence' encompasses infraction of not merely property of personal rights but of civil liberties, material deprivations and non-pecuniary damages. Under its wide umbrella comes everything that affects a citizen in his civil life. Unless a statutory provision either specifically

or by necessary implication excludes the application of principles of natural justice, because in that event the Court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The two fundamental maxims of natural justice are (i) *audi alteram partem* and (ii) *nemo judex in causa sua*. Thus, the observance of principles of natural justice is the pragmatic requirement of fair play in action.

14. In ***Delhi Transport Corporation v. D.T.C. Mazdoor Congress***, [1991] Supp 1 SCC 600; the Hon'ble Supreme Court held as follows:-

> "… It is now well-settled that the 'audi alteram partem' rule which in essence, enforces the equality clause in article 14 of the Constitution is applicable not only to quasi-judicial orders but to administrative orders affecting prejudicially the party-in-question unless the application of the rule has been expressly excluded by the Act or Regulation or Rule which is not the case here. Rules of natural justice do not supplant but supplement the Rules and Regulations. Moreover, the rule of law which permeates our Constitution demands that it has to be observed both substantially and procedurally…."

15. In ***Basudeo Tiwary v. Sido Kanhu University***, [1998] 8 SCC 194, the Hon'ble Supreme Court held that in order to impose procedural safeguards, the Court has read the requirement of natural justice in many situations when the statute is silent on this point. The approach of the Hon'ble Supreme Court in this regard is that omission to impose the hearing requirement in the statute under which the impugned action is being taken does not exclude hearing – it may be implied from the nature of the – particularly when the right of a party is affected adversely. The justification for reading such a requirement is that the Court merely supplies omission of the Legislature.

16. Law is well settled that no material can be utilized to the detriment of any person unless it is confronted to him/her and the persons to be affected is given an opportunity to rebut the allegation raised against him.

17. In *Kishinchand Chellaram V. Commissioner of Income-tax, Bombay City-II, (125) 1980 ITR 713 (SC)*, the Hon'ble Supreme Court held that it was true that proceedings under the income-tax law were not governed by the strict rules of evidence, and, therefore, it might be said that even without calling the Manager of the bank in evidence to prove the letter dated February 18, 1955, it could be taken into account as evidence. But before the income-tax

authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for an opportunity to cross-examine the Manager of the bank with reference to the statements made by him.

18. In *Kanak Cement Pvt. Ltd. V. Sales Tax Officer, Assessment Unit, Rajgangpur, (1997) 105 STC 112 (Ori),* it has been held that it is a fundamental requirement of the principles of natural justice that if any person is likely to be affected by the use of any material collected by the Revenue those are to be brought to his notice, and disclosed to him. The requirement of natural justice is to disclose by way of confrontation the materials collected and proposed to be used against a dealer. The strict principles or rules of evidence under the Indian Evidence Act, 1872 do not apply to proceedings under the Orissa Sales Tax Act, 1947. Authorities under the Act can collect materials behind the back of an assessee. But they are not required to disclose the source. However, any materials sought to be utilized against the assessee are to be brought to his notice.

19. In the instant case, admittedly the Collector has not confronted the joint inquiry report submitted by Addl. Sub-Collector and DSWO to the petitioners before directing disengagement of the petitioners from their posts on the basis of the said joint inquiry report. It may be noted that in W.P.(c) No.31955 of 2011 it is stated that though in the selection process of the petitioners, the ANM, namely Smt. Sunita Rani Sahoo was present along with one Nirupama Sethi, the Supervisor and the CDPO, she was terminated on the ground that ANM was not present. In the said writ petition, it is further stated that in a common selection test held on 21.10.2010 though 7 Anganwadi Helpers were selected, the petitioner, namely, Kabita Behera was disengaged on the ground that in the selection process ANM was not present.

20. In view of the above, this Court is of the opinion that the order of disengagement dated 07.12.2011 passed by the Collector, Bhadrak on the basis of the joint inquiry report submitted by Addl. Sub-Collector and D.S.W.O., Bhadrak without confronting the same to the petitioners vis-à-vis without affording an opportunity of hearing to the petitioners is not sustainable in law. Consequentially, the further direction of the Collector, Bhadrak vide impugned order dated 07.12.2011 to the CDPO, Dhamnagar to go for fresh selection is also illegal.

21. In the fact situation, this Court directs the Opp. Party-authority, who is competent as per the guideline to disengage the Anganwadi Helpers, to confront the adverse material to each of the Anganwadi Helpers individually

and give them opportunity of hearing and thereafter pass appropriate order in accordance with law within a period of two months from the date of this judgment.

22. In the result, the writ petitions are allowed to the extent indicated above. No costs.

Writ petitions allowed.

2014 (I) ILR - CUT- 314

B. K. PATEL, J.

W.P.(C) NO. 10379 OF 2013 (Dt.21.06.2013)

SATYABRATA SAHOO ……...Petitioner

.*Vrs.*

COMMISSIONER OF ENDOWMENTS, ODISHA & ORS. ……...Opp.Parties

TENDER – Auction of "Bhog Shop" – Advertisement made specifically informing the intending bidders to make security deposit in the form of Bank draft to participate in the auction – Petitioner offered cash security and he was denied to participate in the auction – Tender settled in favour of O.P.4 – Action challenged – Held, authorities can not go beyond the terms and conditions stipulated in the tender call notice/advertisement and they have rightly denied the petitioner to participate in the auction – Moreover the enhanced offer made by the petitioner cannot be a ground to interfere in the bid since it is not found to be arbitrary or unreasonable. (Paras 7, 10)

Case laws Referred to:-

1.AIR 1996 SC 11 : (Tata Cellular-V- Union of India)
2.AIR 2002 SC 834 : (State Financial Corporation-V- M/s. Jagadamba Oil Mills)

For Petitioner - M/s. H.S. Mishra, A.K. Mishra, R. Dash.

For Opp.Parties- M/s. Dr. A.K. Rath (O.P.1 & 2),
M/s. Bidyadhar Mishra & P. Bharadwaj (O.P.3),
Mr. J.K. Mishra (2), (O.P.4).

B.K.PATEL,J. This writ petition has been filed by the petitioner challenging the auction of two 'Bhog shops' at Shri Chandrasekhar Jew Pitha under Dhenkanal Debottar held on 29.04.2013 in the office of O.P. No.1 at Bhubaneswar for the period from 1.5.2013 to 31.03.2014 and allotment thereof in favour of O.P. No.4; and praying for issuance of a writ of certiorari quashing the entire process of auction in question and also for issuance of a writ of mandamus directing the opposite parties 1 to 3 for conducting fresh auction of the said Bhog Shops.

2. Before going through the main issue involved in this writ petition, it is worthwhile to have a little glance at the background of the petitioner's case as has been adverted to by the petitioner in this writ petition. Earlier, petitioner came up before this Court by way of filing W.P.(C) No. 9713 of 2012 with a prayer to direct the O.P.No.3 to allot the Bhog Shop of Shri Chandra Sekhar Jew Pith for the year 2012-13 as the O.P. No.3 did not receive any offer in response to the tender call notice dated 3.4.2012. This Court while disposing of the said writ petition with direction that the petitioner was to approach the O.P. No.3 with his offer for the balance period and on examination of the offer, if O.P. No.3 will find the offer to be beneficial in the interest of the Deity and public, petitioner may be permitted to run the Shop till end of March, 2013 on payment of the amount in advance. Accordingly, petitioner was allotted the said Shop till the end of March, 2013. However, before the end of March, 2013 fresh auction for the year 2013-14 could not take place. At this juncture petitioner again approached this Court by filing W.P.(C) No. 7458 of 2013 with a prayer to allow the petitioner to operate the Bhog Shop in question till the end of June, 2013 or till finalization of the fresh tender process. This Court vide order dated 22.04.2013 disposed of the said writ petition with a direction to permit the petitioner to continue till 29.04.2013 and if the fresh auction fails or is not conducted, the petitioner will be permitted to continue the Bhog shop till fresh auction is held on depositing the amount as would be fixed by the Sub-Collector. Petitioner was continuing the said Bhog Shop as such.

The case of the petitioner in the instant petition in nutshell is that, O.P. No.3 issued the tender call notice No. 255 dated 22.04.2013 under Annexure-1 calling upon the intending bidder to participate in auction of two Bhog Shops in question, which was to be held on 29.04.2013 in the office of O.P. No.1 at Bhubaneswar, for the period from 1.5.2013 to 31.03.2014. The

upset price for each shop room was fixed at Rs.5,83,850/-. It was further specifically mentioned in the tender notice that intending bidders are to deposit Rs.58,385/- in the form of a Bank Draft as security deposit for each shop to make them eligible to participate in the auction. The grievance of the petitioner is that instead of publishing all the terms and conditions in the tender call notice, it is mentioned in the notice that all the terms and conditions of the auction can be seen in the working hours of any working days at the Debottar Office of Dhenkanal. Be that as it may, petitioner being the intending bidder prepared two Demand Drafts of Rs. 6.00 lakh and Rs. 2.00 lakh on 25.04.2013 (under Annexure-2 series) and on 29.04.2013 went to Bhubaneswar along with those two Demand Drafts and Rs.10.00 lakhs in cash to participate in the auction.It is stated that, after reaching Bhubaneswar, immediately petitioner prepared two Demand Drafts of Rs. 58,385/- each (under Annexure-2 series) towards security amount for both shops and at about 1.00 p.m. he approached the opposite party Nos. 1 and 3 to accept his security money, but O.P. No.3 refused to accept the same stating that the same is beyond the terms and conditions of the auction notice. Thereafter, the auction was held and ultimately O.P. No.4 became the successful bidder at Rs. 12,02,000/-.

3. Mr. Mishra, learned counsel for the petitioner submitted that the petitioner was ready to offer Rs. 16.50 lakhs, but mechanically petitioner was not allowed to participate in the auction process and ultimately the bid has been settled at Rs.12,02,000/- which is a loss to the public exchequer. In this regard, Mr. Mishra, placed reliance on an earlier decision of this Court in the case of **Brajabandhu Pati Vs. Collector-cum-Trustee, Debottar, Dhenkanal** (W.P.(C) No. 7041 of 2009 decided on 17.09.2009) wherein this Court at paragraph 10 of the judgment, placing reliance on the judgments of Hon'ble Supreme Court in the cases of **Tata Cellular Vs. Union of India** : AIR 1996 SC 11 and **State Financial Corporation Vs. M/s. Jagadamba Oil Mills :** AIR 2002 SC 834, has observed as under:

> "…the deity is a perpetual minor and the property belonging to a minor requires protection, it is the obligation of the authorities to protect the interest of the minor. It is the settled principle of law that the sale by public auction or tender or private negotiations should be bona fide and endeavours should be made to get the highest price and the act of the authorities, i.e., trustee, its actions must be fair, honest, cautious and reasonable and every attempt must be made to fetch the maximum price. …… In view of the above principle, this Court directs opposite party Nos. 1,2,3 and the Commissioner of

Endowments to fix the upset price in future so that the property and interest of the deity is well protected…."

It was further submitted by the learned counsel for the petitioner that the terms and conditions of the auction in details were not given in the tender call notice for which the same was not clear and transparent and it was also not stipulated in the advertisement as to at what time the security deposit can be received. It was submitted that during the previous years, excepting 2012-13, the auction was conducted at Dhenkanal and large number of participants were taking part in the auction, but for the first time, the auction was held at Bhubaneswar for the Bhog Shops at Dhenkanal for the reason best known to the authorities. Therefore, it was submitted, all the actions of the authorities in question are illegal, arbitrary and mala fide and hence the entire tender process is liable to be quashed and fresh tender is required to be conducted.

4. Counter affidavits have been filed on behalf of opposite party Nos. 1 to 3-authorities traversing the averments made by the petitioner in the writ petition. It is stated in the counter that the petitioner was well aware of the terms and conditions of the tender notice in question and he has personally verified the same in the office of O.P. No.3 more than once from 25.4.2013 to 27.4.2013. Despite of being well aware of the terms and conditions, petitioner did not deposit the Demand Drafts towards security deposit within the prescribed time i.e. 12.30 PM to 1.30 PM as per the conditions of the auction. It is further stated that the petitioner has made false and incorrect statements in the writ petition which would be apparent from the contradictory averments made at paragraphs 13, 19 and 21 of the writ petition.

5. On the other hand O.P. No.4-the successful bidder, in whose favour the shop rooms have already been settled, has filed counter affidavit stating that as the petitioner has submitted cash towards security deposit on the date of auction, the authority rightly did not accept the same and thereafter the petitioner left the office of O.P.No.1 at 1.00 p.m.. It is further averred that the O.P. No.4 being the successful tenderer has already deposited the entire money on the same date i.e. 29.04.2013 and as per the conditions prescribed agreement has been executed on 30.04.2013 and he has already been delivered possession of the shop rooms from 01.05.2013. He has also started his business by investing lakhs of rupees, and it is stated that the petitioner is trying to vandalize the entire auction process with an ulterior motive.

6. Learned counsel on behalf of opposite parties in course of their arguments reiterated the stand taken in the counter affidavits and submitted that the petitioner has not come to the Court with clean hands. All the drafts produced by the petitioner under Annexure-2 series are not prepared by the petitioner rather they are in the names of one Bidyadhar Sahoo and one Basanti Sahoo. Petitioner approached the opposite parties to accept cash towards security deposit, which was contrary to the conditions made in the tender call notice, for which opposite parties-authorities have not accepted the same. As the petitioner could not succeed in his ambition, he is trying to make out a case to sabotage the entire process of auction with an intention to take the wrong advantage of the order of this Court dated 22.04.2013 passed in W.P.(C) No. 7458 of 2013 wherein this Court has observed that 'petitioner may be permitted to continue till 29.04.2013 when the auction is scheduled to be held, but if the auction fails or is not conducted, the petitioner will be permitted to continue the Bhog Shop till auction is held on depositing the amount as would be fixed by the Sub-Collector'.

7. With reference to the entire fact situation of the case and contentions made by the learned counsel for the parties, this Court has carefully gone through the records. It is a well settled principle that the authority cannot go beyond the terms and conditions stipulated in the tender call notice/advertisement. In the instant case, when it is clearly mentioned in the tender call notice that intending bidders are to deposit the security amount of Rs. 58,385/- for each shop in the form of Bank Draft, the approach of the petitioner to the opposite parties-authorities to accept the Cash Security itself, as admitted by the petitioner in the writ petition, is wrong and the authority has rightly not accepted the same which would be in violation of the terms and conditions of notice.

Further, on the one hand petitioner is claiming to have approached the authorities on 29.04.2013 to accept his two Demand Drafts under Annexure-2 series towards security which they refused to receive, but on the other hand opposite parties-authorities in their counter affidavits stated that petitioner has never deposited any Demand Draft towards security deposit. Be that as it may, it appears from the two Bank Drafts under Annexure-2 series that they have been prepared and remitted by one Basanti Sahoo and not by the petitioner. Therefore, even if the aforesaid contention of the petitioner is accepted, it cannot be said that the authorities have committed any wrong in not accepting the said Demand Drafts from the petitioner and not allowing him to participate in the auction. Petitioner being well aware of the terms and conditions mentioned in the advertisement, cannot take the benefit of his own wrong as explained by a

legal maxim *"commodum ex injuria sua nemo habere debet"* meaning thereby convenience cannot accrue to a party from his own wrong or no person ought to have advantage of his own wrong.

8. It is also the settled position of law that the petitioner approaching the Court must come with clean hands and put forward all the facts before the Court without concealing and suppressing anything and seek an appropriate relief. In the case at hand the question does arise, if the petitioner is a bona fide intending bidder, why he has produced the Demand Drafts under Annexure-2 series before this Court which have been prepared and remitted by one Bidyadhar Sahoo and one Basanti Sahoo, whereas the petitioner is claiming in the writ petition that he himself has prepared the Drafts. The statements made by the petitioner in the writ petition are contradictory. By showing the Bank Drafts prepared by others, petitioners cannot be permitted to establish his bona fide and splash colour of arbitrariness on the opposite parties-authorities without any basis.

9. Also the allegations of the petitioner that non-mentioning of all the terms and conditions of the auction in the advertisement itself and holding the auction at Bhubaneswar are arbitrary and unreasonable, cannot be accepted. As it appears from record, petitioner is not a new bidder for the first time. Rather he is a quite experienced bidder having participated in the auctions of Bhog Shops earlier and also an experienced litigant. He has filed several writ petitions before this Court in several occasions to obtain shops. In the order dated 22.04.2013 passed by this Court in W.P.(C) No. 7458 of 2013 filed by the petitioner, this Court has taken note of the publication of the tender notice in question and date of auction i.e. 29.4.2013 at Bhubaneswar and accordingly allowed the petitioner to run the shop till 29.04.2013, which shows that the same was very much within the knowledge of the petitioner. Further, the petitioner without any objection, being well aware of all the terms and conditions of the auction, has gone to Bhubaneswar to participate in the auction on the scheduled date. But, somehow or rather, when he became unsuccessful in his mission at this stage he cannot have any grievance with regard to legality and validity of tender call notice or place of auction. Law does not permit a person to both approbate and reprobate.

10. In the tender call notice in question, the authorities have fixed the upset price for both the Bhog Shops and finally it has been settled in favour of O.P. No.4 as he has offered much above the upset price and became successful. This Court cannot interfere in any auction process or award thereof, merely basing on the enhanced offer made by another after confirmation of bid in favour of successful bidder, unless it is found to be

arbitrary or unreasonable. On analysis of the entire fact situation of the present case, law on the point and the decision of this Court in the case of **Brajabandhu Pati** (supra),upon which reliance has been placed by the learned counsel for the petitioner, it is found that there is no illegality, arbitrariness or impropriety in the process of auction in question.

11. In view of the above, there is no merit in this writ petition and the same is accordingly dismissed. No order as to costs.

Writ petition dismissed.

2014 (I) ILR - CUT- 320

B. K. NAYAK, J.

W.P.(C) NO. 18142 OF 2011 (Dt.27.06.2013)

BHIMSEN GOCHHAYAT .....Petitioner

.*Vrs.*

THE ZONAL MANAGER,
BANK OF INDIA & ORS. .....Opp.Parties

A. SERVICE LAW – Compassionate allowance for dismissed employee – Each Case is to be considered on its own merit, taking into account the gravity of the misconduct – The fact that he has a large family and there is no source of income is relevant, although poverty itself may not be an essential condition to allow the prayer for compassionate allowance.

In this Case petitioner was working as Daftary in the Bank of India – He was dismissed from service for committing fraud to misappropriate Bank's money – He made an application under Regulation 31 of the Banks Regulation 1995 for compassionate allowance – No indication of any financial distress or poverty in that application – Held, in view of the gravity of the misconduct, the Opp.Party No.2 is justified in refusing compassionate allowance to the petitioner – Impugned order calls for no interference by this Court.

(Paras 9,10,11)

B. CONSTITUTION OF INDIA, 1950 – ARTS. 16, 226

Compassionate allowance – Dismissed employee committed fraud to misappropriate Bank's money – Grave misconduct – Poverty itself is not a ground to grant such allowance – Held, O.P.2 is justified in refusing compassionate allowance to the petitioner.

(Paras 10,11)

Case law Referred to:-

2009 (4) SLR 52 : (Ex. ASI Shadi Ram -V- Government of NCT of Delhi & Ors.).

For Petitioner - M/s. Subash Ch. Puspalaka, K. Satapathy, K. Mohanty & S. Samal.
For Opp.Parties -Mr. G. A. R. Dora, Sr. Advocate.

B.K.NAYAK, J. The petitioner in this writ petition challenges the order dated 07.06.2011 under Annexure-1 passed by the Zonal Manager, Bank of India, Orissa Zone rejecting the petitioner's application for grant of compassionate allowance.

2. The petitioner was appointed initially as a part time sweeper on 23.05.1973 at Basta Branch of Bank of India and subsequently got promoted to the post of Daftary. For committing fraud on the bank the petitioner was prosecuted under Sections 468/419/420 of the I.P.C. in G.R. Case No.1049 of 1982 in the court of learned J.M.F.C., Balasore and was convicted and sentenced to R.I. for three years for the said offence by judgment dated 26.08.1987. After initiation of prosecution he had been placed under suspension. On his conviction, the petitioner was dismissed from service with effect from 26.08.1987 as per the Bank's Regulation. The petitioner challenged the order of conviction in Criminal Appeal No.60 of 1984, which was allowed by the Additional Sessions Judge, Balasore by judgment dated 14.03.1989 and the petitioner was acquitted of the charges. After his acquittal in appeal, the Bank initiated a disciplinary proceeding against him and issued charge-sheet-cum suspension order suspending him with effect from 12.12.1982. In the disciplinary proceeding, he was found guilty and was dismissed from service by order dated 11.05.1991. The petitioner preferred an appeal challenging the order of dismissal and the appellate authority by order dated 28.04.1995 modified the order of dismissal from service to termination of service with three months pay and allowance in lieu of notice vide Annexure-2. Aggrieved by the appellate order of punishment the petitioner filed OJC No.3143 of 1997 before this Court. This Court allowed the writ petition by judgment dated 15.03.2007 and directed the opposite parties to reinstate the petitioner with 40% back wages and consequential benefits from the date of dismissal to the date of reinstatement.

The opposite parties challenged the judgment passed in the writ petition by filing SLP No.7357 of 2007 in the Hon'ble Supreme Court. The SLP was disposed of on 12.08.2009 and the judgment of this Court was set aside and the matter was remanded for fresh disposal by this Court. On fresh hearing the writ petition was dismissed by order dated 14.03.2010 with the observation that the charges proved against the petitioner are quite grave and the punishment of dismissal from service does not seem to be disproportionate. The petitioner moved the Hon'ble Supreme Court in SLP No.1859 of 2010 challenging this Court's order, but the SLP was dismissed on 13.12.2010. Thereafter, the petitioner approached the authority for pension/ compassionate allowance under Regulation 31 of the Bank's Regulation 1995 by making a representation on 22.12.2010 vide Annexure-3. Since no prompt action was taken on his representation, the petitioner approached this Court in W.P.(C) No.3804 of 2011 and by order dated 24.02.2011 this Court directed the Bank authorities to consider and dispose of the representation of the petitioner within a period of two months.

3. Thereafter by the impugned order dated 07.06.2011 (Annexure-1), the Zonal Manager of the Bank has rejected the representation of the petitioner indicating that the petitioner was originally governed under Bank's Contributory Provident Fund Regulations and has received full amount of CPF on 25.06.2000 and that he has never exercised his option for pension after coming into force of the Bank of India Employees' Pension Regulations,1995 and, therefore, the petitioner was not entitled to any pension.

So far as the prayer for grant of compassionate allowance is concerned, the authority observed in the impugned order that the charges against the petitioner were very serious in nature involving fraud, forgery, misappropriation, theft of CANPAD and his punishment was upheld by this High Court and also the Supreme Court and, therefore, he does not 'deserve special consideration' for sanction of compassionate allowance.

4. It is the submission of the learned counsel for the petitioner that the petitioner, though was initially dismissed from service by the disciplinary authority, the said punishment was substituted by punishment of termination of service by the appellate authority and that even though he is not entitled to pension for imposition of such punishment, he was entitled to compassionate allowance as per the Regulation 31 of the Banks Regulation and, therefore, denial to grant the same on the ground that the charges were serious in nature, is contrary to such regulation and unjustified.

Learned counsel for the opposite party-Bank, on the other hand, submits that the claim of compassionate allowance by an employee, who

has been dismissed or terminated is not as of right but at the discretion of the authority only where his case 'deserves special consideration' as required under the Regulation and that the charges against the petitioner being very very serious in nature, the petitioner's case does not 'deserve special consideration' and, therefore, the discretion exercised by the authority is quite justified and needs no interference.

5. The appellate order under Annexure-2 passed by the appellate authority of the Bank reveals that as Daftary the petitioner practised fraud at Balasore Branch in collusion with outsiders by using Credit Authorisation Note (CAN) containing forged signatures of two officials of Lindsay Street Branch of the Bank's Eastern Zone. For practicing fraud, the petitioner had stolen the entire pad of CAN from the Branch and kept the same at his residence. He had used the broken pieces of Branch Receipt Scroll rubber stamp to affix Lindsay Street Branch on CAN no.226007. He had filled in the said CAN on 09.08.1982 for Rs.35,000/- favouring one outsider namely, Babaji Nayak with forged signatures of the authorized officials in order to defraud Balasore Branch of the Bank.

6. Regulation 31 of the Banks Regulation provides for sanction of compassionate allowance in favour of an employee, who has been terminated from his service. The said regulation which has been quoted in Annexure-1 is reproduced below :

"**31. Compassionate Allowance:-**

(1) An employee, who is dismissed or removed or terminated from service, shall forfeit his pension: Provided that the authority higher than the authority competent to dismiss or remove or terminate him from service may, **if**

(i) such dismissal, removal, or termination is on or after the 1st day of November,1993 and

(ii) the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of the pension which would have been admissible to him on the basis of the qualifying service rendered up to the date of his dismissal, removal or termination."

It reveals from the aforesaid regulation that an employee, who is dismissed or removed or terminated from service after the 1st day of Novermber,1993 may be granted compassionate allowance in case the authority concerned considers his case 'deserving special consideration' at

the rate not exceeding 2/3rd of pension which would have been admissible to him on the basis of qualifying service rendered up to the date of dismissal or removal or termination.

7. On query by the court, learned counsel for the parties stated that the expression, 'deserving of special consideration' in Regulation 31 has not been defined any where nor is there any guideline to consider the same. While the petitioner's counsel failed to explain the meaning of such expression, the learned counsel for the opposite parties submitted that though punishment of dismissal can be awarded to an employee for any gross misconduct enumerated in Regulation 5 of the Banks Regulation, all such gross misconducts cannot be of the same gravity and, therefore, in case the misconduct consists of fraud, forgery and misappropriation which are prejudicial to the interest of the Bank or causes serious loss, the case may fall outside the expression and the authority in its discretion may refuse to sanction compassionate allowance.

8. Parimateria provision is available under Rule 41 of the CCS (Pension) Rules which also uses the expression 'deserving of special consideration' for grant of compassionate allowance. Government of India have also issued an office memorandum formulating 'Guiding principles for grant of Compassionate Allowance", which was taken note of by the Delhi High Court in the case of ***Ex. ASI Shadi Ram v. Government of NCT of Delhi and others: 2009 (4) SLR 52.*** The Guiding principles formulated by the Government of India have been extracted in paragraph-9 of the said judgment as follows :

> " In support of his case before the Tribunal, the petitioner also relied upon the "Guiding Principles for Grant of Compassionate Allowance", formulated by the Government of India in OM dated 22nd April,1940 for applying the aforesaid Rule 41 CCS (Pension) Rules, under which all applications for Compassionate Allowance are to be considered. This OM (which is hereinafter referred to as the "Guidelines") is reproduced below for convenience :-
>
> "Guiding principles for the grant of Compassionate Allowance- It is practially impossible in view of the wide variations that naturally exist in the circumstances attending each case, to lay down categorically precise principles that can uniformly be applied to individual case. Each case has, therefore, to be considered on its merits and a conclusion has to be reached on the question whether there were any such extenuating features in the case as would make the punishment awarded, though it may have been necessary in the

> interests of Government, unduly hard on the individual. In considering this question, it has been the practice to take into account not only the actual misconduct or course of misconduct which occasioned the dismissal or removal of the officer, but also the kind of service he has rendered. Where the course of misconduct carries with it the legitimate inference that the officer's service has been dishonest, there can seldom be any good case for a Compassionate Allowance. Poverty is not an essential condition precedent to grant of a Compassionate Allowance, but special regard is also occasionally paid to the fact that the officer has a wife and children dependent upon him, though this factor by itself is not, except perhaps in the most exceptional circumstances, sufficient for the grant of a Compassionate Allowance."

9. The aforesaid guiding principles are only illustrative in nature indicating certain factors which may be taken into consideration in determining whether a particular case deserves special consideration. Each case has to be decided on the basis of its attending circumstances and no precise or uniform principle can be laid down. However, the actual misconduct and its gravity is definitely a factor to be taken into consideration or borne in mind, so also any extenuating feature in the case as would make the punishment awarded unduly harsh on the individual. The fact that the dismissed employee has a large family with wife, children and other dependents to support and has no other source of income should also be relevant though poverty itself may not be an essential condition for considering the case as deserving of special consideration.

10. Regulation 5 of the Banks Regulation in the case at hand enumerates several gross misconducts, which may entail dismissal of an employee. Such gross misconduct inter alia includes-

> (a) engaging in any trade or business outside the scope of his duties except with the written permission of the Bank;
>
> (b) xx xx xx
>
> (c) drunkenness or riotous or disorderly or indecent behaviour on the premises of the bank;
>
> (d) willful damage or attempt to cause damage to the property of the bank or any of its customers;
>
> (e) willful insubordination or disobedience of any lawful and reasonable order of the management or of a superior; and the like.

The above misconducts though grouped under the category of "gross misconduct", which may entail dismissal from service, are definitely not as grave as practicing fraud, forgery, misappropriation, fabrication of documents etc in order to misappropriate bank's money. Therefore, the nature of misconduct may also play a role in determining whether a case deserves special consideration for grant of compassionate allowance.

11. In the instant case, the authority concerned has taken into consideration the gravity of the misconduct for which the petitioner was dismissed or terminated from service. The gravity of the charge was also taken note of by the High Court as also the Hon'ble Supreme Court. No extenuating factor exists which would entail imposition of a lesser punishment.In his representation to the authority for sanction of compassionate allowance, nothing has been indicated by the petitioner about his financial distress or poverty.

In the aforesaid circumstances, I find no infirmity in the order of opposite party no.2 in refusing to grant compassionate allowance to the petitioner.The writ petition is, therefore, dismissed. No costs.

Writ petition dismissed.

2014 (I) ILR - CUT- 326

B. K. NAYAK, J.

W.P.(C) NO.14762 OF 2013 (Dt.01.08.2013)

SUDIPTA CHANDRA RAY .....Petitioner

.*Vrs.*

THE COLLECTOR-CUM-D.M., & ORS. .....Opp.Parties

ODISHA PANCHAYAT SAMITI ACT, 1959 - S.44-Q

Appeal – Stay of an impugned order by the higher Court is not automatic – While considering the question of stay, the Court has to strike a balance between the comparative convenience and in convenience of the parties and also examine the prima facie merits of the impugned judgment.

In this case no such thing has been done by the learned District Judge – Held, the impugned order of stay is modified to the extent that neither the petitioner nor O.P.3 is allowed to function as the Chairman of Panchayat Samiti, Daspalla till disposal of the Election Appeal.

(Para 6)

For Petitioner - Mr. Pitambar Acharya, Sr. Advocate

For Opp.Parties - Addl. Standing Counsel,
(for O.P.Nos.1 & 2)
Mr. S.P. Mishra, Sr. Advocate,
(for Caveator O.P. no.3).

B.K.NAYAK, J. In this writ petition the petitioner challenges the legality and propriety of the order dated 26.06.2013 under Annexure-6 passed by the learned District Judge, Nayagarh in Election Appeal No.3 of 2013 staying the operation of the judgment dated 24.4.2013 passed by the learned Civil Judge (Senior Division), Nayagarh in Election Misc. Case No.15 of 2012.

2. The factual matrix is as follows:

(A) The petitioner being the elected Panchayat Samiti Member of Tumadi Gram Panchayat in the district of Nayagarh contested the election for the post of Chairman, Daspalla Panchayat Samiti against his rival candidate, opposite party no.3, who was declared elected.The petitioner filed Election Misc. Case No.15 of 2012 before the learned Civil Judge (Senior Division), Nayagarh under Section 44-A of the Orissa Panchayat Samiti Act,1959 challenging the election of opposite party no.3 on the ground that the post of Chairman of the Samiti was reserved for OBC category and that opposite party no.3 even though does not belong to OBC category, produced a fabricated caste certificate and contested the election. The Civil Judge (Senior Division) by his judgment dated 24.4.2013 (Annexure-1) found that opposite party no.3 does not belong to OBC category and as such was disqualified to contest the election and while declaring his election void, further declared the petitioner elected to the post of Chairman of the Panchayat Samiti.

(B) As per the above judgment, the Collector, Nayagarh-opposite party no.1 vide notification no.538 dated 26.4.3013 under Anexure-2 declared the petitioner as the Chairman of Daspalla Panchayat Samiti. In pursuance of the notification under Anenxure-2, the petitioner assumed charge as Chairman of the Samiti, as is evident

from the letter under Annexure-3 addressed by the B.D.O., Daspalla to the Collector, Nayagarh.

(C) Challenging the judgment passed by the learned Civil Judge (Senior Division), Nayagarh in Election Misc. Case No.15 of 2012, opposite party no.3 filed Election Appeal No.3 of 2013 before the learned District Judge, Nayagarh. Along with the appeal memo, opposite party no.3 also filed a petition to stay the operation of the judgment passed by the learned Civil Judge (Senior Division), so also the notification under Annexure-2 issued by the Collector, Nayagarh.

(D) By the impugned order dated 26.06.2013 (Annexure-6), the learned District Judge has stayed the operation of the judgment passed in the Election Misc. Case no.15 of 2012 by the Civil Judge (Senior Division), Naygarh.

3. At this stage, it is appropriate to notice certain further developments. While filing the Election Appeal, opposite party no.3 also challenged the notification dated 26.4.2013 (Annexure-2) before this Court by filing W.P.(C) No.10229 of 2013. By order dated 16.05.2013 this Court after hearing counsel for opposite party no.3 and the present petitioner passed interim order staying operation of the said notification dated 26.4.2013 (Annexure-2). The present petitioner filed Writ Appeal No.228 of 2013 challenging the interim stay order dated 16.05.2013 passed by the learned Single Judge in W.P.(C) No.10229 of 2013. In the meantime, the learned District Judge, Nayagarh passed the present impugned order of stay dated 26.6.2013 of the judgment passed in Election Misc. Case. The Division Bench dismissed the writ appeal as well as W.P.(C) No.10229 of 2013 as infructuous by order dated 01.07.2013 with the following observation :

" xx xx xx

It is brought to our notice that the learned District Judge, Nayagarh on 26.06.2013 in Election Appeal No.3 of 2013 has stayed the operation of the judgment passed by the learned Civil Judge (Senior Division), Nayagarh in Election Misc. Case No.15 of 2012 till disposal of the appeal. A photo copy of the order dated 26.06.2013 of the learned District Judge, Nayagarh in Election Appeal No.3 of 2013 is produced before us.

In view of above, the writ appeal as well as the writ petition has become virtually infructuous. Therefore, the writ appeal as well as the writ petition stands dismissed as infructuous.

> However, we direct the learned District Judge, Nayagarh to dispose of the Election Appeal No.3 of 2013 as expeditiously as possible preferably within a period of two months from the date of receipt of a certified copy of this order on its own merit without being influenced by any of the observation made by this Court either in the writ petition or in the writ appeal."

4. The learned counsel for the petitioner raised only one contention that the appellate court (District Judge, Nayagarh) has no power to pass an order of stay inasmuch as neither Section 44-Q nor any other provision of the Orissa Panchayat Samiti Act,1959 or the Rules framed thereunder confers such power. It is submitted that the Election Tribunal and the appellate court under the Panchayat Samiti Act cannot travel beyond the provision of the Statute in this respect. Refuting such contention, learned counsel for opposite party no.3 submits that every court/Tribunal has the trappings of a civil court and would be deemed to have the ancillary power to pass any interim order during the pendency of the main proceeding. In particular, it is submitted that an appellate court under a special statute has the implied/ancillary power to grant stay even if such power has not been specifically conferred by the statute.

5. The Division Bench dismissed the Writ Appeal No.228 of 2013 without interfering with the order of stay under Annexure-2 passed by the learned Single Judge in W.P.(C) No.10229 of 2013 because of the fact that by then the learned District Judge, Nayagarh had passed the impugned order of stay of operation of the judgment passed in the election misc. case. Though the Division Bench was not considering the legality and propriety of the stay order passed by the learned District Judge yet they thought it fit to direct the District Judge to dispose of the Election Appeal within two months. In the meantime, one month is already over, and for that matter, the stay order passed by the learned District Judge will continue for one more month only. In the circumstances, I desist from considering the merits of the contentions raised by the learned counsel for the parties.

6. As to the merits of the impugned stay order passed by the learned District Judge it is seen that no reason at all has been given by the learned District Judge except saying that since the appeal has been filed challenging the judgment of the Civil Judge (Senior Division), Nayagarh in the Election Misc. Case, it would be just and proper to grant stay of operation of the impugned judgment till disposal of the appeal. Stay of an impugned order by the higher court is never automatic. While considering the question of stay, the court has to strike a balance between the

comparative convenience and inconvenience of the parties and also examine the prima facie merits of the impugned order/judgment. No such thing has been done by the learned District Judge in the present case. The Election Appeal is going to be disposed of within a month or so in view of the direction of the Division Bench in the writ appeal. While setting aside the election of opposite party no.3 the learned Civil Judge (Senior Division) has also declared the petitioner elected as the Chairman of the Panchayat Samiti. It would, in the circumstances, be appropriate that neither the petitioner nor opposite party no.3 is allowed to function as the Chairman of Panchayat Samiti, Daspalla till disposal of the Election Appeal by the learned District Judge, Nayagarh and this Court directs accordingly. The impugned order of stay (Annexure-6) stands modified accordingly. The writ petition is thus disposed of.

Writ petition disposed of.

2014 (I) ILR - CUT- 330

S.K.MISHRA, J.

W.P.(C) NO.13628 OF 2013 (Dt.21.08.2013)

M/S. PARADEEP PHOSPHATES LTD. ……..Petitioner

.Vrs.

THE L.A. OFFICER, JAGATSINGHPUR & ORS. ……...Opp.Parties

A. CIVIL PROCEDURE CODE, 1908 - O-1, R-10

Land Acquisition made for the petitioner-company – O. P. Nos. 2 to 45, whose lands were acquired, filed execution without making the company as a party – Application filed by the company to be impleaded as a party under Order 1, Rule 10 C.P.C., was dismissed – Order challenged – Held, impugned order is set aside – Direction issued to implead the petitioner-company as a party in the execution proceeding.
(Paras 9,10,11)

B. LAND ACQUISITION ACT, 1894 - Ss.18, 50 (2)

Land Acquisition Authority or the company for whose benefit the land acquisition is made is a necessary party in the proceeding under the land acquisition Act – Held, the petitioner-company is a proper party hence the learned trial Court is not justified in rejecting the application of the petitioner-company under Order 1, Rule 10 C.P.C. to be impleaded as a party in the execution case filed by O.P. Nos.2 to 45. (Paras 10, 11)

Case law Relied on:-

AIR 1995 SC 724 : (U. P. Awas Evam Vikas Parishad-V- Gyan Devi (dead) by L.Rs. & Anr.)

For Petitioner - M/s. Sambit Rath & B. K. Nayak-3.

For Opp.Parties - Addl. Govt. Advocate,(for O.P.No.1)
M/s. K. K. Jena, A. K. Mohapatra &
S. N. Das (for O.Ps.2 to 45).

S.K.MISHRA, J. The petitioner, Paradeep Phosphates Ltd. has assailed the order dated 18.06.2013 passed in Execution Case No.27 of 2010, arising out of I.A. No.161 of 1990 of the court of Civil Judge (Senior Division), Jagatsinghpur, rejecting an application filed by the petitioner under Order 1, Rule 10 of the Code of Civil Procedure, 1908, hereinafter referred to as the "Code" for brevity, for impleading the Paradeep Phosphates Ltd. as a party to the execution proceeding.

2. The facts are not disputed. Lands of the opposite party no.2 to 45 were acquired by the Land Acquisition Officer under Land Acquisition Act, 1994 for the purpose of utilizing the same by the petitioner company. At the time of acquisition, a reference was made to the learned Civil Judge (Senior Division), Jagatsinghpur under Section 18 of the Land Acquisition Act for determination of compensation amount in respect of the acquired land, as the petitioners raised objection being dissatisfied by the compensation amount awarded. The learned Civil Judge (Senior Division), as per the judgment dated 18.05.2009 in L. A. Case No. 161 of 1990, passed the following order :

> "The reference is allowed on contest against the opp.parties and the said reference is answered accordingly. The opposite party no.2 is directed to pay compensation at the enhanced rate of Rs.31,000/- (Rupees thirty-one thousand) per acre for the lands of the petitioners under acquisition along with the additional market value at the rate of 12% per annum from the date of publication of notices u/s. 4(1) of

> the L.A. Act till the date of taking possession of the land, statutory solatium at the rate of 30% on the market value and interest at the rate of 9% per annum for the first year after acquisition and at the rate of 15% per annum for the subsequent years till the payment on the excess amount of compensation."

After passing of such an order, opposite parties 2 to 45 challenged the same by preferring LAA Case No.84 of 2009 in this Court, which is pending. As the matter stood thus, the said opposite parties have initiated an execution proceeding before the learned Civil Judge (Civil Judge), Jagatsinghpur, which is registered as Execution Case No. 27 of 2010 without making the petitioner-company as a party to this case.

3. The petitioner-company came to know about the initiation of the execution proceeding after receipt of letter no.181 dated 27.04.2013 along with copy of the order passed by this Court in W.P.(C) No.17839 of 2012 issued by the opposite party no.1. In the letter, opposite party no.1 has intimated the petitioner to deposit the total compensation amount of Rs.97,29,538.41 immediately for payment of higher compensation as prayed for by the decree holders. Though the petitioner was arrayed as opposite party no.2 in LAA. No. 161 of 2009, it was not made a party by the opposite parties in the aforesaid writ petition filed in this Court. In that writ petition, this Court has directed the opposite party no.1 to satisfy the decree immediately with a further direction to conclude the execution proceeding by the end of June, 2013. After receipt of letters from the Special Land Acquisition Officer, MIP, Jagatsinghpur, the petitioner filed a petition on 17.06.2013 under Order 1, Rule 10 read with Sections 47 and 151 of the Code for impleading it as a party to the Execution Case No.27 of 2010. To avoid any delay, the petitioner also filed its objection to the execution petition stating therein the exorbitant claims made by the decree holder and maintainability of the execution petition.

4. The decree-holders filed objection on 18.06.2013 and a copy of the same was served on the petitioner's counsel. Learned Civil Judge (Senior Division) after hearing the parties, rejected the petition filed for intervention on 18.06.2013 without assigning any reason only on the ground that this Court has directed to conclude the execution proceeding by end of June, 2013. The petitioner further submits that a meeting took place for settlement of enhanced compensation to the land-losers in presence of the Collector, Member of Parliament, Jagatsinghpur, representative of land-losers and intervener-Paradeep Phosphates Ltd. and an agreement was arrived at between the parties and the same was signed in the form of proceeding. On

20.02.2010, the Special Land Acquisition Officer, MIP, Jagatsinghpur being directed by the authority, forwarded copy of the said proceeding on 11.02.2010 for payment of additional compensation to the land losers of Paradeep Phosphates Ltd. In that letter, various terms and conditions were agreed upon by the parties and it was signed by the Collector and District Magistrate, Jagatsinghpur.

5. The petitioner further claims that the claim of Rs.97,29,538.41 has been wrongly calculated and it will be around Rs.62,00,000/- and the executing court also did not consider the aforesaid fact and rejected the application directing the opposite party no.1 to deposit Rs.97,29,538.41. It is therefore prayed that since the amount to be paid to the opposite party nos. 2 to 47 is to be adjudicated in the execution case, the petitioner-company should be arrayed as a party.

6. While disposing of the application under Order 1, Rule 10 of the Code, the learned Civil Judge (Senior Division), Jagatsinghpur has not assigned any reason for rejecting the application filed by the petitioner. It is only stated in the order that this Court has directed in W.P.(C) No. 17839 of 2012 to conclude the execution proceeding by the end of June, 2012. Hence, the opposite party no.1 i.e. the judgment debtor, namely the Special Land Acquisition Officer is directed to deposit the said amount, otherwise the Bank Accounts were to be attached by the order of the court.

7. Learned counsel for the petitioner submits that since the direction has been given by the learned Civil Judge (Senior Division) to the present petitioner to pay the compensation, the petitioner-company is a necessary party to the execution proceeding. Secondly, it is contended that in **U.P. Awas Evam Vikas Parishad v. Gyan Devi (dead) by L.Rs. and another,** AIR 1995 SC 724, the Constitution Bench of the Supreme Court has laid down that the Land Acquisition Authority or the Company, for whose benefit the land acquisition is being made, is a necessary party in the proceeding under the Land Acquisition Act. The learned counsel for the opposite parties 2 to 47, on the other hand, submits that in view of the order passed by this Court in the afore stated writ petition, the learned Civil Judge (Senior Division) has no other option but to order for payment of the compensation to the decree holders.

8. Having gone through the ratio decided by the Constitution Bench of the Supreme Court in **U.P. Awas Evam Vikas Parishad v. Gyan Devi (dead) by L.Rs. and another** (supra), this Court is of the opinion that the ratio laid down therein is squarely applicable to the present case. In

paragraph 25 of the judgment, the majority view of the case has been laid down in the following terms:

"25. To sum up, our conclusions are:

1. Section 50(2) of the L.A. Act confers on a local authority for whom land is being acquired a right to appear in the acquisition proceedings before the Collector and the reference Court and adduce evidence for the purpose of determining the amount of compensation.

2. The said right carries with it the right to be given adequate notice by the Collector as well as the reference Court before whom acquisition proceedings are pending of the date on which the matter of determination of compensation will be taken up.

3. The proviso to Section 50(2) only precludes a local authority from seeking a reference but it does not deprive the local authority which feels aggrieved by the determination of the amount of compensation by the Collector or by the reference Court to invoke the remedy under Article 226 of the Constitution as well as the remedies available under the L.A. Act.

4. In the event of denial of the right conferred by Section 50(2) on account of failure of the Collector to serve notice of the acquisition proceedings the local authority can invoke the jurisdiction of the High Court under Article 226 of the Constitution.

5. Even when notice has been served on the local authority, the remedy under Article 226 of the Constitution would be available to the local authority on grounds on which judicial review is permissible under Article 226.

6. The local authority is a proper party in the proceedings before the reference court and is entitled to be impleaded as a party in those proceedings wherein it can defend the determination of the amount of compensation by the Collector and oppose enhancement of the said amount and also adduce evidence in that regard.

7. In the event of enhancement of the amount of compensation by the reference Court, if the Government does not file an appeal, the local authority can file an appeal against the award in the High Court after obtaining leave of the Court.

8. In an appeal by the person having an interest in land seeking enhancement of the amount of compensation awarded by the reference Court the local authority should be impleaded as a party and is entitled to be served notice of the said appeal. This would apply to an appeal in the High Court as well as in this Court.

9. Since a company for whom land is being acquired has the same right as a local authority under Section 50(2), whatever has been said with regard to a local authority would apply to a company too."

9. Section 50 of the Land Acquisition Act provides that where the provisions of this Act are put in force for the purpose of acquiring land at the cost of any fund controlled or managed by a local authority or of any Company, the charges of and incidental to such acquisition shall be defrayed from or by such fund or Company. Sub-section (2) provides that any proceeding held before a Collector or Court in such cases the local authority or company concerned may appear and adduce evidence for the purpose of determining the amount of compensation. Provided that no such local authority or Company shall be entitled to demand a reference under Section 18 of the Land Acquisition Act. Thus, a plain reading of Section 18 reveals that the petitioner-company is a proper party in all proceedings under the Land Acquisition Act and they have a right of being heard.

10. Secondly, it is seen that the learned Civil Judge (Senior Division) while answering to the reference very categorically directed the opposite party no.2 to pay the compensation amount on the enhanced rate as specified therein. So the Paradeep Phosphates Ltd. is a proper and necessary party to the execution proceeding, more so, because of the fact that they claim that the calculation made by the judgment-debtors are in the higher side and is not in accordance with the order passed by the learned Civil Judge (Senior Division). Accordingly, this Court comes to the conclusion that merely because this Court has passed an order in W.P.(C) No. 17839 of 2012 to direct conclusion of the execution proceeding by certain date, in which the petitioner was not a party, cause of justice cannot be ignored and the petitioner cannot be estopped from raising all the legitimate objections available to it.

11. In that view of the matter, the writ petition succeeds, however, in view of the facts of the case, without cost. The order dated 18.06.2013 passed in Execution Case No.27 of 2010, arising out of L.A. Case No.161 of 1990 by the learned Civil Judge (Senior Division), Jagatsinghpur is set aside. It is directed that the petitioner-company be arrayed as a party to the proceeding. The learned Civil Judge (Senior Division) shall consider the

objections raised by the petitioner and dispose of the execution proceeding as expeditiously as possible after affording reasonable opportunity of hearing to the parties. Parties are directed to appear before the lower court on 31.08.2013.

Writ petition allowed.

2014 (I) ILR - CUT- 336

S. K. MISHRA, J.

CRLREV NO. 756 OF 2013 (Dt.02.12.2013)

MRUTYUNJAYA N. JENA ……..Petitioner

.Vrs.

REPUBLIC OF INDIA (C.B.I.) ……Opp.Party

PREVENTION OF CORRUPTION ACT, 1988 - Ss.2 (c), 3, 4 r/w Sections 220, 223 Cr. P.C.

Petitioner not a public servant – He has been charged U/ss. 120-B, 420, 468, 471 I.P.C. and Section 13 (2) read with Section 13 (1) (d) of the P. C. Act, 1988 – He entered in to Criminal conspiracy with the then Branch Manager and the then officer of Canara Bank and managed to take loan in favour of a non-existing firm and committed fraud by misappropriating public money – Held, the petitioner can be tried along with other two accused persons by the Special Court under the prevention of corruption Act – No reason to interfere with the impugned order. (Paras 8 to 11)

Case laws Referred to:-

1.(2003) 8 SCC 628 : (Vivek Gupta-V- Central Bureau of Investigation & Anr.)

2.(1973) 2 SCC 72 : 1973 SCC (Cri) 738: AIR 1973 SC 2204. : (Union of India-V- I.C. Lala)

3.AIR 1961 SC 1241 (1961) 2 Cri L.J. 302. : (State of A.P.-V- Kandimalla Subbaiah)

4.(1980) 2 SCC 465 : (Shivnarayan Laxminarayan Joshi & Ors.-V- State

of Maharashtra)
5.(1981) 2 ACC 443 : (Mohammad Usman Mohammad Hussain Maniyar-V- State of Maharashtra).
6.(2010) 45 OCR (SC) 503 : (Yogesh @ Sachin Jagdish Joshi-V- State of Maharashtra).

For Petitioner - M/s. Manoranjan Mohapatra, N. Behera.

For Opp.Party - M/s. S.K. Padhi (Sr. Adv.).

Heard learned counsel for the petitioner and the learned Standing Counsel for the C.B.I. Perused the Records.

2. The petitioner assails the order dated 26.07.2013 passed by the learned Special Judge (CBI), Bhubaneswar in T.R. No.36 of 2010 in rejecting the application filed by him under Section 227 of the Code of Criminal Procedure, 1973, hereinafter referred as the 'Code' for brevity, to discharge him from the charges under Section 120-B, 420, 468, 471 I.P.C. and Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988, hereinafter referred as the 'Act'.

3. In course of hearing the learned counsel for the petitioner raised two points; firstly it is submitted that the petitioner not being a public servant, as defined under Section 2 of the Act, cannot be charged for the offence under Sections 120-B, 420, 468, 471 I.P.C. and Section 13 (2) read with Section 13 (1) (d) of the Act, secondly, it is contended that there is no material on record to come to the conclusion that there has been any conspiracy between the petitioner and the other two accused persons to commit any crime as there is no written document to that effect nor, it is submitted that, the prosecution alleged that there is oral evidence to that effect.

4. Mr. S.K. Padhi, learned Senior Standing Counsel for the C.B.I. relies upon the reported case of Vivek Gupta v. Central Bureau of Investigation and another, (2003) 8 SCC 628 contending that the petitioner can be charged for the aforesaid offences along with the co-accused persons, who are public servants.

5. The prosecution case, in brief is that the present petitioner as Proprietor of Utkal Fabrication and Engineering works, Rourkela applied for certain loan of Rs. 10 lakh was sanctioned under Credit Guarantee Fund for small scale industries. It is further alleged by the prosecution that no firm in the name and style of Utkal Fabrication and Engineering Works in shed Nos. 4 and 5, Nayabazar, Rourkela was in existence. During investigation, it came

to light that the petitioner entered into criminal conspiracy with Chaitanaya Badi, the then Branch Manager, Canara Bank, Bishra Road Branch, Rourkela and Dipankar Mishra, the then officer of Canara Bank of said branch to commit cheating and fraud to misappropriate public money. In pursuance thereto, the Branch Manager sanctioned the loan of Rs.10 lakhs in favour of the present petitioner falsely certifying his credit worthiness. The amount was sanctioned in favour of the said non-existence firm. Thereafter, F.I.R. was lodged and Investigating machinery was set into motion. On completion of investigation, charge sheet has been submitted against the then Branch Manager and the then Officer of Canara Bank, Bishra Road Branch, Rourkela along with the petitioner. It is not disputed that the present petitioner is not a public servant. So now the question arises, whether the present petitioner can be tried along with other two accused persons by the Special Court under the Prevention of Corruption Act and whether there is sufficient material on record to frame charges against the present petitioner.

6. Section 3 of the Act provides power of the Central Government or the State Government to appoint Special Judges to try any offence punishable under the Act and any conspirac y to commit or any attempt to commit or any abetment of any of the offences specified in clause (a). Section 4 of the Act provides for the cases triable by the Special Judges. Sub-section (1) provides that notwithstanding anything contained in the Code, or in any other law for the time being in force, the offences specified in Sub-section (1) of Section 3 shall be tried by Special Judges only. Sub-section (2) provides that every offence specified in Sub-section (1) of Section 3 shall be tried by the Special Judge for the area within which it was committed, or, as the case may be, by the Special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government. Sub-section (3) provides that while trying any case, a Special Judge may also try any offence, other than an offence specified in Section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

Section 22 of the Act provides that the provision of the Code, a Special Judge shall, in their application to any proceeding in relation to an offence punishable under the Act, have effect subject to certain modifications specified therein. The modifications of the provisions of the Code in their application to offences punishable under the Act do not modify the provisions of Chapter XVII of the Code, which is relevant for the present case.

Section 220 of the Code provides trial for more than one offence. It is apt to take note of the exact words appearing in the said section, which reads as follows :

"220. Trial for more than one offence.- (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub-section (2) of Section 212 or in sub-section (1) of Section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this Section shall affect Section 71 of the Indian Penal Code (45 of 1860)."

Section 223 of the Code provides for those persons who may be charged jointly. The relevant portion of the said section is quoted below :

"223. What persons may be charged jointly. – The following persons may be charged and trial together, namely –

(a) persons accused of the same offence committed in the course of the same transaction.

(b) persons accused of an offence and persons accused of abetment or, or attempt to commit.

(c) x x x

(d) persons accused of different offences committed in the course of the same transaction.

(e) –(g) x x x

7. Taking into consideration the aforesaid provisions, the Supreme Court in ***Vivek Gupta v. Central Bureau of Investigation and another (supra)*** has amplified the law governing the field. It is appropriate to quote the relevant portion of the judgment.

> "13. Section 223 of the Code of Criminal Procedure has not been excluded either expressly or by necessary implication nor has the same been modified in its application to trials under the Act. The said provision therefore is applicable to the trial of an offence punishable under the Act. The various provisions of the Act which we have quoted earlier make it abundantly clear that under the provisions of the Act a Special Judge is not precluded altogether from trying any other offence, other than offences specified in Section 3 thereof.. A person charged of an offence under the Act may in view of sub-section (3) of Section 4 be charged at the same trial of any offence under any other law with which he may, under the Code of Criminal Procedure, be charged at the same trial. Thus a public servant who is charged of an offence under the provisions of the Act may be charged by the Special Judge at the same trial of any offence under IPC if the same is committed in a manner contemplated by Section 220 of the Code.
>
> 14. The only narrow question which remains to be answered is whether any other person who is also charged of the same offence with which the co-accused is charged, but which is not an offence specified in Section 3 of the Act, can be tried with the co-accused at the same trial by the Special Judge. We are of the view that since sub-section (3) of Section 4 of the Act authorizes a Special Judge to try any offence other than an offence Specified in Section 3 of the Act to which the provisions of Section 220 apply, there is no reason why the provisions of Section 223 of the Code should not apply to such a case. Section 223 in clear terms provides that persons accused of the same offence committed in the course of the same transaction, or persons accused of different offences committed in the course of the same transaction may be charged and tried together. Applying the provisions of Sections 3 and 4 of the Act and Sections 220 and 223 of the Code of Criminal Procedure, it must be held that the appellant and his co-accused may be tried by the Special Judge in the same trial.
>
> 15. This is because the co-accused of the appellant who have been also charged of offences specified in Section 3 of the Act must

be trial by the Special Judge, who in view of the provisions of sub-section (3) of Section 4 and Section 220 of the Code may also try them of the charge under section 120-B read with Section 420 IPC. All the three accused, including the appellant, have been charged of the offence under section 120-B read with Section 420 IPC. If the Special Judge has jurisdiction to try the co-accused for the offence under Section 120-B read with Section 420 IPC, the provisions of Section 223 are attracted. Therefore, it follows that the appellant who is also charged of having committed the same offence in the course of the same transaction may also be tried with them. Otherwise it appears rather incongruous that some of the conspirators charged of having committed the same offence may be tried by the Special Judge while the remaining conspirators who are also charged of the same offence will be tried by another court, because they are not charged of any offence specified in Section 3 of the Act.

16. Reliance was placed by the respondent on the judgment in ***Union of India v. I.C. Lala, (1973) 2 SCC 72 : 1973 SCC (Cri) 738 : AIR 1973 SC 2204,*** but the counsel for the appellant distinguished that case submitting that the facts of that case are distinguishable inasmuch as in that case apart from the two army offers, even the third appellant who was a businessman, was charged of the offence punishable under section 120-B IPC read with Section 5(2) of the Act. Such being the factual position in that case, Section 3(1)(d) of the relevant Act was clearly attracted. In the instant case he submitted, there was no charge against the appellant of having conspired to commit an offence punishable under the Act. The aforesaid judgment refers to an earlier decision of this Court in the case of ***State of A.P. v. Kandimalla Subbaiah****,* AIR 1961 SC 1241 : (1961) 2 Cri LJ 302. The learned counsel for the appellant distinguishes that case also for the same reason, since in that case as well the respondent was charged of conspiracy to commit an offence punishable under the Act."

8. Such clear ratio decided in the aforesaid case leaves no doubt in the mind of this Court that the accused though is not a public servant still he can be charged for the offences as described above as there is an allegation of criminal conspiracy punishable under Section 120-B of the I.P.C. Thus the first contention raised by the learned counsel for the petitioner is not acceptable.

9. So far as the second contention is concerned. Section 120-A of the I.P.C. defines "criminal conspiracy". The basic ingredients of the offence of

criminal conspiracy are (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. The Supreme Court in Shivnarayan Laxminarayan Joshi and others v. State of Maharashtra, (1980) 2 SCC 465, laid down that a conspiracy is always hatched in secrecy and it is impossible to adduce direct evidence of the common intention of the conspirators. Therefore, the meeting of minds of the conspirators can be inferred from the circumstances proved by the prosecutor, if such inference is possible.

In ***Mohammad Usman Mohammad Hussain Maniyar v. State of Maharashtra : (1981) 2 ACC 443,*** it was observed that for an offence under Section 120-B, the prosecution need not necessarily prove that the perpetrators expressly agree to do and/or cause to be done the illegal act, the agreement may be proved by necessary implication.

10. In this case, having perused the records, the learned Special Judge has held that all the accused persons entered into a compromise to cause an illegal act, such as, cheating and forgery. As the allegation prima facie shows that there is a criminal conspiracy, the charge has been rightly framed against the accused persons. There is no reason to come to a different conclusion, in fact, the reported case cited by the learned counsel for the petitioner i.e. Yogesh alias Sachin Jagdish Joshi v. State of Maharashtra, (2010) 45 OCR (SC) 503 goes against the contention raised by the learned counsel for the petitioner. At paragraph 25 of the judgment, the Supreme Court mentioned that two or more persons for doing an illegal act or an act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances and the conduct of the accused.

11. In that view of the matter, this Court comes to the conclusion that there is no reason to interfere in the findings recorded by the learned Special Judge (C.B.I.), Bhubaneswar and the revision application is devoid of merit and the same is dismissed. Pending Misc. Case is also dismissed as infructuous.

Revision dismissed.

2014 (I) ILR - CUT- 343

B. K. MISRA, J.

R.F.A. NO.6 OF 2009 (Dt.14.05.2013)

PRASANNA KUMAR RAM .....Appellant

.Vrs.

NABAKISHORE RAM & ORS. .....Respondents

HINDU SUCCESSION ACT, 1956 – S.8

Scheme of succession to the property of a Hindu dying intestate – Heirs specified in Class-I took simultaneously to the exclusion of all other heirs – A Son's son was not mentioned as an heir under Class-I of the Schedule so he could not get any right in the property of his grand father under the provision – The right of a son's son on his grand father's property during the life time of his father which existed under Hindu law as in force before the succession Act, was not saved expressly by the Act and therefore the earlier interpretation of Hindu law giving a right by birth in such property ceased to have effect.

In this case Lot No-1 and Lot No.2 property are ancestral properties in the hands of defendant No.1, father of the plaintiff and in view of the above provision the plaintiff cannot have any interest in the said properties when his father defendant No.1 is alive and he can not question the alienation of Lot No.1 property by defendant No.1 to defendant No.2 as the said property devolved on defendant No.1 in his individual capacity and not as "Karta" of his family after the death of his father – Held, suit for partition filed by the plaintiff has been rightly dismissed by the Court below. (Paras 15,18,20)

Case laws Referred to:-

1.2011 (II) Orissa Law Reviews 431 : (Sourindra Narayan Bhanja Deo-V- Member, Board of Revenue, Orissa & Ors.)

2.59(1985) CLT 407 : (Satyapriya Mohapatra-V- Ashok Pandit)

3.1993 (I) OLR 187 : (Sankarlal Verma-V- Smt. Uma Sahoo)

4.70(1990)CLT 335 : (Mst.Kasturi Adabasia & Ors.-V- Bishu Dandasena & Ors.).

5.AIR 1986 SC 1753 : (Commissionr of Wealth-tax, Kanpur, etc.-V- Chander Sen etc.)
6.AIR 1987 SC 558 : (Yudhishter-V- Ashok Kumar).

For Appellant - M/s. S.P.Mishra, Miss. S.Misra, S.K.Mohanty, S.S.Satpathy, A.K.Dash, S.S.Kashyap, S.K. Sahoo, S.K. Samantray.

For Respondents No.2 -M/s. P.K.Mohanty, D.N. Mohapatra, Smt. J. Mohanty, P.K. Nayak, S.N. Das.

For Respondent No.5 - Mr. J.Patra, Addl. Standing Counsel

B.K.MISRA, J. The appellant, who was the plaintiff in T.S.No.90/571 of 2006/2001, being aggrieved by the judgment and decree dismissing the suit on contest against the defendant nos.2 and 5 and ex parte against defendant nos.1, 3 and 4 has preferred this appeal.

2. The appellant, who was the plaintiff in the court below (hereinafter referred to as "the plaintiff"), filed the suit for partition of Lot Nos.1 and 2 properties of the plaint suit schedule, which are said to be his ancestral properties. Admittedly, the plaintiff is the son of defendant no.1. Plaintiff and defendant no.1 as well as proforma defendant nos.3 and 4 belong to one family. It is the case of the plaintiff that suit plot no.1205 described as Lot No.1 property in the plaint schedule was leased out by the Government in G.A.Department in favour of Rajendra Ram, who happens to be his grand father and father of defendant no.1. The said Rajendra Ram constructed several shop rooms over the said plot no.1205 and let out to different tenants. Rajendra Ram died in the year 1970 leaving behind his only son, namely, defendant no.1. The suit property was recorded in the name of Rajendra Ram and after his death it was mutated in the name of defendant no.1. Lot no.2 property, i.e., plot no.664 is the ancestral residential house of the parties, which was constructed out of the joint family fund and was renovated from time to time for the comfortable living where the plaintiff used to stay. The said plot no.664 stands recorded in the name of defendant no.1, who is the father of the plaintiff and Bijan Ram, father of the proforma defendant nos.3 and 4. Plot no.664 appertains to Khata No.513 and in that khata there exists two plots, i.e. plot no.664 and 665. Plot no.665 was allotted to Bijan Ram by an amicable partition and defendant no.1 got plot no.664. In the record of right. Khata No.513 stands recorded in the name of defendant no.1 and Bijan Ram. It is alleged that proforma defendant nos.3 and 4 have no interest over plot no.664 by virtue of the previous amicable partition between Naba Kishore Ram and Bijan Ram. According to the

plaintiff, he is the only son of defendant no.1 and therefore, he has 50% share in the properties described in Lot Nos.1 and 2 of the plaint suit schedules. It is alleged by the Plaintiff that his father Defendant no.1 being guided by some unscrupulous persons, attempted to sell away the properties and when the plaintiff came to know about that from one Kunja Kishore Ram, he requested his father to refrain from that, but his father (defendant no.1) did not pay any heed to that but on the other hand, rebuked the plaintiff and challenged him to do whatever he likes. Thus, the plaintiff being disgusted with the attitude of his father, namely, defendant no.1, asked him for partition of the suit properties, which defendant no.1 flatly refused for which the plaintiff instituted the suit seeking partition. During pendency of the suit and in course of hearing of the miscellaneous case, the plaintiff came to know that defendant no.1 has sold away Lot no.1 property to defendant no.2 on 29.10.2001. According to the plaintiff, he used to derive income out of the shop rooms, which were built by his grand feather, Rajendra Ram @ Raja Ram over Lot no.1 property and since that property is the ancestral property of him as well as defendant no.1, he and defendant no.1 (father), each has 50% share over the same. The plaintiff alleges that when the defendant no.1 came to know about the partition suit filed by the plaintiff, he (Defendant No.1) deliberately sold away Lot no.1 property to defendant no.2 without his knowledge, and consent as well as without having any legal necessity. It is further alleged that the defendant no.1 had no right to sell more than the share due to his share and that apart, he cannot sell away the ancestral joint family property. According to the plaintiff, the sale of lot no.1 property by defendant no.1 to defendant no.2 is void in the eye of law and even if such sale has taken place, the same does not affect the plaintiff's interest. Thus, when on 1.10.2001 the plaintiff asked the defendant no.1 for partition and when that was refused, the plaintiff finding no other way out had to institute the suit for partition of the suit schedule properties.

3. Defendant no.1 and proforma defendant nos.3 and 4 were set ex parte since they did not appear in the court when hearing of the suit was taken up.

4. Defendant nos.2 and 5 contested the suit by filing their separate written statement.

5. Defendant no.2 in his written statement while praying for dismissal of the suit having no cause of action, inter alia, pleaded that the suit property described in Lot No.1 is not partiable as the same when leased out by the Government to a member of the family that becomes his separate property and accordingly no other member of the coparcenery and not even his male

issue acquires any interest in it by birth. It is also his further plea that when after the death of the original lease holder, his son (defendant no.1) became the rightful owner and when he in order to meet his legal necessity, alienated the suit Lot no.1 property to him after obtaining necessary permission from defendant no.5 vide Tripartite Deed No.6822 dated 29.10.2001, the plaintiff cannot question about that as he has no right, title and interest over the said lot no.1 property. Defendant no.2 further asserts that after taking delivery of possession of lot no.1 property, he got his name mutated in his favour and he is going on paying the land revenue to the concerned authority. Inter alia it is his specific stand that when Lot No.1 suit property stands recorded in the name of defendant no.1 and when he for his legal necessity such as defraying medical expenses and marriage expenses of his two unmarried daughters, sold the property to him after obtaining necessary permission from the Government, Plaintiff cannot question such sale as he has no right, title and interest or possession over the suit schedule property in any manner and cannot seek for partition of that property.

6. Defendant no.5, namely, the State, in its written statement while raising many questions about the maintainability of the suit have asserted that the State is the lawful owner and title holder of the suit Lot no.1 property which was leased out to Rajendra Ram for shop-cum-residential purposes and after his death, Lot no.1 property was mutated in favour of defendant no.1 on proper application to the G.A. Department. The said Naba Kishore Ram, defendant no.1 applied to the G.A. Department seeking permission for transfer of the land in favour of defendant no.2 by way of sale and accordingly, a tripartite deed was executed in between the G.A. Department, Naba Kishore Ram and Sunil Kumar Mohanty on 22.10.2001, which was registered vide deed No.6823 dated 29.10.2011. With regard to the allegation of the plaintiff about interpolation in the tripartite deed, defendant no.5 avers that the lessee had signed the document by putting the date as 12.10.2001 which was executed on 22.10.2001 and accordingly, the sale is not void in the eye of law. It is prayed by defendant no.5 that the plaintiff having no cause of action to file the suit in respect of Lot no.1 property, the same should be dismissed with compensatory cost on the plaintiff.

7. Out of the pleadings of the parties, the following issues were settled for determination.

(i) Whether the suit is maintainable?

(ii) Whether there is cause of action to file the suit?

(iii) Whether the suit is bad for non-joinder or necessary party?

(iv) Whether the plaintiff is entitled for ½ share out of the suit schedule property and a direction can be given to the defendant no.1 to partition the suit land by metes and bounds?

(v) Whether the sale deed executed by defendant no.1 in favour of defendant no.2 is valid one?

(vi) Whether the plaintiff is entitled to decree for means profit of Rs.10,000/- per month from the date of alienation of Lot no.1 property?

(vii) To what other relief, the plaintiff is entitled?

8. The learned 2nd Addl. Civil Judge (Senior Division), Bhubaneswar after considering the evidence and materials placed before it, arrived at the conclusion that the plaintiff is not entitled to the relief of partition of the suit property, which he has prayed for and accordingly dismissed the suit.

9. In this appeal, the present appellant, who was the plaintiff in the court below challenges the findings of the learned 2nd Addl. Civil Judge (Senior Division), Bhubaneswar on the ground that when the suit properties are ancestral properties of the Plaintiff and Defendant No.1, the learned court below without applying its juridical mind and without proper appreciation of the evidence and legal issues dismissed the suit which has caused great prejudice to the present appellant.

10. I have gone through the evidence as has been laid in the court below and also heard the learned counsel appearing for the appellant as well as the learned counsel for the respondent No.2 and the learned Addl. Standing Counsel appearing for respondent No.5. The overwhelming evidence on record shows that the Lot No.1 property was leased out to Rajendra Ram by the Government in General Administration Department in favour of the deceased, the father of the plaintiff on the strength of a registered lease deed dated 29.06.1962 vide Ext.1 over which the said Rajendra Ram constructed fifteen shop rooms which were let out to different persons. There is also no dispute that after the death of the said Rajendra Ram in the year 1970, the defendant No.1, who is the son of the said Rajendra Ram got the land mutated in his name in respect of Lot No.1 property and the said certified copy of the record of right has been marked as Ext.2. Similarly, with regard to Lot No.2 property, there is no dispute that the property appertains to Khata No. 513 and Plot No. 664 also stands recorded in the name of the

father of the plaintiff-appellant, namely, defendant No.1. There is also no dispute that the Lot No.1 property has been sold by defendant No.1 to defendant No.2, after obtaining necessary permission from the General Administration Department of Government of Orissa, which was challenged in the suit on the ground that since the said property after the death of the original lessee Rajendra Ram devolved on his son, namely, the father of the plaintiff, the same becomes the ancestral property of the plaintiff and, therefore, over the Lot No.1 and Lot No.2 properties, the plaintiff being the coparcener of his Hindu joint family undivided property, he has coparcenary right over the same.

11. Mr. Mishra, learned Senior Counsel for the appellant very strenuously contended that as per the settled position of law, alienation of joint family property by a Manager is restricted to the extent except for legal necessity or for the benefit of the family otherwise he can not do so. Besides that, it was also contended that the l ease hold property granted in favour of the grandfather of the plaintiff is both heritable and transferable in nature and in that context reliance was placed on a decision of this Court reported in ***2011 (II) Orissa Law Reviews 431, Sourindra Narayan Bhanja Deo V. Member, Board of Revenue, Orissa and others***. Besides that, reliance was also placed on two decisions of this Court as reported in ***59 (1985) CLT 407, Satyapriya Mohapatra V. Ashok Pandit, 1993 (I) OLR 187 Sankarlal Verma V. Smt. Uma Sahoo***. Accordingly, it was contended that when without any legal necessity the Lot No.1 property was sold by defendant No.1 to defendant No.2, the same is not binding on the plaintiff and in that context reliance was placed on a decision of this Court reported in ***70 (1990) C.L.T. 335, Mst. Kasturi Adabasia and others V. Bishnu Dandasena and others***. Accordingly, it was argued on behalf of the appellant with vehemence that the findings recorded by the learned trial court cannot be sustained and besides that when the judgment in question is very cryptic and non-speaking one, the same is liable to be set aside.

12. Learned counsel appearing for the respondent Nos. 2 and 5, on the other hand, contended that the trial court has given cogent and detailed reasons while dismissing the suit and there is no reason for interfering with the judgment and decree of the court below which is under challenge in this appeal and this Court as the Appellate Court is to examine the whole issues involved in the appeal including the points of law and give a finality to the matter.

13. While hearing the appeal, a very interesting point was raised at the Bar as to whether assuming that the grandfather's property was ancestral

property in the hands of the father, can the grandson would have an interest in the property, who has acquired the interest in it by birth.

Under the Hindu law, it is clear that the moment a son is born, he gets a share in the father's property and becomes part of the coparcenary. His right accrues to him not on the death of the father or inheritance from the father but with the very fact of his birth. Normally, therefore whenever the father gets a property from whatever source from the grandfather or from any other source, be it separate property or not, his son should have a share in that and it will become part of the joint Hindu family of his son and grandson and other members who form joint Hindu family with him. But the question is; is the position affected by Section 8 of the Succession Act, 1956 and if so, how?

Under the Hindu Law, the son would inherit the property of his father as 'Karta' of his own family. But the Hindu Succession Act has modified the rule of succession. The Act lays down the general rules of succession in the case of males. There were divergent views in the matter. But the position has been set to rest by the Hon'ble Apex Court in two decisions as reported in ***AIR 1986 SC 1753, Commissioner of Wealth-tax, Kanpur, etc. V. Chander Sen etc***. and in the case of ***Yudhishter V. Ashok Kumar reported in AIR 1987 SC 558***.

The Hon'ble Apex Court in the aforesaid two decisions held that Section 8 of the Hindu Succession Act, 1956 indicates the heirs in respect of certain property and Class I of the heirs includes the son but not the grandson. It includes, however, the son of the predeceased son. Under Section 8 of the Hindu Succession Act, 1956, the property of the father who dies intestate devolves on his son in his individual capacity and not as Karta of his family. In the words of the Hon'ble Apex Court in the case of Commissioner of Wealth-tax, Kanpur (supra) is as follows :-

> "In view of the Preamble to the Act i.e. that to modify where necessary and to codify the law, in our opinion it is not possible when Schedule indicates heirs in Class I and only includes son and does not include son's son but does include son's of a predeceased son, to say that when son inherits the property in the situation contemplated by Section 8 he takes it as Karta of his own undivided family. The Gujurat High Court's view noted above, if accepted, would mean that though the son of a predeceased son and not the son of a son who is intended to be excluded under Section 8 to inherit, the latter would by applying the old Hindu law

> get a right by birth of the said property contrary to the scheme outlined in Section 8. Furthermore as noted by Andhra Pradesh High Court the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today the property which devolved on a Hindu under Section 8 of the Hindu Succession Act would be HUF property in his hand vis-à-vis his own son; that would amount to creating two classes among the heirs mentioned in Class I, the male heirs in whose hands it will be joint Hindu family property and vis-à-vis son and female heirs with respect to whom no such concept could be applied or contemplated. It may be mentioned that heirs in Class I of Schedule under Section 8 of the Act included widow, mother, daughter of predeceased son etc".

14. Thus, the express words of Section 8 of the Hindu Succession Act, 1956 cannot be ignored and the same must prevail. It is necessary to bear in mind the Preamble of Hindu Succession Act, 1956 which states that it was an Act to amend and codify the law relating to intestate succession among the Hindus, with that background the express language which excludes son's son but include son of a predeceased son cannot be ignored and their Lordship's of the Hon'ble Apex Court accepted the views of the Allahabad High Court, Full Bench view of the Madras High Court, Madhya Pradesh High Court and Andhra Pradesh High Court, but did not agree with the view of the Gujurat High Court in the matter.

15. Section 8 of the Hindu Succession Act, 1956 lays down the scheme of succession to the property of a Hindu dying intestate. The schedule classified the heirs on whom such property should devolve. Those specified in Class I took simultaneously to the exclusion of all other heirs. A son's son was not mentioned as an heir under Class I of the schedule, and, therefore, he could not get any right in the property of his grandfather under the provision. The right of a son's son on his grandfather's property during the lifetime of his father which existed under Hindu law as in force before the Act, was not saved expressly by the Act, and, therefore, the earlier interpretation of Hindu law giving a right by birth in such property ceased to have effect.

16. It is needless to mention here that Section 8 of the Hindu Succession Act, 1956 confers the right of succession only on the son of a predeceased son and not on a grandson when his father is living at the time of succession and he does not get anything on the ground that he gets a right by birth.

17. Even assuming that the Lot No.1 and Lot No.2 property are ancestral properties in the hands of defendant No.1, but because of the specific provisions contained in Section 8 of the Hindu Succession Act, the appellant-plaintiff cannot have any interest in the said properties. Thus, in the instant case, when the father of the plaintiff, namely, defendant No.1 is alive and when the plaintiff claims that Lot No.1 and Lot No.2 properties are the ancestral properties, he cannot seek for any partition of those properties and he cannot have any claim over those properties and cannot seek for relief of partition during the lifetime of his father i.e. defendant No.1, who is alive now, as the old position has undergone, a radical change in the law of succession i.e. Section 8 of the Hindu Succession Act, 1956. The plaintiff cannot question the alienation of Lot No.1 property by defendant No.1 to defendant No.2 as the said property devolved on defendant No.1 in his individual capacity and not as 'Karta' of his family when Rajendra Ram died.

18. Accordingly, the contention of the learned counsel for the appellant that since the suit properties are the ancestral properties of the plaintiff, he has right over the suit properties and can maintain the suit for partition is not tenable in the eye of law. The decisions relied upon by the learned counsel for the appellant as has been quoted earlier has no application to the facts of this case. Very unfortunately this interesting question of law was never raised in the court below, but when the appeal is before this Court, this Court is duty bound to take into consideration the law governing the field and it is also the settled position of law that a question of law can be agitated at any stage and question of estoppel does not arise at all.

19. The learned court below though did not consider this aspect but while answering Issue Nos.4 and 5 the two vital issues has assigned reasons for negativing the claim of the plaintiff seeking partition of the suit properties.

20. In the premises, from the foregoing discussions and keeping in background the established position of law as enunciated by the Hon'ble Apex Court in the case of ***Commissioner of Wealth-tax, Kanpur, (Supra) and Yudhishter V. Ashok Kumar (supra)***, I am to arrive at the irresistible conclusion that the plaintiff could not have maintained the suit for partition as laid in the court below and rightly the same has been dismissed.

Accordingly, the present appeal being devoid of merit stands dismissed for the reasons assigned by this Court. There is, however, no order as to costs.

Appeal dismissed.

2014 (I) ILR - CUT- 352

DR. B.R. SARANGI, J.

CRLMC NO. 1818 OF 2004 (Dt. 19.07.2013)

AKSHAYA KU. SWAIN ……..Petitioner

.Vrs.

DOLAGOBINDA SWAIN & ORS. …….Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.482

Complaint Case – Amendment – No specific provision in the Code – Amendment prayed to add the age of the accused persons – It will neither change the nature and character of the Complaint petition nor prejudice the accused persons in any manner- Held, Magistrate has power to amend the Complaint petition in the ends of justice.

(Paras 9,10)

Case laws Referred to:-

1.Vol.32 (1990) OJD. 359 (Crl.) : (Srimati Sabita Sahoo-V- Captain Khirod Ku.Sahoo)
2.AIR 1977 SC 2432 : (Bindeshwari Prasad Singh-V- Kali Singh).
3.2007(II) OLR 80 : (M/s. Maa Jagadamba Traders –V- M/s. Goodlass Nerolac Paints).

For Petitioner - M/s. A.R. Dash, B.B. Patnaik, R.N. Behera, S.K. Nanda & M.C. Swain.

For Opp.Parties- Mr. R. K. Kar, Learned Counsel.

DR. B.R.SARANGI, J. The petitioner assails the order dated 27.05.2004 passed by the learned J.M.F.C, Kendrapara in I.C.C. case No.15 of 1999 rejecting the petition filed by the petitioner on 23.08.2002 in Annexure-2 to incorporate the ages of the accused persons in the complaint petition under Annexure-1 dated 25.01.1999, which has been confirmed by the learnedAdditional District & Sessions Judge, Kendrapara by order dated 26.7.2004 in Criminal Revision petition No.16 of 2004 under Annexure-4.

2. The petitioner's case in nut-shell is that, he being the complainant, filed I.C.C. Case No.15 of 1999 in the court of learned S.D.J.M., Kendrapara against the opposite parties alleging commission of offences under Sections 323/294/147/379/506 read with Section 34 I.P.C., basing upon which the

learned S.D.J.M., Kendrapara took cognizance of the offence after examining the complainant on oath. After the cognizance of the offence was taken, the learned S.D.J.M. transferred the case to the court of learned J.M.F.C., Kendrapara. While the case was pending before the learned J.M.F.C., Kendrapara, a petition under Annexure-2 was filed seeking for incorporation of ages of the accused persons in the complaint petition, which is necessary for adjudication. The accused-opposite parties after being released on bail, objected to the said petition filed by the complainant. By order dated 27.05.2004 under Annexure-3, learned J.M.F.C. rejected the prayer of the complainant stating that there is no specific provision in the Code of Criminal Procedure for amendment of a complaint petition and therefore, the petition filed on behalf of the complainant to add the ages of the accused persons in the complaint petition is devoid of merit. Thereafter the complainant filed Criminal Revision No.16 of 2004 before the learned Additional Sessions Judge, Kendrapara, who by order dated 26.7.2004 rejected the revision petition with the observation that the order of the Magistrate did not suffer from any infirmity and by rejection of such petition, no right of the party was decided nor the case was disposed of finally. He further observed that as the order was interlocutory in nature, the revision petition was not maintainable.

3. With this backdrop, the petitioner has filed this application invoking the jurisdiction of this Court under Section 482 Cr.P.C. with a prayer to quash the orders passed by the learned J.M.F.C. and learned Additional District & Sessions Judge, Kenerapara vide Annexures-3 & 4 respectively and has sought for direction to incorporate the ages of the accused persons in complaint petition in exercise of inherent power of this Court.

4. Entertaining the application, this Court by order dated 10.11.2004 while issuing notice to the opposite parties, passed an interim order staying further proceeding in I.C.C. Case NO.15 of 1999 pending before the learned J.M.F.C., Kendrapara.

5. On being noticed the accused persons entered appearance through their counsel who urged similar contentions and in course of hearing stated that Code of Criminal Procedure has not provided for any amendment. This Court can not quash the order passed by the learned J.M.F.C. as well as the learned Additional District & Sessions Judge and order so passed are fully and wholly justified.

6. Mr. A.R. Dash, learned counsel for the petitioner, to substantiate his contentions, has relied upon the judgment reported in **Vol.32 (1990) O.J.D.359 (Criminal)** ***Srimati Sabita Sahoo Vrs. Capta in Khirod Kumar***

Sahoo in which this Court relying upon the judgment of the apex Court reported in **A.I.R. 1977 Supreme Court 2432** ***Bindeshwari Prasad Singh Vrs. Kali Singh***, wherein it has been held that though the subordinate criminal courts are not vested with inherent power there is no doubt that this Court has got inherent power. Therefore, the petition filed to amend the application under Section 125 Cr.P.C. can also be considered by this Court in exercise of inherent power. The said decision has also been relied upon by the learned J.M.F.C. in the impugned order, but he has distinguished the same stating that the said case relates to a proceeding under Section 125, Cr.P.C., which is quasi civil in nature and besides that the accused persons in present case have already entered appearance and have been released on bail.

7. Mr.R.K. Kar, learned counsel appearing for the opposite parties, supported the impugned order stating that in the event amendment is allowed for incorporation of the ages of the accused persons in the complaint petition, it will cause prejudice to the opposite parties.

8. In the above background of facts and law, it is to be considered whether this Court has got the power to allow the amendment for incorporation of ages of the accused persons in the complaint petition, which has been inadvertently left out at the time of filing. The incorporation of ages of the accused persons is highly necessary for just and proper adjudication of the matter as the opposite parties are accused persons in a complaint case and more so after taking cognizance, the accused persons have entered appearance and have been released on bail. Therefore, in the event the ages of the accused persons are incorporated in the complaint petition, it will no way prejudice either of the parties. The Code of Criminal Procedure has not made any provision for amendment of any application. Therefore, it is the only power left under Section 482 Cr.P.C. conferring jurisdiction on the High Court, which is inherent in nature to consider the application for amendment in the ends of justice. The learned Magistrate is wholly and fully justified in holding that he has no jurisdiction to entertain the application for mendment as there is no provision in the Criminal Procedure Code to allow the prayer for amendment. But while considering the application under Section 482 Cr.P.C., this Court is not precluded to exercise the inherent power in the ends of justice to incorporate the ages of the accused persons in the complaint petition as in the meantime they have surrendered and have been released on bail. By incorporating the ages of the accused persons in the complaint petition, it will not change the nature and character of the complaint petition as well as it will not prejudice the accused persons in any manner whatsoever.

9. This Court has considered a similar matter in the case of ***M/s Maa Jagadamba Traders Vrs. M/s Goodlass Nerolac Paints***, 2007 (II) OLR-80 wherein this Court has gone to the extent of holding that the Magistrate has power to amend the petition where it is required to secure the ends of justice. In the said decision, the order of Magistrate allowing the amendment with regard to the name of the complainantcompany has been challenged before this Court and this Court has held that no illegality or procedural irregularity is found out in the impugned order warranting interference of this Court by invoking the inherent power under the Code of Criminal Procedure and thereby confirmed the action of the Magistrate allowing the amendment. Therefore, in the event the ages of the accused persons are incorporated in the complaint petition, which have been left out inadvertently, no prejudice would be caused to anybody. More so, Mr. R.K. Kar, learned counsel appearing for the opposite parties fairly states that on the basis of the order of cognizance when the accused persons have already appeared and released on bail, there will be no infirmity in the event the amendment to the complaint petition is allowed and the ages of the accused persons are incorporated in the said petition.

10. In view of the aforesaid facts and circumstances in my considered opinion, the orders passed by the learned J.M.F.C., Kendrapara in Annexure-3 and the learned Additional District & Sessions Judge, Kendrapara in Annexure-4 are liable to be set aside. Accordingly, the same are set aside with a direction to the learned J.M.F.C. to incorporate the ages of the accused persons in the complaint petition in order to secure the ends of justice. The complaint case being an age old case of the year 19999, learned J.M.F.C. is directed to complete the proceeding by the end of November, 2013.

11. With the aforesaid observation and direction, the CRLMC is allowed accordingly.

Application allowed

.

2014 (I) ILR - CUT- 356

DR. B. R. SARANGI, J.

CRLMC. NO. 1369 OF 2004 (Dt.26.07.2013)

SUSANTA KUMAR MOHARANA & ORS. .....Petitioners

.*Vrs.*

STATE OF ORISSA .....Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S. 311

Power of the Court U/s.311 Cr. P.C. is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision – No party in the trial can be foreclosed from correcting errors – If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence or special circumstances in putting relevant questions during Cross-examination, the Court should be magnanimous in permitting such mistakes to be rectified.

In this case learned Special Judge while getting ready for delivering the judgment found that the said Court as well as the learned SDJM failed to take certain measures which ought to have been taken at the time when the seized property was produced before the Court by the prosecuting agency – Accordingly he has called upon the I.O., P.W.7, who can depose about the aforesaid facts and can testify as to the proper custody of the M.Os. and sample packets – The reasons assigned by the learned Special Judge are well founded – Held, there is no infirmity in the impugned order calling for interference of this Court.

Case laws Referred to:-

1.AIR 1968 SC 178 : (Jametraj Kewalji Vogani-V- State of Maharashtra)
2.1989(2) SCR 52 : (Benudhar Mohanty & Ors.-V- State of Orissa)
3.1991 (4) OCR 452 : (Mukunda Dev Baral-V- Sanjib Baral & Ors.)
4.AIR 1970 SC 272 : (Khetra Basi Samal & Anr.-V-The State of Orissa)
5.AIR 1973 SC 799 : (Amar Chan Agrawala-V- Shanti Bose & Anr.)
6.AIR 1975 SC 1854 : (Pakalapati Narayana Gajapathi Raju & Ors.-V-Bonapalli Peda Appadu & Anr.)

7.1992(5) OCR 268 : (Nilamani Das-V- Bhikari Nayak & Ors.)
8.1993 (6) OCR 451 : (Gandharba Das & Ors.-V- State of Orissa)
9.1994 (7) OCR 243 : (Tusar Kanti Swain & Anr.-V- State of Orissa)
10.1996 (10) OCR 13 : (Sabar Mahabhoi & Ors.-V- State of Orissa & Ors.)
11.AIR 1999 SC 2292 : (Rajendra Prasad-V- Narcotic Cell through its Officer-in-charge, Delhi)
12.(2013)5 SCC 741 : (Natasha Singh-V- Central Bureau of Investigation (State).

For Petitioners - Mr. R.N. Panda.

For Opp.Parties - Addl. Standing Counsel.

DR. B.R.SARANGI, J. This application is directed against the order dated 9.6.2004 passed by the learned Special Judge-cum-A.D.J., Paralakhemundi (Gajapati) in G.R.Case No.221 of 2002/ T.R.No.7 of 2002 arising out of Mohana P.S.Case No.28 of 2002 under Section 20 of the N.D.P.S. Act wherein in exercise of the power under Section 311 of the Code of Criminal Procedure, he has called upon the I.O. (P.W.7) for re-examination and directed the Special Public Prosecutor to furnish the names of the witnesses and the description of the documents, which the prosecution wants to examine/ prove for speedy trial.

2. The prosecution case, in brief, is that on 4.6.2002 the A.S.I. of Mohana P.S., who was on evening patrol duty, found three cement gunny bags lying in the rest-shed of Mohana Bus stoppage near T.R.W. hostel. He detained the petitioner, who was waiting for the Bus to way home and two others, who were standing there. It is further alleged that some other persons, who were standing there fled away seeing the police. The A.S.I. sent information to the Police Station. The O.I.C. and B.D.O. (P.W.5) arrived there and found three bags to have contained Canabis (Ganja) and the said articles were seized and on personal search, nothing was found from the petitioner. However, the petitioner was arrested and sent for trial.

3. The prosecution examined seven witnesses, whereas the petitioner examined himself under Section 315, Cr.P.C. In the said statement, the petitioner has explained the circumstances under which he was in Mohana Bus stand situated at Mohana Bazar area and stated that at the relevant time he had gone to Mohana in connection with marriage negotiation and was waiting for the bus to come back home.

4. After completion of trial, the case was posted to 9.4.2004 for judgment on which date the learned Special Judge did not deliver the same

as some inherent defects in the prosecution case as pointed out by the defence to the extent that on 5.6.2002 the S.D.J.M. was not in office and the C.J.M. was in-charge and the S.D.J.M. appears to have sent the sample for chemical examination without referring in the order-sheet as to who authorized him to send the sample for chemical examination and it was also not reflected in the forwarding report if the seal was in-tact and the proper custody of the M.Os. from 5.6.2002 till 7.6.2002, the date it was produced in the Laboratory, has not been established. In this circumstances, vide order dated 9.6.2004 the learned Special Judge in exercise of the power conferred under Section 311, Cr.P.C. directed for recalling the I.O., P.W.7 for clarification and directed the Special P.P. to make a prayer in writing by next date, i.e. by 23.6.2004 stating therein the details of the names of the witnesses and description of the documents, which the prosecution wants to examine/ prove. In the impugned order, it was observed that any subsequent prayer to that effect shall not be entertained.

5. Heard learned counsel for the parties.

6. In the above backdrop of the case, learned counsel for the petitioners strenuously urged that the learned Special Judge could not have exercised the power under Section 311, Cr.P.C. to recall the witness, P.W.7 to fill up the lacuna in the prosecution case when the matter was posted for judgment after completion of adducing evidence by both parties. It is also further urged that in absence of any application filed by the prosecution for recalling the witnesses and calling for the documents, the court could not have issued such direction to patch up the defects, which ought to have gone in favour of the defence. He fairly submits that the law empowers the court to recall any witness or summon any witness at any stage of the proceeding, which does not mean that even after conclusion of the trial and the matter was posted for judgment. It is further stated that pursuant to the impugned order, the case has been adjourned to 23.6.2004, but the same is against the spirit of Section 309, Cr.P.C. Making a prayer to recall a witness is the statutory duty of the prosecution. The Court may suo motu recall a witness, but it is contrary to law to adjourn the case directing a party to perform his statutory duty in absence of any prayer to that effect to give a chance to the party to patch up its case and as such, the adjournment granted is contrary to Section 309, Cr.P.C., which is the only provision for adjournment.

7. In view of the aforesaid facts and circumstances, it is to be examined whether in exercise of the powers under Section 311, Cr.P.C. the Court can summon a material witness or to examine a person present in court or to

recall a witness already examined. For better appreciation, Section 311, Cr.P.C. is quoted below:

> "311. **Power to summon material witness, or examine person present**- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case."

8. On a bare reading of the above mentioned provision, it is very much clear that it confers a wide discretion on the Court to act as and when the exigencies of justice require. The Section is in two parts, the first part gives a discretionary power, but the second part is mandatory. The use of the word 'may' in the first part and of the word 'shall' in the second firmly establishes this difference. Under the first part, which is permissive, the Court may act in one of the three ways.

(a) Summon any person as a witness;

(b) Examine any person present in Court although not summoned; and

(c) Recall or re-examine a witness already examined.

The second part is obligatory and compels the Court to act in these three ways or any one of them, if the just decision of the case demands it. As the Sections stands, there is no limitation on the power of the Court arising from the stage to which the trial may have reached, provided the Court is bonafide of the opinion that for the just decision of the case, the step must be taken. This power is exercisable at any time before the judgment. The law laid down in AIR 1968 S.C. 178 (**Jametraj Kewalji Vogani v. State of Maharashtra**; 1989 (2) SCR 52 (**Benudhar Mohanty and others v. State of Orissa**); 1991 (4) OCR 452 (**Mukunda Dev Baral v. Sanjib Baral and others**); AIR 1970 SC 272 (**Khetra Basi Samal and another v. The State of Orissa**); AIR 1973 SC 799 (**Amar Chan Agrawala v. Shanti Bose and another**); AIR 1975 SC 1854 (**Pakalapati Narayana Gajapathi Raju and others v. Bonapalli Peda Appadu and another**); 1992(5) OCR 268 (**Nilamani Das v. Bhikari Nayak and others); 1993(6) OCR 451 (Gandharba Das and others v. State of Orissa**); 1994(7) OCR 243 (**Tusar Kanti Swain and another v. State of Orissa**) and 1996(10)

OCR 13 (**Sabar Mahabhoi and others v. State of Orissa and others**), supports the above view.

9. Keeping in view the above mentioned provisions, it is made clear that the power of the Court under Section 311, Cr.P.C. is plenary to summon or even recall any witness at any stage of the case if the Court considers it necessary for a just decision. It is the settled position of law that the Court should not permit to fill up the lacuna in the prosecution evidence by recalling a witness for further cross-examination. But then what is meant by "lacuna in a prosecution case" has to be understood before deciding the case. A lacuna in prosecution is not to be equated with the fall out of an oversight committed by a public prosecutor during trial either in producing relevant materials or in eliciting relevant answers from witnesses. The old proverb "err is human" is the recognition of the possibility of making mistakes to which humans are susceptible. A corollary of any such laches or mistakes during the conduct of a case cannot be understood as a lacuna which a Court cannot fill up. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. This principle is also equally applicable to the defence. No party in the trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence or special circumstances in putting relevant questions during cross-examination, the Court should be magnanimous in permitting such mistakes to be rectified. The function of the Criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better. The apex Court in **Rajendra Prasad v. Narcotic Cell through its Officer-in-charge, Delhi**: AIR 1999 SC 2292 has laid down the principle which should weigh in the mind of a Judge deciding such an issue.

10. The law is well settled that in order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 311, Cr.P.C. are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person already examined who are expected to be able to throw light upon the matter in dispute.

11. In a recent judgment reported in (2013) 5 SCC 741 (**Natasha Singh v. Central Bureau of Investigation (State**), the Supreme Court while analyzing the scope and object of Section 311 Cr.P.C. has held in paragraph 8 as follows:

> "Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under Cr.P.C, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, Cr.P.C has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case."

12. In para-12 of the judgment in Natasha Singh (supra), reliance has been placed on the judgment in Rajendra Prasad (supra), wherein the apex Court has considered a similar issue and held as follows:

> "8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

13. On perusal of the records, it is seen that the learned Special Judge while getting ready for delivering the judgment and on perusing the evidence available on record, found that the said Court as well as the Court of

S.D.J.M. failed to take certain measures which as per the observations made by the Court in their decision ought to have been taken at the time when the seized property was produced before the court by the prosecuting agency. He further observed that omission on that count would likely to prove fatal to the prosecution. It has also been indicated that the omission done by the prosecution to the extent that vide order-sheet dated 5.6.2002 the O.I.C. Mohana P.S. made a prayer to send the sample ganja packets to the Deputy Director, RFSL, Berhampur and on that date, the C.J.M., Palakhemundi was in-charge of the court of learned S.D.J.M. and no order on the said prayer was passed on that date or any date thereafter. There is on record the copy of Memo No. 934(4) dated 5.6.2002 of the court of S.D.J.M., Palakhemundi, which reflects that on 5.6.2002 the learned S.D.J.M. sent the sample packets to the Deputy Director. It is not forthcoming as to on whose instructions the S.D.J.M. sent the sample packets for chemical examination. It is neither mentioned in the order-sheet nor in the forwarding report of the SDJM as to whether the seized articles were produced before the court with the seal in perfect order though on verification of the Sessions malkhana register, it is found that the M.Os. were received on 5.6.2002. Further, it is also not forthcoming from the case record as to when those sample items were produced before the court.

14. The aforesaid being the mistakes committed by the Court, the prosecution is likely to be highly prejudiced due to the aforesaid omission and therefore, it should not be allowed to suffer as that would cause miscarriage of justice. Considering the same, learned Special Judge wanted to exercise the power under Section 311, Cr.P.C. in the interest of justice to take some damage repair measure, which more so necessary when a case is at trial stage. Accordingly, he has called upon the I.O., P.W.7, who can depose about the aforesaid facts and can testify as to the proper custody of the M.Os. as well as sample packets and in what manner those were produced before the SDJM and/or received by the Judge-in-charge of Sessions malkhana and who took the sample packets to the RFSL, Berhampur. The reasons assigned by the learned Special Judge are well founded inasmuch as the same is within the domain of the power conferred under Section 311, Cr.P.C. The lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. This being the position of law, here is a case of over-sight of the management of the prosecution, which has subsequently been detected and accordingly, by virtue of the impugned

order, the error is sought to be corrected. Therefore, no party in the trial can be foreclosed from correcting errors.

15. In view of the aforesaid facts and circumstances and the law laid down by this Court as well as the apex Court, I find no infirmity or illegality in the impugned order passed by the learned Special Judge. Accordingly, I decline to interfere with the same. The CRLMC is dismissed.

Application dismissed.

2014 (I) ILR - CUT- 363

DR. B. R. SARANGI, J.

CRLMC NO.167 OF 2002 (Dt.27.09.2013)

KAMALAKANTA MODI & ANR. .....Petitioners

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 - S.202 (2)

When the Magistrate after examining the complainant and his witnesses U/s.200 Cr. P.C. is of the view that an offence exclusively triable by the Court of session appears to have been made out, he is to hold an inquiry as per the proviso to Section 202 (2) Cr. P.C., where the complainant besides herself is bound to examine all the witnesses named in the complaint petition.

In the present case the complainant has examined three witnesses and filed a memo not to adduce any more witness and the Magistrate took cognizance basing on her initial statement – Held, this Court vacated the impugned orders taking cognizance and considering the offences alleged are grievous in nature remanded the complaint case to the Court of the Learned SDJM with a direction that the learned Magistrate will give an opportunity to the complainant to examine herself as well as the remaining witnesses in course of inquiry and dispose of the same in accordance with law. (Para 11)

Case laws Referred to:-

1. 2002 (2)OLR 274 : (Fakir Singh-V- Bijay Kumar Bagaria)
2. 1990(I) OLR 408 : (Nira –V- Narayan)
3. 47(1979) CLT 244 : (Gokulananda Mohanty & Ors.-V- Muralidhar Mallik)
4. 61(1986)CLT 95 : (Kartikeswar Nayak-V- Karadi Jagannath & Ors.)
5. 66(1988) CLT 532 : (Magi Nayak & Ors.-V- The State of Orissa & Baikunthanath Das)
6. (1988) I OCR 41 : (Dhaneswar Behera & Ors.-V- State of Orissa & Ors.)
7. (1989) 2 OCR 128: (Gopal Krishna Routa & Ors.-V- State of Orissa & Anr.)
8. (1989)2 OCR 665 : (Kailash @ Kelu Jena & Ors.-V- Rama Chandra Majhi)
9. AIR 1968 SC 647 : (State of Orissa-V- Sudhansu Sekhar Misra & Ors.)

For Petitioners - M/s. K.K.Jena, A.K. Biswal, A.K. Behera.

For Opp.Parties – Mr. Zafarulla, Addl. Standing Counsel, (O.P.No.1)

DR, B.R.SARANGI, J. This CRLMC has been directed against the order dated 17.5.2002 passed by the learned Adhoc Addl. District & Sessions Judge, Balasore in Criminal Revision No. 70/2001 of 6/1998 confirming the order dated 5.1.1998 passed by the learned S.D.J.M., Balasore in I.C.C. Case No. 113 of 1997 in which cognizance of offence under Sections 363/376/109, IPC was taken.

2. The short fact is that on 19.5.1996, Bhanja Parmanik, the father of the victim Sanjulata Parmanik lodged an F.I.R. before the Town P.S., Balasore that while his daughter Sanjulata Parmanik, aged about 15 years was returning home from Tentulia Thakurani after performing puja on 18.5.1996, on the way near Chandmari Padia, accused Sanjay Kumar Behera kidnapped her in a Tempo and confined her in the house of late Kailash Modi. While his relatives tried to rescue her from there, the father of the accused, Narahari Behera alias Chila did not allow them to come and quarreled with them. After receiving the F.I.R., Police registered P.S. Case No. 166 of 1996 against Sanjay Kumar Behera only under Sections 363/366 and arrested him and sent him to the court of the learned S.D.J.M., Balasore and G.R. Case No. 595 of 1996 was registered. After investigation, police submitted charge-sheet against accused Sanjay Kumar Behera under Sections 363/366, IPC for which S.T. Case No. 63 of 1997 is subjudice before the Asst. Sessions Judge-cum-C.J.M., Balasore.

When the matter was subjudice, accused Sanjay Kumar Behera, Narahari Behera, Kamalakant Modi, Kartick Chandra Das, Balai Chandra Das and the victim Sanjulata Parmanik were arrested by the police personnel of Kotwali P.S., Midnapur on 2.6.1996 and were produced before the learned S.D.J.M., Midnapur. On interrogation, the victim Sanjulata Parmanik stated that she was 19 years old and married to Sanjay Kumar Behera and on such statement, all the accused persons were released on bail by the learned S.D.J.M., Midnapur. Even before this Court in Criminal Misc. Case No. 1872 of 1996, the victim Sanjulata Parmanik filed an affidavit describing her as wife of Sanjay Kumar Behera as she was major and she also filed an affidavit, before the learned S.D.J.M., Balasore stating the same fact and wanted to be examined under Section 164 Cr.P.C. but she could not attend the court due to some unavoidable reasons. After the victim girl Sanjulata Parmanik was produced before the learned S.D.J.M., Balasore, she was given to the custody of her father. After four months she filed the complaint against the petitioners describing them as accused persons before the learned S.D.J.M., Balasore which was registered as I.C.C. Case No. 113 of 1997 alleging that she has been raped by accused Sanjay Kumar Behera and Chila alias Narahari Behera. The learned S.D.J.M., Balasore recorded the statement of the victim girl under Section 200 Cr.P.C. and proceeded with the enquiry under Section 202 Cr.P.C. In course of enquiry, three witnesses, i.e. the parents of the victim and one Raghunath Panigrahi were produced. Though the complaint petition reveals a number of witnesses including the police officers, who had investigated the G.R. Case, after examination of the aforesaid three witnesses, the complainant filed a memo that she would not adduce any more witness during enquiry; even the complainant herself has not been examined under Section 202 Cr.P.C. Before taking cognizance, learned S.D.J.M., Balasore called for police papers from the court of the learned Asst. Sessions Judge-cum-C.J.M., Balasore in S.T. Case No. 19/63 of 1997 vide order dated 4.11.1997, but the latter did not spare the aforesaid case record. Therefore, the learned S.D.J.M., Balasore could not get opportunity to peruse the G.R. Case records. However, on the basis of the initial statement of the victim recorded under Section 200 Cr.P.C. and enquiry conducted under Section 202 Cr.P.C., the learned Magistrate took cognizance of the offence under Sections 363/366/376, IPC against all the accused persons in I.C.C. Case No. 113 of 1997. Kamala Kanta Modi and Balai Chandra Das challenged the said order of taking cognizance before the learned District and Sessions Judge, Balasore in Criminal Revision No. 70/01 of 6/98 on the following grounds:

(i) The complainant did not examine all the withnesses including herself at the time of enquiry under Section 202 Cr.P.C

(ii) The memo filed by the complainant is not as per law and the memo reveals that the complainant does not want to procedure any more witnecess at the time of enquiry . Since there are prevaricating statements of the complainant in connection with this case, her examination was necessary at the time of examination by the court.

(iii) Since police had already investigated into the same case and submitted final report against these petitioners, the learned court below should have perused the police papers before taking cognizance.

3. Learned Adhoc Addl. Sessions Judge, Balasore by order dated 17.5.2002 confirmed the order of taking cognizance dated 5.1.1998 passed by the learned S.D.J.M., Balasore against the petitioners accepting the memo of complainant declining to examine the remaining witnesses after perusing her initial statement and statement recorded under Section 202 Cr.P.C.

4. Mr. K.K. Jena, learned counsel appearing for the petitioners vehemently urged that the learned S.D.J.M., Balasore vide order dated 7.4.1997 had already taken cognizance before conducting enquiry under Section 202 Cr.P.C., which is contrary to the provisions of law. He further submitted that while taking cognizance, the statement of the victim has neither been recorded nor all the witnesses named in the complaint petition have been examined. Therefore, the order taking cognizance is bad in law as the procedure envisaged in a Sessions triable case under Section 202 Cr.P.C. has not been followed thereby, it vitiates the entire proceeding. He further urged that the learned S.D.J.M., Balasore even though called for the records in G.R. Case, without perusing the same has taken the cognizance in I.C.C. Case. Consequently the order of taking cognizance in I.C.C. Case is misconceived one and the same is liable to be quashed.

To substantiate his contention he relied upon the judgment in ***Fakir Singh v. Bijay Kumar Bagaria*** reported in 2002 (2) OLR 274 in which the case of ***Nira v. Narayan,*** 1990 (I) OLR 408 has been relied upon where it is held that before taking cognizance, the Magistrate has to conduct enquiry under Section 202 Cr.P.C. and thereafter proceed with the matter. He has also relied upon the judgments in ***Gokulananda Mohanty and others v. Muralidhar Mallik***, 47 (1979) CLT 244, ***Kartikeswar Nayak v. Karadi Jagannath & 11 others***, 61 (1986) CLT 95, ***Magi Nayak and others v. The State of Orissa and Baikunthanath Das***, 66 (1988) CLT 532, ***Dhaneswar Behera and others v. State of Orissa and others***, (1988) I OCR 41, ***Gopal Krishna Routa and others v. State of Orissa and another***, (1989) 2 OCR

128 and ***Kailash alias Kelu Jena and others v. Rama Chandra Majhi***, (1989) 2 OCR 665 and stated that the proceeding is vitiated due to non-compliance of the provisions contained under Section 202 Cr.P.C. by not examining the complainant as well as all the witnesses stated by her.

5. Mr. Zafarulla, learned Addl. Standing Counsel appearing for the State vehemently opposed the contention raised by the learned counsel for the petitioners stated that the learned S.D.J.M., Balasore is justified in taking cognizance for the aforesaid offences against the petitioners in I.C.C. Case No. 113 of 1997, which has been confirmed by the learned Adhoc Addl. Sessions Judge, Balasore in Criminal Revision No. 70/2001 of 6/1998. He further stated that neither the order of taking cognizance nor the revisional order suffers from any infirmity or illegality, which needs to be interfered with by this Court invoking the jurisdiction under 482 Cr.P.C.

6. On examination of the contention raised by the learned counsel for the petitioners, it is found that by order dated 7.4.1997, learned S.D.J.M., Balasore in I.C.C. Case No. 113 of 1997 has not taken cognizance of any offence but has only stated that the complaint alleged makes out a cognizable offence and directed for enquiry under Section 202 Cr.P.C. In view of such position, the contention raised by Mr. Jena, learned counsel for the petitioners that by order dated 7.4.1997 the learned Magistrate took cognizance of offence is absolutely misconceived one and the same is not correct and is hereby rejected.

As regards the contention raised that the proceeding initiated against the accused persons in I.C.C. Case No. 113 of 1997 is not sustainable in view of non-compliance of the provisions contained under Section 202 Cr.P.C., which is a Sessions triable case by not examining all the witnesses named in the complaint petition including the complainant herself, it is found in the record that in 202 Cr.P.C. enquiry conducted by the learned S.D.J.M., Balasore, the complainant examined three witnesses and filed a memo that she would not adduce any more evidence during the enquiry and the complainant herself had not been examined under 202 Cr.P.C. But the learned S.D.J.M., Balasore considering her initial statement and the evidence of other witnesses, namely, her parents and one Raghunath Panigrahi, took cognizance which *ipso facto* cannot be said that it has invalidated the order of taking cognizance.

7. So far as reliance placed on the judgment reported in the case of ***Fakir Singh v. Bijay Kumar Bagaria*** 2002 (2) OLR 274 in which ***Nira v. Narayan***, 1990 (I) OLR 408 is concerned, it is found that in the said case on 2.8.1999

the complainant was present, initial statement of the complainant was recorded and thereafter cognizance was taken under Section 394, IPC calling on 7.8.1999 for enquiry under Section 202 Cr.P.C. Considering the said order, this Court held that the learned Magistrate took cognizance first and conducted enquiry under Section 202 Cr.P.C. afterwards and therefore the said order is not sustainable. But the fact of the said case is not applicable to the present case in view of the fact that order dated 7.4.1997 which has been relied upon by Mr. Jena, learned counsel for the petitioners does not indicate that the learned Magistrate has taken cognizance of any offence, rather the learned Magistrate directed for enquiry under Section 202 Cr.P.C. Thereafter, he caused enquiry and gave opportunity to the complainant to examine all the witnesses including herself vide order dated 5.1.1998 and finding a prima facie case under Section 366/376/109, IPC, the learned Magistrate took cognizance of the above offences against the petitioners. In view of such position, the contention raised by the learned counsel for the petitioners is not acceptable.

8. Learned counsel for the petitioners referred to the case of ***Dhaneswar Behera and others v. State of Orissa and others***, (1988) I OCR 41 in which this Court quashed the cognizance taken by the learned Magistrate under Sections 302/201, IPC in a case in which police agency submitted the final report and the learned Magistrate treated the protest petition as a petition of complaint and registered as I.C.C. Case on the ground that when the offence is triable by court of Sessions, the learned Magistrate can not take cognizance without examining all the witnesses for the complainant. To arrive at such conclusion this Court relied upon the judgments in **Gokulanand v. Muralidhar, 47 (1979) CLT 244, Guliar v. Krishna, 1984 (1) OLR 58=1983 CLR (Criminal) 283, Om Prakash v. Manmohan, 1984 (I) OLR 340 =57 (1984) CLT 355=1984 Cri.L.J. 901= 1987 (1) OLR 1=63 (1987) CLT 904=1987 (I) Crimes 330=1987 Cri.L.J. 759** to the effect that in a complaint case triable exclusively by the court of Session, no cognizance can be taken by a Magistrate without examining all the witnesses for the complainant as required by the proviso to Section 202 (2) of the Cr.P.C. and on the basis of statements of some witnesses made in the course of investigation by the Police agency. The proposition laid down by the Court is not disputed rather the fact of each case has to be decided on its own facts and circumstances of the case, which is the settled principle of law as laid down by the Hon'ble Supreme Court in the case of ***State of Orissa v. Sudhansu Sekhar Misra and others***, reported in AIR 1968 SC 647.

9. In the present case, the complainant after examining three witnesses filed a memo stating, inter alia, that she does not want to examine any more

witness to substantiate her complaint. When the complainant herself declined to examine other witnesses mentioned in the complaint petition, on the basis of initial statement she relinquished to examine herself.

10. Similar view has been taken by this Court in **Kartikeswar Nayak v. Karadi Jagannath & 11 others**, reported in 61 (1986) CLT 95 wherein in para-5 this Court observed as follows:-

> "The scope of an enquiry under section 202 of the Code is no longer res integra. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others, reliance was placed on two earlier decisions reported in Chandra Deo Singh v. Prakash Chandra Bose alias Chabi Bose and another and Vadilal Panchal v. Dattatraya Dulaji Ghadigaorkar and another, and it was held as follows: "It would thus be clear from the two decisions of this Court that the scope of the enquiry under Section 202 of the Code of Criminal Procedure is extremely limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint-(i) on the materials placed by the complainant before the Court; (ii) for the limited purpose of finding out whether a prima facie case for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not"

It was further examined as to whether in an enquiry under Section 202 of the Code, it was open to the Judicial Magistrate to determine the truth or falsity of the complaint. It was held as follows.

> "…. It is true that in coming to a decision as to whether a process should be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a prima facie case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court or even this Court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint,

if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an enquiry under Section 202 of the Code of Criminal Procedure which culminate into an order under Section 204 of the Code. Thus it may be safely held that in the following cases an order of the Magistrate issuing process against the accused can be quashed or set aside:

(1) Where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;

(2) Where the allegations made in the complaint are potently absured and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;

(3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and

(4) Where the complaint suffers from fundamental legal defects, such as, want of sanction or absence of a complaint by legally competent authority and the like.

The cases mentioned by us are purely illustrative and provide sufficient guidelines to indicate contingencies where the High Court can quash proceedings."

(Also see Samir Chandra Guha and another v. K.Pradhan & another and Kewal Krishan v. Suraj Bhan and another).

"The procedure laid down in the proviso to section 202 (2) of the Code with regard to cases exclusively triable by the Court of session was introduced in the new code and has been interpreted by different High Courts. In this Court the first case of its time was reported in The State v. Kastu Behera.

The legality of the case of Kastu Behera (supra) was called in question in Gokulananda Mohanty and others v. Muralidhar Mallik. After taking several decisions into consideration including Boya

Lakshmanna v. Boyachinna Narasappa and another, Paranjothi Udyar and others v. State and others, Kamal Krishna De v. State and another and Babu Ram and another v. State of Uttar Pradesh a Division Bench of this Court held:-

"When the Magistrate after examining the complainant and his witnesses under section 200 of the Code of Criminal Procedure is of the view that an offence exclusively triable by the Court of Session appears to have been made out, he is bound to take action under the proviso to section 202 of the Code and there is no discretion left in him not to hold such enquiry. In the enquiry, which is bound to be undertaken, he has to call upon the complainant, examine them on oath".

The principle laid down in the case of Gokulananda Mohanty (supra) has been uniformly followed by this Court. The decision to name a few are E. Ketra and others v. Khal Madhab and others, in which also a supporting Division Bench decision of the Andhra Pradesh High Court reported in Ramachander Rao Jadu Behera and others v. Dhaneswar Samantray, Kartikeswar Nayak v. Karadi Jagannath and 11 others, and another Division Bench decision reported in Ramesh Samal and eight others v. Chabi Mandal and another. So, the uniform view of this Court is in cases exclusively triable by the Court of Session the procedure laid down in the proviso to section 202(2) of the Code for examination of all witnesses requires strict compliance. This view of the Court finds support from a number of decisions of different High Courts, such as, Kamal Krishna De v. State and another (supra) (Calcutta), Ramchander Rao and others v. Boina Ramchander and another (supra) (Andhra Pradesh), Shyamkant Wamanrao Pawar and others v. State of Maharastra and others (Bombay), Dinesh Chan Sinha v. Rahmatullah and another (Allahabad), Ranjit Guha Neogi v. State and another (Calcutta), Moideenkutty Haji and others v. Kunhikoya and others (Kerala)

6. Despite the pronouncement of this Court on the applicability of the proviso to section 202(2) of the Code to the cases exclusively triable by the Court of Session instituted on complaint, in two decisions of this Court, a slightly different view was taken and in both of them the leading case of Gokulananda Mohanty (supra) was not noticed. In State of Orissa v. Khetrabasi Biswal and others, a learned Judge of this Court held that if it appears to the Magistrate that the offence complained of is triable by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them

on oath. He is not required to examine the complainant. He is required to examine only the witnesses produced by the complainant. The expression "his witnesses" cannot include the complainant himself. In Katikeswar Nayak v. Karadi Jagannath & 11 others (supra) relying upon the case of Gokulananda Mohanty (supra) it was held that in an enquiry according to the proviso to section 202 (2) of the Code, besides the witnesses named in the complaint petition, the complainant is bound to examine himself, because ultimately during trial after commitment he will be required to be examined as a witness for the prosecution. The earlier case, however, was not noticed, but it was interpreted that "all his witnesses" included the complainant himself. In Subash Bastia and others v. Bhagabat Bastia and another, though one of the allegations was for an offence under section 436, IPC exclusively triable by the Court of Session, no reference was made to the proviso to section 202 (2) of the Code and it was held that if the complainant does not examine some of the witnesses present, but examines those named in the complaint petition, the issue of processes was not vitiated. Broadly speaking, however, in these two decisions the larger principle laid down in the case of Gokulananda Mohanty (supra) was not differed from.

11. In view of the aforesaid settled position of law and applying the same to the present case, it is found that the complainant has examined three witnesses and filed a memo that she would not adduce any more witness during the enquiry and basing on her initial statement recorded by the learned S.D.J.M., Balasore, cognizance has been taken but that ipso facto cannot vitiate the proceeding itself, but that may be an inherent lacuna, which the Magistrate can adhere to, by applying the same giving opportunity to the complainant. Therefore, for all these reasons, I am of the view that, although the impugned orders are to be vacated but the complaint case should be remanded to the court of the learned S.D.J.M., Balasore so that the learned Magistrate will give an opportunity to the complainant to examine the remaining witnesses in course of enquiry and dispose of the same in accordance with law and allow her to examine herself in compliance of the provisions contained under Section 202 (2) Cr.P.C. as the offences alleged are grievous in nature. Be it stated here that it will not be necessary to re-examine the witnesses as already examined in course of enquiry and the statements made by them on oath shall be taken into consideration for formulation of opinion.

12. Mr. K.K. Jena, learned counsel for the petitioners brought to the notice of the Court by filing a memo that during pendency of this case, Narahari

Behera-opposite party No.4 expired on 15.11.2004 and also produced xerox copy of the death certificate issued by the Department of Health & Family Welfare in support of his contention. Therefore, the case is abated as against the opposite party No.4-Narahari Behera, as he is no more there. He has also further brought to the notice of the Court that in the meantime, Sessions Trial Case No. 19/63 of 1997 initiated against one of the accused namely, Sanjay Kumar Behera under Sections 363/366, IPC has ended in acquittal vide judgment dated 5.10.2002. Since the offence alleged is arising out of the same proceeding and the same incident and by facing trial, accused Sanjay Kumar Behera has been acquitted and the allegation made against him has not been substantiated by following a trial, the complaint as against him also cannot be sustainable in view of Section 300 Cr.P.C.

13. So far as remaining two accused persons, namely, Kamalakanta Modi and Balai Chandra Das, the order of cognizance is vacated subject to the observation made above and I.C.C. Case No. 113 of 1997 is remanded back to the court of learned S.D.J.M., Balasore for disposal of the same in accordanec with law. With the above observation and direction, the CRLMC is disposed of.

Aapplication disposed of.

2014 (I) ILR - CUT- 373

DR. B.R. SARANGI, J

CRLMC. NO.684 OF 2003 (Dt.23.09.2013)

PRADEEP KUMAR PATRA ……Petitioner

.Vrs.

RADHAMOHAN PADHI …….Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1881 - S.138

Offence U/s. 138 N.I. Act – Ingredients –

(i) a Cheque was issued ;

(ii) the same was presented ;

(iii) but, it was dishonoured

(iv) a notice in terms of the said provision was served on the person sought to be made liable ; and

(v) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice.

In this case a cheque was issued but it is found from the complaint petition and inquiry report that the cheque number and dates are different - No material to indicate as to which cheque has been issued and which cheque has been dis-honoured – Complainant failed to establish a case U/s. 138 N.I. Act – Learned Magistrate has committed gross error by taking cognizance U/s.138 N.I. Act which is here by quashed. (Paras 7,8,9)

Case laws Referred to:-

1.(2008) 8 SCC 1 : (Financial Services Ltd.-V- J.N. Sareen & Anr.)
2.(2009) 14 SCC 683 : (Jugesh Sehgal-V- Shamsher Singh Gogi)
3.1992 Supp-1 SCC 335 : (tate of Haryana & Ors.-V- Bhajan Lal & Ors.)
4.AIR 1988 SC 709 : (Madhavrao Jiwaji Rao Scindia & Anr.-V- Sambhajirao Chandrojirao Angre & Ors.).

For Petitioner - M/s. A. Das, G.P. Panda, S.K. Swain & A. Das.
For Opp.Party - None

DR. B.R.SARANGI, J. The opposite party being the complainant filed a complaint case bearing I.C.C. Case No. 215 of 1999 before the court of the learned S.D.J.M., Bhubaneswar under Section 138 of the N.I. Act in which the learned Magistrate took cognizance by order dated 25.7.2000, which is sought to be challenged in the present application.

2. The fact as revealed from the complaint petition is that on 10.12.1998, the petitioner issued a cheque for Rs. 30,000/- in favour of the opposite party bearing cheque No. 749465 dated 10.12.1998 drawn on State Bank of India, C&I Division, Bhubaneswar, Main Branch towards payment of his personal debt. It is stated that the said amount had been borrowed by the petitioner from the opposite party on 13.08.1997 by executing a promissory note for the said value. After obtaining the said cheque, the opposite party deposited the same in Urban Cooperative Bank Ltd., Bhubaneswar and the

Bank forwarded the said cheque for clearance, which was returned for non-clearance "due to insufficient fund". On 31.3.1999, the complainant-opposite party through his Advocate intimated the fact of non-clearance/non-encashment of the cheque to the petitioner by registered post with A.D. demanding for immediate payment within a period of fifteen days. It is further alleged that in spite of such notice the petitioner failed to pay the said amount within the stipulated period for which the opposite party-complainant filed the complaint petition vide Annexure-1.

3. This Court while entertaining this application, issued notice on 3.4.2003 through registered post with A.D. and after valid service of notice, the A.D. has been received back. But none appeared for the opposite party.

4. Mr. A. Das, learned counsel appearing for the petitioner states that the petitioner is no way connected with the alleged transaction and as such the initiation of the complaint case before the court below is to harass the petitioner. After initiation of the complaint case, the complainant was examined under Section 200 Cr.P.C. and thereafter the learned S.D.J.M. took cognizance under section 138 of the N.I. Act against the petitioner and issued notice for his appearance. He further submits that during the proceeding the opposite party-complainant filed the advocate notice which was sent to the petitioner as stated in the complaint petition. In the said notice it was stated "you on or about 8.9.1998 issued cheque bearing No.749422 dated 08.9.1998, drawn on State Bank of India, C&I, Bhubaneswar Main Branch in favour of my client Mr. Tapan Kumar Padhi towards liquidation of loan availed by you from my client", whereas in the complaint petition in paragraph-8(1), it is stated as follows :-

> "that on 10.12.1998 at Bhubaneswar the accused issued a cheque favouring complainant amount to Rs.30,000/- only bearing cheque No.749465 dated 10.12.1998 drawn on State Bank of India, C&I, Bhubaneswar Main Branch towards repayment of his personal debt ……"

5. On perusal of the above mentioned statements, it is found that two contradictory stands have been taken, namely, in both the statements the cheque numbers and dates are different. Therefore, it appears that the complainant is not sure of the cheque issued in his favour and its number and dates, thereby an attempt was being made to cause harassment to the petitioner by filing such frivolous complaint case.

6. Mr. A. Das, learned counsel for the petitioner relying on the judgments of the Hon'ble apex Court in the case of ***DCM FINANCIAL SERVICES LIMITED v. J.N. SAREEN AND ANOTHER***, (2008) 8 SCC 1 and ***JUGESH SEHGAL v. SHAMSHER SINGH GOGI,*** (2009) 14 SCC 683 submits that while taking cognizance the learned S.D.J.M., Bhubaneswar should have at least followed the section as enunciated under the N.I. Act i.e. under Sections 138 and 142 and without application of any mind, the order taking cognizance under Section 138 of the N.I. Act is bad in law. He also relies upon the judgments in the case of ***STATE OF HARYANA AND OTHERS v. BHAJAN LAL AND OTHERS,*** reported in 1992 Supp.(1) SCC 335 and ***Madhavrao Jiwaji Rao Scindia and another v. Sambhajirao Chandrojirao Angre and others***, AIR 1988 SC 709, where it is stated that this Court has jurisdiction to quash the proceeding by invoking the power under Section 482 Cr.P.C.

7. In view of the above contention of the learned counsel for the petitioner, now the provisions contained under Section 138 of the N.I. Act is to be taken for consideration. On perusal of the same, it is found that the complaint petition alleging an offence under Section 138 N.I. Act must demonstrate the following ingredients:

> "(i) a cheque was issued;
>
> (ii) the same was presented;
>
> (iii) but, it was dishonoured;
>
> (iv) a notice in terms of the said provision was served on the person sought to be made liable; and
>
> (v) despite service of notice, neither any payment was made nor other obligations, if any, were complied with within fifteen days from the date of receipt of the notice: S.M.S. S. Pharmaceuticals Ltd. V. Neeta Bhall and another:2007(I) OLR 559 and Saroj Kumar Poddar v. State (NCT of Delhi) and another: 2007 (I) OLR 347".

8. Applying this analogy to the present case, it is made clear that a cheque was issued but on perusal of the complaint petition vis-à-vis inquiry report, it is found that in both the cases the cheque numbers and dates are different. There is no material available on record to indicate which cheque has been issued and which cheque has been dis-honoured. On perusal of the factual aspects of the case in hand, it appears that the complainant is not certain of saying which cheque has been produced on which date. In that

view of the matter, it can be said that the complainant has not come to the Court with a clean hand and more particularly, an offence under Section 138 of the N.I. Act has not been made out as alleged by the complainant. So far as invoking the jurisdiction of this Court under Section 482, Cr.P.C. is concerned, relying upon the judgments mentioned (supra) learned counsel for the petitioner stated that the said point is no more res integra. In view of the fact that the complaint alleged does not make out a case for interference of this Court invoking the jurisdiction of this Court under Section 482 Cr.P.C., the proceeding should be quashed.

9. Taking into consideration the parameters fixed by the apex Court with regard to quashing of the proceeding as stated (supra), this Court has no hesitation to hold that the complainant has failed to establish a case as against the petitioner so as to invoke the provisions contained under Section 138 of the N.I. Act. In view of such position and fact of law, this Court is of the opinion that the learned Magistrate has committed gross error which is apparent on the face of the record by taking cognizance under Section 138 of the N.I. Act. For the ends of justice and in order to prevent the abuse of the process of the Court, this Court has no hesitation to quash the proceeding initiated against the petitioner under Section 138 of the N.I. Act. Accordingly, the proceeding so initiated under Section 138 of the N.I. Act in ICC Case No. 215 of 1999 pending in the court of learned S.D.J.M., Bhubaneswar is hereby quashed.

10. Accordingly, the CRLMC is allowed.

Application allowed.

2014 (I) ILR - CUT- 377

DR. B. R. SARANGI, J.

CRLMC NO.304 OF 2003 (Dt.24.09.2013)

SUSANTA KU. SAMANTRAY ……..Petitioner

.*Vrs.*

STATE OF ODISHA & ANR. …….Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 - S.190

Cognizance – Prerogative of the Magistrate – Magistrate has to apply his judicial mind independently without being biased by any body – Held, Order taking cognizance by the Magistrate on the suggestion made by the Addl. Sessions Judge can not sustain, which is liable to be quashed. (Paras 9,10)

Case law Referred to:-

1991 (I) OLR 391 : (Tapan Kumar Ray-V- Susil Kumar Pradhan & Anr.)

For Petitioner - M/s. D.P. Dhal, P.K. Routray, R. Agarwal.
For Opp.Parties - None

DR. B.R.SARANGI, J. The petitioner assails the order dated 8.6.2000 passed by the learned J.M.F.C., Kantabanjhi in G.R. Case No. 37 of 1997 taking cognizance of offence under Section 304, part-II/34, IPC against him.

2. The facts as revealed from the F.I.R. are that on the date of occurrence the informant's son Thabir Majhi was taking some logs along with some of his co-villagers to sell at Kantabanjhi. It is alleged that the Forest Ranger and the Forester along with Forest Guards seized the logs and arrested them. It was further alleged that they also killed Thabir Majhi during investigation. On the basis of the F.I.R., Police registered Tureikela P.S. Case No. 9 of 1997 under Section 302/34, IPC and the O.I.C., Tureikela police station took up investigation. During investigation he arrested Forester, Santosh Kumar Bhoi and Forest Guards, namely, Pravas Chandra Pani, Jaladhar Mahananda, Sribatsa Kuanra and Kapiketan Swain on 3.3.1997 and forwarded them to the court. Ultimately, they were released on bail by the learned District & Sessions Judge, Bolangir on 17.3.1997.

3. In course of investigation, the Circle Inspector, Bangamunda took up the charge of the case and as per the order of the Superintendent of Police, Bolangir, the investigation and charge of this case was handed over to the Inspector, C.I.D., Crime Branch, Orissa, Cuttack. After thorough investigation of the case, as per the order of the Addl. D.G.P., Crime, C.I.D., Orissa Final Report as mistake of fact under Section 302/34, IPC was submitted on 6.11.1998. On receipt of the final report on 24.11.1998, notice was issued to the informant, who appeared through his Advocate and filed a protest petition on 25.1.1999/16.3.1999 and thereafter on hearing him the learned Magistrate accepted the final report and by order dated 19.4.1999 passed orders to destroy the seized articles after four months of the appeal period is over.

4. Against the said order, the informant filed a Criminal Revision bearing No. 6 of 1999 before the court of the learned Addl. Sessions Judge, Titlagarh who by order dated 5.4.2000 disposed of the same stating that no case is made out under Section 302/34, IPC rather it attracts Section 304, Part-II of the IPC and directed the learned J.M.F.C., Kantabanjhi to consider the application of judicial mind in taking cognizance under section 304, part-II read with section 34 of the IPC against the four Forest Guards mentioned in the order.

5. Mr. D.P. Dhal, learned counsel for the petitioner submits that in impleading the petitioner as accused by order dated 8.6.2000, the learned Magistrate has committed an error which is apparent on the face of the record in view of the fact that neither the F.I.R. nor any other separate document indicates that the present petitioner is in any way connected with the alleged offence. Apart from the same, the taking of cognizance by learned Magistrate under Section 304, part-II read with Section 149 of the IPC is absolutely a misconceived one in view of the fact that he has only acted on the direction of the learned Addl. Sessions Judge and has not applied his mind independently. He further submits that since learned Magistrate has erroneously impleaded the petitioner-Susanta Kumar Samantray in the commission of alleged offence, he seeks to quash the same.

6. It appears that while taking cognizance initially the learned Magistrate has not applied his mind in proper perspective and taken cognizance under Section 302/34, IPC which was challenged before the revisional authority, who in turn directed the learned Magistrate for reconsideration of the offence alleged with further direction for impletion of Range Officer i.e. the present petitioner herein as party and also directed that while taking cognizance the learned Magistrate should apply his judicial mind. But it is found that the learned Magistrate without applying his mind in proper perspective has been persuaded by the order of the learned Addl. Sessions Judge, who has no jurisdiction to suggest under what offence the cognizance can be taken by the Magistrate. Taking cognizance under the offence alleged is the prerogative of the Magistrate himself. The opinion expressed by the learned Addl. Sessions Judge on consideration of the revision application filed by the party being prima facie one he should not have indicated the provisions under which the offence was to be considered, rather he should have remanded the matter back to the court below for reconsideration of the same in accordance with law without making a suggestion to take cognizance under sections 304, part-II read with section 34, IPC. It amounts that the learned Addl. Sessions Judge while rectifying the error committed by the learned court below being influenced by the order suggesting to take

cognizance under a specific offence namely, under section 304, part-II and read with section 149 of the IPC since he has no jurisdiction to do so. Taking cognizance is within the full domain of the Magistrate concerned and not the learned Addl. Sessions Judge. In the fitness of things, learned Addl. Sessions Judge should have remanded the matter to the learned Magistrate in the interest of justice for reconsideration by applying the judicial mind. After the record was received by the learned Magistrate, the informant filed a protest petition stating therein that the above forest guard including Susanta Kumar Samantray, the present petitioner being Range Officer was present in the spot and participated in the occurrence and thereby prayer was made to implead the petitioner as accused though the order of Addl. Sessions Judge was completely silent with regard to the involvement of the present petitioner.

7. On perusal of record it is found that the learned Magistrate has committed a gross error that without registering a separate case on the protest petition and without resorting to the provisions contained under Sections 190, 200 and 202 of the Cr.P.C. proceeded with the matter which amounts to non-application of judicial mind.

8. Learned counsel for the petitioner relied upon a judgment of this Court in the case of ***Tapan Kumar Ray v. Susil Kumar Pradhan and another,*** 1991 (I) OLR 391, wherein it is stated that when on consideration of the entire material on record, no prima facie case is made out, the Court has committed illegality and irregularity thereby this Court should interfere under its jurisdiction under Section 482 Cr.P.C.

9. On consideration of the materials available on record and the contention raised by Mr. Dhal, learned counsel for the petitioner, it appears that though initially the learned Magistrate has not taken cognizance under Section 304, part-II read with Section 149 of the IPC but at the instance of the learned Addl. Sessions Judge took cognizance under Section 304, part-II read with Section 149 of the IPC and such order of cognizance suffers from material irregularity inasmuch as the learned Addl. Sessions Judge has no jurisdiction either to suggest or to take cognizance of any offence. On the other hand, taking cognizance being the prerogative of the Magistrate and within his domain, any suggestion made by the higher forum on consideration of the revision application or in Section 482 Cr.P.C. application cannot be sustainable and as such the impugned order passed by the learned Magistrate at the instance of the learned Addl. Sessons Judge cannot be sustained, so far as it relates to the petitioner and accordingly, the

allegation made against the petitioner in the impugned order should be set aside.

10. Apart from the same, the learned Addl. Sessions Judge having reserved the matter at the time of taking cognizance, the same cannot be sustainable inasmuch as there is no application of judicial mind. More so, while entertaining a protest application procedure envisaged under Chapter-XV of the Cr.P.C. has to be followed and non-application of such procedure vitiates the proceeding. In the present case, at the instance of the learned Addl. Sessions Judge, the learned Magistrate has taken cognizance under Section 304, part-II read with Section 149 of the IPC so far as it relates to the petitioner which is thoroughly misconceived one. Accordingly, the impugned order dated 8.6.2000 passed by the learned J.M.F.C., Kantabanjhi in G.R. Case No. 37 of 1997 taking cognizance against the petitioner cannot be sustained and the same is hereby set aside.

11. With the aforesaid observation and direction, the CRLMC is allowed accordingly.

Appliaation allowed.