2010 (I) ILR-CUT- I

I.M.QUDDUSI,ACJ & S.R.SINGHARAVELU,J.

FAKIRCHARAN SINGH -V- STATE OF ORISSA ORS.*

JULY 30,2009.

CIVIL PROCEDURE CODE,1908 (ACT NO.5 OF 1908) – ORDER 47 RULE 1 & 2 r/w SEC.3 & 4 OF THE URBAN LAND (CEILING & REGULATION) REPEAL ACT,1999.

Review of judgment – Writ petition disposed of on 29.06.2005 with a direction to the State Govt. to consider the application U/s.20 ULC Act in consonance with Urban Land (Ceiling & Regulation) Repeal Act,1999 – The repealing Act 1999 was adopted by the State Govt. on 5.4.2002 vide resolution passed in the State Legislature and as per the said resolution no compensation should be paid for the land possession of which had not been taken over by the State Govt. after vesting U/s.(10) 3 of the ULC Act.

Petitioner mentioned that actual physical possession of the land has not been taken over hence this review petition filed keeping in view the provisions of the repealing Act,1999.

Held, it is a fit case for re hearing of the Writ petition out of which this review arises.

(Para 4 to 7)

For Petitioner – Mr.Bijan Ray (Sr.Adv.)
C.Choudhury, D.Chhotray, B.Mohanty, S.Mohanty,
B.Moharana & Miss. Vijayshree.

For Opp.Parties – Additional Government Advocate.

---

*RVWPET NO.112 OF 2005. In the matter of application under Order XL VII, Rules 1 & 5 of the C.P.C.

I.M. QUDDUSI, ACJ. This review petition has been filed against the order passed by this Court on 29.6.2005 in O.J.C. No. 7386 of 1999 with a further prayer to direct the opposite party no.1 to pass appropriate order restoring possession of the property to the petitioner, his mother and brothers.

2. It appears that against the order passed by the Special Officer-cum-Competent Authority, Urban Agglomeration, Cuttack in U.L.C. Case Nos. 4/83, 5/83, 11/84, 12/84, 13/84 and 14/84, the petitioner preferred an appeal registered as U.L.C. Appeal No.2 of 1998 before the Revenue Divisional Commissioner, Central Division, Cuttack, which was dismissed on 5.5.1999. Against the order dated 5.5.1999 passed by the RDC, Central Division, Cuttack, the writ petition (O.J.C. No. 7386 of 1999) was filed on 23.6.1999.

3. The returns were duly filed by the mother of the petitioner Lovabini Dei and four brothers namely Ashok Kumar Singh, Rabindra Kumar Singh, Saroj Kumar Singh and Ajad Kumar Singh which were registered as Ceiling Case No. 5/83, 11/84, 12/84, 13/84 and 14/84 respectively. The petitioner took the

plea that the area covered by tank and houses existing on the plot in question should be excluded from total land as those are not vacant land and appurtenant and additional appurtenant to the buildings constructed prior to the Act came into force have not been allowed as per building regulation etc. Out of the total land held by the returnee measuring Ac. 29,200 decimals as on 17.2.96, an area of Ac. 9,688 decimals has been excluded and the balance vacant land of AC. 19.532 decimals was found to be surplus. Though a symbolic possession was taken over on 6.5.1999 but the fact remains that this Court did not restrict the opposite parties to take over possession of the land but on 24.12.2003, it was ordered that distribution of case land in question shall remain stayed. However, the Urban Land (Ceiling and Regulation) Repeal Act, 1999 came into force with effect from 22.3.1999. Sections 3 and 4 of the said Act is reproduced as under:

3. (1) The repeal of the principal Act shall not effect-

(a) the vesting of any vacant land under sub-section (3) of Section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under sub-section (1) of Section 20 of any action taken thereunder, notwithstanding any judgment of any court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under sub-section (1) section 20.

(2) Where

(a) any land is deemed to have vested in the State Government under sub-section (3) of section 10 of the principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land. Then, such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. Abatement of the legal proceedings-

All proceedings relating to any other made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any Court, tribunal or other authority, shall abate.

Provided that this section shall not apply to the proceedings relating to section 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly

> authorized by the State Government in this behalf or by the competent authority."

4. The repealing Act, 1999 was adopted by the State Government on 5.4.2002 vide resolution passed in the State Legislature published in the Orissa Gazette Extraordinary No. 574 dated 27.4.2002. In the said resolution, it was mentioned by the State Government that no compensation should be paid for the land possession of which had not been taken over by the State Government after vesting u/s (10) 3 of the U.L.C. and legal proceedings initiated under the said Act will also be closed.

5. In view of the above mentioned facts, as the writ petition was disposed of on 29.6.2005 with the direction to the State Government in Urban Development Department to consider the application u/s. 20 and pass appropriate orders in consonance with repealing Act, 1999, the instant review petition has been filed in which it has been specifically stated that neither possession was taken over nor any compensation was paid to the petitioner and in appropriate cases where possession has neither been taken over nor compensation has been paid, the State Government still holds the power to grant exemption as prescribed under section 20.

6. In view of the fact that when in the Central Act adopted by the State Government it has been specifically provided that no compensation should be paid for the land possession of which has not been taken, in the instant matter, it was mentioned by the petitioner that the Government being conscious of such provision, on 30.5.2003 directed the competent authority as under:

> "Though Tahasildar was directed on 6.5.1999 for taking over possession, eventually actual physical possession having not yet been taken over, he may further be directed to take steps for taking over possession and evict......"

7. In view of the above, we think that it is a fit case for rehearing of the writ petition out of which this review arises. Accordingly, the order dated 29.6.2005 passed in O.J.C. No. 7386 of 1999 is set aside and the review petition is allowed.

Registry is directed to list O.J.C. No. 7386 of 1999 in the next month for fresh hearing along with W.P.(C) No. 13313 of 2005 and the connected contempt case. However, counter affidavit may be filed by the parties, if they so desire.

Review Petition allowed.

2010 (I) ILR-CUT- 4

I.M.QUDDUSI,ACJ & B.N.MAHAPATRA,J.

JANPATH KHURDA BYABASAI SANGHA,BBSR & ORS. -V- STATE OF ORISSA & ORS.*

SEPTEMBER 11,2009.

CONSTITUTION OF INDIA,1950 – ART.19(1)(g) & (6).

Right of street vendors/hawkers – Representation of the petitioner-Society to provide space for vending zone – Held, direction issued to the Bhubaneswar Muncipal Corporation to take necessary steps for providing vending zone to 66 members of the petitioner's Society in order of their seniority – However this Court has made it clear that the allotment of space in the vending zones will not confer any legal right to do their business perpetually.

(Para 8,9)

Case laws Referred to:-

1.AIR 1985 SC 1206 : (Bombay Hawkers' Union & Ors.-v-Bombay Municipal Corporation & Ors.)
2.AIR 1986 SC 180 : (Olga Tellis & Ors.-V-Bombay Municipal Corporation & Ors.)
3.AIR 1989 SC 1988 : (Sodan Singh & Ors. -V- New Delhi Municipal Committee & Ors).
4.AIR 1952 SC 12 : (State of Orissa -V- Madan Gopal Rungta).
5.AIR 1962 SC 1044 : (Calcutta Gas Company (Proprietary) Ltd.-V-State of West Bengal & Ors).
6.AIR 1976 SC 578 : (Jasbhai Motibhai Desai -V- Roshan Kumar Haji Bashir Ahmed & Ors.)
7.(2006) 3 SCC 229 : (Milk Producers Association,Orissa & Ors.-V-State of Orissa & Ors.)

For Petitioner : M/s.Pradipta Mohanty, D.N.Mahapatra, J.Mohanty, P.K.Nayak, C.R.Nayak, S.N.Dash.

For Opp.Parties : M/s.M.Mahapatra, S.Mohanty, L.N.Sahoo, S.Routray, P.Sahoo, R.P.Kar, A.N.Ray & Miss.S.Mohanty. (For O.P.No.3).
M/s. S.B.Panda (For O.P.4)

---

*W.P.(C) NO.2923 OF 2008.In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.N.MAHAPATRA, J. Petitioner No.1-Janapath Khudra Byabasai Sangha (hereinafter called, 'the Society') along with its office-bearers has filed this writ petition seeking directions to opposite parties to rehabilitate the members of the Society by providing them adequate space for vending zones and/or kiosks as per the norms prescribed under the National Policy on Urban Street Vendors vide Annexure-2.

2. The brief facts leading to the present writ petition are that petitioner no.1 is a registered society formed by the street vendors/hawkers who have been doing their business for years together beside the road in temporary shops of Janpath at Bapuji Nagar and earning their livelihood. According to the petitioners, they have been paying licence fees regularly for the purpose to the Bhubaneswar Municipal Corporation (for short 'the Corporation'). In spite of the same, the members of the Society have been evicted from the said place by the Corporation with the assurance to settle them by providing vending zones. Now the Corporation has backed out of its assurance. Hence, this petition.

3. Mr. Pradipta Mohanty, learned counsel appearing on behalf of the petitioners, submitted that the members of the Society having been evicted from their temporary shops are now doing their business by moving place to place and thereby sustaining loss in business and hardship to their livelihood. Members of the Society are the beneficiaries of the National Policy on Urban Street Vendors. The members are all poor unemployed citizens of the State and have been maintaining their livelihood by doing small business for the last 20 to 30 years. They also have no substantial source of income to start any big business either by making their own shop premises or by taking shops on rent in Bhubaneswar city. Mr. Mohanty further submitted that realizing such predicament of the street vendors, who are subjected to harassment and humiliation in the guise of eviction, the apex Court in ***Bombay Hawkers' Union & Ors. V. Bombay Municipal Corporation & Ors., AIR 1985 SC 1206,*** while expressing its dissatisfaction over the policies of the Government and various authorities on the question of settlement of street vendors, directed the Union Government as well as the State Governments to form policies in that respect so that the street vendors and small businessmen doing business on the road side can be settled, and they should not be disturbed without affording them such opportunity. Similar view is also expressed by the apex Court in ***Olga Tellis & Ors. V. Bombay Municipal Corporation & Ors., AIR 1986 SC 180*** and in ***Sodan Singh & Ors. V. New Delhi Municipal Committee & Ors., AIR 1989 SC 1988***. Keeping in view the above directives, the policy, namely, National Policy for Urban Street Vendors was formulated and the main intention of the policy was to give vendors and road-side businessmen the legal status by amending/casting/repealing and implementing appropriate laws and providing legitimate zone/space for such type of businessmen. The said policy was circulated by the Government of India to all the State Governments, which in turn has also been provided to all urban local bodies to work out in the spirit of the principles given in the policy. Unfortunately, the National policy is not implemented in its letter and spirit neither by State Government nor by the Corporation or by Urban Local bodies in the State. The opposite parties have miserably failed to give due regard to implement the same. The petitioners' Society s affiliated to National Street Vendor Institutions (for

short, 'NSVI'). A representation was made on 16.10.2006 to the Commissioner before the eviction in the year 2006. O.P. No.3 provided the space for vending zone, which is hardly adequate for 54 members out of 110. Therefore, a further representation was made on 15.11.2007 (Annexure-6) to the Commissioner to provide sufficient space to accommodate all the members of the Society. It is further argued that being politically biased and influenced by members of the Rajpath Khurdra Byabasai Sangh, Bhubaneswar, who are evicted from the place near to the capital market and capital police station, were provided vending zone in Plot No.338 in Mouza: Bapujinagar, which is the usual business place of the members of the petitioners' Society. Being aggrieved by such action of the opposite parties, the petitioners met the Commissioner of the Corporation who assured to settle them and, accordingly, directed the Health Officer to make necessary cleaning at the spot, but backed out of such assurance subsequently. It is further argued that plot No.408 in Bapujinagar is still lying vacant wherein the members of the Society can be settled but the petitioners have now come to learn that the said plot is meant for beautification and plantation, which has been indicated as the secondary aspects in the National Policy on Street Vendors. Indicating the above fact, petitioners made a representation on 24.01.2008 to the Commissioner of the Corporation under Annexure-7. It is the onerous duty and responsibility of the State under the Directive Principles of State Policy as enshrined under Article 47 of the Constitution of India to take adequate measures for improving the social and economic standard of the citizens and also to ensure the fundamental rights of livelihood as guaranteed under Article 21 of the Constitution. But in the present case, opposite parties have failed to discharge their duties and responsibility by not doing social justice to the members of the petitioners' Society who have been subjected to exploitation by opposite parties owing to repeated eviction. Thereafter, several representations were made for settlement of the members of the Society by providing vending zone in available vacant plot. Despite the fact that adequate space is available to settle the members of the Society, opposite parties have shown no interest in this regard.

4. Learned counsel for O.P. No. 3 submitted that the petitioners have no locus standi to file the writ petition. On the other hand, the Corporation is always following the rehabilitation norms according to availability of space and situation. As per Annexure-1, there are 66 members of the petitioners' Society. Out of them, 54 have already been rehabilitated. Petitioners' claim for rehabilitation of 110 members is quite imaginary and petitioners' Society by adding fake names has sought for relief on the incorrect facts.

The allegation that opposite parties are acting partially and showing favouritism to other similarly situated associations thereby settling them in the place of the petitioners' Society is not correct. Janpath is one of the busiest roads connecting Master Canteen leading to Airport, and the Government have already floated tenders for construction of flyover bridge

and widening the road by six lanes taking into account the traffic congestion and public inconvenience. Therefore, no vending zone is possible in Bapujinagar or beside Janpath. Vendors like petitioners' Society cannot claim such relief, and on the other hand, the Corporation is also taking all possible steps within its means and providing temporary vending zones at different places. Larger public interest cannot be ignored for the sake of rehabilitation of a few individuals claiming right over the government road.

5. Learned counsel appearing for B.D.A. (O.P. No.4) submitted that since no cause of action has arisen against the BDA unlike the other opposite parties, the writ petition is not at all maintainable as against O.P. No.4. The BDA has not taken any steps either by initiating unauthorized proceedings under Section 91 of the Orissa Development Authorities Act, 1982 or otherwise against the writ petitioners and its members claiming to have been carrying on their respective business on either side of the street in Janpath area from Rajmahal Square to Sishubhawan Chhak. Since the said National Policy has not been implemented in the State of Orissa or within the area of the Corporation by making necessary amendments of the existing laws and incorporating new provisions in consonance with the said Policy, the existing laws will continue to operate. Therefore, the writ petition being premature as against B.D.A. (O.P. No.4) is liable to be dismissed.

6. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

7. Law is well settled that only legally protected right can be enforced through Court. The existence of such right is the condition precedent to invoke the writ jurisdiction. (See ***State of Orissa-v-Madan Gopal Rungta,*** AIR 1952 SC 12, ***Calcutta Gas Company (Proprietary) Ltd.Vs.State of West Bengal & Ors.,*** AIR 1962 SC 1044 and ***Jasbhai Motibhai Desai-v-Roshan Kumar, Haji Bashir Ahmed & Ors,*** AIR 1976 SC 578).

In ***Milk Producers Association, Orissa & Ors. Vs. State of Orissa & Ors.,(2006) 3 SCC 229*** while dealing with same situation in Bhubaneswar itself, the Apex Court repelled the case of promissory estoppel given to similarly situated persons and held that the question of promissory estoppel in such a case does not arise. The Apex Court held that the rank trespassers cannot claim the right of rehabilitation. The Court observed as under:

> "There does not exist any legal concept which confers a legal right upon an encroacher to be rehabilitated. The matter may be different where the State comes out with a policy decision which meets the constitutional scheme as envisaged under Article 162 of the Constitution. In the instant case, we have noticed that the appellants have failed to show the existence of any such scheme, which can be said to be irretrievable in nature. In view of the 2003 Act, even the doctrine of promissory estoppel will have no application."

This Court in W.P.(C) No. 14169 of 2008 (*Footpath Khyudra Byabasai Sangha*), disposed of on 31.07.2009, held as follows:-

> "Needless to say that writ is issued only to advance cause of justice. The writ Court cannot thwart the cause of justice. An aggrieved person who suffered legal injury can only approach the writ Court for equitable relief and the Court can only enforce a legal right."

Even ***Bomaby Hawkers' Union case (supra)*** relied upon by the petitioners, the apex Court held that no one has any right to do his or her trade or business so as to cause nuisance, annoyance or inconvenience to the other members of the public. Public Streets, by their very nomenclature and definition, are meant for the use of the general public. They are not laid to facilitate the carrying on of private trade or business.

8. It is not in dispute that no policy has yet been framed by the State in consonance with the National policy (Annexure-2) nor any suitable amendment has been made to the existing laws governing the field. In such situation, the petitioners have no legally protected right which can be enforced through a writ court. However, in the case at hand, considering the representations of the petitioners'-Society, opposite party no.3 has provided vending zone which stated to be adequate only for 54 members of the Society for their rehabilitation. According to opposite party no.3, 54 members of the Society have already been rehabilitated in the place under consideration. According to the petitioners, though opposite party no.3 some time ago had offered certain space on the roadside from Rajmahal square to Sishubhawan, it was hardly adequate to settle 54 members of the petitioners' Society and none of its members has been rehabilitated in the said place. It was argued that opposite party no.3 is not following any rational and consistent policy for rehabilitation of the evicted street vendors and it is adopting pick and choose method. Though the members of the Society were doing their business on the roadside from Rajmahal to Sishubhawan, the evicted persons from other places have been settled in their place to carry on their business, but the members of the petitioners' Society have been discriminated. As per Annexure-1 to the writ petition, the member strength of the petitioners-Society is 66, whereas Annexure-6 shows it 54. Similarly, in paragraph-11 of the writ petition it is stated to be 110. The petitioners have nowhere mentioned the names of all the 110 members in the writ petition and the basis on which a person is inducted to the list of members of the Society. The member-strength of the petitioners-Society was 66 at the time of filing of the writ petition, i.e., 23.2.2008. Prior to that, eviction proceedings were initiated in the years 2004 and 2006. Therefore, it is not understood as to how the strength could be increased up to 110 after such eviction. This itself projects a shadow on the genuineness

of the claim made by the petitioners in regard to the strength of the Society as 110.

9. In the above fact situation, we feel it proper to give the following directions:-

(i) The petitioners shall furnish the address and photographs of 66 members whose names appear in Annexure-1 in order of their seniority keeping in view the length of business carried on by them in the place under consideration duly signed by all the 66 members;

(ii) The O.P. No.3 shall ensure that the 54 members of the petitioners' Society in order of their seniority, as would be furnished by petitioners in a list, are settled in the vending zone already made available by O.P.No.3.

(iii) It must be ensured by O.P. No.3 that no outsider is allotted any space in the vending zone provided in between Rajmahal Square and Sishubhawan prior to settlement of the members of the petitioners' Society.

(iv) O.P. No.3 may also take necessary steps for providing vending zone for the remaining 12 members named in Annexure-1, if possible, at any suitable place.

(v) After allotting the space in vending zone for all the 66 members of the Society, if further space is available, O.P. No.3 is at liberty to provide the same to any other footpath vendor(s);

(vi) O.P. No. 3 shall implement the above direction within three months from the date of receipt of the list of members as indicated in clause (i) above from the petitioners;

We make it clear that the allotment of space in the vending zones to petitioners will not confer any legal right to do their business perpetually. For the purpose of larger public interest they can be evicted from such places by O.P. No.3.

10. The writ petition is disposed of with the above direction.

There shall be no order as to costs.

Writ petition disposed of.

2010 (I) ILR-CUT- 10

I.M.QUDDUSI, ACJ & S.C.PARIJA, J.

KUNI LATA SAHOO -V- SENIOR DIVISIONAL MANAGER, L.I.C. OF INDIA,CUTTACK & ANR.*

AUGUST 6,2009.

INSURANCE ACT, 1938 (ACT NO.4 OF 1938) -SEC.45.

Life Insurance claim - Repudiation of Policy - Ground is deceased-insured with held correct informations about his health at the time of effecting the policy - In fact he was suffering from minor ailments like gastritis with super ficial stomach Ulcer which is not a serious disease having any bearing on the risk under taken by the LIC - So non-discloser of the same can not be said to be material when the same did not affect the life expectancy of the deceased-insured.

Moreover he died due to viral Encephalitis coupled with Cardio respiratory arrest which had no nexus with the previous ailments - Repudiation of Policy and rejection of the claim by the LIC was not proper and justified - Held, direction issued to LIC to pay the sum assured under the policy to the petitioner within three months.

(Para 17)

Case laws Referred to: -

1.AIR 1960 Calcutta 696 : (Rohini Nandan Goswami -V- Ocean Accident & Guarante Corporation Ltd).
2.AIR 1961 Punjab 253 : (Lakshmi Insurance Co.Ltd.-V- Bibi Padma Wati).
3.AIR 1968 Madras 324 : (Life Insurance Corporation of India -V- Janaki Ammal).
4.2001 SCW 161 : (Life Insurance Corporation of India & Ors.-V-Smt.Asha Goel & Anr)
5.AIR 2007 Orissa 19 : (Smt.Gouri Sethi -V-Divisional Manager of L.I.C. & Ors).
6.AIR 2008 SC 424 : (P.J.Chacko & Anr -V- Chairman, Life Insurance Corporation of India & Ors.).

For Petitioner : M/s.M.R.Tripathy.
For Opp.Parties : M/s.S.K.Das, S.Swain, S.R.Subudhi.

---

*W.P.(C) NO.3552 OF 2003. In the matter of an application under Articles 226 & 2278 of the Constitution of India.

S.C. PARIJA, J. The widow of the deceased insured has filed this writ petition assailing the action of the Life Insurance Corporation of India (for short ‘L.I.C.’) in repudiating all liabilities under the insurance policy bearing No.580572572 on the ground that the deceased insured had withheld correct informations regarding his health at the time of effecting the insurance policy with L.I.C. Accordingly the petitioner has prayed for quashing of the letter of

repudiation dated 18.3.1997 (Annexure-6) and to direct payment of the sum assured under the said policy.

2. The brief facts of the case is that the husband of the petitioner Babaji Charan Sahoo submitted a proposal for taking a life insurance policy with the L.I.C., Branch Office, Nimapara, in the district of Puri, on 21.2.1992. The proposal was accepted by the L.I.C. on 28.3.1992 and the insurance policy bearing no. 580572572 for an assured sum of Rs.40,000/- was issued by the L.I.C. in favour of the insured. The insured Babaji Charan Sahoo died on 4.6.1993 at the age of 31 years, leaving behind his wife, a daughter and a son along with his old parents. The death of insured Babaji Charan Sahoo, as certified by the doctor was due to Viral Encephalitis and Cardio Respiratory arrest. After the death of her husband, the petitioner submitted claim application in the prescribed form along with original Insurance Policy and Death Certificate on 2.7.1993, for getting the sum assured under the policy.

3. L.I.C. kept the matter pending and after a lapse of about three and half years, the Cuttack Divisional Office of L.I.C., vide their letter dated 18.3.1997 intimated the petitioner that the L.I.C. has decided to repudiate all liabilities under the policy on the ground that the deceased insured had withheld material informations regarding his health at the time of effecting the assurance with them. It was further mentioned in the said letter that at the time of submitting the proposal for assurance dated 21.2.1992, the deceased insured had stated his usual state of health as good and that he had not consulted any Medical Practitioner for any ailment requiring treatment for more than a week. Similarly he had answered some other questions in negative as mentioned in the said letter dtd.18.3.1997. According to Divisional Office of LIC, the answers given by the deceased insured were found to be false and the insured had infact suffered severe Gastritis and Pyloric Canal Ulcer with gross deformity for which he had consulted a doctor and had taken treatment only one year before he took the policy. Accordingly, the petitioner was intimated that as the deceased insured had not disclosed these facts and gave false answers regarding his health at the time of taking the policy, the LIC has repudiated the policy and forfeited all amounts paid by the deceased insured towards insurance premium.

4. Learned counsel for the petitioner submits that as the petitioner suffered from Gastritis and Peptic Ulcer, which was not a serious disease at all and as the deceased insured admittedly died of Viral Encephalitis and Cardio Respiratory arrest, which had no remote nexus with the ailments which the deceased insured was suffering prior to taking of the policy, the non-disclosure of such fact cannot be a ground for rejecting the claim. Accordingly it is submitted that LIC has repudiated the claim mechanically and without application of mind.

5. Learned counsel appearing for the LIC, opposite party nos. 1 and 2, with reference to the counter affidavit filed submitted that the deceased insured had withheld material informations regarding his health while submitting the proposal for taking insurance coverage of his life on 21.2.1992. The deceased insured expired on 4.6.1993. As the claim was an early death claim, an enquiry was made by the LIC for settlement of the claim made by the petitioner. On enquiry, it came to the knowledge of the LIC that the deceased insured was suffering from Peptic Ulcer prior to the date of proposal and as such was not in a good health condition at the time of effecting the insurance policy. In this regard, it is submitted that the deceased insured had given false statement to the questionnaire contained in the proposal form, as per Sl. No.11, which was with regard to the personal history of the proposed insured. From Sl. No. A to E, the deceased insured had answered in the negative as 'No' and in Sl. No.I, the deceased insured had answered as 'Good'. The questions and the answers furnished by the deceased insured in the proposal form, as contained in the letter of repudiation dated 18.3.1997 is extracted below:

		Questions	**Answers**
"11.	A.	During the last five years did you consult a Medical Practitioner for any ailment requiring treatment or more than a week?	No
	B.	Have you ever been admitted to any Hospital or Nursing Home for General check-up, observation, treatment or operation?	No
	C.	Have you remained absent from place of work on grounds of Health during the last five years?	No
	D.	Are you suffering from or have you ever suffered from ailments pertaining to lever, stomach, heart, lunge, kidney, brain or nervous system?	No
	E.	Are you suffering from or have you ever suffered from Diabetes, Tuberculosis, High Blood Pressure, Low blood pressure, Cancer, Epilepsy, Hernia, Hydrocele, Leprosy or any other disease?	No

I. What has been your usual state of Health? Good"

6. Accordingly, learned counsel for the LIC submitted that in view of such false statements furnished by the deceased insured at the time of effecting the insurance policy, the LIC is entitled to repudiate all liabilities under the said policy, as per Section 45 of the Insurance Act.

Section 45 of the Insurance Act reads as under:

> "Policy not to be called in question on ground of misstatement after two years. No policy of life insurance effected before the commencement of this Act shall, after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose."

XXX XXX XXX XXX

7. There are three conditions for application of the second part of Section 45 of the Insurance Act, which are:–

"a. the statement must be on a material matter or must suppress facts which it was material to disclose;
b. the suppression must be fraudulently made by the policy-holder; and
c. the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose."

8. In the case of ***Rohini Nandan Goswami v. Ocean Accident and Guarantee Corporation Ltd.,*** AIR 1960 Calcutta 696, while considering the duty of a insured to disclose material facts and the right of the insurer to avoid the insurance policy in case of such non- disclosure, the Hon'ble Court observed that where to a claim under the policy of insurance concealment of material fact is alleged by the insurer as entitling him to avoid the policy, the Court has to consider what is a material fact. Whether a particular fact is

material depends upon the circumstances of a particular case. Evidence of materiality is not always necessary. Materiality of a particular fact may be obvious from its very nature. The test to determine materiality is whether the fact has any bearing on the risk undertaken by the insurer. If the fact has any bearing on the risk, it is a material fact, if not it is immaterial.

9. While interpreting a contract of life insurance, a Division Bench of Punjab High Court in the case of ***Lakshmi Insurance Co. Ltd. v. Bibi Padma Wati***, AIR 1961 Punjab 253, observed as under:

> "The contract of life insurance being one of utmost good faith and the probable expectancy or duration of the life of policy-holder being an important element in it, the controlling factor in the construction of terms "sickness, ailment or injury" in the application by insured for revival of his lapsed insurance policy must necessarily be the intent of the parties without attaching to any one of these terms any technical or theoretical meaning. Whatever the term 'ailment', or 'sickness' may mean in the medical sense, or in accordance with their dictionary meaning, they cannot embrace merely transitory and temporary illness in its accepted sense, as they are not material to the risk insured. These terms refer to disorders of substantially serious nature affecting general health and do not include passing indispositions which do not affect the applicant's general health. No embargo, therefore, can be placed on the insured, in not declaring occasional physical disturbances of a trivial character. These terms are to be restricted to such illnesses which impair the constitution of the insured or interrupt the performance of vital functions. xxx xxx xxx."

10. Considering the effect of Section 45 of the Insurance Act and whether the policy holder had made an inaccurate or false statement on a material matter or suppressed facts which it was material to disclose and it was fraudulently made by the policy holder and the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, the Division Bench of Madras High Court in the case of ***Life Insurance Corporation of India v. Janaki Ammal,*** AIR 1968 Madras 324, proceeded to observe as under:

> "Thus, there is ample authority for the proposition that, an insurer could avoid a contract of insurance after the expiry of period of two years mentioned in the first part of S.45 of the Insurance Act only on the ground of suppression of illness, which affects the expectation of life of the insured and not mere temporary or trivial illness and that unless the disease he was suffering from is clearly established and it is also established that disease would have a material bearing on the insurability of the policy holder, the policy

cannot be invalidated. We are, therefore, clear that in the circumstances of this case, the mere fact that the deceased had been taking medicines and injections without proof of anything more would not be sufficient to invalidate the policy."

11. Learned counsel for the petitioner relied upon a decision of the Apex Court in the case of ***Life Insurance Corporation of India and others v. Smt. Asha Goel and another***, 2001 SCW 161, wherein the Hon'ble Court observed as follows:

> "In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particulars look forward to prompt and efficient service from the Corporation. Therefore the authorities in-charge of Management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly issued by it should be one of extreme care and caution. It should not be dealt with any mechanical and routine manner."

12. Learned counsel for the petitioner has also relied upon a Division Bench decision of this Court in the case of ***Smt. Gouri Sethi v. Divisional Manager of L.I.C. and Ors.***, AIR 2007 Orissa 19, where in a similar situation the LIC had repudiated the claim on the ground that the deceased insured had furnished false statement to the questionnaire contained in the proposal form and had suppressed his age and physical deformity. This Court while referring to the aforementioned decision of the Madras High Court (AIR 1968 Madras 324) came to hold that the deceased insured had not stated in the proposal form that he was suffering from Acid Peptic disease and Allergic and has been treated for Hypertension prior to his taking the insurance policy and admittedly the deceased insured died of Cardiac Vascular Arrest and Hemiplegia, the suppression of prior ailment not affecting the expectation of life cannot be a ground to repudiate the policy. Accordingly, this Court directed the LIC to release the claim of the petitioner therein.

13. Learned counsel for the LIC has relied upon a decision of the Apex Court in the case of ***P. J. Chacko and Anr. V. Chairman, Life Insurance Corporation of India & Ors.***, AIR 2008 S.C. 424, in support of his contention that a deliberate wrong answer in the proposal form which has a great bearing on the contract of insurance, if discovered, may lead to the policy being vitiated in law and therefore the proposal can be repudiated if a fraudulent act has been discovered. In the said case, the deceased insured while submitting the proposal form had not disclosed that he had undergone an operation for Adenoma Thyroid. Subsequently, the deceased insured died of Polyneuritis. The Hon'ble Court, in the facts of the case, came to hold

that since the deceased insured had undergone an operation for Adenoma Thyroid, which was a major operation, which fact he did not disclose prior to obtaining the insurance policy and died within six months from the date of taking the policy, the LIC is entitled to repudiate all liability under the policy.

14. The legal position which emerges from the aforementioned judicial pronouncements is that the test to determine materiality is whether the fact not disclosed has any bearing on the risk undertaken by the insurer. If the fact has any bearing on the risk, it is a material fact. If the insured failed to disclose in the proposal form trivial ailments suffered by him temporarily on some occasions, the same cannot be construed as fraudulent suppression of material facts, so as to repudiate the contract of insurance.

15. The Insurance policy, apart from its special feature, is a contract between a person seeking to be insured and the insurer. In interpreting the terms of contract of insurance, they should receive fair, reasonable and sensible construction in consonance with the purpose of the contract as intended by the parties. Emphasis in such cases is laid more upon a practical and reasonable, rather than, on a literal and strained construction. In interpreting the contract of insurance neither the coverage under a policy should be unnecessarily broadened, nor should the policy be rendered ineffective in consequence of unnatural or unreasonable construction. An attempt should be to construe a contract in liberal manner so as to accomplish the purpose or the object for which it is made. In the absence of ambiguity, neither party can be favoured but where the construction is doubtful, the Courts lean strongly against the party who prepared the contract. Where there is a susceptibility of two interpretations, the one favourable to the insured is to be preferred.

16. In the present case, the deceased insured was suffering from Gastritis with superficial Stomach Ulcer and was under medication for some time, as would be evident from the Doctor's report (Annexure-K) to the counter affidavit. Admittedly, the deceased insured died of Viral Encephalitis and Cardio Respiratory arrest and suffered from the same only ten hours before his death, as would be evident from the Medical Attendant Certificate (Annexure-4 series) to the writ petition.

17. In view of the principles of law as discussed above, we are of the considered view that as the deceased insured was suffering from minor ailments like Gastritis with superficial Stomach Ulcer, which is not a serious disease having any bearing on the risk undertaken by the L.I.C., the non-disclosure of the same cannot be said to be material, especially when the same did not affect the life expectancy of the deceased insured. Moreover as the cause of death of the insured was admitted due to Viral Encephalitis coupled with Cardio Respiratory arrest, which had no nexus with the

previous ailments of the deceased insured, the repudiation of the policy and rejection of the claim by the L.I.C. was not proper and justified.

18. In view of the above findings, the writ petition is allowed and the LIC, opposite party nos. 1 and 2 are directed to pay the sum assured under the policy of insurance to the petitioner, which shall be paid within a period of three months.

Writ petition allowed.

2010 (I) ILR-CUT- 18

B.P.DAS,J & B.P.RAY,J.

ARSS INFRASTRUCTURE PROJECTS -V- STATE
OF ORISSA & ORS.& BATCH.

JULY 7. 09

ORISSA MINOR MINERALS CONCESSION RULES, 2004 – RULE 24.

"Royalty" payable by the Contractors for the procurement of minor minerals – Since petitioners have paid royalty once to the mine owners they need not be forced to pay it again – Held, if royalty has already been deducted from the running bills of the petitioners they are entitled to get refund of the same.

(Para 10)

Case law Relied on:-

2006(Supp-II) OLR 672 : (Akuli Charan Das etc.-V-Commissioner-cum-Secretary,Department of R & B Orissa etc.)

Case laws Referred to:-

1.AIR 2005 SC 1646 : (State of West Bengal -V-Kesoram Industries Ltd.etc.
2.AIR 2005 SC 3936 : (State of H.P. -V- Gujarat Ambuja Cement Ltd.).

For Petitioners – S/Shri Kamal Bihari Panda, P.K.Sahoo & D.Panda.
For Opp.Parties – Shri Milan Kanungo.
For Petitioners – S/Shri Kamal Bihari Panda, P.K.Sahoo, D.Panda.
For Opp.Parties – Shri Anindya Kumar Mishra.
For Petitioners – M/s.Shri Pravakar Behera, B.A.Prusty.
For Opp.Parties – Shri Milan Kanungo.
For Petitioners – M/s.S.K.Sangneria.
For Opp.Parties – Shri Milan Kanungo.

---

*W.P.(C) NOS.7744,7746,7748,7749, 7754,7755,7880,7882,7883,7884,7885,7886,7887,7890,7891,7904,12448, 13324,13325,7751,7888,7894,7895,7897,12447,13299,13300,13301,13302, 13323,13326 OF 2008 & W.P.(C) NOS.17,3806 & 3808 OF 2009. In the matters of applications under Articles 226 & 227 of the Constitution of India.

B. P. DAS, J. In all these writ petitions, the relief claimed by the petitioners being the same and similar, they were heard together and are being disposed of by this common judgment.

2. The petitioners in these writ petitions are all contractors and they had entered into different contracts with the State Govt./Rail Vikash Nigam Ltd. for executing different types of construction works under the State Govt./Rail Vikash Nigam Ltd. The petitioners have prayed for a direction to the opposite parties not to deduct royalty from their running account bills in excess of the rates fixed at the time of signing the agreements.

3. For the sake of brevity, we indicate the facts of W.P. (C) No.7744 of 2008. Here, the petitioner had entered into an agreement with the opposite party-State Govt. after being successful in the competitive bid in respect of the work "Improvement to Cuttack-Govindpur-Banki-Simor Road (M.D.R.-77) From 5/0 to 10/0 KM., 15.820 to 16/260 KM & 17/0 to 17/500 KM under 12th FCA for the year 2006-07". As per the terms and conditions of the said agreement, the petitioner had to bear all taxes, including VAT, income tax, royalty, fair weather charges, tollage, where necessary. While preparing the estimate for the aforesaid work, the opposite parties also prepared a Lead Statement wherein the amount of royalty payable by the contractor was incorporated. According to the petitioner, a contractor while quoting the rates and prices in the bid for a particular work usually quotes such rates and prices after taking into account the amounts to be paid by him towards taxes, duties, royalties and other levies. It is alleged that the opposite parties while effecting payment of the 7th running account bill of the petitioner deducted huge amount towards royalty, in excess of the amount which was to be paid by the petitioner in terms of the Lead Statement, vide Annexure-1. It is stated that while the petitioner was made to pay Rs.3,38,781/- as royalty out of the total sum of Rs.84,62,510/- as per the 4th running account bill, in the 7th running account bill the opposite parties deducted a sum of Rs.2,14,283/- out of the total sum of Rs.3,94,030/- payable to it. According to the petitioner, the amount of royalty deducted from its 7th running account bill was more than 50% of the total bill amount and, therefore, the same was in excess and in contravention of the Lead Statement in Annexure-1.

The petitioner averred that it was justly liable to pay the royalty as per the rates fixed at the time of submitting the tender and signing the agreement and the opposite parties could not have resorted to enhance the rate of royalty after the agreement was executed between the parties and the same could not be increased during the course of execution of the work.

4. The counter affidavit filed by opposite party no.3-Executive Engineer, Jagatsinghpur (R&B) Division, in W.P. (C) No.7890 of 2008 has been adopted by his counterparts as well as opposite party no.1-Secretary to the Govt. in Works Department in all other writ petitions, as would appear from the orders dated 12.2.2009 and 24.3.2009 passed in W.P. (C) No.7744 of 2008.

The opposite parties have taken a stand that the agreement executed between the parties clearly indicated that the contractor was to bear sales taxes, octroi taxes and all other required materials at its own cost as per the Orissa Minor Minerals Concession Rules, 2004 (hereinafter called '2004 Rules') in vogue at the time of signing the agreement. It is also clearly stipulated in the agreement that the rates of royalty would be increased by

40% automatically with effect from the 4th year in case the said rate is not revised after expiry of three years from the date when the rate was last fixed due to any reason. The Govt. of Orissa in the Department of Steel and Mines by notification dated 31.8.2004 revised the rates of royalty increasing the same by 40% automatically with effect from 31.8.2007. As the enhancement in the rate of royalty was made effective from 31.8.2007, according to the opposite parties, the petitioner/contractor should have kept it in mind and it was well within his knowledge that the rates of royalty had been increased with effect from 31.8.2007 and he had to bear the same and accordingly the tender contemplating such enhanced cost must have been given by him keeping the aforesaid aspect in view and as all his working period pervades after such enhancement. Therefore, the deponent/opposite party no.3 being the incumbent was correct to recover the amount of royalty and has recovered the same from the bill of the contractor as per the agreement.

5. Learned counsel appearing for the petitioners have, however, submitted that similar question came up for consideration before a Bench of this Court in W.P. (C) No.4246 of 2005 and its batch of writ petitions, judgment in which was delivered on 22.11.2006 and reported in ***2006 (Supp-II) O.L.R. 672 : Akuli Charan Das etc. etc. v. Commissioner-cum-Secretary, Department of R & B, Orissa,*** **etc. etc**. In the aforesaid decision it was held that in cases where agreements were signed before 31.8.2004, i.e., the date of promulgation of the Orissa Minor Minerals Concession Rules, 2004, the petitioners were entitled to reimbursement on the basis of the revised rate stipulated in the 2004 Rules.

Countenancing the argument of the learned counsel for the petitioners that these cases are covered by the decision of this Court in Akuli Charan Das case (supra), it is submitted by the learned counsel for the opposite parties that the said decision has no application to the present cases because in the case of ***State of West Bengal v. Kesoram Industries Ltd., etc. etc., AIR 2005 SC 1646***, the apex Court held that "royalty is not tax. Royalty is paid to the owner of land who may be a private person and may not necessarily be State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax".

Then reference was made to the decision rendered by the apex Court in ***State of H.P. v. Gujarat Ambuja Cement Ltd., AIR 2005 SC 3936***, wherein the definition of 'royalty' has been indicated.

6. According to the learned counsel for the opposite parties, in Akuli Charan Das case, relief was granted to the petitioner basing upon the provisions of section 64A of the Sale of Goods Act, 1930, which only apply to the case of tax on sale or purchase of goods, duty of customs or excise on goods. Here is a case where the royalty collected is not a duty of customs or excise on goods, or tax on sale or purchase of goods. So, the petitioners cannot get the benefit of the aforesaid decision.

7. In the aforesaid factual background, before going into the merit of the case, let us have a look at the relevant part of the contract agreement, which has been annexed to the counter affidavit filed by the opposite parties as Annexure-A/3.

Clause 45 of the Contract Agreement deals with Tax and Clause 45.1 thereof provides as follows :

> "The rates quoted by the Contractor shall be deemed to be inclusive of the sales and other taxes that the Contractor will have to pay for the performance of this Contract. The Employer will perform such duties in regard to the deduction of such taxes at source as per applicable law."

Thus it says that all duties, taxes and other levies payable by the contractor under the contract, or for any other cause shall be included in the rates, prices and total bid price submitted by the bidder. According to the opposite parties, in view of the aforesaid clause, the petitioners are liable to pay the royalty and their prayer to reimburse such royalty deducted from them is not sustainable in law.

When the learned counsel for the petitioners strongly placed reliance on the decision of this Court in Akuli Charan Das case, let us examine if the ratio decidendi of Akuli Charan Das case is at all applicable to the case of the petitioners. The same stand was also taken by the State in paragraph 7 of the judgment rendered in Akuli Charan Das case and the same is extracted hereunder :

> "7. The next stand of the State that it has no liability whatsoever with the increase/enhancement of royalty on account or 2004 Rules and that the enhancement has to be borne by the contractors/petitioners, is based upon Clauses-13.3 and 13.4 which are quoted herein below :

13.3 All duties, taxes, royalties and other levies payable by the Contractor under the Contract, or for any other cause, shall be included in the rates, prices, and total Bid price submitted by the Bidder.

13.4 The rates and prices quoted by the Bidder shall be fixed for the duration of the Contract and shall not be subject to adjustment.

A similar Clause though a little differently has been relied upon in the counter affidavit filed in W.P. (C) No.15694 of 2005 and the relevant Clause 41.1 which is quoted herein below :

41.1 The rates quoted by the contractor shall be deemed to be inclusive of the sales and other levies, duties, Royalties, Cess, toll, taxes of Central and State Governments, local bodies and authorities that the Contractor will have to pay for the performance of the contract."

8. In the aforesaid Akuli Charan Das case, on the basis of the contentions advanced by the parties, the following three issues arose for adjudication :

(1) Whether the Orissa Minor Minerals Concession Rules, 2004 published in the official gazette on 31.8.2004 would apply to an agreement entered into before the said date ?

(2) Whether the opposite parties are justified in claiming that the enhancement of royalty is to be borne by the contractors and the Department has got no relation to the increase/decrease in the rate of royalty OR whether in view of the promulgation of the Orissa Minor Minerals Concession Rules, 2004, the contractors are entitled to claim reimbursement on the basis of the new schedule rate ?

(3) Whether the opposite parties are justified in claiming that they are entitled to deduct royalty at the time of effecting payment to the contractors if no receipt of payment of royalty is provided by the contractors at the time of raising such bills."

The first issue was dealt with in paragraph 11 of the judgment and was answered in the negative holding that the 2004 Rules would apply to all procurements of minor minerals made by the petitioners (contractors) on or after 31.8.2004 irrespective of the date on which

the agreements were signed. So, the argument advanced by the learned counsel for the petitioners that the petitioners are not the lessees or they are not raising minerals for which they are not liable to pay the royalty, does not hold good.

The second issue was dealt with in paragraph 12 of the judgment and taking aid of section 64A of the Sale of Goods Act, 1930, their Lordships held that the contractors were justified in their claim for reimbursement of royalty at the rate stipulated in the 2004 Rules and on and from the date 31.8.2004, i.e., the date of promulgation.

So far as the third issue is concerned, it was held that any claim for reimbursement towards royalty would be justified if evidence of payment of such royalty is furnished.

9. In paragraph 19 of the judgment in Akuli Charan Das case, it was held thus:

"We are clearly of the view that the stand of the State that the evidence of payment of royalty is required, is wholly justified since the 'royalty' as a computation of costs has been admittedly taken into consideration while arriving at 'abstract of estimate' as well as 'lead statement'. Therefore, for a contractor to claim reimbursement of royalty, obviously, the evidence of such payment of royalty has to be furnished. A contractor cannot be permitted to gain at the cost of the State and, therefore, the only extent of his right extends to seeking 'reimbursement' alone and such claim of reimbursement obviously has to be preceded by payment and production of evidence thereof."

Let us see whether the provisions of section 64A of the Sale of Goods Act, 1930 can be of any help to the petitioners. The said Section 64A is quoted hereunder :

"64A. In contracts of sale, amount of increase or decreased taxes to be added or deducted – (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods-tax paid where tax was chargeable at that time,

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add to much to the contract price as will be equivalent to the amount paid or payable in

> respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and
> xxx xxx xxx
> (2) The provisions of Sub-section (1) apply to the following taxes, namely :-
> (a) any duty of customs or excise on goods;
> (b) any tax on the sale or purchase of goods."

10. It is true that section 64A of the Sale of Goods Act deals with tax on sale or purchase of goods and duty of customs or excise on goods. We have not been called upon in this proceeding to answer whether royalty is a tax. The question here is whether the petitioners, who have suffered royalty once after payment of the same to the mine owners, should they be forced to pay royalty again and if the same has already been deducted from the running bills of the petitioners, are they entitled to get refund of the same ? The answer is in affirmative as these cases are squarely covered by the principle decided by this Court in Akuli Charan Das case (supra).

11. Accordingly we dispose of all these writ petitions with the direction that if the petitioners have already paid the royalty, on production of evidence of such payment, the opposite parties shall refund the amount so collected by them as royalty to the petitioners.

No costs.

Writ petition disposed of.

2010 (I) ILR-CUT- 25

B.P.DAS, J & B.P.RAY,J.

ROURKELA SHRAMIK SANGHA UNION -V- STEEL AUTHORITY OF INDIA.*

DECEMBER 11, 2009.

CONSTITUTION OF INDIA, 1950- ART,226 & 227.

Writ petition - By Rourkela Shramik Sangha - For a direction to permanently restrain Steel Authority of India Ltd. (SAIL) and Rourkela Steel Plant (RSP) to set up a slag based Cement Plant - Held, Petitioner has no locus standi to maintain the writ petition and cannot compel the opposite parties to go for a particular type of manufacturing process. (Para 8)

For Petitioner : S/Shri H.M.Dhal,A.Patnaik & B.B.Swain
For Opp.Parties : Shri J.K.Mishra, Asst.Solicitor General of India (For O.P.Nos.1 & 4) Shri Jagannath Pattnaik, (Sr.Advocate) B.Mohanty.T.K.Patnaik & A.Patnaik. (For O.P.No.2) S/Shri S.K.Padhi,Sr.Advocate, G.Mishra,A.Das & Smt.M.Padhi (For O.P.No.3) & Shri S.C.Panda (For O.P.No.5).

*W.P.(C) NO.14800 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B. P. DAS, J. Rourkela Shramik Sangha Union through its General Secretary Shri M. D. Panicker has filed this writ petition seeking a direction to permanently restrain opposite party no.2-the Steel Authority of India Ltd. (SAIL) and opposite party no.3-the Rourkela Steel Plant (RSP) from proceeding with the setting up of the proposed Joint Venture Slag-based Cement Plant in terms of the advertisement issued by the SAIL in Annexure-3 as the same is opposed to public policy. The petitioner has also sought for a direction to the SAIL and RSP to take effective step for achieving full utilization of the fly ash generated by the RSP in terms of the notification dated 14.9.1999 issued by the Ministry of Environment and Forests, Govt. of India regarding management of fly ash vide Annexure-1.

Annexure-3 is the advertisement issued by the SAIL and published in an English daily on 8.1.2007 inviting Expression of Interest from interested parties for Joint Venture Participation for setting up of a Slag Cement Plant at Rourkela by utilizing the entire Slag generated or proposed to be generated at its Integrated Steel Plant, i.e., RSP.

2. Shortly stated, the case of the petitioner in this writ petition is that the petitioner-Rourkela Shramik Sangha Union is a trade union registered under the Trade Unions Act and its members numbering over 20,000 are working in the establishment of RSP, which is engaged in manufacture of steel and steel products and is owned by the SAIL, which is a Govt. of India Company.

Two thermal power generating units, i.e., CPP I and CPP II, operating in RSP for generation of electricity for captive use in the manufacturing operation in RSP generate approximately 6 lakhs tons of fly ash per annum. The ash generated from the power plants which is highly polluting industrial waste product is dumped into the ash ponds through wet disposal method. In the process of manufacturing steel and steel products, RSP also generates around 8 lakhs tons of another industrial waste product, i.e., Blast Furnace Granulated Slag (Slag hereinafter) per annum. Out of the aforesaid two industrial waste products generated by RSP, 100% of the Slag is purchased and consumed by various cement manufacturing units located within the State of Orissa for using the same in the manufacture of blended cement called "Portland Slag Cement" (PSC) and as no portion thereof is accumulated, the slag generated does not pose any pollution problem. But the fly ash generated by the Captive Power Plants of the RSP is a very difficult material to handle in dry state because it is very fine and readily airborne even in mild wind. It disturbs the ecology of the region being a source of soil, air and water pollution; long inhalation of fly ash causes silicosis, fibrosis of lungs, bronchitis, pneumonitis etc. and the flying fine particles of ash poses problems for people living near power stations, corrode structural surfaces and affect horticulture. It is alleged that the dumping of huge quantity of fly ash generated by the RSP into the ash ponds directly and materially affect the health and life of thousands of workers and general public living in the vicinity of the ash ponds. According to the petitioner, the SAIL, which is a Government of India company, has failed to ensure full utilization of fly ash generated from the power plants in the RSP in terms of the notification dated 14.9.1999 issued by the Ministry of Environment and Forests.

On 8.1.2007, SAIL published the advertisement in Annexure-3 inviting Expression of Interest from interested parties to set up a Slag-based Cement Plant at Rourkela under a Joint Venture Company. The petitioner noticing the pollution of environment and as the fly ash generated by the captive thermal power units of the RSP is highly polluting and environmentally unfriendly industrial waste product and the information procured under the Right to Information Act revealed that a huge quantity of fly ash generated by the two thermal power units of the RSP is disposed of to the ash ponds through wet-disposal method and only a very small and negligible quantity of such fly ash is consumed in brick-making and_manufacture of Portland Pozzolana Cement (PPC) or used in similar industrial applications and also in raising dyke height of the ash ponds and/or filling low lying areas, the petitioner requested the management of the opposite party nos.2 and 3 to take immediate step for disposal of fly ash generated by the RSP and suggested that instead of proceeding to set up the proposed Slag-based

Joint Venture cement plant as per Annexure-3, they should take steps to set up fly ash based Joint Venture cement plant by first consuming 100% of the fly ash because slag is already being fully consumed by various cement plants located and operating within the State for which slag does not at all pose any pollution problem.

The sum and substance of the case of the petitioner is that instead of proceeding to manufacture cement by using the slag generated by the RSP, the SAIL and RSP should proceed to manufacture cement by using the fly ash generated by the RSP and stored in the ash ponds, which would considerably reduce the high stacking of fly ash thereby reducing the quantity of fly ash in the ash ponds in course of time.

3. Opposite party nos.2 and 3 on the other hand while resisting the reliefs sought for in the writ petition, have challenged the maintainability of the writ petition on the ground that the petitioner being a trade union has no locus standi or competency to challenge the setting up of the proposed joint venture project of Slag-based cement plant at Purunapani, as it is not affecting the service condition of any workman working in the RSP, much less any member of the petitioner-union. The opposite parties have further stated that the tender has reached its finality, but due to the interim order of this Court dated 17.11.2008, final decision in the matter is yet to be taken. The opposite parties have highlighted the objectives of the project, i.e. (i) Setting up of cement industry at Purnapani by resuming mining activity would help in gainful utilization of abandoned infrastructures and internal resources of the PSU; (ii) It will address a long standing demand of the public in and around Purunapani to expedite the project without delay (Annexure-B/2 of the counter of O.P. nos.2 and 3); (iii) It will bring socio-economic development and provide employment opportunity in the forest dominated under developed area of the State of Orissa; and (iv) It is pressing necessary of SAIL to plan for solid waste management namely "slag" particularly keeping in view its future expansion plan. It is stated that due to the capacity expansion and commissioning of 5th Blast Furnace and enhancement of hot material production, a huge quantity of slag and almost double the present quantity, would be generated and keeping the same in view, the opposite parties have planned for its utilization by setting up of the proposed the slag-based cement plant at Purunapani. In other words, the proposed plant has been conceived to cater to the excess generation of slag due to such expansion/modernization/commissioning of new blast furnace in the RSP. It was further submitted that the issue relating to environmental pollution due to generation of fly ash at Rourkela cannot be linked with the establishment of proposed slag based cement plant at Purunapani as per Annexure-3 and the issues are independent and different.

4. The State Pollution Control Board, Orissa, opposite party no.5, in its counter affidavit has indicated that the captive power plants of the RSP are far behind the target in terms of utilization of fly ash as stipulated in the Fly Ash Notification dated 14.9.1999 and that all the three ash ponds are almost filled up.

5. In order to know the truth in the allegation of the petitioner that the fly ash is stored in the ash ponds in a dangerous situation, we required the Board to make an inspection of the power plants of the RSP. Thereafter in terms of this Court's order dated 1.5.2009, an inspection has been carried out by the Board on 8.5.2009 and a report is filed along with the additional affidavit wherein it has been concluded that the fly ash management of the industry is grossly inadequate and due to inadequacy in ash utilization and ash pond management system, the ash slurry is found to be discharged to Guradi Nallah which in its turn lead into river Brahamani creating water pollution. It was further observed that as there was imminent threat of water pollution by way of ash slurry disposal to Guradi Nallah and Brahmani river, prompt action is required to be taken to contain ash slurry in ash ponds and stop discharge of ash slurry to Guradi Nallah.

6. The Regional Officer of the Board at Rourkela after inspecting the industry on 30.5.2009 submitted his report to the Member-Secretary of the Board by letter dated 9.6.2009 and the same is produced before us along with the memo. dated 7.7.2009. The relevant part of the inspection report is extracted hereunder :

Sl. No.	Item	Observation on compliance & status
1.	Capacity & operational and Consent status	… …
2.	The APC equipment for the power plant	… …
3.	Compliance stack monitoring results	… …
4.	Upgradation of ESPs	… …

4.	Ash pond management.	The power plant has three numbers of ash ponds namely Ash pond-A, B, C. Into these ash ponds the ash slurry from CPP-1 of RSP and CPP-2 of NSPCL is being discharged and the over flow water is discharged to Guradi Nala. At present about 1200 cum of ash is being pumped to the ash ponds. Thus on monthly basis about 40000 cum of ash is put in the ash ponds. The present status is as follows : 1. Ash pond-A- The area of this ash pond is 37.49 Acs. The ash is full and 4th & final raising (231 mts to 235 mts RL) is to be done. The tender published and reportedly the job will commence during October-2009, about 80,000 cum of ash will be utilized making the embankment and it will take about 9 months for complete raising of this dyke. Reportedly about 3 lakh Cum of volume will be created so that it will last for about 7 months. 2. Ash pond- B – The area of this ash pond is 26.99 Acs. The final raising of this ash pond has already been done. Present it is evacuated to create void for emergency filling up with ash slurry. Reportedly they have awarded contract for evacuating of 1 lakh cum of ash during Apr to June 09, out of which 50,000 cum already evacuated. Further evacuation is under progress. 3. Ash pond- C – The area of this ash pond is 56.00 Acs. This dyke is presently reached level to starter dyke i.e., at 228 mts. Presently it is evacuated to create void for emergency filling up with ash slurry. Reportedly they have awarded contract for evacuating of 3 lakh cum of ash from B & C during July 09 to Jan 10. The job has commenced from 18th May 2009.

		4. The industry has further given details on future evacuation of ash to create voids in the ash pond which was not presently evaluated because they have not shown any available space. 5. At present the evacuation rate is 2200 cum per day and daily discharge is 1200 cum per day. It was estimated that they have at present voids of 40,000 cum in Ash pond-C and 20000 Cum in Ash pond-B for discharge of ash slurry. 6. The industry has submitted lay out map on which future dumping of evacuated ash will be done. They have demarked three places. They will divrt one channel, provide a guard wall etc. and create about 2.5 lakh cum of voids to last for about 6 months. The lay out plan is submitted. 7. Thus it is estimated that if the evacuation-dumping in low lying areas continue as submitted this will continue for a period of 7 to 9 months. **8.** It was also reported that they have taken up construction of ash pond-D (102 Acs) so that it will cater for the future dumping of ash. It is estimated that at 2 years of time is necessary for construction of ash pond-D.
5.	Water quality of Ash over flow to Guradi Nala	It is observed that at present they are discharging ash pond over flow water to Guradi nala from Ash pond- B & C. The effluent samples were collected on 30-05-2009 and on 3-06-2009. The analysis report is enclosed. These are not conforming to standard prescribed. The monitoring reports for entire year is also enclosed at Annexure-III.

6.	Ash pond recirculation System	The industry was directed to complete the ash pond recirculation system for Pond-C within 3 months i.e. by Jan 2009. It was observed that they have completed the pedestals and pipe line is partly laid. They apprised that they will complete the recirculation system by Nov, 2009.
7.	Fly ash utilization	The data submitted by the industry is enclosed. The major utilization is dumping done at low lying areas within the plant premises. They should explore more constructive approaches like making fly ash bricks, blocks etc and promoting market for such products.
8.	Observations & & Conclusion	1. At present the industry is resorting to adhoc ash management practices like ash pond evacuation job with filling up of voids with ash slurry. This practice is continuing since May-2008. This type of stop gap arrangement is not a full proof measure for ash pond management. 2. As reported by the industry the dyke raising for Ash pond-A is likely begin during Oct-09 and it will take about 9 months for completion. Thus the dyke raising is likely to be completed by Jun-2010. 3. The industry has a ash pond void of 60,000 cum and identified void space in nearby areas of nearly 2.5 Cum. Thus with these void space the ash pond is likely to be managed for a period of 8 to 9 months with marginal impact of surrounding water body. 4. The industry should identify further void space for disposal of ash. 5. The ash pond-D is likely to be completed after two years.

		6. The industry shall take steps for promotion of ash brick utilization in this area. 7. The dry ash supply system to out side the parties near the plant boundary is yet to be functional. The building for compressor, and pipe line partly completed. They have been asked to expedite the matter. 8. The ash dumping practice is not satisfactory. The dump area is not covered with earth or slag to restrict fugitive emission.
9.	Recommendation	The present compliance is not satisfactory. ……

The result of the analysis of the samples of effluent collected on 30.5.2009 and 3.6.2009 from over-flow water to Guradi Nalla from Ash Ponds B and C, which are enclosed to the inspection report, reveal as follows :

Sl. No.	Point of sampling	p^H	TSS mg/l	COD mg/l	BOD_3 at 27° C mg/l	Cl- mg/L
1	Ash pond-B over-flow to Guradihi Nalah	6.5	962	66	-	26
2.	Ash pond-C over-flow to Guradihi Nalah	6.5	194	62	-	22
	Prescribed standard	5.5-9.0	100	250	30	1000

	Methods of Analysis	Electro metric	Gravime t ric	Closed refux titrom- Etric	BOD at 27°	Argeno metric titrim- etric
Sl. No.	Point of sampling	p^{H}	TSS mg/l	COD mg/l	BOD_3 at 27° C mg/l	C I - mg/L
1	Ash pond-B over-flow to Guradihi Nalah	6.3	565	42	-	22
2.	Ash pond-C over-flow to Guradihi Nalah	6.7	229	36	-	19
	Prescribed standard	5.5-9.0	100	250	30	1000
	Methods of Analysis	Electro metric	Gravime t ric	Closed refux titrom- Etric	BOD at 27°	Argeno metric titrim- etric

7. The aforesaid reports are quite alarming and as we understand, no effective step has been taken by the SAIL/RSP to control the situation, despite such reports. In no civilized country the factories/plants should be allowed to operate with such a high level of air and water pollution. As the SAIL is a public sector undertaking, the Board perhaps has taken a lenient view in the matter and has not initiated any effective and stringent action in filing prosecutions against the management and the occupiers of SAIL/RSP.

8. So far as the proposal of the SAIL for setting up of a slag-based cement plant is concerned, the petitioner cannot have a say on the decision of the SAIL and its venture partners to get into the contract for the purpose of establishing a manufacturing unit of cement, be it slag-based or fly ash based. The petitioner cannot compel the opposite parties to go for a particular type of manufacturing process and do not have the locus standi to maintain the writ petition seeking a direction in that regard. But at the same time, we find that the petitioner has successfully drawn the attention of this Court regarding the public injury and the public wrong being caused due to

accumulation of fly ash from the thermal captive power plants of opposite party nos.2 and 3, i.e., SAIL and RSP.

9. Everybody knows that right to life does not mean that it is merely an animal existence but it should have the right to live with dignity including the enjoyment of pollution free air and water and to live in a healthy and conducive atmosphere, which is required for existence of a human being. The report submitted by the Board reveals startling facts and we fail to understand why the Board is keeping silent over the matter without taking any drastic and effective action against the SAIL. The sphinx like silence of the Board authorities speaks a volume pertaining to their competency in implementation of the statutory duties cast upon them. As a statutory body, the Board has entirely failed in its duty to achieve the results desired by the general public, who are the worst sufferers of the evils of the polluted air and water. Needless to say that the root cause of this situation is the inaction on the part of the SAIL/RSP authorities and their defiance to take effective steps with regard to proper utilization of fly ash generated by it and to adhere to the pollution control measures, even though due to inadequate utilization of fly ash, the same is found disposed of to Guradi Nallah, which in its turn flows to river Brahmani creating water pollution. While rejecting the prayer of

10. the petitioner to direct the SAIL and RSP to set up a slag-based cement plant, we direct the Board to take effective steps against the officers of the SAIL and RSP, who are responsible for non-compliance of the environmental norms and mismanagement of the fly ash as indicated in the aforesaid inspection report and take the errant officers to task inclusive of initiation of criminal proceedings against such officers.

Before parting, we would like to observe that it would be just, fair and prudent on the part of the SAIL authorities to go for a fly ash based plant, which shall maximum utilize the fly ash generated by the RSP and stored in its ash ponds for manufacture of cement instead of slag-based cement plant, which will ultimately bring down the ash level of the ash ponds and reduce the pollution level as well.

10. The writ petition is disposed of with the observations made above.

Writ petition disposed of.

2010 (I) ILR-CUT- 35

B.P.DAS,J & INDRAJIT MAHANTY,J.

NARENDRA NATH BISWAL -V- STATE OF ORISSA & ORS.*

AUGUST,31,2009.

(A) CONSTITUTION OF INDIA, 1950 – ART.39(d)

Petitioner has been serving as Time keeper since 1984 being employed through Labour Contractor – Requirement of four Time keepers for the employer but the work managed by the petitioner along with one regular time keeper – Petitioner passed matriculation – Recommendation of the management that he is sincere and has shown devotion to his duty – He continued in the post to the satisfaction of his superiors – Hence his original appointment may be treated as "merely irregular" but not illegal.

Held, there being continuous need of a Time keeper in the establishment and the petitioner having worked more than ten continuous years he is entitled for consideration for the purpose of regularization / absorption. (Para-16)

(B) CONSTITUTION OF INDIA, 1950 – ART.14 & 16

Equal pay for equal work – The classes of employees perform identical/similar duties and carrying out same functions with same nature of responsibilities, having same academic qualification, are entitled to equal pay.

In this case the petitioner is working as a contract-casual worker since 1984 and has been paid minimum wages as applicable to him from time to time – He discharges the duties of a regular time keeper and possesses necessary qualification to hold such post – Vacancies in the post continues to exist without being filled up – Held, petitioner is entitled to the benefit of equal pay for equal work as may be payable to regular employees from the date of filing of the Writ application. (Para 16)

Case law Relied on-:

1.(2006)9 SCC 321 : (State of Haryana -V- Charanjit Singh).

Case laws Referred to:-

1.(1989) 3 SCC 191 : (V.Markendeya -V- State of A.P.).

2.(2000) 7 SCC 449 : (Food Corporation of India -V- Shyamal K.Chatterjee & Ors.)

For Petitioner – M/s.P.K.Routray & A.K.Nayak.

For Opp.Parties 1 & 2 – Addl.Govt.Advocate.

For Opp.Parties 3 to 6 – M/s.R.K.Rath & N.R.Rout. M/s.S.B.Nanda, A.K.Mishra, S.K.Mishra, P.K.Mishra, D.P.Nanda, U.N.Nayak & J. K.Nanda.

For Opp.Party No.7 – M/s.P.K.Lenka & A.K.Moharana.

For Opp.Party No.8 – Mr.Pradeep Kumar Rout.

*O.J.C.NO.5391 OF 1997. In the matter of an application under Articles 226 & 227 of the Constitution of India.

I.MAHANTY, J. The petitioner-Narendra Nath Biswal, who was appointed as a contract casual labour and has been working as Time Keeper since 1984 with the IDCOLCement Ltd. (government company of the State of Orissa), has filed the present writ application with a prayer to direct the opposite parties to regularize his services as well as to grant him equal pay for equal work.

2. Learned counsel for the petitioner submitted that the petitioner was engaged as "Time Keeper" in the mines of the erstwhile IDCOL Cement Ltd. (ICL), a Government of Orissa enterprises w.e.f. 15.7.1984 and w.e.f. 12.7.1988 since the Time Keeper-Shri R.K.Pattnaik superannuated and the post had fallen vacant, the petitioner though engaged through a labour contractor, was directed to perform the duty as a Time Keeper. Since then he has been working as Time Keeper. It was submitted that although various contract labourers who were junior to him were absorbed as regular employees by the opposite party-ICL, the petitioner has been discriminated. Inspite of filing of several representations since he has not been regularized nor given equal pay for equal work, he was compelled to file the present writ application in the year 1997.

3. It appears that during the pendency of the writ application, the state Government's shareholding in IDCOL Cement Ltd. was transferred in favour of the Associated Cement Company Ltd. (ACC Ltd.) vide the Share Purchase Agreement dated 22.12.2003. Thereafter, the said company i.e. M/s.IDCOL Cement Ltd was duly amalgamated with the Associated Cement Company Ltd.

4. In course of the present proceeding, the ICL has filed its counter affidavit through the Senior Deputy Manager (Personnel) of Danguri Mines Lime Stone Quarry. While admitting the fact that the petitioner was as a contract labour working under them, yet it has been averred that he could not claim for regularization or absorption into the services of the opposite party. It has been asserted that since the petitioner was a contract labour and was beyond the disciplinary control of the principal employer, he was not given the responsibility of a "regular" Time Keeper nor his assignment of work and duty was in the nature of a regular Time Keeper, Thus, by merely working in the Time Office, he could not ipso facto be conferred with the status of the direct regular worker/employee. Apart from the above, it was averred that the claim for equal pay for equal work is also unacceptable since the petitioner was a contract labour and this principle of law would have no application to

such contract labourers. The Opposite Party-ICL further stated in the affidavit that though the petitioner was working in the Time Office, he had not been employd as a regular Time Keeper and although the work of a Time Keeper was of an essential and responsible nature, the petitioner was not doing any physical checking of attendance at the site and was not maintaining all statutory records nor was authorized to sign on such records nor making postings of leave of the employees, nor checking T.A. bills of the employees which are required to be done by a regular Time Keeper and merely because the petitioner was doing some routine clerical work as and when required, he could not be conferred with the status of a regular Time Keeper.

5. The petitioner has filed a rejoinder affidavit in reply to the affidavit of ICL and stated that although the petitioner was a matriculate and was originally employed as a contract labour, he had been engaged in the time office of the opposite parties vide order dated 22.11.1995 under Annexure-1. In that order, he was directed to work as a Time Keeper at the Time Office at Dunguri Mines Lime Stone Quarry and he had been directed for shift duty, making attendance of the employees in 'D' & 'E' register, maintaining records of Exit, Pass, over time intimations, preparation of night shift allowance bill, conveyance allowance bill, dust allowance bill and checking of casual supply bill and other matters from time to time when required. Placing reliance on Annexure-1, the petitioner asserted that he has been working as a Time Keeper and discharging all responsibilities of a Time Keeper in a regular vacanct post, which the opposite party did not fill up. In so far as the allegation of discrimination is concerned, the petitioner in Paragraph-5 of the rejoinder affidavit stated that many casual labour, who were junior to him and were originally employed as contract labour, has been regularized without conducting any interview and he has named Kabi Khusal, Ashok Pradhan, Dillip Kumar Behera, Dillip Kumar Dora and many others who are juniors to the petitioner and have been regularized in course of their service there by alleging grass discrimination.

6. As noted hereinabove, since the shares of ICL were sold in favour of M/s. ACC Ltd. thereafter, M/s. ACC Ltd. has also filed a counter affidavit, inter alia, claiming that since the ICL is now, being owned by M/s. ACC Ltd, a private company the writ application was not maintainable on this score. Apart from the aforesaid objection, M/s. ACC Ltd. has also raised a further plea that after purchase of the shares of the ICL and amalgamation of the plant and mines with M/s. ACC Ltd., the contractor under whom the petitioner had been employed, namely, Upendra Kumar Sahu (O.P.8) floated Voluntary Retirement Scheme (VRS scheme) by notice dated 22.7.2007, pursuant to which, all contract workers(except the petition) have accepted

the scheme and have been duly paid the benefits of such a scheme except the present petitioner.

7. Sri Upendra Kumar Sahu, labour contractor has also filed an affidavit enclosing thereto the notice of the Voluntary Retirement Scheme and further stated that the petitioner did not accept the Voluntary Retirement Scheme under which he was entitled to receive Rs.1,29,356.61 and pursuant to the order of this Court dated 6.5.2008 the said amount was deposited by way of demand draft in favour of the Registrar (Judicial), Orissa High Court and the same has been kept in short term fixed deposit with the Registry.

8. In the light of the aforesaid submissions made by the parties, the following undisputed facts emerged:

i) The petitioner had been engaged as a contract labour with M/s.ICL since 1984.
ii) He has been working in the Time Office as Time Keeper as evident from Annexure-1 dated 22nd November 1995 in a regular vacancy.
iii) At the time of filing the writ application M/s. ICL along with its Danguri Mines Lime Stone Quarry was a Government of Orissa enterprise.
iv) A Share Transfer Agreement was entered into between M/s.ICL and M/s.ACC Ltd. dated 22nd December, 2003. Pursuant to which shares of ICL were transferred in favour of M/s. ACC Ltd.
v) M/s. ICL, therefore, amalgamated with its parent company i.e. M/s. ACC Ltd.

9. Now, it becomes imperative to take note of certain provisions of Share Transfer Agreement dated 22nd December 2003 pertaining to the service condition of the employees of the erstwhile ICL and the same is quoted herein below:

> "5.4- The Purchaser and the Company agree and covenant and undertake that they shall take and cause to be taken all actions and do and cause to be done all that is within their authority, power or control and they shall jointly and severally liable for and ensure that the following is duly done/complied with/accomplished:
>
> (i) After the conclusion of the transactions contemplated in this Agreement the Company shall continue to retain the services of all the permanent employees of the Company who are in employment of the Company as on the Closing Date and shall not retrench and/or terminate any such employee for a period of up to 2 (two) years from the said date other than dismissal of any such employee on disciplinary grounds which shall be made in accordance with the applicable Law.
>
> (ii) In case the Company initiates, implements or administers any voluntary retirement scheme (VRS) for any of its permanent

employees, during the said two years from the Closing Date, the said scheme should offer a VRS package that would be substantially superior to the existing VRS package approved by the State Government of Orissa.

(iii) The Company shall continue with/renew the labour contract(s) with the existing contractor(s) for job work and for supply of labour that are in force as on the Closing Date for a period of at least 2 (two) years from the Closing Date and remuneration and benefits not less favourable to the contractor and the labour than that existing on the Closing Date provided that any such contract may be terminated earlier than 2(two) years on the grounds of any material breach thereof by the contractor or on disciplinary grounds and such termination shall be made in terms of the contract and the applicable Law.

In case the Company initiates, implements or administers any voluntary retirement scheme for any of its contract employees during the period of two years from the Closing Date, the said scheme should offer a VRS package that would be superior to any VRS package approved by the State Government of Orissa for non regular employees before the Closing Date.

(iv) After the conclusion of the transactions contemplated in this Agreement, all loans and advances given by the Vendor to the Company (after 31.12.02) guarantees, undertakings, indemnities and/or securities provided by the Vendor, and any mortgage, hypothecation, lion, pledge charge or any other encumbrance created on any of the proportions or assets of the Vendor in favour of any Person, for the benefit of or for the purpose of the business of the Company, as specified in Schedule 'II' shall, in case of loans and advances be paid by the Company in 8 (eight) equal annual installments without interest or penalty with the first installment failing due for payment on the date 4 (four) years from the Closing Date and in other aforesaid cases got replaced, substituted, cancelled or revoked and the Vendor and the property and assets of the Vendor shall be got released and/or discharged and made free of all liens, liabilities, obligations and encumbrance of any nature whatsoever in this regard as and from the Closing Date to the entire satisfaction of the Vendor and/or this may be accomplished by a date to be mutually agreed between the Vendor and the Purchaser, not being later than 3 (three) months from the Closing Date but in any case the liability

and obligations of the Vendor in respect of each of the aforesaid cases shall cease as from the Closing Date in respect thereof:

(v) The Company shall, so long as it continues to use the brand name 'IDCOL' in respect of the products of the Company, continue to pay royalty to the Vendor on the same terms and conditions as is presently applicable. If the Company, discontinues the use of the said brand name or a name in any way similar to or matching with or representing the said brand name, it shall notify the Vendor three months in advance and shall pay the royalty in advance for here months at a rate averaging the sales per month in 2002 from April 2002 to December 2002. It is however, agreed between the Parties that if the Company intends to discontinue the use of the said brand name or a name in any way similar to or matching with or representing the said brand name, from the day following the Closing Date, the Company shall notify the Vendor on the Closing Date and the Company shall not be liable to pay any royalty in respect of the use of the said brand name or a name in any way similar to or matching with or representing the said brand name from the Closing Date."

In view of the aforesaid Clauses in the Share purchase Agreement, it would be clear that the fate of the petitioner and his status continuity in employment with M/s.ACC Ltd. and his status would depend upon the questions, as to whether the petitioner could claim himself as a permanent employee of the company from the date of the aforesaid agreement or as a contract employee ? Answer to this question would be extremely important, since, in the present case, the labour contractor had floated the VRS scheme to which, of course, the petitioner did not accept.

10. We would like to first deal with the claim of the petitioner for equal pay for equal work. It is well settled in the case of **V. Markendeya v. State of A.P.,** (1989) 3 SCC 191 that the principles of equal pay for equal work is not an abstract one. While it is open to the State to prescribe different scales of pay for different cadres having regard to the nature of its and/or responsibilities as well as educational qualification but where two classes of employees perform identical or similar duties and carrying out the same functions with the same nature of responsibility having same academic qualifications, they would be entitled to equal pay. If the State denies them quality in pay, its action would be violative of Articles 14 and 16 of the Constitution and it is obligation of the Court to strike down the discrimination and grant relief to the aggrieved employee. But before such relief is granted, the court must consider and analyze the rational behind the State action and if on an analysis of the relevant rules, orders, nature of duties, functions,

measure of responsibility and educational qualifications required for the relevant posts, the court finds that the classification made by the State in giving different treatment to the two classes of employees is founded on rational basis having nexus with the objects sought to be achieved, then such classification must be upheld. But relief to an aggrieved person seeking to enforce the principles of equal pay for equal work can only be granted after it is demonstrated before the court that discrimination has been practised by the State without there being any reasonable classification for the same.

It has also been well settled by the Hon'ble Supreme Court in the case of **Food Corporation of India v. Shyamal K. Chatterjee and others,** (2000) 7 SCC 449 that contract casual workers are entitled to parity in pay with the regular employees if they perform similar work with responsibility and no distinction can be made in so far as equal pay for equal work is concerned on the basis that the aggrieved employee is a contract casual worker.

11. In view of the aforesaid judgments of the Hon'ble Supreme Court what needs to be first determined is the nature of the duties being performed by the petitioner vis-à-vis the regular employee.

In the present case at hand, the petitioner has annexed as Annexure-1, the letter of the Sr. Deputy Manager (Personnel) dated 22nd November 1995 addressing the petitioner as a Time Keeper at the Time Office at the Dunguri Mines Lime Stone Quarry and assigned the followings pecific responsibilities:

1. Shift duty- Marking attendances of the employees, including marking attendances in the 'D' & 'E' Register for staff employees as per Staff attendance Register daily & preparation of Daily report.
2. Marking C.B., comp. off in the attendance Register as and when received approved intimations.
3. Maintaining Records of Exit pass O.T. intimations etc.
4. Filling up columns No.1 to 7 in the attendance Register in Form-D & E every month by the end of proceeding month.
5. Preparation of Night shift Allowance bill, conveyance allowance, Dust Allowance etc.
6. Checking of Casual supply bills and any other matter from time to time as and when required.

In the counter affidavit of ICL although the deponent, Sr. Deputy Manager (Personnel) has sought to deny the authenticity of the said document, yet, in the rejoinder affidavit, the petitioner has annexed a further as Annexure-11, a letter addressed by the self-same Deputy Manager

(Personnel) to one Sri B.Patnaik (Regular Employee) who was addressed as Clerk, who has been assigned with the following duties of Time Keeper in the Time Office:

1. Shift duty– Marking attendances of the employees in D& E Register both operatives & staff and preparation of daily Labour reports.
2. Marking C.B. in the attendance Registers and maintaining different records of Time Office such as Exit pass, O.T. intimation etc.
3. Writing names & designation etc. of offices and staff of D.L.O. & Behera Banjipali Mines in the attendance Register every month.
4. Preparation of Bonus Bill/Posting Registers of the Employees.
5. Writing of Attendance Cards of all operatives each month.
6. Maintenance of all papers and Registers, Records and files in connection with shift and receiving daks from different Departments.
7. Any other work that may be entrusted to him from time to time.

On a comparison of the assignment given to the regular employee-Sri B.Patnaik and the petitioner, (casual worker)it is seen that the nature of duties, responsibilities and obligation are exactly same and, therefore, it can safely be concluded that the petitioner, in fact, while working as a Time Keeper has discharged the function and duties of regular Time Keeper.

12. The case of the petitioner has further substantiated by the fact that the Deputy Manager (Personnel) has recommended the case of the petitioner for absorption as early as on 12.7.1988 and the said note appended as Annexure-3 which is quoted hereunder:

> "<u>GENERAL MANAGER (MINES)</u>
>
> I. Shri Narendra Nath Biswal has been working in the time Officer as Casual Office Assistant being supplied through Casual Labour Supply Contractor since 1984 against the post of Time Keeper, which have fallen vacant subsequent to the superannuation of Shri R.K.Pattnaik, Jr. Clerk and Shri L.M.Sarkar Jr. Clerk. At present, he is paid Rs.20/- per day. He has read upto H.S.C. Examination.
>
> Since the job of Time Keeper is of permanent nature, engagement of contract Labour in the said job for a longer period may lead to legal complication in future. Further, this job is also of

confidential in nature and most vital in an Industry. Shri Biswal is very sincere and hard working and is now well acquainted with the job of Time Keeper including preparation of allowance bill, Casual Labour supply Bill etc.

It is suggested to appoint Shri Biswal as Apprentics on the consolidated allowance of Rs.400/- per month initially for a period of one year in satisfactory completion of which he will be fixed in the regular grade."

Once again the Deputy Manager (Personnel) affirmed the fact that the petitioner was discharging his duty as regular Time Keeper under his note dated 26.12.1991 under Annexure-4 and the same is quoted hereunder:

"<u>MANAGER (PERSONNEL)</u>

The representation dated 23.10.91 of Shri Narendra Nath Biswal, casual labour, working as Time Keeper may kindly be seen. In the Time office at present we are having two nos. of shift Time Keeper against the required strength of 4 nos. (3 for three shifts and one for leave reserve & off). As such we are forced to run the Time Office in two shifts i.e. 'A' & 'B' against the required 3 shift operation. In absence of any one of the existing Time Keeperwe are running the Time Office with Sri Narendra Biswal supplied through the Contractor as casual labour, violating the provision of the Mines Act, As a Time Keeper, he puts his signature in various documents.

Shri Biswal has been working as Time Keeper since 1984 and he has been efficiently discharging his duties as Shift Time Keeper. So far as his qualification is concerned, he has passed H.S.C. Examination from Board of Secondary Education, Orissa.

In view of the duties and responsibilities on him and his long services with him we may consider his case for regular appointment as Junior Clerk against the existing vacancy or else his case be considered on short term appointment.

Submitted."

Once again on 26.12.1991, the General Manager (Mines) recommended the case of the petitioner as quoted hereunder:

"Ref: Note at prepage & above.

Due to shortage of Time Keepers, one Sri Narendranath Biswal, a matriculate, is working as Time Keeper in our Dungri Limestone Quarry as a casual labour since 1984. At present he is drawing Rs.28.15 per day.

We have only 2 time keepers against our requirement of 4 nos. to run the Time Office in a shift.

> We have found Sri Biswal to be very sincere and has gained experience in preparation of monthly bills including maintenance of time office records.
>
> We may also require such experienced hand Damapala & Behera-Banjapali Limestone Mines.
>
> Mr. Biswal may be appointed on probation period of one year against the post o Jr.Clerk Time office for Damapara Mines.
>
> Submitted."

13. On a joint reading of the aforesaid facts and keeping in view the fact that the averments made by the petitioner in his rejoinder affidavit have not been responded by the opposite parties, we have left with no option other than to hold that the petitioner has been discharging the responsibilities of regular Time Keeper since adequate number of Time Keepers as required under law were not available in the regular establishment. Further, his work has always been to the satisfaction of his superior officers who from time to time has strongly recommended his case for his sincerity in discharging the job.

14. The present case is a case where an employee though engaged as a contract labour since 1984, has only been given minimum wages as applicable to him from time to time. Although, in fact and in reality, he has been discharging duties of a regular Time Keeper and also possesses necessary qualifications to hold such post as well as in view of the fact that vacancies in the said post continued to exist without being filled up.

Therefore, in the light of the above, we have no hesitation in holding that the petitioner is entitled to the benefit of equal pay for equal work as may be payable to regular employees for the period of service rendered by him as a Time Keeper with Dunguri Mines Lime Stone Quarry. Having come to hold that the petitioner is entitled to his claim for equal pay for equal work, the next question that arises for consideration is as to from which date he shall be entitled for benefits on such a direction.

15. It is further by now well settled in the case of **State of Haryana v. Charanjit Singh,** (2006) 9 SCC 321 that before any direction can be issued by a court, the Court must first see that there are necessary averments and there is a proof and if the High Court is, on the basis of material placed before it, being convinced that there was equal work of equal quality and all other relevant factors are fulfilled, it may direct payment of equal pay from the date of the filing of the respective writ petition.

In view of the aforesaid decision of the Hon'ble Supreme Court, we hold that the benefit for equal pay for equal work shall be extended to the petitioner from the date of filing of the writ application, i.e. 8.4.1997.

16. In the present case, it is seen that the petitioner has been serving as Time Keeper in the Time Officer of the Dunguri Mines Lime Stone Quarry of

ICL since 1984 although he has been employed through labour contractor. The petitioner has possessed matriculation certificate and is otherwise eligible for being posted to the said post. The employer required more than four Time Keepers to operate the Time Office and admittedly, on superannuating of the earlier Time Keeper, the petitioner along with only one other regular Time Keeper, managed the affairs of the Time Office. The recommendation of the management (Annexures 3 and 4) are also in favour of the petitioner and it is stated that he is sincere and has shown devotion to his duty and he having been continued in such post since 1984 to the satisfaction of the superior, his original appointment as Time Keeper may be treated as "merely irregular" but not illegal. Apart from the above, it is clear from the facts of the present case that there is a continuous need for such a Time Keeper in the establishment of the employer and he, having admittedly worked for more than ten continuous years, is entitled for consideration for the purpose of regularization/absorption.

17. The present writ application was filed in the year 1997 and the transfer of the shares by the State Government in favour of the present employer, i.e., M/s. ACC Ltd. took place in the year 2003 (i.e. during the pendency of the writ application). In terms of the Share Purchase Agreement (the relevant portion of which has been quoted in Paragraph – 9 hereinabove), it is clear therefrom that, M/s. ACC Ltd.-Company is required to retain the services of all the permanent employees who were in employment of the company as on the closing date. The agreement also perceives that the company may initiate a Voluntary Retirement Scheme for its permanent employee, but in the present case, it is the admitted position that the opposite party-company has not yet initiated any Voluntary Retirement Scheme for the "permanent" employees.

It is worthwhile to mention here that plea has been raised by the labour contractor – Upendra Kumar Sahoo (O.P. 8) that he had framed a Voluntary Retirement Scheme for contract workers, which admittedly, has not been accepted by the petitioner. Since we have held that the petitioner was entitled to seek regularization/absorption in service under the erstwhile IDCOL Cement Ltd., we, therefore, further declare that the petitioner should be treated as a "regular employee" with effect from the date of filing of the present writ application, i.e. 8.4.1997. Consequently, the petitioner having been declared to be a "regular employee", in terms of Clause – 5.4 of the Share Purchases Agreement, the petitioner's, in terms of Clause – 5.4 of the Share Purchase Agreement, the petitioner's services stand protected, to the extent applicable to the permanent employees. Therefore, the offer of VRS made to the petitioner as a contract labour is declared invalid in law and in any event could not be imposed on the petitioner who was unwilling to accept the terms of the VRS floated for contract labours.

18. Accordingly, the writ application is allowed with the following directions:

i) The petitioner shall be entitled for equal pay for equal work as applicable to regular employees from the date of filing of the writ application i.e. 8.4.1997.

ii) The petitioner is also further declared to be a regular employee of ICL w.e.f. 8.4.1997.

iii) The petitioner being declared as permanent employee of erstwhile ICL shall be entitled to the protection given to permanent employees under Clause – 5.4 of the Share Purchase Agreement.

iv) The petitioner shall be entitled for release of the arrears within a period of three months from the date of receipt of certified copy of this judgment.

v) The petitioner shall be deemed to continue as employee in the erstwhile ICL as taken over by M/s. ACC Ltd..

vi) The fixed deposit made with the registry by the contract labourer along with the interest thereon be released in favour of Upendra Kumar Sahu – Opposite Party No.8.

Writ petition allowed.

2010 (I) ILR-CUT- 47

B.P.DAS,J & INDRAJIT MAHANTY,J.

RAM KUMAR JAIN -V- RAMAKANTA GOUD & ORS.

OCTOBER 20,2009.

ORISSA MUNICIPAL ACT,1950 (ACT NO.23 OF 1950) – SEC.18,21 & 57 r/w ART.243-ZG OF THE CONSTITUTION.

Petitioner elected as "Chairperson" Kesinga NAC – His election challenged by filing Election Petition before the learned District Judge U/s.18 of the Act – Petitioner filed petition challenging maintainability of the case before the learned District Judge – Petition rejected – Hence this writ petition.

U/s.18 & 21 of the Act only election of a Councilor to a Municipality can be challenged before the learned District Judge – So election petition challenging the petitioner's election as "Chairperson" before the learned District Judge is not maintainable being without jurisdiction – Held, in view of Section 57 of the Act an aggrieved party may challenge the election of that "Chairperson" in the Civil Court.

(Para 9,10)

Case law Referred to:-

(1998) 9 Supreme Court Cases 594 : (Jaspal Singh Arora -V-State of M.P.& Ors

For Petitioner – M/s.Santosh Kumar Nanda,N.Maharana,R.Sahoo & S.LLal.

For Opp.Party No.1 – M/s.A.K.Nanda & G.N.Sahu.

For Opp.Parties 2 & 3 – Addl.Govt.Advocate.

---

*W.P.(C) NO.11555 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

I.MAHANTY, J. In the present writ application, the petitioner Sri Ram Kumar Jain has sought to challenge an order dated 29.7.2009 passed by the learned District Judge, Kalahandi-Nuapada at Bhawanipatna in Election Petition No.13 of 2008, rejecting the petitioner's application for preliminary hearing on the point of jurisdiction.

2. The case of the petitioner is that he was elected as Chairperson to Kesinga NAC and the present election petitioner has sought to challenge the same by filing an election petition No.13 of 2008 before the learned District Judge/Tribunal Kalahandi-Nuapada at Bhawanipatna. On receiving notice from the election Tribunal, the present petitioner filed a petition on 17.2.2009 praying for adjudicating the issue of maintainability as a preliminary issue on the plea that the election petition was not maintainable in law.

3. Learned counsel for the petitioner submitted that the election petition challenging the election of 'Chairperson' of a Municipal body by way of filing

of an election petition before the District Judge/Tribunal is not permissible in law.

4. Sri A.K.Nanda, learned counsel for the Opposite Party No.1 (Election Petitioner) submitted that the writ petitioner had contested for 'Councillor' from a general category seat and had been duly elected as Councilor to the Kesinga N.A.C.. After the petitioner succeeded in his election as Councillor from a general seat, thereafter he sought to contest the election for "Chairperson" of the said NAC, which is reserved for "OBC candidate" on the basis of a caste certificate submitted by him, claiming to be an OBC candidate. It is further averred in the writ petition that the petitioner has duly elected as 'Chairperson' of the NAC and has been declared as such by Opposite Party No.2-Election Officer. The petitioner asserts that Opposite Party No.1 (Election Petitioner) who has been elected as counselor from Word No.5 of Kesinga NAC had contested for the post of 'Chairperson' but on loosing the election, filed an election petition before the learned District Judge/Tribunal, which is the subject matter of challenge on the ground of maintainability.

5. In course of hearing of the present writ application, since an important question of law arose for consideration, request was made to the learned Advocate General to appear in the matter in order to assist the Court and in particular, to ascertain as to whether an election petition before the District Judge/Tribunal, challenge to an election of Chairperson of the N.A.C. was at all maintainable or not and further, if such election petition was held to be not maintainable in law, then, what remedy was available to a person who intends to question or challenge the election of a Chairperson of the Municipal Body.

6. Sri A.Mohanty, learned Advocate General appearing on behalf of the State submitted that on a plain reading of Section 18 of the Orissa Municipal Act (in short the 'Act') as well as Article 243-ZG of the Constitution of India, only those election petitions seeking to challenge the election of a Councilor to a Municipality could be brought before the District Judge/Election Tribunal under Sections 18 and 21 of the Act. For the purpose of convenience, the relevant Article and Sections of the Municipal Act, 1950 are quoted hereunder:

"Article 243 ZG.- Bar to interference by courts in electoral matters.- Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under article 243ZF shall not be called in question in any court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such

manner as is provided for by or under any law made by the Legislature of a State."

"**18. Power to question election by petition-** (1) The election of any person as a Councillor may be questioned petition on the ground.

(a) that such person committed, during or in respect of the election proceedings, a corrupt practice as defined in Section 28; or
(b) that such person was declared to be elected by reason of the improper rejection or admission of one or more votes, or for any other reason was not duly elected by a majority of lawful vote; or
(c) that such person though enrolled as an elector was disqualified for election under the provisions of Sections 15, 16 and 29.

(2) The election of any person as a Councillor shall not be questioned-

(a) on the ground that the name of any person qualified to vote has been omitted from or the name of any person not qualified to vote has been inserted in the electoral roll;
(b) on the ground that an non-compliance with this Act or any rule or of any mistake in the forms required thereby or of any error, irregularity or informality on the part of the office or officers charged with carrying out the provisions of this Act or any rules, unless such non-compliance mistake, error, irregularity or informality has materially affected the result of the election."

"**21. Tribunal –** (1) An election petition shall be heard by the District Judge within whose jurisdiction the Municipality area is situated.

(2) Such District Judge (hereinafter referred to as "Tribunal") shall be deemed to exercise jurisdiction as persona designate and not acting in capacity of a Judge of a Civil Court."

Learned Advocate General submitted that in view of the aforesaid constitutional provision, as well as the provisions made by the Legislative Assembly by enacting the Act, an election petition seeking to challenge the election of a Chairperson to a municipal body before the District Judge/Tribunal may not be permissible in law. Yet, in course of hearing, Sri Mohanty drew the Court's attention to Section 57 of the Municipal Act which is quoted hereunder :

"**57. Civil Court** not to grant temporary injunctions in certain cases – No Civil Court shall, in the course of any suit, grant any temporary injunction or make any interim order –

(a) restraining any person from exercising the powers of performing the functions or duties of a Member, Chairperson, Vice-Chairperson officer or servant of a Municipality or of a Committee or Sub-Committee of Municipality on the ground that such person has not been duly elected appointed as such member, Chairperson, Vice-Chairperson officer or servant; or

(b) restraining any person or persons or any such Municipality or Committee or Sub-Committee of a Municipality from holding any election, or from holding any election in any particular manner."

In the light and scope of Section 57 of the Act as quoted hereinabove and in view of the constitutional limitation, imposed by Article 243 ZG as well as Section 18 of the Act, Sri Mohanty learned Advocate General suggested that, in the present case, only a challenge the election of a 'Councillor' to Municipal body, is permissible by way of filing of an election petition under Section 18 read with Section 21 of the Act before the Election Tribunal. But, if a person is aggrieved by any other election, such as an election by the councillors for a 'Chairperson' of the council, the same though not permissible before the Election Tribunal, yet, in terms of the Section 57 of the Act, there appears to be no bar to the Civil Court from entertaining such challenge. In other words, Sri Mohanty, the learned Advocate General submitted that, in so far as challenge to the election of 'councillors' of municipal bodies, is concerned, the forum prescribed in the Act, is the District Judge/Election Tribunal. But in so far as election to the office of "Chairperson" of the Municipality is concerned, although Section 57 of the Act prescribes that no Civil Court shall, in the course of any suit, grant any "temporary injunction" or make any interim order restraining any person from exercising the powers of performing the functions or duties of a Member, Chair person on the ground that such person has not been duly elected, yet, there is no embargo in the Orissa Municipal Act which prohibits the aggrieved party from questioning the election of a Chairperson by way of filing a declaratory suit before the appropriate Civil Court.

Sri Mohanty, further submits that if a purposive interpretation is given to Sections 18 and 57 of the Act, it would be clear that while the election of a Councillor may be challenged before the District Judge/Tribunal, the election of a Chairperson of a Municipality may be challenged before the competent civil Court, even though such Civil Court is statutorily barred from passing any temporary injunction, since the office bearers of such public bodies discharge public duties, therefore, while the election of a Chairperson, is permissible before the competent Civil Court, even though such civil court shall be bound by the statutory bar under Section 57 of the Act and may not grant any temporary injunction or any interim order restraining the elected

person from exercising his powers or performing the functioning of the duties under the statute.

7. Mr. Nanda, learned counsel for Opposite Party No.1 refers to the judgment of the Hon'ble Supreme Court in the case of **Jaspal Singh Arora v. State of M.P. and others**, (1998) 9 Supreme Court Cases 594. In the said judgment, the Hon'ble Supreme Court while considering the provisions of the M.P. Municipal Act came to conclude that the mode of challenging the election by an election petition had been provided under the said Act, covering such election and, therefore, such election could not be called in question except by an election petition as provided under that Act. Accordingly, Their Lordships concluded that the bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition.

8. The fact situation that arises for consideration in the present case is distinctly different while Sections 18 and 21 of the Act does provide the forum for challenge of an election of a 'Councillor' to a Municipal Body, these provisions do not cover a challenge to the election of a 'Chairperson' of such Municipal Body, and therefore, the same is covered by Section 57 of the Act. Therefore, for challenge to the election of 'Chairperson', an aggrieved party may move the Civil Court. Since both Sections 18 and 57 of the Act have been provided for by the State Legislature in the Municipal Act itself , the constitutional embargo imposed by Article 243-ZG, has been duly complied by the Legislature.

9. On consideration of the submissions made as noted hereinabove, we are of the clear view that it is well settled proposition of law that no person can be left remedy-less. Therefore, while the State Legislature by enacting Sections 18 and 21 of the Orissa Municipal Act, 1950 as provided for the Forum to challenge of the election of a Councilor i.e. District Judge/Election Tribunal, yet, though no specific forum has been provided for under the Act, challenge to the election of a 'Chairperson' may take place under Section 57 of the Act by initiating civil suits, questioning the election of office bearer of a Municipality including that of a Chairperson, even while the selfsame statute i.e. the Municipal Act restricts the jurisdiction of such Civil Court from passing temporary injunction or interim orders restraining such elected persons from exercising the powers or performing functions or duties as Chairperson or Officer of such Municipality.

10. In the light of what has been noted hereinabove, while giving a purposive interpretation to the provisions of the Act vis-à-vis the constitutional embargo provided under Article 243-ZG, we are of the considered view that the Election Petition filed by the Opposite Party No.1 seeking to challenge the writ petitioner's election as 'Chairperson' to Kesinga N.A.C., by way of filing the election petition under Section 18 of the Act, is

not maintainable and beyond the jurisdiction of the Election Tribunal. Accordingly, we set aside the order of the learned Dist. Judge, Kalahandi-Nuapada at Bhawanipatna dated 29.7.2009 and hold that Election Petition No.13 of 2008 pending before the District Judge, Kalahandi Nuapada at Bhawanipatna is not maintainable and beyond its jurisdiction.

Before parting, we may observe that it shall be open for the Opposite Party No.1 (Election Petitioner), if so advised, to file an appropriate declaratory suit before the competent Civil Court having jurisdiction over the

matter and if the Opposite Party files such a suit before a Civil Court of competent jurisdiction, such court shall do well to deal with the matter expeditiously and take steps to dispose of the matter within a period of six months from the date of filing of such civil suit in accordance with law and without being influenced in any manner by any of the observations made herein.

The writ petition is allowed to the extent indicated hereinabove.

Writ petition allowed.

2010 (I) ILR-CUT- 53

B.P.DAS, J & B.P.RAY, J.

DR.RAM NARAYAN MOHANTY -V- SWAMI VIVEKANANDA NATIONAL INSTITUTE OF REHABILITATION TRANING & RESEARCH & ANR.

OCTOBER 15, 2009.

CONSTITUTION OF INDIA, 1950 – ART.311,16

Voluntary retirement - When effective - Held, before the employee actually released from service he can withdraw his option for voluntary retirement.

In the present case petitioner applied on 26.02.2008 to take VRS w.e.f. 28.02.2009 - Petitioner made another application Dt.06.11.2008 to withdraw the above application - Competent authority replied on 10.11.2008 that the request of the petitioner for VRS w.e.f 28.02.2009 already accepted - Hence the writ petition.

Order of the competent authority would operate on and from 28.2.2009 and till then the jural relationship continues between the petitioner and his employer and during that period the petitioner has the option to withdraw his application for VRS.

(Para 6 & 7)

Case law Relied on : -

AIR 202 SC 1341 : (Sambhu Murari Sinha -V- Project & Development India Limited & anr.).

For Petitioner : Mr.Bijan Ray.

For Opp.Party No.1 : Mr.G.Rath.

---

*W.P.(C) NO.3242 OF 2009. In the matter of an application under Articles 226 and 227 of the Constitution of India.

B.P. RAY, J. In this application under Articles 226 and 227 of the Constitution of India, the petitioner has prayed for quashing the order under Annexure-3, by which the VRS of the petitioner was accepted by the competent authority of Swami Vivekananda National Institute of Rehabilitation Training & Research, Olatpur, Cuttack (in short, 'SVNIRTAR') which is an undertaking of Govt. of India in the Ministry of Social Justice & Empowerment.

2. Shorn of unnecessary details, the petitioner's case in brief is that he was working as Orthopaedic Surgeon in SVNIRTAR. The petitioner submitted an application under Annexure-1 dated 26.2.2008 for voluntary retirement from service. It was stated in the application that the petitioner would complete 20 years of service in the Institute on 16.2.2009. It was also stated that the petitioner was unable to continue in service because of his health problem and he may be permitted to take VRS w.e.f. 28.2.2009. According to the petitioner, when the application under Annexure-1 was pending consideration, the petitioner submitted another application under

Annexure-2, which is dated 6.11.2008 stating inter alia that the petitioner wanted to withdraw the application for voluntary retirement submitted by him under Annexure-1 and he be permitted to continue in service. The petitioner alleges that without considering the application under Annexure-2, the competent authority has communicated an Office Memorandum under Annexure-3 which is dated 10.11.2008, in which it was stated that the request of the petitioner for VRS from service w.e.f. 28.2.2009 has been accepted by the competent authority and accordingly, the petitioner would stand relieved from service on the due date. This order under Annexure-3 is assailed in this writ application solely on the ground that the petitioner having withdrawn the VRS application submitted by him before its acceptance, there was hardly any scope to pass the impugned order under Annexure-3.

3. A counter affidavit has been filed by the opposite parties refuting the allegations made in the writ petition. It was stated in the counter affidavit that the application for VRS submitted by the petitioner was forwarded by the Director in the letter under Annexure-B dtated 25.6.2008 to the Chairperson of the Executive Council, who is competent to take decision in the matter. The Chairperson of the Executive Council accepted the VRS of the petitioner and conveyed his approval in Annexure-C dated 31.10.2008, which was received by the Director on 4.11.2008 and this fact was intimated to the petitioner under Annexure-D, which has also been annexed to the writ petition as Annexure-3. It was also stated that the request of the petitioner for withdrawal of the VRS application was forwarded to the appointing authority and the appointing authority did not accept the request of the petitioner for withdrawal of the voluntary retirement from service under Annexure-E annexed to the counter affidavit. On the basis of these averments, it was stated that the writ application was not maintainable and the same was liable to be dismissed.

4. The petitioner has filed a rejoinder stating that the withdrawal of VRS application is valid before the employee was actually released from service. The opp. parties have filed a reply to the rejoinder, in which the averments made in the counter have been reiterated. However, the petitioner has filed a further reply to such affidavit filed by the opposite party which do not contain any additional facts.

5. Mr. Bijan Ray, learned Senior Counsel appearing for the petitioner submits that the petitioner having withdrawn his VRS application prior to its acceptance, the opposite parties have erred in law in accepting the VRS of the petitioner. On the other hand, learned counsel for the opposite parties submits that the VRS application of the petitioner was accepted by the competent authority and the factum of acceptance of VRS of the petitioner was conveyed in the letter under Annexure-C dated 31.10.2008. This factum of acceptance was merely communicated to the petitioner in the letter under

Annexure-D dated 10.11.2008. Therefore, according to Mr.Rath, learned counsel for the opposite parties, there is no infirmity in the order accepting the VRS of the petitioner.

6. The aforesaid rival contentions require careful consideration. Undisputedly, the petitioner submitted application for VRS and in that application the petitioner stated that the VRS sought by him be made effective from 28.2.2009. When this application was pending, the petitioner withdrew the same as would appear from Annexure-2 dated 6.11.2008. It is the contention of the opposite parties that the order of the competent authority accepting the VRS of the petitioner was communicated to the Director of the Institute under Annexure-C which was received in the Directorate on 4.11.2008 and only thereafter, the petitioner submitted an application withdrawing the VRS under Annexure-2 dated 6.11.2008. This factual aspect is seriously disputed by the learned counsel for the petitioner inasmuch as, according to Mr. Ray, learned counsel for the petitioner the order accepting VRS under Annexure-3 is dated 10.11.2008, whereas, the petitioner had submitted application for withdrawal of the VRS on 6.11.2008 and therefore, there was no impediment in permitting the petitioner to withdraw the VRS submitted by him.

7. Although, we find from the materials available on record that the order accepting the VRS of the petitioner was communicated in the letter under Annexure-C dated 31.10.2008 and was received in the Directorate on 4.11.2008, yet the same was communicated to the petitioner in the impugned order under Annexure-3, which is dated 10.11.2008. Therefore, the petitioner had withdrawn his VRS application prior to the order of acceptance was communicated to him. In our considered view, it was within the domain of the petitioner to withdraw the VRS application submitted by him prior to its acceptance. Law in this regard is no more res integra. The apex Court in the case of **Sambhu Murari Sinha v. Project and Development India Limited and another,** AIR 2002 SC 1341 has held that:-

> "in absence of a legal, contractual or constitutional bar, a prospective resignation can be withdrawn at any time before it becomes effective, and it, becomes effective when it operates to terminate the employment or the office-tenure of the resignor."

Keeping in view, the law laid down by the apex Court in the decision (supra), we are of the further view that the primary order under Annexure-C which is pressed into service to contend that VRS was accepted prior to the submission of the withdrawal application, itself states inter alia that the competent authority has conveyed the approval for VRS of the petitioner w.e.f.28.2.2009. In other words, the order accepting the VRS of the petitioner would be effective from 28.2.2009. Therefore, without entering into

the controversy that the order under Annexure-C was received in the Directorate on 4.11.2008 where after the petitioner submitted his withdrawal application, we hold that the withdrawal application was not affected in any manner whatsoever for the reason that the order of competent authority would operate on and from 28.2.2009. Therefore, jural relationship between the petitioner and his employer continues and during continuance of jural relationship, the petitioner had withdrawn his VRS application under Annexure-2, which is dated 6.11.2008. Since the VRS of the petitioner would operate on and from 28.2.2009, there was no impediment in withdrawing the VRS submitted by the petitioner prior to the same coming into operation.

In such view of the matter, the order under Annexure-3 is unsustainable in law and is liable to be quashed, which we hereby do.

Accordingly, the writ petition is allowed. No costs.

Writ petition allowed.

2010 (I) ILR-CUT- 57

A.S. NAIDU, J & B.K. NAYAK, J.

RAMESH NAIK - V - STATE OF ORISSA.

OCTOBER 8, 2009.

PENAL CODE. 1860 (Act No. 45 of 1860) SEC. 304, PART – II

Deceased refused to return the pet parrot of the appellant – Sudden provocation by the appellant due to such refusal – Appellant deprived of the power of self control – He picked up a Merha (Thenga) from the spot and dealt a blow on the head of the deceased which proved to be fatal.

When the appellant reached the spot he was totally unarmed – There was no plan or premeditation to cause death – Atbest only knowledge can be imputed to him that the Merha blow was likely to cause death of the deceased – Held, conviction U/s. 302 IPC is altered to Section 304 Part - II IPC.

Case law Relied on:

1987(II) OLR 307 : (San karsan Naik - V - State)

Case laws Referred to :-

1. AIR 1979 SC 1532 : (Shankar -V - State of Madhya Pradesh).
2. AIR 1983 SC 463 : (Jagtar Singh - V - State of Punjab).
3. 1986(II) OLR 313 : (Narasingha Bisoi - V - State).

For Appellant : M/s. Kalyan Patnaik, Sahadev Panda, S. Pattanaik & Ranjit Samal.

For Respondent : Government Advocate

---

*CRIMINAL APPEAL NO. 44 OF 2001. From the judgment and order dated 4.12.2000 passed by Shri Md. Abdul Majid, Additional Sessions Judge, Sonepur in Sessions Case No. 20/18 of 1999.

B.K.NAYAK, J. The judgement and order passed by the learned Additional Sessions Judge, Sonepur in Sessions Case No.20/18 of 1999 convicting the appellant under Section 302, I.P.C. and sentencing him to undergo imprisonment for life has been assailed in this appeal.

2. The short prosecution case, as set out in the F.I.R. lodged by one Jasoda Ranabansia (P.W.3) is that the son of the informant, namely, Chabila Ranabansia had caught a parrot from a mango tree and had kept in his house. On 10.07.1998, at about 6.00 A.M. while, the informant and her husband, Rabi Ranabansia were tending cattle near the village, the accused-appellant, Umesh Naik came there and abused the husband of the informant in filthy language stating that his son had caught and kept the parrot belonging to him. The informant's husband having protested and refused to give back the parrot, the appellant picked up a Merha (wooden lathi) from the spot and dealt a blow on his head, as a result of which, he fell down sustaining bleeding injury and became

unconscious. The appellant then dealt another blow by Merha on the right shoulder of the informant's husband and then left the place by throwing the Merha on the spot. On arrival of witnesses, the injured was taken to the U.G.P.H.C., Birmaharajpur and the informant lodged F.I.R. at Birmaharajpur Police Station, on the basis of which, P.S.Case No.50 of 1998 was registered under Sections 294/307 of the I.P.C. The injured was subsequently taken to VSS Medical College, Burla, but he succumbed to the injuries on the way whereupon the case turned to one under Section 302, I.P.C.

3. The plea of the accused is one of the complete denial of the occurrence.

4. In order to bring home the charge the prosecution examined altogether nine witnesses, whereas the defence examined one solitary witness, namely, Bhagaban Behera. Relying on the evidence of eyewitness, P.Ws.1, 2, 3 and 6, the trial court found the accused-appellant guilty under Section 302, I.P.C. and accordingly passed the impugned order of conviction and sentence.

5. In assailing the impugned judgment, the learned counsel for the appellant has contended that the evidence of the eye-witnesses cannot be relied upon because they were not present on the spot at the time of occurrence and secondly for the reason that they are all interested witnesses being related to the deceased. It is further contended by him that even if the evidence of the witness are accepted to be true, the appellant could not be convicted under Section 302, I.P.C., as he never intended to cause the death of the deceased and only dealt two blows by lathi which was picked up from the spot because of the quarrel and provocation given by the deceased and his refusal to return the parrot of the appellant.

6. The learned State Counsel, on the other hand, contended that the presence of the eyewitnesses on the spot cannot be doubted as they were the most natural witnesses, inasmuch as, their house was just near the place of occurrence. He also submits that the evidence of the eyewitnesses, who are related to the deceased, deserves more credence as they were not likely to implicate an innocent man to the exclusion of the real culprit.

7. We heard the learned counsel for parties in extenso and carefully perused the evidence on record. It transpires from the evidence of the doctor (P.W.5), who conducted autopsy over the body of the deceased and the post mortem report (Ext.2) that there was one lacerated wound of size 1" x ½" x ½" over the right shoulder joint and another lacerated wound of size 3 ½" x ¾" x ½", over the right parietal region of the scalp. The head injury has caused fracture of right parietal bone leading to haematoma. The cause of death of the deceased was intracranial haemorrhage due to fracture of skull. It is, therefore, clear that the single injury caused to the head of the deceased

proved fatal and caused the death. There can, therefore, be no doubt that the deceased met with homicidal death.

8. Evidence of P.Ws. 1 and 2, who are eyewitnesses to the occurrence reveals that hearing the shout of the wife of the deceased (P.W.3) they rushed to the spot and saw the appellant dealing one blow on the head of the deceased by a thenga and a second blow on the shoulder of the deceased, as a result of which, the deceased sustained bleeding injury on the head and fell down. Evidence of P.Ws. 1 and 2 is consistent with the evidence of P.W.3, who was all along present in person with the deceased on the spot. P.Ws. 1 and 2 are the mother and daughter respectively and their house is situated only about 15 qubits away from the place of occurrence. Admittedly, the deceased was the cousin of P.W.1 being the husband of her sister-in- law (Nananda). But then such relationship could not be a ground to disbelieve the clear and cogent testimony of P.Ws. 1 and 2, who have no animosity with the appellant. Law is well settled that evidence of interested witnesses, who are related to the victim is not to be thrown away on the ground of such relationship, but it is to be scrutinised carefully. It is also trite law that related witnesses would not implicate an innocent man against whom they have no axe to grind to the exclusion of real culprit. In the instant case, the evidence of P.Ws.1, 2 and 3 which suffer from no infirmity deserves full credence as they have no reason to falsely implicate the appellant in the offence in question.

9. Now it is to be determined whether the appellant can be convicted for the offence under Section 302 of the I.P.C. Argument had been advanced before the trial court that the offence if any committed by the appellant could be one under Section 304 Part-II of the I.P.C. and not under Section 302, I.P.C., but the trial court has observed that due to prior enmity between the deceased and the appellant over the issue of ownership of the parrot, the appellant had threatened the deceased to finish him and, therefore, he assaulted the deceased with the intention to cause his death. The observation of the trial court is wholly misconceived as there is no such acceptable evidence on record. The evidence of P.W.3 reveals that while she and the deceased were taking the cattle for tending, the appellant met them near the village temple and asked the deceased to return back the parrot, whereupon the deceased replied that he was not going to return it since it was caught by his son from a mango tree. This reply of the deceased enraged the appellant, who immediately picked up a Merha (thenga) from the spot and assaulted the deceased by the same. Similar is the evidence of P.Ws.1 and 2, the other two eye witnesses. The evidence thus reveals that the appellant met the deceased at the end of the village and claimed return of his pet parrot which was refused by the deceased. The appellant was present on the spot totally

unarmed and the refusal of the deceased to return the parrot provoked him and, therefore, being deprived the power of self control he picked up the Merha and dealt a blow on the head of the deceased which proved to be fatal. There was no plan or premeditation on the part of the appellant to cause the death of the deceased and at best only knowledge can be imputed to him that the Merha blow which was dealt by him was likely to cause death.

10. For the foregoing reasons, the offence would be one under Section 304, Part-II of the I.P.C. not amounting to murder which comes within provision under Section 304 Part-II of the I.P.C. This conclusion finds support from the principles laid down in the decisions reported in 1987 (II) OLR 307, **Sankarsan Naik v. State;** AIR 1979 SC 1532, **Shankar v. State of Madhya Pradesh;** AIR 1983 SC 463, **Jagtar Singh v. State of Punjab** and 1986 (II) OLR 313, **Narasingha Bisoi v. State.**

11. The appeal is thus allowed in part. The order of conviction and sentence passed against the appellant under Section 302 of the I.P.C. is set aside and in lieu thereof, the appellant is convicted under Section 304 Part-II of the I.P.C. It is said that the appellant has already suffered imprisonment for eleven years and is still languishing in jail. We therefore, sentence the appellant for his conviction under Section 304, Part-II of the I.P.C. to imprisonment for the maximum period prescribed by law which he has already undergone. The appellant be set at liberty forthwith unless his detention is required in any other case.

Appeal allowed in part.

2010 (I) ILR-CUT- 61

L.MOHAPATRA,J & B.N.MAHAPATRA,J.

SRI PRAVAT CHANDRA PANI & ORS.-V-COMPTROLLER & AUDITOR GENERAL OF INDIA & ORS.*

SEPTEMBER 4,2009.

CONSTITUTION OF INDIA,1950 – ART.16,39(d).

Stepping up of pay – Juniors on promotion placed on higher scale – Senior can not be paid less than his juniors.

In this case admittedly opp.party No.5 is junior to the petitioners – In the revised scale O.P.5 started getting salary of Rs.5450/- where as petitioners were getting Rs.5,300/- - Held, petitioners pay has to be stepped up with reference to the higher pay of Opp.Party No.5 along with arrear differential pay. (Para 6)

Case laws Referred to:

1.AIR 1997 SC 1783 : (Union of India & Ors.-v-P.Jagdish & Ors.).
2.(2009)3 SCC 94 : (Gurcharan Singh Grewal & Anr.-v-Punjab State Electricity Board & Ors.)

For Petitioners – M/s.R.K.Rath & N.R.Rout.
For Opp.Parties – Mr.P.K.Parhi, Addl.Standing Counsel (Central Govt.).

---

*O.J.C.NO.14579 OF 2001. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. The petitioners in this writ application challenge the legality of the order dated 6.8.2001 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack in Original Application Nos.362 and 363 of 2000 rejecting the prayer of the petitioners for stepping up of their pay to that of their junior, opposite party No.5.

2. The petitioners were initially recruited as Clerks on different dates in the year 1984 and 1985. In due course they were promoted as Accountants and subsequently as Senior Accountants with effect from 1.1.1992. The seniority of the petitioners as well as opposite party No.5 had been determined in the rank of Clerk on the basis of their merit position assigned by the recruiting authority and accordingly, a gradation list had been prepared. Similarly, in the rank of Accountant also a gradation list was prepared according to their dates of promotion. Opposite party No.5 was junior to the petitioners all through. Petitioners and opposite party No.5 were promoted to the post of Senior Accountant on the same date and, therefore, the petitioners also remained senior to opposite party No.5 in the rank of Senior Accountant. A circular was issued in the year 1988 with regard to passing of departmental examination and under the said circular, a candidate passing the examination is entitled to one advance increment.

The petitioners appeared in the departmental examination and cleared the same in the year 1994 and 1995. At the time of passing of examination they were getting pay of Rs.1480/- and those who have passed the departmental examination in the year 1994, one advance increment had been granted and they started drawing Rs.1520/- from April, 1994. Those who passed in the year 1995 also started drawing salary of Rs.1520/- from April, 1995 by getting one advance increment of Rs.40/-. Opposite party No.5, who is junior to the petitioners also appeared in the departmental examination along with them in the year 1994 and 1995, but failed to clear the same and accordingly did not get any advance increment. The said opposite party No.5 cleared the departmental examination in the year 1996. When the matter stood thus, the 5th Pay Commission recommendations were accepted with effect from 1.1.1996 and the scale of pay in which the petitioners were serving was revised to Rs.5000-8000/-. The petitioners were taken over to the revised scale of pay and started drawing Rs.5,300/- with effect from 1.1.1996. Opposite party No.5 who also came to the said scale of pay with effect from 1.1.1996 having passed the departmental examination in 1996 also started drawing pay of Rs.5,300/-. Even though the opposite party No.5 failed twice in the year 1994 and 1995 to clear the departmental examination, became entitled to one advance increment from 1.4.1996 having cleared the departmental examination in the year 1996. As a result, opposite party No.5 was granted one advance increment of Rs.40/- which had become Rs.150/- in the revised scale of pay and accordingly, he started getting salary of Rs.5450/- whereas the petitioners were getting Rs.5,300/-. Because of this anomaly in pay, the petitioners approached the Tribunal praying for stepping up pay on the ground that their junior was getting more salary than them. The Tribunal in the impugned judgment referred to FR-22 and dismissed the Original Application filed by the petitioners.

3. Shri Rath, the learned senior counsel appearing for the petitioners assails the impugned judgment on the ground that the opposite party No.5 is admittedly junior to the petitioners in the rank of Clerk, Accountant as well as Senior Accountant. Opposite party No.5 also failed to clear the departmental examination in the year 1994 and 1995. The 5th Pay Commission recommendation was accepted with effect from 1.1.1996 as a result of which, the pay of the petitioners was revised to Rs.5,000- 8,000/- and they started getting pay of Rs.5,300/- with effect from 1.1.1996. Opposite party No.5 having cleared the departmental examination in 1996, one advance increment was paid to him from April, 1996 making his salary Rs.5,450/- whereas the petitioners continued to get Rs.5,300/-. The petitioners admittedly being senior to opposite party No.5, their pay should have been stepped up and they should have been allowed to draw pay of Rs.5,450/-

with effect from the date the opposite party No.5 started getting the said salary.

4. Though a counter affidavit has been filed before this Court by the Department, the learned counsel appearing for the Department drew attention of the Court to Annexure-R/1. Annexure-R/1 is a communication from the Assistant Comptroller and Auditor General (N) to all field offices and Deputy Director (P) with regard to anomalies in the pay arising in the Sr. Auditors/ Sr. Accountants cadre as a result of passing Incentive Examination by a senior before 1.1.96 and junior after 1.1.96. The letter is quoted below :

" Circular No.20/NGE/2002
No.371-NGE(Entt)28-2002
OFFICE OF THE COMPTROLLER
AND AUDITOR GENERAL OF INDIA.

Date 3 MAY 2002

1. All field offices (as per mailing list)
2. Deputy Director (P)

Subject: Anomalies in pay arising in the Sr. Auditors/Sr.Accountants cadre as a result of passing Incentive Examination by a senior before 1.1.96 and junior after 1.1.96.

Sir,

For last few years anomalies in pay were being referred to Hqrs. Office by some field offices as a result of passing Incentive Examination for Sr.Auditors/Sr. Accountants by a senior before 1.1.96 viz-a-viz his junior who passed this examination after 1.1.96 and thus became eligible for grant of advance increment in the revised scale under CCS (Revised Pay) Rules 1997.

Ministry of Finance, Government of India, to whom the matter was referred previously, did not allow such stepping up as circulated vide Headquarters office circular letter No.606/NGE (Entt)/28-2000 dated 1.8.2000. Now on reconsideration the Ministry has agreed to allow benefit of stepping up of pay, as a special case, subject to the condition that no arrears of pay and allowances shall be granted.

Individual proposals for stepping up of pay of seniors who passed incentive examination before 1.1.96 and are drawing lesser pay than their juniors who passed the said examination after 1.1.96 and became eligible for grant of advance increment in revised scales under CCS (RP) Rules 1997 may be sent to this office along with comparative statements of pay from time to time and certificate of first junior, for necessary verification and issue of sanction orders.

Yours faithfully,
Sd/-

(MEERA SWARUP)
ASSTT. COMPTROLLER AND
AUDITOR GENERAL (N)"

5 Referring to the said letter it was contended by the learned counsel for the Department that the proposal for stepping up of pay of the seniors, who passed incentive examination before 1.1.96 and are drawing lesser pay than their juniors, who passed the said examination after 1.1.96 and became eligible for grant of advance increment in revised scales is under consideration and as it appears in paragraph-2 of the said letter, a decision has been taken to allow them benefit of stepping up of pay but without any arrears.

6. On perusal of the said letter in Annexure-R/1, it appears that now on reconsideration the Ministry has agreed to allow benefit of stepping up of pay, as a special case, subject to the condition that no arrears of pay and allowances shall be granted. In this connection, reference may be made to a decision of the Apex Court in the case of **Union of India and others v. P.Jagdish and others** reported in AIR 1997 Supreme Court 1783. In the reported case the question was stepping up of pay of seniors. Incumbents not getting special pay were promoted to the post of Head Clerks earlier than their juniors, who were getting special pay. The juniors on promotion were placed on higher slab taking into account the special pay drawn by them in lower cadre. The Apex Court held that pay of seniors is required to be stepped up to figure equal to pay as fixed for juniors in higher post. In the case of **Gurcharan Singh Grewal and another vrs. Punjab State Electricity Board and others** reported in (2009)3 Supreme Court Cases 94, the Apex Court considered Rule 27 of the Fundamental Rules and held that a senior cannot be paid less than his juniors, even if anomaly in senior's pay is due to difference of incremental benefits. Senior's pay has to be stepped up with reference to higher pay of junior. In view of what has been decided in the above two cases and also decision of the Department in Annexure-R/1, there cannot be any doubt in mind that the petitioners are entitled to step up of pay and they should be paid the pay drawn by their junior, opposite party No.5. The petitioners are entitled to pay of Rs.5,450/- with effect from April, 1996 i.e. the date on which their junior, opposite party No.5 was paid. Coming to the question of arrears, the anomaly having taken place due to wrong interpretation of the rule made by the Department, the petitioners are also entitled to the differential pay for the period from April, 1996 till the date of stepping up.

7 We accordingly set aside the order of the Tribunal impugned before us and direct that the petitioners be paid salary of Rs.5,450/- from April, 1996 till the actual stepping up is done and the arrear differential pay be also calculated and paid within a period of six months.

The writ application is accordingly allowed.

2010 (I) ILR-CUT- 65

L.MOHAPATRA, J & B.N.MAHAPATRA,J.
GOPABANDHU BISWAL -V- UNION OF INDIA & ORS.*
OCTOBER 9,2009.

CONSTITUTION OF INDIA, 1950 – ART.311.

Adverse remark – Representation for expunction – Representation rejected without assigning reasons – This Court called for the records – Deputy Secretary in his notes not only pointed out the justification for such adverse remark but also dealt with the grounds taken in the representation and on perusal of the same the Special Secretary to Government accepted the reasons and rejected the representation – Held, it can not be said that no reason has been assigned while rejecting the representation and this Court can not sit in appeal and come to a different conclusion.

(Para 5)

Case law Referred to:-

2009(4)SCC 240 : (Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank -v-Jagdish Saran Vershney & Ors).

For Petitioner – M/s.A.K.Mishra, j.Sengupta, D.K.Panda,P.R.Jibandash & G.Sinha.

For Opp.Parties – Mr.J.K.Mishra, S.Ch.Samantray
Central Government Counsel(for O.P.1)
Addl.Standing Counsel (For O.P.2 to 4).

---

*W.P.(C) NO.4245 OF 2002. In the matter of an applications under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA,J. The petitioner, who was applicant before the Central Administrative Tribunal, Cuttack Bench, Cuttack in Original Application No. 461 of 2000, has filed this Writ application assailing the order of the Tribunal dated 26.9.2001 passed in the aforesaid O.A.

2. The petitioner is an I.P.S Officer of Oirssa Cadre and at the time of filing of O.A., he was holding the post of D.I.G. of Police. In the said O.A., he prayed for quashing the order dated 13.1.2000 communicating adverse remark made against him for the period from 1.4.1998 to 24.3.1999 and also the order dated 27.5.2000 rejecting his representation for expunction of adverse remark. Counters and rejoinder were filed before the Tribunal and on consideration of the materials placed, the Tribunal came to hold that the petitioner is not entitled to relief claimed and, accordingly, dismissed the O.A.

3. In course of hearing, Shri Aswini Mishra, learned Senior Counsel appearing for the petitioner assailed the impugned judgment on the ground that adverse remark had been made without any basis and order of rejection

of the representation also suffers from non-application of mind. It was also contended by the learned Senior Counsel that there was no basis for making such adverse remark and when the petitioner submitted a representation for expunction of the said remark on the grounds stated therein, the said representation was rejected without assigning any reason. The representation having been rejected without assigning any reason according to the learned counsel for the petitioner, cannot stand the test of law and, therefore, the matter should be remitted back to the competent authority for reconsideration of the representation. Adverse remark communicated to the petitioner is the subject matter of Annexure-1, which is quoted below:-

"**Shri H.V.A.Suba Rao, I.A.S.**
ADDL.SECRETARY TO GOVERNMENT

GOVERNMENT OF ORISSA

GENERAL ADMINISTRATION(S.E.) DEPARTMENT

D.O.No.206 /SE. Bhubaneswar
The 13.1.2000

Dear Sri Biswal,

Review of the confidential report on your work for the year 1998-99 (from 1.4.98 to 24.3.99) reveals that your dedication to duty should improve. You had lost perspective and acted way ward at times.

Government hope you will try to improve.

If you wish to make any representation against the above adverse remarks, you may do so (in quadruplicate) within 45 days of receipt of this letter.

Regards

Yours sincerely,
(H.V.A.Suba Rao)

Shri Gopabandhu Biswal, I.P.S.
Commandant, Second Bn.
Jharsuguda."

4. As is evident from the above, the first part of the remark is not adverse but is advisory in nature. However, the second part of the remark is adverse. It appears that against the said adverse remark, the petitioner submitted a representation on 4th February,2000 for expunction of the same and the 2nd representation was made on 28th February,2000 for the self-same purpose. The representation dated 4th February,2000 was processed and considered. By letter dated 27.5.2000, the petitioner was intimated that his representation for expunction of adverse remark has been rejected.

5. The first ground taken by the learned counsel for the petitioner is that there were no materials for making such adverse remark. In the representation submitted by the petitioner on 4th February,2000, he has stated about his achievement during the relevant period and prayed for

expunction of the adverse remark. Law is well settled that neither the Tribunal nor this Court can sit in appeal and decide as to whether there were materials for passing an adverse remark. The Court has to only see as to whether the representation of the petitioner filed before the competent authority for expunction of adverse remark has been dealt with reasons or not. Therefore, this Court is incompetent to entertain the first ground of challenge regarding non-availability of materials for passing the aforesaid adverse remark. So far as disposal of the representation is concerned, undisputedly, rejection order communicated to the petitioner does not indicate any reasons. We, therefore called upon the learned counsel for the Central Government to produce the records. From the records, we find that the Deputy Secretary to Government in the concerned Department had given his notes taking into account the grounds taken in the representation filed by the petitioner. The said report was accepted by the Additional Secretary to Government in the G.A.Department dated 1.5.2000 and the file was placed before the Special Secretary to Government in the G.A. Department for consideration. The Deputy Secretary in his noties has not only pointed out the justification for such adverse remark but also dealt with the grounds taken in the representation. On perusal of the same, the Special Secretary to Government accepted the reasons and rejected the representation. Therefore, it can not be said that no reasons have been assigned while rejecting the representation against the adverse remark. Though we agree with the learned Senior Counsel for the petitioner that the order communicating to the petitioner regarding rejection of his representation does not indicate any reasons, we find that reasons are recorded in the file itself. Reliance was placed by the learned Senior Counsel for the petitioner on a decision of the Hon'ble Supreme Court in the case of **Chairman, Disciplinary Authority, Rani Lakshmit Bai Kshetriya Gramin Bank Vrs. Jagdish Saran Versheny and others** reported in 2009(4) SCC 240. The Hon'ble Supreme Court in the said decision has held that while considering the representation for expunction of adverse remark, reasons should be assigned. The reasons may not be elaborate but some reasons should be assigned for rejecting the representation. As stated earlier, from the file produced before us, we find that reasons have been assigned for rejecting the representation and, therefore this Court cannot sit in appeal and come to a different conclusion.

6. For the reasons stated above, we do not find any merit in the writ application and, accordingly, dismiss the same.

Writ petition dismissed.

2010 (I) ILR-CUT- 68

L.MOHAPATRA, J & B.P.RAY, J.

S.SIMANCHAL PATRO -V- STATE OF ORISSA

NOVEMBER13, 09

PENAL CODE 1860 - (ACT NO. 45 OF 1860) SEC .304 - B 498-A & Sec 4 D.P.Act.

Allegation against the appellant is that he pressurised his wife (deceased) to sell the house at Tikabali - No other material to show that the deceased was subjected to harassment or cruelty for any other demand which can be termed as dowry demand. Held, conduct of the appellant in putting pressure on the deceased to sell the house at Tikabali does not attract dowry demand & as such comes within the purview of requirement of section 304-B I.P.C and the appellant could not have been convicted there under. Moreover there being no evidence that there was any demand of dowry the appellant also could not have been convicted U/s. 498-A I.P.C & Section 4 of D.P.Act.

(Pare 13)

For Appellant : Mr.J.Katikia.
For Respondent : Addl.Govt.Advocate.

---

*CRLA NO. 119 OF 2002. From the judgment and order dated 08.11.2002 passed by Sri B.N.Jena, 1st Addl. Sessions Judge, Berhampur in Sessions Case No.11 of 2001/ Sessions Case No.54 of 2001 GDC.

L. MOHAPATRA, J. The appellant having been convicted for commission of offence under Sections 304-B/498-A of the Indian Penal Code, (in short, 'I.P.C.') and under Section 4 of Dowry Prohibition Act (in short, 'D.P. Act') by the learned 1st Addl. Sessions Judge, Berhampur in Sessions Case No.11 of 2001/Sessions Case No.54 of 2001 G.D.C., has preferred this appeal against the order of conviction and sentence. For offence under Section 304-B of I.P.C., the appellant has been sentenced to imprisonment for life, for conviction under Section 498-A of I.P.C., he has been sentenced to imprisonment for three years and for conviction under Section 4 of D.P. Act, he has been sentenced to imprisonment for two years. However, all the sentences have been directed to run concurrently.

2. The case of the prosecution as revealed from the record is that the deceased-P. Bhagyabati was working as an Anganwadi Worker in Tikabali in the district of Phulbani and she was given in marriage to the appellant on 7.12.1995. At the time of marriage cash of Rs.50,000/-, a sum of Rs.15,000/- towards furniture and 5 tolas of gold ornaments were given to the deceased and one tola of gold ornament was given to the mother of the appellant. It was agreed that the deceased would continue in her service and the appellant would start a business at Tikabali. For about two years after the marriage, the deceased continued at Tikabali and the appellant was joining

with her. Thereafter, it is alleged that the appellant started putting pressure on the deceased for getting the house at Tikabali registered in her name and also started ill-treating her. As promised at the time of marriage, preliminary arrangements were made for opening a shop at Tikabali and the appellant was asked to invest a sum of Rs.10,000/-. The appellant, on the other hand, insisted that the deceased should leave her job and join him at his own place at Chikitipentha after selling the house at Tikabali. For this dispute, the caste members called a meeting on 1.8.1999 at the instance of the appellant. It was decided in the caste meeting that the deceased would proceed on leave and join the appellant in his village and the document transferring the house in the name of the deceased would be registered and the same would not be sold without permission of the caste members. Accordingly, the deceased joined the appellant in his house on 18.8.1999. A gift deed was executed in favour of the deceased in respect of the house at Tikabali. After the normal relationship was restored, the appellant again insisted upon the deceased to sell the house at Tikabali. But the deceased was unwilling to do so. Ultimately, both of them went to Tikabali and sold the house for a sum of Rs.95,000/- on 29.3.2000 to the daughter of P.W.1. Suddenly on 20.5.2000 at 8.05 A.M., the deceased was admitted to M.K.C.G. Medical College Hospital, Berhampur by the appellant with 99% burn injuries. P.W.9 after this occurrence lodged the F.I.R. at Mahila Police Station, Berhampur. The Inspector-in-charge of the said Police Station visited the Hospital and found the deceased in a precarious condition. The deceased died on 26.5.2000 at about 9.40 A.M. After completion of investigation, charge sheet was submitted against the appellant for commission of offence under Sections 498-A, 304-B of the I.P.C. as well as under Section 4 of the Dowry Prohibition Act.

3. The prosecution in order to bring home the charges examined 12 witnesses whereas, one witness was examined on behalf of the defence. The plea of the appellant is that he was working as a Conductor and the deceased was working at Tikabali. During first two years of marriage, he was often going to Tikabali. When his left hand was operated and his father also became ill, the deceased did not come to his house, even though she was called. On the other hand, he was asked to come to Tikabali and stay with her as an illatom son-in-law, which he refused. According to the appellant, the deceased caught fire from gas burner while boiling water and a false case had been foisted against him.

4. Out of 12 witnesses examined on behalf of the prosecution, P.W.9 is the informant and brother of the deceased. P.W.1 is the father of one Samita Panigrahi, who had purchased the house from the deceased. P.W.2 deposed about the decision taken in the caste meeting and the pressure put on the deceased by the appellant for selling the house. P.W.3 is a witness to

seizure and P.W.4 is the Constable, who had accompanied the dead body for post mortem examination, P.W.5 is a witness to the inquest and P.W.6 is a witness to seizure of some gold and silver ornaments and other materials. P.W.7 deposed about the conduct of the parties after marriage and P.W.8 is the Doctor, who conducted the post mortem examination, P.W.10 is a witness to the seizure of the bed head ticket, P.W.11 is the brother-in-law of the deceased and P.W.12 is the I.O.

5. On analysis of evidence of these witnesses examined by the prosecution in course of trial, the trial court came to a conclusion that the death of the deceased occurred within 7 years of the marriage in the house of the appellant and the cause of death remains unexplained by the appellant who had a duty to explain the same. It is also found that the death was directly connected with cruelty meted out for fulfillment of dowry demands and accordingly, the trial court found the appellant guilty of the charges and convicted him thereunder.

6. Learned counsel appearing for the appellant assailed the impugned judgment on the ground that the ingredients of Section 304-B of I.P.C. had not been established by the prosecution in course of trial. With a reference to the evidence adduced by the prosecution, it was contended by the learned counsel for the appellant that though the death of the deceased occurred within 7 years of marriage, there is no evidence on record to show that preceding the death of the deceased there was any demand of dowry or that the deceased was tortured for non-fulfillment of such dowry demand. It was also contended by the learned counsel that immediately after marriage, there is no material to show that there was any demand and, therefore, the appellant could not have been convicted for commission of offence either under Section 498-A of I.P.C. or under Section 4 of D.P. Act.

7. Learned Addl. Govt. Advocate in support of impugned judgment submitted that the appellant insisted upon selling of the house belonging to the deceased at Tikabali for the purpose of utilizing the consideration money for his own purposes and six days prior to the death of the deceased, the house had been sold for a sum of Rs.95,000/-. Therefore, it cannot be said that there was no demand of dowry or that the deceased had not been subjected to torture for non-fulfillment of dowry demand immediately preceding her death. Admittedly, as the death has occurred not in normal circumstances within 7 years of marriage, the presumption is that it is a case of dowry death.

8. Keeping in mind the submissions made by the counsel appearing for both the parties and the findings arrived by the trial court, we examined the evidence carefully. P.W.9 who is the brother of the deceased lodged the F.I.R. In his deposition, he stated that during marriage besides furniture and gold ornaments cash of Rs.50,000/- had been given to the appellant. Since

the deceased was working as a Teacher in the Anganwadi Centre at Tikabali, it was decided that the appellant would shift to Tikabali and stay there in the house given to the deceased by her father and the appellant had agreed to the said condition. For a month or two after the marriage, the deceased remained in the house of the appellant and thereafter both of them came to Tikabali. A house was arranged and furniture were prepared for running a shop and the appellant was requested to make an initial investment of Rs.10,000/-. Two months thereafter, the appellant refused to come to Tikabali to run the business and about one month thereafter, the appellant took away the deceased for a festival and did not allow her to come back Tikabali and join service for about a month. On return to Tikabali, the deceased told him that the appellant was insisting her to give up the job and stay with him where he intends to start a business. She also expressed that the appellant asked her to bring money from her father to start a business at Khani Poda. The deceased, however, continued to serve for one and half months. Thereafter, the appellant took her back on the ground of his father's illness. The deceased was not allowed by the appellant to join at Tikabali and ultimately this witness along with his brother brought her to Tikabali. This witness further alleges that 10 days later the appellant started demanding a sum of Rs.15,000/- which was paid. When this dispute was going on and the deceased was serving at Tikabali, the appellant filed a petition before the caste society alleging therein that the deceased was not being allowed to join with him. The caste society advised the family of the deceased that the deceased must give up her job and the house spared by the father of the deceased should be registered in the name of the deceased. On 1.8.1999, the Maha Sangha of their caste society asked them to appear and a decision was taken to the effect that the deceased would go on leave and the house at Tikabali would be registered in her name but the appellant shall not transfer the house without permission of the Maha Sangha. According to the above decision on 18.8.1999, the deceased was left in the house of the appellant and the house at Tikabali was also registered in the name of the deceased. Thereafter, the relationship became normal with usual exchange of visits. Towards March, 2000, this witness came to know from the deceased that the appellant was insisting her to sell the house at Tikabali and was ill treating her. Though a complaint was made before the Maha Sangha, no decision was taken and on 29th March, 2000, the deceased sold the house to one Biswanath Panda. After the house was sold, the appellant and the deceased came to the house of this witness and paid Rs.95,000/- towards sale proceeds. However, on the next day morning, both of them went back with the money to the place where the appellant used to stay. On 20th May, 2000, they heard about the injuries sustained by the deceased and when he came to the Hospital, he saw the deceased lying

with her entire body burnt. She was incapable of talking. Next day morning, he lodged a report before the Police. We have carefully perused the cross-examination of this witness, but did not find any material to disbelieve his testimony.

9. P.W.7 is another witness, who stated that before marriage, the deceased was serving as Anganwadi Teacher at Tikabali and during marriage negotiation, the father of the deceased proposed that after marriage, the deceased would continue in service and if necessary, the appellant may have to stay at Tikabali in his house which was promised to be given to the deceased. He has further stated that the appellant insisted the deceased to sell the house at Tikabali as he was in need of money and utilize the same for some new business. He has further stated that during stay of the deceased with the appellant, one day early morning, the appellant and his brother came to his house at about 5.00 A.M. and requested him to go to their house to shift the deceased to the hospital saying that the deceased had been burnt alive by an accidental fire from a Kerosene fed lamp as her synthetic saree got fired while she had been to attend the call of nature. P.W.2 has stated that in the year 1999, there was a report of misunderstanding and family conflict between the accused and his wife, for which he as the Secretary of the caste society, went to bring about reconciliation and settle the dispute. In his deposition, he further stated that as far as he remembers, it was decided that the house given to the deceased by her parents would not be sold without permission of the caste society, but some time thereafter the deceased once came to him and said that she was being pressurized by the appellant to sell the house.

10. P.W.11 is another witness who is related to the deceased. He has supported the allegations made by P.W.9 to some extent. The other witnesses except the doctor and the I.O. are not material for the purpose of the case. P.W.8 is the doctor, who conducted the post mortem examination and he was of the view that the burn injuries were ante mortem in nature caused by dry heat and the cause of death was due to septicaemic shock as a result of complications arising out of the burn injuries. He further stated that if a person is poured with kerosene oil and lit with a matchstick while in a sleeping condition, such injuries are very much possible.

11. On analysis of the above evidence, it is clear that the deceased died due to burn injuries sustained by her. There is no charge under Section 302 of the I.P.C. and the only charge is under Section 304-B of the said Code. Section 304-B, I.P.C. defines dowry death. It prescribes that where the death of a woman is caused by burns or bodily injury or occurs otherwise than under normal circumstances within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand

for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death. Undisputedly, in the present case, the death of the deceased is caused by burn injuries and within 7 years of marriage. The prosecution was further required to prove and establish that soon before the death of the deceased, she was subjected to cruelty or harassment by the appellant for or in connection with any demand for dowry. The evidence adduced by the prosecution through P.Ws.7,9 & 11 establish that prior to the death of the deceased, the appellant was pressuring the deceased to sell the house standing in the name of the deceased at Tikabali and ultimately the said house had been sold. Whether this conduct of the appellant would come within the purview of "subjecting the deceased to the cruelty or harassment in connection with the demand of dowry", is a matter to be examined.

12. Reliance was placed by the learned counsel for the appellant in a decision of the Hon'ble Supreme Court in the case of **K. Prema S. Rao and another Vrs. Yadla Srinivasa Rao and others** reported in 2003 SCC (Cri) 271. In the said reported case, the deceased was married to the appellant on 26.6.1988. Dowry was given at the time of marriage including 5 acres of land and a house site as a customary gift to the deceased by her father. Three to four months after the marriage, the husband started demanding that the landed property standing in the name of the wife be transferred to him. When the deceased refused, trouble between the two started and it was alleged that the husband subjected the deceased-wife to harassment. While considering the question as to whether such conduct of the husband in insisting the wife to transfer the land in his favour would amount to demand for dowry or not, the apex Court took the following view. In paragraph 16 of the said Judgment, it has been held that:-

> "….The evidence which has been found acceptable by the courts below against Accused 1 is that the cruel treatment and harassment of the deceased by him led her to commit suicide which was a death "otherwise than under normal circumstances". To attract the provisions of Section 304-B IPC, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty and harassment "in connection with the demand for dowry". There is no evidence on record to show that the land was demanded as a dowry. It was given by the father to the deceased in marriage ritual as *pasupukumkuma*. The harassment or cruelty meted out to the deceased by the husband after the marriage to force her to transfer the land in his name was "not in connection with any demand for dowry". One of the main ingredients of the offence of "demand of dowry" being absent in this

case, the High Court cannot be said to have committed any error in acquitting Accused 1 for offence under Section 304-B IPC."

13. In the present case as stated earlier, the only allegation against the appellant is that he pressurized his wife (the deceased) to sell the house at Tikabali. There is no other material to show that the deceased was subjected to harassment or cruelty for any other demand which can be termed as dowry demand. In view of what has been decided by the apex Court in the aforesaid case, we hold that the conduct of the appellant in putting pressure on the deceased to sell the house at Tikabali does not come within the purview of requirement of Section 304-B of the I.P.C. and accordingly, the appellant could not have been convicted thereunder. So far as offences under Section 498-A of the I.P.C. and Section 4 of the D.P. Act are concerned, as is evident from the evidence of P.W.9, at no point of time there was any demand except the articles which had been given at the time of marriage to the deceased. Therefore, the appellant could not also have been convicted for commission of offences under Section 498-A of the I.P.C. or under Section 4 of the D.P. Act.

For the reasons stated above, we allow the appeal and set aside the impugned judgment. It is stated that the appellant is in custody till now. If that be so, he be set at liberty forthwith unless his detention is required in any other case.

Appeal allowed.

2010 (I) ILR-CUT- 75

L.MOHAPATRA,J & B.P.RAY,J.

PURANDORA KHINANG -V- STATE OF ORISSA.*

NOVEMBER 17,2009.

EVIDENCE ACT,1872 (ACT NO.1 OF 1872) – SEC.24

Extrajudicial confession – No Court should start with a presumption that it is a weak type of evidence – The witness must be unbiased, not even remotely inimical to the accused – The words spoken by the witness must be clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime.

In this case the appellant immediately after the occurrence holding a blood stained Tangia instantly confessed before P.Ws.1 & 2 to have killed his brother – Chemical examination report shows that the blood stained earth seized from the spot, Tangia seized from the appellant and the wearing apparels of the appellant and the deceased seized in course of investigation contained human blood of A B group – Held, all these factors establish the charge regarding the involvement of the appellant in committing murder of his brother.

(Para 6,7)

Case laws Referred to:-

1.1985(1) OLR.638 : (Bhanu Dei -v- State).
2.61(1986)CLT 133 : (Dinabandhu Munda -v-State of Orissa).
3.1984(1) OLR.199 : (Kotari Suri -v- The State of orissa).
4.(1999) 17 OCR(SC) 502 (State of Punjab -v- Gurdeep Singh).
5.1993CRI.L.J.3364 : (Sitaram Vishnu Chalke-v-State of Maharashtra).
6.AIR 1975 SC 258 : (The State of Punjab -v- Bhajan Singh & Ors).
7. 1992(II) OLR 63 : (Binder Munda -v- State).
8. AIR 2008 SC.2819 : (Kusuma Ankama Rao -v- State of Andhra Pradesh).

For Appellan – M/s.Jugal Kishore Panda, Chinmaya Mohanty & S.Panigrahi.

For Respondent – Additional Government Advocate.

---

*CRIMINAL APPEAL NO.188 OF 2001. From the judgment and order dated 3.8.2001 passed by Shri S.K.Mishra, Addl.Sessions Judge, Jaypore in S.C.No.34 of 1999.

L.MOHAPATRA, J. This appeal has been filed assailing the judgment and order dated 3.8.2001 passed by the learned Additional Sessions Judge, Jeypore in Sessions Case No.34 of 1999 convicting the appellant for commission of offence under Section 302 of the Indian Penal Code (in short 'I.P.C.') and sentencing him to undergo imprisonment for life and fine of Rs.2,000/-, in default, to undergo further R.I. for one year.

2. The case of the prosecution as revealed from the record is that on 14.11.1998 at about 9 P.M. the appellant was knocking his door when P.Ws.1 and 2 got up from sleep, came out of the house and found the appellant standing with a blood stained Tangia. On being questioned, the appellant confessed to have killed his brother Kaladhar Khilar. Thereafter, the appellant was caught hold of and the tangia was snatched away from his hands. The matter was reported to the police by P.W.1 which was treated as F.I.R. and investigation was taken up. On completion of investigation, charge-sheet was submitted for commission of offence under Section 302 of the I.P.C.

3. Prosecution in order to prove the charge, examined 10 witnesses but none was examined on behalf of the appellant. Out of 10 witnesses examined on behalf of the prosecution, P.W.1 is the informant. Extra judicial confession was made by the appellant before P.Ws.1 and 2. P.W.3 is the wife of the appellant. P.Ws.4, 5 6, 7 and 8 turned hostile. P.W.9 is the doctor, who conducted the postmortem examination and P.W.10 is the I.O. The trial court on the basis of the extra judicial confession made by the appellant before P.Ws.1 and 2 coupled with the postmortem and chemical examination reports, found the appellant guilty of the charge and convicted him thereunder.

4. The learned counsel for the appellant assailed the impugned judgment on the ground that extra judicial confession by itself is a week piece of evidence and therefore, solely on the basis of the extra judicial confession, the trial court could not have convicted the appellant for commission of the alleged offence. It was also contended by the learned counsel that P.Ws.1 and 2 before whom the prosecution alleges that the appellant made the extra judicial confession were not in friendly term with the appellant and the basis of evidence shows that they had enmity and therefore, under these circumstances, no reliance could be placed on the evidence of P.Ws.1 and 2 so far as extra judicial confession is concerned. According to the learned counsel, once extra judicial confession is left out of consideration, there is no other material to connect the appellant with the alleged crime and therefore, the impugned judgment convicting the appellant is unsustainable.

Learned counsel for the State submitted that though P.Ws.1 and 2 have stated that they were not in friendly term with the appellant, considering the manner and circumstances under which the extra judicial confession was made, the evidence of P.Ws.1 and 2 in that regard cannot be brushed aside. According to the learned counsel for the State, the extra

judicial confession made before P.Ws.1 and 2 coupled with the conduct of the appellant immediately after the occurrence, the injuries found on the body of the deceased and the chemical examination report, clearly point at the guilt of the appellant and therefore, there is no reason for this Court to interfere with the impugned judgment.

5. We have carefully scrutinized the evidence of these two witnesses examined on behalf of the prosecution in course of trial. P.W.1 is the informant and is a neighbour of the appellant. He in his deposition has stated that in the night of occurrence at about 9 P.M. when he was in his house, he heard sound from outside. Being curious about the sound, he came out and found the appellant standing in front of his house which situates near the house of this witness. P.W.2 was also present there. This witness asked the appellant as to what he was doing so late in the night and the appellant replied that he had committed murder of his own brother and showed the dead body of his deceased brother lying by the side of his own house. At that time the appellant was holding a blood stained Tangia and his wearing apparels were also stained with blood. Fearing that the appellant may flee away, they caught hold of him, called the village Naik and other members of the village and took the appellant to the Police Station along with the weapon of offence. Thereafter he orally reported about the matter. In cross-examination this witness has stated that he and P.W.2 were present when the appellant made a confession before them and that he was not in friendly terms with the appellant. P.W.2 whose presence at the time when the appellant made the extra judicial confession is stated by P.W.1 has also supported by P.W.1 in every respect and he has also stated in cross-examination that he was not in friendly relationship with the appellant. P.W.3 is the wife of the appellant and she was declared hostile. Similarly P.Ws.4, 5, 6, 7 and 8 were declared hostile. P.W.9 is the Doctor, who conducted postmortem examination and found two incised wounds on the body of the deceased. One of the incised wounds was over the right side neck and the other was also over the right side neck just below the first injury. P.W.9 was of the opinion that all the injuries were ante mortem and homicidal in nature. They were also sufficient in the ordinary course of nature to cause death. He also opined that the injuries could be caused by Tangia which is stated to be the weapon of offence. P.W.10 is the I.O.

On analysis of the evidence of these witnesses, it appears that at about 9 P.M. in the night of occurrence, P.Ws.1 and 2 heard a sound from outside and came out of the house. They saw the appellant standing in front of his house with a blood stained Tangia and P.W.1 asked him as to what he was doing so late in the night. The appellant confessed before them to have committed murder of his brother and showed them the dead body. From the evidence of P.Ws.1 and 2, it is clear that not only the appellant

made an extra judicial confession before them admitting to have committed murder of his brother, but also he was found standing in front of his house with a blood stained Tangia and also showed the dead body of the deceased to both P.Ws. 1 and 2. The question raised before this Court is as to whether the extra judicial confession made before P.Ws.1 and 2 can be accepted or not. Learned counsel appearing for the appellant with reference to the evidence of P.Ws.1 and 2 submitted that both these witnesses admitted in cross-examination that they were not in friendly term with the appellant. P.W.4 who turned hostile also stated in cross-examination that P.Ws.1 and 2 did not pull on well with the appellant. In view of such statement made by P.Ws.1, 2 and 4, it is stated by the learned counsel that it is improbable that the appellant would make an extra judicial confession before two persons with whom he does not have a friendly relationship. Learned counsel for the appellant in this regard referred to a number of decisions of this Court and the apex Court. The said decisions are ***Bhanu Dei v. State, reported in 1985(1) O.L.R. 638***, ***Dinabandhu Munda v. State of Orissa, reported in 61(1986) C.L.T.133***, ***Kotari Suri v. The State of Orissa, reported in 1984 (1) O.L.R. 199***, ***State of Punjab v. Gurdeep Singh, reported in (1999) 17 OCR (SC) 502***, ***Sitaram Vishnu Chalke v. State of Maharashtra, reported in 1993 CRI. L.J. 3364, The State of Punjab v. Bhajan Singh and others, reported in AIR 1975 Supreme Court 258*** *and* ***Binder Munda v. State, reported in 1992 (II) OLR 63***.

On perusal of all the aforesaid decisions, we find that the Courts have observed that extra judicial confession by itself is a weak piece of evidence, but at the same time, an order of conviction can lie, if such extra judicial confession is found to be voluntary and true. In order to find out as to whether such extra judicial confession is voluntary and true or not, it is necessary to examine the evidence of such witnesses speaking about extra judicial confession carefully to find out the exact words used by the appellant while making a confession and the reason for making such extra judicial confession.

6. In a recent decision, the Supreme Court in the case of ***Kusuma Ankama Rao v. State of Andhra Pradesh, reported in AIR 2008 Supreme Court 2819,*** while analyzing Section 24 of the Evidence Act, observed as follows:

> "An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The value of the evidence

> as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

The observation made in the aforesaid paragraph of the judgment is no different than what has been earlier decided in several cases. If the facts of the present case are examined carefully, it will be found that both P.Ws.1 and 2 were not in friendly terms with the appellant but in the night of occurrence when both of them heard some sound from outside, they came out of the house, found the appellant standing in front of his house with a blood stained Tangia and when P.W.1 asked him as to what he was doing late in the night, the appellant confessed to have killed his brother. The entire incident took place in such a manner that the question as to whether the appellant could repose confidence in order to make an extra judicial confession or not did not arise. The extra judicial confession was made immediately after the occurrence. The appellant was found standing in front of his house with a blood stained Tangia and on being questioned he instantly admitted to have killed his brother and also showed the dead body of the deceased to both the witnesses P.Ws.1 and 2. The circumstances under which such extra judicial confession was made, it cannot be entirely thrown out merely because the appellant was not in a friendly terms with the said two witnesses. Apart from the extra judicial confession, the Court cannot also overlook the conduct of the appellant immediately after the occurrence. The appellant was found standing in front of his own house with a blood stained Tangia and there is no explanation from the side of the appellant in this regard. He also showed the dead body of the deceased to both the witnesses P.Ws.1 and 2. The injuries found on the deceased could

be caused by Tangia and this is the opinion of the Doctor P.W.9. Therefore, the injuries found on the dead body corroborate the case of the prosecution that the deceased was assaulted by means of a Tangia which was found in the hands of the appellant immediately after the occurrence. Coming to the chemical examination report, the learned counsel for the appellant referred to the evidence of I.O., P.W.10 and stated that the blood group of neither the appellant nor the deceased having been done, no reliance could be placed by the trial court on such chemical examination report. It is true that the blood group of neither the appellant nor the deceased had been done, but the chemical examination report shows that the blood stained earth seized from the spot contained human blood of Group AB. The Tangia seized from the hands of the appellant also contained human blood of the same group. The wearing apparels of the appellant and the deceased seized in course of investigation also contained the human blood of Group AB. The appellant has not explained as to how human blood of AB Group was found on the Tangia as well as on his wearing apparels. Under these circumstances, we do not find any fault with the trial court in placing reliance on the said chemical examination report.

7. From the discussions made above, it is clear that the appellant immediately after the occurrence on being questioned as to what he was doing so late in the night, instantly confessed to have killed his brother before P.Ws.1 and 2 and at that time he was not only holding a blood stained Tangia but also showed the two witnesses the dead body of the deceased. The injuries on the dead body of the deceased could be caused by Tangia held by the appellant and the chemical examination report also shows human blood of Group AB not only in the sample earth seized from the spot but also from the wearing apparels of the appellant and deceased as well as the Tangia seized from the appellant. All these factors clearly establish the charge leaving no room to entertain a doubt regarding involvement of the appellant in committing murder of his brother.

8. For the reasons stated above, we do not find any merit in the appeal and accordingly dismiss the same.

Appeal dismissed.

2010 (I) ILR-CUT- 81

A.S.NAIDU, J.

MAKARADHWAJ BEHERA -V- SATYANATH MAHANTA & ANR.*

NOVEMBER 17, 2009.

NEGOTIABLE INSTRUMENTS ACT,1881(ACT NO.26 OF 1881)-SEC. 138

Dishonour of cheque - Notice in writing issued to the drawer by registered post within 15 days from the date of receipt of the intimation from the bank claiming the amount to be paid - Notice returned unserved with endorsement " Party continuously absent for 7 days" - No finding that the accused - petitioner is intentionally avoiding to receive notice and managed to get an incorrect endorsement or the address given was fictitious - No material that the complainant made any endeavour to send the notice once again.

Held, unless a notice in writing is received by the drawer of such cheque the offence will not be constituted - Conviction and sentence passed by the Courts below are setaside.

(Para 14, 15)

Case laws Referred to :-

1. (2006) 6 SCC 456 : (D.Vinod Shivappa -V- Nanda Belliappa).
2. 1998 Bank,J. 120 : (A.Sudershan -V- Mannen (Shabir) & anr.).

For Petitioner : M/s. S.S.Das, B.R.Das,R.R.Mohanty, S.Modi, K.Behera & A.Mohanty.

For Opp.Party No.2 : Addl. Standing Counsel.

---

*CRL.REVISION NO. 503 OF 1999. From the judgment dated 24.06.1999 passed by Sri B.B.Kar, Addl.Sessions Judge, Rairangpur in Crl. Appeal No.116/92 of 1997-95 confirming the judgment of 02.09.1995 passed by Sri J.P.Chand, S.D.J.M, Rairangpur in I.C.C. No.39 of 1992.

A.S.NAIDU,J. The order of conviction and sentence passed by learned S.D.J.M., Rairangpur in I.C.C. No.39/1992 which was confirmed by learned Addl. Sessions Judge, Rairangpur in Crl. Appeal No.116/92 of 1997-95 is assailed in this Crl. Revision invoking inherent jurisdiction of this court under Section 397 read with Section 401 of the Cr.P.C.

2. Opp. party No.1 filed a complaint petition, inter alia, alleging commission of offences under Section 138 of the Negotiable Instruments Act and the said complaint petition was registered as I.C.C. No.39/92 in the court of S.D.J.M., Rairangpur. It was alleged that a cheque issued by the petitioner for an amount of Rs.14,000/- payable at Canara Bank, Telegaon Branch when tendered bounced on 26.6.1992 with an endorsement "insufficient funds in the account". It was averred in the complaint petition that a lawyer's notice was issued by registered post to the petitioner, but then the same returned to the complainant with an endorsement that the

addressee was absent for six to seven days Thereafter after waiting for the statutory period, the complaint petition was filed.

3. The plea of the petitioner was complete denial.

4. The prosecution in order to substantiate its case got examined three witnesses and exhibited four documents. The petitioner got himself examined as D.W.1.The trial court after discussing the evidence of P.Ws.1 to 3 came to the conclusion that the petitioner had issued the cheque in favour of the complainant on 10.3.1992 and the said cheque when presented returned unpaid by the Bank due to insufficiency of funds in the account of the petitioner. On the basis of such conclusion the petitioner was found guilty for commission of offence under Section 138 of the N.I. Act and was convicted. The trial court sentenced the petitioner to under go S.I. for a period of six months and to pay a fine of Rs.500/- , in default to undergo S.I. for a period of one month.

5. Being aggrieved the petitioner preferred Criminal Appeal No.116/92 of 1997-95 which was heard by learned Addl. Sessions Judge, Rairangpur. The appellate court also after discussing the evidence, both oral and documentary, found no error apparent on the judgment of the trial court, confirmed the order of conviction and sentence and dismissed the appeal. Consequently the present revision has been filed.

6. The main ground on which the order of conviction and sentence is assailed is that the complainant has not proved the service of notice as contemplated under Section 138 of the N.I. Act and as such an offence under the said Section cannot said to have been committed. Relying upon Section 138 (b), it is argued that the said section casts a mandate upon the holder of the cheque to serve notice in writing to the drawer of the cheque before approaching the court. According to Mr. Das, learned counsel for the petitioner, no materials were produced before the court below to establish that the notice which was mandatorily required to be issued had been served on the petitioner. In absence of such materials, the complaint petition itself was not maintainable and it is a fit case where the order of conviction and sentence should be set aside.

7. The notice of this Crl. Revision was duly issued to opp. party No.1, but then he refused to accept the same as would be evident from postal endorsement as well as peon’s report and the same was treated to be sufficient. No counsel also appeared on behalf of opp. party No.1, before this Court.

8. The sole question which needs to be determined in this case is as to whether a proceeding under Section 138 of the N.I. Act can be maintained in absence of service of notice as contemplated under Section 138(b) of the N.I. Act. For appreciating the said position, it would be prudent to refer to Section 138 of the Act reads as follows:

"***Dishonour of cheque for insufficiency,etc.,of funds in the account***.

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless –

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and

(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the aid notice.

Explanation - For the purpose of this section, "debt or other liability" means a legally enforceable debt return of the cheque and service of the same.
or other liability."

9. Thus sine-qua-non for filing a complaint petition is issuance of a notice in writing to the drawer regarding the According to the complainant the cheque issued by the petitioner bounced as sufficient funds were not available in the account and the said fact was intimated to the complainant. It is also submitted that the complainant on receiving such intimation issued a registered notice to the petitioner, but then as would be evident from Exts.3 and 3/1, the notice returned back to the sender with an endorsement of the Postal Department that the petitioner was absent for 6 to 7 days. Relying upon such endorsement, Mr. Das, learned counsel for the petitioner, submitted that, admittedly notice was not served upon the petitioner. It is further forcefully submitted that there was no material

available before the court nor any iota of evidence either oral or documentary was adduced to lead to a conclusion that the petitioner at any time was avoiding to receive the notice.

10. In the case in hand, however, neither there is any pleading nor there is any evidence to reveal or to come to a conclusion that the drawer had adopted any dubious means and managed to get an incorrect endorsement. Thus, the facts of the present case is completely different from the facts in the case of D.Vinod Shivappa(supra) and the said decision shall not be applicable to the present case.

11. A combined reading of Sub-Sections (b) and (c) of Section 138 of the N.I. Act would lead to an irresistible conclusion that the cause of action for filing a complaint under Section 138 of the N.I. Act would arise only after making the demand to the drawer claiming the amount to be paid by giving a notice in writing within 15 days from the date of receipt of the intimation from the Bank regarding dishonour of the cheque. In absence of such notice, as would be evident from the section, there may be no valid demand and the cause of action may not arise for the offence in consonance with law.

12. In the touch stone of the aforesaid principles of law, if we examine the facts of the case at hand, it would be evident that though a registered notice as contemplated under Section 138 of the N.I. Act was issued, the same was not served upon the petitioner and returned with an endorsement that he was absent for 6 to 7 days. It is also not the case of the complainant, that the petitioner is intentionally avoiding to receive the notice and/or the address given was fictitious. Thus it is apparent that no notice was served upon the petitioner as mandatorily required under Sub-Sections (b) and (c) of Section 138 of the N.I. Act which would mean that no demand has been made within 15 days from the date of dishonour of cheque in question. In other words, the mandates inbuilt in Section 138 of the N.I. Act have not been complied with. This aspect was not kept in mind either by the trial court or by learned appellate court.

13. In the case of **D.Vinod Shivappa v. Nanda Belliappa**, reported in (2006) 6 SCC 456, the Supreme Court observed as follows:

> "We cannot also lose sight of the fact that the drawer may be dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the

process of law, the court shall presume service of notice. This, however, is a matter of evidence and proof. Thus even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely, the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be premature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure."

14. A similar matter came before the Andhra Pradesh High Court in the case of **A. Sudershan v. Mannen (Shabir) and another** reported in **1998 Bank.J.120**. In the said case also service of notice of dishonour of cheque sent by registered post returned back unserved with an endorsement "party continuously absent for 7 days." Interpreting Clauses (b) and (c) of Section 138 of the N.I. Act it was held that unless a notice in writing is received by the drawer of such cheque the offence would not be constituted. Therefore the receipt of notice is absolutely necessary as a pre-condition for constituting such an offence. The act of giving a notice contemplated by Section 138 of the N.I. Act means actually serving the notice in terms of Section 27 of the General Clauses Act, 1897. In other words, if there is any ambiguity regarding what constitutes service of notice under Section 138 of the N.I. Act, unless court is satisfied that the accused is intentionally avoiding to receive the notice, it must hold that due to non-service of the notice on the petitioner in terms of Clauses (b) and (c) of Section 138 of the N.I. Act an offence under that section is not constituted and the complaint petition is liable to be dismissed. It appears from the judgment that both the courts below have observed that notice issued by registered post returned unserved with an endorsement that the petitioner was absent for 6 to 7 days. No materials were produced before the courts below that any endeavourance was made by the complainant to send the notice once again. There is also no finding that the accused-petitioner is intentionally avoiding to receive the notice. In the absence of such finding the order of conviction and sentence cannot be sustained.

15. In the aforesaid scenario, I am of the firm view that conviction and sentence recorded against the petitioner cannot be sustained. In the result, this Revision Petition stands allowed and consequently the conviction and

order of sentence recorded by the lower appellate court confirming the findings of the learned Magistrate in I.C.C. No.39 of 1992 is set aside and the accused is acquitted and set free.

Revision allowed.

2010 (I) ILR-CUT- 87

A.S.NAIDU, J & B.N.MAHAPATRA, J.

E.SURYANARAYAN PATRO -V-PRESIDENT TRIBAL DEVLOPMENT CO-OPERATIVE CORPN. OF ORISSA LTD. & ANR.

NOVEMBER 25, 09

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

Departmental Proceeding - Enquiry Officer exonerated the delinquent from the charges - Disciplinary authority disagreed with the findings of the Enquiry Officer and inflicted the punishment of compulsory retirement without giving an opportunity of hearing to the delinquent.

Held, disciplinary authority shall supply the reasons of disagreement with the findings of the Enquiry Officer to the delinquent and shall give the delinquent an opportunity to persuade the disciplinary authority to accept the favourable conclusion of the Enquiry Officer- There after the disciplinary authority shall take a final decision on the charges framed against the delinquent. Held the matter remitted to the disciplinary Authority to take up the enquiry from the point it stood vitiated and to conclude the same afresh.

(Para - II)

Case laws Referred to : -

1. AIR 1999 SC 3734 : (Yoginath D.Bagde V. State of Maharashtra & Anr.)
2. AIR 1998 SC 2713 : (Punjab National Bank & Ors.V.Kunj Behari Misra, AIR 1998 SC 2713)
3. AIR 1997 SC 2249 : (Sudhir Vishnu Panvalkar V. Bank of India)
4. AIR 2000 SC 22 : (The High Court of Bombay V. Sashikanta,)
5. AIR 1996 SC 1669 : (State Bank of Patiala& Ors. V.K.S.Sharma.)

For petitioner : Mr.G.A.R.Dora (Sr.Advocate)
M/s.G.R.Dora, J.K.Lenka & S.P.Misra.

For Opp.Parties: M/s.S.L.Patnaik & Md.Arif
(For O.P.No.2).

---

*O.J.C. NO.504 OF 2001. In the matter of an application under Articles 226 and 227 of the Constitution of India.

B.N.MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order of compulsory retirement of the petitioner dated 18.05.1999 (Annexure-3) and the appellate order dated 10.11.2000 (Annexure-4) confirming it, which were passed by the Disciplinary Authority and the Appellate Authority respectively, and direct the opposite parties to grant him all service benefits.

2. The facts and circumstances giving rise to the present writ petition are that the petitioner while working as In-charge Branch Manager in Tribal

Development Co-operative Corporation of Orissa Ltd. (in short 'the Corporation'), Parlakhemundi, two Departmental Proceedings, one being 59 dated 02.01.1990 and other being 1815 dated 22.03.1995 were initiated against him. The charge in the first D.P. was that the petitioner along with Ex-Shop Assistant, Shri R.C.Satapathy illegally transported 'Mahua' seeds to outside the State for pecuniary gain, which was detrimental to the interest of the Corporation. The allegation in the second D.P. was that the petitioner instructed one B.B.Kar, Shop Supervisor to purchase "Niger seeds" at higher rate, from private traders, without any permission from higher authorities and thereby disobeyed the order of the higher authorities. The petitioner denied the charges in his explanation. Not being satisfied by the explanation, the Administrative Officer of the TRIDCO, Bhubaneswar and Divisional Manager of the Corporation were appointed as the Enquiry Officer in respect of the first and second departmental proceedings respectively to enquire about the charges. The petitioner was exonerated from the charges as per enquiry reports dated 24.12.1996 (Annexure-1) and dated 10.09.1996 (Annexure-2) submitted by both the Enquiry Officers. The Disciplinary Authority disagreed with the findings of the Enquiry Officers and inflicted the punishment of compulsory retirement vide order dated 18.05.1999 (Annexure-3).

Being dissatisfied with the order of the Disciplinary Authority passed under Annexure-3, the petitioner filed an appeal before the Appellate Authority who vide his order dated 10.11.2000 (Annexure-4) declined to interfere with the orders of the Disciplinary Authority. Hence, this writ petition.

3. Mr. Dora, learned Senior Advocate appearing on behalf of the petitioner vehemently argued that law is well settled that, in case the Disciplinary Authority disagrees with the report of the Enquiry Officer on a particular finding of fact, he has to record reasons and then serve a show cause notice upon the delinquent officer, and after considering his show cause, the Disciplinary Authority shall have to pass the final order. This vital aspect has been lost sight of the Disciplinary Authority. Therefore, the orders of the Disciplinary Authority as well as the Appellate Authority are liable to be set aside and the petitioner is entitled to all financial benefits as, in the meantime, he attained the age of superannuation in the year 2009. In support of his contention, Mr. Dora relied on the decisions of the Hon'ble Supreme Court in ***Yoginath D. Bagde V. State of Maharashtra & Anr.***, ***AIR 1999 SC 3734*** and ***Punjab National Bank & Ors. V. Kunj Behari Misra, AIR 1998 SC 2713***.

4. Per contra, Ms. S.L.Pattnaik, learned counsel for the O.P.-Corporation supported the impugned orders passed by the Disciplinary Authority as well as the Appellate Authority. Relying on the decision of the Hon'ble Supreme Court in ***Sudhir Vishnu Panvalkar Vs. Bank of India, AIR 1997 SC 2249*** she contented that since Management of the

Corporation lost confidence due to loss caused by the petitioner to the Corporation, it decided that continuance of the petitioner in the Corporation would be detrimental to the interest of the Corporation. She further argued that the petitioner has failed to satisfy this Court how non-service of a show cause notice before passing the order of punishment by the Disciplinary Authority disagreeing with the exoneration report of the Enquiry Officers caused prejudice to the petitioner.

Ms. Patnaik relying on the decision of the apex Court in ***The High Court of Judicature at Bombay Vs. Sashikanta, AIR 2000 SC 22***, submitted that the enquiry report is an opinion, which is not binding on the disciplinary authority. Further, relying on the decision of the apex Court in ***State Bank of Patiala & Ors., Vs. K.S.Sharma, AIR 1996 SC 1669*** argued that no prejudice has been caused to the petitioner as natural justice has been complied with. Hence, this Court may not interfere with the impugned orders and the writ petition should be dismissed.

5. On the rival contentions raised at the Bar, the question that needs determination by this Court is as to whether it is incumbent upon the Disciplinary Authority to afford opportunity of hearing to the delinquent officer before passing the order of punishment by disagreeing with the exoneration reports of the Enquiry Officers?

6. It is not in dispute that two different Enquiry Officers had exonerated the petitioner from the charges leveled against him in two separate disciplinary proceedings. But, the Disciplinary Authority disagreeing with the findings of the Enquiry Officers inflicted the punishment of compulsory retirement with effect from 18.05.1999 without giving any show cause notice to the petitioner. This course of action of the Disciplinary Authority, no doubt, has caused prejudice to the petitioner, who was exonerated from the charges in the disciplinary proceeding by Enquiry Officers. In this context, it will be useful to refer to some of the decisions of the Hon'ble Supreme Court.

In the case of ***Yoginath D. Bagde (supra),*** the apex Court held as follows:-

> "In view of the above, a delinquent employee has the right of hearing not only during the enquiry proceedings conducted by the enquiry Officer into the charges leveled against him but also at the stage at which those findings are considered by the Disciplinary Authority and the latter, namely, the disciplinary Authority forms a tentative opinion that it does not agree with the findings recorded by the enquiry Officer. If the findings recorded by the Enquiry Officer are in favour of the delinquent and it has been held that the charges are not proved, it is all the more necessary to give an opportunity of hearing to the delinquent employee before reversing those findings. The formation

of opinion should be tentative and not final. It is at this stage that the delinquent employee should be given an opportunity of hearing after he is informed of the reasons on the basis of which the Disciplinary Authority has proposed to disagree with the findings of the enquiry Officer. This is in consonance with the requirement of Article 311(2) of the Constitution as it provides that a person shall not be dismissed or removed or reduced in rank except after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. So long as a final decision is not taken in the matter, the enquiry shall be deemed to be pending. Mere submission of findings to the disciplinary Authority does not bring about the closure of the enquiry proceedings. The enquiry proceedings would come to an end only when the findings have been considered by the Disciplinary Authority and the charges are either held to be not proved or found to be proved and in that event punishment is inflicted upon the delinquent. That being so, the "right to be heard" would be available to the delinquent up to the final stage. This right being a constitutional right of the employee cannot be taken away in any legislative enactment or Service Rule including Rules made under Article 309 of the Constitution."

The apex Court in the case of ***Punjab National Bank (supra)*** relying upon its earlier decisions in *State of Assam V. Bimal Kumar Pandit*, AIR 1963 SC 1612; *Institute of Chartered Accountants of India V. L.K.Ratna*, AIR 1987 SC 71; *Managing Director ECIL, Hyderabad V. B.Karunakar*, AIR 1994 SC 1074, *Ram Kishan V. Union of India*, AIR 1996 SC 255 held as follows:-

"… It will not stand to reason that when the finding in favour of the delinquent officers is proposed to be over-turned by the disciplinary authority then no opportunity should be granted. The first stage of the inquiry is not completed till the disciplinary authority has recorded its findings. The principles of natural justice would demand that the authority which proposes to decide against the delinquent officer must give him a hearing. When the inquiring officer holds the charges to be proved then that report has to be given to the delinquent officer who can make a representation before the disciplinary authority takes further action which may be prejudicial to the delinquent officer. When, like in the present case, the inquiry report is in favour of the delinquent officer but the disciplinary authority proposes to differ with such conclusions then that authority which is deciding against the delinquent officer must give him an opportunity of being heard for otherwise he would be condemned unheard. In departmental proceedings what is of ultimate importance is the finding of the disciplinary authority."

7. Thus, in a Departmental Proceeding the Disciplinary Authority has a final say on the issues of the findings of fact. He has a right to disagree with the findings recorded by the Enquiry Officer. In a case where the Disciplinary Authority disagrees with the Enquiry Officer on a particular finding of fact, he has to record the reasons for such finding and then serve a show cause notice upon the delinquent officer before taking any action against him. If the Disciplinary Authority disagrees with the Enquiry Officer and passes order detrimental to the interest of the delinquent officer without affording any opportunity of being heard to the delinquent that would amount to violation of the principles of natural justice and in that case the order imposing punishment would be vitiated.

8. In view of the above, we are of the considered view that it is incumbent upon the Disciplinary Authority to afford an opportunity of hearing to the delinquent officer if the Disciplinary Authority intends to differ with the orders passed by the Enquiry Officers, who exonerated the delinquent officer from the charges. It is so necessary to comply with the requirement of principles of natural justice as well as Article 311(2) of the Constitution, which provides that a person shall not be dismissed from service or removed or reduced in rank without affording reasonable opportunity of being heard in respect of the charges leveled against him.

9. It is the settled law that once the Court sets aside the order of punishment on the ground that the enquiry in the disciplinary proceeding has not been properly conducted, the Court has to remit the case to the Disciplinary Authority to take up the enquiry from the point it stood vitiated and conclude the same afresh. *(See Managing Director, ECIL, Hyderabad & Ors. Vs. B.Karunakar & Ors., AIR 1994 SC 1074 ;Hiran Mayee Bhattacharyya Vs. Secretary, S.M.School for Girls & Ors., (2002) 10 SCC 293; U.P.State Spinning C. Ltd. Vs. R.S.Pandey & Anr., (2005) 8 SCC 264; and Union of India Vs. Y.S.Sandhu, AIR 2009 SC 161)*

It is difficult to accept the submission of Mr. Dora that since the disciplinary authority has not granted any opportunity of hearing to the petitioner while disagreeing with the enquiry officer, the order of the disciplinary authority is not sustainable, and therefore this Court should grant all financial benefits to the petitioner without remitting the matter to Disciplinary Authority for giving an opportunity of hearing to the delinquent officer in view of decisions of the apex Court in *Yoginath D. Bagde (supra)* and *Punjab National Bank (supra)*.

In ***Yoginath D. Bagde (supra)*** the apex Court scrutinized the order of dismissal dated 8.11.1993 passed by the Disciplinary Committee and issued direction to reinstate the appellant in service with all consequential benefits including arrears of pay with the following observation:-

"In the instant case, we have scrutinized the reasons of the Disciplinary Committee and have found that it had taken its final decision without giving an opportunity of hearing to the appellant at the stage at which it proposed to differ with the findings of the enquiry Officer. We have also found that the complaint's story with regard to the place at which the demand was allegedly made by the appellant was inconsistent. We have also noticed that the trap laid by the A.C.B., Nagpur against the appellant had failed and was held by the Enquiry Officer to be a farce and not having been laid with the permission of the Chief Justice. We have also noticed that there was absolute non-consideration of the statements of defence witnesses, namely, Dr. Naranje and Mr. Bapat, advocate, by the Disciplinary Committee. This factor in itself was sufficient to vitiate the findings recorded by that Committee contrary to the findings of the Enquiry Officer."

In ***Punjab National Bank (supra)***, the apex Court set aside the orders imposing penalty and directed the appellants to release the retirement benefits to the respondent with the following observation.:-

"Both the respondents superannuated on 31st December, 1983. During the pendency of these appeals Misra died on 6th January, 1995 and his legal representatives were brought on record. More than 14 years have elapsed since the delinquent officers had superannuated. It will, therefore, not be in the interest of justice that at this stage the cases should be remanded to the disciplinary authority for the start of another innings. We, therefore, do not issue any such directions and while dismissing these appeals we affirm the decisions of the High Court which had set aside the orders imposing penalty and had directed the appellants to release the retirement benefits to the respondents…"

From the above observation, what appears to have weighed the Hon'ble Supreme Court is the long passage of fourteen years time from the date of superannuation.

The circumstances under which the apex Court granted service benefits in the above two cases do not exist in the case at hand. Hence, the ratio decided in the aforesaid cases has no application to the present case.

There is no quarrel over the legal propositions of law laid down by the apex Court in the decisions relied upon by Ms Patnaik, but those are of no help to the opposite parties in view of the discussions made hereinabove.

10. In the above fact-situation, we hereby quash the impugned orders passed under Annexures-3 and 4.

11. In the circumstances, it would be proper to remit the case to the Disciplinary Authority to take up enquiry from the point it stood vitiated and to conclude the same afresh. While doing so, the Disciplinary Authority shall supply the reasons of disagreement with the findings of the Enquiry Officer to the delinquent and shall give the delinquent an opportunity to persuade the Disciplinary Authority to accept the favourable conclusion of the Enquiry Officer. Thereafter the disciplinary authority shall take a final decision on the charges framed against the delinquent. Since in the meantime the delinquent officer has crossed the age of superannuation, the entire exercise should be completed as early as possible preferably within a period of four months from the date of communication of this order.

With the above observation, the writ petition is disposed of.

Writ petition disposed of .

2010 (I) ILR-CUT- 94

A.S.NAIDU,J & L.K.MISHRA,J.

STATE OF ORISSA -V- PANCHANAN JENA & ANR.*

OCTOBER 19,2009.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.100.

Right of private defence – A person who is in imminent and reasonable danger to his life or limb may inflict any harm, even death to his assailant either when the assault is attempted or directly threatened.

In this case the accused and deceased are brothers and were in dragger's head – On the date of occurrence as the deceased and his henchmen entered into the house of the accused being armed with deadly weapons and as the accused apprehended imminent danger as there was no reasonable mode of escape he had no other way but to fire at the deceased to save his life – He has also not exceeded his right of private defence – Held, defence case is more probable as the prosecution is guilty of suppression of material facts – Conclusions arrived at by the sessions Court do not suffer from any infirmity.

(Para 15,& 17)

Case law Referred to:-

1AIR 1986 SC 660 : (Yogendra Morarji -V-State of Gujarat)

For Appellant – Addl.Govt.Advocate.

For Respondents – M/s.D.P.Dhal & Associates.

---

*GOVERNMENT APPEAL NO.87 of 1998. From an order of acquittal dated 9th April,1997 passed by Sri N.N.Praharaj, Addl.Sessions Judge, Jajpur in Sessions Trial No.123/10 of 1996.

A.S.NAIDU, J. The judgment and order of acquittal dated 9th April, 1997 passed by learned Addl. Sessions Judge, Jajpur acquitting the accused-respondents from the charges under Section 302/34 of the Indian Penal Code, in short, "IPC" and Section 27 of the Arms Act in Sessions Trial No.123/10 of 1996, is assailed in this Government Appeal.

2. The prosecution case, sworn of unnecessary details, is that on 3.6.1995 at about 12.30 P.M. while Babaji Jena was entering into his homestead land, accused Panchanan fired at him with his double barrel gun. The informant, P.W.1 on hearing the sound of fire came out of his house and saw Panchanan standing near the door of the main entrance with the gun and firing 3-4 rounds aiming at his father Babaji Jena, consequently Babaji having suffered gun shot, fell down. Soon thereafter, accused Panchanan, his wife Subasini, daughter Sasirekha (Litu) and Madhurekha (Tutua) being armed with sticks came to the deceased and started assaulting. At that juncture, the neighbours gathered at the spot, but they were not permitted to go near the body of Babaji as Rajrekha (Mitu), another daughter of

Panchanan, who was also holding a double barrel gun was standing near the body and threatened the onlookers. It is alleged that she also fired 3-4 rounds, which hit the nearby walls of the house, coconut trees etc. The informant after the incident rushed to the Bari Police Out-post and lodged the F.I.R.(Ext.1). On the basis of the said F.I.R., police went to the spot and took care of the situation. In course of investigation, inquest was held over the body of Babaji, the same was sent for post-mortem examination, blood-stained earth, wearing apparels as well as one double barrel gun was seized, different persons were examined and their statements were recorded under Section 161, Cr.P.C., incriminating materials were sent to the serologist for chemical examination, and the gun was sent for ballistic examination. After completion of investigation, charge-sheet was submitted against two accused persons in G.R.Case No.629 of 1995 in the court of learned SDJM, Jajpur. On verification of the documents submitted by the police and on being prima facie satisfied, learned SDJM took cognizance of the offence under Section 302/34, IPC and Section 27 of the Arms Act and committed the case to the Court of Session for trial.

3. The plea of the defence was one of denial. The accused Panchanan in his statement recorded under Section 313, Cr.P.C. stated that on 3.6.1995 Babaji, his sons, daughter and wife forcibly entered and gherowed his house and were planning to attack him and his children. It is alleged that land disputes were pending between Babaji and Panchanan leading to several criminal cases. It is further stated that accused Panchanan is a physically handicapped person and was able to walk only with the help of crutches and he had two grown up daughters. Taking the advantage of the said fact, Babaji Jena had harassed him in past and did not permit him to cultivate his lands since 1993. He had intimated the said fact and the harassment meted out to him to the Chief Minister, local police and other public officers, but none were able to provide him any protection. On 15.8.1994 he took resort to hunger strike before the office of the Superintendent of Police and the Superintendent of Police and Collector assured him to take steps. On 21.8.1994 the deceased and his sons were arrested, but after they were released on bail, they became more violent and launched attack after attack on the family of the accused persons. Being severely harassed and humiliated by such attacks, accused Panchanan again approached the police. Taking the help of police on 29.5.1995 Panchanan and his labourers ploughed the land, but Babaji and his sons threatened the labourers. On 3.6.1995, Babaji and his sons once again attacked house, family members and property holding deadly weapons like pharsa, gun etc. and tried to murder Panchanan and his family members. They broke open the door and were successful in assaulting his wife. For self defence and to protect him

and his family members, Panchanan made blank fire from his gun. In short, the plea of the defence was that of private defence.

4. In order to substantiate their case, prosecution got examined ten witnesses. Out of them, P.W.1 is the son of Babaji and is an eye witness to the occurrence, P.W.2 is a villager and an eye witness, P.W.3 is another villager and is an eye witness, P.W.4 is another son of Babaji and also an eye witness, P.W.5 is the informant and a co-villager and was a witness to the occurrence, P.W.6 is also a witness to the occurrence, P.W.7 is the doctor, who conducted autopsy over the dead body of Babaji, P.W.8 is a seizure witness in whose presence the bullet pouch containing six bullets tied to the waist of Panchanan was seized, P.W.9 is the I.O. and P.W.10 is the S.I. of Bari Police Station, who received the F.I.R. and is also a seizure witness.

5. The accused persons in order to establish their plea, got examined five witnesses. Out of them D.W.1 is the Deputy Superintendent of Police of the Grievance Cell. He had made enquiry to the charges levelled by Panchanan against Babaji and found the same to be correct, D.W.2 is the C.I. of Police, Jajpur who had also received several complaints from Panchanan against his brother Babaji Jena and had registered 4-5 criminal cases against deceased Babaji, D.W.3 is the constable of Bari Police Station, who was deputed to guard the house of accused Panchanan for a period of 15 days, D.W.4 is a neighbour, who saw deceased Babaji and his sons shouting and threatening to set fire to the house of Panchanan, D.W.5 is another villager, who deposed that the son of Babaji asked them not to plough the land.

6. Learned Sessions Judge after discussing the evidence in extenso and taking into consideration the past conduct of the parties, came to the conclusion that there was previous enmity between accused Panchanan and Babaji, who were brothers, with regard to the landed properties. Accused Panchanan had no male issues and was living in his house with two grown up daughters, whereas, Babaji had three sons. Several criminal cases were initiated against Babaji on the basis of allegations made by Panchanan. On the basis of the direction issued by the Superintendent of Police, enquiry was made by Deputy Superintendent of Police and it was found that Babaji was trying to harass Panchanan taking advantage of the fact that he was crippled being a patient of polio. It is also found that the local police being satisfied that there was threat to the life and property of accused Panchanan had deputed a constable to guard the house for a period of fifteen days and that soon after the said constable was removed, the incident took place. After a threadbare analysis of the oral evidence adduced on behalf of the prosecution, learned Addl. Sessions Judge came to the conclusion that the version with regard to the scenario of the alleged crime becomes unreasonable as the evidence is not trustworthy in so far as material facts

are concerned. On the other hand, learned Addl. Sessions Judge, after examining the witnesses adduced by the defence, held that the defence case appears to be more probable while the prosecution appears guilty of suppression of material facts. On the basis of such conclusion, the Sessions Court held that the prosecution totally failed to prove their case against the accused persons and the accused persons were entitled to right of private defence and acquitted them.

7. Learned counsel for the State strenuously took this Court through the evidence both oral and documentary and submitted that the finding of the Sessions Court to the effect that Babaji and his sons tried to enter into the house is not correct. In fact they were walking on the road and were trying to enter into their own house, but Panchanan without any rhyme or reason took out his gun and fired at Babaji causing vital injuries. It is further submitted that in view of the evidence of eye witnesses to the effect that accused Panchanan indiscriminately fired at Babaji, in consequence whereof, he died out of gun-shot injuries, the Sessions Court committed illegalities in acquitting the accused persons. According to learned Addl. Govt. Advocate, the plea of private defence is not available to the accused persons and the Sessions Court acted illegally and with material irregularity in holding that the accused persons in order to save their life and property fired at the deceased. In short, it is submitted that the conclusions arrived at by Sessions Court are based more on surmises and conjectures than evidence adduced and it is a fit case where the order of acquittal needs interference.

8. Mr.Dhal, learned counsel for the respondents, on the other hand, while repudiating the submissions made by learned counsel for the State, submitted that the prosecution has not come to the court with clean hands. They have developed the story stage by stage. Perusal of the evidence of the eye witnesses would clearly reveal that they were speaking blatant lies. The spot map and the evidence of the independent witnesses clearly establishes that taking advantage of the fact that police guard was removed Babaji and his sons being armed with deadly weapons entered into the house of the accused persons and assaulted the inmates,. According to Mr.Dhal, the accused Panchanan being a physically handicapped person and as there was no other male member in the family, to save his own life and the life of his family members and to protect his property had no way out but to fire one bullet at Babaji, which hit him on his right hand. It is submitted that after receiving the bullet shot, Babaji became more violent and tried to challenge the accused, consequently, Panchanan had to fire for the second time. It is further submitted that though Panchanan had 6-7 bullets in his pouch and two bullets were loaded in the gun, he did not fire the same, which clearly reveals that he has not exceeded the right of private defence. Mr.Dhal further submitted that the Sessions Court has vividly discussed the

evidence and the conclusions arrived at suffers from no infirmity and the said order of acquittal may not be interfered with.

9. Heard learned counsel for the parties diligently. Perused all the evidence meticulously. Admittedly, the death of Babaji was caused by gun shot injuries, which fact is also established from the evidence of the doctor (P.W.7), who had conducted post-mortem. On dissection, P.W.7 found the gun shot injury above the medial aspect of right upper arm 4" above the elbow joint with 3" penetration. There was another gun shot wound over the lower part of the chest on the sternum. The cause of death was due to haemorrhage and shock resulting from the above injuries. Ext.7, is the post-mortem report, which corroborates the statement made by the doctor (P.W.7) in court. Thus, there is no ambiguity that Babaji died due to gun-shot injury. It is also admitted by accused Panchanan that he had fired twice, the first shot hit the right arm and the second one hit the chest. Thus, the only thing, which needs to be considered in this case, is as to whether the accused persons in furtherance of their common intention to cause death of the deceased had fired the gun resulting in the death of Babaji and/or as to whether the accused persons had fired at Babaji for self-defence.

10. Admittedly, accused Panchanan is a lame man. Perusal of the entire evidence reveals that inter-se disputes were pending between Babaji and Panchanan in respect of their joint family properties. Several criminal cases were initiated against Babaji. Accused Panchanan was assaulted on number of occasions. It also appears from the evidence of accused Panchanan that he had complained before the authorities of district administration as well as before the police with regard to the atrocities committed by Babaji and attempts made by him to assault Panchanan and his family members and to destroy his properties by setting fire. Evidence is also available to reveal that Babaji was not permitting Panchanan to get his lands cultivated and in fact Panchanan had taken police help to cultivate the land and on one occasion Babaji was arrested. Being aggrieved by such action in past Babaji had attacked the house of Panchanan and on the basis of the complaint made by Panchanan, a police constable was deputed to guard the life and property of Panchanan for a period of fifteen days. The incident, it appears, took place the very next day police guard was removed from the house. Most of the eye witnesses are sons and relatives of Panchanan. According to the prosecution case, Babaji was entering into his house when Panchanan without any rhyme or reason fired at Babaji, which struck his right arm. This aspect of the case does not appear to be correct, inasmuch as the spot map as well as the evidence of the I.O. and the evidence of the defence witnesses reveal that the body of the deceased was found within the fenced compound of the accused. It further established that the house of Panchanan had a green fence all around with a gate on the front and the

body was found lying under the verandah of the house of accused persons. This evidence clearly reveals that Babaji and others had entered into the house of Panchanan. There are some evidence to reveal that they were carrying deadly weapons. Apprehending danger to the property and person, Panchanan came out to his verandah with the gun and warned Babaji not to commit any mischief. When the latter did not listen to him, it appears from the evidence, he fired the first bullet, which hit the right arm of the deceased. From the evidence of P.W.4, who happens to be the son of the deceased Babaji, it appears that after Panchanan fired a bullet shot, which struck the right arm of Babaji, the latter (Babaji) challenged the accused persons and there was an altercation. At that juncture, the accused Panchanan fired the second bullet, which struck on the right chest of Babaji, thereby causing bleeding injury. The prosecution is bound by the said evidence, which clearly reveals that after being hit on right arm, Babaji challenged the accused and altercation continued. P.W.10, the I.O. on receiving information reached at the spot and found that accused Panchanan was standing on the spot holding a gun and the dead body was lying inside the compound. He performed inquest over the dead body. Ext.20, the inquest report, reveals that the deceased was lying on the verandah of the house of the accused persons near the northern gate. The evidence of P.W.9, C.I. of Police, reveals that the village road runs in east-west direction and the house of accused Panchanan and that of the deceased situate facing to each other on the opposite sides of the said road. The distance between the two houses is about 40 ft. The house and homestead of accused Panchanan was fenced by a green fence of about 3 ft. height. The front door of the house of accused Panchanan is about 20 ft. away from the said fence. The front door of the house of the deceased is about 10 ft. away from the road. He also stated that the dead body was found lying on the outer court yard of the house of accused Panchanan.

11. A cumulative reading of the evidence of the said witness vis-à-vis the spot map leaves no room for doubt that the dead body was found lying between the green fence and the house of accused Panchanan. The said fact unerringly reveals that Babaji and others had opened the gate attached to the fence and entered inside the house belonging to accused Panchanan. Thus, the prosecution story to the effect that the deceased was going to his own homestead when the accused fired the gun at him causing his death, is an after-thought and is blatantly false. The Sessions Court has discussed the evidence and has arrived at the same view, which we find cogent and consistent with the evidence.

12. The only other question, which needs to be considered, is as to whether after firing the first bullet, there was any occasion for Panchanan to fire the

second bullet, in other words, as to whether Panchanan had exceeded his right of private defence.

13. The most salient principles of right of private defence of body are as under:

(i) There is no right of private defence against an act which is not in itself an offence under the Code;

(ii) The right commences as soon as-and not before- a reasonable apprehension of danger to the body arises from an attempt or threat to commit some offence although the offence may not have been committed and it is conterminous with the duration of such apprehension. That is to say, right avails only against a danger imminent, present and real;

(iii) It is defensive and not a punitive or retributive right. Consequently, in no case the right extends to the inflicting of more harm than it is necessary to inflict for the purpose of the defence. In other words, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh "with golden scales" what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bonafide defender "if he with the instinct of self-preservation strong upon him, pursues his defence a little further than may be strictly necessary in the circumstances to avert the attack".

(iv) The right extends to the killing of the actual or potential assailant when there is a reasonable and imminent apprehension of the atrocious crimes enumerated in the six clauses of Section 166.

(See **Yogendra Morarji v. State of Gujarat**: AIR 1986 S.C.660)

14. Scrutiny of the evidence in the case in hand in the touchstone of the aforesaid principles laid down by the Supreme Court, we find that the dispute between the accused and his brother Babaji was prevailing since long and several criminal cases were pending against the deceased. Taking advantage of the physical incapability of the accused Panchanan, Babaji in the past had tried to harass him in different ways. There are also allegations with regard to the assault on Panchanan and his family members. On the basis of the allegations made by Panchanan, his brother Babaji was arrested. Babaji and his sons had tried to cause loss to Panchanan by setting fire to the house and causing damage to the crops. They were not permitting Panchanan to carry on the cultivating operation in his own field.

These facts are very clear from the evidence of the police officials, who were examined as defence witnesses as well as the report submitted by Superintendent of Police after field enquiry. It further appears that as the police authorities were satisfied that there was threat to the life and property of Panchanan, a constable was deputed to guard his house for a period of fifteen days. The evidence further reveals that soon after the guard was removed, Babaji and his sons entered into the house of Panchanan to attack him and his family members. Apprehending imminent danger to his life and property, Panchanan came out from the house with his double barrel gun and cautioned Babaji. Fact remains, Babaji entered into the fence surrounding Panchanan's house and crossed 20 ft. in between the gate and house that too with his henchmen being armed. It is apparent that both the brothers were in dragger's head. It further appears from the evidence that Panchanan prevented/ warned Babaji and when he did not listen, he fired at him. After being injured by the first gun shot, Babaji as would be evident from the prosecution evidence, challenged Panchanan and an altercation ensued. Consequently, to protect him as well as the life of his family members and property, Panchanan fired for the second time, which hit the chest of Babaji and he fell down.

15. The aforesaid scenario of facts would attract the first two clauses of Section 100 of IPC. The combined effect of these two clauses is that taking the life of the assailant would be justified on the plea of private defence, if the assault causes reasonable apprehension of death or grievous hurt to the person exercising the right. In other words, a person who is in imminent and reasonable danger of losing his life or limb may in the exercise of right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. It appears that Panchanan apprehended imminent danger and there was no reasonable mode of escape as Babaji and his henchmen had entered into his house being armed with deadly weapons and he had no other way out but to fire at Babaji to save his own life, the life of his two grown up daughters and wife as well as properties.

16. The falsity and exaggeration of the prosecution case is further apparent from the fact that the allegation with regard to holding any gun by Mitu @ Rajrekha Jena, daughter of Panchanan could not be established. Neither any other gun was seized nor the prosecution could establish the said fact by adducing any cogent evidence. In fact, in course of hearing learned counsel for the State also conceded that there is no material to connect respondent no.2 with the alleged crime.

17. Admittedly, Panchanan had fired twice. He had a pouch containing seven bullets. The gun was also loaded. But then he did not use the same, which indicates that he had not exceeded his right of private defence and

used only that much of force, which was necessary to evade any imminent danger to his life, the life of his family members and property. From the discussions made in the preceding paragraphs and after going through the evidence adduced by both sides, we are satisfied that the defence case appears to be more probable. On the other hand, it appears that the prosecution has tried to improve the case from stage to stage and is also guilty of suppression of material facts and tried to keep the Court in darkness in appreciating the true as well as real situation. After going through the entire judgment, we are also satisfied that the Sessions Court has discussed the evidence threadbare and the conclusions arrived at do not suffer from any infirmity.

18. Considering all these aspects and taking into consideration the over all picture, we are not inclined to interfere with the order of acquittal. Accordingly, the Government Appeal fails and is dismissed.

Appeal dismissed.

2010 (I) ILR-CUT- 103

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

JHURI GOUDO & ANR.-V- STATE OF ORISSA.

NOVEMBER 13, 2009

CRIMINAL PROCEDURE CODE, 1974 - SEC.313.

Statement of the accused - Questioning must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand.

In the instant case appellants have been asked to answer a single question containing a series of facts.

Held, statements of accused persons should be recorded U/s.313 Cr.P.C. by putting separate question for each material substance in a simple way that an illiterate mind or one which is perturbed or confused can readily appreciate and understand.

(Para 8 & 9)

Case law Referred to : -

(2007) 37 OCR (SC) 872 : (Ajaya Singh -V- State Maharastra).

For Appellants : Mr. Rashmi Narayan Patnaik.

For Respondent: Addl. Govt.Advocate.

---

*JAIL CRIMINAL APPEAL NO. 212 OF 1999. From the judgment and order dated 23.08.1999 passed by Shri H.B.Das, Sessions Judge, Kandhamal-Boudh at Phulbani in T.S.No.75 of 1998.

PRADIP MOHANTY, J. This appeal is directed against the judgment and order dated 23.08.1999 passed by the learned Sessions Judge, Kandhamal-Boudh at Phulbani in S.T. No. 75 of 1998 convicting the appellants under Section 302 of the Indian Penal Code read with Section 34 of the Code and sentencing them to undergo imprisonment for life.

2. The case of the prosecution is that on 16.03.1998 at about 9.00 P.M. both the appellants by means of Sal and Bamboo lathis brutally assaulted deceased Kalaram Goudo, the brother of appellant no.1 and uncle of appellant no.2, when he was taking food on his verandah. Thereafter, they took him to a nearby jack fruit tree, made him lie on the ground and dealt blows all over his body by lathis, as a result of which he succumbed to the injuries at the spot. The appellants also brought the dead body of the deceased and threw it on the cot lying on his verandah. The Gramrakhi, on being informed, came to the spot and guarded the dead body. Thereafter, son of the deceased went to Baliguda P.S. and lodged FIR. on 17.03.1998 at 9.25 A.M. On receipt of the FIR, a case was registered, investigation commenced and on its completion charge sheet was submitted against both the appellants under section 302/34 I.P.C.

3. The appellants denied the charge and pleaded that the case was falsely foisted against them.

4. In order to prove its case, the prosecution examined as many as seven witnesses. P.W.1, the son of the deceased, is the informant and an ocular witness. P.W.2 is the wife of the deceased and also a witness to the occurrence. P.W. 3 is the younger brother of the deceased. P.W.4 is the constable and a witness to the seizure. P.W.5 is the doctor, who conducted post-mortem examination. P.W.6 is the constable who escorted the dead body for the post-mortem examination. P.W.7 is the investigating officer. The defence examined none.

5. The learned Sessions Judge convicted and sentenced the appellants as mentioned hereinbefore.

6. Mr. Patnaik, learned counsel for the appellants assails the conviction on the ground that there are major contradictions and omissions in the evidence of P.Ws.1 and 2, who are said to be the only ocular witnesses. Both of them are related to the deceased and have tried to develop the prosecution case in court. No independent witness has been examined by the prosecution. That apart, the object of examination of the accused persons under section 313 Cr.P.C. has been defeated in the instant case because the questions put to the appellants do not cover all the circumstances appearing against them and thereby they have been deprived of explaining those circumstances. It is the settled principle of law that the questions framed in the statement of the accused must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand, but in the instant case appellants have been asked to answer a single question containing a series of facts. In support of his contention he relies upon the decision in ***Ajay Singh v. State of Maharashtra,*** (2007) 37 OCR (SC) 872.

7. Mr. Nayak, learned Additional Government Advocate vehemently submits that there are ample materials against the appellants. The evidence of P.Ws.1 and 2 is very clear and cogent and there is no reason to disbelieve the same. P.W.3 corroborates the evidence of P.Ws.1 and 2 with regard to presence of the appellants on the spot soon after the deceased was done to death. He further submits that the provisions of section 313 Cr.P.C have been scrupulously followed by the trial court. Therefore, there is no ground to interfere with the impugned order.

8. Perused the LCR, more particularly the statement of the accused persons recorded under section 313 Cr.P.C. and the decision of the apex Court in Ajay Singh's case (supra). In the said decision, the Supreme Court has ruled that it is not sufficient compliance to string together a long series of facts and ask the accused what he has got to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questioning must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and

understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.

9. Keeping the above ratio in view, this Court examined the statement of the accused persons recorded by the trial court under section 313 Cr.P.C. The trial court has put the following questions to each of the accused persons :

> "(1) It transpires from the evidence of the P.Ws. and the materials on record is that on 16.3.98 during night hours at about 9 P.M. in village Ribingia, you assaulted Kalaram Goudo as a result of which he died. What have you got to say?
>
> (2) Do you want to say anything in this case?"

From the aforesaid, it is found that no separate question has been put to the accused persons about each material substance which is intended to be used against them. These two accused persons are illiterate. It is difficult to believe that they would have been able to understand the questions put to them. For the above reason, this Court is of the view that the impugned judgment and order of conviction passed by the trial court cannot be sustained. It is a fit case for remand to the trial court, which should record the statement of the accused persons under section 313 Cr.P.C. by putting separate question for each material substance and thereafter dispose of the matter afresh in accordance with law.

10. In the result, the Jail Criminal Appeal is allowed, the impugned judgment of conviction and sentence passed against the appellants is set aside and the matter is remitted back to the trial court for recording of the statement of the accused persons under section 313 Cr.P.C. in the light of the observation made above. This Court directs the trial court to record the accused statement afresh and complete the trial by the end of February, 2010.

Appeal allowed.

2010 (I) ILR-CUT- 106

M.M.DAS, J.

SHRI CHAKRARAM SAMAL & ANR.-V- RADHAMANI PALAKA & ORS.*

OCTOBER 15, 2009.

(A) INSURANCE ACT, 1938 (ACT NO.4 OF 1938) - SEC.39.

Nominee of life Insurance Policy – Death of the assured- Nominee is only authorised to receive the amount but he or she has no right over the amount due unless he or she is the successor to the said property under law - Held, such amount can be claimed by the heirs of the assured in accordance with the law of succession governing them.

(Para 3)

(B) HINDU LAW – ***Divorce decree against wife - Wife can no be held to be a successor over the money available under the LIC Policy of her husband.***

(Para 4)

Case law Referred to :-

AIR 1984 SC 346 : (Smt. Sarbati Devi & Anr.-V- Smt.Usha Devi).

For Appellants : M/s.A.K.Nanda, S.K.Bangadeo.

For Respondents: M/s.S.K.Das, S.Swain, S.R.Subudhi & M.Jesthy (For R. NO.6)

M/s.S.K.Nayak,A.C.Baral,B.K.Saho. Mrs.D.Nayak & S.Biswal. (For R.Nos.3 to 5)

M/s.S.S.Rao,B.K.Mohanty, & N.C.Nayak. (For R.No.2)

*R.F.A.NO .194 OF 2005 . From the judgment and decree dated 2.05.2005 and 23.06.2005 passed by Dr.Subhas Chander Hota. Civil Judge (Sr.Divn) Rayagada in Title Suit No.32 of 2002.

M. M. DAS, J. The appellants as plaintiffs filed T.S. No. 32 of 2002 before the Civil Judge (Senior Division), Raygada, inter alia, praying for a declaration that the plaintiffs are entitled under the will to receive the service benefits of late Raghunath Samal, i.e. C.P.F. accumulations, gratuity and other benefits payable by the F.C.I. and the Life Insurance Corporation. The suit has been decreed in part by the learned trial court ordering that the plaintiffs-appellants are entitled to the properties bequeathed under the will dated 11.6.2001, Ext. 2, except the testator's insurance claim to which the Defendant No. 2-Smt. Sasirekha Samal is entitled as nominee. This appeal has been preferred against the part of the suit claimed, which has been dismissed.

2. The respondent no. 2-defendant no.2 is stated to be dead by the learned counsel for the appellants and her name has been deleted from the cause title page of the appeal memo pursuant to the order dated 25.2.2009. A cross appeal was preferred by the said deceased-respondent no.2. After

her death, she having not been substituted by her legal heirs, the said cross appeal has abated.

3. The suit was filed by the appellants for declaration that they are entitled to the service benefits as well as the amount under the L.I.C. Policy of the deceased Raghunath, who was the brother of the plaintiffs. In the said L.I.C. Policy, the respondent no. 2, being the wife of the said deceased Raghunath, was named as “Nominee”. It was the case of the plaintiffs that the plaintiffs succeeded to the estate of late Raghunath by virtue of a will executed by him. The will has been accepted by the court below as genuine, which do not require a probate. It was also the case of the plaintiffs that there was a divorce decree between Raghunath and the respondent no. 2 prior to filing of the suit. However, the court below while finding that the decree of divorce is a valid decree as well as the will executed by late Raghunath in favour of the plaintiffs vide Ext. 3 is a valid and binding document, recorded a finding that the nominee often takes precedence over a successor. Admittedly, the appellants are the successors to the interest in the estate of the deceased Raghunath. It is a settled position of law that a nominee holds the property of the person concerned in trust on behalf of the true owners and the nominee can have no right over the said property unless he or she is the successor to the said property under law. The Supreme Court in the case of ***Smt. Sarbati Devi and another –v- Smt. Usha Devi***, AIR 1984 SC 346 while considering the question whether a nominee of a life insurance policy under Section 39 of the Insurance Act, 1938 (Act No. IV of 1938) on the assured dying intestate, would become entitled to the beneficial interest in the amount received under the policy, to the exclusion of the heirs of the assured, referring to various earlier decisions and analyzing Section 39 of the Insurance Act, laid down that a mere nomination made under Section 39 of the Act does not have the effect of conferring on the nominee any beneficial interest in the amount payable under the life insurance policy on the death of the assured. The nomination only indicates the hand which is authorized to receive the amount, on the payment of which the insurer gets a valid discharge of its liability under the policy. The amount, however, can be claimed by the heirs of the assured in accordance with the law of succession governing them.

4. In the instant case, in view of the finding that there was a divorce decree between the deceased respondent no. 2 and late Raghunath, she could not be held to be a successor having interest over the money available under L.I.C. Policy of late Raghunath. This Court, therefore, finds that the court below was in error in holding that the plaintiffs are not entitled to the amount under the L.I.C. Policy and dismissing the suit in respect of the said amount. The appeal is, therefore, allowed and the judgment of the trial court is modified to the extent that the suit is decreed in whole and the

plaintiffs are also entitled to the amount under the L.I.C. Policy of late Raghunath along with the other service benefits as already decreed. The respondent no. 6, who was the defendant no. 6 in the court below, shall disburse the amount under the L.I.C. Policy of late Raghunath to the plaintiffs.

Appeal allowed.

2010 (I) ILR-CUT- 109

M.M.DAS,J.

KSHETRABASI BEHERA & ORS. -V- STATE OF ORISSA & ANR.*

JULY 29, 2009.

CRIMINAL PROCEDURE CODE,1973 (ACT NO.2 OF 1974) – SEC.190(b).

Cognizance taken for the offences U/s.498-A, 323,506,406/34 IPC upon Police report – Order challenged.

Only husband and his relatives may be liable for commission of an offence U/s.498-A IPC but not strangers – In this case petitioner nos.5 to 10 are in no way related to the family of the husband of the informant – Held, order passed is an out come of non-application of judicial mind which is liable to be quashed – Matter remitted back for fresh order by the learned S.D.J.M.

For Petitioner – P.K. Mishra
For Opp.Parties – R.K.Kar

*CRLMC.NO.2091 OF 2008. In the matter of an application under Section 482 of Criminal Procedure Code.

Heard learned council for the parties.

The order dated 16.4.2008 passed by the learned S.D.J.M., Talcher in G.R. Case No. 940 if 2007 has been impugned in the this application. By the said order, the learned S.D.J.M. Talcher took cognizance of the offences under 498-A/f323/506/406/34 I.P.C. against the petitioners.

Mr. P.K. Mishra, learned counsel for the petitioners submits that the petitioners nos. 5 to 10 are in no way related to the family lof the husband of the informant and therefore, Section 498-A I.P.C. cannot be attracted as against them.

It appears from the impugned order that the learned S.D.J.M., Talcher has not dealt this aspect of the matter but has mechanically taken cognizance of the offences on filing of the charge-sheet by the police. The Magistrate is empowered to take cognizance of the offence upon a police report under the provisions of Section 190 (1) (b) Cr.P.C. Filing of the report of the police on completion of the investigation is done under Section 173 Cr.p.c. Power under Section 190 Cr.P.C. cannot be mechanically exercised on receiving a police report, but the Magistrate is required to apply his judicial mind to such report before taking cognizance of any offence.

Section 498-AI.P.C. clearly provides that the only persons who may be liable for commission of such offence are the husband and his relations.. Strangers cannot be made as accused persons of commission of offence under Section 498-A I.P. SC.

It is, therefore, clear from the impugned order that the order taking cognizance of the offence is an outcome of non-application of judicial mind

I, accordingly , quash the order dated 16. 4. 2008. passed by the learned S.D.J.M., Talcher in G.R.Case No. 940 of 2007 and remit the matter back to learned S.D.J.M., Talcher to pass a fresh order in accordance with law after perusing the charge-sheet well as the materials .

The CRLMC is accordingly disposed of.

Urgent certified copy of this order be granted on proper application.

Application disposed of

2010 (I) ILR-CUT- 111

R.N.BISWAL, J.

TARACHAND MAJHI -V- LALIT PADHAN

NOVEMBER 20, 2009.

ORISSA GRAM PANCHAYAT ACT, 1964(ACT NO.1 OF 1965)-SEC.39.(d)

Recounting of votes - There are pleadings coupled with ample evidence on record with regard to rejection of valid votes and acceptance /addition of invalid votes - Non framing of issue is not sufficient to reject the petition for recounting of votes - Held, learned Trial Court was justified in allowing the petition for recounting of votes in respect of six booths out of eleven.

(Para 7)

Case laws Referred to :-

1. (1998 SCC 962 : (T.H.Musthaffa -V- M.P.Varghese & Ors)
2. AIR 1987 SC,.1242 : (Ram Sarup Gupta (dead) by Lrs.-V- BNishun Narain Inter College & Ors.)
3. AIR 1966 SC 735 : (Bhagwati Prasad - V- Chandramul).
4. AIR 1995 Bombay 333 : (Appa Babaji Misal Patil & Ors.-V- Dagdu Chandru Misal & Ors.)

For Petitioner : M/s.Goutam Misra.
For Opp.Party : M/s.Prafulla Kumar Kar & D.K.Rath.
M/s. Ajodhya Ranjan Dash,S.K.Nanda-1, B.Mohapatra, S.N.Sahoo & K.C.Sahu.

---

*W.P.(C) NO.13194 OF 2009 . In the matter of an application under Articles 226 & 227 of the Constitution of India read with the provisions of Orissa Gram Panchayat Act.

R.N. BISWAL, J. In this writ petition, the petitioner challenged the order dated 31.8.2009 passed by learned Civil Judge (Junior Division), S. Rampur in Election Petition No.5 of 2007 allowing the application filed by the opposite party for recounting of votes.

2. Opposite party was the election petitioner and petitioner was opposite party in the aforesaid case. The petitioner, opposite party and three others contested the election to the office of Sarpanch of Lingmarni Grama Panchayat, where opposite party was declared elected. Petitioner (present opposite party) filed the aforesaid case to declare the election of opposite party (present petitioner) null and void and to declare that he had been elected as Sarpanch of the aforesaid G.P.

3. Opposite party filed counter therein. Evidence was adduced. The petitioner (present opposite party) filed a petition to recount the votes polled in that election. There were altogether 11 booths. The learned Civil Judge (Junior Division), S. Rampur after hearing learned counsel for the parties

allowed recounting of votes in respect of six booths, out of 11 booths vide order dated 31.8.2009, under Annexure-3. Being aggrieved with the said order, the opposite party filed the present writ petition.

4. Learned counsel appearing for the petitioner submitted that there was no pleading in the election petition to recount the votes, as such, no issue was framed in respect thereof. Furthermore, no material was adduced during the evidence justifying recounting of votes. So, the learned court below ought not to have allowed the petition for recounting of votes. In support of his submission, he relied on the decision in the case of ***T.H. Musthaffa v. M.P. Varghese and others*** (1999) 8 SCC, 692, where the Apex Court held that unless pleading contains necessary foundation for raising an appropriate issue, no amount of evidence will be sufficient for raising the issue and granting the relief sought for.

5. Learned counsel appearing for opp. party contended that there was ample material in the election petition for recounting of the votes. It was prayed there to call for all the relevant records including the ballots utilised in the election and to verify and count the ballots in the court process. He further contended that evidence was also led in that light. It is found from the election petition that in booth No. 6 there were more than 300 voters. While election was going on in that booth petitioner along with a number of his followers prevented the voters from casting their votes, for which, more than fifty voters could not exercise their franchise and the hooligans forcibly snatched away the utilised ballots of the said booth. Even though in fact, there was no counting of votes of booth No. 6, the election officials being influenced by the petitioner falsely declared that the petitioner secured 206 valid votes whereas the opposite party secured only 19 valid votes. It is further found from the election petition that while counting ballots in other booth about more than 40 invalid votes were added to the credit of the opposite party (present petitioner) and 24 valid votes of the petitioner (present opposite party) were rejected illegally. Thus, there was improper addition and rejection of votes, for which the present petitioner was illegally declared to have been elected as Sarpanch of Lingmarni Grama Panchayat.

In the case of ***Ram Sarup Gupta (dead) by L.Rs., v. Bishun Narain Inter College and others,*** AIR 1987 Supreme Court 1242, the Apex Court held:-

> "In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the

> duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered."

The Apex Court, again in the case of ***Bhagwati Prasad v. Chandramaul,*** AIR 1966 Supreme Court 735, held:-

> "The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and has had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

As stated earlier, in the present case, there are sufficient materials in the pleading showing rejection of valid votes and acceptance of invalid votes.

6. Admittedly, in the case at hand, no specific issue has been framed as to whether about 40 invalid votes were added to the credit of opposite party (present petitioner) and 24 valid votes of the petitioner (present opposite party) were rejected illegally and that even though the opposite party (present petitioner) did not secure any vote in booth No.6, 206 votes were illegally counted in his favour. The learned counsel for the opposite party submitted that the issues framed covered the said issue. He further submitted that even if no issue was framed in that regard, when there is specific evidence that some invalid votes were counted in favour of the petitioner and some valid votes of the opposite party were not so counted and there is evidence to that effect, non-framing of issue in respect thereof cannot be a ground to reject the prayer for counting of votes. In support of his submission, he relied on the decision in the case of ***Appa Babaji Misal Patil and others v. Dagdu Chandru Misal and others,*** AIR 1995 Bombay 333, where a Division Bench of Bombay High Court held:-

"Shri Agrawal, learned counsel appearing on behalf of the appellants, submitted that the lower Appellate Court was in error in ignoring the specific evidence given by the plaintiff, asserting that the partition was effected prior to year 1914 between the branches of Balu and Sheshappa. The learned counsel urged that the positive claim made by the plaintiff was by-passed by lower Appellate Court only on the ground that the case of partition was not specifically pleaded in the plaint and issue was not struck by the trial Court on the fact of partition. In our judgment, the complaint of Shri Agrawal on this aspect is correct because pleadings are not the evidence and a party who deposes in the witness box, cannot be permitted to turn around and claim that the fact of partition should be ignored because it was not averred in the pleadings. On perusal of the testimony of the plaintiff, it is clear that the plaintiff deposed that Ijappa, Sheshappa and Daji, son of Sheshappa partitioned the land between themselves. The specific statement made in the evidence is sufficient to conclude that partition was effected prior to year 1914 between the branches of Balu and Sheshappa and the suit land had fallen to the share of Daji."

7. In the case at hand, it is found from the impugned order that while the election petitioner (present opposite party) was being examined as P.W. 1 he deposed that he obtained 1190 votes while the opposite party obtained 1229 votes and more than 40 invalid votes were added to the opposite party (present petitioner) and about 25 valid votes of the petitioner (present opposite party) were rejected, which have been corroborated by P.W. Nos. 2 to 4. P.W. 1 further deposed that 206 votes were added to the opposite party (present petitioner) in booth No. 6 though he has not secured any such vote, which has been corroborated by P.W. 5. So, there is ample evidence with regard to rejection of valid votes and addition of invalid votes and counting of votes in respect of the opposite party (present petitioner), even though he did not poll any vote from booth No.6. There is also pleading in that respect. So, non framing of issue in that regard is not sufficient to reject the petition for counting the votes. The trial court discussing the law and fact in detail rightly allowed the petition for recounting of votes in respect of six booths, out of eleven booths.

Accordingly, the writ petition stands dismissed.

No cost.

Writ petition dismissed.

2010 (I) ILR-CUT- 115

INDRAJIT MAHANTY, J.

SRI ARUNA KUMAR @ ARUNA PRADHAN-V- RADHIKA PRADHAN & ANR.*

NOVEMBER 20, 2009.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) - SEC.125.

Maintenance claimed by wife and daughter - husband raised suspicion over the character of the wife and disputes paternity of the child and refused to pay the same - DNA test proves that he is the biological father of the child - Held, husband is liable to pay maintenance alongwith litigation cost of Rs.5000/-.

(Para 5, 6)

Case law Referred to:-

OLR 2004 (29) 29 : (Thogorani @ D.Damayanti -V- State).

For Petitioner : M/s. P.K.Mohanty & P.K.Pradhan.
For Opp.Parties : M/s.H.N.Mohapatra, A.Samantray & M.R.Behera.

*CRLREV NO. 463 OF 2007. In the matter of an application under Section 401 read with Section 397 of the Criminal Procedure Code, 1973.

I.MAHANTY, J. The present revision has been filed by the petitioner seeking to challenge an order dated 26.3.2007, passed by the learned S.D.J.M., Athamallik in Crl. Misc. Case No.64/2003, in a proceeding under Section 125 Cr.P.C. directing payment of maintenance of Rs.500/- each to the opposite parties, namely, Radhika Pradhan and Nirupama Pradhan (wife and daughter of the petitioner respectively).

2. On a perusal of the pleadings taken in the petition, it appears that the essence of the contention of the petitioner was that the petitioner had raised suspicion over the character of Opposite Party No.1 and stated that Opposite Party No.1 had became pregnant through other sources. He further asserted that the petitioner had no sexual relationship with the Opposite Party No.1 from 15.2.2002 while the Opposite Party No.1 gave birth to a daughter, namely, Nirupama Pradhan (O.P. No.2) on 19.4.2003, i.e. after a period of 14 months from the date of deparature of petitioner, which gave rise to suspicion on the part of the petitioner that he was not the father of Opposite Party No.2.

3. The trial court has noted that while the petitioner's wife before him is a rustic village lady, yet, she had proposed in course of the trial to the opposite party-husband that since her husband disputes the paternity of their daughter-Nirupama, she was willing to undergo DNA Test to set aside such doubt but the present petitioner, in course of the trial, did not agree to such proposal.

4. In view of the fact that the husband did not agree to the proposal, the trial court held that he having denied such an offer establishes that the

husband is uncertain in respect of his own claim and, therefore, draw an inference against him. In this aspect, reliance was placed in the case of **Thogorani @ K.Damayanti v. State,** OLR 2004 (29) 29.

5. In course of the present revision, the same issue was once again reiterated and in a Misc. Case No.2296 of 2007 disposed of vide order dated 12.11.2007, directions were issued to the Registrar (Judicial), to make the arrangement for the DNA Test and accordingly, in terms of the said direction, the blood samples of all the parties were drawn and sent to the Central Forenscic Science Laboratory, Kolkota for its expert opinion. The report of the Central Forensic Science Laboratory was opened in court on 20.10.2009 and the said report is extracted herein.

> "Report No.:CFSL(K)/EE/2009 (Orissa)-114 Dated:01.6.2009.
>
> From the above observations, it is concluded that Mr. Arun Kumar Pradhan (Source of Exhibit: A Blood Sample I) is the biological father of Ms. Nirupama Pradhan (Source of Exhibit C: Blood Sample III), daughter of Ms. Radhika Pradhan (Source of Exhibit B: Blood Sample II).
>
> Note: 1. Results relate only to exhibits tested.
>
> 2. Sealed remnants of the exhibits A.B. and C are returned after examination under the sample seal given below."

By order dated 29.10.2009, directions were issued for both the parties to appear in person. Although the Opposite Party-wife had appeared, the petitioner-husband did not appear in spite of communication of order by his legal counsel.

6. In view of the facts as noted hereinabove, the submissions and contentions raised by the petitioner herein made need no further consideration whatsoever and therefore, the criminal revision stands dismissed with litigation cost of Rs.5000/- (Rupees five thousand) payable by the petitioner in favour of Opposite Parties. Consequently, all interim orders passed stand vacated.

In view of the dismissal of the present revision petition, the executing court is at liberty to proceed forthwith and is directed to take all effective steps to recover the outstanding maintenance amount from the husband at the earliest.

Revision dismissed.

2010 (I) ILR-CUT- 117

SANJU PANDA,J.

MANORANJAN PANDA -V- SAILENDRA NARAYAN
PRAHARAJ & ORS.*

DECEMBER 11,2009.

CIVIL PROCEDURE CODE,1908 (ACT NO.5 OF 1908) – ORDER 26, RULE 1.

Commission for examination of witness – Discretion of the Court – There is no material on record that due to ailment petitioner was unable to move – Documents filed were not duly proved that those were issued by a registered medical practitioner – Held, since learned Trial Court has considered the materials before him and not satisfied that the said witness should be examined on Commission this Court is not incliened to interfere with the impugned order.

(Para 7 & 10)

Case law Referred to:-

1.AIR 2004 SC 3682 : (Mohit Kumar & Ors.-v-Dato Mohan Swami &Ors.)

For Petitioner – M/s.Arun Kumar Mishra-2, B.P.Samal,S.K.Rout, S.Latif.

For Opp.Parties – M/s.P.P.Ray, G.C.Das, S.N.Upadhaya & P.K.Mohanty. (For O.P.No.1)

*W.P.(C) NO. 17136 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S. PANDA, J. In this writ application challenge has been made to the order dated 15.11.2008 passed by the learned Civil Judge (Junior Division), 1st Court, Cuttack in Title Suit No.495 of 2001 rejecting an application filed by the petitioner under Order 26, Rule 1, CPC.

2. The facts as narrated in the writ application are as follows:

The petitioner, who is aged about 60 years, is defendant no.1 in the suit. Opposite party no.1 as plaintiff filed the suit praying for a declaration that the suit schedule property is joint family homestead property, and for permanent injunction restraining defendant no.1 from going over the suit land and in case defendant no.1 was found to be being in possession, recovery of possession and repurchase of the suit scheduled property and for further declaration that recording of the name of defendant no.1 in the consolidation ROR is illegal and without jurisdiction and the alleged partition dated 12.10.1969 was invalid and illegal with other ancillary reliefs.

3. After the plaintiff's evidence was closed, defendant no.1 examined two witnesses. Thereafter, defendant no.1- petitioner filed an application under Order 26, Rule 1 CPC with a prayer to depute a commission to examine him at his residence as he was suffering from partial paralysis and

admitted to Hi-Tech Medical College and Hospital, Rasulgarh, Bhubaneswar. Since defendant no.1 was not able to move and was completely bed ridden, along with his application he filed the requisition for medicine, medication sheet, copy of bed head chart and the medical certificate. The plaintiff filed his objection to the said application specifically alleging that the medical documents were created and fabricated. The documents regarding bed head ticket and list of medicines etc. were not acceptable without any medical certificate. It was further alleged by the plaintiff that in order to avoid the court to mark the demeanour of the witness during cross-examination in the case, defendant no.1 filed this application. He also objected that the present address of defendant no.1 was not furnished and the plaintiff would not be able to meet the expenses to depute a commission to the house of defendant no.1 for his examination.

4. Considering the application, the learned Civil Judge (Junior Division) rejected the same with the finding that there was no medical certificate issued by any registered medical practitioner showing the infirmity or illness of defendant no.1 and it was also not clear that the medication sheet and temperature chart referred to any disease which rendered the condition of the patient so miserable as not to allow him to come to the court and get himself examined as a witness.

5. Learned counsel for the petitioner submitted that the court below failed to appreciate the materials available on record though the documents filed by the petitioner indicated regarding his admission to the Hi-Tech Medical College and Hospital and other documents showed his health condition. He further submitted that those materials should not have been ignored by the court below and since the evidence of defendant no.1 is very vital in the suit, he should have been examined by a commission as he was not in a condition to come to the court and his application to depute a commission to examine him should have been favourably considered by the court below.

6. Learned counsel for the opposite parties vehemently objected and stated that at present the petitioner is not hospitalized nor is he in a condition to come to the court and depose. Therefore, the trial court rightly rejected the application.

7. Order 26, Rule 1, CPC confers wide discretion on the court to issue a commission for examination of any person where a witness is to be examined and to issue such commission for the said purpose, the court has to accept a certificate purported to be signed by a registered medical practitioner as evidence of sickness or infirmity without calling the medical practitioner as a witness to support the said plea.

In the present case, the petitioner filed some documents in support of his plea of illness. Those documents were not duly proved that those were issued by a registered medical practitioner. The apex Court in a decision reported in **AIR 2004 SC 3682** (**Mohit Kumar and others** v. **Dato Mohan Swami and others**) has held that the court may liberally exercise its power of permitting recording of evidence on commission excepting for such witnesses who are very material and who the learned Judge, in his discretion, feels necessary must appear before him so that the demeanour of any witness may need to be watched.

9. Admittedly defendant no.1 in the present case is a very vital witness and he was partially affected by Paralysis. Therefore, there is no material on record that due to the said ailment he was unable to move.

10. Since in the present case, the trial court considered the materials before him regarding the illness of defendant no.1 and it was not satisfied that the said witness should be examined on commission, there is no error apparent on the face of the impugned order. Therefore, this Court is not inclined to interfere with the same.

The writ application is accordingly dismissed. No costs.

Writ petition dismissed.

2010 (I) ILR-CUT- 120

S.C.PARIJA, J.

SHUVAM CONSTRUCTION PVT. LTD. -V- SMT. BABITA MOHANTY & ANR.*

OCTOBER 27,2009.

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

Power of the Court to add Party to a proceeding may not depend solely on the question whether such Party has any interest in the suit property but also to consider whether right of the said person may be affected if he is not added as a Party.

In this case petitioner is a lis pendens transferee and plaintiff having sold her interest in the suit property may not take interest to pursue the suit - Held, in order to ensure effectual adjudication of the suit and to avoid multiplicity of litigation the petitioner should be impleaded as a party to the suit.

Case laws Referred to:-

1.AIR 1992 Orissa 47 : (Sri Jagannath Mahaprabhu -V- Pravat Chandra Chatterjee & Ors.)
2.AIR 2005 SC 2209 : (Amt Kumar Shaw & Anr.-V- Farida Khatoon & Anr).
3.AIR 2007 SC 1062 : (Dhanalakshmi & Ors. -V-P.Mohan & Ors).
4.AIR 1977 Orissa 183 : (Pravat Kumar Misra & Anr.-V- Prafulla Chandra Misra & Anr.)
5.2008(II) OLR 747 : (Panjum Bibi @ Ramjan Bibi & 7 Ors.-V-Najma Alim & Anr).

For Petitioner – D.Das.
For Opp.Parties – J.Patnayak

*W.P.(C) NO.5427 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S.C.PARIJA,J. The order of the Ad hoc Addl. District Judge, Fast Track Court No.II, Bhubaneswar, dated 03.03.2008, passed in C.S.No.120 of 2003, rejecting the petitioner's application under Order 1 Rule 10(2) read with Section 151 C.P.C., is under challenge in the present writ application.

The facts, giving rise to the present writ application is that the plaintiff-opposite party no.1 filed C.S.No.120 of 2003 in the Court of the Civil Judge (Senior Division), Bhubaneswar, against the defendant-opposite party no.2 for eviction, recovery of arrear rent and mesne profit. During the pendency of the civil suit, the plaintiff-opposite party no.1 sold her right, title and interest in the suit property to the present petitioner by registered sale deeds dated 16.06.2004. After the same of the suit property, as the plaintiff-opposite party no.1 did not pursue the civil suit in the right earnest and as the present petitioner, being a lis pendens transferee had vital interest in the suit, the petitioner filed an application under Order 1 Rule 10(2) read with Section 151

CPC for being impleaded as plaintiff in the civil suit. The said application was objected to by the defendant-opposite party no.2, though no objection was raised by the plaintiff-opposite party no.1.

Learned Trial Court taking into consideration the fact that the plaintiff has sold the suit property during the pendency of the civil suit without obtaining permission of the Court and as the sale deeds executed in favour of the present petitioner has not been acted upon and that the sale of the suit property in favour of the present petitioner is hit by the doctrine of lis pendens provided under Section 52 of the Transfer of Property Act (in short "T.P.Act"), proceeded to hold that the petitioner is neither a proper pary nor a necessary party and accordingly rejected its application for being impleaded as party to the civil suit.

Learned counsel for the petitioner submits that as the petitioner has purchased the suit property from the plaintiff-opposite party no.1 by registered sale deeds dated 16.6.2004, on payment of valuable consideration, he has a vital interest in the civil suit and therefore he is a proper party to the proceeding. It is further submitted that the plaintiff having sold the suit property to the present petitioner, the plaintiff is not taking proper steps and not pursuing the civil suit and therefore, the petitioner being the lis pendens transferee having right, title and interest over the suit property, he should have been impleaded as a party to the proceeding, so as to enable him to protect its interest in the suit. It is also submitted that as the plaintiff is a dominus litis of the suit and no objection having been raised by the plaintiff to the application of the present petitioner for being impleaded as a party to the civil suit, the impugned order of rejection is not proper and justified.

Learned counsel for the petitioner, in support of his contention has relied upon a Full Bench decision of this Court in the case of ***Sri Jagannath Mahaprabhu Vs. Pravat Chandra Chatterjee and Ors***. AIR 1992 Orissa 47, where in a similar case, while considering the rights of a lis pendens transferee to be impleaded as a party in a pending suit, this Court observed that a transferee pendent elite to the extent he has acquired interest from the defendant, is vitally interest in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property, may not properly defend the suit and may collude with the plaintiff. Order 22, Rule 10 (1) CPC enables such a lis pendens transferee to continue the suit with the leave of the Court and though there is no bar operating against the transferor continuing the suit for the benefit of the transferee, Order,22, Rule 10 CPC is an alternative procedure which safeguards against the danger that the original plaintiff being no longer interest in the proceedings might not vigorously prosecute the same or might even collude with the adversary. This Court further observed that though the

plaintiff is under no obligation to make a lis pendens transferee a party, the Court has discretion in the matter, which must be judicially exercised and an alienee pendente lite would ordinarily be joined as a party, to enable him to protect his interest. This Court proceeded to hold that even if a lis pendens transferee is not a necessary party, when a motion is made by such lis pendens transferee to be impleaded as a party, the Court may, in exercise of its discretion judicially, add him as a party to prevent multiplicity of suits. Accordingly, this Court held that even if an application is filed under Order 1, Rule 10 CPC, the Court should ignore the labelling of such an application and treat the same as one filed under order 22, Rule 10(1) CPC, if the ingredients thereof are satisfied.

Learned counsel for the petitioner has also relied upon a decision of the Apex Court in the case of ***Amit Kumar Shaw and another Vs. Farida Khatoon and another,*** AIR 2005 S.C. 2209, in support of his contention that the power of a Court to add a party to the proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right. In the said decision, the Supreme Court, while considering the scope of Order 1 Rule 10 CPC and Order 22 Rule 10 CPC, came to find that under Order 22 Rule 10 CPC, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. Hon'ble Court further observed that since under the doctrine of lis pendens a decree passed in the suit, during pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed. The Hon'ble Court proceeded to hold as follows:-

> "The doctrine of lis pendens applies only where the lis is pending before a Court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the Court has discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order XXII Rule 10 an alienee

pendente lite may be joined as a party. As already noticed, the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente life of an interest in immovable property is a representative-in-interest of the dparty from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation, he is entitled to be heard in the matter on the merits of the case."

Learned counsel for the petitioner has also relied upon the decision of the Apex Court in the case of ***Dhanalakshmi & others V. P.Mohan & others***, AIR 2007 sc 1062, where the Supreme Court, while interpreting Section 52 of the T.P.Act and Order 1 Rule 10 CPC, held that a lis pendents purchaser is a necessary and proper party to the suit.

Learned counsel for the defendant-opposite party no.2 submits that as the suit property is alleged to have been sold to the present petitioner, during the pendency of the civil suit, without obtaining permission of the Court, the same is hit by the doctrine of lis pendens as provided in Section 52 of the T.P.Act and therefore such a lis pendens transferee is neither a necessary party nor a proper party to the civil suit. It is further submitted that as the alleged sale deed in respect of the suit property, executed by the plaintiff in favour of the petitioner, has not been acted upon, as has been found by the Trial Court, the present petitioner, as a lis pendens purchaser has no right to intervene in the suit. It is also submitted that as the suit filed by the plaintiff-opposite party no.1 against the defendant is for eviction, recovery of arrear rent and mesne profit, the present petitioner, as a lis pendens transferee cannot be impleaded as a party in the said suit, as the same would expand the scope and charge the nature and character of the civil suit. In this regard, learned counsel has relied upon a decision of this Court in the case of ***Pravat Kumar Misra and another V Prafulla Chandra Misra and another,*** AIR 1977 Orissa 183 and a recent Division Bench decision of this Court in the case of ***Panjum Bibi @ Ramjan Bibi & 7 others v. Najma Alim and another,*** 2008(II) OLR 747.

On an analysis of the principles of law, as discussed above, it is evident that the proposition of law that a lis pendens purchaser is not a necessary party to the suit is not an absolute one and the question depends upon facts and circumstances of each case and the Court in a given case has the discretion to add a pendent lite transferee as a party to the suit for a substantial justice and effectual adjudication of the suit, and also to avoid multiplicity of litigations. As per the provision of Section 52 of the T.P.Act, a transferor pendente lite is treated in the eye of law as a representative-in-interest of the transferee, who shall be bound by the decree that may be

passed against the transferor. Therefore a transferee pendente lite has vital interest in the suit property. In a contingency where the transferor after alienating the suit property and having no more any interest, does not properly defend the suit and colludes with the adversaries, the alienee pendente life may be joined as a party and on motion being made, the Court should exercise its discretion judicially and alienee should ordinarily be allowed to join the suit as a party to enable him to protect his interest.

The power of a Court to add a party to the proceeding may not depend solely on the question whether such party has any interest in the suit property. The Court has also to consider whether right of the said person may be affected if he is not added as a party to the suit. As a lis pendens transferee is bound by the final decree that may be passed in the suit, it is only just and proper that he should be brought on record, so as to enable him to protect his right, more so when the transferor has lost any further interest to contest the suit.

In the instant case, as the petitioner is admittedly a lis pendens transferee, it has vital interest in the litigation and its apprehension that the plaintiff having sold her interest in the suit property, may not take interest in pursing the civil suit is justified and therefore in the interest of justice and in order to ensure effectual adjudication of the suit and avoid multiplicity of litigation, it is just and proper that the petitioner should be impleaded as a party to the civil suit.

Applying the principles of law as discussed above to the facts of the present case, the impugned order rejecting the petitioner's application under Order1 Rule 10(2) read with Section 151 CPC, for being impleaded as a party to the civil suit is not proper and justified and the same is accordingly quashed. The petitioner is permitted to be impleaded as a party to the civil suit.

The question regarding validity or otherwise of the sale deeds executed by the plaintiff infavour of the present petitioner, in respect of the suit property and the effect of such assignment may be considered by the trial Court at the final hearing of the civil suit, on which no opinion is expressed.

The writ application is accordingly allowed.

Writ petition allowed.

2010 (I) ILR-CUT- 125

L.K.MISHRA,J.

CHINTAMANI SAHU -V- STATE OF ORISSA.*

OCTOBER 27,2009.

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

Prayer for further Cross-examination and cross-examination of witnesses – Court has to consider the gravity of the offence and the ground for which the witnesses couldn't be cross-examination.

The present case involves offence U/s.302 IPC – If the witnesses are not cross-examined it would cause grave prejudice to the petitioner – Held, since no ground has been put forth as to why the witnesses were not cross-examined the defence should be saddled with compensatory cost of Rs.1500/-.

(Para 4,5)

For Petitioner – M/s. R.K.Nayak, S.K.Dash, S.P.Dash & P.C.Mohanty.
For Opp.Party – Addl.Government Advocate.

---

*CRLMC NO.2145 OF 2009. In the matter of an application under Section 482 of Code of Criminal Procedure.

Order dated 22.05.2009 passed by the learned Sessions Judge, Keonjhar in S.T. Case No. 170 of 2005 by which he rejected the prayer of the petitioner (who is the accused therein) under Section 311 of the Code of Criminal Procedure, 1973 (here-in-after called 'the Code') for further cross-examination of P.W. 1 and cross-examination of P.W. 2, 3 and 5 is impugned in this application. The learned advocate for the petitioner declined to cross-examine P.Ws. 2, 3 and 5. He also allegedly could not cross-examine P.W. 1 effectively. Therefore, the aforementioned petition was filed on behalf of the accused-petitioner inter alia delineating the specific questions to be put to P.W. 1 in further cross-examination.

2. Heard from both sides. Learned advocate for the petitioner has contended that further cross-examination of P.W. 1 is necessary and P.Ws. 2, 3 and 5 have not at all been cross-examined. This being a Sessions Case involving offence under Section 302 I.P.C., if the witnesses are not cross-examined then it would cause grave prejudice to the petitioner and would result in failure of justice. Learned Additional Government Advocate has submitted that the accused-petitioner should not be allowed to take advantage of his own mischief and once having declined to cross-examine the witnesses should not be allowed to do so since if such an action is allowed each and every accused can hold up the trial indefinitely.

3. Section 311 of the Code reads as follows:

"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 recalled 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 be essential to the just decision of the case."

4. The case involves offences under Sections 498-A/304-B/302/201/34 of I.P.C. and Section 4 of the Dowry Prohibition Act, 1961. If some witnesses are not at all examined it can cause grave prejudice to the defence. However, the fact remains that sometimes the defence succeeds in protracting the trial of the case by deliberately refusing to cross-examine the material witnesses and later seeking to cross-examine them under Section 311 of the Code. In the present case, no reason has been put forth in the petition as to why the witnesses (P.Ws. 2, 3 and 5) were not examined at all by the defence though it has been mentioned in the petition that P.W. 1 was cross-examined ineffectively since the senior conducting counsel was not present. In view of the nature and gravity of offence, this Court feels that the evidence cross-examination of the aforesaid witnesses is essential to the just decision of the case.

5. Once the Court comes to a conclusion that the evidence of the witnesses is essential to the just decision of the case, it automatically follows that the petition under Section 311 of the Code is to be allowed. However, since no ground at all has been put forth why the witnesses were not cross-examined, this Court feels that the defence should be saddled with compensatory cost.

The petition filed by the defence to further cross-examine to P.W. 1 and to cross-examine P.Ws. 2, 3 and 5 is allowed who shall be summoned by the trial Court for cross-examination, however, the cross-examination of P.W. 1 shall be limited to the questions mentioned in the petition. The aforementioned order is subject to payment of cost of Rs. 1,500/- (rupees one thousand five hundred) by the defence which shall be deposited to the credit of the State under appropriate head.

The CRLMC is allowed.

2010 (I) ILR-CUT- 127

B.K.PATEL,J.

KASINATH DAS & ORS. -V- D.M.,NEW INDIA ASSURANCE CO.LTD. & ORS.*

OCTOBER 6,2009.

WORKMEN'S COMPENSATION RULES, 1924, RULE 32 (2).

Review of judgment – No provision under the W.C.Act.

In the present case Commissioner passed award by taking Rs.3000/- as monthly wages for the Workman - Insurance Company filed petition for correction of the award on the ground that accident occurred prior to amendment of W.C.Act when maximum monthly wages for the workmen was Rs.2000/- Commissioner corrected the award on the ground of arithmetical error - Hence this Writ petition.

An arithmetical mistake is a mistake of calculation and a clerical mistake is a mistake in writing or typing – Learned Commissioner has modified the judgment already passed in blatant violation of Sub Rule 2 of Rule 32 of W.C. Rules 1924 – Held, impugned order quashed, direction issued for recovery of compensation for payment to the petitioner.

(Para 15)

Case laws Referred to:-

1.1995(2) TAC.135: (Rajbir Singh-V-S.K.S.Yadav,Commissioner Workmen's Compensation).
2.1997 (1) TAC 2(HP) : (Oriental Insurance Co.Ltd. -V- Smt.Kala Devi & Ors.)
3.1998 (1) TAC 814 (P & H) : (Gurunam -V- Commissioner Workmen's Compensation)
4.2001(2) TAC 250(SC) : (Rathi Memon -V- Union of India).
5.AIR 1987 SC 2186 : (Kuntesh -V- Management, H.K. Mahavidyalaya, Sitapur).
6.AIR 1978 SC 1814 : (Chandra Bhan Singh -V- Latafat Ullah Khan).
7.AIR 1970 SC 1273 : (P.N. Thakershi -V- Pradyumansinghji).
8.AIR 1966 SC 641 : (Harbhajan Singh -V- Karam Singh).
9.AIR 1965 SC 1457 : (Chunibhai -V- Narayanrao).
10. AIR 1966 SC 1047 : (Master Construction Co.(P) Ltd. -V- State of Orissa & Anr).

For Petitioners : M/s.D.K.Mohapatra & A.K.Kar.
For Opp.Parties : Mr.N.K.Mishra (for O.P.1)
Mr. S.N.Ali (for O.P.3)
Addl.Govt.Advocate (for O.P.2).

*W.P.(C) NO.13042 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.K. PATEL,J. In this writ application petitioners assail the legality of the common order dated 25.7.2008 passed by the Commissioner for Workmen's Compensation-cum-Asst. Labour Commissioner,Cuttack (for short, 'the Commissioner')passed in W.C.Case Nos. 493-D,494-D and 495-D of 2003, copy of which is at Annexure-1 to the writ application, correcting the common judgment dated 30.1.2008, copy of which is at Annexure-2 to the writ application, passed in the said cases.

2. On consent, the matter was taken up for disposal at the stage of admission.

3. Petitioners and others are among the legal heirs of three deceased workmen who died on 29.9.2000 due to injuries caused by an accident arising out of and in course of their employment as labours in a truck belonging to the opposite party no.3 who had been insured by opposite party no.1 New India Assurance Co. Ltd.. Petitioners 1 and two others preferred W.C.Case No.493-D of 2003; petitioner no.2 preferred W.C.Case No.494-D of 2003; and petitioner no.3 and three others preferred W.C.Case No.495-D of 2003 against opposite parties 1 and 3 before the learned Commissioner. It is pertinent to note that legal heirs of another deceased labourer who also died in the same accident preferred M.V.Misc.Case No.1241 of 2000 claiming compensation under section 166 of the Motor Vehicles Act before the learned M.A.C.T., Cuttack. By judgment/award dated 30.3.2006 passed in M.V.Misc.Case No.1241 of 2000, copy of which is at Annexure-5 to the writ application, said claimants were awarded Rs.1,95,000/- towards compensation. Upon enquiry, considering the materials on record including the judgment/award passed in M.V.Misc.Case No.1241 of 2000, learned Commissioner passed the common judgment dated 30.1.2008 directing the opposite party no.1 to deposit compensation amount of Rs.3,27,705/- in W.C.Case No.493/D/2003, Rs.3,32,005/- in W.C.Case No.494-D/2003 and Rs.3,11,970/- in W.C.Case No.494-D /2003. Said award was corrected by the impugned order on an application filed by the opposite party no.1. For better appreciation of the circumstances under which the impugned order was passed, it shall be profitable to reproduce the same. The impugned order at Annexure-1 reads:

> "Extract copy of order dtd.25.7.2008 passed by the Commissioner for Workmen's Compensation-cum-Asst.Labour Commissioner, Cuttack.

W.C.CaseNo.493-D/03
W.C.CaseNo.494-D/03
W.C.Case No.495-D/03

Kasinath Das and others … Applicants

-vrs-

D.M., New India Assurance Co.Ltd. and others
… Opp.Parties.

The application filed by the opp. party no.2 for appropriate order, regarding correction of the judgment passed by this Hon'ble Court.

Heard. The opp.party no.2 prays for correction of judgment on various grounds, which amounts to review of the judgment which is not permissible under law. However, considering the submission of the learned counsel for the opp.party no.2 regarding quantum of compensation, I found that the accident occurred prior to the amendment of the W.C.Act and by the time of accident maximum monthly wages under the Act was Rs.2000/- and Rs.1600/- for the workmen.

The learned Advocate for the applicant has filed a Xerox copy of the judgment of the Hon'ble MACT in M.V.Misc.No.1241 of 2000. The Hon'ble MACT while calculating compensation has taken into account the monthly wages of the victim/deceased at Rs.1500/- per month, the cause of action arising out of one accident and involvement of same vehicle. The pleadings of the petitioner in the said case was that the deceased was a labour in the same vehicle. But by mistake it has been lost sight while passing judgment.

As such the assessment of compensation by taking Rs.3000/- as monthly wages is not tainable in the eye of law. This being an Arithmetical error this Court has the power to correct the same. Keeping in mind the aforesaid judgment of the Hon'ble MACT, I hold the monthly wages of the deceased as Rs.1600/- per month due to limitation factor and accordingly the compensation in W.C.Case No.493-D/03 comes to 50% of wages of Rs.1600/- X 24 years age factor i.e.800/- X 218.47 = Rs.1,74,776.00. In W.C.Case No.494-D/03 50% of the monthly wages of Rs.1600/- X 22 years of age factor i.e. Rs.800/- X 221.37 = Rs.1,77,096.00, similarly in W.C.Case No.495-D/03 the compensation ;amount would be 800 X 207.98 = Rs.1,66,384/- and accordingly the application filed by the O.P.No.2 is disposed off.

The office is directed to carry out the necessary correction in the judgment and communicate the same to the parties.

Sd/- Commission

xxx xxx xxx"(sic)

4. Sri D.K. Mohapatra, learned counsel for the petitioners would submit that it is apparent from the impugned order that the learned Commissioner was fully aware of the fact that review of the judgment under the Workmen's

Compensation Act (for short 'the W.C. Act') is not permissible under law. Despite categorical observation to the effect that prayer of opposite party no. 1 for correction of judgment amounts to prayer for review of judgment which is not permissible under law, on the pretext of correction of arithmetical error, the learned Commissioner upon reference to the amendment enhancing deemed maximum monthly wages to be adopted from two thousand rupees to four thousand rupees brought into Explanation II to clauses (a) and (b) of sub-section (1) of Section 4 of the W.C. Act w.e.f. 08.12.2000, and the award at Annexure-5 passed by the learned M.A.C.T., Cuttack, reviewed the common judgment passed more than six months prior to such review. It was argued that by no stretch of imagination the impugned order can be construed to have effected arithmetic correction only. Rather, learned Commissioner assigned reasons for reviewing the judgment. Therefore, the impugned award is not sustainable under law. In support of his contention learned counsel for the petitioners relied upon decisions of Delhi High Court in ***Rajbir Singh –vrs.- S.K.S. Yadav, Commissioner Workmen's Compensation*** : 1995 (2) T.A.C. 135 (Del), of Himachal Pradesh High Court in ***Oriental Insurance Co. Ltd. –vrs.- Smt. Kala Devi and others*** : 1997 (1) T.A.C. 2 (HP) and of Punjab and Haryana High Court in ***Gurnam –vrs.- Commissioner Workmen's Compensation*** : 1998 (1) T.A.C. 814 (P & H).

5. Learned counsel for the petitioners would further argue that though Explanation II to clauses (a) and (b) of sub-section (1) of Section 4 of the W.C. Act was amended w.e.f. 08.12.2000, the accident having taken place on 29.09.2000 and the common judgment in the three W.C. cases having been passed on 30.01.2008, the legal heirs of the deceased workman were entitled to benefit which was available on the date when the W.C. case was finally adjudicated. In this context, learned counsel for the petitioners relies upon decision of the Hon'ble Supreme Court in ***Rathi Memon –vrs.- Union of India*** : 2001 (2) T.A.C. 250 (S.C.).

6. Learned counsel for the opposite party no.1 would contend that as the Insurance Company has already deposited compensation amount as directed in the impugned order and the petitioners have already received the same during the pendency of the writ application, the writ application has become infructuous. Learned counsel for the opposite party no.1 also contended that as the amendment enhancing the amount of deemed maximum monthly wage to be adopted for calculation of compensation was effected after the date of accident, the impugned award does not amount to review. It amounts to correction of inadvertent arithmetical mistake.

7. None of the provisions under the W.C. Act provides for power of review of judgment. The only power of review that has been conferred on the Commissioner under Section 6 of the W.C. Act is in respect of half –monthly payment payable under Section 4(1)(d) of the W.C. Act. Admittedly, in the

present case, learned Commissioner has not resorted to provision under Section 6 of the W.C. Act. On the contrary, learned Commissioner has observed that prayer for correction of the impugned judgment sought by the Insurance Company amounts to prayer for review of the judgment which is not permissible under law. Nonetheless, learned Commissioner proceeded to modify the impugned judgment on the pretext of correcting arithmetical error. In bringing about so called correction of arithmetical mistake or error, learned Commissioner has referred to award passed by learned M.A.C.T., Cuttack in M.V. Misc. Case No.1241 of 2000 as well as amendment of Explanation II to clauses (a) and (b) of sub-section (1) of Section 4 of the W.C. Act enhancing the amount of deemed maximum monthly wages from "two thousand rupees" to "four thousand rupees".

8. Prior to amendment Explanation II to clauses (a) and (b) of sub-section (1) of Section 4 of the W.C. Act read as follows:

> " xx xx xx xx xx Explanation II- Where the monthly wages of a workman exceed two thousand rupees, his monthly wages for the purposes of clause (a) and Clause (b) shall be deemed to be two thousand rupees only."

By virtue of Workmen's Compensation (Amendment) Act, 2000 (Act 46 of 2000) the words "two thousand rupees" were substituted by the words "four thousand rupees" w.e.f. 08.12.2000.

9. Thus, obviously, on the date of accident monthly wages of the deceased could not have been deemed to have more than two thousand rupees. However, such amount was enhanced to four thousand rupees pursuant to the Act 46 of 2000 long before the common judgment was passed on 30.01.2008 in W.C. Case Nos..493-D/03, 494-D/03 and 495-D/03.

10. Review is a creature of statute. Power of review is not an inherent power. It must be conferred by law either specifically or by necessary implication. In absence of any provision granting express power of review, an order in review is ultra vires, illegal and without jurisdiction. The Courts may have limited power only to make correction if the order, as drawn up, did not express the intention of the Court. (See ***Kuntesh –vrs.- Management, H.K. Mahavidyalaya, Sitapur*** : AIR 1987 SC 2186, ***Chandra Bhan Singh –vrs.- Latafat Ullah Khan*** : AIR 1978 SC 1814, ***P.N. Thakershi –vrs.- Pradyumansinghji*** : AIR 1970 SC 1273, ***Harbhajan Singh –vrs.- Karam Singh*** : AIR 1966 SC 641 and ***Chunibhai –vrs.- Narayanrao*** : AIR 1965 SC 1457).

11. It is apparent from the impugned order that on an application filed by the Insurance Company learned Commissioner passed the impugned order without notice to the petitioners. It is also apparent that impugned order is a reasoned order in which the learned Commissioner observed that award

passed in the three W.C. cases was not in accordance with provision of the W.C. Act prior to amendment as well as award passed by learned M.A.C.T., Cuttack in M.V. Misc. Case No.1241 of 2000. As is observed, learned Commissioner determined the monthly wages of deceased workmen 'keeping in mind' the award passed by the learned M.A.C.T., Cuttack. Resorting to such recourse was not at all available to the learned Commissioner in view of not only absence of any provision under the Act but also specific bar contained in Rule 32 of the Workmen's Compensation Rules, 1924 which reads:-

> "Judgment.-(1) The Commissioner, in passing orders, shall record concisely a judgment, his finding on each of the issues framed and his reasons for such finding.
>
> (2) The Commissioner, at the time of signing and dating his judgment, shall pronounce, his decision, and thereafter no addition or alteration shall be made to the judgment other than the correction of a clerical or arithmetical mistake arising from any accidental slip or omission."

12. An arithmetical mistake, as has been laid down by the Hon'ble Supreme Court in ***Master Construction Co. (P) Ltd. -vrs.- State of Orissa and another*** : AIR 1966 S.C. 1047, is a mistake of calculation, a clerical mistake is a mistake in writing or typing. An error arising out of or occurring from an accidental slip or omission is an error due to a careless mistake or omission unintentionally made. Such an error should be apparent on the face of record. It should not be an error which should depend for its discovery, on elaborate argument of questions of fact or law. Therefore, correction of arithmetical mistake as contemplated under sub-rule (2) of Rule 32 of the Workmen's Compensation Rules, 1924 cannot be construed to mean correction of anything more than mistake in addition, subtraction, multiplication etc. arising from accidental slip or omission. Save and accept such rectification of the mistake apparent on the face of the judgment, neither the Workmen's Compensation Act nor the Rules framed thereunder confers on the Commissioner any jurisdiction to interfere with the judgment already passed. Learned Commissioner appears to have modified the judgment already passed without jurisdiction and in blatant violation of sub-rule (2)of Rule 32 of the Workmen's Compensation Rules, 1924.

13. In ***Rajbir Singh –vrs.- S.K.S. Yadav, Commissioner Workmen's Compensation*** (supra), it has been held by Delhi High Court, with regard to power of review of judgment under Section 6 of the W.C. Act:

> "6. No power of review has been conferred on the Competent Authority for reviewing the orders passed under Section4 (1)(a), (b) and (c). Only power of review is conferred in respect of the order which is passed presumably under Section 4(1)(d) of the Act and

> rightly so because under Section 4 (1)(d) of the Act there is a temporary disablement which may be curable and in such a situation if subsequently it comes out that there has been change in the medical condition of the employee then obviously a fresh application can lie to the Competent Authority giving the new facts and Competent Authority can get the employee medically examined. It is possible that in such medical examination it may be found that the workman had either been cured or had suffered permanent disablement. In such a case, review can be made by the Competent Authority and appropriate order made under Section 6 of the Act, but such is not the case where compensation has been awarded under Section 4(1), (b) and (c) of the Act."

Similar view has also been taken by Himachal Pradesh High Court in ***Oriental Insurance Co. Ltd. –vrs.- Smt. Kala Devi and others*** (supra) and Punjab and Haryana High Court in ***Gurnam –vrs.- Commissioner Workmen's Compensation*** (supra).

14. The W.C. Act is a beneficent legislation. Long before the adjudication of W.C. Case Nos..493-D/03, 494-D/03 and 495-D/03 amendment more beneficial to workmen had already been brought into Explanation II to clauses (a) and (b) of sub-section (1) of Section 4 of the W.C. Act. In **Rathi Memon –vrs.- Union of India** (supra), it has been observed:

> "34. Shri K. Sukumaran, learned senior Counsel relied on the decision of another Division Bench of the Kerala High Court in ***Oriental Insurance Company Ltd. v. Asokan****,* 1997(1) Kerala Law Times 608 : 1997 (1) T.A.C. 835, in which a decision of this Court is quoted. That decision of this Court is dated 6th November, 1996, rendered by a two Judge Bench (Kuldip Singh and Saghir Ahmad, JJ.) of this Court (C.A. Nos.16904-09 of 1996). Later we came across that the said decision is reported in **New India Assurance Co. Ltd. v. V.K. Neelakandan and others**, 1999 (8) SCC 256. The said decision was also under the Workmen's Compensation Act. This is what the two Judge Bench said :
>
> "We are finally determining the rights of the workmen today. The Act is a special legislation for the benefit of the labour. Keeping in view the scheme of the Act we are of the view that the only interpretation which can be given to the amendment is that if any benefit is conferred on the workmen and the said benefit is available on the date when the case is finally adjudicated, the said benefit should be extended to the workmen"."
>
> 35. A three Judge Bench of this Court in ***Kerala State Electricity Board and another v. Valsala K. and another***, JT 1999 (7) SC 292: 1999 (8) SCC 254: 2000 (1) T.A.C. 6, has referred to the

aforesaid decision and held that it was wrongly decided in view of the four Judge Bench decision of this Court in ***Pratap Narain Singh Deo*** (supra). Nonetheless, in appropriate cases the principle of taking advantage of the beneficial legislation, subsequently enacted, is not dissented from by the larger Bench."

At paragraph-30 of the judgment it has been categorically held :

"xx xx we are of the definite opinion that the Claims Tribunal must consider what the Rules prescribed at the time of making the order for payment of the compensation."

15. In view of the above, the writ application is allowed and the impugned order is quashed. Opposite party no.2 Commissioner for Workmen's Compensation-Cum-Assistant Labour Commissioner, Cuttack is directed to take steps for recovery of compensation as awarded in terms of judgment dated 30.01.2008 and payment thereof to the petitioners at the earliest. No cost.

Writ petition allowed.

2010 (I) ILR-CUT- 135

S.K.MISHRA,J.

BHAGABAT SAHOO & ORS.-V- STATE OF ORISSA & ANR.*

NOVEMBER 30,2009

EVIDENCE ACT,1872 (ACT NO. 1 OF 1872) – SEC.145.

Complaint case and G.R.Case – Examination of witnesses in the Complaint case – Defence filed petition to use the statement of witnesses recorded U/s.161 Cr.P.C. in the G.R.Case to contradict the witnesses in the Complaint case – Petition rejected – Hence this revision.

Held, the right of the accused to Cross-examine the witnesses with reference to the statement recorded U/s.161 Cr.P.C. can not be taken away.

(Para 10)

Case laws Referred to:-

1.1978 Criminal Law Journal 295 : (Madhav Rao -v- Mohamad Abdul Mateen).

2.1982 Criminal Law Journal 1818 : (Harnam Singh & Ors.-v-State).

For Petitioners – M/s.S.K.Sahoo, Smt.G.Sahoo, M.K.Mallick & D.P.Pattnaik.
Addl.Standing Counsel.

For Opp.Parties – M/s.D.Panda, B.Swain, N.K.Dash & A.K.Parida
(For O.P.2).

*CRL.REV.NO. 879 OF 2008. From the order dated 25.6.2008 passed by Sri D.R.Sahu, J.M.F.C.,Bhadrak in I.C.C.Case No.66 of 2006.

S.K. MISHRA, J. Heard learned counsel for the petitioners as well as learned Addl. Government Advocate for the opposite parties. Keeping in view the limited nature of the question involved, the matter is disposed of at the stage of admission.

2. The petitioners assail the order dated 25.06.2008 passed by the learned J.M.F.C., Bhadrak in 1.C.C. No.66 of 2006 rejecting the petition dated 29.2.2008 of the petitioners for confronting the statement of P.Ws.1,4,5,6 and 7 recorded under Section 161 Cr.P.C. in G. R. Case No.1699 of 2005, as contradiction

3. The factual background of the present case is that on 23.11.2005 the complainant lodged an FIR at Bhandaripokhari Police Station regarding the occurrence. On 30.12.2005 the police submitted a final report stating that the case is one mistake of fact. On 23.2.2006 the complainant filed the complain case before the learned S.D.J.M., Bhadrak which is registered as I.C.C. Case No66 of 2006.

4. The learned S.D.J.M., Bhadrak, after due enquiry under Section 202 Cr.P.C., took cognizance of offence under Sections 341/323/294/506/34 IPC and issued process against the accused persons. On 10.3.2006, G.R Case No.1699 of 2005 was tagged to the present complain case filed by the

complainant. Thereafter, six witnesses were examined by the complainant. On 22.9.2007 the accused persons were allowed to further cross-examine the P.W.1. On 29.10.2007 the accused persons were allowed to further cross-examine P.Ws. 4, 5 and 6 with a direction to submit the appropriate costs. During further cross-examination of P.W.4, the learned counsel for the accused persons suggested to P.W.4 that he had not stated the fact to the I.O. in G. R. Case No.1699 of 2005 which he had stated before the Court. In other words, the defence attempted to contradict the witness regarding some material omission in her statement recorded under Section 161 of the Code of Criminal Procedure, hereinafter referred as 'the Code', for brevity. The learned counsel for the complainant raised objection and submitted that arbitrarily the police being influenced by the accused persons, submitted final report for which the complain case has been filed and those witnesses have already been examined under Section 202 Cr.P.C. by the learned S.D.J.M., Bhadrak. Learned counsel for the complainant raised objection that the statement recorded under Section 161 Cr.P.C. by the I.O. cannot be allowed to be used by the defence counsel for contradicting any witnesses. The learned Magistrate accepted the contention of the learned counsel appearing for the complainant and did not allow the defence to put any question or suggestion to the prosecution witnesses with reference to their statement recorded under Section 161 Cr.P.C. Such order has been assailed in this revision application.

5. Learned counsel for the petitioners drew attention to the Court to the provision of under Section 145 of the Indian Evidence Act, 1862 and submitted that the statement recorded under Section 161 of the Code, during investigation is a previous statement even though the present case is a complain case.

6. Learned Additional Standing Counsel for the State and the learned counsel appearing for Opp. Party No.2, on the other hand, supported the finding of the learned J.M.F.C., Bhadrak and prayed to dismiss this revision application.

7. Under Section 145 of the Indian Evidence Act, it is provided that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question, without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contracting him. Section 162 of the Code provides that the statement recorded under Section 161 of the Code cannot be used in any enquiry or trial except for the purpose of contradicting such witness in such trials. Section 162 of Code does not provide that the said statement cannot be used in any proceeding other than the one for which that particular

investigation was conducted. The only limitation is that such statement may be used to contradict a witness for the prosecution.

8. Admittedly, in this case an FIR was lodged by the complainant and the case was investigated by the Police Officer of Bhandaripokhari Police Station. In course of such investigation, he recorded the statement of the witnesses under Section 161 of the Code. So, such recording of statement of the witnesses is definitely a previous statement reduced in to writing. Such view is supported by the decision of the Karnatak High Court in the case of **Madhav Rao V. Mohamad Abdul Mateen,** ***1978 Criminal Law Journal 295***, wherein it has been held that a prosecution witness is a witness examined by the prosecution. It is immaterial whether the complainant examines witnesses on his behalf in prosecuting the complaint or a prosecution is launched by the State through the investigating agency, the witnesses so examined in support of the prosecution case remain prosecution witnesses and as such, if they have made any previous statements to the investigating officers in regard to the very incident in question, those statements can be used to contradict the witnesses if such an occasion arises. It may be further noted that both Sections 145 of the Indian Evidence Act and Section 162 of the Code, do not differentiate between a complain case and a case launched by an investigating agency.

9. The learned J.M.F.C., Bhadrak, while considering the motion made by the defence, for confronting statements recorded under Section 161 of the Code, was influenced by the allegation that the police officer did not investigate the case properly and did not record the statement of the witnesses under Section 161 of the Code. In other words, the complainant alleges that the investigating officer only made a pretence of investigation.

10. Be that as it may, the right of the accused person to cross-examine the witnesses when reference to such statement under Section 161 of the Code cannot be taken away. On the other hand, at the final disposal of the case if the learned Magistrate comes to the conclusion that the investigating officer has actually not examined the witnesses then it is open for him to appreciate the evidence keeping in view the said allegations.

11. Another point that arises in this case is how to prove such contradiction if any. The learned counsel for the petitioner relies on the decision reported in ***1982 Criminal Law Journal, 1818*** (**Harnam Singh & Ors. V. State)** wherein it has been laid down that the non-production of such a witness like the investigating officer, by the prosecution, the defence be will not precluded from calling him as a witness for it. Therefore, it is hereby made clear that in case any contradiction arises and if the defence files an applications to summon the investigating officer concerned than the Court shall consider the same.

12. Keeping in view the aforesaid consideration, the revision application is allowed. The petitioners are directed to make a fresh application before the learned J.M.F.C., Bhadrak within three weeks for recall of P.W.1 to P.W.6 indicating in the application the exact question they want to put to those witnesses. The witnesses shall attend the Court at the cost of the petitioners and for that purpose the cost shall be assessed by the trial court.

Revision allowed.