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

W.P.(C) NO.17279 OF 2009 (Decided on 22.09.2010)

M/S. BINODINEE KISSAN SEVA KENDRA …… Petitioner.

.Vrs.

INDIAN OIL CORPORATION LTD. & ORS. …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.14,16, 19, 21.

Petitioner is a retail out let dealer of Petrol, diesel and petroleum products – Termination of dealership – Allegation of adulteration on petroleum products supplied to the consumer – Although guide lines provide appeal remedy there is no bar to invoke extraordinary and discretionary jurisdiction of this Court if there is violation of the statutory rule, principles of natural justice or if the act of the authority is found to be arbitrary or unreasonable.

In the present case decision of the corporation by conducting 2 tier sample tests instead of 3 tier sample tests is contrary to the guide line – Held, action of the corporation is not only unreasonable but also arbitrary and as such violative of Art.14 of the Constitution.

Held, there is violation of fundamental rights of the petitioner and this Court quashed the order of termination of dealership and directed the corporation to restore dealership to the petitioner.

(Para 12)

Case laws Referred to:-

1.AIR 1990 SC 1031 : (Mahabit Auto Stores & Ors.-V-Indian Oil Corporation & Ors.).
2.AIR 1974 SC 555 : (e.p.Royappa -V- State of Tamil Nadu & Anr.).
3.(1978)1 SCC 248 : (Maneka Gandhi -V- Union of India).

For Petitioner - M/s. Santanu Kr.Sarangi, Sundeep Kr.Sarangi, B.Behera & J.Acharya.
For Opp.Parties – Mr. Sanjit Mohanty, Sr.Advocate
M/s. S.Pattnaik, R.R.Swain, A.Mohapatra, A.Mohapatra, A.Mohanty & A.Mehar.

V.GOPALA GOWDA, C.J. This writ petition has been filed by a retail outlet dealer of petrol, diesel and petroleum products in the name and style

M/s. Binodinee Kissan Seva Kendra initially questioning the legality of the show cause notice dated 4.11.2009 issued to it under Annexure-11.

2. This Court vide order dated 7.12.2009 issued notice to opposite parties 2 and 3 by special messenger and thereafter matter was being adjourned and further, on account of the subsequent event that had taken place, the order of termination of petitioner's dealership dated 24.02.2010 under Annexure-12 was passed. During pendency of the writ petition, an amendment petition was filed in this writ petition and the same was registered as Misc. Case No. 6745 of 2010, which came for consideration on 30.04.2010. Opposite parties 2 and 3 have not raised any objection to the prayer for amendment and the same was allowed. Now also opposite parties 2 and 3 have filed counter affidavit justifying the impugned order on various grounds.

3. The attack on the order of termination of dealership of the petitioner is on several grounds out of which the main ground is that the procedure under the Marketing Discipline Guidelines, 2005 issued by the Corporation regarding the conduct of test to find out whether the petroleum product supplied to the consumer is adulterated or not at the instance of a dealer or its servant or agent is not valid, to invoke right by the Corporation under Clause-17 of the terms and conditions of the dealership agreement between the Corporation and the petitioner.

4. The case of the petitioner is that the transporter's sample was not tested because he has not retained the 2 X 1 litre MS as prescribed under Regulation-2.3 of the Marketing Discipline Guidelines, 2005. Therefore, the conclusion arrived at by the opposite party No.1 on the basis of laboratory test as indicated in the impugned order is only on the basis of the sample collected from the depot as well as the tank of the dealer. Therefore, it is contended that 3-tire sample testing procedure has not been complied with by the opposite party, which is mandatory in law, as the action of invoking the right of the Corporation under Clause-17 of the agreement for termination of the dealership, will have serious consequences upon the petitioner, as she will be losing her statutory right of running retail outlet of petrol, diesel and other petroleum products.

5. It is contended that the procedure laid down in the guidelines, should be strictly adhered to by the Corporation before invoking its right for termination of the dealership of the petitioner but that has not been done in the present case. Therefore, the action has been taken by the opposite party No.1 on the basis of incomplete test conducted by the officers of the Corporation and recorded the finding of fact holding that the samples of petroleum product collected from both the depot as well as the tank of the retailer found to be adulterated. Therefore, the action of the first opposite party in terminating the contract of the petitioner is arbitrary and

unreasonable, which is violative of Article 14 and is interrelated to Articles 19(1)(g) and 21 of the Constitution of India. Therefore, the procedure provided under the guidelines will not come in the way of the petitioner to invoke the extraordinary discretionary jurisdiction of this Court in questioning the correctness of the impugned order.

6. Mr. Sanjit Mohanty, learned senior counsel appearing for the Corporation placing reliance upon Clause-2.3 of the Guidelines stated that the required 3-tier sample testing procedure has not been done in the present case. The burden lying on the petitioner has not been discharged in the instant case. He further states that the finding of the Officer in the laboratory test of the materials collected from the depot as well as the tank of the dealer is proved on the basis of the same Clause-17 of the agreement was invoked by the Corporation and the impugned order is passed under Annexure-12, therefore it does not call for any interference by this Court in exercise of this Court's extraordinary & discretionary power for the reason that the finding of fact recorded on scientific laboratory analysis of the materials collected from the depot as well as the tank of the petitioner and the same was found to be altogether adulterated. Therefore, the dealer has committed misconduct in selling the petroleum products to the consumers which has brought bad name to the Corporation. On account of such serious misconduct on the part of the petitioner, the impugned order is justifiable and against this order the petitioner has got right of an Appeal under Notes-IV of Clause- 6.3 of the Guidelines, which has not been availed by her. Therefore, it is urged that this Court need not exercise its extraordinary and discretionary jurisdiction to grant any relief to the petitioner.

7. The second ground of justification of the impugned order is that the petitioner is bound by the terms and conditions of the dealership agreement which provides for arbitration clause. Therefore, if there is any serious dispute with regard to the correctness of the impugned order, it requires to get an arbitrator appointed who has to adjudicate the dispute between the parties under the provisions of the Arbitration and Conciliation Act, 1996 as the same is applicable to the facts of this case. In view of the aforesaid reasons the learned Sr. Counsel for the opposite parties would submit that the petitioner is not entitled for the reliefs as prayed for in this petition and therefore he has prayed for dismissal of this writ petition.

8. With reference to the above rival contentions raised by the learned counsel for the parties, we have carefully examined the correctness of the impugned order to answer the following points that would arise for our consideration.

i) Whether the petitioner for redressal of her grievance has to avail either the appeal remedy or arbitration proceedings?

ii) Whether the impugned order is vitiated on account of non-compliance with the statutory requirement of 3 tier sample testing procedure as provided under the Guidelines?

iii) What order the petitioner is entitled?

9. The aforesaid points are answered in favour of the petitioner by assigning the following reasons:-

i) The appeal remedy as provided in the guidelines is no bar for this Court to invoke extraordinary and discretionary jurisdiction under Article 226 of the Constitution of India.

ii) It is well settled principles of law that if an order is in violation of the principles of natural justice or statutory rules, there is no bar for the petitioner to approach this Court despite the statutory right of appeal is available for the petitioner.

iii) The Marketing Discipline Guidelines do not support the Corporation in passing the impugned order. No doubt the petitioner for the purpose of regulating its conduct of business entered into the contract with the Corporation by executing necessary agreement which is statutory in nature.

iv) The guidelines provide an Appeal remedy. Without exhausting the appeal remedy, in case this Court is satisfied that there is violation of the statutory rule or the principles of natural justice and also the act of the authority is found to be arbitrary or unreasonable, then the Appeal remedy for the petitioner is no bar for this Court to exercise it extraordinary and discretionary power to grant the relief to the petitioner.

10. In the instant case challenge was made by the petitioner to the show-cause notice dated 4.11.2009(Annexure-11). On 7.12.2009 notice was issued to the opposite parties and thereafter the event of passing of the order of termination of dealership had taken place and therefore the petitioner has rightly filed an amendment application, the same was allowed in Misc. Case No.6745 of 2010 vide order dated 30.4.2010 as there was no opposition to the prayer for amendment to this writ petition.

11. The counter statement is also filed justifying the impugned order. The order of termination could have been the subject matter of appeal before the appellate authority if the writ petition is not pending. Since the matter is pending before this Court, at this stage directing the petitioner to approach the appellate authority is not correct and the Appeal remedy to the petitioner also not a bar for this Court to entertain this petition for the reason that the procedure required to be followed under the guidelines has not been strictly followed by the Corporation by not conducting 3-tier sample testing procedure before terminating the contract as the transporter's sample at the time of delivery of petroleum products to the petitioner by the transporter

was not available for testing with the samples collected from the petitioner's depot/tank, the laboratory tests were conducted. The procedure of 3 tier test under the Guidelines has to be held as mandatory for the reason that exercise of the right under Clause 17 of the agreement by the Corporation on the basis of laboratory tests report will have a serious civil consequence upon the petitioner's right.

12. The contention urged on behalf of the Corporation is that the burden lies on the petitioner to prove the fact that she was not selling adulterated petroleum products to her customers. The said burden is not discharged since the petitioner did not retain 2 X1 litre MS as required under the Regulation-2.3 of the Marketing Discipline Guidelines. This contention cannot be accepted by us for the reason that before invoking the right by the Corporation under Clause-17 of the agreement for terminating the contract of the petitioner, the procedure as contemplated under the guidelines was required to be strictly adhered to by the Corporation in the instant case. Therefore the Corporation has not discharged the initial burden by conducting the required tests as contemplated under Regulation-2.3 of the Guidelines. Therefore, the conduct of tests of sample is incomplete, inconclusive for not conducting the laboratory tests of sample of the transporter. In case there was collection of sample of the transporter retained by the dealer as well as the transporter itself in the absence of availability of the sample of the transporter with the dealer, then there was no difficulty for the Corporation to procure sample from the transporter to find out whether at the time of the delivery of the petroleum products to the petitioner the sample of the same should be retained by the transporter. Conducting the laboratory test without procuring the required sample of the transporter and accepting the report of the Officer on the basis of the laboratory tests done from the samples drawn from the Depot and tank of the dealer and arriving at the conclusion that it was adulterated, is an incomplete tests conducted by the Officer and the Corporation has not complied with the mandatory procedure to find out the truth of the matter. Therefore, termination of the contract of dealership of the petitioner by the Corporation is in violation of a well established procedure which is strictly required to be followed by the Corporation under the Guidelines referred to supra. Therefore, the action of the Corporation in accepting the report of the laboratory test and not accepting the explanation given by the petitioner for the reason that she has not discharged her onus in not producing the samples collected by her at the time of delivery by the transporter is not sustainable in law. The question of defence on the part of the petitioner does not arise unless the required procedure is followed by the Corporation to invoke its right under Clause-17 of the agreement. The act of the Corporation is not only un-reasonable but also arbitrary and therefore the

same is in violation of the Article 14, as the decision of the Corporation by conducting 2 tier sample tests but not by 3 tier sample tests as required under the guidelines.

13. In this regard, it is worthwhile to refer to a decision of the Hon'ble Supreme Court in the case of **Mahabir Auto Stores and others v. Indian Oil Corporation and others**, AIR 1990 SC 1031, wherein Hon'ble Supreme Court with reference to Article-14 at Paragraph-12 after adverting to various constitution decisions of the Supreme Court examined the power of the High Court and the Supreme Court under Articles 226 and 32 respectively in the cases of **E.P. Royappa v. State of Tamul Nadu & another** , AIR 1974 SC 555 & **Maneka Gandhi v. .Union of India**, (1978) 1 SCC 248 it is held that in respect of the statutory Corporation, Article 14 is attracted if it is shown that its action is either arbitrary or unreasonable When there is violation of Article 14 on the part of the Statutory Authority which is interrelated to Articles 19(1)(g) and 21 of the Constitution. For the foregoing reasons there is violation of the fundamental rights of the petitioner. Hence on the ground it self this Court is required to exercise its extraordinary and discretionary power and grant the reliefs to the petitioner in this petition.

14. Accordingly, we answer the aforesaid points in favour of the petitioner, allow the writ petition and quash the order of termination dated 24.2.2010 under Annexure-12. The steps for consequential relief by restoring the dealership to the petitioner must be made by the Corporation immediately.

Writ petition allowed.

2011 (I) ILR – CUT- 7

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

CONTC NO.913 OF 2010 (Decided on 5.10.2010).

M/S. ORTEL COMMUNICATIONS LTD. …….. Petitioner.

.Vrs.

K. RAGHURAMAYA & ANR. …….. Opp.Parties

CONTEMPT OF COURTS ACT, 1971 (ACT NO.70 OF 1971) – SEC.12.

Contempt of Courts – Writ petition filed by the Contempt-Petitioner dismissed – No order passed in its favour – He has no cause of action to file a Contempt petition.

Prayer for withdrawal of the Contempt application was turned down by this Court since the process of the Court had already been initiated at the behest of the petitioner effecting the interest of other parties and that too with an oblique motive.

Contempt petition filed during vacation – Under Chapter-III, Rule 3 of the Orissa High Court Rules, 1948, a Contempt petition can not be portrayed as an "Urgent matter" to be listed during vacation – Filing of such petition amounts to an abuse of the process of the Court and therefore contumacious in nature – Held, Contempt petition is dismissed with costs of Rs.25,000/-/

(Para 10 to 13)

Case laws Referred to:-

1.JT 2000 (2) SC 293 : (Om Prakash Jaiswal -V- D.K.Mittal & Anr.).
2.ILR (2007) KAR 5184 : (Banglore Development Authority -V- Gururaj S/o.Late M.S.Prithviraj & B.V.Ram Murthy).

For Petitioner - M/s, Sourya Sundar Das, K.Behera, S.Modi & S.S.Pradhan.
For Opp.Party No.1. - M/s. Saurjya Kanta Padhi (Sr.Advocate) M.Padhi, A.Das & B.Panigrahi.
For Opp.Party No.2 - Mr. M.B.Rao.

I.MAHANTY, J. This contempt application has been filed by M/s. Ortel Communications Ltd. with a prayer to punish the Chairman of Paradeep Port Trust Ltd. (O.P. No.1) and a director of M/s. Manthan Broad Band Services Pvt. Ltd. (O.P. No.2) for causing deliberate violation of the direction of this Court passed in judgment dated 12.5.2010 in W.P.(C) No.10386 of 2009.

2. The petitioner herein, M/s. Ortel Communications Ltd. had filed the writ petition, i.e. W.P.(C) No.10386 of 2009 challenging the award of a tender by the Paradeep Port Trust for providing cable TV network system at Paradeep Port in favour of "M/s. Manthan Broad Band Services Pvt. Ltd". Apart from the petitioner-M/s. Ortel Communications Ltd. another tenderer, M/s. Modent Antena Pvt. Ltd. had also filed W.P.(C) No.9134 of 2009 challenging the award of tender in favour of M/s. Manthan Broad Band Services Pvt. Ltd.. Both the aforesaid writ applications came to be disposed of vide a common judgment dated 12.5.2010, upholding the decision taken by the Paradeep Port Trust to award the contract in favour of M/s. Manthan Broad Band Services Pvt. Ltd. and observed in Paragraph-14 as follows:

> "xx xx xx Therefore, this Court feels that Paradeep Port Trust would grant ten days time to 'Manthan' to satisfy the Port Trust that it is capable or has permission to telecast all the channels which it is otherwise required to telecast, i.e. 60 channels and 40 pay channels. In the event it fails to do so within the time stipulated above, necessary steps shall be taken for annulling the decision and no agreement shall be executed."

3. After the aforesaid judgment was passed on 12.5.2010, the present contempt application came to be filed on 31.5.2010 during the Summer Vacation of the Court and a memo was filed by the petitioner stating the reasons for mentioning which is to the following effect:

> "That this Hon'ble Court in its judgment dated 12.5.2010 directed the O.P. No.1, Paradeep Port Trust to allow 10 days time to O.P.No.2 to satisfy it that it has permission to telecast all the channels and further directed that incase O.P. No.2 fails to do so the selection process would be annulled and no agreement would be executed, in the meanwhile 10 days time has already expired but O.P. No.1 did not take any steps to annulling the selection process. So the matter is very urgent in nature, this may kindly be listed on 01.06.2010 for admission."

4. In accordance with the aforesaid memo, the matter came to be listed during the Summer Vacation, i.e. on 1.6.2010 wherein the Hon'ble Vacation Judges directed for issuance of notice to the parties and to file requisites within three days. But, the requisites were not filed within the time stipulated and the same were filed only on 23.6.2010, on which date, notices are issued fixing 20.7.2010 for appearance and show cause of the parties.

4.1. This matter was thereafter listed on 21.7.2010, on which date W.P.(C) No.10386 of 2009 was also listed, since a Misc. Case was filed therein by

M/s. Manthan Broad Band Services Pvt. Ltd. seeking extension of time for compliance with the directions of this Court passed in judgment dated 12.5.2010. On the said date, the application for extension of time was allowed by this Court for the reasons noted in the separate order passed in the aforesaid writ application and on the self same date, i.e. on 21.7.2010, this Court issued notice to the contempt petitioner to show cause as to whether the petitioner has got "*locus standi"* to maintain the contempt petition as there was no order passed in its favour and the writ application filed by it had been dismissed. Further, the contempt petitioner was called upon to show cause as to whether during Summer Vacation a contempt matter could be construed as an "urgent matter" to be moved before the Vacation Judge. Accordingly, this matter thereafter was posted to 16.9.2010 and on the prayer of the petitioner's counsel, matter stood adjourned to 23.9.2010 on which date, arguments were advanced by the learned counsel Mr.Patjoshi on behalf of the petitioner; Mr. S.K.Padhi, learned senior counsel on behalf of the Paradeep Port Trust and Mr. M.B.Rao, learned counsel appearing for the director of M/s. Manthan Broad Band Services Pvt. Ltd.

4.2. Mr. Patjoshi, learned counsel for the contempt-petitioner prayed that since this Court had extended the period of time as prayed for by M/s. Manthan Broad Band Services Pvt. Ltd. for compliance with the judgment dated 12.5.2010 passed in W.P.(C) No.10386 of 2009, he may be permitted to withdraw the contempt application as the same had become infructuous. Insofar as the issues raised by this Court in its order dated 21.7.2010 is concerned, he contended that the writ application filed by the contempt petitioner had not been "dismissed" but had been "disposed of" and since the Paradeep Port Trust had not complied with the direction of this Court, within the time stipulated, the same came to be the "cause of action" on the part of the petitioner to initiate a contempt proceeding, since the petitioner was vitally interested in the re-tender for providing cable TV connection at Paradeep Port Trust. He further submitted that the matter involved was of immense commercial interest to the petitioner and on this account a memo has been filed by the petitioner for listing the contempt matter during the Summer Vacation. He also submitted that the Hon'ble Vacation Judges, on being satisfied on the "urgency shown" by the petitioner in their memo, directed listing of this matter on 1.6.2010 and passed orders for issuance of notice to the opposite parties. He further submitted that listing of this matter during the Summer Vacation was on the directions of the Hon'ble Vacation Judges and since the same had been listed on the direction of the Hon'ble Vacation Judges, the matter was taken up for consideration during the Summer Vacation.

4.3. Mr. Patjoshi, learned counsel for the petitioner submitted that the "role of the petitioner" in the contempt proceedings, was merely to bring to the notice of the Court the violation of its directions and such initiation is permissible not only by a party to a legal proceeding but also by an outsider or a private party. He therefore, submitted that the petitioner was a party to the proceedings and that it is well settled that, a civil contempt could be initiated by a private party. In this respect, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Om Prakash Jaiswal v. D.K.Mittal and another,** JT 2000 (2) SC 293.

5. Mr. S.K.Padhi, learned counsel for the Chairman, Paradeep Port Trust (O.P. No.1) submitted that filing of the present contempt application amounts to a clear "abuse of the process of the Court". In terms of the direction of this Court in W.P.C. No.10386 of 2009 vide its judgment dated 12.5.2010, the prayer of the petitioner therein for quashing of the decision of the Paradeep Port Trust to award the tender in favour of M/s. Manthan Broad Band Services Pvt. Ltd. was challenged by the petitioner. This decision of the Port Trust was affirmed by the Court and in the concluding Paragraph-17, this Court had decided not to interfere with the decision of the Paradeep Port Trust in this matter. Therefore, clearly the prayer of the petitioner having been turned down, even though the word "dismissed" is not mentioned in the order, yet effectively, the writ application of the petitioner had been dismissed. Even though the petitioner's writ application had been dismissed, yet the petitioner went ahead and filed a contempt application, interalia, on the allegation that the Paradeep Port Trust have not acted in terms of the observations made in Paragraph-14 of the judgment by this Court. The aforesaid allegation raised while being wholly incorrect, the direction of this Court granting ten days time to M/s. Manthan Broad Band Services Pvt. Ltd., was complied with by the Paradeep Port Trust by issuing a letter to M/s. Manthan Broad Band Services Pvt. Ltd. on 1.6.2010 granting the said party with 10 days' time to satisfy the Port Trust of its capability and/or necessary permission to telecast the number of channels committed by it in the tender.

5.1. Apart from the above, Mr. Padhi submitted that no contempt on the behest of the writ petitioner (whose writ petition has been dismissed) could have been filed even though M/s. Manthan Broad Band Services Pvt. Ltd. had not complied with the direction of the Paradeep Port Trust. The petitioner, M/s. Ortel Communications Ltd. had no *locus standi* to initiate a contempt proceedings, since it was within the rights of the Paradeep Port Trust to decide regarding the necessity for re-tender. M/s. Ortel Communications Ltd. while being in the business of cable network, does not possesses any vested right to compel the Paradeep Port Trust to proceed with the tender and it was within the discretion of the Paradeep Port Trust to

act in the best manner it chooses in order to protect its own interest. He further submitted that the "real cause" for filing the contempt petition by M/s. Ortel Communications Ltd., (whose writ petition had been dismissed), was to arm twist the Paradeep Port Trust into annulling the tender awarded in favour of M/s. Manthan Broad Band Services Pvt. Ltd. He also submitted that no sooner the petitioner obtained the order dated 1.6.2010, whereby the Hon'ble Vacation Judges were pleased to issue notice, the entire objective behind the contempt petition was achieved by M/s. Ortel Communications Ltd. by publishing a further "notice" both in the Orissa TV (OTV) channel as well as the local newspapers including the daily 'Samaj' threatening television companies from providing permission to M/s. Manthan Broad Band Services Pvt. Ltd. for telecasting their channels under a further threat of contempt.

6. Mr. M.B.Rao, learned counsel for Opposite Party No.2 (Mr. S.K.Ghosh, the Director, M/s. Manthan Broad Band Services Pvt. Ltd.) reiterating the arguments advanced by Mr. Padhi, learned senior counsel appearing on behalf of the Paradeep Port Trust further submitted that while he entered appearance on behalf of Opposite Party No.2, no justification whatsoever has been stated in the contempt petition for impleading the Opposite Party No.2 as a contemnor. He further submitted that M/s. Manthan Broad Band Services Pvt. Ltd. have a number of directors and the petitioner have not indicated any reason as to why they chose to implead only the present Opposite Party no.2 in particular. Learned counsel further submitted that the petitioner-M/s. Ortel Communications Ltd. made an advertisement both in the television channels as well as in the local newspapers, after the direction has been passed issuing notice in the present contempt application, threatening the television companies from offering their channels to M/s. Manthan Broad Band Services Pvt. Ltd. if they agree to supply their signals to them with the threat of 'initiation' of contempt.

7. Mr. Rao, learned counsel for Opposite Party No.2 placed reliance on a judgment of the High Court of Karnataka in the case of **Banglore Development Authority v. Gururaj S/o. Late M.S. Prithviraj and B.V.Ram Murthy,** reported in ILR (2007) KAR 5184, in support of his contention that, the act of the petitioner in filing the contempt application, even after its writ application was dismissed, amounted to an "abuse of the Court's process" and the present case is very serious example of the abuse of the process of the Court since it intended to deceive the Court by suppressing material fact and/or by initiating the frivolous or vexatious contempt proceeding.

8. In the light of the contentions advanced by the learned counsel for the parties as noted hereinabove, it would be necessary for us to note that it is well settled that mere disobedience of an order may not be sufficient to

amount to a "civil contempt" within the meaning of Section 2(b) of the Contempt of Courts Act, 1971 and the "element of willingness" is an indispensable requirement to substantiate the charge of contempt. In order to initiate contempt proceedings, there must be "contumacious act on the part of the accused and the same must be deliberate and intentional".

8.1. In Hallsbury's Laws of England, Fourth Edition, Vol-9 page 27 in the matter of "abuse of process" in general, the following has been mentioned:

> "The court has power to punish as contempt any misuse of the court's process. Thus the forging or altering of court documents and other deceits of like kind are punishable as serious contempts. Similarly, deceiving the court or the court's officers by deliberately suppressing a fact, or giving false facts, may be a punishable contempt. Certain acts of a lesser nature may also constitute an abuse or process as, for instance, initiating or carrying on proceedings which are wanting in bona fides or which are frivolous, vexatious, or oppressive. In such cases the court has extensive alternative powers to prevent an abuse of its process by striking out or staying proceedings or by prohibiting the taking of further proceedings without leave. Where the court, by exercising its statutory powers, its powers under rules of court, or its inherent jurisdiction, can give an adequate remedy, it will not in general punish the abuse as a contempt of court. On the other hand, where an irregularity or misuse of process amounts to an offence against justice, extending its influence beyond the parties to the action, it may be punished as a contempt."

8.2. We are further of the considered view that, every "abuse of the process of the court", may not necessarily amount to Contempt of Court Abuse and such abuse of the process of the Court calculated to hamper the due course of a judicial proceeding or the orderly administration of justice, is Contempt of Court. In certain cases, the manner of the abuse of the process of the court may be suitably dealt with, as between the parties, by striking out pleadings under the provisions of Order-6, Rule-16 or in some other manner. But, on the other hand, it may be necessary to punish as a "Contempt", a course of conduct which abuses and makes a mockery of the judicial process and which thus extends its pernicious influence beyond the parties to the action and affects the interest of the public in the administration of justice. The public have an interest, an abiding and a real interest, and a vital stake in the effective and orderly administration of justice, because, unless justice is so administered, there is the peril of all rights and liberties perishing. The Court has the duty of protecting the interest of the public in

the due administration of justice and, so, it is entrusted with the power to commit for Contempt of Court, not only order to protect the dignity of the Court against insult or injury as the expression "Contempt of Court" may seem to suggest but also to protect and to vindicate the right of the public that the administration of justice shall not be prevented, prejudiced, obstructed or interfered with. The term "abusing of the court's process" can be applied to many different types of conduct but generally term connotes some misuse of the court's process.

9. In the present case, we have carefully gone through the judgment dated 12.5.2010 rendered in W.P.(C) No.10386 of 2009, in which the petitioner had sought for cancellation of the decision made by the Paradeep Port Trust to award a contract for supply of Cable Television Connection at Paradeep Port Trust in favour of M/s. Manthan Broad Band Services Pvt. Ltd. The petitioner's prayer was clearly and categorically turned down by this Court. Therefore, the writ application of the petitioner clearly stood dismissed. The further direction therein to the Paradeep Port Trust to allow ten days time to M/s. Manthan Broad Band Services Pvt. Ltd. to satisfy its capacity to supply the necessary number of channels, was a matter of concern between Paradeep Port Trust and M/s. Manthan Broad Band Services Pvt. Ltd and M/s. Ortel Communications Ltd. had no concern whatsoever with the aforesaid direction. The Paradeep Port Trust had in terms of the said direction issued notice to M/s. Manthan Broad Band Services Pvt. Ltd. providing ten days time from 1.6.2010. The present contempt application was filed by the petitioner on 31.5.2010 after the writ application had been dismissed and notices were issued on 1.6.2010. The petitioner-company sought to take full advantage of the issue of notice by making advertisements in the various local TV channels as well as in the local newspapers, threatening contempt to all the television companies as if they enter into any contract with M/s. Manthan Broad Band Services Pvt. Ltd. and that they would extend the contempt proceedings. This compelled the M/s. Manthan Broad Band Services Pvt. Ltd to approach the TDSAT, who in turn, were pleased to direct the said television companies to enter into contract with M/s. Manthan Broad Band Services Pvt. Ltd.. Due to such impediment caused by the petitioner's company, M/s. Manthan Broad Band Services Pvt. Ltd. were also compelled to seek extension of time in Misc. Case No.9713 of 2010 for compliance of the direction of this Court in the judgment dated 12.5.2010 in W.P.(C) No.10386 of 2009 and such Misc. Case was allowed by this Court vide order dated 21.7.2010.

10. On a detailed analysis of the fact as enunciated herein. It is clear therefrom that the petitioner-company being an unsuccessful bidder for providing cable TV network at Paradeep Port Trust, sought to challenge the decision of the Paradeep Port Trust in awarding the contract in favour of M/s.

Manthan Broad Band Services Pvt. Ltd. by filing the writ petition, i.e. W.P.(C). No.10386 of 2009. When that petition came to be dismissed, the petitioner-company filed a contempt petition in which, when notice was directed to be issued, the petitioner-company issued advertisements both in various TV channels as well as the local news papers threatening possible signal suppliers not to supply their signals to M/s. Manthan Broad Band Services Pvt. Ltd. Every endevour was made by the petitioner-company to try and frustrate M/s. Manthan Broad Band Services Pvt. Ltd. from complying with the requirements of the Paradeep Port Trust and to frustrate it from performing its obligation in terms of the tender. It is the TDSAT, which came to the rescue of M/s. Manthan Broad Band Services Pvt. Ltd. thus enabling them to comply with the requirements of the Paradeep Port Trust.

10.1. It is also important to note herein that the Rules of the Orissa High Court, 1948 and in particular, Chapter-III, Rule-3 which provides for the nature of matters which to be listed during the vacation:

> "Chapter-III, Rule-3:- A proceeding of the kind referred to in Rule-1 (viii) and Rule 1 (xi) of this Chapter may, in the discretion of the Bench hearing the same, be heard either in Court or in Chambers as it may direct. An *ex parte* motion or application entertainable by a Single Judge may be made in Court or in Chambers as the Judge may direct. An urgent application may be made to the Vacation Judge in Court or otherwise as he may direct. Every other appeal, motion or application except when specifically provided otherwise shall be presented or made in open Court."

10.2. The said rule specifically permits only such "urgent matters" which cannot wait reopening of the Court and the same may be taken up during vacation.

10.3. In the present case, a memo was filed by the learned counsel for the petitioner, as quoted hereinabove, clearly indicating the fact that a contempt petition was made to be portrayed as an "urgent matter" for which reason, the matter was directed to be listed before the Vacation Judge. We may also note that a contempt application by their very nature, both the criminal contempt and civil contempt are the matters between the Court and the contemnor, are not of an urgent of a nature which may be listed during vacation.

10.4. Even apart from the above, in the light of the consequences noted hereinabove, we are of the considered view that in the facts and circumstances of the present case the filing of a contempt application itself amounted to "an abuse of the process of the court" by the petitioner, filed with the intent to try and frustrate the successful party from effectively complying with the directions of this Court, within the period as directed.

11. Although learned counsel for the petitioner made a submission to permit withdrawal of the contempt application, the same was turned down by us, since we are of the considered view that the petitioner after having initiated the present proceedings and having obtained an order directing notice to the parties, the matter could no longer be permitted to withdrawn, since the process of the Court had already been initiated at the behest of the petitioner effecting the interest of other parties and that too with an oblique motive. Insofar as the judgment cited by the petitioner in the case of Om Prakash Jaiswal (supra), we are in respectful agreement with the views expressed therein but the facts of the present case being clearly distinguishable, the said judgment is of no assistance to the stand of the petitioner.

12. Accordingly, we are of the considered view that the petitioner has filed the present contempt case against the opposite parties without there being any cause of action for contempt. Hence, while dismissing the present contempt application, we are also of the further view that the initiation of the present contempt proceeding itself amounted to an abuse the process of the Court and, therefore, contumacious in nature. But we propose not to initiate any proceeding of contempt against the petitioner with the hope and trust that the petitioner shall not repeat such action in future.

13. The contempt petition is dismissed with costs of Rs.25,000/- (Rupees twenty five thousand) only payable to the Advocates Welfare Fund of the Orissa State Bar Council.

Application dismissed.

2011 (I) ILR – CUT- 16

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

W.P.(C) NO.17844 OF 2010 (Decided on 30.11.2010)

S.BADRI NARAYAN PATRO
@ BADRINATH …… Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 ART.22(5)

Preventive detention U/s.3 of the Prevention of Black Marketing and Maintenance of supplies of Essential Commodities Act, 1980 – Confirmed by State Government – Representation by the petitioner-detenu – Representation sent to the State Government on 02.09.2010 – Rejection of the representation by the Government on 23.09.2010 as suggested by the Advisory Board without considering the same independently – No reason has been ascribed for the delay in disposing of the representation – Held, order of detention is illegal – Impugned order quashed and direction issued to the jail authorities to release the detenu-petitioner forthwith.

(Para 7,8)

Case laws Referred to:-

1.AIR 1981 SC 2069 : (Rahmattulah -V- State of Bihar)
2.AIR 1991 SCW 362 : (K.M.Abdullah Kunhi & Anr.-V- Union of India)
3.AIR 1975 SC 1516 : (Jagan Nath Biswas -V- The State of West Bengal)
4.AIR 1975 SC 1517 : (Sk.Serajul -V- State of West Bengal)
5.AIR 1990 SC 225 : (t.a.Abdul Rahman -V- State of Kerala & Ors.)
6.1994 Crl..L.J. 620 : (Pradeep Nilkanth Paturkar -V- S.Ramamurthi)
7.1996 Crl. L.J. 1981 : (Kundanbhai Dulabhai Shaikh -V- Dist.Magistrate,Ahmedabad)
8.AIR 1982 SC 1315 : (Dhananjaya Das -V- District Magistrate & Anr.).

For Petitioner - M/s. Subash Ch.Lal, M.K.Das, S.Mallik, S.K.Das, J.Nayak, S.Lal & S.Rout.
For Opp.Parties - Government Advocate.

V. GOPALA GOWDA, C.J. This writ petition has been filed by the petitioner-detenu praying to quash the order of detention dated 11.8.2010 (Annexure-1) passed by the Collector and District Magistrate, Ganjam under sections 3 (1) and 3 (2) of the Prevention of Black Marketing and

Maintenance of Supplies of Essential Commodities Act, 1980 (hereinafter referred to as 'the Act') as well as the order dated 23.9.2010 (Annexure-4) passed by the State Government under section 12(1) read with section 13 of the aforesaid Act confirming the order of detention passed by the Collector & District Magistrate against the petitioner urging various legal contentions.

2. The facts of the case are that the petitioner is the Managing Director and proprietor of Simla Silk Sortex Rice Mill and Biswanath Rice Mill located at Surada in the district of Ganjam. The aforesaid two mills deal in rice and paddy as Miller Agent-cum-Custom Miller for different Government agencies including Orissa State Civil Supplies Corporation Ltd. for delivery of common raw rice. On the basis of allegation that the petitioner is involved in illegal dealing in essential commodities like rice and paddy, the allegation was enquired into by a team of officers which conducted raid in the godown and premises of the aforesaid two Mills on 7.6.2010. During raid, one of the workers present produced six numbers of purchase and stock registers of both the Mills but he failed to produce other relevant and required documents for verification. The team found entries of purchase of paddy in the Purchase Register of Simla Silk Sortex Mill. They also verified some of the receipts as per the said register regarding purchase and payment of minimum support price to the farmers named therein. To ascertain the genuineness of the entries, the named farmers were contacted but they denied to have sold any paddy or to have received any cheque from the petitioner that has been mentioned in the register to have been issued to them. The team further found that Biswanath Rice Mill is a Boiler Plant, which was found to be in operational condition and producing both common raw rice and common boiled rice in the mill without any permission for producing the same. There was also boiled paddy on the drying yard and boiling tank and huge stock of boiled rice in heaps at the rice milling outlet point of the Mill from which the team was of the opinion that the petitioner had indulged in illegal trading of boiled rice when he was appointed as custom miller for common raw rice. He had also not maintained separate registers for each mill which according to the team was apparently done to avoid inspection by higher authorities. In the register the petitioner had shown to have issued four cheques in favour of the farmers in token of payment of minimum support price but the concerned farmers denied to have received the cheques. Also the cheques had not been presented for encashment till the order of detention was passed. The team also found that there was no signature of the farmers on the vendor receipts issued by the petitioner. On verification of the stock, the team found that there was shortage of Q.342.87.200 of paddy and excess of Q.85.00 of common raw rice. Therefore there was contravention of the provisions of Clauses 4, 7, 9, 10 and 14 of the Orissa Rice and Paddy Procurement (Levy) and

Restrictions on Sale and Movement Order, 1982. Accordingly, action under section 6(A) of the Essential Commodities Act was initiated and prosecution report under section 7 of the said Act was filed. Further the investigating officer filed report for detaining the petitioner under section 3 (1) of the Act so as to prevent him from acting in a manner prejudicial to the maintenance of supplies of commodities essential to the community. On the basis of the aforesaid, the Collector & District Magistrate was satisfied that the petitioner has been committing offence punishable under the provisions of the Essential Commodities Act read with the Orissa Rice and Paddy Procurement (Levy) and Restriction on Sale and Movement Order, 1982. Being satisfied that the detention of the petitioner was necessary to prevent him from acting in a manner prejudicial to the maintenance of supplies of the commodities essential to the community at large, the Collector and District Magistrate passed the order of detention in exercise of the power conferred on him under sections 3(1) and 3(2) of the Act referred to supra. The said order was confirmed by the State Government vide Annexure-4.

3. Counter affidavit has been filed by the detaining authority traversing the petition averments. With regard to the allegation of non-consideration of the petitioner's representation, it is stated that the representation dated 26.8.2010 of the petitioner was forwarded to the State Government on 2.9.2010 and the State Government referred the matter to the Advisory Board and in conformity with the opinion of the Advisory Board, the Government confirmed the order of detention. No counter has been filed on behalf of the State.

3. The first ground of attack is that the representation made by the petitioner to the State Government against the order of detention as required under section 8 of the Act has not been considered by the State Government and no order of rejection has been communicated to him. Non-consideration of the representation violated the constitutional right guaranteed under Article 22(5) of the Constitution of India. Therefore, the order of detention is void in law as held by the Supreme Court in the case of **Rahmattulah v. State of Bihar**, AIR 1981 SC 2069 and **K.M.Abdullah Kunhi and another v. Union of India**, AIR 1991 SCW 362 wherein the Supreme Court has held that clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. The obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of the detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. Therefore, it is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the

representation on its own without being influenced by any such view of the Board. Learned counsel for the petitioner has also placed reliance upon an unreported decision of this Court in **Pankaj Kumar Tibrewal v. Government of Orissa**, O.J.C.No.3550 of 2002 disposed of on 17.6.2002. On similar facts of the case after referring to the decisions of the Supreme Court in **Jagan Nath Biswas v. The state of West Bengal**, AIR 1975 SC 1516, **Sk.Serajul v. State of West Bengal**, AIR 1975 S.C. 1517, **T.A.Abdul Rahman v. State of Kerala and others**, AIR 1990 S.C. 225 and **Pradeep Nilkanth Paturkar v. S.Ramamurthi**, 1994 Crl.L.J.620, this Court held that the delay in initiating the proceeding is bad in law and on that ground itself the order of detention is liable to be quashed. The Division Bench in the aforesaid unreported decision referred to the decision of the Supreme Court in **Kundanbhai Dulabhai Shaikh v. Dist. Magistrate, Ahmedabad** and others, 1996 Crl.L.J 1981 wherein the Supreme Court quashed the detention order on the ground of delay in disposing of the representation and quashed the order of detention.Mr.Lal, learned Senior Counsel appearing for the petitioner, submits that the said decision with all fours is applicable to the case on hand. Therefore, the detention order is liable to be quashed. Another ground of attack is that the allegations made in the ground of detention can at best relate to contravention of the Levy Control Order for which normal action/proceedings can be taken in appropriate court of law instead of exercising the drastic power under the Act. Therefore, the detention order is an abuse of the process of law inasmuch as none of the grounds of detention show that the acts alleged against the petitioner are prejudicial to the maintenance of supplies of commodities essential to the community for the reason that (a) the levy order has nothing to do with the common man, (ii) the levy order is intended to offer minimum support price to the farmers while paddy is procured by any rice mill (iii) every Miller is obliged to pay levy of 75% of the total quantity of rice of each variety confirming to specification milled by him every day out of the stock of paddy owned by him and (iv) a rice miller can be a custom miller for milling of paddy not belonging to the mill. Other restrictions contained in the levy order have been done away with by the Central Government by issuing notification GSR No. 104(E) dated 15.2.2002. It was next contended that the grounds of detention were vague, indefinite, irrelevant and extraneous and there was no proper application of mind by the Collector and District Magistrate in passing the order of detention as also there was no subjective satisfaction of the Collector for passing the order of detention.

4. Learned Government Advocate with reference to the record sought to justify both the orders contending that the District Magistrate after applying his mind to the records/materials which were seized at the time of raid and spot verification which revealed that so many illegalitities were committed by

the petitioner which are prejudicial to the maintenance of supply of commodities essential to the community passed the order of detention. The grounds are in detail set out in the grounds of detention which was communicated to the detenu and the same has been perused by the State Government which passed the order of confirmation under sub-section (4) of Section 3. Thereafter the State Government has discharged its function in communicating the same to the petitioner and given opportunity to submit his representation. All the materials were placed before the Advisory Board which considered the same in detail and after calling for further information from the appropriate Government submitted its report holding that there is sufficient cause for the detention of the petitioner. On the basis of the said report, the State Government confirmed the order of detention. The representation submitted by the petitioner was placed before the Advisory Board for consideration which has been carefully considered by the Advisory Board which in its report opined that the order of detention passed against the petitioner is on valid grounds. The State Government has accepted the same and passed the order of confirmation. Therefore, learned Government Advocate submits that no ground is made out for interference with the order of detention.

5. With reference to the above said rival legal contention, we have carefully examined the orders of detention passed by the Collector and District Magistrate and the State Government. The District Magistrate has no doubt passed the order on 11.8.2010 on which date the stock verification was completed. On the same day the order of detention was passed. So there was little time left for the detaining authority to apply his mind to he various grounds mentioned in the grounds of detention. The Supreme Court in the case of **Dhananjaya Das v. District Magistrate and another**, AIR 1982 SC 1315 held that the grounds of detention must be in existence on the date when the order was passed and the authority concerned has to be satisfied about the grounds of detention on the date of the order and the satisfaction of the detaining authority must be clear on the face of the grounds of detention. The order of detention is dated 11.8.2010. The grounds of detention are signed on 12.8.2010 as it appears from the date below the initial of the detaining authority. Under sub-section (3) of Section 3 of the Act, the detaining authority is obliged to forthwith report the fact of detention to the State Government together with the grounds on which the order has been made. We have perused the relevant file produced by the learned Government Advocate. The note dated 12.8.2010 of the Under Secretary reveals that the Collector has not furnished the grounds of detention along with other papers for approval of the State Government.

6. It is the case of the petitioner that he submitted a detailed representation pointing out that the allegations made in the grounds of

detention do not call for resort to the drastic provisions of the Act. It is his further case that the State Government confirmed the order of detention without considering his representation. We have perused the Government file from which it appears that on 4.9.2010, the representation of the detenu was ordered to be placed before the Advisory Board. On 22.9.2010, the Advisory Board opined that there are sufficient grounds for detention of the detenu, i.e., the petitioner. From the file it further appears that on 23.9.2010 suggestion was given to reject the representation of the petitioner as the same has been found by the Advisory Board to be unsatisfactory. On the same day, order was passed to reject the representation. It therefore appears that the State Government has neither applied mind nor independently considered the representation of the petitioner but rejected the same being influenced by the opinion of the Advisory Board. At this stage it is profitable to note what the apex Court said in **Rahamatulah'** case (supra):

> "The law is well settled that in case of preventive detention of a citizen, the obligation of the appropriate government is two fold☹1) to afford the detenu the opportunity to make a representation and to consider the representation which may result in release of the detenu and (ii) to constitute a Board and to communicate the representation of the detenu along with other materials to the Board to enable it to form is opinion and to obtain such opinion. The former is distinct from the latter. As there is a two fold obligation of the appropriate government, so there is a two fold right in favour of the detenu to have his representation considered by the appropriate government and to have the representation once again considered by the Government in the light of the circumstances of the case considered by the Board for the purpose of giving its opinion…..The opportunity of making a representation is not for nothing. The representation if any submitted by the detenu is meant for consideration by the appropriate authority without any unreasonable delay, as it involves the liberty of a citizen guaranteed by Article 19. The non-consideration or an unreasonably belated consideration of the representation tantamounts to non-compliance of Clause (5) of Article 22….Where the State Government waited till the receipt of the Advisory Board's opinion and there was an unexplained period of twenty four days on non-consideration of the representation and, thus there was no independent consideration of the representation by the State Government, there was clear non-compliance of Article 22(5) and detention was, consequently, liable to be quashed."

Similar view was also taken by the Constitution Bench of the Supreme Court in **K.M.Abdullah Kunhi's** case (supra) wherein the Supreme Court observed as under:

> " It is now beyond the pale of controversy that the constitutional right to make representation under Clause (5) of Article 22 by necessary implication guarantees the constitutional right to a proper consideration of the representation. Secondly, the obligation of the Government to afford to the detenu an opportunity to make representation is distinct from the Government's obligation to refer the case of detenu along with the representation to the Advisory Board to enable it to form its opinion and send a report to the Government. It is implicit in clauses (4) and (5) of Article 22 that the Government while discharging its duty to consider the representation cannot depend upon the views of the Board on such representation. It has to consider the representation on its own without being influenced by any such view of the Board. The obligation of the Government to consider the representation is different from the obligation of the Board to consider the representation at the time of hearing of the reference….. The consideration by the Board is an additional safeguard and not a substitute for consideration of the representation by the Government. The right to have the representation considered by the Government is safeguarded by Clause (5) of Article 22 and it is independent of the consideration of the detenu's case and his representation by the Advisory Board….."

7. The file does not reveal that there was any independent consideration of the representation of the petitioner by the State Government. Rather from the notes in the file it appears that since the Advisory Board found the representation unsatisfactory, suggestion was made to reject the representation. Of course, no reason has been assigned to reject the representation. From the file it appears that the representation of the petitioner was sent to the State Government by the Collector & District Magistrate on 2.9.2010 and the representation was rejected on 23.9.2010. No reason has been ascribed for the delay in disposing of the representation. The State Government has also not filed counter affidavit explaining he delay.

8. In view of the aforesaid, we are of the opinion that there was no independent consideration of the representation of the petitioner by the State Government and non-consideration of the representation and non-communication of the order on the representation by the State Government independent of any opinion of the Advisory Board constitutes violation of the constitutional right given under Article 22 of the Constitution of India and

failure to discharge the statutory function of the State Government under section 8 of the Act. Therefore, for this reason alone the writ petition must succeed. Accordingly, the writ petition is allowed and the impugned orders Annexures-1 and 4 are quashed. The Jail authorities are hereby directed to release the detenu-petitioner forthwith if his detention is not required in connection with any other criminal case pending against him.

There would be no order as to costs.

Writ petition allowed.

2011 (I) ILR – CUT- 24

V.GOPALA GOWDA, CJ & S.C.PARIJA, J.

W.P. (C) NO.8840 OF 2009 (Decided on 09.07.2010)

ADIVASIS FOR SOCIAL &
HUMAN RIGHTS ACTION ……. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.244(1)

Rights of the Scheduled Tribes – Enforcement of – Writ petition for a declaration that in a "Scheduled Area" no person other than a Scheduled Tribe has the right to live and vote in any Constituency – Under Section 9(1) (c)and (d) of the Delimitation Act, 2002, Constituencies in which seats are reserved for Scheduled Castes or Scheduled Tribes shall as far as practicable be located in areas where the proportion of their population to the total population is the largest – Held, the plea of the petitioner that the entire Sundargarh district having been declared as a Scheduled Area nobody else, except a Scheduled Tribe has the right to live in such an area is wholly erroneous and misconceived - Merely because an area has been declared to be a Scheduled Area under part 'C' of the "Fifth Schedule" the same does not imply that nobody else except a Schedule Tribe has a right to live in the said area – Held, there is no merit in the writ petition warranting interference by this Court.

(Para 14,15 & 16)

Case law Referred to:-
AIR 1970 SC 951 : (Ram Kripal Bhagat & Ors. -V-State of Bihar).

For Petitioner - M/s. A.P.Mohanty, K.C.Mohanty, D.K.Singh, S.K.Biswal & T.Sahu.
For Opp.Parties - Mr. J.K.Mishra, Asst. Solicitor General-1)
Mr. S.D.Das (Asst.Solicitor General-2)
M/s. D.P.Dhal, S.K.Tripathy, K.Dash, S.K.Dash & P.K.Routray

S.C. PARIJA, J. The petitioner who claims to be a registered Society, formed with avowed object of securing justice and well being of the members

of Scheduled Tribes in the State, has filed this writ petition seeking enforcement of the rights of the Scheduled Tribes of Sundargarh district in the State of Orissa, guaranteed under Articles 14, 19(1)(e), 21 and 244 read with the Fifth Schedule to the Constitution of India.

2. The contention of the petitioner is that in a Scheduled Area none but the Scheduled Tribe has the right to settle down on the soil comprising the Scheduled Area. Hence, no person other than a Scheduled Tribe has the right to live in a Scheduled Area and every person not being a Scheduled Tribe is an unlawful occupant on the soil comprising the Scheduled Area and as such he cannot exercise the right to vote in any constituency in a Scheduled Area.

3. The other contention of the petitioner is that every constituency in a Scheduled Area, in the election to the House of People or State Legislative Assembly, should be declared as a reserved constituency under Articles 330 and 332 of the Constitution of India. According to the petitioner, no candidate other than a candidate who belongs to a Scheduled Tribe should have the right to contest election from any constituency created in the Scheduled Area, for being a member of the Legislative Assembly of a State or for being a member of the Parliament of India. In this regard, it is submitted that the representation of People's Act 1950 and 1951 and the Delimitation Act, 2002 having not been made applicable to the Scheduled Areas of the State of Orissa by the Governor, in exercise of his power under sub-clause (1) of Clause (5) of Part 'B' of the Fifth Schedule to the Constitution, all elections held by the Election Commission in the Scheduled Areas of the State, by application of the provisions of the law made in the Representation of People's Act, 1950 and 1951 is void. Accordingly, it is contended that no Act of the Parliament or of the Legislature of the State can apply to a Scheduled Area, unless the same is made specifically applicable by public notification made by the Governor of the State.

4. In the counter affidavit filed on behalf of the opposite parties 4, 5 and 6, it has been stated that the entire Sundargarh district in the State of Orissa has been declared as a 'Scheduled Area' by the President of India, in exercise of power conferred under sub-clause(1) of clause (6) of the Fifth Schedule, read with Article 244 (1) of the Constitution of India. However, it is not the law that any person who is not a Scheduled Tribe has no right to live in a area declared to be a Scheduled Area and that such area is wholly and exclusively reserved for the Scheduled Tribe only. It is further stated that the Fifth Schedule to the Constitution of India does not exclude the general population from living in the Scheduled Areas. On the other hand, clause

5(2) of the Fifth Schedule provides that the Governor of the State may make regulation which may (a) prohibit or restrict transfer of land by or amongst members of the Scheduled Tribes in such area, (b) regulate the allotment of land to members of the Scheduled Tribes in such areas and (c) regulate the carrying on of business as money lender by persons who lend money to members of the Scheduled Tribes in such area.

5. It has been averred in the counter affidavit that the Governor of Orissa has promulgated the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956, to control and check transfer of immovable property by the Scheduled Tribes in the Scheduled Areas of the State of Orissa, which is in force in the district of Sundargarh.

6. Coming to the plea of the petitioner that all constituencies in a Scheduled Area is to be reserved for the Scheduled Tribes, it has been stated in the counter affidavit that the Delimitation Commission was established by the Government of India under the Delimitation Act, 2002, to redraw the boundaries of various Assembly and Lok Sabha constituencies based on the recent census. The Delimitation Commission of India prescribed the guidelines and methodology of delimitation of Assembly and Parliamentary constituencies, which have been delimited on the basis of 2001 census. As per Section 9(1) (d) of the Delimitation Act 2002, seats for Scheduled Tribes are to be reserved in the constituencies in which the percentage of their population to the total population is the largest. Accordingly, out of 147 seats for Assembly constituencies in the State of Orissa, 24 seats have been reserved for Scheduled Castes and 33 seats have been reserved for Scheduled Tribes.

As regard the entitlement of seats for Scheduled Tribes in the district of Sundargarh, it has been stated in the counter affidavit that keeping in view the 2001 census and the percentage of Scheduled Tribe population in the district, out of 7 seats for the Assembly constituencies in the district of Sundergarh, 5 seats have been reserved for Scheduled Tribes, in conformity with the provisions of the Delimitation Act 2002 and the guidelines issued thereunder.

7. Articles 330 and 332 of the Constitution of India provides for reservation of seats in the House of People (Lok Sabha) and the Legislative Assembly of the State, for Scheduled Castes and Scheduled Tribes, which shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that State in the Lok Sabha and the total number of seats in the State Assembly, as the population of the Scheduled Castes and Scheduled Tribes in the State or part of the State, as the case may be, in

respect of which seats are so reserved, bears to the total population of the State.

8. Article 244 of the Constitution of India provides for administration of Scheduled Areas and Tribal Areas. Clause (1) of Article 244 provides that the provision of Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States specified therein.

9. Section 9(1) (c) and (d) of the Delimitation Act, 2002, provides that constituencies in which seats are reserved for Scheduled Castes or Scheduled Tribes shall, as far as practicable, be located in areas where the proportion of their population to the total population is the largest.

10. In the present case, as has been revealed in the counter affidavit, constituencies in the State of Orissa for State Assembly and Lok Sabha have been delimited on the basis of 2001 census. Taking into consideration the population of Scheduled Castes and Scheduled Tribes in proportion to the total population of the State, 24 seats have been reserved for Scheduled Castes and 33 seats have been reserved for Scheduled Tribes in the State Assembly. As per the provisions of the Delimitation Act, 2002, out of the 7 seats in the district of Sundargarh for the State Assembly, 5 seats have been reserved for Scheduled Tribes on the basis of the percentage of their population to the total population of the district is the largest.

11. The Fifth Schedule to the Constitution contains 7 clauses and consists of Parts A, B, C and D. Clause 6 in Part C deals with Scheduled Areas as the President may by order declare. Clause 5 of the Fifth Schedule deals with laws applicable to the Scheduled Areas. Sub-clause (1) of clause 5 provides that the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State, subject to such exception and modification as the Governor may specify in the notification which may be given retrospective effect.

12. Sub-clause (2) of clause 5 of the Fifth Schedule provides that the Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area. Under Sub-clause (3) of clause (5) of the Fifth Schedule, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.

13. Admittedly, the entire district of Sundergarh has been declared as a 'Scheduled Area' by the President, in exercise of power conferred under clause 6(1) of the Fifth Schedule, read with Article 244(1) of the Constitution. The Governor of Orissa for the peace and good government of the Scheduled Area has promulgated the Orissa Scheduled Areas Transfer of Immovable Property (By Scheduled Tribes) Regulation, 1956, to control and check transfer of immovable property in the Scheduled Areas of the State, in order to protect the rights of Scheduled Tribes. Similarly, the Orissa (Scheduled Areas) Debt Relief Regulation, 1967, has been promulgated to provide for relief from indebtedness to the Scheduled Tribes in the Scheduled Areas of the State. All these regulations are in force in the district of Sundergarh, being a Scheduled Area.

14. From the above, it cannot be said that the Union or the State Government has failed to comply with the provisions of Article 244(1) read with Fifth Schedule of the Constitution. The plea of the petitioner that the entire Sundargarh district having been declared as a Scheduled Area, nobody else, except a Scheduled Tribe has the right to live in such a area is wholly erroneous and misconceived. Merely because an area has been declared to be a Scheduled Area under Part 'C' of the Fifth Schedule, the same does not imply that nobody else except a Scheduled Tribe has a right to live in the said area.

15. Coming to the plea of the petitioner that any Act of the Parliament or the State Legislature has to be made applicable to the Scheduled Areas by public notification to be issued by the Governor of State, under Part 'B' of the Fifth Schedule to the Constitution, in order to make the same operative in the Scheduled Area, the same is equally fallacious and misconceived and deserves outright rejection. What is provided under sub-clause (1) of clause 5 of the Fifth Schedule is that the Governor is empowered, notwithstanding anything in the Constitution, to direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or shall apply to a Scheduled Area subject to such exceptions or modifications, as the Governor may specify in the notification. Hence, only if any Central or State Act is not to be applied to a Scheduled Area or is to be applied to a Scheduled Area, subject to such exceptions and modification, the Governor of the State may specify the same in the notification. Hence, by necessary implication, it cannot be said that all Acts of the Parliament or the State Legislature can only apply to a Scheduled Area, if there is a notification to that effect by the Governor of the State. (See- ***Ram Kripal Bhagat and others –vrs- State of Bihar***, AIR 1970 SC 951).

16. In view of the foregoing discussions, we do not find any merit in the contentions raised by the petitioner so as to warrant any interference by this Court, in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

The writ petition being devoid of merit, the same is accordingly dismissed.

2011 (I) ILR – CUT- 30

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

W.P.(C) NO.15068 OF 2010 (Decided on 18.11.2010)

DR. ALIVA MOHANTY …… Petitioner.

.Vrs.

UTKAL UNIVERSITY, ORS. ……. Opp.Parties.

SERVICE – Interview for the post of Lecturer in women's studies – Petitioner is a post Graduate from Utkal University and a Ph.D. degree holder – Petitioner applied for the post but did not receive the call letter for interview – Hence this writ petition.

The Regulations governing the field i.e. University Grants Commission (Minimum Qualification required for the Appointment and Career Advancement of Teachers in Universities and Institutions Affiliated to it) Regulations, 2000 – Amendment of Regulations in 2009 indicating NET/SLET as the minimum eligibility condition but candidates awarded Ph.D. degree shall be exempted – Non consideration of petitioner's Ph.D. degree while scrutinizing her application – Held, petitioner is eligible to get a call letter for the post of Lecturer as per the advertisement – Since University authorities allowed the petitioner to appear in the interview along with others pursuant to an interim order, Opp.Parties shall now publish the result of such interview.

(Para 6 to 10)

For Petitioner - M/s. S.J.Pradhan, D.Pradhan.
For Opp.Parties - Mr. G.P.Mohanty.

B. P. DAS, J. This writ application has been filed by the petitioner with a prayer to direct the opposite parties to issue call letter to her for the interview to be held on 08.09.2010 for the post of Lecturer in Women's Studies, pursuant to the advertisement dated 30.4.2010 in Annexure-2 or alternatively to quash the advertisement dated 30.4.2010 and to issue a fresh advertisement in terms of the University Grants Commissions (Minimum Qualification for Appointment of Teachers and other Academic Staff in Universities and Colleges and other Measures for the Maintenance of Standards in Higher Education) Regulations, 2010, hereinafter referred as the "UGC Regulations, 2010".

2. The brief facts leading to the writ application tend to reveal as follows:-

The petitioner completed her H.S.C. Examination in the year 1982 with 1st division securing 67% marks. She also completed I.A. with 1st division securing 67 % marks and graduation in arts with 2nd Class Hons securing 59% marks. Thereafter she completed her Post Graduation in Economics from Utkal University in 2nd Class securing 58% marks. After completing P.G. in Economics in the year 2001, she started prosecuting her Ph. D degree in "A study on Socio Economic and Demographic Status of Women in Orissa" and completed the same in the same year 2001 and accordingly the petitioner was awarded with the Ph. D. Degree in 2001. Thereafter, she did her M.A. in Women's Studies from Allagappa University, Tamilnadu in the year 2004 and subsequent thereto, she completed M. Phill in Women's Studies from Mother Teresa Women's University, Kodaikanal.

During the period from January, 2004 to May, 2005 she was engaged as Deputy Course Coordinator for M.A. in Women's Studies by Utkal University, Bhubaneswar. She was also appointed as Examiner and Question Setter in Women's Studies and also a Member of Steering Committee of School of Women's Studies, Utkal University. The petitioner was also the Examiner and Question Setter for M. Phil in Women's Studies, Revenshaw University, Cuttack and was also invited as subject expert by Berhampur University for conducting research and projects. She was permitted to act as Research Guide of the University and allowed to take 8 scholars at the maximum and presently three students are doing research work under her guidance.

In the year 2005, Utkal University decided to engage two number of Adjunct Lecturers in the School of Women's Studies and accordingly an advertisement was published in the local newspaper on 18.11.2005 fixing certain eligibility criteria like minimum 55 % marks in P.G. in Women's Studies and preference will be given to those having Ph.D. or M. Phil Degree relating to Women's issues and the candidate should have P.G. Teaching experience in Women's Studies and should have publication of papers in national and international journals. The petitioner responded to the said advertisement and ultimately she stood first in the selection list and was engaged on contractual basis as Adjunct Lecturer in the School of Women's Studies for a period of one year from the date of joining and is also continuing as such in the said post till date as extensions have been granted to her from time to time. In the meantime, the petitioner had published six papers in the national journals and two papers in the international journals to

her credit. Apart from this, her book titled "Development of Rural Women" was published by the Yash Publication, New Delhi.

While the petitioner was so continuing, Utkal University made an advertisement on 30.4.2010 under Annexure-2 inviting applications in prescribed form from eligible candidates for engagement in teaching positions in various Departments of the University including one post of Lecturer in the Department of Women's Studies. The advertisement stipulates that the said positions are on contractual basis and co-terminus with the date 31.3.2012 or upto the funding from the UGC, whichever is earlier, and the positions are purely temporary in nature and can be terminated at any time by the University authorities without assign any reason thereof. The qualifications for the said positions will be as per the UGC norms and the Selection Committee for the posts will be constituted as per the decision of the Syndicate dated 15.2.2010. The last date for submission of application form was fixed to 31.5.2010.

According to the petitioner, the UGC Regulations, 2010 is applicable to every University established or incorporated by or under a Central Act, Provincial Act or a State Act. Clause 3.0.0 of the UGC Regulations, 2010, deals with the recruitment and qualifications of the vacancies. The relevant clauses of Clasue-3.0.0 i.e. Clauses 3.1.0, 3.2.0, 3.3.0 and 3.3.1 are quoted thus:-

> "3.1.0 The direct recruitment to the posts of Assistant Professors, Associate Professors and Professors in the Universities and Colleges shall be on the basis of merit through all India advertisement and selections by the duly constituted Selection Committees as per the provisions made under these Regulations to be incorporated under the Statutes/Ordinances of the concerned university. The composition of such committees should be as prescribed by the UGC in these Regulations.
>
> 3.2.0 The minimum qualifications required for the post of Assistant Professors, Associate Professors, Professors, Principals, Assistant Directors of Physical Education and Sports, Deputy Directors of Physical Education and Sports, Directors of Physical Education and Sports, Assistant Librarians, Deputy Librarians, Librarians will be those as prescribed by the UGC in these Regulations.
>
> 3.3.0 The minimum requirements of a good academic record, 55% marks (or an equivalent grade in a point scale wherever grading system is followed) at the master's level and qualifying in the

> National Eligibility Test (NET), or an accredited test (State Level Eligibility Test - SLET/SET), shall remain for the appointment of Assistant Professors.
>
> 3.3.1. NET/SLET/SET shall remain the minimum eligibility condition for recruitment and appointment of Assistant Professors in Universities / Colleges / Institutions.
>
> Provided however, that candidates, who are or have been awarded a Ph. D. Degree in accordance with the University Grants Commission (Minimum Standards and Procedure for Award of Ph.D. Degree) Regulations, 2009, shall be exempted from the requirement of the minimum eligibility condition of NET/SLET/SET for recruitment and appointment of Assistant Professor or equivalent positions in Universities / Colleges / Institutions."

3. Relying upon the aforesaid provisions and the UGC Regulations, 2010, learned counsel for the petitioner submitted that the petitioner was not required to clear the National Eligibility Test ('NET' in short) as she was awarded with Ph.D. degree in women's related subject and as per the University Grant Commission (Minimum Standards and Procedure for award of Ph.D. Degree) Regulation, 2009, the candidates, who are having Ph.D. degree, shall be exempted from the minimum eligibility condition of NET/SLET, which has also been dealt with in UGC Regulations, 2010. Learned counsel further submits that since the petitioner has not been called to the interview, the action of the opposite parties is per se illegal and, therefore, the petitioner has filed the writ application with the prayer as indicated above.

4. On 6.9.2010, while issuing notice, this Court in Misc. Case No. 14196 of 2010 allowed the petitioner to participate in the interview, which was going to be held on 8th September, 2010 for the post of Lecturer in Women's Studies, but directed that the result of the interview for the said post should not be declared without leave of this Court. Said interim order is continuing.

5. A counter affidavit has been filed on behalf of the opposite parties through the Assistant Controller of Examination of the University taking the stand that the petitioner has not possessed the NET or Ph. D degree in Women's Studies for becoming eligible to the post as per Regulation 4.4.1 of the U.G.C. and whatever degree she has obtained is based upon her basic subject Economics for which the claim of the petitioner that she possessed the Degree as per the advertisement is misconceived. It is further indicated that she had no NET/SLET or Ph. D. degree in Women's Studies as per

U.G.C. Guidelines and hence the Scrutiny Committee rejected her case. It is also indicated that publication of paper in national and international journals is not the consideration in this case. As Women's Studies is an interdisciplinary subject, any post graduate degree holder is not eligible for lectureship.

6. This being the stand of the opposite parties, let us now have a look at the Rules governing the field. It is the case of the petitioner that she is a Post Graduate from Utkal University and is a Ph. D. degree holder on the subject "A study on Socio Economic and Demographic Status of Women in Orissa". This aspect has not been disputed nor the fact that she did her M.A. in Women's Studies from Allagappa University. The objection of the University to her application is only to the fact that even though she is M.A. in Women's Studies, she does not have any Ph.D degree or NET qualification.

7. The Regulations, governing the filed, i.e. University Grant Commission (Minimum Qualification required for the Appointment and Career Advancement of Teachers in Universities and Institutions Affiliated to it) Regulations, 2000, was amended in 2002, 2006 and 2009. In the Regulations, 2009, it has been indicated that NET/SLET shall remain the minimum eligibility condition for requirement and appointment of Lecturers in Universities/Colleges/Institutions, but those, who have been awarded with Ph.D. degree in compliance of the Regulations, 2009 shall be exempted from the requirement of the minimum eligibility condition of NET/SLET.

8. Let us see whether the petitioner is justified in claiming that her Ph.D. degree should have been considered while scrutinizing her application. The stand of the opposite parties is that Women's Studies is an interdisciplinary subject, which means that Women's Studies, as claimed by the petitioner, has emerged as a discipline with a core area of theory, within an interdisciplinary framework that draws on theories from other disciplines, which means from other social sciences. So, it cannot be equated with other traditional subjects. So far as Women's Studies is concerned, it was rightly pointed out by learned counsel for the petitioner that one has to be dependent upon various subjects right from Social Science to Economics.

Regulation 4.4.0 of the UGC Regulations, 2010 deals with the Assistant Professor because of the reason that Assistant Professor is the base post and in the guideline there is no mention about the post of Lecturers.

9. Here in this case the petitioner has secured more than 55 % marks at the Master's degree level. In point no.2 of the notes of the Advertisement in

Annexure-2, it has been indicated that the qualifications for the said positions will be as per the UGC norms as amended from time to time by the UGC. So UGC norms 2010 provide that NET is not required when there is Ph.D degree. There is nothing on record to dispute that the petitioner did not have the Ph.D. degree on the Women's related subjects because she did Ph.D in "A study on Socio Economic and Demographic Status of Women in Orissa". Hence in our considered opinion, the petitioner is eligible to get a call letter for the post of Lecturer as per advertisement in Annexure-2. Pursuant to the interim order, the University authorities have already allowed the petitioner to appear in the interview.

10. Accordingly we hold that the petitioner is eligible to be considered for the post of Lecturer in Women's Studies. As she has already appeared in the interview along with others, the opposite parties shall now publish the result of such interview.

The writ petition is disposed of with the above order. No cost.

Writ petition disposed of.

2011 (I) ILR – CUT- 36

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

W.P.(C) NO.13135 OF 2010 (Decided on 22.9.2010)

BIRANCHI PRADHAN ……Petitioner

.Vrs.

E.O. DEBOTTAR & ORS ……..Respondent

CONSTITUTION OF INDIA, 1950 – ART.226.

Auction of Sairat – Notification for public auction – Offset price fixed at Rs.10,36,200/- - None participated in the bid – Authorities settled the sairat in favour of O.P.3 at Rs.9,50,000/- on the basis of a private negotiation – Action challenged.

Prime object for auction is to ensure maximum revenue – Before negotiating with O.P.3 & another the Executive Officer should have published the decision to settle the sairat on negotiation so that the sairat would have fetched more money –In the above scenario this Court allowed the petitioners and O.P.3 to bid in the open Court – Since petitioners offer was Rs.12,00,000/- i.e. more than the offer made by the O.P.3 the bid was settled in favour of the petitioners and direction issued to O.P.1 to compute the amount for the period of operation of the sairat by O.P.3 and refund the amount after proportionately adjusting the same out of his deposited amount.

AIR 1985 (SC) 1147 : (Ram & Shyam Company -V- State of Haryana & Ors.).

For Petitioner -Sourjya S. Das
For Opp.Party -Mr.Satyabrata Mohanty

Heard Mr.S.S.Das, learned counsel for the petitioners, Mr.S.Mohanty, learned counsel for O.P.3 and Mr. J.P.Pattnaik, learned Additional Government for the State.

The petitioners representing the villagers of Paikrapur under Gurudijhatia P.S. of Cuttack District have filed this writ petition challenging the decision of the Administrative Authorities of Athagarh Endowment, O.P.1, in rejecting their offer made in respect of the sairat-source of cycle stand of Sri Sri Dhabaleswar Deva for the financial year 2010-11 pursuant to the notification dated 18.3.2010 made in Annexure-1 and settling the said

sairat in favour of O.P.3 by accepting his offer and executing the agreement with him on the basis of a private negotiation in course of public auction.

Mr. Das, learned counsel for the petitioners, draws our attention to the notification dated 18.3.2010 issued by the Sub-Collector-cum-Executive Officer, Athagarh Endowment under Annexure-1.

As it appears, the price offered by O.P.3 for the sairat in question, i.e., Rs.9,50,000/- is lesser than the offset price fixed by the Authority in Annexure-1, which is Rs.10,36,200/-. In the notification, it was indicated that the sairat in question would be put to public auction for the financial year 2010-11 on 25.3.2010 at 11 a.m. in the Office of Sub-Collector-cum-Executive Officer, Athagarh Endowment and the intending bidders were required to deposit their Earnest Money to enable them to participate in the bid. If for any reason, the sairat could not be settled on that date, it would be put to auction on the next date, i.e., 26.3.2010 and in case, it fails on that date, again for the third time, it would be done on 27.3.2010.

It is an admitted fact that on those three occasions, nobody participated in the bid and ultimately, O.P.3 approached the authority and the sairat was settled in his favour at Rs.9,50,000/- and he deposited Rs.5,00,000/- with the Sub-Collector, Athagarh and agreement was entered into on 3.4.2010. The balance amount was directed to be deposited in various instalments. But it is stated by the petitioners that the balance amount has not been deposited till date.

Challenging the aforesaid action, the petitioners filed this writ petition on 30.7.2010. This Court by order dated 17.8.2010 while adjourning the matter to 23.8.2010 directed the petitioners to come with bank draft of Rs.10.00 lakhs drawn in favour of the Registrar (Judl.) of this Court to show their bona fide that they were interested to take the sairat in question and as an interim measure also directed that status quo as on that date in respect of the sairat in question would be maintained till next date. On 23.8.2010 when this matter came up before us, learned counsel for the petitioners produced 21 nos. of bank drafts amounting to Rs.10.00 lakhs, which were directed to be kept in a sealed cover with the Registry. Ultimately when the matter was taken up on 20.9.2010, this Court directed the Sub-Collector, Athagarh, to appear before this Court today (22.9.2010) at 10.30 a.m. so also the respective parties, since the petitioners had already offered Rs.10.00 lakhs and that too, for operation of the sairat for the balance period of the financial year 2010-11.

Pursuant to the aforesaid order dated 20.9.2010, the Sub-Collector, Athagarh, the petitioner and O.P.3 are present.

It is stated by Mr. Das for the petitioners that after the auction failed, a person namely, Jaga Rout along with O.P.3 approached the Executive Officer and O.P.3 offered the highest amount, i.e. Rs.9,50,000/- as against the offer of Jaga Rout, i.e., Rs.7,50,000/-.

Looking at the facts and circumstances of the case, we are of the opinion that the prime interest of the Administrator is to ensure that maximum revenue is collected out of the sairat in question and in this case, before negotiating with O.P.3 and Jaga Rout, the Executive Officer should have published the decision to settle the sairat in negotiation so that the sairat would have fetched more money and the benefit would have gone to the Deity. The order of the Executive Officer, Athagarh Endowment, is extracted hereunder.

> "One Sri Jaga Rout, S/o.Gandharba Rout, At-Bidyadharpur, P.O.Mancheswar, P.S.-Choudwar Dist.-Cuttack placed an application on 27.3.2010 stating to take the said sairat with a sum of Rs.7,50,000/- (seven lakhs fifty thousand only). But the other one Sri Rusia Munduli, S/o.Hader Muduli of Bidyadharpur, P.O.-Mancheswar, P.S.-Choudwar, Dist.-Cuttack, placed an application on the same day stating to take the said sairat with a sum of Rs.9,00,000/- (rupees nine lakhs only).
>
> Considering their two applications of two different applicants, the said sairat was allowed in favour of Rusia Muduli, S/o.Hadu Muduli of Bidyadharpur, P.O.-Mancheswar, P.S.-Choudwar, Dist.-Cuttack for the financial year 20.10.11 on negotiation basis. But enhancing Rs.50,000/- (fifty thousand) more according to his application i.e., Rs.9,50,000/- (nine lakhs fifty thousand only). The above said negotiation amount for the said sairat is to be deposited in the office of the Athagarh debottar.
>
> Sd./-Illegible
> 29.3.10
> E.O. Athagarh Debottar.

Later :-

> The said sairat holder namely Rusis Muduli placed an application also at the last hour of the office stating that even though he accepted the above said negotiation amount of the E.O. Debottar Athagarh for the above said sairat but prayed to deposit Rs.4,00,000/- (rupees four lakhs only) out of the total amount and the rest amount is to be deposited within the month of 'Kartik' through instalments. The said application was allowed in part, i.e., to deposit Rs.4,00,000/- but as regards to Rs.5,50,000/- is to be deposited within a month of agreement. Accordingly, the sairat holder is to execute the

agreement within seven days.

Sd./-Illegible
29.3.10
E.O. Athagarh Debottar"

When the petitioner has already deposited Rs.10,00,000/-, which is Rs.50,000/- more than the price offered by O.P.3, in the interest of the Revenue as well as Deity and `as the Deity may get more revenue, applying the principles enunciated by the apex Court in the case of ***Ram and Shyam Company vrs. State of Haryana and others,*** AIR 1985(SC) 1147, we allowed both the petitioners and O.P.3, who are present in Court, to bid in the open Court. Accordingly, the bid was conducted in the open Court, in which petitioners offer to pay Rs.12,00,000/- (rupees twelve lakhs) whereas O.P.3 offers to pay Rs.11,90,000/- (rupees eleven lakhs ninety thousand). Since the offer price of the petitioners is higher than that of O.P.3 and the Deity will get much more revenue in the auction in comparison to the amount received from O.P.3 in the negotiation, we accept the offer price of the petitioners at

Rs.12,00,000/- (rupees twelve lakhs).

In view of such, we direct the Registry of this Court to encash the demand drafts, which were kept in sealed cover, and issue a cheque for Rs.10,00,000/- (rupees ten lakhs) in favour of the Sub-Collector-cum-Executive Officer, Athagarh Endowment on a proper application filed by the learned Additional Government Advocate. Thereafter, on fulfilling all other conditions of the contract by the petitioners, the O.P.-authority shall pass necessary orders settling the sairat in question in their favour for the balance period of the financial year 2010-11 and the agreement shall be entered into between them within seven days and the petitioners shall be allowed to operate the sairat from 1st October, 2010. The petitioners are also directed to deposit the balance amount of Rs.2,00,000/- (rupees two lakhs) with the authority within a period of four weeks from today, failing which, it will be construed to be an act of contempt and entail cancellation of agreement and forfeiture of the amount deposited. After expiry of the agreement period, the petitioner shall give delivery possession of the sairat peacefully to the Sub-Collector, Athagarh.

The Sub-Collector-cum-Executive Officer, Athagarh Endowment, O.P.1 is directed to compute the amount for the period of operation of the sairat by O.P.3 and refund the amount after proportionately adjusting the same out of his deposited amount.

The Sub-Collector, Athagarh, submits that the amount shall be computed and refunded to O.P.3 within seven days from today.

Personal appearance of the Officers is dispensed with.

With the aforesaid direction, the writ petition as well as the misc. case is disposed of.

Writ petition disposed of.

2011 (I) ILR – CUT- 41

L.MOHAPATRA, J & ARUNA SURESH, J.

O.J.C. NOS.5921, 5922 & 7798 OF 2000 (Decided on 23.11.2010)

MAN MOHAN MISHRA & ORS. …….. Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.16(1).

Seniority – Determination – Roster point promotees (reserved category) can not count their seniority in the promoted category from the date of their continuance of officiation in the promoted post vis-à-vis the general candidates who were senior to them in the lower category and were later promoted before the roster point promotee was given further promotion.

In the present case O.P.5 an officer of O.A.S. Class-II was junior to all the petitioners but he was promoted as a reserved category candidate to OAS Class-1 (Jr.Branch) against a roster point earlier than the petitioners – While he was continuing as an officer in OAS Class-1 (Jr.Branch) all the petitioners were promoted to OAS Class-1 (Jr.Branch).

Held, O.P.5 can not claim seniority over all the petitioners as an officer in OAS Class-1 (Jr.Branch).

(Para 6)

Case law Relied on:-

AIR 1999 SC 3471 : (Ajit Singh & Ors.-V- The State of Punjab & Ors.).

Case laws Referred to:-

1.AIR 1997 SC 2366 : (Jagdish Lal -V- State of Haryana)
2.(1997) 5 SCC 201 : (Ashok Kumar Gupta -V- State of U.P.)
3.AIR 2007 SC 71 : (M.Nagaraj & Ors. -V-Union of India & Ors.).

For Petitioners - M/s. J.Patnaik, Sanjit Mohanty, S.P.Panda, S.C.Samantaray. N.C.Sahoo, D.Mohanty, S.Pattnaik, P.K.Muduli & S.Nanda.

For Opp.Parties - Additional Govt. Advocate (for O.P.Nos.1 to 3) M/s. B.N.Rath, G.N.Rath, S.K.Jethy, M.K.Panda, P.S.Samantaray, S.B.Mohanty, M.K.Sing Deo & K.K.Mohapatra, M/s. R.K.Rath, N.R.Rout & P.Rath. M/s. S.K.Das, S.Swain, M.Jesthy & R.C.Jena.

M/s. C.A.Rao & A.Tripathy (for O.P.No.5).

L.MOHAPATRA, J. Inter se seniority between the petitioners and opposite party No.5 in O.J.C. No.5922 of 2000 is the dispute involved in this writ application. Opposite party No.5 approached the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1685 of 1998 claiming seniority over all the petitioners in the post of OAS Class-I (Junior Branch) and consequently OAS Class-I (Senior Branch). The said Original Application having been allowed, the present petitioners who were respondents 7, 8, 9, 11 to 90, 102 and 106 in the said Original Application have filed this writ application challenging the judgment of the Tribunal passed in the said Original Application. Since all the three writ applications have been filed challenging the judgment of the Tribunal, they were taken up for hearing and disposed of in this common judgment.

2. Facts leading to filing of the Original Application by opposite party No.5 before the Tribunal are that in the year 1976 the petitioners were selected and appointed as direct recruit general candidate officers of Orissa Administrative Service (OAS) Class-II and they joined in July 1979. Opposite party No.5 was appointed against a reserved category post being a Scheduled Tribe candidate on the basis of a special recruitment held for Scheduled Castes/Scheduled Tribes by the Orissa Public Service Commission to OAS Class-II and accordingly he joined as OAS Class-II Officer on 13.8.1982. On 30.5.1992 even though opposite party No.5 was junior to all the petitioners in the cadre of OAS Class-II, he was promoted to OAS Class-I (Junior Branch) on ad hoc basis as a reserved category candidate against the Roster point in the said promotional post. The said promotion of opposite party No.5 from OAS Class-II to OAS Class-I (Junior Branch) was subject to the result of O.A. Nos.1015 of 1989, 976 of 1990 and 1389 of 1990 pending before the Orissa Administrative Tribunal then. Even though all the petitioners were senior to opposite party No.5 in the cadre of OAS Class-II, they were promoted to OAS Class-I (Junior Branch) in the year 1995-96 and by then opposite party No.5 was still working as an Officer in the OAS Class-I (Junior Branch). On 9.9.1996, a provisional Gradation list of OAS Class-I (Junior Branch) Officers as on 1.7.1996 was prepared on the basis of date of joining in OAS Class-I (Junior Branch). In the said Gradation list, the opposite party No.5 was placed at serial No.41. While the matter stood thus, on 27.12.1996, O.A. Nos.1015 of 1989, 976 of 1990 and 1389 of 1990 were disposed of by the Tribunal with a direction that the 176 promotees of OAS Class-II of the year 1980-81 be placed below the direct recruits of OAS Class-II of 1977 batch. In pursuance of the

said judgment of the Tribunal, on 14.1.1997, a fresh Gradation List of OAS Class-I (Junior Branch) Officers as on 1.12.1996 was prepared specially taking into consideration the judgment of the Hon'ble Supreme Court in the cases of R.K. Sabharwal (AIR 1995 SC 1371), Virpal Singh Chauhan (AIR 1996 SC 448) and Ajit Singh-I (AIR 1996 SC 1189) and the petitioners who were promoted to OAS Class-I (Junior Branch) later than opposite party No.5 were placed above opposite party No.5 and in the Gradation List prepared on 14.1.1997, the name of opposite party No.5 figured at serial No.196 below all the petitioners. On 3.2.1997, the State Government through the G.A. Department submitted a proposal before the OPSC for relaxation of the qualifying experience of 144 Officers in OAS Class-I (Junior Branch) for promotion to OAS Class-I (Senior Branch. OPSC vide letter dated 3.6.1997 accepted the proposal of the Government to relax the qualifying experience of two years in OAS Class-I (Junior Branch) for promotion to OAS Class-I (Senior Branch). After obtaining the concurrence of OPSC, the Government of Orissa in G.A. Department relaxed the provision contained in Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 in exercise of power under Rule 13 thereof. The judgment passed by the Tribunal in the aforesaid three Original Applications was assailed before the Hon'ble Supreme Court and the Gradation List dated 5.5.1997 prepared for OAS Class-I (Junior Branch) Officers was also questioned before the Hon'ble Supreme Court. The Civil Appeals were dismissed on 10.7.1997. In view of the relaxation in Rule 5 of the aforesaid Rules, the petitioners along with others were promoted to OAS Class-I (Senior Branch) on 15.7.1997. Challenging such promotion as well as the placement in the Gradation List of OAS Class-I (Junior Branch), opposite party No.5 filed the present Original Application before the Tribunal praying for the following reliefs:

> (1) Restoration of seniority of opposite party No.5 as it was appearing in the provisional Gradation List under Annexure-2 to the Original Application;
>
> (2) To quash the revised Gradation List in Annexures-3 and 4 to the Original Application;
>
> (3) To quash the promotion of all the petitioners to OAS Class-I (Senior Branch);
>
> (4) To direct the State authorities to promote him to OAS Class-I (Senior Branch) from the date his juniors were promoted and also to give all financial and other service benefits.

The said Original Application having been allowed by the Tribunal on 21.6.2000, the present writ application has been filed challenging the same.

3. The following are the undisputed facts involved in this case:

(1) Opposite party No.5 was junior to all the petitioners as OAS Class-II Officer;

(2) Opposite Party No.5 was promoted to OAS Class-I (Junior Branch) on ad hoc basis as a reserved category candidate against a Roster point on 30.5.1992 much prior to the petitioners who were promoted in 1995-96 to OAS Class-I (Junior Branch) as general candidates;

(3) All the petitioners were promoted to OAS Class-I (Junior Branch) when the opposite party No.5 was still continuing as an Officer in OAS Class-I (Junior Branch);

(4) While all the petitioners and opposite party No.5 were working as Officers in OAS Class-I (Junior Branch) Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 was sought to be relaxed in exercise of power under Rule 13 thereof and the qualifying experience of two years in Class-I (Junior Branch) was sought to be relaxed for the purpose of promotion to OAS Class-I (Senior Branch). The said proposal was concurred by OPSC;

(5) In view of the above relaxation in the qualifying experience of two years of service, all the petitioners got promotion to OAS Class-I (Senior Branch) earlier to opposite party No.5;

(6) Though initially a Gradation list of Officers belonging to OAS Class-I (Junior Branch) had been prepared on 1.7.1996 on the basis of date of joining in OAS Class-I (Junior Branch), subsequently it was modified relying on the judgment of the Hon'ble Supreme Court in the above three cases. In the Gradation list of 1.7.1996 opposite party No.5 had been shown senior to all the petitioners whereas in the Gradation list of 14.1.1997, opposite party No.5 figured at serial No.196, below all the petitioners.

4. The question for determination is that the opposite party No.5 having been promoted to the post of OAS Class-I (Junior Branch) much earlier to all the petitioners, whether the Gradation list in respect of Officers working in OAS Class-I (Junior Branch) should have been prepared on the basis of date of joining or on the basis of the aforesaid three Supreme Court decisions. The other question to be determined is as to whether the

petitioners having been promoted to OAS Class-I (Junior Branch) while the opposite party No.5 was continuing in the said post of OAS Class-I (Junior Branch) even though earlier promoted, the petitioners can claim seniority over opposite party No.5 as Officers in OAS Class-I (Junior Branch). The last question to be determined is whether the State had any authority to relax the requirement of two years of service as an officer of OAS Class-I (Junior Branch) for the purpose of promotion to OAS Class-I (Senior Branch).

5. The first two questions to be determined are interlinked. Undisputedly opposite party No.5 was promoted from OAS Class-II to Class-I (Junior Branch) as a reserved category candidate against the Roster point much prior to all the petitioners. Opposite party No.5 was promoted to OAS Class-I (Junior Branch) on 30.5.1992 whereas all the petitioners were promoted to OAS Class-I (Junior Branch) as general candidates in 1995-96. Therefore, on the basis of the date of joining as an Officer of OAS Class-I (Junior Branch) the first Gradation list had been prepared on 1.7.1996. When the opposite party No.5 was continuing as an Officer of OAS Class-I (Junior Branch), all the petitioners were promoted to OAS Class-I (Junior Branch). Relying on this fact, Shri Sanjit Mohanty and Shri Jagannath Patnaik, the learned Senior Counsel appearing in two of the cases and the learned State Counsel appearing in the case filed by the State submitted that in view of the judgment of the Hon'ble Supreme Court in the case of Ajit Singh and others v. The State of Punjab and others, reported in AIR 1999 SC 3471 otherwise known as Ajit Singh-2 case, the petitioners have to be treated as senior to opposite party No.5. Shri C.A. Rao, the learned counsel appearing for opposite party No.5 referring to the very same judgment and to the provisions contained in the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Rules, 1976 submitted that the opposite party No.5 having been promoted to OAS Class-I (Junior Branch) earlier than the petitioners against a reserved vacancy, he is to be treated as senior to all the petitioners. The Constitution Bench decision of the Hon'ble Supreme Court in the case of Ajit Singh-2 was also placed before the Tribunal and the Tribunal picked up certain paragraphs from the said judgment, interpreted the same in favour of opposite party No.5 and allowed the Original Application. Since the entire dispute revolves around the law laid down by the Hon'ble Supreme Court in Ajit Singh-2 case, it is necessary for us to refer to the said judgment and find out as to whether the claim of opposite party No.5 is justified or not.

Ajit Singh Januja and some others were working against the post of Superintendent Grade-1, Superintendent Grade-II and Assistant in Punjab

Civil Secretariate, Chandigarh. They were members of the cadre of Punjab Civil Secretariat. The grievance made in the writ petition filed by them was that the policy for reservation in respect of candidates belonging to Scheduled Castes and Backward Classes, was being implemented by the State Government in a manner, because of which the members belonging to the Scheduled Castes and Backward Classes were holding posts in excess to their reservation quota. This was not only prejudicial but detrimental to their right for being considered for promotion to higher grade. Their case having been dismissed by the Full Bench of the Punjab & Haryana High Court on 23.8.1989, they approached the Hon'ble Supreme Court in several Civil Appeals. All those appeals were decided in a common judgment, reported in ***AIR 1996 SC 1189***. The Hon'ble Supreme Court in the said case observed that the members of Scheduled Castes or Backward Class who have been appointed/promoted on basis of the policy of reservation and system of roster cannot claim promotion against general category posts in the higher grade, on basis of their seniority in the lower grade having been achieved because of the accelerated promotion or appointment by applying the roster. The equality principle requires exclusion of the factor of extra weightage of earlier promotion to a reserved category candidate because of reservation alone, when he competes for further promotion to a general category with a general category candidate, senior to him in the panel. The Court held in paragraph-16 of the judgment that the rule of reservation gives accelerated promotion, but it does not give the accelerated 'consequential seniority'. If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category candidate is promoted later to that higher grade, the general category candidate shall regain his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. Even after disposal of the said case by the Hon'ble Supreme Court, three interlocutory applications were filed for clarification by the State of Punjab and the said three interim applications were decided by a Constitution Bench of the Hon'ble Supreme Court reported in ***AIR 1999 SC 3479***. The Hon'ble Supreme Court in the case of ***Jagdish Lal v. State of Haryana, reported in AIR 1997 SC 2366*** having taken a view contrary to Ajit Singh Januja I, it became necessary to file the said three interim applications.

In the case of Union of India v. Virpal Singh, the Hon'ble Supreme Court held that it was permissible for the Railways to say that reserved candidates who get promotion at the roster points would not be entitled to claim seniority at the promotional level as against senior general candidates who got promoted at a later point of time to the same level. It was further held that it would be open to the State to provide that as and when the

senior general candidate got promoted under the rules, whether by way of a seniority rule or a selection rule to the level to which the reserved candidate was promoted earlier, the general candidate would have to be treated as senior to the reserved candidate (the roster point promotee) at the promotional level as well, unless, of course, the reserved candidate got a further promotion by that time to a higher post. The last part of the observation of the Hon'ble Supreme Court was described as the 'catch up' rule. Similar view was also expressed in Ajit Singh Januja I case as stated earlier. In the case of Jagdish Lal v. State of Haryana (supra) a view contrary to Virpal and Ajit Singh-1 was taken and it was held that the general rule in the Service Rules relating to seniority from the date of continuous officiation which was applicable to candidates promoted under the normal seniority/selection procedure would be attracted even to the roster point promotees as otherwise there would be discrimination against the reserved candidates. The Bench also observed that the right to promotion was a statutory right while the rights of the reserved candidates under Article 16(4) and Article 16(4A) were fundamental rights and in that behalf, it followed ***Ashok Kumar Gupta v. State of U.P., reported in (1997) 5 SCC 201***.

6. In view of the conflicting decision as stated above, the Constitution Bench was called upon to decide the question involved by way of clarification in the three interlocutory applications filed in Ajit Singh Jajuna-2 case. Having gone through the entire judgment of Ajit Singh Januja-2 case, we feel it necessary to quote some of the relevant paragraphs of the judgment. While answering the question as to whether the right to be considered for promotion is a mere statutory right or a fundamental right, the following observations were made by the Hon'ble Supreme Court in paragraphs-27 and 28 of the judgment which are quoted below:

> "In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal and other cases, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950.

Articles 16(4) and 16(4A) do not confer any fundamental right to reservation :

We next come to the question whether Article 16(4) and Article 16(4A) guaranteed any fundamental right to reservation. It should be noted that both these Articles open with a nonobstante clause – "Nothing in this Article shall prevent the State from making any provision for reservation……" There is a marked difference in the language employed in Article 16(1) on the one hand and Article 16(4) and Article 16(4A). There is no directive or command in Article 16(4) or Article 16(4A) as in Article 16(1). On the face of it, the above language in each of Articles 16(4) and 16(4A), is in the nature of an enabling provision and it has been so held in judgments rendered by Constitution Benches and in other cases right from 1963."

While considering the question of reservation and effect of roster point of reservation, the Hon'ble Supreme Court in the said judgment held as follows:

" It must be noted that whenever a reserved candidate goes for recruitment at the initial level (say Level I), he is not going through the normal process of selection which is applied to a general candidate but gets appointment to a post reserved for his group. That is what is meant by 'reservation'. That is the effect of 'reservation'.

Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level I for promotion of the reserved candidate at various roster points to level 2, the reserved candidate if he is otherwise at the end of the merit list, goes to Level 2 without competing with general candidates and he goes up by a large number of places. In a roster with 100 places, if the roster points are 8, 16, 24 etc. at each of these points the reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by sidestepping several general candidates. That is the effect of the roster point promotion.

It deserves to be noticed that the roster points fixed at Level 1 are not intended to determine any seniority at Level I between general candidates and the reserved candidates. This aspect we shall consider again when we come to Mervyn Continho v. Collector of Customs, (1966) 3 SCR 600 : (AIR 1967 SC 52) lower down. The roster point merely becomes operative whenever a vacancy

reserved at Level 2 becomes available. Once such vacancies are all filled, the roster has worked out. Thereafter other reserved candidates can be promoted only when a vacancy at the reserved points already filled arises. That was what was decided in R.K. Sabharwal v. State of Punjab (1995 AIR SCW 1371 : AIR 1995 SC 1371 : 1995 Lab IC 1618)."

The most important question relates to seniority of roster promotees. Answering the said question, the Hon'ble Supreme Court in paragraphs-42, 43 and 48 of the judgment observed as follows:

" We shall here refer to two lines of argument on behalf of the reserved candidates. Ajit Singh was an appeal from the judgment of the Full Bench of the Punjab and Haryana High Court in Jaswant Singh v. Secretary to Govt., Punjab Education Department, (1989) 4 Serv LR 257 : (1990 Lab IC 559). In that case, reliance was placed by the reserved candidates on a general Circular dated 19.7.69 issued by the Punjab Government which stated that the roster point promotions would also confer seniority. In fact, while dismissing the writ petitions filed by the general candidates the High Court declared that the State was obliged to count seniority of the reserved candidates from the date of their promotion as per the Circular dated 19.7.69. The judgment of the Full Bench was reserved by this Court in Ajit Singh in the appeal filed by the general candidates. That resulted in the setting aside of the above declaration regarding seniority of roster point promotees as stated in the Punjab circular dated 19.7.69.

But before us, reliance was placed by the reserved candidates as was done in Jagdish Lal (1997 AIR SCW 2257: AIR 1997 SC 2366: 1997 Lab IC 2301), upon the general seniority Rule contained in various Punjab Service Rules applicable in the Civil Secretariat, Education, Financial Commissioner, etc. Departments which Rules generally deal with method of recruitment, probation, seniority and other service conditions. All these Rules provide a single scheme for recruitment by promotion on the basis of seniority-cum-merit and then for seniority to be determined in the promotional post from the date of "continuous officiation", whenever the promotion is as per the method prescribed in those Rules. It is on this seniority rule relating to "continuous officiation" at the promotional level that reliance was placed before us by the reserved candidates, as was done in Jagdish Lal. Question is whether roster points promotees can rely on such a seniority rule?

> It is clear, therefore, that the seniority rule relating to 'continuous officiation' in promotion is part of the general scheme of recruitment by direct recruitment, promotion, etc. – in each of the services in Class I, II and III – and is based upon a principle of equal opportunity for promotion. In our opinion, it is only to such promotions that the seniority rule of 'continuous officiation' is attracted"

Having considered all the previous decisions on this issue, the Hon'ble Supreme Court in paragraph-56 of the said judgment held that in the case of Jagdish Lal, the Court had arrived at an incorrect conclusion and the said paragraph is quoted below:

> "The Court in Jagdish Lal delinked Rule 11 from the Recruitment Rules and applied the same to the roster promotees. For the reasons given already in regard to Ajit Singh, we hold that Jagdishlal arrived at an incorrect conclusion because of applying a rule of continuous officiation which was not intended to apply to the reserved candidates promoted at roster points."

The most relevant paragraph of the judgment is the observation made in paragraph-76, which is quoted below:

> " We, therefore, hold that the roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post, - vis-a-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate – he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level. We shall explain this further under Point 3. We also hold that Virpal and Ajit Singh have been correctly decided and that Jagdishlal is not correctly decided. Points 1 and 2 are decided accordingly.

In the case of ***M. Nagaraj & others v. Union of India & others, reported in AIR 2007 S.C. 71***, the "catch-up" rule or concept of "consequential seniority" came for consideration. It was held that the concept of "catch-up" rule or "consequential seniority" are judicially evolved concepts to control the extent of reservation. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of these concepts, the structure of Article 16 (1) stands destroyed or abrogated. It cannot be also said that

"equality code" under Articles 14, 15 and 16 is violated by deletion of the "catch-up" rule.

It is, therefore, clear that roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuance of officiation in the promoted post vis-à-vis the general candidates who were senior to them in the lower category and were later promoted before the roster point promotee was given further promotion. If the present case is examined on the basis of the aforesaid principle, it will be clear that as an Officer of OAS Class-II, the opposite party No.5 was junior to all the petitioners and he was promoted as a reserved category candidate to OAS Class-I (Junior Branch) against a roster point earlier than the petitioners. While he was continuing as an Officer in OAS Class-I (Junior Branch), all the petitioners were promoted to OAS Class-I (Junior Branch). Therefore, applying the principles laid down by the Hon'ble Supreme Court in the said judgment it can be safely held that opposite party NO.5 cannot claim seniority over all the petitioners as an officer in OAS Class-I (Junior Branch).

7. The next and last question for consideration is as to whether the State Government had any authority to relax the rules for the purpose of giving further promotion to OAS Class-I (Senior Branch). Rule 5(3) of the OAS Class-I (Recruitment to Senior Branch) Rules, 1979 clearly provides that an officer working as OAS Class-I (Junior Branch) can be considered for promotion to OAS Class-I (Senior Branch) provided he has completed two years of service as an Officer in OAS Class-I (Junior Branch). Rule 13 of the said Rules empowers the Government to relax the requirement of two years of service and accordingly a decision was taken to relax the said requirement and concurrence of OPSC was also obtained. There being no dispute about these facts, we are of the view that Rule 13 empowers the State Government to relax the Rules/requirement of two years of service and accordingly the same has been done with concurrence of OPSC and therefore, there is no illegality in such decision. All the petitioners having been promoted to OAS Class-I (Senior Branch) earlier than the opposite party No.5 in accordance with their seniority, there is no illegality in such promotion.

8. While examining the impugned judgment of the Tribunal, we found that the relevant portions of the judgment of the Constitution Bench in the case of Ajit Singh-2 had not been taken note of and the Tribunal confused the entire issue and allowed the Original Application.

9. Consequently for the reasons stated above, we set aside the impugned judgment of the Tribunal and allow the writ applications.

Writ petition allowed.

2011 (I) ILR – CUT- 53

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

W.P. (C) NO.15607 OF 2005 (Decided on 09.11.2010)

RAMAKANTA RATH …….. Petitioner.

.Vrs .

HIGH COURT OF ORISSA & ANR. …….. Opp.Parties.

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

Departmental proceeding – Petitioner was working as Senior Assistant-cum-Peskar – Charge framed for interpolation of orders of this Court and deliberate refusal to receive the order of suspension – He was found guilty and reduced to Junior Assistant – Appeal filed by him was dismissed – Hence the writ petition.

So far as the first charge is concerned there is no evidence on record except the evidence of two witnesses that the petitioner had taken the record from the Copying Section, although he was not in custody of the record all through – No presumption can be drawn that the petitioner must have interpolated the order – Held, finding of the inquiry officer is set aside being based on no evidence – So far the Second charge is concerned there is material that the petitioner had deliberately avoided to receive the order of suspension – Held, petitioner is guilty of the Second charge but not the first charge – Punishment imposed by the disciplinary authority appears to be disproportionate – Held, order of punishment as well as the appellate order is set aside and the matter remitted to the disciplinary authority to impose appropriate punishment relating to the second charge.

(Para 6 & 7)

For Petitioner - M/s. Chiranjib Mohapatra,
Mrs. Madhusmita , Abhiram Swain,
M/s. Ashok Mohanty, Hrusikesh Tripathy,
B.Panigrahi, P.K.Mohanty & P.K.Sahu,
Dr.Manoranjan Panda,
Mr. P.K.Nanda.

For Opp.Parties - Addl. Govt. Advocate

L. MOHAPATRA, J. The petitioner faced a departmental proceeding while working as Senior Assistant-cum-Peskar in this Court and was found guilty

of the charge. As a major punishment, he was reduced to the lower post i.e. Junior Assistant on time scale with seniority above all the incumbents in that time scale and the period of suspension was treated as such. The appeal preferred against the order of punishment having been rejected, he has filed this writ application challenging initiation of departmental proceeding, the order of punishment as well as the order of appellate authority.

The facts leading to initiation of departmental proceeding against the petitioner are that in June, 1999, the petitioner was working as Peskar in the Court of one of the Hon'ble Judges. During Summer Vacation, O.J.C.No.6526 of 1999 was taken up for admission along with Misc.Case No.6053 of 1999. This case was taken up by the Hon'ble Judge during vacation in whose Court the petitioner was working as Peskar. In the said Misc.Case, an interim order was passed directing the petitioner therein to deposit a sum of Rs.4,50,000/- against Bill No.1860 dated 4.5.1999. The said order was subsequently tampered by erasing the digit '4' and inserting the digit '2' in its place. The first certified copy of the order was granted to the advocate's clerk on 4.6.1999 and the second certified copy thereof was granted on 8.6.1999. The record in question was sent to the copying Section for issuance of both the certified copies and on 5.6.1999, it is alleged that the petitioner personally brought back the record from the copying department by endorsing his signature on the register meant for receipt of Court's order. The documents for preparation of certified copies were sent by the petitioner to the copying department on 4.6.1999 and 7.6.1999. On 22.6.1999, the petitioner is alleged to have taken the said register from the copying department and returned the same sometime thereafter and it was noticed that the portion carrying the signature of the petitioner in the said register had been torn away and, accordingly, the petitioner was charged for interpolation of the orders of the Court. He was also charged for having deliberately refused to receive the order of suspension even though he was present in the Court premises on 20.7.1999. On the above allegations, Departmental Proceeding No.2 of 1999 was initiated against the petitioner and he was served with a copy of charge memo.

2. The petitioner submitted his reply to the said allegations stating therein that the dictation was taken by the Stenographer and as an abundant caution he made a note with regard to the amount directed to be deposited in the cause list. As per usual practice, on an application being made by the petitioner in the writ petition, the record of the concerned case was sent to the copying department along with a Court Transit Register by the Bench Peon for grant of certified copy of the order. On 3.6.1999 the order was passed in the aforesaid writ application and on 4.6.1999 the record had been given to the copying department along with the copy application and Bench

Transit Register. He further stated in his reply that he had no occasion to take the records of the said case from the copying department nor had he received the same at any time after certified copy of the order was granted on 4.6.1999. On 22.6.1999 only during lunch hour he came to know that the figure Rs.4,50,000/- appearing in the order dated 3.6.1999 had been tampered to read as Rs.2,50,000/-. According to the petitioner, when the record was sent to the copying department for grant of certified copy, the figure Rs.4,50,000/- was appearing in the order. He basically denied any knowledge regarding tampering of the said order.

3. After submission of reply, an Inquiry Officer was appointed and inquiry was conducted. Some witnesses were examined in course of inquiry and several documents were also exhibited. The Inquiry Officer found that record in the said case had been supplied by the petitioner through P.W.4 to the copying department and there is no doubt that the petitioner was the custodian of the record as on and from it was listed, but there was nothing to show that the record was handed over to the Section at any time before Summer Vacation. During this period, the record moved from the petitioner to the copying section from where the petitioner himself collected the record and reliance in this regard was placed by the Inquiry Officer on the evidence of P.Ws.2 and 3. The Inquiry Officer further found that there is no direct evidence to show that the petitioner had torn the relevant portion of the record bearing his signature or tampering of the record but the circumstances as appeared from the evidence clearly indicate that the petitioner had torn the relevant portion. The Inquiry Officer further came to a conclusion that the petitioner was the custodian of the record at the time application for certified copy was filed and he asked P.W.4 to obtain the copy application from the copying section and thereafter handed over the record to him. On 22.6.1999 he took away the register from the copying department outside the copying section and returned sometime thereafter as stated by P.Ws.2 and 6. The Inquiry Officer further found that there is no evidence to show that the record was dealt with by any person otherwise than the petitioner before such manipulation was detected except that the record had been sent for preparation of certified copy which was handed over to the applicant in the writ application on 4.6.1999 and 8.6.1999 respectively. The petitioner having found to be in custody of the record, a presumption was drawn by the Inquiry Officer that it is the petitioner, who must have interpolated the order when the record was in his custody and, accordingly, found him guilty of the charge. So far as second charge is concerned, the Inquiry Officer also held that the petitioner deliberately refused to receive the suspension order.

4. On the basis of such inquiry report, the petitioner was called upon to show cause as to why major penalty shall not be imposed on him and after receipt of his reply, order of punishment was passed reducing him to the lower post i.e. the Junior Assistant and treating the period of suspension as such. The appeal preferred by the petitioner against the order of punishment was also rejected and hence this writ application.

5. Learned counsel appearing for the petitioner assails the order of punishment as well as the order of the appellate authority solely on the ground that the documents on the basis of which charges were framed were never produced before the Inquiry Officer and, therefore there was no basis for the Inquiry Officer to hold the petitioner guilty of the charges regarding interpolation of the orders. It was contended by the learned counsel for the petitioner that the entire allegation against the petitioner as revealed from the charge memo is that he was working as a Peskar at the relevant time and after the order was signed, the record had been sent to the copying section for grant of certified copy. The further allegation against the petitioner is that he brought the record from the copying section by signing the register marked as Exbit-B and again returned it to the copying Section. Two certified copies are alleged to have been granted to the applicant in the said writ application but none of the certified copies were produced in course of the inquiry. Therefore, there was no material on record before the Inquiry Officer to show that at any point of time the order had been interpolated and the digit '4' appearing in the said order had been replaced by digit '2'.

Learned counsel for the State defending the order of punishment submitted that after the record had been sent to the copying section, it is the petitioner who brought back the record form the copying section and was in custody of the record before it was sent back to the copying section. The record having not been handled by anybody else, the Inquiry Officer was justified in drawing a presumption that interpolation must have been done by the petitioner.

6. Undisputedly, on 3.6.1999 the petitioner was working as a Peskar in the Court in which O.J.C.No.6526 of 1999 along with Misc.Case No.6053 of 1999 had been taken up for admission. Undisputedly, an interim order was passed by the Court directing the applicant of the said writ application to deposit a sum of Rs.4,50,000/- against Bill No.1860 dated 4.5.1999. The original record was perused by us and the order dated 3.6.1999 passed in the aforesaid Misc. Case clearly indicates the figure Rs.4,50,000/-. The allegation is that when the first certified copy of the order was granted, the order had been interpolated and the digit '4' has been replaced by digit '2'

but when the second certified copy was granted, interpolation earlier made had already been corrected and the second certified copy reflected the figure Rs.4,50,000/-. Though the entire charge in this regard is based on these two certified copies alleged to have been granted by the copying section, they were never produced before the Inquiry Officer and on the other hand, the stand taken by the counsel appearing for the applicant in the said writ application that the first certified copy granted by the copying section had been eaten away by a bull. It is, therefore clear that the certified copy of the order indicating the figure Rs.2,50,000/- had never been produced before the Inquiry Officer. Surprisingly, the second certified copy was also not produced before the Inquiry Officer. Therefore, these two documents which formed the basis of charge relating to interpolation were not made available to the Inquiry Officer. The further allegation is that the petitioner obtained the record from the copying section by signing on the register marked as Exbit - B and after returning the record to the copying section, it was found that portion of the register in which his signature was appearing had been torn away. It is, therefore, clear that there is no documentary evidence to show that the petitioner had taken the record of the said case from the copying section and returned it sometime thereafter. However, the Inquiry Officer has come to a conclusion that the petitioner had taken the record from the copying section basing on evidence of two witnesses. Even if the evidence of these two witnesses is accepted to the extent that the petitioner had obtained the record from the copying section and returned the same after sometime, in absence of any other material, no presumption can be drawn to the effect that merely because the petitioner had taken custody of the record for some time, he must have interpolated the order. There may be cases where direct evidence is not available but circumstantial evidence should be such that no other presumption can be drawn except that the petitioner must have interpolated the order. There is no dispute in this case that the dictation was taken by the Stenographer, record of the case was taken to the copying section by the Peon and the record had already been handed over to the copying section for the purpose of grant of certified copy. Therefore, it can never be said that it is the petitioner alone, who was in custody of the record all through. Accordingly, we are of the view that the Inquiry Officer committed an illegality by drawing a presumption that the petitioner must have interpolated the order having remained in custody of the record for some time. For the reasons stated above, we set aside the said finding of the Inquiry Officer being based on no evidence.

So far as second charge is concerned, it relates to non receipt of the order of suspension by the petitioner even though he was present in the Court premises. On perusal of the evidence in this regard and the finding of the Inquiry Officer, we find that there are materials available on record to

show that the petitioner deliberately avoided to receive the order of suspension and, accordingly, we find no justification to disturb the said finding of the Inquiry Officer.

7. In view of the above discussion, while we find that the petitioner is guilty of the second charge, he is not guilty of the first charge relating to interpolation of the orders. So far as question of punishment is concerned, having found that the first charge relating to interpolation of the Court's record has not been proved against the petitioner, order of punishment imposed by the disciplinary authority appears to be disproportionate. Accordingly, we also set aside the order of punishment as well as the appellate order and remit the matter back to the disciplinary authority to impose appropriate punishment only considering the fact that the petitioner is found guilty of the second charge i.e. for deliberately avoiding to receive the order of punishment. The disciplinary authority is further directed to pass necessary orders regarding punishment within two months from the date of communication of this order.

The writ application is disposed of.

Writ petition disposed of.

2011 (I) ILR – CUT- 59

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

W.P. (C) NO.8799 OF 2008 (Decided on 08.10.2010)

SUJATA AGRAWAL …….. Petitioner.

.Vrs.

ZONAL MANAGER L.I.C.
OF INDIA & ORS. …….. Opp.Parties.

INSURANCE ACT, 1938 (ACT NO.4 OF 1938) – SEC.45 r/w Sec.126 Contract Act.

Insurance Policy issued on 15.04.2003 – First premium paid – Policy holder suffered from kidney problem – Expired on 9.11.2003 due to Cardiac arrest – Petitioner being the nominee approached the authorities for settlement of death claim – Claim repudiated – Hence the writ petition.

Deliberate wrong answers given in Column-11 of the proposal form that the policy holder had no kidney, heart and brain problems – Opp. Parties collected informations that the patient was a known case of kidney disease – Moreover CRF/ESRD is not a disease which would have affected the policy holder overnight – Held, there is deliberate suppression of material facts – Policy obtained with fraudulent act – Repudiation of claim is justified.

(Para7to10)

Case laws Referred to:-

1.AIR 1962 SC 814 : (Mithoolal Nayak -V- Life Insurance Corporation of India).
2.AIR 2008 SC 424 : (P.J.Chacko & Anr.-V- Chairman Life Insurance Corporation of India & Ors.).

For Petitioner - M/s. Goutam Acharya, T.P.Acharya, A.K.Mahakud, S.K.Behera, P.K.Das & Dr.B.Das.
For Opp.Parties - M/s. P.R.Barik, P.Choudhury & P.Routray.

C.R. DASH, J. Repudiation of the Insurance claim of the petitioner by the opposite parties 1 and 2 is the subject matter of this writ petition.

2. Petitioner's husband Late Dinesh Kumar Agrawal took an Insurance policy bearing No. 584779543 for a sum assured of Rs.10,00,000/- with yearly premium of Rs.6,644/-. The policy was taken on 31.03.2003 and the

policy certificate/bond was issued on 15.04.2003 with the date of commencement of the policy with effect from 15.04.2003. In the said policy the present petitioner was the nominee. The policy holder paid the first premium of Rs.6,644/- vide Annexure-3. Immediately after taking the policy on 31.03.2003, the policy holder (petitioner's husband) suffered from Kidney problem and got himself treated in the Kalinga Hospital as an Outpatient vide patient card in Annexure-4. On 9.11.2003 owing to some health complications arising out of the Kidney problem, the policy holder was rushed to Kalinga Hospital in the morning. On the same day i.e. 09.11.2003 he expired of Cardiac arrest. After his death, the present petitioner being the nominee in the policy approached opposite party No.2 for settlement of the death claim of her husband. The petitioner complied with all the requirement as insisted by the opposite parties, but the opposite party No.2 repudiated the claim of the petitioner vide letter dated 03.11.2005 (Annexure-6). The petitioner filed a representation before the Zonal Manager, Life Insurance Corporation of India (Opposite party No.1). The opposite party No.1 however vide Annexure-7 confirmed the order of Opposite party No.2.

3. Opposite parties 1 and 2 have filed a counter affidavit asserting that from the date of commencement of the policy, the duration of the policy was for one year, one month and 24 days and the petitioner had paid only one premium. Cause of death of the policy holder as has been evident from the treatment particulars is Chronic Renal Failure ('CRF' in short). The policy holder, however, at the time of submission of the proposal form while answering the questions with regard to his health did not disclose about the fact that he is suffering from C.R.F. and such a conduct on the part of the policy holder amounts to suppression of material facts. It is the further case of opposite parties 1 and 2 that the Insurance contract is based on principles of uberrimafides i.e., utmost good faith and the opposite parties 1 and 2 have, however, prove to the effect that the policy holder died of C.R.F. and he deliberately suppressed material facts with regard to his health at the time of submission of the proposal.

4. Learned counsel for the petitioner with all the vehemence at his command submits that the opposite parties 1 and 2 having accepted the premium after verification of the proposal form being duly certified by their Medical Officer, cannot now repudiate the claim on the ground of suppression of material facts by the policy holder at the time of submission of the proposal. Assuming arguenda, the allegation of opposite parties 1 and 2 to be true the petitioner being a layman and ignorant about the symptoms of C.R.F. had no knowledge about the onsetting of the disease of C.R.F. at the time of submission of proposal and the policy holder had suppressed nothing. Otherwise the policy holder, as asserted by the learned counsel for

the petitioner had no medical ailment at the time of submission of the proposal and he was found suffering from Kidney problem only after taking the policy. The policy holder having acted bona fide or uberrimafide for that matter, it was not proper and lawful on the part of the opposite parties 1 and 2 to repudiate the claim of the petitioner.

Learned counsel for the opposite parties on the other hand takes us through hosts of documents relating to treatment of the policy holder and submits that Chronic Renal Failure usually occurs over a number of years as the internal structures of the Kidney are slowly damaged; in the earlier stages there may not be symptoms; in fact, progression may be so slow that symptoms do not occur until kidney function less than $1/10^{th}$ of normal. Taking us through some text down loaded from internet, learned counsel for the opposite parties tries to make us aware about the symptoms of CRF at early stage and advanced stage. It is further submitted that as the policy holder died of CRF, he must have suffered from the disease since long, he must also have come across the symptoms of the disease since long and he having suppressed such facts, the policy has been rightly repudiated.

5. Admittedly the policy was taken on 31.03.2003. According to the petitioner the policy holder was examined as an out patient in Kalinga Hospital, Bhubaneswar on 13.05.2003. Such an assertion by the petitioner was disputed by the opposite parties 1 and 2 as there is some over-writing relating to date in the Out Patient Ticket (Annexue-4). In view of such objection, vide order dated 5.1.2010 the OPD Register of Kalinga Hospital for the months of March, 2003 and May, 2003 were called for. On verification of the original OPD Register for the months of March, 2003 and May, 2003 it is found that the figure “3” relating to month in Anneuxre-4 was a slip of pen and subsequently it has been corrected to “5” by over-writing “5”on the figure “3”. From the Out Patient Register for the month of May, 2003 it is found that the policy holder was examined as an out patient on 13.05.2003. On verification of the Out Patient Register for both the aforesaid months, learned counsel for the opposite parties 1 and 2 also accepts the position that the policyholder was examined as an out patient vide Anenxure-4 on 13.05.2003 and not on 13.03.2003. Admittedly, the policy holder expired on 09.11.2003. It is also an admitted position that the policy holder having expired within a period of two years from the date of commencement of the policy, he is not protected by the limitation prescribed in Section 45 of the Insurance Act and the Insurance Company under Section 45 of the said Act has a right to repudiate the claim if the policy holder is found to have suppressed the material facts.

6. In the case of **Mithoolal Nayak Vrs. Life Insurance Corporation of India**, A.I.R. 1962 SC 814 and referred to in **P.J. Chacko and another Vrs. Chairman Life Insurance Corporation of India and Ors.** A.I.R. 2008 SC 424 Hon'ble Supreme Court has held that there are three conditions for application of 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.

7. With the aforesaid position of law in the background, we propose to find out whether a policy holder is guilty of suppression of material facts. The policy holder in col.11 of the proposal form has answered all the questions in negative and has certified his usual state of health to be good. According to the proposal form the policyholder had no disease relating to his kidney, brain, lungs, heart, stomach, liver etc; he had no hypertension; he was never hospitalized and during the last five years he had not consulted any medical practitioner for any ailment requiring treatment for more than a week.

8. From the pleadings in the writ petition, it is found that the policy holder suffered from Kidney problem immediately after taking the policy and he was treated as an Outpatient in Kalinga Hospital vide Outpatient Card in Annexure-4. Annexure-4 shows that the policy holder's disease diagnosed is DM^{1}_{3} and C.R.F. In the column of history and progress, it is mentioned "known case of……C.R.F.(ESRD)". In Annexure-5 at Page-20 also on investigation by the Life Insurance Corporation, the hospital authority have supplied information in Form No.3816 to the effect that the patient was a known case of Kidney disease (ESRD) on maintenance dialysis. It is further mentioned in said form that history of the case was reported by the patient i.e. the policy holder. During investigation by a Medical Officer "known case of……..." is appended in the prescription or examination documents, generally if the disease has already been diagnosed or there is any report to that effect. In the present case, the policy holder came to be treated in Kalinga Hospital on 13.05.2003 for the first time as asserted by the petitioner. CRF/ESRD is not a disease which would have affected the policy holder over night. By the time he went for treatment to Kalinga Hospital, he had knowledge that he is suffering from CRF/ESRD otherwise in the out patient ticket, the treating physician would not have made the endorsement "known case of CRF….." As asserted in the counter affidavit on 05.04.2003

i.e. after four days of taking the policy the petitioner was treated by one Dr. S.K. Agrawal, who has given the certificate vide Annexure-C at the behest of the opposite parties 1 and 2. From Annexure-C it is found that on the said date i.e. 05.04.2003 the policy holder was treated on the basis of his complaint about weakness, frequency of urination, body ache and HTN. From the said certificate vide Annexure-C it is further found that the policy holder was also suffering from hyper tension. From col.4 of Annexure-C it is further found that the policy holder had shown some old prescriptions to Dr. Agrawal. Dr. Agrawal, however, in Annexure-C could not opine about the duration of the treatment of the policy holder prior to his coming to him. From the aforesaid facts on record it cannot however, be held that the policy holder suffered form hypertension within four days of taking of the policy and within two months thereafter he suffered from CRF. The policy holder has also answered column no.11 of the proposal form in negative by stating that he had no hypertension. As from Annexure-C it is found that the policy holder was under treatment by 05.04 2003 and by that time he had also visited other doctors, before coming to Dr. Agrawal, conclusion is irresistible that he must have knowledge about his disease of hypertension and other ailments like frequent urination etc. on the date of taking of the policy. The petitioner has however, either suppressed such fact at the time of giving the proposal or with the full knowledge about his disease he answered column no.11 of the proposal form knowing the answer he has given to be false.

9. The Hon'ble Supreme Court in the case of P.J. Chacko supra in paragraph-16 has held thus:-

> "The purpose for taking a policy of insurance is not, in our opinion, very material. It may serve the purpose of social security but then the same should not be obtained with a fraudulent act by the insured. Proposal can be repudiated if a fraudulent act is discovered. The proposer must show that his intention was bona fide. It must appear from the face of the record. In a case of this nature it was not necessary for the insurer to establish that the suppression was fraudulently made by the policy holder or that he must have been aware at the time of making the statement that the same was false or that the fact was suppressed which was material to disclose. A deliberate wrong answer which has a great bearing on the contract of insurance, if discovered may lead to the policy being vitiated in law."

10. Regard being had to the law settled by the Hon'ble Supreme Court as above and our discussion supra, the answer given by the policy holder in column no.11 of the proposal form regarding his suffering from High Blood Pressure or kidney disease or regarding his state of health on the face of

records are held to be deliberate wrong answers, which has a great bearing on the contract of insurance. We, therefore, find no justification to interfere with the impugned orders vide Annexure-6 and 7.

In the result, the writ petition is dismissed.

Writ petition disposed of.

2011 (I) ILR – CUT- 65

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

JCRLA. NO.39 OF 2001 (Decided on 04.08.2010)

MADAN MOHANTA ……..Appellant.

.Vrs.

STATE OF ORISSA ……..Respondent.

PENAL CODE, 1860 (ACT NO 45 OF 1860) – SECS. 302, 304 PART-I.

Conviction of the appellant U/s. 302 I.P.C. by the Trial Court – Conviction challenged – P.W.2 deposed that there was a quarrel between the deceased and the appellant over theft of a chicken – Appellant suddenly dealt blows on the deceased by means of a Tangia – Act was committed in the heat of passion upon sudden quarrel with the deceased at the spur of the moment – Moreover the appellant dealt first blow by the blunt side of the axe which presupposes that he had no intention to kill the deceased – Exception 4 of Section 300 I.P.C. is attracted and the act of the appellant comes within the ambit of Section 304, Part-I I.P.C. – Held, conviction U/s. 302 I.P.C. is converted to one U/s. 304 Part-I I.P.C.

(Para 10,11)

Case law Referred to:-

AIR 1982 SC 1185 : (Ram Karan & Ors. -V- State of Utter Pradesh)

For Appellant - Smt. Usharani Padhi
For Respondent - Mr. S.K.Nayak,
Addl. Government Advocate

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment and order dated 31.03.2001 passed by the Additional Sessions Judge, Talcher in Sessions Trial Case No.122-A/26 of 1998/2000 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that both the accused-appellant and the deceased were two brothers. They belonged to village Tavapal and lived in separate houses situated at both the ends of the village. On 01.06.1998 morning, the accused and his wife Bhajani detected their two missing chicken in the house of the deceased and requested him to return

the same. The deceased refused to part with and claimed the same to be his own. There was exchange of hot words. The accused in a fit of anger suddenly dealt a blow on the neck of the deceased by means of an axe. The deceased tried to flee away from the spot. But, the accused chased him and dealt a second blow on his head by means of the said axe. The deceased fell down on the ground and succumbed to the injury. F.I.R. was lodged by the Grama Rakhi at the Pallahara Police Station on the basis of which the case was registered, investigation taken up and on its completion charge sheet under Section 302, I.P.C. was submitted against the accused-appellant.

3. Plea of the accused is one of complete denial of the allegation.

4. In order to prove the charge under Section 302, IPC, the prosecution examined as many as 13 witnesses including the doctor and the I.O. and exhibited 11 documents. Defence examined none.

5. The learned Addl. Sessions Judge, who tried the case, convicted the appellant under Section 302, IPC and sentenced him to undergo imprisonment for life basing upon the ocular evidence of P.Ws.2 and 7 coupled with the evidence of the doctor P.W.1 with a specific finding that the successive blows on the vital part like neck and skull amply demonstrate the intention of the accused to cause the death.

6. Smt. Padhi, learned counsel appearing for the appellant assails the judgment of conviction on the following grounds:

(i) P.Ws 2 and 7 are not trust worthy witnesses and the conviction can not be based upon their evidence.

(ii) The prosecution has failed to establish that the accused had intention to kill the deceased.

(iii) Her alternative submission is that even if it is assumed that the appellant is responsible for the death of the deceased, in the facts and circumstances of the case the act committed by him may come under the ambit of Section 304 Part-I, IPC but not under Section 302, IPC.

7. Mr. Nayak, learned Addl. Government Advocate, on the other hand, supports the impugned judgment and vehemently contends that evidence of P.Ws.2 and 7 is very clear, cogent and convincing that the appellant assaulted the deceased. There is no material to discard their evidence.

Rather their evidence gets corroboration from other prosecution witnesses. The successive blows dealt by the appellant makes it clear that he had the intention to kill the deceased. Therefore, there is no illegality committed by the trial court in convicting the appellant under section 302, IPC.

8. P.W.2, who is an ocular witness, specifically deposed that the house of the deceased situates in front of his house. At the time of occurrence, he was sitting on a wooden bench lying under the jack fruit tree standing in front of the house of the deceased. At that time, the accused and his wife came to the house of the deceased and accused him of committing theft of their chicken to which the deceased denied. The wife of the accused entered into the house of the deceased and brought out the chicken. When the deceased protested, a quarrel ensued between the deceased and the accused. All on a sudden, the accused gave a blow on the blunt side of the Tangia on the neck of the deceased. In order to save his life the deceased escaped from the spot. But, accidentally at a distance he fell down and when he was trying to get up and go away, the accused dealt a Tangia blow on the head of the deceased, as a result of which the latter fell down and succumbed to the injury. Nothing has been elicited in cross-examination to discredit his testimony.

P.W.7 has corroborated the evidence of P.W.2. He admitted that the accused and deceased were two brothers. He specifically deposed that at the time of occurrence, hearing the quarrel between the deceased and the accused, he came out of the house and found that the accused, who was chasing the deceased holding an axe in his hand, dealt a blow on the deceased by means of that axe. Seeing that, he entered inside the house out of fear. However, in cross-examination, he has specifically stated that he saw the occurrence by standing in his outer verandah. Nothing has been elicited in the cross- examination to discard his evidence.

P.W.10 is the father-in-law of the deceased. He stated that on the date of occurrence after returning from Jungle he went to the house of his daughter. Wife of the accused told him about the incident. He proceeded to the house of his daughter Mukta and saw the deceased lying dead near the front door of his house with bleeding injury on his neck. Thereafter, he went to the village Choukidar and reported the matter. The village Choukidar (P.W.11) on being informed first came to the spot and from there went to the police station and lodged the F.I.R.

P.W.1 is the doctor, who conducted post-mortem examination over the dead body of the deceased. He found a cut injury of seize 5 cm. X 0.5 x

1 cm on the left side of the neck and external laceration of the occipital brain. He opined that the death was due to extensive laceration of the occipital brain. The injuries found on the person of the deceased were sufficient to cause death. He further opined that the injuries were possible by an axe and also proved his opinion Ext.2.

P.W.3 is the police constable, who took the dead body of the deceased to the postmortem hall of Pallahara hospital, received the wearing apparels of the deceased and produced the same before the I.O. along with command certificate. He proved the command certificate Ext.3.

P.Ws.4 and 5 are witnesses to the seizure of the axe, lungi, blood stained earth and sample earth made vide seizure list Ext.4. Both of them have proved the said seizure list and their signatures which have been marked as Exts.4/1 and 4/2. P.Ws.6 and 8 are witnesses to the inquest and seizure of blood stained earth from the spot. They proved the inquest report (Ext.5) and the seizure list (Ext.6). P.W.9 is also a witness to the inquest.

P.W.13 is the Officer-in-Charge of Pallahara Police Station who investigated into the case, seized the incriminating articles as well as the material objects, sent the same for chemical examination, prepared the sketch map and ultimately filed the charge-sheet. Nothing has been brought out in the cross- examination to suit the defence plea.

9. The analysis of evidence made above goes to show that P.Ws.2 and 7 are witnesses to the occurrence. Both of them have seen the appellant dealing blows by means of an axe on the deceased. Despite searching cross-examination, their evidence has remained unshaken. Their evidence does not suffer from any infirmity. There is also nothing on record to disbelieve their evidence. The evidence of the Medical Officer P.W.1, that he found a cut on the left side of the neck and depressed fracture of the occipital skull supports the ocular testimony that accused dealt two blows by an axe first by its blunt side and the second by its sharp side. Therefore, on consideration of the ocular testimony of P.Ws.2 and 7 as well as the evidence of the doctor (P.W.1) and other materials available on record, this Court comes to the conclusion that the prosecution has established beyond any shadow of doubt that the appellant assaulted the deceased with the axe (M.O.I) and on account of such assault the deceased died.

10. Now, it is to be seen whether by the act committed the appellant is liable for the offence under Section 302, IPC or Section 304 Part-I thereof. P.W.2 deposed that there was a quarrel between the deceased and the

appellant over theft of chicken, for which the appellant suddenly dealt blows on the deceased by means of a Tangia, as a result of which the deceased fell down and succumbed to the injuries. From this, it can be safely concluded that the act was committed in the heat of passion upon a sudden quarrel with the deceased at the spur of the moment without any premeditation. Furthermore, the fact that the appellant dealt first blow by the blunt side of the axe presupposes that he had no intention to kill the deceased. Taking an overall view of the fact situation and keeping in mind the principles laid down by the apex Court in ***Ram Karan and others v. State of Utter Pradesh***, AIR 1982 SC 1185, this Court is satisfied that Exception 4 of Section 300 I.P.C. is attracted in this case and, therefore, the act of the appellant comes within the ambit of Section 304 Part-I, IPC.

11. For the reasons stated above, the conviction of the appellant under Section 302, I.P.C. is converted to one under Section 304 Part-I, I.P.C. and the appellant is sentenced to undergo rigorous imprisonment for 10 years. It is stated by the learned counsel for the appellant that the appellant has remained in custody from the date of his arrest and by now has completed more than twelve years. If that be so the appellant Madan Mohanta be set at liberty forthwith, unless his detention is required otherwise.

12. Apeal allowed. In The Jail Criminal Appeal is allowed in part to the extent indicated above.

Appeal allowed in part.

2011 (I) ILR – CUT- 70

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

W.P.(C) NO. 12771 OF 2010 (Decided on 10.11.2010).

KARTIKA CHANDRA RAY ..... Petitioner.

.Vrs.

NEELACHAL GRAMYA BANK & ORS. ..... Opp.Parties.

SERVICE – Transfer – No doubt transfer is an incidence of service and in all transfer cases Courts should not interfere – But whenever order of transfer affects the service conditions/financial entitlement of the employee then the Court may consider to interfere with the same.

In this case petitioner is working as a messenger i.e. a Class-IV employee to whom normally transfer rules should not apply – However, he was transferred from Kharavela Nagar Branch to Pahala Branch vide order Dt.06.07.2010 under annexure-1 – Again O.P.2 modified the said order on 23.7.2010 and transferred the petitioner under annexure-2 to Bhubaneswar Branch Unit-IV where a messenger has already been posted with an oblique motive that the petitioner will be denied Daftry allowance of Rs.1000/- per month.

Keeping in view the financial loss to the petitioner and absence of any proper administrative reasons to transfer the petitioner within a span of few days this Court feels it proper to interfere with the order of transfer passed by O.P.2 and quashed the transfer order under annexure-2 and directed to give effect to the transfer order under annexure-1. (Para 5,6 & 7)

For Petitioner - M.s, Bikram Senapati & M.K.Panda.
For Opp.Parties - M/s. S.K.Das, M.K.Das, B.C.Pradhan & S.Mohanty.

S.K.MISHRA J. Petitioner in this case assails his successive transfer order which was passed by the opposite parties within a span of few days. The petitioner is working as a Messenger in Neelachal Gramya Bank (opposite party no.1) and was posted as Kharavela Nagar Branch. He is a Senior Messenger in the said Branch and therefore getting Daftry allowance of Rs.1,000/- per month.

2. It is pleaded by the petitioner that because of the litigation between the Union and the Bank, opposite party No.2 has become vindictive and

started to disturb the poor Messengers and in consequence thereof the petitioner was transferred from Kharavela Nagar Branch to Pahala Branch vide order dated 6.7.2010. However, opposite party no.2 with the malafide intention to accommodate his flatterers modified the said order vide order dated 23.7.2010 and transferred the petitioner to Bhubaneswar Branch, Unit-IV where a Messenger has already been posted and thereby the petitioner will be denied the Daftry allowance of Rs.1,000/- per month.

3. Terming the order passed by opposite party no.2 as malafide and arbitrary, the petitioner further claims that there is no transfer policy in spite of RRB guidelines to formulate proper placement. The opposite parties are therefore using transfer of employees as per their sweet will. The petitioner further claims that the transfer order passed by opposite party no.2 is also without jurisdiction. The Controlling Authority is the Chief General Manager, Regional Office, Pipili. Hence, the order passed by the General Manager, Neelachal Gramya Bank, Head Office at Kokila Residency is without jurisdiction. The petitioner also pleads that as per the Thorat Committee Resolution, the Controlling Officer-in-charge will be the authority for transfer. It is further pleaded that besides the above, the petitioner is a Class-IV employee to whom normally transfer rules should not apply. However, the petitioner is ready to join at Pahal Branch which will not mean any pecuniary loss to him. On such pleadings, the petitioner prayed that the order of transfer under Annexure-2 be quashed and the opposite parties be directed to post him at Pahal Branch as per the order under Annexure-1.

4. The opposite parties have filed their counter affidavit wherein they deny that there was no malafide intention on their part in transferring the petitioner. They contend that transfer is an incidence of service and falls within the domain of discretion of the management and hence the Bank is not bound to place the petitioner at the branch of his choice. The averment of the petitioner that he will sustain huge financial loss because of his posting is also denied by the opposite parties. The opposite parties further plead that the Thorat Committee recommendations are merely the guidelines and such guidelines are not mandatory and cannot be allowed to override the administrative exigencies.

5. It is true that transfer is an incidence of service and all cases of transfer should not be interfered with by the Court under the Writ jurisdiction. However, whenever any transfer is ordered which effects the service conditions/financial entitlement of the petitioner then the Court may consider to interfere with the same.

6. The petitioner, undisputedly, shall suffer a loss @ Rs.1,000/- per month as he will be denied the Daftry allowance in the Kharavela Nagar Branch,Unit-IV, Bhubaneswar, which he would be entitled to in the Pahala Branch. Secondly, it is seen that the petitioner was once transferred on 6.7.2010 and after lapse of only three weeks another transfer order was passed on 23.7.2010. Learned counsel for the opposite parties contend that it is passed in administrative exigencies. However, the counter affidavit filed by the opposite parties do not reflect what were the exigencies and on which the transfer was effected. Learned counsel for the opposite parties produced the records and argued that the Bhubaneswar Branch is the Main Branch of the Bank and functions as Nodal Clearing Office. The Branch Manager of the Bhubaneswar Branch has telephonically requested to post another experienced sub staff as he cannot manage the Branch with single Messenger. However, this fact was not pleaded by the opposite parties in their counter affidavit, counter affidavit to the Misc. Case as well as in the Additional Affidavit. Since the nature of exigency has not been pleaded, it appears to be an afterthought.

7. Thus, keeping in view the financial loss to the petitioner and absence of any proper administrative reasons to transfer the petitioner after 21 days of his first transfer, this Court is of the opinion that the transfer order passed by opposite party no.2 requires interference. Therefore, this Court quash the transfer order under Annexure-2 and direct the opposite parties to give effect to the transfer order under Annexure-1.

The writ petition is allowed. No costs.

Writ petition allowed.

2011 (I) ILR – CUT- 73

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

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

STATE OF ORISSA …….. Petitioner.

.Vrs.

BASANTA KUMAR BEHERA …….. Opp.Party

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

Resignation submitted by the Opp.Party in order to undertake new assignment – Resignation not allowed to be withdrawn in the public interest by the appointing authority – The Opp.Party has forfeited the claim of counting his past service in GREF as qualifying service for the purpose of retirement benefits – Held, order passed by the Tribunal that the Opp.Party is entitled to the Pension by taking in to consideration the qualifying service he has rendered in the GREF is erroneous which is liable to be quashed.

(Para 4,5 & 6)

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

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

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

The opposite party i.e. the petitioner before the learned Administrative Tribunal, was a Junior Engineer (Civil) in the cadre of Junior Engineer under the State of Orissa and retired as an Assistant Engineer on superannuation w.e.f. 30.04.2004. Prior to his joining as Sub-Assistant Engineer on 06.11.1973, the opposite party has rendered service as Superintendent, B.R. Grade-II in the G.R.E.F. w.e.f. 01.11.1968 to 15.10.1975. He resigned from the service in order to undertake the new assignment on his own request, which was accepted. The opposite party has represented to the Department to count his past service rendered under the G.R.E.F. towards pension, which was not accepted by the Sate of

Orissa and such rejection was communicated to the opposite party vide letter dated 23.03.2006. Against such an order, the present opposite party filed an Original Application, inter alia, praying for an order directing the respondents to sanction pension and other pensionary benefits by counting the period on 01.11.1968 to 15.10.1973 as qualifying service.

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

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

> *"26.* ***Forfeiture of service on resignation-*** *(1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of past service.*
>
> *(2) A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another*

appointment, whether temporary or permanent, under the Government where service qualifies."

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

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

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

Writ petition is allowed.

2011 (I) ILR – CUT- 76

M.M.DAS, J.

W.P. (C) NO.13079 OF 2008 (Decided on 20.09.2010)

RADHAKANTA JUADI …… Petitioner.

.Vrs.

STATE OF ORISSA & ANR. ……Opp.Parties.

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

Amendment of Election Petition at the time of trial – Tribunal allowed the prayer – Appeal filed by the present petitioner dismissed – Hence the writ petition.

The date of birth of the alleged third child was mentioned as Dt.06.08.2003 in the original election petition and the election petitioner filed a certificate to that effect – Now he sought to amend the date of birth as Dt.08.11.2003.

Change of date of birth will not change the nature and character of the case but since a certificate to that effect was filed indicating the date of birth as Dt.06.08.2003, allowing the election petitioner to amend the said date of birth on the ground that it is a typographical error would amount to patch up the lacuna in the case in the absence of any supportive documents to that effect – Held, impugned order allowing such amendment is set aside.

(Para 9 & 10)

Case laws Referred to:-

1.2007 (Suppl.) II OLR 875 : (Sasmita Pradhan -V-District Collector-C.E.O., Puri & Ors.).

2.(2006) 12 SCC 1 : (Ajendraprasadji N.Pandey & Anr.-V-Swami Keshavprakeshdasji N. & Ors.).

3.(2006) 12 SCC 20 : (Union Bank of India -V-Venkatesh Gopal Mahishi & Anr.)

4.AIR 1977 SC 680 : (M/s. Modi Spinning & Weaving Mills Co. Ltd. & Anr.-V- M/s. Ladha Ram & Co.)

5.AIR 1977 SC 681 : (Sukhad Raj Singh -V- Ram Harsh Misra & Ors.)

6.(2008) 5 SCC 117 : (Chander Kanta Bansal -V- Rajinder Singh Anand)

7.(1969) CLT 1108 : (Gobind Ch. Panda -V- Darsan Ch. Rout & Ors.).

For Petitioner - Mr. Goutam Mishra.
For Opp.Parties - M/s. H.K.Mishra, A.K.Mishra, A.B.Behera & T.K.Sahoo (for O.P.2)
Addl. Government Advocate (for O.P.1)

M. M. DAS, J. The petitioner is the elected Sarpanch of Mayabarha in the district of Sonepur. Apart from the petitioner, there were three other candidates to contest the election to be the office of the Sarpanch of the said Grama Panchayat. After declaration of the result of the election, the opp. party no. 2 filed an application under Section 31 of the Orissa Grama Panchayat Act before the learned Civil Judge (Junior Division), Rampur challenging the election of the petitioner on the main ground that he had more than two children born after the cut off date. The said election petition was registered as MJC No. 10 of 2007. The petitioner after appearing in the said election dispute has filed a show cause/written statement. In paragraph-4 of the written statement, the petitioner denied the allegation with regard to the dates of birth of his children stating the same to be incorrect and false. On 26.6.2010, the opp. party no. 2 (election petitioner) filed an alleged extract of the immunization register indicating that the male child was born on 6.8.2003. After filing of the written statement by the petitioner, the opp. party no. 2, who is the election petitioner in the court below, filed an application under Order 6 Rule 17 C.P.C. seeking amendment of the petition, when the case was posted for trial. The learned Election Tribunal by its order dated 3.12.2007 allowed the said petition for amendment against which the present petitioner preferred an appeal before the learned District Judge, Sonepur. The appeal was dismissed by order dated 22.2.2008 confirming the order of the learned Election Tribunal by which the amendment was allowed. Being aggrieved, the petitioner has preferred the present writ petition calling in question the orders passed by the learned Election Tribunal and the learned Appellate Court are at Annexures-5 and 6. The proposed amendment in the application under Order 6 Rule 17 C.P.C., which was sought for by the opp. party no. 2, is as follows:

2. In paragraph-4 of the last line after the words the date of birth "6.8.2003" may be deleted and in its place "8.11.2003" may be written".

Paragraph-4 in the Original Election Petition was as follows:

> "That the O.P. No. 1 is disqualified for being elected as the Sarpanch of Mayabarha Grama Panchayat as he has three children after the cut-off date as described below; (i)Twinkil Juadi, D/O. Radhakanta Juadi, Date of birth – 17.3.1999 (ii) Rinki Juadi, D/O. Radhakanta Juadi, Date of birth- 7.7.2002 (iii) Atul Juadi, S/O. Radhakanta Juadi, Date of birth-06.08.2003."

3. The learned Election Tribunal hearing the application for amendment concluded that the amendment will enable the court to find out the truth and such amendment is required to the interest of justice. It was further concluded that such amendment will not change the nature and character of the case and accordingly, the prayer for amendment was allowed. The learned appellate court recording the statement of the respondent (opposite party no. 2 herein) that the appeal being against an interlocutory order of the lower court is not maintainable in view of the ratio laid down in the decision reported in the case of ***Sasmita Pradhan –v- District Collector-C.E.O., Puri and others***, 2007 (Suppl.) II OLR 875 came to the conclusion that the appeal is not maintainable in the eye of law and accordingly, is dismissed. The appellate court has not gone into the question as to whether allowing the amendment was legally sustainable or not.

4. Mr. G. Mishra, learned counsel for the petitioner urged that in view of the original pleadings at paragraph-4 of the election petition and in view of the fact that the election petitioner himself has produced an extract copy of the immunization registered as a document in support of his case, which shows that the last child of the petitioner was born on 6.8.2003, the learned Election Tribunal having not taken into consideration the said aspect has committed an error in allowing the prayer for amendment made by the election petitioner (opposite party no.2). He relied upon the decisions in the case of ***Ajendraprasadji N. Pandey and another –v- Swami Keshavprakeshdasji N. and others***, (2006) 12 SCC 1, ***Union Bank of India –v- Venkatesh Gopal Mahishi and another***, (2006) 12 SCC 20, ***M/s. Modi Spinning & Weaving Mills Co. Ltd. and another –v- M/s. Ladha Ram & Co.***, AIR 1977 SC 680, ***Sukhad Raj Singh –v- Ram Harsh Misra and others***, AIR 1977 SC 681, ***Chander Kanta Bansal –v- Rajinder Singh Anand***, (2008) 5 SCC 117, ***Gobind Ch. Panda –v- Darsan Ch. Rout and others***, (1969) CLT 1108. In the case of Ajendraprasadji (supra), the Supreme Court in respect of the amendment of the pleadings under Order 6 Rule 17 C.P.C. laid down that merely stating the averments made in the amendment application, the same could not be submitted before commencement of trial in spite of taking utmost care taken by the defendants-applicants does not satisfy the requirement of Order 6 Rule 17 C.P.C. without giving supporting the particulars which would satisfy the requirement of law that the matters now sought to be introduced by the amendment could not have raised earlier in spite of due diligence. In the said case, the Supreme Court considering the prayer for amendment allowed at a belated stage and interpreting the proviso to Order 6 Rule 17 C.P.C. brought in by C.P.C. (Amendment) Act, 2002 laid down as follows:

> \“43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of due

> diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (sic Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognizing the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

5. The Supreme Court, therefore, examined the case that the amendment sought for will fall under the proviso to Order 6 Rule 17 C.P.C. On that context, it was concluded that the defendant has, therefore, to prove that in spite of due diligence, he could not have raised the matter before the commencement of trial. Examining the facts of the said case, it was ruled that the matter sought to be introduced by the defendant by way of additional written statement does not satisfy the requirement of Order 6 Rule 17 C.P.C. and thus, the same could not have been allowed to be introduced by the amendment. In the case of M/s. Modi Spinning & Weaving Mills (supra), the trial court rejected the prayer for amendment of the written statement, which was made approximately after three years from the date of filing of the written statement. By the said amendment, which was sought for to be introduced, the defendants wanted deletion of some paragraphs and substitution of two new paragraphs. The High Court on revision affirmed the judgment of the trial court by coming to the conclusion that by means of amendment, the defendants wanted to introduce an entirely different case and if such amendments were permitted, it would prejudice the other side.

6. Considering the facts of the said case, the Supreme Court laid down that it is true that inconsistent pleas can be made in pleadings but the effect of substitution of two paragraphs is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admission made by the defendants in the written statement. If such

amendments are allowed, the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. With the above findings, the Supreme Court confirmed the order passed by the High Court rejecting the prayer for amendment.

7. Delayed amendments sought for have put for consideration of the court on enumerable number of cases. After amendment of Order 6 Rule 17 C.P.C., such amendments, if satisfied the proviso to Order 6 Rule 17 C.P.C., can only be allowed. In view of such position of law as discussed above, which has been repeatedly laid down by the Apex Court as well as this Court, it is for this Court to examine the facts of the present case to determine as to whether the learned Election Tribunal was right in allowing the amendment sought for by the election petitioner.

8. As already narrated above, the amendment sought for was with regard to the date of birth of the alleged third child of the petitioner. The said date of birth of the alleged third child in the original election petition was mentioned as 6.8.2003, which was sought to be changed to 8.11.2003. In the show cause affidavit filed by the writ petitioner before the court below, the allegation made in paragraph-4 to the election petition with regard to the date of birth of the alleged third child of the petitioner was specifically denied by the writ petitioner, is as follows:

"4. That the allegations made in para-4 are incorrect and hence denied for the contents of para-4 it is submitted that Twinkil Juadi is the daughter of the O.P. but it is wrong and incorrect the date of birth is on dtd. 17.3.1999 and likewise Rinki Juadi is not the daughter of the O.P. and to such child was born to the O.P. on dtd. 07.07.2002 likewise Atul Juadi is not the son of the O.P. and any such child was never born on dtd. 06.08.2003 and as such, the petitioner has given a false information and false pleading before this Court. Such allegations have been made by the petitioner after creating some baseless documents with the collusion of the health worker of Mayabarha. It is note worthy the petitioner is hostile to the O.P. for the last 15 years than the petitioner and the O.P. had contested for the post of Sarpanch of Mayabarha G.P. for the first time and in that election the O.P. had elected for the post of Sarpanch of Mayabarha G.P. and further both the present petitioner and the O.P. had further contested for the post of Sarpanch of Mayabarha G.P. in the next election and at that time the present petitioner was the Sarpanch of same G.P. and likewise in this election both the petitioner and the O.P. were contesting for the post of Sarpanch of Mayabarha G.P. along with others candidate who were lost the election along with the petitioner and the O.P. was declared as Sarpanch of Mayabarha G.P. and as such there was/is strong political rivalry between the petitioner and the O.P. No. 1 and when the petitioner was the Sarpanch from 2001 to 2006 the so called health worker of Mayabarha was under the

care and control of the petitioner. As the O.P. was making organization for last 15 years in that G.P., the petitioner being apprehensive of the contest to be made in future, only to create evidence appears to have created some paper gaining over the health worker."

9. The election petitioner has filed a document in support of his case purporting to be a certificate granted by the Medical Officer-in-charge, C.H.C., Dunguripali showing the date of birth of the third child of the petitioner to be 6.8.2003. In the application for amendment filed under Order 6 Rule 17 C.P.C., the election petitioner except stating that the date of birth of the third child as mentioned in para-4 of the election petition was wrongly typed as 6.8.2003 instead of 8.11.2003, has not stated any other ground as to why such amendment should be allowed. No doubt, changing of the date of birth of the alleged third child of the petitioner could not change the nature and character of the case, but since the opp. party no. 2, who is the election petitioner, himself filed a certificate as at Annexure-3 indicating that a male child was born to the petitioner on 6.8.2003 allowing the election petitioner to amend the said date of birth on the ground that it is a typographical error would amount to patch of lacuna in the case of the election petitioner. As neither any supportive document with regard to the date sought to be amended was produced by the election petitioner nor any statement was made in the application for amendment regarding the source of such error nomenclatured by the petitioner as typographical error, the amendment petition was filed at a belated stage.

10. Under the circumstance of the case, the amendment sought for should not have been allowed by the Election Tribunal. I, therefore, set aside the impugned order allowing the amendment with regard to the date of birth of the alleged third child of the petitioner as mentioned in para-4 of the election petitioner. As the election case is pending since 2007, the learned Election Tribunal-cum-Civil Judge (Junior Division), Jajpur is directed to dispose of the Election Petition No. 10 of 2007 as expeditiously as possible preferably by the end of 2010. The writ petition is accordingly allowed but in the circumstances without cost.

Writ petition allowed.

2011 (I) ILR – CUT- 82

M.M.DAS, J.

O.J.C. NO.9641 OF 1998 (Decided on 08.10.2010)

CHAKRADHAR PADHIARY …….. Petitioner.

.Vrs.

P. O., INDUSTRIAL TRIBUNAL, & ANR. …….. Opp.Parties.

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

Departmental Proceeding – Petitioner is a workman under the O.P.2-management – The petitioner while working as a security guard a theft occurred in the factory premises and the stolen articles were seized from the house of the petitioner – Petitioner was placed under suspension – Inquiry Officer found the petitioner guilty – Petitioner was dismissed from service and raised Industrial Dispute – Criminal Case against the petitioner ended in acquittal – No evidence led or materials produced on behalf of the management to prove such seizure of the stolen articles from the house of the petitioner – Entire conclusion arrived at by the Tribunal is found to be based on surmises and conjectuers – Held, impugned award is quashed and the petitioner be reinstated in service and the period during which he was out of service shall be treated to be included in his period of service and since the management has not got any benefit from the petitioner when he was out of service he should be paid 25% of the back wages from the date of his dismissal till the date of reinstatement.

(Para 10 & 11)

For Petitioner - M/s. G.C.Mohapatra, M.K.Panda (A) & H.K.Sahu.

For Opp.Parties- M/s.Shyamananda Mohapatra, G.Mohanty, P.C.Das, J.C.Mishra, P.C.Biswal, B.Rout, P.K.Panda, S.K.Mishra, S.Sahoo, B.P.Nayak.

M. M. DAS, J. The petitioner, who is the workman of the management-opposite party no.2 - M/s. Charge Chrome Plant, Ferro Alloys Corporation Limited, has called in question the award dated 20.09.1997 (Annexure-12) passed by the learned Presiding Officer, Industrial Tribunal, Bhubaneswar in I.D. Case No.10 of 1987.

2. The petitioner was appointed as a Trainee (C) under the opposite party no.2 and on 15.10.1982 he was absorbed as a Security Guard. A theft occurred in the factory premises of the Management and it was alleged that on 10.11.1985 there was seizure of stolen articles from the house of the petitioner by the Bhadrak (Rural) Police. By an order dated 10.11.1985, the petitioner was placed under suspension pending inquiry into the charges. A proceeding was drawn up against the petitioner for the alleged theft of some company materials, namely, some electric bulbs and some wires. The petitioner submitted his show cause on 02.12.1985 and thereafter, on the appointment of an Enquiring Officer, the inquiry proceeded. During the inquiry, three witnesses were examined on behalf of the Management and one from the side of the delinquent. The Enquiring Officer submitted his report to the opposite party no.2 holding the petitioner guilty. Copy of the inquiry report is alleged to have not been supplied to the petitioner.

3. By order dated 12.02.1986, the opposite party no.2 dismissed the petitioner from service, upon which the petitioner raised an industrial dispute. A reference was made to the Industrial Tribunal by the Labour Department of the Government under the Industrial Disputes Act, 1947. The reference was as follows:-

"Whether the action of the management of Charge Chrome Plant, FACOR, Randia, Bhadrak in dismissing Sri Chakradhar Padhiary, Ex-Junior Helper from services from 12.2.86 vide their order No.41/86 dt.12.2.86 is legal and/or justified ? If not, to what relief Sri Padhiary is entitled" ?

4. The learned Presiding Officer upon receipt of the said reference registered the same as I.D. Case No.10 of 1987 and issued notice to the workman and the Management to file their respective statement of claim and written statement. On appearance, the parties filed the same. The Presiding Officer, Industrial Tribunal framed the following issues:

i) Whether the reference is maintainable?
ii) Whether the domestic enquiry conducted against the workman is fair and proper ?
iii) Whether the action of the management of Charge Chrome Plant, FACOR, Randia, Bhadrak in dismissing Sri Chakradhar Padhiary, Ex-Jr.Helper from Services from 12.2.86 vide their order No.41/86 dt.12.2.86 is legal and/or justified ? If not, to what relief Sri Padhiary is entitled ?

5. Upon framing the issues the Presiding Officer took up issue No.(ii) first, as the preliminary issue and by order dated 10.02.1992 held that the domestic inquiry conducted by the Management was not fair and proper. The Management challenged the said order in O.J.C. No.3919 of 1992

before this Court. A Division Bench of this Court by order dated 12.12.1992 declining to interfere with the matter dismissed the writ petition observing that the Tribunal may proceed with the matter and it would be open for the employer to establish through evidence with regard to the propriety of the order in question. Thereafter, the management upon filing an application, the matter was taken up giving opportunity to the management to prove its case on merit against the petitioner and the workman to rebut the same.

6. With regard to issue No.(i) as to whether the reference is maintainable or not, the learned Tribunal has come to the conclusion that the reference is maintainable, which is conclusive. With regard to issue No. (ii), which was found that as the Tribunal has earlier held that the domestic inquiry was not properly conducted which was confirmed by this Court, the said issue has lost its significance. The only issue that remains to be adjudicated by the Tribunal was issue No.(iii), which is same as the reference. In the charge-sheet, which was framed against the petitioner and has been made as Anneuxre-2 to the writ petition, it appears that the following charges were framed.

"CHARGESHEET"

Further to our letter of suspension reference No.CCP/PNL/820/85 dated 10th November, 1985, you are charged with the following acts of misconduct:

It has been reported that you were having in your possession in your House in the Village Chengagadia properties which were stolen from the Company's premises and for which the Company had lodged complaint with the police in sometime past.

On 10th November, 1985, Police personnel of Bhadrak (Rural) Police Station, recovered the following properties, which belongs to Company and which were stolen from Company's premises, as mentioned above.

LIST OF PROPOERTIES

i)	Helogen fitting with Bulb 1000 Wt (Phillips Mak	..	Three Nos.
ii)	Sodium Vapour Lamp Ballast Choke 250 Wt	..	Two Nos.
iii)	Mercury Vapour Lamp Ballast Choke 250 Wt	..	One No.
iv)	500 Wt. Bulb Screw Type	..	Three Nos.

v) 500 Wt. Holder .. Four Nos.

vi) P V C Wire .. 100 Mtrs.

> Further, in some of the above properties seized by the Police from your House in the village Chengagadia and taken to their custody bear "FACOR" mark on them.
>
> Hence from the above it shows that either you yourself have stolen the properties from the Company's premises or you have received the same from someone who had stolen with your knowledge. The above acts of yours constitute serious misconduct in employment. Looking to the serious nature of the misconduct alleged against you, you have been suspended effected from 10th November, 1985, pending enquiry.
>
> You are, however, required to show cause in writing within 48 hours of receipt of this Charge-sheet as to why severe disciplinary action should not be taken against you, failing which the matter will be decided ex parte."

7. It, therefore, transpires that the crux of the allegation of the management was theft of articles, which were found in possession of the workman in his house in village Chengagadia and were seized by the police from his house. It would be pertinent to state here that on the allegation of theft, G. R Case No.1128/85 was registered, investigated and charge-sheet was filed against the petitioner and another accused. The two seizure witnesses while being examined by the criminal court, namely, Rabindra Kumar Naik and Kailash Chandra Sahani, stated that police has not seized anything in their presence from anybody. The criminal case ultimately ended in acquittal of the petitioner by judgment dated 29.09.1992. The statements of the seizure witnesses given before the learned Magistrate were marked as Exts. B and B/1 and similarly, the seizure lists were marked as Exts. A and C and the judgment of acquittal passed in G.R. Case was marked as Ext. D. The witnesses examined before the Presiding Officer of the Industrial Tribunal with regard to the seizure, from the side of the management, have given prevaricating statements. For example, one Shri Bhagirathi Prasad Das, the Chief Security Officer of the opposite party no.2 stated before the Tribunal that he was present, when the police seized the articles and Ext.6, which is the seizure list, was proved by him. Though he stated to have put his signature in the seizure list, but on being confronted, it was found that he was not the signatory to the same. He also stated that he is unable to say if the articles were physically seized from the house of the two persons and further stated that the articles were seized at the police station. None of the

other witnesses examined by the management have proved the seizure of the stolen articles from the house of the petitioner. The Tribunal, however, basing on surmises, in Paragraph-8 of the award, recorded the following findings:-

> "8. Learned Advocate for the second party – workman contended that R.K. Nayak and Kailash Chandra Sahani,k the named persons of the seizure list, Ext. 6 have not been examined in this Tribunal, further, their testimonies marked Exts. B and C are available on record in which they have disowned to be the witnesses of the seizure of the seized materials from the house of Chakradhar Padhiary and on these materials on record, the dismissal of the second party – workman is not sustainable. On the other hand, M.W. No. 2, the informant has said that he is not a witness to the recovery of materials from the house of Chakradhar Padhiary, but has said that he was told by the police as well as by M.W. No.3 that the stolen articles of FACOR has been recovered from the house of Chakradhar Padhiary, he came to the Police Station with Srikant Bisoi (M.W. No.4) and saw the recovered materials at the Police Station. M.W. No.3, the lone eye witness to the factum of recovery, has said that he had seen that the police surrounded the house of Chakradhar Padhiary and recovered electrical equipments, wires etc. and brought the same underneath the 'Pinda' of Chakradhar Padhiary's house, prepared the seizure list and took away the seized materials in the vehicle. M.W. Nos. 2 and 4 though are not eye witnesses, but their testimonies that they found the seized materials belonging to the 'FACOR' at the Police Station cannot be said to have suffered in any way. In fact, the second party – workman and Bankanidhi Sendha, M.W. No. 3 belong to the same village of Chengagadia. It has not been brought out from the testimony of M.W. No.3 the reason for which M.W. No. 3 will speak lie against the second party – workman. It cannot be assumed that when the police has conducted raid to the house of a person at 6.45 A.M. there will be only two witnesses present in the vicinity. There is no unreasonableness in the testimony of M.W. No.3 to discredit his testimony.
>
> By Exts. 3/2 and 3/3 the security of the first party – management have been informed on 6.11.85 and 8.11.85 of the theft of Halogen Fittings with bulb and wires from the plant premises of the first party. In fact, there is no eye witness to the commission of theft. Ext. 3/1, F.I.R. of this case against the second party – workman was lodged on 9.11.85 which also stands confirmed vide Ext. D. The seizure list, Ext. 6 transpires that the Halogen Alight with the word

> 'FACOR' engraved on it, have been recovered from the house of Chakradhar Padhiary on 10.11.85. Legal presumption is always available against a person who is in possession of stolen articles that he has committed theft of those articles, unless the presumption is rebutted. In this case, the presumption has not at all been rebutted. The un-rebuttal presumption discussed above would suffice to hold that the stolen articles were recovered from the house of the second party – workman".

8. Though a counter affidavit has been filed in this writ petition on behalf of the management, but none appeared, when the matter was taken up for hearing on their behalf and nothing substantial has been brought out in the counter affidavit,. Countenancing the statements made on behalf of Mr. Mohapatra, learned counsel for the petitioner. It further appears from the award that the Tribunal has recorded that non-examination of the two seizure witnesses has no material bearing in this case as they have disowned to be witnesses to the factum of seizure and examining them would not have enhanced the case of the management any further.

9. In this factual backdrop coupled with the materials produced by the workman before the Tribunal that he has not been gainfully employed during the interregnum for which he has led material evidence, the only point, which remains to be determined in this case is as to whether this Court in a writ of certiorari should interfere with the award or not. It is settled position of law that while exercising jurisdiction under Article 226 of the Constitution; this Court does not act as an appellate authority. Its jurisdiction is circumscribed by limits of judicial review to correct errors of law or procedural errors leading to manifest injustice or violation of principles of natural justice. But, however, it is also settled that an order can be set aside, if it is based on extraneous grounds or there are no grounds at all for passing such order or the grounds are such that no one can reasonably arrive at the conclusion as has been arrived at. From the facts of the present case, as it is crystal clear that the charge was solely in respect of seizure of stolen articles from the house of the petitioner and the seizure has not been proved and the criminal case ended in acquittal of the petitioner inasmuch as before the Tribunal, no materials were produced nor any evidence was adduced on behalf of the management to prove such seizure of the stolen articles from the house of the petitioner, the entire conclusion of the Tribunal is found to be based on surmises and conjectures. The fact, as delineated therefore, clearly shows that no one can reasonably arrive at the conclusion as has been arrived at by the Tribunal on the evidence adduced before it.

10. This, according to me, is sufficient ground to set the award, inasmuch as, it is seen that the Tribunal has failed to apply its judicial mind

to the facts of the case. The Tribunal has not gone into the question as to whether the petitioner was gainfully employed during the period when he is out of service, being dismissed in the proceeding. The materials produced before this Court clearly make out a case that the petitioner was not gainfully employed during the said period.

11. In view of the above conclusions, the impugned award dated 20.09.1997 passed in I.D. Case No.10 of 1987 is quashed and it is directed that the petitioner should be reinstated in service by the opposite party no.2 within a period of thirty days from the date of communication of this judgment. The period during which he was out of service shall be treated to be included in his period of service. With regard to back-wages, as the opposite party no.2 - management has not got any benefit from the petitioner, according to me, the petitioner should be paid 25% of the back-wages from the date of his dismissal till the date of reinstatement.

12. With the aforesaid observations and directions, the writ petition is allowed. No costs.

Writ petition allowed.

2011 (I) ILR – CUT- 89

R.N.BISWAL, J.

W.P.(C) NO.16298 OF 2009 (Decided on 16.09.2010)

SUDARSAN NAYAK & ANR. ……. Petitioners.

.Vrs.

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

HINDU RELIGIOUS ENDOWMENTS ACT, 1951 (ACT NO.25 OF1955 ORISSA) –SEC.27.

Appointment of Non-hereditary Trust Board – Before sending any proposal to the State Govt. it is mandatory for the Asst. Commissioner of Endowments to publish a notice in the notice Board of the concerned religious institution and to intimate the general public of the locality by beat of drum inviting suggestions and objections on the proposal.

In the present case intimation given to general public of the locality by beat of drum inviting suggestions and objections on the proposal from the persons affected but notice was not published in the notice Board of the religious institution in question Compliance of which is mandatory in nature – Held, appointment of Non-hereditary Trust Board is illegal.

(Para 8)

Case laws Referred to:-

1.1992 (II) OLR 330 : (Khetramohan Rout & Ors. -V- Sri Sri Nageswar Mahadev & Ors.)

2.1994 (I) OLR 185 : (Upaleswaru Thakurani & Upaleswari Narayani Thakurani & Ors. -V- Commissioner of Endowments, Orissa & Ors.).

For Petitioners - M/s. Ajodhya Ranjan Dash, B.Mohapatra, P.K.Behera, S.N.Sahoo & K.S.Sahu.

For Opp.Parties - M/s. Akshaya Kumar Rath (for O.Ps. 1 and 2).

R.N.BISWAL,J. In this writ petition, the petitioners call in question Annexure-3, the order of appointment of Non-hereditary Trust Board represented by opp. party Nos.3 to 17 in respect of the deities, viz.,

"Nilakantheswar Deb" and "Dula Dei Thakurani" Bije at Kunjar under Pipili P.S. in the district of Puri.

2. As per the writ petition, the petitioners are the hereditary trustees of the aforesaid deities. While the forefathers of petitioner No.1 were performing Mali Seba, the forefathers of petitioner No.2 were performing Anna/Dhupa Seba of the said deities. At present, the petitioners are performing the Seba like their respective ancestors as hereditary trustees to the best satisfaction of the public. The father of petitioner No.1 and petitioner No.2 have been recorded as Marfatdars of the deities and their properties in the Major Settlement R.O.R. of the year 1966. In the final consolidation R.O.R. published in the year, 1982, both the petitioners have also been recorded as Marfatdars in respect of the deities and their property. However, opp. party Nos.3 to 17, influencing the Assistant Endowment Commissioner, Bhubaneswar managed to constitute a Non-hereditary Trust Board being represented by them in respect of said deities and their property without the knowledge of the petitioners and the general public of the locality. The petitioners as well as the villagers came to know about constitution of the Non-hereditary Trust Board only on 24.07.2009, when some personnel of the office of the Commissioner of Endowments along with some police personnel locked the temple. Hence, the writ petition.

3. Learned counsel appearing for the petitioners submitted that as per Section 27(1) of Orissa Hindu Religious Endowments Act (hereinafter referred to as OHRE Act), before constituting Non-hereditary Trust Board in respect of any religious institution other than math, the Assistant Commissioner of Endowments must be satisfied that there is no hereditary trustee in respect thereof. Since there are hereditary trustees in respect of religious institution in question, constitution of Non-hereditary Trust Board was illegal. In support of his submission, he relied on the decisions in the case of ***Khetramohan Rout and others v. Sri Sri Nageswar mahadev and others*** 1992 (II) OLR-330 and ***Upaleswari Thakurani and Upaleswari Narayani Thakurani and others v. Commissioner of Endowments, Orissa and others*** 1994 (I) OLR-185.

4. Learned counsel for the petitioners further submitted that as per the provision contained under Section 27 of the O.H.R.E. Act, the Assistant Commissioner of Endowments is duty bound to publish a notice in the Notice Board of the concerned religious institution and intimate the general public of the locality by beat of drum inviting suggestion and objection before sending the proposal to the State Government for constitution of Non-hereditary Trust Board, but he has not done so in the instant case. So, he submitted that the writ petition should be allowed and Annexure-3 should be quashed.

5. On the other hand, learned counsel appearing for opp. party Nos. 1 and 2 contended that all the formalities were complied with before the Non-hereditary Trust Board was constituted. He further contended that the petitioners are only performing the Seba Puja since their forefathers, but they are not trustees of the deities. As they neglected in their duty, the Assistant Commissioner of Endowments, Bhubaneswar rightly constituted the Non-hereditary Trust Board.

6. It would be profitable to quote Section 27 (1) of O.H.R.E. Act, which reads as follows:-

> "**27. Non-hereditary trustees, their number and appointment-**(1) The Assistant Commissioner shall, in cases where there is no hereditary trustee, with the prior approval of the State Government appoint non-hereditary trustee in respect of each religious institution other than maths and specific endowments attached thereto and in making such appointments, the Assistant Commissioner shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the said institution is chiefly maintained.
>
> Provided that the Assistant Commissioner shall, before sending any proposal to the State Government for such prior approval, publish a notice in the Notice Board of the concerned religious institution and intimate the general public of the locality by beat of drum, inviting suggestions and objections on the proposal from all persons affected, to be made within a period of thirty days from the date of such publication, and forward to the State Government the suggestions and objections, if any, received, along with such proposal."
>
> As per this provision, the Assistant Commissioner of Endowments can appoint a Non-hereditary Trust Board with approval of the State Government in respect of the religious institution other than Math where there is no hereditary trustee.

7. In the Full Bench decision of this Court in the case of Khetramohan Rout and others (supra), it was held that:

> "The absence of a hereditary trustee being a condition precedent for exercise of the power under Section 27 of the Act, the Assistant Commissioner shall have to record, while exercising this power, as to why he is of the opinion that there is no hereditary trustee of the religious institution. This satisfaction may be arrived at on the basis of materials placed before the Assistant Commissioner, for which purpose, he may go in for a summary inquiry ……."

Again in the decision Upaleswari Thakurani and Upaleswari Narayani Thakurani and others (supra), this Court held that:

> "Therefore, the Assistant Commissioner has to be satisfied and has to record a finding that there is no Hereditary Trustee of the religious institution and therefore, he is empowered to appoint a Non-Hereditary Trust Board and he is making such appointment. The satisfaction of the Assistant Commissioner has to be arrived at on the basis of the materials placed before him and he may also hold a summary enquiry for the aforesaid purpose."

In the instant case, learned counsel appearing for the opp. party Nos. 1 and 2 produced the relevant records from the office of Assistant Commissioner of Endowments before this Court. On perusal of the said records, nowhere it was found that the Assistant Commissioner of Endowments enquired into the matter and was satisfied that there was no hereditary trustee in respect of the religious institution in question.

8. As quoted above, as per Section 27 of the O.H.R.E. Act before sending any proposal to the State Government for appointment of Non-hereditary Trust Board, it is incumbent upon the Assistant Commissioner of Endowments to publish a notice in the Notice Board of the concerned religious institution and to intimate the general public of the locality by beat of drum inviting suggestions and objections on the proposal. On perusal of the record of the Assistant Commissioner of Endowments produced before this Court, it is found that the general public of the locality was intimated by beat of drum inviting suggestions and objections on the proposal from the persons affected, but there is nothing to show that any notice was published in the Notice Board of the religious institution in question, compliance of which is mandatory in nature.

9. Therefore, under such circumstances, the writ petition is allowed and Annexure-3 is hereby quashed. No cost.

Writ petition allowed.

2011 (I) ILR – CUT- 93

R.N.BISWAL, J.

W.P.(C) NO.5328 OF 2009 (Decided on 02.11.2010)

M/S. INDIAN OIL CORPORATION LTD ……. Petitioner.

.Vrs.

M/S. FREEDOM FILLING STATION …….. Opp.Party.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 1 & 2 r/w Sec.41 (e) Specific Relief Act, 1963.

Agreement between the parties determinable in nature – Trial Court ought not have granted status quo order and the appellate Court should not have confirmed it.

In this case the learned Civil Judge has not discussed about irreparable loss and balance of convenience- Admittedly Opp. Party is a dealer of Petroleum Products under the petitioner – On refusal of the interim relief if the Opp.Party has sustained any loss, he could have been compensated by money had he won the suit – In the absence of irreparable injury, the order of status quo can not stand – Held, impugned orders of both the trial Court and appellate Court are set aside.

(Para 9,12 & 13)

Case laws Referred to:-

1.(1991) 1 SCC.353 : (Indian Oil Corporation Ltd.-V- Amritsar Gas Service & Ors)

2.AIR 2003 Delhi, 410 : (Mittal Services -V- Escotel Mobile Communication Ltd.).

For Petitioner - M/s. Sanjit Mohanty, S.Pattnaik, S.C.Samantray, R.R.Swain & S.Mohanty.

For Opp.Party - M/s. S.P.Mishra, S.Nanda, B.S.Panigrahi, A.K.Dash, S.K.Sahoo.

R.N.BISWAL,J. The petitioner challenges the order dated 24.11.2008 passed by the learned Adhoc Addl. District Judge, Fast Track Court No.III, Bhubaneswar in F.A.O. No.11/49 of 2006 confirming the order dated 20.7.2006 passed by the learned Civil Judge (Junior Division), Bhubaneswar in I.A. No.281/2005 arising out of C.S. No.241 of 2005 directing the parties to maintain status quo in respect of M/s. Freedom Filling Station till disposal of the suit.

2. The petitioner, Indian Oil Corporation Limited (hereinafter referred as I.O.C.), a registered Government Company having its registered office at Mumbai carry on business of sale and distribution of petroleum products throughout India by engaging dealers and distributors. The petitioner was the defendant and opp. party was the plaintiff in C.S. No.241 of 2005. As per the case of the plaintiff, on 23rd February, 2001, it was appointed by the defendant as dealer for retail sale and supply of petroleum products at Bhubaneswar. On 21.3.2005, the Assistant Manager (Quality Audit) of the I.O.C. made a routine visit and collected sample of Motor Spirit/Petrol (MS) from the retail outlet of the plaintiff and subsequently sent the same to laboratory for testing. On 31.3.2005, the plaintiff received a letter from the opp.party wherein it was specifically pointed out that the Full Boiling Point (FBP in short) as per Laboratory Test Report was found to be 225^0C against the maximum limit of 215^0C, and, as such, the product was off-specification when other criteria remaining the same. So, in the said letter, plaintiff was asked to show cause within 7 days from the date of its issue as to why penal action should not be taken against it leading to termination of the dealership. It was also mentioned in the said letter that it was the second case of sample failure, the first one being in the month of February, 2004 in respect of the plaintiff's retail outlet. According to the plaintiff in the first alleged failure report neither the Marketing Discipline Guidelines (MDG in short) was followed nor the request of the plaintiff to test retained T.T. sample was complied with. The Laboratory Test Report, on the basis of which the letter dated 31.3.2005 was issued bore no name of the retail outlet. Furthermore, in the said report, FBP was found to be 220^0C as against the maximum limit of 215^0C, but in the notice in place of 215^0C it has been mentioned as 225^0C.

3. Apprehending that basing on the said vague Laboratory Test Report, the defendant would terminate the dealership of the plaintiff, it filed the aforesaid suit with prayer to declare that the letter dated 31.3.2005 issued by the defendant was illegal, null and void and to restrain the defendant from taking any penal action against it. Along with the suit, the plaintiff filed a petition under Order 39 Rule 1 and 2 of C.P.C. with prayer to restrain the defendant from terminating the dealership till disposal of the suit. The said petition was registered as I.A. NO.281 of 2005. Notice was issued to the defendant in the said I.A to show cause but as it did not appear, order of status quo in respect of M/s Freedom Filling Station was passed on 30.5.2005 which continued from time to time till it was made absolute.

4. The defendant appeared on 31.1.2006 and filed show cause in I.A. No.281 of 2005, inter alia, contending that it was the owner of the outlet and one Bhagaban Pattnaik was awarded the dealership in respect of retail outlet in question on freedom fighter quota. On his death, his widow and two

sons executed the dealership agreement with the defendant on 23.2.2001 and they carried the said business in the name of the firm, M/S Freedom Filling Station. As per the said agreement, the plaintiff was to sell the products of the defendant strictly in compliance with the terms and conditions of the agreement and the provisions of the MDG. But, it adulterated the petroleum products and sold the same to the customers which was detected in November, 2000 and August, 2003. Again on 19.2.2004, Ms Sample collected from retail outlet in question was found to be adulterated on laboratory test for which fine of Rs.20,000/- was imposed on the plaintiff and the same was paid by it. Further, on 21.3.2005, sample of MS Xtra premium was taken from the said retail outlet which failed the laboratory test whereas the Tank Truck Retention sample passed laboratory test. On 31.3.2005, the I.O.C. issued a notice to show cause to the plaintiff as to why action would not be taken against it for adulterating petroleum products. The reply given by the plaintiff vide letters dated 4.4.2005 and 8.4.2005 having been found not satisfactory, the dealership agreement was terminated vide order dated 20.1.2006 with immediate effect. The possession of retail outlet in question was taken over by I.O.C. on 21.1.2006 at 9.20 A.M. in presence of police. On the same date at 10.30 A.M., it was handed over to M/s. Ramamani Motors, one of the Indian Oil dealers to run the same on adhoc basis. On 22.4.2006, the plaintiff again forcibly entered into the said retail outlet for which intimation was given to O.I.C., Capital Police Station and S.P., Khurda. Accordingly, the defendant prayed to dismiss the I.A.

5. After hearing learned counsel for both sides, the learned Civil Judge (Junior Division), Bhubaneswar held that sample collected from the retail outlet of the plaintiff on 21.2.2005 was tested on 28.2.2005 and allegedly failed the laboratory test. Sample Collected on 17.3.2005 and 18.3.2005 from the depot passed the laboratory test at Kolkata. But those samples were received on 5.4.2005, i.e., beyond 10 days of collection in regional laboratory at Kolkata. As per the M.D.G. the sample should have been reached in the laboratory within 10 days of collection. So, according to the trial court the plaintiff raised a fair question which would be decided at the time of hearing of the suit and allowed I.A. No.281 of 2005 vide order dated 20.7.2006 and made the interim order absolute.

Being aggrieved with the said order, the defendant filed an appeal before the District Judge, Khurda at Bhubanesar which on being transferred to Adhoc Addl. District Judge Fast Track Court No.III, Bhubaneswar was renumbered as 11/49 of 2006. After hearing learned counsel for the parties, the appellate court dismissed the appeal and confirmed the orders of the trial court, inter alia, holding that the I.O.C. failed to prove a single document to show that any customer complained against the plaintiff to have sold any

adulterated petroleum products. The present writ petition has been filed by the appellant against the said appellate order.

6. Learned counsel for the petitioner submitted that as per Clause-3 of the agreement entered into between the parties on 23.2.2001, the agreement shall remain in force for 5 years and continue thereafter for successive periods of one year each until determined by either party by giving three month's notice in writing to the other of its intention to terminate the agreement and upon expiration of such notice period the agreement and the licence granted shall stand cancelled and revoked. Moreover, Clause 56 (i) of the said agreement envisages that notwithstanding anything to the contrary, the I.O.C. shall be at liberty to terminate the agreement if the dealer deliberately contaminates or tampers with the quality of the Corporation's products. Furthermore, as per M.D.G. in case of second adulteration, the dealership agreement is liable to be terminated. So, the contract is determinable in nature. Since the agreement was determinable, the court below ought not to have granted temporary injunction in view of the provision contained under Section 41 (e) of the Specific Relief Act. In support of his submission, he relied on the decision in the cases of ***Indian Oil Corporation Limited v. Amritsar Gas Service and others*** (1991) 1 SCC, 353, ***Rajasthan Breweries Ltd. v. Stroh Brewery Company,*** AIR 2000 Delhi 450, ***Mittal Services v. Escotel Mobile Communication Ltd.,*** AIR 2003 Delhi, 410 and some other cases.

7. Learned counsel for the petitioner next submitted that the Civil Judge (Junior Division), Bhubaneswar held that the opp. party had a prima facie case on the ground that on 17.3.2005 and 18.3.2005 samples were collected from the depot, but the same were received in the laboratory on 5.4.2005, i.e., beyond 10 days of collection, which is against the M.D.G. According to learned counsel for the petitioner nozzle sample collected on 21.3.2005 failed laboratory test, both in Paradip and Calcutta laboratories vide reports under Annexures-J and L respectively, whereas the depot sample and the genuine T.T. sample met the laboratory test under Annexure-K and K-1. The density in manufactured T.T. sample vide Annexure-M has been tallied with the failure nozzle sample vide Annexure-J, as such the opp.party has manufactured the said T.T.samaple relating to the report under Annexure-M. The density of the depot sample along with the genuine T.T. sample does not tally with the manufactured T.T.sample.

8. Learned counsel for the petitioner next submitted that in issuing temporary injunction the tests to be applied are (i) whether the plaintiff has a prima facie case (ii) whether the balance of convenience is in favour of the plaintiff (iii) whether the plaintiff would suffer irreparable injury, if his prayer

for temporary injunction is disallowed. The learned Civil Judge (Junior Division), Bhubaneswar did not discuss about balance of convenience and irreparable loss. The appellate court also did not discuss the same, except stating that the opp. party had a prima facie case, it would sustain irreparable loss, if the stay was not granted and that the balance of convenience leaned in its favour. So, learned counsel for the petitioner urged to allow the writ petition.

9. It is found from Clause-3 of the dealership agreement entered into between the parties, on 23.2.2001 that the agreement shall remain in force for five years and continue thereafter for successive periods of one year each until determined by either party by giving 3 months' notice in writing to the other of its intention to terminate the agreement and upon expiration of such notice period the agreement and the licence granted shall stand cancelled and revoked. Further, as per Clause 56(1) of the said agreement, the petitioner shall be at liberty to terminate the agreement if the dealer deliberately contaminates or tamper with the quality of any of the Corporation's product. Furthermore, as per M.D.G. in case of second adulteration, the dealership agreement is liable to be terminated, as such, the contract is determinable in nature.

10. Learned counsel for the opp.party submitted that the order of imposition of fine for the so-called first adulteration has not yet been finalized. Opp.party has filed a representation on 25.1.2005 for review of the said order, but, it has not yet been disposed of. In the meantime more than five years have already elapsed. As it appears the opp.party has not taken any step to see that the representation is disposed of soon. Moreover, admittedly opp.party has already deposited the fine amount of Rs.20,000/-. So, at this stage, prima facie it is found that the opp. party had adulterated petroleum product earlier, in the month of February 2004 for which it paid the fine of Rs.20,000/- imposed. Whether the sample collected from the outlet of the opp. party on 21.3.2005 was in fact adulterated or not shall be decided at the time of trial of the suit. Prima facie it appears that it was found adulterated. Even if it is presumed that it was not adulterated, still then the order of status quo cannot stand, as would be discussed now.

11. Section 41(e) of the Specific Relief Act envisages that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforceable. Section 14(1)(C) of the said Act lays down that a contract which is in its nature determinable cannot be specifically enforced. Admittedly, the contract between the parties in the present case is determinable in nature. In the decision Indian Oil Corporation Limited (supra), the apex court held that:

"The finding in the award being that the Distributorship, agreement was revocable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section(1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is 'a contract which is in its nature determinable'. In the present case, it is not necessary to refer to the other clauses of sub-section(1)of Section 14,which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1)of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained."

Similarly, in the case of Rajasthan Breweries Ltd.(supra)the Delhi High Court held that:

"Even in the absence of specific clause authorizing and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature".

Similarly, in the case of Mittal Services (Supra) the Delhi High Court held that:

"Apart from the fact that the plaintiff was appointed as a franchisee for the territory of District Kaithal only on a non-exclusive basis as is evident from Clause 5.2 of the agreement, and the defendant had discretion to appoint as many franchisees for that very area as it deemed proper, the agreement being of a

> determinable nature, is not specifically enforceable. In view of Section 14(1)(C)(S.41(e))of the Act and by virtue of Section 41(e)(14(1)(c)) of the Act, no injunction of the nature prayed for by the plaintiff can be granted. Thus, finding no prima facie case in favour of the plaintiff, the application is liable to be dismissed."

As per the above decisions, even if it is presumed that there was no second adulteration, in the present case, still then the trial court ought not have granted status quo order and the appellate court ought not have confirmed it, since the agreement between the parties was determinable in nature.

12. Furthermore, learned Civil Judge has not discussed about the irreparable loss and balance of convenience, so also the appellate court. Even if it is presumed that there is a prima facie case in favour of opp.party, still then in absence of proving that balance of convenience leans in its favour and that it would sustain irreparable injury, if injunction is not granted, the order of granting injunction is bad in law. Admittedly, opp.party is a dealer in respect of petroleum products under the petitioner. Because of refusal of interim relief, if the opposite party had sustained any loss, it could have been compensated by money had it won the suit ultimately. So, there was no question of sustaining irreparable injury. Even if it is presumed that the inconvenience which was likely to be caused from withholding the injunction than that which was likely to arise from granting it, still then since there was no question of sustaining irreparable injury, the order of status quo cannot stand.

13. Under such circumstances, the writ petition is allowed and the orders of both the trial court as well as appellate court are set aside and the order of status quo passed in respect of M/s. Freedom Filling Limited is vacated. Learned Civil Judge (Junior Division), Bhubaneswar shall dispose of C.S. No 241 of 2005 as expeditiously as possible preferably within a period of four months from the date of receipt of this order.

Accordingly, the writ petition stands disposed of. No cost.

Writ petition allowed.

2011 (I) ILR – CUT- 100

INDRAJIT MAHANTY, J.

CRLMC. NO.1734 OF 2009 (Decided on 09.11.2010)

BHARATI MAHANTA …….. Petitioner.

.Vrs.

NARAHARI MAHANTA & ANR. …….. Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.125 r/w Sec.397(3) & 482 Cr.P.C.

Father-in-law and Mother-in-law claimed maintenance from daughter-in-law – Maintainability of the application – Son of the Opp.Parties (husband of the petitioner) expired while working as a peon – Petitioner received all the death-cum-pensionary benefits including the job of a peon under the Rehabilitation Assistance Scheme.

Held, Since the trial Court as well as the lower Revisional Court have given concurrent views regarding maintainability of the proceeding the issue as to whether the petitioner would be liable to pay maintenance to the Opp.Parties or not would be decided in the trial – Moreover as Second Revision is clearly prohibited U/s. 397 (3) Cr.P.C. and there being no special case made out by the petitioner to entertain the present application U/s.482 Cr.P.C. especially when proceeding U/s.125 Cr.P.C. is pending for adjudication on merit, the present petition U/s.482 is not maintainable.

(Para 4 to 7)

Case laws Referred to:-

1.AIR 1978 SC 1807 : (Ramesh Chandra Kausal -V- Veena Kausal).
2.2006 35 OCR P-114 : (Labanya Senapati -V- State of Orissa & Anr.).

For Petitioner - M/s. D.Panda, DPR Dhal, A.K.Parida, A.K.Budhia & S.R.Pati.
For Opp.Parties - M/s. Manasi Mohapatra & U.K.Behera.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioner-Bharati Mahanta, who has sought to challenge the order dated 08.04.2009 passed by the learned Sessions Judge, Keonjhar in Criminal Revision No.16 of 2008 affirming the order dated 06.08.2008 passed by the learned S.D.J.M., Champua in CMC No.112 of 2007 whereby the learned S.D.J.M., Champua came to hold that the

application under Section 125 Cr.P.C. filed by the Opposite Parties (father-in-law and mother-in-law of the widow petitioner) is maintainable in the eye of law.

2. Mr. D. Panda, learned counsel appearing for the petitioner, inter alia submitted that the Opposite Parties had only one child, namely, Amrut Charan Mahanta (husband of the present petitioner) who passed away on 27.08.1995. Late Amrut Charana Mahanta was working as a Peon in Badanai High School and on his demise, his widow, namely, the present petitioner, was provided with employment as a Peon under the Rehabilitation Scheme in place of her deceased husband. Accordingly, the Opposite Parties asserted that since the petitioner has availed all the death and pensionary benefits of her deceased husband and has been appointed as a Peon in place of her husband, she is liable to maintain her father-in-law and mother-in-law-Opposite Parties herein.

Learned counsel for the petitioner contended that the proceeding under Section 125(1) (d) Cr.P.C. cannot be initiated by the parents-in-law against their widow daughter-in-law. Section 125 Cr.P.C. is quoted herein below.

"Section 125 Cr.P.C: Order of maintenance of wives, children and parents.

(1) If any person leaving sufficient means neglects or refuses to maintain:

(a) His wife, unable to maintain herself, or

(b) His legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) His legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, of

(d) His father or mother, unable to maintain himself or herself."

It was further asserted by the learned counsel for the petitioner that the Opposite Parties are not the parents of the present petitioner but are in-laws and therefore, have not come under the purview of Section 125(1) (d) Cr.P.C. and proceeding thereunder is not maintainable against the petitioner (widow) by her parents-in-law.

3. Learned counsel for the petitioner further asserted that the petitioner does not stand in the shoes of her deceased husband, since she has not inherited or enjoyed any share in the ancestral property and nowhere it is found that in case of death of the petitioner's husband, his parents can claim maintenance against their daughter-in-law. Hence it is submitted that a widow daughter-in-law cannot be placed on the same footing as that of her deceased husband. It is also submitted that the present Opposite Parties

have possess 10 Acres of landed properties and are cultivating the same by engaging labourers and earning near about rupees one lakh per year from cultivation. It is further asserted that the Opposite Party No.1 is maintaining four wives with whom he is enjoying the benefit of the properties and the petitioner has been deprived of her right to inherit her husband's properties and shares in the ancestral property by the Opposite Party No.1.

4. Learned counsel appearing for the Opposite Parties on the other hand contended that the present petition under Section 482 Cr.P.C. is not maintainable, since it is well settled that the inherent power of the High Court should not be used to interfere with the concurrent findings of the Court below and the power should be used sparingly and with circumspection and the High Court should not embark upon an enquiry with regard to the allegations made by the petitioner. Accordingly, it is submitted that since the learned S.D.J.M., Champua as well as the learned Sessions Judge, Keonjhar have recorded concurrent findings on the question of maintainability, a second revision in the garb of a petition under Section 482 Cr.P.C. is not maintainable.

Learned counsel for the Opposite Parties further submitted that the purview of Section 125 Cr.P.C. is not only conceives of an order for maintenance but essentially, a measure of social justice with a view to protect persons who do not have sufficient means for survival. Reliance was placed by the learned counsel on a judgment of the Hon'ble Supreme Court in the case of Ramesh Chandra Kausal v. Veena Kausal, AIR 1978 SC 1807, wherein the Division Bench constituting Hon'ble Justice V.R. Krishna Iyer and Hon'ble Justice D.A.Desai propounded the principle of law that "*social justice is not constitutional Claptrap but fighting faith which enlivens Legislative texts with militant meaning which negative, illustrate the functional relevance of social justice as an aid to statutory interpretation.*" Keeping this view, if any person having sufficient means neglects or refuses to maintain his father or mother who is unable to maintain himself or herself, an application under Section 125 Cr.P.C. is maintainable.

Learned counsel for the Opposite Parties further submitted that Section 125 Cr.P.C which is entitles a neglected wife, child and parent, should be widely interpreted to include members of family since the term 'family' includes *"the group of people related either by blood or marriage".* Learned counsel for the Opposite Parties further submitted that in terms of Section 125(1) (d), even a married daughter is liable to maintain her parents, if they do not have any sufficient means to maintain themselves and there is no justifiable reason whatsoever for daughter-in-law not to be saddled with similar responsibility in the event of the death of a son especially when the deceased son's widow has obtained all the death-cum-pensionary benefits

including reappointment under the Rehabilitation Scheme on the death of a son.

5. In response to the aforesaid contention, the learned counsel for the petitioner submitted that while it is correct that a second revision before the High Court is prohibited by sub-section(3) of Section 397 of Cr.P.C., yet, the inherent power of High Court is still available under Section 482 Cr.P.C. and while Section 397 of Cr.P.C. prohibits second revision in order to avoid frivolous litigation, but at the same time, the doors of the High Court to a litigant, who had lost before the Sessions Judge, is not completely closed and in "special cases" the bar under sub-section (3) of Section 397 Cr.P.C. could be lifted and the power of a High Court to entertain the petition under Section 482 Cr.P.C., is not subject to the prohibition under sub-section (3) of Section 397 Cr.P.C. and is capable of being invoked in an appropriate cases.

6. In the light of the submissions made by the learned counsel for both the parties and on perusal of the impugned order, it is clear that while the learned S.D.J.M. came to a conclusion that the proceeding under Section 125 Cr.P.C. filed by the Opposite Parties-parents-in-law was maintainable, the learned Sessions Judge while affirming the said order, placed reliance on a judgment of this Court in the case of Labanya Senapati v. State of Orissa and another, 2006 35 OCR at page 114 and came to hold that since the present petitioner had obtained a job of Peon in place of the deceased husband under the Rehabilitation Scheme and, since, the petitioner step into the shoes of the deceased, she was legally bound to maintain the Opposite Parties.

7. It is clear from the impugned orders that both the trial court as well as lower Revisional Court have concurrent views on the maintainability of the proceeding under Section 125 Cr.P.C. and the issues as to whether or not the petitioner (widow daughter-in-law) would be liable to pay maintenance to the Opposite Parties (parents-in-law) would have to be gone into at the trial.

8. In my considered view, in the present case, since the maintainability of a proceeding under Section 125 Cr.P.C. was the subject matter of challenge and both the Courts below having given their concurrent views regarding maintainability of such a proceeding, the present petition under Section 482 Cr.P.C. is clearly not maintainable since a second revision is clearly prohibited under sub-section (3) of Section 397 Cr.P.C. Although the present petition has been filed under Section 482 Cr.P.C. and the power vested in the High Court therein is not subject to Section 397 Cr.P.C., yet I am of the considered view that no special case has been made out by the petitioner to entertain the present application under Section 482 Cr.P.C., especially when the proceeding under Section 125 Cr.P.C. remains pending for adjudication on merits.

9. Accordingly, I find no merit in the present application and, therefore, the CRLMC stands dismissed. The trial Court is directed to take up the proceeding under Section 125 Cr.P.C. expeditiously and dispose of the same within a period of three months from the date of receipt of the certified copy of this judgment on the basis of evidence produced by the parties and without in any manner being influenced by any observations made by this Court in course of the challenge made by the petitioner to the maintainability of the proceeding under Section 125 Cr.P.C.

Application allowed.

2011 (I) ILR – CUT- 105

H.S.BHALLA, J.

W.P. (C) NO.748 OF 2010 (Decided on 1.12.2010)

GOLAKH BIHARI SAHOO & ORS. …….. Petitioners.

.Vrs.

STATE PROJECT DIRECTOR,
SSA & ORS. …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART. 14 & 16.

Disengagement of petitioners by an unilateral decision with a cryptic order – Petitioners were working as Block Resource Persons – They made representation to revive their bread – Dismissal of the representation without giving an opportunity of hearing to the petitioners – Hence the writ petition.

No notice was served on the petitioners before passing of the impugned order – Non-consideration of the representation by the competent authority amounts to violation of the principles of natural justice – Held, impugned order is quashed – O.P.3 would be at liberty to pass any fresh order in accordance with law.

(Para 5 & 6)

For Petitioner - M/s.S. Pattnaik & associates.
For Opp.Parties - Addl. Standing Counsel

H.S.BHALLA,J. Heard learned counsel for the petitioners and learned Addl. Standing Counsel for the State.

2. 31st December, 2009 was declared as a black day for the petitioners, who were working as Block Resource Persons under different blocks in the district of Kendrapara, when they were disengaged from their respective posts with effect from 31st December, 2009 by virtue of the impugned order dated 31.12.2009 under Annexure-3. In order to revive their bread, the petitioners have knocked the door of this Court by filing the present writ petition challenging the impugned order, which runs as follows :

> "All the BRPs (Block Resource Person) in Arts and Science stream working in the District are hereby disengaged w.e.f. from 31.12.2009

instantly.This order will come into effect immediately."

3. Learned counsel for the petitioners vehemently argued that the services of the petitioners have been dispensed with by an unilateral decision with a cryptic order by completely giving a go-bye by indispensable terms/ stipulations as enshrined in the advertisement. He further submitted that the advertisement clearly spells out that mere notice in advance is mandatory before issuing the order of disengagement. The petitioners also filed a representation, which was also dismissed and they have no other option but to file the present writ petition and finally, learned counsel for the petitioners submitted that the impugned order in question be struck down.

4. I have considered the contentions of learned counsel for the petitioners and for the reasons to be recorded by me hereinafter, the writ petition is liable to be accepted.

5. Perusal of the above quoted order shows that the same was passed without affording any opportunity to the petitioners nor any notice was served before passing the impugned order. To my mind, the order should reflect that principles of natural justice have been followed. Passing of such order is not a matter of mere formality, but the order should reflect some consideration by the competent authority. The impugned order does not suffice the requirement of natural justice.

6. Without going into the merits of the case and without observing further else it may prejudice the parties, the impugned order dated 31.12.2009 (Annexure-3) is hereby quashed. Before I part with this order of mine, it is made clear that the opposite party no.3, District Project Coordinator, SSA, Kendrapara would be at liberty to pass any fresh order in accordance with law.

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

Writ petition disposed of.

2011 (I) ILR – CUT- 107

MRS. ARUNA SURESH, J.

CRLA. NOS.311, 269 OF 2007 (Decided on 25.11.2010)

LOKANATH SUBUDHI & ANR. ……. Appellants.

.Vrs.

STATE OF ORISSA ……. Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SECS. 366 & 376.

Rape – Prosecutrix left her house with cash and ornaments and stayed with the appellants for about two months without making any effort to release – No resistance for sexual relationship – No complaint before any body during her long stay with the appellants – Her age was assessed to be 19 years – The doctor examined her did not find any fresh injury marked over the margin of hymen and hymen was found absent – He did not find any evidence of sexual intercourse – He did not find any evidence of spermotza living or dead in the vaginal swab of the prosecutrix – Held, prosecution failed to prove that the victim was kidnapped and gang raped by the appellants – Impugned judgment is set aside.

(Para 11, 14 & 15)

For Appellant - M/s. D.P.Dhal & B.s.Mohapatra
For Respondent - Miss. Samapika Mishra
Addl. Standing Counsel

MRS. ARUNA SURESH, J. Impugned in this appeal is the judgment of conviction and order of sentence dated 1st May, 2007 of the Additional Sessions Judge, Bhuabaneswar whereby appellants were convicted for offences under Section 376(2) (g) I.P.C. and 366 I.P.C. and sentenced to undergo rigorous imprisonment for 10 years and fine of Rs.5,000/- rigorous imprisonment for one year and fine of Rs.2500/- each respectively. Both the sentences were ordered to run concurrently and benefit under Section 428 Cr.P.C. was also given to the appellants.

2. In short, the prosecution story is that during the intervening night of 30/31.5.1997, the prosecutrix came out of the house at about 1 A.M. for urination. The accused persons gagged her mouth and forcibly lifted her . They took her to village Benapanjari where she was kept in a house and

was allegedly raped by the appellants . From there, she was taken to a lodge at Balugaon where she was kept for one and a half month and was gang raped by both the appellants 4-5 times. Informant Gobardhan Barik woke up at night and on seeing the almirah and the backdoor of the house open, he searched the almirah and found Rs.10,000/- in cash and other jewellery missing from the almirah. He accordingly lodged a report in the concerned police station.

3. After about one and half months of the incident, prosecutrix,s paternal grandfather lodged a complaint at Jatni Police Station resulting in to registration of F.I.R. No.115 (2)/1987 under Section 366/109 I.P.C. The prosecutrix recovered on 2.8.1997 and was got medically examined. After completion of the investigation, charge-sheet was filed in the Court.

4. Mr. D.P.Dhal, learned counsel for the appellants has submitted that the trial court did not properly appreciate the statement of the witnesses examined by the prosecution in support of its case. He has argued that from the statement of the prosecutrix and admissions made by her, it is obvious that she was a consenting party and run away from the house taking cash and jewellery with the appellants and she maintained physical relationship with appellant Kabu @ Basanta @ Lokanath Subudhi of her own free will and consent, as she was in love with him for few years since before the alleged incident. He further submitted that prosecrutix knew that Kabu was married to another woman for about two years before the date of incident and knowing it well that she would not be able to marry him, she chose to run away with him from her house.

5. As regards appellant Lingaraj Baral, it is argued that he was acquainted with the family of the prosecutrix and was on visiting terms with them. It is pointed out by him that there is no specific allegation of rape against appellant Lingaraj Baral. He has also referred to the medical examination report of the prosecutrix to emphasis that the prosecutrix was not raped by any of the appellants. He has prayed that under the circumstances of the case, the impugned judgment and order of sentence of the Additional Sessions Judge be set aside.

6. Miss Samapika Mishra, learned Addl. Standing Counsel appearing on behalf of the State has submitted that since prosecutrix was examined after about two months of the alleged incident, the doctor could not give any clear report, if the prosecutrix was ravished by the appellants. She further submitted that prosecutrix, as P.W.5 has clearly deposed that she was lifted by the appellants when she went out of her house at mid-night for urination and was taken to different places, kept in a lodge and was raped 3 to 4 times by the appellants. She has submitted that the trial Court rightly convicted the appellants for the offences under Section 366/376 2(g) IPC.

7. As per the ossification report, age of the prosecutrix was found to be between 17 to 19 years. Given the benefit of marginal error of 2 years age of the prosecutrix can be fairly assessed as 19 years at the time of the incident. She was, therefore, a major and was capable of giving her consent to the appellants for her physical relationship with them.

8. Prosecutrix had left her home during intervening night of 30/31.5.1997 when her parents and other family members were asleep. Before leaving the house she removed Rs.10,000/- in cash and gold ornaments weighing about two and half Bharis and rupa ornaments weighing 10 Bharis. P.W.1 & P.W.2 are the parents of the prosecutrix. They have in categorical terms deposed that when Gopabandhu Barik, (P.W.1) got up at night for urination, he found the doors of the almirah and the doors of the house open. On search, both the witnesses found ornaments and cash of Rs.10,000/- missing from the almirarh. It is pertinent that P.W.5, the prosecutrix has admitted that she had paid Rs.10,000/- in cash and a pair of gold rings to appellant Loknath Subudhi @ Kabu to meet the expenses. It goes unexplained on the record as to why prosecutrix removed gold ornaments and cash from the almirah if she had left the house for urination. This clearly indicates that she left her house with cash and ornaments with a view to elope with Kabu. Admittedly, she was in love with Kabu for about 7.8 years before the date of incident. It has come in evidence that Labu had got married. Knowing it well that Kabu could not marry her being a married man, prosecutrix chose to run away with him with cash and Jewellery. As per the statement of the prosecutrix herself, she was taken to a house at village Benapanjari where both the appellants had sexual relationship with her. Thereafter, she was taken to another house at Baghamari and on the following day, she was taken to Balugaon by bus where she was kept in a lodge for about 1 & ½ months. She has further deposed that from Balugaon, she was taken to village Nuagaon where she was kept in a room.

9. Admittedly, as per the cross-examination, she did not wake up any member of the family while going for urination. She did not struggle to release herself from the clutches of the appellants when they lifted her and took her to village Benapanjari which was at the distance of about 4 to 5 kms from her village. She walked on foot with the appellants for about half kilometer and, thereafter, she hired a auto-rickshaw. As per her cross-examination, she was not man-handled or misbehaved by the appellants in any manner. She did not raise any hulla nor resisted or complained to any one while traveling in the auto-rickshaw for her rescue. She also did not make any complaint to the driver of the auto-rickshaw that she was being forcibly taken away by the appellants. It is not in dispute that many vehicles were plying on the road at the time when she was traveling in the auto-rickshaw. There were shops and cabins also on the way. She did find some

trucks parked on the road and drivers eating in the Dhaba. However, she did not take any steps to attract the attention of the truck drivers for her rescue by raising shouts or alarm for help.

10. It is pertinent that during her stay at the lodged for one and half months, may be more, she did not complain to any of the persons who stayed in the lodge regarding the conduct of the appellants. She washed out her blood-stained clothes and did not make any effort to run away from Gajendra lodge or free herself from the clutches of the appellants. She walked to village Nuagaon in the accompany of the appellants on foot and she came across many people on the way but she did not make any complaint about her confinement by the appellants to anyone. She did not make any efforts to run away through she had the opportunity to escape from the company of the appellants.

11. Thus, it is clear that since prosecutrix was in love with the appellant, Kabu for about 7 years and Kabu had got married about 2 years of the incident, they decided to run away from the house. Conduct of the prosecutrix in leaving her house with ornaments and cash, living with the appellants for about two months before her recovery, having sexual relationship without any resistance, her staying with the appellants without making any effort to run away or seek assistance of the people, whom she saw while driving from place to place or at the lodge for her rescue, clearly indicate that prosecutrix was a consenting party when she maintained physical relationship with the appellants. She was neither kidnapped nor was forcibly taken away by the appellants. Rather she of her own tree will left her parents house with cash and jewellery to join the company of the appellants.

12. The trial Courtm, in my view did not properly appreciate the statement of the prosecutrix, which in clear terms spelt out the consent of the prosecutrix in the entire episode.

13. The other independent witnesses of the prosecution P.W.3, Jayanti Pradhan, P.W.4, Anusuya Barik, P.W.7 Gagan Bihari Behera, P.W.8, Litu Badajena, P.W.9, Suryakanti Biswal have turned hostile and they have not supported the prosecution case. P.W.6 Tunibala Barik did not support the prosecution in her statement in chief, but when cross-examined by the public prosecutor for the State, she stated that prosecutrix was recovered from Village Balugaon in her presence. Regarding the factum of alleged rape by the appellants on the prosecutrix, her statement is based on what the prosecutrix had told her. In other words, what she has deposed in her cross-examination is based on hearsy. Her testimony becomes doubtful especially when none of the other independent witnesses have supported her. As discussed about the prosecutrix's own statement, does not fully support the prosecution case.

14. Dr. Prabhas Chandra, P.W.10 had examined the prosecutrix. On her examsdination, he did not find any fresh injury marked over the margin of hymen and hymen was found absent. He did not find any evidence of sexual intercourse. He did not find any evidence of spermotza living or dead in the vaginal swab of the prosecutrix. Hence, his testimony is also of no help to the case of the prosecution.

15. In view of my discussion as above, it is concluded that prosecution has failed to prove that prosecutrix was kidnapped and gang raped by the appellants. The prosecution has failed to bring home the guilt of the appellants beyond shadow of any reasonable doubt. Hence, the judgment and sentence dated 1.5.2007 of the Additional Sessions Judge, Bhubenswar is hereby set aside.

The appellants are hereby acquitted of the offences under Section 366/376 (2) (g) of the I.P.C. Their Bail-bond and Surety Bond are of hereby discharged. They be released forthwith, if not wanted in any other case.

Attested copy of this order be sent to the Superintendent Jail through special messenger immediately for compliance. Trial Court record be returned back.

Appeal allowed.

2011 (I) ILR – CUT- 112

SANJU PANDA, J.

W.P.(C) NO.3961 OF 2010 (Decided on 24.11.2010)

SOUMYA SMITA SAHOO …… Petitioner.

.Vrs.

MAJOR SUSHEET KUMAR NAYAK & ORS. ……. Opp.Parties**.**

HINDU MARRIAGE ACT, 1955 (ACT NO. 25 OF 1955) – SEC.26.

Custody of minor daughter – Divorce between the parents – As per the decree daughter was left in the care and custody of the father and mother shall exercise visitation rights – Father married for the second time and the child was kept with his parents at Bhubaneswar – Mother filed application for modification of the terms and conditions of the decree and to take custody of the child – Application rejected – Hence the writ petition.

In this case in order to know the attachment of the child this Court directed production of the child and gave interim custody of the child with the mother for 7 days and on the next date it was observed that the child was very happy and preferred her mother's company than the grand parents – Held, Welfare of the child is paramount and has primacy even over statutory provisions – Considering the nature of care and affection that a child requires in the growing stage of her life and keeping in mind her welfare, the custody of the child is granted to her mother.

(Para7&8)

Case law Referred to:-

(2010) 4 SCC 409 : (Bikram Bharua -V- Salini Bhala).

For Petitioner - M/s. H.M.Dhal, B.B.Swain, A.Kanungo.
For Opp.Parties - M/s. Ashok Kumar Mohapatra, A.K.Mohapatra & N.C.Rout.

S.PANDA, J. In this writ petition, the petitioner has challenged the order dated 18.2.2010 passed by the learned District Judge, Khurda at Bhubaneswar, in Interim Application No.42 of 2010 arising out of Guardian (P) No.41 of 2010 refusing to grant Interim custody of the child to the petitioner who is the mother.

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

The petitioner and opposite party no.1 were married on 26.11.2002 at Bhubaneswar. Out of the wedlock a daughter, namely, Sanah Satrusal was born on 25.06.2005. Opposite party no.1 is working in the Indian Army. The petitioner is an MBA. As dissension cropped up between the parties, they decided to get their marriage dissolved by mutual consent. Accordingly, an application under Section 13-B of the Hindu Marriage Act was presented before the Judge, Family Court, Hyderabad which was registered as O.P.No.937 of 2008. As per the terms and conditions, the decree of divorce was granted by the Judge, Family Court, Hyderabad on 23.03.2009. It was settled by the parties that the daughter, who was then aged about 3 ½ years, shall remain in the care and custody of the father and the mother shall exercise her visitation rights over the child at any time at her convenient. The wife agreed not to make any claim including permanent alimony or maintenance against each other in future. While the matter stood thus, opposite party no.1 married for the second time on 02.12.2009. He is staying with his newly wedded wife Raina Pathak, daughter of Col. N.B.Pathak. The child is no more in the care and custody of opposite party no.1; rather opposite party no.1 has left her with his parents at Bhubaneswar. After knowing the said fact, the petitioner moved the court below in the month of February, 2010 for custody of the child, her future education and well being. In the said application, she stated that the parents of opposite party no.1 are aged about 60 years and since the child is below 5 years, she should remain with her. Along with the said application, she filed Interim Application No.42 of 2010 for interim custody of the child. Due to urgency, she also filed an application for ex parte hearing of the matter. However, the learned District Judge by the impugned order directed opposite party no.1 not to remove the child from the territorial jurisdiction of the Bhubaneswar court as the petitioner apprehended that the child may be shifted from the jurisdiction of the Bhubaneswar Court since opposite party no.1 is staying at Punjab.

3. Learned counsel for the petitioner submitted that without considering the welfare of the child, the court below rejected I.A No.42 of 2010 for interim custody of the child. Therefore, the petitioner has filed this writ petition to interfere with the impugned order.

4. Pursuant to the notice issued by this Court on11.03.2010, the opposite parties appeared. Keeping the interest of the child in mind in order to make the assessment of her attachment towards the mother as well as the opposite parties, this Court decided to inter-act with the child. Accordingly, opposite parties 2 and 3, who are the grand-parents of the child produced her on 29.A.2010 before this Court. After personally interacting with the child and taking into consideration the objection raised by opposite party no.1, this Court gave interim custody of the child to the mother for a

period of 7 days from the said date. After 7 days, pursuant to the Court's direction, the child was again produced before the Court and much against the submissions made on the previous date of hearing of the matter, this Court observed that the child was very happy and she preferred her mother's company as the bonding between them was greater than the grant-parents'. This Court taking note of the condition of the child, extended the interim order till 21st May, 2010. On the said date, the case was adjourned to 21st June, 2010 and the interim arrangement has been continuing.

5. During the course of hearing of the matter on 21st June, 2010, learned counsel appearing for the opposite parties submitted that the main application is pending before the learned District Judge. Therefore, the interim order passed by this Court should be vacated and the learned District Judge should hear the matter on merits.

5.1 Learned counsel for the petitioner submitted that since the child is below 5 years and opposite party no.1 has already married for the second time, the custody of the child is to be continued with the mother-the present petitioner and the court below may hear the application on merits.

6. Considering the submissions of the parties and that the matter relates to the custody of the child, this Court is concerned about the welfare of the child which is the paramount consideration.

7. The child admittedly is below 5 years when she appeared before this Court. In course of the personal interaction with the child, she appeared to be quite intelligent and was able to express her feelings. She being less than 5 years of age, is in a very formative and impressionable stage of her life. The welfare of the child is of paramount importance in matter relating to child custody. The welfare of the child has a primacy even over statutory provisions as held by the apex Court in the case of Bikram Bharua v. Salini Bhala reported in (2010) 4 SCC 409.

8. This Court, remembering above factual aspect and the principle of law that it is dealing with a very sensitive issue in considering the nature of care and affection that a child requires in the growing stage of her life and keeping in mind the needs of the child and her welfare, grants the custody of the child- Sanah Satrusal to her mother-the petitioner.

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

Writ petition disposed of.

2011 (I) ILR – CUT- 115

B.N.MAHAPATRA, J.

MACA. NOS.848 & 1133 OF 2009 (Decided on 19.11.2010)

KUNIBALA SAHOO & ORS. **……..** Appellants.

.Vrs.

JAGAMOHAN MAJHI & ANR. …….. Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – SEC.168.

Tribunal has got ample power U/s. 168 M.V. Act, to determine "Just compensation" payable to the claimants irrespective of the amount of compensation claimed in the claim application – There is no restriction that the compensation could be awarded only up to the amount claimed by the claimants and as per the above provision it may be less or more than the amount claimed.

So the expression "Just compensation" would mean what is fair, moderate and reasonable but it should not be arbitrary, fanciful and unjustifiable from the evidence on record.

In the present case the claimants claimed Rs,2,00,000/- in the claim petition – The Tribunal assessed the just compensation as Rs.2,44,800/- - Since the Tribunal wanted to restrict the amount of compensation to the extent claimed by the claimants he has not awarded any amount of compensation towards funeral expenses and loss of consortium – Held, the claimants are entitled to the just compensation held by the Tribunal i.e. Rs.2,44,800 + Rs.2000/- for funeral expenses and Rs.5000/- towards consortium along with interest @ 7% from the date of filing of the claim petition till the date ofdeposit.

Case laws Relied on : -

1.AIR 2003 SC 674 : Nagappa -V- Gurudayal Singh & Ors
2.76 (1993) CLT 605 : Mulla Md. Abdul Wahid -V- Abdul Rahim & Anr.

For Appellants - Mr. Bhimasen Sahoo
For Respondents -Mr. S.Mukherjee
M/s. P.K.Panda, P.K.Padhi & S.K.Bal.
For Appellants - M/s. G.P.Dutta, M.Dutta, A.Ghose, S.K.Mohanty, S.K.Mohanty, B.K.Sahoo S.P.Kar.
For Respondents - Mr. Bhimasen Sahoo
Mr. S.Mukherjee.

B.N.MAHAPATRA, J. These two appeals arise out of an award dated 09.07.2009 passed by the 2nd M.A.C.T., Cuttack in Misc. Case No.505 of 1998. MACA No.848 of 2009 has been filed by the claimant-appellants for enhancement of the compensation whereas MACA No.1133 of 2009 has been filed by the insurer-M/s. Oriental Insurance Company Ltd. for grant of right to make recovery of the awarded amount from the owner of the vehicle.

Since the facts and law involved in these appeals are one and the same, both the appeals are heard together and disposed of by this common judgment.

2. The facts and circumstances giving rise to the present appeal are that the deceased Surendra Kumar Sahoo died in a vehicular accident which took place on 15.12.1997. The claimants (appellants in MACA No.848 of 2009) filed a claim petition before the 2nd M.A.C.T., Cuttack (for short, 'Tribunal') claiming compensation of Rs.2,00,000/- (Rupees two lakhs). After hearing the learned counsel for the parties, the Tribunal came to the conclusion that the claimants are entitled to compensation of Rs.2,44,800/- (Rupees two lakhs forty-four thousand eight hundred) excluding funeral expenses and loss of consortium. However, the Tribunal limited the said compensation to Rs.2,00,000/- on the ground that in the claim petition the claimants had made a claim only to the tune of Rs.2,00,000/-. Hence, the present appeal.

3. Mr. B.Sahoo, learned counsel appearing on behalf of the appellants (in MACA No.848 of 2009) submits that under Section 168 of the Motor Vehicles Act, 1988, the Tribunal is required to determine the just compensation payable to the claimants irrespective of the amount of compensation claimed by the claimants. It is further submitted that once the Tribunal comes to the conclusion that the amount of just compensation is Rs.2,44,800/-, it should not have limited the same to Rs.2,00,000/-. In support of his contention he relied upon the judgment of the apex Court in ***Nagappa vs. Gurudayal Singh and others, AIR 2003 SC 674*** and this Court in ***Mulla Md. Abdul Wahid vs. Abdul Rahim and another, 76 (1993) C.L.T. 605.***

4. Mr. G.P. Dutta, learned counsel appearing on behalf of M/s. Oriental Insurance Company Ltd., submits that the Tribunal has rightly limited the amount of compensation to the extent claimed by the claimants. It is further submitted that at the relevant time of accident, the driver of the offending vehicle did not have valid driving licence. Hence, right of recovery of the awarded amount from the owner of the vehicle may be granted to the Insurance Company.

5. Now the issues involved in the present appeals are:

(i) Whether the Tribunal has duty to determine the just compensation irrespective of the amount of compensation claimed by the claimants?

(ii) Whether the Insurance Company is entitled to grant of right of recovery of the amount of compensation from the owner of the vehicle?

6. So far as issue no.(i) is concerned, it is not in dispute that after hearing the learned counsel for the parties and taking into consideration the oral and documentary evidence, the learned Tribunal came to the conclusion that the claimants are entitled to a compensation of Rs.2,44,800/- excluding the funeral expenses and compensation for loss of consortium. However, the Tribunal limited the said amount of compensation to Rs.2,00,000/- on the ground that in the claim petition the claimants had claimed compensation to the tune of Rs.2,00,000/-. Section 168 of the M.V. Act deals with award of Claims Tribunal. The said section empowers the Claims Tribunal to determine the amount of compensation which appears to it to be just. Therefore, the Tribunal is duty bound to determine the just compensation under Section 168 of the M.V. Act in the given circumstances in a particular case. There is no restriction that the compensation could be awarded only up to the amount claimed by the claimants. This being the intention of the legislature, the determination of just compensation as required under Section 168 of the M.V. Act is nothing to do with the amount of compensation claimed by the claimants. Amount of just compensation determinable under Section 168 of the M.V. Act may be less or more than the amount of compensation claimed by the claimant depending upon the facts and circumstances of a particular case.

7. In the case of ***Nagappa (Supra),*** the apex Court held that under the provisions of Motor Vehicles Act, 1988, there is no restriction that compensation could be awarded only up to the amount claimed by the claimants. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than the amount claimed, the Tribunal may pass such award. Only embargo is — it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V.Act.

This Court in ***Mulla Md. Abdul Wahid (Supra),*** held that the Tribunal has the duty to determine the amount of compensation which appears to it to be just. The expression "just compensation" would obviously mean what is fair, moderate and reasonable and awardable in the proved circumstances of

a particular case and the Tribunal has the power to award compensation more than the amount claimed by the claimants.

8. In view of the above, this Court is of the considered view that the Tribunal is not justified in restricting the amount of compensation to Rs.2,00,000/- after having held that the just compensation in the present case is Rs.2,44,800/- excluding the funeral expenses and compensation for loss of consortium. From para-8 of the impugned award of the Tribunal, it appears that since the Tribunal wanted to restrict the amount of compensation to the extent claimed by the claimants, he has not awarded any amount of compensation towards funeral expenses and loss of consortium. Since this Court holds that the Tribunal is duty bound to determine the just compensation irrespective of the amount of compensation claimed, the claimants are entitled to compensation towards funeral expenses and loss of consortium which is determined at Rs.2,000/- and Rs.5,000/- respectively as provided in the 2nd Schedule of the M.V. Act. Thus, the total amount of compensation which the claimants are entitled to get comes to Rs.2,51,800/- (Rs.2,44,800/- + Rs.2,000/- + Rs.5,000/-)

9. The second issue relates to grant of right of recovery of compensation amount from the owner of the offending vehicle to the Insurance Company. In this regard the categorical finding of the Tribunal in paragraph-9 of the impugned award is that at the relevant time of accident, the driver of the offending vehicle had valid driving licence. Moreover, today Mr. Dutta, learned counsel for the Insurance Company could not be able to adduce any evidence in support of its contention that the driver of the offending vehicle did not have any driving licence at the relevant time of accident.

10. In view of the above, this Court directs the respondent No.2-M/s. Oriental Insurance Company Ltd. in MACA No.848 of 2009 (appellant in MACA No.1133 of 2009) to deposit the above amount of compensation of Rs.2,51,800/- (rupees two lakhs fifty-one thousand and eight hundred) along with interest @ 7% from the date of filing of the claim petition till the date of deposit before the Tribunal within a period of eight weeks from today. On deposit of such amount, the Tribunal shall disburse the same to the claimants in the manner indicated in its impugned award.

On production of receipt in respect of deposit of the awarded amount as directed above before the Tribunal, the Registrar (Judicial) of this Court shall refund the statutory deposited amount of Rs.25,000/- along with interest accrued thereon to the appellant-Oriental Insurance Company Ltd.

11. In the result, MACA No.848 of 2009 filed by the claimant-appellants is allowed, and MACA No.1133 of 2009 filed by appellant-Insurance Company is dismissed. No order as to costs.

MACA No. 848/09 allowed .
MACA No.1133/09 dismissed.

2011 (I) ILR – CUT- 120

B.P.RAY, J.

MACA NO.482 OF 2003 (Decided on 27.08.2010)

MAHESWARI SETHI & ORS. …… Petitioners.

.*Vrs*.

VENKATESWAR RAO & ORS. …… Opp.Parties.

MOTOR VEHICLE ACT, 1988 (ACT NO. 59 OF 1988) – SEC.147.

Tribunal reduced the compensation by 50% on the ground of contributory negligence – No evidence was made on behalf of the Insurance Company to show that there was negligence on the part of the deceased in contributing to the accident – Held, learned Tribunal was wholly unjustified in reducing the compensation by 50% which is unsustainable in law – Claimants are entitled to full compensation as awarded by the Tribunal.

(Para 5)

For Petitioners - M/s. P.Acharya, S.R.Pati, P.K.Ray & B.Dash.
For Opp.Party - Mr. A.K.Mohanty (For O.P.No.2).

B.P.RAY J. This appeal has been filed by the claimants for enhancement of the award passed in M.A.C.T. Misc. Case No. 29/461 of 2001/2000 by the 5th M.A.C.T. Khurda. By the impugned award learned Tribunal held that the claimants are entitled to get compensation to the tune of Rs.9 lakhs and while coming to such conclusion learned Tribunal has reduced the same 50% on the reasoning that due to contributory negligence of the deceased, the total compensation is to be divided by 2 which comes to Rs.4,50,000/- Accordingly, learned Tribunal held that the claimants were entitled to an award of Rs.4,50,000/- with interest @ 6% per annum from the date of filing of the claim application i.e. from 21.12.2000 till its payment. This award is impugned in the present appeal.

2. The fact giving rise to the appeal was that while the deceased was returning to his house on his Scooter at Balugan bazaar on N.H.5 the offending truck bearing registration No. AP-16-U-9817 dashed against the deceased from his back side resultantly the deceased fell down and the truck ran over him for which the deceased died on the spot. The incident took place at about 10.30 P.M. on 20.8.2000. The post mortem examination

over the dead body of the deceased was conducted in the Government Hospital at Banpur and the local police registered a criminal case. It appears from the record that the vehicle in question was validly insured with respondent no.2 covering the date of accident. The deceased was a business man dealing in prawn and fish and was about 42 years of age. According to the claimants the deceased was earning Rs.12,000/- per month.

3. The claimants have examined two witnesses and no witness was examined on behalf of the Insurance Company. The owner was set ex parte. The Insurance Company while denying its liability to pay the compensation challenged the age, occupation and income of the deceased.

4. At the trial the wife of the deceased was examined as p.w.1 and p.w.2 was an eye witness. Learned Tribunal on consideration of all the oral and documentary evidence came to the conclusion that the death of the deceased occurred due to the vehicular accident involving the offending vehicle and it was also further held that the driver of the offending vehicle was rash and negligent in causing the accident. Having held thus, the learned tribunal also made endeavour to find out the contribution of the deceased towards family with reference to the documentary evidence filed by the claimants and accordingly learned tribunal has held that the contribution of the deceased towards the family was Rs.60,000/- per annum and applying 15 multiplier the amount of compensation was arrived at Rs.9 lakhs. This amount of Rs.9 lakhs was divided by 2 by the learned Tribunal on the reasoning that there was contributory negligence on the part of the deceased and on such basis the amount of compensation was fixed at Rs.4.50 lakhs.

5. I have heard learned counsel for the parties and also perused the records. After perusal of the records and the materials available on it, I am of the considered opinion that the learned Tribunal committed manifest error in reducing the quantum of compensation by 50% on the reasoning of contributory negligence. As a matter of fact, no evidence was made on behalf on the Insurance Company to show that there was negligence on the part of the deceased in contributing to the accident. Such reasoning passed by the Tribunal to reduce the quantum of compensation by 50% is within any basis and therefore, I am of the opinion that the learned Tribunal was wholly unjustified in compensation by 50%. Therefore, without disturbing the findings of the learned Tribunal, I hold that the reduction of compensation by 50% is unsustainable. In other words, the claimants are entitled to compensation of Rs.9 lakhs which was arrived at by the learned Tribunal and accordingly, I so direct. The Insurance Company is also directed to deposit the enhanced amount of compensation with 6% interest from the

date of filing of the appeal i.e. 15.7.2003 within a period of two months hence.

6. Now it appears that claimant-respondent no.5 is dead. Out of the enhanced amount of compensation the Tribunal is directed to keep 50% of the enhanced amount in fixed deposit in the name of Respondent Nos. 1 to 4 for a period of 5 years and the balance amount shall be disbursed in favour of the residual claimants.

The appeal is accordingly allowed. No cost.

Appeal allowed.

2011 (I) ILR – CUT- 123

B.K.PATEL, J.

W.P.© NO.6615 OF 2010 (Decided on 4.11.2010)

PADMABATI PATTNAIK @ NAYAK ……. Petitioner**.**

.Vrs.

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

Service law – Anganwadi worker – Recruitment of – Not covered by any statute – As per guidelines applicant should be a permanent resident of the concerned village/AWC area - Petitioner was selected although she secured less points than O.P.5 as O.P.5 failed to file residential certificate – Subsequently O.P.5 produced residential certificate and petitioner's appointment was set aside – Hence the writ petition.

Ordinarily qualification or extra qualification laid down for the recruitment should be considered as on the last date for filing of the application – In this case O.P.5 did not produce permanent residence certificate at the time of filing of application but produced the same subsequently – Held, the impugned order passed on the basis of a certificate subsequently issued and produced is not sustainable in law, hence no illegality in the engagement of the petitioner.

(Para 15)

Case law Referred to :-

(2008) 10 SCC 687 : (Diptimayee Paridav -V- State of Orissa & Ors.).

For Petitioner - M/s. Samir Kumar Mishra, K.R.Mohanty, J.Pradhan, B.Rath & P.Prusty.

For Opp.Parties - N.C.Pati, A.K.Das, M.R.Dash, N.Singh, A.C.Rout. (for O.P.No.5)

B.K. PATEL, J. The petitioner has assailed the legality of order dated 20.3.2010 passed by Sub-Collector,Puri in A.W.W.Misc.(A) No.47 of 2008 setting aside the order of engagement of the petitioner as Anganwadi Worker (for short, 'A.W.W.') of Nadakhanda(Indupur-2) Anganwadi Centre (for short, 'A.W.C.') , directing her disengagement and to issue fresh order of engagement in favour of the opposite party no.5.

2. Pursuant to advertisement under Annexure-1 petitioner and opposite party no.5 submitted applications for engagement as A.W.W.. The last date

of submission of application was 16.2.2008. It was also indicated under Annexure-1 that applicants shall remain present during scrutiny on 18.2.2008. In the advertisement it was stipulated that the applicant must be a permanent resident of the village under A.W.C.. Also the format of application prescribed submission of certificate of permanent residence obtained within preceding six months from the Tahasildar along with the application form. Though the petitioner produced all the requisites including permanent residence certificate, opposite party no.5 did not produce permanent residence certificate along with her application. However, she was granted time to produce the same by 20.2.2008. She could not produce permanent residence certificate on that date also as her application for grant of the certificate was rejected by the Additional Tahasildar, Satyabadi. In such circumstances, though opposite party no.5 secured more points on merit than the petitioner, the petitioner was engaged as A.W.W.. Subsequently by order dated 10.4.2008 passed by the Sub-Collector, Puri in Resident Misc.(A) No.25 of 2008 under Annexure-A/5 preferred by opposite party no.5 against order passed by the Additional Tahasildar rejecting application to grant permanent resident certificate, opposite party no.5 was held to be a permanent resident of concerned village in view of her marriage with a permanent resident of the said village and accordingly permanent residence certificate was issued in her favour on 27.5.2005.

3. Impugned order was passed on the basis of residential certificate obtained by the opposite party no.5 as stated above.

4. It is averred in the counter affidavit filed by opposite party no.5 that the Additional Tahasildar illegally rejected her application for residential certificate. Said order was set aside and residence certificate was directed to be issued by the Sub-Collector holding that the opposite party no.5 was married to a permanent resident of concerned village prior to the date of submission of application for engagement as A.W.W.. Therefore, application of opposite party no.5, who was a permanent residence of the concerned village, had been rejected illegally while engaging the petitioner as A.W.W. By the impugned order illegality committed by the Selection Committee was rectified.

5. In the counter-affidavit filed by the opposite parties 2 to 4, though prayer has been made to dismiss the writ petition, it has been pleaded in paragraph-7 :

> "xxx Opposite party no.5 could not produce the resident certificate according to her undertaking. The Additional Tahasildar did not

issue the residence certificate of Nadakhanda in favour of opposite party no.5. Since she was not belonging to Nadakhanda. After the selection process was over, she married to Kalu Ch.Pradhan of Nadakhanda and got resident certificate from Tahasildar,Satyabadi pursuant to the direction of appellate authority."

6. Learned counsel for the petitioner would submit that the guidelines issued by the State Government prescribes requisite conditions to be eligible for being considered as A.W.W. The foremost condition is that the applicant must be a resident of village included under the A.W.C. The applicant is required to establish her credentials with regard to fulfillment of eligibility criteria on the date of application. Admittedly, opposite party no.5 failed to substantiate her claim of residence not only while filing application but also by the extended date allowed by the C.D.P.O. She got married to a resident of concerned village only after selection of the petitioner as A.W.W. As she was not eligible to be considered for engagement at the time of selection, learned Sub-Collector committed illegality in setting aside the petitioner's engagement and directing engagement of the opposite party no.5. In support of the contentions learned counsel for the petitioner relied upon decision of the Hon'ble Supreme Court in **Diptimayee Paridav –v- State of Orissa and others**: (2008)10 S.C.C. 687.

7. Learned counsel for the opposite party no.5 submitted that grant of residential certificate was illegally rejected by the Additional Tahasildar though the opposite party no.5 was entitled to the required residential certificate in view of her marriage with a permanent resident of concerned village prior to the date of application. In the appeal filed against the order of the Additional Tahasidar rejecting application for resident certificate, Sub-collector categorically came to a finding that opposite party no.5 had got married to a permanent resident of concerned village and thereby acquired residential status prior to the date of application. Therefore, there is no scope to interfere with the impugned order.

8. Leaned counsel for the State appearing for the opposite parties 1 to 4 would submit that opposite party no. 5 secured more points on merit. Though she could not produce required residence certlificate along with her application, Sub-Collector was satisfied regarding status of opposite party no.5 as a permanent resident of the village under A.W.C. Oppoiste party no.5 being more meritorious than the petitioner, her engagement as A.W.W. is in the interest of beneficiaries of the project for which A.W.Cs function.

9. As has been observed in **Diptimayee Paridav –v- State of Orissa and others(supra)** the matter relating to recruitment of A.W.W. is not covered by any statute. Recruitments are made pursuant to the scheme

framed by the Central Government. The State, therefore, while making recruitments in such project in exercise of jurisdiction under Article 162 of the Constitution of India, may issue such guidelines and/or circulars as it may deem fit and proper. The said guidelines are ordinarily binding on all the functionaries working in terms of the "scheme" including the Selection Committees constituted for the recruitment of A.W.W. When marks are fixed specifying the criteria in the rule, the same should be strictly followed. The Selection Committee has not been conferred with any power to grant relaxation. Stages for grant of marks having been fixed; one committee cannot usurp the jurisdiction of the other.

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

11. Rule 1 of the guidelines for selection of A.W.Ws provides:

> "Applications for selection of Volunteers to work as Anganwadi Workers will be invited for each village/Anganwadi Center area from women residing in the said village/Anganwadi Center area."

12. Condition No.1 under Annexure-1 translated into English reads:

> "Applicant should be a permanent resident of the concerned village/A.W.C. area"

13. Annexure-2, the format of application form provides at serial no.7 for enclosing residential certificate obtained from the Tahasildar within six months prior to the date of application.

14. There being no dispute that residential certificate was issued to opposite party no.5 long after the date of selection of A.W.W., obviously application submitted by the opposite party no.5 was incomplete in respect of residential certificate. Residential certificate was issued pursuant to order dated 10.4.2008 passed by the Sub-Collector in Resident Misc.Appeal No.25 of 2008 on the basis of finding with regard to disputed questions of date of marriage of opposite party no.5. Notwithstanding issuance of residential certificate in favour of opposite party no.5 at a subsequent date, Selection Committee which rejected opposite party no.5's candidature on the ground of want of proof regarding permanent residence, could not have considered application of the opposite party no.5 as the Selection Committee took decision of engagement of the petitioner in the manner prescribed by the guidelines. As has been observed earlier, Selection Committee has not been conferred with any power to grant relaxation.

15. In **Diptimayee Paridav –v- State of Orissa and others(supra)** it has been reiterated that ordinarily the qualification or extra qualification laid down for the recruitment should be considered as on the last date for filing of application. Opposite party no.5 having failed to substantiate her claim of qualification for engagement for want of proof regarding permanent residence of the concerned village, there was no illegality in the engagement of the petitioner. Therefore, the impugned order passed on the basis of a certificate subsequently issued and produced is not sustainable in law. Guidelines have been issued to ensure transparency and to prevent arbitrariness. Opposite party no.5 having failed to substantiate proof of residence and thereby having failed to fulfill the requirement under the guidelines, was rightly considered by the Selection Committee to be not eligible for engagement on the date of selection.

16. Therefore, the writ application is allowed and the impugned order is quashed.

Writ petition allowed.

2011 (I) ILR – CUT- 128

B.K.PATEL, J.

W.P.(C) NO.2460 OF 2008 (Decided on 19.11.2010)

UPENDRANATH DEY ……. Petitioner

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.Vrs.

ANANTA KUMAR DEY & ORS. ……. Opp.Parties.

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

Exparte decree – Set aside of – Delay of thirteen years – Ground is non-service of summons against a defendant – Trial Court condoned delay on payment of costs – Hence the writ petition.

Case of the present O.P.1 is that no summons was served on him in the suit – But he came to know regarding the exparte decree when copy of the same was filed in Court by the present petitioner on 30.11.2005 in IA No.3 of 2004 arising out of C.S. No.65 of 2003 - I – No oral or documentary evidence adduced on behalf of the petitioner to indicate service of summons on O.P.1 – Held, no ground to interfere with the impugned order.

(Para 6)

Case laws Referred to:-

1.(1987) CLT (supp.) 428 : (Rabindra Pras Kamilla -V- Abhaya Prasad Kamilla).

2.1992(I) OLR 277 : (Prafulla Chadra Deo -V- Satyanarayan Chandra Deo & Anr.)

3.2003(I) OLR 61 : (Bishnu Charan Malla -V- Sanskarsan Mohapatra @ Behera &Ors)

4.1996 (II) OLR 355 : (Lundu Roudia -V- Dusman Roudia).

For Petitioner - M/s. Ramakanta Mohanty, D.K.Mohanty, A.P.Bose, S.K.Mohanty, P.Jena, D.Patnaik, S.N.Biswal & S.Mohanty.

For Opp.Parties - M/s. P.K.Jena, N.Panda & D.P.Mohapatra (O.P.1)

B.K.PATEL, J. Petitioner has assailed in this writ petition the legality of order dated 28.1.2008 passed by learned Civil Judge, (Junior Division), Jaleswar in Misc. Case No.3 of 2006 by which opposite party no.1's

application under Order 9 Rule 13 of the C.P.C. was allowed and *ex parte* decree passed in T.S. No.130 of 1991 by learned Munsif, Balasore was set aside subject to payment of cost of Rs.4,5000/-.

2. Petitioner is the plaintiff and opposite party no.1 is the defendant no.1 in T.S. No.130 of 1991. Petitioner has filed the suit for correction of M.S. ROR. Petitioner's case is that in response to notice opposite party no.1 entered appearance through Sri B. Jena, Advocate and took time thrice to file written statement. However, as no written statement was filed by opposite party no.1, *ex parte* decree was passed on 2.11.1992 in favour of the petitioner. Pursuant to the decree petitioner filed mutation cases bearing Misc. Case Nos.47 and 48 of 1995 in which also opposite party no.1 did not appear in spite of service of notice and M.S. ROR was corrected. Long after thirteen years, opposite party no.1 filed application under Order 9 Rule 13 of the C.P.C. accompanied by application under Section 5 of the Limitation Act. Petitioner filed objections against both the applications. In support of opposite party no.1's assertions P.W.1 was examined and documents marked Exts.1 to 3 were admitted into evidence. It is averred in the writ petition that without affording any opportunity to the petitioner to cross-examine P.W.1, the impugned order was passed erroneously holding that summons was not served on the opposite party no.1 in the suit.

3. It was contended by the learned counsel for the petitioner that order sheet in T.S. No.130 of 1991 reveals that opposite party no.1 had entered appearance through Sri B. Jena, Advocate on 4.5.1992 and filed petitions for time to file written statement and for setting aside the order setting him *ex parte*. On 24.6.1992 also opposite party no.1 had filed petition for time to file written statement which was allowed subject to payment of cost of Rs.10/-. However, opposite party no.1 neither paid cost nor took any step on 6.7.1992 and 28.7.1992 for which application dated 4.5.1992 to set aside the order setting opposite party no.1 *ex parte* was rejected. Notice was issued to opposite party no.1 in mutation cases also, but he did not participate in the proceeding before the Tahasildar. After long lapse of thirteen years, opposite party no.1 filed application under Order 9 Rule 13 of the C.P.C. on the ground that the petitioner had not supplied correct address of opposite party no.1 and committed fraud on the court in order to obtain *ex parte* decree and that opposite party no.1 had no knowledge regarding the *ex parte* decree till he was told regarding the same by his lawyer appearing in C.S. No.65 of 2003-1. Learned court below passed the impugned order without considering petitioner's objections and without giving him opportunity to cross-examine opposite party no.1's son who was examined as P.W.1. It was strenuously contended that learned court below

had no basis to come to the finding that the opposite party no.1 had no knowledge regarding the *ex parte* decree till filing of application under Order 9 Rule 13 of the C.P.C. in the year 2006.

4. It was contended on behalf of learned counsel for the opposite party no.1 that petitioner practised fraud on the court to obtain *ex parte* decree dated 2.11.1992. No notice was ever served on opposite party no.1 in the suit. He did not execute any Vakalatnama in favour of Sri B. Jena, Advocate. Opposite party no.1 could know about the *ex parte* decree from his lawyer appearing in C.S. No.65 of 2003-1 in which copy of the *ex parte* decree was filed by the petitioner on 30.11.2005. Evidence was adduced on behalf of opposite party no.1 to substantiate such assertions. P.W.1 was cross-examined on behalf of the petitioner. No evidence was adduced on behalf of the petitioner to substantiate the claim that notice was issued to opposite party no.1 or that opposite party no.1 entered appearance through any counsel. Learned court below has passed the impugned order upon perusal of the case record which indicates that service of summons on opposite party no.1 was held by order dated 22.2.1992 to be sufficient after 'refusal postal service'. S.R. and P.A. of opposite party no.1 indicating due service of notice was not available in the case record. Learned court below has awarded exemplary cost of Rs.4,500/- to take care of inconvenience caused to the petitioner. In such circumstances, there is no reason to interfere with the finding of fact regarding non-service of summons in exercise of writ jurisdiction.

5. Non-service of summons against a defendant is one of the two statutory grounds under Order 9 Rule 13 C.P.C. for setting aside a decree passed against him *ex parte*. Provision, inter alia, mandates that in any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly served, court shall make an order setting aside the decree as against him upon such terms as to costs.

It has been held in **Rabindra Pras Kamilla –v- Abhaya Prasad Kamilla**: (1987) CLT (supp.) 428 that Order 9 Rule 13 C.P.C. is a beneficial legislation for the benefit of the defendant against whom *ex parte* decree has been passed. Subject to the specific preconditions, the same is to be interpreted liberally in favour of the defendant applying for setting aside the *ex parte* decree. In **Prafulla Chadra Deo –v- Satyanarayan Chandra Deo and another** : 1992(I) OLR 277 and **Bishnu Charan Malla –v- Sanskarsan Mohapatra alias Behera and others**: 2003(I) OLR 61 it has been observed that even if a defendant might have knowledge of the suit, yet he is within his right to expect an effective service of summons on him

calling upon him to appear in court and unless such service is made, he may avoid the Court. In **Lundu Roudia –v- Dusman Roudia**: 1996(II)OLR 355 it has been held that while dealing with application under Order 9 Rule 13 C.P.C. court should see that the rights of the parties are determined on contest. Approach should not be over technical and contrary to liberal and should be justice oriented.

6. Case of the present opposite party no.1 is that no summons was served on him in the suit. He came to know regarding the *ex parte* decree when copy of the same was filed in court by the petitioner on 30.11.2005 in I.A. No.3 of 2004 arising of Civil Suit No.65 of 2003-I. Application under Order 9 Rule 13 C.P.C. was filed on 16.1.2006 along the application under section 5 of the Limitation Act and a medical certificate indicating opposite party no.1's illness from 1.11.2005 to 13.1.2006. Petitioner filed objections to the petitions filed by the opposite party no.1. Opposite party no.1 had executed power of attorney in favour of his son who was examined as P.W.1. In his affidavit evidence P.W.1 reiterated the assertions made in the applications under Order 9 Rule 13 C.P.C. and section 5 of the Limitation Act. His evidence regarding illness found corroboration from the medical certificate Ext.3. Certified copy of the order in I.A.No.3 of 2004 was also filed at Ext.2. Though order sheets in T.S.No.130 of 1991 indicates that the opposite party no.1 appeared through Mr. B.Jena, Advocate and filed petitions for time on 4.5.1992 and 26.6.1992, no suggestion whatsoever was given to P.W.1 in course of his cross-examination regarding opposite party no.1's appearance in court. P.W.1 appears to have reiterated in course of his cross-examination that no notice was served on his father. Moreover, no oral or documentary evidence was adduced on behalf of the petitioner to indicate service of summons on opposite party no.1. Even the Vakalatnama alleged to have been executed by P.W.1 in favour of Sri B.Jena, Advocate was not confronted to P.W.1. On examination of the case record learned court below does not appear to have found the S.R. and P.A. of opposite party no.1. Finding of the learned court below regarding non-service of summons having been based on the basis of such materials on record, in view of the statutory provisions under Order 9 Rule 13 C.P.C. and legal principles indicated above, there appears no ground to interfere with the impugned order.

Therefore, the writ petition is dismissed.

Writ petition dismissed.

2011 (I) ILR – CUT- 132

B.K.NAYAK, J.

CRLMC. NO.1861 OF 2004 (Decided on 03.09.2010)

NARAYAN MEHER …….. Petitioner.

.Vrs.

MUKTA MEHER & ANR. …….. Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.125, 482.

In a proceeding U/s. 125 Cr.P.C. the Magistrate is not expected to go in to the question regarding the validity of marriage, however, living as husband and wife and being treated by others as such is sufficient for awarding maintenance – Moreover the proceeding being summary in nature ordinarily it is not expected by the Magistrate to insist upon strict proof of marriage.

In the present case the name of the petitioner appears as the father of O.P.2 in the Birth Certificate as well as vaccination card – In the voter list O.P.1 has been described as the wife of the petitioner – There is no contrary evidence forth coming from the side of the petitioner to disbelief marriage – Held, there is no infirmity in the judgments of the Courts below allowing maintenance in favour of the Opp.Parties. (Para 10)

Case laws Referred to:-

1.AIR 1987 SC 1049 : (Balbir Singh -V- State of Hariyana)
2.63 (1987) CLT 628 : (Smt. Ratna Pradhan -V- Abhi Pradhan)
3.(1993) 6 OCR 465 : (Pankaj Naik @ Padmalochan Naik -V- Hemanta Naik)
4.(1988) 1 OCR 44 : (Smt. Jemamani Das @ Panda -V- Sri Umesh Ch.Panda)
5.(1996)10 OCR 360 : (Kshitish Chandra Mishra -V- Smt.Sara Sahoo & Anr.)

For Petitioner - M/s. Himansu Sekhar Mishra, A.K.Mishra, T.K.Sahoo & R.K.Sarangi.
For Opp.Parties - M/s. D.P.Dhal, K.Dash & B.S.Dasparida.

B.K. NAYAK, J. This application under section 482 of the Code of Criminal Procedure has been filed by the petitioner challenging the order dated 30.01.2003 passed by the learned Judicial Magistrate First Class. Barpali in

Crl. Misc.Case No.34 of 2001 granting maintenance of Rs.500/- per month in favour of each of the opposite parties under Section 125 Cr.P.C., which has been confirmed by the judgment dated 29.07.2004 passed by the learned Additional Sessions Judge (F.T.C), Bargarh in Criminal Revision No.14 of 2003.

2. The present opposite party Nos.1 and 2 were respectively petitioner Nos.1 and 2 and the present petitioner was the opposite party in Crl.Misc.Case No.34 of 2001 in the Court of the learned Judicial Magistrate First Class, Barpali. The opposite dparties filed on application under Section 125 of the Code of Criminal Procedure praying for monthly maintenance of Rs.1000/- each from the present petitioner. Their case, in brief, is that the opposite party No.1 and the petitioner were in love with each other and had physical relationship and both of them lived together as wife and husband in the house of the petitioner in their village.While living together they entered into matrimony in a marriage ceremony performed in the house of the present petitioner in presence of village gentries, relations and caste people. Out of their relationship, opposite party No.2. Pramod was born in the year 1999. After the birth of opposite party No.2 the health condition of opposite party No.1 deteriorated and the petitioner started rebuking and neglecting her and did not provide food and medicines. The petitioner and his family members also tortured her both physically and metally on the pretext that her father had not given sufficient dowry at the time of marriage. At the instance of opposite party No.1 a Panchayati was convened, but the petitioner disregarded the decision taken in the said Panchayati for which the opposite parties were forced to take shelter in another house of the petitioner in the same village and were depending upon the charity and mercy of others. It is the further case of the opposite parties that the petitioner is working as a Primary School Teacher and getting monthly salary of Rs.4500/-, besides having cultivable lands in the village.

3. The petitioner filed show cause in the maintenance proceeding denying the allegations made by the opposite parties in their petition. It was admitted by him that he and opposite party No.1 are residents of the same village Ambarmunda. Having denied the relationship between him and opposite party No.1 and their alleged marriage, it was stated that question of birth of opposite party No.2 out of their relationship does not arise. It was stated by the petitioner that before being appointed as Primary School Teacher he was studying outside the village for five years and that opposite party No.1 became pregnant through somebody else, but since both of them belong to the same caste, opposite party No.1 and his family members wrongly asserted that he is the father of opposite party No.2. With such assertions the petitioner claimed for dismissal of the maintenance application.

4. In the proceeding before the learned Judicial Magistrate First Class, Barpali, the opposite parties examined five witnesses including opposite party No.1 as P.W.5 and also led into evidence the birth certificate and vaccination card of opposite party No.2 and true copy of the electoral roll which have been marked as Exts.1,2 and 3. The present petitioner examined three witnesses including himself as O.P.W.No.1.

On consideration of the evidence led by the parties, the learned judicial Magistrate First Class came to hold that opposite party No.1 is the legally married wife of the petitioner and opposite party No.2 is their child and that the petitioner neglected and refused to provide maintenance to the opposite parties, who are unable to maintain themselves. Accordingly, learned Judicial Magistrate First Class, Barpali passed the order directing the petitioner to pay monthly maintenance of Rs.500/- to each of the opposite parties from the date of filing of the maintenance application.

5 Being aggrieved by the aforesaid maintenance order, the petitioner filed Criminal Revision No.14 of 2003 in the Court of the learned Additional Sessions Judge (F.T.C.) Bargarh and the learned revisional Court confirmed the findings of the Trial Court and upheld the maintenance order. The petitioner, has, therefore, approached this Court under Section 482 of the Code of Criminal Procedure.

6 Learned counsel for the petitioner contended that the findings of the Court below with regard to the relationship and marriage between the petitioner and opposite party No.1 and the paternity of opposite party No.2 are completely perverse and suffer from complete non-application of mind to the glaring discrepancies in the evidence of P.Ws and the inherent improbabilities in the case of the opposite parties on account of non-examination of the parents of opposite party No.1 and the priest, who allegedly performed the marriage.

Learned counsel for the opposite parties on the other hand, submits that in a proceeding under section 125 of the Code of Criminal procedure strict proof of marriage between the parties is not warranted and that the clear and consistent evidence of P.Ws coupled with the documentary evidence clearly prove that the opposite party Nos. 1 and 2 are respectively wife and son of the petitioner and both the courts below have assessed the evidence in its right perspective. It is his further submission that findings of fact recorded by both the courts below are well reasoned and free from any perversity and therefore, this second revision in the guise of an application under section 482 of the Code of Criminal procedure is not maintainable to upset the concurrent findings of fact recorded by the Courts below.

7. With regard to the question whether the High Court is competent to interfere with the concurrent findings of the learned Courts below in exercise of its power under Section 482 of the Code of Criminal procedure, the Apex Court in the case of ***Balbir Singh –Vrs. State of Hariyana*** AIR 1987 SC 1049 has observed thus:

> "16. The proper course for the High Court, even if entitled to interfere with the concurrent findings of the Courts below in exercise of its power under S.482 Cr.P.C., should have been to sustain the order of maintenance and direct the respondent to seek an appropriate declaration in the Civil Court, after a full fledged trial, that the child was not born to him and as such he is not legally liable to maintain it. Proceedings under S.125, Cr.P.C., it must be remembered are of a summary nature and are intended to enable destitute wives and children, the latter whether they are legitimate or illegitimate, to get maintenance in a speedy manner. The High Court was, therefore, clearly in error in quashing the order of maintenance in favour of the child".

8. There is absolutely no bar for entertaining a petition under Section 482 Cr.P.C. at the instance of a person who has lost before the trial Court as well as in revision before the Sessions Court. Inherent power of the High Court under section 482 Cr.P.c. is extraordinary in nature and not circumscribed by any other provision of the Code. Such power can be exercised to give effect to any order under the Code, or to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. The power however is to be exercised sparingly. Re-appreciation of evidence so as to reach a different conclusion on a question of fact and to upset the concurrent findings of the Courts below which are otherwise reasonable and based on assessment of evidence is not permissible. It is only where the findings are based on no evidence or suffer from non-consideration of material and relevant evidence that the High Court can interfere with such findings in exercise of inherent power in order to secure the ends of justice.

9. I have gone through the evidence on record carefully, as also the judgments of both the learned Courts below. Opposite party No.1, as petitioner before the trial Court examined five witnesses including herself as P.W.5. All the P.Ws. categorically state that the petitioner and opposite party No.1 had relationship between themselves much prior to the marriage and they both stayed together in the house of the present petitioner and subsequently marriage between them was performed as per their caste custom in which ceremonies like Homa, exchange of garland and Saptapadi were performed. It is also in evidence that a Brahmit Priest, namely, Sundarmani Panigrahi performed the marriage. It is also in evidence of the

witnesses that on the occasion of the marriage a feast was given by the petitioner to the Caste men and villagers. While some P.Ws. state that the feast was given on the date of the marriage, P.W.2 has stated in his cross-examination that feast was given to 7 to 8 days after their demand. It is in the evidence that since the petitioner and opposite party No.1 continued to stay together in the house of the petitioner without a formal marriage, the Caste men demanded a marriage feast. In view of such evidence the statement of P.W.2 in cross-examination can not be interpreted to mean that the marriage feast was given 7 to 8 days after the marriage, as contended by the learned counsel for the petitioner,. It is also contended that non-examination of the parents of opposite party No.1 and the Priest makes the story of marriage improbable. But such contention can not be accepted in view of the evidence of P.W.5 that her parents did not attend the marriage. Besides, non-examination of the Priest is not fatal in as much as there is no contrary evidence on record that Sundarmani Panigrahi did not act as the Priest. Besides oral evidence, opposite party No.1 also proved the Birth Certificate and Vaccination Card of opposite party No.2 as Exts.1 and 2 and the copy of the electoral roll of the village as Ext.3. Ext.1 which has been issued by the Registrar, Birth and Death reveals that opposite party No.2 was bron on 07.06.1999 and the date of registration of such birth is 23.07.1999. It is apparent that on the date of registration of birth of opposite party No.2 there was no dispute between the petitioner and opposite party No.1. Therefore, the name of the petitioner appearing as the father of opposite party No.2 in the Birth Certificate is a strong circumstance about the relationship between the parties and the paternity of opposite party No.2. The Vaccination Card Ext.2 also refers the date of birth of opposite party No.2 and the name of the petitioner as his father. The Voter list of the year 2001 (Ext.3) is a true copy, which has been attested by the Tahasildar, Barpali. In the voter list opposite party No.1 has been described as the wife of the petitioner. As against such evidence, the petitioner examined three witnesses including himself as O.P.W.No.1. While the petitioner only denied his relationship and marriage with opposite party No.1, O.P.Ws.2 and 3 have only expressed their ignorance about the relationship and marriage between the petitioner and opposite party No.1. The learned J.M.F.C., Barpali has considered the entire evidence on record in its proper perspective in order to record his findings with regard to the marital status of opposite party No.1 and paternity of opposite party No.2.

10. It is well settled in a catena of decisions that in a proceeding under Section 125 Cr.P.C. the Magistrate is not expected to go into the question regarding the validity of marriage and that living as husband and wife and being treated by others as such is sufficient for awarding maintenance. In

this context decisions in the cases of ***Smt.Ratna Pradhan v. Abhi Pradhan :*** 63 (1987) CLT 628 : ***Pankaj Naik alias Padmalochan Naik v. Hemanta Naik:*** (1993) 6 OCR 465 and ***Smt.Jemamani Das alias Panda v. Sri Umesh Ch.Panda,*** (1988) 1 OCR 44 may be seen.

The standard of proof regarding marriage in a proceeding under Section 125 Cr.P.C. is not as strict as in a case under Section 494 of the Indian Penal Code. The proceeding being summary in nature, ordinarily it is not expected by the Magistrate to insist upon strict proof of marriage.

11. The learned counsel for the petitioner has placed reliance on the decision of this Court in the case ***of Kshifish Chandra Mishra, vrs. Smt. Sara Sahoo and another*** : (1996) 10 OCR 360 where in a revision against a maintenance order this Court set aside the finding of the magistrate regarding the marriage between the parties. On going through that decision, it is found that there were serious infirmities, improbabilities and incongruity in the case of the alleged wife. Sufficient evidence was led from the side of the alleged husband to show that there was no marriage between the parties. Even though the marriage was claimed to be performed inside a temple, the Priest and Tax Collector of the Temple deposed against the alleged wife stating that there was no such marriage. Testimony of the alleged wife went totally uncorroborated apart from the overwhelming denial evidence adduced on behalf of the alleged husband. The said decision is therefore, non applicable to the facts and circumstances of the present case as no infirmity of the nature found therein are present here.

12. In the light of the discussion made above, I find no infirmity in the judgments of the Courts below. The CRLMC is therefore devoid of merit and as such dismissed.

Application dismissed.

2011 (I) ILR – CUT- 138

S.K.MISHRA, J.

W.P.(C) NO.2086 OF 2010 (Decided on 4.11.2010)

PADMANAVA CHOUDHURY …….. Petitioner.

.Vrs.

DEBENDRA KUMAR MOHANTY ……..Opp.Party.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 39, RULE 1 & 2.

Temporary injunction – Before issuing such order Court must be satisfied; Firstly, that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief asked for by the Plaintiff-petitioner. Secondly, the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable, before his legal right can be established on trial and Thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it.

The first condition is generally termed "a prima facie case" in other words prima-facie existence of a right and its infringement – Prima facie case is not to be confused with prima facie title – Prima facie title can be established by evidence – Prima facie case means, a substantial question raised bonafide which at first sight needs investigation and adjudication – Existence of prima facie case by itself is not sufficient to grant inunction of temporary nature – The applicant has to satisfy the second condition by showing that unless such an injunction is granted in his favour, he shall suffer an injury, which can not be adequately compensated by awarding damages – The third condition is called the principle of balance of convenience – In applying these principles, the Court should weigh the amount of substantial mischief that is likely to be caused to the other side if the injunction is granted – Where all the conditions are satisfied a temporary injunction may never the less be refused for other reasons.

In the present case registered sale deeds have been executed in favour of the present Opp.Party and his name has been mutated in respect of the suit land but fact remains that he has not taken possession of the same so although it is prima-facie established that the Opp.Party has got a bonafide right in his favour but he is not in possession of the suit lands so neither the balance of convenience is

in his favour for issuing injunction nor there is any chance for him to suffer irreparable loss.

Held, status quo order passed by the learned trial Court and confirmed by the appellate Court are quashed.

For Petitioner - M/s. C.Choudhury, B.Mohanty, D.Chhotray, S.Mohanty, & B.Maharana.
For Opp.Party - M/s. B.Mahanty, D.P.Mahanty, R.K.Nayak, B.Das, T.K.Mohanty.

S. K. MISHRA, J. The opposite party in Misc. Case No. 22/241 of 2001, arising out of Title Suit No. 249 of 2001 of the court of the Ist Additional Civil Judge (Senior Division), Bhubaneswar has assailed the order passed by the Civil Judge (Senior Division) on 4th October, 2004, which has been confirmed by the learned Ad hoc Addl. District judge, F.T.C. No.3, Bhubaneswar in F.A.O. No. 24/13/152 of 2006/2004 temporarily injuncting him from creating any disturbance over the suit land.

2. The lands, for which the present case has been initiated, measure an area of Ac.0.41 decs. pertaining to three plots. Those plots are; (i) Plot No.261, Khata No. 296, area Ac.0.18 decs. corresponding to Plot no.261/710, Khata No. 299/11 Area Ac.-.18 decs. (ii) Chaka Plot no.642, Chaka No.229, Area Ac.0.13 decs. of Mouza-Saleswar, and (iii) Khata No. 515, Chaka Plot No.1818, Area Ac.0.10 decs. Mouza-Jagannathpur, Dist. Khurda. The first two plots are the subject matter of the dispute in O.S. No.206 of 1986. The civil litigation is at present pending before this Court in S.A. No.34 of 1996. The third plot bears Chaka Plot No.1818 is the subject matter of O.S. No. 180 of 1999. The matter is at present pending before the learned District Judge, Bhubaneswar in R.F.A. No.73 of 2005. The present opposite party filed a suit for perpetual injunction. In the said suit he filed an application under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure, 1908, hereinafter referred as the Code, for brevity. The opposite party, inter alia, alleged that he purchased the suit land from the original recorded tenant Hata Pradhan under two Regd. Sale Deeds executed on 19.07.1985 and 24.07.1987. Since then, he has been possessing the suit land and it has been mutated in his favour during consolidation operation. It is his further case that the defendant-opp.party no.1, widow of late Hata Pradhan and defendant no.2 claiming as the daughter of said Hata Pradhan challenged the first Sale Deed made by Hata Pradhan in Title Suit no.206 of 1986 before the Munsif, Bhubaneswar. Though the suit was decreed in their favour, the said decree was set aside by the Appellate Court in Title Appeal No.19 of 1988 and the sale deed was held to be valid.

3. The second sale deed was executed by defendant no.1 after the death of Hata Pradhan in Title Suit no.180 of 1999 and the same is still the subject matter of the pending litigation. During the pendency of the said suit, defendant nos.1 and 2 jointly sold the disputed land to the present petitioner on 01.11.2000 knowing fully well that Hata Pradhan has already sold the suit land to the present opposite party. It is the further case of the petitioner that the said Hata Pradhan during his life time has transferred his suit land and defendant no.1 has no right, title or interest over the suit land to transfer the same to opposite party no.2. Hence, the petitioner has not acquired any right, over the suit land. Therefore, he prayed for temporary injunction, claiming that he will suffer irreparable loss otherwise.

4. The present petitioner i.e. the opposite party before the learned Senior Civil Judge filed his objection denying the averments made in the interim application. He, inter alia, pleaded that the petitioner has no cause of action and the suit is bad being hit by Sections 10 and 11 of the Code. The defendants further pleaded that the sale deeds alleged to have been executed by the Hata Pradhan in favour of Debendra Kumar Mohanty are under challenge on the ground that those sale deeds were forged documents. It is specifically pleaded that the Hata Pradhan was an illiterate and he used to affix thumb impression on different documents. Thus, the signatures appearing on the documents purporting to be of Hata Pradhan are forgeries. The present petitioner has further pleaded that Labanyabati Pradhan and Charubala Pradhan while in peaceful possession of the suit land have alienated it in his favour for the legal necessities and delivered possession thereof to him. Since then, the present petitioner is in possession of the suit land. So the petitioner prayed for dismissal of the interim application.

5. After taking into consideration the documents led by both sides and the averments made in the petition as well as in the counter affidavits, the learned Ist Additional Civil Judge (Sr. Division), Bhubaneswar came to the conclusion that a prima facie case exists in favour of the petitioner, balance of convenience lies in favour of issuing injunction and unless such injunction is granted, the petitioner shall suffer irreparable loss. Accordingly, he allowed the Misc. Case on contest and temporarily restrained the opposite parties, i.e. the present petitioner from interfering in the peaceful possession of the petitioner, i.e. the present opposite party over the suit land till disposal of the suit.

The petitioner preferred an appeal before the District Judge, which came to be disposed of by the Ad hoc Additional District Judge, F.T.C.-3, Bhubaneswar, who concurred with the findings recorded by the learned Civil

Judge (Senior Division) and therefore dismissed the Appeal. Such orders of the learned courts of the original and the appellate jurisdiction are called in question in this writ application.

6. In course of hearing of the writ application, the learned counsel for the petitioner submitted that the findings recorded by the learned Civil Judge (Senior Division) as well as the appellate court are erroneous in view of the fact that the lands in question have not been recorded in the name of the present opposite party in any consolidation proceeding. Rather, the lands have been recorded in their name in pursuance of the order passed by the Tahasildar in a Mutation case. Secondly, it is contended that in the earlier litigation i.e. in O.S. No.206 of 1986, the opposite party namely, Debendra Kumar Mohanty has categorically admitted that he has not taken possession of the suit land. Thereafter, on several occasions proceedings were started under section 144 of the Criminal Procedure Code, 1973, (in short, "Cr.P.C.", for brevity). The Executive Magistrate took note of the possession of Labanyabati and her daughter and dropped the proceedings. These facts, it is contended that would show that the said Debendra Mohanty is not in possession of the land in question. He therefore contended that the writ petition be allowed and the orders passed by the courts in original and appellate jurisdiction be set aside.

7. The learned counsel for the opposite party, on the other hand submitted that the court has carefully assessed the materials on record and has come to a just and proper conclusion for which no interference is required. Injunctions are discretionary reliefs. Temporary injunctions are guided by Rules 1 and 2 of Order XXXIX of the Code. The settled principles, which govern the exercise of the discretion conferred on this Court under these rules, are that before issuing any order of temporary injunction, the Court must be satisfied;

firstly, that there is a serious question to be tried in the suit and that on the facts before the Court there is a probability of his being entitled to the relief asked for by the plaintiff –petitioner;

secondly, the Court's interference is necessary to protect him from that species of injury which the Court calls irreparable, before his legal right can be established on trial;

and

thirdly, that the comparative mischief or inconvenience which is likely to issue from withholding the injunction will be greater than that which is likely to arise from granting it.

The first of the above conditions is what is generally termed "a *prima facie* case". In other words, the *prime facie* existence of a right and its infringement is the first condition for the grant of a temporary injunction. *Prima facie* case is not to be confused with *prima facie* title. *Prima facie* title can be established by evidence. On the other hand, a *prima facie* case means, a substantial question raised *bona fide* which at first sight needs investigation and adjudication. But the existence of a *prima facie* case by itself is not sufficient to grant injunction of the temporary nature. The applicant should further satisfy the second condition by showing that unless such an injunction is granted in his favour, he shall suffer an injury, which cannot be adequately compensated by awarding damages. The third condition is called the principle of balance of convenience. In applying these principles, the court should weigh the amount of substantial mischief that is likely to be caused to the applicant if the injunction is refused and balance it with that which is likely to be caused to the other side if the injunction is granted. If on such consideration, the Court comes to the conclusion that pending adjudication of the issues, the subject matter should be maintained in *status quo*, an injunction for that purpose should be issued. It must however be remembered that a temporary injunction should only be granted if all the three conditions are satisfied. Even where all the above conditions are satisfied, a temporary injunction may nevertheless refused for other reasons. This being the principle, the present case should be examined to consider, whether the conditions are fulfilled.

8. As far as prima facie case is concerned, since Regd. Sale Deeds have been executed in favour of the present opposite party and the name of the present opposite party has been mutated with respect to the suit land, it is *prima facie* established that he has got a substantial question of *bona fide* right in his favour. However, coming to the second and third considerations i.e. irreparable loss and balance of convenience, it is seen that the present petitioner, in an earlier litigation, which is pending before this Court at the second appellate stage, has stated before the trial court that as he was not staying in the village he had not taken possession of the suit land. He has further stated that as Hata Pradhan told them at the time of selling his land to the opposite party that he would stay on his land till his death. Hence the opposite party has not taken possession of the land till giving of the deposition. Thus, it appears that as far as part of the suit land is concerned, on execution of the sale deed, he has not taken possession thereof. As far as the other portion of the land is concerned, the leaned counsel for the petitioner drew attention of the court to a series of orders passed by the Executive Magistrate in proceedings under Sections 144 of the Cr.P.C. It appears from those orders that time and again the opposite party has initiated proceedings under section 144 of the Cr.P.C., but the same has

been dropped. Though an order passed under Section 144 of the Cr.P.C. is not binding on the Civil Court nevertheless, the same has to be considered as admissible material especially there is scramble possession and the court is required to determine *prima facie* possession of any of the parties. However, such materials are rebutable, but can only be done so at the stage of adducing evidence by the parties.

9. Thus, it is seen that *prima facie* the contesting opposite party i.e. the petitioner in the original court, is not in possession of suit lands. Hence, neither the balance of convenience is in favour of issuing injunctions, nor there is any chance of him suffering irreparable loss.

10. On the basis of the aforesaid discussion, this Court is of the opinion that the learned courts of original and appellate jurisdiction have come to erroneous findings regarding the conditions of irreparable loss and balance of convenience. Therefore, this court comes to the conclusion that the orders passed by the learned original and appellate court are not sustainable and hence, the same are set aside.

In the result, the writ application is allowed and the orders passed by the learned original court in Annexure-2 and the learned appellate court in Annexure-9 are hereby quashed. No cost.

Writ petition allowed.