**V.GOPALA GOWDA, CJ.**

MISC.CASE NO.49 & 57 OF 2009 (Decided on 15.04.2011)
(ARISING OUT OF ARBP NO.65 OF 2008)

**G.C.KANUNGO** ……. Petitioner.

*.Vrs.*

**ROURKELA STEEL PLANT & ANR.** ……..Opp.Parties.

**A. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.151.**

**Power of Court to recall an order – If an order obtained by fraud by a party to the proceeding and a party had no notice in the said proceeding, the order is a nullity in the eye of law and the Court has every power to recall that order.** (Para 21)

**B. EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S. 114.**
**r/w Section 28 of Post Office Act, 1898.**

**Evidentiary value of a letter sent under certificate of posting – Not comparable to a receipt for sending a communication by registered post – When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the post office – But when a certificate of posting is sought no record is maintained by the post office – Held, in the absence of any record a certificate of posting may be of very little assistance.** (Para 24)

**C. ARBITRATION ACT, 1996 (ACT NO.26 OF 1996 ) – S.11(6), (7).**

**Order passed by the Chief Justice/or his designate U/s.11(6) of the Act – Order reached its finality U/s.11(7) – Such order can not be reviewed by the Chief Justice.** (Para 26)

**D. LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – s.137.**
**r/w Section 43 of the Arbitration Act, 1996.**

**Claim is of the year 1999 – Payment was made on 11.02.99 and the same was received by the petitioner either without any objection or without prejudice to raise the dispute – Application approaching the C.J. U/s.11 (6) was filed in the year 2008 – Held, the application U/s.11(6) is not maintainable being grossly barred by limitation.**
(Para 24)

E. **CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF 1908) – S.11 (4).**

**If a particular plea/document was available to be taken in the former suit or proceeding and such plea had not been taken, such a plea can not be permitted to be taken in a subsequent suit or proceeding by the same party arising out of the same cause of action.**

**In the present case first application U/s.11(6) was filed in the year 2002 – No plea was taken in that application that the petitioner had approached the M.D. for appointment of Arbitrator by letter Dt.19.12.2001 – First application was dismissed by the Chief Justice on 01.10.2007 – Second application U/s.11 (6) filed in the year 2008 seeking appointment of arbitrator – Held, Second application U/s.11 (6) is not maintainable being barred by constructive resjudicata.**

(Para 25.)

**Case laws Referred to:-**

1.2005(8) SCC 618 (P.37) : (SBP & CO. –V- Patel Engineering Ltd. & Anr.)
2.AIR 1932 Bombay 68 : (Pratap Singh-V-Kishanprasad and Co.)
3.AIR 2006 SC 825 : (State of Maharashtra-V- Rashid Babubhai Mulani)
4.2007 Supp.(SC)(2)OLR 545 : (M/s. Narendra Nath Panda & Co.-V-Union of India Three Ors.)
5.1997(9) SCC 97 : (Union of India-V-Momin Construction Company)
6.AIR 2002 SC 1012 : (Konda Lakshmana Bapuji-V-Govt. of Andhra Pradesh & Ors.)
7.AIR 1965 SC 1150 : (Devilal Modi-V-Sales Tax Officer).
8.JT 2010(4) SC 525 : (M.R.F. Ltd.-V-Manohar Parrikar & Ors.)
9.AIR 2000 SC 2301 : (Madhvi Amma Bhawani Amma & Ors.-V-Kunjikutty Pillai Meenakshi Pillai & Ors.)
10.(2010) 3 SCC 353 : (S.Nagaraj (dead by LRs & Ors.-V-B.R.Vasudeva Murthy & Ors. etc.)
11.2009(2) SCC 337 : (Bharat Sanchar Nigam Ltd. & Anr.-V-Motorola India Pvt. Ltd.).
12.1999(2) OLR (SC) 151 : (Budhia Swain & Ors.-V-Gopinath Deb & Ors.)
13. AIR 1980 SC 161 : (Kewal Singh -V- Lajwanti).
14. AIR 1980 SC 161 : (Kewal Singh-V-Lajwanti)
15. AIR 2006 SC 825 : (State of Maharashtra-V- Rashid Babubhai Mulani)
16. 1965 sc 1150 : (Devilal Modi-V-Sales Tax Officer)
17.2007 (Supp.II) OLR 545 : (M/s. Narendra Nath Panda & Co. & Anr.-V-Union of India & three Ors.)

For Petitioner - M/s. Milan Kanungo, Y.Mohanty, D.Pradhan, S.K.Mishra, B.Pattnaik, B.B.Panda, S.N.Das, N.K.Jujhatisingh & R.K.Rath.
For Opp.Parties - M/s. N.Ku.Sahu, B.Swain & N.K.Das.

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***V.GOPALA GOWDA, C.J.*** The petitioner has filed Misc. Case No. 49 of 2009 to modify the order dated 20.5.2009 to the extent of indicating RMD/1 of 1993-94 in place of agreement dated 1.4.1991, whereas the opposite parties have filed Misc. Case No. 57 of 2009 for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2008 and order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 arising out of the said arbitration petition urging various factual and legal grounds.

2. The brief facts are stated for the purpose of appreciating the rival legal contentions urged on behalf of the parties with a view to find out as to whether the opposite parties are entitled for the relief sought for in the aforesaid Misc. Case.

3. Contract bearing No.RMD/1 of 1993-94 was executed between SAIL and the petitioner for handling of different raw materials wagons etc. at different stockyards inside Rourkela Steel Plant by the claimant-contractor. Initially the contract value was for Rs.4,47,66,000/-. The contract was for a period of fifteen months with effect from 1.4.1993 and the same was extended for a further period of two months upto August, 1994. The contract value was amended to Rs.6,53,16,000/-. The contractor was submitting the running bills and he was receiving the admitted amounts as per the terms of the contract. It is stated that he had submitted the final bill and final payment was made vide letter dated 11.02.1999 for an amount of Rs.4,25,677.98 and there was no further claim of the claimant. Therefore, the contract was closed without any objection. Hence, it is stated that the claim now made by the petitioner is an after-thought and with a motive to make wrongful gain for himself. The agreement between the parties provides for resolution of the dispute, i.e., Arbitration Clause 15.0 to 15.5 by arbitratioin through Arbitrator and certain terms and conditions are stipulated in the said contract, vide Clauses 15.1, 15.2., 15.3, 15.4, 15.5 regarding nomination of the Arbitrator by the Managing Director and the dispute regarding supply of materials etc. along with the condition that sittings of the Arbitrator shall take place at Rourkela.

4. The petitioner filed a petition before this Court bearing M.J.C No. 18 of 2002 for appointment of an Arbitrator. This Court vide order dated 1.10.2007 dismissed the petition for the reason that learned counsel for the

petitioner was not able to point out the arbitration clause in the agreement. Apart from that no application appeared to have been filed for invoking the arbitration clause and there was also no averment to that effect in the body of the petition.

5. The petitioner filed a review petition before this Court, which was registered as RVWPET No.3 of 2008. After hearing the learned counsel for the parties, the same came to be dismissed for the reason that though there is an arbitration clause in the agreement, but it was not indicated any where that at any point of time the petitioner approached the opposite parties for appointment of an Arbitrator and the opposite parties have disputed the amount, which is to be paid to the petitioner. Therefore, this Court found no ground for review of the order except granting liberty to the petitioner to approach again to the Chief Justice invoking the jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 in short, "the Act" in case there exists dispute as mentioned in the arbitration clause and the opposite party failed to appoint the Arbitrator. Therefore, the review petition was dismissed without interfering with the order dated 1.10.2007 passed in M.J.C.No. 18 of 2002 with the liberty as mentioned above.

6. It is the further case of the opposite parties that the petitioner without making any request to the named authorities for appointment of an Arbitrator as provided in clause 15.1 of the agreement, by manufacturing a letter dated 29.12.2001 stated to have been sent to the opposite party no.1 by way of Under Certificate of Posting though in fact no such letter was sent to the opposite party no.1 at any point of time requesting him for appointment of an Arbitrator, filed another Arbitration petition before the Chief Justice of this Court, which was registered as ARBP No. 65 of 2008. The said petition was neither served on SAIL, Rourkela Steel Plant nor notice was sent from this Court in the said petition to the opposite parties. However, copy of the petition was served by the claimant-petitioner's counsel on one Mr.Asim Amitav Das, a practicing Advocate of this Court. According to the opposite parties, Mr.Das was never authorized by the SAIL to appear in the aforesaid case. This Court after hearing Mr.Milan Kanungo and Mr.Asim Amitav Das, learned counsel appearing for the petitioner and Rourkela Steel Plant respectively disposed of the aforesaid Arbitration case vide its order dated 20.5.2009 with reference to the clause 15 of the agreement dated 1.4.1991. The then Acting Chief Justice of this Court after hearing the learned counsel for the parties for the reasons recorded in the order referring to the arbitration clause, held that there is no dispute that arbitration clause exists in the agreement and that there are admitted disputes and differences between them and with the consent of the learned counsel appearing for

both parties, appointed Mr.Justice K.P.Mohapatra, a former Judge of this Court as an Arbitrator to decide the dispute between the parties and to pass an award. Accordingly, the Arbitration petition was disposed of.

7. It is stated by the opposite parties that the petitioner by suppressing many material facts, as stated above, and not complying with the statutory requirements as provided in sub-section (6) clauses (a) & (c) of Section 11 of the Act filed ARBP No. 65 of 2008 seeking the indulgence of this Court for appointment of an Arbitrator. For granting such prayer, the petitioner should have served notice upon the opposite party no.1 as required under law and only after giving opportunity of hearing to the parties, necessary appropriate direction should have been given to the respective parties, who have failed to comply with the appointment procedure of an Arbitrator as provided in the clause of the agreement, if any, in relation to any subsisting dispute between them on the date of application. In support of such submission, Mr.N.K.Sahu, learned counsel for the opposite parties has placed reliance upon the decision of the Supreme Court in **SBP & CO. v. Patel Engineering Ltd. And another**, 2005(8) SCC 618 (para-37), and **Pratap Singh v. Kishanprasad and Co,** AIR 1932 Bombay,68.

8. It is the further case of the opposite parties that they never authorized or instructed Mr.Asim Amitav Das, Advocate to appear in the said arbitration case to represent them in the proceedings and vakalatnama was also never given to the said advocate engaging him on their behalf to appear in the above arbitration proceedings before the Chief Justice. It is stated that Mr.Das on the basis of a copy of the arbitration petition being served upon him by the petitioner's counsel appeared in the case without there being any authorization given by the opposite parties. On hearing the learned counsel for both the parties, the said arbitration case was allowed. Further the operative portion of the order dated 20.5.2009 clearly reflects that the then Acting Chief Justice of this Court passed an order on the basis that there is admitted dispute between the parties and both of them have given consent for appointment of Arbitrator to resolve the dispute. In this regard it is vehemently stated by the opposite parties that there is no existing dispute between the parties in terms of the contract on the date of application for appointment of Arbitrator, as final payment was received by the petitioner on 11.2.1999 without raising any objection regarding such payment.

9. It is the further case of the opposite parties with regard to the settled position of law that the Chief Justice or his nominee and the Arbitrator before entertaining a claim of the parties must satisfy himself whether the claim of the party is well within the time on the question of limitation. The claim of the

petitioner is liable to be rejected on the ground of limitation without calling for any other legal proof since final payment to the petitioner in respect of the work in question was made way back in the year 1999 and as per the requirement of law, the right accrued in favour of the petitioner to apply for appointment of an Arbitrator within three years from the date the final payment was made. The final payment was made on 10.2.1999 and no material evidence was produced in the arbitration case to justify that the petitioner approached the authorities within the prescribed period of limitation for appointment of Arbitrator. According to the petitioner the only document available in the arbitration petition is Annexure-4, the letter dated 29.12.2001 purported to have been sent by the petitioner to opposite party no.1 approaching him for appointment of an Arbitrator in terms of the agreement. The same was said to have been sent Under Certificate of Posting, which is seriously disputed by the opposite parties. The authenticity of the said letter is seriously disputed by specifically denying receipt of such letter by the opposite parties at any point of time. Further the documents produced along with the arbitration case would clearly show that the letter claiming payment of final bill was sent by the petitioner to the opposite parties by registered post to the Managing Director for either settlement of the claim or appointment of an Arbitrator for resolution of the dispute between the parties. The said plea has been obviously taken to create cause of action for the petitioner for filing Arbitration petition though the petitioner was not legally entitled to approach the Chief Justice of this Court for appointment of an Arbitrator as the said letter was alleged to have been sent to a party under Certificate of Posting. It is further stated that a letter sent under certificate of posting by a sender is not comparable with a communication sent by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the post office. But when a letter is sent under certificate of posting only a certificate is given to the sender and no record is maintained by the Post Office either about receipt of the letter or the certificate issued. It is stated that certificate can be procured by affixing antedated seal with the connivance of the employee of the post office. No direct evidence is available on record that the original letter was actually put in an envelop and posted Under Certificate of Posting to opposite party no.1 to draw a presumption under Section 114 of the Evidence Act that the letter was posted and received by him. In view of the aforesaid factual and legal position, when the sending of the letter is seriously disputed, the court cannot presume in law in the absence of the materials on record that the opposite parties have received such letter on the basis of the alleged postal seal attached to the letter sent under Certificate posting. Further, it is stated that even assuming though not admitting that such letter was sent, the

dispute was not subsisting between the parties as the petitioner never approached opposite party no.1 for referring the dispute to the Arbitrator as per the agreement, which is a condition precedent as provided under Section 11 of the Act and binding between the parties to the contract. In support of such submission, learned counsel for the opposite parties placed reliance upon the decision of the Supreme Court in the case of **State of Maharashtra v. Rashid Babubhai Mulani**, AIR 2006 SC 825.

10. It is further contended by the learned counsel for the opposite parties that after disposal of the earlier Arbitration petition in M.J.C.No. 18 of 2002, review petition bearing RVWPET No.3 of 2008 was filed. The then Acting Chief Justice has held that there is no material available on record to substantiate that the petitioner had approached the concerned authorities by sending notice and serving upon them for appointment of an Arbitrator, and therefore review petition bearing RVWPET No.3 of 2008 was dismissed. However, liberty was given to the petitioner to file another petition after following due procedure. Therefore, it is contended by learned counsel for the opposite parties that this Court has rightly dismissed the review petition. In support of such contention, he has relied upon the decision of the Supreme Court in **M/s.Narendra Nath Panda and Co. v. Union of India and three others**, 2007 Supp. (SC) (2) OLR, 545.

11. It is further stated that if the letter was sent in the year 2001 to the Managing Director of the Company preferring a claim for appointment of an Arbitrator, the same could have been mentioned in its earlier arbitration petition M.J.C.No. 18 of 2002 filed by the petitioner. From the said fact, an adverse inference to be drawn is that such letter was never in existence and the same has been fabricated for the purpose of this case in order to defeat the statutory requirement as provided in the Act as well as to frustrate the law of limitation regarding maintainability of the application seeking for appointment of an Arbitrator by the then Chief Justice of this Court. In support of such contention, the learned counsel for the opposite parties has placed reliance upon the case of **Union of India v. Momin Construction Company,** 1997(9) SCC 97.

12. It is further submitted by him that the plea taken by the petitioner in Misc. Case No. 49 of 2009 that he has approached the Managing Director of the Company on 29.12.2001 for appointment of an Arbitrator to resolve the dispute is barred by the principles of constructive res-judicata. Learned counsel for the opposite parties placed reliance upon the decision of the Supreme Court in **Konda Lakshmana Bapuji v. Govt. of Andhra Pradesh**

**and others**, AIR 2002 SC 1012 and **Devilal Modi v. Sales Tax Officer**, AIR 1965 SC 1150.

13. It is further urged that the wrong concession made by a counsel who was not authorized by the opposite parties cannot bind the parties if the statutory provision clearly provides otherwise. The applicability of the statutory provision in a given situation or question of liability of a person under any provisions of law invariably depend upon the scope and meaning of the provision and the same has got to be adjudged not on any concession made. Any such concession made by an advocate in the case, who has no authority to represent the party has no relevance and the same could not have even accepted by the then Acting Chief Justice to determine the valuable rights and liability incurred or acquired by the parties in view of the axiomatic principle there can be no estoppel against statute. In relation to the order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 only after receipt of the notice from the named Arbitrator appointed by this Court vide order dated 20.5.2009 in ARBP No. 65 of 2008, the opposite parties came to know that Arbitrator has been appointed. Immediately after receipt of the notice from the Arbitrator on 16.7.2009, the Law Officer of the opposite parties wrote a letter to the concerned Advocate referring to the letter received from the Arbitrator stating that the petitioner has never approached the Managing Director for appointment of an Arbitrator and therefore, the petition under Section 11(6) of the Act filed by the petitioner is not maintainable in law and approaching the Chief Justice of this Court for appointment of an Arbitrator is premature and the Managing Director of Rourkela Steel Plant was neither consulted for appointment of any Arbitrator nor any instruction was given to the said Advocate and the Law Officer requested to file appropriate petition seeking modification of the order. Again on 27.7.2009 the Law Officer requested the said Advocate to send a copy of the petition filed by the petitioner for appointment of an Arbitrator before this Court and to file a petition for modification of the order and also an application for stay of the arbitration proceeding before the Arbitrator in ARBP No. 65 of 2008. After receipt of the letter from the Law Officer, the advocate filed two Misc. Cases, i.e., Misc. Case No.23 of 2009 for recalling of the order dated 20.5.2009 and another Misc. Case No. 24 of 2009 for stay of further proceedings of the arbitration proceedings before the learned Arbitrator. It is stated that from the aforesaid correspondence between the concerned Advocate and the Law Officer of SAIL, Rourkela Steel Plant, it is ascertained that the Company has not received the petition from the petitioner seeking for appointment of an Arbitrator. Therefore, it is not possible on their part to give any comment in the matter. The Acting Chief

Justice of this Court disposed of the aforesaid Misc. Cases on 3.9.2009 with the following observation:

> "As I remember, I put a question to the learned counsel for the parties that if he has any objection in the appointment of Mr.Justice K.P.Mohapatra a retired Judge of this Court as Arbitrator, he had no objection to the same. Therefore, Mr.Justice K.P.Mohapatra was appointed as Arbitrator. This was asked before making appointment of Justice K.P.Mohapatra as Arbitrator only with an intention that if any grievance or bias is reported by the opp.parties, RSP, the same can be said in the instant application."

14. It is further submitted that the reasons assigned by this Court while disposing of the aforesaid Misc. Case Nos. 23 and 24 of 2009 filed by the concerned Advocate has been given with reference to the statement made by the said advocate in the Court while the order was passed on 20.5.2009 in ARBP No.65 of 2008. With reference to the aforesaid factual position, it is stated that the circumstances reveal that the order dated 20.5.2009 passed by the then Acting Chief Justice of this Court is not sustainable in law in view of the fact that no consent was ever given by the opposite parties for appointment of Justice K.P.Mohapatra as the Arbitrator to resolve the dispute between the parties. The so called statement, stated to have been made on behalf of the opposite parties in Court being contrary to the statutory provisions of law, such concession/ consent, if any, made by the Advocate, who had no authority to represent the opposite parties is not binding on them and the said concession or consent does not operate as estoppel against the statute. Under sub-section (6) of Section 11 of the Act, the legislative scheme of Section 11 and the agreement executed by the parties has to be given great importance. If the parties have agreed upon certain procedure for appointing an arbitrator as contemplated under sub-section (2) thereof, then such procedure should be adhered to to appoint an Arbitrator to resolve the dispute between the parties. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing an Arbitrator as contemplated under sub-section (2) of Section 11 of the Act or the various contingencies as provided in sub-section (6). In the instant case the parties have agreed on the procedure for appointment of an Arbitrator for settlement of the dispute by an Arbitrator as provided in sub-section (2) and accordingly executed the agreement with specific clause providing procedure for appointment of an Arbitrator. In the absence of materials whatsoever on record to show that any of the contingencies enumerated in clause (a) or (c) of sub-section (6) has arisen, the application moved by the petitioner before the Chief Justice of this Court

was clearly not maintainable in law and as such, the said application deserved to be dismissed as not maintainable in law for not following the agreed procedure and the claim is barred by limitation and the then Acting Chief Justice had no authority to appoint an Arbitrator. These legal aspects of the matter were not considered by the then Acting Chief Justice in the Misc. Cases filed by the concerned advocate and the opposite parties have no opportunity to ventilate their grievances inasmuch as no notice was issued to them for their appearance in the Arbitration petition proceedings and the circumstances under which the order sought to be recalled was passed, were not within the knowledge of the opposite parties and they had no occasion to bring all these facts for allowing the Misc. Cases filed by them.

15. In support of the averments, an additional affidavit of the Assistant General Manager is filed along with the letter sent by them to the Arbitrator on 27.7.2009.

16. The said petition has been opposed by the petitioner by submitting a date chart along with written note of submission. It is stated that the orders dated 20.5.2009 passed in ARBP No.65 of 2008 and dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 have become final as the same were not challenged before the Supreme Court and therefore, the present Misc. Case, seeking review of the aforesaid orders is not maintainable in law. Further, it is contended by Mr.R.K.Rath, learned Sr. Counsel that after the Misc. Cases were dismissed for the reasons recorded in the order, on 3.10.2009 Vakalatnama was filed by the Managing Director of Rourkela Steel Plant before the learned Arbitrator ( a memo is produced for my perusal). On 30.11.2009 Misc. Case No. 49 of 2009 was filed by the petitioner for modification of the order dated 20.5.2009 due to typographical mistake regarding the date of agreement and on 5.12.2009 the order of the learned Arbitrator reflects the deposit of Rs.40,000/- towards his fees for five sittings by the opposite parties. (memo of the documents is filed for my perusal). On 16.12.2009 counter to the Misc. Case No. 49 of 2009 as well as another Misc. Case No. 57 of 2009 for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2008 and order dated 3.9.2009 passed in Misc. Case Nos.23 and 24 of 2009 was filed by the opposite parties. It is stated that the said orders operate as res- judicata for entertaining the above Misc. Case. In support of such contention, the learned Senior Counsel placed reliance upon decisions of the Supreme Court in **M.R.F. Ltd. v. Manohar Parrikar and others**, reported in JT 2010 (4) SC 525, **Madhvi Amma Bhawani Amma and others v. Kunjikutty Pillai Meenakshi Pillai and**

**others**, AIR 2000 SC 2301 and **S.Nagaraj (dead by LRs and others v. B.R.Vasudeva Murthy and others etc**., (2010) 3 SCC 353.

17. Mr.Rath, learned Sr. Counsel further stated that the present Misc. Case filed by the opposite parties is barred by limitation as provided under Section 43 of the Act. In support of this contention, reliance is placed upon the decision of the apex Court in **Bharat Sanchar Nigam Ltd. and another Vs. Motorola India Pvt. Ltd**., 2009(2) SCC 337.

18. In view of the aforesaid legal contentions, Mr.Rath, learned Sr. Counsel contends that the order dated 20.5.2009 be modified by allowing Misc. Case No. 49 of 2009 and Misc. Case No. 57 of 2009 be dismissed as not maintainable in law being barred by res judicata as well as being barred by limitation under Section 43 of the Act.

19. With reference to the said rival, factual and legal contentions, the following points would arise for my consideration:

(i) Whether the Misc. Case filed for recalling the order dated 20.5.2009 passed in ARBP No. 65 of 2009 and the consequential order dated 3.9.2009 in Misc. Case Nos.23 and 24 of 2009 is maintainable in the eye of law?

(ii) Whether the opposite parties have made out a case for recalling of the aforesaid orders ?

(iii) Whether the filing of the arbitration petition bearing ARBP No.65 of 2008 by the petitioner invoking the power of the Chief Justice under Section 11(6) of the Act for appointment of Arbitrator is barred by law of limitation?

(iv) Whether the filing of the subsequent petition under Section 11(6) of the Act is at all maintainable without fulfilling the statutory and contractual requirements as provided under the Act and in the agreement in question?

(v) Whether in order to satisfy the pre-requisite condition for entertaining an application under Section 11(6) of the Act, the purported letter dated 29.12.2001 filed by the petitioner is at all to be accepted under the law as a valid piece of evidence to substantiate the fact that the petitioner had approached the Managing Director for appointment of Arbitrator and he failed to do so ?

(vi) Whether the plea taken by the petitioner with regard to approach to the Managing Director by issuing the purported letter for filing ARBP No.65 of 2008 after the earlier M.J.C.No.18 of 2002 was dismissed on 1.10.2007, which was also affirmed in SLP (Civil) No. 24867 of 2007, is barred by the principle of constructive res judicata ?

(vii) Whether the review petition bearing RVWPET No.3 of 2008 challenging the order dated 1.10.2007 passed in M.J.C. No. 18 of 2002 was at all held to be maintainable in the eye of law and on the basis of the operative portion of the order dated 10.7.2008 passed in the aforesaid review, the second arbitration petition bearing ARBP No.65 of 2008 is at all maintainable under law ?

(viii) Whether it can at all be held that as the opposite parties have participated in the proceeding before the Arbitrator, their right to challenge the order dated 20.5.2009 by filing the recall petition has been waived ?

20. Points (i) & (ii) are required to be answered in favour of the opposite parties for the following reasons.

21. It is an undisputed fact that earlier arbitration petition under Section 11(6) of the Act filed by the petitioner in M.J.C.No. 18 of 2002 was dismissed vide order dated 1.10.2007. That order was affirmed by the Supreme Court in SLP (Civil) No. 24867 of 2007 vide its order dated 10.1.2008. While disposing of the said Special Leave Petition, it was observed that learned counsel for the petitioner desires to withdraw the Special Leave petition with a view to file review petition before the High Court and the Supreme Court allowed the counsel for the petitioner to withdraw and the special leave petition was dismissed as withdrawn. Pursuant to the same, review petition being RVWPET No.3 of 2008 was filed. Learned the then Acting Chief Justice of this Court dismissed the same holding that though there is an arbitration clause in the agreement, it was not indicated any where at any point of time that the petitioner approached the opposite parties to appoint an Arbitrator and the opposite parties have disputed the amount, which is to be paid to the petitioner. Therefore, there was no ground for review of the said order except granting liberty to the petitioner to approach again to the Chief Justice invoking the jurisdiction under Section 11 of the Act. The then Acting Chief Justice while making such observation has made it clear that the review petition was disposed of without interfering with the order dated 1.10.2007 passed in M.J.C.No. 18 of 2002. The said observation made in the review petition order would confer a statutory right upon the petitioner to

approach the Chief Justice of the High Court again by filing another arbitration petition under Section 11(6), even though there is no live claim of the petitioner as the same is barred by limitation in view of the assertion made by the opposite parties that final bill was settled on 11.02.1999 and with the dismissal of the earlier arbitration case, the same operates as res-judicata and the review petition was dismissed without interfering with the order dated 1.10.2007. The liberty given to the petitioner in review petition order is subject to the right available to the petitioner under the provisions of the Act. Therefore, I have to state that the second arbitration petition without placing demand upon the Managing Director of the Company as required in law to settle the claim or appoint an Arbitrator as provided under clause 15.1 as per the finding recorded in the earlier order, the Arbitration petition is not maintainable as the claim of the petitioner was also barred by limitation because the provisions of the Limitation Act would apply to the Arbitration proceeding under the Act in view of Section 43 of the Act, since the same was filed by the petitioner in the year 2008. Therefore, the order allowing the petition without issuing notice to the opposite parties and serving the same upon the opposite parties on the basis of the concession made by Mr.Asim Amitav Das on whom a copy of the petition was served by the learned counsel for the petitioner in the second Arbitration petition who has no authority or instruction to represent the Company and appointing Justice K.P.Mohapatra as the Arbitrator, therefore, is a nullity in the eye of law for more than one reason, namely, the petition is barred by constructive res-judicata as held by the Supreme Court in Konda Lakshmana Bapuji (supra). The relevant portion of the said judgment is extracted below:

> "….. Section 11 of the Code of Civil Procedure incorporates the principles of res judicata which, in short, means a matter which has already been adjudged judicially between the same parties. In substance, Section 11 bars a Court from trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a Court and has been heard and finally decided by such Court which is competent to try such subsequent suit or the suit in which such suit has been subsequently raised……" (para-23)

This important legal aspect of the matter has not been considered by the then Acting Chief Justice when the order was passed in the second arbitration petition. This aspect was also not noticed by the learned the then Acting Chief Justice of this Court while disposing of Misc. Case Nos.23 and 24 of 2009 filed by the opposite parties. Therefore, the petition filed by them to recall the order urging various grounds and legal contentions is

maintainable as the order was obtained in ignorance of the fact that necessary notice in the proceedings had not been served at all upon the opposite parties. If the judgment was obtained by fraud by a party to the proceedings and a party had no notice in the proceedings, the order is a nullity in the eye of law. In support of such contention, he has placed reliance upon the decision of this Court in **Budhia Swain and others v. Gopinath Deb and others**, 1999(2) OLR (SC) 151, the relevant portion of which is extracted below:

> "…….. The grounds on which the Courts may open or vacate their judgments are generally matters which render the judgment void or which are specified in statutes authorizing such actions. Invalidity of the judgment of such a nature as to render it void is a valid ground for vacating it at least if the invalidity is apparent on the fact of the record. Fraud or collusion in obtaining a judgment is a sufficient ground for opening or vacating it. A judgment secured in violation of an agreement not to enter a judgment may be vacated on that ground. However, in general a judgment will not be opened or vacated on grounds which could have been pleaded in the original action….." (para-7)

In view of the aforesaid settled position of law, it is apparent on the face of the record that no notice was sent to the opposite parties in the second arbitration proceedings. The above aspect was not being considered by the then Acting Chief Justice while disposing of Misc. Case Nos. 23 and 24 of 2009 vide common order dated 3.9.2009. Therefore, the Misc. Case filed by the opposite parties is maintainable in law and the same is neither barred by constructive res-judicata nor limitation as the order of appointment of the Arbitrator is a nullity in the eye of law and the orders passed in Miscellaneous petitions without considering legal aspects is bad in law, hence, the said order does not operate as res-judicata. It is apt to extract what the apex Court said in this regard in **Kewal Singh v. Lajwanti,** AIR1980 SC 161:

> "…….. as regards the question of constructive res judicata it has no application whatsoever in the instant case. It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally decided between the parties.

22. In view of the aforesaid reasons, the contention urged by Mr.R.K.Rath, learned Sr. Counsel that the order passed in the Misc. Cases

referred to supra operates as res-judicata, has no application to the facts of the case as the said decision will apply against the petitioner in view of the dismissal of the earlier arbitration case since the same has become final and the petitioner has no right to maintain the second Arbitration petition solely on the basis of the liberty given in the order passed in the Review Petition. The liberty given to a party has to be examined with reference to the law and if the claim is barred by limitation, the second petition is not at all maintainable.

23. For the reasons stated supra, the opposite parties have made out a case for recalling the aforesaid order. Accordingly, point nos.(i) & (ii) are answered in favour of the opposite parties.

24. Point Nos.(iii) and (iv) are also required to be answered in favour of the opposite parties for the reasons that the claim for appointment of Arbitrator is barred by limitation because the final bill was submitted by the petitioner in the year 1999 and payment was made on 11.02.1999 and the same was received by the petitioner either without any objection or without prejudice to raise the dispute. The earlier arbitration case being M.J.C.No. 18 of 2002 was dismissed on 1.10.2007 for the reasons that no claim was made upon the Managing Director of the opposite party company and the same has attained finality as the SLP filed by the petitioner came to be withdrawn on 10.1.2008 and the review petition filed was also dismissed on 10.7.2008. In respect of the very same claim the subsequent application is barred by limitation as the provisions of the Limitation Act are applicable to the arbitration proceedings under the Arbitration & Conciliation Act as per Section 43 of the Act. Therefore, the claim of the petitioner is not at all maintainable in law as the same has been filed without satisfying the pre-requisite condition of service of statutory notice upon the opposite party no.1 to entertain an application under Section 11(6) of the Act as the purported letter dated 29.12.2001 alleged to have been sent to the opposite party no.1 under Certificate of Posting was not mentioned in MJC No.18 of 2002 and not produced and no tenable explanation is forthcoming as to why the same is not produced before the apex Court and in the Review Petition and therefore, I have to hold that the said document is a fabricated document which could not have even accepted by the then Chief Justice. The notice must have been sent to the opposite party no.1 by registered post with acknowledgment due either for settlement of claim or for appointment of an Arbitrator. In the absence of such material the finding recorded in the earlier arbitration case bearing MJC No.18 of 2002 that there is no notice served upon the opposite party no.1 is factually correct and in view of the said finding placing the very same letter by the petitioner in the subsequent

second Arbitration proceedings, the contention urged on behalf of the opposite parties that it is a concocted document to maintain the arbitration petition before this Court has to be accepted as correct. The Supreme Court in the case of **State of Maharashtra v. Rashid Babubhai Mulani**, AIR 2006 S.C.825 held that a certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the post office either about the receipt of the letter or the certificate issued. The relevant portion of the said judgment is quoted below:

> "A certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the Post Office. But no record is maintained by the Post office either about the receipt of the letter or the certificate issued. The ease with which such certificate can be procured by affixing ante-dated seal with the connivance of any employee of the Post Office is a matter of concerned. The Department of Posts may have to evolve some procedure whereby a record in regard to the issuance of certificates is regularly maintained showing a serial number, date, sender's name and addressee's name to avoid misuse. In the absence of such a record, a certificate of posting may be of very little assistance, where the dispatch of such communications is disputed or denied …….. " (para 14)

In the absence of such a record, a certificate of posting may be of very little assistance to the petitioner, where the dispatch of such communications is disputed or denied as in the present case. Therefore, I have to reiterate the finding recorded by my predecessor in his order dated 1.10.2007 that there is no notice issued and served upon the opposite parties to maintain the arbitration case. Hence, point no.(v) is also accordingly answered against the petitioner.

25. Point No.(vi) is also required to be answered against the petitioner in view of the finding recorded that Misc. Case filed by the opposite parties is maintainable holding that the second arbitration petition operated as constructive res judicata under Section 11(4). The Apex Court in *Devilal Modi v. Sales Tax Officer (supra)* held that if constructive res-judicata were not applied to such proceedings, a party could file as many writ petitions as he liked and take one or two points every time. That clearly was opposed to

considerations of public policy on which res-judicata was based and would mean harassment and hardship to the opponent. Besides, if such a course were allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected. The relevant portion of the said judgment is extracted below:

> "……. At the hearing of this appeal, he has filed another petition asking for leave from this Court to take some more additional points and that shows that if constructive res-judicata is not applied to such proceedings a party can file as many writ petitions as he likes and take one or two points every time. That clearly is opposed to considerations of public policy on which res judicata is based and would mean harassment and hardship to the opponent. Besides, if such a course is allowed to be adopted, the doctrine of finality of judgments pronounced by this Court would also be materially affected. …."

In view of the aforesaid decision of the apex Court, the point No. (vi) is also answered in favour of the opposite parties.

26. For the reasons stated supra and dismissal of the review petition being RVWPET No.3 of 2008 not interfering with the order dated 1.10.2007 passed in MJC No.18 of 2002, the second arbitration petition filed by the petitioner is not at all maintainable in law. This Court in **M/s.Narendra Nath Panda & Co. and another v. Union of India and three others**, 2007(Supp.II) OLR-545 referring to the decisions of the Supreme Court held that a provision for review is not normally procedural at all. Review is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given under Section 11(7) of the Act finality to a decision of the Chief Justice or his designate under Section 11(6) of the Act and has not provided for review, then to read a right of review in such provisions by an interpretation process would, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act. The relevant portion of the said judgment is quoted below:

> "A provision for review is not normally procedural at all. Review is in the nature of a remedy and is a substantive part. Therefore, when the Legislature has consciously given under Section 11(7) finality to a decision of the Chief Justice or his designate under Section 11(6) of the Act and has not provided for review, then to read a right of review in such provisions by an

> interpretation process would, in my opinion, amount to amending the statute by reading something into it which is clearly not there. Such an interpretation would fall foul of Section 5 of the Act. Therefore, the decision on the construction of purely procedural aspect of law does not cover the present situation."

Keeping in view the decision referred to above, point no.(vii) is answered against the petitioner.

27. Point No.(viii) is also required to be answered against the petitioner for the reason that the order, which was passed is held to be a nullity and mere engaging a lawyer or depositing the amount towards the fees of the Arbitrator will not waive the right of the opposite parties to challenge the order dated 20.5.2009 for filing petition for recalling the order, which is vitiated in law and suffers from nullity in the eye of law. For the reasons recorded above in answer to the aforesaid contentious points, the order passed on 20.5.2009 is a nullity for various reasons as indicated above. Therefore, the right of the opposite parties is not waived. Engaging a lawyer or depositing the amount shall not come in the way for the opposite parties to challenge the said orders seeking for setting aside the same. Accordingly, the said point is also answered in favour of the opposite parties.

28. For the aforesaid reasons, as all the contentious points have been answered in favour of the opposite parties by accepting the legal contentions urged on their behalf which are based on the decisions of the Apex Court on various legal principles therefore, the same are accepted as they are well founded. But on the other hand, the submissions made by the learned Senior Counsel appearing on behalf of the petitioner are wholly untenable in law and therefore, the same cannot be accepted.

29. For the reasons stated above, the Misc. Case No. 57 of 2009 is allowed and orders dated 20.5.2009 passed in ARBP No.65 of 2008 and dated 3.9.2009 passed Misc. Case Nos.23 and 24 of 2009 are hereby recalled. The Misc. Case No. 49 of 2009 filed by the petitioner for modification of the order dated 20.5.2009 stands dismissed.

M.C.No.57/09 is allowed.
M.C.No.49/09 is allowed.

**2012 ( I ) ILR- CUT- 19**

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

MISC.CASE NO.8071 OF 2011 (Decided on 09.09.2011)
(Arising out of W.P.( C) No.14884 of 2011)

**NISHAKAR KHATUA & FIVE ORS**. …… Petitioner

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART.300-A**.

**Acquisition of lands in favour of POSCO, a private Company for establishment of Steel Plant – Notification made U/s. 4 (1) of the L. A. Act to acquire lands for public purposes – Writ petition filed by land owners/losers challenging such acquisition is maintainable.**

**Issuance of notification U/s. 4(1) read with Section 17(4) L.A. Act is not permissible in law – Dispensing with the provision U/s.5-A of the L.A. Act for conducting an enquiry by giving reasonable opportunity to the land losers is a clear case of violation of their statutory as well as Constitutional rights – Held, petitioners have made out a prima-facie case in their favour – Direction issued to maintain status quo as on today in respect of the private lands of the concerned villages till disposal of the writ petition.** (Para 36 to 41)

**Case laws Referred to:-**

1.(2009)10 SCC 115 : (Babu Ram & Anr.-V- State of Haryana & Anr.)
2.(2011) 4 SCC 769 : (Dev Sharan & Ors.-V- State of Uttar Pradesh & Ors.)
3.(2011) 5 SCC 553 : (Radhey Shyam & Ors.-V-State of Uttar Pradesh & Ors.)
4.AIR 1982 SC 149 : (S.P.Gupta-V- Union of India)
5.(1982) 3 SCC 235 : (People's Union for Democratic Rights & Ors.-V- Union of India & Ors.)
6.(1986) 2 SCC 594 : (Chaitanya Kumar & Ors.-V-State of Karnataka & Ors.)
7.(2003) 7 SCC 546 : (Guruvayoor Deveswom Managing Committee & Anr.-V- K.C.Rajan & Ors.)
8.(2005) 5 SCC 598 : (Ashok Lanka & Anr.-V-Rishi Dixit & Ors.)
9.(2008) 12 SCC 541: (Indian Bank-V- Godhara Nagrik Co-operative Credit Society Ltd. & Anr.)

10.(2003) 1 SCC 335 : (Northern India Glass India-V- Jaswant Singh)
11.(1984) 2 SCC 624 : (Hari Singh-V- State of U.P.)
12.(2003) 10 SCC 626 : (Pratibha Nema & Ors.-V- State of M.P. & Ors.)
13.(2010) 10 SCC 292 : (Nand Kishore Gupta & Ors.-V-State of U.P. & Ors.)
14.AIR 2003 SC 234 : (Northern Indian Glass Industries-V- Jaswant Singh & Ors.)
15.AIR 1997 SC 482 : (Municipal Corporation of Greater Bombay-V- The Industrial Development & Investment Co. Pvt. Ltd. & Ors.)
16.(2010) 3 SCC 402 : (State of Uttaranchal-V-Balwant Singh Chaufal)

For Petitioner - M/s. Jayant Das, Sr. Advocate
M/s. S.N.Mishra, Aditya N. Das, N.Sarkar, E.A.Das & P.Mishra.
For Opp.Parties - Mr. Asok Mohyanty, Advocate General, (for O.P.1 & 2)
M/s. Jagannath Patnaik, Sr. Advocate B.Mohanty, T.K.Patnaik, A.Patra, S.Patnaik, M.S. Rizvi, B.S.Raiguru, P.Ray, L.Pangari, B.Jena, A.Das (for O.P.3)
M/s. Sanjit Mohanty, Sr. Advocate S.Mohanty, R.R.Swain & S.Nanda (for O.P.4)

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***V.GOPALA GOWDA, C.J.*** The petitioner nos. 1 to 6 are the owners of the lands located at villages Dhinkia, Govindpur, Bhuyanpal, Polanga, Bayanala Kandha, Nolia Sahi and Nuagaon covered under the impugned notifications Annexure-2 series issued under Sections 4 and 6 of the Land Acquisition Act. They have filed the present writ petition on their behalf and on behalf of the other land owners whose lands are covered under the said notifications and who have no access to justice seeking the following reliefs urging various facts and legal contentions.

(i) admit and allow this writ application with costs;

(ii) declare/hold that the land acquisition proceedings initiated under and pursuant to Annexure-2 series hereto are bereft of jurisdiction and are ab initio void and non-est in the eyes of law and accordingly, quash the same with exemplary costs with consequent direction to return any land forcibly and illegally taken pursuant to Annexure-2 series; and

(iii) direct/order that the possession, nature, character and use of the concerned land owners in villages Dhinkia, Govindpur, Bhuyanpal, Polanga, Nolia Sahi, Bayanala Kandha and Nuagaon

(affected by the Annexure-2 series hereto) shall not be alterted (and accordingly maintain status quo ), pending disposal of this writ petition; and

(iv) pass such other orders/directions as may be deemed fit and proper (including appropriately moulding the reliefs) in the bona fide interest of justice.

2. In the said writ petition, Misc. Case No. 8071 of 2011 has also been filed praying for the following interim reliefs urging various facts and placing reliance upon the documents produced in support of the writ petition.

(i) admit and allow this misc. application; and

(ii) direct/order that no pursuant and consequential actions/steps shall be taken pursuant to the notifications as at Annexure-2 series to the writ application, pending disposal of the writ application; and

(iii) direct/order that further operation of the orders/notifications as at Annexure-2 series shall remain halted pursuant to an order of stay against the said orders/notifications, pending disposal of the writ petition; and

(iv) direct/order that status quo as on date shall be maintained regarding possession, right, title, interest, nature, character and use of the lands covered by the orders/notifications as at Annexure-2 series to the writ petition, pending disposal of the writ petition; and

(v) pass such other order/directions as may be deemed fit and proper in the bona fide interest of justice.

3. Relevant brief facts are stated for the purpose of examining as to whether the petitioners herein have made out a prima facie case for granting the prayers made in the Misc. Case as extracted supra by this Court during the pendency of the writ petition.

4. The State Government has issued the impugned notifications under Sections 4 and 6 of the Land Acquisition Act (hereinafter called the 'L.A. Act') to acquire the lands in favour of the proposed Steel Plant of M/s.

POSCO India Pvt.Ltd. (hereinafter called in short 'POSCO'). The acquisition proceedings have been started at the instance of the Orissa Industrial Infrastructure Development Corporation (hereinafter called in short 'the Corporation'), a statutory Corporation having its registered office at IDCO Towers, Janpath, Bhubaneswar to acquire lands in favour of POSCO, a Company registered under the Companies Act, 1956 having its registered office at Fortune Towers, Chandrasekharpur, Bhubaneswar represented by its Managing Director who is opposite party no.4 in the writ petition. The Corporation made requisition to the District Collector of Jagatsinghpur to acquire the land for the purpose of establishing the proposed Steel Plant by POSCO. Accordingly, Section 4 notifications were issued to acquire the land of the villages covered in the impugned notifications for the public purpose in favour of the POSCO Company to establish its Steel Plant in the acquired land. The case of the petitioners is that the acquisition of land in the name of POSCO through the Corporation is not permissible in law as the acquisition of land is in favour of a Private Company. Therefore, the acquisition of land must be made by the State Government by following the procedure contemplated in Part VII of the L.A. Act. It is further stated that the waiver of statutory right of the land owners under Section 5(A) of the L.A. Act by the State Government by resorting to emergency provision of Section 17(4) of the L.A. Act is a colourable and mala fide exercise of power by the State Government there being no emergency as provided in Section 17(2) in respect of the acquisition of land in favour of POSCO Company for the establishment of proposed Steel Plant. Therefore, it is stated that exercising the power by the State Government waiving the statutory right under Section 5A of the Act is bad in law and publishing section 4(1) read with Section 17(4) notifications without there being an order of the State Government to invoke emergency clause is a gross and patent violation of the fundamental

and statutory rights guaranteed to the petitioners and other land owners under Articles 14,19 and 21 and Constitutional right guaranteed under Article 300A of the Constitution of India. It is further stated that there has been no emergency of the nature mentioned in Section 17(2) which is evident from the latest status report posted in the official website of District Jagatsinghpur which indicates that notwithstanding the issue of impugned notice under Section 4(1) of the Act, subsequent progress of the acquisition work has been held up as agitationists are not allowing entry of any revenue personnel into the concerned area in connection with land acquisition work.

5. It is further stated that the impugned land acquisition proceedings have been initiated through the opposite party no.3, which describes itself as 'Nodal Agency' for land acquisition in its website.

6. It is stated that the Corporation is not competent to acquire the lands exclusively for any particular Company and could only under certain circumstances, acquire land for an 'industrial estate' or an 'industrial area' as defined in Orissa Industrial Infrastructure Development Corporation Act, 1980 (hereinafter called in short 'IDCO Act'). It is stated that the impugned notifications under Section 6 were published beyond one year from the date of publication of notification under Section 4 (1) in respect of the land covered under Annexure-2 series. The date of publication of Section 4 notifications and date of publication of notifications under Section 6 and date of awards passed are clearly described in the table furnished by the petitioners' counsel during the course of argument for better appreciation of the case which is as under:

| A | B | C | D | E | F | G | H | I | J | K | L |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Sl .No.* | *Notification on Sec. 4 of L.A. Act read with S.17(1) & 17(4) of L.A. Act.* | *Mouza* | *Notification No.* | *Date* | *Gazette Notification Date* | *U/s .6 L.A. Act* | *Notification No.* | *Date of Declaration beyond one yr.of S.4(1) Notification- Gross Violation of S.6(1) proviso (ii) – see col.F* | *Date of notification* | *S.9 Notice (no service of notice)* | *Date of award u/s 11 is beyond two years from the date of declaration u/s.6 and hit by S.11(1) –See Col..I* |
| 1 | 4 | Bayanala Kandha | 51323 | 28.12.05 | 2.1.2006 | 6 | 41533 | 17.10.07 | 21.11.07 | No notice | Beyond Two years |
| 2 | 4 | Bhuyan-pala | 51337 | 28.12.05 | 2.1.2006 | 6 | 44682 | 13.11.07 | 22.11.07 | No notice | Beyond Two years |
| 3 | 4 | Nuagaon | 51344 | 28.12.05 | 2.1.2006 | 6 | 44726 | 13.11.07 | 22.11.07 | No notice | Beyond Two years |
| 4 | 4 | Nolia Sahi | 51351 | 28.12.05 | 2.1.2006 | 6 | 45278 | 16.11.07 | 22.11.07 | No notice | Beyond Two years |
| 5 | 4 | Polanga | 51330 | 28.12.05 | 2.1.2006 | 6 | 45318 | 16.11.07 | 22.11.07 | No notice | Beyond Two years |
| 6 | 4 | Gobinda-pur | 307 | 4.1.06 | 16.3.2006 | 6 | 45324 | 16.11.07 | 22.11.07 | No notice | Beyond Two years |
| 7 | 4 | Dhinkia | 315 | 4.1.06 | 16.3.2006 | 6 | 45330 | 16.11.07 | 22.11.07 | No notice | Beyond Two years |

7. It is stated that no notice under Section 9 was issued and served upon the petitioners and other land owners before passing awards by determining the market value of their acquired land and that the awards have been passed beyond the period of two years. Further, there is no approval of the awards passed by the Land Acquisition Officer by the State Government which is required under the first proviso to Section 11 of the Act. Therefore, the impugned awards passed are void ab initio and they are not legal and valid. It is stated that the land acquisition is for POSCO Private Limited Company, a wholly owned subsidiary of Pohang Steel Company located in South Korea and has no shareholder who is a citizen of India. All the shares except one are held by the foreign company and the one share is held by a Korean national. Amount more than the amount payable by POSCO India

(P) Ltd. towards compensation and administrative charges is paid by them to the Corporation. In this regard, additional affidavit is filed by the petitioners on 22.7.2011 read with paragraphs 9.1 and 9.2 of the counter affidavit of the Corporation wherein it has addressed letters to the Collector stating that the land has been selected by them whereas Memorandum of Understanding entered with the State Government and the POSCO, it has selected the sites which is stated in the counter affidavit filed on behalf of opposite party nos. 1,2 and 5. The Memorandum of Understanding has lapsed. It stipulates 'transfer' of land acquired to the Company as per the counter affidavit filed on behalf of opposite party nos. 1,2 and 5. The acquisition of land comprised in seven villages are meant for a Private Limited Company through Corporation which is acting as an intermediary. The entire cost of acquisition is borne by the Private Limited Company. It is further stated that Section 3 (f) sub clause (iv) of the L.A.Act expressly excludes 'acquisition of land for Companies' from the definition of 'public purpose' in the Act. The acquisition for companies is governed by Part VII of the L.A.Act read with Companies (Land Acquisition) Rules, 1963 and not by Part II of the L.A.Act. The acquisition of land in favour of a Private Limited Company is subject to procedure prescribed under Part VII and the aforesaid Rules. Section 44B of L.A.Act limits the acquisition of land in favour of a Private Company for the purpose of erection of dwelling-houses for workmen of the company as provided under Section 40(1)(a). Acquisition of land for establishment of Steel Plant does not come within the purview of the aforesaid provision of the Act. Therefore, the acquisition of land by the State Government under Part II of the L.A.Act at the instance of the Corporation is without jurisdiction and is ab initio void and non-est in the eye of law. Passing the awards without obtaining approval from the State Government first as required under proviso to Section 11 of the L.A. Act is also equally illegal and the acquisition proceedings are void ab initio in law.

8. Mr. J.Das, learned Senior Counsel has placed strong reliance upon the decision of the Supreme Court in the case of Devinder Singh & Ors. Vs. State of Punjab & Ors., reported in (2008)1 SCC 728 wherein the Apex Court has held that for acquisition of private land in favour of a company following the procedure as provided under Part VII of the L.A. Act and the Companies (Land Acquisition) Rules, 1963 is mandatory. It is stated that the Corporation cannot cause land acquisition for itself. Learned Senior Counsel placed strong reliance upon the objects/Reasons/Preamble of the OIIDCO Act, 1980, and Sections 2(h), 2(i) defining 'Industrial Area' and 'Industrial Estate' respectively and Sections 14, 15 and 31. The Corporation is not acquiring land for any 'industrial area' or 'industrial estate'. No notification is available for establishment of any 'industrial estate' as provided under

Section 14(ii)(a). The Corporation could only cause acquisition of land for an 'industrial area' or 'industrial estate' and not solely and exclusively for a Private Limited Company at the cost of such a Company. Therefore, the State Government has not followed the procedure as provided under Part VII of the Act and the Rules referred to supra though they are mandatory. Acquisition of land for a Private Limited Company at its own cost can only be done under Part VII of the L.A. Act and not under Part-II of the Act. The notifications under Section 4 being vitiated, exercise of power under Sections 6 and 11 are also void ab initio in law. Therefore the same are liable to be quashed.

9. Resort to Section 17(4) of the L.A. Act without any legitimate reasons for invoking emergency clause waiving Section 5A right of the petitioners and other land owners is bad in law. Section 5A partakes the character of a fundamental right guaranteed to the land owners under Articles 14, 19(i) (g) and 21 of the Constitution of India and is an unavoidable ingredient of the mandatory requirement of natural justice. Waiver of Section 5A right of the land owners by the State Government through arbitrary exercise of power and resort to Section 17(4) is manifestly illegal and unconstitutional. In support of this legal contention, Mr. Das has placed reliance upon the decisions of the Supreme Court in the case of Babu Ram & Anr. Vs. State of Haryana & Anr., reported in (2009)10 SCC 115, Dev Sharan & Ors. Vs. State of Uttar Pradesh & Ors., reported in (2011)4 SCC 769 and Radhey Shyam & Ors. Vs. State of Uttar Pradesh & Ors., reported in (2011)5 SCC 553.

10. Further it is contended that there is contradictory and inconsistent stand of the State Government and Corporation with regard to mentioning of the reason both under Section 4(1) notifications and Section 6 notifications. In Section 4(1) notifications it is expressly mentioned that the acquisition of land is for M/s. POSCO Company whereas notifications under Section 6 indicate that the acquisition is for an industrial undertaking of OIIDCO i.e. proposed Steel Plant of M/s. POSCO. Both the said notifications indicate that they are not for 'public purpose' and that the acquisition of land in question is at Government expense whereas in reality the acquisition of land is for Private Limited Company at its own cost. Therefore the acquisition of land should not be undertaken under Part II of L.A.Act but under Part VII and would be limited to the prescriptions as provided under Section 40(1)(a) as stated under Section 44 B of the L.A. Act.

11. Learned Senior Counsel on behalf of the petitioners and some land owners of the villages in question has placed strong reliance upon some

decisions regarding locus standi of the petitioners for filing this writ petition and contended that the writ petition is not adversary in nature but it is a public interest petition representing the cause of large number of semi-educated, marginal/small land owners who are ignorant of the intricacies of the Constitution of India, the provisions of L.A.Act and the Companies Act. It is further stated that they are being illegally deprived of their property in violation of their fundamental rights and other statutory rights. Therefore, the writ petition is maintainable as 'class action' litigation. The decisions relied upon by the learned counsel for the petitioners are :(i) S.P.Gupta Vrs. Union of India- AIR 1982 SC 149; (ii) People's Union for Democratic Rights & Ors.Vs. Union of India & Ors. (1982)3 SCC 235; (iii) Chaitanya Kumar & Ors. Vs. State of Karnataka & Ors., (1986) 2 SCC 594; (iv) Guruvayoor Deveswom Managing Committee & Anr. Vs. C.K. Rajan & Ors., (2003)7 SCC 546; (v) Ashok Lanka & Anr. Vs. Rishi Dixit & Ors., (2005)5 SCC 598 and (vi) Indian Bank Vs. Godhara Nagrik Co-operative Credit Society Ltd. & Anr., (2008) 12 SCC 541.

12. Regarding delay and latches, it is stated that there is no delay and latches in filing this petition. The information posted in the website of the Collector, Jagatsinghpur District, indicates that nothing has proceeded beyond notifications under Section 4(1) of the L.A.Act. No land owners have been dispossessed of their agricultural or homestead land. There is no delay and latches in this case in view of the written statement of opposite party no. 2, Collector, Jagatsinghpur which indicates that nothing is proceded beyond notifications under Section 4(1) of the L.A. Act and the land owners have not been dispossessed. The entire process of acquisition of land in question from the very inception are ab initio void. It is a clear case of continuing wrong and the process of land acquisition has not been completed. The writ petition involves fundamental rights and the statutory rights, the same cannot be waived by the State Government though no emergency to acquire the land is made out. In this regard, he has relied upon the decisions of the Supreme Court in the case of Bandhu Mukti Morcha, reported in AIR 1984 SC 802 and Delhi Jal Board Vrs. National Campaign – CA No. 5322 of 2011 disposed of on……. Reliance has also been placed upon the decisions of the Supreme Court in the case of Northern India Glass India Vs. Jaswant Singh, reported in (2003)1 SCC 335, Municipal Corp. of Greater Bombay Vs. I.D.I.C.Pvt. Ltd., reported in (1996)11 SCC 501 and Hari Singh Vs. State of U.P., reported in (1984) 2 SCC 624. The decision upon which reliance has been placed by learned Senior Counsel on behalf of the Corporation namely, Pratibha Nema & Ors., Vs. State of M.P. & Ors, reported in (2003)10 SCC 626 is not a case for acquisition exclusively and solely for a private limited company and it is for establishment of a 'diamond park'. This decision has

no application to the present case. Another decision relied upon is Nand Kishore Gupta & Ors. Vs. State of U.P. & Ors., reported in (2010)10 SCC 292 which is the case of Yamuna Express way project under implementation under public private partnership model, acquisition under U.P.Industrial Area Development Act, 1976 to be owned by the public corporation. Therefore, it is not a case of acquisition of land solely for a Private Limited Company and it is not one where power of eminent domain had been utilized by the State Government for a purpose set down in Section 40(i)(a) of (Part VII of L.A.Act). Therefore, it has been held in that case on facts that it is not a case where the power of acquisition was exercised by the State Government for the work or project of a Company. Therefore, both the decisions referred to above have no application to the fact situation. It is further contended that the petitioners have made out a prima facie case for grant of interim prayer in view of the fact that the acquisition proceedings from the inception till the date of passing awards is void ab initio in law and there is blatant violation of the fundamental and statutory rights of the land owners and the balance of convenience is in their favour. Hence, they are entitled for the interim prayers sought for in the miscellaneous application referred to supra.

13. Objection to the Misc. Case has been filed on behalf of opposite party nos. 1,2 and 5 by way of counter affidavit being sworn to by one Syed Nayar Ahmed, Addl. Secretary to Government of Orissa, Revenue and Disaster Management Department, Orissa Secretariat, Bhubaneswar, Dist. Khurda inter alia traversing the averments in the writ petition as well as misc. petition contending that the same are not maintainable either in fact or in law as the petitioners have no locus standi to file this writ petition either personally or in the representative capacity as they have not disclosed in the writ petition any fact leading to prove the right either under the Constitution or under any statutory Act. They have also not disclosed the identity of the persons whom they claim to represent in this writ application. Therefore, in the absence of any such material particulars, the Misc. Case is liable to be dismissed in limini with cost.

14. It is also contended that the self same petitioners have filed another writ application bearing W.P.(C) No. 14885 of 2011 claiming that they are ‘other traditional forest dwellers’ as defined in Section 2(o) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 whereas in the present writ petition, they have claimed both as individuals and members of the community of village Gobindpur and are exercising their rights under the Scheduled Tribes and other Traditional Forest Dwellers(Recognition of Forest Rights) Act, 2006 which are mutually contradictory and self-destructive inasmuch as both the assumptions cannot

be true at the same point of time and for that reason alone, it is stated that the writ petition is liable to be dismissed. They have claimed that they are the owners and persons interested in the acquisition of their respective piece of land and that they depend on their land for their livelihood and shall be deprived of the same by the impugned acquisition of land which stand of them is contradictory and inconsistent with each other.

15. Further it is stated that the writ petition is also liable to be dismissed for delay and laches inasmuch as the petitioners themselves have admitted that the notifications under Section 4(1) of the Land Acquisition Act were issued way back in January, 2006. They did not challenge the said notifications for more than five years which shows their acquiescence in land acquisition and opportunism of the petitioners is abundantly clear from the averments made in the writ petition and the misc. case, the same amounts to abuse of the process of law as the self same petitioners claiming to be traditional forest dwellers/representatives of traditional forest dwellers have challenged in W.P.(C) No. 14885 of 2011, the decision of the Government of India in granting the clearance by the Ministry of Environment and Forest, wherein the Government of India diverted Ac. 1253.225 hectares of forest land in favour of M/s. POSCO by order dated 2.5.2011. It is further stated that the writ petition is also liable to be dismissed as both the writ as well as the misc. case suffers from suppression of material facts and particulars, incorrect representation of facts are made which are contradictory to each other for which the writ petition is not maintainable and liable to be dismissed.

16. The averments made in paragraph-3 of the misc. case and the contentions raised are untenable, misconceived and liable to be rejected. Further, it is stated that the acquisition of land is made by the State Government under L.A.Act, 1894 on the application of the IDCO under Section 31 of the Orissa Industrial Infrastructure Development Corporation Act, 1980 and such acquisition is for public purpose within the meaning of Section 3 clause (f) & sub-clause (iv) of the L.A.Act. The background of such acquisition of land for public purpose is enshrined in the Industrial Policy, 2001 of the State Government for the purpose of transforming Orissa into a vibrant Industrial State creating a business climate conducive to accelerate investment in industry and infrastructure projects, raising income, employment, economic growth in the State and reducing regional disparities in economic development. The project has got the approval of State Government under the provision of the Orissa Industries (Facilitation)Act, 2004 (hereinafter called in short 'OIF Act'). IPICOL has appraised the Steel Project and recommended to the State Government for entering into

Memorandum of Understanding. High Level Clearance Authority (HCLA) under the provisions of OIF Act has approved the Steel Project on 17.6.2005. Pursuant to approval by HCLA, MoU between the Government of Orissa and M/s. POSCO for establishment of Integrated Steel Plant of 12 MT capacity at Paradeep has been signed on 22.6.2005 which document is produced at Annexure-A/1.

17. The State Government following due procedure under the L.A. Act, 1894 have proceeded with publishing Sections 4(1), 6(1) notifications and issued order under Section 7 of the L.A.Act. The allegation of the petitioners that exercise of power by the State Government is a mala fide and colourable one is denied as wholly untenable in law. It is urged on behalf of the Company that the declaration notifications of the Government under Section 6(1) of the L.A. Act that the acquisition is made for a public purpose is not open to challenge in view of the Section 6(3) of the Act which states that declaration of the Government shall be conclusive evidence that the land is needed for a public purpose of the IDCO which in turn will lease out the same in favour of the Company.

18. It is further stated that by resorting to Section 17(4) and waiving the right under Section 5A of the Act, the State Government has not committed any illegality under the law as the purpose of emergency has been to welcome largest Foreign Direct Investment (FDI) in the State with a view to uplift the socio economic condition of the people through industrialization and providing employment opportunities.

19. The Corporation has filed requisition with the District Collector of Jagatsinghpur District for acquisition of private land measuring Ac. 437.69 comprising in seven villages in the district of Jagatsinghpur mentioned in Annexure C/1 series by addressing letters dated 7.10.2005, 18.10.2005 and 20.10.2005. The Collector was also requested to initiate the land acquisition proceedings under the emergency provision of L.A. Act, 1894, so as to make the land available at the earliest possible time for the purpose mentioned therein. The declaration notifications published under Section 6(1) of L.A.Act and order under Section 7 have been issued vide notifications dated 16.11.2007 and 7.1.2008 respectively wherein it is specifically mentioned that land is required for a public purpose i.e. IDCO for establishment of Steel Plant. The above notifications show that the land is being acquired for a public purpose and not for a private company. Declaration notifications published under Section 6 of the Act has been made under Annexure D/1 series in respect of the seven villages. The averments made in paragraphs 4, 5 and 6 of the Misc. Case have been denied as not correct. The

contentions raised by the petitioners in the writ petition are termed as misconceived and untenable in law and cannot be accepted by this Court. Further it is stated that it is not a fact that the land has been acquired for a private limited company but has been acquired for IDCO for public purpose for establishment of industries under the IDCO Act, 1980 particularly Sections 15, 31 to achieve the laudable objective of the said Act for securing the orderly establishment of industries, the provisions of the Orissa Industries (Facilitation) Act, 2004 read with Land Acquisition Act, 1894. It is not a fact that the land acquisition work has been held up which has been falsely averred by the petitioners. In fact Section 4(1) notifications read with Section 17(4) have already been issued and declaration notification under Section 6 and order under Section 7 of the Act have already been made and awards under Section 11 of the Act have already been passed and payment of compensation has been started. It is further stated that from the following facts, it would be evident that in the present case, land acquisition is made for public purpose.

(a) all requisitions for the land covered under the notifications referred to above have been filed by opp.party no.3(IDCO) which is a Statutory Corporation owned by the State Government;
(b) all payments at various stages of land acquisition have been made to the District Collector by IDCO.
(c) Notifications under Section 6 and orders under Section 7 referred to above would clearly indicate that the land is being acquired for IDCO.
(d) The lease agreements which have to be executed between the Collector of the District and the requisitioning authority of the land acquisition will be executed with IDCO making IDCO a lessee of the Government for the land in question.
(e) Possession of the land will also be given by the Collector to IDCO.

20. Further it is contended that Section 3 (f)(iv) of the Land Acquisition Act defines that 'public purpose' includes acquisition of land for a Corporation owned or controlled by the State. The IDCO Act has received the assent of President of India. Section 31 of the said Act states that whenever any land is required by the Corporation for any purpose in furtherance of the objects of the Act and the Corporation is unable to acquire it by agreement, the State Government may upon an application of the Corporation in that behalf, order proceedings to be taken under the L.A.Act, 1894 for acquiring the same on behalf of the Corporation as if such lands were needed for public purpose within the meaning of Act.

The beneficial implication of the projects is as under:-

(a) Growth in development of rail and road infrastructure which will benefit other areas;

(b) Substantial gain of revenue for the Central and State Governments;

(c) Generation of large scale employment; and

(d) Meeting partially the Steel demand in the country.

21. Considering the above factors, the State Government felt that the project would be in the larger interest of the State. Therefore, the State Government approved the proposal and executed an MOU with M/s. POSCO India Private Limited. It is further submitted that the National Council of Applied Economics and Research (NCAER) which is an autonomous institution and widely respected in the field of Applied Economics & Research has conducted a Social cost benefit analysis of the POSCO Steel Project in Orissa.

22. The salient features of the Project are quoted hereunder for appreciation of this Court.

(i) These multipliers imply that POSCO's iron ore project would create an additional employment of 50,000 person annually for the next 30 years. This translates into Rs. 20 billion of additional output for Orissa. In terms of value addition, the iron ore project would contribute 1.3 percent to Orissa's State Gross Domestic Product by 2016-17.

(ii) On the other hand, if POSCO puts up the Steel Project to utilize the entire iron ore mined in the State, the impact on the economy would be much greater- 8,70,000 persons for 30 years for additional employment each year over the next 30 years. This translates into Rs. 298 billion of additional output for Orissa. In terms of value addition, the Steel project would contribute 11.5 percent to Orissa's SGDP by 2016-17.

(iii) POSCO India's project if set up in an SEZ area will contribute a cumulative tax revenue(indirect taxes on domestic sales and capital goods, corporate tax etc.) of Rs. 174.970 crore, in nominal terms, to the State Government of Orissa ) and the Government of India over the useful life of thirty five operating years as per report of the Economic Law Practice Firm Das and Associates prepared for NCAER, the Government of Orissa cumulative share would be Rs. 77,870 crore on account of VAT inflow on domestic sales and the

share accruing to the State Government from the Government of India on the tax revenue collected from the Project.

Therefore, it is submitted that the Project would have more beneficial purpose and the same is obviously for public interest although the project is being set up by a Private Limited Company through IDCO. If the generation of additional employment of 8,70,000 persons for 30 years and contribution in terms of value addition of 11.5 percent to the State Domestic Product(SDP) of the State apart from the huge revenue for the State and the Central Governments do not serve public purpose or interest, one would be at a loss to understand what constitutes public purpose or interest.

23. On the similar lines, Corporation has also filed affidavit. Further affidavit on behalf of opposite party nos. 1,2 and 5 has been filed in reply to the additional affidavits filed on behalf of the petitioners dated 25.5.2011 and 30.5.2011 traversing the averments and legal contentions. On the similar line, objection on behalf of the opposite party no.3 has been filed by way of affidavit. Counter affidavit to the additional affidavit filed by the petitioners being sworn to by Miss. Madhuri Mishra, Land Officer of Orissa Industrial Infrastructure Development Corporation has also been filed. More or less, similar contentions as have been urged by opposite party nos. 1,2 and 5 have been urged justifying the acquisition of land and leasing the same in favour of the M/s. POSCO.

24. Preliminary counter has been filed on behalf of opposite party no. 3 on 24.5.2011 seeking to justify issuance of the impugned notifications under Section 4(1) read with Section 17(4) of the L.A.Act more or less on the similar ground urged by opposite party nos. 1,2 and 5. It is further stated that declaration notification under Section 6 of the L.A.Act has been made in respect of land village-wise as mentioned in Section 4(1) notifications read with Section 17(4) of the L.A.Act. Declaration notifications were made under Section 6 of the L.A.Act on 17.10.2007, 13.11.2007 and 16.11.2007 under Annexure-C/3 series. It is further stated that awards have been made since long and payment of compensation has already started. In support of the same he has produced Annexure-F/3 series. Further it is stated that the land has been acquired by the State Government at the instance of the Corporation for the Company for establishment and promotion of industries in the State which is for a public purpose. In fact, vide letter dated 5.11.2005 under Annexure D/3 the Collector & District Magistrate, Jagatsinghpur has requested the Corporation to deposit a sum of Rs. 63,63,856/- to expedite the proposal for Section 4(1) notification @ 10% of the approximate compensation amount as establishment cost and other charges.

Accordingly, the IDCO deposited the entire establishment cost to expedite the matter. Subsequently, the IDCO in its letter dated 28.10.2009 placed funds amounting to Rs. 11,21,36,684/- with the Special Land Acquisition Officer, Jagatsinghpur towards payment of compensation to the land owners in respect of village Bayanalkandha, Noliasahi, Polanga, Bhuyanpal, Nuagaon, Gobindapur and Dhinkia in the district of Jagatsinghpur. The money deposited by the IDCO is public money and the payment of compensation by the Land Acquisition Officer is made out of Government fund vide letter dated 28.10.2009 under Annexure E/3. Further the allegation of violation of the fundamental rights guaranteed under Articles 14,19 ,21 and constitutional right under Article 300A of the Constitution of India to land owners is denied as wholly untenable in law. It is further reiterated that notifications under Sections 4(1) and 6 of the Act are lawful and they are correct in the eye of law.

25. Opposite party no.4-the beneficiary Company has also filed objection on 24.5.2011 to the Misc. Case filed by the petitioners justifying the acquisition proceedings leasing the land in its favour urging the same contention as has been urged by opposite party-State Government and its officials and the IDCO.

26. Mr. Asok Mohanty, learned Advocate General and Mr. Jagannath Patnaik, learned Senior Advocate contended that the writ petitioners have no locus standi to file this writ petition as the petitioner no.1 and 5 are claiming that they are representing the land owners. They are filing the writ petition on their behalf which is not permissible in law. Learned Senior Counsel rebutted the legal contention urged on behalf of the petitioners that they have got locus standi to take up the cause of the other land owners stating that they have no access to justice as they are illiterate people. Therefore, they contended that the writ petition is liable to be dismissed on the ground that the petitioners have no locus standi. In so far as other petitioners are concerned, they have not produced any documents to show that they have acquired ownership right of the land acquired. Therefore, they have also no locus standi to file the writ petition challenging the acquisition proceedings. They further contended that there is delay and laches in challenging the acquisition proceedings and therefore, the writ petition is liable to be rejected. In support of their legal contention, they have placed reliance upon the decisions of the Supreme Court in the case of Northern Indian Glass Industries Vs. Jaswant Singh & Ors., AIR 2003 SC 234 and Municipal Corporation of Greater Bombay Vs. The Industrial Development & Investment Co. Pvt. Ltd. & Ors., reported in AIR 1997 SC 482. Mr. Jagannath Patnaik, learned Senior Counsel placed reliance upon a decision

of the Supreme Court in the case of Pratibha Nema & Ors. Vs. State of M.P. & Ors., reported in JT 2003(6) SC 256 in support of justification of acquisition of land for POSCO. In that case land was acquired under the L.A.Act by the State Government for public purpose and placed at the disposal of Industries Development Corporation which leased out the same to a Company in private sector for establishment of Diamond cutting and polishing unit. The Company deposited certain amount with the Corporation. The said amount was in turn made available to the Land Acquisition Collector towards compensation to be paid to the persons from whom land was acquired. No part of compensation amount for acquisition was paid out of public revenue. In such a case, whether there is sufficient compliance of second proviso to Section 6(1) was examined and answered in favour of the State. The Apex Court in the above referred case has held that once the amount paid by the company to the Corporation was found to be the advance premium for the lease, it would become the fund of the said Corporation, even if it be on a rough and ready basis and such fund when utilized for payment of compensation, wholly or in part, would satisfy the requirements of the second proviso to Section 6(1) read with Explanation 2. The same is held to be legal and valid. In support of the same legal contention regarding acquisition of huge land under Land Acquisition Act by State for construction of express highway and development of township work proposed to be get done through third party on BOT basis, contractor selected by tender process is held to be legal and valid. The Apex Court has further held that acquisition of land for public purpose or for company under Sections 4, 39, 40 and 41 of L.A.Act cannot be said to be case of a colourable exercise of power. Therefore, learned Senior Counsel Mr. Patnaik placing reliance upon the provisions of Sections 3 (f)(iv), 4(1) and 17 of the L.A.Act and Section 17 (4) waiving Section 5A right of the land owners to acquire land submits that the acquisition of land in favour of the Corporation which in turn leasing the land in favour of M/s. POSCO for establishment of integrated Steel Plant is permissible in law in view of the observations made by the Apex Court in the above cases. It is further submitted that dispensation of enquiry to be conducted by the Collector by invoking emergency clause of Section 17(2) of the L.A.Act has been held to be justified in the case referred to supra.

27. With reference to the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for consideration by this Court in the Misc. Case .

(i) Whether the writ petition filed by the petitioners on their behalf & on behalf of the other land owners whose lands are covered in the

impugned notifications in representative capacity claiming that it is a public interest & class action litigation is maintainable in law ?

(ii) Whether the petitioners have made out a prima facie case for grant of interim prayer and are entitled for the interim relief as prayed for in the Misc. Case ?

**(iii)** What order ?

**Point Nos. 1 & 2 :**

28. Both the points are interrelated and therefore, the same are answered together.

29. We have carefully examined the rival legal contentions urged on behalf of the parties with reference to the aforesaid points framed by us and after perusing the documents and records produced before us, we are of the view that the said points are required to be answered in favour of the petitioners for the following reasons.

30. To maintain this writ petition, learned Senior Counsel, Mr. Jayant Das has rightly placed reliance upon the decisions of the Supreme Court in the case of S.P.Gupta Vrs. Union of India, reported in AIR 1982 SC 149; People's Union for Democratic Rights & Ors. Vrs. Union of India & Ors., reported in (1982)3 SCC 235; Chaitanya Kumar & Ors. Vs. State of Karnataka & Ors., reported in (1986) 2 SCC 594; Guruvayoor Devaswom Managing Committee & Anr. Vs. C.K.Rajan & Ors., reported in (2003)7 SCC 546; Ashok Lanka & Anr. Vs. Rishi Dixit & Ors., reported in (2005)5 SCC 598; and Indian Bank Vrs. Godhara Nagrik Co-operative Credit Society Ltd. & Anr., reported in (2008)12 SCC 541. While considering the Misc. Case, there is no need for us to extract the relevant paragraphs of the aforesaid judgments in this order in view of the clear legal proposition of law laid down by the Supreme Court in the aforesaid cases regarding the filing of the writ petition as class action on behalf of the land losers/owners, except certain relevant paragraphs of the decision of the Supreme Court in the case of Guruvayoor Devaswom Managing Committee (supra), wherein a three Judge Bench of the Hon'ble Supreme Court after referring to its earlier Constitution Bench and other large number of decisions held as under:

> "50. The principles evolved by this Court in this behalf may be suitably summarized as under:
>
> *(i)* The Court in exercise of powers under Article 32 and Article 226 of the Constitution of India can entertain a petition filed by any

interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court.

The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfil its constitutional promises. (See *S.P. Gupta* v. *Union of India, 1981 Supp. SCC 87*, *People's Union for Democratic Rights* v. *Union of India*,(1982) 2 SCC 494; *Bandhua Mukti Morcha* v. *Union of India, (1984) 3 SCC 161* and *Janata Dal* v. *H.S. Chowdhary, (1992) 4 SCC 305*.)

(*ii*) Issues of public importance, enforcement of fundamental rights of a large number of the public vis-à-vis the constitutional duties and functions of the State, if raised, the Court treats a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. (See *Charles Sobraj* v. *Supdt., Central Jail, (1978) 4 SCC 104* and *Hussainara Khatoon (I)* v. *Home Secy., State of Bihar (1980) 1 SCC 81*.)

(*iii*) Whenever injustice is meted out to a large number of people, the Court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India as well as the International Conventions on Human Rights provide for reasonable and fair trial.

(*iv*) The common rule of locus standi is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, the depraved (*sic*), the illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. [See *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India*, *S.P. Gupta*, *People's Union for Democratic Rights*, *D.C. Wadhwa (Dr)* v. *State of Bihar* and *BALCO Employees' Union (Regd.)* v. *Union of India*.]

(*v*) When the Court is prima facie satisfied about variation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the State or the Government from raising the question as to the maintainability of the petition.

(See: *Bandhua Mukti Morcha*.)

(*vi*) Although procedural laws apply to PIL cases but the question as to whether the principles of res judicata or principles analogous thereto

would apply depends on the nature of the petition as also facts and circumstances of the case. [See *Rural Litigation and Entitlement Kendra* v. *State of U.P.* and *Forward Construction Co.* v. *Prabhat Mandal (Regd.)*.]

(*vii*) The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as a public interest litigation. (See *Ramsharan Autyanuprasi* v. *Union of India*.)

(*viii*) However, in an appropriate case, although the petitioner might have moved a court in his private interest and for redressal of personal grievances, the Court in furtherance of the public interest may treat it necessary to enquire into the state of affairs of the subject of litigation in the interest of justice. (See *Shivajirao Nilangekar Patil* v. *Dr Mahesh Madhav Gosavi*.)

(*ix*) The Court in special situations may appoint a Commission, or other bodies for the purpose of investigating into the allegations and finding out facts. It may also direct management of a public institution taken over by such Committee. (See *Bandhua Mukti Morcha*[1], *Rakesh Chandra Narayan* v. *State of Bihar* and *A.P. Pollution Control Board* v. *Prof. M.V. Nayudu*.)

In *Sachidanand Pandey* v. *State of W.B.* this Court held: (SCC pp. 334-35, para 61)

> "*61*. It is only when courts are apprised of gross violation of fundamental rights by a group or a class action on when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to none in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

31. In the case of State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402, the Supreme Court examined various facets of public interest litigation in the backdrop of criticism from within and outside

the system and made lucid analysis of the concept and development of public interest litigation in the following three phases:

> "Phase I.--It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalised groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.
>
> Phase II.--It deals with the cases relating to protection, preservation of ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments, etc. etc.
>
> Phase III.--It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."
>
> While dealing with the first phase of development, the Court referred to large number of precedents and recorded its conclusion in the following words:
>
> "We would not like to overburden the judgment by multiplying these cases, but a brief resume of these cases demonstrates that in order to preserve and protect the fundamental rights of marginalised, deprived and poor sections of the society, the courts relaxed the traditional rule of locus standi and broadened the definition of aggrieved persons and gave directions and orders. We would like to term cases of this period where the Court relaxed the rule of locus standi as the first phase of the public interest litigation. The Supreme Court and the High Courts earned great respect and acquired great credibility in the eyes of public because of their innovative efforts to protect and preserve the fundamental rights of people belonging to the poor and marginalised sections of the society."

32. Petitioner Nos. 2,3,4 and 6 claim to be land losers. Petitioner no. 1 and 5 claim to represent other land losers who have not approached this Court as 'class action' litigation; thus the writ petition on behalf of such land losers is maintainable. Having regard to the undisputed facts and circumstances of the case, prima facie we feel that the acquisition proceedings which have been initiated by the State Government on the basis of MOU entered into by it with the POSCO (opposite party no.4) for establishment of 12 MT integrated Steel Plant in the State of Orissa at

Paradeep in the district of Jagatsinghpur and also to lease out the same to the POSCO through IDCO are bad in law. Pursuant to the MOU entered into between POSCO and the State Government, the State Government as per Clause-5 of the MOU is to acquire 20 to 25 acres of land for establishment of official headquarters of the Company in Bhubaneswar and approximately 4000 acres of land for the purpose of setting up of the Steel Project and associated facilities including the port facilities and a storage yard for coking coal and 2000 acres of land for township development, recreational activities and all related social infrastructure development collectively, the 'Integrated Township Development'. Out of this approximately 1500 acres would be identified adjacent/near to the Steel Project and another 500 acres near the Mining Project. The Government of Orissa State also agreed to acquire and transfer all the above mentioned land required for the overall Project, free from all encumbrances through Orissa Industrial Infrastructure Development Corporation on payment of the cost of the land. In view of the aforesaid agreement made between the State Government and the Company, the acquisition of land in favour of the POSCO through the IDCO as lessor is an undisputed fact and the facts pleaded in this case by the opposite parties that 10% of compensation amount i.e. Rs. 63,63,856/- has been deposited with the Corporation and further sum of Rs. 11,21,36,684/- has been deposited towards the cost of acquisition would clearly go to show that the acquisition of land is in favour of the POSCO, the beneficiary for establishment of Steel Plant as agreed upon with the State Government under the MOU. Further the impugned notifications published under Section 4(1) read with Section 17(4) and Section 6(1) of the L.A.Act would clearly show that the acquisition of land is for the purpose of private company M/s. POSCO and the requisition letter under Annexure-D/3 series made with the District Collector produced by the Corporation would clearly show that acquisition of land is for the purpose of establishment of industries, which in fact is not correct is evident from the letter dated 21.9.2005 written by the Deputy Managing Director, POSCO India Private Limited to the Chairman-cum-Managing Director, IDCO, Bhubaneswar with subject "submission of proposal for alienation of Government land for construction of proposed 12MTA Integrated Steel Plant at Paradeep" after referring letters dated 16.7.2005 & 13.8.2005 and IDCO's letter dated 2.9.2005 and letter dated 12.9.2005 wherein it has been mentioned at paragraph-1 that on behalf of POSCO-India " I thank you for all your support extended to me and to my colleague towards the setting up of the POSCO-India project and we look forward to your invaluable support in making the project a reality." After these letters and correspondences, IDCO sent requisition letters dated 18/20.10.2005 which are produced by the Corporation mentioning that different extent of land is required to be acquired by it in different villages

and other series of letters under Annexure-II series for establishment of industries. Section 4(1) notifications read with Section 17(4) of the Act would clearly go to show that the acquisition is not for the establishment of industries, but for particular company i.e POSCO which is evident from Clause-5 of the MOU entered into with the State Government by the Company which is not permissible under Section 3(f)(iv) of the L.A.Act read with Section 31 of the IDCO Act as contended by the opposite parties. Therefore, acquisition of land not following the procedure laid down under Part VII of the L.A. Act & Rules referred to supra in favour of Company prima facie is not tenable in law.

33. The legal questions that are raised by the petitioners are required to be considered and answered at the time of disposal of the writ petition on merits. Therefore, we may have to state in this order at this stage while considering the interim prayer sought for by the petitioners that taking into consideration the extent of the land of the illiterate persons who are unable to approach this Court on account of illiteracy, poverty and related problems which have been confronting them, the writ petition on behalf of other land owners/losers is maintainable in law as class action litigation as held by the Apex Court in a catena of cases referred to supra.

34. Further regarding delay and laches in filing this writ petition also, learned Senior Counsel placed reliance on the dates given by the petitioners in the chart which is extracted in this order in respect of Sections 4(1) & 6 notifications published in the official Gazette which are beyond the statutory period prescribed under the provisions of Section 6 of the Act. Mr. Sanjit Mohanty, learned Senior Counsel for opp.party no.4 placed strong reliance upon the public notice referred to under Section 4(1) of the Act published in respect of the village of the petitioners dated 29.11.1006 and 25.11.2006 and submitted that the first date of declaration notification issued under Section 6(1) of the Act being 16.11.2007, the statutory requirement of issuance of declaration notifications under Section 6(1) of the Act was published within the statutory period stipulated in the said provisions. If the above notices issued by the Collector to the land owners/public as contended by the learned Senior Counsel on behalf of POSCO are taken into consideration, declaration notifications published under Section 6(1) are valid in law. This factual and legal contention urged on behalf of the parties is also required to be examined on merits by this Court with reference to the provisions of the L.A.Act and the law laid down by the Apex Court in this regard. But the fact remains that the contention urged on behalf of the Senior Counsel Mr. Jayant Das giving particulars that the publication of the notifications in the Official Gazette under Section 6(1) is beyond one year

from the date of publication of preliminary notifications under Section 4(1) read with Section 17(4) of the L.A.Act is required to be carefully examined by this Court. Further, possession of land has not been taken from the land losers/owners of the villages referred to supra is evident from not producing Section 16(1) notifications by the State Government and its officers. Further it is stated that the entire process from the very inception of land acquisition proceedings prima facie became void-ab-initio for the reason that undisputedly the acquisition of land is for a private Company for establishment of a Steel Plant. Therefore, it cannot be said that this acquisition is for public purpose in terms of definition under Section 3(f) sub-clause (iv) of the L.A.Act merely because requisition is made in favour of the Corporation as provided under Section 31 of the IDCO Act. But on the other hand, letter correspondences made between the State Government and the Company and Company and Corporation would prima facie show that the acquisition of land is not in favour of Corporation for establishment of industries as contended by it. The requisition by the Corporation represented by its Managing Director to the District Collector of Jagatsinghpur is in favour of the POSCO Company is evident from the letter correspondence and there is a specific mention in this regard in the Sections 4(1) and 6 notifications and also money was deposited by the Company with the Corporation which in turn has deposited the same with the District Collector towards the acquisition of land as required under Section 6 of the L.A.Act. . Therefore, it is contended by the petitioners that the case of the opposite parties that the acquisition proceedings were initiated stating that the same was for public purpose is factually not a correct fact. Section 3 clause (f) sub-clause (iv) of the L.A.Act, expressly excludes 'acquisition for Companies' from the definition of 'public purpose' under the Act. In view of the above definition clause prima facie we cannot accept at this stage that the acquisition of land in favour of Corporation is for public purpose and acquisition is in favour of the Company is prima facie evident from the impugned notifications and other documents referred to supra which is in contravention of Section 40 (i)(a) read with Section 44B of the L.A.Act. If the acquisition of land is made in favour of the Company as defined under Section 3(e) of the Act, the procedure required under Section 39 of the Act read with Rules 4,5 and 6 of the Rules shall be complied with. That has not been done. Therefore, the contention on behalf of the petitioners that the acquisition proceedings from the inception till the conclusion are void ab initio is required to be examined. Further placing reliance upon the following two decisions of the Supreme Court in the case of Bandhu Mukti Morcha Vs. Union of India & ors., reported in AIR 1984 SC 802 and Delhi Jal Board Vs. National Campaign (C.A No. 5322 of 2011), it is urged that it is a case of continuing wrong and the process of land acquisition has not been completed as per the information

posted by the District Collector in the website and not producing Section 16(1) notifications to evidence the factum of taking over possession of land from the land owners. Therefore, the writ petition involves fundamental and statutory rights of the land losers/owners, which cannot be waived on the technical ground of delay and laches as contended by the opposite parties Senior Counsel. Further reliance placed by the learned Senior Counsel on behalf of the Corporation upon the decision of the Supreme Court in the case of Pratibha Nema & Ors. Vs. State of M.P. & Ors., reported in (2003)10 SCC 626 has no application to the fact situation as the proceedings in this case prima facie shown at this stage is void ab-initio and therefore it is contended that the delay and laches shall not come in the way of this Court to exercise its discretionary power to undo the injustice caused to the land owners and examine their fundamental and statutory rights. The above rival legal contentions urged on behalf of the parties are required to be examined in detail with reference to the provisions of L.A.Act and IDCO Act and the records in relation to the acquisition proceedings. The State Government, the Collector and the Land Acquisition Officer have not produced any material to show prima facie that the possession of the acquired land has been taken over from the land owners and notifications under Section 16 of the L.A.Act has been published to evidence the fact of taking over possession from the land owners by the State Government and that acquired land has vested with it, and thereafter it has transferred the same to the Corporation which in turn has handed over possession of the said land to the POSCO by executing lease deed in its favour. Therefore, the contention that is urged on behalf of the opposite parties that the writ petition suffers from delay and laches and therefore it has to be thrown away at this stage cannot be accepted at this stage, having regard to the undisputed fact that the writ petition is maintainable and the same cannot be rejected on the ground of delay and laches. The notification under Section 4(1) read with Section 17(4) waiving of Section 5A statutory right of the land owners is an undisputed fact.

35. Section 17(4) notifications could not have been issued in the instant case merely because requisition is made by the Corporation for acquisition of land for establishment of Industrial Estate to establish industries prima facie for the reason that acquisition of land in fact is in favour of a Private Company, and the State Government has not resorted to the procedure as contemplated under Part VII of the L.A.Act namely, obtaining prior approval of the Government and following the mandatory procedure as provided under Rules 4,5 & 6 of Companies (Land Acquisition)Rules, 1963, which are required to be strictly adhered to for the purpose of acquisition of land in favour of a private Company. Section 44-B provides that notwithstanding

anything contained in this Act, no land shall be acquired under Part VII, except for the purpose mentioned in clause (a) of sub-section (1) of Section 40 for a private company which is not a Government Company.

36. In the instant case the acquisition of land of Ac.4000 is for establishment of a Steel Plant by a private Company POSCO. The acquisition of land other than for the purpose mentioned in Section 44-B prima facie is not permissible in law. Apart from the said reasoning, Section 17(4) of the L.A.Act could not have been invoked by the State Government in the facts of the case unless there was emergency as stipulated under Section 17(2) of the Act. Section 17(2) of the Act can be taken aid of by the State Government only for the specified purpose, namely, whenever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station, or of providing convenient connection with or access to any such station or the appropriate Government considers it necessary to acquire the immediate possession of any land for the purpose of maintaining any structure or system pertaining to irrigation, water supply, drainage, road communication or electricity, the Collector may immediately after the publication of the notice mentioned in sub-section(1) and with the previous sanction of the appropriate Government enter upon and take possession of such land which shall thereupon vest absolutely in the Government free from all encumbrances. Therefore, the issuance of notifications under Sections 4(1) read with section 17(4) prima facie having regard to the undisputed fact that the acquisition of land is for establishment of a Steel Plant by M/s. POSCO is not permissible in law. Dispensing with the provision of Section 5A for conducting an enquiry by giving reasonable opportunity to the land losers is a clear case of negation of a very valuable statutory right and Constitutional right as held by the Apex Court in a catena of cases thereby it has deprived them of their valuable fundamental rights to carry on with agricultural occupation guaranteed under Article 19(i)(g) which is inter-related to Article 21 of the Constitution by arbitrarily acquiring their agricultural land under the guise of public purpose by issuing Section 6 notifications. No material documents are produced by the State Government to show that there was emergency to acquire the land in question and it is permissible as provided under Section 17(2) and to justify the issuance and publication of the notifications under Sections 4(1) read with Section 17(4) to waive the statutory right of the land owners.

37. In this regard, reliance has been placed by the learned Senior Counsel for the petitioners upon the decision of the Supreme Court in the

case of Devinder Singh & Ors. Vs. State of Punjab & Ors., reported in (2008)1 SCC 728, in which case it has been held that for the purpose of acquisition of private land for a company, the procedure as provided under Part-VII of the L.A.Act and the Companies (Land Acquisition)Rules, 1963 are required to be followed as they are mandatory in nature. Further it is stated that the Corporation could not have sent requisition to the District Collector to acquire the lands for itself though its purpose is to form an industrial estate. On a reading of the objects and reasons of the preamble of the OIIDCO Act, 1980 and definition of 'Industrial Area' and 'Industrial Estate' as in Sections 2(h) and 2(i) and provisions of Sections 14,15 and 31 of the OIIDCO Act, 1980, it appears that the Corporation has not acquired the land for any 'industrial area' or 'industrial estate' as defined in Section 2(h), 2(i) of the OIIDCO Act. No notification is published covering the acquired land for any industrial area to establish industrial estate as required under Section 14(ii)(a) of the IDCO Act. The IDCO can only cause acquisition of land for an 'industrial area' in which area 'industrial estate' can be established and not solely and exclusively for a Private Limited Company at the cost of such a Company. Prima facie the Notifications under Section 4 (1) read with Section 17(4) of the L.A.Act being fatally vitiated and ab initio void, the exercise of power by State Government under Section 6 and the alleged awards under Section 11 are also ab initio void and non est as stated by the petitioners as the same was done beyond one year is evident from the documents Annexure F-3 series produced by the Corporation. As could be seen from the notices under Section 9 and 10 to pass awards which are produced, same were issued on 8.5.2008, but awards were passed on 3.8.2008. This would further clearly go to show that awards were passed without serving notices upon the land owners. The same should have been maintained in the normal course after issuing notices to the land owners, hearing them and determining the market value of their acquired property. This procedure is not followed by the State-opposite parties. The copies of awards passed and produced by the Corporation do not instill confidence in the mind of the Court that the same are passed in the normal course by following the mandatory procedure. The market value has not been correctly determined on the basis of either capitalization or sale statistics method. Apart from the said reasoning, there is nothing on record to show that notices to pass awards were served upon the land owners and the awards were approved by the State Government as required under the first proviso to Section 11 of the L.A.Act. Section 11 proviso clearly states that no award shall be made by the Collector under sub-section (i) without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorize in this behalf. Second proviso of Section 11 provides that it shall be competent for the appropriate Government to direct

that the Collector may make such award without such approval in such class of cases as the appropriate Government may specify in this behalf. Therefore, undisputedly, there is no previous approval or post facto approval of the State Government in so far as awards are concerned upon which strong reliance is placed by the learned Senior Counsel on behalf of the opposite parties to contend that the acquisition proceedings were concluded way back in the year 2008. The award notices were also not communicated under Section 12(2) to the land owners and no documentary evidence is produced in this regard. After three years the petitioners are approaching this Court which is barred by delay and laches which contention prima facie, is not tenable in law in view of the decisions of the apex Court referred to supra.

38. The argument advanced by Mr. Sanjit Mohanty, learned Senior Advocate is that the final notifications are all within one year from the last dates of publication of notifications being hereinafter referred to as the date of the publication of the notifications of Section 4(1) of the Act for the purpose of computation of one year as provided under section 6(1) for issuing declaration notifications. If that interpretation is given, then publication of notifications in the official Gazette will have no consequences at all for the purpose of issuing declaration notifications under Section 6 of the L.A.Act. If such argument is accepted, requirement of simultaneous publication both in the official Gazette and in two daily newspapers circulating in that locality as per Section 4(1) of the L.A.Act, 1894 and giving of public notice of substance of such notification by the Collector would be meaningless. That must be simultaneous or within the reasonable period, but not after the lapse of six months from the date of Gazette Notifications. If such belated notices are taken for the purpose of computation of limitation as provided to declare the Section 6 notifications, the object and purpose of stipulation of limitation in the above provision can be frustrated. The acquisition authority published such notification for the purpose of computing one year. This aspect of the matter prima facie cannot be accepted in these proceedings at this stage. Therefore, if the dates given in the chart by the petitioners' counsel is taken into consideration, prima facie it would reveal that the Section 6 notifications are beyond the period of one year.

39. In view of the aforesaid observation we have to hold prima facie that the awards are not the awards in the eye of law. Further in view of Section 11-A of the Act, the Collector shall make an award under Section 11 within a period of two years from the date of publication of the declaration notification under Section 6 of the L.A. Act and if no such awards are passed as per Section 11 of the Act, the proceedings for the acquisition of the land shall

lapse. This aspect of the matter is also required to be examined. The various vital aspects which have been referred to supra as contended by the learned Senior Counsel appearing for the petitioners and opposite parties are required to be considered at the time of hearing on merits.

40. For the foregoing reasons we are of the view that petitioners have made out a very strong prima facie case for grant of the interim prayer and that the balance of convenience is in their favour and if the interim order is not passed, greater hardship would be caused to them. Prima facie, there is violation of their fundamental, constitutional and statutory rights which are infringed.

41. Hence, we are of the prima facie view that the reliefs sought for by the petitioners in the aforesaid Misc. Case referred to supra have to be granted. We accordingly direct that status quo as on today in respect of the private lands in question of the concerned villages as per Annexure-2 series be maintained till disposal of the writ petition.

The Misc. Case is accordingly allowed.

Application allowed.

**2012 ( I ) ILR- CUT- 48**

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

W.P.(C) NO.25628 OF 2011 (Decided on 24.10.2011)

**M/S. VINAYAK AGRO INDUSTRY,**
**ROURKELA, BISRA**. ……Petitioner

.*Vrs.*

**COMMISSIONER OF COMMERCIAL**
**TAXES, ORISSA & ORS**. …….. Opp.Parties.

**ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO.4 OF 2005) – S.74 (5).**

**Imposition of Penalty – Conditions – Only after giving the driver or the person-in-charge of the goods a reasonable opportunity of being heard and holding such enquiry as may deem fit and further after being satisfied that any of the two conditions i.e. violation of provisions or submission of false or forged documents or way bills either covering entire goods or part of the goods carried in the vehicle, the prescribed authority may impose penalty – Imposition of penalty can not be sustained unless it is clearly shown that any of the conditions prescribed in Sub-Section (5) of Section 75 is satisfied – Held, such power not to be exercised on suspicion or doubt – In case of imposition of penalty tax to be determined first otherwise no penalty can be quantified.**

(Para 9,10,30)

**Case laws Referred to:-**

1.(2010) 1 GSTR 453 (SC) : (Commissioner of Customs(Preventive)-V- Aafloat Textiles (I) P.Ltd. & Ors.)
2.(1992)1 SCC 534 : (Shrisht Dhawan(Smt.) -V-Shaw Bros.)
3.AIR 1965 SC 491(V 52 C 80) : (University of Mysore & H.H.Anniah Gowda-V- C.D. Govinda Rao & Anr.)

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

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***B.N. MAHAPATRA, J.*** This writ petition has been filed with a prayer for quashing the order dated 15.09.2011 (Annexure-1) passed by opposite party No.2-Additional Commissioner of Sales Tax (Appeals), Central Zone, Orissa, and order dated 27.08.2011 (Annexure-5) passed by Sales Tax

Officer, Unified Check Gate, Jamsolaghat on the ground that the said orders are illegal, arbitrary and contrary to the provisions of the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") and violative of Article 14 of the Constitution.

2. Petitioner's case in a nutshell is that it is a registered dealer under the OVAT Act, Orissa Entry Tax Act and Central Sales Tax and has been allotted with tax identification No.2132007587. It carries on business in manufacturing automobiles spring leaf, tractor trolly etc. The petitioner purchased 16 ton scrap spring pati from one M/s. Lokenath Traders, 150/A, South Sinthee Road, Kolkata, who is a registered dealer under the VAT Act and CST Act in the State of West Bengal. The goods were booked through M/s. Gupta Roadways, Jakaria Street, Kolkata vide goods receipt No.GR/4224/11 dated 20.08.2011. The truck bearing Registration No.OR-14-U-8398 was carrying the goods supported with the required statutory documents namely, goods receipt note, tax invoice issued by Lokenath Traders, Challan of Lokenath Traders and statutory way bill No.AAA 3391612 along with manifest No.GR 4224/11 dated 20.08.2011 issued by Gupta Traders. When the truck carrying the goods accompanied by required documents reached Jamsolaghat Checkgate on 22.08.2011, Sales Tax Officer, Unified Checkgate, Jamsola (for short, "S.T.O.") verified the goods along with the documents. Upon verification, he was of the opinion that the spring patti loaded in the vehicle were in good condition readily usable in heavy vehicles and it could not be treated as scrap materials (scrap spring patti). On the basis of said allegation, the S.T.O. issued show cause notice dated 24.08.2011 in terms of Section 74(5) of the OVAT Act asking the petitioner to explain the discrepancies. In the show cause notice, it was pointed out that the consignment is not scrap spring leaf but spring leaf set in good condition to be used in different heavy vehicles. The petitioner was required to show cause as to why penalty as provided under Section 74(5) of the OVAT Act i.e. five times of the tax leviable on such goods or 20 per centum of the value of the goods whichever is higher shall not be realized. In response to the said show cause notice dated 24.08.2011, the petitioner by letter dated 25.08.2011 represented to the S.T.O. that it has complied with the provisions of Section 74(2) and Section 74(3) of the OVAT Act. All the required statutory documents were produced by the driver of the vehicle before the S.T.O. for verification and those were found to be in order. The materials carried in the truck were raw materials and after processing both mechanically and chemically, those would be sold in the market. The S.T.O. was intimated that the said goods were purchased by the selling dealer in auction sales of scrap, spring leaf in loose as well as assembled conditions. The petitioner has purchased the goods in course of inter-state sales and

has paid the Central Sales Tax. Despite the above, the S.T.O. in an illegal manner without application of mind and without taking into consideration the submissions of the petitioner has passed the order dated 27.08.2011 (Annexure-5) under Section 74(5) of the OVAT Act demanding payment of Rs.11,76,000/- towards tax and penalty imposed both under the OVAT Act and Entry Tax Act.

The petitioner being aggrieved by the order dated 27.08.2011 filed writ petition bearing W.P.(C) No.23516 of 2011 before this Court which was disposed of on 05.09.2011 with liberty to the petitioner to file revision petition before the Revisional Authority. It was further directed that if such a revision petition is filed within a period of one week from the date of the order, the same shall be disposed of within four days thereafter examining the goods that were alleged to be detained illegally to find out as to whether those goods were old one or new by taking assistance of technical expert. Pursuant to the said direction, the petitioner filed a revision petition and opposite party No.2 constituted a technical committee as directed by this Court to ascertain the status of the goods i.e. whether the goods in question were old one or new. Basing on the facts and circumstances of the case and taking into account the report of the technical committee constituted by him, opposite party No.2 disposed of the revision petition vide order dated 15.09.2011 by deleting the demand levied under the OET Act and directing the S.T.O. to proceed further under the OET Act by issuing proper notice. However, the order dated 27.08.2011 passed by the S.T.O. levying tax and penalty under the OVAT Act was confirmed.

3. Being aggrieved by the said order of the revisional authority under Annexure-1, the petitioner has filed this writ petition.

4. Mr. D. Pati, learned counsel appearing for the petitioner submitted that on the oral direction of opposite party No.2, the petitioner along with his Advocate went to Jamasola Check Post and appeared before opposite party No.3 on 10.09.2011 for the purpose of joint verification of the goods. No joint verification was conducted in presence of the petitioner. The technical committee refused to allow joint verification of the goods. The petitioner reported this matter to opposite party No.3 by submitting a written explanation which was acknowledged by him on 10.09.2011. Mr. Pati, learned counsel, submitted that unless the goods are put to test through mechanical means, it is not possible to find out the status of the goods. The goods do not have the required strength and hardness which is essentially required for use in heavy automobile vehicles. It was submitted that during the course of hearing of the revision petition on 08.09.2011, opposite party

No.2 also wanted to know the source of purchase of the goods of the selling dealer. Accordingly, the petitioner put its best effort and on 12.09.2011 produced the documents in support of purchase made by the selling dealer from Four Star Alloys, Jamshedpur, vide tax invoice No.131/11-12 dated 14.08.2011. The said Four Star Alloys have also purchased spring leaf obsolete scraps in auction from Tata Motors Limited, Jamshedpur vide tax invoice No.2118800613 dated 21.06.2011. The technical committee constituted by opposite party No.2 did not allow the petitioner to have his say and inspection was done in absence of the petitioner violating the principles of natural justice. Opposite party No.2 in a perfunctory manner has confirmed the order dated 27.08.2011 and has not taken into consideration the documents establishing the purchase of obsolete spring leafs (scrap) starting from Tata Motors Limited, which were produced at the time of hearing of the revision petition on 12.09.2011. Opposite party No.2 has also not taken into consideration the representation dated 10.09.2011 of the petitioner submitted to opposite party No.3. The petitioner has also raised certain jurisdictional issue which has not been controverted by opposite party No.2. Opposite party No.3, who is the Check Post Officer has issued the non-statutory notice violating the mandatory procedure of law. He has determined the value of the goods at Rs.14,00,000/-and computed tax and penalty contrary to the documentary evidence available which reveals the actual value of the goods. Opposite party No.3 has not alleged undervaluation of the goods in the show cause notice. He lacks jurisdiction to make assessment unless, the case falls under the scope of casual dealer. The documentary evidence establishes the name of the purchaser and seller, and the petitioner is a registered dealer and accordingly, opposite party No.3 is not vested with the jurisdiction to make assessment. In support of the contention, learned counsel for the petitioner has placed strong reliance on the judgment of this Court in the case of *Sri Vinayak Store vs. Sales Tax Officer and others, 86 STC 423.* Further, relying on the provisions of Section 74 of the OVAT Act and Rules 79 and 80 of the OVAT Rules, Mr. Pati, contended that the present demand has been raised illegally and initiation of the proceeding against the petitioner is also invalid, illegal, arbitrary and contrary to the aforesaid provisions. It is further stated that the observation of opposite party No.3 is without any basis and the imposition of tax and penalty is liable to be quashed. The entries made in the very documents produced before opposite party No.3 show that the goods carried were absolutely old goods. Opposite party No.3 is vested with jurisdiction to levy tax and penalty in the event he finds that the goods are not supported with the statutory documents required under Section 74(2) of the OVAT Act. The way bill was neither defective nor incomplete. Prerequisites for imposition of penalty under Section 74(5) read with Rule 80(12) of the OVAT

Rules is that the way bill is defective or incomplete and the said postulation is absent in the case of the petitioner. In the event, the defect or omission is remedied, penalty under Section 74(5) is not imposable. The petitioner has not been served with any statutory notice in Form VAT-405 as prescribed in terms of Rule 80(12) of the OVAT Rules. Opposite party No.3 has imposed penalty on the petitioner without recording reasons and without coming to the conclusion about the mala fide intention of the petitioner by bringing any materials on record.

5. Per contra, Mr. R.P.Kar, learned Standing Counsel appearing on behalf of the Revenue submitted that various contentions raised by the petitioner with regard to alleged procedural irregularities committed by the S.T.O. and not acting in accordance with Section 74 of the OVAT Act read with Rules 79 and 80 of the OVAT Rules were taken in the earlier writ petition bearing W.P.(C) No.23516 of 2011. This Court after hearing the learned counsel for the parties, disposed of the said writ petition, giving liberty to the petitioner to approach the revisional authority and the revisional authority was directed to find out the status of the goods i.e. as to whether those were old one or new by taking assistance of technical expert.

In view of the same, the present writ petition raising similar grounds again is not maintainable as it is hit by the doctrine of res judicata. Apart from this, the contentions raised in this writ petition, were not raised before the revisional authority. Therefore, the petitioner is estopped from raising those points in the present writ petition. Further, pursuant to the order of this Court, the revisional authority constituted a technical committee, who are of the opinion that the goods carried in the vehicle in question are not obsolete/old materials but new materials and there is nothing on record to disbelieve the version of the Technical Committee. Concluding his argument, Mr. Kar, vehemently submitted that the revisional authority is justified in affirming the order passed by the S.T.O. so far as levy of tax and penalty under the OVAT Act is concerned.

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

> (i) Whether in the facts and the circumstances of the case, the S.T.O., Unified Checkgate, Jamsola is justified in taking action under Sub-Section (5) of Section 74 of the OVAT Act and in passing order dated 27.08.2011 under Annexure-5 ?
> (ii) Whether the opinion of the Technical Committee constituted pursuant to order of this Court in W.P.(C) No.23516 of 2011 is

binding on the petitioner as well as opposite party-Commercial Tax Department Authorities in the facts and circumstances of the case ?

(iiii) Whether the order dated 15.09.2011 (Annexure-1) passed by opposite party No.2-revisional authority is sustainable in law ?

7. Question No.(i) is as to whether the S.T.O. is justified in taking action under sub-section (5) of Section 74 of the OVAT Act and in passing the order dated 27.08.2011 under Annexure-5.

8. To deal with this question, it is necessary to know what is contemplated under sub-section (5) of Section 74 of the OVAT Act, which is extracted below:

> "74. ***Establishment of check-posts and inspection of goods while in transit. —***
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> xx xx xx
>
> (5) The officer-in-charge of the check-post or barrier or the officer authorized under sub-section (3), after giving the driver or person-in-charge of the goods a reasonable opportunity of being heard and holding such enquiry as he may deem fit, may impose, for possession or movement of goods (in transit), whether seized or not, in violation of the provisions of clause (a) of sub-section (2) or for submission of false or forged documents or way bill either covering the entire goods or a part of the goods carried, a penalty equal to five times of the tax leviable on such goods, or twenty per centum of the value of the goods, whichever is higher, in such manner as may be prescribed".
>
> (underlined for emphasis)

9. Section 74(5) of the OVAT Act prescribes that the officer-in-charge of the check-post or barrier or the officer authorized under sub-section (3), after giving the driver or person-in-charge of the goods, a reasonable opportunity of being heard and holding such enquiry as he may deem fit, may impose penalty, as prescribed under the said sub-section, for possession or movement of goods (in transit), whether seized or not upon fulfilment of any of the following conditions:-

(i) in violation of the provisions of clause (a) of sub-section (2), or

(ii) for submission of false or forged documents or way bills either covering the entire goods or part of the goods carried.

10. Thus, only after giving the driver or the person-in-charge of the goods, a reasonable opportunity of being heard and holding such enquiry as he may deem fit and further after being satisfied that any of the two conditions hereinbefore exists, the prescribed authority shall impose penalty. Imposition of penalty under this sub-section cannot be sustained unless it is clearly shown that any of the conditions prescribed in that sub-section is satisfied. In order to exercise jurisdiction under Section 74(5), the prescribed authority must be satisfied that either of the two conditions is fulfilled and such power cannot be exercised on some suspicion or doubt.

11. In the instant case, the S.T.O. after inspection of the goods in question and documents accompanied it, issued show cause notice dated 24.08.2011 (Annexure-3) to the petitioner –dealer intimating him that on inspection of goods, he noticed that the goods covered by waybill were found to be incorrect; those goods are found to be auto parts (spring) leaf in sets; but the way bill in support of the consignment discloses the goods to be scrap spring pati. In the said show-cause notice against column "scheduled goods inspected", the following entries have been made:

> "Scheduled of goods inspection : 216 (two hundred sixteen) no. of spring leafs sets are found loaded in the truck bearing no.— OR-14-U-8393 in good condition and each set is consisting of different no. of leafs. The consignment is not scrap spring leafs but spring leafs set in good conditions to be used in different heavy vehicles."

12. In the order dated 27.08.2011 (Annexure-5), the S.T.O. observed/held as follows:

> "The waybill and the invoice in support of the consignment discloses the goods to be 16 MT of scrap spring patti purchased from M/s. Lokenath Traders, 150A, South Sinthee Road, Kolkata vide tax invoice No.05/AUG/2011-12 dated 20.08.2011 and the value of the goods disclosed amounting to Rs.3,26,400/-. The ASTO on duty verified the documents produced by the driver and referred to the STO on duty for unloading and thorough checking of the instant vehicle. As directed by the STO on duty the said vehicle was unloaded and thoroughly checked on dated 23.8.11 by the ASTO in charge of unloading with the active cooperation of the driver. On such verification it is revealed that the instant vehicle is loaded with 216 nos of spring leaf sets which are auto parts and are in good condition. Further all the 216 sets of spring leafs which are found to be unused and can be used in different heavy vehicles in its present form. It is also examined by a competent person who happens to be

> auto mechanic and revealed that all spring leafs loaded in the instant vehicle are of good condition and can be readily used in heavy vehicles. No trace of scrap material (scrap spring patti) is found loaded in the instant vehicle. Since the goods are found to be auto parts, but the invoice and way bill in support of the consignment discloses the goods to be scrap spring patti. Hence, systematic arrangements of documents have been done by the dealer to evade tax.
>
> Responding the show cause notice issued under section 74(5) of the OVAT Act 2004, the dealer partner Sri Rajesh Rajuka filed the compliance on dated 26.8.11. As stated in his written submission, the goods in question is a raw material for the dealer firm and the documents carried by the driver of the vehicle are genuine. The dealer has neither denied the fact that the said goods are auto parts i.e. spring leafs in sets. Explanation as offered by the dealer is far from satisfactory and not at all convincing. The selling dealer deals in automobile spare parts along with machinery parts and heavy earth moving equipments and is not a trader of scrap goods. The systematic arrangement of document done by the dealer is intentional and deliberate one."

13. From the noting made in the show cause notice and observations/findings of the S.T.O., in his order dated 27.08.2011 (Annexure-5) quoted above, it can be safely said that the driver of the vehicle submitted false/forged documents/waybills covering the entire goods carried in the vehicle. It is certainly a case of fraud.

14. Law is well settled that fraud vitiates everything.

The Hon'ble Supreme Court in the case of ***Commissioner of Customs (Preventive) vs. Aafloat Textiles (I) P. Ltd. and others***, (2010) 1 GSTR 453 (SC), held that fraud vitiates every solemn act. It is fraud in law if a party makes a representation which he knows to be false and injury ensures therefrom although the motive from which the representation proceeded might not have been bad.

15. The Hon'ble Supreme Court in ***Shrisht Dhawan (Smt) vs. Shaw Bros.,*** (1992) 1 SCC 534), held as under:-

> "Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, 'wing me into

> the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or pubic policy forbids as being prejudicial to another. In Black's Legal Dictionary, 'fraud' is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In *Concise Oxford Dictionary*, it has been defined as criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to *Halsbury's Laws of England*, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines 'fraud' as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false."

16. The contention of Mr. Pati that since the driver has produced various documents covered under clause (a) of sub-section (2) of Section 74 and thereby has not violated the said provision, the S.T.O. is not justified in taking action under Section 74(5) of the OVAT Act and passing the order under Annexure-5 is not sustainable in law for the reasons stated above.

Further, since the case of opposite parties is not that the goods carried in the vehicle are not fully covered by way-bills or that the way-bill is defective or incomplete there is no need to issue notice in Form VAT 405 as contemplated in Rule 80(12) of the OVAT Rules. The specific case of opposite parties is that the goods carried in the vehicle are found to be 216 sets of spring leafs to be used and can be used in its present form but the invoice and waybill in support of the consignment disclose those goods to be scrap spring patti. Hence, the petitioner's contention in this regard is not sustainable in law. Similarly, the petitioner's further contention that the S.T.O. has no jurisdiction to assess the petitioner as he is not a casual dealer is not sustainable in law because, the S.T.O. has not made any

assessment in the instant case. The S.T.O. exercising his power vested in sub-section (5) of Section 74 has imposed penalty and the petitioner is required to pay penalty imposed under Section 74(5) in addition to tax as contemplated in sub-section (7) of Section 74 of the OVAT Act.

17. In view of the above, the S.T.O., Unified Checkgate, Jamsola is justified in taking action under Section 74 (5) of the OVAT Act and in passing order dated 27.08.2011 under Annexure-5.

18. Question No.(ii) is as to whether the opinion of the Technical Committee constituted pursuant to order of this Court in W.P.(C) No.23516 of 2011 is binding on the petitioner as well as opposite party-Commercial Tax Department Authorities in the facts and circumstances of the case.

19. As stated above, the order under Annexure-5 passed by opposite party No.3 was challenged in W.P.(C) No.23516 of 2011. After considering the rival legal contentions of the parties, the said writ petition was disposed of with liberty to the petitioner to approach the revisional authority and the revisional authority was also directed to constitute a Technical Committee to find out the status of the goods i.e. whether the goods in question are old one or new. Such an order was passed as the S.T.O. detained the vehicle of the petitioner bearing Registration No.OR-14-U-8398 at Unified Checkgate, Jamsolaghat on the ground of furnishing false declaration of the description of goods loaded in the vehicle in question in the way bill and invoice. According to the S.T.O., the documents produced by the driver of the vehicle at the Check-gate, such as, way-bill, invoice, in support of consignment disclose the goods to be 16 MT of scrap spring patti purchased from M/s. Lokenath Traders, South Sinthee Road, Kolkata and the value of the goods was Rs.3,26,400/-. On verification, the S.T.O. found 216 sets of spring leafs which are auto-parts and were in good condition to be used and can be used in different heavy vehicles in its present form. No trace of scrap materials (scrap spring patti) was found loaded in the vehicle in question. Therefore, show cause notice was issued under Section 74(5) of the OVAT Act for imposition of five times penalty of the tax leviable on such goods or 20 per centum of the value of the goods whichever is higher for the reason of false declaration of the description of goods in the documents produced at the Checkgate. In the show cause reply, the petitioner has explained that those were scrap materials. According to the S.T.O., in the show cause reply, the petitioner has never denied the fact that the goods are auto parts i.e. spring leaf in sets. Further observation of the S.T.O. is that the selling dealer deals in automobile spare parts along with machinery parts and heavy earth moving equipments and is not a trader of scrap goods. He is of the opinion

that the intention of the petitioner-dealer was to evade payment of tax. After necessary investigation, he came to a conclusion that the goods in question were auto parts and determined the value of such goods accordingly and imposed tax and penalty under the OVAT Act and also under the Orissa Entry Tax Act. As per the direction of this Court in W.P.(C) No.23516 of 2011, a Technical Committee was constituted vide office order No. 14402 dated 09.09.2011 with the members consisting of Sri Satrughan Nayak, Asst. RTO., Unified Checkgate, Jamsolaghat as Chairman and Sri Sanjay Kumar Sahu, Jr. MVI and Sri G.C. Hansda, Jr. MVI as members of the Committee, in order to ascertain as to whether the alleged goods declared as scrap spring patti in the way-bill and invoice of M/s. Lokenath Traders, Kolkata sent through M/s.Gupta Roadways loaded in vehicle bearing Registration No.OR-14-U-8398 are old one or new. The constituted Technical Committee submitted its report dated 12.09.2011, wherein it is stated that all the members of the technical committee checked the vehicle in question by opening the cover and verified the alleged goods after rotating both the sides of the sets and found that the alleged goods are new spring leafs set.

20. After hearing learned counsel for the petitioner, the revisional authority passed the impugned order under Annexure-1 with the following observations and findings:

> "Heard the ld. advocate appearing on behalf of the petitioner, gone through the orders of STO, Unified Checkgate, Jamsolaghat vis-à-vis the grounds of revision and the material available in the record along with the report of the constituted technical committee and have come to the conclusion that the STO, Unified Checkgate, Jamsolaghat is fully justified in raising the demand u/s.74(5) of the OVAT Act, detaining the vehicle bearing No.OR14-U-8398. First of all I would like to point out here that in all the documents, such as, the petitioner's own Govt. way bill, consignment note of the transporter and the tax invoice of the consignor there is false declaration of description of commodity/goods. That is to say goods actually loaded in the vehicle are new spring leaf sets whereas the declaration of the goods, in the documents produced by the driver before the checkgate officer consisting of Govt. way bill, tax invoice of the seller, consignment note of the transporter, etc. is scrap spring patti. This has been done with obvious mala fide intention of not paying due tax to the state exchequer at the right time. All the three members of the constituted technical committee are of the unanimous view that the goods carried in the vehicle bearing No.OR-

> 14-u8398 are new spring leaf sets. Thus the expert view goes against the petitioner's contention that those alleged goods are scrap spring patti. Hence the mensrea of the petitioner is found fully established. The Checkgate officer is also justified in enhancing the value of the goods loaded in the vehicle to Rs.14,00,000/- after through enquiry of the market rate since the price of new one is definitely going to be much higher than the price of scrap material which have been disclosed in the tax invoice and waybill. This has been done with active involvement of the instant petitioner. Thus the enhancement of price to Rs.14,00,000/- by the STO is sustained. Moreover, the STO of the Checkgate is justified in imposing penalty as contemplated u/s.74(5) of the OVAT Act. Hence, the demand of VAT @ 13.5% to the tune of Rs.1,89,000 and VAT penalty to the tune of Rs.9,45,000/- are confirmed.
>
> Now coming to the demand and penalty rised under OET Act I would like to point out here that this is an order passed by the STO U/s.74(5) of the OVAT Act. Therefore, under the said order demand raised under the OET Act to the tune of Rs.14,000/- and penalty imposed under the OET Act to the tune of Rs.28,000/- cannot be sustained. Therefore, the demand and penalty raised under the OET Act in the instant order of he STO totaling an amount of Rs.42,000/- is quashed. The STO is directed to initiate fresh proceeding for collection of tax on the alleged goods as per the provisions of law under the OET Act."

21. Thus, the revisional authority, who is the fact finding authority, taking into consideration the report of the technical committee constituted pursuant to direction of this Court, came to the conclusion that the documents furnished by the petitioner before the S.T.O. contain false declaration of the description of commodity/goods. The goods in question were found to be new one whereas it is described as scrap spring patti and this has been done with obvious mala fide intention of not paying tax due to the State exchequer. It was further contended that unless the goods are put to test through mechanical means, it is not possible to find out the status of the goods. The goods do not have the required strength and hardness which is essentially required for use in heavy automobile vehicles. Such contentions of the petitioner are not acceptable in view of the unanimous opinion of all the members of the technical committee having expertise in the automobile field. Moreover, it is unheard that when such goods are sold in the market, the consumers before purchasing such goods would put to test through mechanical means to find out the status of the goods, its strength and hardness. If a consumer of the goods can satisfy himself without any test

through mechanical means, about the status of the goods, its strength and hardness, it is not understood why the opinion of the technical committee consisting of Sri Satrughan Nayak, Asst. RTO., Unified Checkgate, Jamsolaghat as Chairman and Sri Sanjay Kumar Sahu, Jr. MVI and Sri G.C. Hansda, Jr. MVI, having expertise in automobile field cannot be accepted. Further, an expert can by visual inspection make out the distinction between scrap material and new material. In the instant case, the expert committee have made elaborate study and examination of materials concerned and gave their report.

22. The Constitution Bench of the Hon'ble Supreme Court in ***University of Mysore and H.H. Anniah Gowda v. C.D. Govinda Rao & Anr., AIR 1965 SC 491 (V 52 C 80)*** held as follows:-

> "Boards of Appointments are nominated by the Universities and when recommendations made by them and the appointments following on them, are challenged before courts, normally the courts should be slow to interfere with the opinions expressed by the experts. There is no allegation about mala fides against the experts who constituted the present Board; and so, we think, it would normally be wise and safe for the courts to leave the decisions of academic matters to experts who are more familiar with the problems they face than the courts generally can be."

23. Thus, the finding of the Technical Committee is binding on the petitioner as well as opposite party-Commercial Tax Authorities. The fact finding authorities have rightly held that actually the goods in question loaded in the vehicle are new spring leaf sets whereas the declaration of the goods in the documents produced by the driver before the S.T.O. consisting Government way bill, tax invoice of seller, consignment note of the transporter etc. show that those are scrap spring patii.

24. The contention of the petitioner, placing reliance upon the case of ***Sri Vinayak Store*** *(supra)* that the petitioner being the registered dealer, the value indicated in the way bill has to be accepted is of no help to the petitioner for the reason that the said decision is not applicable to the facts and circumstances of the case. In that judgment, this Court has held that where the purchaser/consignee is a registered dealer, ordinarily the value indicated in the way bill has to be accepted unless compelling reasons exist. If, however, the officer-in-charge of the check-post is of the considered view that a departure is warranted, he must record reasons therefor and indicate

those to the prescribed person. Adoption of such procedure will be in tune with principles of natural justice.

25. In the instant case, the S.T.O. has indicated valid reasons for holding that the goods in question loaded in the vehicle were new spring leaf sets and the value mentioned in the documents like waybill and tax invoice has been understated and the actual value is much higher for the reasons stated in the impugned order.

26. In view of the above, the decision of this Court in the case of ***Sri Vinayak Store*** *(supra)* is of no help to the petitioner.

27. Question No.(iii) is as to whether the order dated 15.09.2011 (Annexure-1) passed by opposite party No.2 is sustainable in law.

28. For the reasons stated in the preceding paragraphs, opposite party No.2-revisional authority is fully justified in confirming the levy of penalty under Section 74(5) of the OVAT Act made by the S.T.O. under Annexure-5 and also in deleting the imposition of penalty under the OET Act in a proceeding under the OVAT Act, with a direction to the S.T.O. to initiate a fresh proceeding under the OET Act.

29. We notice that the S.T.O. has levied VAT @ 13.5% to the tune of Rs.1,89,000/- in the order passed under sub-section (5) of Section 74 of the OVAT Act and opposite party No.2-revisional authority also confirmed such levy of VAT. Section 74(5) does not contemplate levy of VAT. It contemplates imposition of penalty only. However, sub-section (7) of Section 74 provides that subject to the Rules as may be prescribed, the officer-in-charge of the check-post or barrier or the officer authorized under sub-section (3) may release the goods to the owner of the goods or to any person duly authorized by such owner on payment of penalty imposed under sub-section (5) in addition to tax payable thereon.

30. A conjoint reading of sub-sections (5) and (7) of Section 74 of the OVAT Act makes it clear that only on payment of the penalty imposed under sub-section (5) in addition to tax payable the prescribed authority may release the goods. It needs no emphasis that quantification of penalty depends on determination of tax. Unless, tax is determined first, no penalty can be quantified as contemplated in Section 74(5). Any other interpretation shall render sub-section (5) of Section 74 redundant.

31. In that view of the matter, opposite party No.2-revisional authority is justified to hold that the petitioner is required to pay tax and penalty and the vehicle bearing Registration No.OR-14-U-8398 can only be released after

realisation of the demanded dues under the OVAT Act to the tune of Rs.11,34,000/-.

32. In the result, the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

**2012 ( I ) ILR- CUT- 63**

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

W.P.(C ) NO.7178 OF 2011 (Decided on 06.09.2011).

**M/S. TOYO ENGINEERING INDIA LTD**. .....Petitioner.

*.Vrs.*

**SALES TAX OFFICER & ANR**. .....Opp.Parties.

**A. ORISSA ENTRY TAX ACT, 1999 (ACT NO. 11 OF 1999) .S.7**

**Practice and procedure – Show cause notice – Necessity of rendering opportunity to the dealer – If a dealer is required to pay tax due as per the return and he fails to make payment of tax due as per the return and interest accrued there on along with return or revised return the show cause notice is served upon the dealer to make payment of tax due on the return – If the dealer fails to respond to such notice an order has to be issued in Form E-23 imposing penalty – Where the dealer files nil return and it is not the case of the assessing officer that the dealer has admitted certain amount towards its tax liability in the return and made less payment than the amount admitted to be payable by him in his return, he is not justified to issue notice in form E-24 and consequently demand notice in Form E-8 in the event the assessing officer feels that the deductions claimed by the dealer is not admissible/allowable as disclosed in the return furnished, he shall issue a show cause notice asking the dealer to pay the amount due on the return in Form E-22 and E-23 as provided under Rule 10 (5).** (Para 15,16)

**B. WORDS & PHRASES – "Tax payable by the dealer" – The phraseology used "Tax payable by the dealer" as per the return furnished does not connote the tax which is payable according to the provisions of the statute – If it is construed so, then in exercising power under Clause (b) of Sub-rule (6) of Rule 10 of the Orissa Entry Tax Rules, 1999, which does not provide any opportunity of hearing to the dealer, the assessing authority shall raise demands by unilaterally disallowing various claim made in the return which would be in gross violation of the principles of natural justice.** (Para 8)

**C. INTERPRETATION OF STATUTE – While interpreting the provisions of the statute, every part of the provisions of the statute has to be given effect**

**and one part can not be interpreted in a manner inconsistent with another part of the statute which would defeat the object and purpose of the Act and Rules - Where language of any provision in a statute is clear, it is impermissible to vary the language unless the plain and unambiguous language leads to an absurd result.** (Para 9,10)

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**Case laws Referred to:-**

1.AIR 1997 SC 1165 : (Mohammad Ali Khan & Ors.-V-Commissioner of Wealth-tax)
2.AIR 1961 SC 1170 : (J.K. Cotton Spinning & Weaving Mills Co.Ltd.-V-State of U.P.)
3.AIR 1971 SC 530 : (H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur & Ors etc.-V- Union of India)

For Petitioner - M/s. S.N.Sahu, B.Panda, B.B.Sahu Bijay Panda.
For Opp.Parties - Mr. R.P.Kar (Standing Counsel for Revenue)

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***B.N.MAHAPATRA, J***. Challenge has been made to the notices issued for less payment of tax in Form- E24 under Rule 10(6)(b) as well as demand notice in Form-E8 under Rule-16 of the Orissa Entry Tax Rules, 1999 (for short 'OET Rules') on the ground that both the notices have been issued directing the petitioner to pay Rs.13,33,115/- along with interest at the rate of 2% for the period from 01.01.2010 to the date of payment of the amount as directed in Form E24 without application of mind and misconstruing the above provisions of the OET Rules.

2. Petitioner's case in a nutshell is that the petitioner is a dealer registered under Value Added Tax Act, 2004 (for short 'VAT Act') and Entry Tax Act, 1999 (for short 'ET Act'). It has been regularly filing its quarterly returns as required under sub-section (1) of Section 7 of the OET Act before the Assessing Authority disclosing nil turnover of value of goods on which entry tax is payable. In spite of the same, the Sales tax Officer, Paradeep Circle, Paradeep, Jagatsinghpur issued notice for less payment of tax in Form E-24 under Rule 10(6)(b) followed by notice of demand in Form E-8 under Rule 16 of the OET Rules for Rs.13,33,115/- along with interest as directed in Form-E24. Hence, the present writ petition.

3. Mr.B.Panda, learned counsel for the petitioner submitted that the said notices have been issued without application of mind. The petitioner is a works contractor and in order to execute the work, it has procured machineries and

construction materials from outside the State of Orissa and overseas countries on which no entry tax is leviable. The petitioner has been regularly filing its quarterly return in Form E-3 as required under sub-section (1) of Section 7 of the OET Act. According to Mr.Panda, since the petitioner has filed quarterly return as required under Section 7(1) of the OET Act, no assessment can be made under Section 9A read with Rule 15A of the OET Rules. The impugned demand has been made ignoring the principle laid down in the judgment of this Hon'ble Court dated 18.02.2008 in W.P.(C) No.6515 of 2006 in the case of Reliance Industries Limited. Levy of entry tax on the goods imported from foreign countries is hit by Article 286(b) of the Constitution. The VAT amounting to Rs.50,55,057/- has been deducted at source from the payments made to the petitioner on account of execution of work. Therefore, further demand raised under OET Act is illegal.

4. Mr. Kar, learned counsel appearing for the Commercial Taxes Department submits that there is no illegality or infirmity in issuing the notice in Form E-24 under Rule 10(6)(b) and demand notice in Form E-8 under Rule 16 of the OET Rules. The petitioner having claimed illegal deductions from the total value of goods purchased and utilized in execution of the works contract, the Assessing Officer in exercise of power vested under Rule 10(6) (b) of the OET Rules has issued Form E-24 raising the amount due from the dealer. Consequently, notice of demand issued in Form E-8 is also valid.

5. On rival contentions of the parties, the only question that arises for consideration by this Court is as to whether in exercise of the power vested with the Assessing Officer under clause (b) of sub-rule (6) of Rule 10, the Assessing Officer can examine the correctness of various deductions claimed in the return to find out the amount of tax due from the assessee unilaterally by applying his own method of calculation.

6. To deal with the above question, it is necessary to know what is contemplated in sub-rule (6) of Rule 10, which is reproduced below:-

"(6) (a) Each and every return in relation to any tax period furnished by a dealer shall be subject to manual or system based scrutiny.

(b) If, as a result of such scrutiny, the dealer is found to have made payment of tax less than what is payable by him for the tax period, as per the return furnished, the assessing authority shall serve a notice in Form E24 upon the dealer directing him to pay the balance tax and interest thereon by such date as may be specified in that notice."

7. A plain reading of above rule makes it clear that the return filed by the dealer shall be subject to manual or system based scrutiny and on such scrutiny, if the dealer is found to have made payment of tax less than what is payable by him for the tax period as per the return furnished, the Assessing Officer shall serve the notice in Form E 24 upon the dealer directing him to pay the balance tax and interest thereon by such date as may be specified in that notice. Thus, by exercising power vested under clause (b) of sub-rule (6) of Rule 10, the Assessing Officer shall ask the dealer to pay differential amount between the tax payable by him as per the return furnished and the amount of tax paid along with return. In other words, if the dealer pays the less amount of tax than what he admits to be payable by him as per the return furnished, the Assessing Officer shall and can ask the dealer to pay the differential amount in form E-24. To illustrate, if, as per the return filed by the dealer, Rs.100/- tax is payable by him and his return is accompanied by a challan showing payment of Rs.40/-, the Assessing Authority shall issue notice in Form E-24 for the balance amount of Rs.60/-. Therefore, under sub-rule (6) of Rule 10 there is no provision to give any opportunity of hearing to the dealer before issuing notice under that sub-rule in Form E-24. Opportunity of hearing the dealer before issuing notice in Form-24, has been rightly not provided because the Assessing Authority is only required to ask the dealer to pay the differential amount between the amount admitted by the dealer in his return to be payable and the amount already paid. If the provisions contained in sub-rule(6) of Rule 10 would be construed otherwise, it would give unbridlled power to the Assessing Authority to disallow various deductions claimed in the return giving his own interpretation without affording any opportunity of hearing to the assessee and to raise any demand which is certainly not the intention of legislature.

8. In this context, it is also very much necessary to deal with an important aspect raised by Mr. Kar, the Standing Counsel for the Revenue that if the assessee claims bogus, illegal deductions in its return, the Assessing Authority cannot remain a silent spectator and accept the tax admitted by the dealer in its return. According to Mr. Kar, in that event there will be huge loss to the State Exchequer. Therefore, according to Mr. Kar, the phraseology used “tax payable by the dealer” as per the return furnished connotes the tax which is payable according to the provisions of the statute. We are unable to accept such contention taken by Mr. Kar as in that event in exercising power under clause (b) of sub-rule (6) of Rule 10 which does not provide any opportunity of hearing to the dealer, the Assessing Authority shall raise demands by unilaterally disallowing various claim made in the return. That would be in gross violation of the principles of natural justice.

9. It is pertinent to note here that the apprehension of Mr.Kar has been taken care of by the Legislature in Rule 10 itself.

It is well settled legal position that, while interpreting the provisions of the statute, every part of the provisions of the statute has to be given effect and one part cannot be interpreted in a manner inconsistent with another part of the statute that would defeat the object and purpose of the Act and Rule. In ***Mohammad Ali Khan and others Vs. Commissioner of Wealth-tax***, AIR 1997 S.C. 1165, the Supreme Court has quoted the following observations of the Court made in ***J.K. Cotton Spinning & Weaving Mills Co. Ltd., vs. State of U.P.,*** AIR 1961 SC 1170:

> "The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of statute should have effect."

10. It is a settled position in law that where language of any provision in a Statute is clear, it is impermissible to vary the language unless the plain and unambiguous language leads to an absurd result. That is not the case here.

11. At this juncture, it will be beneficial to refer the decision of the Hon'ble Supreme Court in the case of ***H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others etc., vs. Union of India,*** *AIR 1971 SC 530,* wherein the Hon'ble Supreme Court in the context of interpretation of the constitutional provision held that:

> "134. ….. A constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. The meaning of a word or expression used in the Constitution often is coloured by the context in which it occurs: the simpler and more common the word or expression, the more meanings and shades of meanings it has. It is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was used by the Constitution makers, and in discharging the duty the Court will take into account the context in which it occurs, the object to serve which it was used, its collocation, the general congruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the Court will avoid repugnancy with accepted norms of justice and reason….."

12. As per Rule 10(1)(a), the return under sub-section (1) of Section 7 of the Act shall be submitted in Form E-3 within twenty-one days of the date of expiry of the month or quarter as the case may be, to which the return relates.

13. Clause (a) of Sub-rule (3) of Rule 10 of OET Rules provides that the return under sub-rule (1) or (2) shall be accompanied by the receipt from the Government treasury or a crossed demand draft drawn in any scheduled bank or a bankers' cheque issued by the scheduled bank in favour of the Asst. Commissioner, Sales tax or Sales Tax Officer of the Circle, as the case may be, to fulfill the payment of tax as per the return.

Clause (b) of sub-rule (3) of Rule 10 provides that where the dealer furnishes a return under sub-rule (1) or (2) without proof of full payment of tax payable for the tax period, a notice in form E-21 shall be served upon such dealer for payment of the tax due as per the return furnished and the dealer shall pay the amount of tax defaulted within the time specified in that notice.

14. Rule 10(5)(a) provides, where a dealer fails to make payment of the tax due and interest thereon along with return or revised return furnished for any tax period, a notice in Form E-22 requiring such dealer to show cause within 14 days from the date of receipt of the notice shall be served upon him.

Rule 10(5)(b) provides, where the dealer fails to respond to such notice or explain the default in payment of tax or interest or both to the satisfaction of the authority issuing notice under clause (a) penalty shall be imposed under sub-section (6) of Section 7 and the order shall be issued in Form E-23.

Rule 10 (5) (c) provides where a dealer fails to furnish the proof of payment as required under sub-section (1) of Section 7, a notice in Form E-22 requiring such dealer to show cause within fourteen days from the date of receipt of the notice shall be served on such dealer and if the dealer either fails to respond to such notice or fails to explain to the authority issuing such notice, sufficient cause for not furnishing the proof of payment of the tax due, the penalty shall be imposed under sub-section (7) of Section 7 and the order shall be issued in Form E-23.

15. Thus, on a conjoint reading of the above provisions, if a dealer is required to pay the tax due as per the return and he fails to make payment of

the tax due as per the return and interest accrued thereon along with return or revised return the show cause notice is served upon the dealer to make payment of the tax due on the return. If the dealer fails to respond to such notice an order has to be issued in Form E-23 imposing penalty.

16. In the instant case, the petitioner-dealer has filed its nil return for the period under consideration. Since it is not the case of the Assessing Officer that the dealer has admitted certain amount towards its tax liability in the return and made less payment than the amount admitted to be payable by him in its return, he is not justified to issue notice in Form E-24 and consequently demand notice in Form E-8 raising demand of Rs.13,33,115/-. According to the Assessing Officer, as per the figures furnished in the return the tax due for the period under consideration comes to Rs.13,33,115/- as various deductions claimed by the dealer, according to the Assessing Authority, is not admissible/allowable. In that event, the Assessing Officer shall issue a show cause, asking the dealer to pay the amount due on the return in Form E-22 and E-23 as provided under rule 10(5).

17. In view of the above, the notice issued in Form E-24 and demand notice in Form E-8 under Annexure-3 series are quashed. Liberty is given to the Assessing Officer to proceed against the petitioner in accordance with law, if he is of the opinion that the tax due on the return as furnished by the petitioner is not paid by it due to wrong/excessive claim of deduction(s) in the return.

18. In the result, the writ petition is allowed.

Writ petition allowed.

**2012 ( I ) ILR- CUT- 70**

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

W.P.(C) NOS.20748 & 20749 OF 2011 (Decided on 12.08.2011)

**M/S. MAA VAISHNAVI SPONGE LTD. & ANR.** .....Petitioner.

*.Vrs.*

**DIRECTOR GENERAL OF INCOME TAX & ORS.** ... ... Opp.Parties.

**INCOME TAX ACT, 1961 (ACT NO. 43 OF 1961) – S.132 (1) (iii).**

**In order to make a seizure of the assets in exercise of power U/s. 132 (1) (iii) assessee's possession over the assets is not sufficient – The Authorized Officer must have reason to believe that the assets represent wholly or partly the undisclosed income of the person in whose possession the assets are found.** (Para 9)

**Case laws Referred to:-**

1.(1969) 74 ITR 836 (SC) : (ITO -V- Seth Brother)
2.AIR 1954 SC 300 : (M.P. Sharma & Ors.-V-Satish Chandra, District Magistrate Delhi & Ors.)
3.1976(104)ITR 389 : (Om Prakash Jindal-V-Union of India)
4.(1989) 176 ITR 261 : (Sriram Jaiswal-V-Union of India)

For Petitioners - M/s. R.P.Kar, A.N.Ray, B.P.Mohanty, P.K.Mishra, K.K.Sahoo.
For Opp.Parties - Mr. A.K.Mohapatra, Sr. Standing Counsel (Income Tax Deptt.)

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***B.N. MAHAPATRA, J.*** Both the writ petitions have been filed with a prayer to quash the prohibitory order dated 6.7.2011 passed under sub-section (3) of Section 132 of the Income Tax Act, 1961 (for short, "the Act") as per Annexure-1 in respect of the accounts of the petitioner-Companies maintained with opposite party Nos. 6 to 10 Banks and warrant of authorization dated 18.06.2011 on the ground that those are illegal being without jurisdiction.

However, in course of hearing Mr. R.P. Kar, learned counsel appearing on behalf of the petitioners confined his prayer in both the writ petitions only to quashing of the prohibitory order passed under Annexure.1.

2. Since the prayer in both the writ petitions is identical, these are disposed of by this common judgment.

3. The facts and circumstances giving rise to the present writ petitions are that the petitioners are Companies incorporated under the provisions of the Companies Act, 1956 having their registered office at Dua Complex, Panposh Road, Rourkela. The petitioners are mainly engaged in manufacturing Sponge Iron, TMT and Structural Steel. The petitioners have been regularly filing their income tax returns. On the strength of warrant of authorization dated 18.06.2011, there were search and seizure operations in the business premises of the petitioner-Companies on 6.7.2011 and 7.7.2011. In course of search, by letter dated 6.7.2011 under Annexure-1 the Authorized Officer issued prohibitory order u/s. 132(3) of the Act to the Branch Manager, IDBI Bank, Rourkela directing him not to remove, part with or otherwise deal with the articles mentioned in the said order without his permission. Vide letter dated 6.7.2011 (Annexure-3) the Assistant General Manager, Mid Corporate Rourkela intimated the petitioner-Maa Vaishnavi Sponge Ltd. that they have received a notice from the Deputy Director of Income Tax (Investigation) to disclose information regarding transaction in the accounts and to disclose credit facility sanctioned with details of their terms and conditions and securities thereof and also not to remove, part with or otherwise deal with the accounts/safe deposit lockers/safe deposit articles maintained by them without prior permission of the Income Tax authorities or revocation of said notice. On 15.7.2011, the petitioner made a request to opposite party no.2-Director of Income Tax (Investigation), Bhubanerswar to allow the petitioners to operate the Bank Accounts in respect of which prohibitory order under Section 132(3) of the Act has been issued as they are facing difficulties in carrying on their business. Since no action was taken, the petitioners issued another letter dated 21.7.2011 with a request to permit them to operate the bank accounts. As repeated requests to permit the assessees to operate their bank accounts did not yield any result, the present writ petitions have been filed.

4. Mr. R.P. Kar, learned counsel appearing for the petitioners submitted that opposite party nos. 4 & 5-Income Tax authorities have illegally issued prohibitory order under Section 132 (3) of the Act on 6.7.2011 in respect of cash credit and current account etc. maintained with opposite party nos. 6, 7, 8, 9 & 10 although those accounts are regular accounts of the Companies and are disclosed in the return filed by the petitioners for the purpose of assessment. Without forming any opinion that undisclosed income of the assessee-petitioners was deposited in the bank accounts, the opposite parties have illegally restrained the petitioners from operating those accounts. The petitioner-assessees availed loan of crores of rupees from different banks to

carry on their business and for illegal action of the opposite parties their business has come to a halt. The search party including opposite party nos. 4, 5 & 6 transgressed their power and illegally issued order prohibiting the petitioners from operating the bank accounts. The petitioners are not in possession of any undisclosed income and, therefore, the action taken u/s. 132(3) of the Act is illegal. The Commercial Taxes Department and Central Excise Department have also approached the Income Tax authorities to allow the petitioner-Companies to operate bank accounts in order to carry on their business. The petitioner-Companies have entered into contracts with different buyers, traders and Government organizations and to discharge the contractual obligation, the operation of the bank accounts is very much necessary. Due to seizure of the bank accounts of the petitioners, their business got closed and more than 500 daily wage workers were rendered unemployed. The staff quarters are in dark due to non-payment of electricity bill. Statutory payments like staff salary, provident fund, ESI service tax, Excise Duty, Entry tax could not be paid. Due to arbitrary action committed by opposite party nos. 1 to 5, the petitioners' business has been paralyzed. Placing reliance on the judgment of this Court in the case of *M/s. Visa Comtrade Ltd. vs. Union of India and others* [W.P.(C) No.572 of 2011, disposed of on 18.05.2011], Mr. Kar prayed for quashing of the prohibitory order (Annexure-1) issued under Section 132(3) of the Act.

5. Mr. A.K. Mohapatra, learned Senior Standing Counsel for the Income Tax Department submitted that there is no illegality in issuing prohibitory order in respect of the bank accounts in question. The search and seizure action u/s. 132(3) is valid as the same has been conducted as per Warrant of Authorisation dated 18.6.2011. The Warrant of Authorisation has been issued after due satisfaction from the competent authority of the Income Tax Department. The prohibitory order u/s. 132(3) has been issued accordingly on 6.7.2011 to various banks for the verification of the accounts. As per Section 132(8A), an order under Section 132(3) of the I.T.Act shall not be imposed for a period exceeding 60 days from the date of that order. Hence, the prohibitory order u/s.132(3) is very much within the purview of law. Basing on the request of the petitioner-assessees, the Income Tax Authorities had issued letter to the Branch Manager, State Bank of India, Bonai to allow the petitioners to make payment towards Excise Duty but they have not been allowed to have free operation of the bank accounts since the very purpose of the search and seizure of the bank account shall be otherwise defeated if the entries of heavy cash deposit and withdrawal would not be examined as to whether same constitute undisclosed income. The allegation of the assessees that the accounts were kept under attachment for a long period is not correct. The money lying with the bank accounts has

not been seized or taken away. Only reasonable restriction has been made to verify the account. The assessees have not furnished any valid explanation with regard to the discrepancies noticed between cash balance as per cash book maintained in the accounting tally package and the actual cash found during search. Since the investigation is still continuing and each entry is being verified, free operation of the Bank accounts may hamper the process of investigation. The prohibitory order u/s 132(3) has been issued after due satisfaction of the competent authority.

6. Mr.Mohapatra further argued that the issue involved in the case of the petitioners is similar one with the issue which had come up in the case of *Lan Eseda Steels Ltd. V. ACIT* [209 ITR 901 (AP)]. In that case, bank operations were frozen by the officers acting under Section 132(3) of the Act. Assessee's case was that its business was being affected by the order and that at any rate the credit balance in the bank account was debts owed by the bank and not capable of attachment u/s. 132(3). The High Court dismissed the writ petition following the decision in *ITO Vs. Seth Brother* (1969) 74 ITR 836 (SC), stating that if the action taken is a regular one in the course of his functions except where the action taken is malicious or for a collateral purpose, the court would not interfere merely by substituting its own office for that of the officials, pointing out that the inconvenience caused is temporary. Decision of Hon'ble Supreme Court in *M.P. Sharma and others Vs. Satish Chandra*, *District Magistrate, Delhi and others,* AIR 1954 SC 300 was cited in support of the view that such inconvenience caused by search and seizure is only temporary interference of fundamental right and would constitute a reasonable restriction. It was further held that the High Court was satisfied that there was sufficient prima facie justification for the order in that case and attachment of such bank account had been held to be valid.

7. On the rival contentions, the questions that would arise for consideration are as follows:-

(i) Whether before issuing the prohibitory order u/s. 132(3) of the Act the Assessing Officer has formed any prima facie opinion on the basis of the materials on record that the money deposited in various bank accounts represents partly or wholly undisclosed income of the assessee-petitioners?

(ii) Whether in the facts and circumstances of the cases, the prohibitory order issued u/s. 132 (3) of the Act by the opposite parties-Income Tax Department in respect of various bank accounts is valid?

8. Since question Nos. (i) & (ii) are inter-related, those are dealt with together.

Before proceeding further, it is necessary to know what is contemplated in Section 132(3) of the Act. For ready reference the same is reproduced below:

> "(3) The authorised officer may, where it is not practicable to seize any such books of account, other documents, money bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to sub-section (1), serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.
>
> *Explanation.--* For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under clause *(iii)* of sub-section (1)."
>
> *(Underlined for emphasis)*

9. The use of word "**such**" appearing in Section 132 of the Act refers to the assets mentioned in Section 132 (1)(c), i.e., assets which are reasonably believed to be undisclosed property of the assessee. Where it is not practicable to seize such assets the provisions of sub-section (3) of Section 132 of the Act is resorted to. Law is well settled that in order to make a seizure of the assets in exercise of power u/s. 132 (1) (iii) assessee's possession over the assets is not sufficient. The Authorised Officer must have reason to believe that the assets represent wholly or partly the undisclosed income of the person in whose possession the assets are found. Similarly, where the Authorised Officer is not satisfied or he has doubt to believe that a particular asset found on search is undisclosed property of the assessee, he cannot have recourse to the provisions of Section 132(3) of the Act. It is only when the Authorised Officer has reasonably believed that incorporeal assets such as bank deposits or deposits in pass books, document etc. found on a search represent wholly or partly the undisclosed property of the assessee and the circumstances of the given case [for reasons other than those mentioned in the second proviso to Sub-section (1)] do not permit immediate seizure of the same, the provision of Sub-section (3) of Sec. 132 may be resorted to. Thus, Section 132(3) can be

resorted to only if there is any practical difficulty in seizing the asset which is liable to be seized. Therefore, it is only when in course of search any jewellery, ornament or money etc. is discovered and on scrutiny it is found to be undisclosed property the same can be seized under Section 132(1) (iii) or for the reasons stated in second proviso to sub-section (1) or for the reason stated in Section 132(3), an order can be served on the owner or person who is in immediate possession or control of the assets that he shall not remove, part with or otherwise deal with it except with previous permission of Authorized Officer, as the case may be.

10. The intention of legislature is certainly not to give unbridle power to the Authorized Officer to seize or issue prohibitory order in respect of any asset/bank account etc. found in the course of search without application of his mind for forming of an opinion/a belief on the basis of any material available on record that the asset/deposit in bank account represents wholly or partly the undisclosed income of the assessee.

This Court in ***M/s. Visa Comtrade Limited*** (supra), held as under:-

> "38. …..Recording of reasons/satisfaction involves application of intelligent mind to come to a conclusion that the money lying in the current account represents the undisclosed income of the assessee for which the same is liable to be seized. Top most care should be taken before taking seizure action in respect of a bank account already disclosed to the Income Tax Department. Needless to say that in fiscal statutes emphasis is given to transact every transaction through the bank account. Even the Act itself does not recognize cash transaction after a particular limit. Therefore, all bona fide assessees are required to do their business transactions through the bank account. If a current bank account of a bona fide assessee is seized without properly applying the mind that the money deposited in the Bank Account represents undisclosed income, then that will cause irreparable loss to the assessee concerned and his business will be jeopardized. The employees will not get their salary, electricity dues cannot be paid, day-to-day expenses of the business cannot be met and the supplier cannot get their dues; various Revenue authorities including the Government authorities will not get their dues/ taxes/duties. Ultimately, the business will come to an end and the assessee shall be deprived of his fundamental right guaranteed under Article 19(1)(g) of the Constitution to carry on his business/profession. It is certainly not the object of the search and seizure provided under the Act to close anybody's business. No

> doubt, the Revenue authorities are watchdogs of the Government Revenue. They are not expected to take any lenient view in respect of unscrupulous and dishonest business man. Evasion of tax is not to be tolerated and action must be taken against the erring assessee and/or the tax evaders. At the same time, they must see that the honest and bona fide business men are not harassed because they are the source of the Government Revenue. Therefore, various fiscal statutes provide that before taking any drastic step including search and seizure operation in case of an assessee, the competent authority has to first record its satisfaction for taking such action".

Therefore, order under Section 132(3) cannot be issued indiscriminately or it is not automatic in a search and seizure proceeding as contended by learned Senior Standing Counsel Mr.A.K.Mohapatra.

11. In the instant cases, it is not the case of the opposite party-Income Tax authorities that any deposit/transaction made in the various bank accounts in respect of which prohibitory order under Section 132(3) of the Act has been issued represent wholly or partly the undisclosed income of the assessee-petitioners. On the contrary, the stand of the opposite party Income Tax authorities is that the prohibitory order under Sec.132(3) has been issued for the purpose of finding out whether any transaction made in those accounts represents undisclosed income of the assessees. Petitioners' case is that the accounts were disclosed to the Income Tax Department in their return of income for the purpose of assessment and the petitioners have no undisclosed income which is parked in those accounts.

12. In the course of hearing, learned Senior Standing Counsel Mr.Mohapatra also submitted that the Authorised Officer after recording his satisfaction that money lying deposited in the bank accounts represent wholly or partly the undisclosed income of the assessee-petitioners, prohibitory order under Sec. 132(3) has been issued in respect of the bank accounts in question. To substantiate his stand he wanted to produce the relevant record and accordingly he produced the relevant record. On perusal of the same, we are not satisfied that the Revenue has recorded any reason to come to a conclusion before issuance of prohibitory order dated 06.07.2011 (Annexure-1) that any deposit/ transaction in the bank accounts in question has not been passed through regular books of account and/or undisclosed income of the petitioners (wholly or partly) has been parked in the said accounts. Mr. Mohapatra, learned Senior Standing Counsel fairly conceded the same. On the other hand, as stated above in its counter, the Department stated that investigation is going on to ascertain as to whether

the money lying in the bank accounts in question represents disclosed or undisclosed income. However, he vehemently argued that issuance of a prohibitory order u/s. 132(3) of the Act pursuant to search and seizure u/s. 132(1) is automatic and 60 days' time u/s. 132(8A) of the Act has been given to the Income Tax Department to examine and find out as to whether the various deposits made in such bank accounts are disclosed or undisclosed income.

13. For the reasons stated above, we are unable to accept the above contention of the learned Senior Standing Counsel justifying the action of the Authorised Officer in issuing prohibitory order under Section 132(3) of the Act. Moreover, even though in the meantime more than one month passed from the date of issuance of prohibitory order u/s. 132(3) of the Act, no material has been produced before us to show that any of the deposits/entries made in various bank accounts in question represent wholly or partly the undisclosed income of the assessees. This Court in ***Visa Comtrade Ltd. (supra)***, referring to the judgment of Punjab & Haryana High Court in *Om Prakash Jindal v. Union of India*, 1976 (104) ITR 389 and the decision of Allahabad High Court in the case of *Sriram Jaiswal v. Union of India*, (1989) 176 ITR 261, held that prohibitory order u/s. 132(3) of the Act issued in respect of bank accounts without forming any belief or without any material on record to conclude that the amount deposited in such bank accounts is either wholly or partly undisclosed income of the petitioner is not sustainable in law.

14. The decision of the apex Court in *M.P.Sharma (supra)* has no application to the present cases as in that case the apex Court while examining as to whether issue of search warrant under Section 96(1) of Criminal Procedure Code, 1898 infringes the fundamental right under Article 19(1)(f) and 19(1)(g), (5) of the Constitution, held that a search by itself is not a restriction on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction of the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. Hence, no question of violation of Article 19(1)(*f*) is involved where search warrants which purport to be under the first alternative of Section 96(1) of the Criminal Procedure Code are issued. The apex Court in the case of Seth Brothers (supra), while considering the scope of Section 132 of the Act, 1961, held

that since by the exercise of power under Section 132 of the Income Tax Act, 1961, a serious invasion is made upon the rights, privacy and freedom of the tax payer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the court. If the conditions for the exercise of the power are not satisfied the proceeding is liable to be quashed. Thus, this case on the other hand supports the case of the petitioners. The case of the Andhra Pradesh High Court in *Lan Eseda Steels Ltd. (supra)* has no application to the present cases as the facts and issues involved in that case is different from the present cases.

15. For the reasons stated above, we are of the considered view that issuance of prohibitory order dated 6.7.2011 under Sec. 132(3) of the Act in respect of Current Bank Accounts, Savings Bank Accounts, Cash Credit Accounts, Loan Accounts, Over Draft Accounts, Recurring Deposit Accounts, personal accounts, any other type of accounts of the petitioners are not valid. Therefore, the order u/s. 132 (3) of the I.T. Act in respect of the above accounts is quashed. So far as Lockers and Safe Deposit Articles mentioned in Prohibitory Order (Annexure-1) are concerned, the Authorised Officer is directed to take a final decision in accordance with law after giving opportunity of hearing to the petitioner.

16. We make it clear that our observations/findings given above are confined to the order issued under Section 132(3) of the I.T. Act in respect of Bank Accounts maintained with different banks as indicated supra. We have not expressed any opinion with regard to validity of search and seizure operation conducted by the Income Tax Department in exercising power under Section 132 (1). We further clarify that our order/direction would not preclude the Income Tax authorities to examine the deposits/entries made in the Bank Accounts in question and utilize the same in making assessment of the income of the petitioners if permissible under law.

17. In the result, the writ petitions are allowed to the extent indicated above.

No order as to costs.

Writ petitions allowed.

**2012 ( I ) ILR- CUT- 79**

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

W.P.(C) NO.12684 OF 2004 (Decided on 22.07.2011)

**M/S. B.ENGINEERS & BUILDERS LTD.** …….Petitioner.

*.Vrs.*

**ASST. COMMISSIONER OF INCOME TAX & ANR**. ……. Opp.Parties.

**INCOME TAX ACT, 1961 (ACT NO.43 OF 1961 ) – S.148.**

**Notice for reassessment – Validity of such notice challenged in writ petition – Writ petition disposed of with a direction to raise objection before the assessing authority – Consequently assessment order passed – Subsequent writ petition filed in which the fresh assessment order as well as question of limitation regarding issue of notice for re-assessment was challenged – Maintainability of writ petition – Held, subsequent writ petition is maintainable as the previous writ petition was disposed of without deciding the issue as to the validity of issue of notice**. (Para 5,8)

**ALTERNATIVE REMEDY – Writ petition filed challenging the re-assessment proceedings as well as the validity of the notice issued U/s.148 of the Act – Maintainability of such writ petition – Held, writ petition is not maintainable but appeal can be preferred before the appellate authority.** (Para 9)

**Case laws Referred to:-**

1.(1993) 204 ITR 412 : (Chief Commissioner of Income Tax-V-N.C.Budharaja)
2.262 ITR 605(Cal.) : (Simplex Concrete Piles(India) Ltd. & (2) GEO Miller & Co.Ltd.-V-Deputy Commissioner of Income Tax & Ors.)

For Petitioner - M/s. B. Panda, D.K.Das, B.R.Panda, K.P.Mohapatra & S.C.Barik.
For Opp.Parties - Sr. Standing Counsel(Income Tax)

***B.N. MAHAPATRA, J***. This writ petition has been filed with a prayer to quash the notice issued under Section 148 of the I.T. Act, 1961 (for short,

the 'Act') and the order of assessment dated 28.02.2003 passed under Sections 147/143(3) of the Act for the assessment year 1989-90 (Annexure-1 series) on the ground that action taken under Section 147 and notice issued under Section 148 dated 13.01.1997 are barred by limitation and bad in law.

2. The facts and circumstances giving rise to the present writ petition are that the petitioner is a Limited Company incorporated under the Companies Act, 1956. For the assessment year 1989-90, the petitioner filed its return of income on 29.12.1989 disclosing loss of Rs.7,34,490/-. The said return was processed under Section 143(1) on 30.03.1990. Subsequently, the assessment was completed under Section 143(3) of the Act on 31.03.1992 on total income of Rs.8,61,270/-Thereafter, notice under Section 148 of the Act was issued on 13.01.1997 and the same was served upon the petitioner on 16.01.1997. On receipt of the aforesaid notice, on 05.02.1997 the petitioner requested the Assistant Commissioner Income Tax to inform the reasons for re-opening of the assessment. In response to notice under Section 148 of the Act the assessee filed its return on 28.10.1997 disclosing total loss at Rs.7,34,489/-. On 18.11.1998 the Deputy Commissioner of Income Tax, Special Range, Bhubaneswar communicated the reasons for re-opening the assessment on the grounds that the assessment was completed under Section 143(3) on the total income of Rs.8,61,270/- for the assessment year 1989-90, after allowing deduction of Rs.29,09,632/- for investment allowance under Section 32-A of the Act. As the assessee company is not engaged in the activities of manufacturing and not producing any article or things, it is not entitled to any deduction on investment allowances and therefore, an amount of Rs.29,09,632/- for the assessment year 1989-90 has escaped assessment. In the said order the petitioner was asked to explain as to why the deductions allowed under Section 32-A of the I.T. Act for the assessment year shall not be withdrawn and the reassessment shall not be completed accordingly. While the matter stood thus, the petitioner filed O.J.C. No.16437 of 1998 with a prayer to quash the re-assessment proceeding initiated for the assessment year 1989-90 on several grounds including validity of the action taken under Section 147 and issuance of notice under Section 148 of the Act. This Court vide order dated 26.06.2001 disposed of the said writ petition directing the petitioner to file objection within 30 days from the date of the order. This Court further directed that on receipt of the objection, the authority concerned shall hear the parties and pass final order within 30 days thereafter. On 17.12.2002 notice under Section 142(1) of the Act was issued to the petitioner to show cause as to why the investment allowance claimed by it should not be withdrawn in the light of the ratio laid down by the Hon'ble Supreme Court in

the case of *Chief Commissioner of Income Tax Vs. N.C.Budharaja*, (1993) 204 ITR 412. The assessee filed its show cause reply dated 26.12.2002 stating therein that the proposal to withdraw the benefit already granted under Section 32A and to complete the reassessment are not legally valid as the same constitute pure change of opinion. Section 147 applies only where there was a reason to believe that any income chargeable to tax has escaped assessment for any assessment year and where an assessment under Section 143(3) or under Section 147 of the Act has been made no action under Section 147 shall be taken after expiry of four years from the end of the relevant assessment year by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Section 142(1) or Section 148 to disclose fully and truly all the material facts necessary for his assessment for that assessment year. So far as the claim made under Section 32A was concerned, the petitioner has disclosed fully and truly all material facts necessary which were duly considered by the Assessing Officer and he has consciously allowed the deduction under Section 132A of the Act. The decision of the Supreme Court in N.C.Budharaja (supra) does not constitute the opinion contemplated in Section 147. The Assessing Officer applying its mind having allowed the deduction claimed under Section 32A cannot reopen the assessment by changing his opinion as the same is not permissible under the law. The time limit to take action under Section 263 seems to have expired and the Department is trying to take action under Section 147 of the Act. The notice of reassessment under Section 148 having been issued after four years, the same is bad in law. The decision of the apex Court in N.C.Budharaja (supra) is not applicable to the petitioner's case. There is procedural infirmity to the notice issued under Section 148 of the Act. The petitioner also relied on certain judicial pronouncements before the Assessing Officer. The Assessing Officer rejected petitioner's show-cause reply and passed the assessment order holding that in the instant case new information came to the possession of the Assessing Officer in the form of judicial pronouncements as laid down by the apex Court in N.C.Budharaja's case in the year 1993. The opinion of the Assessing Officer was consequence of the judgment delivered by the Hon'ble Supreme Court; therefore it cannot be said that it is a change of opinion. The Assessing Officer further held that the petitioner is not entitled to get any deduction in view of the apex Court judgment in N.C.Budharaja (supra) under the head of investment allowance and assessed the petitioner at a total income of Rs.28,70,900/-. Hence, the present writ petition.

3. Mr.B.Panda, learned counsel appearing for the petitioner submits that the impugned order of assessment has been passed in gross violation

of the direction of this Court in O.J.C. No.16437 of 1998 wherein vide order dated 26.01.2001, liberty was given to the petitioner to file objection before the authorities and the authorities were directed to pass the final order after considering the petitioner's objection and keeping in mind the direction given in the earlier writ petition in O.J.C. No.1769 of 1999 disposed of on 13.07.2000 for the assessment year 1993-94. Issuance of notice under Section 148 of the Act is invalid as the same was issued beyond the statutory period of four years provided under the statute. Consequently, the order of assessment passed on the basis of the said notice is illegal. The Assessing Officer has not considered the reply of the petitioner dated 26.12.2002 filed pursuant to notice dated 07.12.2002 issued under Section 142(1) of the Act. The impugned order of assessment was passed contrary to the direction of this Court. The petitioner is deprived of his legitimate/constitutional right of carrying on his business under Article 19(1)(g) of the Constitution. The claim of deduction under Section 32-A of the Act towards investment allowances have been allowed by the Department initially under Section 143(1)(a) and subsequently order passed under Section 143(3) of the Act, after due application of mind, reopening of assessment taking action under Section 147 of the Act and issuing notice under Section 148 is nothing but change of opinion which is not permissible under the law. The principle decided in the case of *N.C.Budharaja (supra)* is not applicable as the same has no nexus to the case of the petitioner. Placing reliance in the case of *(1) Simplex Concrete Piles (India) Ltd and (2) GEO Miller and Co. Ltd., vs. Deputy Commissioner of Income Tax and others, 262 ITR 605 (Cal)*, Mr. Panda submitted that issuance of notice under Section 148 of the Act after a lapse of 4 years from the end of the relevant assessment year is totally invalid in law. The Assessing Officer is not correct to hold that O.J.C. No.16437 of 1998 was dismissed. Mr. Panda, prayed for quashing of the notice under Section 148 and order of re-assessment.

4. Mr. A. Mohapatra, learned Senior Standing Counsel appearing for the Income Tax Department submitted that the petitioner-assessee earlier had challenged the validity of the notice under Section 148 of the Act in O.J.C. No.16437 of 1998 and the said writ petition was dismissed by this Court. Therefore, it is not open to the petitioner to challenge again the validity of the said notice in the present writ petition. Moreover, the writ petition is not maintainable as the assessee has alternative remedy to file an appeal under Section 246-A of the Act before the Commissioner of Income Tax (Appeals). The direction of this Court in O.J.C. No.16347 of 1998 dated 26.06.2001 has been duly complied with. Due opportunity was given to the petitioner during the proceeding under Section 147 of the Act and issuance

of notice under Section 148 is permissible in law as per the settled position of law.

It was further argued that notice under Section 148 was issued after obtaining due approval of the CIT, Bhubaneswar as per the provisions of law in force on the date of approval granted by the CIT and also on the date of issue of notice under Section 148 of the Act. The assessment of any assessee can be reopened upto a period of 10 years. Therefore, the contention of the petitioner that the assessment cannot be reopened after 4 years is not correct and the same is contrary to the provisions of law as per letter dated 14.11.2002 received from the Standing Counsel. Concluding his argument, Mr. Mohapatra, prayed for dismissal of the writ petition.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is as to whether after dismissal of O.J.C. No.16437 of 1998 in which the validity of the notice issued under Section 148 of the Act was challenged by the petitioner, the present writ petition is maintainable ?

6. To deal with the above question, it is necessary to know what was the subject matter of challenge in O.J.C. No.16437 of 1998 and what order was passed in that case. According to the Department, in the said writ petition, the petitioner had challenged the validity of the notice issued under Section 148 of the Act and this Court dismissed the said writ petition. Therefore, the petitioner is estopped from challenging the same relief in the present writ petition. The petitioner-assessee does not dispute that it had challenged the validity of the notice issued under section 148 of the Act in O.J.C. No.16437 of 1998 on the question of limitation and on other grounds. According to Mr. Panda, that issue was not adjudicated by this Court in the previous writ petition (O.J.C. No.16437 of 1998). This Court had remanded the matter to the Assessing Officer with a liberty to the petitioner to file objection before the Assessing Officer and the Assessing Officer was directed to pass final order after hearing the parties. Therefore, the Income Tax Department is wholly unjustified to say that since O.J.C. No.16437 of 1998 in which notice issued under Section 148 had been challenged was dismissed, the petitioner is estopped from challenging the validity of the said notice in the present writ petition.

7. For proper adjudication of the rival contentions, it is felt necessary to extract hereunder the order dated 26.06.2001 passed in OJC No.16437 of 1998.

15. 26.06.2001 Petitioner has filed this writ petition challenging the notice issued to it under Section 148 of the Income Tax Act, 1961.

2. Heard the learned counsel for the petitioner, and the learned Standing Counsel (Income-tax). Without expressing any opinion on the rival contentions as to the correctness or otherwise of the reassessment notice issued, it is directed that the petitioner may file objection to the same within thirty days from today. On receipt of the objection, the authority concerned shall hear the parties and pass final order within thirty days thereafter.

3. It is submitted that earlier similar matter relating to re-assessment for the assessment year 1993-94 was challenged before this Court in OJC No.1769 of 1999 and the said writ petition was disposed of on 13.07.2000. It is open to the petitioner to bring the same to the notice of the authority considering the matter. We make it clear that if the petitioner feels aggrieved by the order to be passed by the Assistant Commissioner, it is at liberty to prefer appeal before the appellate authority. All other contentions are kept open.

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

8. On perusal of the above order of this Court, it is amply clear that the issue relating to validity of notice issued under Section 148 of the Act has not been adjudicated by this Court in OJC No.16437 of 1998. The said writ petition was disposed of giving liberty to the petitioner to file objection before the Assessing Officer and the Assessing Officer was directed to pass final order after hearing the parties. Therefore, the learned Assessing Officer as well as the learned Senior Standing Counsel is not correct to say that the writ petition (O.J.C. No.16347 of 1998) in which the petitioner had challenged the validity of the notice issued under Section 148 of the Act was dismissed.

9. The next question that would arise for consideration by this Court whether the assessee is right in approaching this Court in the present writ petition challenging the validity of the notice issued under Section 148 of the Act as well as the reassessment proceedings. Perusal of the order dated 26.06.2001 passed in O.J.C. No.16437 of 1998 reveals that in case the petitioner feels aggrieved by the order passed by the Asst. Commissioner, it was given liberty to prefer appeal before the appellate authority.

10. In view of the above, the proper course open to the petitioner was to approach the appellate authority in terms of order dated 26.06.2001 passed in O.J.C. No.16437 of 1998. Therefore, the present writ petition is not entertained. We make it clear that this Court has not expressed any opinion on various points urged by the petitioner either in earlier writ petition (O.J.C. No.16437 of 1998) or in the present writ petition. If the petitioner is so

advised it may approach the appellate authority by way of filing an appeal within four weeks from today. If such an appeal is filed, the appellate authority shall decide the appeal on its own merit in accordance with law.

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

Writ petition disposed of.

**2012 ( I ) ILR- CUT- 86**

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

W.P.(C) NO.4377 OF 2008 (Decided on 15.09.2011)

**LARSEN & TOUBRO LTD.** ……Petitioner.

*.Vrs.*

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

(A) **ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO.4 OF 2005) – S.11.**

**Rule 6 of the OVAT Rules – Not provided for "other like charges" , Section 11 (2) (C) is unworkable.**

**Rule 6 (e) of the OVAT Rules provides only deduction on account of labour and service charges from the gross turnover to arrive at the taxable turnover – This is not even in conformity with Section 11 (2) (C) of the OVAT Act which provides deduction towards labour, service charges and also "other like charges" – Rule 6(e) does not talk of any "other like charges" – Only value of goods sold in execution of works contract can be taxed under the VAT Act – Various deductions as provided/set out in the decision of the Hon'ble Supreme Court in Gannon Dunkerley and Co. and another -Vrs- State of Rajasthan and Ors. (1993) 88 STC 204 (SC) are not confined to labour and service charges only – Rule 6(e) must provide various deductions setout/prescribed by the Constitution Bench of the Hon'ble Supreme Court in Gannon Dunkerley's Case.** (Para 9)

**(B) Measure of Tax – In the field of taxation law must be certain and unambiguous – If the measure of tax is not provided either under the Act or the Rules the levy itself becomes uncertain.**

(Para 11)

**Case laws Referred to:-**

1.(1993) 88 STC 204 : (Gannon Dunkerley & Co. & Anr.-V-State of Rajasthan & Ors.)
2.(2007) 7 VST 317(SC) : (State of Jharkhand-V-Votas Ltd.)
3.2009 (5) SC 326 : (Jantia Hill Truck Owners Assocation-V-Shailang Area Coal Dealer & Truck Owner Association & Ors.)
4.(1985) 60 STC 1 : (Govind Saran Ganga Saran-V-Commissioner of Sales Tax)

5.AIR 1973 SC 855 : (Sirsi Municipality by its President, Sirsi-V- Cecelia Kom Francis Tellis).

For Petitioner - Mr. V.Raman, Sr. Advocate.
M/s. Satyajit Mohanty, R.R.Swain, P.K.Muduli & M.Banaji.
For Opp.Parties - Mr. R.P.Kar, Standing Counsel for Revenue

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***B.N. MAHAPATRA, J.*** This Writ Petition has been filed with a prayer to declare Section 11(2)(c) of the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act') as well as Rule 6(e) of the Orissa Value Added Tax Rules, 2005 (for short, 'OVAT Rules') unworkable for the reasons stated in the writ petition.

2. Mr.V.Raman, learned Senior Advocate appearing on behalf of the petitioner submits that while Section 11(2)(c) of OVAT Act provides for deduction towards labour, service charges and other like charges, Rule 6 (e) of the OVAT Rules provides for deduction towards labour and service charges only from the gross turnover to arrive at the taxable turnover in respect of works contract. Both these provisions do not provide for other deductions prescribed by the Hon'ble Supreme Court in the case of *Gannon Dunkerley and Co. & Anr v. State of Rajasthan & Ors.*, (1993) 88 STC 204 (SC). The Hon'ble Supreme Court in the case of *State of Jharkhand v. Voltas Ltd.*, (2007) 7 VST 317 (SC) held that deduction of labour and other charges is inadequate and it is necessary for the State Legislature to make provision for each and every deduction prescribed by the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra).* Failure of State Legislature to make provision for deductions set out in *Gannon Dunkerley's case (supra)* renders the provisions of Section 11(2)(c) as well as Rule 6(e) unworkable.

3. Per contra, Mr.Kar, learned Standing Counsel for the Revenue submits that it is nobody's case that no rule is provided under the OVAT Rules prescribing deductions from the gross turnover to arrive at the taxable turnover. Rule 6(e) provides such deduction with certain restrictions. Therefore, it cannot be said that the OVAT Rules is completely silent about the deductions from the gross turnover in relation to works contract to determine taxable turnover. It is further submitted that under Article 141 of the Constitution of India the law declared by the Hon'ble Supreme Court is binding on every court within the territory of India. Therefore, the deductions prescribed in *Gannon Dunkerley' case (supra)* if brought to the notice of any Assessing Officer he will permit deduction as provided in the said judgment and there is absolutely no basis for the petitioner to apprehend that the Assessing Officer shall not allow permissible deductions from gross turnover while determining taxable turnover in relation to

works contract. Merely because Rule 6(e) of the OVAT Rules does not provide for deductions in detail in line with judgment of Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)*, that cannot render any action invalid. In support of his contention, Mr.Kar placed reliance upon the decision of the Hon'ble Supreme Court in *Jantia Hill Truck Owners Association Vs. Shailang Area Coal Dealer and Truck Owner Association and others*, 2009(5) Supreme 326, wherein the Hon'ble Supreme Court held that even in a case where the statute provides for certain things to be done, subject to the Rules, any action taken without framing the Rules would not render the action invalid. If a statute is workable even without framing of the Rules, the same has to be given effect to. The law itself except in certain situations does not envisage vacuum.

4. On rival contentions raised by the parties, the only question that falls for consideration by this Court is as to whether Section 11(2)(c) read with Rule 6(e) should provide for various deductions as set out/prescribed by the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)* for the purpose of determining taxable turnover in case of a works contract.

5. To deal with the above question, it is necessary to know what is contemplated in Section 11(2)(c) of OVAT Act and Rule 6(e) of OVAT Rules. The said provisions are extracted below:-

> "11. **Levy of tax on sale.—**
> (1) xx xx xx
>
> (2) For the purposes of sub-section (1), the expression "***taxable turnover of sales***" shall mean, in relation to a dealer liable to pay tax on sale of goods under sub-section (1) of Section 10, that part of the gross turnover of sales during any period which remains after deducting there from—
>
> (a) xx xx xx
> (b) xx xx xx
>
> (c) in case of turnover of sales in relation to works contract, the charges towards labour, services and other like charges subject to such conditions and restrictions as may be prescribed:
>
> ***Provided that*** where the amount charged towards labour, services and other like charges in such contract are not ascertainable from the terms and conditions of the contract or the books of account maintained for

the purpose, the amount of such charges shall be calculated at the prescribed rate;"

*(underlined for emphasis)*

**Rule. 6(e)**. ***Determination of taxable turnover***.—

Xx xx xx

(e) in case of works contract, the expenditure incurred towards labour and service, subject to the condition that evidence in support of such expenses are produced to the satisfaction of the Commissioner:

***Provided that*** where a dealer executing works contract, fails to produce evidence in support of expenses towards labour and service as referred to above or such expenses are not ascertainable from the terms and conditions of the contract or the books of accounts maintained for the purpose, expenses on account of labour and service shall be determined at the rate specified in the Appendix."

6. Section 11(2(c) provides for computation of taxable turnover of sales. In case of works contract it provides that the taxable turnover of sales shall mean that part of the gross turnover of sales during any period which remains after deducting there from the charges towards labour, services and other like charges subject to such condition and restriction as may be prescribed. However, Rule 6(e) of the OVAT Rules provides that to determine the taxable turnover of sales in case of works contract expenditure incurred towards labour and services shall be allowed subject to the condition that the evidence in support of such expenditure is to be produced to the satisfaction of the Commissioner. Thus, even though Section 11(2)(c) provides for deductions towards "other like charges" besides labour and service charges, the Rules do not provide any such deductions. When the statute provides that something is to be prescribed in the Rules then that thing must be provided in the Rules with a view to making the provision workable and valid.

7. By now, it is no more *res integra* that in view of Article 366 (29-A)(b), State Legislatures are competent to impose tax on transfer of property in goods involved in execution of works contract. In *Gannon Dunkerley's case (supra)*, the Hon'ble Supreme Court held that the value of goods involved in execution of works contract will have to be determined by taking into account the value of the entire works contract and deducting there from the charges towards labour and services which would cover: (a) labour charges for execution of the works; (b) amount paid to a sub-contractor for labour and services; (c) charges for planning, designing and architect's fees; (d) charges for obtaining on hire or

otherwise machinery and tools used for execution of the works contract; (e) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property which is not transferred in the course of execution of a works contract; (f) cost of establishment of the contractor to the extent it is relatable to supply of labour and services; (g) other similar expenses relatable to supply of labour and services; (h) profit earned by the contractor to the extent it is relatable to supply of labour and services. The amounts deductible under these heads will have to be determined in the light of the facts of a particular case on the basis of the material produced by the contractor.

8. It is further held by the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)* that in cases where the contractor does not maintain proper accounts or the accounts maintained by him are not found worthy of credence it would be permissible for the State Legislature to prescribe a formula for determining the charges for labour and services by fixing a particular percentage of the value of the works contract and to allow deduction of the amount thus determined from the value of the works contract for the purpose of determining the value of the goods involved in the execution of the works contract. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charges for labour and services does not differ appreciably from the expenses for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. Since the expenses for labour and services would depend on the nature of the works contract and would not be the same for all types of works contracts, it would be permissible, indeed necessary, to prescribe varying scales for deduction on account of cost of labour and services for various types of works contracts. This judgment has been followed by the Hon'ble Supreme Court in *Voltas Ltd.'s case (supra).*

9. Needless to say that the law declared by Hon'ble Supreme Court is the law of the land and binding on everybody. Perusal of Rule 6(e) of the OVAT Rules reveals that it provides only deduction on account of labour and service charges from the gross turnover to arrive at the taxable turnover. This is even not in conformity with Section 11(2)(c) of the OVAT Act which provides deduction towards labour, service charges and also "other like charges". Unfortunately, Rule 6(e) does not talk of any "other like charges". It only provides for labour and service charges which are to be deducted from the value of works contract but does not provide for anything towards "other like charges". This is required because only value of goods sold in execution of works contract can be taxed under the VAT Act. The various deductions as provided/set out in the decision of the Hon'ble Supreme Court in *Gannon Dunkerley' case (supra)* are not confined to labour and service charges only.

Therefore Rule 6(e) must provide various deductions set out/prescribed by the Constitution Bench of the Hon'ble Supreme Court in Gannon *Dunkerley's case (supra)*.

10. We are unable to accept the contention of Mr.Kar that in view of the fact that various deductions are provided by the Constitution Bench of the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)* neither the taxing authority nor the assessee-dealer faces any difficulty in allowing/availing such deductions from the gross turnover irrespective of the fact that such deductions are not provided in Rule 6(e) of the OVAT Rules.

11. Law is well settled that in the field of taxation, law must be certain, clear and unambiguous. In the matter of taxation, either the statute or the Rules framed under the statute must cover the entire field. The Hon'ble Supreme Court in the case of ***Govind Saran Ganga Saran v. Commissioner of Sales Tax,*** [1985] 60 STC 1 held as under:-

> "… The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

Thus, if the measure of tax is not provided either under the Act or under the Rules, the levy itself becomes uncertain and such uncertainty proves fatal to the validity of the taxing statute.

12. Apart from the above, it is well settled principle of law that statutory authorities are bound to abide by the Act and Rules.

In ***Sirsi Municipality by its President, Sirsi V. Cecelia Kom Francis Tellis***, AIR 1973 SC 855, the Hon'ble Supreme Court observed that rules or the regulations are binding on the authorities.

13. The Hon'ble Supreme Court in *Jantia Hill Truck Owners Association's case (supra), upon which Mr.Kar placed reliance,* held that if a statute is workable even without framing the Rules the same has to be given effect to. Law itself except in certain situations does not envisage vacuum. In the present

case, Section 11(2)(c) of the OVAT Act provides that in case of works contract charges towards labour, service and "other like charges" as prescribed are to be deducted from gross value of works contract to arrive at taxable turnover. The word 'prescribed' according to Section 2(33) of the OVAT Act means prescribed by rules. Thus, it is left open to the Rule making authorities to prescribe "other like charges" of course subject to conditions and restrictions, but in the present case, Rule is also silent about "other like charges". Therefore, it cannot be said that Section 11(2)(c) is workable. Hence, *Jantia Hill Truck Owners Association's case (supra)* is of no help to Mr. Kar.

14. This Court in *Larsen & Toubro Limited Vs. State of Orissa & Ors.,* (2008) 12 VST 31 (Orissa) held that after decision in the case of *Gannon Dunkerley's case (supra)* the entire law on works contract has got changed and it is the governing judgment in the works contract . Law laid down in that case by the Hon'ble Supreme Court is binding on all the courts in India which is the mandate of Article 141 of the Constitution of India. In the said judgment, this Court further held that Section 2(e) and Section 29(2)(e) of the Orissa Sales Tax Act, 1947 make it clear that Rules are contemplated under the Act for the purpose of ascertaining deduction in the case of taxable turnover in respect of works contract; but necessary Rules have not been framed. In the absence of any statutory prescription for calculation of taxable turnover the Act remains unworkable.

15. Therefore, absence of provisions for various deductions in Section 11(2)(c) and Rule 6(e) in line with the judgment of the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)* certainly creates uncertainty, so far levy of tax on works contract is concerned. To avoid such uncertainty, the State Government is directed to amend Rule 6(e) to bring in line with judgment of the Hon'ble Suprme Court in *Gannon Dunkerley's case (supra)* vis-à-vis Section 11(2)(c) of the OVAT Act. Till such amendment is made to Rule 6(e) of the OVAT Rules, the Commissioner of Sales Tax is directed to issue suitable instructions to all the taxing authorities to allow various deductions from the gross turnover to arrive at the taxable turnover in respect of works contract in terms of decision of the Hon'ble Supreme Court in *Gannon Dunkerley's case (supra)*.

16. With the aforesaid observations/directions, the writ petition is allowed.

Writ petition allowed.

**2012 ( I ) ILR- CUT- 93**

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

W.P.(C) NO.23389 OF 2011 (Decided on 06.09.2011)

**M/S. BATEMAN ENGINEERING (INDIA) PVT. LTD.** …….Petitioner.

.*Vrs.*

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

**A. CENTRAL SALES TAX (REGISTRATION & TURNOVER) RULES - RULE 12.**

**Rule 12 of the Central Sales Tax (R & T) Rules and Rules 7 A and 12 of the Central Sales Tax (Orissa) Rules – Praying for time to furnish declaration forms till audit assessment taken up – Rejection of such petition justified – Under the OVAT Act, C.S.T. Act and O.E.T. Act and Rules made there under, there is no provision for making the audit assessment for every tax period in respect of all the registered dealers.** (Para 10)

**B CENTRAL SALES TAX (R & T) RULES - RULE 12 (7).**

**Proviso to Rule 12 (7) of the C.S.T. (R & T) Rules as well as proviso to Rule 12 (1)(b) of the C.S.T. (0) Rules – Discretion is vested with the prescribed/ Assessing Authority to permit further time to a dealer to file declaration forms/ Certificates.** (Para 18)

**Case laws Referred to:-**

1.AIR 2000 SC 761 : (Corporation Bank & Anr.-V-Navin J. Shah)
2.(2004) 8 SCC 524 : (Clariant International Ltd.-V-Securities & Exchange Board of India)
3.(1983) 4 SCC 131 : (Narendra Singh-V-Chooty Singh)

For Petitioner - Mr. S.C.Lal, Sr.Advocate
M/s. S.Lal, D.Das, S.Lal & M.Agrawal.
For Opp.Parties - Mr. R.P.Kar, Standing Counsel for Revenue

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***B.N. MAHAPATRA, J.*** In the present writ petition though several reliefs have been prayed for, Mr. S.C. Lal, learned Senior Advocate appearing on behalf of the petitioner has confined his argument to the following three reliefs:

(i) To quash the impugned orders of provisional assessment dated 20.04.2011 passed under Rule 12(1)(b) of the Central Sales Tax (Orissa) Rules, 1957, [for short, "CST(O) Rules"] under Annexure-3 series for the quarters March, June and September, 2010 and the demand raised thereunder;

(ii) To quash the notice dated 27.07.2011 issued under Annexure-5 in terms of Section 51 of the Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act'), for special mode of recovery of the tax demanded under Annexure-3 series; and

(iii) To issue a writ of mandamus directing opposite party No.3-Deputy Commissioner of Sales Tax, Barbil Circle, Barbil to consider the effect of filing of the wanting 'C' Forms under Rule 12(1)(a) and (b) of the CST (O) Rules.

2. The petitioner's case in a nutshell is that the petitioner company is a registered dealer under the OVAT Act carrying on the business of works contract at Joda. It has entered into an agreement with M/s. TATA Steel Ltd., (for short, 'TATA') for carrying out the works contract of material handling system for handling iron ore dispatch for 6.8 and 10 MTPA expansion at Joda Iron Ore Mines. The petitioner company as per agreement in certification of TATA had procured plants and machinery by way of purchase in course of interstate trade and commerce from outside States on payment of Central Sales Tax. While the said goods were in course of transit, the petitioner sold the said goods to TATA on the basis of transfer of documents under Section 6(2) of the Central Sales Tax Act, 1956 (for short, 'CST Act'). As per the requirement of Section 6(2) of the CST Act, the purchasing dealer i.e. TATA is obliged to furnish the declaration forms 'C' to the petitioner so that the petitioner can avail the tax exemption for the said subsequent sale effected by it to TATA. As per Rule 7 of the CST (O) Rules, the petitioner is mandatorily required to submit its quarterly return in Form-I showing the tax payable for the sales effected in course of inter-state trade and commerce and transactions done under Sections 3, 5, 6A and 8 of the CST Act during such quarter. As per Rule 7A, the petitioner is supposed to enclose the declaration forms along with the return. The petitioner had submitted its quarterly returns for the Quarters March, June and September 2010 on 16.11.2010 before opposite party No.3, but while submitting the returns, the petitioner could not submit the declaration form 'C' as the purchaser i.e. TATA had not handed over the said declarations form to the petitioner. On receiving the returns, opposite party No.3 sent three notices in Form II-B dated 11.03.2011 for the aforesaid three quarters calling upon the petitioner to furnish the wanting declaration forms/certificates by 11.04.2011. On

11.04.2011, the petitioner sought for an adjournment for submitting the wanting declaration forms. The case was fixed to 17.04.2011 by opposite party No.3. Subsequently, time was granted till 20.04.2011. On 20.04.2011, the representative of the petitioner submitted a reply to the show cause notice stating therein that 'C' forms had not been collected and the same would be produced before the audit assessment is taken up. Opposite party No.3 had rejected the petition dated 20.04.2011 and passed provisional assessment orders on the same day, i.e., 20.04.2011 under Rule 12(1)(b) of the said Rules under Annexure-3 series raising a tax demand of Rs.1,29,59,491/- for the quarters of the year 2010-2011. Subsequent to the demand raised on the basis of the provisional assessment orders, opposite party No.3 has issued notice (Annexure-5) under Section 51 of the OVAT Act for realization of the tax demanded under Annexure-3 series. Hence, the present writ petition.

3. Mr. S.C. Lal, learned Senior Advocate appearing on behalf of the petitioner submits that due to non-supply of 'C' declaration forms by opposite party No.3 to TATA, who in turn was to give the same to the petitioner, the petitioner could not furnish the 'C' Forms. Thus, opposite party no.3 was fully aware of the fact that he had not supplied 'C' forms to TATA, as a result of which TATA was not able to supply the said forms to the petitioner. It is submitted that without giving sufficient opportunity to the petitioner in terms of language and spirit of proviso to Rule 12(1)(b) of CST (O) Rules opposite party no.3 has rejected the petitioner's application dated 20.04.2011 filed before him seeking time till taking up the audit assessment for production of 'C' forms. The aforesaid conduct of opposite party No.3 smacks of mala fides. The Assessing Authority arbitrarily completed the provisional assessment and raised huge tax demand hurriedly even though no time limit is provided in the Statute for passing provisional order of assessment. After completion of the provisional assessment, opposite party No.3 had issued 'C' declaration forms to TATA on 02.07.2011 and in turn TATA had handed over the 'C' forms covering the transactions of subsequent sale under Section 6(2) to the petitioner. The petitioner, thereafter, submitted the said 'C' forms before opposite party No.3 on 16.07.2011. Thus, the petitioner has submitted all the 'C' forms as pointed out by opposite party No.3 in the Notice in Form II-B under Annexure-1 series. Thus, there was sufficient cause which prevented the petitioner from producing the 'C' forms along with the return. Opposite party No.3 has acted in a most arbitrary manner and in haste. The action of the Assessing Officer is against the rules of fair play and principles of natural justice. In the meantime, the required 'C' forms having been filed for the quarters March, June and September, 2010 before the Assessing Authority, there would not be any liability to pay central sales tax and therefore, the provisional orders of assessment passed under Annexure-3 series are liable to be quashed.

4. Per contra, Mr. R.P. Kar, learned Standing Counsel appearing on the behalf of the Revenue, submits that sufficient opportunity is provided under Rule 12(7) of the CST (R & T) Rules and under Rule 7(A) and Rule 12(1)(b) of the CST (O) Rules to a dealer to submit declaration forms/certificates. Despite the same, the petitioner-dealer having failed to file the declaration forms, opposite party No.3 has rightly passed the provisional order of assessment under Annexure-3 series after granting some further time. There is no infirmity or illegality in passing the impugned orders of provisional assessment. Therefore, Mr. Kar, prays for dismissal of the writ petition.

5. On the rival contentions of the parties, the question that falls for consideration by this Court is as to whether there was sufficient cause for permitting further time to the petitioner-dealer for furnishing the required declaration forms/certificates and opposite party No.3 is not justified in passing the provisional orders of assessment dated 20.04.2011 under Annexure-3 series.

6. To deal with the above question, it is necessary to know what is contemplated in sub-rule (7) of Rule 12 of the CST (R & T) Rules, 1957 and Rule 7-A(1) and Rule 12(1)(b) of the CST (O) Rules, 1957. The relevant portions of the above provisions are quoted below:

**CST (R & T) Rules, 1957**

"Rule12.(7)- The declaration in Form 'C' or Form 'F' or the certificate in Form 'E-1' or Form 'E-II' shall be furnished to the prescribed authority within three months after the end of the period to which the declaration or the certificate relates:

***Provided that*** if the prescribed authority is satisfied that the person concerned was prevented by sufficient cause from furnishing such declaration or certificate within the aforesaid time, that authority may allow such declaration or certificate to be furnished within such further time as that authority may permit. "

**CST(O) Rules, 1957**

**"Rule*7.A* *Statements and declaration forms/ certificates.—***
(1) Every registered dealer, while filing return under rule 7, for the month/quarter ending on 30th of June, 30th of September, 31st of December and 31st of March every year, shall furnish to the Assessing Authority, the declaration and/or certificates as referred to in sub-rule (7) of the rule 12 of the CST (R & T) Rules, received from the purchasing

dealers/transferees for the transactions made in the quarter preceding to the quarter for which the return is filed as above showing the particulars of transactions in the statement of Form C, E-I/E-II, F, H, I and J as applicable."

**"Rule *12.* *Assessment.—***

(1)(a) xx xx xxx

(b) In cases where any or more of the conditions as mentioned in clause (a) above is not fulfilled, the assessing authority shall proceed to asses the tax due provisionally, giving due opportunity to the dealer, on account of —

(i) declaration forms/certificates not furnished in support of claim for exemption, deduction and/or concession claimed in the return(s); or the declaration(s) and/or certificate (s) so furnished being not in order/incomplete/defective;

(ii) arithmetical mistake apparent on the face of such return (s) resulting in less payment of tax, and/or

(iii) the return(s) so furnished being not in order/incomplete/incorrect:

***Provided that***, in case of failure to furnish the declaration and certificates as required under sub-section (4) of Section 8 of the Act, the Assessing Authority may, for sufficient cause, permit such further time to the dealer for furnishing the required declaration forms/certificates."

7. Though specific time has been provided under Rule 12(7) of the CST (R & T) Rules, as well as in Rule 7A of the CST (O) Rules, under proviso to Rule 12(7) of the CST (R & T) Rules and proviso to Rule 12(1)(b), power is vested with the Prescribed /Assessing Authority to allow such declaration forms/ certificates to be furnished within such further time as that authority may permit on being satisfied that the person concerned was prevented by sufficient cause from furnishing such declaration forms/certificates within the time prescribed in the said Rules.

8. The facts which are not in dispute are that the petitioner has submitted its quarterly return for the quarters of March, June, September, 2010 on 16.11.2010 before opposite party No.3. The petitioner did not submit the declaration Form 'C' within the time stipulated in Rule 12(7) of CST (R&T) Rules and Rule 7A of the CST(O) Rules. On receiving three returns, opposite party

No.3 sent three notices in Form II-B dated 11.03.2011 for the said three quarters, calling upon the petitioner to furnish the wanting declaration forms/certificates by 11.04.2011. On 11.04.2011, the petitioner sought for an adjournment for submitting the wanting declaration forms and time was allowed till 17.04.2011. Again the time was allowed till 20.04.2011. On 20.04.2011, the representative of the petitioner submitted a reply to the show cause notice along with a time petition. In the said show cause reply, the representative of the petitioner specifically stated that the 'C' forms had not been collected and the same will be produced before him without fail prior to taking up the audit assessment. The said petition dated 20.04.2011 was rejected by opposite party No.3. According to the petitioner, though there were sufficient cause for not furnishing the declaration forms/certificates within the time provided under Rule 12(7) of the CST (R & T) Rules, 1957 and Rule 7A of the CST (O) Rules, without permitting further time to the petitioner to furnish the required declaration forms/certificates, the Assessing Authority passed the provisional orders of assessment hurriedly under Rule 12(1)(b) of CST(O) Rules.

9. In our view, opposite party No.3 is justified in rejecting the petition dated 20.04.2011 wherein a prayer had been made to allow time for furnishing declaration form till audit assessment is taken up. Under the OVAT Act, CST Act and OET Act and Rules made thereunder, there is no provision for making the audit assessment for every tax period in respect of all the registered dealers. Therefore, if the contention of Mr. Lal, learned Senior Advocate would be accepted then in many cases where no audit assessment is made, tax due to the Government on account of non-furnishing of declaration forms by the registered dealer cannot be collected/realized.

10. Further contention of Mr. Lal is that since no limitation has been prescribed to complete the provisional assessment, opposite party No.3-Assessing Authority should not have hurriedly completed the provisional assessment and for that purpose he also should have not insisted production of declaration forms. Such a proposition of Mr. Lal is not tenable for acceptance by this Court.

11. If statute does not provide period of limitation for completing provisional assessment under Rule 12(1)(b) of the CST(O) Rules, that does not mean that the assessment should not be made for indefinite period. The provisional assessment must be completed within reasonable time.

The Hon'ble Supreme Court in the case of ***Corporation Bank and another vs. Navin J. Shah***, AIR 2000 SC 761, held as under:

> "12. We may further notice that there is another strong reason as to why the claim made by the respondent should not have been granted. The transactions in question took place in the years 1979 and 1981. The difficulties in realisation of the amounts due from the consignee also became clear at the time when the claim was made before the Corporation and the claim had been made as early as on December 19, 1982. The petition before the Commission was filed on September 25, 1992 that is clearly a decade after a claim had been made before the Corporation. A claim could not have been filed by the respondent at this instance of time. Indeed at the relevant time there was no period of limitation under the Consumer Protection Act to prefer a claim before the Commission but that does not mean that the claim could be made even after unreasonably long delay. The Commission has rejected this contention by a wholly wrong approach in taking into consideration that foreign exchange payable to Reserve Bank of India was still due and, therefore, the claim is alive. The claim of the respondent is from the bank. At any rate, as stated earlier, when the claim was made for indemnifying the losses suffered from the Corporation, it was clear to the parties about the futility of awaiting any longer for collecting such amounts from the foreign bank. In those circumstances, the claim, if at all was to be made, ought to have been made within a reasonable time thereafter. What is reasonable time to lay a claim depends upon facts of each case. In the legislative wisdom, three years period has been prescribed as the reasonable time under the Limitation Act to lay a claim for money. We think, that period should be the appropriate standard adopted for computing reasonable time to raise a claim in a matter of this nature. For this reason also we find the claim made by the respondent ought to have been rejected by the Commission."

12. As stated above, the provisional assessment ought to have been made within a reasonable time and therefore, the assessing authority is fully justified to insist the dealer-petitioner to furnish declaration forms on the basis of periodical return filed when the declaration forms were not filed within the time allowed under the Rule 12(7) of CST (R&T) Rules and Rule 7A of CST (O) Rules.

13. The above contention of Mr.Lal also can be looked at from another angle. Under Rule 12(7) of the CST (R & T) Rules, 1957 and Rule 7A of the CST (O) Rules, time is specified for furnishing declaration forms. It is only Rule 12(7) of the CST (R & T) Rules, provides that if the prescribed authority is satisfied that the person concerned was prevented by sufficient cause for furnishing such declaration forms/certificates within the time provided, such

authority may allow further time to furnish the declaration forms. Similarly, proviso to Rule 12(1)(b) of the CST (O) Rules, 1957, provides that before making provisional assessment the Assessing Authority may permit such further time to the dealer to furnish the said declaration forms/certificates. Therefore, merely because no time is provided for passing the provisional assessment order under Rule 12(1)(b), on that ground time cannot be allowed indefinitely to a dealer to file required declaration forms/certificates. It is only where there is sufficient cause for not filing the declaration forms within the prescribed time, further time shall be allowed by the Assessing Authority to furnish declaration forms/certificates.

14. Now, the other contention of Mr. Lal for not furnishing the statutory declaration forms/certificates within the time allowed under Rule 12(7) of CST (R & T) Rules, Rule 7A and under proviso to Rule 12(1)(b) of CST (O) Rules before the assessing authority is to be examined to find out as to whether the petitioner was prevented by sufficient cause from furnishing required declaration forms/certificates before the Assessing Authority.

15. The other reason given by Mr. S. Lal for not furnishing 'C' declaration forms within the time stipulated under the above relevant Rules is that the petitioner had to get the declaration forms from TATA and TATA was a dealer under the jurisdiction of opposite party No.3. Opposite party No.3 was fully aware of the fact that he had not supplied 'C' declaration forms to TATA. Therefore, TATA was not able to supply the declaration forms to the petitioner till the provisional assessment order was made. Opposite party No.3 had issued 'C' forms to TATA on 02.07.2011 and in turn TATA had handed over the said 'C' forms to the petitioner covering the transactions of subsequent sale under Section 6(2) for which returns were filed by the petitioner. The petitioner in turn had submitted the said 'C' forms before opposite party No.3 on 16.07.2011. The said fact has not been disputed by Mr. Kar, learned Standing Counsel appearing on behalf of the Revenue. Thus, the petitioner has submitted all the 'C' forms as pointed out by opposite party No.3 in the Notice in Form II-B under Annexure-1 series after receiving the declaration 'C' Forms from TATA.

16. In the above peculiar circumstances, it cannot be said that there was no sufficient cause for the petitioner for not furnishing the declaration forms within the time provided under Rule 12(7) of CST (R & T) Rules and Rule 7A of CST (O) Rules and by the time the provisional assessment was passed under Annexure-3 series.

17. It may be noted that non-furnishing of declaration forms by the purchasing dealer to the selling dealer cannot always constitute a sufficient

cause to permit the selling dealer further time for furnishing the required declaration forms/certificates. What is sufficient cause to permit further time to the selling dealer for furnishing the required declaration forms/certificates depends upon facts of each case.

18. Under proviso to Rule 12(7) of the CST (R & T) Rules as well as proviso to Rule 12(1)(b) of the CST (O) Rules discretion is vested with the Prescribed/Assessing Authority to permit further time to a dealer to file declaration forms/certificates. Needless to say that any discretion vested with the Quasi Judicial, Judicial and Administrative Authorities should be exercised judiciously. The discretion vested with the Prescribed/Assessing Authority to permit further time to the dealer for furnishing the required declaration forms/certificates for sufficient cause, must be exercised fairly and bona fide and must answer the test of reasonableness.

19. The Hon'ble Supreme Court in ***Clariant International Ltd. vs. Securities and Exchange Board of India;*** (2004) 8 SCC 524, held as under:

> "26. The Board, further, having a discretionary jurisdiction must exercise the same strictly in accordance with law and judiciously. Such discretion must be a sound exercise in law. The discretionary jurisdiction, it is well known, although may be of wide amplitude as the expression "as it deems fit" has been used but in view of the fact that civil consequences would ensue by reason thereof, the same must be exercised fairly and bona fide. The discretion so exercised is subject to appeal as also judicial review, and, thus, must also answer the test of reasonableness."

20. The Hon'ble Supreme Court in ***Narendra Singh vs. Chooty Singh,*** *(1983) 4 SCC 131,* held that discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion.

21. In the instant case, opposite party No.3 being aware of the fact that he himself had not issued the declaration forms to TATA from whom the petitioner is to obtain the said forms to furnish before him, he should not have rejected the petitioner's application dated 20.04.2011 and passed the provisional order of assessment on the very same day. This action of opposite party No.3 is not certainly fair and reasonable and in consonance with the provisions of Rule 12(7) of the CST (R & T) Rules and 12(1)(b) of the CST (O) Rules.

22. In view of the above, the provisional assessment orders passed under Annexure-3 series and notice issued in terms of Section 51 of OVAT Act under

Annexure-5 are quashed. Opposite party No.3 is directed to examine the petitioner's claim of sale under Section 6(2) of the CST Act in accordance with law taking into consideration the declaration forms/certificates produced by the dealer-petitioner and pass appropriate orders.

23. With the aforesaid observation/direction, the writ petition is allowed. No order as to costs.

Writ petition allowed.

**2012 ( I ) ILR- CUT- 103**

**B.P.DAS, J & S.K.MISHRA, J.**

W.P.(C) NO.16400 OF 2011 (Decided on 16.11.2011)

**GOBIND CHANDRA ROUT & ORS.** ……..Petitioners.

*.Vrs.*

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

**CONSTITUTION OF INDIA, 1950 – ART.226.**

**Public Interest Litigation (PIL) – Main intention of PIL is to vindicate public interest and to help the poor, ignorant and socially or economically disadvantaged persons whose fundamental and other rights are affected and they are unable to seek legal redress – PIL can also be extended for air pollution and sexual harassment cases.**

**In this case there was litigation between the petitioners and IDCO with G.A. Department for a piece of land belonging to the G.A. Department and IDCO which was allotted in favour of O.P. 9,10 &13 – This writ petition was filed by the petitioners to achieve what they could not do in the Civil Court – Held, petitioners have not come up before this Court with clean hands and the action of the petitioners is a clear abuse of the process of the Court for private gain – Neither the petitioners nor the interveners have locus standi to challenge the allotment.**

(Para 20 to 24)

**Case laws Referred to:-**

1.(2011) 5 SCC 29 : (Akhila Bharatiya Upbhokta Congress-V-State of Madhya Pradesh & Ors.)
2.AIR 1986 SC 825 : (Chaitanya Kumar & Ors.-V-State of Karnataka & Ors.)
3.(1996) 6 SCC 734 : (S.P.Anand Indore-V-H.D.Deve Gowda & Ors.)
4.(1997) 8 SCC 114 : (Gourav Jain-V- Union of India & Ors.)
5.AIR 2010 SC 2550 : (State of Uttaranchal-V-Balwant Singh Chaufal & Ors.)
6.AIR 2004 SC 1923 : (Dr. B.Singh-V-Union of India & Ors.)
7.AIR 2006 SC 2643 : (Kushum Lata-V- Union of India & Ors.)
8.(2006)6 SCC 613 : (Rajib Ranjan Singh 'Lalan' (VIII)-V-Union of India & Ors.)

For Petitioners - M/s. Ashok Kumar Mohapatra, A.K.Mohapatra, N.C.Rout, S.K.Padhi, S.K.Mishra, A.H.Khadanga & Tej Kumar.

For Opp.Parties - Addl. Govt. Advocate
M/s. Jagannath Patnaik, Sr. Advocate, B.Mohanty, J.K.Patnaik, A.Patnaik, S.Patnaik, R.P.Ray, M.S.Rizvi & B.S.Raiguru (for O.P.Nos.3,4)
M/s. Sanjit Mohanty, Sr.Advocate S.Pradhan (for O.P.Nos.8,9,10 & 13)
M/s. G.P.Dutta, M.Dutta, S.K.Mohanty & D.Patnaik, (for O.P.No.11) Mr. B.P.Tripathy (for interveners)

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***B. P. DAS, J.*** This application has been filed by Sri Gobinda Chandra Rout and two others with the followings prayers.

> "to issue Rule NISI calling upon the opp. parties to show cause as to why:-
>
> A. A writ of mandamus or any other appropriate writ/ writs shall not be issued directing the Central Bureau of Investigation (CBI) or Crime Branch, Cuttack to hold as to how O.P. Nos.8, 9 and 13 could be granted as many as 11 leases for land and building from IDCO and another lease for Ac.2.000 by the G.A. Department, Govt. of Orissa and also against the officials who aided and abetted such illegal transactions and to cancel the said allotment-cum-lease of lands and buildings upon consideration of the report of the C.B.I. or Crime Branch, as the case may be, and the professional licence issued to O.P. No.8 by O.P. No.14 to carry on practice as a chartered accountant for his professional misconduct and unethical omission and commissions.
> B. If the Opp. Parties fail to show cause or show insufficient cause make the Rule absolute.
> Xxxx"

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

The petitioners, in shape of Public Interest Litigation, challenge the grant of allotment-cum-lease of lands and ready-made buildings, four in number in favour of opposite party No.9, two in favour of opposite party no.11, one each in favour of opposite parties 10 and 12 and three in favour of opposite party no.13, in Chandaka Industrial Estate, Bhubaneswar by opposite parties-Orissa Industrial Infrastructure

Development Corporation, Bhubaneswar (shortly "IDCO"). The petitioners also challenge allotment of one such ready-made building in favour of opposite party no.13 by the General Administration Department, Government of Orissa. The petitioners challenge such allotments on the ground that the same are illegal, improper and grossly mala fide and pray for cancellation of the same.

In Table-A of paragraph-1 of the writ application, the petitioners have indicated details of the allotments which are extracted herein-below:-

| Sl. No. | Firm Name | Date of decision of allotment of land | Allowed or disallowed | Extent of land allotted with allotment order and date | Name & Position of the person who represents the Firm. |
|---|---|---|---|---|---|
| 1. | M/s JSS Consultancy Services Pvt. Ltd. (OP No.9) | 3.5.05 | Allowed | For Item No.1 to 4, please see Sl. No.8, 82, 154 & 249 of Annexure-6 which is approximately 2.951 acres. | Bijoy Kumar Sahoo (Director) (O.P. No.8) |
| 2. | -do- | 18.01.06 | -do- | | -do- |
| 3. | -do- | 25.11.06 | -do- | | -do- |
| 4. | -do- | 14.11.07 | -do- | | -do- |
| 5. | M/s SRB Consultancy Pvt. Ltd. (O.P.11) | 25.11.06 | -do- | For Item No.5 and 6, please see Sl. No. 148 and 190 of Annexure-6 | Ms. Baijayanti Sahoo (Director) D/o.B.K.Sahoo (O.P.8). |
| 6. | -do- | 3.2.07 | -do- | | -do- |
| 7. | M/s. SIA Information & Technology (O.P.12). | 25.2.08 | -do- | For Item No.7, Please see Sl. No. 289of Annexure-6 | |
| 8. | M/s. JSS IT Solutions Pvt. Ltd. (O.P.No.10) | 25.2.08 | -do- | For Item No.8, Please see Sl. No. 294 of | Bijoy Kumar Sahoo (Director) (O.P. No.8) |
| 9. | St. Shiridi Sai Education Society (O.P. No.) | 12.1.99 & 14.1.99 | -do- | For Item No.9, Please see Annexure-9 under which 5 acres of land has been allotted | Bijoy Kumar Sahoo (Director) (O.P. No.8) |

| | | | | | |
|---|---|---|---|---|---|
| 10. | -do- | Not Known | -do- | SDF Building No. 1 &2 with an area of 989 decimal has been allotted vide Letter No.5597 dt. 17.3.2010 | Particulars of the allotment has been applied for under RTI Act and will be furnished as soon as received. |
| 11. | -do- | Not Known | -do- | Land measuring Ac.1.970 has been allotted vide letter No.26076 dt.31.12.2010. | -do- |
| 12. | -d- | Not Known | -do- | Land measuring Ac.2.000 has been allotted. | Particulars of allotment has been applied under RTI Act for the information. As soon as the information is received, it will be filed. |

3. According to the petitioners, O.P. No.8, namely, Bijay Kumar Sahoo, by misutilizing his official relationship with IDCO and influencing some Government officials, has established several firms, and by using the names of the said firms to his advantage, has acquired valuable parcels of land and buildings from IDCO and G.A. Department. The said opposite party no.8 has inducted his father, wife, children so also himself as Chairperson, Secretary, Director and Partners, etc. of the firms who have been arrayed as opposite parties 9 to 13. For the aforesaid reason, the petitioners want that a probe is necessary to bring the truth to light about the role of opposite party no.8-Bijay Kumar Sahoo in the alleged grabbing of land from IDCO, which is a Public Sector Undertaking as well as from the G.A. Department of the Government of Orissa.

4. The averments made in paragraph-9 of the writ application that Ms. Baijayanti Sahoo, who is the Director of M/s S.R.B. Consultancy, O.P. No. 11, is the daughter of opposite party no.8 has been seriously objected to by opposite party Nos.8 and 11 to be false. The petitioners have also subsequently admitted that Ms. Baijayanti Sahoo is not the daughter of opposite party no.8.

5. In the counter affidavit filed on behalf of IDCO, it is indicated that the allotments of land and buildings in Industrial Area, Chandaka, Bhubaneswar by them in favour of opposite parties 9 to 13 are lawful, correct and reasonable. Such allotments have been made in favour of different companies and Societies and also in favour of opposite parties 9 to 13, who are different persons in the eye of law having separate entities. It is further contended that the IDCO is legally empowered to

allot the lands and buildings in exercise of the powers conferred on it under Section 15 (c) of the Orissa Industrial Infrastructure Development Corporation Act, 1980. Apart from opposite parties 9 to 13, lands have already been allotted to several industrial units for establishment of their industries, namely, M/s Suraj Packaging, M/s Specialty Restaurant Pvt. Ltd. M/s Royal Hotel Pvt. Ltd., M/s Team India Pvt. Ltd. M/s Mahila Vikash Nigam and M/s. JSS IT Solutions Pvt. Ltd and many others, who are in possession thereof.

6. According to learned counsel for the IDCO, the petitioners have been locked up in various litigations as detailed in paragraph-8 of the counter affidavit. It would be profitable at this stage to quote the said paragraph-8 of the counter affidavit.

> "8. That with regard to the averments made in paragraphs-3 to 3.1 of the writ petition, the deponent humbly submitted that the petitioners had filed C.S. No. 425 of 2006 and I.A. No. 299 of 2006 against IDCO and another, in the matter of declaration of occupancy right over the suit property bearing Khata No.612, Plot No.44 measuring an area of Ac.5.30 in village Chandrasekharpur corresponding to Industrial Area, Chandaka with a further prayer for grant of permanent/temporary injunction against the defendants restraining them not to enter into the suit land and disturb peaceful possession of the petitioner by making any construction thereon with a further prayer to declare the registered lease deed No.825, dt.23.01.80 executed between Defendant Nos.1 and 2 as illegal, invalid and not to create any right or interest with the defendant No.1 in respect of the suit property. The Civil Judge, Senior Division, Bhubaneswar in his order dated 04.01.2007 dismissed I.A. No.299/2006 in respect of Plot No.44, Khata No.612 measuring an area of Ac.5.30 in favour of the Corporation. Being aggrieved the petitioner had filed F.A.O. No. 120/2007 before the Hon'ble High Court to set aside the order dated 04.01.2007 of Civil Judge, Senior Division, Bhubaneswar in I.A. No.299/2006 thereto. M/s JSS IT solutions Pvt. Ltd., the allottee have also filed W.A. No. 90/2008 against Sri Gobinda Chandra Rout and other in the matter of setting aside the order dated 30.05.2008 of the Hon'ble High Court in W.P.(C) No.7816/2008 relating to Plot No.44, Khata No.612 measuring an area of Ac.5.30 dec. in village Chandrasekharpur corresponding to Industrial Area, Chandaka. The Hon'ble High Court in their order dated 17.6.2008 in W.P.(C) No.7816 of 2008

have vacated the status quo order and allowed W.A. No.90/08 with a further direction to dispose of the FAO No.120/2007 on dated 19.06.2008. The Hon'ble High Court in their order dated 29.07.2008 dismissed FAO No.120/2007 in favour of the Corporation. Review Petition No.142/2002 filed by the petitioner against the impugned order dated 29.7.2008 in FAO No. 120/2007 was also dismissed."

7. According to learned counsel for IDCO, in almost all the litigations the petitioners became unsuccessful and out of their personal grudge, they have filed the present writ application in the guise of Public Interest Litigation.

8. Counter affidavit has been filed on behalf of opposite parties 8 and 13, sworn to by Bijay Kumar Sahoo-O.P.8 and in paragraph-9 thereof they have indicated the following:-

"9. That your deponent craves leave of this Hon'ble Court to file its para-wise reply to the averments made in the counter affidavit as hereunder;

(a) That in reply to the averments made in Para-1 Table-A of the writ petition is disputed and denied by these opposite parties. It is relevant to mention it here that St.Siridi Sai Education Society is a non-profitable charitable Organisation and it was allotted the mentioned lands for setting up Sai International School, its Hostels for both boys and girls, play ground on 20.1.2007, 31.12.2010 & 14.07.2010 respectively.

It is humbly submitted by this deponent that O.P. No.13 was initially allotted Plot No.5/A for setting up of Sai International School which was set up and running since year 2008. Further Sai International School is affiliated to CBSE New Delhi and IGCSE University of Cambridge, U.K. After setting up of the school since the strength of the students increased (within three years, i.e. from 2008 to 2011, the strength of the students has grown up to 1700 apart from other teaching and non-teaching staffs) the school was in need of more land for its expansion for which it submitted application before the IDCO/O.P. No:3 & 4 and pursuant such applications further lands were allotted to the Society for setting up of girls Hostel, Boys Hostel and a Centre of

Excellence in a phase manner and also the O.P. No.13 as per the rate fixed by O.P. No.3 & 4 paid the premium.

In a short span of three years time, SAI International School has been conferred the International School Award (ISA) for the year 2010-13 by the British Counsel U.K. The students of SAI International School also have brought many laurels for the State including the prestigious "PAINT THE WORLD" contest. This was a global contest and two of the students of SAI have own the 1st and 9th Position respectively in the entire world. They have brought laurels not only for the state but also for the country as well.

Thus it is submitted by these Opp. Parties that when the petitioners failed in their all attempts to blackmail these Opp. Parties, the petitioners have filed this writ petition stating all incorrect facts. It is pertinent to mention it here that the assertion made in Sl. No.12 of Table A does not belong to the O.P. No.13 but in order to mislead this Hon'ble Court, the petitioners have shown it to be an allotment in favour of O.P. No.13 as such the said assertions is specifically denied by these Opp. Parties.

It is also submitted by these Opp. Parties that the IDCO in consonance with IPR and after following due procedures have allotted land in favour of these O.Ps, so the allegation that such allotment as have been made to the O.P. No.13 is illegal, improper and grossly malafide are specifically denied by this deponent.

(b) That with regard to the averments made in Paragraph-1.1 of the writ petition, it is respectfully submitted by this deponent that the petitioners have got no locus standi to challenge the license granted to this deponent by O.P. No.14 to carry on practice as a Chartered Accountant and also it is submitted that no gross unethical practice and professional misconduct has/have been committed by this deponent as this deponent has not obtained any allotment-cum-lease of land either for himself of his family members individually but the land has been allotted to a company/society who fulfilled the criteria set up by the IDCO and as it successfully established the School, more lands as per requirement were allotted in favour of the company/society and their being no embargo for allotment of more than one land in

favour of a company/society, the O.P. No 3 & 4 on receipt of the application, after following due procedure have allotted the land. It is further submitted that the averments in this paragraphs that the O.P. Nos. 11 & 12 are related to this deponent or his firm and this deponent either through himself or through his wife, father, daughter is functioning as Chairman, Managing Director or Director or Secretary or vitally interested persons of O.P. No. 11 & 12 are specifically denied by these Opp. Parties. It is clarified by this deponent that either this deponent or its society is no way directly or indirectly connected with O.P. No. 11 & 12.

(c) That in reply to the averments made in Paragraph-2 of the writ petition, it is submitted that the petitioners have got no cause of action for filing this writ application as they have already ventilated their grievance before different Courts/ Authorities and some of the proceedings have already culminated in favour of these opposite Opp. parties and some are pending for adjudication.

(d) That the averments made in Paragraphs-3.1, 3.2, 3.3, 3.4, 4, 5, 6 & 7 relates to the Civil Suits pending in the different courts. It is relevant to mention it here that C.S. No: 425/2006 filed by the petitioners and co sharers seeking a declaration of occupancy status against the State Government, allegedly on the basis of Hatha Patta from Raja of Pattia is pending in the Court below.

In this context it is submitted by these Opp. parties that when the petitioners have already availed their remedy under the common law, the present writ petition cannot be entertained on the same set of allegations and as such the writ petition is liable to be dismissed with cost.

(e) That the allegations made in Para-8 are all tissues of false hood and a separate counter is being filed on behalf of O.P. No.11 & 12 as such these averments are specifically denied.

It is submitted that the O.P. No.8 has set up the first International Day Boarding School in Orissa by the name of SAI International School. On the demand by the IT majors like Infosys, TCS, Wipro etc to have a good school in Infocity Area, IDCO allotted five acres land to St.Shirdi Sai Education Society to setup a Model Public School of International standard. Accordingly SAI International School has been set up. In a span

of three years, SAI International is well known in the entire country and bagged many National as well as International awards. It has been chosen as the best International school by British Council, Government of UK. The students of SAI International School have come out with flying colours in all the examinations including entrance examinations for Engineering, Medical, CLAT and CPT.

(f) That the further averments made in Paragraph-8 of the writ petition that O.P. No.8 has inducted his father, wife and his children so also himself as Chairperson, Secretary, Director and Partners etc. of O.P. Nos. 11 & 12 are specifically denied by this Opp. party. It is once again reiterated that either this deponent or any of this family members are stated above are no way connected to the O.P. No.11 & 12 and the petitioners in order to hoodwink have made such false statement on oath as such, the writ petition is liable to be dismissed with cost."

9. Mr. Jagannath Patnaik, learned Senior Advocate for IDCO, in support of his contentions referred to Clause-9.15 of the Industries Department Resolution dated 2.3.2007, which speaks thus:-

"Special thrust shall be laid on promotion of high quality social infrastructure in the form of schools, colleges, technical and professional institutions, hotels, multiplexes, townships, commercial complexes, health-care facilities, leisure & entertainment facilities, resorts, golf courses, tourism areas, etc, through IDCO and private developers. Private developers shall be selected through open competitive bidding process.

10. According to Mr. Patnaik, the aforesaid provision was also there in IPRs of 1996 and 2001. Further referring to Section 15 (c) of the Orissa Industrial Infrastructure Development Corporation Act, 1980, he submitted that the Corporation shall have power to allot plots, factory sheds or buildings or part of buildings, including residential tenements, to suitable persons in industrial estates established or developed by the Corporation;

He further drew our attention to Section-18, which speaks as follows:-

> 18. Directions by the State Government-The State Government may issue to the Corporation such general or special directions as to policy as it may think necessary or expedient for carrying out the purposes of this Act, and the Corporation shall be bound to follow and act upon such directions.

11. According to Mr. Patnaik, the aforesaid IPRs contain directions of the State basing upon which the lands have been allotted as in the IPRs it is specifically indicated that special thrust shall be laid on promotion of high quality social infrastructure in the form of schools, colleges, etc.

12. Before going into the merits of the case, let us consider the maintainability of the writ application as has been questioned by Mr. Sanjit Mohanty, learned Senior Advocate for opposite parties 8, 9, 10 and 13. According to him, in the guise of public interest litigation this writ application has been filed to vindicate the personal grievance of the petitioners. There is no element of public interest involved, as the lands were allotted since long and the institutions in question are well running institutions giving employment to many unemployed persons and high quality education to the students.

13. Learned counsel for the State submitted that he has instruction in the matter that the educational institutions set up by opposite party no.8 are well running institutions and now this writ application at a belated stage has been filed by some persons who lay their claims over portions of the lands allotted to opposite parties 9 to 13, which, according to the petitioners, have been allotted by a “Hata Patta” of the Zamindar.

14. The petitioners also in the writ application have narrated the details of litigations, between them and the IDCO and between them and opposite party no.8. The said litigations as described in the writ application, also came up to this Court in W.P.(C) No. 3020 of 2009.

15 According to learned counsel for IDCO, in almost all the litigations, the petitioners failed to establish their right over any part of lands, which according to them have been allotted to opposite parties 9 to 13.

16. Now in the aforesaid premises, can we say that this litigation is bona fide ?

17. With regard to the question of maintainability of the writ application, which has been raised by the opposite parties, learned counsel for the petitioners relied upon certain decisions:-

Placing reliance on the case of ***Akhila Bharatiya Upbhokta Congress v. State of Madhya Pradesh and others, (2011) 5 SCC 29,*** learned counsel for the petitioners submitted that the State and/or its agencies/ instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/ decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well-defined policy.

According to learned counsel for the petitioners, the aforesaid procedure/policy has not been followed in this case.

Further reliance was placed on the decision in the case of ***Chaitanya Kumar and others v. State of Karnataka and others, AIR 1986 SC 825***, wherein the apex Court has held that award of contracts to a chosen few is contradictory.

According to the petitioners, even though they have made M/s SRB Consultancy Pvt. Ltd., IDCO Tower, represented by Ms. Baijayanti Sahoo, stating her to be the daughter of Sri Bijay Kumar Sahoo, as opposite party no.11 and the fact that she is the daughter of Sri Bijay Kumar Sahoo is disputed, then also the basis on which the allotment has been made in her favour should be probed into.

Further reliance was placed by the petitioners on the decision in the case of ***S.P. Anand Indore v. H.D. Deve Gowda and others, (1996) 6 SCC 734***. However this decision has no application to the facts and circumstances of the case at hand.

Again reliance was placed on the decision in the case of ***Gourav Jain v. Union of India and others, (1997) 8 SCC 114***, wherein it has been indicated that Court can give reliefs in respect of matters which are not even specifically stated in the pleadings with a view to render socio-economic justice and empowerment to handicapped persons and enforce their fundamental rights.

Banking upon these decisions, petitioners submission was that they have locus standi to maintain the writ application even though they

were locked up in litigations with IDCO and with opposite party no.8-Shri Bijay Kumar Sahoo in certain matters.

18. During pendency of the writ application, some of the residents of village-Patia filed an intervention application through learned counsel Mr. B.P. Tripathy, stating to be sailing on the same boat as that of the writ petitioners. Their allegation is like that of the allegation of the writ petitioners and learned counsel for the interveners also relied upon the decisions, which were relied upon by learned counsel for the writ petitioners.

19. Let us see whether the petitioners as well as the interveners have come to this Court with clean hands and whether they have any locus to maintain the writ application.

20. Public Interest Litigation when entered into the Indian judicial process, its main intention was to vindicate public interest and to help the poor, ignorant and socially or economically disadvantaged persons, whose fundamental and other rights are affected and who are unable to seek legal redress. PILs are entered in other spheres where judicial intervention is necessary like air pollution, sexual harassment, etc. But of late it has become a tool in the hands of unscrupulous persons to vindicate the private interest by abusing the process of Court.

21. In the case of ***State of Uttaranchal v. Balwant Singh Chaufal & Ors, AIR 2010 SC 2550***, the apex Court had issued certain directions in order to preserve the purity and sanctity of P.I.L. One of such conditions being that the Court should prima facie verify the credentials of the petitioner before entering a P.I.L.

In the case of ***Dr. B. Singh v. Union of India and others, AIR 2004 SC 1923***, the apex Court in paragraph-13 has held that

> "Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest and ugly private malice, vested interest and/or publicity seeking is not lurking It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. xxx xxx xxx"

In the case of ***Kushum Lata v. Union of India & Ors. AIR 2006 SC 2643***, the apex Court has held that the Court should be satisfied about the credentials of the applicant.

In the case of ***Rajib Ranjan Singh 'Lalan' (VIII) v. Union of India and others, (2006) 6 SCC 613***, the apex Court has held that Public Interest Litigation is meant for benefit of the lost and lonely and it is meant for those whose social backwardness is the reason for no access to the Court. Public Interest Litigations are not meant to advance the political gain and also settle scores under the guise of public interest litigation and to fight a legal battle.

22. In view of the aforesaid pronouncements of the apex Court, let us see the conduct of the petitioners. Admittedly the petitioners try to get their right over a piece of land belonging to the GA Department and IDCO on the ground that they have the right over the said land by virtue of the "Hata Patta" issued by the Zamindar and the land has been allotted in favour of one among the opposite parties 8 to 13. The petitioners as well as IDCO and the G.A. Department have been locked up in many litigations for the aforesaid land, as has been described by the petitioners in the writ petition starting from paragraph-1 to paragraph-7.

In paragraph-7 of the writ petition the petitioners have stated:-

> "That it will thus appear that these petitioners and other co.sharerors who are fighting out a litigations in the Civil Court having files C.S. No.425/2006 for declaration of their occupancy right over Hal Plot No.44 of Khata No.612 in Mouza-Chandrasekharpur which land having been reclaimed by their forefathers since 1910 and having planted hundred of mango and other fruit bearing trees which are also 70-80 years old, have been harassed by O.P. No.8 and 10 who have fraudulently and illegally obtained a piece of land measuring Ac.1.620 out of Hal Plot No. 44 from IDCO (O.P. No.3 and 4) in the year 2008 which is prima facie and exfacie hit U/s-52 of the T.P. Act. xxx xxx xxx"

23. This being the admitted position, the cause of filing of the writ application is that the petitioners want to achieve what they could not do in the Civil Suit. That the petitioners cannot do.

24. For the facts we have already indicated, and after going through the judgments of the apex Court referred to above, we are of the clear view that the petitioners prima facie have not come up before this Court with clean hands and the action of the petitioners is a clear abuse of the process of Court for private gain. The petitioners have only private interest in this litigation and no public interest part is attached to it. The petitioners have no locus standi to maintain the writ application. Like that of the petitioners, the interveners have also no locus standi to challenge the allotment in question as they can be said only to be the meddlesome interlopers and they have entered into the arena of litigations only to highlight the interest of the writ petitioners without any public interest. The writ application is dismissed on this score. There shall be no order as to costs.

Writ petition dismissed.

**2012 ( I ) ILR- CUT- 117**

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

CONTC No.481 of 2011(Decided on 11.8.2011)

**ANIRUDHA ROUT** **..**……petitioner

*.Vrs.*

**ALKA SIROHI & ORS.** … .. ..Opp. parties

**CONTEMPT OF COURTS ACT,1971 (ACT NO. 70 OF 1971 ) S.12**

**Whether in a Contempt application , the Court can issue any direction to rectify the injustice done to the petitioner - Held, yes.**

**In this case the petitioner was selected for appointment to IAS in the year 2005 – Due to wrong submissions made by the learned Assistant Solicitor General as well as the learned counsel for the state the petitioner was deprived of promotion to IAS against the vacancy available in the year 2005.**

**This Court is a Court of record under Art. 215 of the Constitution of India and it is Competent to determine the scope of its jurisdiction – As a Court of record it has a duty to keep all its records correctly and in accordance with law - Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it - The High Court's power in that regard is plenary and the plenary powers of the High Court would include the power of review relating to errors apparent on the face of the record.**

**Since this Court feels that grave injustice has been done to the petitioner the Contempt petition is disposed of with a direction to the contemnors for taking immediate steps to promote the petitioner to IAS against the vacancy which remained unfilled in the year 2005.**

( paraa 6,7)

**Case laws Relied on :-**

1. (2000) 1 SCC 666 :- M.M. Thomas Vrs. State of Kerala and anr.)

2. (2004) 9 SCC 670 :- **(**U.P. Residents Employees Cooperative House Building Society and others Vrs. New OKHLA Industrial Development Authority and anr.)

For Petitioner - Mr. D.K. Mohapatra, B.B.Routray, S.Das, S.K.Samal & B. Mansingh.
For Opp. Parties – M/s. Saktidhar Das (For O.P.1)
M/s. J.K. Mishra, S.S. Mohanty & P.C.Behera ( For O. P. 2 )
Advocate General

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***L.MOHAPATRA, J.*** This is an application under Section 12 of the Contempt of Courts Act read with Article 215 of the Constitution of India.

The facts leading to filing of this application are as follows:-

The petitioner had filed Original Application No.817 of 2006 before the Central Administrative Tribunal, Cuttack Bench, Cuttack praying for appointment to Indian Administrative Service against the post available for the year 2005.

2. Case of the petitioner is that he is an officer of Orissa Civil Service in Super Time Scale. In the year 2003 he became eligible for promotion to I.A.S. under the provisions of Regulations 5 (5) of IAS (Appointment by Promotion) Regulations, 1955. Unfortunately, no selection was held for the years 2003, 2004 and 2005 as the selection for the years 2002 and 2003 was challenged in the High Court in various writ applications and the matter being subjudice, no steps were taken for selection. After the writ applications were disputed of by the High Court, D.P.C. was held on 5th and 6th October 2006. On the basis of the records of service, the petitioner was selected for appointment to I.A.S. in the year 2005. However, the said selection was made provisional on the ground that the disciplinary proceeding was pending against him. The said D.P.C. which selected him for the year 2005 carried forward his selection to 2006 but again kept it provisional for the very same reason. The petitioner thereafter was censured in the departmental proceeding. With the above background of the case, the Tribunal after taking into consideration the stand taken by the State Government as well as U.P.S.C. and the Union of India allowed the Original Application by judgment and order dated 24th August, 2007. The operating part of the judgment of the Tribunal is quoted below:

> "With the above-mentioned consideration, we are of the view that there is merit in this O.A. which is allowed. We direct that the State Government will ignore the punishment of censure awarded to the applicant as it would relate to the period of commitment of the alleged irregularity and it should issue a clearance certificate in favour of the applicant. Thereafter, it should forward the same to the UPSC. On receipt of the clearance certificate, the UPSC should take

further step to appoint the applicant to the IAS ignoring that as per rule is validity would have expired by 31st December, 2006. The entire exercise shall be completed within a period of three months from the date of receipt of copy of this order. There shall be no order as to costs."

3. Challenging the said judgment of the Tribunal, the State came up in a writ application vide W.P.(C) No.581 of 2008. It is stated at the Bar that the said writ application was heard and judgment was reserved but before the judgment was delivered, the case was listed on the basis of a memo filed by the learned counsel for the State on 22.7.2009 praying for withdrawal of the writ application. When the matter was taken up by this Court on 22.7.2009, a memo was moved on behalf of the State for withdrawal of the writ application. The then Assistant Solicitor General appearing for the UPSC opposed withdrawal of the writ application and submitted that the list sent for filling up the vacancy in the Indian Administrative Service up to the year 2006 had been exhausted and names are only to be sent for the year 2007 onwards. On the basis of the above submission made by the learned Assistant Solicitor General, the Court directed that vacancy in the Indian Administrative Service from the year 2007 onwards to be filled up considering the names of all eligible persons including the petitioner.

The above submission made by the learned Assistant Solicitor General at the time of hearing of the writ application on 22nd July 2009 was based on in correct information. From Annexure-3, it is very clear that for each of the year, 2004, 2005 and 2006 one post remained unfilled. The chart indicated in Annexure-3 issued by the Government of India in the Ministry of Personnel, P.G. & Pensions Department of Personnel & Training dated 10th February 2010 is quoted below :

| Year | No.of vacancies | No. of officers appointed | Date of appointment | No. of unfilled vacancies |
|---|---|---|---|---|
| 2003 | 09 | 06+02 | 17.11.2006 & 04.01.2007 | 01 |
| 2004 | 05 | 04 | 17.11.2006 | 01 |
| 2005 | 06 | 05 | 17.11.2006 | 01 |
| 2006 | 04 | 03 | 17.11.2006 | 01 |

4. Admittedly, for the years 2005 and 2006, the petitioner had been selected by DPC on the basis of his service records for promotion to I.A.S.. However, his selection was made provisional because of pendency of a

departmental proceeding. As is evident from Annexure-3, one vacancy for I.A.S. remained unfilled in 2005 and one vacancy also remained unfilled in the year 2006. Therefore, the learned Assistant Solicitor General could not have made a submission before the Court on 22.7.2009 that the list sent for filling up vacancy in the I.A.S. up to the year 2006 had been exhausted.

After coming to know about the above vacancy, the petitioner filed an application for modification of the order dated 22.7.2009 vide Misc. Case No.9036 of 2009. The said Misc. Case was taken up for orders on 22.10.2009. In the said order, the Court observed that the impugned order of the Tribunal could not have been confirmed in view of the direction issued by the Court in the first instance to proceed with the selection in the year 2007 and on the statement of the learned Assistant Solicitor General appearing for UPSC that the list sent for filling up the vacancy in the I.A.S. up to the year 2006 had been exhausted. However, the Court did not consider the question as to whether vacancies were available for the year 2005 and 2006 as indicated above but disposed of the Misc. Case on the statement of the learned counsel appearing for the State that even if the case of the petitioner is considered for the year 2007 it will not affect his seniority in view of the Regulations 5 of the Indian Administrative Service (Appointment by Promotion) Regulations, 1955. Quoting the statement made by the learned counsel appearing for the State, the Court held that in view of the above submission, there was no need to modify the order dated 22.7.2009. When the petitioner found that the above statement of the learned counsel for the State was without any basis, again an application for modification of the said order was filed vide Misc. Case No. 17621 of 2009. The said Misc. Case was dismissed on the ground that after disposal of the writ application, no such petition is maintainable. Therefore, the petitioner has filed this application under Section 12 of the Contempt of Court Act read with Article 215 of the Constitution of India solely on the ground that because of wrong submissions made by the learned Assistant Solicitor General at the first instance as well as the wrong submission of the learned counsel for the State in the second instance, the petitioner has been deprived of promotion to IAS against the vacancy available to be filed in the year 2005.

5. Shri B.Routray, learned counsel appearing for the petitioner drew attention of the Court to the above documents to establish his claim that the petitioner has been a victim of wrong submissions made by the learned counsel appearing for the UPSC as well as the learned counsel for the State based on wrong information given by the respective departments.

Shri Mishra, learned Senior Counsel appearing for the UPSC submitted that the petitioner though was selected in the year 2005 for promotion to IAS, in 2006 he could not be given promotion as a departmental proceeding was pending against him. He was found unfit for the year 2006 because of the punishment imposed on his in the departmental proceeding. The DPC found him very good for the year 2007 and, accordingly, his case has been recommended by UPSC for inclusion at serial no.1 in the select list of 2007 and in terms of the said recommendation, the petitioner has already been appointed to IAS by the Government of India, DOPT Notification dated 24.4.2011 and therefore the State authorities cannot be found fault with.

Learned Advocate General appearing for the State also submitted that the first order dated 22.7.2009 was passed by this Court because of the submission made by the learned Assistant Solicitor General when the State wanted to withdraw the writ application.

6. Having heard Shri Routray, learned Counsel appearing for the petitioner, Shri J.K.Mishra, learned Senior Counsel for UPSC and the learned Advocate General, we find that while allowing the Original Application filed by the petitioner, the Central Administrative Tribunal had specifically directed the State Government to ignore the punishment of censure awarded to the petitioner as it relates to the period of commitment of the alleged irregularity and further directed the State Government to issue a clearance certificate in favour of the petitioner. It was also directed that after issuing a clearance certificate, the case of the petitioner should be forwarded to UPSC and on receipt of the clearance certificate, the UPSC should take further step to appoint the petitioner to IAS ignoring that as per Rule its validity would have expired by 31st December, 2006. It is therefore clear from the said order that the Tribunal not only directed the State Government to ignore the punishment of censure but also directed for issuance of a clearance certificate and sending the name of the petitioner to UPSC for taking further step for appointment to IAS. Had the writ application been allowed to be withdrawn on the basis of a memo filed by the learned counsel for the State, the petitioner would have got the benefit of the order of the Tribunal and would have got promotion to IAS in the year 2005 against the unfilled vacancy available. Because of the submission made by the learned Assistant Solicitor General that vacancy for the years 2005 and 2006 had been exhausted, this Court directed to consider the case of the petitioner for the year 2007. The petitioner has been a victim of such submission made by the learned Assistant Solicitor General on the basis of wrong information imparted to him by UPSC. It is clear from Annexure-3 that one vacancy

remained unfilled in the year 2005 and one vacancy also remained unfilled in the year 2006. While hearing the application filed by the petitioner for modification of the order dated 22.7.2009, again a wrong submission was made by the learned counsel for the State that even if the petitioner is given promotion in the year 2007 to I.A.S., there shall be no loss of seniority. On the basis of such a wrong submission, the Court declined to modify its earlier order dated 22.7.2009. Though it is stated by the learned Advocate General that another Misc.Case has been filed to delete that portion of the order dated 22.10.2009, no other has been passed on that Misc.Case. With the above background and considering the fact that the vacancy was available to be filled up for the years 2005 and 2006, we are of the view that grave injustice has been done to the petitioner because of a wrong submission made by the learned counsel for the UPSC at the first instance as well as the learned counsel for the State in the second instance specially when the petitioner was found suitable for promotion in both the years. The question that arises for debate is as to whether in a contempt application, the Court can issue any direction to rectify the injustice done to the petitioner. In the case of M.M. Thomas Vrs. State of Kerala and another reported in (2000) 1 SCC 666, the Apex Court held that the High Court as a court of record as envisaged in Article 215 of the Constitution, must have inherent powers to correct the records. A court of record envelops all such powers whose acts and proceedings are to be enrolled in a perpetual memorial and testimony. A court of record is undoubtedly a superior Court which is itself competent to determine the scope of its jurisdiction. The High Court, as a court of record, has a duty to itself to keep all its records correctly and in accordance with law. Hence, if any apparent error is noticed by the High Court in respect of any orders passed by it the High Court has not only power, but a duty to correct it. The High Court's power in that regard is plenary. The Court further observed that that if the power of correcting its own record is denied to the High Court, when it notices the apparent errors, its consequence is that the superior status of the High Court will dwindle down. Therefore, it is only proper to think that the plenary powers of the High Court would include the power of review relating to errors apparent on the face of the record. The case of ***U.P. Residents Employees Cooperative House Building Society and others Vrs. New OKHLA Industrial Development Authority and another*** reported in (2004) 9 Supreme Court Cases 670 is relevant for the purpose of this Case. The facts leading to filing of this case before the Hon'ble Supreme Court were that for development of NOIDA, land belonging to the applicant Society and its members were acquired. The State Government formulated a policy to allot some developed plots to the members of the Society. As disputes arose during implementation of that policy, writ petition was filed in the Allahabad High Court. Against orders in

that writ petition a civil appeal was filed in this Court. By an order dated 3.5.1990, certain directions were issued on the basis of a consensus arrived at between the parties. It was agreed and so recorded that allotments be made either in Sectors 40, 41 or 42. The plots were to be developed by NOIDA within a period of nine months and the price of the plots was to be at the rate of Rs. 1000 per square metre. 242 members could not be accommodated and again approached the Hon'ble Supreme Court. On 4.4.1991 the statement of counsel for NOIDA was recorded and an order was passed. Subsequently, it was found that the submission made by the learned counsel appearing for the NOIDA was not based on correct facts. Therefore, in the contempt application, the Hon'ble Supreme Court issued orders for allotment of land.

7. The aforesaid two decisions clearly lay down the powers of the High Court under the Contempt of Courts Act as well as under Article 215 of the Constitution of India. Since we have already held that grave injustice has been done to the petitioner because of the circumstances stated earlier, we dispose of this contempt petition directing the contemnors to take steps immediately to promote the petitioner to IAS against the vacancy which remained unfilled in the year 2005.

The contempt petition is disposed of.

Contempt petition disposed of.

**2012 ( I ) ILR- CUT- 124**

**PRADIP MOHANTY, J & B.K.NAYAK, J.**

JCRLA NO.46 OF 2002 (Decided on 30.09.2011)

**SANJAY NAYAK** ……..Appellant.

*.Vrs.*

**STATE OF ORISSA** … ….Respondent.

**PENAL CODE, 1860 (ACT NO.45 OF 1860 ) – S.300.**

**Murder – No direct evidence to connect the appellant with the murder of the deceased – Prosecution case entirely based on circumstantial evidence i.e the deceased was last seen with the accused – Trial Court placed reliance upon the evidence of P.Ws. 5, 6 and 10 – It can be inferred from the evidence of P.W.5 that she gives different statements at different stages with regard to the presence of the appellant along with the deceased at the time of occurrence – P.W.10 also can not be a witness to the last seen theory – Even if the last seen theory is believed the conviction of the appellant can not be sustained since there is no other incriminating circumstance proved by the prosecution – Held, prosecution has failed to establish all the circumstances to arrive at the only conclusion that it is the appellant and the appellant alone who committed the murder of the deceased.**

(Para 11)

**Case law Referred to:-**

.AIR 1991 SC 1674 : (Inderjit Singh & Anr.-V- State of Punjab)

For Appellant - Mr. B.K.Mishra, Advocate
For Respondent - Mr. B.P.Pradhan
Addl. Govt. Advocate

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***PRADIP MOHANTY, J.*** In this jail criminal appeal, the appellant challenges the judgment and order dated 17.08.2002 passed by the learned Additional Sessions Judge, Bhanjanagar-Aska, Bhanjanagar in Sessions Case No.12 of 2000 (S.C.132/2000 GDC) convicting him under Section 302, IPC and sentencing him to undergo imprisonment for life for having committed murder of his wife Sujata.

**2.** Informant Bijay Kumar Pradhan is the father of the deceased Sujta and father-in-law of the accused-appellant. Fifteen days prior to the date of

occurrence the appellant had returned from Surat, the place of his service, to the house of the informant along with his wife (deceased Sujata) and their female baby. On 18.11.1999 at about noon the informant and his wife were in their field and the accused-appellant, his wife (deceased) and their female baby were in the house of the informant. At about 3.00 P.M., the informant came to his house for taking a bucket to water his land and saw the front door of his house had been closed from inside. He entered inside the house by breaking open the door and found his daughter lying dead in a pool of blood and her female child came crying towards him. He also noticed that the radio was on and the backside door of the house was open. But, he did not find the accused-appellant in the house. He immediately informed the police over phone and on their arrival, he submitted a written report scribed by one Santosh Kumar Mohanty. The A.S.I. of Balipadar Out-post who received the F.I.R. sent the same to Buguda Police Station for registration and took up investigation of the case. During investigation he held inquest over the dead body and sent the same to the S.D. Hospital, Bhanjanagar for post-mortem examination, prepared the spot map and examined the witnesses. He seized the blood stained weapon, sample earth, bloodstained wearing apparels of the deceased. He arrested the accused-appellant and seized his wearing apparels. He sent the seized articles for chemical examination and on completion of investigation submitted charge-sheet against the accused-appellant.

**3.** The plea of the appellant is one of complete denial and false implication. His specific plea is that he returned to his father-in-law's (informant's) house from Surat along with his wife and the child together with Rs.5,000/- and entrusted the said amount to his father-in-law. As his father-in-law spent the same, out of anger he left the house of his father-in-law leaving his wife and child. On the way he met his mother-in-law and told her that he was going to his house.

**4.** The prosecution in order to prove the charge has examined as many as 12 witnesses including the I.O. and the doctor and exhibited 10 documents. Defence has examined one witness on its behalf.

**5.** The learned Additional Sessions Judge, who tried the case, on assessment of the evidence on record convicted the accused-appellant under Section 302 I.P.C. and sentenced him to undergo imprisonment for life inter alia taking into consideration the circumstantial evidence such as last seen theory and the conduct of the accused-appellant who absconded from the spot immediately after the occurrence.

**6.** Learned counsel for the appellant submitted that there is absolutely no direct evidence to connect the appellant with the crime. Last seen theory and the conduct of the appellant are the two incriminating circumstances on the basis of which the appellant has been found guilty by the trial court. Evidence of the witnesses regarding the deceased and the appellant having been last seen together does not appear to be clear, consistent and conclusive. Merely because two persons were found together at a particular time and some time thereafter one of them found dead, the inevitable conclusion cannot be that the other is the author of the crime. In absence of any other evidence pointing to the guilt of the appellant, evidence of last seen together is not sufficient. He further submitted that so far as absconding of the accused-appellant from the spot is concerned, it is clear from the evidence of the parents of the deceased (P.Ws.5 and 6) that prior to the occurrence the appellant was proposing to go to his village. Furthermore, if he had intention to abscond he would not have been present in his village wherefrom he was arrested by P.W.11. In cross-examination P.W.11 admitted that prior to the arrest of the appellant he had gone to his village and did not ask the villagers as to where the appellant had gone. There is nothing on record to show that by the time the appellant was arrested, he was aware about the death of his wife. Under such circumstances, the conduct of the appellant cannot be doubted, as has been done by the trial court, for not returning to his father-in-law's house to see his deceased wife. He also submitted that the circumstances relied on by the prosecution are neither fully established nor consistent with the hypothesis of the guilt of the appellant. As such, the appellant is entitled to be acquitted on benefit of doubt.

**7.** Mr. Pradhan, learned Additional Government Advocate vehemently contended that from the evidence available on record it is established that there was a quarrel between the appellant and the deceased on the date of occurrence for money. It transpires from the evidence of P.Ws.5 and 6 that on the date of occurrence the deceased and the appellant were seen together by them when they left for field at about 12.00 noon. According to P.W.10, the appellant was seen by him at about 2.00 PM when he came out of the house of P.W.6 having his wearing apparels drenched and seeing P.W.10 he again retreated into the house. So, through the evidence of P.Ws.5, 6 and 10, the prosecution has been able to establish that at the time of occurrence the deceased was in the company of the appellant. He also contended that the conduct of the appellant, who absconded from the house of P.W.6 soon after the death of the deceased, further strengthens the case of the prosecution that he was the author of the crime. He lastly contended that all the links of the chain of the circumstantial evidence are established

by the prosecution and, therefore, there is no scope for this Court to interfere with the impugned judgment of conviction and sentence passed by the trial court.

**8.** Perused the LCR. This is a case where there is at all no direct evidence to connect the appellant with the murder of the deceased. The prosecution case is entirely based on the circumstantial evidence. P.Ws.1, 2 and 3 are respectively witnesses to the seizure of a knife, the seizure of blood and the inquest held over the dead body of the deceased. P.W.4 is the brother of the deceased and brother-in-law of the appellant. In his examination-in-chief he stated that on the date of occurrence at about 3.00 P.M. he returned home from the college and found his deceased sister lying dead in the house with bleeding stab injury on either side of her neck. On being told by his father (P.W.6), he went to the field and called his mother (P.W.5). In cross-examination, he admitted that the appellant had married his sister about two years prior to her death. During that period the appellant with his sister might have visited his house three to four times. To his knowledge, they were leading a peaceful life. P.W.5, the mother of the deceased, in her examination-in-chief stated that the appellant had married her deceased daughter about two years before her death. On the date of occurrence her husband (P.W.6) went to the field and informed her to come there along with the labourers. Eighteen days prior to the date of occurrence the appellant, her deceased daughter and grand daughter of one and half years old had come to her house from Surat. On the date of occurrence she and P.W.6 went to the field along with the labourers leaving the appellant, the deceased and their female child in the house. At about 3.00 P.M., P.W.6 left for home to bring a bucket for watering the land. About 3.30 P.M., her son (P.W.4) went to the field and informed her that the deceased was killed. She returned home and found the deceased lying dead in a pool of blood in their house with stab injuries on both sides of her neck. The appellant was found absconding. In cross-examination, she admitted that to her knowledge after the marriage the deceased and the appellant were leading a peaceful conjugal life. She also admitted that during their stay in her house they lived peacefully except for one day. On the day of incident in the morning she found the appellant quarrelling with the deceased demanding money from her. On that day the appellant was proposing to go to his village. She advised him to return in the evening. On the day of incident about 12.00 noon when she and P.W.6 were in the house, the appellant left their house on a cycle informing them to go to his village. On her return from the field she found the wooden almirah, which was not locked, was opened and the clothes inside it lying helter-skelter on the floor of their house. The appellant returned about 1.30 PM on the date of the incident when she was preparing

to go to the field. P.W.6 is the father of the deceased and father-in-law of the appellant. In his examination-in-chief he stated that on 01.11.1999 the appellant with the deceased and grand daughter had come to their house. On 18.11.1999 at about 7.00 A.M. when he was preparing to go to the field with plough he found the appellant quarrelling with the deceased for money. The deceased informed him that the appellant requiring money for his expenses which she had not and he (P.W.6) also did not have that amount. About 12.00 noon he returned from the field and again proceeded there instructing P.W.5 to come with the labourers. At that time the appellant was in their house. Some time after P.W.5 followed him with the labourers. About 3.00 P.M. he came back to his house to take a bucket to water the Padar and found the front door was closed from inside and the radio was blaring. He called the appellant, but got no response. He gave a kick on the door as a result of which the latch was broken and the door opened. His grand-daughter rushed towards him crying. He found the deceased lying on the floor in a pool of blood. The backyard door of the house was open. He found all the articles including clothes kept inside one wooden almirah and steel almirah lying scattered on the floor. He found one deep bleeding wound on the left side neck and three bleeding wounds on the right side neck of the deceased. P.W.4 came from the college and he told him to bring P.W.5 from the field as the appellant had killed the deceased. From the Panchayat Office he made a phone call to Balipadar Outpost and the police came at about 5.00 P.M. On arrival of police he handed over the written report scribed by P.W.7 on his dictation. Ext.4 is the said written report. Police made inquest over the dead body of the deceased in his presence and he put his signature thereon. Ext.3/2 is his signature on the inquest report. In cross-examination, he admitted that to his knowledge the deceased and the appellant were leading a peaceful conjugal life. When he proceeded to the field in the afternoon, the appellant was present in their house. P.W.7 is a co-villager. He stated that on 18.11.1999 on the dictation of P.W.6, he scribed Ext.4 and Ext.4/2 is his signature thereon. He also stated that on 19.11.1999 in his presence police seized a piece of blood stained cement from the floor of the house of P.W.6 under seizure list Ext.2 and Ext.2/2 is his signature thereon. In cross-examination, he admitted that he was not examined by police regarding scribe of the F.I.R. P.W.8 is the doctor who conducted post-mortem examination on the dead body of the deceased and found the following external injuries:

"1. Blood was coming from both the nostrils and blood-stains were found all over the body.

2. Antemortem imprint (pressure) abrasion on left side of the neck 3" x 1", 2" x 1" and 3" x 1" respectively almost parallel to each other from below the above.

3. Antemortem penetrating lacerated injury on left side of neck 1" x 1" x 1" almost continuous with the imprint abrasion 3" x 1".

4. Penetrating lacerated injury on right mastoid region of the skull 1" x 1" x 1".

5. Two punctured injuries on the upper part of the front side of the neck.

6. Abrasion on the front of the right side of the chest and on the middle part of right ear 5" x 2" and ½" x ½" respectively.

7. Ill-defined bruise on right tempo-parietal region of the skull 2" x 2"."

On dissection he found the following injuries.

"(i) Fracture of Rt. Temporal region of the skull with intra cerebral haemorrhage.

(i) On dissection of the neck tear of left carotid artery with congestion of pere arterial area, so also congestion of all the structures of neck."

He opined that the death was due to head injury and haemorrhagic shock caused within 24 to 36 hours. Ext.5 is the post-mortem report and Ext.5/1 is his signature. He also opined that the injuries found on the body of the deceased could be possible by the knife, which was produced before him by the police. P.W.9 is the A.S.I. of Police of Balipadar Outpost. He deposed that on 18.11.1999 at about 6.00 PM he got information over telephone from P.W.6 about the death of his daughter. At about 8.30 PM he arrived at the occurrence village and there P.W.6 handed over the written report (Ext.4) to him. He sent Ext.4 to the O.I.C. Buguda P.S. for registration and took up investigation. During the course of investigation, he examined P.Ws.5 and 6, went inside the house of P.W.6 and found the dead body of the deceased lying on the floor. As it was night, he could not make further investigation. On the next day, i.e., on 19.11.1999 he again went to village Banka, examined P.W.4, prepared the spot map (Ext.7) and in presence of the Executive Magistrate-cum-B.D.O., Belaguntha as well as the witnesses he held inquest over the dead body of the deceased identified by P.W.6 and prepared

inquest report Ext.3. He sent the dead body for post-mortem examination. In cross-examination he admitted that he made station diary entry after receiving telephonic message. He found the deceased lying on the floor of the first pucca room. He found some clothes lying scattered and a battery operated radio was kept on the shelf. P.W.10 is a co-villager. He stated that on the date of occurrence at 2.00 P.M. in the after-noon while he was returning home from the field took rest on the verandah of the house of one Madhusudan Pattnaik which is in front of the house of P.W.6. He saw the appellant came out from the house of P.W.6 having his wearing apparels drenched. The moment the appellant saw him, he again retreated into the house. After some time P.W.6 came, entered into his house and came out shouting that the deceased was killed. Then he along with others went to his house and saw the deceased lying dead in a pool of blood inside the outer house. In cross-examination, he admitted that while he was sitting on the verandah of Madhusudan Pattnaik, he did not find anybody going or coming on the road. He also admitted that P.W.6 is his uncle in village courtesy. They are of the same caste, but not relatives. P.W.11 is the Officer-in-Charge of Buguda Police Station who received Ext.4 from P.W.9 and registered a case. He took charge of the investigation from P.W.9 on 19.11.1999 at 2.00 PM. He examined some witnesses and seized one blood-stained knife from the house of P.W.6. On 30.11.1999 he arrested the appellant and forwarded him to court on the same day. On 20.12.1999 he handed over charge of investigation to S.I. A. K. Mohanty (P.W.12) on his transfer. In cross-examination he admitted that prior to the arrest of the appellant, he had gone to village Madhabarida in search of the appellant but did not find him. He did not ask anybody in that village as to where the appellant had gone. P.W.12, who took up investigation from P.W.11, deposed that on 25.03.2000 he sent some of the seized articles to R.F.S.L. Berhampur through the S.D.J.M., Bhanjanagar. He made query to the doctor (P.W.8) by sending a knife to him for examination and opinion. After completion of investigation, he submitted the charge-sheet. Ext.10 is the report of the Chemical Examiner.

Defence has examined one Ranjit Goud as D.W.1 in support of its plea. He deposed that on the date of occurrence he had been to the house of P.W.6 to give Rs.500/- to the appellant towards his fare to go to Surat. His wife (deceased) told him that appellant had already left for his village as he reached late. In cross-examination he admitted that he reached the house of P.W.6 at 2.00 P.M. and did not find anybody except the wife of the appellant and she told him that the appellant had left the house 15 minutes prior to his arrival.

**9.** The analysis of evidence made above would go to show that there is no direct evidence to connect the appellant with the murder of the deceased. The trial court has convicted the appellant solely basing on the circumstantial evidence. The circumstances relied upon by the trial court are; the quarrel between the appellant and the deceased in the morning of the occurrence day, the last seen theory and the conduct of the appellant. It may be stated that where there is no direct evidence and the case is based solely on circumstantial evidence, the prosecution must prove each circumstance beyond reasonable doubt and the circumstances so proved must form a complete chain without giving scope to any other hypothesis and should be consistent only with the guilt of the accused. In other words, all the circumstances must form an unbroken chain leading to the only conclusion of the guilty of the accused. Due care must be taken in evaluating circumstantial evidence and while doing so the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof.

**10.** Keeping the aforesaid in view, this Court proceeded to consider each of the circumstances referred to above. As regards quarrel between the appellant and the deceased, the trial court has relied upon the evidence of P.Ws.5 and 6. On threadbare scanning of the evidence of P.Ws.5 and 6, this Court finds that P.W.5 in cross-examination has replied to a Court question that on the date of incident in the morning she found the appellant quarrelling with the deceased demanding money from her. But, in her examination-in-chief she has not uttered a single word about such quarrel. Even she had not stated to the police about any such quarrel in her statement recorded under Section 161, Cr.P.C. and for the first time in cross-examination she disclosed about the same. P.W.6 has not stated anything about the quarrel in the F.I.R., although allegedly the quarrel ensued in the morning. P.W.4, the brother of the deceased, has not stated a single word about the quarrel between the deceased and the appellant. Rather P.Ws.4, 5 and 6 have stated in their evidence that the appellant and the deceased were leading a peaceful life. In face of the above evidence, it cannot be believed that on the date of occurrence there was a quarrel between the appellant and the deceased for money. So far as absconding of the appellant from the spot is concerned, it is clear from the evidence of the prosecution witnesses that on the date of incident the appellant was proposing to go to his village. P.W.11, the Investigating Officer, stated that he arrested the appellant from his village Madhabarida on 30.11.1999 and that he had gone to that village in search of the appellant prior to his arrest but did not ask anybody in the village as to where the appellant had gone. From his evidence, it reveals that the appellant was very much present in his village from the date of incident, i.e., 18.11.1999 till the date of arrest, i.e., 30.11.1999. P.W.5, who is none else

but the mother of the deceased, in her evidence stated that on the date of occurrence the appellant was proposing to go to his village and she advised him to return in the evening. She further stated that on the date of incident at about 12.00 noon when both she and P.W.6 were in their house, the appellant left for his village informing them. From the above evidence of P.W.5, it is crystal clear that on the date of incident at about 12.00 noon the appellant left for his village on a cycle in presence of P.Ws.5 and 6. From the evidence of the I.O. (P.W.11), who arrested the appellant from his village, it is inferred that there was no specific search made by him about the appellant. In the face of the above evidence, it cannot be said that the appellant had tried to escape from the course of justice and disappear from the spot. Furthermore, if the appellant had an intention to flee away, he would not have been available in his village for being arrested. Therefore, merely because the appellant was not found in the occurrence house, his conduct cannot be doubted and such conduct of the appellant will have no assistance to the prosecution.

**11.** So far as last seen theory is concerned, the trial court has placed reliance upon the evidence of P.Ws.5, 6 and 10. On careful scrutiny of the evidence of these three witnesses, this Court finds that when P.W.6 left for the field at about 12.00 noon instructing his wife (P.W.5) to come with the labourers, at that time the appellant, the deceased and P.W.5 were in the house. So, it cannot be construed that only deceased and appellant were there in the house when P.W.6 left for the field. As such, P.W.6 at no stretch of imagination can be regarded as a witness to last seen theory. P.W.5. although in her examination-in-chief stated that one and half hours after her husband, she with labourers went to the field and at that time the appellant along with her deceased daughter and grand-daughter remained in the house, in cross-examination she admitted that on the date of incident at about 12.00 noon when she and her husband were in the house, the appellant on a bi-cycle left their house informing them to go to his village. Just thereafter she again admitted to a Court's question that the appellant returned about 1.30 PM on the same day of the incident when she was preparing to go to the field. If the above statements of P.W.5 are read together, it can be safely inferred that she gives different statements at different stages with regard to presence of the appellant along with the deceased at the time of occurrence and as such it is difficult to place reliance on such prevaricating statement. The next witness to last seen theory, according to the trial court, is P.W.10. He testified that on the occurrence day at about 2.00 PM while sitting on the verandah of a house situated in front of the house of P.W.6, he saw the appellant coming out from the house of P.W.6 wearing drenched clothes and the moment he (P.W.10) saw him,

the appellant again retreated into the house. This witness in cross-examination admitted that the house where he was sitting is not just in front of the house of P.W.6 but 3 to 4 houses apart from the house of P.W.6. On the face of this evidence, it is difficult to believe that P.W.10 could have seen the appellant coming out of the house of P.W.6. It further appears that P.W.10 did not state this fact to P.W.6, when the latter informed the matter to police. There is also nothing on record to show that P.W.10 disclosed this fact either to any of the family members of the deceased or any of the co-villagers. Non-disclosure of this fact before anybody else itself speaks volumes about the truthfulness of P.W.10. Above all, P.W.10 cannot be a witness to the last seen theory, as he does not state that he saw the appellant and the deceased together. At this juncture, it is relevant to glance through the evidence of D.W.1, who specifically stated that on the date of occurrence he had been to the house of P.W.6 to give Rs.500/- to the appellant towards his fare to Surat and his wife (deceased) told him that the appellant had already left the village. It is well settled that the evidence of a defence witness deserves equal consideration as that of a prosecution witness. For all these reasons, the last seen theory introduced by the prosecution cannot be believed under any stretch of imagination. Even otherwise also if the last seen theory is believed, the conviction of the appellant cannot be sustained, since there is no other incriminating circumstance proved by the prosecution. In this connection, it is worthwhile to refer to a judgment of the apex Court in ***Inderjit Singh and another v. State of Punjab***, AIR 1991 SC 1674 wherein it has been ruled that when there is no direct evidence to connect the accused, the only circumstance that the deceased was last seen in the company of the accused by itself is not sufficient to establish the guilt of the accused.

For the discussions made above, this Court arrives at the conclusion that the prosecution has failed to establish all the circumstances and the circumstances so established do not form an unbroken chain leading to the only conclusion that it is the appellant and appellant alone who committed the murder of the deceased.

**12.** In the result therefore, the appeal is allowed by setting aside the impugned judgment of conviction and sentence passed by the trial court in Sessions Case No.12 of 2000 (S.C.132/2000 GDC) and the appellant is acquitted of the charge.

Appeal allowed.

**2012 ( I ) ILR- CUT- 134**

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

W.P.(C) NOS.4271 & 9251 OF 2007 (Decided on 20.10.2011)

**STATE OF ORISSA** .....Petitioner.

*.Vrs.*

**PRAMOD KUMAR SAHU & ANR.** .....Opp.Parties.

**ORISSA FOREST ACT, 1972 (ACT NO.14 OF 1972 ) – S.56.**

**Confiscation proceeding – Authorized Officer confiscated the seized truck along with the wood and planks – In appeal learned Addl. District Judge set aside the Order of confiscation – Hence the writ petition filed by the state.**

**Power of confiscation should be passed by the Authorized Officer, not sitting as a forest official but as an independent authority.**

**In the present case owner's plea was that the seized truck was transporting disputed wood which were dismantled parts of old wooden furnitures - The said plea was supported by the forester as well as an independent witness – The authorized Officer failed to consider such evidence – Held, state is unable to make out any cogent ground for interference in the impugned order – Writ petition filed by the state is liable to be dismissed.**

**Case law Referred to:-**

1997 (II) OLR 354 : (State -V- P.P.Agrawla)

For Petitioner - Mr. S.D. Das, Addl. Standing Counsel
M/s. C.Ananda Rao, A.K.Rath & S.K.Behera.
For Opp.Party - M/s. Savitri Ratho, M.Kr. Das,
Mahendra Kr. Das & K.C.Ratho.

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***B. K. PATEL, J.*** In W.P.(C) No. 4271 of 2007 the State has assailed legality of judgment dated 8.2.2007 passed by the Additional District Judge, Angul allowing F.A.O. No. 1 of 2007 and setting aside the order dated 22.12.2006 passed by the Authorized Officer-Cum-Assistant Conservator of Forest, Athamalik Division in C.P. Case No. 4 of 2006-2007, arising out of O.R. Case No. 1-A of 2006-2007 by which seized truck belonging to

opposite party (hereinafter referred to as 'the owner') along with sized wood were confiscated. In W.P.(C) No. 9251 of 2007 the owner has made prayer to direct the opposite party/forest officials to release the seized truck in view of judgment passed by the Additional District Judge, Angul in F.A.O. No. 1 of 2007. Therefore, the above writ petitions are taken up for hearing and disposal together.

2. At about 4 A.M. on 17.4.2006 one Chittaranjan Pradhan, forester of Athamallik along with other forest officials detained the seized truck near Gandhi Chhak of Athamallik while the driver of the truck was transporting personal belongings of one Ramesh Chandra Bhutia consequent upon his transfer. It is alleged, on search, 30 pieces of size wood and planks of different sizes were found to be transported without authority. Consequently, proceeding under Section 56 of the Orissa Forest Act, 1972 (for short 'the Act') was initiated. After enquiry, in course of which evidence was adduced from both sides, the Authorized Officer passed order of confiscation of truck and wood in question.

3. Being aggrieved by the order of confiscation passed by the Authorized Officer, the owner preferred FAO No.1 of 2007. On reappraisal of evidence on record, upon reference to rival contentions, the Additional District Judge, Angul observed that owner's plea that the seized truck was transporting personal effects of abovesaid Ramesh Chandra Bhutia gets support from not only the evidence adduced on behalf of the owner but also by the evidence of some of the witnesses examined on behalf of Forest Department. It was observed that before transporting his personal belongings, Ramesh Chandra Bhutia had obtained permission from the Range Officer to transport the furniture. In passing the order of confiscation the Authorized Officer acted more like of a forest official than an independent authority contrary to principle laid down in **State –vrs. P.P. Agrawla** : 1997 (II) OLR 354, wherein it has been held that the power of confiscation under Section 56 of the Act is a very important power and it has to be used by the Authorized Officer, not sitting as a forest official but as an independent authority. In essence, it was held by the Appellate Authority that in the confiscation proceeding, Forest Department failed to adduce evidence regarding commission of forest offence.

4. In assailing the impugned judgment, it is submitted by the learned counsel for the State that Authorized Officer passed order under Section 56 of the Act on the basis of evidence on record which established transportation of sized wood without authority. As many as five witnesses

were examined on behalf of the prosecution. Evidence was also adduced from the side of the owner who examined himself as well as other witnesses. However, the appellate court passed the order being swayed away by stray statements of witnesses Chittaranjan Pradhan, forester and Sweta Kumar Danga who were examined on behalf of the prosecution by holding that sized wood were dismantled parts of furniture. It is argued that the appellate court has failed to take note of the totality of evidence which clearly indicates that seized wood were sized timbers which were being transported in the seized truck without any permit.

5. In reply, it is submitted by the learned counsel for the owner that from the very beginning, the owner took the plea that 30 pieces of disputed wood were dismantled parts of household articles such as racks, bench etc. belonging to Ramesh Chandra Bhutia who had obtained permission from the Forest Department to transport the articles on his transfer. Ramesh Chandra Bhutia as well as the truck driver deposed regarding the same. They were supported by witnesses Sweta Kumar Danga and Chittaranjan Pradhan who were examined on behalf of the Forest Department. Authorized Officer passed order of confiscation without reference and consideration of said evidence. The Appellate Authority rightly set aside the order of confiscation placing reliance on the decision of **State –vrs. P.P. Agrawla** (supra)

6. Appellate Authority has jurisdiction to consider an appeal by re-appreciation of evidence on record. Both questions of law as well as fact may be dealt with in appeal. However, there is little scope for reappraisal of evidence in a writ proceeding. It is well settled that the High Court, in exercise of writ jurisdiction, will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

7. In his show cause filed before the Authorized Officer, the owner took the categorical plea that Ramesh Chandra Bhutia was transporting his household articles including table, bench, cot etc. in the truck. In his evidence before Authorized Officer also the owner deposed that he sent his driver Dushmanta Kumar Behera for transportation of household materials of Ramesh Chandra Bhutia in the seized truck. Said Dushmanta Kumar Behera stated in his evidence that on 16.4.2006 he brought the truck to Athmallik to transport Ramesh Chandra Bhutia's personal household materials. At Athmallik Ramesh Chandra Bhutia called the forester to verify the wooden articles like cot, bench, rack, sofa set, chair, table etc. The truck was detained and taken to office of the District Forest Officer no sooner did it start after loading. It is in the evidence of the driver that articles in the truck

included dismantled and detached parts of furniture which were seized. Ramesh Chandra Bhutia himself deposed that he had hired the seized truck for transportation of household articles. Before loading he got the wooden furniture verified by the Forester, Athmallik. Due to shortage of space some furniture were dismantled to pieces and loaded in the truck. Thus, evidence was adduced from the side of the owner that before loading furniture were verified by the forester and that some of the furniture were dismantled before loading. This part of evidence finds support from the evidence of Sweta Kumar Danga an independent witness and Chittaranjan Pradhan, Forester, Athmallik. Sweta Kumar Danga deposed that articles loaded in the truck included cot, bench, racks etc. In course of cross-examination it was elaborated by this witness that articles included dismantled parts of bench and racks. The planks had nail marks. It is also in his evidence that Ramesh Chandra Bhutia showed permission granted by Forest Official for transporting household articles at the time of seizure. Forester Chittaranjan Pradhan admitted in course of his cross-examination that in course of seizure Ramesh Chandra Bhutia had produced certificate granted by him for transportation of household articles. However, the certificate was not seized. Authorized Officer does not appear to have considered such evidence which squarely supports the owner's plea that seized wood were dismantled parts of old wooden furniture. The learned Additional District Judge has also taken note of the circumstance that Authorized Officer passed the order of confiscation without verifying the seized wooden planks which were never produced before him. Thus, learned Additional District Judge, Angul has assigned cogent reasons in support of the conclusion that order of confiscation was passed without reference to evidence on record. Upon scrutiny of materials on record finding of fact recorded by the Additional District Judge does not appear to be perverse or unreasonable. Therefore, State has failed to make out any cogent ground for interference with the order passed in FAO No.1 of 2007. W.P.(C) No.4271 of 2007 is liable to be dismissed with cost.

8. It appears that by order dated 7.9.2007 passed in Misc. Case Nos.8137 and 4216 of 2007, arising out of W.P.(C) No.4271 of 2007, the seized truck has been released in the interim custody of the owner on furnishing cash security of Rs.50,000/- and other conditions. Therefore, there remains nothing to be decided in W.P.(C) No.9251 of 2007, the prayer having been become infructuous. The owner is entitled to refund of cash security of Rs.50,000/-.

9. In view of the above, W.P.(C) No. 4271 of 2007 is dismissed with cost which is assessed at Rs.2000/-(Rupees two thousand) payable to the

owner. W.P.(C) No.9251 of 2007 is disposed of as infructuous. The Authorized Officer is directed to refund the cash security of Rs.50,000/- (Rupees fifty thousand) to the owner.

W.P (C) No. 4271 /07 dismissed.
W.P (C) No. 9251 /07 disposed of.

**2012 ( I ) ILR- CUT- 139**

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

O.J.C. No. 370 of 1993 (Decided on 12.08.2011)

**KULAMANI MOHANTY & ORS.** ……Appellants.

*.Vrs.*

**STATE OF ORISSA & ORS.** … … Respondents.

**Service – Fixation of yardstick with regard to other heads of departments and the judiciary – Recommendation of the 4th pay Committee – The employees of the District Judiciary being equal to the employees of the state secretariat should get the benefits that is given to the employees working in the secretariat – Held, District and Sessions Judge Cuttack have been declared as Head of the Department – Direction issued to the opp. party to create posts of Superintendent level–II and Superintendent Level–I in Consonance with the latest decision of the Government and by applying the revised yard stick of Head Typist in the office of the Heads of Department as per political and services Resolution dated Ist June , 1978 in respect of the Heads of the Department in the Judgeship of Cuttack.**

For Petitioner - M/s Saktidhar Das, AK.Nayak and S.K.Samanta ray

For Opp.Party - Addl Standing Council.( For Op. 1& 2)

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***S.K.MISHRA, J*** The petitioners in this case call in question the fixation of yardstick of Head Typists in the judgeship of Cuttack in violation of recommendation of the 4th Pay Committee. The also challenge the alleged discrimination in fixation of yardstick with regard to other heads of the departments and that of the judiciary.

2. The petitioners claim that as per the Finance Department Notification No. 43301/F dated 28.8.1980, the judgeship of Cuttack, i.e., the District and Sessions Judge, Cuttack is the Head of the Department. The 4th Pay Committee recommended for amalgamation of two grades of Head Typists, i.e., Senior and Junior into one and the Government accordingly implemented the recommendations.

The State Government in their Resolution No. SC/6-1/78-12130/Gen. dated 1st June, 1978 decided that after amalgamation of two grades of Head Typists into one on recommendation of 4th Pay Committee, the yardstick of

the Heads of the Departments fixed in Political and Services Department Resolution No. 17156/Gen. dated 6.11.1964 became inoperative and incapable of implementation. It was further stated that the Home Department had issued orders in their Resolution No. SE.2-26/75-52845 dated 20.11.1976 revising the yardstick for sanction of post of the Head typist in various departments of the Secretariat. The Government have, therefore, decided that a post of Head Typist in the office of Heads of Department will be admissible for every six Typists in an office. When the number of Junior and Senior Grades Typists in an office will be more that 30% of the above yardstick another supervisory post of Head Typists will be admissible. Such Resolution superseded all previous Resolutions of the Political and Services Department on the subject.

3. On 9th April, 1980 the Government in Political and Services Department in their office memorandum clarified that even Head Typist is in charge of one Section having six Typists, but no posts exist in the Issue Section to co-ordinate the work of Head Typists and to be in over all charges of Issue Section. As difficulties were being experienced regarding distribution of work among the Head Typists, maintenance of Registers, Log Books, Stamp Accounts, etc., there was need for creation of a post higher in rank than the post of Head Typist. After careful consideration, the Government decided that the post of Typist, both Junior and Senior, sanctioned on yardstick and non-yardstick basis for Issue Section of Heads of Departments would form base posts for the purpose of sanctioning of posts of Head Typists. It was further decided that 20% of the number of base postsas formed subject to marginal adjustments, would indicate the number of Head Typists admissible for the Section. It was further resolved that in case of the existing number of posts of Head Typists sanctioned for the section falls short of the number arrived at on the basis of 20% of the base posts, the balance number of post of Head Typists may be created. For sections of which the total number of posts of Head Typists as sanctioned in four or more, one of the posts of the Head Typists will be converted to the post of a Superintendent, who is to co-ordinate the work of the Head Typists and to be in over all charge of the Issue section of Head of Department as mentioned above. It was decided that the post of Superintendent would be filled up from among the Head Typists of the Issue Sections of the Officers of the Heads of Departments. The post of Superintendent will be included for the purpose of creation of Leave Reserve Posts in accordance with Home Department Resolution No. 11634/H dated 8.3.1979.

4. Thus the post of Superintendent, which was created, was to be filled up from among the Head Typists of the Issue Sections of the Office of the

Heads of the Department. The post of Head Typists was to be filled up in the Issue Section of the Heads of Department in accordance with the said principle.

5. It is further averred by the petitioners that in the judgeship of Cuttack, 57 posts of Junior and Senior Typists are available. This Court by judgement dated 22.2.1991 passed in O.J.C. No. 950 of 1985 held that the recommendation of the 4th Pay Committee has been accepted and 50% post of Junior Grande Typists have been upgraded as Senior Grade Typist vide Government Order No.7512 of the Law Department dated 8.5.1987. The post of Head Typist, if not created, be created within a period of three months from the date of receipt of the order of the Court.

6. The petitioners plead that in any judgeship two different establishments are maintained. One is maintained by the Home Department for the purpose of sessions and criminal cases and the other is maintained by the Law Department for civil and other matters. It is further averred that though there were 61 posts of Junior and Senior Grade Typists available in the judgeship of Cuttack, the Home Department in their Notification dated 5th September, 1991 bearing No. 61154 have been pleased to create three posts of Head Typists and the Law Department in their Notification No. III-J-51/87-3221/L dated 25.2.1992 have been pleased to create two posts of Head Typists. Thus in all five posts of Head Typists have been created in the Judgeship of Cuttack whereas according to strength following norms and ratio of yardstick as has been fixed in various Departments of the State, the requirement of ten posts are available to be created for the post of Head Typist, but for the reasons best known to the authorities, no further post of Head Typists have been created and only five posts have been created. As a result of such action, the petitioners are suffering a lot and have been deprived of getting their legitimate dues. The authorities have adopted a step motherly attitude, for which on an earlier occasion of O.J.C. No. 950 of 1985 was filed wherein this Court gave direction for creation of Head Typist. The same was created, but it was not in accordance with the yardstick as has been created in the other Departments of the Government.

7. It is pleaded by the petitioner that in the judiciary the workload is no way inferior, but may be more than any of the Heads of Departments of the State. The Typists are even working beyond the scheduled office hours for discharging their duties, but they have been treated unequally along with similarly situated persons though it has been decided on principle of the State Government that in each six posts, one Head Typist shall be created for any and other Heads of Department, but in respect of the Judgeship of Cuttack where sixty one posts of Typists are available, only five posts of

Head Typists are created though the Government have decided that in every six posts, there should be one Head Typist.

8. The petitioners further plead that it would be clear from the gradation list relating to the Director General of Police, Orissa, that the Typists posted under different Deputy Inspector Generals, Orissa, are not only inter-transferable, but also there is a common cadre in respect of the Typists belonging to the Director General as well as in different other places of posting. This would go to show that the Resolution of the Government referred to the Head of Department in Resolution dated 1.6.1978, the Head Typists refers to Typists in that office and also includes Typists working under its jurisdiction but posted at different places. Similar is the case in the Directorate of Handicrafts and Cottage Industries.

9. It is further pleaded that the Typists in other Departments working under one Heads of Departments but posted at different places are treated to be working under the same Heads of Departments and considered for promotion to the next higher grades. The Typists, who have been posted at various courts subordinate to the District Judge, Cuttack belonging to the same cadre, are entitled to be considered as working under the District Judge, Cuttack while considering their case for promotion to the next higher grade. Not treating the Typists under the District Judge, Cuttack, as their counter parts in other Heads of Departments of the State Government are being treated, amounts to discrimination and violates the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India, hence liable to be interfered with. As all the representations to the authorities yielded no result, the petitioners filed this writ application to issue a mandamus for creation of post of Head Typist as per the Government Resolution. Later on, on change of designation of the Head Typist in the Secretariat, the prayer was amended for creation of Superintendent Level-II and Superintendent Level-I, as per the direction of the Government in respect of the Heads of the Departments, in the judgeship of Cuttack.

10. Opposite Party No.1 have filed their written statement in which they have tried to justify the non-creation of Head Typist in accordance with the ratio which has been made applicable to Heads of the Department of the Secretariat on the ground that the Pay Commission recommendation was for creation of post of Head Typist in the office of District Judge only. Since the District Judge controls the Sub-ordinate Courts and the cadre of Typists under the Judgeship includes the Typists working in the Court of Magistrates and Munsifs of outlaying stations also, the yardstick prescribed for Heads of Department is not applicable in the cases of all Typists working in other

courts under the Judgeship. It is further pleaded that the decision of the P and S Department for the purpose of creation of post in the Heads of the department is not applicable to the entire Judgeship but at best confined to the office of the District Judge alone. It is further pleaded that since the Head Typist of the Judgeship has no scope to supervise the work of a Typist of Magisterial Court of outlying station, the erstwhile P & S Department Resolution is not applicable in this case. On such plea the opposite party no.1 pleaded that the writ petition should be dismissed.

11. Opposite party No. 2, i.e. the Secretary to Government, Law Department through the Joint Secretary has filed his counter affidavit. Opposite party No. 2 pleads that there is no separate district establishment like the Heads of Department and District establishment. The District Judges have been declared as the Heads of department for certain limited purposes. But the Ministerial establishment of the District Judges and sub-ordinate Judges belong to District cadre like the Ministerial establishment of the District. Sub-ordinate Offices under different Departments of Government Heads of Department controls the District Offices. The control over the District and Sub-ordinate judiciary rests with the High Court under Article 235 of the Constitution of India. The Heads of Department has got jurisdiction all over the State. But the jurisdiction of the District Judge is limited to the district only. In case of the ministerial staff, the District Judge is the appointing and disciplinary authority, but the High Court is the appellate authority. The ministerial staff of the District Judge and Sub-ordinate Judges are transferred within the district. Their appointment and condition of service are regulated by the Orissa District and Sub-ordinate Court's Ministerial Services (Method of Recruitment and Conditions of Service) Rules, 1969. So the Ministerial staff of the Sub-ordinate judiciary is purely of district cadre, though the District Judges have been declared as the Heads of Department. So the principle fixed, i.e. one Head Typist for twelve Junior and Senior Typists taken together for Sub-ordinate judiciary in compliance to this Court's Order in O.J.C. No.950 of 1985 is just and reasonable and cannot be at par with the principle meant for Heads of the department as they belong to District cadre. Any change in principle will put Government in embarrassing position in meeting the demands of ministerial staff of the District Offices under other Department of Government. On the administrative side, the views of the High Court was once sought for and the demands of the All Orissa Judicial Employees' Association for giving them status of employees of the Heads of Department was not accepted by this Court. So it is pleaded that the prayer of the petitioners merits no consideration and, therefore, opposite party no.2 pray that the same be dismissed.

12. The Registrar (Administration) of the High Court has also filed a counter affidavit wherein it is pleaded that out of eighteen petitioners, petitioners 1 to 7, 17 and 18 have retired in the meantime on attaining the age of superannuation. Petitioner Nos.1 to 6 and 17 have retired as Head Typists and petitioner nos.7 and 18 retired as Senior Typist. It is further admitted that the Government of Orissa. Finance Department Memorandum No.43301/F, dated 28.8.1980, Appendix-3 of the Orissa Service Code containing the list of Heads of Department has been substituted and under the heading of "Law Department" in the said list, the District and Sessions Judges have been given the status of "Heads of Department". Accordingly, the District and Sessions Judge, Cuttack is deemed to be a Head of the Department, for all practical purposes.

13. It is further pleaded that pursuant to the order passed by this Court in O.J.C. No.950 of 1985 the Home Department and Law Department have created the post of Head Typists for different Judgeships of the State, which appears to have fallen short of the decision of this Court, since no proportions have been maintained. It is further admitted that in the Judgeship of Cuttack, five posts were created by the Home Department by Notification dated 5.9.1991 and two posts were created by the Law Department by Notification dated 25.2.1992. In view of the fact that there are 69 base level posts of Junior and Senior Grade Typists in the judgeship of Cuttack, apart from two posts of Junior Typists for the Special Courts, nine posts of Head Typist and three posts of Superintendent are admissible in terms of the Government Resolution dated 9.4.1980. The Registrar (Administration) has further pleaded that neither the number of posts of Head Typist has been enhanced nor any post of Superintendent has been created in the Judgeship of Cuttack till date.

The Registrar has further pleaded that the work load for the Typists in the Judiciary is not inferior to that of the Typists of other Heads of Department of the State. Considering the heavy work-load, the Typists in the judiciary use to work even beyond the scheduled office hours, without any extra remuneration. It is further pleaded that unlike other Government establishments of District Cadre, such as the Collectorate, the District Judgeship of the State enjoy the status of Heads of Department as declared by the State Government in Annexure-1 to the writ petition. Accordingly, posts of Heads Typists have been created as per the direction of this Court in the Sub-ordinate judiciary, which posts are not available in the District Cadre establishments. Hence the grievance of the petitioners regarding their entitlement to the benefits at par with the Typists of other Heads of Departments of the State Government appears to be genuine. The Registrar

has further clarified that the Government in its General Administration Department Resolution No.2320/Gen. dated 31.1.1997 have been pleased to designate the post of Head Typist as Superintendent Level-II and Superintendent Level-I respectively.

14. From the above pleading it is clear that all the parties agree that the District and Sessions Judge, Cuttack have been declared as the Head of the Department. In fact Annexure-1, which has been issued on 28.8.1980, declares all the District and Sessions Judges at Sl.No.3 to be the Heads of the Department. Now the question remains whether such an order declaring the District and Sessions Judge as Heads of the Department is for any limited purpose or otherwise. Learned counsel for the State has failed to draw attention of the Court to any specific Notification/Resolution/Standing Order or any statute which indicates that the District and Sessions Judges are Heads of the Department only for some limited purpose and not for creation of the post like ministerial staff etc.

15. Annexure-2 is the Resolution of the Political and Service Department issued on Ist. June, 1978 is titled as “Revision of the yardstick of Head Typists in the Office of the Heads of Department”. It provides that after amalgamation of the two grades of Head Typists (Senior and Junior) into one on the recommendation of the 4$^{th}$ Pay Committee, the yardstick of the Head Typists as fixed in the Political and Services Department Resolution No.17156-Gen. dated 6.11.1964 became inoperative and incapable of implementation. It is further resolved that in the meantime the Home Department have also issued orders in their Resolution No.SE.2- 26/75-52845 dated 20.11.1976 revising the yardstick for sanction of posts of Head Typists in the Departments of Secretariat. Government have, therefore, been pleased to decide that a post of Head Typist in office of Heads of Department will be admissible for every six Typists in that office. When the number of Junior and Senior Grade Typists in an office will be more than 30% of the above yardstick another supervisory post of Head Typist will be admissible. It is further resolved that such Resolution supersedes all previous Resolution of the Political and Services Department on the subject and it was ordered that the Resolution to be published in the Gazette and copies be sent to all concerned for information and necessary action.

16. The plea taken by opposite party no.1 appears to be misconceived as the Resolution in question does not speak of any particular place of posting or does not provide that the Typists and the supervising Head Typist or the Superintendent Typist should be posted at one place. The Magistrates working in the outlying stations come under the control of the District and

Sessions Judge and their staff also come within the jurisdiction of the District and Sessions Judge in his administration side. The District and Sessions Judge being the Heads of the Department and being the appointing and also the disciplinary authority, there appears to be no reason why they should be treated at a different footing than the treatment meted to other Heads of the Departments in the Secretariat or in other establishments. Thus, the plea taken by opposite party no.1 appears to be fallacious and unacceptable.

17. This Court as per order dated 22.2.1991 in O.J.C. No.950 of 1985 has taken into consideration that the Government pursuant to recommendation of the 4th Pay Committee upgraded the post of Junior Grade Typist as Senior Grade Typist. The post of the Head Typist was to be created later on. This Court, therefore, directed that opposite party nos.2 and 3 shall create such post within a period of three months from the date of receipt of the order. In principle the recommendation of the 5th Pay Commission has been accepted. The employees of the District judiciary being equal to the employees of the Secretariat working under the different Heads of the Department should also get the benefits that are being given to the employees working in the Secretariat . In this connection, the opposite parties cannot make any distinction between the Heads of the Department. In doing so they have violated the principles of equality and equal opportunity as enshrined under Articles 14 and 16 of the Constitution.

18. Hence the writ petition is allowed. The opposite parties are directed to create, within six months of receipt of this order, posts of Superintendent Level-II and Superintendent Level-I in consonance with the latest decision of the Government and by applying the revised yardstick of Head Typist in the office of the Heads of Department as per Political and Services Resolution dated Ist June, 1978 in respect of the Heads of the Department in the Judgeship of the Cuttack. The opposite parties shall also create such posts with respect to all other District Judgeships. No costs.

Writ petition allowed.

**2012 ( I ) ILR- CUT- 147**

**M.M.DAS, J.**

W.P. (C) NO. 2270 OF 2008 (Decided on. 26.07.2011)

**PRAVAKAR BEHERA** …… …Petitioner

*.Vrs.*

**BIBEKANANDA ROUT & ORS** ……Opp. parties

**ORISSA GRAM PANCHAYAT ACT, 1964 (ACT NO.1 OF 1965) – S.39 (1) (C).**

**Rejection of nomination paper on the ground that the O.P.1 has not mentioned his Caste in the space provided in the declaration column of the nomination paper – Non mentioning the Caste by O.P.1 in no way brought him within the disqualification Clause U/s.25 of the Act and the Election Officer, who scrutinized the nomination paper acted contrary to rule 29 of the OGP (Election) Rules, 1965 in rejecting the nomination paper of O.P.1 – Held, no error in the judgments of the Courts below, impugned in this writ petition.**

**Case law Referred to:-**

57 (1984) CLT 451 : Abhan Singh @ Abhan Singh Rajput v. Election Officer, Raighara Grama Panchayat and others,

**Case law Reliede on :-**

AIR 1974 SC 2343 : Dillip Kumar Gon v. Durga Prasad Sinha,

For Petitioner: M/s. Sanjit Mohanty, Sr. Advocate, B.D.Pradhan & O.P.Mohanty.

For opp. parties: Addl. Government Advocate (For O.P 2.)
M/s. H.M. Dhal & B.Swain. (For O.P. 1)
M/s P.K.Mohanty -2 & P.K.Pradhan. (For O.Ps 4 to 6)

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***M. M. DAS, J.*** In this writ petition, the petitioner has called in question the judgment dated 2.2.2008 passed by the learned District Judge, Cuttack in Election Appeal No. 5 of 2007 confirming the judgment dated 22.9.2007 passed by the learned Civil Judge (Junior Division), Athagarh in Election Misc. Case No. 5 of 2007.

2. The facts leading to the present case are that the election to the office of Sarpanch of Viruda Grama Panchayat was scheduled to be held on 13.2.2007 . The said seat of the Sarpanch was a general seat. As per the schedule of election, nomination papers were to be filed between 8.1.2007 to 15.1.2007. The opp. party no. 1 filed his nomination to contest the election to the office of Sarpanch of the said Grama Panchayat on 15.1.2007. Scrutiny of the nomination papers was held on 16.1.2007 and the Election Officer rejected the nomination paper of the opp. party no. 1 on the ground that he has not mentioned his caste in the space provided in the declaration column of the nomination paper. Election as scheduled was held on 13.2.2007 and the petitioner was declared elected as the Sarpanch of the said Grama Panchayat. The opp. party no. 1 filed Election Misc. Case No. 5 of 2007 before the learned Civil Judge (Junior Division), Athagarh challenging the illegal and improper rejection of his nomination paper. The grounds of challenge to the election of the petitioner as Sarpanch were that the nomination paper of the opp. party no. 1 could not have been rejected by the Election Officer since as per Rule 29 (b) of the Orissa Grama Panchayat Rules, the Election Officer shall not reject the nomination paper if he is otherwise satisfied that the identity of a candidate is not in doubt and the question of eligibility is not involved. The other ground for challenge was that the nomination paper of the opp. party no. 1 being illegally rejected, the same has materially affected the election, as the opp. party no. 1 was debarred from contesting the said election and, hence, the election becomes void as per section 39 (c) of the Orissa Grama Panchayat Act, 1964 (hereinafter referred to as 'the Act'). The petitioner, who was declared elected, on receiving summons in the Election Misc. Case filed his objection to the same, inter alia, denying the statement made in the election petition that just after rejection of the nomination paper, the election petitioner (opp. party no. 1) immediately intimated regarding such highhanded action of the Election Officer to the Election Commissioner, Orissa, Bhubaneswar. The learned Civil Judge (Junior Division), Athagarh after framing the issues in his judgment dated 22.9.2007 arrived at the findings that Rule 29 of the Orissa Grama Panchayat Rules (for short, 'the Rules') does not provide that non-mention of caste is a ground for rejection of the nomination paper. He further found that the opp. party no. 3 in the Election Misc. Case, i.e., the Authorized Election Officer, who scrutinized the nomination paper was found to have acted carelessly for which the Election Officer (opp. party no.2 in the Election Misc. Case) wrote to the Sub-Collector, Athagarh by his letter dated 2.2.2007 along with the photo copy of the nomination paper of the opp. party no. 1 (election petitioner) with a request to take necessary action as deemed proper against the said Authorized Election Officer. On the above findings and on the analysis of the

materials, both oral and documentary, produced before the Election Tribunal, he held that it is crystal clear that during scrutiny of the nomination paper, the opp. party no. 1 was not disqualified to contest the election on any ground as provided under section 25 of the Act. From Ext. A/1, he concluded that the Authorized Election Officer had no doubt about the identity of the candidate and also the question of eligibility of the candidate to contest the election was not involved. Accordingly, he declared the election of the present petitioner to the office of Sarpanch, as null and void and allowed the Election Misc. Case. The petitioner carried an appeal to the learned District Judge, Cuttack in Election Appeal No. 5 of 2007. The learned District Judge also referring to the materials on the point and further referring to section 39 (1) of the Act as well as the decision of this Court in the case of ***Abhan Singh @ Abhan Singh Rajput v. Election Officer, Raighara Grama Panchayat and others***, 57 (1984) CLT 451 and a decision of the Kerala High Court, found no error in the judgment of the learned Civil Judge (Junior Division), Athagarh and confirmed the same.

3. Learned counsel for the writ petitioner vehemently urged that the opp. party no. 1 having not filled up the nomination paper in the prescribed form properly and having omitted to mention his caste therein, the nomination paper was rightly rejected and the learned courts below should not have interfered with the election of the petitioner as the Sarpanch.

4. Learned counsel for the opp. party no. 1, on the contrary, drawing the attention of this Court to the decision in the case of Abhan Singh (supra) as well as the judgment of the apex Court in the case of ***Dillip Kumar Gon v. Durga Prasad Sinha,*** AIR 1974 SC 2343 contended that the seat of the Sarpanch in the concerned Grama Panchayat being a general seat, non-mention of caste did not affect the qualification of the opp. party no. 1 to contest the election to the office of Sarpanch in any manner. As per section 39 (1) (c) of the Act, if the learned Civil Judge (Junior Division) finds that the nomination paper has been improperly rejected or accepted, it is mandatory on his part to declare the election of a returned candidate void. Learned counsel also referred to Rule 29 of the Rules, which provides that the Election Officer shall on the appointed time, date and place, receive nomination papers for the office of Sarpanch in form No. 4 and scrutinize them in presence of the candidates, their proposer and seconders, if any, who may be present. If he finds that the candidate is duly qualified in accordance with the provisions of section 11 of the Act and not disqualified under any of the clauses of section 25 of the Act, he shall approve the candidature . It is also provided in clause (b) of the said Rule that the Election Officer shall not reject the nomination paper merely on account of

some discrepancy between the age, name or other particulars of a candidate or his proposer or seconder as given in the nomination paper and in the electoral roll, provided that the Election Officer is otherwise satisfied that the identity of a candidate is not in doubt and the question of eligibility is not involved.

5. In the case of Abhan Singh (supra), this Court, on a question of mentioning incomplete name in the nomination paper by the petitioner, i.e., mentioning his name as "Abhan Singh" instead of "Abhan Singh Rajput" referring to Rule 29 of the Rules, concluded that the identity of the petitioner therein was not in question. Hence, the discrepancy in the nomination paper should not have been made a ground for rejection of the same. In the case of Dillip Kumar Gon (supra), the Supreme Court, while dealing with sections 33 (2) and 36 of the Representation of Peoples Act, 1951 on the facts that in the election to the Bihar Legislative Assembly from 147 Jamtara Assembly Constituency (General), one Abdul Hamid filed his nomination paper without striking out the portion in the declaration part of the nomination paper meant for candidates of S.C./S.T. contesting for a reserved seat and his nomination paper was rejected on the ground that failure of the candidate to delete the words "S.C." means that he belongs to S.C. which is not true, laid down that in such circumstances, the rejection of nomination paper of Abdul Hamid was manifestly erroneous. Emphasis was given by the Supreme court on the fact that the Constituency was a general Constituency and the seat for which the candidates wanted to contest the election was not a reserved seat.

6. Similar is the fact in the present case. Hence, non-mentioning the caste by the opp. party no. 1 in no way brought him within the disqualification clause under section 25 of the Act and the Election Officer, who scrutinized the nomination paper, acted contrary to Rule 29 of the Rules in rejecting the nomination paper of the opp. party no.1. This Court, therefore, finds no error in the judgments of the courts below, which are impugned in this writ petition.

7. In the result, the writ petition being devoid of merit is dismissed, but in the circumstances without cost.

Writ petition dismissed.

**2012 ( I ) ILR- CUT- 151**

**M.M.DAS, J.**

S.A. NO.151 OF 1991 (Decided on 07.07.2011)

**TRINATH NAIK @ NAYAK (DEAD) AFTER HIM, HIS L.Rs., MENAKA NAYAK & ORS**. … …..Appellants.

*.Vrs.*

**HEMA BEWA & ANR**. . ……Respondents.

**HINDU MARRIAGE ACT, 1955 (ACT NO.25 OF 1955) – S. 16.**

**Whether in view of Section 16 of the Hindu Marriage Act, an illegitimate son has share in the paternal property along with other Co-sharers ? – Held, Yes.**

**In the present case both the Courts below have found Defendant No.2 as the illegitimate son of Khetra Naik – Held, both the learned Courts below rightly held that Defendant No.2 being the illegitimate son was entitled to succeed to the properties left by Khetra Naik as a legal heir.** (Para 7)

For Appellants – M/s. N.C.Panigrahi, K.P.Nanda & Miss. Sujata Dash.

For Respondents – M/s. S.R.Pattnaik, U.S.Pattnaik, S.K.Ray, P.K.Rout, P.Behera, M.Mohanty, B.Brahmachari, P.N.Mohanty, S.C.Dash.

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***M. M. DAS, J.*** This Second Appeal was admitted on 27.3.1992 on the following substantial question of law:

> "Whether in view of Section 16 of the Hindu Marriage Act, an illegitimate son has share in the paternal property along with other sharers ?"

2. The suit was filed by one Mandodari Bewa and Trinath Naik, who are mother and son, against the defendant-respondent, inter alia, alleging that the plaintiff no.1 is the wife of Khetri @ Khetra Naik and she lived with her husband as his wife from 1931-32 till 28th July, 1978, when Khetra Naik died. According to the plaintiff, Khetra and plaintiff no.1 did not have any male

issue even after fifteen years of their marriage and, therefore, they adopted the plaintiff no.2 as their son in 1947, when he was about two years old, after observing all rites and customs of adoption. Plaintiff no.2 thereafter lived with the plaintiff no.1 and her husband Khetra. Plaintiffs further alleged that the defendant no.1 was married to one Khadala Maharatha, but she deserted her husband as well as her daughter and lived with one Aji Naik. In 1967, she came to the house of plaintiff no.1, when she has conceived a child and worked there as servant and was allowed to live in the house. Khetra Naik developed an illicit relationship with the defendant no.1, who deserted her first husband Khadala Maharatha. She was thereafter driven out from the house and gave birth to defendant no.2. Defendant nos.1 and 2 came back to the house of the plaintiff and thereafter Khetra Naik died. Out of compassion, they were allowed to work as servants.

3. In the meantime, the plaintiffs went to the Tahasildar to mutate the suit scheduled lands in their names. The prayer was allowed. But, subsequently, an objection was raised by the defendants before the Tahasildar and the Tahasildar struck out the name of plaintiff no.2 from the mutated Record of Rights and recorded the suit land in the name of the plaintiff no.1 and the defendants holding that defendant no.1 is the second wife and defendant no.2 is the son of late Khetra Naik. This fact was denied by the plaintiffs. The plaintiffs in the suit sought to declare that the plaintiff no.1 has absolute right, title, interest and possession over Schedule-'A' an 'C' land and has joint right, title, interest and possession over Schedule-'B' land along with the plaintiff no.2 as the sole successor of Khetra Naik. They also sought to declare that the plaintiff no.2 is the adopted son of late Khetra Naik and the plaintiff no.1 and as an ancillary relief, decree for permanent injunction was also sought for.

4. Written statement was filed on behalf of the defendants denying the plaint allegations. It was admitted that plaintiff no.1 is the legally married wife of late Khetra Naik. The fact of adoption was, however, denied. The defendant no.1 further pleaded that she was previously married to Khadala Maharatha and out of their wedlock, a daughter was born to them. But she was divorced by Khadala Maharatha after birth of the daughter. Thereafter, she again got married to Khetra Naik according to their caste custom. She lived with him in his house as his legally married wife and defendant no.2 was born out of their wed-lock. She also claimed to be the widow of late Khetra Naik and defendant no.2 to be her son.

5. The learned trial court after framing issues came to the conclusion that it is an admitted case that the plaintiff no.1 was legally married to Khetra

Naik and the defendant no.1 was not the legally married wife of Khetra Naik and she cannot enjoy the status of widow. Defendant no.2 was born out of the union of Khetra Naik and defendant no.1 and, therefore, he was the illegitimate son of Khetra Naik and plaintiff no.2 is the adopted son of Khetra Naik and plaintiff no.1. Thereafter, the learned trial court on analyzing the evidence found that the Schedule - A, B and C lands were the properties of late Khetra Naik and Khetra Naik gifted away the Schedule-'C' land to plaintiff no.1 in order to avoid future complication. Schedule - A and B lands are to be inherited by the plaintiffs 1 and 2 and the defendant no.2, who is found to be illegitimate son of Khetra Naik. Accordingly he decreed the suit in part. An appeal was carried by the plaintiffs against the said judgment, being Title Appeal No.6 of 1986. The learned appellate court on scrutinizing the materials on record and the findings, confirmed the findings arrived at by the learned trial court.

6. As before filing of the Second Appeal, the plaintiff no.1 expired, plaintiff no.2 preferred the Second Appeal and he having expired in the meantime, his legal heirs have been substituted as appellants.

7. Section-16 of the Hindu Marriage Act is as follows:-

> **"16. Legitimacy of children of void and voidable marriages-**(1) Notwithstanding that marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.
>
> (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
>
> (3) Nothing contained in sub-section (1) or sub-section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12,

> any rights in or to the property of any person, other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents".

Since, factually both the courts below have found that the defendant no.2 was the illegitimate son of the husband of the plaintiff no.1, i.e., Khetra Naik, a bare reading of Section-16 clearly shows that the said illegitimate son, who was the defendant no.2 in the suit will succeed to the properties left by Khetra Naik as a legal heir and the learned courts below have rightly held so.

8. I, therefore, find no merit in the Second Appeal. However, it is directed that since the Schedule-'C' property has been declared to be the exclusive property of the original plaintiff no.1 and after her death, the same has been succeeded by her son, plaintiff no.2, and, thereafter, the legal heirs, who have been substituted as appellants, the respondents in this appeal, who are the defendants shall be permanently injuncted from interfering with the possession of the appellant over the 'C' schedule property.

9. With the aforesaid modification of the decree passed by the courts below, the Second Appeal stands dismissed. There shall be no order as to costs of this Second Appeal.

Appeal dismissed.

**2012 ( I ) ILR- CUT- 155**

**M.M. DAS, J.**

R.S.A. No. 423 of 2010 (Decided on. 12.9.2011)

**BIJAN KISHORE MOHANTY** ……Appellants.

*.Vrs.*

**KANAKALATA DAS @ MOHANTY & TWO ORS.** ……Respondents.

**CIVIL PROCEDURE CODE, 1908 - (ACT NO. 5 OF 1908) ORDER 7 RULE 11(a)**

**Court has to ensure that meaningless litigations, which are otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the Court.**

**In the present case, suit filed by the plaintiff is based on speculative succession and it can not be said that the plaintiff has a contingent interest in the suit property as envisaged u/s 21 of the T.P. Act nor any interest over the said properties, which admittedly is the absolute property of Defendant No. 1. Held, learned Courts below rightly held that the plaintiff-appellant had no cause of action on the date of filing of the suit.** (Para 15)

**Case law Referred to:-**

AIR 1970 SC 1059 : Sidramappa v. Rajashetty and others,
AIR 1977 SC 2230 : Smt. Puspa Devi v. the Commissioner of Income Tax, New Delhi,
(SC) 613. 2007 (II) : OLR Hardesh Ores (P) Ltd. v. Hede & Company
AIR 1932 Calcutta 600 : Sashi Kantha Acharjee and others v. Pramode Chandra Roy and others,
AIR 1946 Calcutta 118. : Tarak Chandra Das and another v. Anukul Chandra Mukherjee ,
AIR 1977 SC 2421 : T. Arivandandam v. T. V. Satyapal and anther

For appellant : M/s.R.K.Mohanty, D.K.Mohanty, Sangita Mohanty, D.Veradwaj, S.Mohanty, P.Jena, A.Mohanty, B.K.Mohanty, Sumitra Mohanty & S.N.Biswal.

For respondents: M/s. P.K.Rath, P.K. Satapathy, R.N.Parija, A.K.Rout and D.Pattanaik.

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***M. M. DAS, J.*** The plaintiff-appellant has filed this appeal challenging the concurrent judgments passed by the learned courts below rejecting the plaint under Order – VII, Rule – 11 C.P.C. on the ground that the plaintiff's suit does not disclose a right in him to sue and is tainted with an illusory cause of action.

2. The plaintiff filed the suit, being, C.S. No.527 of 2009, before the learned Civil Judge (Senior Division), Puri for declaration of his contingent interest over the suit property and for permanent injunction restraining the defendant no.1 from alienating the suit property either herself or through her agent. The plaintiff is the son of the defendant no.1 (mother). The defendant no.1 inherited the suit property from her parents by way of succession. According to the plaintiff, the defendant no.1 is not in a fit mental condition to deal with the suit property, as she is easily influenced and has no independent thought because of her illness. Taking advantage of such situation, the defendant no.2, who is the younger brother of the father of the plaintiff, has got a Power of Attorney executed by the defendant no.1 in favour of the defendant no.3.

3. After appearance of the defendants, an application was filed by them under Order – VII, Rule – 11 C.P.C. for rejection of the plaint on the ground that the plaintiff has got no semblance of right, title and interest or possession over the suit property. The defendant no.1 succeeded to the suit properties, which belonged to her mother and after the death of her mother, it has been recorded in the name of the defendant no.1

4. The learned trial court, upon hearing the said application, by his order dated 05.12.2009, came to the conclusion that as admitted by the plaintiff, the defendant no.1 is the full owner of the suit properties and, thus, the plaintiff can only lay claim on the said properties after the demise of his mother – defendant no.1, but so long as she is alive, the plaintiff has no existing right and hence, the plaintiff has no cause of action to file the suit during the life time of the defendant no.1 claiming any right, title and interest on her property and rejected the plaint under Order VII, Rule 11(a) C.P.C.

Being aggrieved by the aforesaid order of the learned trial court, the appellant preferred R.F.A. No. 128 of 2009 before the learned District Judge, Puri.

The learned lower appellate court on perusing the pleadings in the plaint and on analyzing the provisions of Order – VII, Rule – 11 C.P.C. and relying upon various decisions of the apex Court, endorsed the findings of the learned trial court confirming the same.

6. The Second Appeal has been admitted on the following substantial questions of law:-

(I) Whether the learned courts below have acted contrary to law in rejecting the plaint filed by the appellant under Order – VII, Rule – 11 (a) C.P.C. holding that the plaint does not disclose the cause of action by construing the plaintiff's suit as a suit on speculative succession without considering the plaint averments made in paragraph – 3 of the plaint to the effect that the defendant no.1 did not have the stability of mind to execute the Power of Attorney, which aspect, if would have been proved factually in the suit, would have nullified all actions of the Power of Attorney Holder, defendant no.3, who is respondent no.3, herein ?

(II) Whether the plaintiff under law can maintain a suit on a contingent interest which is conceptually different from a speculative succession and where allegation of fraud has been made ?

7. Mr. R.K. Mohanty, learned counsel appearing for the appellant submitted that an application has been filed by the plaintiff for amending the plaint, during the pendency of the Second Appeal, for introducing a prayer in the plaint to declare the Power of Attorney executed by the defendant no.1 in favour of the defendant no.3 as a void document. He further submitted that Order – VII, Rule – 11 (a) C.P.C. though provides that a plaint shall be rejected, where it does not disclose a cause of action, but a bare reading of the plaint filed by the appellant would go to show that at this stage, the learned courts below could not have held that the plaintiff had no cause of action to file the suit. Mr. Mohanty further submitted that the question, whether the plaintiff had any cause of action or not, was to be determined on the evidence adduced by the parties during trial of the suit. The plaintiff has disclosed the cause of action in paragraph – 5 of the plaint by stating that the cause of action for the suit arose on 03.11.2009, when the defendants planned to dispose of the suit land through the agent and it could come to the notice of the plaintiff, within the local limits of the court. It was also submitted that "cause of action" under law, means a bundle of facts, which give occasion to form the foundation of the suit and it is well settled in law that cause of action can be deciphered from the entire reading of the plaint and it is the substance and not merely the form that has to be looked into.

According to Mr. Mohanty, the pleading has to be construed, as it stands without addition or subtraction of words or change of its apparent grammatical sense. It is not permissible to cull out a sentence or a passage and to read it, out of context in isolation. For the above contentions, Mr. Mohanty took support of the decisions in the case of ***Sidramappa v. Rajashetty and others,*** AIR 1970 SC 1059, ***Smt. Puspa Devi v. the Commissioner of Income Tax, New Delhi,*** AIR 1977 SC 2230 and ***Hardesh Ores (P) Ltd. v. Hede & Company,*** 2007 (II) OLR (SC) 613.

8. It was also contended by Mr. Mohanty that in the instant case, a composite reading of the plaint would disclose that the plaintiff has alleged that her mother, defendant no.1 is not in a fit mental condition to deal with disposal of her property, as she is easily influenced because of her illness. The above assertion in the plaint is required to be proved during trial of the suit, if the defendants do not admit the same. Thus, a factual adjudication is necessary to find out the mental capacity of defendant no.1 with regard to disposal of her properties and the plaintiff has every right to protect such property over which, he has a contingent interest. Hence, the learned courts below should not have thrown out the plaintiff from the precinct of the court by rejecting the plaint at the threshold.

9. With regard to contingent interest of the plaintiff, Mr. Mohanty submitted that such an interest can be declared in a suit along with the relief of permanent injunction. In support of his contention, he also relied upon the decisions in the case of ***Sashi Kantha Acharjee and others v. Pramode Chandra Roy and others,*** AIR 1932 Calcutta 600 and ***Tarak Chandra Das and another v. Anukul Chandra Mukherjee*** , AIR 1946 Calcutta 118.

10. Mr. P.K. Rath, learned counsel appearing for the respondents, on the contrary, submitted that the only question to be dealt with in the present appeal is, as to whether the learned courts below have committed any error of law in rejecting the plaint on the ground that the plaintiff has no cause of action to file the suit and in this context, it is required to be examined as to whether the contention advanced by the appellant that he has a contingent interest over the suit properties and is entitled to a declaration thereon, can be accepted ? Mr. Rath contended that admittedly the defendant no.1 has inherited the property by succession, and, therefore, in view of Section 14 of the Hindu Succession Act, she is the only absolute owner having right to deal with the properties in the manner she likes. He took support of Section 30 of the Hindu Succession Act for his contention that a Hindu can dispose of his/her properties by Will or other testamentary disposition, which is capable of being so disposed of by him/her in accordance with law which is

applicable to Hindus. After the Hindu Succession Act came into force, the concept of reversionary right has been given a go-bye and thus, the plaintiff cannot claim any such right. Mr. Rath also contended that the question of contingent interest is not recognized by the Hindu Succession Act, 1956, which by itself is a codified law governing succession to property by a Hindu. Succession under the Mitakshyara School of Hindu Law opens only upon the death of a male or female Hindu dying intestate and during the life time of the absolute owner of such properties even his or her legal heirs cannot claim any right over the same anticipating the death of such person and future succession.

11. The Transfer of Property Act deals with "vested interest" and "contingent interest". Section 19 of the said Act is the provision governing "vested interest". The said provision may not be referred to in the present case, as admittedly, the plaintiff does not claim a "vested interest" over the suit property. Section 21 of the said Act deals with "contingent interest" which is as follows:-

> "21. ***Contingent interest***.- Where, on a transfer of property an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain event shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes vested interest in the former case, on the happening of the event; in the latter, when the happening of the event becomes impossible.
>
> ***Exception***.- Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income, or so much thereof as may be necessary, to be applied for his benefit, such interest is not contingent".

"Contingent interest" is also provided in section 120 of the Indian Succession Act, 1925 which is as follows:-

> "120. ***Date of vesting when legacy contingent upon specified uncertain event***.- (1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.
>
> (2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

***Exception***:- Where a fund is bequeathed to any person upon his attaining a particular age, and the Will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent".

Section 21 of the Transfer of Property Act can only be made applicable where there is a transfer of property. Section 120 of the Indian Succession Act occurs in part-VI of the said Act, which deals with testamentary succession and such a succession is not claimed by the plaintiff.

12. In the case of ***T. Arivandandam v. T. V. Satyapal and anther,*** AIR 1977 SC 2421, it was laid down that on a bare reading of the plaint, if the Court finds that the plaint is manifestly vexatious and meritless in the sense not disclosing a clear right to sue, the Court can exercise power under Order – VII, Rule – 11 C.P.C. and reject the plaint.

13. Considering the rival contentions of the parties and on perusal of the case laws relied upon by the learned counsel for the respective parties, this Court comes to the conclusion that it is well settled by the apex Court that for rejecting a plaint under Order – VII, Rule – 11 C.P.C. only the averments of the plaint are to be gone into and the Court has to ensure that meaningless litigations, which are otherwise bound to prove abortive, should not be permitted to occupy the judicial time of the Court. In the above background, it is to be examined whether the plaint in the instant case does disclose any cause of action, which is solely based on the ground that the plaintiff has a contingent interest over the suit properties.

14. With regard to the contention of Mr. Mohanty, learned counsel for the appellant that there are allegations in the plaint that the defendant no.1 (mother of the plaintiff) is ill and not in a fit condition of mind to deal with her properties and such allegations can only be proved during the trial of the suit, besides cause of action connotes a bundle facts and the plaint should not be thrown out on the ground that the plaintiff has no cause of action to bring the suit, this Court finds that if from perusal of the plaint itself it is seen that the plaintiff has absolutely no interest over the suit properties, even if, the plaintiff has alleged some facts to be existing, which are required to be

proved during the trial of the suit, the plaint can be rejected under Order – VII, Rule – 11(a) C.P.C. for want of cause of action.

15. With regard to the contention of the appellant that the appellant has a contingent interest over the disputed properties, which can be declared in the suit for which, the appellant has relied upon the decisions of the Calcutta High Court in the case of Sashi Kantha Acharjee and others (supra) and Tarak Chandra Das and another (supra), it is found that in the case of Sashi Kantha Acharjee and others (supra), the Calcutta High Court was considering the question of dealing with the properties under a "Will". The Calcutta High Court in the said case held that reversioners under the Hindu law are expectant heirs with a spes successionis. The ratio of the said decision, therefore, cannot be made applicable to the facts of the present case, where the plaintiff does not claim as a reversioner, more so, both the aforesaid cases were decided much prior to the Hindu Succession Act came into force, which does not recognize the right of the reversioners. The said decisions also do not deal with the question of contingent interest. This Court, therefore, while accepting the contention of Mr. Rath, learned counsel appearing for the respondents, comes to the conclusion that as held by the learned courts below, the suit filed by the plaintiff is based on speculative succession and it cannot be said that the plaintiff has a contingent interest in the suit property, as envisaged under Section 21 of the Transfer of Property Act nor any interest over the said properties, which admittedly is the absolute property of the defendant no.1 and thus, as held by the learned courts below, the appellant had no cause of action on the date of filing of the suit to bring the suit for the reliefs claimed. I, therefore, find no error in the judgments of the learned courts below.

16. In the result, the appeal, being devoid of merit, is dismissed, but in the circumstances without cost.

Appeal dismissed.

**2012 ( I ) ILR- CUT- 162**

**R.N.BISWAL, J.**

W.P.(C) NO.2706 OF 2006 (Decided on 19.10.2011)

**GOPINATH PANDA** …. ….. Petitioner.

.Vrs.

**M/S.MINERAL & METALS TRADING CORPN. OF INDIA LTD.,BBSR**. …….Opp.Party.

**INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.25-B.**

**Continuous service of workman – The petitioner-workman was disengaged on 1.4.93 and the learned Tribunal calculated the number of days he worked from that date backward till 1.4.92 and held that the petitioner-workman did not work for 240 days in 12 calendar months preceding the date of his disengagement, which is under challenge.**

**In this case even though the petitioner did not work for 240 days in twelve calendar months immediately preceding the date of his termination, yet he has worked for more than 240 days in the year 1991, 1990 and 1989 as found from the evidence on record and as such he was deemed to be in continuous service for one year in terms of Clause (1) of Section 25-B of the I. D. Act – Held, the order of the learned Tribunal that the petitioner-workman has not worked for one year is illegal and the Opp.Party management having not complied with the provision of Section 25-F of the I.D. Act before refusing work to the petitioner-workman is illegal – Since the management no more require labourers, a lump sum amount of Rs,2,00,000/- is awarded in favour of the petitioner-workman.** (Para 7)

**Case laws Referred to:-**

1.2002 (95) FLR : (Suraj Pal Singh & Ors.-V-Presiding Officer Labour Court No.III & Anr.)

2.AIR 2003 SC 2658 : (State of Haryana & Anr.-V-Tilak Raj & Ors.)

For Petitioner - M/s. Durga Prasad Nanda, P.K.Mahapatra, M.K.Pati, R.Kanungo.

For Opp.Party - M/s. B.Dasmohapatra & B.N.Bhoi

***R.N.BISWAL,J.*** This writ petition has been filed challenging the order dated 16.11.2005 passed by the learned Industrial Tribunal, Bhubaneswar in Industrial Dispute Case No.34/96 (Central).

2. The Government of India in the Ministry of Labour, in exercise of powers conferred upon them by Clause-(d) of sub-section (1) and sub-section-2 (A) of Section 10 of the Industrial Disputes Act, 1947 (hereinafter referred as I.D. Act) referred the following dispute to the learned Industrial Tribunal, Bhubaneswar on 19.9.1996, for adjudication.

> "Whether the action of the management of M.M.T.C. Ltd., Paradip, Dist: Jagatsinghpur, Orissa in terminating the services of Sri Gopinath Panda, Labourer with effect from 1.4.1993 and not giving him enhanced wage, bonus and overtime allowances due to him is legal and justified ? If not, to what relief the workman is entitled to ?"

3. The said reference was registered as I.D. Case No.34/96 (C). In his claim statement, the petitioner-workman stated that on 9.5.1981 he was engaged as a labourer by the opp.party-management for picking up foreign materials from iron ore and clearing spillages at ship's deck and was being paid on hourly basis up to end of June 1986. Thereafter he was paid wages @ 22.50 paise per day. He continued as such for more than 12 years without break in service. After several representations made by the petitioner-workman and taking into account his continuous service for more than 12 years, the General Manager M.M.T.C. issued a letter to the Chief General Manger (P & A) M.M.T.C. for regularization of his service vide office letter No.6.3.1992, but to no effect. So, he was compelled to file O.J.C. No.8708 of 1992 against the opp. party-management before this Court for regularization of his service. In Misc. Case No.182 of 1993 arising out of said O.J.C., this Court vide order dated 14.1.1993 directed the opp.party-management to allow the petitioner to continue as daily wager, but instead of complying the said order, they disengaged him from 1.4.1993. On 15.3.1995, O.J.C. No.8708 of 1992 was disposed of directing the petitioner to approach the Industrial forum to establish his right that his termination was illegal. Accordingly, he took shelter of the labour machineries and ultimately the aforesaid reference was made by the Central Govt. According to the petitioner-workman his services were illegally terminated without following due procedure of law, as laid down under the I.D. Act, even though he continuously worked from 9.5.1981 to 1.4.1993. The opp. party-management in their written statement contended that they never engaged the petitioner on 9.5.1981 as alleged. He was engaged as a casual worker as and when required @ Rs.22.50 paise per day from 1987. He was never employed continuously. He was not given any appointment letter and as such there was no question of regularization of his service. They denied any letter to have been issued by the General Manager M.M.T.C. for

regularization of the service of the petitioner. They also denied to have disobeyed the order of this Court. According to them, the work of deck clearing and cleaning of foreign materials from iron ore is not perennial in nature. When they obtain order from foreign buyers of iron ore, then only clearing of foreign materials from the ore is required. It is the further case of the opp. Party-management that because of poor performance of the casual workers, they set up automatic plant for cleaning foreign materials from the stack and ship deck by investing huge amount of money. They no more require labourers for cleaning such foreign materials from the iron ore or from the site. On the basis of the claim statement and the written statement of the parties, the learned Industrial Tribunal framed two issues.

4. To establish their respective case, both the parties led evidence. After going through the evidence on record and hearing the counsel for the parties, the learned Tribunal allowed the reference in favour of the petitioner-workman. The said order was challenged by the opp.party-management, before this Court in O.J.C. No.4229 of 1999. This Court set aside the impugned order and remanded the matter back with direction to decide the matter afresh with liberty to the parties to adduce further evidence if any. Pursuant to the said order, liberty was given to the parties to adduce further evidence. Petitioner (W.W.No.1) was recalled, examined further and cross examined. Some documents were exhibited on behalf of the petitioner workman. Similarly M.W.No.2 was examined and Ext.A was marked. After going through the evidence on record, the learned Tribunal held that the petitioner-workman was working as a daily wager as and when required; that he did not hold any post and that he failed to prove that he worked for 240 days in one calendar year preceding the date of his removal, as required under Section 25-B and Section 25-F of the I.D. Act and as such ordered that the action of the opp. party-management in terminating the services of the petitioner with effect from 1.4.1993 and in not giving him enhanced wage/bonus, over time allowance was legal and justified vide order dated 16.11.2005. The said order is under challenge in the present writ petition.

5. Learned counsel for the petitioner submits that vide letter NO.Z.20025/47-2000-CLC-II dtd. 22.8.2000 the Govt. of India issued a circular directing all the State Industrial Tribunals to transfer the cases relating to Industries/Industrial undertakings for which the appropriate Govt. is the Central Govt. to newly constitute Central Govt. Industrial Tribunals and from the said date onwards the State Industrial Tribunals ceased to have jurisdiction to decide disputes in which the Central Govt. is the appropriate Govt. Further, this Court through Special Officer (Admn.) wrote

vide memo No.8342 dated 20.9.2000 to the Industrial Tribunals at Bhubaneswar and Rourkela to transfer the Central Govt. reference to the Central Govt. Tribunal. So, the adjudication of the present dispute by the Industrial Tribunal, Bhubaneswar is without jurisdiction and as such it is liable to be struck down. As against this, learned counsel appearing for the opp. party-management contends that, earlier the Central Tribunal, Bhubaneswar decided the present reference as stated earlier on 8.12.2008. The same being set aside by this Court, the reference was remanded back to the Industrial Tribunal, Bhubaneswar to decide it afresh. On being so directed by this Court, the Tribunal adjudicated the matter afresh, even though separate Central Govt. Industrial Tribunal had already been established by then. Moreover, petitioner-workman did not raise this point before the Industrial Tribunal, so at this stage it cannot be raised.

6. Admittedly, the present I.D. case was disposed of earlier on 7.12.1998. Being dissatisfied with the said order the management filed O.J.C. No.4229 of 1999 before this Court which having been heard was disposed of on 20.4.2005 and the matter was remanded back to the Industrial Tribunal, Bhubaneswar to decide the case afresh. So, even if the Central Govt. Industrial Tribunal had already been established by the time the case was remanded back to the Industrial Tribunal, Bhubaneswar, in view of specific order of this Court to decide the Case afresh, it cannot be said that Industrial Tribunal, Bhubaneswar lacked jurisdiction to decide it. Moreover, as rightly submitted by learned counsel for opp. Party-management, the petitioner did not raise this point before the Tribunal. As it appears, he is a fence sitter. He was waiting for the result and when it went against him, he is raising this point now. Furthermore, the Industrial Tribunal, Bhubaneswar was deciding both the matter relating to Central and State reference till establishment of separate Central Govt. Industrial Tribunal. The Industrial Tribunal, Bhubaneswar did not lack inherent jurisdiction to decide the reference in question. So, the argument advanced on behalf of learned counsel for the petitioner-workman that the Industrial Tribunal Bhubaneswar lacked jurisdiction to decide the reference after establishment of the Central Govt. Industrial Tribunal cannot be accepted.

7. Learned counsel for the petitioner-workman submits that the learned Tribunal committed gross error of law in calculating the number of days the workman worked in twelve calendar months preceding the date of his termination. The petitioner-workman was disengaged on 1.4.1993 and the learned Tribunal calculated the number of days he worked from that date backward till 1.4.1992 and held that the petitioner-workman did not work for 240 days in 12 calendar months preceding the date of his disengagement,

which is wrong. If it is proved that the workman worked for 240 days in any calendar year preceding his termination, he cannot be denied the benefits of Section 25-F of the I.D. Act. In support of his submission, he relies on the decision in the case of **Suraj Pal Singh and others and Presiding Officer Labour Court No.III and another,**2002(95)FLR, Delhi High Court, where it has been held that Section 24-B read with Section 25-F of the I.D. Act cannot be restricted to immediately preceding the calendar year. As long as an employee has worked for 240 days in any calendar year preceding his termination, he would be entitled to the benefits under Section 25-F of the Act. Learned counsel for opp.party-management has no quarrel over this proposition of law. In the case at hand, even though the petitioner did not work for 240 days in twelve calendar months immediately preceding the date of his termination, yet he has worked for more than 240 days in the year 1991, 1990 and 1989 as found from the evidence on record and as such he was deemed to be in continuous service for one year in terms of Clause (1) of Section 25-B of the I.D. Act. So, the order of the learned Tribunal that the petitioner-workman has not worked for one year is illegal on the very face of it. Admittedly, the opposite party-management have not complied with the provision of Section 25-F of the I.D. Act before refusing work to the petitioner-workman, so his disengagement is illegal.

8. As regards non-payment of enhanced wage, bonus and over time allowances, it has been held in the case of **State of Haryana and another Vs. Tilak Raj and others**, AIR 2003 S.C.2658 that since daily wager hold no post and the scale of pay is not attached to a definite post he cannot claim the benefits. In the present case, as borne out from the evidence on record, the petitioner was engaged as a daily wager, so he is not entitled to get enhanced wage, bonus and overtime allowances. The learned Tribunal has rightly not awarded these benefits to the petitioner-workman.

9. The petitioner was disengaged in the year 1993. He was aged about 40 years in the year 2006. So now in the year 2011, he is aged about 45 years. As per the case of the opp.party-management, in the meantime they have set up an automatic plant for cleaning foreign materials from the stack and ship deck by investing huge amount of money and they no more require labourers for cleaning of the same. Under such circumstances, it would meet the ends of justice if a lump sum amount of Rs.2,00,000/- is awarded in favour of the petitioner-workman as compensation.

10. Accordingly, the writ petition is allowed in part and the impugned order holding that the action of the opp.party- management in terminating the services of the petitioner-workman with effect from 1.4.1993 is justified is

set aside and the order, so far as the action of the opp.party-management in not giving the enhanced wage, bonus and overtime allowances to the petitioner- workman is hereby confirmed. The opp.party-management shall pay a sum of Rs.2,00,000/- (Rupees two lakh) as compensation to the petitioner-workman within a period of one month hence, failing which they shall pay interest at the rate of 9% per annum till payment is made.

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

Writ petition allowed in part.

**2012 ( I ) ILR- CUT- 168**

**R.N. BISWAL, J.**

CRL.REV. NO.76 OF 2011 (Decided on 16.11.2011)

**NIRANJAN BEHERA** …….Petitioner.

*.Vrs.*

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

**ESSENTIAL COMMODITIES ACT, 1955 ( ACT NO.10 OF 1955 ) – S.7.**

**Seizure of P.D.S. wheat – Police Officers not below the rank of Inspector have been authorized by the Govt. to exercise the power like the Licensing Authority under Clause 23 of P. D.S. (Control) Order 2008 – S.I. of Police, Bhadrak (Rural) P.S. who searched and seized the truck and the P.D.S. wheat being below the rank of Inspector had no authority to do so – Held, the seizure being illegal, the order of cognizance taken under Section 7 of the E.C. Act can not stand the scrutiny of law.** (Para 5)

For Petitioner - M/s. Mahendra Ku. Das, S.Mallik, S.Rout, M.Das, J.Nayak & S.K.Das.
For Opp.Parties - Addl. Govt. Advocate

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***R.N.BISWAL,J.*** The facts of the case leading to filing of the revision in short is that on 20.5.2010, accused, Rajkumar Sharma loaded 250 bags of P.D.S. wheat weighing 125 quintals in the truck bearing registration No.ORY-5418 at F.C.I. depot, Ranital to deliver the same to the depot Manager, OSCSC Ltd. Keonjhar but while he was unloading the same in the godown of Tapaswini Behera of whom the petitioner is the power of Attorney holder at Ranital under Bhadrak Block, the S.I. of police Bhadrak (Rural)P.S.seized the P.D.S. wheat along with the truck and prepared seizure list in respect thereof as per Annexure-3 series and reported the incident to the I.I.C., Bhadrak (Rural) P.S. Accordingly, Bhadrak P.S. Case No.169 of 2010 was registered under Sections 407/420/411/34 of I.P.C. along with Section 7 of the E.C. Act. The matter was investigated into and charge sheet was filed thereunder, as prima facie it was found that all the accused persons, including the petitioner conspired to misappropriate the P.D.S. wheat by cheating and committing breach of trust and to screen themselves from the alleged crime, the co-accused, Santosh Kumar Marandi, the Marketing Inspector, Anandapur and Lifting Officer-in-charge,

Keonjhar without having any authority directed the petitioner in writing to receive and keep the aforesaid P.D.S. wheat in his godown on the false plea that the truck developed mechanical defect wherein wheats bags were being carried.

[

On receipt of the charge sheet, the learned S.D.J.M., Bhadrak went through it along with the entire case diary and finding a prima facie case against the accused persons including the petitioner took cognizance of the aforesaid offences, vide order dated 11.10.2010. Being aggrieved with the said order, the petitioner has preferred this revision with prayer to quash the same along with the seizure list, Annexure-3 series.

2. Learned counsel for the petitioner submits that the S.I. of police Bhadrak (Rural) P.S. is not authorized under Clause-23 of P.D.S. (Control) Order, 2008 to search and seize the P.D.S. wheat and truck. So the search and seizure being illegal, the entire criminal proceeding including the seizure of the P.D.S. wheat and the truck and the impugned order of taking cognizance deserve to be quashed.

3. On the contrary, learned Addl. Standing Counsel contends that at the time of seizure of P.D.S. wheat along with the truck, on 21.5.2011 the I.O., A.K. Rout was in-charge of Inspector Bhadrak (Rural) P.S. In terms of Clause-23 of P.D.S. (Control) Order 2008, police officers not below the rank of Inspector having been authorized to effect search and seizure by Govt. Notification No.7599 dated 29.4.2010, the I.O. is competent to seize P.D.S. wheat and the truck in question. Learned Addl. Standing Counsel further submits that even if it is presumed that the S.I. Mr. Rout who was in-charge of the Inspector lacks authority to search and seize the P.D.S. wheat along with the truck, at best the offence under Section 7 of the E.C. Act cannot be attracted against the petitioner. But the offence under Sections 407/420/201/411/120-B of I.P.C. can squarely be attracted against him and the co-accused persons since they conspired to commit breach of trust by unloading the P.D.S. wheat in a place other than the place of destination in order to sale the same in the black market and thereby cheated the Government and to screen the offence against them, the marketing inspector, Co-accused Santosh Kumar Marandi wrote a letter to the petitioner to keep the wheat in his godown on the pretext that the truck suffered break down, even though he has no authority to write so and the vehicle was found to be fit to ply by the M.V.I., Bhadrak.

4. Because of the rival submissions, it is to be decided whether the S.I. of police Bhadrak (Rural) P.S. was competent to effect search and seizure of

P.D.S. wheat along with the truck. It would be profitable to quote clause 23 of O.P.D.S. (Control) Order, 2008, which reads as follows:-

> **"Power of entry, search and seizure etc.** (a) – The Licensing Authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit:
>
> (i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating to such contravention;
>
> (ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;
>
> (iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;
>
> (iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises;
>
> Provided that in entering upon and inspecting any premises the persons so authorized shall have due regard to the social and religious customs of the persons occupying the premises.
>
> (v) search, seize and remove the stocks of the essential commodities and the packages, coverings, animals, vehicles, vessels or other conveyances used in carrying the said essential commodities in contravention of the provisions of this order or of the conditions of any licence issued there under and thereafter take or authorize the taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.
>
> (b) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause."

5. In terms of the above provision, the Govt. of Orissa in F.S. and C.W. Department authorized some of the officers of the same department to act as Licensing Authority vide notification No.7450 dated 29.3.2008. Thereafter vide notification No.7599 dated 29.4.2010 published in O.G.E. No.739 dated 13.5.2010, the police officers not below the rank of Inspector have been authorized by the Govt. to exercise the power like the Licensing Authority under Clause 23 of O.P.D.S. (Control) Order, 2008. The S.I. of police, Bhadrak (Rural) P.S. who searched and seized the truck and the P.D.S. wheat being below the rank of inspector had no authority to do so. The submission of learned Addl. Standing Counsel that the I.O. of the case was in-charge of the Inspector at the time of seizure would be of no help to him, because the seizure was made by S.I. Siddheswar Nayak who is below the rank of Inspector of Police. So, the seizure being illegal, the order of cognizance taken under Section 7 of the E.C. Act cannot stand the scrutiny of law.

6. As regards the offence under Section 407 of I.P.C, there is nothing to show that any F.I.R. or complaint was made by the Orissa Food Supplies Corporation alleging commission of criminal breach of trust against the petitioner. So, the offence under Section 407 of I.P.C. also cannot be attracted against the petitioner. Since there is no allegation of theft of P.D.S. wheat the question of receiving of stolen property, let alone dishonestly knowing the same to be stolen, does not arise. So, the offence under Section 411 of I.P.C. also fails. Nobody alleges that he was cheated by the petitioner, so the offence under Section 420 of I.P.C. also cannot be attracted. Since no offence under Sections 407/420/411 of I.P.C. is committed, there is no question of causing any evidence of commission of offence to disappear and accordingly the offence under Section 201 of I.P.C. also fails. When all the offences fail, the question of hatching a conspiracy to commit an offence (120-B of I.P.C.) does not arise.

Accordingly, the revision is allowed, the order dated 11.10.2010 passed by the learned S.D.J.M., Bhadrak and the seizure list under Annexure-3 series are hereby quashed. The seized truck and the P.D.S. wheat or sale proceeds of the said wheat and documents and articles seized under Ext.3 series be returned to the persons entitled to the same.

The CRLREV is accordingly disposed of.

Revision allowed.

**2012 ( I ) ILR- CUT- 172**

**INDRAJIT MAHANTY, J.**

CRLMC. NO.2454 OF 2010 (Decided on 26.08.2011)

**STATE OF ORISSA** .....Petitioner.

*.Vrs.*

**BIJAYA SANKAR SAHU & ORS**. ……Opp.Parties.

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

**Power U/s. 311 Cr.P.C. must be used judiciously and not capriciously or arbitrarily because any improper or capricious exercise of power may lead to undesirable results.**

**In this case the prosecution filed an application U/s. 311 Cr.P.C. for re-examination of P.W.1, the prosecutrix, basing on a complaint Dt.04.05.2010 from P.W.1 that on 02.03.2010 while she was examined in the Court she was unable to state the truth due to threats received by her – This Court perused the examination in-chief and cross-examination of the Prosecutrix which was recorded in one continuous sitting and the prosecutrix has clearly supported the prosecution case – Prosecutrix's bald assertion of coercion and threat without any material is wholly inadequate to act upon her complaint which was also not supported by affidavit – Held, no justification to interfere with the impugned order rejecting the application U/s.311 Cr.P.C.**

**Case laws Referred to:-**

1.(2004) 4 SCC 158 : (Zahira Habibulla H. Sheikh & Anr.-V-State of Gujarat & Ors.)
2.AIR 1991 SC 1346 : (Mohanlal Shamji Soni-V- Union of India & Anr.)

For Petitioner - Mr. D.Panda, Addl. Govt. Advocate
For O.P.Nos.1 & 2 - M/s. B.K.Ragada, L.N.Patel & N.Das.
For O.P. No.3 - None

***I. MAHANTY, J.*** The present application under Section 482 Cr.P.C. has been filed by the prosecution seeking to challenge the order dated 13.05.2010 passed in S.T. Case No.161/5 of 2009-10, whereby the learned Additional Sessions Judge, (F.T), Sambalpur has rejected a petition filed by the prosecution under Section 311 Cr.P.C. seeking recall and re-examination of P.W.1-Sukanti Dhal (Prosecutrix/victim).

2. Mr. D. Panda, learned Additional Government Advocate appearing on behalf of the State submits that the prosecution filed a petition under Section 311 Cr.P.C. basing on a complaint received from the prosecutrix, P.W.1-Sukanti Dhal, complaining that she had been unable to state the truth in course of her examination-in-chief on the date of her examination i.e. on 2.3.2010 allegedly due to threats received by her, for which reason she prayed for her own recall and re-examination in the interest of justice. This complaint of the prosecutrix was attached to a petition filed by the prosecution under Section 311 Cr.P.C. Mr. Panda further submits that the trial court ought to have favourably considered the prayer of the prosecution and if the prayer of the prosecution to recall and re-examination of P.W.1-Sukanti Dhal (Prosecutrix) had been allowed, there would be no prejudice to the defence, inasmuch, as the defence would have been entitled for further cross-examination.

Mr. Panda further submits that the case at hand is a case of brutal gang rape and the interest of justice would be best served, if the prosecutrix is directed to be recalled and re-examined and that would also enable the trial court to arrive at the truth of the allegation. In this respect reliance was placed on a judgment of the Hon'ble Supreme Court in the case of ***Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others***, (2004) 4 Supreme Court Cases 158.

3. While placing reliance on the aforesaid judgment, learned Counsel for the State submits that the Court should step in to prevent undue miscarriage of justice that is perpetrated upon the victims and the Courts have to ensure that accused persons are punished and that the mighty or authority of the State are not used to shield itself or its men.

4. Mr. B.K. Ragada, learned counsel appearing for opposite party Nos.1 & 2 (accused persons in the court below) submits that the plea that the prosecutrix had been threatened by the defence is wholly false, unsubstantiated and has been raised belatedly after more than two months from the date on which the prosecutrix/victim was examined in court. Admittedly, in the present case, the prosecutrix (P.W.1) was examined in court on 2.3.2010. The alleged complaint was made by the prosecutrix to the Public prosecutor only on 4.5.2010 i.e. after more than two months and basing on such allegation or complaint, a petition under Section 311 Cr.P.C. came to be filed by the Public Prosecutor who attached thereto a copy of the purported complaint received by him from the prosecutrix. The complaint made by the prosecutrix is extracted herein below:

"1. That the case under reference is in trial in your honourable court.

That on 3.3.2010, while I gave my evidence in your honourable court, I was under fear psychosis due to threatening and intimidation from the accused side, for which I could not give my evidence fairly and properly.

Hence I pray that my prayer may kindly be taken in to consideration to recall me to your honour court again for giving my evidence afresh, freely, fairly and properly for the interest of justice and to punish the culprit"

5. Before dealing with the case at hand, it has become necessary to take note of the evidence rendered by the prosecutrix in course of the trial, certified copy of which has been filed by the learned counsel for the State in course of the hearing. On perusal of the evidence in chief of the P.W.1-Sukanti Dhal (Prosecutrix), it appears therefrom that the prosecutrix has wholly supported the case of the prosecution and also categorically stated that she had identified the accused persons in the T.I. parade conducted inside the Circle Jail, Sambalpur to be the culprits, who had committed rape on her.

6. On a careful reading of the examination-in-chief as well as the cross-examination of P.W.1-Sukanti Dhal (Prosecutrix), I find no ground to even indicate any "threat or coercion" being applied on such witness. It is equally important to note herein that the prosecutrix was examined-in-chief as well as cross-examined on the same date i.e. on 2.3.2010. In other wards, there was no break between the examination-in-chief as well as the cross-examination which appears to have been recorded in one continuous sitting. The prosecutrix has clearly supported the case of the prosecution in her evidence-in-chief. Therefore, I am clearly in agreement with the views expressed by the learned Additional Sessions Judge (F.T), Smablpur in the impugned order to the effect that, the prosecutrix's bald assertion of coercion and threat without any material details whatsoever is wholly inadequate to be acted upon. The complaint of the prosecutrix is also not supported by any affidavit.

7. In the case at hand, the judgment relied upon by the learned counsel for the State in the case of ***Zahira Habibulla H. Sheikh and Another*** (supra) has no application to the facts of the present case and on the contrary learned Additional Sessions Judge (F.T.), Sambalpur has correctly

placed reliance upon an earlier judgment of the Hon'ble Supreme Court in the case of ***Mohanlal Shamji Soni v. Union of India and Another***, AIR 1991 Supreme Court 1346 and in particular, the dicta laid down therein, which directs that power under Section 311 Cr.P.C. must be used judiciously and not capriciously or arbitrarily because any improper or capricious exercise of the power may lead to undesirable results. Hence, I am of the considered view that this dicta of Hon'ble Supreme Court has been correctly applied by the trial Court to the facts and circumstances which arise for consideration in the present case.

8. In view of the aforesaid conclusion, I find no justifiable reason to interfere with the impugned order and while dismissing the present application, affirm the impugned order dated 13.5.2010 passed in S.T. Case No.161/5 of 2009-10 by the learned Additional Sessions Judge (F.T), Sambalpur and direct vacation of all interim orders.

Application dismissed.

**2012 ( I ) ILR- CUT- 176**

**ARUNA SURESH, J.**

W.P. (C) NO.18644 OF 2011 (Decided on 26.07.2011)

**KAURAB CHANDRA PRADHAN** ……..Petitioner.

*.Vrs.*

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

**ORISSA ADMINISTRATIVE TRIBUNAL ACT,1985 (ACT NO.13 OF 1985 ) – S.15.**

**Jurisdiction – Admittedly the petitioner who was working as a junior teacher was appointed as regular primary school teacher under Zilla Parishad w.e.f. 09.04.2008 – His service conditions are governed and regulated by the provisions contained in the Orissa Service Code, the Orissa Civil Service (Classification, Control & Rules) and he is a Civil Servant and as such is holding a Civil Post under the State – Held, since the petitioner is holding a Civil post the writ petition is not maintainable.**

For Petitioner - Mr. R.C.Behera.
For Opp.Parties - Mr. S.N.Mohapatra, Standing Counsel for School & Mass Education Department.

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***ARUNA SURESH, J. (*Oral )** Petitioner was appointed as Swechhasevi Sikshya Sahayak in Boitasarei Primary School under Pallahara Block in the district of Angul on 12.8.2001. After joining the services, he continued as such for a period of 8 years His services were regularized and was appointed as Regular Primary School Teacher by Chief Executive Officer, Zilla Parisad, Angul on 9.4.2008. However, he was directed to continue as Assistant Teacher in Injidi Primary School as per order dated 28.6.2008 issued by the District Inspector of Schools, Palalhara. He continued to work as Assistant Teacher in Injidi Primary School and after completion of more than 10 years of service, his deputation was cancelled and he was transferred to his original place of posting i.e. Boitasarei Primary School vide order dated 28.6.2011 (Annexure-4). Aggrieved by his transfer order, petitioner has preferred this appeal.

Mr. S.N. Mohapatra, learned Standing Counsel for School and Mass Education Department has disputed the jurisdiction of this Court to entertain this writ petition alleging that Section 15 of the Administrative Tribunal

Act,1985 (Hereinafter referred to as 'the Act') expressly deals with the jurisdiction, powers and authority of State Administrative Tribunals and according to the said Section, State Administrative Tribunal has all the jurisdiction, powers and authority in relation to recruitment and matters concerning recruitment to any civil services of the State or to any civil post under the State or, to all service matters concerning a person appointed to any civil service of the State or, any civil post under the State. He has submitted that petitioner being a regular primary School teacher under Zilla Parishad is holding a civil post and, therefore, the only forum available to the petitioner to challenge the transfer order is before the Orissa Administrative Tribunal.

Mr. R.C. Behera, learned counsel for the petitioner has urged that petitioner had initially filed an Original Application before the Administrative Tribunal, Cuttack Bench being O.A. NO.2159 (C ) of 2011. However the said OA was withdrawn by the petitioner in view of the preliminary objection raised by Mr. Tripathy, learned Standing Counsel for the Government relating to the maintainability of the OA. Therefore, the petitioner was left with no option but to file this writ. He has placed on record the certified copy of the order dated 6.7.2011 wherein the objection to the jurisdiction of the Tribunal made by learned Standing Counsel of the State has been recorded.

To appreciate the submissions made by learned Standing Counsel for the State, provisions of Section 15 of the Act need consideration.

It reads as below:-

> "15. Jurisdiction, powers and authority of State Administrative Tribunals.-(1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all Courts (except the Supreme Court[***] in relation to-
>
> (a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;
>
> (b) all service matters concerning a person [not being a person referred to in clause (c) of this sub-section or a member, person or civilian referred to in clause (b) of sub-section (1) of section 14] appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with

the affairs of the State or of any local or other authority under the control of the State Government or of any corporation [or society] owned or controlled by the State Government;

(c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in clause (b), being a person whose services have been placed by any such local or other authority or corporation [or society] or other body as is controlled or owned by the State Government, at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) of local or other authorities and corporations [or societies] controlled or owned by the State Government:

Provided that if the Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub –section in respect of different classes of, or different categories under any class of, local or other authorities or corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all Courts (except the Supreme Court [***]) in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (b) of sub-section (1) of this section or a member, person or civilian referred to in clause (b) of sub-section (1) of section 14] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs.

(4) For the removal of doubts, it is hereby declared that the jurisdiction powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable."

Thus, it is clear that every matter relating to the recruitment or all service matters concerning a person appointed to any civil service to the State, all service matters pertaining to service of such person in connection with the affairs of the State, concerning a person whose services have been placed by any such local or other authority controlled or owned by the State Government, at the disposal of the State Government for such appointment falls within the powers, authority and jurisdiction of the State Administrative Tribunal. Similarly, the administrative Tribunal has the jurisdiction concerning recruitment to any service or post in connection with the aforesaid such local or other authority or corporation or society and all service matter concerning a person, so appointed.

Section 15 of the Act was interpreted by this Court in W.P. (C ) No.3388 of 2010 (Hrusikesh Sethi & Others Vs. State of Orissa and others) and 3752 of 2010(Rajeeba Kumar Dutta Vs. State of Orissa and others).It was observed :-

"*A person holding a post under a State is a person serving or employed under the State. The relationship of master and servant exists between the State and the person holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control, the manner and method of his doing the work and the payment of wages or remuneration, as the case may be. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether such a relation between the State and the alleged holder of a post exists or not".*

*"A conjoint reading of Articles 309, 310 and 311 gives an impression that post under the State denotes an office. A person who holds a civil post under a State holds an office during the pleasure of the Government except as expressly provided by Article 310 of the Constitution. In other words, a post under the State is an office or a position to which duties in connection with the affairs of*

*the State are attached. Article 310(2) contemplates that a post may be abolished and a person holding such post may be required to vacate the post."*

Method of determination as to whether a person holding a post under the Government is a civil servant or is a member of the civil service is the existence of relationship of master and servant between the State and the person holding such post. Existence of such relationship depends on the right of the State to select and appoint the holder of the post or its right to sustain or dismiss him, its right to control the manner and method of his doing the work and the payment of his wages and remuneration. The relationship of master and servant is established by the presence of all or some of the factors as above in conjunction with other circumstances.

Section 3 (q) of the Act defines service matters in relation to a person i.e. service conditions. It includes remuneration (including allowances), pension, promotion, retirement benefits, tenure including confirmation seniority, promotion, reversion, pre-mature retirement and superannuation, leave of any kind, disciplinary matters or any other matter related to the service whatsoever. Now, it is to be seen whether a regular junior teacher working under Zilla Parisad is a civil servant or is holding a civil post within the meaning of Section 15 of the Act.

Learned Standing counsel for the respondent has brought to my notice Resolution no.II-SME/B-33-09-17566/SME., Dt.9.11.2009 of the Government of Orissa, School & Mass Education Department. This resolution was passed in pursuance of Article 243 of the Constitution of India as inserted by the Constitution by the 73rd Amendment Act of 1992, whereby powers were conferred on the State to hand over the elementary education to the control of Zilla Parisad and other Panchayati Raj institutions. Since thereafter, Zilla Parisad is empowered to engage Sikshya Sahayaks, appoint Junior Teachers and regular Primary School Teachers. By virtue of this Resolution, the scale of pay and other allowances of the regular Primary School Teachers appointed by the Zilla Parishad are at par with the Primary School Teachers (Level-V) under School & Mass Education Department. Such regular Primary School Teachers have to remain on probation for one year. They are entitled to pensionary benefits as admissible to the State Government servants under the new re-structured defined contribution Scheme as per the amended provisions of Orissa Civil Services Rule 1992 with effect from 1.1.2005. Besides, Regular Primary School Teachers are also entitled to house rent allowance and leave as

admissible to Primary School Teachers under Mass Education Department. Their age of superannuation has also been fixed at '58' years. As per Clause –1 of this Resolution, the services of a Regular Teacher are governed by the provisions contained in Orissa Service Code, the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962 and the Orissa Reservation of Vacancies in posts and services (for SC & ST ) Act, 1975 and Rules 1976 and such other rules and instructions issued by Government from time to time. This resolution was concurred by the Finance Department and was enforced with immediate effect.

Coming back to the facts & circumstances of the case admittedly that petitioner, who was working as Junior Teacher was appointed as regular Primary School Teacher under Zilla Parishad w.e.f. 09.04.2008. His appointment was made pending finalization of the service condition with the pay scale applicable to Level-V of the Elementary Cadre Trained Teachers.

Petitioner is being paid emoluments by the State Government. He is entitled to pensionary benefits, house rent allowance, leave etc. as per the State Government Service Code and Rules regulating the services of a Civil Servant who is holding a civil post. Since petitioner and his service conditions are governed and regulated by the provisions contained in the Orissa Service Code, the Orissa Civil Service (Classification, Control & Rules) and his services are under the direct control and supervision of Zilla Parishad which a State body, he is a civil servant and is holding a civil posts under the State. A relationship of master and servant exists between Zillla Parishad and the petitioner. Therefore, all his service matters, including his transfer can be challenged by him only before the Orissa Administrative Tribunal.

Since, the petitioner is holding a civil post under Zilla Parishad and existing Government establishment. Hence, the writ petition is not maintainable.

It seems that Mr. Tripathy, learned Standing Counsel for the State inadvertently omitted to mention the aforesaid resolution dated 9.11.2009 when he objected to the maintainability of the OA filed by the petitioner before the Orissa Administrative Tribunal, Cuttack Bench.

In view of my discussion as above, writ petition is hereby rejected for want of jurisdiction. However, to avoid further harassment, delay and inconvenience to the petitioner, he is given liberty to file an appropriate application for revival of his Original Application on or before 9.8.2011

before the Orissa Administrative Tribunal, Cuttack Bench. On receipt of the application, the Tribunal would consider the same in the light of this order and proceed to dispose of the same on merits.

Registry is directed to communicate the certified copy of the order to the Registrar, Orissa Administrative Tribunal, Cuttack Bench forthwith so as to avoid any further delay.

Free attested copy of this order be provided to the Standing Counsel for School and Mass Education Department under signature of the Court Master.

Writ petition dismissed.

**2012 ( I ) ILR- CUT- 183**

**SANJU PANDA, J.**

W.P. (C) NO.8370 OF 2005 (Decided on 20.07.2010)

**PRAVAKAR SWAIN & ORS**. ……Petitioners.

*.Vrs.*

**TAHASILDAR, AUL & ANR.** ……Opp.Parties.

**ORISSA SURVEY & SETTLEMENT RULES, 1962 – RULE 34.**

**Correction of ROR and maps to be made on the grounds enumerated in Rule 34 basing on the cause of action which arose after preparation of ROR – Rule 34 can not be resorted to by making an application in respect of a cause of action prior to publication of the ROR – In case any party aggrieved about an erroneous entry in the finally published ROR and any cause of action arose prior to the publication of the ROR, the appropriate legal remedy has been provided under Section 15, 25 and 42 of the Orissa survey and settlement Act, 1958 – Held, the Tahasildar had no jurisdiction to correct the said ROR under Rule/Section 47 of the Orissa Mutation Manual, 1962.** (Para 7,9)

For Petitioner - M/s. S.K.Nayak-2, S.R.Ahmed, M.K.Jena, S.K.Pattnaik, Miss. P.B.Mohanty & r.N.Singh
For Opp.Parties - Addl. Govt. Advocate

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***S. PANDA, J.*** The petitioners have filed this writ petition challenging the order dated 28.3.2005 passed by the Sub-Collector, Kendrapara in Mutation Case No.347 of 2003.

**2.** The petitioners filed Mutation Case No.347 of 2003 for mutation of the land in question in their names on the basis of the order passed by the Tahasildar, Aul in OLR Case No.137 of 1983. In the said OLR case, the land was settled in their names as Stitiban raiyat. They were paying rent regularly in pursuance of the said settlement. They are in possession of the property uninterruptedly. Opposite party no.1 directed the R.I. to make an inquiry regarding possession of the petitioners in respect of the disputed land. After making an inquiry, the R.I submitted report that the petitioners are in possession of the land. He submitted corresponding Hal plots of the Sabik Plots. The case was then placed before the Addl. Tahasildar, who vide order

dated 27.6.2003 after examining the report of the R.I. and the OLR records, directed to mutate the names of the petitioners in respect of the disputed land i.e. Hal Plot No.1108 with an area of Ac.0.15 decimals in a separate khata by deleting the same from the Government Khata No.1854. After the appeal period was over, the ROR was corrected.

**3.** While the matter stood thus, Sub-Collector, Kendrapara, opposite party no.2, during his visit to the Tahasil Office on 19.2.2005 inspecting the records set aside the order dated 27.6.2003 without giving any notice to the petitioners and directed the Tahasildar to take follow up action. Accordingly, on the direction of opposite party no.2, the names of the petitioners were cancelled, previous status of the disputed land was reflected in the ROR with intimation to the R.I. and parties were informed through notice and public proclamation. After knowing the said proclamation, the petitioners have filed the present writ petition.

**4.** Learned counsel for the petitioners submitted that the Sub-Collector has no jurisdiction to set aside the order passed by the Tahasildar without issuing notice to the petitioners. Since the Tahasildar had corrected the ROR as per Section 47 of the Orissa Mutation Manual, the Sub-Collector should not have reviewed the same. Therefore, the impugned order is liable to be set aside.

**5.** Learned Addl. Government Advocate appearing for the State, relying on the counter affidavit filed by opposite party no.1, submitted that in the Sabik Jamabandi Register, the disputed land had been recorded as Government land under Khata No.917, Plot No.908/2980 measuring an area of Ac.0.14 decs. in mouza-Salianch under Anabadi status. The kissam of the Plot was recorded as “Gadia”. The petitioners submitted a rent schedule that the case land was settled in their favour vide OLR Case No.137 of 1987 by the Tahasildar, Aul which was not available in the office as the same had been destroyed. The fact remains that in the Sabik record-of-rights no correction was effected as per OLR Case No.137 of 1987. He further submitted that the village was under settlement operation and the power and authority of the Tahasildar had already ceased during said settlement operation. On 9.12.2002, the petitioners applied for mutation of the disputed land on the basis of the rent schedule for which Mutation Case No.347 of 2003 was initiated. The rent schedule is not a final document. On the contrary, the rent schedule is normally issued at the time of proceeding of the OLR Case. Showing the settlement of the disputed land in their favour, the petitioners filed rent schedule to grab the land which is meant for public purpose i.e. Gadia. The Hal ROR was published in the year 1991.

Therefore, the power of the Tahasildar had ceased after publication of the Hal ROR with effect from 30.9.2001. Accordingly, the Sub-Collector, Kendrapara, opposite party no.2, has rightly passed the impugned order dated 19.2.2005. Therefore, the same need not be interfered with.

**6.** From the rival submissions of the parties and after perusal of the records, it appears that after disposal of the OLR case, the settlement operation was started in the area. Therefore, the power of the Tahasildar to correct the ROR had ceased. It is the admitted fact that final Hal ROR was published in the year 1991. The OLR Case was disposed of prior to final publication of the ROR.

**7.** This Court in OJC No.9621 of 1996 (Harihar Mohapatra v. Commissioner of Land Records and Surveys) has held that the correction of ROR and maps to be made on the grounds enumerated in Rule 34 of the Orissa Survey and Settlement Rules, 1962 has to be based on cause of action which arose after preparation of ROR. Otherwise, grant of opportunities to make objection and prefer appeal becomes a meaningless exercise. It cannot be certainly the legislative intent that a person who fails to file an objection and/or prefer an appeal can overcome the prescription of time prescribed for the aforesaid purpose by resorting to Rule 34. Therefore, Rule 34 cannot be resorted to by making an application in respect of a cause of action which arose prior to the publication of the ROR. In view of the aforesaid observations of this Court, the Government issued a notification on 6$^{th}$ May, 1999 referring to the Departmental Letter dated 3.1.1991 specifically stating that the correction of ROR by the Tahasildar through a mutation proceeding in respect of the factual position which was existing prior to the publication of the ROR is beyond the scope of Rule 34 of the Orissa Survey and Settlement Rules, 1962. In case any party is aggrieved about an erroneous entry in the finally published ROR and any cause of action arose prior to the publication of the ROR, the appropriate legal remedy has been provided under Section 15, Section 25 and Section 42 of the Orissa Survey and Settlement Act, 1958. The aggrieved party has the option of filing a revision petition before the Board of Revenue within one year of publication of ROR or filing a Civil Suit within three years. The said instruction was also clarified that earlier instruction dated 3.1.1991 was superseded.

**8.** Law is also well settled that ROR neither creates title nor extinguishes the title.

**9.** In view of the above position, the Tahasildar had no jurisdiction to correct the said ROR under Rule Section 47 of the Orissa Mutation Manual.

**10.** Hence, this Court is not inclined to interfere with the impugned order.

Accordingly, the writ petition is dismissed.

Writ petition dismissed.

**2012 ( I ) ILR- CUT- 187**

**B.K.NAYAK, J.**

W.P.(C) NO.8517 OF 2011 (Decided on 22.08.2011)

**TUSHAR KANTA PANIGRAHI** …….. Petitioner.

.*Vrs.*

**UDAYANATH SAHU** …….. Opp.Party.

**CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF 1908) – ORDER 26, RULE 9.**

**Dispute relating to boundary – Demarcation of adjacent lands and report of a survey knowing person is essential – Where the evidence along with the evidence of a private Commissioner is deficient or inadequate for the Court to come to a definite conclusion, the Court has jurisdiction to depute a survey knowing Commissioner**.

**Case laws Referred to:-**

1.2003(I) OLR 370 : (Sitaram Nayak-V-Smt. Usharani Das)
2.2009(II) OLR (SC) 57 : (Haryana Waqf Board-V-Shanti Sarup & Ors.)
3.2011 (II) OLR 678 : (Kartik Chandra Nayak-V- Bira Kishore Nayak & four Ors.)
4.64 (1987) CLT.722 : (Mahendranath Parida-V-Purnananda Parida & Ors.)

For Petitioner - M/s N.C.Pati
For Opp.Party - M/s S.K.Tripathy

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Heard learned counsel for the parties. Perused the impugned order.

The defendant in C.S. No.29 of 2010 pending on the file of the learned Civil Judge (Jr. Division), Jharsuguda has filed this writ petition challenging the order dated 23.3.2011 passed by the Trial Court rejecting the defendant's application under Order 26 Rule 9, CPC for deputing a survey knowing Commissioner to demarcate the suit land.

The suit of the plaintiff-O.P. is for permanent injunction against the defendant. Admittedly, both the plaintiff and the defendant have purchased land from the common vendor and the lands of both are adjacent. Essentially, the dispute is with regard to identification and demarcation of the disputed land in question over which both the parties claim title by virtue of

purchase from the common vendor and the defendant has also filed a counter claim. In the suit the defendant filed a petition for deputation of a survey knowing Commissioner for measuring, demarcating the land in question. The Trial Court has rejected the petition holding that there is much evidence to be adduced which may help in adjudicating the dispute regarding the boundary and therefore, it is not the proper stage to allow the prayer for deputing a Commissioner. For giving such ground the Trial Court evidently took note of the observation of this Court in the case Sitaram Nayak v. Smt. Usharani Das; 2003 (I) OLR – 370, to the effect that when the dispute is relating to the boundary and evidence can be secured by the petitioner by employing the Tahasil Court Amin an application under Order 26 Rule 9, CPC is not necessary.

The learned counsel for the petitioner submits that the Trial Court having held that it was not proper stage for consideration of the application for deputing a Commissioner, he should have kept it pending for consideration at the proper stage instead of rejecting it outright without considering that the nature of the dispute entails investigation by a survey knowing Commissioner. The learned counsel for the O.P., on the other hand, contends that the petitioner has got the suit land demarcated through the Tahasil Amin twice and the reports of the Tahasil Amin have been led into evidence which would be sufficient along with other evidence on record to decide the dispute in question.

Whether reports of any Tahasil Amin with regard to demarcation of the disputed land have been led into evidence or not is not borne out from the impugned order as the same is not at all taken into consideration by the Trial Court for rejecting the petition. On the other hand, the learned counsel for the petitioner has invited attention of this Court to some averments made in the plaint that the defendant had got the Tahasil Amin for demarcation of the land, but the demarcation could not be completed.

Law is well settled, as observed by the Apex Court, in the decision reported in 2009 (II) OLR (SC) – 57 (Haryana Waqf Board v. Shanti Sarup and others) that when the controversy between the parties was regarding identification and demarcation of adjacent lands a Commissioner ought to be appointed for demarcation of the lands.

Similar view has also been taken by this Court in the decision reported in 2011 (II) OLR – 678 (Kartik Chandra Nayak v. Bira Kishore Nayak and four others) following the earlier decision of this Court reported in 64 (1987) C.L.T. 722 (Mahendranath Parida v. Purnananda Parida and

others) where it has been held that the Court should not ordinarily refuse to appoint a Commissioner if it considers a local investigation to be requisite or proper only on the ground that the party can adduce evidence through a private survey knowing person.

The aforesaid judicial pronouncements reveal that for the purpose of demarcation of adjacent lands the evidence and report of a survey knowing person is very much essential. The survey knowing person may be a private Amin taken privately by any or both the parties or it may be a survey knowing Commission appointed by the Court under Order 26 Rule 9, CPC. The purpose is that the Court should be in a position to come to a definite conclusion as to the identity of the disputed land and be able to give a decision about its ownership. Therefore, where the report of a private Commissioner has been accepted as correct and the Court is in a position to give a decision on the basis of such report along with the other evidence on record, it may not be necessary to depute a survey knowing Commissioner at the intervention of the Court. But where the evidence along with the evidence of private Commissioner is deficient or inadequate so that the Court is not in a position to come to a definite conclusion, the Court has jurisdiction to depute a survey knowing Commissioner.

In the present case, the Trial Court has not made any reference about the evidence or report of any private Amin taken by the defendant or any Tahasil Amin having demarcated the land. In such circumstances, without taking into consideration the report of the private Amin or the Tahasil Amin if available the Court below should not have rejected the petition. I, therefore, set aside the impugned order and direct the Traiul Court to consider the report of any Tahasil Amin with regard to demarcation of the disputed land, if led into evidence, and in the event, the Trial Court comes to the conclusion that the report is not adequate to determine the controversy with regard to the boundary of the lands of the parties it shall reconsider the petition filed by the defendant under Order 26 Rule 9, CPC.

The writ petition is accordingly disposed of.

Consequent upon disposal of the writ petition M.C. No.5406 of 2011 stands disposed of. Issue UCC as per rules.

Writ petitions allowed.

**2012 ( I ) ILR- CUT- 190**

**B.K.MISRA, J.**

W.P.(C) NO.25961 OF 2011 (Decided on 02.12.2011)

**KALANDI RANA** ……Petitioner

*.Vrs.*

**SRI SRI BIRAJA THAKURANI,**
**JAJPUR**. ……..Opp.Party

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

**Amendment of written statement at appellate stage – Defendant seeks to introduce new facts through the proposed amendment of his pleadings which is entirely inconsistent with the written statement he filed in the Court below and if the proposed amendment would be allowed virtually, it will introduce new facts and would change the nature and character of the pleadings – Held, there is no illegality in the impugned order rejecting the prayer for amendment of the written statement.** (Para 13)

**Case law Referred to:-**
AIR 1979 SC 551 : (Ishwar Das-V- State of Madhya Pradesh & Ors.)

For Petitioner - Mr. Samir Kumar Misra, J.Pradhan, P.Prusty, D.K.Pradhan, D.Samal & S.Mohapatra.
For Opp. Party - Mr. Mahadev Mishra, Miss M.Mishra & Mr. G.C.Bhuyan.

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***B.K.MISRA, J.*** The present petitioner, who was the appellant in R.F.A. No.62 of 2006 being aggrieved with the order dated 14.9.2011 (Annexure-4) passed by the learned Additional District Judge, Jajpur in rejecting his prayer for amendment of the written statement has approached this Court for quashing the impugned order at Annexure-4.

2. I may mention here that Sri Sri Biraja Thakurani (the present opposite party in this writ petition) represented by the Managing Trustee, namely, the Sub-Divisional Officer, Jajpur had instituted Title Suit No.102 of 1986 impleading the present petitioner as defendant for declaration of right, title and interest and confirmation of possession over the suit land. It was also prayed by the plaintiff that the defendant has no right, title and interest over the house standing on the suit plot and to give vacant possession

within a period to be fixed by the Court failing which he be evicted through the process of law and also for permanent injunction. The present petitioner who was defendant in the said suit contested the same by filing written statement. The suit was decreed on contest against the defendant and the defendant was directed to vacate the suit land and the house within six months failing which defendant would be at liberty to get the decree executed through the Court.

3. Challenging the said judgment and decree, the loosing defendant filed an appeal which was registered as R.F.A. No. 62 of 2006 in the court of learned Additional District Judge, Jajpur.

4. During the pendency of the said appeal, a petition was filed under Order 6, Rule 17 of the Civil Procedure Code (for short C.P.C.) with a prayer for amending the written statement contending therein that because of inadvertence and bonafide mistake some material facts could not be stated in the written statement which could only be detected at the appellate stage. It is the case of the present petitioner that the proposed amendments would in no way change the nature and character of the suit in any manner nor would cause any prejudice to the respondent. The proposed amendment which was prayed to be incorporated in the written statement in para-15 is to the effect that "in the year 1955, Dhruba Rana was inducted as a tenant in respect of the suit land for agricultural purpose and it was agreed that in lieu of rent, Dhruba Rana, the lessee was to give flower to the Deity. Subsequent to lease, Dhruba constructed a house on the suit land in the year 1940 and resided there. Dhruba Rana was possessing the suit property as a tenant under the plaintiff and in lieu of rent supplied flowers to the Deity and acquired occupancy right over the suit land by the year 1947."

5. Such prayer of the appellant for amending the written statement was vehemently opposed to by the respondent on the ground that by the proposed amendments to the written statement the appellant wants to introduce new facts which would completely change the nature and character of the suit and besides that when suit which was filed in the year 1986, has been disposed of on contest after parties led evidence and only to nullify the judgments and decree of the court below, the new facts are being tried to be introduced.

6. Learned Additional District Judge, Jajpur by the impugned order disallowed the prayer of the appellant for amendment of the written statement.

7. I have heard the learned counsel for the parties and perused the petition filed under Order 6, Rule 17 of the C.P.C. (Annexure-2) and also the impugned order at Annexure-4.

8. Learned counsel appearing for the petitioner contended that law is quite well settled that amendment can be allowed at any stage and there is no impediment or bar for an appellate court permitting the amendment of pleadings so as to enable a party to raise a new plea. All that is necessary is that the appellate court should observe the well known principles subject to which the amendments of pleadings are usually granted. One of the circumstances which will be taken into consideration before an amendment is granted as to the delay in making the application seeking such amendment and, if made at the appellate stage, the reason why it was not sought in the trial court ***(A.I.R. 1979 SC 551 Ishwar Das –V- State of Madhya Pradesh and others).***

9. It is the settled position of law that while considering an application under Order 6, Rule 17 of the C.P.C. certain important factors are to be borne in mind, namely:-

(1) Whether the amendment sought is imperative for proper and effective adjudication of the case?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? And

(6) As a general rule, the court should decline amendments if a fresh suit on the amendment claims would be barred by limitation on the date of application.

10. In the instant case, the amendment which has been sought for by the present petitioner was at the appellate stage and that too of the written statement filed by the present petitioner as the defendant in Title Suit No.102 of 1986. In the said written statement so filed by the present petitioner, it was averred that one Dhruba Rana was inducted as a tenant in respect of the suit land and as per the agreement the said Dhruba Rana was

to supply flower to the deity in lieu of rent. Dhruba Rana constructed a house over the suit land and resided there and after his death his wife Jasoda brought the defendant, who is 'Bhanaja' of late Dhruba Rana (sister's son) and they lived thereon. On the death of Jasoda, it is the case of the defendant that he inherited the suit property and possessed the same as a tenant under the plaintiff and in lieu of rent supplied flowers to the deity.

11. For the sake of clarity, I may mention here that the specific case of the plaintiff is that the suit house was constructed in the year, 1950 by the management of the temple and Dhruba Rana was allowed to reside in the suit house with his wife. But in 1952 Dhruba Rana left Jajpur and thereafter was unheard of for which the Managing Trustee of the temple permitted one Harekrushna Mohanty to occupy the suit house so also the brother of Jasoda and one Trinath Jena along with wife of the said Dhruba Rana. It is the further case of the plaintiff that Dhruba, Jasoda, Harekrushna, Brudaban and Trinath were living in the suit house with the permission of the Managing Trustee of the temple and in the year, 1976 when the Managing Trustee with the approval of the Trust Board asked Jasoda to vacate the house and the land by withdrawing permission given to Dhruba Rana as the Trust Board wanted to raise a permanent building over the suit land by demolishing the old dilapidated thatched house. On the application of Jasoda and taking into consideration her age, the Trust Board accorded permission to Jasoda to reside in a room on the western part of the suit land. But she was asked to vacate the suit house and the land in favour of the plaintiff. It is also the specific case of the plaintiff that the suit land was settled with the plaintiff in a proceeding under Section 6 & 7 of the Orissa Estate Abolition Act and the plaintiff paid rent as well as Municipality Holding Tax in respect of the suit land.

12. It is an admitted fact that when the written statement was filed in the Court below the present petitioner, who was defendant in the said suit though had full knowledge of the facts but he did not choose to incorporate the facts which now he proposes to insert in the written statement by way of amending the same at the appellate stage. It is seen that the learned Civil Judge (Sr.Divn.), Jajpur on contest has disposed of the said suit as per the issues settled. In the written statement filed in the Court below, the defendant had never averred that he was inducted as a tenant in the year, 1940 for agricultural purpose and thus acquired occupancy right over the suit land by the year 1947.

13. In the instant case, the defendant seeks to introduce new facts through the proposed amendment of his pleadings which is entirely

inconsistent with the written statement which he filed in the Court below and if the proposed amendment would be allowed virtually, it will introduce new facts and would change the nature and character of the pleadings. This is a peculiar case where after disposal of the suit on contest and having lost the suit in the Court below, the defendant at the appellate stage wanted to amend the written statement by introducing new facts.

14. Learned Appellate Court in the impugned order at Annexure-4 has delved deep into the matter and by a well reasoned order disallowed the prayer of the petitioner for amendment of the written statement.

15. In view of the above, I do not find any illegality and irregularity or manifest error of law in the impugned order in rejecting the prayer for amendment of the written statement. Accordingly, the writ petition being devoid of merit, stands dismissed.

Writ petition dismissed.