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

W.P.(C) NO. 13185 OF 2006 (Dt.22.02.2012)

SANJAY DAS …….Petitioner

.Vrs.

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

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

Administrative order – Validity – Authority exercising power for oblique motive and not bona fide amounts to fraud on power – Held, fraud on power voids the order.

In this Case petitioner's mother is the recorded tenant in respect of the land in question – Government issued notification U/s.4(1) L.A. Act to acquire her land and other lands in favour of CDA for the formation of residential lay out, without mentioning her name in the relevant column – Although there was no urgency, notifications U/s.17 (1) (2) (4) of the L.A. Act was issued invoking urgency clause deliberately for dispensing with the enquiry provided U/s.5-A of the L.A. Act – Moreover non-passing of the award as required U/s.11-A and passing of the same after 20 years in the name of the District Collector is not tenable in law – Held, the above action of the Government is void abinitio – Impugned Orders quashed. (Para 18)

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

Power of High Court – High Court can mould reliefs as prayed in the writ petition in furtherance of interests of justice and not merely on the making out of a legal point.

In this Case although this Court found the acquisition proceedings and award are void abinitio but since the land is acquired by CDA for allotment in favour of the residents and public purpose is the prime consideration against private interest, declined to quash the same by moulding the reliefs by directing the Opp.Parties to see that compensation for the acquired land of the petitioner is determined on the basis of the present market value as on this date and the Development Authority to grant five contiguous sites measuring 40 ft. x 60 ft. in the area in question to the petitioner for which the present rate of allotment shall be charged and that amount shall be deducted from

out of the compensation that would be determined and payable to the petitioner. (Para 30,31)

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

Writ petition – Delay of 22 years – Administrative order challenged – Order proved to have been passed in bad faith with corrupt motive – Held, delay and laches shall not stand as a bar to entertain the writ petition. (Para 19)

D. LAND ACQUISITION ACT, 1894 – Ss.4, 5-A, 6, 10,11 & 17.

Notification U/s. 4(1) of the Act – Conducting enquiry after issuance of notification U/s.4(1) is not only the statutory right but also a human right – State Government took over possession of the land U/s.17(1) of the Act by illegally invoking urgency Clause and handed over the same in favour of CDA – Held, issuance of notification U/s.17(1) read with Section 17(4) can not sustain and liable to be quashed. (Para 21)

Case laws Relied on:-

1.AIR 1997 SC 1236 : (Ramniklal N. Bhutta & Anr.-V-State of Maharashtra & Ors.)
2.(2010)7 SCC 129 : (Bondu Ramaswamy & Ors.-V-Bangalore Development Authority & Ors.)

Case laws Referred to:-

1.AIR 1975 SC 1767 : (Balwant Narayan Bhagde-V- M.D. Bhagwat & Ors.)
2.AIR 1999 SC 1281 : (Babu Verghese & Ors.-V- Bar Council of Kerala & Ors.)
3.(1875) 1 Ch D 426 : (Taylor -V- Taylor)
4.AIR 1964 SC 72 : (S. Pratap Singh-V- State of Punjab)
5.1956-1 All E R. 341 : (Lazarus Estates Ltd.-V- Beasley)
6.(2005)6 SCC 493 : (Govt. of A.P. & Ors.-V- Kollutla Obi Reddy & Ors.)
7.(2003) 12 SCC 538 : (Haryana State Handloom & Handicrafts Corpn. Ltd. & Anr. -V- Jain School Society)
8.(2011)5 SCC 394 : (Banda Development Authority, Banda-V- Motilal Agarwal &Ors)
9.(1996)3 SCC 124 : (U.P. Jal Nigam, Lucknow through its Chairman & Anr.-V- Kalra Properties (P) Ltd. Lucknow & Ors.)

10.(1993)4 SCC 369 : (Satendra Prasad Jain & Ors.-V- State of U.P. & Ors.)
11.(1995)6 SCC 31 : (Awadh Bihari Yadav & Ors. -V- State of Bihar)
12.AIR 2008 SC 261 : (Devinder Singh & Ors. -V- State of Punjab & Ors.)
13.1925 A.C.338 P-343 : (Municipal Council of Sydney-V- Cambell)
14.(1844)6 Q.B.682 P-715 : (Reg -V- Governors of Darlington School).
15.1904 AC 515 : (General Assembly of Free Church of Scotland-V- Overtoun)
16.AIR 1980 SC 319 : (State of Punjab & Anr.-V- Gurdial Singh & Ors.)
17.2005(7)SCC 627 : (Hindustan Petroleum Corpn.Ltd.-V- Darius Shaper Chenai &Ors)
18.AIR 2008 SC 261 : (Devinder Singh & Ors.-V- State of Punjab & Ors.)
19.AIR 1975 SC 1409 : (Pasupuleti Venketeswarlu-V-The Motor & General Traders)
20.AIR 1941 FC-1940 FCR 84 : (Lachmeshwar Prasad Shukul & Ors.-V- Keshwar Lal Chaudhuri & Ors.)
21.(1934)294 US 600,P-607 : (Patterson-V- State of Alabama)
22.(1940)309 US 551,P-555 : (Minnesota-V- National Tea Co.)
23.AIR 1939 Privy Council 98 : (Vyricherla Narayana Gajapatiraju-V- Revenue Divisional Officer, Vizagapatam).

For Petitioner - M/s. Baishnab Ch.Das, T.K.Rath, G.Das.
M/s. S.K.Padhi (Sr.Adv.),S.Parida, A.R. Nayak.
For Opp.Parties- M/s. R.K.Mohapatra, G.A. & P.K.Muduli, A.S.C. (for O.P.No.s1 & 2)
M/s. P.K.Mohanty & M.K.Panda (for O.P.No.3).

V. GOPALA GOWDA, CJ. The petitioner's mother was the record tenant in respect of the acquired land measuring an area of Ac.9.89 decimals. After abolition of the estates, such lands vested with the State government under the provisions of the Orissa Estates Abolition Act, 1951(hereinafter called as the "O.E.A. Act") and on the application filed by his late mother of the petitioner under the O.E.A. Act, O.E.A. Case Nos.48 & 49 of 1968-69 were registered in the office of Additional Tahasildar, Sadar, Cuttack and rights in respect of the acquired land were settled in her favour by his order dated p1.10.1982 in exercise of his power under Section 8(1) of the O.E.A. Act, which order was confirmed by the Supreme Court in determining the statutory right in favour of the petitioner's mother as a tenant in respect of the acquired land. The petitioner, who succeeded to the estate of his mother as her legal heir, is before this Court questioning the legality and validity of the acquisition proceedings initiated by the State Government at the instance

of the Cuttack Development Authority (hereinafter called as the "C.D.A.") for the purpose formation of residential lay out under the provisions of Orissa Development Authorities Act, 1982 and the preliminary notification dated 25.07.1983 issued under Section 4(1) of the Land Acquisition Act, 1894 (hereinafter called as 'L.A.Act') followed by Section 17(1)(4) notification dated 3.8.1983 dispensing with the enquiry as provided under Section 5-A of the L. A. Act and thereafter the publication of declaratory notification dated 18.10.1984 made U/s.6 and the award in respect of the acquired land passed in favour of the Collector after lapse of 20 years on 5.2.2004. He has sought to quash the said impugned notifications and award urging various facts and legal grounds.

2. The relevant and necessary facts are briefly stated in this judgment for the purpose of appreciating the rival legal contentions urged by the learned Senior Advocate appearing on behalf of the petitioner and the learned Government Advocate for the State and its officers and the learned counsel for C.D.A.

3. The claim of the petitioner is that his mother had raiyati right over the land bearing Hal Plot No.80 under Khata No.330 measuring an area of Ac.9.89 decimals in Mouza Bidyadharpur w.e.f. 1.10.1982 and the said land was the subject matter of the acquisition proceedings initiated by the State Government under the L.A. Act at the instance of the CDA for formation of residential lay out. It is stated by the petitioner that the notification published under Section 4(1) of the L.A. Act was followed by a notification under Section 17(1) & (4) of the L.A. Act though there was no urgency for the State Government to invoke emergency clause either at the relevant time or at a time subsequent to the amendment of the above provision by Act No.68/84 which came into force w.e.f. 24.09.1084 in so far as the housing scheme to be implemented by the C.D.A. was concerned as provided under the L.A. Act to dispense with the enquiry in the acquisition proceedings, which is not only a fundamental right, but also human right of the petitioner as held by the Supreme Court in a catena of cases. Therefore, it is pleaded by the petitioner that his valuable statutory right to file objections to the preliminary notification published U/s.4(1) of the L.A. Act regarding the proposed acquisition of land and personal hearing was denied to him by the State Government in exercise of its so-called power by issuing notification under Section 17 of L.A. Act, for which it is not empowered in law. Therefore, the acquisition proceedings under Section 6 notification published declaring that the land in question along with other land is required to be taken by the Government for the public purpose in favour of the development authority for the purpose of implementation of the housing scheme by forming the residential lay out under the Development Authority Act is void ab initio in

law. It is further contended that after the said declaratory notification U/s.6 was published on 18.10.1984, the same was followed by issuance of certificate of possession of the land and the delivery of possession of the same to the C.D.A. is not in conformity with Section 16 of L.A. Act, which provides that after passing of the award in respect of the land involved in this case, possession can be taken by the Collector upon which the acquired land vests with State Govt. and thereafter it can transfer the land & deliver possession to the C.D.A. So, issuance of the certificate of possession of the land in favour of C.D.A. is also bad in law as the Collector had not taken possession of the acquired land from the petitioner- land owner and it was also not preceded by passing of an award by the Collector within two years from the date of the declaratory notification published under Section 6 of the L.A. Act. Therefore, due to non-passing of the award by the Collector within two years statutory period as amended by Act No.68/84 which came into force w.e.f. 24.9.1984 after publication of Section 6 notification, the acquisition proceedings lapsed under Section 11-A of the L.A. Act. It is further pleaded by the petitioner that the acquired land did not vest with the State government. Therefore, the question of taking over possession of the land and transfer of the same to the Development Authority did not arise at all. Mr. Padhi relied upon a decision of the Supreme Court in the case of Balwant Narayan Bhagde V. M.D. Bhagwat and others reported in AIR 1975 SC 1767 wherein at paragraph 26 the Supreme Court has made relevant observation regarding the mode of taking over possession of acquired land. It is further contended by him that Section 11-A of the L.A. Act provides for passing of award by the L.A. Collector within a period of two years from the date of publication of the declaratory notification U/s.6 and thereafter notice for taking over possession of the land shall be issued calling upon the owner to deliver possession evidencing the factum of taking over possession U/s.6. But that has not been done in the case on hand by the State Government. Therefore, the acquisition proceedings in respect of the land in question are void ab initio in law. The learned Senior Advocate contends that if a statute provides for the statutory authority to do a thing in a particular manner, then it has to be done in that manner or not at all. If the statutory authority follows a course other than the procedure laid down in the statute, the same is not permissible in law. In support of the aforesaid proposition of law, he has placed reliance upon a judgment of the Supreme Court in the case of Babu Verghese and others V. Bar Council of Kerala and others, reported in AIR 1999 SC 1281, wherein the Supreme Court after referring to the Chancery Court Decision in Taylor V. Taylor, (1875) 1 Ch D 426, Privy Council decision and the earlier decisions of the Supreme Court has laid down the aforesaid legal principle. Therefore, he submits that the action of the State Government regarding acquisition of the land by issuing Section 6

Declaratory notification, the alleged issuance of the certificate of possession of the land in question in favour of C.D.A. and passing of award in the year 2004 in favour of the District Collector of Cuttack are bad in law and therefore he has prayed to quash the same. It is further contended by him that as on the date of initiation of the acquisition proceedings in respect of the acquired land, there was a lis pending between the petitioner's mother and the State Government as she had preferred a claim under the provision of O.E.A. Act before the Tahasildar, Sadar, Cuttack to determine her statutory right of conferring the tenancy rights over the land in question to which she was legally entitled. Therefore, non-mentioning of this fact in the preliminary notification that the land of the petitioner proposed to be acquired was involved in litigation as the proceedings were pending before the Tahasildar at the instance of the petitioner's mother and not issuing notice to the petitioner's mother either at the stage of Section 4(1) or before passing of the award or at the time of alleged taking over possession of the land which is required to be followed and following the procedure to be followed for issuing notice under Section 9 & 10 of the L.A. Act before passing of the award and passing of the award admittedly beyond two years period stipulated under proviso to Section 11-A, the acquisition proceedings lapsed.

4. Learned Senior Advocate for the petitioner further places strong reliance upon the decision of the Supreme Court in the case of ***S.Pratap Singh V. State of Punjab*** reported in AIR 1964 SC 72, and submits that the acquisition of land by the State Government for the public purpose for formation of the residential lay out in the municipal area of Cuttack by the Cuttack Development Authority without following the well established statutory procedure, which is mandatory in law is an arbitrary exercise of power. Therefore, the proceedings are rendered as void ab initio in law as the action of the State Govt. is a fraud on power. The Land Acquisition Officer has exercised his power and passed an award in favour of the Collector of the Cuttack District in respect of the lands involved in this case after lapse of nearly 20 years despite the fact that the petitioner's mother's right was crystallized by the Addl. Tahasildar which decision is affirmed by the Apex Court in relation to her tenancy claim, to which proceedings the State Government and its Officers were parties. The exercise of power under Section 11by the Land Acquisition Officer to pass an award is fraud on power and the same is not sustainable in law as the acquisition proceedings lapsed under Section 11-A of the L.A. Act. Therefore, the award passed by the Collector is a nullity in the eye of law more than one reason, namely, it is not passed within two years from the date of declaration under Section 6 i.e. 18.10.1984 and award was passed on 6.2.2004 not in favour of the petitioner's mother. Undisputedly, there was no award passed within two

years in favour of the petitioner's mother and no notice was issued under Sections 9 & 10 of the L.A. Act to her as she was the owner of the property and therefore she was entitled for hearing in the proceedings to determine the market value of the acquired land. Therefore, passing of the ward in favour of the Collector of the district is bad in law. It is further urged that even assuming for the sake of argument without admitting that the acquired land is a Govt. Land pursuant to the abolition of estates under the O.E.A. Act and vested with the State govt., passing of an award in respect of Govt. land in favour of the Collector did not arise as no acquisition proceedings are required to be initiated for acquisition of Govt. land, which is well established principle of law.

5. Learned Senior Advocate appearing on behalf of the petitioner places reliance upon the constitutional Bench judgment of the Supreme Court in the case of S.Pratap Singh (supra), wherein the Apex Court was examining the pleasure theory exercising its power under Article 310 of the Constitution of India and in paragraph 5 of the said judgment it has referred to the judgment of the House of Lords in the case lf Lazarus Estates Ltd. V. Beasley reported in 1956-1 ALL E R 341 at page 345 in support of the following proposition of law. "If the power is required to be exercised by the State Government in accordance with the provisions of the Act and if it is not done in that manner, it is fraud on power". Therefore, it is urged by the learned Senior Advocate that the action of the State Government in acquiring the land by issuing notifications under Sections 4 & 17 of the L.A. Act without mentioning the name of the petitioner's mother as she has claimed tenancy rights and proceedings were pending at that relevant time and dispensing with the statutory enquiry as provided under Section 5-A of the L.A. Act by issuing Section 17(1) & (4) notifications, which power could not have been invoked for the purpose for which the land was proposed to be acquired, is a nullity in the eye of law. In fact, the said proposition of law has been laid down by the Supreme Court in another context referring to various other judgments of the House of Lords, which are extensively referred to in the Pratap Singh's case (supra). Strong reliance is also placed upon the said judgment to quash the acquisition proceedings contending that Section 4(1), Section 17(4) & Section 6 notifications and the award passed by the Collector are all void ab initio in law for the reason that the exercise of power by the State Govt. is a fraud on power.

6. The State Government has filed a detailed statement of counter traversing the petition averments denying the rights claimed by the petitioner and sought to justify the acquisition proceedings initiated by the State Government at the instance of the Development Authority contending that

the Development Authority has got statutory duties to be performed by acquiring the lands of the private owners through the State Government for the purpose of implementing the housing scheme and forming a residential lay out in the metropolitan area of the Authority and allot the sites in favour of eligible persons. Mr. R.K. Mohapatra, learned Govt. Advocate contends that the Development Authority is a statutory Authority established for the purpose of implementation of statutory provisions of the Orissa Development Authority Act. The Development Authority of Cuttack having regard to the fact that the population of the metropolitan area of Cuttack City and Cuttack Development Authority, has increased and Orissa Development Authority Act casts statutory obligation on the part of the Development Authority to prepare housing scheme and implement the same. For this purpose, it has acquired land through the State Government to develop the land and form the residential lay out and allot the sites in favour of the needy eligible residents, who have been residing within the area of the Development Authority, as the residents of the Orissa State have got the fundamental right guaranteed under Article 19(1)(e) of the Constitution of India to have residence for their peaceful living. Therefore, he submits that the process of acquisition of land was initiated by the Development Authority and on the basis of that acquisition for implementation of housing scheme, the State Government after being satisfied with the requisition of the Authority has issued the impugned notifications for the purpose of acquiring land in exercise of its eminent domain and statutory powers under Section 4(1) of L.A. Act including the various items of land proposed to be acquired the same that was followed by Section 17(1)(4) notification of L.A. Act as the Development Authority made a requisition to the State Government to meet the urgent need of acquisition of land dispensing with the enquiry as provided under Section 5-A of the L.A. Act on the ground that if the proceedings are protracted, the purpose for which the land sought to be acquired will be defeated. Therefore Section 17(1)(4) notification of L.A. Act was also issued by the State Government subsequently after issuing Section 4(1) notification dispensing with the statutory right of enquiry of the petitioner's mother before issuing the declaratory notification under Section 6 of the L.A. Act.

7. It is further contended by learned Govt. Advocate that even before amendment of Section 17 by Act No.68/1984, exercise of power by the State Government for issuance of notification under Section 17 of the L.A. Act is perfectly legal and valid and thereafter final notification under Section 6 was issued and possession of the land involved in this proceedings was taken by the Government and thereafter certificate of possession has been issued in favour of the Cuttack Development Authority. Therefore, it is contended by

Mr. Mohapatra that the acquisition of land is for the public purpose, which is permissible under the L.A. Act and that power has been exercised by the State Government to discharge the constitutional obligation towards the residents of Cuttack Development Authority to facilitate the Development Authority to implement its housing scheme by forming a residential lay out and allot the sites in favour of the eligible applicants. Therefore, he submits that the various legal contentions urged on behalf of the petitioner that the action of the State government in acquiring the land in question is void ab initio in law for the reason of non-compliance of Section 5-A, the award not being passed within two years from the date of publication of Section 6 declaratory notification dated 18.10.1984 and the land acquisition proceedings are lapsed under Section 11-A of the L.A. Act are all wholly untenable in law. Further he contends that the land having been included in the housing scheme and the lay out plan and the modified lay out plan having already been approved by the Development Authority, the acquisition proceedings should not be quashed by this Court in exercise of its judicial review power at this belated stage, as the petitioner is not entitled to the relief sought for as he has not been diligent in prosecuting his rights and the public interest will be adversely affected.

8. Mr. P.K. Mohanty, learned counsel appearing on behalf of the opp.party no.3-Cuttack Development Authority submits that the acquisition proceedings are legal and valid and he further submits placing reliance upon the decisions of the Supreme Court in the cases of ***Govt. of A.P. and others V. Kollutla Obi Reddy and others*****,** reported in (2005) 6 SCC 493, ***Haryana State Handloom & Handicrafts Corpn.Ltd. and another V. Jain School Society*****,** reported in (2003) 12 SCC 538, that acquisition proceedings in the case on hand were initiated in the year 1983 and concluded in the year 2004. The petitioner slept over his rights. He further contends that there is enormous delay on the part of the petitioner in approaching this Court seeking a discretionary relief from this Court to quash the acquisition proceedings. Therefore, the delay and laches alone is sufficient for dismissing the writ petition.

9. Mr. Mohanty further contends that the amendment to Section 11 of the L.A. Act by Act 68 of 1984 has no application to the facts situation of the case as the said Section provides for an Explanation that in computing the period of two years during which any action or proceedings are initiated in pursuance of the declaration and an order of stay has been passed, such period shall be excluded for computation of two years from the date of publication of Section 6 notification. Further, he places reliance upon the judgment of this Court disposed of on 3.12.1991 in O.J.C. No.2652 of 1987,

the right of the petitioner's mother was crystallized when she has been declared as raiyat in respect of the acquired land by the Addl. Tahasildar-cum-O.E.A. Collector, Cuttack on 1.10.1982 assessing rent and salami and at that time there was no correction of the R.O.R. in favour of the petitioner. The said order dated 1.10.1982 was the subject matter of O.E.A. R.C. Nos.92 and 93 of 1983U/s.38-B of the O.E.A. Act before the Member, Board of Revenue, Orissa, Cuttack. The Member, Board of Revenue vide common order dated 12.5.1987 set aside the order dated 1.10.1982 passed by the O.E.A.Collector. The order dated 12.5.1987 of the Member, Board of Revenue was subject matter before this Court in O.J.C. No.2652 of 1987. After hearing, the order dated 12.5.1987 of the Member, Board of Revenue was set aside by this Court vide order dated 3.12.1991. Assailing the said order dated 3.12.1991 of this Court, State of Orissa filed S.L.P.(Civil) No.9861 of 1992 before the Apex Court, which was dismissed vide order dated 9.4.1996. Thereafter, the State Govt. filed Review Petition bearing RPO No.2891 assailing the order dated 9.4.1996 passed in S.L.P. (Civil) No.9861 of 1992 which was also dismissed by the Apex Court vide order dated 11.3.1997.

For correction of R.O.R., the petitioner had approached this Court by filing W.P.(C) No.11261 of 2003. In the said writ application, there was no challenge to the validity of the impugned notifications issued under the L.A. Act. Further he submits that upon the publication of notification under Section 17(1) & (4) of the L.A. Act, possession of the land has been immediately taken by the State Government before Section 6 declaratory notification was published. Therefore, the contention urged on behalf of the petitioner that after passing of the award in respect of the acquired land, possession of the same was required to be taken is wholly untenable in law. He further places reliance upon the judgment of the Supreme Court in the case of ***Govt. of Andhra Pradesh and others V. Kollutla Obi Reddy and others*** (supra) in support of the proposition of law laid down by the Supreme Court that High Court was moved by filing writ petition by the petitioners in the above cases long after Section 4(1) and Section 6 declaratory notifications were published. On this ground alone, the writ petitions were not entertained as they were barred by delay and laches. He further places reliance upon another judgment of the Supreme Court in the case of ***Haryana State Handloom & Handicrafts Corpn. Ltd. and another V. Jain School Society*****,** (supra) in support of the proposition of law that in inordinate delay in filing the writ petition, the Court shall not exercise its power for grant of relief. There is delay of 22 years in filing this writ petition. Therefore, the same shall not be entertained by this Court in exercise of its discretionary power. He also places reliance upon the decision of the

Supreme Court in the case of ***Banba Development Authority, Banda V. Motilal Agarwal and others***, reported in (2011) 5 SCC 394 in support of the proposition of law that in matters relating to public purpose, the Apex Court has consistently held that it should be viewed seriously and relief was denied to the petitioner for delay in the said case. The aforesaid decisions of the Apex Court are aptly applicable to the case on hand. Further the Apex Court has held that delay of few years would be fatal, if acquired land has been partly or wholly utilized for the public purpose. He also places reliance upon the judgment of this Court in O.J.C. No.2652 of 1987 dated 3.12.1991 wherein the right of the petitioner's mother was crystallized and she has been declared as a raiyat by the Addl. Tahasildar on 1.10.1982 assessing the rent and salami. Further it is contended that there is enormous delay in filing this Writ Petition, which has not been properly explained by the petitioner, therefore, his claim need not be granted by this Court in exercise of its discretionary power under Article 226 of the Constitution.

10. Further it is contended by the learned counsel on the merits of this case that the land in question acquired by the State government possession of the same was taken by it under Section 17(1) of the L.A. Act, the same was handed over to the C.D.A. which has developed over a portion of Ac.1.802 decimals by forming a road dividing Sectors 8 & 11 the land measuring Ac.0.718 decimals and the balance area of Ac.6.470 decimals have been reserved for a group housing complex for construction of a cluster of duplex houses. Therefore, the nature of the acquired land has been changed. At this belated stage quashing of the acquisition proceedings by this Court in respect of the land in question will be against the public interest and therefore, he submits that the petitioner is not entitled to the reliefs as prayed for in this writ petition.

11. He further places reliance upon the judgment of the Supreme Court in the case of ***U.P. Jal Nigam, Lucknow through its Chairman and another V. Kalra Properties (P) Ltd., Lucknow and others*** in (1996) 3 SCC 124 in support of the legal contention that in exercise of the power under Section 17(1) & (4) dispensing with the enquiry under Section 5-A of the L.A. Act and on service of the notice under Section 4(1) of the Act the possession of the land in question was taken by the State Government and the same was handed over to the Authority, since emergency was there to acquire the land. Therefore, it is held in that case that the land vested with the State Government under Section 17 (2) is free from all encumbrances. Further it is urged that it is settled position of law that once possession of the acquired land is taken by the State government by operation of Section 17(1) of the L.A. Act, the land vests in the State Government free from all

encumbrances and unless a notification under Section 48(1) of the L.A. Act is published in the Gazette withdrawing from the acquisition of land, the acquisition made by the State Govt. will be valid. Therefore, the petitioner is not entitled to the reliefs as claimed by him. Hence he has prayed for dismissal of the writ petition.

12. He has also placed reliance upon another decision of the Supreme Court in the case of ***Satendra Prasad Jain and others V. State of U.P. and others*****,** reported in (1993) 4 SCC 369, wherein three Judge Bench of the Supreme Court has held that Section 11-A of the L.A. Act is intended to benefit the land owner and ensure that the award is made within a period of two years from the date of publication of Section 6 declaratory notification. Therefore, when the Government fails to make an award within two years of the declaratory notification as required under Section 6 by virtue of the provisions of Section 11, the land is still not vested with the State Government, its title remains with the owner and the acquisition proceedings shall lapse under Section 11-A is not tenable in law. When Section 17(1) of L.A. Act is applied to acquire the land in question by reason for emergency, situation prevails for acquisition of private land. The State Government takes possession of the land prior to making of the award under Section 11 and the owner will be divested of his title to the land, which is vested in the State Government. Therefore, Section 11-A has no application to the cases of acquisition of land in view of Section 17(1) & (4) notifications of the L.A. Act. Hence, the learned counsel contends that the reliance placed upon the provisions of Section 11-A & submission made on behalf of the petitioner in this regard placing reliance upon the decisions of the Apex Court referred to supra is wholly untenable in law as the same is not applicable to the case on hand.

13. He also further places reliance upon the decision of the Supreme Court in the case of ***Awadh Bihari Yadav and others V. State of Bihar*****,** reported in (1995) 6 SCC 31, where it is held that Section 11-A is not attracted to the fact situation and acquisition proceedings would not be lapsed, even if, no award is made within the period prescribed by Section 11. Further he places reliance upon the decision of the Supreme Court in ***Banda Development Authority, Banda (supra) wherein the Supreme*** Court laid down the principle after following the decision in ***Satendra Prasad Jain and others*** (supra)wherein the Supreme Court has stated that the ratio laid down in the said case is not applicable in the facts situation of this case. Therefore, the learned counsel contends that the petitioner is not entitled to the reliefs as prayed for. Therefore, he has prayed for dismissal of the writ petition.

14. With reference to the above rival factual and legal contentions urged on behalf of the parties, the points that would arise for consideration are as follows:-

(i) Whether the petition is liable to be rejected solely on the ground of delay and laces?

(ii) Whether notification published under Sections 4 (1) & 17(1) (4) dispensing with the enquiry as provided under Section 5-A, is permissible in law to the fact situation?

(iii) Whether Section 17(1) read with Section 17(4) is applicable to the facts situation ?

(iv) Whether the acquisition proceedings in respect of the petitioner's land without mentioning the name of the claimant's mother in the relevant column who was already before the Tahasildar in respect of the land in question for conferment of right on her under the O.E.A. Act and acquiring the land in favour of the Development Authority is legal and valid ?

(v) Whether non-passing of award within two years from the date of publication of Section 6 declaratory notification is legal and valid and whether passing of award in favour of the Collector after lapse of 20 years from the date of declaration is legal and valid and acquisition of land under Section 11-A of L.A. Act is lapsed or not ?

(vi) What relief the petitioner is entitled to ?

15. The first and second points are required to be answered against the opposite parties together as they are interrelated for the following reasons.

It is an undisputed fact that the land was a tenanted land. Statutory right was conferred upon the original tenant viz. mother of the petitioner under the provisions of O.E.A. Act. An application was filed by the petitioner's mother as a tenant before the Tahasildar, Sadar, Cuttack. Proceedings were registered in OEA Case Nos.48 & 49 of 1968-69. Despite this undisputed fact, a preliminary notification under Section 4(1) of the L.A. Act was issued without mentioning the name of the mother of the petitioner as her claim in respect of the land in question was pending but on the other hand, the name of the Collector of Cuttack district was mentioned in the

relevant column "Khatedar" of the notification. The rayati right was conferred upon the mother of the petitioner in respect of the land in question, as she was the original applicant. Therefore, the right of the petitioner's mother was crystallized against which order the case was taken up before the Supreme Court by the State Govt. by filing S.L.P. (Civil) and the same was dismissed so also the review petition was dismissed in 1997. This fact would clearly go to show that the petitioner's mother was the original applicant and she was declared to have rayati right. Therefore, the acquisition proceedings in respect of the land in question showing the name of the Collector that it is a Government land and after abolition of estate by virtue of the O.E.A. Act, it vested with the State Government is wholly untenable in law. The statutory right was conferred upon the tenant, the mother of the petitioner and that right has been crystallized in her favour by virtue of the order of the Tahasildar of Sadar Cuttack which order has attained finality. Therefore, the description of the name of the Collector of the District in the column of the owner/occupant of the impugned notifications is not legally correct. Hence, issuance of Section 4(1) notification by the State government is bad in law. The said notification was followed by Section 17(1)(2) & (4) notifications. The provisions of the said Section has no application to the fact situation in respect of the land in question for the reason that there was no need for the acquisition of private owner's land for the purpose of formation of the residential lay out as there was no emergency for acquisition of land at all. Invoking of the emergency provisions of Section 17(4) by the State Government to acquire the land of the petitioner along with other land in favour of the C.D.A. by dispensing with statutory right of enquiry of the mother of the petitioner as provided under Section 5-A of the L.A. Act, is a fraud on power on the part of the State Govt. and dispensing with such right of enquiry of the petitioner's mother as provided under Section 5-A of the Act is in violation of human right is the law declared by the Apex Court in the case of ***Devinder Singh and others V. State of Punjab and others,*** AIR 2008 SC 261.

16. The factual and legal contention urged by the learned Govt. Advocate and learned counsel for the Development Authority that possession of the land from the mother of the petitioner was taken over in pursuance of Section 17(1) notification is once again arbitrary exercise of power by the State government, as such power is not conferred upon it and the land in question could not have been acquired by the State Government in favour of the C.D.A. invoking the emergency provision contained in sub-section (1) of Section 17 read with sub-sections (2) & (4) thereof. The purpose for which the land is acquired is not provided under un-amended provisions of Section 17(4). Even after the amendment to the said provision by Act No.68 of 1984,

no such purpose is also provided in the above said provisions for acquisition of land on emergency situation which came into force with effect from 24.9.1984. Therefore, the exercise of power by the State Government to acquire land of the petitioner in favour of the C.D.A. for the formation of residential lay out is a fraud on power, which action of it is a nullity in the eye of law as held by the Supreme Court in the case of ***S.Pratap Singh V. State of Punjab*** (supra) upon which Mr. Padhi, learned Senior Advocate for the petitioner places his reliance in support of his legal submissions. The Supreme Court, after referring to the house of Lords judgment in the case of ***Lazarus Estates Ltd. V. Beasley (supra),*** at paragraph 5 of the said judgment, has laid down the law which reads thus:

> "…….No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud".

Further at paragraph 6 with reference to the judgment of appeal cases in the case of ***Municipal Council of Sydney V. Cambell,*** 1925 A C 338 at page 343, the same issue has been dealt with, the relevant portion of which reads thus:

> "…….In the context of an allegation that the statutory power vested in a municipal corporation to acquire property had been used in bad faith which was held to have been proved, stated:
>
> A body such as the Municipal Council of Sydney, authorized to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes and if it attempts to do so, the Courts will interfere. As Lord Loreburn said, in Clanricarde Marquess V. Congested Districts Board of Ireland (1914) 79 J.P. 481: "Whether it does so or not is a question of fact." Where the proceedings of the Council, are attacked upon this ground, the party impeaching those proceedings must, of course, prove that the Council, though professing to exercise its powers for the statutory purpose, is in fact employing them in furtherance of some ulterior object."

In the same paragraph, reference has also been made to the case in ***Reg V. Governors of Darlington School, (***1844) 6 Q B 682 at page 715, the relevant portion of which is extracted hereunder.

> "No public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to

be that of the body, but proved to be committed in bad faith or from corrupt motives, would certainly be held to be inoperative.

It may be also possible to prove that an act of the public body, though performed in good faith and without the taint of corruption, was so clearly founded on alien and irrelevant grounds as too be outside the authority conferred upon the body, and therefore inoperative. It is difficult to suggest any act which would be held ultra vires under this head though performed bona fide."

In paragraph 7 of the aforesaid case, reference has been made to another judgment of Lord Lindley in ***General Assembly of Free Church of Scotland V. Overtoun,*** 1904 AC 515, wherein at page 695 the learned Lord said:

" I take it to be clear that there is condition implied in this as well as in other instruments which create powers, namely, that the power shall be used bona fide for the purpose for which they are conferred."

17. At this state it would be necessary to refer to another judgment of the Supreme Court in the case of State of ***Punjab and another V. Gurdial Singh and others***, reported in AIR 1980 SC 319 in which at paragraph 9 the Supreme Court has made an observation regarding the validity of the land acquisition proceeding, which reads thus:

"The question then, is what is mala fides in the jurisprudence of power ? Legal malice is gibberish unless juristic clarity keeps it separate from the popular concept of personal vice. Pithily put, bad faith which invalidates the exercise of power – sometimes called colourable exercise or fraud on power and oftentimes overlaps motives, passions and satisfactions – is the attainment of ends beyond the sanctioned purposes of power by simulation or pretension of gaining a legitimate goal. If the use of the power is for the fulfillment of a legitimate object the actuation or catalysation by malic is not legicidal. The action is bad where the true object is to reach an end different from the one for which the power is entrusted, goaded by extraneous considerations, good or bad, but irrelevant to the entrustment. When the custodian of power is influenced in its exercise by considerations outside those for promotion of which the power is vested the court calls it a colourable exercise and is undeceived by illusion. In a broad, blurred sense, Benjamin Disraeli was not off the mark even in law when he stated. "I repeat ….. that all power is a trust – that we are accountable for its exercise – that

> from the people, and for the people, all springs, and all must exist." Fraud on power voids the order if it is not exercise bona fide for the end designed . Fraud in this context is not equal to moral turpitude and embraces all cases in which the action impugned is to affect some object which is beyond the purpose and intent of the power, whether this be malice-laden or even benign. If the purpose is corrupt the resultant act is bad. If considerations, foreign to the scope of the power or extraneous to the statute, enter the verdict or impels the action mala fides or fraud on power vitiates the acquisition or other official act."
>
> (Emphasis laid by the Court)

18. In the judgment rendered by the Apex Court in ***Pratap Singh's*** case referred to supra, in which the decisions of constitutional Bench, House of Lords and other Courts have been exhaustively dealt with, and in the case of ***State of Punjab and another V. Gurdial Singh and others*** referred to supra, the law has been laid down by the Apex Court stating that if the Authority exercises its power for oblique motive but not bona fide it amounts to fraud on power. The said cases are aptly applicable to the facts situation of the case on hand. Section 17(1)(2) & (4) notification has been issued dispensing with the statutory right of enquiry of the mother of the petitioner, which is held to be a human right in the Devinder Singh's case referred to supra. Exercising the power by the State Government under the provisions of Section 17 & taking possession of the land of the petitioner is a valuable constitutional right conferred upon the petitioner's mother under Article 300-A of the Constitution. Therefore, deprivation of such valuable constitutional and statutory right, particularly by not giving an opportunity of hearing to the petitioner's mother and straightway declaring the land by notifying under Section 6 of the L.A. Act which is acquired for public purpose in favour of the C.D.A., is not in consonance with the settled legal position. Further under the guise of public purpose, possession of the land has been taken under emergency provision of Section 17(1), which power is not available to the State Government for the purpose of acquiring land in favour of the Development Authority and taking over possession of the land and handing over the same to the Authority is a fraud on power exercised by the State Government. Therefore, the above said action of the State Government is void ab initio in law. Thus, the question of delay and laches shall not come in the way of this Court to exercise its power and jurisdiction as held by the Supreme Court in the case of S.Pratap Singh V. State of Punjab (supra).

> "9. Pausing here, we might summarize the position by stating that the Court is not an appellate forum where the correctness of an order of Government could be canvassed and, indeed, it has

> no jurisdiction to substitute its own view as to the necessity or desirability of initiating disciplinary proceedings, for the entirety of the power, jurisdiction and discretion in that regard its vested by law in the Government. The only question which could be considered by the Court is whether the authority vested with the power has paid attention to or taken into account circumstances, events or matters wholly extraneous to the purpose for which the power was vested, or whether the proceedings have been initiated mala fide for satisfying a private or personal grudge of the authority against the officer. If the act is in excess of the power granted or is an abuse or misuse of power, the matter is capable of interference and rectification by the Court. In such an event the fact that the authority concerned denies the charge of mala fides,or asserts the absence of oblique motives or of its having taken into consideration improper or irrelevant matter does not preclude the Court from enquiring into the truth of the allegations made against the authority and affording appropriate reliefs to the party aggrieved by such illegality or abuse of power in the event of the allegations being made out."

19. For the foregoing reasons, reliance placed on the decisions of the Supreme Court by the learned Government Advocate and learned counsel for the C.D.A. which are referred to above are untenable in law as the same do not apply to the fact situation of the present case. Hence, we have to answer the first point in favour of the petitioner that the delay and laches shall not come in the way of the petitioner and the same is rejected.

20. Having answered to the first point for the reasons elaborately stated by publication of Sections 4 & 17 notifications dispensing with the enquiry as provided under Section 5-A, the statutory right of hearing to the petitioner's mother is violated. Therefore, Section 6 notification is also bad in law. The said notification is also void ab initio for non-compliance of the requirement of issuing the notice and conducting an enquiry by giving opportunity of filing an objection to Section 4(1) notification and hearing to the petitioner as provided under Section 5-A of the L.A. Act and in compliance with the principles of natural justice. Accordingly, we have to answer the second point in favour of the petitioner.

Answer to Point No.(iii)

21. Issuance of notification under Section 17(1) read with Section 17(4) dated 3.8.1983 to acquire the land in question along with other lands under the emergency provision which was not available either prior to amendment to Section 17(2) of the L.A. Act or subsequent to amendment to the provision by Act No.68/84 came into force w.e.f. 24.9.84 to acquire the land for the

purpose of formation of residential lay out by the State Government in favour of the C.D.A. for implementation of its housing scheme. Therefore, exercise of statutory power by the State Government under Section 17(1) read with Section 17(4) dispensing with the statutory requirement of enquiry as provided under Section 5-A of the L.A. Act is bad in law. In this regard, Hon'ble Supreme Court in the cases of ***Hindustan Petroleum Corpn. Ltd. V. Darius Shaper Chenai and others,*** reported in 2005 (7) SCC 627 and ***Devinder Singh and others V. State of Punjab and others***, AIR 2008 SC 261, has held that conducting of enquiry after issuing notification under Section 4(1) of the L.A. Act is not only the statutory right, but also a human right. Therefore, issuance of the above said notification and the alleged taking over possession of the land under Section 17(1) of the L.A. Act as contended by the learned counsel on behalf of the opposite party Nos.1 & 2 is also without authority of law, as the State Govt. has erroneously invoked the said provisions of the Act to take over possession of the land and handed over the same in favour of the C.D.A. is illegal as it is opposed to the statutory provisions of Section 17(2) of the L.A. Act. Therefore, issuance of notification under Section 17(1) read with Section 17(4) is bad in law and the same cannot be allowed to sustain and is liable to be quashed.

Answer to Point No.(iv)

22. The acquisition proceedings are initiated by the State Government at the instance of the C.D.A. without mentioning the petitioner's mother's name either in Section 4(1) or Section 6 declaratory notification and also in the award though her statutory right of raiyat upon the land in question under the O.E.A. Act was conferred by the Additional Tahasildar, Sadar, Cuttack as on the date of issuance of Section 4(1) and Section 6 notifications, her statutory right was crystallized. The action of the Revenue Authorities without effecting her name in the R.O.R. and mentioning her name in the notifications issued under Sections 4(1), 17(1) & 17(4) and Section 6, but mentioning the name of the District Collector and acquiring the land by the State Government in favour of the C.D.A. is not legal and valid. The statutory right to file valid objections to the pre-notification proposing to acquire the land for the housing scheme framed by the CDA, not only affected the statutory right, but also the constitutional right guaranteed to the mother of the petitioner under Article 300-A of the Constitution and thereby it has deprived the livelihood of the petitioner as well as his family members. Therefore, it has infringed the Fundamental Right guaranteed under Article 21 of the Constitution of India. Thus, initiation of acquisition proceedings without mentioning the name of the petitioner's late mother in the impugned notifications for acquisition of the land is vitiated in law as the same are contrary to the provision of the L.A.

Act and also amount to deprivation of fundamental and constitutional rights of the petitioner. Therefore, the acquisition proceedings in respect of the land in question are bad in law.

23. Accordingly, point nos.(i),(ii),(iii) & (iv) are answered against the opp.parties and in favour of the petitioner.

Answer to Point No.(v)

24. The award is not passed within two years from the date of publication of notification under Section 6 of the L.A. Act. It is an undisputed fact that the final notification was issued on 18.10.1984 and hence by 17.10.1986 the award should have been passed by the Collector as required under Section 11-A of the Act. There was no stay of the acquisition proceedings in respect of the land in question in any court of law. In this view of the matter, not passing an award within two years by the Collector from the date of publication of Section 6notification, the acquisition proceedings have become lapsed under Section 11-A. The period of limitation is fixed under Section 11-A after amendment of the L.A. Act by Act No.68 of 1984, with the avowed object that non-passing of the award in absence of stipulation of the period of limitation, the land owners have been adversely affected. Therefore, the period of limitation is prescribed for passing of the award by the Collector. Non-passing of the award in favour of the owner in this case and passing of the same after 20 years in the name of the Collector is not tenable in law and hence, the acquisition proceedings have become lapsed. When the rights in relation to the land in question were conferred upon the mother of the petitioner, the passing of the award in favour of the Collector and the alleged taking over possession and transfer of the land by handing over possession certificate are all void ab initio in law. Further, as per the judgment of the Supreme Court with regard to taking over possession of the acquired land by the Collector, he should have produced document to evidence the fact of taking over possession of the acquired land from the petitioner's mother. However, it is undisputed fact that possession of land was not taken either from the petitioner's mother or the petitioner as the right upon the land was granted in her favour by the Addl. Tahasildar-cum-O.E.A., Collector.

25. Therefore, we have to hold that possession of the land has not been taken from the owner of the land. What has been taken by the Collector in this case is only the paper possession, but not the physical possession. The procedure required to be followed for taking over the land has been clearly observed at paragraph 26 in the judgment of the Supreme Court in the case

of **Balwant Narayan Bhagde V. M.D. Bhagwat and others (supra),** the relevant portion of which is quoted below:-

> "In a proceeding under the Act for acquisition of land all interests are wiped out. Actual possession of the land becomes necessary for its use for the public purpose for which it has been acquired. Therefore, the taking of possession under the Act cannot be "symbolical" in the sense as generally understood in Civil Law. Surely it cannot be a possession merely on paper. What is required under the Act is the taking of actual possession on the spot. In the eye of law the taking of possession will have the effect of transferring possession from the owner or the occupant of the land to the Government."

26. Accordingly, the above observation with regard to taking over possession of the acquired land squarely applied to the case on hand. On the basis of the certificate issued to the Development Authority by the State Govt., the contention urged on behalf of opposite party nos. 1 & 2 is wholly untenable in law for the reason that there is no proof to evidence the fact of taking over possession of the land from the petitioner's mother. Non-passing of the award in favour of the petitioner's mother has rendered the proceedings lapsed under Section 11-A of the L.A. Act. Therefore, this Court has to declare the same as bad in law and we hold that acquisition proceedings in respect of the land involved in this petition have lapsed. Accordingly, we answer the Point No.(v) in favour of the petitioner.

Answer to Point No.(vi)

26. Even though all the points are answered in favour of the petitioner, what is the relief required to be granted in favour of the petitioner, having regard to the facts and circumstances of the case, is the question we are required to answer in this case. It would, therefore, be necessary for us to refer to the decision of the Supreme Court in the case of ***Pasupuleti Venketeswarlu V. The Motor & General Traders,*** AIR 1975 SC 1409, wherein the Supreme Court while interpreting Order 7 Rule 7 and Order 41 Rule 25 of the C.P.C. after referring to the Federal Court judgment in the case of ***Lachmeshwar Prasad Shukul and others V. Keshwar Lal Chaudhuri and others*****,** reported in AIR 1941 FC-5 = 1940 FCR 84, the leading case on the points, has made observation, which reads thus.

> " …… It is basis to our processual jurisprudence that the right to relief must be judged to exist as on the date a suitor institutes the

legal proceeding. Equally clear is the principle that procedure is the handmaid and not the mistress of the judicial process. If a fact, arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy. Equity justifies bending the rules of procedure, where no specific provision or fairplay is violated, with a view to promote substantial justice-subject, of course, to the absence of other disentitling factors or just circumstances. Nor can we contemplate any limitation on this power to take note of updated facts to confine it to the trial Court. If the litigation pends, the power exists absent other special circumstances repelling resort to that course in law or justice. Rulings on this point are legion, even as situations for applications of this equitable rule are myriad. We affirm the proposition that for making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court can, and in many cases must, take cautious cognizance of events and developments subsequent to the institution of the proceeding provided the rules of fairness to both sides are scrupulously obeyed."

28. In the above case, the Apex Court has referred to the rule adopted by the Supreme Court of the United States in ***Patterson V. State of Alabama*** reported in (1934) 294 US 600 at page 607; which runs as follows:

> "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered."
>
> (Emphasis laid by this Court)

That view on the Court's powers was reaffirmed once again in the then recent case of ***Minnesota V. National Tea Co***. (1940) 309 US 551 at Page 555. Sulaiman J, in the same case 1940 FCR 84 = (AIR 1941 FC5) relied on English cases and took the view that an appeal is by way of a re-hearing and the Court may make such order as the Judge of the first instance could have made if the case had been heard by him at the date on which the appeal was heard (emphasis is made). It is also on the theory of an appeal being in the nature of rehearing that the Courts in this country have in numerous

cases recognized that in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take in to account even facts and events which have come in to existence after the decree appealed against. In this case the power of appeal is not akin to that of the judicial review and the power conferred upon the court does not stand in the way to mould the justice. The power of judicial review is a discretionary power. The impugned acquisition proceedings were initiated in 1983 and concluded in the year 2004 and in between lot of subsequent developments have taken place by the C.D.A. in the lay out for which purpose the land was acquired and the possession has been taken over, but the said contention does not stand in the way to exercise the power of judicial review by this Court. But the fact remains that even the status quo order was in force in this case by virtue of interim order, the area surrounding the land in question has been taken over and the same is transferred in favour of the Development Authority, the housing scheme has been implemented by it by forming a lay out plan as per the Orissa Development Authority Act and the same has been approved by the Planning Authority. It is stated by the learned counsel for the Development Authority that a portion of the land in question has been used for road and other portion has been used as Park which is one of the statutory requirements to be performed by the C.D.A. to provide a park in the residential lay out and remaining larger area is reserved for housing complex to be built. So, these are the relevant factors required to be taken into consideration by this Court for the purpose of moulding the relief in favour of the petitioner in this petition. Though we have said that the acquisition proceedings are void ab initio in law, we have answered the above contentious points in favour of the petitioner. Having regard to the facts and circumstances of this case, justice has to be done to both the parties by this Court in exercise of the judicial power by moulding the relief which is permissible in law as held by the Apex Court in the case referred to supra. If we quash the acquisition proceedings having answered issue nos.(i) to (v) in favour of the petitioner then we have to give liberty to the State Government to re-do the acquisition proceedings, which will protract the proceedings and the public purpose for which the land was acquired will be lost. Therefore, it would be suffice for this Court, instead of giving liberty to the State Government to acquire the land by initiating proceedings afresh without quashing the acquisition proceedings & notifications, to give direction to the State Government to award compensation in favour of the petitioner taking in to consideration the purpose for which the land in question has been acquired and the amount of compensation shall be determined on the basis of the market value prevailing as on today, as held by the Privy Council in the case of Vyricherla Narayana Gajapatiraju V. Revenue Divisional Officer,

Vizagapatam, reported in AIR 1939 Privy Council 98, the relevant portion of the judgment reads as follows:

> " …….. The compensation must be determined therefore by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy must alike be disregarded. Neither must be considered as acting under compulsion. This This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. But this does not mean that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth. But the question of what it may be worth, that is to say, to what extent is should affect the compensation to be awarded is one that will be dealt with later in this judgment. It may also be observed in passing that it is often said that it is the value of the land to the vendor that has to be estimated. This however is not in strictness accurate. The land, for instance, may have for the vendor a sentimental value for in excess of its "market value". But the compensation must not be increased by reason of any such consideration. The vendor is to be treated as a vendor willing to sell at "the market price" to use the words of Sec.23 of the Indian Act."

29. So, it would be suffice for this Court to hold that though the petitioner succeeds in the writ petition, we need not quash the acquisition proceedings and award as prayed for by the petitioner. We hold that the land acquisition proceedings and award are void ab initio in law. But as the land is required to be acquired for the purpose of forming residential lay out and the allotment of sites in favour of the residents as rightly contended by Mr. Mohapatra, learned Govt. Advocate that public purpose is the prime consideration against the private interest, we have to mould the reliefs as prayed for by the petitioner. In this regard, in the case of ***Ramniklal N. Bhutta and another V. State of Maharashtra and others***, reported in AIR 1997 SC 1236 upon which reliance has been rightly placed by the learned Govt. Advocate, the Apex Court has held at paragraph 10, the relevant portion of which reads thus:

> "…….. The courts have to weigh the public interest vis-à-vis the private interest while exercising the power under Article 226 – indeed any of their discretionary powers. It may even by open to the High

> Court to direct, in case it finds finally that the acquisition was vitiated on account of non-compliance with some legal requirement that the persons interest shall also be entitled to a particular amount of damages to be awarded as a lump sum or calculated at a certain percentage of compensation payable. There are many ways of affording appropriate relief and redressing a wrong; quashing the acquisition proceeding is not the only mode of redress. To wit, it is ultimately a matter of balancing the competing interests. Beyond this, it is neither possible nor advisable to say. We hope and trust that these considerations will be duly borne in mind by the Courts while dealing with challenges to acquisition proceedings."

30. Applying the aforesaid observation to the fact situation of the present case, we mould the reliefs as prayed in this petition by granting the following reliefs to the petitioner.

We declare that the acquisition proceedings and award are void ab initio in law, but we decline to quash the same by moulding the reliefs by directing the opp.parties to see that the compensation for the acquired land of the petitioner is determined on the basis of the present market value as on this date keeping in view the observation of the Privy Council in the case of ***Vyricherla Narayana Gajapatiraju V. Revenue Divisional Officer, Vizagapatam (supra)*** and determine the compensation and award shall be passed within a period of four months from the date of receipt of this judgment.

31. Since we are not interfering with the quashing of the acquisition proceedings except by moulding the relief to give compensation, it is also further directed to the Development Authority to grant five contiguous sites measuring 40 ft. x 60 ft. in the area in question to the petitioner and his family members for which the present rate of allotment shall be charged and that amount shall be deducted from out of the compensation that would be determined and payable to the petitioner. The said direction is issued by this Court following the directions issued by the apex Court in the case of ***Bondu Ramaswamy & Ors. V. Bangalore Development Authority & Ors., (2010) 7 SCC 129.***

32. With the above declarations, observations and directions, the writ petition is disposed of. Rule issued, but no costs.

Writ petition disposed of.

2013 (I) ILR – CUT- 26

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

W. A. NOS. 570,565 & 568 OF 2011(Dt.14.02.2012)

GOVERNING BODY OF RATANPUR SCIENCE DEGREE COLLEGE, PURI. ……..Appellant

.Vrs.

STATE OF ORISSA & ORS. ……..Respondents

EDUCATION – Composite College – Meaning of – Not defined either in the Education Act or the Rules framed there under – Colleges which were initially permitted to open Higher Secondary Classes i.e. +2 Courses and affiliated to the Council of Higher Secondary Education, Orissa and subsequently permitted to open +3 wing in the same building/campus under the same Governing Body registered under the Societies Registration Act, 1860 is called a composite College.

In the present case when Ratanpur Science College was permitted to be established it was precluded from opening +3 wing in future but the degree course i.e. +3 course was separately permitted to be established by a separate Governing Body which was independently registered under the Societies Registration Act bearing independent name i.e. Ratanpur Science Degree College – Held, the learned single Judge has rightly decided that Ratanpur Science College and Ratanpur Science Degree College are separate and district Colleges but not composite College.

For Appellant - Mr. R.K. Rath, Sr.Adv,
Mr. J.K. Rath, Sr. Adv.
M/s. D. Nr. Rath, S.N.Rath & P.K.Rout.

For Respondents - Mr. B.Dash (for Caveator)
M/s. M. M.Senapaty & B.K.Panda (for Res.No.5)

For Appellant - M/s. D.Routray, P.K.Sahoo, R.P.Dalal, K.Mohanty, S.Das, S.Jena, S.K.Samal, S.P.Nath.

For Respondents - Mr. Y. Mohanty, Sr. Adv.
M/s. N.C. Sahoo (for Res.No.5)
M/s. M.M. Senapaty, B.K. Panda(for Res.No.6).

For Appellant - Mr. J. Das, Sr. Adv.
M/s. K.K. Swain, P.N. Mohanty, P.K.Mohapatra.

V.GOPALA GOWDA, CJ. Out of these three appeals, two are preferred by two Secretaries of Governing Body of Ratanpur Ratanpur Science Degree College, AT: Athatira, PO: Alasahi, PS: Astarang, Dist: Puri and another by staff members of the said College questioning correctness of the order passed by the learned Single Judge in a common judgment dated 28.10.2011 dismissing Writ Petitions bearing W.P.(C) Nos.3319 and 3683 of 2003 and declining to quash the impugned letter dated 03.02.2003 vide Annexure-7 declaring the petitioner-College not to be a composite one issued by the Secretary to Government in its Higher Education Department (O.P. No.1) urging various facts and legal contentions.

2. All the Appeals being based on similar facts and law are heard together and a common judgment is hereby passed. The ground of challenge of the common impugned order is that the learned Single Judge has not exercised judicial review power for quashing the order impugned that the appellant/petitioner's College is a Composite College without taking into consideration the orders passed by this Court earlier in the case of Governing Body of D.R.Nayapalli College (OJC No.4581 of 1997 and batch of cases, disposed of on 04.07.2003) and another judgment of the Division Bench of this Court in DGBK College Vs. State of Orissa (OJC No.1486 of 1994, disposed of on 07.08.1995). The said decision has been erroneously applied to the fact situation and relief as sought for has been declined to be granted. Therefore, the impugned order is bad in law and vitiated, on which ground this Court is required to exercise its appellate jurisdiction to set aside the impugned order in the present Appeals and to quash the order impugned in the writ petitions as well.

3. Elaborate argument has been made by Mr.R.K.Rath and Mr.J.K.Rath, learned Senior Advocates for the appellant in the first Writ Appeal (W.A.No.570 of 2011), i.e., the Governing Body of Ratanpur Science Degree College and Mr.J.Das, learned Senior Advocate appearing on behalf of the appellant-staff members of the College in the connected Writ Appeal (W.A.No. 568 of 2011) and Mr.Y.Mohanty, learned Senior Advocate for the respondent No.5. It is submitted that pursuant to order dated 16.01.2012 passed by this Court in these appeals, affidavit along with documents under Annexure-A/1, i.e., Form-I, filed before the Director, Higher Education for grant of permission along with challan regarding the requisite amount deposited for grant of permission to open he degree College, to show that the same is the application filed by Ratnapur Science College but not Ratnapur Science Degree College. The same has been countered by filing statement of objection to the affidavit sworn to by Smt. Santilata Biswal, the

Secretary of the appellant in the first Writ Appeal, i.e., W.A. No.570 of 2011, produced and filed before this Court on 24.01.2012.

3. We have carefully examined the findings and reasons recorded by the learned Single Judge in the impugned order in the backdrop of the impugned order under Annexure-7 challenged in the writ petitions and also the reasoning portion of the judgment of the learned Single Judge to find out as to whether the impugned order is vitiated in law and that whether there is any substantial question of law that would arise in these Writ Appeals warranting interference by this Court so as to set aside and quash the impugned orders in these Appeals & writ petitions respectively. We have also considered the additional affidavit along with documents produced vis-à-vis the counter/objection to the same with a view to find out whether interference of this Court is required or not. Our answer to this question would be in the negative for the following reasons.

4. The learned Single Judge has elaborately referred to all the factual aspects in the writ petitions and thereafter referred to the enquiry conducted by the Higher Education Department pursuant to order dated 27.03.1998 passed by this Court in O.J.C. Nos.3544 and 4306 of 1998. Thereafter, the learned Single Judge perused the letter dated 05.08.1991 of the Secretary of the Governing Body of appellant College, where the Deputy Director (NGC), Orissa granted the letter of permission for establishment of the Higher Secondary Institution (1991-92 academic session) under Section 5(3) of the Orissa Education (Amendment) Act, 1989 permitting the said College to admit students in the first year of higher secondary classes numbering 64 each in the subjects mentioned in the said letter with certain stipulation of conditions and the said letter has been extracted in the judgment of the learned Single Judge. Learned Single Judge has also proceeded to examine the said letter and observed that the Governing Body of the appellant-College was required to be registered in the name of the higher secondary institution and that the said institution was prevented from opening of +3 (Degree Classes) at any time. Subsequently, thereafter the said Institution has got temporary recognition and permanent recognition in the meantime. Vide order dated 04.04.1994, the Director, Higher Education, Orissa in exercise of powers conferred under Rule 7(2) of the Orissa Education (Establishment, Recognition and Management of Private Colleges) Rules, 1991 (for short, 'Rules 1991') accorded permission for establishment of a second Degree College in +3 Arts in favour of the Ratanpur Science Degree College with the intake capacity mentioned in the said letter. The same has been complied with. The learned Single Judge has rightly held both the Colleges independently registered societies under the Societies Registration

Act, 1860 separately and after careful examination the aforesaid contentions vis-à-vis the letter dated 04.04.1994, wherein the Institution in question has been permitted to establish the secondary education College as well as the Degree College and the same have been established and registered separately and each of the Societies running institution is distinct and separate. Thereafter, the learned Single Judge has rightly referred to the case of D.G.B.K. Mahavidyalaya v. State of Orissa & Ors. (OJC No.1486 of 1994 decided on 07.08.1995), wherein a Division Bench of this Court with reference to the fact situation of that case has held that since that institution was existing as an intermediate College (re-designated as Junior College) prior to coming into force of amendment of Orissa Education Act and enforcement of Rules, 1991, the status of that institution was not affected by the provisions of the Rules, 1991. In the concluding paragraph, learned Single Judge has rightly held the writ petitions being similar in facts situation to that of the case in D.G.B.K. Mahavidyalaya referred to supra and further held that the impugned order dated 03.02.2003 declaring that petitioner's College is not a composite College and both are different and distinct Colleges. Correctness of the same is questioned in these appeals. Learned Single Judge has exercised judicial review power after taking relevant material fact and after examining the order impugned in the backdrop of permission granted in favour of both the societies who are applicants and they have been separately registered under the Societies Registration Act with certain terms and conditions. Therefore, they are required to comply with the said terms and condition; no doubt the institutions are separate. Therefore, respondent No.1 has rightly observed that they are not composite and they are distinct Colleges and the same is in accordance with the Rules in vogue and further as could be seen from the application along with affidavit that application seeking permission to establish +3 College is in the name of Ratanpur Science Degree College but not Ratanpur Science College, the same is evident in Form-I and therefore they have registered the said Society separately after permission was granted with terms and conditions stipulated in the letter of 1994. Therefore, the contentions urged that they are composite College is wholly untenable in law and the same is contrary to the documents annexed to the application which they have filed before the competent authority and obtained the permission for opening of +3 College and therefore the learned Single Judge is perfectly right in rejecting the prayers made in the Writ Petitions.

5. Insofar as the apprehension of staff members, appellants in the connected appeal is concerned, that if the grant-in-aid which is extended in their favour will be withdrawn on account of the impugned order dated 3.2.2003 in stating that the Appellant is not a composite college, which order

is upheld by the learned Single Judge. However, the said apprehension of the staff members is misconceived. Once the benefit of grant-in-aid is extended, the appellant College vis-à-vis its staff members comes within the fold of grant-in-aid as per the Rules in vogue or orders they should not have such apprehension. Virtually, they are not aggrieved by the order impugned in the writ petitions; therefore, the learned Single Judge was rightly justified to reject the said writ petitions. Further, we make it clear that the grant-in-aid, which has been allowed to the staff members, is not mentioned in the impugned order challenged in the writ petitions. Therefore, the alleged apprehension in the minds of the staff members is not reasonable; hence the case sought to be pleaded in the writ petitions as well as in the present appeal does not have legs to stand. Further, learned Single Judge with reference to Rules, has held that both the Colleges are separate and distinct; hence they are not composite College. Therefore, the appeals fail and hence the same are dismissed.

Appeals dismissed.

2013 (I) ILR – CUT-31

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

W.A. NO. 611 OF 2011 (Dt.02.04.2012)

CHIEF EXECUTIVE OFFICER-CUM-COMMISSIONER, CUTTACK MUNICIPAL CORPN. CTC. ….....Appellant

.Vrs.

ATUL KUMAR BARIK …….Respondent

A. INDUSTRIAL DISPUTES ACT, 1947 – S.25-B (2).

Workman asserts to have worked 240 days continuously in a calendar year – To disprove the same the employer–corporation should produce rebuttal evidence before the Labour Court as it has documentary evidence like attendance register, aquittance register and leave register etc. in its possession – Employer did not choose to produce any evidence – Held, Labour Court should have drawn adverse inference against the employer-Corporation. (Para 8)

B. INDUSTRIAL DISPUTES ACT, 1947 – S.25-F, 25-N.

Termination of workman – Termination is simplicitor and not for misconduct – Termination falls within the definition of "retrenchment" as defined U/s.2 (oo) of the Act – At the time of retrenchment the employer-corporation neither obtained permission from the State Government as required U/s.25-N nor paid retrenchment compensation to the workman as required U/s.25-F of the Act – This aspect of the matter has not been noticed either by the Labour Court or by the learned single Judge – Held, order of termination is null and void for non-compliance of the provisions under chapter VA and VB and Section 25-N of the Act. (Para 9)

C. CIVIL PROCEDURE CODE, 1908 – O- 41, R- 33.

Power of appellate Court – Industrial dispute Case – Workman although not filed appeal can invoke right under Order 41 Rule 33 C.P.C. – Workman has been terminated without complying with the statutory provisions U/s.25-F Clauses (a) & (b) and Section 25-N of Chapter-VA & VB of the I.D. Act.

In this Case the Labour Court although answered issue Nos.(i) & (ii) in the award in favour of the workman has not granted full back wages – Held, the order of the learned single Judge and the award passed by the learned Labour court is modified by enhancing the back wages from lump sum of Rs.25,000/- to 50% of the back wages from the date of termination till the date of award has come into force and thereafter full salary till he is reinstated. (Para 10,11)

Case laws Referred to:-

1.(2010) 5 SCC 497 : (Anoop Sharma-V- Public Health Division, Haryana)
2.AIR 2011 SC 2532 (p-13,14,15) : (Devinder Singh-V- Muncipal Council, Sanaur)
3.AIR 1964 SC 477 : (Syed Yakoob-V- K.S. Radharishnan)
4.AIR 1976 SC 323 : (Swaran Singh-V- State of Punjab)
5.AIR 2003 SC 3044 : (Surya Dev Rai-V- Ram Chander Rai)
6.AIR 2000 SC 43 : (Delhi Electric Supply Undertaking-V-Basanti Devi & Anr.)
7.2011-IV-LLJ 310 : (Punjab State Coop. Supply & Marketing Federation Ltd.(Management of Markfed) -V- Ashok Kumar Mehta & Ors.)
8.AIR 1968 SC 1413 : (Gopal Kishaji-V- Mohamed Haji Latif & Ors.)
9.(1976) 1 SCC 822 : (State Bank of India-V- Shri N. Sundara Money).
10.(1990) 3 CC 682 : (Punjab Land Development & Reclamation Corporation Ltd. Chandigarh-V- Presiding Officer, Labour Court Chandigarh & Ors.)
11.AIR 1979 SC 75 : (M/s. Hindustan Tin Works Pvt. Ltd.-V- The Employees of M./s. Hindustan Tin Works Pvt. Ltd. & Ors.)

For Appellant - M/s. Gopal K. Mohanty, R.N.Acharya, P.K.Panda, D.Mishra, N.A.Khan.
For Respondents -M/s. Akshaya Ku. Rath & A.K.Nath.

GOPALA GOWDA, C.J. This writ appeal is directed against the judgment/order dated 15.09.2011 of the learned Single Judge in confirming the award dated 13.9.2010 passed by the Presiding Officer, Labour Court, Orissa, Bhubaneswar in I.D. Case No.39/2004, wherein he has answered the point of dispute referred against the appellant-Chief Executive Officer-cum-Commissioner, Cuttack Municipal Corporation (for short the "Corporation") directing reinstatement of the workman in service with a lump sum of Rs.25,000/- only as compensation in lieu of the back wages urging the following grounds and has prayed for setting aside the impugned order

and award passed by learned Single Judge and the Labour Court and to remand the matter to the Labour Court for reconsideration of the case.

2. The first ground of attack of the impugned order is that reference made by the State Government for adjudidication of the points of dispute itself is invalid as the same was made in contravention of Section 73-B of the Orissa Municipal Act, 1950 (for short, "the Municipal Act"). Further, since the workman has not completed 240 days of continuous service in a year, the order of reinstatement runs contrary to the judgment of the Supreme Court. The other ground of attack is that the findings recorded on issue nos. (i) and (ii) without conducting a proper enquiry and following a procedure by the Labour Court by summoning documents from the employer is the irregular procedure adopted by it. Therefore, the entire award is vitiated in law. This aspect of the matter has not been considered by the learned Single Judge while passing the impugned order. Therefore, the order impugned is vitiated in law. On this ground, this Court can exercise its judicial review power in this appeal as the learned Single Judge has failed to exercise his supervisory and discretionary jurisdiction. The writ appeal is a continuation of the writ petition, therefore, this Court can exercise its power as that of the learned Single Judge. Both the order and award are vitiated in law, therefore, the judicial review power is required to be exercised in this appeal and grant the relief as prayed for in this appeal.

3. It is also further contended by the learned counsel for the appellant that the workman has not taken steps before the Labour Court to summon the documents from the appellant employer to prove his claim that he has completed 240 days of continuous service as on 1.6.2002 to comply with the mandatory requirement as held by the Labour Court while answering the contentious issue no.(i) at paragraph-8 of the award. This important aspect of the matter has been completely ignored by the learned Single Judge while passing the order by placing reliance upon the judgment of the Supreme Court in the case of ***Anoop Sharma v. Public Health Division, Haryana***, *(2010) 5 SCC 497*, in support of the justification of reinstatement for non-compliance of the provisions of Section 25-F clauses (a) and (b)of the Industrial Dispute Act, 1947 (for short, "the I.D. Act"), which decision is not applicable to the facts of the case on hand. Further, it is contended that there is no post available in the Corporation against which the respondent-workman could be reinstated. Therefore, the learned counsel submits, if this Court comes to the conclusion that impugned order of the learned Single Judge does not call for any interference, then the reasonable compensation in lieu of reinstatement may be awarded by modifying the award of the Labour Court.

4. Learned counsel Dr Rath on behalf of the workman sought to justify the correctness of the findings recorded in the award on the contentious issues framed by the Labour Court on the basis of the pleadings and evidence on record and urged that the said findings are neither erroneous nor error in law, before the learned Single Judge except contending that the workman has not completed 240 days of continuous service in a year to comply with the mandatory requirement under Section 25-F clauses (a) and (b) of the I.D. Act. Further, proviso to Section 73-B of the Orissa Municipal Corporation Act makes it very clear that the workman falling within the scope of Section 25-F of the I.D. Act, the compensation as would be paid to the workman under the above provisions of the I.D. Act in case of termination order passed against the workman terminating him from his services. Therefore, placing reliance by the appellant upon Section 73-B of the Municipal Act both the Labour Court and also the learned Single Judge have rightly rejected the contentions. Further, in this regard, Dr. Rath has placed reliance upon the decision of the Supreme Court in the case *of* ***Devinder Singh v. Muncipal Council, Sanaur***, *AIR 2011 SC 2532 (Paras-13, 14 and 15)*, which relevant paragraphs have been extracted in the impugned order of the learned Single Judge and he has also placed reliance upon para-21 of the said judgment in support of his contention. The definition of "workman" under Section 2(s) of the I.D. Act, completion of 240 days of continuous service in a year is not the criteria. The source of employment, the method of recruitment, the terms and conditions of the employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether a person is a workman or not within the meaning of Section 2(s) of the I.D. Act. The Supreme Court has further held that a person employed by the employer, who is doing whole time job, is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman. Such a distinction as sought to be made by the learned counsel for the appellant is not made in the definition of Section 2(s) of the I.D. Act between full time and part time. Further, the Supreme Court in the aforesaid judgment has after referring to *Anoop Sharma's* case (supra) has held that effect of violation of Section 25-F, referred to various case laws laying down the binding precedent on the subject and held that the termination of a workman from his service without complying with the mandatory requirement as contained in the provisions of Section 25-F(clauses (a) and (b) should ordinarily result in reinstatement with consequential benefits. Therefore, the learned Single Judge has rightly affirmed the award passed by the learned Labour Court. Therefore, learned counsel submits that there is no need for this Court to interfere with the

impugned order and award as there is no substantial question of law arises for consideration of this Court in this appeal.

5. Further, the direction of re-instatement and payment 25% back wages towards compensation in the award need not be interefered with, but on the other hand, it is a fit case for awarding full back wages and consequential benefits. Further, learned Single Judge has rightly placed reliance upon the well settled principle of law laid down by the Apex Court in the cases of ***Syed Yakoob v. K.S. Radharishnan***, *AIR 1964 SC. 477*, ***Swaran Singh v. State of Punjab***, *AIR 1976 SC 323,* and ***Surya Dev Rai v. Ram Chander Rai***, *AIR 2003 SC 3044*, with regard to exercise of supervisory jurisdiction by this Court under Articles 226 and 227 of the Constitution and rightly held that the case on hand is not fit for interference and further has rightly made an observation that the plea of privatization of the Corporation is of no consequence, as privatization has been made only in certain specific/limited Ward of Cuttack Municipal Corporation area and the Municipal Corporation continues to engage a large number of employees to carry out cleaning services in the Corporation limits. Therefore, privatization plea which is advanced by the learned counsel for the Corporation has been rightly rejected by the learned Single Judge. Therefore, he has prayed for dismissal of writ appeal.

6. While making such submission, he has further pleaded that the workman being a poor person, who is out of employment for one decade, and order of re-instatement has not been given effect to and compensation awarded is not paid to facilitate him to file writ appeal questioning that portion of the award in not awarding full back wages and consequential benefits when the points of dispute are answered in his favour. Therefore, he placed reliance upon Order 41 Rule 33, CPC and the decision of the Supreme Court in the case of ***Delhi Electric Supply Undertaking v. Basanti Devi and another v***, *AIR 2000 SC 43,* and requested this Court to award full back wages and other consequential benefits in this appeal, as the workman has got every right to question that portion of the award which affects his right. In this regard, learned counsel for the appellant was asked to make his submission regarding above plea urged on behalf of the workman to which learned counsel for the appellant submits that the said principle and decision of the Apex Court need not be applied to the case on hand for the reason that Orissa State is a poor State and full back wages need not be awarded in favour of the respondent.

7. With regard to the above rival legal contentions, the following points would arise for our consideration.

(i) Whether the impugned order passed by the learned Single Judge in affirming the finding of fact recorded on the contentious issue nos.(i) and (ii) in the award passed by the Labour Court is vitiated in law is the ground on which this Court can interfere?

(ii) Whether the employee is entitled for the back wages in lieu of lump sum Rs.25,000/- awarded as back wages?

(iii) What award?

8. The first point is required to be answered against the appellant-Corporation for the following reasons. It is an undisputed fact that the workman as an employee was working in the Corporation from 1998, as could be seen from the narration of fact in the award. It is also an undisputed fact that the termination order was passed by the Corporation terminating the services of the workman with effect from 1.6.2002. The termination of the services of the workman is a termination simplicitor but not for misconduct. Therefore, the termination falls within the definition of "Retrenchment" under Section 2(oo) of the I.D. Act. The reliance is placed upon the Madras High Court in the case of ***Punjab State Coop. Supply & Marketing Federation Ltd. (Management of Markfed) v. Ashok Kumar Mehta and others****, 2011-.IV-LLJ 310,* that the termination came to an end after the particular project was over. The said decision has absolutely no application to the fact situation of the case on hand having regard to the fact that the workman has been appointed on 1.1.1998 and has worked till the date of termination order, i.e., 1.6.2002. As per the points of dispute, justification of the order of termination is upon the employer, which is a well established principle of law, as it is the positive action of the appellant in passing order of termination against the workman. The workman has filed his claim statement clearly stating that there is violation of Chapter-V-A and V-B of the I.D. Act. The Labour Court on the basis of the fact and evidence adduced by the workman by way of affidavit wherein the workman has asserted that he was employed by the Corporation on 1.8.1998 and worked till the date of termination i.e. 1.6.2002 and he has worked continuously in terms of the definition of Section 25-B(2) of the I.D. Act. When the workman has asserted that he has worked 240 days continuously in a calendar year, the rebuttal evidence should have been produced by the Corporation before the Labour Court as the Corporation is required to maintain the documentary evidence in view of the Registration of Shops and Establishment Act, 1961, which mandates that a Corporation is required to maintain the attendance register, aquittance register, leave register etc. To rebut the plea of the workman that he has worked for 240 days, the

employer did not choose to produce any evidence, which is in its possession. For non-production of the evidence, the Labour Court should have drawn adverse inference against the appellant Corporation which is not drawn, but it is a fit case to draw adverse inference in view of the decision of the Supreme Court in the case of ***Gopal Kishanji v. Mohamed Haji Latif and others***, *AIR 1968 SC 1413*, wherein the Apex Court after referring to the Privy Council decision has laid down the law, which reads thus:

> "A practice has grown up in Indian procedure of those in possession of important documents or information lying by, testing to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough – they have no responsibility for the conduct of the suit, but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition."

9. The fact that there is no rebuttal evidence adduced by the appellant-Corporation is an undisputed fact. No documentary evidence is produced by the employer to show that the respondent has not worked 240 days continuously in a year during the period he has worked with the Corporation. The case sought to be justified by the appellant is that it is the duty cast upon the workman to justify the order of termination is not legal and valid. This contention is wholly untenable in law. But, on the other hand, it is the duty of the employer to prove that the order of termination is justified because it is its positive action, and every evidence must be available with it. One cannot call upon a workman to prove the negative, which is unknown to the Industrial Jurisprudence. Therefore, the finding of fact recorded by the Labour Court on the contentious issue framed by it after accepting the plea and the evidence of the respondent by way of affidavit is based on proper appreciation of the same and finding recorded on the issue no.(i) and rightly held that the order of termination passed against the workman is not justified. Therefore, it is held that the same is legal and valid. Accordingly, issue no.(i) is answered. The said finding recorded in the impugned award is examined by the learned Single Judge with reference to the grounds urged in the writ petition. Learned Single Judge has rightly declined to exercise his judicial review power holding that in view of the admitted fact that the termination order passed against the workman and it is not proved that the same is legal and valid, and further finding of fact recorded is that the

workman has not been paid the retrenchment compensation i.e. one month's pay. Apart from this, Chapter-V-B attracts to the fact situation of the case that termination of a workman amounts to retrenchment. Permission is required to be obtained from the State Government as provided under Section 25-N of the I.D. Act as there are more than hundred employees working in the Municipal Corporation that also has not been done by it. This important aspect of the matter has not been noticed either by the Labour Court or the learned Single Judge. Therefore, the order of termination is *void ab initio* in law as held by the Supreme Court in catena of cases right from 1976 till 1990 and till this day as in the case of ***State Bank of India v. Shri N. Sundara Money****, (1976) 1 SCC 822.* That principle has been reiterated by the Constitution Bench in the case of ***Punjab Land Development and Reclamation Corporation Ltd. Chandigarh v. Presiding Officer, Labour Court, Chandigarh and others****,* reported in (1990) 3CC 682, wherein the Supreme Court after examining all the case law on this question with reference to Section 2(oo) and amendment to Chapter-V-A of the I.D. Act, clearly held that any termination order otherwise misconduct amounts to retrenchment for which mandatory requirement under Chapter-V-A and B shall be complied with. In the instant case, that has not been done. Therefore, the order of termination passed against the workman is void. The award of the Labour Court is perfectly legal and valid in answering point no.(ii) holding that the workman is entitled for reinstatement. Reinstatement is a normal rule once an order of termination is held to be bad in law. The reliance placed upon the judgment of the Supreme Court by the learned counsel for the appellant that the workman is not entitled for reinstatement and entitled to be awarded back wages is not the correct position of law. The Labour Court has exercised its discretionary power and rightly directed reinstatement of the workman, which has been accepted by the learned Single Judge by recording reasons with reference to the decisions of the Apex Court on each one of the aspects. For the reasons stated supra, no case is made out by the appellant before this Court to deviate from the normal rule of exercising its discretionary power in the case and, therefore, the order of reinstatement has been rightly affirmed by the learned Single Judge in the impugned order. Therefore, we are declined to accept the case pleaded by the appellant's counsel. Having answered point nos.(i) and (ii) in favour of the workman, the order of termination is null and void for non-compliance of the provisions under Chapter-V- 'A' and 'B' and Section 25-N of the I.D. Act, then the normal rule is reinstatement with all consequential benefits including awarding back wages as held by the Supreme Court in ***M/s Hindustan Tin Works Pvt. Ltd. v. The Employees of M/s. Hindustan Tin Works Pvt. Ltd. and others****,* AIR 1979 SC 75, wherein it is held that the workman shall not be a

sacrificial goat by forcing him to unemployment on account of the action of employer. The normal rule should have been followed by the Labour Court as well as the learned Single Judge.

10. Learned counsel Dr. Rath has rightly pointed out to us that appellant has invoked order 41, Rule 33, CPC. Therefore, in the appeal filed by the appellant this Court can exercise its power and award full back wages modifying the award of the Labour Court. In this regard, he has rightly placed reliance upon the decision of the Supreme Court with regard to power of this Court in appeal in the case of ***Delhi Electric Supply Undertaking*** referred to supra. It is worthwhile to extract paragraph-17 of the said judgment, which reads thus:

> "In our approach we can also draw strength from the provisions of Rule 33 of Order 41 of the Code of Civil Procedure which is as under:
>
> "*33. Power of Court of Appeal* – The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order made such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees:
>
> Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

11. In view of the aforesaid principle laid down by the Supreme Court, in the absence of an appeal filed by the workman, the right invoked by workman under Order 41, Rule 33, CPC with all fours shall be applicable to the fact situation of the case on hand, as the workman has been deprived of having suffered at the hands of the employer who made him to go to the Labour Court by raising an industrial dispute regarding the order of termination and the employer did not justify its action before the Labour Court. The livelihood of the workman himself as well as the members of his

family has been taken away for no fault of him without complying with the statutory provisions under Section 25-F clauses (a) & (b) and Section 25-N of Chapter-V-A & B of the I.D. Act. The Labour Court has answered the point nos.(i) and (ii) in favour of the workman but not granted the full back wages in absence of the evidence to show that he was working during the period in question. Not awarding full back wages weighed in our mind to hold that it is a fit case for awarding 50% back wages from the date of termination till the date of award has come into force and thereafter full salary till he is reinstated. In view of the judgment of the Supreme Court, the submission made by Dr. Rath is accepted. Accordingly, we modify the order of the learned Single Judge and the award passed by the learned Labour Court by enhancing the back wages of lump sum Rs.25,000/- to 50% of the back wages from 1.6.2002 till the award is passed and enforceable by the Labour Court. Thereafter the workman is entitled to full salary from 13th September, 2010 as the employer has been litigating the matter without complying with the award passed by the Labour Court.

With the above observations and modification, the writ appeal is dismissed. The modified award in the above terms shall be implemented within four weeks from the date of receipt of the copy of this judgment, failing which the appellant shall pay interest at the rate of 9% on the back wages and full salary awarded.

Appeal dismissed.

2013 (I) ILR – CUT- 41

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

O. J. C. NO. 4635 OF 1997(Dt.09.04.2012)

SWAPNESWAR LENKA …….. Petitioner

.Vrs.

SECURITY OFFICER (RPF),
KHURDA & ROAD ORS. ……..Opp.Parties

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

Disciplinary Proceeding – Unauthorized absence from duty – Petitioner was removed from service – Non-issuance of second show cause notice prior to passing of an order of termination, terminating the services of the petitioner – Violation of principles of natural justice – Held, the Order of removal is quashed – Matter is remanded to the Opp.Party to issue second show cause notice to the petitioner giving reasonable opportunity to file explanation – Direction issued to the employer to pay 50% of the salary to the petitioner within six weeks from the date of removal till the date of superannuation and the salary must be computed on the basis of revised salary prevailing till the date of superannuation – If it is not paid the amount shall carry 9% interest – If it is not complied with, liberty given to the O.P. to issue second show cause notice will lapse automatically and in that event the employer is liable to pay full salary to the petitioner from the date of removal till the date of superannuation. (Para 8,9)

Case laws Referred to:-

1.(1991) 1 SCC 588 : (Union of India-V- Md. Ramzan Khan)
2.(1993) 4 SCC 727 : (Managing Director, ECIL, Hyderabad & Ors.-V- B.Karunakar & Ors.)
3.AIR 1964 SC 506 : (State of Mysore-V- K. Manche Gowda)

For Petitioner - Mr. T.Ch. Mohanty
For Opp.Parties - Mr. B.M.Patnaik

The petitioner namely, Swapneswar Lenka who was working as Constable in Railway Protection Force bearing No.5463 is before this Court questioning the legality and validity of Annexure-1 dated 22.2.1991 passed by the Divisional Security Commissioner, Khurda urging various facts and legal contentions.

2. This Court on previous date of hearing on 26.3.2012 after hearing the learned counsel for the parties at length directed the learned counsel appearing for the opposite party nos.1 and 2 to make submission on the following questions:-

(a) Whether pursuant to the order dated 22.6.1990 (Annexure-6) the petitioner reported for duty as directed as per the records maintained by it.?

(b) Whether on the liberty granted to the Railways disciplinary action was initiated against the petitioner after 25.6.1990?

(c) Whether the termination order passed is legal and justifiable?

3. With reference to the aforesaid questions, learned counsel Mr. Jagabandhu Sahoo has filed an affidavit being sworn to by Chaitanya Marndi, son of Late Mohan Marndi working as Senior Divisional Security Commissioner. Our attention was drawn to paragraph-3 of the affidavit stating that the documents under Annexure-6 to the writ petition is a report which was submitted by Officer-in-charge, RPF, Palasa to the Divisional Security Commissioner, Khurda intimating unauthorized absence of the petitioner from 5.4.1990 to 21.6.1990 and to take necessary disciplinary action against the constable. He has not stated whether the direction to him to report for duty as mentioned in the said letter at the unnumbered paragraph-2, the relevant portion of the said paragraph reads thus:-

> "On 21.6.1990, the said constable appeared this office with fit PMC from 5.4.1990 to 20.6.1990 with remarks declaring him fit for duties from 21.6.90 which was duly issued by Medical Officer, Zonal Dispensary Unit-VIII, Bhubaneswar-12 (Govt.). As such he was directed to ADMO, Palasa with a memo for necessary action on 21.6.1990 after obtaining his explanation. Accordingly he returned to the post with duty fit certificate no 583506 declaring fit for duties from 22.6.90. And he taken on duty from the same date and made a detail diary entry no.406 dated 22.6.90 A.M."
>
> (Emphasis laid by the Court)

4. On the basis of the said letter, whether the petitioner has reported for duty pursuant to the direction contained in the above letter, no statement is made and no averment is forthcoming in the affidavit filed on behalf of the opposite parties. Since then, document issued by the office of the opposite party, there is a mentioned regarding the petitioner reporting for duty and thereafter observation made in the unnumbered last paragraph that if the petitioner fails to give any information to the office, the period mentioned in the said letter be treated as per rules and take necessary disciplinary action

against the petitioner-constable. His PMC fit certificate, Duty Certificate of ADMO/PSA and his explanations are sent herewith for favour of your disposal. From reading of the contention of the said letter, order dated 22.6.1990 has been complied with and permitted the petitioner to report for duty. Thereafter, liberty is granted in the said letter for the satisfactory explanation regarding his unauthorized absence and Disciplinary Authority has initiated Disciplinary Proceedings against the petitioner is evident from the document produced at Annexure-8, wherein the relevant unnumbered paragraph reads thus:-

> " Disciplinary Authority ASC/KUR after going through the findings of E.O. and evidences on record have concurred with the findings of E.O.'s verdict of guilty and opined to impose penalty of removal from service, but since the ASC/KUR is not competent to impose penalty of removal from service to the delinquent constable, he forwarded the case for imposing the proposed penalty of removal from service as per rule 154.2 of the RPF Rules, 1987."

5. As could be seen from the contents of the above said unnumbered paragraph of the letter referred to supra, the Disciplinary Authority after going through the records regarding the unauthorized absence of the petitioner, penalty of removal from service is imposed upon the petitioner pursuant to the findings recorded in the Enquiry Report. The removal of the petitioner is not termination simpliciter, it is for the proved act of misconduct of unauthorized absence. It is evident from the order of removal of the petitioner from service, it is for the misconduct of unauthorized absence in spite of the fact that disciplinary proceedings were initiated, as the disciplinary Authority did not accept the explanation of the petitioner for allegedly remaining absent from his duties.

6. Learned counsel for the opposite parties was called upon to justify the order of removal in this proceeding. The order of removal is passed by accepting the findings of the Enquiry Officer recorded in the enquiry report which findings are accepted by the Disciplinary Authority and thereafter an order of removal was passed against the petitioner as per Rule 156 (b) (iii) of the Railway Protection Force Rules, 1987. Therefore, the fact remains the order of removal is on the basis of the enquiry report, we have repeatedly asked the learned counsel for the opposite parties as to whether the order of removal was preceded by issuance of the second show cause notice as it is mandatory in view of the law laid down by the Hon'ble Supreme Court in the case of **Union of India Vs. Md. Ramzan Khan,** reported in (1991) 1 SCC 588, wherein it has been observed by the Apex Court that before the date of removal from service the issuance of second show cause notice regarding

the proposed penalty to be imposed upon the employee is necessary. The said decision has been reiterated by the Apex Court in the case of Managing Director, ECIL, Hyderabad & Ors. Vrs. B.Karunakar & Ors., reported in (1993)4 SCC 727. The answer to our query from the learned counsel for the opposite parties is that before initiating departmental proceedings, the show cause notice was issued. The petitioner has participated in the enquiry proceedings and unable to make submission with reference to the record that the order of removal is passed after affording an opportunity regarding the punishment of removal is imposed upon the petitioner which is mandatory duty upon the Disciplinary Authority. Therefore, the order of removal is not in compliance with the principles of natural justice as has been held by the Hon'ble Supreme Court in the case of **State of Mysore Vrs.K. Manche Gowda,** reported in AIR 1964 SC 506, which principle has been enunciated if the enquiry report will go against the employee and will be approved by the Disciplinary Authority, it shall be proceeded by second show cause notice is the legal principle laid down by the Apex Court which has been further reiterated in the cases of Ramzan Khan and B. Karunakar referred to supra. Non-issuance of second show cause notice to the petitioner prior to passing an order of termination, terminating the services of the petitioner is in violation of the principles of natural justice and the law laid down by the Apex Court in the aforesaid cases. Therefore, the order of termination is invalid in the eye of law. Hence we have to answer the question No.3 framed by us on 26.3.2012 in favour of the petitioner.

7. Learned counsel for the opposite party has submitted that the order of removal is the subject matter of appeal filed by the petitioner before the appellate authority. Therefore, the learned counsel for the opposite parties submitted that there is no need for this Court to interfere with the impugned order of termination. The said contention of the learned counsel is wholly untenable in law as the petitioner is before this Court questioning the order of removal passed by the disciplinary authority which is vitiated in law for the reasons stated supra.

8. We have examined the validity of the termination order in the backdrop of the facts referred to supra, which are also undisputed and it is evident from the document under Annexure-8 that the order of removal is not preceded by issuance of the second show cause notice to the petitioner in view of the law laid down by the Hon'ble Supreme Court in cases referred to supra. Therefore, the order of removal is liable to be set aside notwithstanding the fact that the appeal against the order of the termination is pending before the appellate authority. Therefore, we are of the view that the same is liable to be quashed in exercise of our judicial review power. Once, we come to the conclusion that the removal order of the petitioner

from his service is liable to be quashed having regard to the subsequent event that had taken place after the order of removal, since the petitioner has attained the age of superannuation with effect from 2005, to give opportunity to the opposite parties, the matter is remanded to the Disciplinary Authority for issuance of the second show cause notice to the petitioner as it would be necessary for this Court to give opportunity to the Disciplinary Authority to submit his explanation to the proposed penalty of removal. Having given the opportunity to the Railways to give second show cause notice after a period of 21 years, the petitioner has been made to suffer for the period from 1991 to 2005 till the date of his superannuation. As observed by the Apex Court in Ramzan's case, once the order of removal is a nullity in the eye of law, remanding the matter and giving opportunity to the employer to comply with the law laid down by the Apex Court, then what should be the salary to be paid to the petitioner is the question falls for our consideration. Having considered the plight of the petitioner, it would be just and proper for this Court to award 50% of the salary to the petitioner from the date of removal till the date of superannuation, so that the employer should decide whether the order of removal issued is correct and thereafter proceed further in the matter. If the explanation is tenable explanation, then it has to examine as to whether the removal order warranted or lesser punishment as required should be considered in addition of leave salary as per the leave rules which are applicable to the petitioner.

9. With the above observation and direction the writ petition is disposed of. The order of removal is hereby quashed. The matter is remanded to the opposite party to issue second show-case notice to the petitioner giving reasonable opportunity to furnish the explanation and after obtaining the explanation; the opposite party shall consider the same and pass appropriate orders in the light of the observation made above. Further direction is given to the employer-opposite parties herein to pay 50% of the salary from 22.2.1991 till 31.8.2005 within a period of six weeks from the date of receipt of certified copy of this order. The direction regarding payment of salary of 50% must be computed on the basis of revised salary prevailing till the date of superannuation. If it is not paid then the amount shall carry interest @ 9% and the same shall be complied with within a reasonable time. If it is not complied with, then the right of liberty given to the opposite party to issue second show cause notice will be automatically lapses and in that event the employer shall be liable to pay full salary to the petitioner from the date of removal till the date of superannuation.

With the above observations and directions, the writ petition is allowed.

Writ petition allowed.

2013 (I) ILR – CUT- 46

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

W.P.(C) NO.27531 OF 2011 (Dt.03.07.2012)

MANAGEMENT COMMITTEE (CFH SCHEME) PARADEEP PORT ADMINISTRATIVE BUILDING ……..Petitioner

.Vrs.

INCOME TAX OFFICER (TDS), CTC. & ORS. ……..Opp.Parties

A. INCOME TAX ACT, 1961– S.197.

Short deduction or no deduction certificate was granted on account of out-standing dues – Fresh reason in the counter affidavit – Validity of an order must be judged by the reasons mentioned there in and it cannot be developed/supplemented by fresh reasons either by oral submission or in the shape of an affidavit – Held, fresh reason stated in the counter affidavit is untenable in the eye of law.

(Para 16,17)

B. ACTION OF GOVERNMENT - Money if any due to the Government – Government, Central or State cannot be permitted to play dirty games with the citizens and/or to coerce them in making payments which they were not legally obliged to make – Held, Government should take appropriate steps but it should not take extra legal steps or adopt the course of manoeuving to collect such money.

(Para 19,20)

Case laws Referred to:-

1.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V-The Chief Election Commissioner, New Delhi & Ors.)
2.AIR 1990 SC 1814 : (Dabur India Ltd. & Anr.-V-State of U.P. & Ors.)

For Petitioner - M/s. Sanjay Kumar Acharya, Saswat Acharya, V.L.Dash, N.C.Das, P.Mohapatra, s.K.Mohanty, P.R. Mohanty, B.K.Sinha.

For Opp.Parties - Mr. A.Mohapatra, Sr. Standing Counsel (for I.T.Dept.)

B.N.MAHAPATRA,J. The petitioner has filed this writ petition claiming several reliefs. However, Mr. Saswat Acharya, learned counsel appearing for the petitioner confined those to following reliefs:

(i) To quash order dated 13.08.2010 (Annexure-1) passed by opposite party No.1-Income Tax Officer (TDS), Cuttack rejecting the petitioner's application dated 04.09.2009 (Annexure-5) made in Form 13 for issuance of No-Deduction certificate under Section 197 of the Income Tax Act, 1961 (for short, "Act, 1961") to different persons for the financial year 2009-2010.

(ii) To declare the action of the opposite parties, particularly, opposite party no.1 and opposite party No.3 in sitting over the petitioner's application for issue of No-Deduction Certificate filed on 22.06.2009 followed by two reminders dated 04.09.2009 and 25.02.2010 for 14 months and pushing it to beyond the financial years 2009-10 and ultimately rejecting the same on 13.08.2010 in spite of the direction of this Court in its order dated 09.07.2010 to issue No-Deduction Certificate under Section 197 of the Act, 1961 within a period of four weeks from the date of the order as deliberate and illegal.

2. Petitioner's case in a nutshell is that it is a non-profit making organization, involved in the general public utility to ensure payment of wages of the labourers as well as their welfare, without involvement in any activity of trade, commerce or business. Petitioner's Trust was created under the recommendation of Justice H.R. Khanna, Former Judge, Supreme Court of India to smoothen the process of payment to labourers engaged by stevedores. Stevedores under the Paradeep Port for cargo handling were engaging group of labourers, on their own choice, on pick and choose basis, for which few group of labourers, were getting constant engagement and other were remaining completely unemployed. That apart, stevedores having their business interest were negotiating with labour leaders to get their work done at reduced rate. This led to fierce infighting between different groups of labourers and ultimately ended up in loss of life and property. In the year 1984, it took such an ugly turn that the Inspector-in-Charge of Paradeep Police Station and his associates together with four labourers lost their lives. Therefore, to solve this problem the Government intervened and the matter came up before the Hon'ble Supreme Court of India in *Paradip Port Trust vs. Paradip Dock & Mazdoor Union, Civil Appeal No.1422 of 1990.* The Hon'ble Supreme Court vide order dated 15.03.1990, directed to constitute a High Powered Committee under Chairmanship of Mr. H.R. Khana, Former Judge, Supreme Court of India with two members nominated by the Ministry of Surface Transport, one of whom is a representative of that Ministry and another is an expert in Port Management. The High Powered Committee had to decide the question of listing the unlisted labourers and their welfare measures at Paradeep Port Trust. As per recommendation of the Hon'ble

Former Justice Mr. H.R. Khanna, Supreme Court of India, a body was formed in the name of petitioner-Management Committee (CFH) Scheme. The petitioner-Committee comprises all "Stevedores", "Senior Officials of Paradeep Port Trust" and "Labour Representatives from different labour Unions" to manage uniform engagement of labourers and disbursement of wages ensuring their welfare, health, housing and retirement benefit etc., so as to ensure that no labour of the pool is exploited by any of the Stevedores. Thus, the power of disbursement of wage was withdrawn from the stevedores and was entrusted to the pool constituted by the petitioner-Management Committee (CFH) Scheme. With this backdrop, the petitioner-charitable organization registered under Section 12AA of the Act, 1961.

3. The petitioner has filed its returns and assessment have been completed for past years by treating the petitioner as a Charitable organization, income whereof is exempted under Section 11 of the Act, 1961. Throughout its existence for more than a decade no tax has been paid by it for any one of the assessment years except assessment year 2004-05 and 2005-06, where a suo-motu revision was being initiated by the Commissioner of Income Tax, which has been subsequently quashed by the learned Income Tax Appellate Tribunal, Cuttack Bench, Cuttack that resulted in NIL demand for both the years. For the year in question, petitioner's application for grant of No-Deduction Certificate under Section 197 was processed and in response to the further query made by opposite party No.1, the petitioner filed the copies of last two years audited accounts and copy of the last assessment order on 04.09.2009. After receipt of the compliance, the concerned section lost the original application somewhere in the office, as a result of which the petitioner again had to file another copy along with all the enclosures on 25.02.2010 accompanied with a request to dispose of the application of the petitioner at an early date. Since no-deduction certificate was not issued in terms of Section 197(1) of the Act, 1961, an informal complaint was filed before the Commissioner of Income Tax but the same did not yield any result. In sheer, desperation, the petitioner was forced to invoke the extra ordinary jurisdiction of this Court by filing W.P.(C) No.5458 of 2010 praying inter alia for issuance of No-Deduction Certificate under the Statutory provision of the Act. The said writ petition was disposed of on 09.07.2010 with a direction to the opposite parties to consider the application of the petitioner for grant of no-deduction certificate in accordance with law and dispose of the same within four weeks from the date of the order. Thereafter, the petitioner approached opposite party No.1 for issuance of no-deduction certificate in terms of the order of this Court dated 09.07.2010 passed in W.P.(C) No.5458 of 2010 and the same was disposed of only on 13.08.2010 rejecting the application of the

petitioner on the plea that since the financial year had already lapsed, certificate under Section 197 of the Act, for the financial year 2009-10 cannot be issued. Hence, the present writ petition.

4. Mr. S.K. Acharya, learned counsel appearing for the petitioner submitted that due to dilatory tactics of opposite party nos.1 to 3 and particularly, the action of opposite party No.1 for non-compliance of the order of this Court, the petitioner is now falling within the mischief of the penal and prejudicial proceedings under Section 40 (a)(ia) of the Act, 1961. Since, No-Deduction Certificate had not been issued to the petitioner in time, some principals who engage the services of the labourers through the petitioner trust, made payments to the petitioner deducting TDS from such payments, whereas other principals have not deducted TDS considering the fact that the petitioner has been getting the No-Deduction Certificate in the past. Consequently, the petitioner faces a double edged sword in the manner of wrongful collection of taxes form the payments made by principals after deducting TDS and disallowances under Section 40(a)(ia) for payments made by principals without deducting TDS. Even though for the immediately preceding year i.e. the financial year 2008-09, no-deduction certificate was issued to the petitioner under Section 197 of the Act, but the same was not considered by opposite party Nos.1 to 3 while rejecting the application of the petitioner for issuance of no-deduction certificate under Section 197 of the Act for the financial year 2009-10.

5. Mr. Acharya, further submitted that the CBDT vide its Circular No.F.No.20/23/67 IT(A-I) had laid down that applications made by trusts for the issue of certificate for deduction of tax at lower rates or without deduction of tax, should be expeditiously dealt with so that the trust could collect interest and dividend income without delay. The certificates issued by the Income-tax officers could be reviewed by them once in three years.

6. The petitioner has made application for issuance of no-deduction certificate 9 months prior to expiry of the financial year 2009-10 i.e. on 22.06.2009. The ground of opposite party No.1 that no-deduction certificate can not be issued due to lapse of time is the deliberate action and delay on the part of opposite party Nos.1 to 3 who did not dispose of the application within a reasonable time. When an assessee files an application for issuance of No-Deduction Certificate, statutory duty is cast upon the I.T. Department to issue the certificate within a reasonable period/statutory limitation period which has not been done in the case of the petitioner. The action of the opposite parties in sitting over the matter is tainted with ulterior intention of

the opposite parties as a whole and opposite party No.1 in particular, in defrauding the present petitioner by denying the statutory benefits permissible to him under the Act. The opposite parties with mala fide intention denied to statutory benefits to the petitioner which is nothing but gross dereliction of duties imposed on them by the Act. Such delaying tactics, not only causes injustice and harassment, but also breeds corruption. This is a matter of serious concern, and if this trend continues unabated it will create anarchy and chaos in Income Tax administration in the country. Placing reliance upon various judgment of the Hon'ble Supreme Court as well as this Court, Mr. Acharya, learned counsel for the petitioner severely criticized the action of the Public Authorities who are discharging public duties, for their negligence and highhandedness.

7. Mr. A. Mohapatra, learned Standing Counsel appearing on behalf of the I.T. Department submitted that the present writ petition filed by the petitioner is not maintainable at the threshold for suppression of facts particularly about the hefty demand that was outstanding against the assessee for which certificate of lower/no- deduction could not be issued and the assessee was aware that only after payment of such arrears of tax the certificate could have been issued. The petitioner filed an application in Form No.13 for issuance of lower deduction certificate under Section 197 of the Act on 22.06.2009. On 25.03.2010 the Assessing Officer by his letter dated 22nd/25.03.2010 reported to the I.T.O.(TDS) that as per the demand notices an amount of Rs.27,36,625/- for the assessment year 2004-05 and Rs.4,62,13,909/- for the assessment year 2005-06 was outstanding against the assessee. Accordingly short deduction/No-Deduction certificate was not issued to the assessee. As per order sheet dated 25.03.2010, it was intimated to the Advocate for the Assessee that certificate of lower/no deduction will be issued only after payment of the arrear tax due by the assessee. On 05.08.2010 order of this Court was received to consider the application of the petitioner-Management Committee (CFH Scheme) in accordance with law and to dispose of the same within four weeks of the date of order dated 09.07.2010. On 13.08.2010, assessee was intimated that as the financial year for which the certificate was sought had lapsed in the meantime no certificate under Section 197 of the Act, 1961 could be issued as per law. It was submitted that there had not been any defiance as alleged to the direction dated 09.07.2010 passed by this Court in W.P.(C) No.5458 of 2010. Since the petitioner had not made payment of the arrear tax which was due for payment, the allegation of the petitioner that there is deliberate inaction on the part of the opposite parties is not correct. The petitioner is not affected in case any legal action is taken against the principal of the petitioner. Since huge demand was outstanding against the assessee, no

short/no deduction certificate could be issued to the assessee and the petitioner had not taken any steps for payment of the arrears outstanding. Therefore, the application for short/no deduction certificate could be issued to the assessee.

8. On the rival, legal and factual contentions advanced by the parties, the following questions fall for consideration by this Court :-

(i) Whether order dated 13.08.2010 (Annexure-1) passed by opposite party no.1-ITO (TDS) rejecting the application of the petitioner made in Form 13 of the I.T. Rules on 22.06.2009 for issuance of certificate under Section 197 of the Act for the financial year 2009-10 is sustainable in law ?

(ii) Whether validity of the impugned order can be justified by assigning fresh reasons by way of counter affidavit other than that is mentioned in the impugned order ?

9. Since, both the questions are interlinked, they are dealt with together.

Undisputed facts are that the petitioner is an assessee under the Act, 1961. It has been registered under Section 12AA of the Act, w.e.f. 01.04.1998 as a Charitable Organization. Returns have been filed and assessments have been completed for successive years by treating the petitioner as a charitable organization. In preceding years its income has been determined as Nil. In the past years, the petitioner was issued with certificate of no-deduction under Section 197 of the Act,. The petitioner filed his application on 22.06.2009 for issuance of certificate under Section 197 of the Act, for the financial year 2009-10 to different persons but the said application was rejected by the impugned order dated 13.08.2010 (Annexure-1) on the ground that the relevant financial year in question was over. In the impugned order only one ground i.e. lapse of financial year in question has been indicated for rejection of application of the petitioner for issuance of no-deduction certificate under Section 197 of the I.T. Act. However, in paragraph-4 of the counter affidavit, the Income Tax Department has taken a stand that on 25.03.2010, the Assessing Officer by his letter No.ACIT/Cir-1(2)/CTC/Misc/2009-10/13543 dated 22nd/ 25.03.2010 reported that as per the demand notices an amount of Rs.27,36,625/- for the assessment year 2004-05 and Rs.4,62,13,909/- for the assessment year 2005-06 was outstanding against the assessee. Accordingly, short deduction/no deduction certificate was not issued to the assessee. It is unfortunate that such a reason was neither indicated in the impugned order

of rejection dated 13.08.2010 passed under Annexure-1 nor taken by the Income Tax Department before this Court while the earlier writ petition bearing W.P.(C) No.5458 of 2009 was taken up for hearing on 09.07.2010. On the contrary, on the date of hearing on 09.07.2010, Mr. Mohapatra, learned Standing Counsel appearing for the Income Tax Department submitted that steps will be taken for consideration of the application of the petitioner for issuance of no-deduction certificate at an early date.

On the basis of above submission of Mr. Mohapatra, this Court directed the opposite parties to consider the application of the petitioner for grant of no-deduction certificate in accordance with law and dispose of the same within a period of four weeks from the date of receipt of copy of the order. On the date of hearing on 09.07.2010 the Department has not taken any ground that there was any outstanding dues against the assessee-petitioner for the financial year 2009-10 for which no certificate under Section 197 could be issued for that assessment year.

10. Thus, one of the reasons for not issuing the short deduction/no deduction certificate under section 197 of the Act to the petitioner was that there was letter of the Assessing Officer dated 25.03.2010 reporting opposite party No.1-ITO(TDS) that an amount of Rs.27,36,625/- for the assessment year 2004-05 and Rs.4,62,13,909/- for the year 2005-06 was outstanding against the assessee. Unfortunately, such a reason is not at all correct because as on 25.03.2010 no dues 4was outstanding against the petitioner-assessee. The demand raised for the assessment years 2004-05 and 2005-06 was nullified by the Tribunal vide its order dated 11th February, 2010 passed in I.T.A. No.191 & 192/CTK/2009 i.e. much before issuance of letter dated 22nd/25.03.2010. Copy of the Tribunal order was produced before this Court in course of hearing.

11. In view of the above, the Assessing Officer could have issued short deduction/no-deduction certificate under section 197 of the Act, 1961 during the financial year 2009-10.

12. We also find that there is inordinate delay and serious laches on the part of opposite party-authorities in dealing with the petitioner's application for grant of no deduction certificate under Section 197 of the Act. There is also no explanation from the Department as to why the petitioner's application submitted on 22.06.2009 for issuance of no-deduction certificate under Section 197 of the Act was taken up for the first time for consideration towards fag end of the financial year 2009-10 and that too on a wrong

ground of non-payment of outstanding dues, no-deduction certificate was not issued to the petitioner-assessee during financial year 2009-10.

13. At this juncture, it is relevant to mention the circular of the CBDT bearing Circular No.F.No.20/23/67 IT(A-I) to expeditiously dealt with the application filed by the Charitable trust for issuance of certificate for deduction of tax at lower rate or without deduction of tax. The said Circular of the CBDT is extracted below:-

> "Letter F. No.20/23/67-IT(A), DT. 28-7-1967
>
> Issue of certificate under s. 197 to charitable trusts whose income is exempt under s.11
>
> A number of cases have come to the notice of the CBDT, where charitable trusts, whose income is exempt under s.11 are filing applications for refund every year to claim refund in respect of tax deducted at source under s. 193 or s. 195. The CBDT desires that in such cases the ITOs should be instructed to bring to the notice of the trusts, the provisions of s. 197, under which the trust can ask the ITO to issue a certificate in its favour directing that either no tax should be deducted at source or the deduction should be made at a lower rate. These certificates should be promptly issued by the ITOs so that the trusts can collect their interest and dividend income without deduction of tax at source. The certificates issued by the ITOs can be reviewed by them once in three years."

14. Apart from the above, we notice that the impugned order of rejection of the petitioner's application for issuance of short deduction/no-deduction certificate under Section 197 of the Act, 1961 is in violation of the order of this Court dated 09.07.2010 passed in W.P.(C) No.5458 of 2009. As stated above, the said writ petition was taken up for hearing on 09.07.2010 i.e. after closure of the financial year 2009-10. On that date, learned Standing Counsel appearing on behalf of the Department could have taken a stand that no certificate under Section 197 of the Act could be issued after closure of the financial year in question. It appears that such a stand was not taken by learned Standing Counsel appearing for the Department on 09.07.2010. On the contrary, the Department has agreed before this Court to issue certificate on previous occasions, but by the impugned order, the Department refused to issue the certificate on the ground that the financial year in question is over. If that be the cause, it is not understood why the Department agreed before this Court to consider the petitioner's application made under Section 197 for grant of no-deduction certificate under Section

197 of the Act. Obviously the action of the Department are not bona fide and does not speak well of its attitude.

15. The mala fides are writ large because new grounds supporting the rejection order taken in the counter affidavit. The rejection order passed under Annexure-1 cannot be supported by any other grounds or reasons other than what is mentioned in the order.

16. Law is also well settled that validity of an order is to be judged by the reasons mentioned therein and it cannot be developed either by oral submission or by filing affidavit.

The Hon'ble Supreme Court, in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851***, held as follows:-

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):
>
> Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."

17. Admittedly, the impugned order of rejection of the petitioner's application does not state that because of outstanding dues, short deduction/no-deduction certificate under Section 197 of the Act was not issued. This is a fresh reason stated in the counter affidavit that too an incorrect reason which contention on behalf of the Revenue is wholly untenable in law.

18. In view of the above, a certificate ought to have been given to the petitioner during the financial year 2009-10 and the Department cannot take advantage of its own inaction and lapses by taking a stand that the financial year is over. Such action of the opposite parties as rightly apprehended by the petitioner would lead to unnecessary complication and unavoidable and inappropriate proceedings. Had the certificate been given in time as was done in the previous year there would not have been any necessity for making any deduction of tax by some of the principals from the payments made to the petitioner and the ultimate consequence, because of Departmental inaction, the Assessee-petitioner has to again go through the process of seeking refund in its assessment.

19. The Hon'ble Supreme Court in M/s. ***Dabur India Ltd. and another v. State of Uttar Pradesh and others.*** *AIR 1990 SC 1814,* observed that Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra legal steps or adopt the course of manoeuvring. Because of the above discontentment expressed at the Bar, it has become necessary to provide guidelines for just exercise of the power of Revenue authorities. To prevent the abuse of power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed by the authorities while exercising such power. New problems call for new solutions.

20. It is expected that the Department shall be careful in future not to indulge in any such avoidable circumstances thereby creates an impression that the intention of the Department is not to help the assessee but to harass them.

21. In the peculiar circumstances, we direct the opposite party No.1 to issue necessary certificate making it effective for the financial year in question.

22. Before parting with the case, we want to observe that this matter needs to be inquired into by the concerned Chief Commissioner of Income Tax. Needless to say that if any lapses are found on the part of the responsible officers, appropriate action/ proceedings shall be initiated against the erring officer (s).

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

Writ petition disposed of.

2013 (I) ILR – CUT- 56

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

W.P.(C) NO. 31361 OF 2011 (Dt.03.07.2012)

PUSPA RANJAN SAHOO … …Petitioner

.Vrs.

ASST. DIRECTOR OF INCOME TAX (INV) & ORS. ……..Opp.Parties

A. INCOME TAX ACT, 1961– S.132.

Search and seizure – "Reason to suspect" vis-à-vis "Reason to believe" – Such powers can be exercised against a person upon fulfilment of certain conditions – Firstly the competent authority must have the information in its possession – Secondly on the basis of such information it must have the reason to believe that the condition as stipulated in Sub-Clause (a) or (b) or (c) of Section 132 (1) of the Act exists.

The words "reason to believe" postulate application of mind and assigning of reasons – There is a rationale nexus between "reason" and "believe" – Held, "reason to believe" is the mandatory requirement of law for search and seizure but in the other hand the search and seizure carried out on the basis of reason to suspect is not valid.

(Para 9 to 12)

B. **INCOME TAX ACT, 1961– S.132.**

Search and seizure – A search which is conducted U/s.132 of the Income Tax Act is a serious invasion into the privacy of the citizen – Held, Section 132 (1) of the Income Tax Act has to be strictly construed and the information of the person or reason to believe by the authorizing officer must be apparent from the note received by him.

(Para 13)

C. INCOME TAX ACT, 1961 – S.132 (1) (iii)

Seizure of undisclosed income or property of the person searched – Prior to insertion of proviso to Section 132 (1) (iii) of the Act stock-in-trade could be seized at the time of seizure if it represents either wholly or partly the undisclosed income or property of the person searched but after insertion of the said proviso seizure cannot be effected on the stock-in-trade but note of such inventory can be prepared for future

use by the department against the assessee – Held, any bullion, Jewellery or other valuable article or thing which is in the form of stock-in-trade of the business cannot be seized by the authorized officer. **(**Para 17,18)

Case laws Referred to:-

1.(2003)260 ITR 67 (Cel.) : (Mahesh Kumar Agarwal-V- Dy.Director of Income Tax).
2.(1981) 130 ITR SC 212 : (Ganga Saran & Sons Pvt. Ltd.-V- I.T.O.)
3.AIR 2005 SC 648 : (Nathi Devi-V- Radha Devi Gupta)
4.(2001) 6 SCC 688 : (Salkia Businessmen's Assocation & Ors.-V- Howrah Municipal Corporation & Ors.)
5.(1990) 2 SCC 71 : (Goodyear India Ltd. & Ors.-V-State of Haryana & Ors. & State of Maharashtra & Ors.).
6.AIR 1972 SC 2284 : (G.Narayana Swami-V- G.Panneerselvam & Ors.)
7.(2002) 7 SCC 273 : (Union of India & Anr.-V-Hansoli Devi & Ors.).

For Petitioner - M/s. U.C. Behera & S.K.Ray.

For Opp.Parties - Mr. A.K.Mohapatra, Sr. Standing Counsel (for I.T. Deptt.)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the warrant of authorization and follow up action including search and seizure of stock-in-trade and stock hypothecated and to declare the seizure of stock-in-trade and stock hypothecated as unconstitutional being without jurisdiction and contrary to 3rd proviso to Section 132(1) of Income Tax Act, 1961 (for short 'the Ac'). The further prayer of the petitioner is for return of the seized stock-in-trade to the petitioner with compensation.

2. The petitioner's case in a nutshell is that the petitioner is an assessee bearing Permanent Account Number (PAN) AAMHP1514Q in the files of ITO-W-2(4), Khurda, who exercises jurisdiction over the petitioner. The petitioner assessee has been filing his return of income and is assessed to tax regularly. The petitioner started trading in gold and silver jewellery in a retail counter since the year 2000. On 9th September, 2011 basing upon the information provided to the Income Tax department as a routine procedure by the local police a search and seizure operation was conducted at the residential-cum-business premises of the petitioner. Subsequently, panchanamas were prepared and statements were recorded under Section

132(4) of the Act. Inventories were made and jewelleries item bearing serial No.1 to 10 and 13 to 22 i.e. totalling 22 items valued at Rs.62,10,585 (Rupees Sixty two lakhs ten thousand five hundred eighty five) have been seized even though the same represented stock-in-trade of the business and stock hypothecated. Hence, the present writ petition.

3. Learned counsel appearing on behalf of the petitioner submitted that statements were recorded under Section 132(4) of the Act with regard to books of Account, other documents or assets found as a result of search and also in respect of all matters relevant for the purpose of investigation. The petitioner who happens to be the Karta of HUF files the returns in his dual capacity, i.e., karta of HUF and individual before the ITO, Ward-2(4), Khurda and is assessed to tax regularly and is not a defaulter so far any income tax is concerned. Neither there has been any non-compliance to summons under Sections 131(1) nor notice under Section 142(1). There existed no apprehension regarding non-cooperation or attempted evasion or avoidance of tax. The petitioner was not in possession of any undisclosed money, billion, jewellery or other valuable articles or thing which can validate the authorization and subsequent issuance of search warrant. Therefore, the entire action under Section 132(1) of the Act was vitiated. The Central Board of Direct Taxes (CBDT), who is empowered by the legislatures to frame rules under Section 132(14) disapproves this kind of search seizure of the present nature vide instruction No.7 of 2003 dated 30.07.2003, the guidelines of which should have been strictly adhered to. The petitioner is running a jewellery business and its part of business is to purchase old gold items, remaking them for trading purpose. Gold is a precious metal, accumulated by people for its monetary value and easy liquidation and anybody in possession of a gold ornament can dispose of the same in the market without any proof of its ownership as a general practice and being a trader in jewellery, the petitioner purchases old ornaments from people in need. Assuming and not admitting for the moment that the search conducted was valid, the seizure of the items in trade cannot be said to be valid. The seizure of stock-in-trade violates the 3rd proviso of Section 132(1) of the Act. Such action of the authority violates the constitutional right guaranteed to the petitioner under the Constitution. The petitioner who traded with silver jewellery and filigree works in his individual capacity also deals with gold jewellery in his HUF business and to finance his HUF business availed a cash credit facility (CC) by hypothecation of stock-in-trade to State Bank of India prior to the search. The opp. parties-Department is debarred from seizure of stock–in-trade in view of the 3rd proviso of Section 132(1) of the Act whether disclosed or undisclosed, whether explained or unexplained.

4. It was further submitted that the warrant of authorization and follow up action including search and seizure of stock-in-trade and stock hypothecated are void *ab initio* and deserve to be quashed on the ground that mere information received from local police and recovery of two items of alleged stolen jewellery from the petitioner who purchased both the items on good faith from the seller, without any further investigation or cogent material or reason, does not constitute information within the meaning of Section 132(1) particularly when search was conducted on the very same day the local police intimated the matter to the Department. Such opinion can at best provide a "reason to suspect" and does not give rise to "reason to believe" and thus does not fulfil any of the conditions precedent for invocation of Section 132 of the Act.

5. Mr. A. Mohpatra, learned Senior Standing Counsel appearing for the opp. parties submitted that there is valid reason to initiate the search and seizure proceedings as contemplated under Section 132 of the Act and the warrant of authorization issued to conduct search and seizure operation in the residential-cum-business premises of the petitioner is valid in law. In support of his contention, he produced the relevant record for perusal of this Court.

6. Mr. Mohapatra further submitted that in course of search and seizure operation, if the search party finds that the stock-in-trade and stock hypothecated either wholly or partly represents undisclosed income or property of the assessee, the search party is fully empowered to seize the stock-in-trade.

7. On the rival contentions urged on behalf of the parties, the questions that fall for consideration by this Court are as follows:-

(i) Whether the condition(s) precedent to initiate search and seizure operation as contemplated under Section 132 of the Income Tax Act are fulfilled/satisfied in the present case so as to make the search and seizure operation conducted in residential-cum-business premises valid in law?

(ii) Whether under Section 132 of the Income Tax Act, no power/authority is vested with the Authorized Officer to seize any bullion, jewellery or valuable article of thing being stock-in-trade?

(iii) Whether the authorized officer in course of search and seizure operation cannot seize stock-in-trade even if he comes to a

conclusion that the said stock-in-trade represents wholly or partly undisclosed income or property of the Assessee ?

8. In order to decide above questions, it is necessary to examine the scope and ambit of Section 132 of the Act. The relevant provisions of Section 132 are quoted below:-

"132. **Search and seizure**

(1) Where the [Director General or Director] or the [Chief Commissioner or Commissioner] [or any such] [Joint] Director or [Joint] Commissioner as may be empowered in this behalf by the Board], in consequence of information in his possession, has reason to believe that

(a) any person to whom a summons under sub-section (1) of Section 37 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or wouldn't, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or things and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property [which has not been, or would not be disclosed] for the purposes of the Indian Income Tax Act, 1922 (11 of 1922) or this Act (hereinafter in this section referred to as the undisclosed income or property),

[then,—

(A) the [Director General or Director] or the [Chief Commissioner or Commissioner], as the case may be, may authorize any [Joint] Director, [Joint] Commissioner, [Assistant Director] [or Deputy

Director] [Assistant Commissioner [or Deputy Commissioner] or Income-tax Officer], or

(B) such [Joint] Director] or [Joint] Commissioner, as the case may be, may authorize any [Assistant Director] [or Deputy Director], [Assistant Commissioner [or Deputy Commissioner] or Income-tax Officer],

(the officer so authorized in all cases being hereinafter referred to as the authorized officer) to-

(i) enter and search any [building, place, vessel, vehicle, or aircraft] where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

[(iia) search any person who has got out of, or is about to get into, or is in the building, place, vessel, vehicle or aircraft, if the authorized officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;]

[(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) or sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorized officer the necessary facility to inspect such books of account or other documents;]

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

[Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business;]

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies there from;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing:

xxxx xxxx xxxx

Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may 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 authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii).

Provided also that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business.

(underlined for emphasis)

9. Section 132 prescribes that the competent authorities are empowered to permit the authorized officers to enter, search, break open, seize, place marks of identification and take other steps as contemplated under sub-clauses (i) to (v). However, such powers can be exercised against a person upon fulfilment of certain conditions. Firstly, the competent authority must have the information in its possession and, secondly, on the basis of such information it must have the reason to believe that the condition as stipulated in sub-clause (a) or (b) or (c) of Section 132(1) of the Act exists. Search and seizure cannot be sustained unless it is clearly shown that it was done by the authority duly authorized and any of the conditions precedent in relation thereto existed.

10. The opinion or the belief so recorded must clearly show whether the belief falls under clause (a) or (b) or (c) of Section 132(1) of the Act. The satisfaction note should itself show the application of mind and the formation of opinion by the officer ordering the search. If the reasons recorded do not fall within in any one of the clauses (a), (b) or (c) then the authorization under Section 132 (1) would not be valid. In order to justify the action the authority must have relevant materials on the basis of which he can form an opinion that he has reason to believe that action to be initiated against a person under Section 132 of the Act is needed. The belief should not be

based on some suspicion or doubt. Section 132 speaks of reason to believe and not reason to suspect or reason to doubt.

11. The reason to suspect that the petitioner is having undisclosed asset and there is likelihood that the same would not be disclosed is not equal to "reason to believe" that petitioner is in possession of undisclosed assets and intends to evade tax. Therefore, search and seizure carried out on the basis of reason to suspect is not valid because reason to believe is mandatory requirement of law for search and seizure {See *Mahesh Kumar Agarwal Vs. Dy. Director of Income Tax*, (2003) 260 ITR 67 (Cal.)}

12. The words "reason to believe" postulate application of mind and assigning of reasons. There is a rationale nexus between "reason" and "believe" {See *Ganga Saran & Sons Pvt. Ltd. Vs. I.T.O.*, (1981) 130 ITR SC 212.

13. In absence of any relevant material, authority would be acting in excess of his power and in violation of the mandatory power of Section 132 of the Act and the action of the authority cannot be sustained. Before taking action under Section 132 the competent authority must assure and reassure about the truthfulness and correctness of the information. A search which is conducted under Section 132 is a serious invasion into the privacy of the citizen. Therefore, Section 132(1) has to be strictly construed and the information of the person or reason to believe by the authorizing officer must be apparent from the note recorded by him.

14. Clause (c) of Section 132(1) concerns money, bullion, jewellery or other valuable article or thing. In order to proceed under clause (c) there must be information with the authorizing authority relating to two matters, firstly, that any person is in possession of money bullion, jewellery or other valuable article or thing; and secondly such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purpose of the Act.

15. Thus, in order to bring a case within the sweep of section 132(1)(c) or section 132A (1)(c) the belief of the authorizing authority as to mere possession of the assets mentioned in that section by a person is not sufficient. The information in possession of the authorizing authority must be such that he may have reason to believe that the assets represent undisclosed income of the person in whose possession the asset is possessed. Thus, where the authorizing authority issues warrant of authorization without there being any reason to believe that the asset which

was in possession of a person represented wholly or partly his undisclosed income, his action is to be held to be without jurisdiction.

16. So far the first question is concerned, Mr. Mohapatra, learned Senior Advocate for the Department produced the connected records for our perusal and we find that there are materials available on record for which the specified authority had reason to believe that the condition precedent to issue the warrant of authorization to conduct search and seizure operation in terms of Section 132 of the Income Tax Act at the residential-cum-business premises of the petitioner existed. Therefore, we are not inclined to quash the warrant of authorization.

17. Question nos.(ii) and (iii) relate to seizure of stock-in-trade found in course of search operation by authorized officer. These two questions being inter-related they are dealt with together. Section 132(1)(iii) empowers the Authorized Officer to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search which represent either wholly or partly undisclosed income or property of the person.

However, the proviso craves out an exception. It provides that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business. Therefore, even if the Authorized officer is of the view that any bullion, jewellery or other valuable article or thing which is in form of stock-in-trade either wholly or partly represents the undisclosed income or property of the person/ assessee searched, he cannot seize the same. But he shall make a note or an inventory of such stock-in-trade of business.

18. Prior to insertion of proviso to Section 132 (1)(iii) with effect from 01.06.2003 stock in trade can be seized at the time of seizure if it represents either wholly or partly the undisclosed income or property of the person/assessee searched. However, after insertion of the proviso with effect from 01.06.2003 it shall not be seized but a note or inventory of such stock in trade shall be prepared. The obvious purpose is to use it at the time of assessment and for other follow up actions.

19. The second proviso to Section 132 (1) (v) provides that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the

authorised officer may 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 authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii).

The 3rd proviso to Section 132(1)(v) provides that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business.

20. At this juncture, it is necessary to refer to Circular No.8 of 2003 dated 18th September, 2003 issued by the Central Board of Direct Taxes (CBDT), which read as follows:-

"60. Amendment in Section 132 to provide that stock-in-trade not to be seized during search:

60.1 The existing provisions of clause (iii) in sub-section (1) of section 132 provide for seizure of any books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of search.

60.2 The Finance Act, 2003, has amended Section 132 to provide that any bullion, jewellery or other valuable article or thing being stock-in-trade of the business, found as a result of search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade. Thus, stock-in-trade of business cannot be seized during search and seizure operations conducted on or after June 1, 2003.

60.3 The existing provisions of the second proviso to sub-section (1) of section 132 provide that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the same could not be placed under deemed seizure, wherein the Authorized Officer may serve an order on the owner or the person in immediate possession that he shall not remove or part with it except with the previous permission of the authorized officer.

60.4 The Finance Act, 2003, has inserted a third proviso providing that nothing contained in the second proviso shall apply in

case of any valuable article or thing, being stock-in-trade or the business.

60.5 These amendments will take effect from June 1, 2003 [Section 59(a)]"

21. In view of the specific provision contained in proviso to Section 132 (1) (iii) and third proviso to Section 132 (1) (v) of the Income Tax Act that bullion, jewellery or other valuable article or things being stock-in-trade of business found as a result of search shall not be seized, contention of Mr. Mohapatra that the authorized officer is fully empowered to seize stock-in-trade if he comes to the conclusion in course of seizure that said stock-in-trade represents wholly or partly undisclosed income or property of the assessee is not tenable in law.

22. Law is well-settled that interpreting a statute, effort should be made to give effect to each and every word used by the Legislature. The Courts always presume that the Legislature inserted every part thereof for a purpose and legislative intention is that every part of the statute should have effect. (See ***Nathi Devi v. Radha Devi Gupta*** , AIR 2005 SC 648).

23. Courts being custodian of law have a solemn duty to uphold the rule of law under all circumstances by directing the authorities concerned to act in accordance with law. If the rule of law is not enforced, it will certainly become a casualty in the process a costly consequence to be zealously averted by all, and at any rate, by the Court. [See ***Salkia Businessmen's Association & Ors. Vs. Howrah Municipal Corporation & Ors., (2001) 6 SCC 688].***

24. The Hon'ble Supreme Court in ***Goodyear India Limited & Ors. V. State of Haryana & Ors. & State of Maharashtra & Ors***., (1990) 2 SCC 71, held as fiscal laws must be strictly construed, words must say what these means, nothing should be presumed or implied, these must say so. True test must always be language used. Assumptions and presumptions are not permissible under fiscal provision.

25. A Constitution Bench of the Hon'ble Supreme Court in ***G. Narayana Swami v. G. Panneerselvam & Ors***., AIR 1972 SC 2284 held that the statute requires to be interpreted giving plain meaning of literal construction, and modification of words used in statutory provisions is not permissible.

26. In ***Union of India and another V. Hansoli Devi and others,*** (2002) 7 SCC 273, the Hon'ble Supreme Court held that if the words of the statute

are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgivers.

27. In view of the above, we are of the view that the seizure of jewellery being stock-in-trade by the authorized officer is wholly without authority of law and contrary to the statutory provision contained in proviso to Section 132 (1) (iii) and third proviso to Section 132(1) (v). Therefore, the opposite parties-Income Tax Department are directed to return the jewellery (gold and silver ornaments) seized by the Authorized Officer in course of search on 9.9.2011 forthwith to the petitioner-assessee after complying with the requirement provided, i.e., making a note or inventory.

28. In the result, the writ petition is allowed to the aforesaid extent.

Writ petition allowed.

2013 (I) ILR – CUT- 68

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

W.P.(C) NO. 13305 OF 2008 (Dt.07.09.2012)

BRAJABANDHU NATH & ORS. ……Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

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

P.I.L. – Scarcity of water at village Jharbeda – Villagers knocked the door of this Court – People of village Jharbeda and Sanmunda solely depend on the water of Satrusagar tank – The portion of the tank used by the people of Jharbeda is known as Satrusagar tank and the portion used by the people of Sanmunda is known as Satrusagar MIP – Satrusagar tank situated at a higher level than Satrusagar MIP which leads to drainage of all rain water towards Satrusagar MIP leaving the villagers of Jharbeda without water – Hence this writ petition.

Water shall always remain as the life line for the people – As per the map under annexure-1 there was a small embankment in between the two tanks which was gradually washed away to which the Opp.Parties do not deny – Held, Opp.Parties should take appropriate decision in this matter to construct an embankment between Satrusagar tank and Satrusagar MIP or make such other provisions for availability of adequate water for the villagers of Jharbeda. (Para 8, 10)

B. CIVIL PROCEDURE CODE, 1908 - S.11.

Res judicata – Order passed in the earlier writ petition has not decided any issue on contest – Held, there can not be any bar for filing a fresh writ petition on the principles of res judicata. (Para 9)

For Petitioner - M/s. S.K.Padhi, Sr. Counsel with
Mrs. M.Padhi, G.Mishra, Mr. A.Das.

For Opp.Parties - Mr. Ashok Mohanty, Advocate General
(for O.Ps.1 & 2)
Addl. Govt. Advocate (for O.Ps.1 to 5 & 9)
M/s. Mukesh Panda & M.S.Panda (O.P.No.8).

S.K.MISHRA, J. In this writ petition, the villagers of village Jharbeda pray to direct the opposite parties to provide an embankment in Satrusagar Tank, which will facilitate the provision of adequate water for use of irrigation and other purposes.

2. In Hindol block of Dhenkanal District, there are two adjoining villages, namely, Jharbeda and Sanmunda and both the villages share the water of Satrusagar Tank. The said tank/M.I.P caters to the need of two villages. Satrusagar MIP has been allocated to Sanmunda village whereas Satrusagar Tank has been allocated to Jharbeda village. The tank which has been allocated to Jharbeda village is perennially without water as the level of part of the tank, is at much higher level vis-à-vis the level of the tank at the site of Sanmunda village. Thus, all the water flows down to the side of Sanmunda village as there is no embankment to provide minimum water level for the Jharbeda village.

4. The villagers of Sanmunda had earlier approached this Court by filing O.J.C. No. 6151 of 1997, which was disposed of on 31.7.1997. It was a Public Interest Litigation. The villagers of Sanmunda had challenged the proposed action of raising embankment over Sanmunda Satrusagar M.I.P. On 31.7.1997 this Court disposed of the writ petition by passing the following order:

> " The grievance of the present writ petitioner is that the opposite parties 1 to 3, 5 and 9 are trying to interfere with the Sanmunda Satrusagar MIP situated in Jharbeda by illegally putting embankment in the project and leasing out the same for pisciculture.
>
> Learned Addl.Govt. Advocate Mr.R.K.Mohanty has made a statement on the basis of instructions received that there is no proposal to raise any embankment by dividing the above project.
>
> After hearing learned counsel for petitioner and learned Addl. Govt. Advocate, we dispose of the writ petition with a direction that O.Ps.2 and 3 shall not raise any embankment by dividing the above project into two parts so as to interfere with the irrigation rights. The Gram Panchayat O.P.No.9 is also directed not to put the project to auction for the purpose of pisciculture."

5. In the meantime, the villagers of Jharbeda have been undergoing tremendous hardship as the water level in Satrusagar Tank, which has been allocated to their village, is precariously low and the villagers have no other

source of water and thus, the inaction of the opposite parties is vitally affecting the daily livelihood of the entire villagers. They have been repeatedly agitating their grievances before the opposite parties, more particularly, the Sub-Collector, Hindol and praying for adequate water supply to the village. The inlet to the tank is through Satrusagar Tank allocated to Jharbeda village and unless steps are taken to provide water to village Jharbeda, the entire villagers would suffer. Unless there is proper boundary in the tank there cannot be adequate water for the villagers of Jharbeda and under these circumstances, the villagers pray that appropriate order be passed directing to construct a boundary in the tank for providing adequate water to the petitioners' village Jharbeda. The Satrusagar Tank is allocated to Jharbeda village, which is under the control of Panchayati Raj Department and the Satrusagar Minor Irrigation Project is under the control of Irrigation Department. There are poles demarcating the two portions allocated to each of the villages. The petitioners, therefore, plead that if boundary is constructed upto a minimum level, the other villagers would not be affected as the same would provide water to both the villagers. The position, as it exists now, would severely affect the present petitioners' village, but by the construction of a boundary, there cannot be any prejudice caused to the other villagers as both the villages will have adequate water supply and the said position would be just and equitable for both the parties concerned. In view of the aforesaid submission, the petitioners have filed this writ petition with the prayer as afore-described.

6. Opposite parties 1 to 5 and 9 have filed their counter affidavit, inter alia, pleading that the land measuring Ac.4.48 dec. appertaining to Hal plot no. 512 under Hal Khata No.100 of village Jharbeda is recorded in favour of the State in Rakshita holding and the kisam of the land is Jalasaya/2 and the said tank is locally known as "Satrusagar Tank". It is further stated that adjacent to the said land, another plot of land appertaining to Hal Khata No.166 of village Sanmunda measuring Ac.7.23 dec. under Hal Plot No. 1562 is also recorded in favour of the State and the kisam of the plot is 'Jalasaya'. The said jalasaya is locally known as "Satrusagar M.I.P". The people of Jharbeda have been using the water of the said Satrusagar Tank for the purpose of bathing as well as agriculture. Similarly, the people of village Sanmunda have been using the water of Satrusagar M.I.P. for the purpose of bathing and agriculture. At present there is no embankment dividing the water area of the tank and the M.I.P. Hence, both the tank and the M.I.P. contain water depending upon the natural gradient at the bottom of the tank. Since there is existing dispute between both the villages, it is not possible to construct embankment between the tank and the M.I.P. and as such, the opposite parties are not taking appropriate measures to provide

water to village Jharbeda. These opposite parties also admit that village Jharbeda is situated at a higher level than Satrusagar M.I.P. During rainy season, the rain water flows down through Satrusagar tank and largely accumulates in Satrusagar M.I.P since there is no embankment in between. Earlier there was a small embankment in between the two ponds, but due to heavy flow of rain water from the side of Satrusagar Tank, the small embankment had been gradually washed out. The Satrusagar Tank and Satrusagar M.I.P have been transferred to the management of Kantimili Gram Panchayat and as such, both the tanks are under the control of Kantimili Gram Panchayat. The villagers of Jharbeda had participated in annual public auction of Satrusagar Tank in the year 1997 at Kantimili Gram Panchayat and one Rabi Narayan Nath, son of Ananda Nath of village Jharbeda being the highest bidder had taken the tank on lease for pisciculture by depositing the auction price of Rs.3050/-. Similarly, Satrusagar M.I.P. coming under village Sanamunda had been put to public auction for pisciculture in the year 1994-95 and the people of village Sanamunda Participated in the public auction at Kantimili Gram Panchayat. In the said auction one Sudhakar Behera, son of Chandramani Behera of village Sanamunda being the highest bidder had taken the M.I.P. on lease by depositing the auction price of Rs.2450/-. But however, at present due to the order passed by this Court on 31.7.1997 in the aforesaid writ petition, public auction for the said tanks for the purpose of pisciculture has been stopped.

7. The opposite parties have further admitted that due to scarcity of water, the villagers of Jharbeda have been facing problem for the purpose of bathing and drinking water for cattle etc., but due to the order passed by this Court in the earlier writ petition, no embankment can be raised by dividing the above project into two parts. Therefore, the allegation made by the petitioners regarding the inaction of the opposite parties is baseless. These opposite parties further submitted that appropriate orders may be passed to solve the dispute between the villagers of Jharbeda and Sanmunda.

8. We have heard the learned counsel for the parties and also perused the records. The map which has been annexed as Annexure-1 clearly shows that there was an embankment between Satrusagar Tank and Satrusagar M.I.P. It is also admitted by all and sundry that Satrusagar Tank is at a higher plain, which leads to drainage of all rain water towards the Satrusagar M.I.P side and leaves the villagers of Jharbeda without any water to be used for the purpose of bathing, drinking water for the residents of the village and cattle and for irrigation of agriculture land. As such, the petitioners are facing a lot of difficulties. The petitioners, therefore, pray for a provision of water,

which is the basic necessity for human life and unless, their need is fulfilled, it shall be violative of Article 21 of the Constitution as water is very much necessary for bare minimum existence of human life and cattle of the villagers.

9. Learned counsel for the opposite parties, on the other hand, very strenuously argued that this writ petition is barred by the principles of res-judicata in view of the order dated 31.7.1997 passed by this Court in OJC No. 6151 of 1997. It is noted here that the order passed in the aforesaid writ petition has not decided any issue on contest, rather it has reiterated the stand taken by the opposite parties that there is no proposal for construction of any embankment in between the tank and M.I.P. Thus, there cannot be any bar for filing a fresh writ petition on the principles of res judicata.

10. Moreover, it is seen that the situation has changed and in the meantime 15 years have elapsed and there is acute shortage of water for the villagers of Jharbeda. Hence, we are of the considered opinion that the opposite parties should take appropriate decision in this matter to construct an embankment between Satrusagar Tank and Satrusagar M.I.P or make such other provisions for availability of adequate water for the villagers of Jharbeda.

11. In that view of the matter, this writ petition is disposed of directing the opposite parties 1,2 and 3 to constitute a team of experts to study the situation and take into consideration all the relevant aspects of the case, decide whether an embankment is necessary for the purpose of providing water to the villagers of Jharbeda within a period of three months from the date of receipt of a certified copy of this judgment. The decision to be taken shall be implemented as expeditiously as possible. In the facts and circumstances of the case, there shall be no order as to cost.

Writ petiton disposed of

2013 (I) ILR – CUT- 73

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

W.P.(C) NO. 7208 OF 2007 (Dt.09.11.2012)

DUSMANTA KISHORE SWAIN .....Petitioner

.Vrs.

CUTTACK DEVELOPMENT AUTHORITY & ORS. .....Opp.Parties

Lease of land – Petitioner was allotted one 'E' Category Plot in the Bidanasi Project Area but due to "Forest Kisam" of the land he was asked to take another plot in exchange – On an application Vice-Chairman allotted Plot No.575-C-1 in Sector-8 in favour of the petitioner – Subsequent order Dt.06.06.2007 cancelling the allotment is challenged.

Duty of the CDA to see that the land allotted to the petitioner was free from litigation – Records show that plots allotted to persons found to be of forest category are reallocated with different plots – In this case after re-allotment of a 'C' category plot in favour of the petitioner CDA has given permission for approval of the plan and to obtain loan for construction – If the allotment of the land is cancelled on flimsy grounds the petitioner will suffer irreparable loss – Held, the order of cancellation Dt.06.06.2007 is illegal hence quashed.

(Para 5)

For Petitioner - M/s. P. K.Kar, D.K.Ratha & D.K.Mohanty.

For Opp.Parties - M/s. D.Mohapatra, M. Mohapatra, S.Nanda & G.R.Mohapatra.

B. P. DAS, J. This writ petition has been filed by the petitioner challenging the cancellation order dated 06.06.2007 of the allotted plot No.575-C 1 in Section-8, under Annexure-15.

2. The brief facts of the case are that the writ petition as delineated is that the petitioner, who is working as a Senior Account Assistant in the office of the Cuttack Development Authority initially in response to the advertisement published in the local daily Oriya newspapers, made an application on 11.01.1989 in prescribed form for an allotment of a plot of land

in the category of 'E' measuring an area 1200 sq.ft. on lease basis and deposited a sum of Rs.4,256/-. Accordingly, the application of the petitioner was considered and opposite party no.4 issued a provisional allotment letter on 20.05.1989 in favour of the petitioner requiring him to deposit @ Rs.450/- in 48 installments with effect from 30.06.1989 till 31.05.1993. Accordingly, the petitioner had deposited the balance amount of all installments towards the lease premium and on 18.03.2000, opposite party no.4 issued a letter intimating the petitioner that he has been allotted 'E' category of plot bearing No.E-309 in Sector-7 of Bidanasi Project area but the said plot cannot be allotted since it was subsequently detected that the allotted plot was "Forest Kisam" land and it attracts the provisions of the Forest Conservation Act and that steps have already been taken for de-reservation of the land allotted to the petitioner and it may take some more time to get clearance from the Government of India. Therefore, the petitioner was asked to exchange his allotted plot in Sector-XI and to give his option to avail the plots in Sector-XI of Bidanasi Project area in exchange of land allotted in Sector-7. Thereafter the petitioner made an application with a request to allot the vacant Plot No.8-3C/563 in Sector-VIII on payment of balance cost which is a 'C' category plot, i.e., 2400 sq.ft. The petitioner further made an application to the Vice Chairman on 25.06.2005 for allotment of Plot No.575/C-1 in Sector-VIII of Bidanasi Project Area in exchange of earlier allotted plot. Taking into consideration the application of the petitioner, opposite party no.4 issued a letter on 29.05.2006 (Annexure-6) allotting him a residential plot bearing No.575/C-1 in Sector-VIII (Drawing No.CDA (PL)B-12/2004) measuring 2400 sq.ft. in exchange of earlier plot allotted and directed him to deposit the balance net amount of Rs.2,57,928/ - as well as a sum of Rs.3,000/- towards the documentation charges and possession handing over freeze. Accordingly, the petitioner deposited the same and allotment was issued on 29.05.2006. The petitioner after getting peaceful possession of the said allotted land applied for permission for construction of double storied building over the said land. After getting permission under Annexure-8, the petitioner took water supply from the Cuttack Development Authority project office and sewerage connection was also sanctioned in favour of the petitioner. Ultimately, the petitioner taking loan from the Housing Development Finance Corporation Limited started construction of the house over the said plot. Initially one Advocate, namely, Nirmal Ranjan Routray had filed a Misc.Case bearing No.851 of 2006 in OJC No.6721 of 1999 a public interest litigation with a prayer that the area in Sector-VIII is green belt area for which the present petitioner, who was opposite party no.1 in the said Misc.Case should not have constructed over the said land. Ultimately, the petitioner, Nirmal Ranjan Routray, advocate, withdrew the said Misc. Case No.851 of 2006

filed by him and when the matter stood thus, opposite party no.4 issued a letter on 03.04.2007 by the order of the Vice-Chairman to the present petitioner to stop further construction of the said plot as some enquiry was contemplated. The enquiry was conducted over the same and according to the petitioner after such enquiry, the land so allotted to the petitioner was cancelled, without considering the consequential effect of the construction of the building by spending a huge amount of money for purchase of the land and incurring huge loan for the same. The said order of cancellation vide Annexure-15 has been passed on the following grounds:

> " a) You have been allotted a 'C' category plot against your original allotment of a 'E' category plot though 7 nos. of 'C' category applicants allotted in Sector-7 (Forest Kisam land) have not yet been given any plot.
>
> b) Your application has been considered without calling for option from other similarly situated persons.
>
> c) You have been allowed "Land adjustment" instead of 'Cost adjustment' which is against the decision in the 74th Authority Meeting. You have been charged @ Rs.205/- instead of Rs.236/-."

3. The petitioner challenges the cancellation contending that he has initially got a land on proper application and paid the money but due to the reason stated that the land could not be allotted to him for which he was given option to take another land which was exercised. But instead of taking 'E' category plot he obtained 'C' category and paid all the money. The allotment was made by the Vice-Chairman he has been given the land and according to him there is no application found pending on the date on which the petitioner was given 'C' category of plot and he refers to Annexure-16 which shows the list of allotment of plots in the newly carved out plot in Sector-VIII and some other sectors which have been relocated after the allotments were found to be in forest area. According to the petitioner there is no reason why his land was cancelled, for which, he has filed this writ petition. This Court vide its order dated 12.6.2007 passed the following orders:

> " Heard.
>
> Issue notice.

Mr. Mohapatra, learned counsel appearing for the C.D.A. accepts notice on behalf of opposite parties. Five extra copies of the writ petition be served on him in course of the day.

List this matter in the week commencing from 2nd July 2007.

Counter affidavit, if any, be filed in the meantime.

.....
I. Mahanty, J.
(Vacation Judge).

Misc. Case No.6815 of 2007

Notice as above.

As an interim measure, the order dated 6.6.2007 passed by the Cuttack Development Authority vide Annexure-15 to the writ application shall remain stayed till the next date and it is made clear that if the petitioner continues with further construction of the building over plot no.8-4/575-C-1 in Sector-VIII of Bidanasi Project Area, the same shall be subject to the result of the writ application and at his risk and cost.

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

.....
I. Mahanty, J.
(Vacation Judge)

4. Counter affidavit has been filed by Mr. D.N.Mohapatra, learned counsel for the opposite parties stating therein that the petitioner was not entitled for the 'C' category of plot and the grounds taken in Annexure-15 are valid grounds basing upon which the land of the petitioner has been cancelled.

5. After hearing learned counsel for the parties, it is an admitted fact that initially the petitioner not got the land by way of making due application as per the advertisement but it is the duty of the Cuttack Development Authority to see the land allotted to the petitioners and other categories of persons are free of litigation. From the records, it is seen that the plots allotted to several persons which were later on found to be under forest category, they are reallocated with different other plots newly carved out in Sector-8, 10 and 11 on the same terms and conditions as that has been done in Section-7,8,9,10 and 11. After allotment of the land to the petitioner consciously the authority have sanctioned the plan to the petitioner and the petitioner has constructed the house over the said plot and this Court has also allowed the petitioner to go on construction which shall be subject to the result of the writ petition. The objection raised in Annexure-15 that he was

allotted ‘E’ category plot and thereafter allotted ‘C’ category plot by the Vice-Chairman is non-est itself and misnomer because the allotment of the land by the Vice-Chairman cannot be said to be illegal, when the CDA has given his permission for approval of plan for construction of the building and also given permission to obtain loan and the petitioner has constructed his residential house over the said plot. If the allotment of land is cancelled on the flimsy ground indicated above then the petitioner will suffer irreparable loss. Accordingly, Annexure-15 is totally erroneous and illegal and not tenable in law and the same is accordingly quashed.

The writ petition is accordingly allowed. There shall be no order as to cost.

Writ petition allowed.

2013 (I) ILR – CUT- 78

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

W.P.(C) NOS. 22004/2011 & 7743/2012 (Dt.20.09.2012)

SRIKARA MAJHI & ANR. ……..Petitioners

.Vrs.

D.M., UNITED BANK OF INDIA & ORS. ……...Opp.Parties

SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – S.13.

Orissa State Civil Supplies Corporation (Petitioner) has some dues on the owner of M/s. Maa Rice Mill (O.P.3) – Petitioner initiated proceeding under the O.P.D.R. Act for realization of such dues – Properties sought to be attached by the corporation are mortgaged with the Bank (O.P.1) for obtaining the loan – Question is whether the corporation can seek attachment of the properties mentioned in the certificate when such property is mortgaged with the Bank.

In this case the petitioner-Corporation is registered under the companies Act hence not a state – So principle of crown debt or principle of priority have no application – Held, the properties having been mortgaged with the bank, the bank has a right to sell the properties to recover its dues and the corporation has no right over the said properties. (Para 8)

Case laws Referred to:-

1.(2000)5 SCC 694 : (Dena Bank-V- Bhikhabhai Pradbhudas Parekh & Co. & Ors.)
2.AIR 2007 Madras 118 : (UTI Bank Ltd.-V- The Deputy Commissioner of Central Excise, Chennai & Anr.)

For Petitioner - M/s. Bigyan Kumar Sharma, A.U.Senapati.

For Opp.Parties – M/s. Ranjit Sahoo, D.Das & M.N.Jena, (for O.Ps.1 & 2)

For Petitioner - M/s. Raj Kishore Swain, Y. Nayak, B.Mohanty, B.Nayak & P.K.Mohanty.

For Opp.Parties - M/s. Rajit Sahoo, D.Das, M.N.Jena & M.K.Acharya (Caveator).

L. MOHAPATRA, J. Both the writ applications relate to the same issue and, accordingly, learned counsel appearing for both parties in both the writ applications were heard and the writ applications are disposed of in this common judgment.

The petitioner in W.P.(C) No.22004 of 2011 is the District Manager of Orissa State Civil Supplies Corporation Ltd., and opposite party no.3 therein is the Proprietor of M/s. Maa Rice Mill located in the district of Subarnapur.

The petitioner, Banisdhar Tripathy, in W.P.(C) No.7743 of 2012 is father of the borrower and a prayer has been made for release of the property belonging to him.

2. The facts leading to filing of the writ applications are that M/s. Maa Rice Mill was appointed as a custom miller by the Orissa State Civil Supplies Corporation and, accordingly, an agreement was executed between the said M/s. Maa Rice Mill and the Corporation on 3.6.2010 for kharif marketing season 2009-10. Under the agreement, the Rice Mill was to receive paddy stocks procured from the farmers by the Corporation and supply the resultant FAQ standard rice to the Corporation within a stipulated time for distribution to the beneficiaries under the Public Distribution System. The said Rice Mill received 29289 quintals of paddy with due acknowledgement and as per the terms of the agreement, it was to supply 19916.85 quintals of resultant rice to the Corporation. As against the said contract, the Rice Mill had supplied only 15875.33.200 quintals and misappropriated 3748.83.400 quintals of rice. The Corporation therefore issued a demand notice through the Collector, Subarnpur on 17.2.2011 requesting the Mill owner to deposit the cost of balance rice. The owner of the Rice Mill, who is opposite party no.3 in W.P.(C) No.22004 of 2011, having not paid the price of the misappropriated rice, a requisition under Section 4 of the Orissa Public Demand Recovery Act 1962 was filed in the Court of Certificate Officer for realization of a sum of Rs.62,91,444.34 from the said opposite party no.3. Along with the said requisition, property statement of the owner was also furnished for the purpose of attachment and recovery of the dues of the Corporation.

3. Opposite party no.3, who is owner of the Rice Mill, had availed financial assistance from opposite party no.1-Bank, namely, United Bank of India by mortgaging the properties, which were sought to be attached under the recovery proceeding initiated under the Orissa Public Demand Recovery Act, 1962. The dues of the Bank having not been paid, the Bank took recourse to the provisions of SARFAESI Act, 2002 and a notice was issued

under Section 13(4) of the said Act on 15.7.2011 for sale of the mortgaged properties. When the Corporation came to know about the said notice, intimation was given to the Bank indicating therein that the Corporation was to get an amount of Rs.62,91,444.34 from the said Rice Mill owner. However, intimation was ignored by the Bank.

4. Case of the Corporation is that any action taken by the Bank under the SARFAESI Act, 2002 does not create first charge in favour of the Bank and, therefore, dues of the State shall have precedence over the dues of the Bank and other financial institution. Shri Sharma, learned counsel appearing for the Corporation submitted that the provisions contained in OPDR Act, 1962 for realization of State dues is not inconsistent with the SARFAESI Act, 2002 and in absence of any provision in the SARFAESI Act creating first charge in favour of the Bank, in lieu of its dues, the said legislation cannot be given overriding effect qua the provisions contained in the State law or the right of the State to recover its dues. In support of his submission, Shri Sharma, learned Counsel appearing for the Corporation referred to Section 35 of the SARFAESI Act, 2002.

5. Learned counsel appearing for the Bank submitted that the properties, which are sought to be attached in the proceeding initiated under OPDR Act, are the properties which had been mortgaged by the owner of the Mill (opposite party no.3) with the Bank for the purpose of obtaining the loan. The properties had never been mortgaged with the Corporation for recovery of any dues and, accordingly, the Corporation has no right over the properties mortgaged with the Bank and the Corporation has to find out some other method for recovery of its dues.

6. The question that arises for consideration is as to whether the Corporation can seek for attachment of the properties mentioned in the certificate when such property has been mortgaged with the Bank for the purpose of obtaining a loan. Therefore, Shri Sharma, learned counsel appearing for the Corporation referring to Section 35 of the SARFAESI Act, 2002 submitted that the provisions of the said Act shall have effect, not withstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Since the SARFAESI Act does not create any first charge, there is no inconsistency between the State Legislation and the OPDR Act under which the Corporation seeks to recover its dues. Moreover, Section 37 of the SARFAESI Act provides that the provisions of the said Act and the Rules made thereunder shall be in addition to and not in derogation of any other law for the time being in force. Therefore, action under both the Acts can be

taken simultaneously and dues of the State being dues of the Crown it shall have precedence over the dues of the Bank.

7. Learned counsel for the Bank in reply submitted that principle of Crown debt or principle of priority does not apply to the present case and, there is no provision under which the Corporation can claim that it shall have precedence over the dues of the Bank. On the other hand, in absence of any such provision, the Bank being a secured creditor, its claim shall prevail over the Crown debt. It was further contended by the learned counsel appearing for the Bank that the Civil Supply Corporation Ltd. has been registered under the Companies Act and, therefore, cannot be treated as a Department of Government and, accordingly, cannot claim that its dues is a Crown debt. Learned counsel for the Bank, therefore prayed for dismissal of the writ application as the Corporation has no right to seek for attachment of the properties mortgaged with the Bank for the purpose of obtaining the loan.

8. Undisputedly, the Corporation is registered under the Companies Act and is a separate legal entity. The principle of priority of Government debts/propriety of State debts is founded on the rule of necessity and of public policy. The State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all and it is essential that as a sovereign, the State should be able to discharge its primary function and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasizes the necessity and the wisdom of conceding to the State, the right to claim priority in respect of its tax dues. In this connection, reference may be to a decision of the Hon'ble Apex Court in the case of ***Dena Bank Vrs. Bhikhabhai Prabhudas Parekh and Co. and others*** reported in (2000) 5 Supreme Court Cases 694. Dues of the Corporation is not a tax due and, therefore the principle of Crown debt or principle of priority shall have no application in the facts of the present case. On the other hand, admittedly, the properties, which are sought to be attached in the proceeding initiated under the OPDR Act, have been mortgaged by the proprietor of the Rice Mill with the Bank for obtaining a loan. The Madras High Court in the case of ***UTI Bank Ltd. Vrs. The Deputy Commissioner of Central Excise, Chennai and another*** reported in AIR 2007 Madras 118 went to the extent of holding that the claim of secured creditor will prevail over the Crown's debts. There is no provision under the OPDR Act creating first charge over the properties sought to be attached in the proceeding. Even if we accept the contention of the learned counsel appearing for the Corporation that SARFAESI Act does not create any charge, the difference is that the properties sought to be attached by the

Corporation, are mortgaged with the Bank for obtaining the loan. The said properties having been mortgaged with the Bank, the Bank has right to sell the properties and recover its dues. The Corporation has no right over the said properties and, accordingly, its dues have to be recovered by way of attachment of the properties which are not mortgaged or otherwise.

9. For the reasons stated above, we find no merit in the prayer of the Corporation and, accordingly, dismiss W.P.(C) No.22004 of 2011.

10. So far as W.P.(C) No.7743 of 2012 is concerned, the petitioner therein is the father of the borrower and he was the guarantor. In addition to the collateral security offered by the borrower, the ancestral residential building of the petitioner was also offered as collateral security for sanction of loan amount. When steps were taken by the Bank for realization of its dues taking recourse to SARFAESI Act, 2002, the petitioner approached this Court in W.P.(C) No.21131 of 2011 and the said writ application was disposed of on 25.8.2011. In the said writ application, it was contended by the petitioner that he arranged a buyer for purchasing Plot Nos.99, 100, 153 and 184 under Khata No.58 extending to an area of Ac.2.220 decimals in Mouza-Kumunde in the district of Sonepur advertised for sale by the Bank for consideration of Rs.1.01 crores. The prospective buyer appeared in the Court through counsel and learned counsel for the prospective buyer undertook to deposit the entire dues of the Bank to the tune of Rs.1,16,82,378.50 (as on 25.7.2011) by end of October, 2011. The Court therefore directed that in the event the prospective buyer deposits the entire money, the property mentioned above shall be sold in favour of the prospective buyer. The other properties mentioned in the advertisement shall be released in favour of the present petitioner. From the claim made in the present writ application, it appears that the prospective buyer did not deposit the amount as undertaken, as a result of which, the Bank issued advertisement for sale of all the properties. Though we find no justification to interfere with the action taken by the Bank for recovery of its dues, being conscious of the fact that the residential house of the petitioner had been mortgaged, we direct the Bank to put all the mortgaged properties in public auction, if not already done, and if the outstanding dues can be recovered by sale of the properties taken as collateral security offered by the borrower, the residential house of the petitioner shall be spared. In the event, it is not possible to recover the entire outstanding dues by sale of the properties mortgaged by the borrower, the Bank may also proceed with sale of the properties of the guarantor (petitioner) for recovery of its dues.

11. With the above observation, this writ application is also disposed of.

Writ petition disposed of.

2013 (I) ILR – CUT- 84

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

W.P.(CRL) NO. 154 OF 2012 (Dt.26.09.2012)

SABAN MAJHI ……..Petitioner

.Vrs.

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

A. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – S. 7-A.

Juvenile in conflict with law – Conviction of petitioner along with others for the offence of gang rape and murder – Question of juvenility raised after his conviction by the trial Court and confirmed by the High Court – On inquiry Juvenile Justice Board found the petitioner a juvenile on the date of commission of the offence – In view of the provisions contained in Section 7-A, 15, 20 & 64 read with Section 2(1) and 2(k) of the Act, no useful purpose shall be served by sending the matter back to the Juvenile Justice Board, Keonjhar which would result in further illegal detention of the petitioner for some more days – Petitioner suffered the sentence more than the period prescribed U/s.15 of the Act – Held, direction issued for release of the petitioner from prison if his detention is not required in any other case.

(Para13)

B. CONSTITUTION OF INDIA, 1950 – ART.226, 227.

Writ jurisdiction – Petitioner convicted U/s.302 and 376 (2) (g) I.P.C. along with others – He claims juvenility for the first time after his conviction confirmed in appeal by this Court – Cogent materials available for prima facie satisfaction of the Court – Age of the juvenile and the benefit of the Act for the juvenile not raised and considered in appeal – Held, this Court can consider the claim of juvenility in exercise of its writ jurisdiction even after disposal of the appeal.

(Para 8)

Case laws Referred to:-

1.AIR 2012 SC 1754 : (Sunil Kumar-V- State of Haryana)

2.AIR 1981 SC 2037 : (Raghubir –V- State of Haryana)

3.AIR 2002 SC 1771 : (Rupa Ashok Hurra-V- Ashok Hurra & Anr.)

4.(2005) 12 SCC 615 : (Gurpreet Singh-V- State of Punjab)

5.(2009) 16 SCC 256 : (Murari Thakur-V- State of Bihar)
6.(2009) 15 SCC 259 : (Pawan-V- State of Uttranchal, etc.,)
7.2011 CRI L.J. 1006 : (Lakhan Lal-V- State of Bihar)
8.2011 CRI. L.J.1004 : (Jitendra Singh-V- State of Uttar Pradesh)
9.AIR 1984 SC 237 : (Gopinath Ghosh-V- State of West Bengal)
10.AIR 1989 SC 1329 : (Bhoop Ram-V- State of U.P.)
11.AIR 1998 SC 236 : (Bhola Bhagat-V- State of Bihar)
12.(2009) 13 SCC 211 : (Hari Ram-V- State of Rajasthan)
13.(2011)50 OCR(SC) 221 : (Amit Singh-V- State of Maharashtra & Anr.)
(2011) 13 SCC 744
14.2008 CRI. L.J. 2115 : (Saheb Sopan Kale-V- State of Maharashtra).

For Appellant - M/s. Niranjan Panda, M. Majhi, S.P.Barik & C.R. Behera, Advocates.
For Respondents - Mr. B.P. Pradhan, Addl. Govt. Advocate.

C.R. DASH, J. The sole petitioner Saban Majhi, son of Chamra Majhi of village Uppardiha in the district of Keonjhar and some others were convicted for offence under Sections 341/376(2)(g)/302/201/34, I.P.C. by the learned Ad hoc Additional Sessions Judge (F.T.C.), Keonjhar in S.T. No.125/1 of 2003/04. The petitioner preferred JCRLA No.143 of 2004 and others preferred two other appeals. All the appeals were heard and disposed of together. Vide judgment dated 23.11.2011 passed in those appeals, this Court maintained the conviction recorded by learned Trial Court and confirmed the order of sentence. The present petitioner has now questioned legality of the conviction so recorded and sentence so awarded on the ground of his juvenility.

2. The question of juvenility was never raised by or on behalf of the petitioner at any stage of the proceeding and trial or in the Jail Criminal Appeal before the High Court. This Court, on consideration of the arguments advanced and the evidence obtained on record, dismissed the appeal preferred by this petitioner vide JCRLA No.143 of 2004. The JCRLA was dismissed on 23.11.2011. The present writ petition was filed on 10.02.2012 with a prayer to recall the order passed in the aforesaid Jail Criminal Appeal and to set the petitioner at liberty on the ground that the writ petitioner was a juvenile on the date of occurrence, i.e. 11.02.2003. Vide order dated 05.03.2012 passed in this writ petition, this Court directed an enquiry to be conducted in respect of the present writ petitioner Saban Majhi by the Juvenile Justice Board, Keonjhar to find out whether he was a juvenile on the date of occurrence, i.e. 11.02.2003. In obedience to the aforesaid direction, learned Chief Judicial Magistrate-cum-Principal Magistrate,

Juvenile Justice Board, Keonjhar conducted an enquiry and found that the writ petitioner Saban Majhi was aged 15 years 07 months and 05 days as on the date of the alleged occurrence, i.e. 11.02.2003, and thus he was a juvenile on the relevant date of occurrence.

3. The writ petition having been nomenclatured to be one under Articles 226 and 227 of the Constitution of India read with Section 362 of the Criminal Procedure Code ("Cr.P.C." for short) with the main prayer to recall / modify the order / judgment passed in JCRLA No.143 of 2004, the very first objection that is raised by Mr. Pradhan, learned Addl. Govt. Advocate is to the effect that in the guise of exercise of jurisdiction under Articles 226 and 227 of the Constitution of India, the judgment passed in the aforesaid Jail Criminal Appeal cannot be reviewed in derogation of the express provision contained in Section 362, Cr.P.C. Learned counsel for the petitioner oppugns such objections with all the vehemence at his command and submits that in view of the provision contained in Section 7-A of the Juvenile Justice (Care & Protection of Children) Act, 2000, as amended in 2006 by the Amending Act 33 of 2006 (hereinafter referred to as "Juvenile Justice Act" for short), this Court cannot close its eyes when there has been flagrant violation of the rights of the petitioner guaranteed under Article 21 of the Constitution of India especially in view of the fact that he is confined under illegal detention.

4. It is contended by Mr. Pradhan, learned Addl. Govt. Advocate that the Jail Criminal Appeal having already been disposed of by a competent Bench of this Court, it is not possible now to review the judgment passed in the JCRLA. He relies on the case of **Sunil Kumar *vs.* State of Haryana,** A.I.R. 2012 Supreme Court 1754, to substantiate his contention.

5. Hon'ble Supreme Court, in the aforesaid case, dealt with the issue involving the provisions contained in Section 362, Cr.P.C., which puts a complete embargo on the criminal courts to reconsider any case after delivery of the judgment, as the court becomes functus officio. In paragraph-9 of the judgment, Hon'ble Supreme Court referring to and following its earlier judgments, held thus –

> "9. This Court in a recent judgment in State of Punjab v. Davinder Pal Singh Bhullar & Ors. etc., AIR 2012 SC 364 : *(2012 AIR SCW 207)* dealt with the issue considering a very large number of earlier judgments of this Court including Vishnu Agarwal vs. State of U.P. & Anr., AIR 2011 SC 1232 : *(2011 AIR SCW 1473)* and came to the conclusion :

> *"Thus, the law on the issue can be summarized to the effect that the criminal justice delivery system does not clothe the court to add or delete any words, except to correct the clerical or arithmetical error as specifically been provided under the statute itself after pronouncement of the judgment as the Judge becomes functus officio. Any mistake or glaring omission is left to be corrected only by the appropriate forum in accordance with law."*

6. We do not dispute the settled position of law referred to by learned Addl. Govt. Advocate so far as Section 362, Cr.P.C. is concerned. But this Court has become *functus officio* after disposal of the Jail Criminal Appeal *stricto sensu* in terms of Section 362, Cr.P.C. only. And such an embargo is operative in respect of trial, appeal, revision, etc., as governed by the provisions of the Cr.P.C. only.

7. Section 5, Cr.P.C. enshrines the saving clause of the Code. There are three components in the saving clause contained in Section 5. They are :-

(i) Cr.P.C. generally governs the matters covered by it;

(ii) If a special or local law is in force covering the same area, the latter law will prevail over the Code;

(iii) But, if there is a specific provision to the contrary, then that will over-ride the special or local law.

It is not disputed at the Bar that Juvenile Justice Act has been enforced as a special statute / law. In view of such accepted position, the special law of Juvenile Justice Act will prevail over the Code so far as trial, etc. of a juvenile is concerned. Only we have to see if there is any "specific provision to the contrary" in the Code to oust the operation of Juvenile Justice Act in a particular case. In that context reference may be made to Section 27, Cr.P.C., which speaks of jurisdiction in the case of juveniles. In view of ruling of Hon'ble Supreme Court in the case of **Raghubir *vs.* State of Haryana,** A.I.R. 1981 S.C. 2037, Section 27, Cr.P.C. is not a "specific provision to the contrary" within the meaning of Section 5, Cr.P.C., but is an enabling provision only. In view of the law settled by Hon'ble the Supreme Court in the aforesaid case of Raghubir, and Section 5, Cr.P.C., it is to be held that provisions of the Cr.P.C. have to give way to provisions of the Juvenile Justice Act, when it concerns a juvenile. In that event Section 362, Cr.P.C. may not be a bar for considering question of juvenility raised for the first time even after conclusion of the trial or disposal of the appeal arising therefrom, if the age of the juvenile and the benefit of the Act was not

considered by the Court concerned while disposing of the concerned case. Such a beneficial interpretation shall also be in conformity with the provisions in Section 7-A of the Juvenile Justice Act as amended by Act 33 of 2006.

8. The next limb of argument by Mr. Pradhan, learned Addl. Govt. Advocate is to the effect that in the guise of exercise of writ jurisdiction under Articles 226 and 227 of the Constitution of India, this Court cannot set aside the judgment passed in the aforesaid Jail Criminal Appeal.

We do not dispute the proposition of law that no writ can be issued to a co-ordinate Bench of the same High Court or another High Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. (*see* ***Rupa Ashok Hurra vs. Ashok Hurra and another,*** *A.I.R. 2002 SC 1771).* But, this Court, in exercise of its jurisdiction under Articles 226 and 227, can certainly consider the claim of juvenility of an accused even after disposal of the appeal, if the age of the juvenile and the benefit of the Act for the juvenile was not raised and considered in the appeal. The Court has to be however satisfied prima facie on the basis of cogent material about such claim of juvenility then.

9. Learned counsels for both the parties relied on a catena of decisions to substantiate their respective contentions. Those decisions are **Gurpreet Singh *vs.* State of Punjab**, (2005) 12 S.C.C. 615, **Murari Thakur *vs.* State of Bihar**, (2009) 16 S.C.C. 256, **Pawan *vs.* State of Uttranchal**, **etc.,** (2009) 15 S.C.C. 259, **Lakhan Lal *vs.* State of Bihar,** 2011 CRI. L.J. 1116, **Jitendra Singh *vs.* State of Uttar Pradesh**, 2011 CRI. L.J. 1004, and so on. Learned counsels also relied on the cases of **Gopinath Ghosh *vs.* State of West Bengal,** A.I.R. 1984 S.C. 237**, Bhoop Ram *vs.* State of U. P.** A.I.R. 1989 S.C. 1329**, Bhola Bhagat *vs.* State of Bihar,** A.I.R. 1998 S.C. 236**, Hari Ram *vs.* State of Rajasthan,** (2009) 13 S.C.C. 211, which have recognized beneficial nature of provisions enacted by the Parliament in the Juvenile Justice Act. We are not inclined to refer to all the decisions relied on by the learned counsels for the parties, as those are not relevant for the purpose of the present case in as much as those decisions relate to raising of the claim of juvenility for the first time before the Supreme Court and dealing with the questions by the Hon'ble Supreme Court either in negative or in affirmative. We feel persuaded, however, to quote here the view of a three judges Bench, in paragraph-41 of the judgment in **Pawan *vs.* State of Uttranchal**, **etc.,** which runs as follows :-

> "41. The question is : should an enquiry be made or report be called for from the trial court invariably where juvenility is claimed for

> the first time before this Court. Where the materials placed before this Court by the accused, prima facie, suggest that the accused was "juvenile" as defined in the 2000 Act on the date of incident, it may be necessary to call for the report on an enquiry be ordered to be made. However, in a case where plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even, prima facie, satisfaction of the court is not made out, we do not think any further exercise in this regard is necessary. If the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the Court must be satisfied by placing adequate and satisfactory material that the accused had not attained the age of eighteen years on the date of commission of offence; sans such material any further enquiry into juvenility would be unnecessary."

10. Hon'ble Supreme Court, on consideration of the materials placed before it in the aforesaid case, held that the evidence regarding age of the petitioner in his confession under Section 313, Cr.P.C. and the School Leaving Certificate without the primary evidence of Birth Certificate being tendered in evidence are not satisfactory and adequate to arouse judicial conscience regarding juvenility, that too when the School Leaving Certificate was procured after conviction. This Court, in the present case, however on being satisfied about the claim of juvenility by the petitioner-appellant had issued direction vide order dated 05.03.2012 for an enquiry to be conducted by the concerned Juvenile Justice Board and the concerned Juvenile Justice Board, after the enquiry, has reported that the petitioner was aged 15 years 07 months and 05 days on the date of occurrence, i.e., 11.02.2003.

11. Hon'ble Supreme Court in the case of **Amit Singh *vs.* State of Maharashtra & Anr.,** (2011) 50 OCR (SC) – 221 (2011) 13 S.C.C. 744 had the occasion to deal with the claim of juvenility of the petitioner after the Special Leave to Appeal Petition against the conviction by the concerned High Court was dismissed. The claim of juvenility was raised for the first time seeking issuance of a writ in the nature of Habeas Corpus under Article 32 of the Constitution of India alleging illegal detention of the petitioner contrary to the fundamental rights guaranteed under Article 21 of the Constitution of India. Hon'ble Supreme Court, taking into consideration its earlier decision in **Hari Ram *vs.* State of Rajasthan,** (2009) 13 S.C.C. 211, held the petitioner therein to be entitled to the beneficial provision of the Juvenile Justice Act, 2000. Further, taking into consideration the provisions contained in Section 2(l) and Section 2(k), Section 7-A, Section 20, Section

15, Section 64 of the Act and Rule 98 of the Juvenile Justice (Care & Protection of Children) Rules 2007 (in short "the Rules"), Hon'ble Supreme Court held the petitioner entitled to be released from prison, as he has already undergone more than the maximum period of imprisonment prescribed in Section 15 of the Juvenile Justice Act. It was also held therein that in view of Section 7-A of the Juvenile Justice Act, the claim of juvenility can be raised even after final disposal of the case. Same is the view of Hon'ble Bombay High Court in the case of **Saheb Sopan Kale *vs.* State of Maharashtra,** 2008 CRI. L.J. 2115, wherein the Bombay High Court taking into consideration the provisions contained in Section 7-A, Section 2(l), Section 2(k) and Section 15 of the Juvenile Justice Act had directed release of the petitioner from prison, as he was a juvenile on the date of occurrence.

12. Learned counsels for the parties fairly submit that the petitioner is in custody from the date of his arrest and at no point of time he was on bail. The petitioner is there in custody for about nine years by now. He has already undergone the sentence of maximum period prescribed for a juvenile in Section 15 of the Juvenile Justice Act.

13. Regard being had to the provisions contained in Sections 7-A, 15, 20 and 64 read with Sections 2(l) and 2(k) of the Juvenile Justice Act, we are of the considered view that no useful purpose shall be served by sending the matter back to the juvenile Justice Board, Keonjhar now, as the same would result in illegal detention of the petitioner for some more days. The petitioner-appellant having already suffered the sentence for more than the period prescribed in Section 15 of the Juvenile Justice Act, we feel persuaded to issue direction for release of the petitioner-appellant from prison, if his detention is not required in any other case.

14. The report dated 24.03.2012 submitted by the C.J.M.-cum-Principal Magistrate, Juvenile Justice Board, Keonjhar, which is there in the record of learned Advocate General on being called through the office of the learned Advocate General, be filed by the learned Addl. Govt. Advocate to form a part of the record of the present case. The Writ Petition is accordingly disposed of.

Writ petition disposed of.

2013 (I) ILR – CUT- 91

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

JCRLA NO. 93 OF 2003 (Dt.30.07.2012)

SADA @ RENTAL HEMBRAM …….. Appellant

.Vrs.

STATE OF ORISSA ……...Respondent

A. CRIMINAL TRIAL – Murder Case – Solitary witness – Testimony of a solitary witness if found to be clear, cogent and unimpeachable is sufficient to establish a criminal charge.

In this Case wife of the deceased (P.W.2) is an eye witness to the occurrence – In her evidence she narrated the incident in a very clear and transparent manner – Her relationship itself is not sufficient to discard her evidence as unworthy of credit in absence of other circumstances to detract from the evidentiary value of her testimony – P.W.2 is a rustic "Adibasi" woman and the "Adibasis" are known for their simple life and dealings – It is unexpected on her part to implicate an innocent person at the cost of the real culprit – Her evidence gets ample corroboration from the medical evidence – Held, conviction sustained. (Para 7)

B. PENAL CODE, 1860 – Ss. 302, 304.

Medical evidence shows that the appellant made successive blows on the head of the deceased causing fracture of both temporal and parietal bone of the deceased – Held, the appellant had intention to kill the deceased and he is liable for punishment U/s.302 I.P.C. but not U/s.304 I.P.C. (Para 8)

For Appellant - Mr. H.K.Mallik
For Respondent - Mr. Sk. Zafarulla, Addl. Standing Counsel.

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment and order dated 18.08.2003 passed by the learned Sessions Judge, Keonjhar in S.T. Case No.247 of 2000 convicting the appellant under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life.

2. The prosecution case is that on 13.06.2000 at about 4 O'clock in the afternoon deceased Bisu Hembram was standing in front of his house. At that time, accused Sada @ Rental Hembram rushed towards him and picking up a piece of wood used for making charpoy assaulted deceased on his head successively. Suddenly, deceased fell down on the ground. His wife and mother brought him inside the house. In the mid-night, he succumbed to the injury. On the basis of the oral report lodged by Nrusingha Soren (P.W.3), Indramani Si(P.W.7), the then O.I.C of Harichandanpur P.S took up investigation. During investigation, he held inquest over the dead body of the deceased, challaned the dead body for post-mortem, made relevant seizures, arrested the accused, sent the seized articles for chemical examination through Court and on completion of investigation filed charge sheet U/s. 302 I.P.C against the accused.

3. On receipt of charge-sheet, cognizance was taken and the case was committed for trial. During trial the prosecution besides examining seven witnesses exhibited twelve documents in order to substantiate the charge. The defence did not choose to adduce either any oral or documentary evidence. The learned Sessions Judge, who tried the case, convicted the accused for commission of offence under Section 302, IPC and sentenced him to undergo imprisonment for life basing upon the oral evidence of P.Ws.2 and 4, the medical evidence of P.W.6 and other incriminating circumstances available on record.

4. Mr. Mallik, learned counsel appearing for the appellant assails the judgment on the following grounds:

(i) P.W.2, the solitary eye-witness, being the widow of the deceased is an interested witness and in absence of any corroboration from independent source no reliance can be placed on her evidence.

(ii) For non-examination of Jabuna Hembram, the mother-in-law of P.W.2, adverse inference is to be drawn against the prosecution, as according to P.W.2 the said Jabuna Hembram was present at the time of occurrence.

(iii) Extra judicial confession said to have been made by the accused before P.W.4 in presence of the Grama Rakhi is not admissible being hit by Section 25 of the Evidence Act.

(iv) In the alternative, for the act committed the accused cannot be liable for punishment under Section 302, IPC and at the worst he may be liable for punishment under Section 304, IPC.

5. Mr. Zafuralla, learned Additional Standing Counsel, on the other hand contends that the evidence of P.W.2 is very clear and cogent. She is a witness to the occurrence. Her evidence coupled with the medical evidence clearly proves the guilt of the accused. The accused also confessed before P.W.4 about the occurrence. Therefore, the impugned judgment of conviction does not warrant interference by this Court.

6. Perused the LCR and gone through the oral and documentary evidence available therein. P.W.1 is the police Havildar who took the dead body for post-mortem and produced the wearing apparels of the deceased the command certificate before the Investigating Officer, who seized the same under Ext.1. P.W.2 is the widow of the deceased and an ocular witness. She specifically stated in her examination-in-chief that at the time of occurrence, her husband was standing in front of their house. The accused rushed in, picked up a piece of wood (used to prepare charpoy) lying in front of their house and assaulted on the head her husband successively. As a result, her husband fell down. She rushed to the rescue of her husband and administered water to him. She brought her husband to the house and he succumbed to the injury around midnight. P.W.3, the informant, is a co-villager of both accused and deceased. In his examination-in-chief, he stated that on the date of occurrence at about 5 to 6 P.M., P.W.2 came and informed him that the accused assaulted her husband on his head by a piece of wood used for making charpoy and also requested him to report the matter in the police station. On the next day morning, he went to the police station and orally reported the matter. His report was reduced to writing in Ext.2. In cross-examination, he admitted that he had no direct knowledge about the incident. P.W.4 is a co-villager of both accused and deceased. He has stated that the village Chawkia called him to show the house of the accused. Thereafter he along with Maheswar Patra accompanied the village Chawkia (Grama Rakhi) to the house of the accused. Then, the accused was sleeping on a charpoy in front of his house. On being asked by the village Chawkia, accused confessed before them that consistently the deceased was quarrelling and assaulting him on the allegation that he stolen his paddy. Out of anger, he assaulted the deceased. He also told that when deceased assaulted him, he counter assaulted the deceased. In cross-examination, he admitted that Bisu (deceased) used to assault the accused during quarrel or altercation between them and the accused was also assaulting Bisu in course of their quarrels preceding the occurrence. P.W.5 is a co-villager and a seizure witness.

P.W.6 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:

"(1) Lacerated injury on mid-forehead of size 3" x 1" x 1".

(2) Lacerated injury on right temporal region of size 3" x 1" x ½".

(3) Lacerated injury on chin of size 2" x 1" x ½"."

He opined that all the injuries were antemortem in nature and might have been caused by blunt and hard object. External injury nos.1 & 2 with their corresponding internal injury were sufficient in ordinary course to cause death. Cause of death was injury to vital organ like brain causing haemorrhage and shock. He also opined that the injuries described in the post-mortem report could be caused by M.O.I, which was produced before him for examination. In cross-examination, he admitted that the injuries detailed in the post-mortem report could be possible if a person falls on a heap of stones/boulders with sufficient force.

P.W.7 is Officer-in-Charge of Harichandanpur Police Station, who registered the case, examined the witnesses, sent the dead body for post-mortem examination, seized the weapon of offence M.O.I as well as the bloodstained "Patia" (mat) of the accused and on completion of investigation filed charge-sheet against the accused.

7. On careful scrutiny of the entire evidence this Court noticed that P.W.2 is a witness to the occurrence. In her evidence she has narrated the incident in a very clear and transparent manner. She has testified that the accused by means of M.O.I assaulted on the head of her husband successively. A close relative who is a natural witness cannot be regarded as interested. 'Interested' refers to a witness who has some direct interest in having the accused convicted somehow or the other. Evidence of P.W.2 has stood judicial scrutiny and inspires confidence. The relationship of P.W.2 by itself is not sufficient to discard the evidence as unworthy of credit in absence of other circumstances to detract from the evidentiary value of her testimony. P.W.2 is a rustic 'Adibasi' woman and the 'Adibasis' are known for their simple life and dealings. So, it is unexpected on her part to implicate an innocent person at the cost of the real culprit. Furthermore, testimony of a solitary witness, if found to be clear and cogent and an unimpeachable character, is sufficient to establish a criminal charge. The evidence of P.W.2 gets ample corroboration from the evidence of the post-mortem doctor P.W.6. P.W.3 has supported the evidence of P.W.2 by stating that P.W.2 informed him about the occurrence at about 5.00 PM and requested him to

lodge a report at the P.S. The so-called confession of the accused before P.W.4 having been made in presence of the 'Grama Rakhi', no reliance can be placed on such evidence. But, however, relying upon the clear, cogent and unimpeachable ocular testimony of P.W.2, which gets corroboration from the medical evidence, conviction can be sustained, even if the evidence of extrajudicial confession is disbelieved. The appellant having failed to examine Jabuna Hembram under Section 311, Cr.P.C. he cannot expect from the Court to draw adverse inference against the prosecution for her non-examination.

8. The next question that arises for consideration is whether accused-appellant is liable for punishment under Section 302, IPC or Section 304, IPC. From the evidence of P.W.2 it is found that the accused came in front of their house, picked up M.O.I and dealt successive blows on the head of the deceased. The severance of assault is manifested from the nature of injuries found on the body of the deceased by the post-mortem doctor P.W.6, who has specifically opined that the successive blows on the head of the deceased have resulted in fracture of both temporal and parietal bone of the deceased. Having regard to the size and weight of M.O.I, the place of assault, i.e., head, which is a vital part of the body, and the nature of injuries sustained by the deceased, it can be safely inferred that the accused-appellant had intention to kill the deceased and, therefore, he is liable for punishment under Section 302, IPC.

9. For the foregoing discussion, this Court is not inclined to interfere with the impugned judgment and order of conviction passed by the trial court. Accordingly, the Jail Criminal Appeal is dismissed being bereft of merits.

Appeal dismissed.

2013 (I) ILR – CUT- 96

M. M. DAS, J.

W.P.(C) NO. 12126 OF 2009 (Dt.03.08.2012)

JAYARAM SAHOO @ BEHERA … Petitioner

.Vrs.

BANAMALI SAHOO & ORS. … Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O. 18, R.1.

Right to begin – General principle is plaintiff to begin the evidence first – Exception provided under O.18, R-1 C.P.C. – When defendant admits the allegations made in the plaint and pleaded different sets of additional facts, onus lies on him to prove such facts and in that case the defendant to begin the evidence first.

In the present case plaintiff alleged fraud in getting the alleged deed of adoption and pleaded that defendant No.1 is not his adopted son – Defendant No.1 denied such pleadings and has pleaded that on 8.8.1967 he was given in adoption to the plaintiff by his natural parents and giving and taking ceremony was performed – Since defendant No.1 has not admitted any fact alleged by the plaintiff exception provided under Order 18 Rule 1 C.P.C. does not apply – Held, impugned order allowing the defendant No.1 to begin the evidence first is set aside.

(Para 10, 11, 13)

Case laws Referred to:-

1.2004(1) CLR 392 : (Chandra Sekhar Pattjoshi-V-Jogendra Pattjoshi & Ors.)
2.2008(II) OLR 566 : (Mirza Niamat Baig & Anr.-V- Sk. Abdul Sayeed & Ors.)
3.1992(I) OLR 72 : (Purastam @ Purosottam Gaigouria & Ors.-V-Chatru @ Chatrubhuja Gaigouria).
4.AIR 1954 Orissa 191: (Balakrishna Kar-V- H.K.Mahatab).

For Petitioner - Mr. A.P.Bose
For Opp.Parties- M/s. D.Mohanty, R.C.Jha, A.C.Jena, T.Choudhury, R.C.Sahoo, A.Banarjee. (for O.P.No.1

M. M. DAS, J. The plaintiff has filed the suit with the following prayers:-

"(a) declare that the defendant No.1 is not the natural or the adoptive son of the plaintiff;

(b) pass a decree that, the gift deed bearing No.380 dt. 20.6.2005 of Sub-Registrar office, Sakhigopal by plaintiff in favour of defendant No.1 is ab initio void, illegal and no title has passed to defendant No.1 by virtue of the said illegal gift deed in respect of "A" and "B" schedule property is the exclusive property of plaintiff and defendants have no manner of right, title, interest or possession over "A" Schedule property and defendants being the sons of Late Bihari Behera S/o. Late Bhagaban Behera are no way connected with the "A" and "B" Schedule property and they have no manner of right, title or interest over "A" schedule property and by virtue of amicable partition plaintiff is in possession of his 1/3rd share, i.e., A.0.03 2/3 (three and two-third) decimals land in "B" schedule land, it is his exclusive property of the plaintiff;

(c) the possession of the plaintiff over the "A" and "B" schedule property be confirmed in the event of dispossession during the pendency of the suit the plaintiff be given recovery of possession through process of the Court ;

(d) the defendants be prohibited by decree of permanent injunction from interfering in the plaintiff's peaceful possession over the suit property in any manner ;

(e) the cost of the suit be decreed against the defendants ;

(f) any other relief or reliefs deemed just and proper also be given."

2. The plaintiff, in paragraph – 9 of the plaint has, inter alia, stated that recitals of the document dated 20.06.2005 are down right false and fabricated and the defendant no.1 is neither the natural son nor he has ever been adopted by the plaintiff at any point of time or he has been treated as such in the society or by the relations of the plaintiff nor any giving and taking ceremony ever was held by the plaintiff or by his wife at any point of time.

3. The defendant no.1 – petitioner, in reply to the said averments, denied the same and asserted that the recitals in the documents dated 20.06.2005 was as per the instruction of the plaintiff with his active knowledge and desire in consultation with other family members, upon which he instructed the scribe and the deed was scribed as per his

instruction. The defendant no. 1 – petitioner specifically asserted that he was adopted by the plaintiff by a giving and taking ceremony performed at that time. He also denied the other allegations made in the plaint.

4. The plaintiff – opposite party No.1 filed an application under Order – 18, Rule 1 CPC seeking a direction from the learned trial court to direct the defendant to begin the evidence first. The learned trial court, after noting down the case of the plaintiff and the defendant no.1 and after perusal of the plaint and the written statement, concluded as follows :-

> "In the instant suit, though the plaintiff has prayed to declare the defendant no. 1 as not his son or adopted son and as the defendant no. 1 claimed himself to be the adopted son of the plaintiff, onus lies on him to prove the said fact. If he would not adduce any evidence he would fail in the suit. So onus lies on him to prove the said fact if he would fail in the suit. So onus lies on him to begin the suit first.

Being aggrieved by the said order, the defendant No.1 has come up in the present writ application.

5. In view of the above pleadings of the parties, the moot question to be decided in the present writ application is as to whether the provision under Order – 18, Rule 1 CPC is applicable to the facts of the case, basing on which the learned trial court has directed the defendant no. 1 – petitioner to begin the evidence first. For brevity, Order –18, Rule 1 CPC is extracted hereunder:-

"ORDER – XVIII
HEARING OF THE SUIT AND EXAMINATION OF WITNESSES

> 1. **Right to begin** – The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

6. Mr. Bose, learned counsel for the petitioner relies upon the decisions in the case of ***Chandra Sekhar Pattjoshi v. Jogendra Pattjoshi and others, 2004 (1) CLR 392*** and ***Mirza Niamat Baig and another v. Sk. Abdul Sayeed and others***, 2008 (II) OLR 566. Relying upon the above decisions, he submits hat Order – 18, Rule 1 CPC can only be made

applicable where the defendant admits the facts alleged by the plaintiff or partially admits such facts and pleads a different set of fact, which is required to be proved by the defendant as the onus to prove such facts lies on the defendant.

7. In the case of *Chandrasekhar Pattjoshi* (supra), this Court was dealing with the aforesaid provision, which arose in a partition suit. This Court, referring to the provisions under Order – 18, Rule 1 CPC as well as Order – 18, Rule 3 CPC, held that the provisions of law as noted in Order – 18, Rule 3 CPC or for that matter Order – 18, Rule 1 CPC does not speak about the order of adducing evidence by two sets of contesting defendants, when each of them admit different part of the claim of the plaintiff and dispute the other. In such circumstances, it was held that the court has to apply its wisdom based on the principle on which the provision of Order 18, Rule 3 has been made and can resolve the dispute of the nature involved in the said case. The said ratio having been laid down in a different set of facts, though not strictly applicable to the present case, it is found that order 18, Rule 1 C.P.C. can only be made applicable, where the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts pleaded by him, the plaintiff is not entitled to any part of the relief which he seeks. If such a case is not made out, the rule is that the plaintiff has the right to begin the suit as only in such a case, the exception is that the defendant shall begin the case.

8. In the case of Mirza *Niamat Baig and another* (supra), this Court, while considering the scope of Order 18, Rule 1 C.P.C. referring to the said provision and the phrase "unless the defendant admits the facts alleged by the plaintiff" held that the word "fact" means all the materials facts and, thus, concluded that where a defendant admits only some of the facts alleged by the plaintiff, there the plaintiff should begin.

9. Mr. Mohanty, learned counsel for the opp. party has relied upon the decision in the case of ***Purastam alias Purosottam Gaigouria and others v. Chatru alias Chatrubhuja Gaigouria,*** 1992 (I) OLR 72 and submitted that this Court in the said case interpreting Order 18, Rule 1 CPC decided that where the onus lay on the defendant to prove a particular fact alleged by him, he is to begin first. However, on examining the said decision, it appears that this Court in the said case was considering the scope of 115 C.P.C., i.e., revisional power of this Court and while considering the said question, in a revision against an order passed under Order 18, Rules 1 and 2 C.P.C., concluded that an erroneous decision relating to 'the right to begin' in clear breach of the provisions of Rules 1 and 2 of Order 18 C.P.C.

causes irreparable injury to the party as noted in the case of ***Balakrishna Kar v. H.K. Mahatab,*** AIR 1954 Orissa 191. This Court in the case of *Purastam alias Purosottam Gaigouria and others* (supra) held as follows:-

> "In this case, the plaintiff sought partition alleging that the property was joint family property and had not been decided by metes and bounds. The defendant – petitioners placed a previous partition since 1960-61 to defeat the plaintiff's suit. In view of the plea of the defendants that there was a previous partition, the learned Subordinate Judge called upon the defendants to begin. The plaintiff's plea that the property was joint family property having been admitted by the defendants and the latter having pleaded previous partition, the defendants are to lose if neither party adduced evidence, the burden being on the defendants to prove previous partition. Only when the defendants lead some evidence in proof of previous partition, the plaintiff would be obliged to lead evidence in rebuttal. Rightly, therefore, the learned Subordinate Judge called upon the defendants to begin. We, therefore, see no merit in this revision which is accordingly dismissed. There would be no order as to costs."

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10. In view of the above decisions, it is seen that only when the defendant admits the allegations made by the plaintiff in the plaint, but has pleaded a different set of additional facts, the onus of proving such facts lying on him, the exception of Order 18, Rule 1 C.P.C. providing that the defendant should begin the evidence first would be applicable, otherwise, the general principle as envisaged under Order 18, Rule 1 C.P.C. shall be followed.

11. In the present case, the plaintiff has alleged fraud to have been practiced on him in getting the alleged deed of adoption executed and has also pleaded that the defendant is not his adopted son and there was never any giving and taking ceremony. The defendant no. 1 has denied such pleadings and in addition to such denial, has pleaded that on 8.8.1967 he was given in adoption to the plaintiff by his natural parents and the giving and taking ceremony was performed. In such nature of pleadings, applicability of Order 18, Rule 1 C.P.C. does not arise as the defendant has not admitted any fact which has been alleged by the plaintiff.

12. However, an adoption, if proved, derails the natural line of succession. The person, who claims to have succeeded to any property by virtue of he being adopted to a family, onus always lies on such person to

prove the fact of adoption. Hence, in the instant case, when the plaintiff has made allegations in support of his case, by advancing a pleading which is negative in form, but affirmative in essence, should ordinarily begin the evidence. However, as adoption has been pleaded by the defendant, onus will lie on him to prove such adoption and thereafter, the plaintiff is required to be afforded with an opportunity to lead rebuttal evidence to such evidence adduced by the defendant.

13. The impugned order, therefore, cannot be sustained. The same is accordingly quashed/set aside. The learned trial court, i.e., learned Civil Judge (Senior Division), Puri shall make an attempt to dispose of the suit finally by end of February, 2013. The right of rebuttal of the plaintiff shall be reserved so that after defendant concludes his evidence, the plaintiff would be given opportunity to lead rebuttal evidence, if he so chooses, in respect of the evidence adduced by the defendant with regard to the fact of adoption.

14. With the aforesaid directions and observations, the writ petition is allowed. Consequently, all pending Misc. Cases stand disposed of.

The interim order of stay of further proceedings of the suit stands vacated.

Writ petition allowed.

2013 (I) ILR – CUT- 102

M. M. DAS, J.

W.P.(C) NO. 20548 OF 2010 (Dt.05.07.2012)

M/S. INDUSTRIAL INCUBATORS PVT.LTD. & ANR. .....Petitioners

.Vrs.

THE WATERBASE LTD. .....Opp.Party

ARBITRATION & CONCILIATION ACT, 1996 – Ss.2 (1) (e), 36 & 40.

Arbitration Award – Execution – Held, only the principal Civil Court i.e. the Court of the District Judge has jurisdiction to execute such award.

In this case award passed by the Arbitration Tribunal but execution proceeding filed before the Madras High Court – Since property involved in the proceeding situates within the jurisdiction of the State of Orissa, Madras High Court transferred the case to this Court and the Superintendent of this Court sent the above case to the Court of the Civil Judge (Sr.Divn.), Balasore – Petitioner filed a petition before the Civil Judge (Sr.Divn), Balasore saying that the proceeding is not maintainable before such Court – The petition having been rejected this writ petition is filed – Held, Civil Judge (Sr.Divn.) lacks inherent jurisdiction under law to proceed with the Execution Proceeding – Just because the Superintendent of this Court dispatched the records to him, the same can not fix jurisdiction on him to proceed – Direction issued to the Civil Judge (Sr.Divn.) Balasore to transfer the execution proceeding to the Court of the learned District Judge, Balasore for disposal of the execution proceeding in accordance with law.

Case law Referred to:-

2004 (II) OLR 452 : (M/s. Nilachakra Construction-V-State of Orissa)

For Petitioner - Mr. Samir Ku. Mishra
For Opp.Party - Mr. Ratikanta Nayak

Heard Mr. Mishra, learned counsel for the petitioner and Mr. Nayak, learned counsel for the opposite party.

It appears that an award was passed in an arbitral proceeding by the Arbitration Tribunal under the Arbitration and Conciliation Act, 1996. The execution proceeding to execute the award was filed before the Madras High Court. The High Court of Madras, finding that the property schedule mentioned in the execution proceeding situates within the jurisdiction of the State of Orissa, transferred the said execution proceeding numbered as E.P. No.9 of 2005 in Arbitration No.1 of 2002 to this Court.

Under Annexure-2 dated 25.10.2006, the Superintendent of this Court sent the aforesaid execution proceeding along with all enclosed papers to the Civil Judge (Senior Division), Balasore in his covering letter dated 25.10.2006 to take action at his end. The petition was filed by the petitioner before the learned Civil Judge (Senior Division), Balasore, inter alia, contending that the said execution proceeding is not maintainable before him. The learned Civil Judge (Senior Division), Balasore, by the impugned order, concluded that such objection should be overruled, in view of the fact that the execution proceeding has been transferred to him by this Court.

It is needless to mention here that even conceding that the Superintendent of this Court has transferred the said document and papers relating to the said execution proceeding to the learned Civil Judge (Senior Division), Balasore, but, if in fact, the said Civil Judge lacks inherent jurisdiction under law to proceed with the said execution proceeding, just because this Court has dispatched the records to him, the same cannot fix jurisdiction on him to proceed with the said execution proceeding, if under law, he lacks such jurisdiction.

A combined reading of Section-2 (i) (e) and Section 36 and 40 of the Arbitration and Conciliation Act, 1996 leaves this Court with no doubt that the Civil Judge (Senior Division) has no jurisdiction to execute an award passed under the said Act and only the Principal Civil Court, i.e., the Court of the District Judge has such jurisdiction. (See ***M/s. Nilachakra CConstruction v. State of Orissa 2004 (II) OLR 452).***

In view of the above, the impugned order cannot be sustained and the same is quashed.

The learned Civil Judge (Senior Division), Balasore is directed to transfer the execution proceeding, being, Execution Case No.4 of 2007 to the court of the learned District Judge, Balasore and the learned District

Judge is directed to proceed with the same is accordance with law as expeditiously as possible, since the matter is pending for a long time. The writ application is accordingly disposed of.

Writ petition disposed of.

2013 (I) ILR – CUT- 105

M. M. DAS, J.

W.P.(C) NO.12627 OF 2004 (Dt.27.07.2012)

SADANANDA MOHANTY ……Petitioner

.Vrs.

URMILA DAS & ORS. … …...Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O.6, R. 17, r/w Article 59 Limitation Act.

Amendment of plaint – Suit for partition – Suit filed in 1997 – Defendant No.1 (brother of plaintiff) filed written statement on 20.07.1998 pleading that their widowed mother executed two registered gift deeds in his favour in the year 1981 in respect of Schedule A & B properties of the plaint – Plaintiff filed petition for amendment of plaint on 18.09.2004 alleging fraud in executing the gift deeds and prayed to declare the gift deeds to be null and void – Learned trial Court allowed amendment – Hence this writ petition.

Under Article 59 of the Limitation Act gift deeds can be challenged only within three years from the date of knowledge of existence of the gift deeds – In this case plaintiff derived knowledge of gift deeds in the year 1998 – After the period of limitation is over right accrued in favour of defendant No.1 and if amendment is allowed it would defeat the right accrued in his favour – Held, learned trial Court is not correct in allowing the amendment of the plaint – Impugned order is set aside.

Case law Referred to:-

AIR 1996 SC 2358 : (Radhika Devi-V- Bajrangi Singh & Ors.)

For Petitioner - Mr. Manoj Ku. Mohanty
For Opp.Parties - Mr. R. K. Nayak

Heard.

The facts reveal that the opposite party no.1, as plaintiff, filed a suit for partition of the properties, which were described in Schedule A, B and C of the plaint. She claimed 1/6th share in both A and C Schedule properties and 1.3rd share in Schedule B property. The petitioner is one of the defendants being defendant no.1, who is the brother of the plaintiff. He

pleaded, inter alia, that their mother Bhabi, who is the widow of Krushna executed two registered gift deeds in his favour in respect of her share in Schedule A and B properties. The said gift deeds were executed in the year 1981. The written statement was filed on 20.07.1998. Waiting for about six years, the plaintiff filed an amendment application on 18.09.2004 to amend the plaint by introducing the pleading that the petitioner defendant no.1 taking advantage of the old age, ailment, innocence and helplessness of their mother got the two gift deeds executed and registered by exercising undue influence, which are unacceptable in law. She further wanted to introduce by way of amendment the pleadings that the alleged two gift deeds are not genuine and were kept in a concealed manner, which were disclosed in the written statement for the first time. She also sought for amendment of the prayer in the suit by increasing the valuation and making a prayer to declare the two gift deeds executed in favour of the petitioner to be null and void.

The learned trial court by order dated 25.09.2004 allowed the amendment. Being aggrieved the petitioner-defendant no.1 is before this Court in the present writ application.

The moot question raised by Mr. Mohanty, learned counsel for the petitioner is that the amendment of the plaint as sought for, cannot be permitted on the ground of limitation. He vehemently urged that under Article-59 of the Limitation Act the gift deeds can be challenged only within three years from the date of knowledge of existence of the gift deeds and in the instant case even assuming that the opposite party-plaintiff did not have knowledge of the said gift deeds earlier but after the same was disclosed in the written statement in the year 1998, the plaintiff cannot take the plea that she did not have the knowledge of the said gift deed and wait for more than the period prescribed to bring the amendment. In the case of **Radhika Dev vrs. Bajrangi Singh and others**, AIR 1996 S.C. 2358 a similar question arose under similar facts before the Apex Court where the Supreme Court accepting the contention of the respondent in the said appeal that the registration of the document is a notice to everyone claiming any right, title and interest therein; even otherwise, the respondents in the written statement filed in June 15, 1988 has specifically pleaded about the gift being made in their favour which was not challenged by the appellant till 1992 by which time even the suit for declaration within the limitation of three years from the date of knowledge had got time barred, dismissed the appeal filed against the order passed by the High Court rejecting the amendment. Even otherwise it is well settled in law that an amendment sought to introduce new facts in the pleadings and a new prayer basing on such new facts, which is

time barred, cannot have retrospective effect and cannot be considered to be part of the pleading from the date when the plaint was filed.

In view of the above analysis, the learned trial court fell into error in allowing the amendment sought for by the opposite party no.1-plaintiff. In the result, therefore, the impugned order dated 25.09.2004 under Annexure-5 is set aside and the plaintiff shall not be permitted to amend the plaint as sought for. The suit being of the year 1997, the learned trial court, i.e., the Civil Judge (Sr. Division) Dhenkanal is directed to dispose of the suit positively by the end of this year. The writ application is accordingly allowed.

Writ petition allowed.

2013 (I) ILR – CUT- 108

INDRAJIT MAHANTY, J.

O.J.C. NO. 2905 OF 1994 (Dt.12.07.2012)

SITARAM PATEL & ORS. .....Petitioners.

.Vrs.

COLLECTOR, SAMBALPUR & ORS. ……..Opp. Parties

CENTRAL PROVINCES TENANCY ACT, 1898 – S.46(2)(b).

Sale deed in question registered on 27.04.1964 – OLR Act, 1960 came into force on 01.10.1965 – Case land is located in the district of Sambalpur and until enactment of OLR Act, 1960 the area was governed by the Central Provinces Tenancy Act, 1988 read with Orissa Amendment Act, XIII of 1953 – Restriction imposed regarding transfer of land by members of the Scheduled Tribe to non-Scheduled Tribe members and prior permission of the Revenue Officer was required for such purpose U/s.46 (2) (b) of the C.P. tenancy Act as amended by Orissa Act,XIII of 1953 – Held, the order passed by the learned Collector declaring such transfer as void being without prior permission of the Revenue Officer is correct. (Para 10,11)

For Petitioners - M/s. C.A.Rao, S.K.Behera, P.K.Sahoo & A.Tripathy. For Opp.Party Nos.1to3 - Addl. Govt. Advocate.
For Opp.Party No.4- M/s. A.Mohapatra, H.N.Mall, R.C.Sahoo & B.Nayak.

I. MAHANTY, J. In this writ application, the petitioners have sought to challenge the order dated 18.01.89 passed in O.L.R. Case No.07 of 1986 under Section 23 of the Orissa Land Reforms Act, 1960 (In short 'O.L.R.' Act) under Annexure-1/1, wherein, the learned S.D.O., Sadar, Sambalpur had concluded that the transfer of land in favour of the petitioners by registered sale deed, belonging to the opposite party No.4, who is a member of Scheduled Tribe, was void since no prior permission for sale as required under Section 22 of the O.L.R. Act, 1960 had been obtained and directed restoration of the land in favour of opposite party No.4 under Section 23 (3) of the O.L.R Act, 1960.

Being aggrieved by the order of the learned S.D.O., Sadar, Sambalpur, the present petitioners preferred an appeal before the learned

A.D.M., O.L.R., Sambalpur which was registered as O.L.R. Appeal Case No.12 of 1989 (Annexure-2) and the said appeal came to be allowed (in favour of the petitioners) by order dated 16.04.1990 on the ground that the alleged transfer of land had been made on 27.04.1964, whereas the O.L.R. Act, 1960 came into force on 01.10.1965 and, therefore, the appellate authority came to hold that the provisions of O.L.R. Act, 1960 were not applicable for the said transfer for land.

Being aggrieved by the said order, the opposite party No.4 preferred a revision before the learned Collector, Sambalpur in O.L.R. Revision Case No.4 of 1990, whereby, the learned Collector, Sambalpur by his order dated 11.03.1994 under Annexure-3 was pleased to quash the order of the learned A.D.M., O.L.R., Sambalpur in appeal and affirmed the order passed by the learned S.D.O., Sadar, Sambalpur and directed restoration of the land in favour of the opposite party No.4 herein.

2. Mr. C.A. Rao, learned counsel appearing for the petitioners, inter alia, contended that the petitioners had purchased the disputed land through a Registered Sale Deed No.1787 dated 27.04.1964 and the same was duly executed by one Bhagirathi Naik (the father of the present opposite party No.4), one Dasarathi Naik (the paternal uncle of the present opposite party No.4) and one Lokanath Naik, the present opposite party No.4 himself, being minor through his father guardian. It was stated that after receiving the total amount of consideration, the vendors delivered the possession of the disputed land to the present petitioners on the same date of the execution of the Registered Sale Deed and the petitioners being the rightful owner in possession continued to enjoy the disputed land without facing any disturbance. In the year 1981, the present petitioners have filed a Mutation Case No.610 of 1981 before the learned Tahasildar, Rengaloi, who after enquiring the factum of possession, directed for mutation of the disputed land in the names of the present petitioners.

It was further asserted on behalf of the petitioners that the transfer of the disputed land took place on 27.04.1964 and the relevant provision under Section 23 of the O.L.R. Act, 1960 (relating to the transfer of immovable property by Scheduled Tribe persons) had not come into force by then, since the said provision came into force only with effect from 17.08.65 i.e. after transfer of the disputed land.

It was further contended on behalf of the petitioners that the present opposite party No.4 and his father as well as uncle belong to “Raj Gond” caste and the said caste was not included under the Schedule Tribe Community as defined under the Constitution (Schedule Tribes) order 1950.

On the other hand, it was asserted that insofar as State of Orissa is concerned, the caste "Gond" was included as "Scheduled Tribe". The caste "Gond" as well as "Raj Gond" both were included under Scheduled Tribes Community for the State of Maharashtra and not for Orissa. It was stated that the caste "Raj Gond" cannot be treated as Scheduled Tribe community insofar as State of Orissa is concerned. Therefore, since at the time of the aforesaid transfer i.e. on 27.04.1964 permission from competent authority was required only for transfer of land by the Scheduled Tribes member and the present opposite party No.4, his father and uncle being members of "Raj Gond" caste, did not come under the Scheduled Tribe community. Hence, no permission under Section 22 of the O.L.R. Act, 1960 was required for such transfer.

3. On the records of the proceeding, it appears that the present opposite party No.4 filed a petition under Section 23 of the O.L.R. Act, 1960 before the learned S.D.O., Sadar, Sambalpur, praying to set aside the sale made through the Registered Sale Deed No.1787 dated 27.4.1964 and for recovery of the possession of the disputed land. In such proceeding, the learned S.D.O., Sadar, Sambalpur vide his order dated 18.01.1989 in O.L.R. Case No.7 of 1986 under Annexure-1/1 came to hold that the sale of the disputed land in favour of the present petitioners was void as no permission for transfer as contemplated under Section 22 of the O.L.R. Act, 1960 has been taken from the competent authority and, therefore, the same was liable to be declared as void and the land in question was required in law to be settled in favour of the present opposite party No.4 under Section 23 of the O.L.R. Act, 1960.

After taking evidence from both sides and going through the documents relied upon by both the parties, the learned S.D.O., Sadar, Sambalur came to conclude that even though it was contended on behalf of the opposite parties (Petitioners herein) that the O.L.R. Act , 1960 was not in force in the year 1964, yet there existed a restriction/bar for transfer of land of the Scheduled Tribes under the C.P. Tenancy Act, 1898, which was in operation at that time and since, admittedly, no permission for transfer of land had been obtained from the competent authority under the C.P. Tenancy Act, 1898 by the writ-petitioners, as such, the transaction in question was void.

In this respect reliance was placed by him on a judgment passed by the Board of Revenue in O.L.R. Revision Case No.68 of 1982 published in C.L.T. Vol-56 of 1983. The learned S.D.O. after consideration of the rival contentions came to a finding that in the "Hamid settlement" the disputed

land had been recorded in the name of Padmalochan Naik, who was the father of Bhagirathi and Dasarathi and in the "Major settlement" this land had been recorded in the name of Bagirathi and Dasarathi Naik, sons of Padmalochan Naik. He further found that even though in the sale deed the caste of the vendors had been mentioned as "Raj Gond", yet from the evidence of the opposite parties, he came to a finding that they belongs to "Gond" by caste and not "Raj Gond" and the said finding was arrived at on the basis of the further finding that there was no caste called "Raj Gond" in the State of Orissa. Therefore, he came to a conclusion that the opposite party No.4 belongs to "Gond" caste which was admittedly a Scheduled Tribe in the State of Orissa. Having arrived at such a finding reliance was placed on the decision given by the Board of Revenue in O.L.R. Revision Case No.68 of 1982 reported in C.L.T. Vol-56 of 1983.

Reliance was also placed on a circular issued by the Government of Orissa in the Revenue and Excise Department in their letter No.6723/AG 7/76 and in paragraph-5 thereof, it was stated that, the provision of Claus(b) of Sub Section (2) of Section 46 of the C.P. Tenancy Act 1898 (as amended by the Orissa Act XIII of 1953) put restriction regarding transfer of land by members of Scheduled Tribes to others. Hence, even in 1964, when the sale deed was registered in favour of the petitioners, there was a necessity for the purchaser to obtain "prior permission" from the competent authority under the C.P. Tenancy Act, 1898 before effecting transfer of the land in favour of the petitioners since the vendors were members of the Scheduled Tribe. In the said decision, it had been held that Section 23 of the O.L.R. Act, 1960 will be applicable to such transfer, even though the O.L.R. Act was not in force at the time of transfer.

4. The present petitioners have relied upon the judgment of this Court, reported in ***C.L.T. 1980 short note 25 page-14*** and submitted that this judgment of the High Court though placed before the learned S.D.O. Sadar, Sambalpur, was not properly understood. The aforesaid judgment of the High Court is quoted hereunder.

> "Admittedly no permission for alienation of land was taken. In fact, there could be no scope for taking of such permission inasmuch as Section 22 or for the matter or that the entire Chapter-II of the Orissa Land Reforms Act where Section 22 occurs was not in force on the date of Ext.1 (registered sale deed). The provision became operative only in 1965. The alienation under Ext.1 without previous permission in writing of the Revenue Officer was not void at the time the contract of sale had been entered into. Section 22 does not

purport to have retrospective effect and, therefore, the transaction which had already been completed could not be hit by Section 22 of the Act."

The learned S.D.O. came to a conclusion that, while the said judgment of this Court was not doubt binding, the facts of the said case were not available in the said notes of the judgment and the said judgment was not a case where it was contended that "prior permission" of transfer of S.T. land was required by law existing at the time of transfer in the form of C.P. Tenancy Act (as amended by the Orissa Act XIII of 1953). The learned S.D.O. further came to conclude that the C.P. Tenancy Act, 1898 was in force in the area, where the disputed land exist, as on date of the alleged transfer. Therefore, since the C.P. Tenancy Act, 1960 (amended by the Orissa Act XIII of 1953) required prior permission of the Revenue Officer, even though, the amendment under Section 22(b) of Sub Section(2) of the Orissa Land Reforms Act, 1960, came into effect only in the year 1965, yet, the sale was void, on account of lack of non-obtaining of necessary permission from the Revenue Officer, as contemplated under the C.P. Tenancy Act, 1898. In this respect, the learned S.D.O. relied upon Clause(b) of Sub-Section-2 of Section 46 of the C.P. Tenancy Act (as amended by Orissa Act XIII of 1953) and came to hold that the said provision put restriction on transfer of land by Scheduled Tribe to a persons who do not belong to Scheduled Tribe even in the year 1964 since the C.P. Tenancy Act, 1960 was in force at the time of transfer. Hence, the sale made through Registered Sale Deed No.1787 dated 27.04.1964 in favour of the petitioner was declared to be void under Section 23(2) of the O.L.R. Act, 1960.

5. This order of the learned S.D.O., Sadar, Sambalpur, was challenged by the petitioners before the learned A.D.M., O.L.R., Sambalpur in O.L.R. Appeal Case No.12 of 1989 (under Annexure-2) and the said appeal came to be allowed in favour of the petitioners by order dated 16.04.1990 on the ground that the transfer had been made on 27.04.1964, whereas the O.L.R. Act, 1960 came into force on 01.10.1965 and, therefore, the lower appellate authority came to hold that the provisions of O.L.R. Act, 1960 were not applicable.

6. The order of the learned A.D.M., O.L.R., Sambalpur was challenged by opposite party No.4 before the learned Collector, Sambalpur in O.L.R. Revision Case No.4 of 1990 and by judgment dated 11.03.1994 (under Annexure-3), the said revision was allowed, the order of the lower appellate authority (Annexure-2) was quashed and the order of the learned S.D.O., Sadar, Sambalpur (Annexure-1/1) confirmed by the learned Collector,

Sambalpur. In the said revision, the present petitioners had raised similar grounds and the learned Collector, Sambalpur came to conclude that, though at the time of transfer of disputed land in question in favour of the petitioners on 27.04.64, the Orissa Land Reforms Act, 1960 had not been promulgated, even then in the sale of the disputed land, was required to comply with the provision of clause-(b) Sub-Section(2) of Section 46 of the C.P. Tenancy Act 1898 (as amended by the Orissa Act XIII of 1953) which required prior permission for transfer of land held by member of S.T. to members of Non-S.T and such mandate of law was in operation. Hence the learned Collector concluded that, it was a mandatory requirement for the petitioner (opposite party No.4 herein) to obtain necessary "prior permission" from the competent authority before registering the sale deed and for effecting of lawful transfer of land to the opposite parties (petitioners herein) in the year 1964. Thus he concluded that it was amply clear from the facts of the case that Section 23 of the O.L.R. Act, 1960 would become applicable and consequently upheld the order of the learned S.D.O., Sambalpur and quashed the order of the lower appellate authority.

7. Having heard learned counsel for the petitioners as well as the learned counsel for opposite party No.4 and after having perused the contentions raised in the petition as well as the judgments impugned herein, I am of the view that two issues arises for consideration in the present case i.e.:

(1) Whether the opposite party No.4 belong to the Scheduled Tribe Community or not?

(2) Whether the Registered Sale Deed dated 27.04.1964 prior to coming into effect of the O.L.R. Act, 1960 on 01.10.65, can be the subject matter of the proceeding and directions and/or orders under the O.L.R. Act, 1960?

8. Insofar as the first issue is concerned, the same is answered in favour of the opposite party No.4 and against the petitioners, inter alia, on the ground that the learned S.D.O., Sadar, Sambalpur in O.L.R. Case No.7 of 1986, in a proceeding under Section 23 of the O.L.R. Act in his judgment dated 18.01.1989 under Annexure-1/1 has categorically concluded the fact that, even though in the impugned sale deed, the caste of the vendors has mentioned as "Raj Gond", but from the evidence of the petitioner (Opposite party No.4 herein), he found that they belong to "Gond" by caste and not "Raj Gond". He further concluded that there was no caste in the State of Orissa called "Raj Gond" and, therefore, came to hold that, since the opposite party-vendors belongs to "Gond" by caste they belonged to the

Scheduled Tribe for the State of Orissa. This finding of fact has been affirmed by the learned Collector, Sambalpur in the order of Revision dated 11.03.1994 (Annexure-3) passed in O.L.R. Revision Case No.4 of 1990. The findings of the learned S.D.O. were based upon both oral as well as documentary evidence. It is well settled in law that the mere mentioning of one's caste in a sale deed cannot be determinative of the caste of a person. Once the trial court as well as the revisional court have affirmed a finding of the fact vis-a-vis the caste of a person, in a writ jurisdiction this Court need not enter into re-determination of any such finding of fact since this Court in writ jurisdiction is limited to consideration of questions of law.

Accordingly, I am of the considered view that since the trial court as well as the revisional court have held that the opposite party No.4 belongs to "Gond" by caste, therefore, this Court accepts such findings of facts and notes that the opposite party No.4 belonged to "Gond" by caste and, therefore, is a member of Scheduled Tribe.

9. The next issue raises some interesting questions. Admittedly, the sale deed was registered on 27.04.64 and the O.L.R. Act, 1960 came into force on 01.10.1965 yet, at the time, when the sale deed was effected i.e. on 27.04.64, the area in which the land is located was governed by the C.P. Tenancy Act, 1898 (as amended by the Orissa Act XIII of 1953). In view of Claus(b) of Sub Section (2) of Section 46 of the C.P. Tenancy Act 1898, it was the mandatory requirement that, permission had to be obtained prior to sale of land by a Scheduled Tribe person to a person who does not belong to Scheduled Tribe. Admittedly, the present petitioners are not the members of any Scheduled Tribe but belong to a General caste. It is also an admitted fact that, no permission under the C.P. Tenancy Act, 1898 (read with Orissa Amendment Act XIII of 1953) had been obtained by the petitioners. The objects and reason behind imposing such restrictions is well documented in several judgments of the Hon'ble Apex Court as well as the Hon'ble High Courts and need not be reiterated.

10. The Orissa land Reforms Act, 1960 and in particular Section 61 thereof categorically declare that, any order passed under the provision of this Act shall be subject to order passed in appeal or revision may be final and shall not be questioned in any court of law. In fact Section 67 specifically bars the jurisdiction of civil courts. While, there exists no bar to challenge an order under Articles 226 and 227 of Constitution, yet, the scope of such challenge is to be limited to only questions of law. By Section 74 of the O.L.R. Act, 1960, while repealing the Orissa Land Tenant's Relief Act 1955, on the same time Sub-Section(2) categorically stipulates that

repeal shall not effect the previous operation of the said enactment or anything duly done or suffered there under or any right, privilege, obligation or liability acquired, accrued or incurred under the said enactment. It would be appropriate to mention herein that at the time of creation of the State of Orissa, certain areas were governed by the Madrass Presidency, Bengal Presidency, State of Bihar and Central provinces. Accordingly, until the State of Orissa created enactment to cover the entire State, various tenancy laws of different states applied to various parts of State of Orissa. Insofar as the case land is concerned, this land is located in the District of Sambalpur and until the enactment of the O.L.R. Act, 1960, this area was governed by the Central Provinces Tenancy Act, 1988 read with Orissa Amendment Act XIII of 1953.

11. As noted hereinabove, Clause(b) of Sub-Section(2) of Section-46 of the C.P. Tenancy Act, 1898, clearly imposed restriction regarding transfer of land by members of the Scheduled Tribe to non-members and Revenue Officer's prior permission was required for such purpose. Admittedly, in the present case, no such permission as contemplated under the C.P. Tenancy Act, 1898 read with Orissa Amendment Act XIII of 1953 had been obtained by the petitioners, prior to registration of the sale deed. Therefore, all such transfer as held by the learned S.D.O. and confirmed by the learned Collector in revision, have in my considered view been correctly declared to be void.

Insofar as the notes of judgment of this Court relied upon by the present petitioners is concerned, reported in ***C.L.T. 1980 short note 25 page-14,*** I am completely agreement with the findings arrived at by the learned S.D.O., Sadar, Sambalpur, inter alia, on the ground that, the said case was not a case where the Hon'ble Court considered an existing enactment prior to the O.L.R. Act 1960 where law required prior permission to be obtained. In other words, that was not a case where, even prior to the O.L.R. Act, 1960 into force, prior permission of the Revenue Officer was mandatorily required as stipulated under the C.P. Tenancy Act, 1898 read with the Orissa Amendment Act XIII of 1953. Therefore, I am of the considered view that the said judgment has no application to the fact situation that arises for consideration in present case. On the other hand, the reliance placed by the learned S.D.O., Sadar, Sambalpur on the judgment rendered by the Board of Revenue in O.L.R. Revision Case No.68 of 1982 reported in ***C.L.T. Vol-56 of 1983*** has been correctly applied to the facts and circumstances of the present case and the said facts are similar to the facts which arose for consideration in the present case.

12. Accordingly, I find no merit in the present writ application and, therefore, the writ application stands dismissed and the order passed by the learned S.D.O., Sadar, Sambalpur in O.L.R. Case No.7 of 1986 as affirmed by the learned Collector, Sambalpur in O.L.R. Revision Case No.4 of 1990 is hereby affirmed. All the interim orders stand vacated. No costs.

Writ petition dismissed.

2013 (I) ILR – CUT- 117

INDRAJIT MAHANTY, J.

W. P. (C) NO. 637 OF 2012 (Dt.13.07.2012)

TAPESH KYAL ……Petitioner

.Vrs.

M/S. SHREE SHYAM PULP & BOARD MILLS LTD. ……Opp.Party

CONSTITUTION OF INDIA, 1950 – ART.226, 227.

Order of cognizance passed by the learned Metropolitan Magistrate, Saket Courts Complex, New Delhi – Whether Orissa High Court can quash such order – Held, No.

High Court has power to issue writs, directions, Orders only through out the territory in relation to which it exercises jurisdiction – The above Magistrate not being subordinate to the Orissa High Court, this Court does not possess the necessary power to quash the order impugned – Held, only the superior Court at New Delhi can quash such order and thereafter if the grievance subsists, the party may approach the Supreme Court.

Case laws Referred to:-

1.(2009)1 SCC 720 : (Harman Electronics Pvt. Ltd. & Anr..-V-National Panasonic India Pvt. Ltd.)
2.(1999)7 SCC 510 : (K. Bhaskaran-V- Sankaran Vaidhyan Balan & Anr.)

For Petitioner - M/s. A.K.Budhia & G.K. Acharya.
For Opp.Party - None
Mr. S.K.Nayak, Addl. Govt. Advocate
(addressed on the request of the Court).

I.MAHANTY, J. In this writ application, under Articles 226 and 227 of the Constitution of India, the petitioner has raised an interesting point of issue which is read as follows:

> "Whether the High Court of Orissa is competent to quash a Criminal Complaint pending before the Metropolitan Magistrate, New Delhi."

2. Mr. G.K. Acharya, learned counsel appearing for the petitioner submits that, since the issuance of summons dated 15.05.2012 by the Metropolitan Magistrate-02 (South), N.I. Act, Room No.505, Saket Courts Complex, New Delhi in C.C. No.157 of 2012 is without jurisdiction, the same is liable to be quashed. He further submits that from the invoices as raised by the opposite party/complainant, contains a clause that if any dispute arises for materials supplied, the same shall be subject to the jurisdiction of Kasipur Court and the said Court is alone competent to try the case. Therefore, the initiation of a complaint case by the opposite party/complainant in New Delhi before the Court of the Metropolitan Magistrate, is without jurisdiction. It is further stated that the petitioner had issued cheque from the bank account at Cuttack and the opposite party/complainant had received the cheque at Cuttack, therefore, the complainant ought to have filed the complaint at Cuttack. It is further claimed that the cheque in question had been issued by the petitioner by way of security.

3. With reference to the aforesaid contentions, this Court is required to examine the following point:

> "iii. Whether this Court has got jurisdiction to interfere with the institution of the complaint lodged by the complainant, opposite party No.1."

4. On the question of jurisdiction, reliance was placed by the petitioner on a judgment of this Court in W.P.(Crl.) No.138 of 2005 disposed of on 22.02.2011***(Sri Kailash Chandra Mishra v. Shri Ajitsinh Ulhasrao Babar)*** and in particular, the conclusion reached therein in paragraph-15 which are quoted hereunder:

> "15. In so far as the jurisdiction of this Court is concerned, since the cheque was issued by the petitioner at Balasore and the cheque was dishonoured at Bhubaneswar, cause of action had taken place in the State of Orissa. Therefore, institution of said complaint at Daman in the State of Uttaranchal is not maintainable. Further, though the complaint is lodged at Daman in the State of Uttaranchal, in view of the amendment to Article-226 of the Constitution of India the Writ Petition filed before this Court, questioning the correctness of the same and seeking to quash the proceedings initiated at Daman, is perfectly maintainable in view of the decision of the Supreme Court referred to supra upon which reliance has been placed by the learned Senior Counsel appearing for the petitioner."

5. In the light of submission advanced by Mr. Acharya, learned counsel appearing for the petitioner, it would be appropriate to note that the prayer made by the present petitioner which is as follows:

> "(i) Issue a writ of certiorari or any other appropriate writ or writs to quash the Criminal Complaint Case No.157 of 2012 pending before the learned Metropolitan Magistrate-02 (South), N.I. Act, Room No.505, Saket Courts Complex, New Delhi, vide Annexure-7."

6. It would be apt to take note of the Article 226 (1) and (2) and Article 227(1) of the Constitution of India which reads as follows:

> ***"226. Power of High Courts to issue certain writs-(1)*** Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto* and *certiorari,* or any of them, [for the enforcement of any of the rights conferred by Part III and for any other purpose].
>
> (2) *The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."*
>
> ***"227. Power of superintendence over all Courts by the High Court-***(1) Every High Court shall have superintendence over all Courts *and tribunals throughout the territories in relation to which it exercises jurisdiction."*

7. In the light of the submissions made by the learned counsel for the petitioner, the question that arises for consideration by this Court is as to whether the Orissa High Court possesses the necessary jurisdiction to quash the order of cognizance passed by the learned Metropolitan Magistrate, Saket Courts Complex, New Delhi.

8. Mr. Acharya, learned counsel appearing for the petitioner laid great emphasis on the judgment of the High Court in the case of **S*ri Kailash***

Chandra Mishra (supra). In paragraph-8 of the said judgment the contention of the petitioner therein was that the complaint petition filed at Daman is not maintainable in law and that the Orissa High Court has the necessary jurisdiction to examine the legality of the summons issued against the petitioner in view of the "amendment to Article 226" of the Constitution to entertain the writ petition, since the cause of action has occurred at Balasore and Bhubaneswar, though complaint petition is filed in the court of Chief Judicial Magistrate First Class, Daman. In support of his submission, he has placed reliance upon the decision of the Supreme Court in the case of ***Harman Electronics Pvt. Ltd. & Another v. National Panasonic India Pvt. Ltd.,*** (2009) 1 S.C.C. 720, wherein the apex Court placing reliance upon Section 138 and 141 of N.I. Act, purportedly held that the writ petition is maintainable.

This Court while deciding the case of ***Sri Kailash Chandra Mishra*** (supra), placed reliance on the "amendment to Article 226" of the Constitution of India and referred to the judgment of the Hon'ble Supreme Court in the case of ***Harman Electronics*** (supra) and came to conclude that the writ petition before the High Court of Orissa was maintainable, "in view of the decision of the Hon'ble Supreme Court referred to supra upon which reliance has been placed by the learned Senior Counsel appearing for the petitioner".

9. Mr. Acharya, learned counsel for the petitioner placed reliance on the conclusion arrived at by the Division Bench of this Court in the case of ***Kailash Chandra Mishra v. Ajitsinh Ulhasrao Babar***, the relevant portion of which has been quoted hereinabove. In the aforesaid judgment, the Division Bench has placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Harman Electronics Private Limited and another v. National Panasonic India Private Limited***, (2009) 1 SCC 720.

The essential facts of that case is that the drawer of the cheque as well as the payee were both located at Chandigarh. On the dishonour of the cheque, a notice was issued to the drawer on behalf of the payee, by a counsel located at New Delhi. After such notice was issued, a complaint was lodged on behalf of the payee at New Delhi. The drawer of the cheque objected to filing of the complaint at New Delhi and after having failed to get his grievance redressed before the Addl. Sessions Judge, New Delhi and the Delhi High Court, ultimately approached the Hon'ble Supreme Court.

The Hon'ble Supreme Court concluded in the aforesaid case that the place of issue of notice under Section 138 of the N.I. Act was not adequate to form the basis for initiating a proceeding under Section 138 N.I. Act. Once

a notice is issued, the same must be served on an accused in order to form a foundation for initiating a complaint case. In the facts of the said case, the Hon'ble Supreme Court found that the notice though issued by a lawyer located at New Delhi was served on the accused at Chandigarh and hence the Hon'ble Supreme Court came to hold that no part of cause of action to lodge complaint arose at New Delhi and resorting to its authority vested under Article 142 of the Constitution of India, directed transfer of the case from New Delhi to Chandigarh.

> "23. For the views we have take it must be held that the Delhi High Court has no jurisdiction to try the case. We, however, while exercising our jurisdiction under Article 142 of the Constitution of India direct that Complaint Case No.1549 pending in the court of Shri N.K. Kaushik, Additional Sessions Judge, New Delhi be transferred to the Court of the District & Sessions Judge, Chandigarh, who shall assign the same to a court of competent jurisdiction. The transferee court shall fix a specific date of hearing and shall not grant any adjournment on the date on which the complainant and its witnesses are present. The transferee court is furthermore directed to dispose of the matter within a period of six months from the date of receipt of the records of the case on assignment by the learned District & Sessions Judge, Chandigarh."

In the light of the facts as noted hereinabove, two important points need to be noted, the first being that challenge to initiation of complaint case at New Delhi, was made by the drawer of the cheque/accused at New Delhi. The said person after not getting any relief from the Delhi High Court moved the Hon'ble Supreme Court.

That was not a case where the drawer/accused approached the High Court of Punjab and Haryana, claiming that the Delhi Court did not have the jurisdiction to entertain such a petition.

10. The second distinctive fact being that, the authority of the Supreme Court of India to determine the question as to whether the Court at New Delhi was competent or not, was within its competency and consequently utilizing its power under Article 142, directed the transfer of the case from New Delhi to the courts at Chandigarh. In the present case the petitioner has chosen not to seek any relief before any superior court at New Delhi and instead has chosen to question the jurisdiction of the learned Metropolitan Magistrate, Saket Courts Complex, New Delhi, by initiating a proceeding before the Orissa High Court. The Orissa High Court clearly is not vested

with the power under Article 142 to direct transfer of a case from one State to another.

11. In the light of the findings of the Hon'ble Supreme Court quoted hereinabove, the Hon'ble Supreme Court categorically concluded that, the Delhi High Court has no jurisdiction to try the case. Therefore, the judgment of the Hon'ble apex Court in the case of Harman Electronics (supra) does not support the contention of the petitioner to the effect that the High Court of Delhi had the necessary jurisdiction to try this case.

12. In the case of ***Harman Electronics*** (supra), the Hon'ble Supreme Court has considered the issue of amendment to Article 226 of the Constitution of India. Article 226 (2) of the Constitution of India came about as a result of the view taken by the Hon'ble Supreme Court in ***Election Commission v. Venkata,*** A.I.R. 1953 S.C. 210 and subsequent cases, wherein it was location or residence of the respondent which gave territorial jurisdiction to a High Court under Article 226, the situs of the cause of action being immaterial for this purpose. The decision of the Supreme Court led to the result that only the High Court of Punjab would have jurisdiction to entertain petitions under Article 226 against the Union of India and those other bodies which were located in Delhi. The object of Clause (1A), inserted by the 15th Amendment Act, 1963, which has been renumbered as Clause (2) by the Constitution (42nd Amendment) Act, 1976, was to restore the view taken by the High Courts and to provide that, the High Court within which the cause of action arise wholly or in part, would also have jurisdiction to entertain a petition under Article 226 against the Union of India or any other body which were located in Delhi. The Amendment thus supersedes the Supreme Court decisions to the contrary.

13. In this respect, it becomes important to take note of various provisions of Constitution of India regarding the issue of territorial jurisdiction of a High Court. In Part-I of the Constitution of India under Article 1, it has been declared that India, that is Bharat, shall be a Union of States and under Sub-article (2) the States and the territories thereof have been specified in the First Schedule. Under Sub-article (3) the territory of India has been defined as (a) the territories of the States. In the First Schedule of the Constitution of India at Serial No.10, the State of Orissa and the territory thereof is noted as follows :

> "The territories which immediately before the commencement of this Constitution were either comprised in the Province of Orissa or were being administered as if they formed part of that province."

14. In Part-VI of the Constitution of India, various aspects relating to the State is indicated and in Chapter-V under Article-214 it has been declared that there shall be a High Court for each State. In so far as Article 226 of the Constitution of India is concerned, while every High Court has been vested with the power to issue directions, orders or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari (as substituted by the Constitution, (Forty-fourth Amendment) Act, 1978 and all such directions, orders or writs may be issued by every High Court throughout the territories in relation to which it exercises jurisdiction. Under Article 227 of the Constitution every High Court is vested with the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be relevant to take note of Article 228 of the Constitution where every High Court is vested with the power to transfer a case from "a court subordinate to it" if a case involves any substantial question of law.

15. The aforesaid provisions of the Constitution of India which are referred to herein above clearly stipulate that "territorial jurisdiction of any State" is confined to the territory specified for each State in Schedule-I of the Constitution. Article 214 of the Constitution has mandates that there shall be a High Court in each State and such a High Court under Article 226 shall have powers "throughout the territory in relation to which it exercises jurisdiction", obviously, the territorial jurisdiction being the territory determined for the State in Schedule-I and no other.

16. Under Article 227, the High Court is vested with the power of superintendence only over those courts and tribunals throughout its territory in relation to which it exercises jurisdiction. Therefore, it clearly refers to the "territory of a State" as contained in Schedule-I of the Constitution. Under Article 228 while the High Court has power and authority to transfer a case pending before any "court subordinate to it", such a court subordinate must be within the territorial limit to exercise jurisdiction. I have extracted various aspects of the Constitution determining the scope and ambit and territorial jurisdiction of the High Court including Orissa High Court which arises for consideration. Therefore, while Orissa High Court has been established under Article 214 of the Constitution of India read with Article 226, such High Court has power to issue directions, orders or writs only "throughout the territory in relation to which it exercises jurisdiction". Therefore, the territory as defined in Schedule-I of the Constitution and no other. Similarly, the Orissa High Court under Article 227 of the Constitution is competent to exercise its power of superintendence only over those courts and tribunals located in the territory in relation to which it exercises jurisdiction i.e. the area

stipulated in the first schedule pertaining to the State of Orissa and no other. Similarly, for the purpose of analogy, the Orissa High Court exercises power to transfer a case from one court to another located within the territory of the State of Orissa and which are subordinate to it as defined and stipulated in Schedule-I of the Constitution of India.

17. In the light of the analysis made hereinabove, this Court is of the considered view that in exercise of authority/powers vested in it by Article 226 & 227 of the Constitution of India, such power and authority must be exercised with great caution and circumspection. Any attempt made by a litigant in order to coerce a court to exceed its territorial jurisdiction, must be stoutly guarded. Any failure to do so, could lead to judicial chaos and anarchy. Accepting the contention of the learned counsel appearing for the petitioner would, in my view, lead to legal chaos since, every High Court would then be held to be empowered to quash a proceeding of a subordinate court of any other State and in my considered view the founding father of the nation and framers of the Constitution, fixed territorial limits of every High Court to try and ensure that while all constitutional bodies including the courts would be free to exercise jurisdiction and authority within their respective territorial jurisdiction any attempt to exceed the same was clearly unconstitutional. It is very often stated in various judgments of the Hon'ble Supreme Court, that greater the power or authority, greater should be the care and caution in exercise of such authority.

18. The Division Bench of this Court in the case of ***Kailash Chandra Mishra*** (supra) has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of ***Harman Electronics*** (supra). This judgment of the Hon'ble Supreme Court is not an authority for the proposition that, the Orissa High Court would have jurisdiction to quash a proceeding pending before a court located outside the territory of Orissa.

In the case at hand, without entering into the contentions raised on behalf of the petitioner relating to alleged lack of territorial jurisdiction on the part of the learned Metropolitan Magistrate, Saket Courts Complex, New Delhi, an aggrieved party must be made to abide by the rule of law and the Constitution of India. Such a plea and/or grievance can only be reddressed by a superior court located within the territory where the proceeding purportedly albeit without jurisdiction has been entertained and/or initiated. If any further grievance exists thereafter that party has every right to move the Hon'ble Supreme Court of India and also seek the exercise of power under Article 142. In the light of the above, I have no hesitation to conclude that the writ petition filed by the petitioner under Article 226 & 227 of the Constitution

is not maintainable, inasmuch as, for the reason that the petition filed before this Court with a prayer to quash the proceeding pending before the learned Metropolitan Magistrate, Saket Courts Complex, New Delhi is not a court subordinate to the Orissa High Court. Consequently, the Orissa High Court does not possess the necessary power of superintendence as provided under Article 227.

19. It is also pertinent to note herein that the term "cause of action" has always considered along with the nature of relief sought and not independent to each other. In the present case at hand prayer has been made for issuance of writ of certiorari to the learned Metropolitan Magistrate-02 (South) N.I. Act, Room No.505, Saket Courts Complex, New Delhi to quash a complaint case pending before him and, therefore, clearly the limitation of jurisdiction found in Article 226 & 227 apply to this case. In the complaint petition (Annexure-8) to the writ petition and in particular para-6 thereof the following as fact has been asserted.

> "That Complainant deposited the aforesaid cheques with its banker State Bank of Patiala, Mahipal Pur Branch, New Delhi for the encashment within the period of validity, however, to the surprise of Complainant the cheques were returned by Accused's banker, Union Bank of India, with the reason "insufficient fund" in the account of Accused.

Therefore, in terms of both the judgments of the Hon'ble Supreme Court in the case of ***Harman Electronics*** (supra) as well as the case of ***K. Bhaskaran v. Sankaran Vaidhyan Balan and another***, (1999) 7 Supreme Court Cases 510, prima facie, the court of the Metropolitan Magistrate, New Delhi was competent to register the complaint.

20. Therefore, in the light of the distinctions drawn hereinabove, there can be no doubt whatsoever that, if a party is aggrieved by an order passed by learned Metropolitan Magistrate, Saket Courts Complex, New Delhi, he has every right to challenge the said order before the superior court at New Delhi and thereafter, if any grievance subsists, may also approach the Hon'ble Supreme Court of India which alone is vested with power under Article 142 of the Constitution of India.

21. With the aforesaid observations and findings arrived at, the writ petition merits no further consideration and stands dismissed.

Writ petition dismissed.

2013 (I) ILR – CUT- 126

INDRAJIT MAHANTY, J.

CRLMC.NO. 397OF11 (Dt.21.11.2012)

RAMESH PRADHAN & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA ……Opp.Party

PENAL CODE, 1860 – S.498-A.

Persons who may commit offence U/s.498-A – It is either the husband of the woman or his relatives – The word "relative" has not been defined in the Penal Code – However Hon'ble Supreme Court held that status of a relative is conferred only by blood, marriage or adoption – Held, the present petitioners not being the relatives of the accused-husband either by blood, marriage or adoption the charge framed against them U/s.498-A I.P.C. is quashed.

Case law Referred to:-

(2009) 6 SCC 757 : (U.Suvetha-V- State by Inspector of Police & Anr.)

For Petitioner - M/s. Lalatendu Samantaray, B.P.Pradhan, R.L.Pradhan S.Swain & G,Das

For Opp.Parties – Miss. Deepali Mahapatra & S.Parida.

Heard Mr.Samantaray, learned counsel for the petitioners and Miss D. Mohapatra, learned counsel for Opp. Party No.2-informant.

The challenge in this application under Section 482 Cr.P.C. is made to an order dated 20.7.2010 passed in G.R. Case No.697 of 2009 framing charge against the petitioners under Section 498A and other provisions of the I.P.C., inter alia, on the ground that the petitioners are not relatives of the husband of the informant and therefore, no charge under Section 498A IPC can be framed against them.

In the case of **U.Suvetha Vrs. State by Inspector of Police and another**, (2009) 6 SCC 757, the Hon'ble Supreme Court has held that Section 498A is a penal one. It, thus, deserves strict construction. Ordinarily, save and except where a contextual meaning is required to be given to a

statute, a penal provision is required to be construed strictly. Since the word 'relative' has not been defined in the Indian Penal Code, the Hon'ble Supreme Court has referred to various Dictionaries and Lexicons and in particular, Random House Webster's Concise College Dictionary defines 'relative' that a person who is connected with another or others by blood or marriage.

The case of the petitioners is that they are not relatives of the husband of the informant either by blood or by adoption. It is claimed by the petitioners that the husband of the informant was a tenant in the house of the petitioners and since he was a orphan, they had participated in the marriage ceremony solemnized at Taratarini Pitha on 19.5.2008.

Section 498-A of the Penal Code reads as under:

" 498-A. Husband or relative of husband of a woman subjecting her to cruelty : - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation :- For the purposes of this section, 'cruelty' means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

The aforementioned provision Section 498-A was inserted in the Penal Code by reason of the Criminal Law (Second Amendment) Act, 1983 (Act 46 of 1983).

From the reading of the aforesaid provision it is clear that an offence in terms of the said provision has to be committed by the persons specified therein i.e. either the husband of the woman or his relatives and they must have subjected her to cruelty. The term' relative' has been specifically

defined by the Hon'ble Supreme Court, as noted hereinabove. In the case at hand, since the present petitioners are not the relatives of the accused-husband either by blood or marriage or adoption, the charge framed against them under Section 498-A IPC is quashed. The trial may continue against the petitioners for other charges framed against them. Since the matter is of the year 2009, the trial court is directed to take up and conclude the trial expeditiously.

The CRLMC is allowed to the extent indicated hereinabove.

Application allowed.

2013 (I) ILR – CUT- 129

SANJU PANDA, J.

W.P.(C) NOS. 23307/2011, 11791 & 11993/2012 (Dt.05.09.2012)

STATE OF ORISSA & ORS. ……..Petitioners

.Vrs.

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION & ORS. ……Opp.Parties

EDUCATION – Admission in to 2nd Shift Degree Engineering Programme – AICTE approved the same for the academic session 2011-2012 – Action challenged by the State Government on the ground that AICTE ignored its views.

AICTE, considering the principle of students enrolling for higher education, which has increased the capacity of the existing institutions, approved 2nd shift and while extending such approval it has considered the views of the State Government and took the decision – Once the institution has received approval, the State Government should not have put restriction in those institutions in not reflecting the seat matrix and extended approval of the institution in the website at the time of Counselling for admission to such technical courses – Held, since AICTE has taken in to consideration the views of the State Government and extended approval to the institutions, this Court is not inclined to interfere with the same. (Para 17)

Case law Referred to:-

(2005) 3 SCC 212 : (Govt. of A.P. -V- J.E. Educational Society)

For Petitioner - Addl. Govt. Advocate

For Opp.Parties- M/s. Pradeep Ku.Mohapatra, S.Mohanty, A. Mohapatra (for O.Ps.3 to 11)
M/s. S.S.Das, R.K. Sahoo & K.C.Mohapatra (for O.P.5)
M/s. K.K.Jena, A.K.Mohapatra & N.Das (for O.P.3)
M/s. D.P.Dash, B.K.Mishra, S.K.Barik(for O.Ps.4 to9)
M/s. J.K.Mishra (Sr. Advocate) (for O.Ps.1 & 2).

For Petitioner - Mr. A.Mohanty, V. Narasingh, S.K.Senapati & S.S.Das.

For Opp.Parties- M/s. S.P.Mohanty, M.M.Pattnayak, S.Pattanayak, K.Beuria.
M/s. H.K.Mohanty, D.K.Pradhan & B.M.Biswal (for O.P.No.3)
M/s. B.Mohanty, S.Mohanty, D.Chhotray & B. Moharana (for O.P.No.5)
M/s. P.K.Mohapatra, S.K.Dash, S.Mohanty & A.Mohapatra (for O.P.No.6)
M/s. P.C.Behera, S.S.Mohanty (for O.P Nos.1 and 2)
Mr. J.K.Mishra (Sr.Advocate) (for O.P.No.1 and 2)

For Petitioner - M/s. P.K.Mohapatra, S.K.Dash & H.K.Moharana.

For Opp.Partie - Addl. Govt. Advocate (for O.P.Nos.1 to 4)
Mr. J.K.Mishra, P.C.Behera, S.S.Mohanty (O.P.5)
Mr. V. Narasingh (for O.P.2).

SANJU PANDA,J. In W.P.(C) No.23307 of 2011, the State Government represented through Principal Secretary, Industries Department, Orissa Secretariat, Bhubaneswar, who is the petitioner, challenges the action of the opposite parties 1 and 2 in granting approval for admission into 2nd shift Degree Engineering Programme for the academic session 2011-2012 to the opposite parties 3 to 13 institutions ignoring the views of the State Government and violating the principle of natural justice.

2. In W.P.(C) No.11791 of 2012, the Director of Technical Education & Training-cum-Chairman, Diploma Entrance Test Committee, 2012, who is the petitioner challenges the action of the opposite parties 1 and 2 in granting approval for admission into 2nd shift Diploma Engineering Programme to the institutions of opposite parties 3 to 6.

3. In W.P.(C) No.11993 of 2012, the petitioner, who is an Educational Institution challenges the action of the State Government in not including 2nd shift Civil Engineering and Mechanical Engineering Diploma Courses for the petitioner's institution with seat matrix meant to be followed through E-Counselling process in spite of duly accorded approval received by it from the All India Council for Technical Education (in short the "AICTE") for the academic session 2012-2013.

4 Since common questions of law and fact are involved in these writ petitions, they were heard together and are being disposed of by this common judgment.

5. The State Government, as matter of policy, took a decision for not to recommend for 2nd shift Engineering Programme. Accordingly, by notification dated 1.2.2011 they have clearly indicated the reasons for not recommending for 2nd shift Engineering Programme for approval. The reasons are as follows:

1. In comparison to the year 2008, the intake capacity in engineering programme has increased substantially a lot. Hence, the seat index has gone up presently.
2. In most of the states, the Technical Universities have not implemented the scheme of the 2nd shift yet.
3. Further, in the 2nd Shift, the safety and security issue of female students may pose a great problem.
4. The labs of the institutes will remain occupied most of the times leading to great difficulty for the students to carry out their project works both for the 1st and 2nd shifts.
5. The shortage of faculty members will force the 1st Shift staff to work for the 2nd shift (as admissible under the scheme) making them busy only in delivering lectures with reduced efficiency. This may also lead to severely affecting the research work of the faculty members ultimately jeopardizing their career growth.
6. Further, during the year 2009 and 2010 many seats remained vacant in the Engineering Colleges in spite of all out efforts taken by the State Government and Management of the Colleges to fill up the seats.

6. Accordingly, the views of the State Government were communicated to the AICTE. The AICTE introduced the 2nd shift Engineering Programme in 2008 in the existing Engineering Colleges to address the issue of regional imbalance, stream wise imbalance and imbalance between Degree vrs. Diploma level institutions based on the ratio of the Engineering students in the State. Before granting approval, the AICTE has to consider the view of the State Government in respect of grant and/or not to grant further extension of approval to existing institutions to increase seat matrix. Though the State Government has clearly outlined the reasons for which it has not recommended for approval for the 2nd shift and not to increase seat matrix in the existing institutions. Ignoring such views, the opposite parties 1 and 2 took a decision and grant approval for 2nd shift Engineering Programme and

also increased the seat matrix, which is arbitrary and contrary to the statutory provision for giving approval.

7. It is submitted that Entry-25 of, List-III deals with education including technical education. As per the schematic arrangements of the Constitution and in view of such entry, the State is empowered to take a policy decision relating to education and exercising such power and accordingly notification dated 1.2.2011 was issued. Till the year 2007, there was only 25 numbers of private Engineering Colleges and 12 numbers of such colleges were being run by the Government. From the year 2008 onwards, the number of private institutions increased and by the academic session 2011-2012, the Engineering Colleges increased from 13 to 79 under private sectors and during academic session 2010-2011 around 9,000 seats remained vacant out of total intake capacity of 27,000 seats and the said number is increased from year by year. Therefore, the approval granted by the opposite party no.1 ignoring the views of the State Government is liable to be quashed. In support of the contention, learned Advocate General cited the decision reported in (2005) 3 Supreme Court Cases 212, ***Govt. of A.P. v. J.E.Educatinal Society*** wherein the apex Court held as follows:

> "The educational needs of the locality are to be ascertained and determined by the State. Having regard to the Regulations framed under the AICTE Act, the representatives of the State have to be included in the ultimate decision-making process and having regard to the provisions of the Act, the writ petitioners would not in any way be prejudiced by such provisions in the A.P.Act. Moreover, the decision, if any, taken by the State authorities under Section 20 (3) (a) (i) would be subject to judicial review"

8. Mr.J.K.Mishra, learned counsel appearing for the All India Council for Technical Education submitted that as per the AICTE (Grant of Approval for Technical Institutions) Regulation-2011, which came into force with effect from the date of its publication in the Official Gazette on 10.12.2010, under Clauses 4.20 and 4.21 and as per the Hand Book for the academic sessions 2011-2012 and 2012- 2013, the AICTE has taken into consideration the views of the State Government and affiliating university which provides as under:

> "3.2 Views of State Government and affiliating university.
>
> 3.3. The State Government/UT and the affiliating university/Board will forward to the concerned regional office of the Council their views on the applications received, with valid reasons or otherwise within a period of fifteen days from the date of receipt of applications.

3.4 The views of the State government/U.T. and the affiliating university/Board will be taken into account by the Regional Committee while taking the decision whether the application is to be processed further or not.

In the absence of receipt of views from the State Government/UT and/or the affiliating university/Board, the Council will proceed for completion of approval process.

9. The opposite parties have also considered the justification for increasing of Technical Education in the Country taking into consideration the growth of AICTE approval of Technical Institutions in last five years which is reproduced as under:

Growth of AICTE approved Technical Institutions in last five years.

Year	**Engineering**	**Mgmt**	**MCA**	**Phar**	**Arch**	**HMCT**	**Total**	**Added in year**
2006-7	**1511**	**1132**	**1003**	**665**	**116**	**64**	**4491**	**171**
2007-08	**1668**	**1149**	**1017**	**854**	**116**	**81**	**4885**	**394**
2008-09	**2388**	**1523**	**1095**	**1021**	**116**	**87**	**6230**	**1345**
2009-10	**2972**	**1940**	**1169**	**1081**	**106**	**93**	**7361**	**1131**
2010-11	**3222**	**2262**	**1198**	**1114**	**108**	**100**	**8004**	**643**
2011-12	**3393**	**2385**	**1228**	**1137**	**116**	**102**	**8361**	**357**

Growth of intake in AICTE approved Institutions in last five years

Year	Engineering	Mgmt	MCA	Pharm	Arch	HMCT	Total	Added in year
2006-07	550986	94704	56805	39517	4543	4242	750797	73566
2007-08	653290	121867	70513	52334	4543	5275	907822	157025
2008-09	841018	149555	73995	64211	4543	5794	1139116	231294
2009-10	1071896	179561	78293	68537	4133	6387	1408807	269691
2010-11	1314594	277811	87216	98746	4991	7393	1790751	381944
2011-12	1485894	352571	92216	102746	5491	7693	2046611	255860

10. The view of the State Government was considered in its Regional Meeting held on 28th May, 2011. At Item No.ERC/42.4 NOC's received from Government/UTs and affiliating Universities regarding starting of new Technical Institutions, new programme(s) /course(s) variation in intake, etc. The Committee considered NOCs' received from the State Governments & the Affiliating Universities.

11. Similarly, AICTE Approval Process Hand Book for the academic session 2011-2012 deal with the issue of views of State Government and Affiliating University which is provided as under:

> "3.2 Views of State Government and affiliating university.
>
> 3.3. The State Government/ UT and the affiliating university/Board will forward to the concerned regional office of the Council their views on the applications received, with valid reasons or otherwise within a period of fifteen days from the date of receipt of applications.
>
> 3.4 The views of the State government/U.T. and the affiliating university/Board will be taken into account by the Regional Committee while taking the decision whether the application is to be processed further or not.
>
> In the absence of receipt of views from the State Government/UT and/or the affiliating university/Board, the Council will proceed for completion of approval process.

12. The Regional Committee received the letters dated 17.1.2012 and also 16.6.2012 respectively from Joint Secretary, Industries Department, Government of Orissa and as per the prevailing practice the AICTE adopted the view taken by a Scrutiny Committee held on the subject for the academic session 2011-2012.

13. The Executive Committee of AICTE basing on the recommendation of the Regional Committee has granted extension of approval to the existing institutions for 2nd shift Engineering Programme and approval for such 2nd shift has not been granted for the year 2011-2012 to any new institution. Therefore, the approval granted by the AICTE for the year 2011-2012 are only a continuation of the approval already granted to those institutions in the year 2010-2011. Such approval for the academic year 2011-2012 was upheld by this Court in Writ Appeal No.328 of 2010 with batch disposed of on 9.11.2010. Therefore, the writ application filed by the State Government and its authority are liable to be dismissed.

14. Considering the above and in view of the fact that the AICTE has been established in accordance with the provisions contained under the All India Council of Technical Education Act, 1987 with a view to proper planning and coordinated development of technical education system throughout the Country. The promotion of qualitative improvements of such technical education in relation to planned quantitative growth and to regulate

and proper maintenance of the norms and standards in the technical education system and for matters connected therewith, it is the duty of the Council to take all steps as it may think fit and grant approval with seat matrix to open and establish technical institutions. To carry out its objective, Hand Book has been published by the AICTE for the purpose of imparting education of the institutions and its promoters. The institutions desirous of getting approval of the AICTE regarding Technical Education are required to apply in the prescribed form and after due scrutiny by a committee, letter of approval is issued by the AICTE. While granting such approval, the AICTE indicates the intake capacity of the institutions in question and after scrutinizing the documents regarding infrastructure, staff, library, etc. The AICTE, as stated above, is the controlling and approval authority, so far as technical educations is concerned.

15. No doubt, the private sectors are encouraged to establish the institution to impart education/technical education to the students, as the Government is not in a position to establish such type of institution, as required to be established.

16. The word “recognition” on the impart of technology of human kind is not erred for rapid future growth. One has to grow for human capital formation, both for manual and for knowledge/unskilled worker. This needs huge investment in infrastructure, including education and basic health and much higher standard of governance right through the value to create an atmosphere of an intermational competitve fair and inclusive work place. There need to be great focus of skilled formation and capability building. According to recent tentative survey done by the Ministry of Human Resources Development Department(As reveals from Education Times of Time of India), the gross enrolment ratio for higher education has increased from 12.4% to 20.2% in last five years. The number of students enrolling for higher education appears to have increased. Taking into view the above aspect with a future foresight, the AICTE extended approval for establishment of the technical institutions.

17. The AICTE considering the principle of student enrolling for higher education, which was increased the capacity of the existing institutions, approved 2nd shift, to accommodate such number of students. The infrastructure and staff are being maintained by the institution itself. However, the AICTE while extending such approval, considering the view of the State Government, took the decision. Once the institution has received approval, the State Government should not have put restriction in those institutions in not reflection the seat matrix and extended approval of the institution in the web site at the time of counseling for admission to such

technical courses. The decision, as cited by the learned Advocate General, in the case of Government of A.P.(Supra) wherein the apex Court has held that educational needs of the locality are to be ascertained and determined by the State. The representatives of the State have to be included in the ultimate decision-making process, which is subject to judicial review. There is no dispute regarding the said proposition of law. In the present case, since the AICTE has taken in to consideration the view of the State Government and extended approval to the institutions, this Court is not inclined to interfere with the same.

18. Accordingly, W.P.(C) Nos.23307 of 2011 and 11791 of 2012 are dismissed and W.P.(C) No.11993 of 2012 is allowed.

W.P.(C) Nos.23307/11 and 11791/12 dismissed.
W.P(C) No.11995/12 allowed.

2013 (I) ILR – CUT- 137

S. C. PARIJA, J.

BLAPL NO. 18619 OF 2012 (Dt.17.10.2012)

PRASANTA KUMAR DASH ……Petitioner

.Vrs.

STATE OF ORISSA ……Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.438.

Anticipatory Bail – Discretion of the Court – Discetion must be exercised on the basis of available material and facts of the particular case – State Counsel submits that the petitioner being one of the Directors of M/s. Seashore Group of Companies collected crores of rupees from the general public by giving false assurances with high rate of interest and prayed for custodial interrogation of the petitioner.

Purpose of incorporating Section 438 in the code is to give regard to the presumption of innocence of an accused until he is found guilty – In this case the petitioner is fully co-operating with the investigating officer and since no material has been produced to justify necessity of custodial interrogation no arrest should be made to the petitioner – Held, in the event of arrest, the petitioner shall be released on bail by the arresting officer on such terms and conditions fixed by such officer.

Case laws Referred to:-

1.AIR 1982 SC 949 : (State of West Bengal & Ors.-V- Swapan Kumar Guha & Ors.)

2.AIR 2011 SC 312 : (Siddharam Satlingappa Mhetre-V-State of Maharashtra & Ors.)

3.AIR 1997 SC 3806 : (State rep. by the C.B.I.-V- Anil Sharma).

For Petitioner - Mr. Ajit Ku. Kanungo
For Opp.Party - Mr. Pravakar Behera

Heard learned counsel for the parties.

This is an application under Section 438 Cr.P.C. for grant of anticipatory bail.

The case of the prosecution, as detailed in the First Information Report ('F.I.R.' for short) is that the petitioner and other Directors of M/s. Seashore Group of Companies are collecting deposits to the tune of crores of rupees from the members of general public by alluring them with high interest rate and promising to pay them heavy return. It is alleged in the said F.I.R. that though interest was shown in the account of the company as dividend and paid to the depositors, inquiry reveals that the amount paid to the depositors was part of the deposits made by them and that the company had no commensurate business to make payment of huge interest and therefore the company was running a money circulation scheme, which is prohibited under the Prize Chits and Money Circulation Schemes (Banning), Act, 1978.

In the said F.I.R. it is further alleged that the company has defaulted in making payment to the depositors and has thus cheated many members of the general public. It is also alleged that the company, i.e. M/s. Seashore Securities Ltd. was accepting the deposits and issuing preferential shares with guaranteed monthly dividend of 2% for a period of 6 years along with one life insurance policy from Tata AIG Life and one accidental insurance policy from Oriental Insurance Company, though the said company is not registered with the Reserve Bank of India as a Non-Banking Financial Company (NBFC) and the shares of the company are also not listed on the National Stock Exchange of India. Accordingly, it is alleged that the activities of the petitioner and other Directors of Seashore Group of Companies constitute offences under Sections 420/120-B I.P.C. read with Sections 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

Learned counsel for the petitioner submitted that the F.I.R. has been lodged by the Deputy Superintendent of Police, Crime Branch, on false and baseless allegations, for extraneous considerations, in as much as, the company i.e., M/s. Seashore Company Ltd. has been duly incorporated under the Companies Act, 1956, and is authorized to issue redeemable preferential shares as provided under the Articles of Association of the said company. It is submitted that the company carries on its business activities strictly in accordance with the provisions of Companies Act, 1956 and the preferential shares issued by the company are redeemable after 6 years from the date of its issue/allotment, which carry a dividend @ 24% per annum. It is further submitted that the company, M/s. Seashore Company Ltd. is not a Non-Banking Financial Company, as it never lends money as one of its principal business and therefore it does not require any registration with the Reserve Bank of India. Further, the company being a public limited company, which issues preferential shares, such a company need not be listed with the National Stock Exchange.

It is submitted by learned counsel for the petitioner that the petitioner's company had been making payment of dividend to the share holders regularly and it is only recently, after lodging of the present F.I.R., there has been some delay in making such payments, due to the seizure of the documents and freezing of the bank accounts of the company by the Investigating Officer. It is submitted that such occasional delay or default in payment of monthly dividend may amount to a breach of contract but the same does not constitute an offence of cheating under Section 420 I.P.C. It is further submitted that the business activities carried on by the petitioner's company, as detailed above, does not amount to a 'money circulation scheme' as has been defined under Section 2(c) of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and therefore the provisions of the said Act has no application to the facts of the present case, as has been held by the Apex Court in ***State of West Bengal and others –vrs– Swapan Kumar Guha and others,*** AIR 1982 SC 949.

It is further submitted that pursuant to the direction of this Court, the petitioner has appeared before the Investigating Officer on different dates and has given his reply in writing to the questionnaire served on him along with photocopies of all documents asked for. As desired by the Investigating Officer, the petitioner has also deputed responsible officers of the company, who have appeared before Investigating Officer and provided necessary clarification in respect of the documents filed.

It is accordingly submitted by the learned counsel for the petitioner that as the allegations made in the FIR relates to the business activities of the petitioner's company, the same are based on documentary evidence which can be verified from the records of the company, most of which has already been furnished to the Investigating Officer and also from the balance-sheet and other records filed before the Registrar of Companies. It is further submitted that the petitioner is ready and willing to appear before the Investigating Officer as and when required and co-operate in the investigation and therefore, the petitioner be protected by an order of anticipatory bail, as otherwise, he would suffer immense humiliation and disgrace, if he is arrested. In this regard, learned counsel for the petitioner relies upon the decision of the Apex Court in ***Siddharam Satlingappa Mhetre –vrs– State of Maharashtra and others,*** AIR 2011 SC 312.

Learned counsel for the State submitted that as the petitioner had been protected by the interim orders of this Court, he has not co-operated in the investigation fully and fairly. It is further submitted that as the allegations against the petitioner is with regard to collection of huge amount of money from the general public by alluring them of high return, by giving false assurances, custodial interrogation of the petitioner will be necessary to elicit useful and material informations. In this regard, learned counsel for the State

has relied upon the decision of the Apex Court in ***State rep. by the C.B.I. – vrs– Anil Sharma,*** AIR 1997 SC 3806.

On a perusal of the case diary, it is seen that pursuant to the direction of this Court, petitioner has appeared before the Investigating Officer and has furnished his written reply to the questionnaire prepared by the Investigating Officer and has also submitted photocopies of several documents pertaining to the business transaction of the company. As the allegations are with regard to collection of money from the general public, the same can be verified from the records of the company and also the records available with the Registrar of Companies. No material has been produced to justify the necessity of custodial interrogation of the petitioner, especially when the case hinges on documentary evidence. No arrest should be made because it is lawful for the police officer to do so. The existence of power to arrest is one thing and the justification for the exercise of it is quite another. The police officer must be able to justify the necessity for such arrest apart from his power to do so.

Considering the materials on record and keeping in view the nature and gravity of the offences alleged against the petitioner, it is directed that in the event of arrest of the petitioner in Cuttack CID, CB P.S. Case No.39 (EOW) of 2012, corresponding to G.R. Case No.2498 of 2012, pending in the court of learned S.D.J.M., Bhubaneswar, he shall be released on bail by the arresting officer on such terms and conditions as the arresting officer may deem just and proper.

It is made clear that the petitioner shall appear before the Investigating Officer as and when required and co-operate in the investigation. The BLAPL is accordingly disposed of.

Application disposed of.

2013 (I) ILR – CUT- 141

B.K. PATEL,J.

F.A.O. NO. 26 OF 2012 (Dt.06.08.2012)

JYOTSNA THANAPATI & ORS. ……Appellants

.Vrs.

UNION OF INDIA **……**Respondent

RAILWAYS ACT, 1989 – S.123(c)(2).

Railway accident – Deceased was moving with valid ticket – While he was attempting to spit through the open emergency window he was thrown out of the train and died – Tribunal refused compensation on the ground that accident occurred due to careless conduct of the deceased and he died due to "self inflicted injury" – Hence this appeal.

Evidence shows that the deceased tried to spit through the emergency window as the compartment was crowded and the untoward incident occurred due to sudden jerk and jolt of the train – So finding of the Tribunal that the death of the deceased occurred due to self inflicted injury as provided U/s.124-A of the Act is not sustainable in law – Held, claimants entitled to compensation for the death of the deceased. (Para- 11)

For Appellants : M/s Mohendra Ku.Mohapatro and S.Khan.

For Respondent : M/s. A.K.Mishra, H.M.Das, A.K.Sahoo & S.Bhanja.

B.K. PATEL, J. This appeal is directed against the judgment dated 31.10.2011 passed by learned Member (Judicial), Railway Claims Tribunal, Bhubaneswar Branch (for short 'the Tribunal') dismissing Case No.OA/97/2009 filed by the appellants who are wife and minor sons of deceased Prafulla Thanapati (hereinafter referred to as 'the deceased') along with the parents of the deceased claiming compensation for death of the deceased.

2. Case of the claimants in the original application is that on 4.7.2008 the deceased along with his father and brother (P.W.2) boarded general compartment of the Sarnath Express at Allahabad railway station to travel to Raipur after purchasing valid tickets. The compartment was overcrowded. At about 1.30 A.M. when the deceased was attempting to spit through the

open emergency window, he was thrown out from the running train due to sudden, heavy and random jerk. Deceased fell on the ground, sustained fatal injuries and died at the spot near Umaria railway station in Madhya Pradesh. In connection with death of the deceased a police case was registered, enquiry was held and final report was submitted. On the basis of such pleadings, it is asserted that death of the deceased having occurred due to untoward incident in terms of Section 123(c) of the Railways Act (for short 'the Act'), applicants are entitled to compensation.

Respondent-railway resisted the claim by filing written statement. It is pleaded that the deceased was not a *bona fide* passenger of the train. It is pleaded that the occurrence leading to death of the deceased does not amount to a untoward incident in terms of provision under Section 123(c) of the Act inasmuch as gross negligence on the part of deceased himself led to the incident for which fatal injuries on the deceased amount to self-inflicted injuries within the meaning of the Act.

3. On the basis of the rival pleadings, Tribunal settled the following issues:

(1) Whether applicants are dependents of the deceased?

(2) Whether the deceased was a *bona fide* passenger?

(3) Whether the incident was an untoward incident?

(4) Whether the applicants are entitled to any compensation?

(5) What relief?

4. In order to substantial their case claimants examined deceased's wife as P.W.1 and deceased's brother as P.W.2. Claimants relied also upon documents prepared in course of enquiry in the police case and death certificate of the deceased. No evidence was adduced on behalf of the Respondent-railway.

However, one Rajendra Kumar Nayak ADME/KUR, described as R.W.1, was summoned and cross examined by the Tribunal.

5. On appraisal of evidence on record, the Tribunal answered issue nos. (1) and (2) in favour of the claimants holding that the applicants were dependants of the deceased and that the deceased was traveling as a bonafide passenger of the train when the occurrence took place. However,

in answering issue no.(3) the Tribunal held that the deceased fell down from the train due to his own rash and negligent action for which fatal injuries sustained by him come within the scope of meaning self-inflicted injuries under Section 124A of the Railways Act. Accordingly, claimants were held to be not entitled to compensation and the impugned judgment dismissing the original application was passed.

6. In assailing the impugned judgment it was submitted by the learned counsel for the appellants that claimants adduced oral as well as documentary evidence in support of their claim for compensation under section 124A of the Act. No rebuttal evidence was adduced from the side of the respondent. Instead, an employee of the railway was summoned and cross-examined by the Tribunal as R.W.1. On appraisal of evidence on record it was held by the Tribunal that documentary evidence including DRM's report supports version of the eyewitness P.W.2 that the deceased fell out of the emergency escape window of a crowded compartment of the moving train while trying to spit out of the emergency escape window. In absence of any rebuttal evidence, finding of the Tribunal that the act of the deceased in spitting through the escape window and consequences thereof come within the meaning of self-inflicted injury as provided under the proviso to section 124A of the Act is without any basis and not sustainable. It was further argued that claimants substantiated their assertion that the deceased was thrown out of the compartment through the escape window due to sudden jerk and jolt of the train through the evidence of occurrence witness P.W.2.

7. Learned counsel for the respondent supported and defended the impugned judgment.

8. Accidental falling of any passenger from a train carrying passengers has been provided to be an "untoward incident" under section 123(c)(2) of the Act. Section 124A of the Act provides for compensation on account of untoward incident. However, compensation is not payable by the railway administration for injury or death arising out of all cases of untoward incidents. Proviso to Section 124 A enumerates certain exceptions. Section 124 A of the Act reads:

> " When in the course of working a railway an untoward incident occurs, then whether or not there has been any wrongful act, neglect or default on the part of the railway administration such as would entitled a passenger who has been injured or the dependant of a passenger who has been killed to maintain an action and recover

damages in respect thereof, the railway administration shall, notwithstanding anything contained in any other law, be liable to pay compensation to such extent as may be prescribed and to that extent only for loss occasioned by the death of, or injury to, a passenger as a result of such untoward incident:

Provided that no compensation shall be payable under this section by the railway administration if the passenger dies or suffers injury due to-

(a) suicide or attempted suicide by him;

(b) self-inflicted injury;

(c) his own criminal act;

(d) any act committed by him in a state of intoxication or insanity;

(e) any natural cause or disease or medical or surgical treatment unless such treatment becomes necessary due to injury caused by the said untoward incident.

Explanation- For the purpose of this section, "passenger" includes-

(i) a railway servant on duty; and

(ii) a person who has purchased a valid ticket for travelling by a train carrying passengers, on any date or a valid platform ticket and becomes a victim of an untoward incident."

9. In the present case, it is not disputed that death of the deceased occurred due to accidental falling from a running passenger train while traveling with valid ticket. Therefore, undoubtedly, death of the deceased occurred due to an untoward incident. However, the Tribunal held the appellant to be not entitled to compensation in view of finding that careless and negligent conduct of the deceased led to accidental falling of the deceased and, therefore death occurred due to "self-inflicted injury" as provided under clause (b) of the proviso to section 124A of the Act.

10. Admittedly, no oral or documentary evidence was adduced from the side of the railway. Deceased's brother P.W.2 was an eyewitness to the occurrence. Having referred to the evidence on record Tribunal held:

> "The applicants have produced Shri Sushil Kumar Thanapati, brother and co-passenger of the deceased who has stated in his sworn affidavit that the compartment was crowded and due to such rush his brother tried to spit out of the emergency escape window, and that time there was sudden jerk and jolt due to which the deceased was thrown out of the train. All the reports including the police reports and the DRM's report have stated identical reasons for cause of death, i.e. the deceased fell out of the emergency escape window of a moving train while trying to spit out of the emergency window. The applicants and their witness, Shri Sushil Kumar Thanapati have also stressed on the absence of a grill on the emergency window, and attributed the fall to this deficiency."

11. It is not disputed that absence of grill in emergency window does not amount to negligence on the part of the railway. Grill-less emergency escape windows are intended to facilitate exit of the passengers in case of emergency. Appellants in the present case do not at all attribute accidental fall of the deceased to negligence on the part of the railway. Rather, as is evident from the evidence of P.W.2, it is alleged that as the compartment was crowded the deceased tried to spit out of the emergency escape window but due to sudden jerk and jolt of the train he was thrown out of the running train. Evidence of P.W.2 on this score has not been discredited in any manner. No material whatsoever has been brought on record by the railway to indicate that the deceased was in any manner careless or negligent in his conduct while attempting to spit through the open emergency window. On the other hand, it appears that the untoward incident occurred due to sudden jerk and jolt of the train. It is in the evidence that deceased tried to spit through the emergency window as the compartment was crowded. Thus, evidence on record does not support the inference of the Tribunal that the deceased fell down from the train due to own rash and negligent action. Therefore, finding of the Tribunal that death of the deceased occurred due to self-inflicted injury as provided under section 124A of the Act is not sustainable in law. Claimants are entitled to compensation for the death of the deceased.

12. Accordingly, the appeal is allowed. The impugned judgment is set aside. Respondent-railway is directed to pay to the claimants compensation amount of Rs.4,00,000/- along with interest at the rate of 6% per annum from the date of filing of original application before the Tribunal till the amount is deposited in the Tribunal within a period of two months. On deposit of compensation with interest, the Tribunal shall disburse the amount to the claimants and keep such amount in fixed deposits in their

names in such proportions as deemed fit. Parties shall bear their own costs.

Appeal allowed.

2013 (I) ILR – CUT- 147

B. K. NAYAK, J.

W.P.(C) NO. 4008 OF 2011 (Dt.31.08.2012)

SUSANTA KU. SETHI & ORS. ……..Petitioners

.Vrs.

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

A. ORISSA RESERVATION OF VACANCIES IN POSTS & SERVICES (FOR SCHEDULED CASTES & SCHEDULED TRIBES) ACT, 1975–Ss. 6 & 7.

Post of Sikshya Sahayak – Advertisement to fill up 1109 Posts which includes unreserved-383, SEBC-299, SC-179 and ST-248 – Petitioners being S.C. Candidates applied but could not be appointed as their position in the merit list was below 179 – However out of 248 seats reserved for S.T. Candidates only 10 posts were filled up and 238 posts remained vacant – Petitioners prayed for appointment by way of exchange of vacancies between reserved categories of S.Cs and S.Ts as per the above provisions but the Government made De-reservation of the vacancies to be filled up by other Candidates – Hence this writ petition.

The post of Sikshya Sahayak neither carries a scale of pay nor any order of the Governor has been issued grouping it in any class of services so it cannot be said to be a Class-III (Group-C) or Class-IV (Group-D) post – Hence proviso to Section 6 of the ORV Act will have no application – Since ORV Act has been specifically made applicable for the recruitment of Sikshya Sahayak, exchange of vacancies between reserved categories of S.Cs and S.Ts should have been done by the authorities before consideration of the question of de-reservation of Scheduled Tribe vacancies – Held, De-reservation made by the Government of the vacancies meant for Scheduled Tribe is illegal – Direction issued that the left out selected S.C. Candidates from the select list of 2006 including the petitioners shall be appointed in accordance with their merit against unfilled vacancies meant for Scheduled Tribes by way of exchange. (Para 9 & 14)

B. PRECEDENT – The Court did not feel bound by earlier decision as it was sans reasons and without reference to statutory rules and other provisions of law.

In this case in W.P.(C) No.19149 of 2009 and the batch of writ applications the learned single Judge concluded that the writ petitioners being S.C. Candidates were not eligible to be appointed against the unfilled vacancies meant for Scheduled Tribe in view of the proviso to Section-6 of the ORV Act and no finding has been recorded as to whether the post of Sikshya Sahayak comes within Class-III or Class-IV posts and no reason has been assigned for the conclusion – Held, since this Bench has given the finding that the post of Sikshya Sahayak does not come within the purview of Class-III (Group-C) or Class-IV (Group-D) service is in disagreement with the earlier view expressed by the learned single Judge in the aforesaid batch of writ petitions, it is not necessary to follow the said decision because it was sans reasons and without reference to statutory rules and other provisions of law and as such it has no binding force – The matter also needs no reference to larger Bench . (Para 10,11)

Case laws Referred to:-

1.(1991)4 SCC 139 : (State of U.P. & Anr.-V- Synthetics & Chemicals Ltd. & Anr.)
2.AIR 1989 SC 38 : (Municipal Corporation of Delhi-V- Gurnam Kaur)
3.AIR 2006 SC 2449 : (Mayuram Subramanian Srinivasan-V- C.B.I.)
4.AIR 2012 SC 1485 : (Rattiram & Ors.-V- State of M.P. through Inspector of Police)

For Petitioners - M/s. Sameer Kumar Das & S.K.Mishra.

For Opp.Parties - Standing Counsel (for Opp.Party 1 to 5)
Mr. T.K.Mishra (for Opp.Parties 6,7,9,13,14 15 &19)

B.K.NAYAK, J. This writ application has been filed by the petitioners to quash appointment of opposite party nos.6 to 25 to the post of Sikshya Sahayak under Annexure-13 and to direct the Collector, Puri to appoint the petitioners in the posts after quashing the order dated 28.10.2010 passed by the Collector in S.S. Misc. Case No.104 of 2009 under Annexure-14 whereby the claim of the petitioners for appointment was rejected.

2. The petitioners are all Scheduled caste persons, who applied for the post of Sikshya Sahayak in the district of Puri as per the advertisement (Annexure-1) issued by the Director, OPEPA, Orissa, Bhubaneswar-opposite party no.3. Undisputedly for the district of Puri the number of posts of Sikshya Sahayak under the advertisement was 1109 with the breakup of unreserved-383, SEBC-299, S.C-179 and S.T-248. The petitioners were eligible and applied for the post, got selected having qualified but they could

not get appointment because their position in the merit list for Scheduled Castes was below 179, i.e., the number of posts advertised for their category. However, it is apparent from Annexure-4, the letter of the Collector, Puri addressed to the Joint Secretary to Government, School and Mass Education Department that out of 248 seats reserved for S.T. candidates, only ten posts were filled up by the candidates selected under that category and 238 number of posts remained vacant for want of qualified ST candidates. Therefore, by the letter dated 13.08.2007 under Annexure-4, the Collector requested the Government to de-reserve 238 S.T. posts for giving appointment to qualified candidates from other categories. Although initially vide letter dated 01.05.2008 under Annexure-6 the Government intimated the Collector refusing for de-reservation of the S.T. posts, however, by subsequent letter dated 03.07.2008 under Annexure-7 the request for de-reservation of 238 vacant S.T. posts was allowed. The said letter indicates that the Government decision allowing de-reservation was made in consultation with Department of S.T. and S.C. Development. It was stipulated that the appointment in de-reserved posts shall be purely on temporary basis with condition that as and when candidates of reserved category became available they may be inducted in the post. This Government decision is further reiterated in Government order dated 14.11.2008 under Annexure-11. On the basis of the Government order under Annexure-7, opposite party nos. 6 to 25, who are admittedly all general and SEBC candidates were appointed against the de-reserved vacancies.

3. It is the submission of the learned counsel for the petitioners that as per Section 6 of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act,1975 (in short 'the ORV Act') the reserved vacancies for S.C. and S.T. shall at the first instance be exchanged between those categories in the event non-availability of qualified candidates from the respective communities, prior to considering the case of de-reservation of the said reserved posts as provided under Section 7 of the Act, and that neither the Collector nor the Government having considered the said fact de-reserved the vacant ST posts and appointed the private opposite parties, who are general candidates and SEBC candidates, which is not permissible. Raising such grievance the petitioners earlier approached this Court in W.P.(C) No.14698 of 2010, which was disposed of on 27.09. 2010 giving liberty to the petitioners to file representation before the Collector-cum-C.E.O., Puri for considering their case. Pursuant to the aforesaid order, the petitioners approached the Collector, Puri by filing representation which was registered as S.S. Misc. Case No.104 of 2009 and by order dated 28.10.2010 (Annexure-14), the Collector rejected the said representation, mainly on the ground that the

Supreme Court in the case of M.Nagraj and others has observed that incase of non-availability of particular class of candidates, the posts meant for them cannot be de-reserved to be filled up by other categories of candidates and, therefore, exchange of reservation between ST & SC will not be permissible. The operative portion of the order of the Collector in paragraph-7 of the order is as hereunder:

> "7. Government in SC & ST Development Department vide their letter no.11124 dated 15.3.2007 has communicated all Collectors the decision of the Hon'ble Supreme Court of India vide their judgment dated 9.10.2006 in the case of M. Nagraj and others. Hon'ble Supreme Court has observed in their order that in case of non-availability of a particular class of candidate the same cannot be de-reserved to be filled up by other categories of candidates. In other words exchange of reservation between ST & SC will not be permissible.
>
> In view of the said orders of the Hon'ble Supreme Court filling up of ST backlog vacancies by SC candidates on exchanging cannot be done.
>
> Hence, the claim of the petitioners merits no consideration. Pronounced the order in the open court on this day the 28th October,2010.
>
> Intimate all concerned."

In assailing the impugned order, the learned counsel for the petitioners submits that exchange of vacancies between ST & SC as per Section 6 of the ORV Act is imperative and that question of de-reservation of any particular reserved category of SC or ST under Section 7 of the Act is not permissible before consideration of the question of exchange of posts between them in terms of Section 6 of the ORV Act.

4. Opposite party nos.4 and 5 have filed an affidavit stating inter alia that for want of qualified candidates, 235 numbers of posts meant for Scheduled Tribe candidates could not be filled up and, therefore, the State Government issued instruction to appoint the candidates belonging to other categories out of the select list on temporary basis and as such the authorities issued appointment letters in favour of the candidates empanelled in the merit list. It is further stated that the contention raised by the petitioners with regard to applicability of Section 6 of the O.R.V. Act has no force in view of the proviso to the said section. It is stated that appointment

of Sikshya Sahayak is contractual, under a scheme with the condition that on completion of few years of service as Sikshya Sahayak the incumbent will be regularized against the post of Primary School Teacher, which carries a scale of pay and is a Class-III (Group-C) Post under the State Government. Therefore, Sikshya Sahayaks are Group (C) employees and because of the proviso to Section 6 of the O.R.V. Act, which is in the nature of an explanation, the main provision of Section 6 with regard to exchange of posts between SCs and STs has no application. It is further stated that the Government has published a resolution dated 10.01.2011 fixing different terms and conditions/guidelines for filling up the existing vacancies of Sikshya Sahayak and, therefore, the previous guidelines by virtue of which advertisement was issued in 2006, have no application. It is also stated that the very question of exchange of post between SCs & STs relating to very same 2006 advertisement came up for consideration before this Court in W.P.(C) No.19146 of 2009 and a batch of connected writ applications and they were disposed of by a common order on 09.07.2010 by holding that exchange of vacancies in one reserve category by candidates of another reserved category or by candidates of general category shall not be applied to Class-III and Class-IV employees. In view of such decision of this Court, the petitioners cannot claim appointment by way of exchange against vacant Scheduled Tribe posts.

By virtue of a subsequent affidavit field by opposite party no.5 on 06.08.2012, it is stated that presently 74 numbers of vacancies for ST category are available. There is however no indication as to when and how the unfilled 235 posts meant for Scheduled Tribe were filled up.

5. The private opposite party nos.6 to 25 have not filed any affidavit of their own. Learned counsel appearing for them only submits that since this Court has already decided the issue of exchange of posts of SCs and STs in W.P.(C) No.19146 of 2009 and the batch of connected writ applications and held that exchange is not permissible for the vacant posts of STs in question, that is binding on this Court and in the event this Court differs from the view expressed in the earlier decision, the matter may be referred to a larger Bench.

6. On the basis of the facts and contentions raised by the parties, the following questions fall for determination :

> (i) Whether de-reservation of vacant posts meant for Scheduled Tribe or Scheduled Castes under Section 7 of the O.R.V. Act is permissible ignoring the question of exchange of posts between SC and ST under Section 6 of the said Act wherever justified ?

(ii) Whether the contractual posts of Sikshya Sahayak are covered under the proviso to Section 6 of the O.R.V. Act and, therefore, exchange between SC and ST category of such posts is impermissible ?

(iii) Whether this Court is bound by the Single Bench decision rendered in W.P.(C) No.19146 of 2009 and the batch of writ applications and whether the matter is required to be referred to a larger Bench in case of disagreement with the view expressed therein ?

7. The 2006 Advertisement for the appointment of Sikshya Sahayak under Anenxure-1 issued as per the Government Resolution dated 31.5.2006 (Annexure-15) reveals that the appointments would be purely contractual with a fixed monthly remuneration of Rs.2,000/-. The advertisement also specifically provides for applicability of the O.R.V. Act to the recruitment. There is no dispute that the petitioners were eligible Scheduled Caste candidates, who applied for the post meant for them and became qualified and their names were found in the select list, but they could not get appointment as the posts meant for Scheduled Castes were completely filled up due to appointment of more meritorious selected SC candidates. Admittedly, 238 number of posts out of the total number reserved for ST candidates could not be filled up due to non-availability of qualified candidates of that category. The petitioners, therefore, claim that they being qualified SC candidates, they should have been appointed in the vacant posts meant for ST candidates by way of exchange as provided under Section 6 of the O.R.V. Act by the appointing authority, instead of the authority requesting the Government to de-reserve the vacant ST posts for the purpose of appointment of other categories of candidates, namely, General and SEBC and the Government should not have de-reserved the said vacant ST posts before appointment of qualified SC candidates by way of exchange. It is apposite, at this stage, to see the relevant provisions of Sections 6 and 7 of the O.R.V. Act which are as follows :

> "**6.Exchange of reservation between the Scheduled Castes and Scheduled Tribes-**The reserved vacancies in appointments shall be exchanged between the Scheduled Castes and Scheduled Tribes in the event of non-availability of candidates from the respective communities but the vacancies reserved for a particular community shall continue to be reserved for that community only for two recruitment years and if candidates are not available for appointment in particular reserved vacancies in the third

year, the vacancy so filled by exchange shall be treated as reserved for the candidates of that particular community who are actually appointed :

[Provided that nothing in this section shall apply to reserved vacancies in appointments in respect of Class III and Class IV posts and services.]

7. Carry-forward of reservation and de-reservation- If, in any recruitment year, the number of candidates either from Scheduled Castes or Scheduled Tribes is less than the number of vacancies reserved for them even after exchange of reservation between the Scheduled Castes and Scheduled Tribes, the remaining vacancies may be filled up by general candidates after de-reserving the vacancies in the prescribed manner, but the vacancies so de-reserved may be carried forward to subsequent three years of recruitment:

Provided … … …"

It is the mandate of Section 6 of the O.R.V. Act that reserved vacancies shall be exchanged between STs and SCs in the event of non-availability of qualified candidates from the respective communities. Section 7 of the Act provides for de-reservation of vacancies meant for SCs or STs in case of non-availability of qualified candidates of those categories, but the Section specifically states that such de-reservation shall be done only after exchange of reservation between SCs and STs. It is, therefore, clear that provision of Section 6 takes precedence over Section 7 of the Act. De-reservation under Section 7 is to be done in the manner prescribed in Rule 5 of the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Rules,1976 (In short 'the ORV Rules'). Under Rule-6 (1) (a) (vi) de-reservation of reserved vacancy shall be made by an appointing authority with the prior approval of the authority next above the appointing authority. For exchange of reserved vacancies between SCs and STs no procedure has been prescribed, which otherwise means that it is the appointing authority, who has to exchange the reserved vacancies between the two categories in case of non-availability of qualified candidates of one category or the other. No approval from any higher authority is required for such exchange.

Proviso to Section 6 of the O.R.V. Act has excepted the applicability of the main provision about exchange in respect of Class-III and Class-IV posts and services. In other words, no exchange of vacancies between SCs

and STs is permissible in respect of Class-III (Group-C) and Class-IV (Group-D) posts. This means that exchange in the reserved vacancies of SCs and STs in respect of all other posts except Class-III and Class-IV is mandatory.

8. Now the question arises whether the posts of Sikshya Sahayak which are contractual posts with a fixed remuneration is a Class-III (Group-C) or Class-IV (Group-D) post. Classification of different posts in services has been made in the Orissa Civil Services (Classification, Control & Appeal) Rules,1962 (in short 'CCA Rules,1962'). Rule 6 of the CCA Rules provides for three classes of Civil Services of the State as Group-A, Group-B and Group-C. Rule 8 (1) provides that civil posts under the State other than those ordinarily held by persons to whom these rules do not apply or included in any State Civil Service, shall, by a general or special order of the Governor be classified as Group-A, Group-B, Group-C and Group-D. Sub Rule (3) of Rule 8 provides that if any civil post under the State has not been classified by an order of the Governor and a question as to its classification arises, the decision thereon of the appropriate Department of Government after taking into account the class to which another civil post carrying a comparable scale of pay belongs shall be final.

9. The learned Standing Counsel appearing for the School and Mass Education Department has not been able to show any order of the Governor about the classification of the service of Sikshya Sahayak. The post of Sikshya Sahayak does not admit of any scale of pay but a fixed remuneration. Learned Standing Counsel has taken a stand that after few years of rendering service as Sikshya Sahayak a person can be regularized in the post of a Primary School teacher which carries a scale of pay. The contention is meaningless. Merely because a Sikshya Sahayak can be considered after some length of service for being absorved against a Primary School Teacher post, that by itself cannot equate him with a Primary School Teacher. Therefore, it must be held that the post of Sikshya Sahayak which neither carries a scale of pay, nor in respect of which any order of the Governor has been issued grouping it in any class of services, it cannot be said to be a Class-III (Group-C) or Class-IV (Group-D) post. Evidently, therefore, proviso to Section 6 of the O.R.V. Act will have no application. Since the O.R.V. Act has been specifically made applicable to the recruitment of Sikshya Sahayak, exchange of vacancies between the reserved categories of SCs and STs should have been done by the authorities before consideration of the question of de-reservation of Scheduled Tribe vacancies. De-reservation made by the Government of the vacancies meant for Scheduled Tribe in the instant case therefore is illegal.

The qualified selected candidates of Scheduled Caste category including the petitioners should have been considered for appointment against the vacancies meant for Scheduled Tribe by way of exchange.

Question nos.(i) and (ii) are answered accordingly.

10. Coming to question no.(iii), it is seen that W.P.(C) No.19146 of 2009 and the batch of the connected writ applications were disposed of by the learned Single Judge by a common order dated 09.07.2010 vide Annexure-B/5. The order reveals that the writ petitioners therein were S.C. candidates, who applied for appointment as Sikshya Sahayak pursuant to 2006 advertisement under Annexure-1. But, though they were found qualified, they were placed in the waiting list. They, therefore, filed the writ applications claiming appointment against the unfilled vacancies meant for Scheduled Tribe communities. While deciding the issue the learned Single Judge took into consideration the guidelines for selection of Sikshya Sahayak issued by the Government in School and Mass Education Department vide resolution dated 31.5.2010, though, in fact, the advertisement of 2006 was never issued in pursuance of the said resolution but it was issued pursuant to Government Resolution dated 31.5.2006 (Annexure-15 to the rejoinder affidavit filed by the present petitioner) of which Clause-4.2 clearly stipulated that against SC and ST quota non-SC/ST candidates shall not be engaged. Paragraph-5 of the order of the learned single Judge in the batch of writ petitions reveals that the petitioners therein placed reliance on Section 6 of the O.R.V. Act. After quoting the provision of Sections 6 and 7 of the O.R.V. Act, in paragraph-6 of the order, the learned Judge observed as under :

> "6. Thus, a bare reading of these provisions reveals that the exchange i.e., filling up the unfilled vacancies in one reserved category by candidates of another reserved category or by candidates of general category shall not be applied in Class-III and Class-IV employees. So, contention that the ST candidates in view of insufficient number of candidates eligible should be filled up by S.C. candidates is of no avail."

Ultimately, considering the fact that in W.P.(C) No.3762 of 2009 this Court directed the Collector, Puri to reconsider the case of the petitioner therein, namely, Biswanath Behera, the learned Judge in paragraph-7 of the order directed all the writ petitioners to file fresh representation before the Collector, Puri, who should examine and find if the petitioners were eligible to be appointed. But the fact remains that in paragraph-6 of the order, as quoted above, the learned Single Judge concluded that the writ petitioners,

who were Scheduled Caste candidates were not eligible to be appointed against the unfilled vacancies meant for Scheduled Tribe in view of the proviso to Section 6 of the O.R.V. Act. However, no finding has been recorded as to whether the post of Sikshya Sahayak comes within Class-III or Class-IV posts, far less any reason assigned for the conclusion.

11. Though my finding recorded above that the post of Sikshya Sahayak does not come within the purview of Class-III (Group-C) or Class-IV (Group-D) service is in disagreement with the earlier view expressed by the learned Single Judge in the aforesaid batch of connected writ applications, it is not necessary to follow the said decision because it was sans reasons and without reference to statutory rules and other provision of law and, therefore, it has no binding force. Law in this regard, as can be seen below, is quite clear and the matter needs no reference to larger Bench.

12. It has been held by the apex Court in the case of ***State of U.P. and another v. Synthetics and Chemicals Ltd and another;*** (1991) 4 SCC 139 as under:

> "39.But the problem has arisen due to the conclusion in the case of Synthetic and Chemicals. The question was if the State legislature could levy vend fee or excise duty on industrial alcohol. The Bench answered the question in the negative as industrial alcohol being unfit for human consumption the State legislation was incompetent to levy any duty of excise either under Entry 51 or Entry 8 of List II of the Seventh Schedule. While doing so the bench recorded the conclusion extracted earlier. It was not preceded by any discussion. No reason or rationale could be found in the order. This gives rise to an important question if the conclusion is law declared under Article 141 of the Constitution or it is *per incuriam* and is liable to be ignored.
>
> 40. 'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd.).* Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law. In *Jaisri Sahu v. Rajdewan Dubey* this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from *Halsbury's laws* of

England incorporating one of the exceptions when the decision of an appellate court is not binding.

41.Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passess sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." *(Salmond on Jurisprudence* 12th Edn., P.153). In *Lancaster Motor Company (London) Ltd. V. Bremith Ltd*. The Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in *Municipal Corporation of Delhi v. Gurnam Kaur.* The bench held that 'precedent sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle of relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not *ratio decidendi*. In *B. Sharma Rao v. Union Territory of Pondicherry* it was observed, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

Similar view has also been expressed in AIR 1989 SC 38; ***Municipal Corporation of Delhi v. Gurnam Kaur,*** AIR 2006 SC 2449; ***Mayuram Subramanian Srinivasan v. C.B.I.*** and AIR 2012 SC 1485;***Rattiram & Ors v. State of M.P. through Inspector of Police***.

13. The petitioners and other Scheduled Caste candidates as per the select list of 2006 are entitled to be appointed against the unfilled vacancies

meant for Scheduled Tribe community in accordance with their merit in the select list. The contention of the learned State counsel that in the meantime new guidelines have been issued in 2011 for filling up vacancies in the posts of Sikshya Sahayak has no force in as much as the posts advertised in 2006 are to be filled up as per 2006 guidelines (Resolution) and by applying the O.R.V. Act and for that matter Section 6 thereof, and thereafter any left out vacancies or future vacancies shall be filled in accordance with the 2011 guidelines or any other new guidelines.

14. In the light of the discussions made above, the order of the Collector under Annexure-14 rejecting the claim of the petitioners is quashed so also the appointment of opposite party nos.6 to 25 under Annexure-13. It is directed that the left out selected Scheduled Caste candidates from the select list of 2006 including the petitioners shall be appointed in accordance with their merit against unfilled vacancies meant for Scheduled Tribes by way of exchange. If after appointment of left out selected SC candidates, still vacancies meant for Scheduled Tribes become available, then the appointment of opposite party nos.6 to 25, which has been admittedly made against ST posts, shall not be disturbed.The writ application is accordingly allowed. No costs.

Writ petition allowed.

2013 (I) ILR – CUT- 159

B. K. NAYAK, J.

CRLMC. NO. 3812 OF 2011 (Dt.01.08.2012)

STATE OF ORISSA ……..Petitioner

.Vrs.

NARAYAN CHANDRA NAYAK ……..Opp.Party

CRIMINAL PROSEDURE CODE, 1973 – S.161 (3).

Recording of statement by "Audio-Video electronic means" – Whether discretionary – Statement made by a person before the I.O. in course of his examination U/s.161 (3) Cr.P.C. may be recorded in writing – As per the proviso to the said Sub-section that statement may also be recorded by audio-video electronic means – The expression may also be recorded means recording by audio-video means is a discretionary additional procedure which may be adopted by the I.O. – Held, the procedure prescribed in the proviso is not in lieu of the recording of the statement by the I.O. in writing but may be in addition to that. (Para 6)

B. CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – Ss.161, 162.

Whether statement of a witness recorded by the I.O. by audio-video means can be treated to be a statement reduced in to writing, as required under the proviso to Section 162 (1) Cr.P.C. – The words "if duly proved" used in the proviso U/s.162 (1) Cr.P.C. clearly show that the record of the statement cannot be admitted in evidence straightaway – Because of the facility of erasure and re-use in the magnetic tape recording the evidence must be received with caution – The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it – Accuracy of what was actually recorded has to be proved by the maker of the record and satisfactory evidence, direct or circumstantial had to be there so as to rule out possibilities of tampering with the record.

In the present case P.Ws.20 and 21 who are said to have video graphed the examination of the witnesses by the I.O. have denied to have done such video graphing – So the genuineness and authenticity of the CDs and cassettes and the information recorded there in are in doubt – The I.O. also has not taken recourse to the provisions U/s.45-A

of the Evidence Act to get the CDs and cassettes examined by any examiner of electronic evidence as referred to U/s.79-A of the Information Technology Act – Held, mere display of the CDs and cassettes will not satisfy the requirement, 'duly proved'- Since the witnesses have been Cross-examined by the prosecution with reference to their statements recorded in writing by the I.O. no further useful purpose will be served in displaying the CDs and cassettes – Held, no infirmity in the impugned order rejecting the prayer of the prosecution for displaying audio-video CDs and cassettes containing statements of the victim and other prosecution witnesses recorded U/s.161 Cr.P.C.

Case law Referred to:-

AIR 1975 SC 1788 : (Ziyauddin Burhanuddin Bukhari-V- Brijmohan Ramdass Mehera & Ors.)

For Petitioner - Mr. A.Mishra, Standing Counsel.
For Opp.Party - M/s. Dharanidhar Nayak, B.K.Das, M.K.Mohanty, T.P.Mohapatra.

B.K.NAYAK, J. In this application under Section 482, Cr.P.C., the petitioner-State has assailed the order dated 20.08.2011 passed by the learned Additional Sessions Judge (FTC-I), Bhadrak in S.T. Case No.76/149 of 2010 rejecting the prayer of the prosecution for displaying audio-video C.Ds and cassettes containing the statements of the victim and some other prosecution witnesses recorded during their examination under Section 161, Cr.P.C., for the purpose of contradicting the said witnesses as they turned hostile to the prosecution.

2. The opposite party is facing trial in the aforesaid S.T.Case for commission of offence under Section 376(2) (a) of the I.P.C. and some other offences for allegedly rapping a married woman. During trial, the prosecution examined 28 witnesses including the victim and the I.O. out of 33 number of charge-sheet witnesses. As it appears, all the material witnesses for the prosecution including the victim did not support the prosecution case. A petition was filed on behalf of the prosecution before the court below with the prayer that the audio-video cassettes containing the statements of the witnesses, which were produced in court, may be displayed for the purpose of contradicting the witnesses in accordance with the proviso to sub section (1) of Section 162 of the Cr.P.C. The said petition was rejected by the impugned order on grounds inter alia that the victim (P.W.12) herself was cross-examined by the prosecution for not supporting

the prosecution case and during such cross-examination she has denied that her statement under Section 161, Cr.P.C. was recorded through audio-video means. Similarly P.Ws.1, 2 (Home guards of the P.S.), P.Ws.3, 4, 6 and 5 and 17 (constables of the P.S.), so also P.W.20, the videographer and P.W.21, the owner of the video shop, where P.W.20 allegedly worked in their cross-examination by the prosecution did not admit that videographing of examination of these witnesses by the I.O. under Section 161,Cr.P.C. was done. The further reason given by the court below is that the Investigating Officer has not mentioned in the case diary that he issued any letter of request to Karim Khan (P.W.21), the Proprietor of the video shop to record the statement of the witnesses by audio-video means, and further that there is nothing to show that the statements given by the witnesses during their examination by the I.O. under Section 161, Cr.P.C. were videographed. Although the case diary revealed that the I.O. seized some C.Ds and cassettes on production by the videographer-Sk. Niyaz (P.W.20), there is nothing on record to show as to where and in whose custody they were kept after seizure and before their production along with charge-sheet. It is also stated by the court below that there is nothing on record to show that the seized C.Ds and cassettes are original documents.

3. The learned Standing Counsel in assailing the impugned order, submits that under the proviso to sub section (3) of Section 161, Cr.P.C., the statement given by a witness during his examination by the I.O. can be recorded by audio-video electronic means and that there being no embargo under the proviso to sub section (1) of Section 162, Cr.P.C., the prosecution can use such audio-video C.D/Cassettes by displaying them in order to contradict a hostile witness whose statement has been so recorded by audio-video means and, therefore, the trial court has gone wrong in rejecting the petition of the prosecution.

4. The learned counsel for the opposite party-accused, on the other hand, contends that the statements of the prosecution witnesses recorded in writing by the I.O. have already been confronted to the said witnesses by the prosecution while putting leading questions to them as they turned hostile to the prosecution and, therefore, there is no necessity of displaying the so called audio-video C.Ds and cassettes again for the purpose of contradicting the said witnesses. It is also his submission that since the genuineness of the seized audio-video C.Ds and cassettes has not been proved and particularly when P.Ws.20 and 21, who are alleged to have videographed the examination of the witnesses by the I.O. during investigation have denied such videographing, the C.Ds and cassettes cannot be displayed for the purpose of contradicting the prosecution

witnesses and therefore, the petition of the prosecution has been rightly rejected by the court below.

5. In order to appreciate the contentions raised by the parties, it is necessary to see the provision of Section 161, 162 (1) of the Cr.P.C. and Section 4 of the Information Technology Act,2000, which are relevant.

Section 161 of the Cr.P.C. provides as hereunder :

"**161. Examination of witnesses by police.**- (1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records:

Provided that statement made under this sub-section may also be recorded by audio-video electronic means."

Section 162 (1), Cr.P.C. provides as hereunder :

162. Statements to police not to be signed-Use of statements in evidence.-(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the

prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act,1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination."

Section 4 of the Information Technology Act,2000 reads as under :

"**4. Legal recognition of electronic records.-** Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is-

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference."

6. Under sub section (3) of Section 161, Cr.P.C. any statement made by a person before the I.O. during the course of his examination may be recorded in writing. Proviso to the said sub section, which has been inserted by way of amendment by Act 5 of 2009, permits the recording of the statement of a witness by the I.O. by audio-video electronic means. The expression, 'may also be recorded' makes it clear that recording by audio-video means is a discretionary additional procedure which may be adopted by the I.O. The procedure prescribed in the proviso is not in lieu of the recording of the statement by the I.O. in writing but may be in addition to that.

The proviso to sub section (1) of Section 162, Cr.P.C. makes it clear that a statement which has been reduced into writing in terms of sub section (3) of Section 161, Cr.P.C. or any part thereof may be used by the prosecution to contradict the witness (maker of the statement) with the permission of the court only after such statement or part was duly proved.

7. The question whether a statement of a witness recorded by the I.O. by audio-video means can be treated to be a statement reduced into writing, as per requirement of the proviso to sub Section (1) of Section 162, Cr.P.C. can be answered with reference to Section 4 of the Information Technology Act,2000. As per provision of Section 4 a statement of a witnesses recorded by the I.O. by audio-video means may be treated to be a statement which has been reduced into writing, fulfilling the requirement of the proviso to sub section (1) of Section 162, Cr.P.C. Before a witness can be contradicted with reference to his previous statement made before the

I.O. under Section 162, Cr.P.C. the statement must be duly proved before it is used for the purpose of contradiction in the manner provided by Section 145 of the Indian Evidence Act. The words 'if duly proved' clearly show that the record of the statement cannot be admitted in evidence straightaway. It has been held by the apex Court in AIR 1968 SC 147 Yusufalli Esmail Nagree-v.- The State of Maharastra as follows :

> "….. If a statement is relevant, an accurate tape record of the statement is also relevant and admissible. The time and place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. One of the features of magnetic tape recording is the ability to erase and re-use the recording medium. Because of this facility of erasure and re-use, the evidence must be received with caution. The Court must be satisfied beyond reasonable doubt that the record has not been tampered with"

In the case of ***Ziyauddin Burhanuddin Bukhari –v.-Brijmohan Ramdass Mehera and others*** reported in AIR 1975 SC 1788, the Supreme Court with regard to proof of tape recorded statements (speeches) held as follows :

> "We think that the High Court was quite right in holding that the tape records of speeches were "documents", as defined by Section 3 of the Evidence Act, which stood on no different footing than photographs, and that they were admissible in evidence on satisfying the following conditions :
>
> (a) The voice of the person alleged to be speaking must be duly identified by the maker of the record or by others who know it.
>
> (b) Accuracy of what was actually recorded has to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record.
>
> (c) The subject matter recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act."

8. In the light of the principles laid down by the apex Court in the aforesaid decisions it is to be seen whether audio-video C.Ds and cassettes have been duly proved or can be proved. As has been found, rightly, by the court below, the persons (P.Ws.20 and 21), who are said to have

videographed the examination of the witnesses by the Investigating Officer have denied to have done such videographing. Therefore, the genuineness and authenticity of the C.Ds and cassettes and the information recorded therein are in doubt. Apparently, the investigating agency has not taken recourse to the provision of Section 45-A of the Evidence Act to get the C.Ds and cassettes examined by any examiner of electronic evidence as referred to in Section 79-A of the Information Technology Act. Therefore, mere display of the C.Ds and the cassettes will not satisfy the requirement, 'duly proved'.

Apart from what has been said above, it is an admitted position that the Investigating Officer reduced the statement of the witnesses into writing during the course of his investigation and the witnesses have been cross-examined by the prosecution with reference to their statements recorded in writing by the I.O. Therefore, no further useful purpose will be served in displaying the C.Ds and cassettes.

9. In the light of the aforesaid discussions, I find no infirmity in the impugned order of the court below. The criminal misc. case is, therefore, dismissed.

Application dismissed,

2013 (I) ILR – CUT- 166

C. R. DASH, J.

CRLMC. NO.4676 OF 2011 (Dt.14.11.2012)

MAHANADI COALFIELDS LTD. ……..Petitioner

.Vrs.

STATE OF ORISSA … ….Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.482.

Accident inside a mine – Death of a Mazdoor working in the petitioner-Company – Manager of the company informed the incident to the appropriate authority who has given notice to the petitioner-company to conduct enquiry under the Mines Act, 1952 – Petitioner-company also entered in to an agreement to provide rupees ten lakhs and employment to one of the dependants of the deceased – In the meantime I.I.C. Orient P.S. registered a P.S. Case U/s.287, 304-A I.P.C. against the officers of the petitioner-company on an F.I.R. lodged by the mother of the deceased Mazdoor – Action challenged.

In this case there are mechanism in the Special law i.e. the Mines Act, 1952 to take care of the accidents in the mines and to punish the culprits – Since Special law prevails over general law as per Section 5 Cr.P.C. any action under the general law i.e. Indian Penal Code is uncalled for – Held, F.I.R. lodged vide Orient P.S. Case No.989 of 2011 is quashed. (Para 5,6,7)

For Petitioner - M/s. Biswa Mohan Pattnaik, R.Sharma, S.R.Singhsamanta & P.R.Pattnaik.

For Opp.Parties - Addl. Govt. Advocate.

C.R. DASH, J. The petitioner, which is a government owned company and a subsidiary of the Coal India Limited, has called in question the police action by the I.I.C., Orient P.S. on the basis of F.I.R. lodged by one Surubali Oram alleging death of her son Amit Oram in an accident that happened inside the mines. The sole question that arises for consideration is whether the police being oblivious of Sections 4 and 5 of the Cr.P.C. can take action against the petitioner – company and its officers under the general penal law when the Special Act (Mines Act, 1952) provides for specific procedure in case of accident that happens inside a mine.

2. A compendium of fact relevant for disposal of this Criminal Misc. Case is as follows :-

Amit Oram, son of informant Surubali Oram was working as a Mazdoor in Orient Colliery in the district of Jharsuguda. He was operating the chute inside the bunker. At about 8.30 P.M. on 18.11.2011 the bunker collapsed and Amit Oram died in that accident. On the next day itself, i.e. on 19.11.2011 the Manager of Orient Mines No.3 intimated regarding the aforesaid accident in Form No.IV-A as per Coal Mines Regulations 1957 and in compliance of Section 23 of the Act to the appropriate authorities. In response to the said intimation vide Annexure-1, the Deputy Director of Mines Safety (Mech.), South-Eastern Zone, Ranchi, who is the competent authority under the Mines Act, has given notice on 21.11.2011 to the petitioner – company for an enquiry under the provisions of the Mines Act, 1952. The petitioner company in the meantime has also entered into a memorandum of agreement with the dependent of late mazdoor Amit Oram in presence of the representatives of the Union and it has been agreed to provide employment to one of the dependent of late Amit Oram and pay the dependants a sum of Rs.10,00,000/- (ten lakhs) along with other benefits as admissible under law to late Amit Oram. On the basis of the aforesaid memorandum of agreement, the petitioner company on 22.11.2011 has already passed necessary office order in that regard. While matter stood thus, the officers of the petitioner company received notice from the I.I.C., Orient P.S. purported to have been issued under Section 91 of the Cr.P.C. for production of certain documents and came to know that on the basis of the F.I.R. lodged by late mazdoor Amit Oram's mother, Orient P.S. Case No.98 of 2011 under Sections 287/304-A, I.P.C. has been initiated against the officers of the petitioner company. The petitioner company deputed some officers to meet the I.I.C. of Orient P.S. and produced relevant documents and have moved this Court for quashing of the F.I.R. on the ground that when there is specific provisions in the Mines Act for punishment of the erring officials responsible for the accident and other benefits to the deceased employee in case of accident / fatality, the police under the general law cannot initiate any action for any accident that happened inside the mines.

3. Mr. B.M. Pattnaik, learned senior counsel appearing for the petitioner submits that Section 23 of the Mines Act provides for intimation / notice to the competent authority in accordance with Section 23 of the Mines Act read with provisions of the Coal Mines Regulation 1957. Such notice having been given, enquiry has already been initiated. Section 72-C of the Mines Act provides for punishment in respect of contravention of law in the event any

dangerous result ensues for such contravention. When there is specific provisions in the Mines Act to deal with the accident that happened inside the mines and when any of the ingredients of offence under Sections 287 and 304-A, I.P.C. is not attracted, it is not proper on the part of the Orient P.S. to initiate action on the basis of the F.I.R. lodged by the mother of the deceased Mazdoor.

Learned counsel for the State on the other hand submits that there being loss of life and such loss of life having happened within the territorial jurisdiction of the Orient P.S., the I.I.C. of that P.S. has rightly initiated action by registering the F.I.R. under Sections 287/304-A, I.P.C. Learned counsel for the State however loathe so far as other contentions of learned senior counsel Mr. B.M. Pattnaik on the point of special law governing the field vis-à-vis general law like the I.P.C. and Cr.P.C. are concerned.

4. In this context, Section 72-C of the Mines Act being apposite, is quoted below for ready reference :-

> "[1]**[72-C. Special provision for contravention of law with dangerous results**-(!) Whoever contravenes any provision of this Act or of any regulation, rule or bye-law or of any order made thereunder [other than an order made under Sub-section (1-A) or sub-section (2) or sub-section (3) of Section 22] [4][or under sub-section (2) of Section 22-A], shall be punishable-
>
> (a) if such contravention results in loss of life, with imprisonment which may extend to two years, or with fine which may extend to five thousand rupees, or with both; or
>
> (b) if such contravention results in serious bodily injury, with imprisonment which may extend to one year, or with fine which may extend to three thousand rupees, or with both; or
>
> (c) if such contravention otherwise causes injury or danger to persons employed in the mine or other persons in or about the mine, with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both:
>
> [5][Provided that in the absence of special and adequate reasons to the contrary to be recorded in writing in the judgment of the court, such fine, in the case of a contravention referred to in clause (a), shall not be less than three thousand rupees.]

(2) Where a person having been convicted under this section is again convicted thereunder, he shall be punishable with double the punishment provided by sub-section (1).

(3) Any court imposing or confirming in appeal, revision or otherwise a sentence of fine passed under this section may, when passing judgment, order the whole or any part of the fine recovered to be paid as compensation to the person injured or in the case of his death, to his legal representative:

Provided that if the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if any appeal has been presented, before the decision of the appeal."

A cursory reading of the provisions of this Section makes it clear that the offence does not lie solely for any loss of life or serious bodily injury, but if there is contravention of any provision of the Act, Regulation, Rule, Bye-Law or any order made thereunder resulting in dangerous results, the offence under Section 72-C would lie. Clauses (a) and (b) provide for punishment and it has been provided that in case of non-compliance which results of loss of life or bodily injury, punishment is awardable. A reading of this provision therefore clearly goes to show that the offence does not lie in case of loss in life simplicitor, but the offence lies in the event of non-compliance with the orders and directions, etc. as provided in the Section. The provision speaks of adherence to safety measures as provided and failure on the part of the officials to comply with relevant provisions as to safety measures as provided or contravention of such provisions is to be visited with punishment.

5. Mining operations are always hazardous and involve risk to life and serious bodily injury to the employees. Officers are always there because of the nature of such work itself and there is insistence for observation of the provisions of the Act, orders, etc. so far as the safety measures are concerned. In spite of such precautions and observance of the provisions of the Act, Circulars, orders, etc. if any loss of life happens, it cannot be said that any person, in fact, had any intention to cause death of the person who lost life in course of the mining operation in which he had been engaged. Looked from such perspective, ingredients of Sections 287/304-A, I.P.C. are not attracted so far as the present case is concerned.

6. Section 5 of the Cr.P.C. makes it clear that if a special or local law exists covering the same area, those laws will be saved and will prevail and

the Cr.P.C. shall have no application in such a case. When it is clear from the provisions of the Mines Act that there are mechanisms to take care of the accidents inside the mines and to punish the culprits if found to have contravened law / regulations, etc., any action under the general law, i.e. Indian Penal Code is uncalled for.

7. In view of the above, the F.I.R. lodged vide Orient P.S. Case No.98/9 of 2011 is quashed. The Criminal Misc. Case is accordingly disposed of.

Application allowed.

2013 (I) ILR – CUT- 171

B. K. MISRA, J.

W.P.(C) NO.16953 OF 2011 (Dt.21.09.2012)

SADHU CHARAN BISWAL ……..Petitioner

.Vrs.

BOMBAY CARDIO VASCULAR & SURGICAL PVT. LTD. & ORS. ……..Opp.Parties

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

Impletion of Party – Pendente lite purchaser – Locus standi – Pendente lite purchaser can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral.

In this case O.P.1 was a bona fide transferee for value in good faith – Transferee pendentelite of an interest in imovable property is a representative-in-interest of the property from whom he has acquired that interest – Held, O.P.1 is a proper party to the suit and the learned trial Court has rightly allowed his prayer to be impleded as a party to the suit. (Para 15, 16)

Case laws Referred to:-

1. AIR 1996 S.C. 135, (Surjit Singh and Ors –v- Harbans Singh & Ors.) etc.,
2. 2010 (II) CLR (S.C.) 103, (Manohar Lal (D) by Lrs. –v- Ugrasen (D) Lrs. & Ors.)
3. AIR 1999 S.C. 976, (Savitri Devi –v- District Judge, Gorakhpur & Ors.) 4. AIR 2010 S.C. 3109, (Mumbai International Airport Pvt. Ltd.,-v- Regency Convention Centre & Hotels Pvt. Ltd., & Ors.,)
5. 1996 S.A.R. (S.C.) 916, (Sarvinder Singh –v- Dalip Singh & Ors,)
6. 2007 (1) C.C.C. 401 (S.C.) (Sanjay Verma –v- Manik Roy & Ors.,)
7. 2007(1) C .C. C. 813 (S.C.), (Sunil Gupta –v- Kiran Girhotra and Ors.,)
8. 2010 (II) CLR (S.C.) 1071, (Har Narain (Dead) by LRs. –v- Mam Chand (Dead) by LRs. & Ors.,)
9. AIR 2005 S.C. 2209, (Amit Kumar Shaw & Anr, -v- Farida Khatoon & Anr)
10. 1992 (1) OLR 17, (Sri Jagannath Mahaprabhu, represented by Marfatder Jagannath Ballav Trustee Board through Executive Officer –v- Pravat Chandra Chaterjee & Ors.)
11. 1993 (II) OLR 102, (Rabindra Mohapatra and others –v- Souri

Prasad Malla & Ors..)
12. AIR 2003 S.C. 3044, (Surya Dev Rai –v- Rama Chandra Rai,)
13. AIR 1955 S.C. 328, (Sita Maharani –v- Cheddi Mahto,)
14. AIR 1964 Patna 1 (FB) (Ramanath Mandal –v- Jojan Mandal,)
15.1995 (Suppl.3) S.C.C. 249, (State of Orissa –v- Brundaban Sharma,)
16. 2009 (12) S.C.C.378 = AIR 2009 S.C. 2991, (State of Orissa –v- Harapriya Bisoi,)
17. 2010 (1) OLR 97, (Shuvam –v- Smt. Babita,)
18. 2007(2) OLR 493 (Shehalata Parija –v- Gour,)
19. AIR 2007 S.C. 1062, (Dhanalaxmi & others –v- P.Mohan,)
20.(2010) 10 SCC 408, (State of Assam –v- Union of India.)

For Petitioner - M/s. Ramchandra Sarangi, P.K.Patnaik, S. S. Mohanty, P.K.Deo.
For Opp.Parties - M/s. Subir Palit, S.N.Nayak, A.K. Mohapatra, A.K.Mahana, D.N.Pattnaik, A. Mishra, A.Kejariwal (for Opp.Party No.1)
M/s. Addl. Govt. Advocate, (for Opp.Party No.2 to 5)
M/s. Sibananda Mohanty, Smt. M.Samantray, (for Opp.Party No.6).

B.K.MISRA, J The petitioner being aggrieved with the impugned order passed by the learned Civil Judge (Jr.Division), Bhubaneswar in Title Suit No. 753 of 2001 dated 17.05.2011 has approached this Court under Articles 226 & 227 of the Constitution of India praying therein to quash the impugned order under Annexure-1 and direct dismissal of the petition filed under Order-1 Rule-10 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as 'C.P.C.')

2. The present petitioner as plaintiff instituted Title Suit No.753 of 2001 for declaration of his right, title and interest over the suit land along with confirmation of possession and for permanent injunction impleading the State of Orissa represented through the Special Secretary, General Administration Department, Director of Estates, General Administration Department, Collector, Khurda and Bhubaneswar Development Authority. In the said suit the opposite party No.1 of this writ petition being represented through its Power of Attorney holder filed an application under Order-1 Rule-10 read with Section 151 of the C.P.C. praying therein to be impleaded as a defendant in Title Suit No. 753 of 2001 contending therein that the Govt. of Orissa has leased out Ac. 3.60 decimals of land i.e., the suit land under Plot no. 332/1882 appertaining to Khata no. 619 in Unit No. 41, Chandrashekharpur, Bhubaneswar which stand recorded in the name of

General Administration Department, Govt. of Orissa, on payment of premium of Rs.90,00,000/- and execution of a Registered Lease Deed. It is the further case of the intervenor petitioner that the suit land has been mutated and the record of right has also been prepared in his name and he is paying land revenue to the Tahasildar, Bhubaneswar and therefore he has valid right and substantial interest over the land in question and the suit which has been filed by the plaintiff be heard in his presence which would help the Court in proper adjudication of the case. It is also alleged that the plaintiff deliberately and intentionally did not array him as a party i.e. defendant though he is a necessary party.

3. The prayer of the intervenor petitioner was opposed tooth and nail by the plaintiff on the ground that the allegation that the plaintiff intentionally and with ulterior motive did not implead the intervenor as a party in the suit can hardly be tenable and accepted as admittedly, the intervenor was leased out Ac.3.60 decimals of land pertaining to revenue Plot no. 332/1882 under Khata no. 619 in Mouza- Chandrashekharpur only in November, 2006 i.e. much after filing of the suit by the plaintiff in the year 2001. It is also the case of the plaintiff that when in the suit the plaintiff has raised the plea of deemed tenancy, for deciding that fact the presence of the intervenor is not necessary and it cannot be construed that the intervenor is a proper or necessary party and therefore the provision of Order-1 Rule 10 of the C.P.C. is neither applicable nor Section 151 of the C.P.C. can come to the aid of the intervenor.

4. It is the further case of the plaintiff that when the State is participating in the hearing of the suit, it cannot be said that the defendants are careless or negligent in pursuing the litigation and the Court cannot invoke the discretionary power under Order-22 Rule-10 of the C.P.C. Accordingly, it was prayed that the Order-1 Rule-10 petition of the intervenor is thoroughly misconceived and filed under misconception of law and therefore should be dismissed.

5. Learned Civil Judge (Jr.Divn.), Bhubaneswar after hearing the learned counsel for the respective parties, by the impugned order allowed the prayer of the intervenor petitioner under Order 1 Rule 10 read with Section 151 of the C.P.C. on the ground that the intervenor petitioner has interest over the suit property as he has purchased the property by paying huge sum of money and the suit property has already been recorded in his name. This impugned order at Annexure-1 is under challenge in this writ petition. Admittedly the said order was challenged in FAO No.30/72 of 2006-2007 and the learned Additional District Judge, Bhubaneswar disposed

of the said FAO by remanding the matter to the trial court for disposal of application which was pending under Order 7 Rule 11 of the C.P.C. and thereafter to dispose of the application filed by the petitioner under Order 39 Rule 1 of the C.P.C. The said order of the learned Additional District Judge, Bhubaneswar was challenged in a writ petition which was registered as W.P.(C) No.19039 of 2010 and this Court while setting aside the impugned order passed by the learned Additional District Judge, Bhubaneswar in FAO No. 30/72 of 2006-2007 directed for re-hearing of the said appeal afresh. Admittedly, the said FAO has not yet been disposed of as contended by the learned counsel for the respective parties.

6. Mr. R.C.Sarangi, learned counsel appearing for the petitioner while challenging the impugned order at Annexure-1 contended that by allowing the prayer of the intervenor under Order 1 Rule 10 of the C.P.C., the learned trial court has committed gross jurisdictional error and therefore, this Court should interfere on the basis that the intervenor has no legal right to pray for impletion on the basis of the so-called document, i.e. allotment of land measuring Ac.3.60 decimals of land appertaining to revenue Plot no. 332/1882 under Khata no. 619 in Mouza- Chandrashekharpur and the subsequent action in mutating the land and obtaining the record of right as those transactions are absolutely in flagrant violation of the restraint order passed in Civil Suit No.753 of 2001 which was filed by the present petitioner as plaintiff impleading the State of Orissa as defendant no.1, Director of Estates, General Administration Department and Collector, Khurda as defendant nos.2 & 3. It was also contended that on the prayer of the plaintiff petitioner in Misc. Case No. 632 of 2001 arising out of Title Suit No.753 of 2001 the learned Trial Court had directed maintenance of status quo over the suit land by both parties and not to change the nature and character of the suit land in any manner till disposal of the suit.

7. Mr.Sarangi, learned counsel appearing for the petitioner very strenuously further urged that the plea of the intevenor that he is a bonafide lessee and he did not know about the pendency of the litigations over the suit land are blatant and brazen lies as the intervenor petitioner was well aware of the litigations pending over the suit land as his very document i.e. his trump card Annexure-A/1 starts with the paragraph “that Ac.3.60 decimals of land pertaining to revenue Plot no. 332/1882 under Khata no. 619 in Mouza- Chandrashekharpur, Bhubaneswar was allotted in favour of Dr.R.K.Panda for establishment of Asian Hospital and Research Centre at Bhubaneswar subject to final out come of the Civil Suit and FAO No. 30/72 of 2006-2007 which were then pending in different civil courts”. According to Mr. Sarangi, when despite the order of status quo which was within the

knowledge of the State Government and when the intervenor himself was aware of such an interim order managed to create papers including Annexure -A/1 in violation of courts order, he cannot be allowed to take any advantage by committing breach of an interim order, the Court has a duty to see that the orders are respected by the parties and directions are complied with and pendente lite transactions are not to be regularized and encouraged during pendency of the litigations. If any leniency or indulgence is shown in favour of the persons who violated the courts order there will be an end of rule of law. Accordingly, it is contended by Mr. Sarangi that the intervenor petitioner who is a lis pendence purchaser by no stretch of imagination can be called a necessary party or a proper party in a declaratory suit for title as his presence is not at all required for arriving at a just decision of the case. Mr. Sarangi in support of his contentions placed reliance on several decisions of the Apex Court as reported in ***AIR 1996 S.C. 135, Surjit Singh and others –v- Harbans Singh and others etc., 2010 (II) CLR (S.C.) 103, Manohar Lal (D) by Lrs. –v- Ugrasen (D) Lrs. & others, AIR 1999 S.C. 976, Savitri Devi –v- District Judge, Gorakhpur and others, AIR 2010 S.C. 3109, Mumbai International Airport Pvt. Ltd.,-v- Regency Convention Centre & Hotels Pvt. Ltd., & others, 1996 Supreme Appeals Reporter (S.C.) 916, Sarvinder Singh –v- Dalip Singh and others, 2007 (1) Civil Court Cases 401 (S.C.) Sanjay Verma –v- Manik Roy and others, 2007(1) Civil Court Cases 813 (S.C.), Sunil Gupta –v- Kiran Girhotra and others, 2010 (II) CLR (S.C.) 1071, Har Narain (Dead) by LRs. –v- Mam Chand (Dead) by LRs. and others, AIR 2005 S.C. 2209, Amit Kumar Shaw and another, -v- Farida Khatoon and another.*** Besides the aforesaid decisions of the Apex Court reliance was also placed by the petitioner in the decisions rendered by this Court reported in ***1992 (1) OLR 17, Sri Jagannath Mahaprabhu, represented by Marfatder Jagannath Ballav Trustee Board through Executive Officer –v- Pravat Chandra Chaterjee and others and 1993 (II) OLR 102, Rabindra Mohapatra and others –v- Souri Prasad Malla and others***. Accordingly, by placing reliance on the aforesaid decisions of the Apex Court and this Court Mr. Sarangi concluded his arguments by stating that on the assumption that a person is likely to secure a right/interest over a suit property after the suit is decided against the plaintiff will not make such person a necessary party or a proper party to the suit.

8. Mr. Subir Palit, learned counsel appearing for the opposite party no.1 while refuting the submissions of Mr. Sarangi, learned counsel appearing for the petitioner contended that the suit was filed by the present petitioner as plaintiff claiming title to the property on the strength of a “Hata Patta” which is nothing but a document fraudulently created and therefore according to

the settled position of law fraud creates no equity and the Plaintiff's suit is liable for dismissal and the interim order passed in Misc. Case No. 632 of 2001 arising out of Title Suit No.753 of 2001 has no legal sanctity. On the other hand, the intervenor petitioner when has acquired valid title and interest over the suit property after taking out the said property on lease on the strength of the registered lease deed executed by the State Government in General Administration Department and when the State has been set ex parte in the original suit and the suit has not proceeded since 2001 the intervenor petitioner has every legal right to protect his interest over the suit property. By impleading the petitioner the Court would be in a better position to adjudicate the dispute effectively and multiplicity of litigation can also be avoided. It was also contended that in view of the guidelines laid down by the Apex Court in ***Surya Dev Rai –v- Rama Chandra Rai, AIR 2003 S.C. 3044***, the impugned order at Annexure-1 does not merit any interference by this Court in exercise of the extra-ordinary power in the writ jurisdiction as there is nothing on record to show about the jurisdictional error or any error apparent on the face of the record to have been committed by the learned Civil Judge (Jr.Divn.), Bhubaneswar. Several citations were relied upon by the opposite party no.1 while buttressing the contentions, namely, ***AIR 1955 S.C. 328, Sita Maharani –v- Cheddi Mahto, AIR 1964 Patna 1 (FB) Ramanath Mandal –v- Jojan Mandal, 1995 (Suppl.3) SCC 249, State of Orissa –v- Brundaban Sharma, 2009 (12) SCC 378 = AIR 2009 S.C. 2991, State of Orissa –v- Harapriya Bisoi, 2010 (1) OLR 97, Shuvam –v- Smt. Babita, 2007(2) OLR 493 Shehalata Parija –v- Gour, AIR 2007 S.C. 1062, Dhanalaxmi & others –v- P.Mohan, (2010) 10 SCC 408, State of Assam –v- Union of India.***

9. Mr. Sidhartha Mishra, learned Additional Government Advocate appearing for the opposite party nos.2 to 5 and Mr. Sibananda Mohanty, learned counsel appearing for opposite party no.6 contended that the impugned order does not call for any interference by this Court when the learned trial court did not commit any irregularity in allowing the prayer of the intervenor petitioner and such exercise of judicial discretion shall not be interfered with by this Court in a certiorari proceeding under Article 227 of the Constitution of India.

10. I have given my anxious hearing to the matter and also perused the plethora decisions cited at the Bar. Similarly, I have perused the impugned order. The only question that is required to be answered is as to whether the opposite party no.1 being a pendente lite purchaser has any locus standi to be impleaded as a party defendant in Title Suit No.753 of 2001.

11. Before proceeding to the matter in detail, let us examine the provisions of Section 52 of the Transfer of Property Act.

> "52. Transfer of property pending suit relating thereto-
>
> During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose.
>
> Explanation-For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof to any law for the time being in force".

12. It is the settled legal position that the effect of Section 52 of the Transfer of Property Act is not to render transfers affected during pendency of a suit by a party to the suit void but only to render such transfers subservient to the rights of the parties to such suit, as may be, eventually determined in the suit. In other words, the transfer remains valid subject of course to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court. ***(2012 (2) O.J.R. 255 (S.C.), A. Nawab John & others –v- V.N.Subramaniyam***.

13. The Apex Court in ***Smt. Saila Bala Dassi –v- Nirmala Sundari Dassi and another, AIR 1958 S.C. 394*** held that "justice requires", a pendente lite purchaser should be given an opportunity to protect his rights. The transferee pendente lite can be added as a proper party if his interest in the subject matter of the suit is substantial and not just peripheral. In ***Nawab John's case (supra)*** their Lordships of the Apex Court have taken into

consideration the various decisions of the Apex Court while deciding the question whether pendente lite purchaser is entitled to be impleaded as a party to the suit. Their Lordships after examining the various judicial pronouncement of the Apex Court have categorically held that the preponderance of opinion of the Apex Court is that a pendente lite purchaser's application for impleadment should normally be allowed or considered liberally.

14. In a decision as reported in (2005) 11 SCC 403, the Apex Court has held that:-

> "Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22, Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendent lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case".

15. In the instant case, the intervenor petitioner was granted permanent lease of an area Ac.3.60 decimals of land pertaining to revenue Plot no. 332/1882 under Khata no. 619 in Mouza-Chandrashekharpur, Bhubaneswar in the year, 2006 for establishment of Asian Hospital and Research Centre at Bhubaneswar subject to final out come of the Civil Suits and FAO No.30/72 of 2006 pending in different Civil Courts. After getting the lease of the land the same was mutated in the name of the intervenor petitioner as well as the record of right has also been prepared in the name of the purchaser Dr.R.K.Panda, Managing Director of Bombay Cardiovascular Surgical Pvt. Ltd., who is the present opposite party no.1 in this writ petition and was also

intervenor petitioner in the court below. Without going into the merits of the cases of the parties and whether the transfer of the property to opposite party no.1 that is the intervenor petitioner is valid or invalid at this stage for deciding the propriety of the impugned order (Annexure-1), suffice is to say that the intervenor petitioner being a pendente lite purchaser is entitled to be heard in the matter on the merits of the case and is entitled to be impleaded in the suit or other proceedings where his predecessor in interest is made a party to the litigation. Order 1, Rule 10 C.P.C. enables the Court to add any person as a party at any stage of the proceedings if his presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity proceedings is also one of the object of the said provision in the Code. The plea raised by the present opposite party no.1 that he was a bonafide transferee for value in good faith is a question to be decided by the Court. If the application for impleadment is thrown out without a decision on the said question it may be that the opposite party no.1 may come up with a separate suit to enforce his right which means multiplicity of proceedings and therefore it cannot be said that the opposite party no.1 is neither necessary nor proper party to the suit in question.

16. I do not find anything wrong in the approach of the learned trial court by allowing the prayer of the intervenor petitioner by the impugned order at Annexure-1. The present petitioner, in my humble view, does not suffer from any prejudice and his rights are in no way would be affected when the opposite party no.1 would be impleaded as a party defendant in Title Suit No.753 of 2001. I find the impugned order at Annexure-1 is a speaking order and it cannot be said that such order has been passed in flagrant violation of the principles of law or rule of procedure or there has been gross jurisdictional error. When the impugned order shows that the prayer of the intervenor petitioner was allowed by the learned Court below not only in the best interest of justice but also to avoid multiplicity of proceeding, I am not inclined to interfere with the same. Accordingly, the writ petition stands dismissed. No costs.

Writ petition dismissed.