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

W.P.(C) NO.91 OF 2011 (Decided on 02.02.2011)

M/S. FALCON MARINE EXPORTS LTD. & ANR. …. …..Petitioners.

.Vrs.

UNION OF INDIA & ORS. …….Opp.Parties.

INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – S.143 (3).

Assessment Order Under challenge – Assessing authority passed the order basing on the reports and materials without supplying copies there of or without providing opportunity of inspection of such documents to the assessee except the Field Visit Report which was communicated to the assessee's representative on the last date of hearing – No effective opportunity was given to the assessee to respond to the Field Visit Report in course of hearing – Stand taken by the revenue that other reports relied upon by the Assesssing Officer were available in the internet is of no consequence – Held, there is violation of principles of natural justice since the assessee has not been given proper opportunity to defend his case - Moreover, mandate of natural justice can not be said to have been satisfied merely because the report or material on which the assessing officer relied was available on internet.

(Para 10, 11 & 12)

Case laws Referred to:-

1.(2009) 2 SCC 192 : (Kothari Filaments & Anr.-V- Commissioner of Customs (Port), Kolkata & Ors.).
2. (1995) 4 SCC 241 : (Collector of Central Excise, Chandigarh-V-Steel Strips Ltd. Sangrur).
3.(1991) 4 SCC 385 : (Attar Singh Gurmukh & Ors.-V-Income Tax Officer, Ludhiana & Ors.)

For Petitioners - M/s. N.Venkataraman (Sr.Advocate)
Satyajit Mohanty, Md. Shafiqe, R.R.Swain & S.Patnaik.
For Opp.Parties - Mr. A.K.Mohapatra
(Counsel for the Revenue)

V.GOPALA GOWDA, C.J. In the present writ petition, the petitioner an Income Tax assessee seeks to question the correctness of the assessment

order dated 6.12.2010 (Annexure-2) passed by the Asst. Commissioner of Income Tax, Circle-1(1), Bhubaneswar and consequential demand notice vide Annexure-2 series on the ground of violation of the principles of natural justice.

2. Learned senior counsel for the petitioner assails the impugned assessment order, inter alia, on the ground that the Assessing Officer had based the impugned order on various documents/reports which were never confronted to the Assessee nor copies furnished to the petitioner. In particular, learned senior counsel for the petitioner invited the Court's attention to the impugned order of assessment where the Assessing Officer had placed reliance upon the following documents/reports:

(i) Response of MPEDA to the query made by the A.O. in relation to the "conversion ratio".

(ii) "Socio-Economic Condition of Fisheries in and around Chilika" published by the Chilika Development Authority (CDA).

(iii) Globalisation and Seafood Export Legislation: The Effect of Poverty In India: Final Report for Orissa dated November 2002 by Cirrus Management Services Pvt. Ltd. (this report is a part of the Post Harvest Fisheries Research Project managed by the Natural Resources Institute, UK and funded by the UK Government's Department for International Development (DFID)

(iv) Value chain analysis of fishery in Puri and Ganjam District of Orissa prepared by Nimble Systems Pvt. Ltd. for OXFAM (India) Trust

(v) Field Visit Report dated 14.11.2010 conducted by the A.O.

3. To substantiate the allegation of violation of the principles of natural justice, learned counsel for the petitioner also placed reliance on the counter affidavit filed on behalf of opposite parties 2 and 3 and in particular, the averments contained in Paragraphs-9 and 9 A thereof which is quoted herein below:

> "**9**. xx xx It was not necessary for the assessing officer to produce copy of the DFID report on Orissa Fisheries as the same is available on the internet. Petitioner has further erred in stating that the disclosure that Babuni Behera is a middleman was generalized to other sellers without a basis. The very fact that the assessee did not discharge its initial burden of proof was sufficient ground to reject the claim of deduction of assessee. This provided clinching evidence and the non-traceability of other sellers from Bhadrak further compounds to it."
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> **9 A**. xx xx The petitioner alleges that copies of research reports were not given to them. This is not required as same is

available online on the internet and is for consumption of the eyes of general population."

4. With reference to the stand taken by the opposite party nos.2 & 3, learned counsel for the petitioner placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Kothari Filaments and another v. Commissioner of Customs (Port), Kolkata and others,** (2009) 2 S.C.C. 192 and in particulars paragraphs-14, 15 & 17 thereof are quoted hereinbelow:

"14. The statutory authorities under the Act exercise quasi-judicial function. By reason of the impugned order, the properties could be confiscated, redemption fine and personal fine could be imposed in the event an importer was found guilty of violation of the provisions of the Act. In the event a finding as regards violation of the provisions of the Act is arrived at, several steps resulting in civil or evil consequences may be taken. The principles of natural justice, therefore, were required to be complied with.

15. The Act does not prohibit application of the principles of natural justice. The Commissioner of Customs either could not have passed the order on the basis of the materials which were known only to them, copies whereof were not supplied or inspection thereto had not been given. He, thus, could not have adverted to the report of the overseas enquiries. A person charged with misdeclaration is entitled to know the ground on the basis whereof he would be penalized. He may have an answer to the charges or may not have But there cannot be any doubt whatsoever that in law he is entitled to a proper hearing which would include supply of the documents. Only on knowing the contents of the documents, he could furnish an effective reply. This aspect of the matter has been considered in *Rajesh Kumar v. CIT* (2007) 2 SCC 181 wherein this Court held: (SCC p.199, paras 48-49)

"48. In any event, when civil consequences ensue, there is hardly any distinction between an administrative order and a quasi-judicial order. There might have been difference of opinions at one point of time, but it is now well settled that a thin demarcated line between an administrative order and quasi-judicial order now stands obliterated (see *A.K.Kraipak v. Union of India,* (1969) 2 SCC 262*, Chandra Bhavan Boarding and Lodging v. State of Mysore* (1969 3 SCC 84 : AIR 1970 SC 2042} and *S.L.Kapoor v. Jagmoha* (1980) 4 SCC 379).

49. Recently, in *Banaras Hindu University v. Shrikant* ((2006 11 SCC 42:2007) 1 SSC (L&S) 327) this Court stated the law, thus: (SCC p.60, para 51)

51. An order passed by a statutory authority, particularly when by reason whereof a citizen of India would be visited with civil or evil consequences must meet the test of reasonableness.

It was observed: (Rajesh Kumar case, SCC p.200, paras 55-56

"55. Justice, as is well known, is not only to be done but manifestly seem to be done. If the assessee is put to notice, he could show that the nature of accounts is not such which would require appointment of special auditors. He could further show that what the assessing officer considers to be complex is in fact not so. It was also open to him to show that the same would not be in the interest of the Revenue.

56. In this case itself the appellants were not made known as to what led the Deputy Commissioner to form an opinion that all relevant factors including the ones mentioned in Section 142 (2-A) of the Act are satisfied. If even one of them was not satisfied, no order could be passed. If the attention of the Commissioner could be drawn to the fact that the underlined purpose for appointment of the special auditor is not bona fide it might not have approved the same."

17. In view of the aforementioned settled legal principles, there cannot be any doubt whatsoever that the principles of natural justice have been violated in this case."

5. He also placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Collector of Central Excise, Chandigarh v. Steel Strips Ltd. Sangrur,** (1995) 4 S.C.C. 241 and in particulars paragraphs-7 & 8 thereof are quoted hereinbelow:

"7. Failure to lay the requisite evidence cannot be made up by reference to authoritative publications unless the Excise authorities inform the assessee that they propose to rely upon the same before the adjudicating authority. It is then open to the assessee to establish that it does not obtain the article by the means referred to in the publication or, indeed, that the publication is not authoritative. In the decision of matters relating to excise, technical knowledge plays a part. It is for that reason that the Tribunal has a

> Technical Member. Technical evidence and authoritative publications must, therefore, be placed in the first instance before the adjudicating authority and the Tribunal. They have the requisite technical expertise to evaluate the same. Technical publications cannot usefully be cited for the first time at the Bar of this Court.
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> 8. Upon such material as has been referred to by learned counsel for the Excise authorities, which we have set out above, we find it "not proved" that hot-rolled strips undergo a process of manufacture before they become cold-rolled strips. We are, therefore, unable to accept the contention of the Excise authorities that the assessees' cold-rolled strips are liable to excise duty at the rate of Rs.650 per metric tonne.

6. Learned counsel for the petitioner also drew attention of the Court to the alleged contentions of the Field Visit Report dated 14.11.2010 by the Assessing Officer and in particular Paragraph-9 and 10 thereof which have been extracted in the assessment order at internal page-13. The same is as follows:

> "Then an employee of Falcon Marine, Sri Rabindranath Prusty, was approached. He stated that business in Balugaon is most brisk two days before and two days after full moon and new moon. That is the reason why there was on business on 14.11.2010. On further query he stated that prawns are brought by various parties. Prawns are sorted in their godown and price is determined then and there. A recording of the conversation was made using mobile recording system, in which he states that prawns are sorted into different counts in their godown in Balugaon itself.
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> 10. During the visit the name and identity of the Assessing Officer was not revealed. It was stated that we are doctorate students doing research on Fishery business in Lake Chilika."

7. In the light of the aforesaid submissions, learned counsel for the petitioner asserts that not only the order of assessment is wholly unlawful being in violation of the principles of natural justice but also the conclusions in Paragraphs-9 and 10 of his Filed Visit Report extracted hereinabove, also clearly indicate that the Assessing Officer had himself conducted the investigation without revealing his own identity and claiming to have taped his conversation under the, guise that he was a doctorate student doing research on fishery business in Lake Chilika.

8. The aforesaid documents/reports referred to by the petitioner, clearly have been utilized by the Assessing Officer to come to his conclusions, especially with regard to the conclusion reached in Part (III) Bogus Purchase and (IV) Cash Purchase of the impugned assessment order.

9. Mr. Mohapatra, learned Standing Counsel appearing on behalf of the Revenue submits that while it is the fact that the petitioner had not been provided with some of the materials relied upon by the Assessing Officer, yet in fact, the impugned order itself indicates that, a copy of the Field Visit Report of the Assessing Officer dated 14.11.2010 was communicated to the A.R. (Assessee's representative) on 01.12.2010.

Apart from the same, learned counsel for the Revenue submits that the very reports relied upon and referred to by the Assessing Officer were available on the internet and, therefore, accessible to the general public including the petitioner, therefore, no violation of the principles of natural justice has occurred to justify any interference in the present case.

Apart from the above, Mr. Mohapatra strenuously urged that the petitioner has the statutory right of appeal under Section 249 of the Income Tax Act, 1961 and therefore, adequate efficacious alternative remedy being available to the petitioner, the writ petition ought not to be entertained.

10. We have considered the averments made by the learned counsel for the respective parties. Perused the pleadings as well as the impugned order. On a clear reading of the same, it is clear that the law is well settled by the Hon'ble Supreme Court in the case of **Kothari Filaments** (supra) that when a statutory authority has passed an order on the basis of the materials which were known only to itself and on the basis of such materials arrived at the conclusions without supplying copies thereof or without providing opportunity of inspection of such document. A person charged with misdeclaration is entitled to know the ground on the basis whereof there would be a levy of tax, non-compliance of which is a clear violation of the principles of natural justice. It is well settled that an assessee may have an answer to the charges or may not have. But without doubt in law, an assessee is entitled to a proper hearing and such proper hearing cannot be said to have taken place without the assessee being provided with the copies of such documents or opportunity to inspect the documents sought to be relied upon by the revenue. This would be so, since an assessee can only possible respond to any charge only on knowing the contentions of the said documents sought to be relied upon and not otherwise. The said principles has also been referred by the Hon'ble Supreme Court in the case of **Collector of Central Excise, Chandigarh** (supra)

11. In the present case, it is admitted case of the Revenue that the reports relied upon and/or referred to by the Assessing Officer in the impugned assessment order have not been served on the assessee except the Field Visit Report dated 14.11.2010 which is mentioned at internal page-13 of the assessment order which indicates that the same had been communicated to the assessee's representative only on 1.12.2010.

Learned counsel for the petitioner asserts that no such communication was received by the assessee's representative. But, without entering into this dispute, the impugned assessment order itself also indicates that, the last date of hearing was 1.12.2010 and even assuming that the Field Visit Report had been handed over to the assessee's representative on 1.12.2010, no effective opportunity was given to the assessee to respond to the same in course of hearing. Since hearing was concluded on the same date. Therefore, it can be safely concluded that no effective opportunity was given to the assessee to respond to the field visit report said to have been handed over to the assessee's representative on 1.12.2010 when on the same day, the hearing of the assessment proceedings were concluded.

12. In any event, the stand of the revenue that other reports relied upon by the Assessing Officer were available in the internet, is no consequence, since, the assessee was entitled to prior notice of any report or material which the Assessment Officer, intended to rely upon and without such advance notice, by merely claiming that the said reports are available on the internet, does not and cannot satisfy the mandate of rules of natural justice.

13. In the light of the aforesaid conclusion arrived by us since the principles of natural justice have been clearly violated in the present case and the conclusion arrived at by the Assessment officer in itself Field Visit Report dated 14.11.2010 extracted at internal page-13 of the assessment order and in particular Paragraphs-9 and 10 thereof which are extracted page-13 of the assessment order is clearly indicative of possible bias, since the Assessment Officer himself had acted as a 'investigator' and had collected certain statements under the guise of being a doctorate student having research in fishery business in Chilika.

14. Considering the aforesaid conclusion reached and further, we dispose of the present writ application to the following directions:

i) The impugned assessment order under Annexure-2 series for the assessment order 2008-09 is hereby quashed.

ii) The revenue is directed to serve copies of the reports sought to be relied upon by the revenue against the assessee listed in

Paragraph-3. Such documents/reports shall be handed over by the learned Standing Counsel for the revenue to the Assessee's counsel by 09.02.2011.

iii) The petitioner shall appear before the Range Officer on 11.02.2011 at 11.00 A.M. on which date, the assessee shall be intimated of the name and designation of the officer to whom assessment may be transferred by the Range Officer.

iv) The reassessment proceeding be concluded within six weeks from the date of appearance of the petitioner.

15. Since we have quashed the impugned order and consequently the demand dealt on technical ground i.e. violation of the principles of natural justice, learned counsel for the petitioner submits that the additional income of the petitioner determined [apart from, the demand relatable to Points (III) Bogus Purchases and (IV) Cash Purchases] is approximately Rs.3.5 crores. The tax and interest thereon would be approximately Rs.1.5 crore. In order to protect the interest of revenue, we direct the petitioner to deposit a sum of Rs.1.5 crores (without prejudice to its rights) within a period of one week from today and such deposit shall be subject to the result of the re-assessment proceedings, which may be taken up, pursuant to the direction contained herein.

16. The petitioner is at liberty to file its statement of claim in support of its case and the same must be proved to show that the payments made in cash which is not in conformity with Section 40A(3) read with rule 6DD of the Income Tax Act and Rules respectively wherein the Hon'ble Supreme Court in support of the said contention relied upon the judgment of the Supreme Court in the case of **Attar Singh Gurmukh and others v. Income Tax Officer, Ludhiana and others,** (1991) 4 SCC 385 with an observation that the terms of Section 40-A(3) are not absolute. Consideration of business expediency and other relevant factors are not excluded. The genuine and bona fide transactions are not taken out of the sweep of the section. It is open for the petitioner to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in Section 40A(3) was not practicable or would have caused genuine difficulty to the payee. It is also open to the assessee to identify the person who has received the cash payment. Keeping in view the aforesaid observations made in the aforesaid paragraph of the Supreme Court, the petitioner before Assessing Officer is required to prove the genuine and bona fide transaction and also satisfy the Assessing Officer the circumstances under which the payment in the manner prescribed in Section 40-A(3) of the Act was not practicable and would have caused genuine difficulty to the payee. This

aspect is required to be proved before the Assessing Officer by producing positive & cogent evidence. With regard to the exemption to make the payment in the manner prescribed under Rule 6-DD, is not applicable to the petitioner herein as he is a trader. It applies only to the purchaser.

17. The writ petition is disposed of in terms of the directions made hereinabove.

Writ petition disposed of.

2011 (II) ILR- CUT- 10

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

(W.P.(C) NO.8569 OF 2006 (Decided on 20.04.2011)

INDIAN OIL CORPORATION LTD. …… Petitioner.

.*Vrs.*

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

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ petition – None of the grounds urged in this writ petition in support of the Case of the Corporation is tenable in law – Petitioner has unnecessarily questioned the validity of the Order of reference and got the matter stayed for more than four and half years for which the workman has been put to great hardship in not getting the dispute adjudicated by the Tribunal – Held, writ petition is dismissed with cost of Rs.5000,00.

(Para 10)

Case laws Referred to:-

1.AIR 1967 SC 469 P-16 : (Delhi Cloth & Mills Co. Ltd.-V-The Workmen & Ors.).
2.AIR 2001 SC 3527 : (Steel Authority of India Ltd. & Ors.-V-National Union Water Front Workers & Ors.)
3.AIR 2006 SC 3229 : (Steel Authority of India Ltd.-V- Union of India & Ors.)
4.(2006) 4 SCC 1 : (Secretary, State of Karnataka & Ors.-V-Umadevi & Ors.)
5.AIR 1968 SC 529 p-4 : (Sindhu Resettlement Corporation Ltd.-V-Industrial Tribunal, Gujarat & Ors.)

For Petitioner - Mr. Arijeet Choudhury, Sr. Advocate
M/s. Sanjit Mohanty, N.C.Sahoo, S.Pattnaik, P.K.Muduli, S.Mohanty & A.Mohapatra.

For Opp.Parties - Mr. J. Katikia, Central Govt. Counsel for O.P.No.s1 and 2
M/s. B.P.Tripathy, R.Acharya, S.R.Parija, U.N.Sahoo & S.Hidayatulla(for O.P.No.3)

V.GOPALA GOWDA, CJ . The petitioner, Indian Oil Corporation Limited represented by Chief Employee Relations Managers and a Constituted attorney of the Corporation, has filed this writ petition seeking for issuance of

a writ of certiorari to quash the impugned order of reference dated 17.4.2006 made by opposite party no.1 in exercise of its power conferred by clause (d) of sub-section (1) and sub-section (2A) of section 10 of the Industrial Disputes, Act,1947 (hereinafter called as the 'ID Act' in short) in referring the existing industrial dispute for adjudication to the opposite party no.2 Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar, to give its award within a specified period of three months and for issuance of a writ of prohibition prohibiting the Tribunal from processing any further with the impugned order of reference and call upon the opposite parties to show as to why any other writ direction and/or order should not be issued giving full relief to the petitioner urging various facts and legal contentions.

2. Brief facts are stated for the purpose of appreciating the rival legal contentions urged on behalf of the parties with a view to find out as to whether the petitioner is entitled to the relief sought to quash the impugned order of reference.

It is stated that the petitioner is a Government company within the meaning of section 617 of the Companies Act, 1956 (hereinafter called the Corporation in short). It has undertaken the business of refining and distributing petroleum products. It has got refinery and oil storage department in various parts of India including at Jatni in the district of Khurda in the State of Orissa. Its establishment at Jatni is registered in accordance with the provisions of the Contract Labour (Regulation & Abolition) Act, 1970. The petitioner engages contractor in various areas of its activities at the Jatni Depot. One M/s.Shakti Marketeers, a proprietary firm of S.K.Mohapatra was engaged as handling contractor at its Jatni depot in terms of a contract dated 12.12.2000 which was effective from 17.12.2000 initially for a period of one year. The said contract was subsequently extended till 29.2.2004 on which date it was terminated. The said contractor employed less than ten persons. Therefore, it was not required to take out a licence in accordance with the Contract Labour (Regulation & Abolition) Act. This fact was mentioned in a letter dated 22.12.2000 from Shakti Marketeers to the petitioner vide Annexure-3. It had received a letter dated 14.10.2003 addressed to the Assistant Labour Commissioner (Central), Bhubaneswar by opposite party no.5 (hereinafter called as the Trade Union) raising a dispute regarding refusal of work to opposite party no.3 wherein it is stated that he was an employee of Samarendra Mohapatra, proprietor of M/s. Shakti Marketeers. It is stated that the said Assistant Labour Commissioner initiated conciliation proceedings and wrongly sent a notice dated 3.11.2003 to the petitioner asking it to attend such proceedings in which notice it has been described that the dispute is one "between the management of M/s. Shakti Marketeers, contractor of M/s. IOC Ltd. Vs. AOTLTWU, opposite party no.5 over illegal

termination of opposite party no.3. The petitioner attended the proceedings on 18.11.2003 and stated its contention as set out in its letter of the said date addressed to the Assistant Labour Commissioner and also written a letter dated 11.12.2003 to Shakti Marketeers advising it to attend the conciliation proceedings as directed by the Assistant Labour Commissioner and informed the same to the Assistant Labour Commissioner by its letter dated 22.12.2003. Copy of the aforesaid letter is produced as Annexure-7 and the written submission of Shakti Marketeers as contained in their letter filed before the Assistant Labour Commissioner on 27.7.2004 is produced at Annexure-8. As per the said letter Annexure-8, it is the case of the contractor that opposite party no.3 was his workman. Despite the same, the Assistant Labour Commissioner continued to send notice of the conciliation proceedings to the petitioner unnecessarily to which the Corporation reiterated its stand. Conciliation proceeding ended in failure and failure report was submitted on 28/30.11.2005 by the Assistant Labour Commissioner to opposite party no.1 and opposite party no.1 on the basis of the failure report and perusal of the record of the conciliation officer in exercise of its statutory power under the provisions of clause (d) of sub-section (1) and sub-section (A) of Section 10 of the Industrial Disputes Act, 1947 referred to the Tribunal for adjudication of the existing dispute in relation to opposite party no.3 regarding illegal termination of his service with effect from 17.6.2003 and to submit the award within a period of three months. Correctness of the same is challenged in this writ petition urging the following grounds :

3. It is contended by the learned Counsel that the dispute impleading the petitioner is bad in law as there is no existing dispute between opposite party no.3 and the petitioner-Corporation as opposite party nos.3 and 5 have not raised dispute against the petitioner but they raised the dispute against opposite party no.4. Therefore, it is urged that the Tribunal has no jurisdiction to entertain the dispute and adjudicate the same and pass the award. It is further contended that opposite party no.2 has adjudicated the dispute with regard to relationship between the Corporation and the opp.party no.3 is evident from the Schedule to the reference referred to the Tribunal for adjudication.

4. The correspondence made by opposite party no.5, the claim made by opposite party no.3 and the counter filed by opposite party no.3 would clearly go to show that there is inconsistent and contradictory plea which is a relevant aspect of the matter according to the judgment of the Supreme Court in the Delhi Cloth and General Mills Co.Ltd. V. the Workmen and others, AIR 1967 SC 469 para 16. Further dispute between the Corporation and opposite party no.3 does not exist as the claim made by opposite party

nos. 3 and 5 is against opposite party no.4 who is the contractor of the Corporation and, therefore, dispute against the Corporation is not maintainable in law. In support of the above contention, he has placed strong reliance upon the judgment of the Supreme Court in Steel Authority of India Ltd. and others V. National Union Water Front Workers and others, AIR 2001 SC 3527. It is further contended that even assuming for the sake of argument that opposite party no.3 was working under the Corporation through opposite party no.4 as their contractor, the Corporation being a Government of India Undertaking is a State under Article 12 of the Constitution of India and as per the law laid down by the Supreme Court in Steel Authority of India Ltd. V. Union of India and others, AIR 2006 SC 3229, the question of regularization or participation of the workman as contractor employee is not permissible in law. Further placing reliance upon the decision in the case of Secretary, State of Karnataka & Ors. Vs. Umadevi & Ors., reported in (2006) 4 SCC 1 it is contended by the learned Senior Counsel that the opposite party no.3 is not entitled for regularization of his services and therefore the reference made by the Union of India is bad in law.

5. Opposite party no.3 sought to justify the order of reference by filing a detailed statement of counter traversing the petition averments by way of affidavit. It is stated that the writ petition filed by the Corporation is devoid of merit and is liable to be dismissed. It is further stated that opposite party no.3 was allowed to work in the Jatni depot of the Corporation with effect from 17.10.1994 as office boy initially much before the opposite party no.4 contractor was entered in the year 2000. He had worked for more than 8 years continuously and sincerely and his service was terminated illegally with effect from 17.6.2003 in the guise of refusal of employment by both the principal employer and the contractor. In support of this he has placed reliance on the experience certificate issued by the Depot Manager in his favour on 15.4.1997. It is stated that termination of his service with effect from 16.6.2003 is in violation of section 25F of the Industrial Disputes Act and he has been victimized for his trade union activities and membership of opposite party no.5. Therefore, it is contended that the same is a colourable exercise of employer's right. Industrial dispute was raised which was conciliated upon by he Assistant Labour Commissioner (Central), Bhubaneswar and on account of the adamant attitude of the petitioner-Corporation it ended in failure and reference has been made. It is stated that opposite party no.3 had earlier given a last representation to the Assistant Labour Commissioner (Central), Bhubaneswar describing his bad condition. It is further contended that with a view to avoid liability under the Industrial Disputes Act, Contractor Labour (Regulation and Abolition) Act, 1970, E.P.F., E.S.I. Acts, Minimum Wages Act and to deprive the statutory benefits

to it's employees, the petitioner is continuing the work of regular/permanent and perennial nature of work under the veil of contractor. The petitioner company is the principal employer, therefore, the stand taken in the conciliation proceedings by the petitioner and in this writ petition are wholly untenable in law and the same need not be accepted.

6. With reference to the above said rival legal contentions, following points would arise for consideration: (a) whether the order of reference dated 17.4.2006 is liable to be quashed ? (b) whether the framing of the point in the schedule of the order of reference amounts to adjudication of the dispute ? (c) Whether the claim statement filed by opposite party no.3 is contradictory plea to the pleadings in the claim petition filed by opposite party nos.3 and 5 before the Conciliation Officer and this Court ? (d) What relief ?

7. All these points are necessary to be taken together and answered as they are inter-related. It is an undisputed fact that the Corporation is registered under the Contract Labour (Regulation and Abolition) Act, 1970. It is also an undisputed fact that opposite party no.4 was a contractor of the Corporation. It is the case of opposite party no.3 that much prior to the contract was given to opposite party no.4, opposite party no,3 was working under the Corporation's Jatni depot as office boy with effect from 17.10.1994, but the opposite party no.4 entered as contractor in the year 2000. His service came to be terminated on 17.6.2003 challenging the correctness of the same dispute was raised by opposite party nos.3 and 5 before the Assistant Labour Commissioner Central, Bhubaneswar pursuant to which conciliation proceedings were held. In the notice issued to opposite party no.4 by the Assistant Labour Commissioner the description of the dispute was between the management of opposite party no.3 and opposite party no.4. Factually and legally the Corporation is the principal employer. Therefore, termination of the service of opposite party no.3 made by the contractor since he was working from 1994 till the date of termination prima facie the opposite party no.1 has come to the conclusion on the basis of the pleadings and record made available before the Assistant Labour Commissioner in the conciliation proceeding, the record which is made available for our perusal would clearly indicate that the document Annexure-11 issued by the Corporation's Marketing Division, Eastern Region evidence the fact that the name of opposite party no.3 is entered in the said document. These are all questions of fact required to be gone into by the Tribunal at the time of adjudication. Therefore, whether opposite party no.3 is an employee of the contractor or the Corporation is a mixed question of fact and law required to be examined for which evidence is required to be adduced by the parties. Therefore, on the basis of the pleadings, this Court can not record a

finding that there is no existing industrial dispute between the petitioner and opposite party no.3 for the reason that the claim petition filed by opposite party nos.4 and 5 before the Conciliation Officer and the notice issued by him to the Corporation describe that the dispute is between opposite party no.3 and opposite party no.4. Such technical contention urged by the learned Senior Counsel on behalf of the petitioner can not be accepted in view of the documents available in the records which are produced by the opposite party no1. Further reliance placed upon the judgment of the Supreme Court in the case of Sindhu Resettlement Corporation Ltd. V. Industrial Tribunal, Gujarat and others, AIR 1968 SC 529 paragraph-4 wherein the Supreme Court made observation that in the claims put forward before the Management of the appellant, requested for payment of retrenchment compensation and did not raise any dispute for reinstatement. Since no such dispute about reinstatement was raised by either of the respondents before the management of the appellant, it is clear that the State Government was not competent to refer a question of reinstatement as an industrial dispute for adjudication by the Tribunal. The dispute that the State Government could have referred competently was the dispute relating to payment of retrenchment compensation by the appellant to respondent no.3 which had been refused. In view of the said observation, the stand taken by opposite party nos.3 and 5 in the claim petition before the Conciliation Officer and the affidavit filed by opposite party no.3 in this proceeding that the reference is incompetent and therefore the same is liable to be quashed is wholly untenable in law as the said decision is misplaced not applicable to the fact situation.

8. As could be seen from the pleadings and the failure report submitted by the Assistant Labour Commissioner, the termination of service was done without following the provision of Section 25-F and the conciliation having failed and considering the failure report the appropriate Government exercised its power under section 10 and made the reference to the Industrial Tribunal for adjudication of the existing industrial/Labour Court dispute between the parties. Therefore, the points of dispute formulated in the Schedule is perfectly legal and valid and the appropriate Government is competent to make the reference. Whether it is an industrial dispute or not is a fact to be ascertained by the Tribunal/Labour Court in the enquiry required to be conducted under the I.D. Act.

9. For the reasons stated supra, the various other pleas which are purely technical in nature have no application to the fact situation of the case. Further reliance placed upon Steel Authority of India Ltd. V. Union of India (supra) and Secretary State of Karnataka and others v. Umadevi (3), 2006(4) SCC 1 have no application to the fact-situation, as the points of

dispute referred to the Tribunal/Labour Court is not for regularization of the services of opposite party no.3, but the justification of the termination of his services.

10. In view of what has been stated above, none of the grounds urged in this writ petition in support of the case of the Corporation is tenable in law. Therefore, the same can not be accepted. The writ petition is devoid of merit.

The petitioner unnecessarily questioned the validity of the order of reference and got the matter stayed for more than four and half years. Therefore, the workman has been put to great hardship in not getting the dispute adjudicated by the Tribunal. Therefore, the writ petition is dismissed with cost of Rs.5000.00. The Tribunal is directed to see that the reference is adjudicated within three months from the date of receipt of copy of this order and the parties shall co-operate.

Writ petition dismissed.

2011 (II) ILR- CUT- 17

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

W.A. NO.233 OF 2010 (Decided on 22.11.2010)

ANANDA PRADHAN ……. Appellant.

.Vrs.

COLLECTOR, KHURDA & ORS. …. …… Respondents

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

Writ petition – Pleadings – If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the Counter affidavit, as the case may be, the Court will not entertain the point.

In the present case learned single Judge quashed notice No.4950 Dt.03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence motion meeting against the Sarpanch on the ground that no resolution as required U/s.24(2) (a) of the G.P.Act has been sent to the Sub-Collector along with the requisition when no such ground was taken by the writ petitioner in the writ petition – Held, impugned judgment of the learned Single Judge is set aside.

(Para 7 & 10)

(B) GRAMA PANCHAYAT ACT, 1964 –(ACT NO 1 OF 1965)S.26(3).

No confidence motion against Sarpanch – Ten ward members out of 15 signed the requisition and the proposed resolution – Sarpanch alleged disqualification of three ward members who have signed the requisition and resolution – Held, the above three ward members are entitled to act as valid ward members till their membership is declared invalid in terms of section 26(3) of the Act and publication of the same by the Collector.

(Para 9)

Case laws Referred to:

1.91 (2001) CLT. 151 : (Smt. Kamala Tiria-V-State of Orissa & Ors.).
2.AIR 1988 SC 2181 : (Bharat Singh & Ors.-V-State of Haryana & Ors.)
3.2010(4) Supreme 750: (Naresh Agarwala-V-City Bank).

For Appellant - M/s. K.P.Mishra, S,Mahapatra, T.P.Tripathy, L.P.Dwivedy.

For Respondents – M/s. D.R.Pattnaik, N.Biswal, N.S.Panda, Miss. L.Pattnaik.

Addl.Govt. Advocate (for Respondent 1 & 2)
M/s. Samir K.Mishra, K.R.Mohanty, J.Pradhan,
P.Prusty, B.Rath & D.K.Pradhan (for Respondent 3)

B.N.MAHAPATRA, J In this Writ Appeal, the appellant assails the judgment dated 08.07.2010 passed in W.P.(C) No.19065 of 2009 whereby the learned Single Judge quashed the notice No.4950 dated 03.12.2009 issued by respondent No.2-Sub-Collector, Khurda fixing a date for no confidence meeting against respondent No.3-Muktamanjari Sahoo @ Muktabala, the Sarpanch of Chhanagiri Grama Panchayat at Chhanagiri, P.S. Jankia, Dist: Khurda.

2. Bereft of unnecessary details, the facts and circumstances leading to the present appeal are that the appellant is a Ward Member of Ward No.2 of Chhanagiri Grama Panchayat. There were 15 Ward Members in total under the said G.P. Out of 15 Ward Members, 10 Ward Members have signed the requisition and proposed resolution dated 21.11.2009 (Annexure-1) for the purpose of initiating no confidence motion against respondent No.3-Sarpanch. After receiving the requisition along with the proposed resolution, the Sub-Collector, Khurda vide notice No.4950 dated 03.12.2009 (Annexure-2) fixed the date of meeting of no confidence motion to 21.12.2009 against respondent No.3-Sarpanch. Accordingly, the said meeting for no confidence motion against the Sarpanch was held on 21.12.2009. The Sarpanch after receipt of notice from the Sub-Collector, Khurda approached this Court in W.P.(C) No.19065 of 2009 with a prayer to quash the notice dated 03.12.2009 fixing the meeting of no confidence motion in respect of Chhanagiri G.P. as well as the resolution dated 21.11.2009 along with the requisition or in the alternative to defer the no confidence motion till the eligibility of Ward Members of Ward Nos.2,4, and 6 is decided. Learned Single Judge vide order dated 08.07.2010 quashed the notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence meeting against respondent No.3-Sarpanch. Hence, the present writ appeal.

3. Mr. K.P. Mishra, learned counsel appearing for the appellant submits that the learned Single Judge travelled beyond the pleadings and held that Section 24(2)(a) of the Orissa Grama Panchayat Act, 1964 (for short, "G.P.Act") has not been adhered to. The challenge in the writ petition was regarding validity of the membership of three Ward Members who were signatories to the requisition and proposed resolution to move no confidence motion against respondent No.3-Sarpanch and accordingly, prayer was made to defer the date of no confidence motion till the eligibility of three

Ward Members is decided. There was no challenge to the procedure adopted for passing the resolution and requisition as required under Section 24 of the G.P. Act by the petitioner in the writ petition. Therefore, the conclusion of the learned Single Judge that as per Section 24(2) of the G.P. Act, the requisition singed by at least 1/3rd of the total membership of the Grama Panchayat along with the proposed resolution has not been sent to the Sub-Collector, Khurda is not supported by any material on record. The aforesaid observation of the learned Single Judge did not arise either from the pleadings of the writ petition or any contention to that effect. Thus, the impugned judgment suffers from an incurable infirmity. The observation made by the learned Single Judge is contrary to the pleadings and the same is liable to be quashed. A valid requisition along with proposed resolution has been sent to the Sub-Collector, Khurda. No reasonable opportunity was afforded either to file their counter affidavit or to produce relevant record for just decision of the case. The decision of this Court in ***Smt. Kamala Tiria Vs. State of Orissa & Others, 91 (2001) C.L.T. 151*** on which respondent No.1 placed reliance has no application to the case of the appellant. Concluding his argument he has submitted that the judgment of the learned Single Judge is liable to be set aside and the present writ appeal may be allowed.

4. Mr. Samir K. Mishra, learned counsel appearing for respondent No.3 supports the order of the learned Single Judge and vehemently argued that even assuming for the sake of argument that the learned Single Judge is not justified to quash notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda on the ground that no resolution as required under Section 24(2) of the G.P. Act has been sent to the Sub-Collector, Khurda, the order of the learned Single Judge is valid as membership of three Ward Members of Ward Nos.4,6 and 2, who were signatories to the resolution of no confidence motion, is under challenge and the same is pending. Since the validity of membership of three Ward Members was under challenge on the very date when no confidence motion against respondent No.3-Sarpanch was moved, those three Ward Members could not have participated in such proceedings until the validity of their membership is decided.

5. In the present appeal, the following points would fall for consideration by this Court:

(i) Whether the learned Single Judge is justified in quashing the notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence motion meeting against respondent No.3-Sarpanch on the ground that no resolution as required under Section 24(2)(a) of the G.P. Act has been sent to the Sub-Collector

along with the requisition, particularly when no such ground was taken by the writ petitioner in the writ petition?

(ii) Whether the three ward members, whose membership is under challenge, are entitled to participate in the no confidence motion against respondent No.3-Sarpanch?

6. So far as issue no.(i) is concerned, undisputedly in the present case the writ petitioner has not taken any ground in the writ petition challenging the procedure adopted for passing resolution and requisition as required under Section 24 of the G.P. Act by minimum 1/3rd members of the Grama Panchayat to initiate no confidence motion against respondent No.3-Sarpanch as well as non-submission of those before the Sub-Collector, Khurda. In the absence of such pleading in the writ petition, the learned Single Judge should not have quashed the notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence motion against respondent No.3-Sarpanch on the ground that no resolution as required under Section 24 of the G.P. Act has been sent to the Sub-Collector along with requisition relying on the decision of this Court in Smt. Kamala Tiria (supra).

7. Law is well settled that a party has to plead the case and produce/adduce sufficient evidence to substantiate his stand taken in the petition and, in case the pleadings are not complete, the Court is under no obligation to entertain the plea.

In ***Bharat Singh & Ors. Vs. State of Haryana & Ors,*** *AIR 1988 S.C. 2181,* the Supreme Court has observed as under:-

> "In our opinion, when a point, which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the Court will not entertain the point. In this context, it will not be out of place to point out that in this regard, there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter affidavit. While in a pleading, i.e. a plaint or written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it."

(Also see ***Naresh Agarwala Vs. City Bank, 2010 (4) Supreme 750***)

As stated above since there is no pleading in the writ petition that no resolution as required under Section 24(2)(a) of the G.P. Act has been sent to the Sub-Collector, Khurda along with the requisition, quashing of the notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence motion against respondent No.3-Sarpanch is not sustainable.

8. So far as the question no.(ii) is concerned, admittedly in the present case out of total 15 Ward Members of the Grama Panchayat, 10 Ward Members have signed the requisition and proposed resolution to initiate no confidence motion against respondent No.3-Sarpanch. It is also not in dispute that the challenge of respondent No.3-Sarpanch in the writ petition is confined to the disqualification of three Ward Members of Ward Nos. 4, 6 and 2, who have signed the said requisition and resolution. Now the question that would arise is whether these three Ward Members can participate in the meeting convened for no confidence motion against respondent No.3-Sarpanch. Sub-section (3) of Section 26 of the said Act, provides that where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member is or has become disqualified such decision shall be published by him in his notice-board and only from the date of the publication by the Collector on his notice-board, the member of the G.P. shall be deemed to have vacated the office and till the date of such publication he shall be entitled to act as if he was not disqualified. For better appreciation, Section 26(3) of the G.P. Act is quoted below:

> "Where the Collector decides that the Sarpanch, Naib- Sarpanch or any other member is or has become disqualified such decision shall be forthwith published by him on his notice-board and with effect from the date of such publication the Sarpanch, Naib-Sarpanch or such other members, as the case may be, shall be deemed to have vacated office, and <u>till the date of such publication he shall be entitled to act, as if he was not disqualified</u>."
>
> (*Underlined for emphasis*)

9. In view of the provision of Section 26(3) of the G.P. Act, we are of the view that three Ward Members of Ward Nos.2,4, and 6 of Chhanagiri Grama Panchayat are entitled to act as valid Ward Members till their membership is declared invalid in terms of Section 26(3) of the G.P. Act and publication of the same by the Collector.

10. In the fact situation, the learned Single Judge is not justified in

quashing notice No.4950 dated 03.12.2009 issued by the Sub-Collector, Khurda fixing the date for no confidence meeting against respondent No.3-Sarpanch. Hence, the impugned judgment of the learned Single Judge is set aside.

11. It is open to the respondent No.2-Sub Collector, Khurda to proceed with the notice No.4950 dated 03.12.2009 forthwith.

12. The appeal is accordingly allowed. No order as to costs.

Writ appeal allowed.

2011 (II) ILR- CUT- 23

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

W.P.(C) NO.17562 OF 2010 (Decided on 23.03.2011)

NATIONAL INSTITUTE OF COMPUTER EDUCATION PVT. LTD. .....Petitioner.

.Vrs.

BRANCH MANAGER, DENA . BANK, CTC & ORS .....Opp.Parties.

CONSUMER PROTECTION ACT, 1986 (ACT NO 68 OF 1986) – S.17.

Petitioner issued cheque to be drawn on Opp.Party-Bank – Cheque dishonoured illegally – Petitioner filed complaint before the State Consumer Disputes Redressal Commission claiming compensation – Complaint petition was dismissed holding that there was no deficiency in service as the O.P.-Bank has already realized the mistake and expressed sincere regrets – Hence this writ petition.

In this case cheque dishonoured due to the erroneous act of the O.P.-Bank and such act amounts to deficiency in service – Held, impugned order passed by the State Commission is set aside – Direction issued to O.P.-Bank to return back Rs.5,025/- wrongly debited to the account of the petitioner along with usual interest for the period from the date the wrong committed till the date of deposit in petitioner's Bank account – O.P.-Bank was further directed to pay Rs.5000/- to the petitioner for deficiency in service.

(Para 8,9)

For Petitioner - Mr. Mohit Agarwal.
For Opp.Parties - M/s. Sidheswar Mallik & P.C.Das. (for O.Ps. 1 and 2)

B.N. MAHAPATRA, J. In the present writ petition challenge has been made to the order of the State Consumer Disputes Redressal Commission, Orissa, Cuttack dated 16.09.2010 passed under Annexure-5 in C.D. Case No.91 of 2001 by which the Commission has dismissed the complaint of the petitioner holding that since the bank has already realized its mistake and has expressed sincere regrets, there is no deficiency on its part.

2. Bereft of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner-Company was maintaining Current Account No.1295 with opp. party-Dena Bank, Cuttack. It

had issued a cheque for Rs.10,000/- on 13.10.1999 drawn on opp. party-Bank in favour of their auditors, M/s Tibrewal Chand and Co. towards their professional fees. On presentation of the said cheque, the same was dishonoured by the O.P.-Bank on the ground of insufficiency of fund. Due to dishonour of the cheque, the auditors refused to hand over the audited balance sheet for which the petitioner could not submit the annual return and the balance sheet before the Registrar of Companies in time. For non-submission of annual return and balance sheet in time, the petitioner was penalized. According to the petitioner, there was sufficient fund as per its own account on the date its cheque was dishonoured. On coming to know of the fact of dishonour of cheque, the petitioner issued letter dated 14.10.1999 to O.P.No.1 complaining about the negligence in honouring the cheque on the same date. O.P. No.1 vide its letter dated 14.10.1999, informed the petitioner that its cheque was rightly dishonoured as it had only Rs.6,530.89 in its bank account. Being dissatisfied with the said letter, the petitioner vide its letter dated 16.10.1999 informed O.P. Nos.1 and 2 that as per its record, balance should be Rs.11,555.89 and that the cheque has been willfully dishonoured by the Bank. On the basis of the statement of accounts obtained from O.P. No.1, petitioner again informed O.P. No.1 vide his letter dated 26.10.1999 that two debit entries were made in the petitioner's account being (a) funds insufficient Rs.5,000/-, and (b) Cheque returning charges Rs.25/- on 26.10.1999 which are incorrect. On 15.11.1999, O.P. No.1 finally admitted its erroneous act of debiting the account of the petitioner and apologized to the petitioner. Since after admitting its erroneous act, O.P. No.1 did not credit the said amount of Rs.5,025/- to the petitioner's account which had been illegally and erroneously debited to its account, the petitioner filed a complaint before the State Consumer Disputes Redressal Commission, Orissa, Cuttack under Section 17 of the Consumer Protection Act, 1986 against opp. parties 1 and 2 for deficiency in service and adopting unfair trade practice. Before the Commission, opp. parties 1 and 2 took a stand that no illegality has been committed by the Bank in dishonouring the cheque of the petitioner as there was insufficient of funds in its account. So there was no deficiency in service. Before the State Consumer Disputes Redressal Commission a further stand was taken by O.P.-Bank that on 25.08.1999 the complainant had deposited a cheque for Rs.5,000/- and instant credit was given to A/c No. 1243. Thereafter, when the cheque returned back, debit entry was made and also Rs.25/- was deducted towards cheque clearing charges from A/c No.1295. The learned State Commission dismissed the complaint with the following observation:-

"Heard the Learned counsel for the parties.

It is evident from the reference letter No.AKM/786/99 dt. 15.11.1999 of O.P. Bank that a cheque for Rs.5000/- pertaining to complainant's account was erroneously debited. O.P. Bank regretted for such an erroneous act and for inconvenience caused to complainant. Since the Bank has already realized the mistake and expressed sincere regrets, we are of the opinion that there is no deficiency on its part.

In the aforementioned circumstances, we find no merit in this complaint. Dismissed. No order as to costs."

Hence, the present writ petition.

3. Mr. Agarwal, learned counsel for the petitioner submits that Account No.1295 stands in the name of the petitioner-Company, i.e., National Institute of Computer Education Pvt. Ltd. and is operated by Mrs. Neeta Agarwal and Mr.Ramesh Agarwal as Directors of the said Company. But Account No.1243 stands in the name of National Institute of Computer Education, which is a proprietorship concern. Both the concerns are separate legal entities in the eye of law and are having distinct account numbers. Therefore, it is erroneous and false to state that the petitioner, which is a private limited Company, maintains two current accounts. The aforementioned facts will be evident from the Account opening forms wherefrom it has also been established that there was no agreement to link both the said Accounts.

4. Mr. Mallick, learned counsel for opp. parties 1 and 2 submitted that the complainant maintains two current accounts namely National Institute of Computer Education Pvt. Ltd. bearing account No.1295 and National Institute of Computer Education (Proprietorship Account) bearing account No.1243. A cheque amounting to Rs.5000/- was deposited in account No.1243 on 25.08.1999 in which instant credit was given on that day. Later the said cheque of Rs.5000/- was bounced due to insufficiency of fund. Therefore, while giving debit entry in Account No.1243, debit entry was made in Account No.1295. Hence, no illegality has been committed by the bank in dishonouring the cheque as there was insufficient funds in the account and thus there is no deficiency in service.

5. It is not in dispute that on 13.10.1999 when the petitioner issued a cheque for Rs.10,000/- pertaining to current account No.1295 maintained with opposite party-Bank his balance in the said bank account should be Rs.11,555.89. It is only because of the wrong committed by opposite party-bank, the said balance was reduced by Rs.5025/- for which the cheque for Rs.10,000/- issued by the petitioner to Chartered Accountant was

dishonoured on presentation. There is no denial to the above fact. In paragraph 9 of the their counter opposite party-Bank stated as follows :

> " The petitioner has suppressed material facts before this Hon'ble Court. It was maintaining two current accounts in the opposite party bank in the name and style of National Institute of Computer Education bearing Account No. 1243 and another namely NICE National Institute of Computer Education Private Limited bearing Account No.1295. A cheque amounting Rs.5000/- was deposited by the petitioner in Account No.1243 on 25.8.99 in which instant credit was given on the very day. The said cheque was however returned back with endorsement of insufficient fund and it was therefore necessary to debit the Account by Rs.5000/- and Rs.25/- towards collection charges. The debit entry of Rs.5025/- was made wrongly in Account No.1295 instead of Account No. 1243. Such inadvertent mistake was committed as the petitioner was maintaining both the accounts……"

6. From the above pleadings of opposite party-Bank, we are unable to accept the stand taken by the Bank that the petitioner M/s National Institute of Computer Education Private Ltd. maintaining current account No. 1295 and National Institute of Computer Education, which is a proprietorship concern, maintaining account no.1243 are one and the same entity. Since former is a Private Limited Company incorporated under the Companies Act, 1956 and the latter is a proprietorship concern, they are separate and distinct legal entities in the eye of law. We are shocked to note that a financial institution like opposite party –Bank, which is a nationalized Bank, does not understand the distinction between a limited Company and proprietorship concern though it has allotted two separate account numbers to them. On the one hand having admitted that the bank has committed mistake by making debit entry of Rs.5025/- wrongly in account no.1295 instead of account no.1243, the further stand of the bank that no illegality has been committed by the Bank in dishonouring the cheque in question as there was insufficiency of funds in the account of the petitioner Company and thus there is no deficiency in service runs contrary to the letter dated 15.11.1999 admitting its mistake and expressing regret for the same.

7. Needless to say that the good will of a business concern plays a pivotal role for its success. In other words, success of a business concern always depends on its good will in the market and in the eyes of customers and creditors. For any reason, if good will of a business concern tarnishes or its image goes down in the business circle, the business will certainly get a

set back. Therefore, those who are responsible for sullying the public image of the business concern are required to compensate for the same.

8. In the instant case, it is not in dispute that the cheque for Rs.10, 000/- drawn on opposite party bank on 13.10.1999 in favour of their auditor M/s. Tibrewal Chand & Co. towards their professional fees was dishonoured due to the erroneous act as stated above committed by opposite party-bank. Therefore, such action of opposite party-bank amounts to deficiency in service rendered by it for which the petitioner lost its reputation in the eye of drawee of the cheque. The petitioner's further case is that due to dishonour of the cheque, the auditor refused to hand over the audited balance sheet and the petitioner could not submit annual return and balance sheet before the Registrar of Companies in time for which the petitioner was penalized.

9. In the fact situation, the order dated 16.09.2010 passed under Annexure-5 by the State Consumer Disputes Redressal Commission in C.D. Case No.91 of 2001 is hereby set aside. We direct opposite party-Bank to return back Rs.5,025/- wrongly debited to the account of the petitioner along with usual interest for the period from the date of wrong committed till the date of deposit in petitioner's Bank. Opposite party-Bank is further directed to pay compensation of Rs.5,000/- within a fortnight from today to the petitioner for deficiency in service.

10. The writ petition is allowed to the extent indicated above.

Writ petition is allowed.

2011 (II) ILR- CUT- 28

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

W.P.(C) NO.1738 OF 2009 (Decided on 17.05.2011)

MAHENDRA KUMAR PUJARI & ANR. ……Petitioners.

.Vrs.

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

ORISSA DEVELOPMENT AUTHORITIES ACT,1982 (ACT NO.14 OF 1982)

Transfer of C.D.A. Plot – CDA imposed charges for 3rd Party transfer – Charges made not statutorily authorized – Held, arbitrary and void.

In this Case petitioner applied for 3rd party transfer of C.D.A. Plot – As per Clause-7 of the provisional allotment letter C.D.A. charged 50% of the differential value between the premium paid and the market value of the plot on the date of transfer – Action challenged – Not a speaking order – B.D.A. is charging 10% of such unearned increase in the value of the plot – Violative of Article 14 of the constitution – Held, charging 50% of the differential amount between the premium paid and the market value of the plot on the date of sale/transfer is arbitrary and the provisions contained in Clause-7 of the provisional brochure to that extent are void. (Para 12)

For Petitioner - M/s. Biswajit Mohanty, S.Patra, P.K.Mohapatra, A.Panda, S.J.Mohanty and D.D.Sahu.

For Opp.Parties- Addl. Govt. Advocate (For O.P.No.1)

M/s. Dayananda Mohapatra, M.Mohapatra, G.R.Mohapatra & S.P.Nath (for O.P.No.2)

B.N. MAHAPATRA, J. This writ application has been filed with a prayer for quashing order No.24977/CDA/dated 28.11.2008 (Annexure-2) passed by opposite party No.2-Secretary, Cuttack Development Authority wherein petitioner no.1-Mahendra Kumar Pujari has been intimated that his request for 3rd party transfer of Plot No. C/1167 under 'C' Category will be considered subject to payment of Rs.3,38,354/-, Rs.15,000/- and Rs.5,760/- towards Administration & Processing fees, building charges and service charges from 1996 to 2007 respectively. Alternatively the petitioners have prayed for reducing the above charges by taking into consideration the rates prevailing as on 01.02.2005 i.e. the date on which the transferor made application for transfer of the said plot in favour of petitioner no.2-Rukmini Satapathy within a specified time.

2. Petitioners' case is that petitioner no.1 was allotted with Plot No.C-1167 under 'C' category in Sector 6 of Bidanasi Project Area. After taking possession, the petitioners constructed a two storied building thereon. Since petitioner no.1 was badly in need of money, he acceded to the request of petitioner no.2 for transfer of the said plot with building thereon. According to petitioner no.1, on 01.02.2005 he submitted an application along with all the requisite documents for transfer of the said plot in favour of petitioner no.2-Smt. Rukmini Satapathy in the office of opposite party no.2-Secretary, Cuttack Development Authority. Thereafter petitioner no.1 sent a reminder on 10.10.2006 with a request to take early decision in the matter. By notice dated 30.06.2006 petitioner no.1 was directed to remove deviation portion from roof projection of the building. According to petitioner No.1, that is a fresh allegation and the same was not taken note of in the earlier order passed on 15.09.1999 in U.C. No. 31 of 1998. The order dated 15.09.1999 directing payment of compounding amount fixed therein was complied with on 27.09.1999. In response to the notice dated 30.6.2006, petitioner No.1 intimated the Cuttack Development Authority (for short, 'C.D.A.') that the allegation made is misconceived and illegal. However, on receiving the order on 27.03.2008 fixing the second compounding amount, petitioner no.1 paid the same on the next date i.e. 28.03.2008. Thereafter by notice dated 11.06.2008, petitioner no.1 was directed to appear along with the prospective transferee for verification of the signature and establish his identity along with the documents mentioned in the said letter. Petitioner no.2 also in the said letter was requested to submit an undertaking in the form of affidavit to take the liability of the building. Again petitioner no.1 received notice dated 22.7.2008 to appear on 11.8.2008 for hearing of U.C. Case No.31 of 1998. After repeated requests, the C.D.A. vide their order No.19751 dated 09.09.2008 intimated petitioner no.1 that his proposal for third party transfer would be considered subject to deposit of Rs.3,93,435/- i.e. 50% of unearned increase towards administration and processing fees Rs.5,760/- and Rs.15,000/- towards service charges and building charges from 1996 to 2007 respectively, besides the ground rent of Rs.720/- up to 2009.

3. Being dissatisfied with the order dated 09.09.2008, petitioner No.1 preferred an appeal before the Commissioner-cum-Secretary, Urban Development Department, Government of Orissa praying for down ward revision of fees assessed on different heads. The Vice-Chairman, C.D.A. heard the matter and while reducing the administration and processing fees to Rs.3,38,354/-, he kept other fees in tact. Thereafter, opposite party no.2 issued the impugned order vide Annexure-2. Hence, the present writ petition.

4. Mr. Mohanty, learned counsel appearing on behalf of the petitioners submitted that the order passed under Annexure-2 is illegal, arbitrary, unusual, highly unreasonable, irrational, without any authority of law and a product of total non-application of mind. It is submitted that without any reason, the C.D.A. is making inordinate delay in disposing of the application for third party transfer. He further submitted that the cost of the land should have been assessed on the basis of the rate prevalent on the date the application for transfer was made. The cost should not be the rate prevailing on the date of issuance of order dated 28.11.2008. Similarly, the fees under different heads, as prevalent at the time of/or on the date the application for transfer of the plot to 3rd party was made, should have been charged. The said other charges should not have been fixed as per the rates prevailing on the date of issue of order dated 28.11.2008. It is further argued that prior to July, 2007 there was no provision for 3rd party transfer and also fixation of fees. The impugned order is neither a speaking one nor a reasoned order. Therefore, it is not sustainable in law. It was further submitted that while Bhubaneswar Development Authority is charging 10% of the unearned increase towards administration and processing fees, there is no reason as to why C.D.A. is charging 50% of the unearned increase. Thus, there should be one set of rate in both the cities. Disparity in charging the administration and processing fees with reference to unearned increase is hit by Article 14 of the Constitution. The C.D.A. should not be allowed to have unbridled power with regard to 3rd party transfer. Therefore, the impugned order is liable to be quashed.

5. Mr. D. Mohapatra, learned counsel appearing for opposite party no.2 submitted that the lease granted by C.D.A. did not provide to create subsequent allottee. However, as per the decision of the authority and on consideration of requirement of allottees and their need, C.D.A. allowed them to find out purchasers who are to be regarded as lessee under C.D.A. on termination of lease in favour of the original allottee subject to compliance of provisional allotment letter read with brochure conditions. The allotment clearly mentioned that the allottee requiring transfer of allotted plot should deposit 50% of unearned increase which is calculated on the basis of the assessment made i.e. difference between the premium paid and market value of the plot on the date of transfer/sale/assigning etc. besides payment of processing fees etc. In the instant case, the transfer was approved by the Vice-Chairman, C.D.A. on 06.08.2008 and the differential cost along with other charges were calculated at Rs.4,14,914/-. It is further submitted that some inadvertent mistakes occurred in different communications including Annexure-2 mentioning the unearned increase as the administration and processing fees. The amount charged is nothing but differential cost payable as specified in the allotment letter and brochure condition read with the

decision of the Authority. Subsequently, petitioner no.1 made a representation to the Commissioner-cum-Secretary, Urban Development Department on 20.10.2008 which was referred to C.D.A. for consideration. In consideration of his representation, the differential cost was charged on the basis of market value for the year 2007-2008 and accordingly, the amount was reduced to Rs.3,59,834/- against the earlier demand of Rs. 4,14,914/-. The application for 3rd party transfer is subject to payment of 50% of the differential cost calculated as per the procedure prescribed in the brochure. Processing fee and consolidation fee charged for the building also form part of the processing fee besides ground rent etc. if any, found due. On deposit of the aforesaid amount, the original allottee is required to cancel the lease deed and the prospective purchaser chosen by the original alottee is put in as a lessee with the condition fixed by the C.D.A.. The lease deed executed is subject to payment of registration fee and payment of stamp duty before the Sub-Registrar by the 3rd party for the standing construction as per the valuation made by the 3rd party. Clause-7 of the brochure stipulating condition of the provisional allotment letter (Annexure-A/2), clearly mentioned the procedure and criteria to be complied with in case of 3rd party transfer. Petitioner no.1 keeping his eyes open agreed to such conditions and accepted the allotment. Subsequently, any challenge to the said conditions and/or praying for annulment of the same before this Court in exercise of its writ jurisdiction is not sustainable. Moreover, this is a purely contractual matter and petitioner no.1 having agreed to such condition, now is estopped from raising any contention in that regard before this Court either on the ground of maintainability or on the ground of merit.

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

(i) Whether the Cuttack Development Authority has any power/authority to charge and recover 50% of the unearned increase in the value of the plot (i.e., difference between the premium paid and market value of the plot on the date of transfer) at the time of sale/transfer/assigning etc. of an allotted plot to a third party in terms of clause 7 of the provisional allotment brochure?

(ii) Whether recovery of 50% of the unearned increase in the value of the plot (i.e. difference between the premium paid and the market value of the plot on the date of transfer) as claimed by the C.D.A. is unreasonable/arbitrary and hit by Article 14 of the Constitution particularly when Bhubaneswar Development Authority functioning in twin city is charging 10% of such unearned increase in the value of the plot?

7. Question no.(i) relates to power/authority of CDA to levy and recover 50% of unearned increase in the value of the plot (i.e. difference between the premium paid and market value of the plot on the date of transfer) at the time of sale of an allotted plot to a third party. In order to deal with question No.(i), it is necessary to know what is contemplated in Clause -7 of the Provisional Allotment letter.

> "7. That you will not be entitled to transfer the plot with building by way of sale or otherwise part with possession of the whole or part of the same (except by way of inheritance) without the previous consent of the Authority in writing. The authority reserves the right to refuse to give such consent, in its absolute discretion, without assigning any reason therefor. In the event of transfer or otherwise parting with possession of the plot with building, made without obtaining previous consent of the Authority in writing, such transfer or parting with possession shall not be recognized by the Authority and it shall be open to the Authority to cancel the allotment/terminate the lease and résumé the plot.
>
> In the event of the consent being given to such transfer the Authority reserves the right to impose such terms and conditions for such transfer, as it may think fit and the Authority shall be entitled to claim and recover a portion of the unearned increase in the value of the plot (i.e. difference between the premium paid and the market value of the plot on the date of transfer) at the time of sale/transfer/assigning etc; the amount recoverable being 50% of the unearned increase. The decision of the Authority, regarding fixing of the market value of the plot referred to above, shall be final and binding. In case the Authority feels that the plot, if transferred, will cause inconvenience to the neighboring allottees or the plot is required for its own use, it shall exercise the right of pre-emption and will pay to you the market value of the plot minus 50% of the unearned increase plus the depreciated cost of building, if any, as determined by registered valuers.
>
> Provided that in case of transfer to direct blood relations (sons, daughters, parents only) 50% of the unearned increase in value would not be payable."

8. Mr. D. Mohapatra, learned counsel appearing on behalf of the C.D.A. fairly conceded that except the Urban Development Act no rule has been framed to regulate the activities of the Developmental Authorities in urban area and in the Urban Development Act, there is no such provision which empowers the Cuttack Development Authority to charge 50% of the

differential value between the premium paid and the market value of the plot on the date of sale/transfer/assigning etc. Mr. Mohapatra except saying that such a condition is stipulated in the brochure as per the decision taken by the Developmental authorities, he has not drawn our attention to any statutory provision from which the C.D.A. derives power to collect 50% of the differential amount between the premium paid and the market value of the plot on the date of transfer under any head or nomenclature including 'administration and processing fees'. Thus, any condition put in the allotment brochure/letter or lease deed by the Authority, which is not provided in the Statute, cannot have the legal sanction behind it and therefore, the same is not valid.

9. The other important aspect of the case is that levy and collection of 50% of the differential value between premium paid and market value of the land at the time of sale/transfer/assigning by C.D.A. from allottee-transferor is nothing but a levy on the income earned by the allottee on sale of his asset. In other words, it is a tax on the income. Mere giving of the nomenclature like "Administration & Processing Fees" cannot change the characteristics of levy. Any charge/levy on such income is nothing, but a tax on income which is covered under Entry No.82 of List-I – Union List of Seventh Schedule to the Constitution of India. Thus, imposition of such levy is beyond the legislative competence of the State or its instrumentalities as levy on income is a Union subject under List-1 of Schedule-VII of the Constitution. Moreover, for earning such income on sale of the allotted plot, petitioner No.1 is required to pay income tax under the Income Tax Act, 1961 and also is required to pay 50% on the self-same income to CDA which is not permissible under the law. As noted above, even there is no provision in the statute for charging and collecting such levy.

10. In view of the above, we are of the considered view that C.D.A. has no power/authority to charge and recover 50% of the differential amount between the premium paid and market value of the plot at the time of sale/transfer/assigning etc. of an allotted plot by an allottee to a third party in terms of clause 7 of the provisional allotment brochure. The provisions contained in clause 7 of the provisional allotment brochure to that extent are void.

11. Question No.(ii) is whether recovery of 50% of the unearned increase in the value of the plot (i.e. difference between the premium paid and the market value of the plot on the date of transfer) as claimed by the C.D.A. is unreasonable/arbitrary and hit by Article 14 of the Constitution particularly when Bhubaneswar Development Authority functioning in twin city is charging 10% of such unearned increase in the value of the plot.

12. In view of our finding that CDA has no authority/power to levy and recover 50% of the differential amount between the premium paid and market value of the plot on the date of sale/transfer/assigning etc. there is no need to answer question No.(ii) as the same is merely an academic issue in this case.

13. For the reasons stated in the preceding paragraphs, we quash the order dated 28.11.2008 passed under Annexure-2 by opposite party No.2-Secretary, Cuttack Development Authority so far as it relates to asking petitioner No.1 to pay 50% of the differential amount between the premium paid at the time of the allotment and market value of the plot on the date of sale/transfer/assigning etc. The C.D.A. is directed to transfer the property in favour of petitioner No.2-Smt. Rukmini Satapathy without charging and collecting 50% of the differential amount between the premium paid and the market value of the plot on the date of sale/transfer/assigning etc. within a period of two months from today subject to payment of other charges directed to be paid in the said order.

14. In the result, the writ petition is allowed to the extent indicated above.

Writ petition allowed.

2011 (II) ILR- CUT- 35

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

O.J.C. NO.1588 OF 1999 (Decided on 20.04.2011)

SOURINDRA NARAYAN BHANJA DEO …….. Petitioner.

.Vrs.

MEMBER, BOARD OF REVENUE,ORISSA & ORS. ……. Opp.Parties.

Lease – Right of lease in Khasmahal land – Death of Lessee – Petitioner is the son of the lessee was in possession over the lease hold land even after the lease period expired – Pendency of renewal application – Resumption proceeding by Collector – Khasmahal authorities to resume land with the consent of the lessee – If the lessee does not consent for resumption and does not give up possession, the only course open to the Khasmahal authorities to take possession through Civil Court as provided in Rule 20, Chapter 1 of the Bihar and Orissa Government Estates Mannual, 1919.

In the present case resumption proceeding has been started but the application of the legal heirs of the original lessee for renewal of the lease is pending – No action has been taken on the same.

Mere assertion that resumption is necessary for public purpose is not enough – There should be a declaration by the Government that the case land is required for a definite/specific public purpose, which is totally absent in this case – Held, proceedings initiated in the Resumption Case is quashed.

(Para 4)

Case laws Referred to:-

1.I.L.R. Cuttack 1392 : (Republic of India-V-Prafulla Kumar Samal)
2.1993 (I) OLR 187 : (Sankarlal Verma-V-Smt. Uma Sahu.)
3.59 (1985) CLT 407 : (Satyapriya Mohapatra-V-Ashok Pandit)

For Petitioner - M/s. S.J.Pradhan, Prasanta Kumar Mohanty, P.K.Khuntia, P.K.Pradhan.

For Opp.Parties – Mr. J.P.Patnaik
Addl. Govt. Advocate
P.K.Routray, P.R.Sutar, M.R.Das, N.K.Deo & R.K.Rout.

B. P. DAS, J. The petitioner in this writ application prays to quash the proceeding initiated by the Collector, Puri (O.P.2) in Resumption Case No. 3 of 1993 and the order of the Member, Board of Revenue under Annexure-5 sanctioning the resumption of land and to direct that the land in question be permanently settled with the petitioner and opposite parties 4, 5 and 6 with heritable and transferable rights in terms of Section-3(4) of the Orissa Government Land Settlement Act, 1962 as amended by Orissa Act 1 of 1991.

2. During pendency of the writ application, opposite party No. 5 having died has been substituted by his legal heirs i.e. opposite part No. 5 (a) and 5 (b). Subsequently opposite party no.4 also died. Since the legal heirs of opposite party no.4 are already on record, no substitution was made as against the said opposite party.

3. The case of the petitioner in this writ application is that his father late Raja Sailendra Narayan Bhanja Deo of Kanika was the lessee in occupation of the land in Mouza-Bankimuhna (Unit No.26), Tahasil-Puri Sadar, Dist-Puri under Khasmahal Lease. The particulars of the land are given herein below:-

Sl. No.	Date of Khasmal Lease	Period of the Lease	Particulars of land	Area	Resumption Case No.
1.	8.10.47	09.06.47 to 08.06.77	Khata No.85 Plot No.63/330 Plot No.64/331 Plot No.66/332	 A0.277 A0.033 A0.043	3/1993
			Total	A0.353	

4. The petitioner's father died on 19.7.1982 and at the time of his death, the lease had already expired. At the time of death of the father of the petitioner, he was fully and exclusively in possession of the aforesaid leasehold land, even after expiry of the lease period. After the death of the petitioner's father, the petitioner, his mother and brothers remained in possession of the leasehold land, having succeeded to the interest of the petitioner's deceased father. The land under the aforesaid lease and the land under two other leases consist of one compact block having a total area of Ac.2.292. The petitioner's father had built a huge building over the aforesaid land and after using it for residential purpose for some years, the said building was let out to the Deputy Accountant General, Government of India for using the same as the office and residence and the tenant is still continuing. The said premises have been assessed to the Municipal holding

tax and have been assigned a holding number of the Puri Municipality in the name of the father of the petitioner. The record-of-rights have been published in the name of the father of the petitioner. Rent has been paid up to the date of expiry of the lease, but thereafter the Tahasildar-opposite party no.3 has not been accepting the rent.

According to the petitioner, the lease granted in favour of the petitioner's father expired on 8.6.1977. Even though the renewal application has been filed before the Tahasildar being Lease Case No. 23 of 1996 in Annexure-1, the same is still pending before the Tahasildar. According to him, by virtue of Section 3 (4) of the Orissa Government Land Settlement Act, 1962, as amended by Orissa Act 1 of 1991, which came into force on 2.9.1992, vide notification bearing S.R.O. No. 837/93 published in the Orissa Gazette (Extraordinary) dated 2.9.1993, opposite party no.3 is to settle the case land with the petitioner and opposite parties 4, 5 and 6 on permanent basis with heritable and transferable rights. While the renewal application filed by the petitioner was pending with the Tahasildar-O.P.3, the Collector, Puri-O.P.2 initiated a proceeding in Resumption Case No. 3 of 1993 for resumption of the case land in which a show cause notice was issued on 27.11.1993 under Annexure-3 against the father of the petitioner. The petitioner filed the show cause reply on 8.7.1997 in Annexure-4 contending that the resumption proceeding was without jurisdiction and void. Thereafter the Collector by order dated 15.7.1989 rejected the show cause reply without affording an opportunity of hearing and referred the matter to the Member, Board of Revenue, seeking sanction for resumption of the case land. Thereafter the Under Secretary (Revenue) of the Board of Revenue by letter dated 11.1.1999 (Annexure-5) conveyed to the Collector, Puri, the sanction of the Member, Board of Revenue to various resumption proceedings including Resumption Case No. 3/93 over the land in question. Aggrieved thereby, the petitioner has approached this Court for the reliefs indicated in the foregoing paragraph.

The show cause notice in Annexure-3 as well as the letter in Annexure-5 conveying sanction of the Member Board of Revenue to the resumption proceeding shows that the leasehold land on resumption is intended to be utilized for construction of public building for use of the Government Departments.

Learned counsel for the petitioner in this regard draws our attention to a judgment of this Court in the case of ***Sourindra Narayan Bhanja Deo v. Member, Board of Revenue, Orissa and others***, (O.J.C. No. 6736 of 1999, decided on 14.7.2004) and submits that the facts of that case are also similar to the case at hand. In O.J.C. No. 6736 of 1999 resumption of the

land was sought on the ground that the lease had already been expired and no steps had been taken for renewal of the lease and there was also violation of the terms of the lease agreement and the land which was sought to be resumed was to be used for public purpose by the Government.

Regarding the status of Khasmahal land, the same is no more resintegra in view of the decision of this Court in the case of ***Republic of India v. Prafulla Kumar Samal, I.L.R. 1976, Cuttack 1392*** and in paragraph-4 of the said judgment it has been held that:-

> "……. Rights of a lessee in Khasmahal lands are in no way different from those which one has in his own private land. Clause (15) of the lease-deed confers a right of renewal on the lessee, and as has been pointed out earlier, the said right cannot be denied by the lessor. Besides the lessee's right in the Khasmahal land being heritable and transferable the lessee can create a permanent right of tenancy in his holding. Thus, in all respect the rights of a lessee are just similar to those of an owner of a private land. (See 1935 CLT 34: Munshi Abdul Kadir Khan v. Munshi Abdul Latif Khan and 1937 CLT 67: Madhusudan Swain v. Durga Prasad Bhagat)"

The decisions rendered by this Court in ***Sankarlal Verma v. Smt. Uma Sahu***, 1993 (1) OLR 187, and ***Satyapriya Mohapatra v. Ashok Pandit***, 59 (1985) CLT 407, make it crystal clear that Khasmahal land is heritable and transferable with a right of renewal and right of lessee in respect of such land is in no way different from that which one has in his own private land.

So far as the public purpose is concerned, let us have a look at sub-Rule (5) of Rule-28 of Bihar and Orissa Government Estates Manual, 1919, which speaks as follows:-

> "xxx When a tenant holds land from Government under a lease containing a clause which authorizes the lessor to resume possession of the whole or part of the lands of the tenancy, this power of resumption shall only be exercised if the land is required for a public purpose, and the power of resumption shall not be exercised without the sanction of the Board of Revenue.
>
> If such land be required for the use of persons other than Government, e.g., for a local body, it should ordinarily be acquired under the provisions of the Land Acquisition Act, and not under the power of resumption given by the lease."

So far as the law regarding the Khasmahal leasehold land is concerned, such land shall be treated as private land of the lessee, having heritable and transferable rights. In this regard we have already referred to the decision in the case of Republic of India (supra).

In the present case, the lease of the land in question has already expired. In the matter of renewal, option is left with the lessee and not with the Khasmahal authorities. Such authorities cannot refuse renewal of the lease, if the lessee opts for the same. Even if the renewal is sought for after expiry of the term, the lessor cannot deny the same. If the lessee, who is entitled to renewal, fails to apply for the same, then the only course open to the Khasmahal authorities is to resume the land with the consent of the lessee and take possession thereof. If the lessee does not consent for resumption and does not give up possession, the only course open to the Khasmahal authorities is to take possession through the process of Civil Court as provided in Rule-20, Chapter-I of the Bihar and Orissa Government Estates Manual 1919.

In the case at hand, the resumption proceeding has been started but the application of the legal heirs of the original lessee for renewal of the lease is pending and no action has been taken on the same. So, in our considered opinion, in view of the settled position of law, the mere assertion that resumption is necessary for public purpose cannot be the ground to resume of the land. Mere saying that it is required for public purpose is not enough. There should be indication of definite public purpose, which is absent in the order/show cause notice passed by the Collector as well as the order of sanction passed by the Board of Revenue. The orders appear to be vague and indefinite in the absence of details about the so called public purpose for which the property was sought to be resumed. It is further indicated that the authorities are not sure about the public purpose for which the land was sought to be resumed.

From a bare reading of the provisions of Rule 28 of the Bihar and Orissa Government Estates Manual 1919, it appears that the power of resumption can only be exercised if the land is required for public purpose. Clause- 11 of the lease deed provides that should the land leased or any portion thereof be at any time required by the Government of Orissa for any purpose declared by Government to be a public purpose, the Collector may resume giving three months notice in writing, through any officer or person authorized on that behalf re-enter and take possession of the said land or portion thereof the lessee shall thereupon be entitled to a reduction in the rent payable under the lease proportionate to the area taken by the Collector. It therefore follows that there should be a declaration by the

Government that the case land is required for a specific public purpose, which is totally absent in this case.

Now the fact remains that after death of the original leaseholder on 19.7.1982, the petitioner and his other co-heirs are in joint possession of the land. It is well settled that the land in question is heritable and transferable and the same has devolved upon the petitioner and his co-heirs. So this question does not require further deliberation.

So, there is no other alternative than to allow the writ application. Accordingly, the proceedings initiated in Resumption Case No. 3 of 1993 under Annexure-3 and the order conveying sanction passed by opposite party no.1 in Annexure-5 are quashed. The authorities are directed to take recourse to Section 3(4) (c) of the Orissa Government Land Settlement Act.

The writ petition is accordingly allowed. No order as to the cost.

Writ petition allowed.

2011 (II) ILR- CUT- 41

L.MOHAPATRA, J.

COPET NOS.39,40 & 41 OF 2009 (Decided on 22.02.2011)

ORISSA SPONGE IRON & STEEL LTD. & ORS. ……Appellants.

.Vrs.

BHUSHAN ENERGY LTD. & ORS. …….Respondents.

(A) COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – S.10-F.

Appeal against order of Company Law Board – Finding of fact – Whether appellate Court can interfere – If a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on question of law – Held, perversity of the finding itself becomes a question of law.

(Para 7)

(B) COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – S.397.

Acts of oppression must be harsh and wrongful – An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority share holders is necessary to be proved – For consideration of oppressive action complained to be continuous one and not isolated or stale – Complaint to be made bonafide and not intended of mud-slinging – It is not required that continuous course of oppressive wrongful conduct over a period of time – If a Court is satisfied that a single wrongful act is such that it's effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, the Court can pass an appropriate order, U/s. 397 of the Act – Held, petitioners before the Company Law Board have failed to prove the alleged act of oppression and mismanagement.

(Para 29)

Case laws Referred to:-

1.AIR 1971 Calcutta 18 : (Unity Company Pvt.Ltd.-V-Diamond Sugar Mills & Ors.)

2.(2007) 140 Comp Cas 300 (CLB) : (Northern Projects Ltd.-V-Blue Coast Hotels & Resorts Ltd. & Ors.)

3.AIR 2005 SC 1624 : (M/s. Dale & Carrington Invt.(P) Ltd. & Anr.-V-P.K.Prathapan & Ors.)

4.(2005) 11 SCC 73 : (Claude-Lila Parulekar (Smt.)-V-Sakal Papers (P) Ltd. & Ors.)
5.(2006) 5 SCC 638 : (Ramesh B.Desai & Ors.-V-Bipin Vadilal Mehta & Ors.)
6.(2005)11 SCC 314 : (Sangramsinh P. Gaekwad & Ors.-V-Shantadevi P. Gaekwad & Ors.)
7.1984(56) C.C.284 : (V. J.Thomas Vettom-V-Kuttanad Rubber Co.Ltd.)
8.1994 (79) C.C.213 : (Palghat Exports Pvt.Ltd.-V-T.V.Chandran & Ors.)
9.(1970) C.C. Vol.40 : (Mohta Bros.(P) Ltd. & Ors.-V-Calcutta Landing & Shipping Co.Ltd. & Ors.)
10.1956 (35) C.C. p-351: (Shanti Prasad Jain-V-Kalinga Tubes Ltd.)
11.AIR 1983 S.C. 1272 : (Cotton Corporation of India Ltd.-V-United Industrial Bank Ltd. & Ors.)
12.1956 (26) C.C. 91 (SC) : (Rajahmundry Electric Supply Corporation Ltd.--V-A. Nageswara Rao & Ors.)
13.1990 (67) C.C. 607 (SC) : (World Wide Agencies Pvt. Ltd. & Anr.-V-Mrs.Margaret T.Desor & Ors.).
14.(1981) 3 SCC.333 : (Needle Industries (India) Ltd. & Ors.-V-Needle Industries Newey (India) Holding Ltd. & Ors.)
15.(2001) 105 C.C.493 : (Hanuman Prasad Bagri & Ors.-V-Bagress Careals Pvt. Ltd. & Ors.).
16.(2010) 6 SCC 719 : (Incable Net (Andhra) Ltd. & Ors.-V-A.P. Aksh Broadband Ltd. & Ors.).
17.1988 (64) C.C.259 : (East Indian Produce Ltd.-V-Naresh Acharya Bhaduri & Ors.)
18.1983 (53) C.C.367 : (B.K.Holdings (P) Ltd.-V-Prem Chand Jute Mills & Ors.)
19.(2010) 6 SCC 178 : (Naresh K.Aggarwala & Company -V- Canbank Financial Services Ltd. & Anr.)
20.1950 SCR 391 : (Nanalal Zaver & Anr.-V-Bombay Life Insurance Co.Ltd. & Ors.)
21.AIR 1966 Calcutta 512 : (Ramashankar Prosad & Ors.-V- Sindri Iron Foundry (P) Ltd. & Ors.)
22.(2008) 6 SCC 750 : (M.S.D.C. Radharamanan -V- M.S.D. Chandrasekara Raja & Anr.)
23.(2009) 10 SCC 197 : (Jai Prakash Gupta-V-Riyaz Ahamad & Anr.)
24.(1990) 4 SCC 406 : (Ashoka Marketing Ltd. & Anr.-V-Punjab National Bank & Ors)

For Appellants - M/s. P.Chatterji, Satyajit Mohanty, R.R.Swain, S.Patnaik, S.S.Das, R.K.Sahoo, K.C.Mohapatra,R.Agarwal, A.Riya & S.P.Das.

For Respondents - M/s. S.K.Kapur, Pinaki Mishra, S.P.Sarangi, P.P.Mohanty, P.K.Das, B.C.Mohanty, A.Pattnaik, R.K.Tripathy, A.Kanungo, A.K.Kanungo & D.K.Das.
For Appellant - M/s. S.K.Kapur, R.K.Rath, P.Mishra & A.Parija.
For Respondents - M/s. P.Chatterji, Satyajit Mohanty, R.R.Swain & S.S.Das.

L. MOHAPATRA, J. The order dated 6th October, 2009 passed by the Company Law Board, Principal Bench, New Delhi in C.P.No.5 of 2009 is assailed in all the three company petitions, which were taken up together for hearing and disposal.

BNS Steel Trading Pvt. Ltd., who was petitioner no.1 before the Company Law Board, has filed COPET No.40 of 2009 whereas BBN Transportation Pvt. Ltd., who was petitioner no.3 before the Company Law Board, has filed COPET No.41 of 2009. Orissa Sponge Iron and Steel Ltd., who was respondent no.1 before the Company Law Board, has filed COPET No.39 of 2009. Out of three petitioners before the Company Law Board, two have preferred COPET Nos.40 and 41 of 2009 whereas out of eleven respondents, respondent No.1-Orissa Sponge Iron and Steel Ltd., has filed COPET No.39 of 2009. The impugned order was passed on the basis of a petition filed under Sections 397, 398 and 399 read with Section 402 and 403 of the Company Act, 1956.

2. BNS Steel Trading Pvt. Ltd., Bhushan Energy Ltd. and BBN Transportation Pvt. Ltd. jointly filed the said Company Petition for the following reliefs :-

"a) Direct the respondents to maintain the status quo regarding their shareholdings, fixed assets of the company, and not to change the shareholding pattern of the company by transfer or further issue of shares.

b) Direct that any transfer in the facts and circumstances of the case shall be void.

c) Direct the Respondents not to sell its shares held in the Respondent No.1 Company without the prior approval of the shareholders.

d) Direct the investigation in the affairs of the company for its financial mismanagement and huge siphoning of the funds.

e) Reconstitute the board of the Respondent No.1 Company after carrying out the investigation in the affairs of the company for its financial mismanagement and huge siphoning of the funds and declare that affairs are being conducted prejudicial to the public interest the company and/or its members and further declare that the affairs of the company are being or are committed on prejudicial to the company or its members or public at large and oppressive to its members and the present management is conducting its efforts in a manner which is intended to disfraud its members creditors and public at large.

f) Pass such further order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

g) Direct the Respondents to transfer the warrants in the name of petitioner No.2."

3. The facts/instances of oppression and mismanagement alleged in the company petition filed by the said three companies are that Orissa Sponge Iron and Steel Ltd. is not only governed under the provisions of Companies Act, 1956 but under the provisions of SEBI Act and Guidelines. It is alleged in the petition that the present management and the promoters holding the controlling stake in the company are trying to dispose of the said unit by way of transferring its shareholding to a 3rd party without the consent and approval of the shareholders. The attitude of the existing promoters to wash their hands of the Company's Management confirms the belief that affairs of the company are being conducted with an intent to defraud its members, creditors and public at large and are oppressive to its members. The circumstances and facts as now emerging or as may emerge fully after investigation would prove beyond doubt that some person other than the existing promoters, who intend to take over management of the Company is influencing the policy of the company. Such action adversely affects the rights of the shareholder at large. It is also alleged that in case of promoters holding the controlling stake handover the company to a party alien to the present line of business, the same would be prejudicial to the interest of the company and consequently the shareholders. It is further alleged that the present management/ directors intend to handover the management of the company to some outsiders to absolve themselves from the liability of the company after siphoning away the huge funds of the company resulting in loss. Such conduct of the present management/directors is an act of oppression, which may ultimately give rise to winding up of the company. It is stated that the company has issued convertible warrants in terms of

shareholders resolution dated 15.10.2007 and the same have been pledged to raise funds but such funds have been diverted by the promoters for their personal use. On this account, it is stated that issuance of such warrants or their conversion may affect capital structure of the company. Some instances of issuance of such warrants and conversion thereof have been narrated in the petitions. It is further stated in the petition that petitioner no.2, Bhushan Energy Ltd. holds 35 lakhs share warrants of the company convertible into equitable shares. After conversion of these warrants, the holding of all the three petitioners would become 27.53 % but the said warrants are not being converted to shares in the name of Bhushan Energy despite of submission of all the requisite documents with the Registrar of Transfer Agent. This conduct of the present management amounts to oppression. The dishonest acts and mala fide intention of the management/ Directors have pushed the company at its financial brink where it is likely to collapse and thus would justify the winding up of the company on just and equitable grounds. Since winding up the company may not be in the interest of the share holders of the company and the company itself, the said petition was filed under the provisions mentioned above and for the relief quoted earlier.

4. With the above background, I proceed to examine the case of the appellants in COPET Nos.40 and 41 of 2009. Admittedly four days after C.P.No.5 of 2009 was filed before the Company Law Board, C.A. No.113 of 2009 was filed by the appellants

(1) For a declaration that 12,00,000 shares in the name of Torsteel Research Foundation in India (Respondent No.10) before the Company Law Board be declared as null and void being contrary to and in violation of the provisions of Section 77 of the Companies Act, 1956.

(2) To declare that 11,88,916 number of shares converted from similar number of warrants of OSIL (Respondent No.1 before the Company Law Board) in the name of Respondent No.10 is null and void.

(3) For a declaration that 14,10,000 equity shares issued by OSIL on preferential basis to Respondent No.10 at Rs.41.14 paise per share amounting to Rs.5.78 crores is null and void.

(4) For a declaration that 40,00,000 warrants of OSIL converted into the equity shares is null and void and for a direction to OSIL and its Directors to transfer 30 lakhs warrants in the name of Bhushan Energy Ltd.

In the said petition, i.e., the case of the appellants is that on inspection of records of Torsteel Research Foundation in India (Respondent No.10 before CLB) and TRFI Investment Private Limited (Respondent No.11 before CLB) from the Registrar of Companies portal of MCA 21, the following facts emerged which constitute the acts of oppression and mismanagement:

(I) In March 2004, Torsteel Research Foundation in India was holding 11% share in OSIL. During the third quarter of 2005, Torsteel Research Foundation in India purchased 12,00,000 shares from Industrial Promotion and Investment Corporation of Orissa Limited which was also a shareholder of OSIL at 58.06 per share amounting to Rs.6.97 crores. Torsteel Research Foundation in India had received Rs.6 crores as a loan from Torsteel Services Limited which is owned and controlled by the promoters of OSIL and this amount was borrowed by Torsteel Services Limited from UTI Bank on 29.7.2005 against the security of Escrow account of payables from OSIL. A corporate guarantee from Torsteel Research Foundation was also provided. On the same day, a sum of Rs.5.44 crores was transferred to Torsteel Research Foundation in its account in ICICI Bank and the said money was utilized for purchasing the 12,00,000 shares from IPICOL. This transaction is in violation of Section 77 of the Companies Act.

(II) In May 2005, OSIL again allotted 11,88,916 number of share warrants to be converted into equal number of shares at the rate of Rs.68.87 per warrant amounting to Rs.8.18 crores in favour of Torsteel Research Foundation which was convertible into equity shares within 18 months from the date of allotment. A small fraction of the said amount was paid by Torsteel Research Foundation to convert the warrants. OSIL in order to facilitate Torsteel Research Foundation to convert those warrants into equity shares provided an advance of Rs.6 crores to Torsteel Services Limited under the pretext of mining development and in turn Torsteel Services Limited provided the same amount to Torsteel Research Foundation for paying the conversion amount in respect of the said warrants. Torsteel Research Foundation utilized the said amount for converting the warrants into equal number of shares in January, 2006. It is, therefore, evident that OSIL provided financial assistance to Torsteel Research Foundation for acquisition of shares of OSIL in violation of Section 77 of the Act.

(III) In August 2006, OSIL issued 14,10,000 equity shares on preferential basis to Torsteel Research Foundation at Rs.41.14 paise per share amounting to Rs.5.78 crores in the same circuitous manner by providing financial assistance in contravention of Section 77 of the Companies Act.

On these allegations, the above prayers were made in the petition.

OSIL contested the petition by filing a reply and the gist of the reply is that at no point of time OSIL either directly or indirectly rendered any financial assistance to Torsteel Research Foundation for acquisition of shares.

5. The Company Law Board after examination of the documents produced by the parties before it, in paragraph-24 of the impugned order, observed that so far as the alleged tainted transactions are concerned, the admitted fact is that all these transactions took place before Bhushan Group (the present appellants) became shareholders. By these transactions, Bhushan Group has not been affected at all in any manner. From paragraph-27 of the impugned order, the Company Law Board proceeded to examine the allegations relating to the alleged tainted transactions but observed that three transactions had been alleged to be tainted. While for two transactions, details were given, for the third one only an apprehension had been expressed. Therefore, the Company Law Board examined the two alleged tainted transactions and came to the following findings.

The first transaction relates to acquisition of 12 lakh shares by Torsteel Research Foundation and it is admitted that OSIL has not funded these transactions. UTI had sanctioned a loan of Rs.6 crores to Torsteel Services Private Limited which was not a party to the proceeding for mining development. This loan was taken on the security of receivable from OSIL. This was the primary security provided by Torsteel Services Limited and the loan was guaranteed by Torsteel Research Foundation. The conclusion arrived at by the Company Law Board is that OSIL has not given any financial assistance directly or indirectly. The allegation of tainted transactions was based on a further allegation that Torsteel Services Pvt. Ltd. is not engaged in mine development but its only business is in fisheries and therefore, the transaction is a tainted transaction as OSIL has indirectly provided financial assistance. In response to such allegation, the Company Law Board observed that UTI Bank had given the loan being satisfied that the primary security given by the loanee is adequate and may be the Bank had the confidence of recovery of the loan because of association of Torsteel Services Pvt. Ltd. with OSIL. It further found that from the said

transactions, it is crystal clear that OSIL has not given any financial support indirectly except perhaps its reputation to the satisfaction of the Bank. It is also held that the said issue cannot be determined in absence of UTI Bank and Torsteel Services Pvt. Ltd. who are not parties to the proceeding.

So far as the second transaction of conversion of warrants by Torsteel Research Foundation out of loan of Rs.6 crores sanctioned by UTI Bank to OSIL is concerned, referring to the letter of UTI Bank, the Company Law Board held that the said amount had been sanctioned by the Bank in favour of OSIL for a specific purpose of lending it to Torsteel Services Pvt. Ltd. for mine development. Torsteel Services Pvt. Ltd. handed over this amount as a loan to Torsteel Research Foundation which was used for conversion of the warrants. The allegation of the appellants in this regard was that Torsteel Services Pvt. Ltd. does not have any mining development experience and its sole business was in fisheries. In respect of the first transactions, such submission having been rejected by the Company Law Board, in respect of the second transaction, the very same submission was also rejected. While arriving at such findings, the Company Law Board had referred to a decision of the Calcutta High Court in the case of ***Unity Company Private Ltd v. Diamond Sugar Mills and others, reported in AIR 1971 Calcutta 18*** and a decision of the Company Law Board, Principal Bench, in the case of ***Northern Projects Ltd. v. Blue Coast Hotels and Resorts Ltd. and others, reported in (2007) 140 Comp Cas 300 (CLB***).

6. Shri Kapur, the learned Senior Counsel appearing for the appellants in the above two appeals drew attention of the Court to certain documents filed before the Company Law Board to substantiate the case of the appellants that the above two transactions are tainted transactions and OSIL had directly or indirectly rendered financial assistance for the above two transactions. It was contented by Shri Kapur, the learned Senior Counsel for the appellants that so far as the first transaction is concerned, UTI Bank advanced a loan of Rs.6 crores to Torsteel Services Pvt. Ltd. for mine development of OSIL. The primary security provided for the said loan was the OSIL payables from it's Escrow account to Torsteel Services Pvt. Ltd. and the said loan was guaranteed by Torsteel Research Foundation. Torsteel Services Pvt. Ltd. after obtaining loan from UTI advanced the same as loan to Torsteel Research Foundation and in turn Torsteel Research Foundation utilized the said amount for purchasing 12 lakh shares of OSIL from IPICOL. Referring to the copy of the Bank transactions of Torsteel Services Pvt. Ltd., it was contented by Shri Kapur, the learned Senior Counsel for the appellant that all these transactions took place on the very same day.

So far as the second transaction is concerned, it was contended by the learned Senior Counsel that UTI Bank sanctioned a loan of Rs.6 crores to OSIL for mine development by Torsteel Services Pvt. Ltd. and the said amount was provided as advance by OSIL to Torsteel Services Pvt. Ltd. for mine development. In turn Torsteel Services Pvt. Ltd. provided the very same amount to Torsteel Research Foundation as a loan and the said amount was utilized by Torsteel Research Foundation for conversion of 11,88,916 warrants of OSIL. It was also contended by Shri Kapur with reference to the Bank transactions that all these transactions had taken place in one day. According to the learned Senior Counsel appearing for the appellants, all these transactions only establish indirect financial assistance rendered by OSIL either for acquisition of shares from IPICOL or for conversion of warrants into shares. Reference was also made to the letter of UTI Bank dated 26.7.2005 to substantiate the contention that Torsteel Services Pvt. Ltd. for obtaining a term loan of Rs.6 crores had offered exclusive charge of Escrow account of OSIL on payables from OSIL as primary security. It was contended by the learned Senior Counsel appearing for the appellants that the promoters of OSIL are also the owners of Torsteel Services Pvt. Ltd. and Torsteel Research Foundation and therefore, it was easier for them to enter into such transactions for defrauding the shareholders.

Shri P. Chatterji, the learned Senior Counsel appearing for the OSIL does not dispute the transactions but submits that none of the documents produced by the appellants establish that OSIL had either directly or indirectly rendered any financial assistance either for acquisition of shares from IPICOL or for conversion of warrants into shares. Referring to the letter of UTI Bank dated 26.7.2005, it was contended by Shri Chatterji, the learned Senior Counsel appearing for OSIL that while granting a term loan of Rs.6 crores in favour of Torsteel Services Pvt. Ltd., the primary security offer was the Escrow account of OSIL on payables from OSIL. Referring to the same, it was contended that any amount payable from the Escrow account of OSIL in favour of Torsteel Services Pvt. Ltd. is the property of Torsteel Services Pvt. Ltd. which could be offered as security and therefore, there was no financial assistance rendered by OSIL in the said transaction. It was also brought to the notice of the Court that against the said loan, Torsteel Research Foundation stood as corporate guarantee and an exclusive charge in relation to the office of Torsteel Research Foundation in India office area at Nariman Point, Mumbai had been created. This property itself was worth of more than Rs.20.00 crores and therefore, no further security was also necessary against a loan of Rs.6 crores. In respect of the second transaction, Shri Chatterji also contended that the loan of Rs.6 crores had

been granted by UTI Bank in favour of OSIL to be utilized for mine development which was undertaken by Torsteel Services Pvt. Ltd. Therefore, the said amount was provided as advance by OSIL to Torsteel Services Pvt. Ltd. for mine development. The conduct of Torsteel Services Pvt. Ltd. in providing a similar amount as loan to Torsteel Research Foundation for conversion of the warrants into shares cannot be said to be a financial assistance rendered by OSIL either directly or indirectly to Torsteel Research Foundation for conversion of warrants into shares.

The learned counsel made the above submissions on facts, alleged in the petition and also cited some decisions in support of their respective submissions. I now proceed to examine the submission of the learned Senior Counsel appearing for both the parties with reference to the documents and the decisions cited at the Bar.

7. A preliminary objection was raised by Shri Chatterji, the learned Senior Counsel appearing for OSIL with reference to Section 10-F of the Companies Act, 1956 and it was submitted that the appellant can only be heard on a question of law and the appellate court cannot reassess the materials placed before the Company Law Board and come to a different conclusion. In response, Shri Kapur, the learned Senior Counsel appearing for the appellants placed reliance on a decision of the Hon'ble Supreme Court in the case of M/s. ***Dale & Carrington Invt. (P) Ltd. and another v. P.K. Prathapan and others, reported in AIR 2005 S.C. 1624***. Para 35 of the said judgment is quoted below:

" Section 10F refers to an appeal being filed on the question of law. The learned counsel for the appellant argued that the High Court could not disturb the findings of fact arrived at by the Company Law Board. It was further argued that the High Court has recorded its own finding on certain issues which the High Court could not go into and therefore the judgment of the High Court is liable to be set aside. We do not agree with the submission made by the learned counsel for appellants. It is settled law that if a finding of fact is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. In the present case we have demonstrated that the judgment of the Company Law Board was given in a very cursory and cavalier manner. The Board has not gone into real issues which were germane for the decision of the controversy involved in the case. The High Court has rightly gone into the depth of the matter. As already stated the controversy in the case revolved around alleged allotment of additional shares in favour of Ramanujam and whether the allotment of

additional shares was an act of oppression of his part. On the issue of oppression the finding of the Company Law Board was in favour of Prathapan i.e. his impugned act was held to be an act of oppression. The said finding has been maintained by the High Court although it has given stronger reasons for the same."

Referring to the above paragraph, Shri Kapur, the learned counsel appearing for the appellants submitted that if the findings arrived at by the Company Law Board is perverse and is based on no evidence, it can be set aside in appeal even though the appeal is permissible only on the question of law. The perversity of the finding itself becomes a question of law. Shri Chatterji, the learned Senior Counsel submitted that only when a finding of fact arrived at by the Company Law Board is found to be perverse or based on no evidence, then only the same can be set aside in appeal. But this is a case where the findings of the Company Law Board are based on documents produced by the parties, under no stretch of imagination it can be said that the findings are based on no evidence or that they are perverse.

As stated earlier, the appellants in order to substantiate their claim that the above two transactions were tainted had relied upon certain documents referred to above and the Company Law Board referring to the said documents recorded the findings against the appellants. Therefore, it cannot be said that the findings are based on no evidence. The question as to whether such findings are perverse or not, it is necessary to refer to the very same documents again. So far as the first transaction is concerned, it is clear from the letter of the UTI Bank dated 26.7.2005 that the term loan of Rs.6 crores had been granted in favour of Torsteel Services Pvt. Ltd. on furnishing certain securities. The primary security is the exclusive charge on Escrow account of payables from OSIL. This clearly shows that whatever amount was payable to Torsteel Services Pvt. Ltd. from the Escrow account of OSIL on account of mining development is furnished as primary security. Therefore, the Company Law Board was right in making any observation that UTI had the confidence of recovering the amount of loan granted in favour of Torsteel Services Pvt. Ltd. because of the business to get from OSIL. There is nothing in the letter to show that OSIL had stood as a guarantor or furnished any security directly or indirectly to the Bank for the purpose of the above loan. On the other hand, it is clear from the said letter that Torsteel Research Foundation stood as a corporate guarantee and an office area of 778 sq.ft. belonging to Torsteel Research Foundation at Bajaj Bhawan, Nariman Point, Mumbai had been furnished as a security. I do not find anything from the letter of the Bank indicating direct or indirect involvement of OSIL in facilitating Torsteel Services Pvt. Ltd. in obtaining loan from UTI by rendering any kind of financial assistance or security. The payables from

Escrow account of OSIL to Torteel Services Pvt. Ltd. for the services rendered by it on account of mine development had been only given as primary security and such payables are the properties of Torsteel Services Pvt. Ltd.

So far as the second transaction is concerned, admittedly OSIL had obtained a loan from UTI Bank to the tune of Rs.6 crores for mine development. The mine development work of OSIL had been undertaken by Torsteel Services Pvt. Ltd. and therefore, the said amount was given as advance to Torsteel Services Pvt. Ltd. for mine development. If Torsteel Services Pvt. Ltd. granted a similar amount of money as loan to Torsteel Research Foundation for the purpose of conversion of warrants into shares of OSIL, it cannot be said that OSIL had directly or indirectly rendered financial assistance to Torsteel Research Foundation either for acquisition of shares from IPICOL or for conversion of warrants into shares of OSIL. The Bank transactions might have taken place on the same date but there is nothing on record to show that OSIL either directly or indirectly funded for acquisition of shares or conversion of warrants into shares. The further objection raised by the appellants was that Torsteel Services Pvt. Ltd. was involved in the business of fisheries but there is nothing on record to show that it was not involved in mine development. Though the transactions shown in the balance sheet in the initial years do not indicate that the said Company was running well, there is nothing on record to disprove the claim of OSIL that it had engaged Torsteel Services Pvt. Ltd. for mine development. Under these circumstances, I find absolutely no error in the findings of the Company Law Board with regard to the above two alleged tainted transactions. Accordingly, on facts, I find that the appellants have miserably failed to prove direct or indirect involvement of OSIL in funding Torsteel Research Foundation in either acquiring the shares from IPICOL or converting the warrants into shares of OSIL as alleged by them and consequently there has been no contravention of Section 77 of the Companies Act.

Shri Kapur, the learned Senior Counsel appearing for the appellants placed reliance on a decision of the Hon'ble Supreme Court in the case of ***Claude-Lila Parulekar (Smt.) v. Sakal Papers (P) Ltd. and others, reported in (2005) 11 Supreme Court Cases 73*** to substantiate his submission that the requirements of Section 77 of the Companies Act, 1956 are mandatory and no company limited by shares, and no company limited by guarantee and having a share capital, shall have power to buy its own shares, unless the consequent reduction of capital is effected and sanctioned in pursuance of sections 100 to 104 or of section 402 of the Act.

Referring to Section 77 of the Companies Act, it was further submitted by Shri Kapur, the learned Senior Counsel that no public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company subject to certain exceptions. According to the learned Senior Counsel, the above two transactions having taken place in contravention of Section 77 of the Act, all such transactions are void.

No doubt the aforesaid decision with reference to Section 108 of the Companies Act, 1956 held the provisions contained therein are mandatory in nature, but the said decision has lost relevance because of the finding arrived at earlier to the effect that neither of the two transactions contravenes Section 77 of the Companies Act, 1956.

8. One of the findings of the Company Law Board in relation to these two transactions is that Bhushan Group became shareholders only after these transactions were completed and that the Bhushan Group has not been affected by these transactions in any manner. Another finding of the Company Law Board that the facts leading to filing of C.A. No.113 of 2009 could not have been collected within four days from the date of filing of the Company Petition and therefore, the allegations made in the said C.A. No.113 of 2009 should have been incorporated in the main Company Petition or in the alternative the appellants should have sought for amendment of the main Company Petition. Challenging the said finding, Shri Kapur, the learned Senior Counsel appearing for the appellants relied on a decision of the Hon'ble Supreme Court in the case of ***Ramesh B. Desai and others v. Bipin Vadilal Mehta and others, reported in (2006) 5 Supreme Court Cases 638***. In the said decision, the Hon'ble Supreme Court observed that a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained, which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. Therefore, unless it becomes apparent from the reading of the company petition that the same is barred by limitation the petition cannot be rejected under Order 7, Rule 11 (d) of the Code of Civil Procedure.

The appellants in the said reported case had filed a Company Petition for rectification of the register of the Company as provided under Section 155 of the Companies Act. Respondents 1 and 2 therein filed an

objection and prayed to dismiss the said Company Petition on the ground that the same was barred by limitation. The application was allowed by the Company Judge and the Company Petition was dismissed on ground of limitation. Division Bench also confirmed the said order of the Hon'ble Single Judge and the matter went to the Hon'ble Supreme Court. On consideration of facts of that case, the matter was remitted back to the High Court for reconsideration. It was contended with reference to the said judgment that long delay in filing the Company Petition was condoned and therefore, delay of four days in filing C.A. No.113 of 2009 could not be a ground for rejecting the petition.

9. On perusal of the impugned order passed by the Company Law Board, I find that the said Company Application No.113 of 2009 was dismissed on merit. Therefore, the above decision cited by Shri Kapur, the learned Senior Counsel appearing for the appellants may not have much relevance in the facts and circumstances of this case. It is the specific case of the appellants in the said petition that on inspection of the records of the Company Law Board, they became aware of the aforesaid alleged two tainted transactions. The date on which the records in the office of the Registrar of Companies were inspected by the appellants has not been mentioned in the petition. On the other hand, the date on which the said C.A. No.113 of 2009 was filed before the Company Law Board, the appellants came out with an open offer published in the "Business Standard" containing such details which could not have been obtained in four days time. The details mentioned in the open offer must have been obtained from the office of the Registrar of Companies much prior to filing of the Company Petition and therefore, the Company Law Board was justified in holding that it was practically impossible on the part of the appellants to inspect the records of Respondents 10 and 11 in the office of the Registrar of Companies in four days time prior to filing of C.A. No.113 of 2009. I do not find any unreasonableness in such findings of the Company Law Board in the impugned order.

Sub-section (2) of Section 77 of the Companies Act provides that no public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of purchase any shares in the Company. Though such a prohibition is available in Sub-section (2), Sub-section (4) of Section 77 provides that if a company acts in contravention of sub-sections (1) to (3) the company, and every officer of the company who is in default shall be punishable with fine which may extent to ten thousand rupees. Though this point was not argued by the learned counsel for the parties, the

Company Law Board has taken note of it in the impugned order and has observed that contravention of the prohibition contained in Sub-section (2) of Section 77 only attracts a penalty under Sub-section (4) of Section 77. Therefore, even assuming for the sake of argument that Shri Kapur, the learned Senior Counsel appearing for the appellants is right in saying that there has been contravention of Sub-section (2) of Section 77, such contravention can only attract a penalty under Sub-section (4) of Section 77.

10. For the reasons stated above, I do not find any merit so far as these two Company Petition Nos. 40 and 41 of 2009 are concerned.

11. With the above allegations made in the Company Petition, now I proceed to examine the case of the appellants in COPET No.39 of 2009.

12. This appeal has been filed by OSIL against the part of the impugned judgment and order passed by the Company Law Board in respect of the directions to OSIL for conversion of 35 lac warrants held by Bhushan Energy Limited into 35 lac equity shares which would constitute approximately 12% of the diluted share capital. Shri P. Chatterji, the learned Senior Counsel appearing on behalf of the OSIL assailed this part of the judgment and order of the Company Law Board on the following grounds:

> (a) A company petition for oppression and mismanagement under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for an isolated alleged act of oppression.
>
> (b) A company petition for oppression and mismanagement under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for ulterior and collateral purposes.
>
> (c) An applicant in a petition under Sections 397 and 398 of the Companies Act cannot be allowed to claim reliefs beyond the company petition by way of interim applications which reliefs are not interim in nature but final.
>
> (d) A company petition under Sections 397 and 398 of the Companies Act deserves to be statutorily dismissed by the Company Law Board unless it is averred and proved by the applicant that it was a case for just and equitable winding up of the company and the Company Law Board had come to a conclusion that winding up would unfairly prejudice the interest of the shareholders and the same can be remedied by passing directions in respect of such oppression or mismanagement.

(e) A petition under Sections 397 and 398 of the Companies Act could not be used for the purposes of enforcing a contract between a company and a shareholder or any third party.

(f) No company petition under Sections 397 and 398 could have been filed for seeking conversion of warrants into equity shares which had been transferred without following the mandatory provision of the securities Contract Regulation Act as according to the respondents in this appeal the warrants are marketable securities and thus covered by the Companies Act.

(g) The Company Law Board could not have come to a conclusion that the company was not entitled to hold a general meeting for deciding the fate of warrants issued under Sections 81(1A) of the Companies Act which is a special procedure for issuing shares except to existing shareholders.

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13. So far as ground No.(a) is concerned, with reference to Sections 397 and 398 of the Companies Act, it was contended that under the said provision, a shareholder having more than 10% shares may submit a complaint before the Company Law Board against the acts of mismanagement or oppression provided (a) the complainant proves before the Company Law Board that the act of mismanagement or oppression would lead to winding up of the company which shall be prejudicial to the shareholders (b) the acts of oppression and mismanagement continued up to the date of filing of the petition (c) the alleged acts of mismanagement of the company affects the rights of the complainant as regards his status as a shareholder of the company and in regard to his proprietary rights.

According to the learned Senior Counsel unless the above requirements are satisfied, a derivative action is not maintainable as it is the ante-thesis to the democratic operation of the Company wherein the shareholders appoint the Directors and Directors are entitled to decide for and on behalf of the shareholders such conduct and acts which are for the benefit of the company. Such a democratic process cannot be interfered with or over-looked by a court unless the above conditions are met at the time of filing of the applications under Sections 397 and 398 of the Companies Act. An isolated or a stray act of the company affecting the rights of a

shareholder cannot attract Section 397 and 398 of the Companies Act. In this connection, reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad and others, reported in (2005) 11 Supreme Court Cases 314***. The observation of the Hon'ble Supreme Court in paras 181 and 183 of the judgment relied upon are quoted below:

> "181. The jurisdiction of the court to grant appropriate relief under Section 397 of the Companies Act indisputably is of wide amplitude. It is also beyond any controversy that the court while exercising its discretion is not bound by the terms contained in Section 402 of the Companies Act if in a particular fact situation a further relief or reliefs, as the court may deem fit and proper, are warranted. (See Bennet Coleman & Co. v. Union of India and Syed Mahomed Ali v. R. Sundaramoorthy). But the same would not mean that Section 397 provides for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the court must arrive at a conclusion upon analyzing the materials brought on record that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The conduct, thus, complained of must be such so as to oppress the minority of the members including the petitioners vis-à-vis the entire body of shareholders which a fortiori must be an act of the majority. Furthermore, the fact situation obtaining in the case must enable the court to invoke just and equitable rules even if a case has been made out for winding up for passing an order of winding up of the company but such winding up order would be unfair to the minority members. The interest of the company vis-à-vis the shareholders must be uppermost in the mind of the court while granting a relief under the aforementioned provisions of the Companies Act, 1956.
>
> 183. The remedy under Section 397 of the Companies Act is not an ordinary one. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The acts complained of may either be designed to secure pecuniary advantage to the detriment of the oppressed or be a wrongful usurpation of authority".

Reliance was also placed on a judgment of Kerala High Court in the case of ***V. J. Thomas Vettom v. Kuttanad Rubber Co. Ltd., reported in 1984 (56) Company Cases 284***. The relevant observation of the Hon'ble High Court in the said case is quoted below:

> "Every kind of oppression cannot be remedied by the court. The oppression must be such as to justify the winding up of the company on just and equitable grounds. Since the words used are "are being conducted", the action complained of must be a continuous one and not either an isolated or a stale one. Once the court is satisfied that the complaint is made without bona fides and to settle old scores or with the sole intention of mud-slinging, no orders under s. 397 or s. 398 will be passed. The court must have strong grounds before it to order winding up. An order under s. 397 or s. 398 can be supported only if such grounds are present. The fact that the complaining parties were themselves participants in the alleged activities will be one of the factors to dissuade the court from exercising its powers under the section. Delay and acquiescence in the acts complained of will also be circumstances against the grant of reliefs. The powers of the court under s. 402 are wide. But the courts have always exercised restraint in interfering with the affairs of the company, for the affairs of the company are normally its own concern and the concern of its shareholders. It is only when the facts and evidence before the court are such as to persuade it to hold that interference with the affairs of the company is necessary, that it would exercise its powers".

Referring to the Company Petition, it was contended that the only action against OSIL in the petition filed under Sections 397 and 398 of the Companies Act is non-conversion of 35 lac warrants into equity shares in favour of the Bhushan Group. With reference to the above two judgments, it was contended that an isolated alleged act of oppression or mismanagement cannot attract the provisions of Section 397 and 398 of the Companies Act and such alleged act is neither for loss nor for benefit of the company. It was also contended that non-conversion of warrants into equity shares does neither arise out of the proprietary right of the Bhushan group as a shareholder of the company nor does it arise out of any shareholders rights. Therefore, any alleged action of refusal to covert the warrants into equity shares is outside the ambit of the provisions contained in Sections 397 and 398 of the Companies Act.

14. So far as the ground No.(b) is concerned, it was contended that a petition under Sections 397 and 398 of the Companies Act cannot be used for ulterior or collateral purposes. It is a matter of record that the Bhusan Group who are the petitioners before the Company Law Board seek to take over OSIL through acquisition of shares in OSIL with an intent to change the management. Section 397 and 398 of the Companies Act does not cover an eventuality that the Company's defence to a hostile take over should be seen as an oppressive act on behalf of the company. The intention of the Bhushan Group is disclosed from their public announcement under the SEBI Takeover Code. It was specifically announced that 35 lac equity shares which would arise out of the warrants would be utilized for the purposes of taking over the OSIL in a hostile manner. Therefore, the entire purpose of filing the application under Section 397/398 of the Companies Act is neither to propagate the interest of the company nor is it for the purposes of protecting the right of a shareholder but it is only to seek an increase in voting power through the subterfuge of conversion of warrants into equity shares obtained from an existing shareholder who was well known to the OSIL for the sole purpose of taking over the company. Reliance is placed on the following clauses of the Public Announcement made by the Bhushan Group which according to Shri Chatterji, the learned Senior Counsel appearing for the OSIL discloses the intention of Bhushan Group. The relevant two clauses are quoted below:

> "3.6 The Acquirer and PACs intend to acquire a majority shareholding in the Target Company accompanies with a change in control of the Target Company. Consequently, this offer is being made in compliance with Regulation 10 and 12 of the Regulations. The Acquirer and/or the PACs may acquire additional equity shares of the Target Company, including from the open market, through negotiation or otherwise, in accordance with the Regulations upto 7 working days prior to closure of the offer. Furthermore, the Acquirer may decide to exercise warrants mentioned under paragraph 1.3 above upto working days prior to closure of the offer. The Acquirer has requested OSIL for registering the warrants in its name".
>
> 7.2 The acquisition of Equity shares will enable the Acquirer (taken together with the shareholding of the PACs in the target company) to get a substantial ownership in the target company. The Bhushan Group has considerable interest in the Indian Steel Industry including the manufacture of valued added auto grade steel products with an increasing presence in the primary steel sector. The acquisition will enable the Bhushan Group to scale up its business

operation by further expanding its presence in the primary steel sector, and providing access to upstream iron ore mines. In addition, the acquisition will also result in synergies for the target company, including the sharing of best practices in manufacturing and quality assurance system and processes, enhanced human capital and managerial talent, and potential and financial operational synergies".

In this connection, reliance was placed on the judgment of ***Re Bellador Silk Ltd., reported in (1965) 1 All England Law Reports 667***. The relevant portion of the judgment relied upon by OSIL is quoted below:

> "It became obvious during Moss Simmons' cross-examination that he did not really want the relief for which he was asking in the petition and that its real object was to achieve a collateral purpose, namely, to get some satisfaction in regard to the repayment to Bellador Ltd. or to the Simmons group of companies, of the outstanding loan. Indeed, he made no bones about this in the witness-box. For example, he was asked if he wanted a receiver appointed and he said that of course he did not, and, although he stated that there were some irregularities of which he disapproved, he time and again emphasized that his real concern was to force an agreement with his co-directors for the repayment of the loans to the Simmons group. The urgency of this became apparent when he explained that the money was needed for the purpose of honouring an agreement made with the Inland Revenue in regard to the payment of arrears of tax. If the loan was not repaid, he was, he said, faced with ruin. A petition which is launched not with the genuine object of obtaining the relief claimed, but with the object of exerting pressure in order to achieve a collateral purpose is, in my judgment, an abuse of the process of the court, and it is primarily on that ground that I would dismiss this petition".

In the case of ***Palghat Exports Pvt. Ltd. v. T.V. Chandran and others, reported in 1994 (79) Company Cases 213***, the Kerala High Court accepted the above view and held as under:

> "We have already referred to what P.W.1 has said as regards the real object of the petition. This real object which is tacitly reflected in the prayers made by the petitioners has been expressly stated in the deposition of P.W.-1. The first prayer is to pass appropriate orders for the purchase of the shares held by the

> petitioners. We feel that in view of the clear and unambiguous statement by P.W.-1, it is difficult for us to discern a different object which will satisfy section 397 of the Act other than an outside object of section 397 of recovering the amount invested for purchasing the shares. Of course, counsel for the respondents wanted to say that the object of the petition was to take action under section 397 of the Act and the relief the petitioners wanted was recovery of the money they have invested. This explanation, we feel, is not commendable and so we cannot accept it, we feel that we have to follow the dictum laid down in Bellador Silk Ltd., In re [1965] 1 All ER 667 (Ch D). We hold that the petition is liable to be dismissed on this sole ground".

Reliance was also placed on the judgment of ***Re J E Cade & Son Ltd., reported in (1992) BCLC 213***, where it was held that a petition for co-lateral purposes is not maintainable. It was contended on behalf of the appellants that the clear motive of the respondent is to some how take over the appellant company for its iron ore mines by seeking the conversion of warrants acquired by the respondent from existing shareholders to whom such warrants were issued on a clear understanding that it will not result in change in management and control of the appellant Company. The entire purposes of seeking conversion of warrants into equity shares is to increase the shareholding of the respondents in the appellant company in a manner that it would assist the respondent to change management of the appellant company so that the respondents are able to use the mineral and mining leases of the appellant company for their other competitive business of producing steel and sponge iron in the State of Orissa. This being the collateral purpose, the Company Law Board should have dismissed the company petition on that basis alone. A decision cited by the respondent before the Law Board in the case of ***Re Astec (BSR) plc, reported in (1998) 2 BCLC 556*** was also relied upon to substantiate the contention that a petition for oppression cannot be used for exerting pressure for making of a take over bid. The relevant portion of the aforesaid judgment relied upon by Shri Chatterji, the learned Senior Counsel is quoted below:

> "In this connection I should perhaps note that although Emerson's notice of motion seeks to strike out the petition on the alternative basis that it is frivolous and vexatious, that is essentially a matter of form only. <u>There is certainly nothing frivolous about the petition, and if and to the extent that it is vexatious it can only be so because it is an abuse of process in the sense which Plowman J used that expression in Re Bellador Silk Ltd.</u>

"Returning therefore to the question of abuse of process, in my judgment Mr. Potts's submission is correct. I fully accept that the petitioners genuinely desire the relief claimed, that is to say an order for the buy-out of their own shares. Equally, however, Mr Stoddart makes clear in his affidavit, and Mr Heslop made clear in argument, that they desire that relief not for itself but because they hope that, if granted, it will lead to something else, that something else being something which the court would not order under s 459, namely a takeover bid by Emerson. The petition is, in my judgment, being used for the purposes of exerting pressure in order to achieve a collateral purpose, that is to say, the making of a takeover bid by Emerson.

The petitioners' attempt to use s 459 as, in effect, a tactical ploy to force Emerson to make a takeover bid, though no doubt wholly well-intentioned, is in my judgment misguided as a matter of law. As such it constitutes in my judgment an abuse of process. That in itself would be sufficient ground for striking the petition out.

Mr. Potts also submitted as another ground for striking out the petition that if the petition were allowed to proceed, there is no realistic prospect of the court granting the relief sought. In the circumstances it is unnecessary for me to consider that submission.

In the result, for the reasons which I have attempted to express, I conclude that this petition is plainly and obviously unsustainable, that it is bound to fail, and that it should be struck out. I so order".

15. With reference to above decision, it was contended that the entire purpose of filing the petition under Sections 397 and 398 of the Companies Act is first stopping any change of the shareholding pattern, then seeking to stop the promoters to go away from the Company by selling their shares and force the promoters to sale their shares to the respondents.

16. In relation to Ground No.(c), it was contended on behalf of the appellant that a petition under Sections 397 and 398 of the Companies Act is required to be filed before the Company Law Board in terms of Regulation 14 of the Company Law Board Regulations. The said Regulations prescribe a format for filing such a petition whereas there is no format for filing an interim application under Section 402 of the Companies Act. With reference to the above, it was also contended that the Misc. petition filed under

Section 397/398 of the Companies Act did not make out a case of either mismanagement or oppression but by way of Misc. applications, allegations of mis-management and oppression were attempted to be brought in. Reliance was placed on paragraph-135 of the judgment in ***Sangramsingh P. Gaekwad v. Shanta Devi P. Gaekwad*** (supra). The said paragraph is quoted below:

> "135. Despite such categorical admissions in the pleadings, a statement was made across the bar that at the time of filing of the Company Petition the Respondent 1 herein did not have all information which came to light at a much later stage. It was urged that only with a view to obtain complete reliefs, prayers made in the company petition were amended and reliefs had been granted by the High Court keeping in view the pleadings and affidavits filed by the parties in all the three matters. We have our own doubts how far the procedure adopted was correct when in a case of oppression the court must strictly go by the pleadings made in the application. The provisions of the Civil Procedure Code do not envisage that pleadings in any other case should be the basis for grant of relief, particularly when the pleas taken in both the petitions are contradictory and inconsistent with each other. Before us affidavits from different proceedings made by the same person or by the other supporting or opposing the application have been placed. They have not been cross-examined. Their attention had not been drawn to their earlier statements which could be done only in terms of Section 145 of the Evidence Act. With a view to elicit the truth the court must have before it a clear picture. In this case, unfortunately, the parties herein have not made any efforts to examine themselves in court so as to enable the other side to cross-examine them. Had the parties to the proceedings been examined and cross-examined, they could have been confronted with the earlier statements made by them in another affidavit."

Reliance was also placed on another decision in the case of ***Mohta Bros. (P) Ltd. and others V. Calcutta Landing and Shipping Co. Ltd. and others, reported in (1970) Company Cases Vol.40 page 119***. The relevant portion of the judgment referred to by the appellants is quoted below:

> "Full particulars must be given by a petitioner in an application under Sections 397 and 398 of the Act of acts of mismanagement and oppression. Vague and uncertain allegations of mismanagement

and oppression, although they may constitute grounds for suspicion, do not entitle a petitioner to ask the court to embark upon an investigation into the affairs of the company, in the hope that in consequence of such investigation, something will turn up which will enable the court to grant relief to the petitioner. It is true that it may not always be possible for one or a group of shareholders to furnish particulars of acts of mismanagement, fraud, oppression, misappropriation or other improper acts, but such inability on the part of shareholders, who have no access to the books of the company, is by no means a ground for directing an investigation into the affairs of the company or for giving any other relief to a petitioner. The petitioner must set out the facts which constitute acts of mismanagement, misappropriation, fraud or oppression and prove, prima facie, at any rate, that on those facts an investigation is called for. If a petitioner fails to set out the facts and produce satisfactory proof in support of those facts no order for investigation into the affairs of the company can be made, nor can any relief be granted to the petitioner. A shareholder has no right of access to the books of the company, but denial of access to such books is not an act of oppression as has been held by this court in a Bench decision, Rajya Lakshmi (Lalita) v. Indian Motor Co. Ltd. If a petitioner cannot make out a case of mismanagement and oppression, because he was unable to collect materials for the purpose, it is not for the court to direct the directors of the company to offer inspection of the company's books and accounts to enable a petitioner to collect materials for the petition under Sections 397 and 398 of the Act, or to direct investigation into the company's affairs and accounts by an independent person to bring out materials for further orders against the company, its directors or shareholders".

Reliance was also placed on the judgment in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd., reported in 1965 (35) Company Cases, Page-351*** and the relevant portion of the judgment relied upon is quoted below:

"These observations from the four cases referred to above apply to s. 397 also which is almost in the same words as s. 210 of the English Act, and the question in each case is whether the conduct of the affairs of a company by the majority shareholders was oppressive to the minority shareholders and that depends upon the facts proved in a particular case. As has already been indicated, it is not enough to show that there is just and equitable cause for winding

> up the company, though that must be shown as preliminary to the application of s. 397. It must further be shown that the conduct of the majority shareholders was oppressive to the minority as members and this requires that events have to be considered not in isolation but as a part of a consecutive story. There must be continuous acts on the part of the majority shareholders, continuing up to the date of petition, showing that the affairs of the company were being conducted in a manner oppressive to some part of the members. The conduct must be burdensome, harsh and wrongful and mere lack of confidence between the majority shareholders and the minority shareholders would not be enough unless the lack of confidence springs from oppression of a minority by a majority in the management of the company's affairs, and such oppression must involve at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder. It is in the light of these principles that we have to consider the facts in this case with reference to Section 397".

With reference to the above judgments, it was contended on behalf of the appellants that the facts mentioned in C.A.Nos.113, 161, 213, 258 and 295 of 2009 contained certain allegations which did not find place in the main petition. No amendment was sought for by the respondents for amending the Company Petition and therefore, in view of the above decisions, the interim applications should have been dismissed as being beyond the pleadings of the Company Petition. The Company Law Board in the impugned order allowed C.A.Nos.213, 258 and 295 of 2009 so far as it relates to conversion of warrants into equity shares even though there was no such allegation of oppression in the main petition in relation to the said amendments. The Court's jurisdiction regarding orders to be passed in interim applications was considered in the case of ***Cotton Corporation of India Limited V. United Industrial Bank Limited and others, reported in AIR 1983 Supreme Court 1272*** and the relevant portion of the judgment is quoted below:

> "It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted. In State of

> Orissa v. Madan Gopal Rungta: (1952) SCR 28: (AIR 1952 SC 12) a Constitution Bench of this Court clearly spelt out the contours within which interim relief can be granted. The Court said that 'an interim relief can be granted only in aid of, and as ancillary to, the main relief which may be available to the party on final determination of his rights in a suit or proceedings. If this be the purpose to achieve which power to grant temporary relief is conferred, it is inconceivable that where the final relief cannot be granted in the terms sought for because the statute bars granting such a relief ipso facto the temporary relief of the same nature cannot be granted. To illustrate this point, let us take the relief which the Bank seeks in its suit. The prayer is that the Corporation be restrained by an injunction of the Court from presenting a winding-up petition under the Companies Act, 1956 or under the Banking Regulation Act, 1949. In other words, the Bank seeks to restrain the Corporation by an injunction of the court from instituting a proceeding for winding-up of the Bank. There is a clear bar in Section 41 (b) against granting this relief. The Court has no jurisdiction to grant a perpetual injunction restraining a person from instituting a proceeding in a court not subordinate to it, as a relief, ipso facto temporary relief cannot be granted in the same terms. The interim relief can obviously be not granted also because the object behind granting interim relief is to maintain status quo ante so that the final relief can be appropriately moulded without the party's position being altered during the pendency of the proceedings."

Relying on the said decision, it was contended on behalf of the appellant that an interim relief can be granted provided it is in the aid of the final relief and there being no nexus between the pleading made in the Company Petition and the pleadings made in the Misc. case, the Court could not have allowed such prayer made in the Misc. application.

17. In relation to Ground No.(d), it was contended that Section 397 and 398 of the Companies Act is an alternative remedy to winding up under Section 433 (f) of the Companies Act. Before the Company Law Board can exercise jurisdiction under Section 397 and 398 of the Companies Act, it has come to a conclusion that the acts of the management are fit to lead the company to winding up. Without such a finding, the Company Law Board cannot exercise jurisdiction under the above two provisions for the purpose of protecting the interest of the Company from winding up. In this connection, reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***Five Minute Car Wash Service Ltd., reported in***

(1966) Vol.36 Company Cases 566. Relevant portion relied upon by the learned counsel is quoted below:

> "This is not, as I read the petition, relied upon as an act of oppression. The allegations of oppression are to be found in paragraph 13, which I have read. Before considering whether these allegations, if proved-as for the present purpose I assume that they will be amount to oppression within the meaning of section 210, I propose to say something about the scope of that section. To succeed in obtaining relief under the section a member of a company must have established that at the time when his petition was presented, the affairs of the company were being conducted in a manner oppressive of himself, or of a part of the members including himself, and unless a petitioner in his petition alleges facts capable of establishing that the company's affairs are being conducted in such a manner, the petition will disclose no ground for granting any relief and will be dismissed in limine as being demurrable.
>
> First, the matters complained of must affect the person or persons alleged to have been oppressed in his or their character as a member or members of the company. Harsh or unfair treatment of the petitioner in some other capacity, as, for instance, a director or a creditor of the company, or as a person doing business or having dealings with the company, or in relation to his personal affairs apart from the company, cannot entitle him to any relief under section 210.
>
> Secondly, the matters complained of must relate to the conduct of the affairs of the company.
>
> Thirdly, they must be such as not only to make the winding up of the company just and equitable, but also to lead to the conclusion that the affairs of the company are being conducted in a manner which can properly be described as "oppressive" of the petitioner, and, it may be, other members. The mere fact that a member of a company has lost confidence in the manner in which the company's affairs are conducted does not lead to the conclusion that he is oppressed; nor can resentment at being outvoted; nor mere dissatisfaction with or disapproval of the conduct of the company's affairs, whether on grounds relating to policy or to efficiency, however well founded. Those who are alleged to have acted oppressively must be shown to have acted at least unfairly towards those who claim to have been oppressed. In Scottish Co-operative Wholesale Society Ltd. v. Meyer (a case under section

210) Viscount Simonds L.C. adopted a dictionary definition of the meaning of "oppressive" as "burdensome, harsh and wrongful."

Reference was also made to the following paragraph in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd.*** (supra) by the learned counsel for the appellant which has been quoted earlier.

Reliance was also placed in the case of ***Rajahmundry Electric Supply Corporation Ltd. v. A. Nageswara Rao & others, reported in 1956 (26) Company Cases 91 (SC)*** and in the case of ***World Wide Agencies Pvt. Ltd. and another Vs. Mrs. Margaret T. Desor and others, reported in 1990 (67) Company Cases 607 (SC***). The relevant part of the judgment in both the cases are quoted below respectively:

> " It was next contended that the allegations in the application were not sufficient to support a winding up order under section 162, and that therefore no action could be taken under section 153-C. We agree with the appellant that before taking action under section 153-C, the court must be satisfied that circumstances exist on which an order for winding up could be made under section 162".

> " We are of the opinion that the averments which a petitioner would have to make to invoke the jurisdiction of sections 397 and 398 of the Act are not destructive of the averments which are required to be made in a case for winding up under section 433(f) on the just and equitable ground, though they may appear to be rather conflicting, if not contradictory. We are in agreement with the High Court that the petition must proceed up to a certain stage which is common to both winding up and invoking the jurisdiction of sections 397 and 398 and though there may be some difference in the procedure to be adopted, it is not such which is irreconcilable and cannot simultaneously be gone into".

In the case of ***Needle Industries (India) Ltd. and others V. Needle Industries Newey (India) Holding Ltd. and others, reported in (1981) 3 Supreme Court Cases 333***, the Hon'ble Supreme Court held that in an application under Section 210 of the English Companies Act, as under Section 397 of our Companies Act, before granting relief the court has to satisfy that to wind up the company will unfairly prejudice the members complaining of oppression, but that otherwise the facts will justify the making of a winding up order on the ground that it is just and equitable that the company should be wound up. In the case of ***Hanuman Prasad Bagri and***

others v. Bagress Cereals Pvt. Ltd. and others, reported in (2001) 105 Company Cases 493, a similar view was expressed. Referring to the above decision, it was contended on behalf of the appellant that in the Company Petition there is no pleading which can lead to winding up of the appellant's company. Unless materials are placed before the Company Law Board to its satisfaction that it is a fit case for winding up, no order on a petition under Section 397/398 of the Companies Act can be passed.

18. In relation to Ground No.(e), it was contended that Section 397 and 398 of the Companies Act cannot be used for the purposes of enforcing a contract between a company and a shareholder or any third party. Referring to C.A. No.295 of 2009 filed before the Company Law Board, it was contended that the respondents have admitted in the said petition that warrants are "option contract". Once it is admitted that warrants are contracts, the same cannot be enforced in an application under Section 397/398 of the Companies Act and reliance was placed on paragraph 185 of the judgment in the case of ***Sangramsingh P. Gaekwad Vs. Shantadevi P. Gaekwad*** (supra). The said paragraph is quoted below:

> "185. It has to be borne in mind that when a complaint is made as regard violation of statutory or contractual rights, the shareholder may initiate a proceeding in a civil court but a proceeding under Section 397 of the Act would be maintainable only when an extraordinary situation is brought to the notice of the court keeping in view the wide and far-reaching power of the court in relation to the affairs of the company. In this situation, it is necessary that the alleged illegality in the conduct of the majority shareholders is pleaded and proved with sufficient clarity and precision. If the pleadings and/or the evidence adduced in the proceedings remains unsatisfactory to arrive at a definite conclusion of oppression or mismanagement, the petition must be rejected."

In the case of ***Incable Net (Andhra) Limited and others v. AP Aksh Broadband Limited and others, reported in (2010) 6 Supreme Court Cases 719***, the Hon'ble Supreme Court held that when there is a breach of contract, the same cannot constitute the ingredients of a complaint under Sections 397, 398, 402 and 403 of the Companies Act, 1956. Such breach could give rise to an action of breach of contract under Section 73 of the Indian Contract Act, 1972. Relying on the above decision, it was contended on behalf of the appellant that conversion of warrants into equity shares being totally decide the right of a shareholder, could not be brought before the Company Law Board for adjudication.

19. In relation to Ground No.(f), it was contended that Section 397 and 398 of the Companies Act could not have been used for seeking conversion of warrants into equity shares which had been transferred without following the mandatory provision of the securities Contract Regulation Act specially considering the submission of the respondents that warrants are marketable securities and thus covered by the Companies Act. Referring to the cases of ***East Indian Produce Ltd. v. Naresh Acharya Bhaduri and others, reported in 1988 (64) Company Cases 259, B.K. Holdings (P) Ltd. v. Prem Chand Jute Mills and others, reported in 1983 (53) Company Cases 367 and Naresh K. Aggarwala and Company v. Canbank Financial Services Limited and another, reported in (2010) 6 Supreme Court Cases 178***, it was contended that if a warrant is construed to be marketable securities then any transfer of the same has to comply the provision contained in Securities Contracts Regulation Act. In none of the pleadings, the respondents ever took the plea that warrant is a marketable security and being covered by SCRA was enforceable by the Company Law Board.

20. In relation to Ground No.(g), it was submitted that in the facts and circumstances of the case, the Company Law Board could not have come to a conclusion that the Company was not entitled to hold a general meeting for deciding the fate of warrants issued under Section 81 (1A) of the Companies Act which is a special procedure for issuing shares except to existing shareholders. It was further contended that by virtue of Chapter XIII of the SEBI DIP Guidelines, 2000, Section 81 and Section 173 of the Companies Act have been made applicable to the warrants to be used by a company to persons other than existing shareholders. Though under Section 173 of the Companies Act, a limited disclosure is required to be made in the form of an explanatory statement with the proposed Special Resolution, the SEBI Guidelines stipulate that information as required under Section 173 of the Companies Act is required to be provided in the explanatory statement. In the present case, warrants were issued after passing of a special resolution accompanied with an explanatory statement wherein it is clearly stipulated that warrants shall not be used for change in management. Since the respondents sought to misuse the warrants for achieving change in management as per their own public announcement, the appellant sought opinion of legal experts and it was opined that the company must hold another general meeting if the warrant was allowed to be used for change in management of the company. The purpose of an explanatory statement is that the shareholders make up their decision in one way or the other on the basis of the said statement. Therefore, the explanatory statement is required to be given full details otherwise it would

amount to misleading the shareholders. Relying on a decision of the Hon'ble Supreme Court in the case of ***Nanalal Zaver and another V. Bombay Life Assurance Co. Ltd. and others, reported in 1950 SCR 391***, it was contended that efforts of a company to avert a takeover which is not liked by the existing shareholders by an outsider, by holding a general meeting to issue further shares cannot be held to be an oppressive act if the company feels that the takeover would not benefit the company. Reference was also made by the learned counsel to the following portion of the judgment in the case of ***Shanti Prasad Jain V. Kalinga Tubes Ltd.*** (supra) in support of the above contention:

> "We have already said that the public company which came into existence in 1957 was not bound by the agreement of 1954 and could offer shares to such persons as it decided to do in general meeting in accordance with section 81. The mere fact that in the meeting of March 29, 1958, it was decided to offer shares to others and not to the existing shareholders would not therefore necessarily mean oppression of the minority shareholders. The majority shareholders were not bound to accept the view of the minority shareholders that new shares should be allotted only to the existing shareholders. It also appears that the Patnaik group was afraid at the time when the new shares were being issued that as they had no money the appellant group would take up the entire new issue and would thus obtain majority control of the Company. This they wanted to avoid and that is why the new issue was resolved in general meeting to be issued to others and not to the existing shareholders. If this was the reason why new shares were not issued to the existing shareholders, it can hardly be said that the action of the majority shareholders in passing the resolution which they did on March, 29, 1958, was oppressive to the minority shareholders. The matter would have been different if the seven persons to whom shares were eventually allotted in July 1958, were benamidars or stooges of the Patnaik or Loganathan group, for in that case it may be said that these two groups forming the majority in the general meeting had acted fraudulently and unfairly by depriving the appellant of what he would have got under section 81. But there can be no doubt that the seven persons to whom the shares were eventually allotted are respectable persons of independent means. There is nothing to show that they were stooges or benamindars of the Patnaik and Loganathan groups. The action of the majority shareholders in allotting the new shares to outsiders and not to the

existing shareholders cannot therefore in the circumstances be said to be oppressive of the appellant and his group.

It is true that by the beginning of 1958 there were differences between the appellant and the Patnaik and Loganathan groups and there was loss of confidence between them. But mere loss of confidence between these groups of shareholders would not come within section 397 unless it be shown that this lack of confidence sprang from a desire to oppress the minority in the management of the company's affairs and that there was at least an element of lack of probity and fair dealing to a member in the matter of his proprietary right as a shareholder".

21. Before dealing with the submission of Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group, it is necessary to refer to the submissions made by the learned counsel with regard to acquisition of 35,00,000 warrants by Bhushan Energy Limited, one of the petitioners before the Company Law Board. According to the respondents, in the year 2007, the company was going through an extremely difficult financial situation and it decided to make a further issue of capital on a preferential basis by way of allotment of warrants which would be convertible into shares at a later stage following the mandatory procedures laid down in SEBI (Disclosure and Investor Protection) Guidelines, 2000 (hereinafter called "DIP Guidelines") In pursuance of such a decision, on 8.10.2007 a Postal Ballot Notice was given to all the shareholders asking for their consent regarding certain resolutions passed by the Board. Resolution No.2 proposed to issue 40 lakh warrants to TRFI Investment Private Limited, a promoter group company on preferential basis with each warrant carrying the right to purchase one fully paid up equity share of Rs.10/- each of the company at a price of Rs.225/- per share. The minimum price of such warrants had been fixed in accordance with the SEBI Guidelines and the equity shares to be allotted on conversion were to rank pari passu in all respects with the existing fully paid up equity shares of the company. By the same resolution, it was also decided to issue 20 lakh warrants in favour of one Prakausali Investments (India) Private Limited, an existing shareholder known to the promoters. The consent of the General Body of the shareholders having been obtained, the company issued the warrants to TRFI as well as Prakausali. At a subsequent stage in the Annual General Meeting held on 15.10.2007, the company again resolved to issue 30,00,000 warrants to TRFI and 15,00,000 warrants to Prakausali on the same terms and conditions. Both the resolutions were implemented and consequently TRFI became holder of 70,00,000 warrants whereas

Prakausali became holder of 35,00,000 warrants. A condition was imposed that the warrants could not be transferred before 19.12.2008. After the aforesaid lock in period was over on 15.1.2009, Bhushan Energy Ltd. one of the petitioners before the Company Law Board acquired the 35,00,000 warrants which had been issued to Prakausali for valuable consideration and became entitled to get the warrants converted into equity shares. After acquisition of the warrants on 13.2.2009, Bhushan Energy Ltd. wrote to the Registrars of the company to transfer the warrants in its name and it was informed that all related documents have been forwarded to the company for doing the needful. Accordingly the matter was pursued with the company through letters and in the meanwhile on 24.2.2009 the application under Sections 397 and 398 of the Companies Act was filed before the CLB and one of the prayers in the company petition was for a direction to the company to convert 35,00,000 warrants acquired by Bhushan Energy Ltd. into equity shares.

22. Now coming to the reply in relation to the grounds taken by Shri Chatterji, the learned Senior Counsel appearing for the appellant OSIL, the following submissions are made by Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group.

SUBMISSIONS MADE BY SHRI KAPUR, THE LEARNED SENIOR COUNSEL FOR BHUSHAN GROUP

23. In reply to Ground No.(a), it was contended that the mismanagement and misconduct are more than one. On one hand there is illegal refusal of the company to convert 35,00,000 warrants into equivalent number of equity shares and on the other hand there is violation of Section 77 (2) of the Companies Act time and again (on three occasions) and there are also other facts regarding attitude of the promoters and majority shareholders and their collusion and conspiracy with the Monnet group in the domestic forum. This collusion is proved by the public announcement made by the Monnet Group claiming itself to be a new promoter along with original promoters and asserting various rights on the basis of a share purchase agreement dated 24.2.2009 whereby the professed object was to confirm the majority of the management in favour of Monnet Group. Therefore, the acts of mismanagement or oppression alleged are not based on isolated incident but are based on series of incidents. It was also contended that even if the act of mismanagement or oppression alleged in the company petition is an isolated one, still then, an application under Section 397 and 398 of the Companies Act will be maintainable. The following observation of the Hon'ble Supreme Court in the case of ***Needle Industries (India) Ltd.***

and others v. Needle Industries Newey (India) Holding Ltd. and others (supra) which is quoted below was relied upon by the learned Senior Counsel:

> "an isolated act which is contrary to law *may* not necessarily and by itself support the inference that the law was violated with a malafide intention or that such violation was burdensome, harsh and wrongful. *But a series of illegal acts following upon one another* can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed."

Referring to the Gaekwad case also it was contended that an isolated incident may not be enough for grant of reliefs which otherwise clearly indicates that there is no such absolute rule and it all depends upon the facts of a particular case.

Reference was made to a decision of Calcutta High Court in the case of ***Ramashankar Prosad and others V. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966 Calcutta 512*** where it was held that if the oppression is of short duration but is of such a lasting character that redress is impossible by calling Board meetings or general meetings of the company, a case for intervention under Section 397 is made out.

It was also contended that Section 397neither contemplates nor requires a continuous course of oppressive wrongful conduct over a period of time. If the Court is satisfied that a single wrongful act is such that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act the Court is entitled to interfere by an appropriate order under Section 397 of the Act.

24. In reply to Ground No.(b), it was contended that in the matter of warrants, the promoter group had allotted 75,00,000 warrants to themselves on preferential basis. They were also quickly converted into equivalent number of shares after the company petition was filed before the CLB. Nobody questioned conversion of these warrants into shares in favour of the promoter group but on the contrary the promoter group though converted the warrants held by TRFI did not do so in the case of Bhushan Energy Ltd. The legitimate request made by Bhushan Energy Ltd. for conversion of warrants was castigated as an attempt to take over the company. The standard applied by the company in case of warrants given to TRFI in contradistinction to the warrants given to Bhushan Energy Limited

are discriminatory, arbitrary and unfair. The ground on which conversion of the warrants into shares held by Bhushan Energy Ltd. was refused is that the Bhushan group would take over the management and control of the company. According to the respondents, this argument was factually not correct and the same has also been held by the Company Law Board in the impugned order.

25. In reply to Ground No.(c), it was contended that when the company petition was presented before the CLB, a demand had been made for registration of warrants in the name of Bhushan Energy Ltd. and the demand had been refused. In paragraph-6(k), the following pleading is available:

> "That the petitioner No.2 is also holder of 35 lakh warrants of respondent company converted into equal number of equity shares of respondent company. After conversion of these warrants, the holding of the petitioners would become 27.53%. However, the respondents have not been transferring the said warrants in the name of petitioner No.2 despite of submission of all the requisite documents with the Registrar of Transfer Agent. This is an act of oppression where the entitlement of petitioner No.2 has been withheld."

It was also contended that in the three subsequent Misc. Petitions (C.As.) a direction was issued by CLB that all those Misc. Petitions and the main application shall be taken up analogously and this direction of the CLB was accepted without protest and the procedure adopted by CLB was not assailed by OSIL at any point of time. Therefore, the conduct of CLB in deciding the main company petition taking the pleadings available in the company applications cannot be now challenged on the ground that the pleadings available in the misc. petitions/company applications cannot be taken as part of the pleading of the main company petition. The decisions relied upon by OSIL were distinguished on facts. On the other hand, reliance was placed in the case of ***Mohta Bros. (P) Ltd. and others V. Calcutta Landing and Shipping Co. Ltd. and others, reported in (1970) Company Cases Vol.40 page 119*** and it was submitted that the petition and the supporting affidavits, if any, may be seen by the Court. It was also contended that in the ***Gaekwad*** case and in the case of ***M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja and another, reported in (2008) 6 Supreme Court Cases 750*** it was observed that the Court will have to consider the entire materials on record and take a holistic view of the matter in order to ensure that the interests of the company are sub-served and grant relief to achieve such an object. Reference in this regard

was again made to the case of ***Ramashankar Prosad and others V. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966 Calcutta 512*** where the Court held that it is always open to a Court to give an applicant the relief which it deems just and the Court is entitled to look into all the evidences before it and if a case of oppression emerges from the facts disclosed then the Court will not be bound by technicality and will grant the relief warranted by the business realities of the situation without taking a narrow legalistic view. Relying in the case of ***Jai Prakash Gupta vs. Riyaz Ahamad and another, reported in (2009) 10 Supreme Court Cases 197***, it was contended that subsequent development of facts which have a material bearing on the entitlement of the parties to relief or on aspects which bear on moulding of relief may be taken note of at any stage of the proceeding.

26. In reply to Ground No.(e), it was contended that the powers of CLB under Sections 397, 398 and 402 of the Companies Act are limitless and the Court may make any order as it thinks fit, with a view to bringing to an end the matters complained of. The CLB may also make such order as is necessary for the regulation of the conduct of the company's affairs and also make any order which in the opinion of the CLB, it is just and equitable. In the present case, the facts are indisputable, stark and imperative and there is no denying the same. Having issued the warrants and enjoyed the benefits there under it was and is the bounden duty and obligation of the company to execute the undertakings contained in the warrants and as envisaged therein by converting the warrants into equity shares. There being no disputed questions of facts involved in the case, the argument of OSIL that the Bhushan Group should seek conversion of warrants into shares by filing a suit is misconceived.

27. In reply to Ground No.(f), it was contended that shares and debentures are well known means of raising capital. Similarly, instruments, such as also warrants, are not an unfamiliar species in corporate jurisprudence and is recognized in Sections 114 and 115 as well as other sections of the Act. Warrants fall within the class of securities and such instruments are expressly covered by paragraph 13.0 of Chapter XIII of the SEBI Guidelines for preferential issues and thus come within the parameters of SEBI Act. To say that the issue of warrants was not justifiable before CLB is an untenable contention because warrants are in any event within the ambit of the statutory provisions and therefore, amenable to CLB's jurisdiction. It was also contended that warrants were issued under Section 81 (1A) of the Companies Act as a mode of further issue of capital on a preferential basis and the same being a subject matter under the Act, the

CLB manifestly had adequate powers to grant the necessary reliefs regarding compliance and fulfillment of the Company's obligations.

28. Apart from the above contentions, it was also contended that there is a clear cut and broad distinction between the sale and purchase of securities in the open market covered by the SCRA and issues of capital by listed public companies, which stand in a different category altogether. Both the two statutes operate in different fields. It was further contended that where specific provision is made for a particular situation, it will override any general provision and in this connection reliance was placed in the case of ***Ashoka Marketing Ltd. and another V. Punjab National Bank and others, reported in (1990) 4 Supreme Court Cases 406***. It was also submitted that SCRA has no application to the instant case and particularly Section 16 on which reliance was placed by OSIL has no application at all.

CONCLUSIONS

29. Having dealt with the submissions of the learned counsel appearing for the parties at length, I now proceed to examine points raised in this Company Appeal.

(I) The first ground/contention of Shri Chatterji, the learned Senior Counsel appearing for the appellant in this appeal, i.e., OSIL is that a petition under Sections 397 and 398 of the Companies Act is not maintainable if it is filed for an isolated alleged act of oppression and mismanagement. Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group in his submission referred to two instances of mismanagement and oppression and in the note of submission furnished to the Court by the said respondents, there is also mention of those two instances only. The first instance of oppression and mismanagement is that OSIL indirectly by means of a loan/guarantee rendered financial assistance to TRFI for purchasing shares in the Company in contravention of Section 77 of the Companies Act. The second instance of oppression and mismanagement is inaction on the part of OSIL in converting 35,00,000 warrants held by Bhushan Energy Limited into equity shares.

So far as the first instance of oppression and mismanagement is concerned, I have dealt with the same extensively in COPET Nos.40 and 41 of 2009 and having found no substance in the said allegation, I have already held that there has been no contravention of Section 77 of the Companies Act. Therefore, the second alleged instance of oppression is an isolated alleged act on the part of the Company. Shri P. Chatterji, the learned Senior Counsel appearing for the OSIL had contended that single instance of

oppression and management will not be sufficient to maintain a petition under Sections 397 and 398 of the Companies Act whereas it was contended by Shri Kapur, the learned Senior Counsel appearing for the respondents Bhushan Group that depending on facts of the case, a single instance of mismanagement and oppression can attract the provisions contained in Section 397/398 of the Companies Act. It will be worthwhile to refer to the decision of the Hon'ble Supreme Court in the case of ***Sangramsinh P. Gaekwad and others v. Shantadevi P. Gaekwad and others*** (supra) where it was held that Section 397 does not provide for a remedy for every act of omission or commission on the part of the Board of Directors. Reliefs must be granted having regard to the exigencies of the situation and the Court must arrive at a conclusion upon analyzing the materials brought on record that the affairs of the Company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Boards of Directors by reason of abusing their dominant position had oppressed the minority shareholders. The interest of the Company vis-à-vis the shareholders must be upper most in the mind of the Court while granting relief under the said provision. The acts of oppression must be harsh and wrongful. An isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, thus, necessary to be proved. The Kerala High Court in the case of ***V.J. Thomas Vettom v. Kuttanad Rubber Co. Ltd.*** (supra), held that every kind of oppression cannot be remedied by the Court. The oppression must be such as to justify the winding up of the Company on just and equitable grounds. The action complained of must be a continuous one and not either an isolated or a stale one. In the case of ***Needle Industries (India) Ltd. and others v. Needle Industries Newey (India) Holding Ltd. & others*** (supra), it was observed that an isolated act which is contrary to law may not necessarily and by itself support the inference that the law was violated with a mala fide intention or that such violation was burdensome, harsh and wrongful. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom those acts are directed. In the case of ***Ramashankar Prasad and others v. Sindri Iron Foundry (P) Ltd. and others, reported in AIR 1966, Calcutta 512***, it was held that Section 397 neither contemplates nor requires a continuous course of oppressive wrongful conduct over a period of time. If the Court is satisfied that a single wrongful act is such that its effect will be a continuous course of oppression and there is no prospect of remedying the situation by the voluntary act of the party responsible for the wrongful act, the Court is entitled to interfere by an appropriate order under Section 397 of the Act. It

is, therefore, clear the law as settled by Courts is that the remedy under Section 397 of the Companies Act is not an ordinary one and the acts of oppression alleged must be harsh and wrongful and that an isolated incident may not be enough for grant of relief and continuous course of oppressive conduct on the part of the majority shareholders is, therefore, necessary to be proved. Only when an isolated act of oppression has such effect that it may amount to continuous course of oppression and there is no prospect of remedying the situation, the Court may consider an application under Section 397 of the Act. In the present case, as discussed earlier, OSIL in the year 2007 took a decision to make a further issue of capital on a preferential basis by way of allotment of warrants which would be convertible into shares at a later stage following the mandatory procedures laid down in SEBI (Disclosure and Investor Protection) Guidelines, 2000. In pursuance of such a decision, on 8.10.2007, a Postal Ballot Notice was given to all the shareholders asking for their consent. By Resolution No.2, it was decided to issue 40,00,000 warrants to TRFI Investment Private Limited and 20,00,000 warrants in favour of one Prakausali Investments (India) Private Limited, a third party shareholder. At a subsequent stage it was again decided in the Annual General Meeting held on 15.10.2007 to issue 30,00,000 warrants to TRFI and 15,00,000 warrants to Prakausali on the same terms and conditions. In view of the above, Prakausali became holder of 35,00,000 warrants and these warrants were sold to Bhushan Energy Limited after the lock in period. In turn, Bhushan Energy Ltd. demanded conversion of the above 35,00,000 warrants into equity shares. The denial on the part of the OSIL to convert these 35,00,000 warrants into equity shares is alleged to be an act of oppression and mismanagement.

On reading of Sections 397 and 398 of the Companies Act and on reading of the judgments delivered by the Hon'ble Supreme Court in the cases of ***S.P. Gaekwad and Needle Industries***, it is clear that relief under Section 397 of the Act can only be granted only when the Court on analysis of the materials brought on record comes to a conclusion that the affairs of the company were such that it would be just and equitable to order winding up thereof and that the majority acting through the Board of Directors by reason of abusing their dominant position had oppressed the minority shareholders. Section 433 of the Companies Act lays down the circumstances in which Company may be wound up by the Tribunal. Except Section 433 (f), no other circumstance is available in this case to direct winding up of a company in the present case. Section 433 (f) provides that a company may be wound up by the Tribunal if the Tribunal is of the opinion that it is just and equitable that the company should be wound up. The question, therefore, is that whether denial on the part of OSIL to convert

35,00,000 warrants held by Bhushan Energy Limited into equity shares is such an act that it is just and equitable that the company should be wound up. In this connection, reference can be made to the Explanatory statement issued in pursuance of Section 173 (2) of the Companies Act. Undisputedly in total 35,00,000 warrants had been issued in favour of Prakausali. The Explanatory statement clearly stipulates that due to the above preferential allotment of equity shares and/or the warrants and the resultant issue of equity shares, no change in management control is contemplated. It was submitted by Shri Chatterji, the learned Senior Counsel appearing for the OSIL that the demand of Bhushan Energy Limited for conversion of these 35,00,000 warrants into equity shares after purchasing the same from Prakausali is for the purpose of taking control of the company and thereby changing the management. Though such an allegation is denied in the note of submission furnished by respondents Bhushan Group, it is a fact that if conversion of these 35,00,000 warrants into equity shares is allowed, the shareholding of Bhushan Group will increase substantially and therefore, the contention of OSIL that the Bhushan Group can make an attempt to take over the company and bring in change in management is not totally unfounded. The above finding also gets support from the Public Announcement made by Bhushan Group. In para-14 of the judgment I have referred to the relevant portion of the Public Announcement made by Bhushan Group. In paragraph-7.2 of the Public Announcement, it is specifically stated that the acquisition of Equity shares will enable the Acquirer (Bhushan Group) to get a substantial ownership in the target company. The Bhushan Group has considerable interest in the Indian Steel Industry including the manufacture of value added auto grade steel products with an increasing presence in the primary steel sector. The acquisition will enable the Bhushan Group to scale up its business operation by further expanding its presence in the primary steel sector, and providing access to upstream iron ore mines. The above declaration clearly shows the intention of the Bhushan Group in demanding for conversion of 35,00,000 warrants held by Bhushan Energy Limited into equal number of equity shares. In this regard, a contention was raised by Shri Kapur, the learned Senior Counsel appearing for Bhushan Group that a similar Public Announcement had also been made by the Monnet Group which intends to take over OSIL. On perusal of the Public Announcement made by Monnet Group, I find that the said Group wants to sail with the promoters and the intention of taking over of the Company is not disclosed from the Public Announcement made by the Monnet Group. I am, therefore, of the view that the demand of Bhushan Energy Ltd. for conversion of 35,00,000 warrants into equity shares and inaction on the part of OSIL in allowing such conversion for the reasons stated above, is not an act which could persuade the Tribunal to direct for

winding up of the company. If there is no material before the Court to justify winding up a company, no relief under Section 397 of the Act can be granted.

Apart from these two instances, there is no specific pleading anywhere in the Company Petition or in the Company Applications subsequently filed in relation to act of mismanagement or oppression. The rest of the allegations are vague, no specific and also not supported by any material.

(II) The second submission of Shri Chatterji, the learned Senior Counsel appearing for OSIL was that a Company Petition for oppression and mismanagement under Sections 397 and 398 of the companies Act is not maintainable, if it is filed for ulterior and collateral purposes. It was submitted that the Bhushan Group having failed in its attempt to get the warrants converted into equity shares have filed this application under Section 397/398 of the Companies Act for a direction to get the warrants converted into shares. The purpose behind getting the warrants converted into equity shares is to take over the Company and bring in change in the management entirely and utilize the mines belonging to OSIL for other Steel Industries owned by Bhushan Group. Shri Kapur, the learned Senior Counsel appearing on behalf of Bhushan Group submitted that 75,00,000 warrants issued in favour of TRFI could be converted into equity shares immediately and nobody questioned such conversion but an objection is raised when a legitimate claim is made by Bhushan Energy Limited for conversion of 35,00,000 warrants into equity shares. The apprehension of OSIL that by such conversion, the Bhushan Group may take over management and control of the company is factually not correct. Reference in this connection was made to the case of ***Re Bellador Silk Ltd., Palghat Exports Pvt. Ltd. and Re J E Cade & Son Ltd.*** which have already referred to while dealing with submission of Shri Chatterji, the learned Senior Counsel appearing for OSIL. Since I have already held while dealing with the first contention that conversion of 35,00,000 warrants into equity shares in favour of Bhushan Energy Ltd. shall increase the shareholding of the Bhushan Group and an attempt can be made for taking over the Company and bring over change in management is not unfounded, there is no necessity to deal with the aforesaid decisions in details and it may be possible that the said Company Petition was filed for the purpose of getting the 35,00,000 warrants converted into equity shares thereby increasing the shareholding of the Bhushan Group for which it shall be in a position to make such an attempt to take control of the management of OSIL. Apart from the above, it was contended that SEBI has not extended the validity of the warrants as

requested beyond 19th of June, 2009. Therefore, once the period for conversion expires, the warrants cannot be directed to be converted into equal number of equity shares.

(III) So far as Ground Nos.(c) (d) and (e) are concerned, decisions were cited by Shri Chatterji, the learned Senior Counsel for OSIL to substantiate his contention that the original Company Petition filed under Section 397/398 of the Companies Act does not disclose any act of oppression or mismanagement and the alleged acts of mismanagement and oppression have been brought out only in the Misc. Petitions registered as Company Applications and therefore, the alleged act of mismanagement and oppression made in the Misc. Petitions cannot form part of the Company Petition unless amended. There is no dispute that a Company Petition filed under Section 397/398 of the Act must specifically disclose the acts of oppression and mismanagement and such allegations made in the Misc. Petitions cannot be taken into consideration as those allegations do not form part of the main Company Petition. An amendment is required in the Company Petition to incorporate the allegations of oppression and mismanagement. Shri Kapur, the learned Senior Counsel appearing for the Bhushan Group did not oppose to such proposition of law but at the same time it was submitted that orders were passed in the Company Applications to the effect that the said Company Applications shall be heard along with the main Company Petition and accordingly the CLB not only looked into the allegations made in the Company Petition but also the Misc. Petitions registered as Company Applications and there is no illegality in the same. There is no necessity to go into this debate in view of my finding earlier that the petitioners before the Company Law Board have come up with only two alleged acts of oppression and mismanagement and they have failed to prove such alleged act of oppression and mismanagement. Therefore, there is no necessity to go into such a technical question.

30. The refusal of OSIL to convert 35,00,000 warrants held by Bhushan Energy Limited into equal number of equity shares may amount to a breach of contract but such breach of contract cannot constitute the ingredients of a complaint under Sections 397, 398, 402 and 403 of the Companies Act. As decided in the case of ***Incable Net (Andhra) Limited and others v. AP Aksh Broadband Ltd. and others*** (supra), such breach could give rise to an action of breach of contract under Section 73 of the Indian Contract Act, 1972.

31. In view of the above finding that the petitioners before the Company Law Board who are respondents in this appeal have failed to establish

mismanagement and oppression on the part of the management and for conversion of warrants into equity shares in an application under Section 397/398 of the Companies Act is not contemplated, it is not necessary to go into the other grounds taken in the appeal. In view of my findings, I allow Company Petition No.39 of 2009 and set aside that part of the order of the CLB impugned in this appeal in which a direction has been issued to the appellant to convert 35,00,000 warrants held by Bhushan Energy Limited into equity shares.

Petitions partly allowed.

2011 (II) ILR- CUT- 84

L.MOHAPATRA, J.

COPET NO.30 OF 2008 (Decided on 04.03.2011)

PRADIP KUMAR KHAITAN & ORS. … …..Petitioners.

.Vrs.

REGISTRAR OF COMPANIES, ORISSA. ……Opp.Parties.

COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – S.633 (2).

Power of High Court to grant relief to an officer of the Company apprehending prosecution – Three circumstances to be considered – Firstly the person to be excused must be shown to have acted honestly – Secondly he must be shown to have acted reasonably and thirdly it must be shown that having regard to all the circumstances of the case he ought fairly to be excused.

In the present case the petitioners who apprehend to be prosecuted for the alleged violation have not only acted honestly but also have acted reasonably in maintenance of the accounts of the Company – Held, petitioners are entitled to be excused U/s.633 (2) of the Companies Act and the Opp.Party ROC is directed not to launch any prosecution against the petitioners for the alleged violation of the accounting standards.

(Para 5,6)

For Petitioners - M/s. A.K.Parija, S.P.Sarangi, B.C.Mohanty, P.P.Mohanty, D.K.Das, P.K.Dash, R.K.Tripathy, A.Kanungo, A.K.Kanungo & A.Pattnaik.

For Opp.Parties - Ms.Saswata Patnaik Central Government Counsel

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L.MOHAPATRA, J. This application has been filed under Section 633 (2) of the Companies Act, 1956. Petitioner No.1 is the Chairman of OCL India Limited (hereinafter referred to as "Company") and petitioner Nos.2 to 7 are its Directors. Petitioner No.8 is the Company Secretary of the Company and Petitioner No.9 is the whole time Director and CEO of the Company.

The facts leading to filing of this petition are that during September/October 2007, the Assistant Director (Inspection) conducted

inspection of books of accounts and records of the Companies under Section 209-A of the Act by the orders of the Regional Director, Ministry of Company Affairs. After completion of inspection, by letter dated 19.3.2008, the Assistant Director (Inspection) alleged violation of certain provisions of the Companies Act and sought for explanations/ clarifications from the Company. Annexure-1 is the letter written to the Company indicating the alleged contraventions of the provisions contained in the Act. Fifteen instances of contraventions of different provisions of the Act have been indicated in the said letter. The Company submitted its explanation/clarification in response to the said letter but the ROC, Cuttack issued six undated show cause notices in June, 2008 to the petitioners with a view to prosecute them on the basis of the said alleged violations. Apprehending prosecution, at the instance of the ROC, Cuttack, the present application has been filed.

2. Before consideration of the submissions of the learned counsel appearing for both the parties, it is necessary to refer to Section 633 of the Act. The said provision is quoted below:

> "633. Power of Court to grant relief in certain cases.-(1) If in any proceeding for negligence, default, breach of duty, misfeasance or breach of trust against an officer of a company, it appears to the Court hearing the case that he is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust, but that he has acted honestly and reasonably, and that having regard to all the circumstances of the case, including those connected with his appointment, he ought fairly to be excused, the Court may relieve him, either wholly or partly from his liability on such terms as it may think fit:
>
> Provided that in a criminal proceeding under this sub-section, the Court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.
>
> (2) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court, before which a proceeding against

that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1).

(3) No Court shall grant any relief to any officer under sub-section (1) or sub-section (2) unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted."

As is evident from the said Section, sub-section (2) provides that where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court, before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under sub-section (1). Sub-section (3) provides that no Court shall grant any relief to any officer under sub-section (1) or sub-section (2) unless the Registrar of the Company is served with a notice to show cause as to why such relief should not be granted. In compliance of sub-section (3) of Section 366, notice was issued to the ROC on 25.7.2008 and the ROC is represented through Ms. Saswata Patnaik in this petition.

3. Coming to the alleged contraventions as mentioned in Annexure-1, it appears that most of the contraventions alleged relate to non-compliance of Accounting Standards. With reference to Section 211 of the Act, Shri A.K. Parija, the learned Senior Counsel appearing for the petitioners submitted that every balance-sheet of a company shall give a true and fair view of the state of affairs of the company as at the end of the financial year and shall, subject to the provisions of the said section, be in the form set out in Part I of Schedule VI, or as near thereto as circumstances admit or in such other form as may be approved by the Central Government either generally or in any particular case; and in preparing the balance-sheet due regard shall be had, as far as may be, to the general instructions for preparation of balance-sheet under the heading "Notes" at the end of that Part. Referring to sub-section (2) of the said Section, it was contended that every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year and shall, subject as aforesaid, comply with the requirements of Part II of Schedule VI, so far as they are applicable thereto. With reference to the aforesaid two provisions, it was further contended that there is nothing in the show cause notices that due to the

alleged non-compliance of accounting standards, the balance-sheet of the company does not give a true and fair view of the state of affairs of the company at the end of the financial year. It is stated in the Company Petition that the Company and its Directors/Officers have acted honestly, reasonably, bona fide and diligently and no prejudice has been suffered by any person by reason of such alleged defaults. No pecuniary or other benefit has been obtained by the petitioners by reason of such alleged defaults. Due diligence has been exercised in auditing the Company's accounts through M/s. V. Sankar Aiyar & Company and accounts have been maintained in terms of the requirements of the relevant provisions of the Act. The accounting standards have been complied with as near to Part I and Part II of Schedule VI as circumstances admit and therefore, the petitioners are entitled to the protection available to them under Section 633 of the Act.

4. Ms. Saswata Patnaik appearing for the Registrar Companies with reference to Annexure-1 submitted that specific violation of the accounting standards have been indicated in the said letter and the petitioners have not been able to explain under what circumstances such contraventions have been made and therefore, notices have been issued by the ROC to the petitioners and in the event the ROC is of the view that the explanation submitted is not satisfactory, it is open for him to launch prosecution under the provisions of the Act.

5. From the documents attached to the petition, it appears that on the basis of Annexure-1, the ROC has issued six notices indicating the contraventions of different accounting standards. The allegations contained in the notice and the replies given by the Company are mentioned hereunder in a tabular sheet.

Reference of Show cause notice	Section violated	Allegation in brief	Reply
Notice No.1	211(3A) read with AS-22	Break up of deferred tax assets/liabilities are not shown	Represents single item
	211(3A) read with AS-13	Profit on sale of investments is not shown as long term and short term	Balance sheet itself indicates that all investments are long term. Hence no separate requirement is necessary
	211(3A) read with AS-2	Raw material not shown at cost. (Over burden sale is adjusted against raw mat cost)	Cost material is shown at net of taxes and sale generated proper disclosure is made as per AS-2
	211(3A) read with AS-29	Liability for non compliance of Jute packaging Act is not shown as contingent liability	Reasons are given by way of note
	211(3A) read with AS-28	Accounting policy followed is mentioned but no disclosure under such policy	There is no such item for disclosure

	211(3A) read with AS-20	Diluted EPS has not been disclosed	Typographical error
	211(3A) read with AS-15	Base Date for actuarial valuation is not mentioned	Clarification is given that year end is the basis
	211(3A) read with AS-6	Depreciation for the year has not been disclosed	Disclosure is made as per Part-I of Schedule VI
Notice No.2	211 read with Part-I of Schedule VI	Advances against Capital expenditure	Disclosure is made as per Part-I of Schedule VI
	211 read with Part-I of Schedule VI	Cash, cheques in hand are clubbed and shown	Cheques on hand are equivalent to cash
	211 read with Part-I of Schedule VI	Quantity of Resins and Aluminum powder are not shown	Quantities are negligible and due to rounding off get eliminated
	211 read with Part-I of Schedule VI	Under investments number of shares is not shown only amountis shown for previous year	Current year disclosure requirement is complied with although number is not required to be shown
	211 read with Part-I of Schedule VI	Sales have been shown as net of Trade discounts, Sale tax, inclusive of excise duty	Proper disclosure is made

	211 read with Part-I of Schedule VI	Pending execution of sale deed, likely expenses have not been shown as contingent liability	Expenses are not material as cost of flat is 3.15 laks
	211 read with Part-II of Schedule VI	Earning in Foreign exchange under head others, nature of exp is not disclosed	Other exp are not significant as 0.01% of total, no details are warranted
	211 read with Part-II of Schedule VI	Dividend on foreign shareholding is not shown separately	Remittance is in Indian rupees only to mandate banks. Hence it can not ascertain
	211 read with Part-II of Schedule VI	Quantities in respect of self consumption of cement is not shown	Not mandatory for self consumption
	211 read with Part-II of Schedule VI	Interest paid on debenture is not shown	Debentures are also loans for fixed period and interest is clubbed with interest on other terms load
Notice No.3	Section 292(1)	Inter corporate borrowings	Board passed resolution authorizing officers to accept borrowing up to certain limits

Notice No.4	Section 217(1)(e)	Director report Disclosure about energy consumption	Grades of for refractory are the same as that are used in cement
Notice No.5	217(2A)	Directors Report disclosure about Employees salaries, designation etc	Disclosure is made
Notice No.6	217(2AA)	Disclosure about compliance by directors	Disclosure is made

From these allegations and replies, it appears that most of the allegations even if accepted to be correct are technical in nature and have not affected the entire accounting procedure adopted by the Company or in disclosure of the true affairs of the Company. In this connection, reference may be made to a decision of the Calcutta High Court in the case of ***BOC India Limited and the Registrar of Companies, West Bengal in C.P. No.94 of 2007/C.A. No.215 of 2007,*** disposed of on 16.7.2007. In the said case, two notices issued by the Registrar of Companies threatening criminal proceeding against the petitioners therein were the subject matter of the proceeding before the Calcutta High Court under Section 633 (2) of the Companies Act, 1956. On consideration of the allegations and the replies, the Court was of the view that the contemplated criminal proceedings were not warranted and accordingly allowed the petition. The same view was also expressed by the Calcutta High Court in the case of ***Chandra Kumar Dhanuka & others v. the Registrar of Companies, West Bengal in C.P.No.428 of 2006/C.A.No.651 of 2006, disposed of on 13.7.2007***. Reference may also be made to another decision in the case of ***Re DUOMATIC, LTD., reported in (1969) 1 All England Law Reports, page 161***. Section 448 of the Companies Act, 1948 of England empowered a court to relieve an officer of a company in the manner that Section 633 (2) of the Indian Act permits a High Court to relieve such officer. In the reported judgment, it was held that Section 448 enables the court to grant relief where three circumstances are shown to exist. First of all, the position must be such that the person to be excused is shown to have acted honestly. Secondly, he must be shown to have acted reasonably. And thirdly, it must be shown that, having regard to all the circumstances of the case, he ought

fairly to be excused. There is no allegation that the petitioners have acted dishonestly or unreasonably and in absence of any such allegation, they are to be excused. There is also nothing on record to show that due to non-observance of the accounting standards as alleged, any of the shareholders of the Company is affected. There is not a single complaint by any of the shareholders of the Company so far as maintenance of the accounts is concerned. The inference is that the Company has tried its best to maintain the accounts in terms of the accounting standards and the contraventions pointed out have not affected the true picture of the balance-sheet of the Company.

6. In view of the above, I accept the contention of Shri A.K. Parija, the learned Senior Counsel appearing for the petitioners that the petitioners who apprehend to be prosecuted for the alleged violations have not only acted honestly but also have acted reasonably in maintenance of the accounts of the Company and therefore, they are entitled to be excused under Section 633 (2) of the Companies Act, 1956. Accordingly this application is allowed and the opposite party-ROC is directed not to launch any prosecution against the petitioners for the alleged violation of the accounting standards.

Application allowed.

2011 (II) ILR- CUT- 93

L.MOHAPATRA, J & S.K.MISHRA, J.

O.J.C. NO.10553 OF 2000 (Decided on 22.04.2011)

RAGHUNATH MISHRA …….Petitioner.

.Vrs.

PRINCIPAL ACCOUNTANT GENERAL (A&E) & ORS. ……Opp.Parties.

SERVICE LAW – Promotion – Fixation of Pension – Petitioner retired as an IAS Officer – After retirement his service extended for six months in the same post – During such extension he was promoted to selection Grade time scale of pay and his pay was fixed accordingly – While fixing pension question arose whether conferring selection Grade is a promotion or not and whether the petitioner is entitled to pension on the basis of the last pay drawn on the date of superannuation or on the basis of the last pay drawn on the promoted scale of pay in the selection Grade.

It is well recognized that a promotion post is a higher post with higher pay where as selection grade is a higher pay but in the same post – Rule 2 of IAS Pay Rules 1954 and Rule 3 of the IAS (Seniority of Special Recruits) Regulation, 1960 – Promotion to selection Grade is not automatic on completion of 14 years of service but there is an element of selection on merit-cum-Seniority – Thus, in the present set of rules, it is held that conforring of Selection Grade to the petitioner is a promotion but it is violative of Clause VIII of All India Services (Death-cum-Retirement Benefits) Rules, 1958, which provides that no Government Servant who is on extension of service after the prescribed date of retirement should be promoted to another post during the period of extension of service.

Held, the petitioner is not entitled to be promoted to the selection Grade and he is not entitled to receive pension on the basis of his last pay drawn on the promoted scale of pay in the selection Grade.

(Para 7,11,12)

(B) LOKPAL & LOKAYUKTA ACT, 1995 (ACT NO.8 OF 1995) – S.8.

Petitioner an IAS Officer - After retirement his service extended for six months – During such extension he was promoted to the

selection Grade – Objection while fixing pension – Auditor General of India held that there shall be no promotion during the period of extension – Petitioner approached Lokpal - Lokpal held to calculate the pension on the basis of the last pay drawn by the petitioner in the selection Grade – Opp. Parties did not follow such direction – Hence the writ petition.

Section 8 of the Act debars the Lokpal to conduct an investigation in respect of a complaint which has/had any remedy before any Court or Tribunal – Held, direction given by Lokpal is of no consequence.

(Para 4)

(C) PROMOTION – Meaning of – Promotion means advance to a higher position, grade or honour – So also promotion means advancement or preferment in honour, dignity, rank – Promotion not only covers advancement to higher position or rank but also implies advancement to higher grade – Held, promotion can either be a higher pay scale or to a higher post.

(Para 7 & 9)

Case law Relied on:-

(1996) 1 SCC 562 : (State Rajasthan -V-Fatch Chand Soni).

Case laws Referred to:-

1.(1999) 9 DVV 273 : (Union of India & Ors.-V-Luithukla (Smt) & Ors.)
2.AIR 1972 SC 996 : (Lalit Mohan Deb & Ors.-V-Union of India)
3.1995 (4)SCC 462 : (Union of India & Anr-V-S.S.Ranade)

For Petitioner - Mr. K.C.Kanungo, G.S.Rath, P.K.Mishra, S.K.Mishra, P.K.Sahoo, B.B.Nayak, A.K.Mohapatra.

For Opp.Parties- Sri Saroj Kumar Das
Addl. Standing Counsel (Central) (for O.P.1)
Addl. Standing Counsel (for O.P.2)

S.K.MISHRA, J. The simple but interesting question which arises in this writ petition is whether conferring selection grade is a promotion or not. The petitioner assails decision of the Principal Accountant General (A & E), Orissa, Bhubaneswar in not granting him pension as per the last pay drawn by him in the selection grade to which he was appointed after the date of his superannuation during the period of his extension.

. The facts of the case are undisputed. It may be summarized as follows:-

The petitioner was an IAS Officer. He retired on superannuation on 30.06.1996. At that time, he was posted as the Secretary to the Orissa Legislative Assembly. It is further borne out that the Government of Orissa because of urgency of public service extended his service for six months up to 31.12.1996 in the same post of Secretary, Orissa Legislative Assembly. During such extension, he was promoted to the selection grade time scale of pay and his pay was fixed accordingly in the selection grade.

While fixing his pension, the Principal of the Accountant General (A & E), Orissa, Bhubaneswar raised an objection, to the effect that, the promotion given to the petitioner during his extension of service after superannuation is not a regular one. The office of the opposite party no.1, therefore, sought a clarification from the Comptroller and Auditor General of India regarding this matter as it involved a promotion in view of the principles laid down under Para-VIII of Government of India, Department of Personnel and Administrative Reforms' O.M. No.260AA/1/77/EST-B dated 18.05.1978.

In the meanwhile, the Government of Orissa clarified that the promotion to selection grade does not involve any change of post on posting. It was further contended that under the IAS Pay Rules, senior scale has been defined as senior time scale/Junior Administrative Grade and selection grade and that an officer who fulfills the eligibility criteria of 14 years can be appointed to the selection grade without any change of post. The State Government, therefore, asserted that since the petitioner was given promotion to the selection grade without any change in his post, the aforesaid clarification of the Department of Personnel and A.R. does not apply.

The Office of the Comptroller and Auditor General of India clarified that the guidelines provide that there shall be no promotion during the period of extension. Hence, the objection raised by the Audit regarding regularity of the promotion granted to Sri Raghunath Mishra, i.e. petitioner is valid.

On such backdrop, the petitioner approached the Lokpal. The learned Lokpal considering the matter held that his pension be calculated on the basis of the last pay drawn by the petitioner. Further. Such direction having not been followed by the opposite parties, the present writ application has been filed.

3. At the outset, this being an application filed by an erstwhile civil servant, a writ application in the High Court is not maintainable. Instead, he should have approached the Central Administrative Tribunal. However, at this juncture, after lapse of more than a decade, we do not propose to

transfer the file to dispose of this matter on this technicality and propose to proceed with the merit of the case.

4. Secondly, it is noted that the Lokpal is appointed under the Orissa Lokpal and Lokayukta Act, 1995. Such an Act empowers the Lokpal to investigate the administrative decision taken on behalf of the State Government or certain local and public authorities of Government Orissa and after making necessary investigation, it is required to submit a report to the competent authority of the State of Orissa under Section -12 of the Act. Further, Section - 8 of the Act debars the Lokpal to conduct an investigation in respect of a complaint which has or had any remedy before any court or Tribunal. Thus, the direction given by Hon'ble Lokpal in this case is of no consequence.

5. Now the question remains whether granting of selection grade to the petitioner during his extension of service is to be treated a promotion or not. In this regard, having heard learned counsel for the petitioner and learned counsel for the opposite party no.1, i.e. Principal Accountant General (A & E), this Court finds that the Rule-3 of the Indian Administrative Service (Pay) Rules, 1954 provides for time scales of pay. Sub-rule (1) of the said Rule provides that the time scale of pay admissible to a member of the service and the dates with effect from which the time scales shall be deemed to have come into force shall be as under:

i. Junior Scale
ii. Senior Scale- (a) Time Scale (b) Selection Grade.

Sub-rule (2) of Rule-3 provides that a member of the service on appointment to the selection grade shall draw pay in that grade as indicated in the Schedule-I. It further provides that the pay of the member of service, who on the date of his promotion to the selection grade was drawing pay at the maximum ordinary scale of pay, shall be regulated in the manner provided there-under. Sub-rule-'2A' provides for appointment to selection grade and to post carrying pay above the time scale pay in the administrative service shall be made by selection grade on merit with due regard to the seniority. The said Rule further provides that no member of the service shall be eligible for appointment to the selection grade unless he has entered the 14 years of service calculated from the year of allotment assigned to him under Rule-3 of the Indian Administrative Service (Seniority of Special Recruits) Regulations, 1960 as the case may be.

6. The learned counsel for the petitioner relied upon the reported case of ***Union of India and others Vs. Luithukla (Smt) and others,*** (1999) 9 Supreme Court Cases, 273 wherein the Hon'ble Supreme Court has held

that the selection grade has been evolved for giving incentive to an employee so that he may not lose interest on account of stagnation. It is contended by learned counsel for the petitioner that granting of selection grade is not a promotion in view of the fact that it did not advance the service conditions, in as much as, he never leaves the post which has already occupied by him nor occupies any new post and the post held by him remains the same and he starts getting pay in the selection grade instead of a lower grade. There is no additional responsibility on the employee also.

The learned counsel for the opposite parties, on the other hand, relied upon the reported case of ***State of Rajasthan Vs. Fatch Chand Soni***, (1996) 1 SCC 562 and contended that promotion not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression 'promotion' has been understood in the wider sense and it has been held that promotion can be either to a higher pay scale or to a higher post.

7. This question has been decided by the Supreme Court in a number of cases. The Constitution Bench of Supreme Court in ***Lalit Mohan Deb and others Vs. Union of India***, AIR 1972 SC 996 explains the scope and concept of selection grade. The Hon'ble Supreme Court quoted the Central Pay Commission and reiterated the object of providing incentives to employees, who have no outlets or a very limited outlets for promotion to higher post. Recommendations have been made in a number of cases that certain percentage of post in the grade should carry 10% on higher scale of pay even though there would be no change in the duty. Following the terminology involved, the same has been described as selection grade post. It is well recognized that a promotion post is a higher post with a higher pay. Selection grade is a higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get chance of promotion on account of limited outlets of promotion should at least be placed in the selection grade to prevent stagnation on the maximum of the scale.

8. In ***Union of India and another Vs. S.S. Ranade***, 1995 (4) SCC 462, the Hon'ble Supreme Court has examined the same issue again and held that it would well depend upon a particular rule. In case element of selection is involved in granting of selection, it would amount to promotion in a higher post scale and it cannot be claimed as matter of right automatically. However, there may be cases where it may be claimed on the basis of seniority only. Thus, whether grant of selection grade is a promotion or not would depend upon a particular rule, Government order, etc. It may be a promotion depending upon the facts of the case.

9. In ***State of Rajasthan Vs Fatch Chand Soni***, (supra) the Hon'ble Supreme Court reconsidered the issue and observed that in the literal sense the word 'promotion' means advance to a higher position, grade or honour. So also 'promotion' means advancement or preferment in honour, dignity, rank. Promotion, thus, not only covers advancement to higher position or rank but also implies advancement to higher grade. In service law also, the expression 'promotion' has been understood in the wider sense and it has been held that promotion can either be a higher pay scale or to a higher post.

10. Thus, it indicates that whenever the conferring of selection grade is a matter of routine on achieving certain years of service, then it is not a promotion but where there is an element of selection on certain qualifying service, then it has been held as a promotion. In this case, the Indian Administrative Service (Pay) Rules, 1954 is confusing, in the sense, that the sub-rule-2 of Rule-3 speaks of appointment to selection grade. However in the proviso, it has provided that the pay of member of service on the date of his promotion to the selection grade shall be regulated in a particular manner. Rule-'2A' further provides that a promotion to the selection grade and to post carrying pay above time scale of pay in the Indian Administrative Services shall be made by a selection on merit with due regard to the seniority. The Rule further provides that member must have completed 14 years of service calculated from the year of allotment assigned to him. Thus, there is an element of selection in the case where merit and seniority are taken into consideration. It is not a case of automatic conferring selection grade to an IAS officer on completion of 14 years of service.

11. Annexure-G of the counter affidavit reflects that on 18.09.1996, 12 officers were allowed officiating promotion to the selection grade in pursuance of rule 3(2A) of the IAS (Pay) Rules, 1954. Thus, it is clear that the State of Orissa is also treating the conferring of selection grade on the IAS as promotion. Though in their letter dated 17.03.1997, i.e. Annexure-B, the State of Orissa has clarified that the petitioner has been given appointment to the selection grade without any change of post and there is no statutory bar for allowing the petitioner to get the selection grade during the period of extension in service. It is not the case of the State of Orissa that selection grade is being conferred as a matter of routine to all IAS officers on completion of 14 years of service. In other words, the State of Orissa has not asserted that there is no element of selection on the basis of merit and seniority for granting such selection grade to the officer.

12. Thus, in the present set of rules, it is held that the conferring of selection grade to the petitioner is a promotion but it is violative of clause-VIII of All India Services (Death-cum-Retirement Benefits) Rules, 1958,

which provides that no Government servant, who is on extension of service after the prescribed date of retirement should be promoted to another post during the period of extension of service. Thus, the petitioner is not entitled to be promoted to the selection grade and thus, he is not entitled to receive the pension on the basis of his last pay drawn on the promoted scale of pay in the selection grade.

Therefore, we find no merit in the writ petition and the same is accordingly dismissed.

Writ petition dismissed.

2011 (II) ILR- CUT- 100

L.MOHAPATRA, J & S.K.MISHRA, J.

W.P.(C) NO.17416 OF 2007 (Decided on 06.04.2011)

LAXMIDHAR NAYAK …….. Petitioner.

.Vrs.

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

SERVICE - Disciplinary Proceeding – Petitioner is working as a Constable in C.R.P.F. – He remained absent from service for more that two years & nine months – No cogent explanation for such absence – Enquiry Officer sent several notices to the petitioner and there after conducted enquiry exparte – Even after proceeding exparte the Enquiry Officer has sent statement of witnesses recorded along with the copies of exhibits to the petitioner giving three weeks time to defend the charges leveled against him - Held, it can not be said that the Departmental Enquiry was conducted in a casual manner and there was violation of principles of natural justice and the petitioner was not given proper and adequate opportunity to defend the allegations made against him – Punishment of removal from service – The conduct and discipline expected from a member of a force can not be equated with other employees like a sweeper or a peon or even a class-III employee of the Government establishment - Held, keeping in view the unauthorized absence of about three years is held to be sufficient ground to inflict harshest punishment of removal from service.

(Para 15,19)

Case laws Referred to:-

1.(2009) 2 SCC (L&S) 569 : (Jagdish Singh -V- Punjab Engineering College Ors.).
2.(2010)2 SCC 772 : (State Uttar Pradesh & Ors.-V-Saroj Kumar Sinha).
3.(2008) 8 SCC 236 : (State of Uttaranchal & Ors.-V-Kharak Singh).

For Petitioner - M/s. Kali Prasana Mishra, S.Mohapatra, T.P.Tripathy, L.P.Dwivedy.
For Opp.Parties - Mr. A.Deo (C.G.C.)

S.K.MISHRA, J. The petitioner in this writ petition assails the order of his removal from service dated 25.6.2004 passed by the Commandant, 10 Battalion, Central Reserve Police Force, opposite party no.3, pursuant to

an ex-parte enquiry, on the ground of unauthorized absence.

2. The petitioner pleads that he was working as a Constable(G.D.) under the Deputy Inspector General of Police, Central Reserve Police Force, opposite party No.2, bearing Force No.871261159. He was granted casual leave w.e.f. 30.11.2000 to 7.12.2000. During leave period, the mother of the petitioner died, therefore the petitioner applied for extension of leave for one month. He further pleads that thereafter he became sick and continued under medical treatment with effect from 15.12.2000. He further pleads that the Central Reserve Police Force (hereinafter referred to as "CRPF" for brevity) doctor treated him on 17.2.2001, but due to serious illness of the petitioner, the CRPF doctor referred the case of the petitioner to Bhubaneswar Government Hospital. Due to such continued illness and financial problem the petitioner could not stay at Bhubaneswar for a long period and was compelled to move his native place for treatment of rheumatic arthritis at Bhanpur Hospital. He further pleads that he had been regularly communicating the authorities regarding his illness and submitted the leave application for extension on medical ground along with the medical certificate.

3. While matter stood thus, opposite party no.2 initiated a Departmental Proceeding against the petitioner without affording reasonable opportunity to the petitioner to show cause and before submission of any show cause to the charge sheet, the Enquiry Officer was appointed. On 26.8.2003 the petitioner was declared as an absconder under Rule 31 of the CRPF Rules by opposite party No.3 exercising the power arbitrarily. It is further pleaded that the proceeding was initiated against the petitioner under Section 11(1) of the CRPF Act, 1949 which provides for award of minor punishment in lieu of or in addition to the major penalty.

4. After knowing that he has been declared as an absconder and a Departmental Proceeding had been initiated against him, the petitioner approached this Court by filing a writ petition bearing W.P.(C) No.11781 of 2003 for quashing of the Departmental Proceeding. During pendency of the said writ petition, opposite party no.3 passed the order of removal. Hence, the petitioner had to withdraw the aforesaid writ petition to approach the appellate authority. It is further pleaded that while granting withdrawal of the writ petition, this Court permitted the petitioner to approach the appellate authority within a period of one month from the date of passing the order and further stipulated that if such an appeal is filed, the appellate authority shall entertain it and dispose of the same in accordance with law.

5. As directed the petitioner submitted an appeal before opposite party no.2, but the said authority without considering the grounds taken by the appellant in its true perspective rejected the prayer of the appellant and thereby confirmed the order of removal passed by opposite party no.3. The petitioner submits that opposite party no.2 has not followed the principles of natural justice in the aforesaid Departmental Proceeding and conducted the same in preconceived and predetermined manner. He was ill and suffering from rheumatic arthritis and was not able to move. Therefore, the plea of the opposite parties that the petitioner did not come for the second medical board is arbitrary and contrary to the facts. He further pleads that the medical certificate issued by the doctors of the Government Hospital cannot be ignored by the authorities. The petitioner further claimed that Section 11(1) of the CRPF Act does not provide for imposition of a major penalty by the authorities. Hence, a major penalty like removal from service can never be awarded under the said Section and therefore is liable to be set aside. It is further pleaded that the penalty imposed is disproportionate to the misconduct alleged. On such pleadings the petitioner pleads that the order of removal, which has been confirmed by the appellate authority, should be quashed.

6. The opposite parties have filed their counter affidavit, inter alia, admitting that the petitioner was sanctioned fifteen days of casual leave w.e.f. 20.11.2000 to 7.12.2000 with permission to avail the Sundays and journey period. He was due to report for duty on 8.12.2000(AN), but he failed to report and since then he was over staying without any permission/sanction of leave by the competent authority. While on casual leave he sent a simple application dated 6.12.2000 for extension of one month leave. Further, he again sent an application on 30.6.2001 for extension of leave on medical ground. On scrutiny of medical certificate enclosed with the application it revealed that he was taking treatment as Out Door Patient from RFWC,CHC, Bhapur reportedly for chronic rheumatic arthritis. He was unauthorizedly absent for the last three years and during that period neither he remained hospitalized in any hospital for a single day(as per medical certificate produced by him) nor took any specialized treatment. He was directed by the Unit several times to appear before the Medical Officer-in-charge, GC CRPF, Bhubaneswar Hospital being nearer to his home town for better treatment and second medical opinion and also to take better treatment free of cost. The petitioner did not report to the Medical Officer-in-Charge, GC, CRPF Bhubaneswar Hospital. Dr. A.K. Tripathy, M.O.(RFWC) CHC, Nayagarh also requested to refer the patient to GC, CRPF Bhubaneswar Hospital for second medical opinion vide letter dated 27.7.2002.

7. In spite of clear directions neither the petitioner reported at GC CRPF Bhubaneswar Hospital for second medical opinion nor the said medical officer referred the case to any other hospital/specialist for better treatment. He was also given option to report at Unit HQR of 10 Battalion, CRPF at Delhi where all facilities for better treatment at AIIMS, Sardarjung Hospital are available. Since he was not hospitalized and reportedly received treatment as OPD patient, it was felt essential to ascertain his health condition and the matter was investigated by Superintendent of Police, Nayagarh, Orissa, as per letter dated 27.7.2002. The Superintendent of Police, Nayagarh, as per letter dated 28.3.2003 intimated that during enquiry it came to light that the individual was not sick and found absent from the village. Further, the S.P. reported that he had engaged himself in collecting money from local youngsters by motivating them to get appointment in CRPF and was reported to be staying at Bhubaneswar and at times he was visiting his native village Chakradharprasad.

8. Taking cognizance on the complaint lodged by the Officer Commanding D/10 Battalion, CRPF, the Chief Judicial Magistrate-cum-Commandant, 10 Battalion, CRPF, issued warrant of arrest against him on 6.5.2001 and sent the same to the S.P., Nayagarh, for execution. Neither the warrant of arrest was executed by the civil police nor the petitioner reported back for duty on his own. As such, a court of inquiry was ordered to ascertain the circumstances under which the petitioner overstayed from sanctioned leave. As a result of the court of inquiry, the petitioner was declared "*deserter*" from the force as per Rule 31(c) of CRPF Rule, 1955 w.e.f. 8.12.2000 as per order dated 26.8.2003. Since the petitioner failed to report for duty as such a Departmental Proceeding enquiry was ordered on 1.10.2003. The opposite parties further plead that the memorandum and article of charges with its enclosures were sent to his declared home town through Registered Post with A.D. The A.D. slip shows that he received the memorandum on 7.10.2003. He was given ample opportunity to appear before the Enquiry Officer to complete the enquiry. Since no representation was received from him, Sri Satya Prakash, Asst. Commandant of 10 Battalion, CRPF, was appointed as an Enquiry Officer to enquire into the charges framed against the individual. The Enquiry Officer as per letter dated 4.11.2003 directed the petitioner to appear before him within ten days, latest by 19.11.2003, for preliminary hearing. In reply to the said memorandum, office order and Enquiry Officer's letter, the petitioner submitted a legal notice dated 11.11.2003 regarding deferment of DE through his advocate for which reply was given to the concerned advocate by the letter dated 19.11.2003. Since the petitioner failed to report within the stipulated time as directed by the Enquiry Officer he was left with no option

except to conduct the DE ex-parte as per the existing Rules. In such ex-parte proceedings both the charges framed against the officer were found to be proved. The Enquiry Officer's report was also served through Registered Post with A.D. vide letter dtd.7.6.2004 to the petitioner with a direction to submit representation, if any, within fifteen days. Thereafter also as no reply was received from the petitioner even after expiry of the stipulated time, the disciplinary authority after going through the entire proceedings came to the conclusion that dismissal from service shall be the appropriate punishment and awarded the same.

9. Aggrieved by the said order he filed a writ petition before this Court. The same was allowed to be withdrawn on 9.2.2006 giving him liberty to prefer an appeal before the appellate authority. Thereafter the petitioner preferred an appeal to the DIGP, CRPF, Durgapur (WB). After considering the case, the appellate authority came to the conclusion that the appeal is without merit, hence he passed an order dated 10.10.2006 to that effect dismissing the appeal of the petitioner. The petitioner has not filed any revision before the competent authority as provided in the CRPF Rules.

The opposite parties further plead that the D.E. was initiated against the petitioner for grave misconduct as a member of the Force was proved beyond any doubt and the punishment was imposed to meet the ends of justice. It is further pleaded that being a member of the Force overstay from sanctioned leave for more than three and half years is not justifiable at all. Though he was directed to report at the GC Hospital, Bhubaneswar, or at Unit HQR, New Delhi, for better treatment, he did not respond to the same. During enquiry it came to light that the individual was not sick and found absent from the village. Thus, after a properly conducted DE he was found not fit to be retained in a disciplined Force like CRPF for such a long absence considering the nature of duties for which he was enlisted for. The authority therefore took the decision that the petitioner deserves stringent punishment keeping in view the requirement of the high standard of discipline and nature of duty he was supposed to perform. Considering this vital aspect, the appellate authority has also rejected the appeal of the petitioner. Thus, on such pleading, the opposite parties prayed to dismiss the writ petition being devoid of any merit.

10. In a rejoinder affidavit the petitioner claimed that the report of the local Police was totally false and baseless as he was under treatment during the relevant period. The local Police without enquiring the facts falsely submitted the report. Without any enquiry or without affording any opportunity to the petitioner, the allegations cannot be proved.

11. The opposite parties have also filed an additional affidavit to the rejoinder filed by the petitioner.

12. In course of hearing of the writ petition, Mr. K.P.Mishra, learned counsel for the petitioner, submitted that there has been gross violation of principles of natural justice in this case as the petitioner was not given proper and adequate opportunity of putting forth his case and defend the allegations made against him. Alternatively, learned counsel for the petitioner relying upon the ratio decided in the case of ***JAGDISH SINGH V. PUNJAB ENGINEERING COLLEGE AND OTHERS****; (2009) 2 Supreme Court Cases (L & S) 569* contended that mere unauthorized absence from duty is not enough to inflict the punishment of removal from service and such punishment is shockingly disproportionate to the misconduct alleged. Therefore, learned counsel for the petitioner prayed that the orders impugned be set aside.

13. Learned Asst. Solicitor General, on the other hand, produced the Departmental Enquiry file, wherein the appellate authorities have taken up the case of the petitioner and contended that adequate opportunities were given to the petitioner in the sense that notice of the date of enquiry, notice to file show cause etc. sent, were received by the petitioner. In spite of such notices, he failed to appear before the DE and, therefore, he cannot claim that the principles of natural justice has been violated in this case. Learned Asst. Solicitor General also contended that keeping in view the nature of duty to be performed by the petitioner and the disciplined behaviour required from a Member of a Force, the punishment inflicted in this case is appropriate and it requires no interference. Therefore, he prayed to dismiss the writ petition.

14. From the records, it is clear that on 17th October, 2003 the Commandant, 10 Battalion, CRPF appointed the Enquiry Officer. A copy of the order was sent to the petitioner at his home address, through Registered Post with A.D. On 23.10.2003 the D.E was placed before the Enquiry Officer. Thereafter, on 4th November, 2003 the E.O. again ordered for issuing notice to the petitioner through registered post. On 28th November, 2003 the case was again taken up, but the petitioner was absent. Hence another letter was issued on that day to him to report in person before the E.O. On 13th February, 2004 also another notice was sent to the petitioner. On 4th March, 2004 he did not appear, but the E.O. records that finding no other alternative the D.E. was to proceed ex-parte and enquiry on day to day basis was taken up. On 21.3.2004 copies of the statement of witnesses so recorded by the E.O. along with the copies of the exhibits was sent to the

delinquent vide registered post dated 21.3.2004 giving him three weeks time to appear before the undersigned in person to defend himself of the charges levelled against him. After expiry of three weeks, on 14th April, 2004, as the petitioner did not appear before the Enquiry Officer, the Enquiry Officer proceeded to prepare the report. On 15.4.2004 he submitted his report to the competent authority.

15. The principles *audi alteram partem* requires that a person should not be condemned before giving an adequate and reasonable opportunity of hearing. If in spite of sufficient notice, the charged employee do not appear before the Enquiry Officer, then there cannot be any violation of principles of natural justice. In this case two decisions have been relied upon by the learned counsel for the petitioner. In the case of ***STATE OF UTTAR PRADESH AND OTHERS V. SAROJ KUMAR SINHA****; (2010) 2 Supreme Court Cases 772*, the Hon'ble Court has examined the question when an ex-parte enquiry can be conducted. The Hon'ble Supreme Court has held that it is only in case when the Government servant despite notice of the date fixed fails to appear, the Enquiry Officer can proceed with the enquiry ex parte. Even in such circumstances, it is incumbent on the Enquiry Officer to record the statement of witnesses mentioned in the charge sheet. Since the Government Servant was absent he would clearly loose the benefit of cross-examination of the witnesses, but on the other hand, in order to establish the charges, the department is required to produce necessary evidence before the enquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge. The Hon'ble Supreme Court further held that an inquiry officer acting in a quasi-judicial capacity, is in the position of an independent adjudicator. He is not supposed to be a representative of department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved.

In the case of ***STATE OF UTTARANCHAL AND OTHERS V. KHARAK SINGH****; (2008) 8 Supreme Court Cases 236*, the Hon'ble Supreme Court has held that a witness should not be the enquiry officer and the evidence should be led in presence of charged employee. The Hon'ble Supreme Court further held that there are some basic principles regarding conducting departmental enquiries, which are as follows:-

(i) The enquiries must be conducted bona fide and care must be taken to see that the enquiries do not become empty formalities;

(ii) If an officer is a witness to any of the incidents which is the subject matter of enquiry or if enquiry was initiated on a report of an officer, then in all fairness he should not be the enquiry officer. If the said position becomes known after appointment of enquiry officer, during the enquiry, steps should be taken to see that the task of holding an enquiry is assigned to some other officer;

(iii) In an enquiry, the employer/department should take steps first to lead evidence against workman/delinquent charged and give an opportunity to him to cross-examine witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give an explanation about the evidence led against him;

(iv) On receipt of enquiry report, before proceeding further, it is incumbent on the part of disciplinary/punishing authority to supply a copy of enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

In applying these principles to the case in hand, it is seen that the petitioner was given a notice to appear before the Enquiry Officer. Thereafter also the E.O. has sent several notices. Even after proceeding ex parte, the Enquiry Officer has sent the statement of witnesses recorded along with the copies of the exhibits to the petitioner as per letter No.M.V-1/04 C/10 dt.21.3.2004 giving him three weeks time to appear before the E.O. to defend the charges levelled against him.

16. Having gone through the records, it is seen that not only the petitioner has been given enough opportunity/notice to defend himself in the departmental enquiry, the enquiry officer has also carefully recorded the evidence of as many as six witnesses from the side of the employer. All these documents were also sent to the present petitioner. Having considered the materials placed before him, the Enquiry Officer has come to a proper conclusion. It cannot be said that the Departmental Enquiry is conducted in a casual manner with a closed mind. The Enquiry Officer was definitely acting as a quasi-judicial authority in this case and this Court finds no infirmity in the procedure adopted by the Enquiry Officer.

17. Furthermore, it is not disputed by the petitioner that he has not received notice in this case. All he pleads that he was ill during that period. However, he has failed to establish his crippling illness, which prevented him to move the HQR or to appear before the E.O. by showing that he was

hospitalized for a long period or was being treated in a highly specialized manner for the entire period. It is also not disputed that after receipt of the enquiry report before proceeding further, the Disciplinary Authority did not supply the copy of the enquiry report. However, all the connected materials, i.e. evidence of the witnesses as well as the exhibits were not supplied by him by the D.A. But in this case it will not cause any prejudice to the petitioner because the Enquiry Officer has sent all these documents as per the letter dtd.21.3.2004. Thus, there is no violation of any of the settled principles guiding departmental enquiries in this case.

18. The contentions raised by the learned counsel for the petitioner is that the punishment inflicted is shockingly disproportionate to the misconduct alleged/proved. It is not disputed that the petitioner was unauthorized absent from 8.12.2000 till 1.10.2003(on which date the charges were framed). Thus, he was absent from more than two years nine months and there is no cogent explanation for the same. Learned counsel for the petitioner relied upon the reported case of *Jagdish Singh v. Punjab Engineering College and others* (supra) wherein the Hon'ble Supreme Court has held that penalty of removal from service for unauthorized absence on a part of a sweeper on four spells totaling to fifteen days in all in two months to sort out his daughter's problem with her in-laws is shockingly disproportionate. In the said case, the Hon'ble Supreme Court has reiterated that unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court/tribunal, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a normal course if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the disciplinary authority or the appellate authority to reconsider the penalty imposed.

19. In view of the aforesaid ratio, this Court considers the punishment awarded to the petitioner in the backdrop of the fact that the petitioner was a member of the Force which is required to maintain an absolute discipline in the matters of performance of duty as well as in the matter of conduct in normal life. The conduct and discipline expected from a member of a Force cannot be equated with other employees like a Sweeper or a Peon or even a Class-III employee of the Government establishment. Thus, keeping in view the unauthorized absence of about three years of the petitioner, it is held to be a sufficient ground to inflict harshest punishment of removal from service and the Court does not consider it expedient to interfere with the same.

Accordingly, this Court finds no merit in the writ petition and the same is dismissed.

The files produced by the learned Asst. Solicitor General be returned to him.

Writ petition dismissed.

2011 (II) ILR- CUT- 110

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

JCRA. NO.59 OF 2002 (Decided on 23.03.2011)

TOFFAN SARBHANG …….. Appellant.

.Vrs.

STATE OF ORISSA … ….Respondent.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.161.

Delay in recording statement of witnesses by police – Credibility – No strait jacket formula can be evolved nor any thumb rule prescribed for its universal application.

In this case delay has been explained by the prosecution that P.W.8 is a Government servant in whose presence the occurrence took place – Being frightened he did not lodge report at the police station on the date of occurrence but on 21.12.2000 he suo motu went to the police station and narrated the incident to the I.O. who recorded his statement on that day – Held, delay in recording the statement can not affect the veracity of the evidence of P.W.8, particularly when he is a man of a distant place and had no animosity with the accused.

(Para 8)

Case laws Referred to:-

1.94 (2002) C.L.T. 229 : (State of Orissa-V- Udaya Naik & Ors.)
2.2004 (II) OLR 482 : (Bisikesan Pujari-V-The State of Orissa).
3.(2010) 9 SCC 259 : (Narinder Kumar-V-State of Jammu & Kashmir).

For Appellant - Mr. Prem Kumar Mohanty.
For Respondent - Mr. S.K.Nayak,
Addl. Govt. Advocate

PRADIP MOHANTY, J. This appeal is directed against the judgment dated 27.04.2002 passed by the learned Additional Sessions Judge, Sonepur in Sessions case No.43/46 of 2001 convicting the appellant under Section 302, IPC and sentencing him to undergo imprisonment for life.

2. The case of the prosecution as unfolded during the trial is that the accused and his wife-Sumukhi (P.W.7) returned to the house of the informant-Iswara Mahanand (P.W.4), who is the father-in-law if the accused, after working as labourer at Cuttack and earning some amount of money. As P.W.7 stayed in the house of her parents, the accused off and on met her in

her parents, house. At that time, the accused had no source of income and was moving hither and thither under the influence of liquor. When Sumukhi fell ill, the appellant did not provide her treatment and, on the other hand, insisted her to accompany him to his house. But, Sumukhi was not ready to go with the accused to his village to lead usual conjugal life with him. One day prior to the occurrence the accused again insisted to take his wife to his won house which was strongly protected by the informant, his sons and Sumukhi (P.W.7). On the next day evening, i.e. , 20th October, 2010, the accused being enraged assaulted the deceased, son of the informant, with a Tabli (M.O.I) near village Fatamunda. On the report of the father-in-law of the accused, police registered the case, sent the dead body for post mortem examination to the doctor, examined the witnesses, arrested the accused , recovered the weapon of offence (M.O.I) and after due completion of investigation filed charge-sheet against the appellant under Section 302, IPC.

3. The plea of the accused was one of complete denial of the prosecution allegation. He specifically stated that he has been falsely implicated in this case.

4. In order to prove its case, prosecution examined as many as 14 witnesses including the doctors and the I.Os and exhibited 16 documents and the defence examined none. The learned trial Judge after conclusion of the trial found the appellant guilty under Section 302, IPC and accordingly convicted him there under and sentenced him to undergo imprisonment for life basing upon the evidence of P.W.8, who is an eyewitness, coupled with the medical evidence and the evidence with regard to recovery of the weapon of offence (Tabli) at the instance of the accused.

5. Mr. Mohanty, learned counsel appearing for the appellant submits that P.W.8 is a chance witness. He was examined two months after the occurrence. His evidence can not be relied upon in view of the decision rendered in the case of State of Orissa v. Udaya Naik and others; 94 (2002) C.L.T. 229. The confession made before a police officer is not admissible under Section 27 of the Evidence Act. Therefore, the same can not be utilized against the appellant in view of settled principle of law reported in the case of Bisikesan Pujari v. the State of Orissa; 2004 (II) OLR 482.

6. Mr. S.K.Nayak, learned Additional Government Advocate vehemently contends that P.W.8, who works as a gardener in the horticulture department and at the relevant time was posted at Sonepur on deputation, is an eyewitness to the occurrence and he has categorically deposed how and in what manner the appellant committed murder of the deceased. Besides, the appellant while in police custody confessed to have murdered the deceased,

led the police and gave recovery of the weapon of offence (M.O.I) in presence of the witnesses, as is evident from the evidence of P.Ws.5, 10 and 14. Therefore, no infirmity or illegality has been committed by the trial court so as to interfere with the impugned judgment.

7. Perused the records. The charge against the accused has been established basing on the testimony of P.W.8. He deposed that he worked as a gardener in the horticulture department. One month prior to the occurrence, i.e. on 20.10.2000 he had come to Sonepur on deputation to work in horticulture department. During that period, he was staying in a rented house of Rahasbihari Bar in village Baiganjuri. On the date of occurrence i.e., 20.10.2000, after finishing his office work he sipped a cup of tea at about 6.30 p.m. in the tea stall situated in front of petrol pump and left for his rented house. While he was going towards his rented house on the way, the deceased was going ahead of him in a narrow lane towards western side of petrol pump. While the deceased was going ahead of him, all on a sudden the accused came towards him from a bush holding a tabli and with that tabli he assaulted the deceased causing injury on his neck, cheek and other parts of his body. With the impact of tabli blow the deceased fell on the ground with groaning sound. Seeing the assault on the deceased he was frightened and out of fear he ran away from the place of occurrence leaving the chapal on the spot. He further deposed that since he was a Government servant and since gory killing had taken place in his presence, being afraid of the situation he did not lodge report at the police station on the date of occurrence but on 21.12.2000 he suo motu went to the police station and narrated the incident to the I.O. and his statement was on that day recorded by the I.O. in cross-examination he admitted that the occurrence took place in between 6.30 and 7.00 p.m. and he clearly identified the accused when he killed the deceased with M.O.I.

P.W.4 is the informant, father-in-law of the accused and father of the deceased. He deposed that one month prior to the occurrence his daughter (P.W.7) and the accused had returned to his house from Cuttack and the accused took all the money which he and his wife (P.W.7) had earned at Cuttack and left his house. Thereafter, his daughter (P.W.7) fell ill, but the accused did not take her care and come to his house. After some days, the accused came and asked P.W.7 to accompany him to his own house situated in village Laxmimunda. But, P.W.7 did not agree as the accused was moving without work and was always under the influence of liquor. The sons of P.W.4 also denied to leave P.W.7. The accused then left his house. On the next day morning, the deceased-Himanshu as usual went to Dhababahali village for tending cattle. Till evening of the day since the deceased did not return home, P.W.4 and his wife searched for and found

him lying injured on the road side of Fatamunda village with multiple injuries on his person. Thereafter, he called some local people and shifted the deceased to the District Headquarters Hospital, Sonepur for his treatment. The doctor after examining the deceased declared him dead. Thereafter, he lodged oral report before Sonepur Police Station which was reduced to writing and he put his LTI in the said report. In cross-examination, he has stated that all the time the accused came to his house after their return from Cuttack, he left his house without his knowledge. The F.I.R. corroborates the statement of P.W.4 (informant).

P.W.5 is a witness to leading to discovery. He deposed that the accused while in custody confessed before the police officer to have murdered the deceased by one tabli and stating so he led the police to the place of occurrence where he had concealed the said tabli and gave recovery of the same. The police seized the said tabli in his presence vide seizure list (Ext.5). He proved the seizure list (Ext.5) and his signature thereon marked (Ext5/1). In cross-examination, he has stated that he proceeded to the place where accused had concealed M.O.I. (table) in a Jeep along with the O.I.C.

P.W.6 is a co-village and a witness to the seizure of plain earth, blood stained earth and two pairs of chapels from the place of occurrence vide seizure list (Ext.6). He is also a witness to the inquest. He proved the seizure list (Ext.6) and the inquest report (Ext.8) and his signatures thereon marked Ext.6/1 and Ext.8/1. P.W.7 is the wife of the accused and sister of the deceased. She corroborated the evidence of her father (P.W.4).

P.W.9 deposed that there was quarrelling between the accused and the family of his wife over leaving of his wife to his house. On being informed, he and some of his villagers brought the deceased in injured condition to the hospital where the deceased was declared brought dead by the doctor. This witness further deposed that he along with father of the deceased had been to Sonepur P.S. and lodged the oral report which was reduced to writing by the O.I.C. and after the FIR was reduced to writing he put his signature on the same. He is also a witness to the inquest and proved the inquest report (Ext.8).

P.W.10 is also a witness to the leading to discovery and seizure of tabli (M.O.I) and two pairs of chapels, plain earth and blood stained earth. He proved the seizure lists (Exts.5 and 6) and his signatures thereon marked Exts.5/2 and 6/2.

P.W.11 is a person of the locality. He stated that he had seen the appellant moving near the petrol pump at Sonepur holding a tabli a few

hours before the deceased was killed. In cross-examination, nothing has been elicited to demolish the above evidence.

P.W.12 is the Doctor, who conducted autopsy over the dead body of the deceased and found the following injuries :

"(1) Incised would placed on the right cheek. It tailed towards angle of the mouth of size 2" x 1" underlying which right masseter muscle, right mandibular vessel cut through.

(2) Chopped would of size 4" x 3" x 2 1/2 " was placed slantingly over the nape of the neck extending from the right mastoid process to the 5th cervical vertebra, underlying which sterno mastoid muscle trapezius of right side, vertebral muscles with right vertebral vessels and spine and body of 3rd, 4th and 5th cervical vertebra also spinal cord had been cut obliquely at that level.

(3) Chopped would of size 3" x 2" x bone deep was placed on the back of the right shoulder joint cutting the outer angle of the right shoulder blade and the ligaments of the right shoulder joint.

(4) Incised would of size 3" x 2" x 1" placed on the outer part of the right deltoid muscle.

(5) Penetrating would of size 1" x ½" x ½" placed on the right side of the neck ½" below the lobule of the right ear, ante-mortem clots were found present.

(6) Penetrating wound of size 1" x ½" x 1" placed on the right side of the neck ½" below the injury no.5.

(7) Brown ligature mark of size 3" x 2" placed on the back of the right waist. On dissection of the injury parchment like base or the ligature mark, extravessations of blood present in the subcutaneous tissue."

He opined that the injuries were ante mortem in nature and the death was due to shock and haemorrhage on account of multiple incised wound on the neck. He also opined that all the above injuries except injury no.7 were possible by M.O.I.

P.W.13 is a witness to the seizure of wearing apparels of the accused and he proved the said seizure list (Ext.13) and his signature marked Ext.13/1.

P.W.14, is the I.O., who registered the case, sent the dead body for post-mortem examination, arrested accused, visited the spot, prepared the spot map and examined the witnesses. On 21.10.2000, he held inquest over the dead body of deceased in the District Headquarters Hospital, Sonepur in presence of the witnesses and prepared the inquest report. He seized some

blood stained earth, sample earth, two pairs of chapels from the spot and prepared the seizure list. On the same day, he also seized wearing apparels of deceased. He received the oral report of informant and reduced the same to writing and on the next day he sent the report to court. He first went to the hospital and then proceeded to the place of occurrence.

8. A contention has been raised by Mr. Mohanty that the statement of P.W.8 was recorded two months after the occurrence and he being a chance witness his evidence can not be relied upon for any purpose. In ***Narinder Kumar v. State of Jammu and Kashmir,*** (2010) 9 SCC 259, it has been held that there is no fixed rule to determine credibility if the prosecution case has been affected by delay in recording statement of witnesses by police. This aspect has to be measured in background of facts and circumstances of the case. Whether or not delay has affected the credibility of the prosecution is a matter on which no straitjacket formula can be evolved nor any thumb rule prescribed for universal application. In the instant case, the delay in recording the statement of the witnesses has been explained by the prosecution that since P.W.8 is a government servant and as the incident of killing took place in his presence, being frightened he did not lodge report at the police station on the date of occurrence but on 21.12.2000 he suo motu went to the police station and narrated the incident to the I.O., who recorded his statement on that day. Therefore, delay in recording the statement can not affect veracity of the evidence of P.W.8, particularly when he is a man of a distant place and had no animosity with the accused. The evidence of P.W.11 is that he had seen the accused moving near the petrol pump holding a tabli a few hours before the deceased was killed. The prosecution through P.Ws.5, 10 and 14 has clearly established that the accused while in custody confessed his guilt, led the police and the witnesses to the place where he had concealed the weapon of offence (M.O.) and gave recovery of the same.

9. For the reasons stated above, this Court holds that the present appellant and none else is the author of the crime and he has been rightly convicted by the trial court.

10. In the result, the impugned judgment of conviction and sentence passed by the trial court is upheld and the Jail Criminal Appeal is dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 116

M.M.DAS, J.

W.P.(C) NO.18140 OF 2010 (Decided on 14.02.2011)

AMRITA MISHRA ……Petitioner.

.Vrs.

CHAIRMAN, O.J.E.E.,BURLA & ORS. ……. Opp.Parties.

Education – Admission in M.B.A. discipline – Petitioner cleared M.A.T. examination – As per the Information Brochure of OJEE, 2010 15% seats in M.B.A. be reserved for Candidates clearing CAT, XAT & MAT – Petitioner interested to take admission in M.B.A. discipline under S.C.S. College Puri – However she was asked to take admission in a private College - Hence the writ petition .

JEE Committee having not specifically mentioned in the Information Brochure that candidates like the petitioner can only take admission in private Institution is estopped from contending that the petitioner can not be admitted to Govt. College imparting M.B.A. Programme – Held, direction issued to Opp.Parties to admit the petitioner in M.B.A. programme in SCS Autonomous College Puri in the seat kept vacant.

(Para 11 to 14)

Case laws Referred to:-

1.(2008) 2 SCC 672 : (DDA-V-Joint Action Committee).
2.(2008) 5 SCC 550 : (State of U.P.-V-Chandra Ran Beer Singh).
3.(2008) 3 SCC 432 : (Basic Education Board, U.P.-V-Upendra Rai).
4.(2007)8 SCC 418 : (M/s. Dhanpur Sugar-V-State of Uttaranchal)
5.(2007)4 SCC 737 : (Directorate of Film Festigals-V-Gaurav Ashwin Jain).
6.(2006)5 SCC 57 : (Union of India-V- Era Educational Trust).
7.(1998) 8 SCC 765 : (Govt. of A.P.-V-. M.Srinivasa Reddy & Ors.).

For Petitioner - M/s. K.P.Mishra, S.Mohapatra, T.P.Tripathy & L.P.Dwivedy.
For Opp.Parties - M/s. S.Palit, A.K.Mahana, A.Kejariwal & D.N.Pattnaik. (for O.Ps 1 & 5)

M.M. DAS, J. The petitioner in this writ petition has sought for issuance of a writ of mandamus directing the opposite parties 1 and 2 to give admission to the petitioner in MBA discipline in Samanta Chandrasekhar Autonomous College, Puri. The petitioner cleared the MAT Examination.

Accordingly, she was registered under the JEE, 2010, as at Annexure – 3. Consequently, she deposited the requisite fees. As per the Information Brochure of OJEE, 2010, fifteen per cent of the seats in MBA Course are reserved for candidates, who have cleared CAT, XAT & MAT i.e. 5% each in the order of preference. It was nowhere stipulated that the said quota of 15% is only available in private colleges. The petitioner has alleged that when the Counselling was completed and documents were verified, the opposite party no.1 compelled the petitioner to take admission in a private college, which was not acceptable to the petitioner. During pendency of the writ petition, a second Joint Entrance Examination was conducted in which, the petitioner secured the merit position of 445.

2.. By an interim order dated 29.10.2010, this Court directed that if seats are vacant in MBA Course in S.C.S. College, Puri, one such seats shall not be filled up without leave of this Court.

3. A counter affidavit has been filed by opposite party no.1 stating that it has always been a practice, as a matter of policy of the Government that the 15% seats in MBA Course to be filled up by the candidates, who have cleared CAT, XAT & MAT relate to private colleges only and not Government colleges. It has been further averred in the counter affidavit that in the second JEE as per the decision of the Policy Planning Body (in short "the PPB") only seats in respect of private colleges were to be filled up by the successful candidates.

4. Mr. Mishra, learned counsel for the petitioner by way of an alternative argument submitted that the MBA Course in S.C.S. College, Puri is outsourced and is a self financing course and is being conducted by a private organization. Therefore, for the purpose of MBA Course, S.C.S. College, Puri cannot be construed to be a Government college.

5. Mr. Palit, learned counsel appearing for the opposite parties 1 and 5 vehemently argued that the PPB in its proceedings has recommended that in order to give effect to Section – 9 (4) of the Orissa Professional Educational Institutions (Regulation of Admission & Fixation of Fees) Act, 2007 (hereinafter referred to as "the Act'), All India Quota Seats to the tune of 15% for MBA Course in the private professional educational institutions should be filled up from CAT, XAT & MAT in equal magnitude. The said recommendation of the PPB has been accepted by the Government in its Industries Department vide its order dated 02.06.2008, who in exercise of powers conferred by Section – 18 of the Act, passed the order adopting the said recommendation of the PPB.

6. It appears that the said recommendation of the PPB made on 28.03.2010 was with regard to regulating the spot selection after the second round of counselling was held in respect of first Joint Entrance Examination, 2010.

7. The Government in its Industries Department passed the order on 2.6.2008 that the candidates, who have cleared CAT, XAT & MAT can only be given admission to private colleges. The said order of the Government is as follows:-

"GOVERNMENT OF ORISSA
INDUSTRIES DEPARTMENT.

No.I-TTI-10/2008/ 8406/I.Bhubaneswar 2.6.2008

O R D E R

Whereas, it has been provided under sub-section (4) of Section -9 of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (hereinafter referred to as the said Act) that in a Private Professional Educational Institution, fifteen percent of the approved intake may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be , conducted by the Central Board of Secondary Education.

And, whereas, there is no All India Test in respect of MCA, B. Pharm and Hotel Management and Catering Technology Programmes like that of Engineering and Medical Programme, the State Government is experiencing difficulties in giving effect to sub-section (4) of Section (9) of the said Act.

And, whereas, there are multiple All India Tests like-CAT,XAT and MAT in respect of MBA Programme, the State Government is experiencing difficulties in giving effect to sub-section (4) of the Section (9) of the said Act.

And, whereas, the Policy Planning Body constituted under the provisions of the said Act has recommended that 15% of the approved intake in respect of MCA, B. Pharm, Hotel Management & Catering Technology Programmes meant for All India quota shall be filled up from the merit list of JEE -2008 since there is no All India Test for such courses.

And, whereas, the said P.P.B. has recommended that All India quota seats to the tune of 15% of MBA Programme shall be filled up

from merit list of CAT, XAT and MAT of the rate of 05% of equal magnitude since there are multiplicity of All India Tests. However, the vacancy from CAT shall be taken to the XAT and then to MAT and, thereafter, if any, vacancy shall be filled up from merit list of JEE-2008.

Now, therefore, in exercise of the powers conferred by section 18 of the said Act, the Government by this order make the following provisions for the academic year 2008-09.

(i) 15% of the approved intake in respect of MCA, B. Pharm, Hotel Management and Catering Technology Programmes meant for All India quota shall be filled up from the merit list of JEE-2008.

(ii) All India quota seats to the tune of 15% for MBA Programme shall be filled up from the merit list of CAT,XAT and MAT at the rate of 05% of equal magnitude. The vacancy from CAT shall be taken to the XAT and then to MAT and thereafter, if any vacancy remains, shall be filled up from the merit list of JEE-2008.

By order of the Governor.
Sd/-
Principal Secretary to Government".

A further contention was raised by Mr. Palit that though the Prospectus for the OJEE, 2010 did not specifically prescribe that the candidates, who have cleared the aforesaid All India Tests, will only be given admission in private colleges, but such a procedure was being followed every year.

8. in view of the settled position of law in various decisions of the Apex Court, such as : -

"1. (2008) 2 SCC 672 (***DDA – versus – Joint Action Committee)***
2. (2008) 5 SCC 550 (***State of U.P. -V- Chandra Ran Beer Singh)***
3. (2008) 3 SCC 432, (***Basic Education Board, U.P. –V- Upendra Rai)***
4. (2007) 8 SCC 418, (***M/s. Dhanpur Sugar –V- State of Uttaranchal)***
5. (2007) 4 SCC 737, (***Directorate of Film Festivals-V- Gaurav Ashwin Jain)***
6. (2006) 5 SCC 57 (***Union of India –V- Era Educational Trust)***
7. (1998) 8 SCC 765 (***Govt. of A.P. v M. Srinivasa Reddy and others)"***

9. In the Information Brochure for admission to various courses including MBA Course of the year 2010 published by the Orissa Joint Entrance

Examination, 2010 under the heading Reservation of seats, it has been provided as follows: -

> **Reservation of seats**: In a private educational institution other than minority institution not exceeding fifteen per centum of the approved intake may be filled up by NRI from the merit list prepared on the basis of JEE.
>
> Where any shortfall in filling up of seats from NRI occurs, such vacant seats may be filled up from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education: provided that while filling such vacant seats NRI shall be preferred. In a private professional educational institution fifteen per centrum of the approved in take may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Entrance Examination, as the case may be, conducted by Central Board of Secondary Education."

10. Clause – 2.7.1 of the said Information Brochure is as follows:-

> 2.1.7. All India quota seats to the tune of 15% for MBA programme shall be filled up from the merit list CAT, XAT and MAT at the rate of 05% of equal magnitude at the vacancy from CAT shall be taken to the XAT and then to MAT thereafter. If any vacancy remains, shall be filled up from the merit list of JEE 2010 during academic session 2010 – 11."

11. Clause – 1.7 (vi) provides availability of courses. In the said clause, it is declared that JEE, 2010 will be conducted to draw the merit list of successful candidates for admission into MBA Course in the colleges/institutes as per the list given in Table – V for the year 2009 as an indicator. The said Table – V enlists the Government MBA Colleges as well as private MBA Colleges. Samanta Chandra Sekhara Autonomous College mentioned under the heading Government MBA Colleges is shown to have 60 seats. The Government's decision as quoted earlier accepting the recommendation of the PPB was adopted on 02.06.2008. A composite reading of the said order of the Government may lead to the conclusion that under sub-section (4) of Section – 9 of the Act, it has been prescribed that 15% of the approved in-take may be filled up strictly from the merit list of All India Engineering Entrance Examination or All India Medical Examination, as the case may be, conducted by the CBSE and that provision has been adopted in course of MBA programme where the PPB recommended that seats to the tune of 15% of MBA programme shall be filled up from the merit

list of CAT, XAT & MAT @ 5% of equal magnitude since there are multiplicity of All India Tests and this decision approved by the Government in the said order may be interpreted to be only restricted to private institutions. But this decision of the Government appears to be ambiguous as, in clause – (ii) of the last paragraph of the said order, which was made by exercising power conferred on it in Section – 18 of the Act that All India Quota Seats to the tune of 15% for MBA programme shall be filled up from the merit list of CAT, XAT & MAT @ 5% of equal magnitude, the Government has never restricted the said 15% seats to private institutions only.

12. Even if, it is so, the said order of the Government taken in 2008 coupled with the fact that the Government decided to adopt previous practice in 2010 cannot be thrust upon the candidates like the petitioner by restricting admission of candidates, who were successful in CAT, XAT & MAT, the MBA programme only to private institutions, when the Information Brochure of OJEE, 2010 is silent in that regard. The petitioner, therefore, believing that he will be considered to take admission, in a Government College imparting MBA programme, is justified in claiming a seat in S.C.S. Autonomous College, Puri. The JEE Committee having not specifically mentioned in the Information Brochure that candidates like the petitioner can only take admission in private institutions is estopped from contending that the petitioner cannot be admitted to a Government College imparting MBA programme as enlisted in Table – V of the Information Brochure.

13. The petitioner, having denied admission to S.C.S. Autonomous College, Puri in MBA programme, is found to be entitled to take admission in the said college for prosecuting MBA programme.

14. As by an interim order, a seat was directed to be kept vacant in the said college and it is not disputed that such a seat is available in the said college, the writ petition is allowed directing the opposite parties to admit the petitioner to MBA programme in S.C.S. Autonomous College, Puri in the seat kept vacant. This shall be done within a period of two weeks from the date of production of certified copy of this judgment before the opposite party no.2 – Principal on the petitioner fulfilling all other requirements, such as, deposit of admission fees, if the same has not yet been deposited by her. No costs.

Writ petition allowed.

2011 (II) ILR- CUT- 122

M.M.DAS, J.

CRP NO.28 OF 2010 (Decided on 04.02.2011)

MUNICIPAL COMMISSIONER,C.M.C. CTC. …. …..Petitioner.

.Vrs.

HAREKRUSHNA NAYAK & ANR. ……. Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 7, RULE 11 (d) r/w Sec. 14 & 18 of the Limitation Act, 1963.

Suit for recovery of dues – Normally a plaint can not be rejected under Order 7 Rule 11 (d) C.P.C. by taking evidence or reading the written statement but by finding out what is contained in the plaint itself – If the plaint itself shows that the claim is barred by time then only it can be rejected – However if the question of limitation is connected with the merits of the claim in the suit then it has to be tried along with other issues – Moreover in view of the provision under Order 7 Rule 6 C.P.C. the plaint should not be thrown out at the threshold under Clause (d) of Order 7 Rule 11 C.P.C. on the ground that it is barred by time, if amendments can be brought in to the plaint to exempt the plaintiff from the law of limitation but such amendment should be of such nature, which is not inconsistent with the averments already made in the plaint – The Plaintiff has also pleaded extension of limitation U/s.18 of the limitation Act and exclusion of certain period U/s.14 of the said Act – Held, the learned Trial Court was correct in not allowing the prayer to reject the plaint – However, the issue as to whether the suit is barred by law of limitation shall be tried by the learned Trial Court along with other issues.

(Para- 6,7,& 8)

Case laws Referred to:-

1.AIR 2003 SC 3174 : (Kamala & Ors.-V-K.T.Eshwara Sa & Ors.).
2.2007 (II) OLR (SC) 613 : (Hardesh Ores (P) Ltd.-V-Hede & Company).

For Petitioner - M/s. Niranjan Panda, S.K.Acharya, M.K.Panda & Miss. S. Mazumdar.
For Opp.Parties - M/s. Ramakanta Mohanty, D.Mohanty, S.Mohanty, D.Varadwaj, P.Jena & S.K.Mohanty (for O.P.2).

M.M. DAS, J. This civil revision has been filed by the defendant no. 1 in C.S. (III) No. 3 of 2004 against an order rejecting an application under Order

7 Rule 11 C.P.C. where a prayer was made by the said defendant to reject the plaint on the ground that the suit was barred by law of limitation. Clause (d) of Order 7 Rule 11 C.P.C. provides that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In the present case, the suit has been filed for recovery of the dues of the plaintiff from the defendant-Cuttack Municipal Corporation, which, according to the plaintiff, has not been paid to him, and was on account of the certain departmental works executed by him. Initially, the plaintiff filed OJC No. 804 of 2001 before this Court on 25.1.2001. By order dated 5.12.2002, the writ petition was disposed of observing that the petitioner should file a civil suit for recovery of the amount and further observing that the period for which the writ petition has been kept pending should be taken into account while calculating the period of limitation. Thereafter, the plaintiff filed the suit claiming recovery of an amount of Rs. 5,13,520/- with compound interest at the rate of 15% per annum for the delay period till the date of final payment along with other ancillary reliefs. The plaintiff averred in the plaint with regard to the works executed by him that the last work was executed on 28.10.1997. The plaintiff in paragraphs- 4 and 5 of the plaint has stated that in spite of several requests for making payment, the Cuttack Municipal Corporation was silent over the matter for which he also moved the Urban Development Department, Government of Orissa by various letters in the year, 2000 before approaching this Court in the writ petition. He gave a notice on 28.3.2003 and 29.10.2003 to the Cuttack Municipal Corporation. He has also referred to a letter dated 18.8.2000 of the Municipal Engineer in paragraph-7 of the plaint. It is averred that part payment was made to him. The plaintiff has also referred to certain letters showing that some amount due to him was wrongly paid to Shri A.C. Pradhan who was directed to refund the said amount to the plaintiff. The plaintiff has also mentioned the documents in the plaint on which he relied upon.

2. Mr. Panda, learned counsel for the petitioner relying upon the judgment in the case of ***Kamala and others –v- K.T. Eshwara Sa and others***, AIR 2003 SC 3174 submits that while deciding the application under Order 7 Rule 11 C.P.C., the Supreme Court has laid down that the court shall only look into the plaint and should not enter into the questions of evidence. He also relies upon the decision in the case of ***Hardesh Ores (P) Ltd. –v- Hede and Company***, 2007 (II) OLR (SC) 613 in support of his contention that whether the plaint discloses a cause of action is essentially a question of fact, but whether it does or does not must be found out from reading the plaint itself. The Supreme Court in the said case has further laid down that the averments made in the plaint as a whole have to be seen to find out whether Clause (d) of Rule 11 of Order 7 is applicable. It is not permissible to cull out a sentence or a passage and to read it out of the

context in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or substraction of words or change of its apparent grammatical sense.

3. Mr. Mohanty, learned counsel appearing for the opp. party, however, submits that in the present case, Clause (d) of Order 7 Rule 11 C.P.C. is not attracted at all, as a plain reading of the plaint would go to show that there is a cause of action for the plaintiff to file the suit and in view of the various correspondences referred to in the plaint, acceptability of which can be gone into during hearing of the suit, the suit cannot be held to be barred by law of limitation. The court below in the impugned order considering all these aspects and relying upon Sections 18 and 14 of the Limitation Act came to the conclusion that the application under Order 7 Rule 11 C.P.C. cannot be allowed and the same has been accordingly rejected.

4. Mr. Panda, learned counsel appearing for the petitioner vehemently urged that Section 18 of the Limitation Act will not apply to the facts of the present case as the letter which is stated to be an acknowledgement of debt as provided under Section 18 of the Limitation Act is in fact not an acknowledgement of any liability. However, this question should be gone into while hearing the suit on merit and the same cannot be adjudicated at the threshold.

5. Rejection of a plaint as contemplated under Clause (d) of Rule 11 under Order 7 C.P.C. is where the suit appears from the statement in the plaint to be barred by any law. This inevitably would mean, as has been fairly settled in law, that to consider an application for rejection of the plaint under the above provisions of the Code, the court can come to a finding on a bare reading of the plaint only that the suit is barred by any law. The corollary, therefore, would mean that parties are not at issue in such a case and indeed the question merely is of law and no investigation into any fact is necessary. If the “law” by which exclusion of Civil Court’s jurisdiction is contemplated and rejection of the plaint is sought for, but the plaint on its face discloses the requirement of investigation into any fact, then there would be no scope for passing an order under Clause (d) of Rule 11 under Order 7 C.P.C. No leap-frog procedure can be adopted by the trial court to efface or obliterate the right contemplated under Order 14 C.P.C. under which parties can raise issues. More specifically Rule 2 of Order 14 in terms contemplates that where issues both law and fact arise in the same suit and unless the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, shall pronounce the judgment on all issues. This impliedly mandates that an issue which is not a pure question

of law, but requires appreciation of facts cannot be decided as a preliminary issue.

6. Normally, a plaint cannot be rejected under Order 7 Rule 11(d) C.P.C. by taking evidence or reading the written statement, but by finding out what is contained in the plaint itself. For the purpose of seeing whether the plaint is within time or not the court has to assume all the averments made in the plaint as correct. If the plaint itself shows that the claim is barred by time, then only it can be rejected. However, if the question of limitation is connected with the merits of the claim in the suit, then it has to be tried along with other issues. At this juncture, it would be apt to refer to Order 7 Rule 6 C.P.C., which is as follows:

"**O. VII R. 6**

Grounds of exemption from limitation of law—Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Provided that the Court may permit the plaintiff to claim exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint."

7. Reading of the above provision would show that the court has discretion to grant liberty to the plaintiff to amend the plaint for claiming exemption from the law of limitation on any ground not set out in the plaint, if such ground is not inconsistent with the grounds set out in the plaint. The intention of the above provision is, therefore, clear that the plaint should not be thrown out at the threshold under Clause (d) of Order 7 Rule 11 C.P.C. on the ground that it is barred by time, if amendments can be brought into the plaint to exempt the plaintiff from the law of limitation but such amendment should be of such nature, which is not inconsistent with the averments already made in the plaint.

8. Applying the above principle to the facts of the present case, where the plaintiff has pleaded extension of limitation under Section 18 of the Limitation Act and exclusion of certain period under Section 14 of the said Act, the question of rejecting the plaint under Order 7 Rule 11 (d) C.P.C. did not arise. The learned trial court, therefore, though on different grounds has arrived at the right conclusion in passing the impugned order and rejecting the prayer of defendant no. 1 made under Order 7 Rule 11 (d) C.P.C. to reject the plaint. This, however, will not preclude the defendant no. 1 to raise the issue as to whether the suit is barred by law of limitation and such issue, if raised, shall be tried by the learned trial court along with all other

issues, which may be raised in the case, without being influenced by any observations made herein above.

9. With the aforesaid observations, this civil revision is, accordingly, dismissed but in the circumstances, without cost.

Revision dismissed.

2011 (II) ILR- CUT- 127

M.M.DAS, J.

W.P.(C) NO.17037 OF 2010 (Decided on 24.02.2011)

GAYATRI KAR …… Petitioner.

.Vrs.

BOARD OF SECONDARY EDUCATION ORISSA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ jurisdiction – Although the case involves question of fact which can not be adjudicated in writ petition but a writ Court can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice.

In the present case petitioner seeks correction of the name of her father in the Matriculation Certificate issued by the Board of Secondary Education in 1993 – The case involves question of fact and the petitioner has to approach the common law Forum by filing a suit – On the other hand for non submission of corrected certificate the petitioner may lose her job – Held, if the petitioner will file the suit and the number of the suit is provided to the employer of the petitioner her service shall not be terminated on the ground that she has not submitted corrected certificate till disposal of the suit and in the event suit is decreed the Board shall correct the name of the father of the petitioner in her H.S.C. Certificate and on production of the corrected certificate the same shall be accepted by her employer.

(Para 6,7)

Case law Referred to :-

AIR 1987 SC 1353 : (Collector, Land Acquisition, Anantanag & Anr.-V-Mst. Katij & Ors.).

For Petitioner - M/s. K.K.Swain, P.N.Mohanty, P.K.Mohanty & R.P.Das.

For Opp.Parties - M/s. P.K.Mohanty, D.N.Mohapatra, J.Mohanty, P.K.Nayak & S.N.Dash (For O.Ps. 1 and 2)

M.M.DAS, J. This writ application has been filed seeking correction of the name of father of the petitioner in her certificate granted by the Board of Secondary Education on passing the HSC Examination in the year 1993.

2. Mr. Swain, learned counsel submits that the name of the father of the petitioner was wrongly mentioned in the said certificate as "Rabindra Nath Kar" instead of "Premananda Kar". He further submits that an application was made to the District Inspector of Schools, Cuttack to correct the primary school certificate in respect of the father's name of the petitioner, which was referred to the concerned Tahasildar, who made an enquiry through the R.I.and found that the father's name of the petitioner is "Premananda Kar" and not "Rabindra Nath Kar" as mentioned in the said certificate. As such, change of name was certified and countersigned by the District Inspector of Schools and, accordingly, the name of the father of the petitioner was corrected in the Admission Register of the Primary School as well as in the High School. Thereupon, the petitioner made an application to the Board of Secondary Education to correct the name of the father of the petitioner. The petitioner states that the application was accompanied by the affidavit sworn to by Sri Rabindra Nath Kar as well as the affidavit sworn to by the petitioner asserting that Premananda Kar is her father. But, the Board authorities though assured the petitioner to make necessary correction in her High School Certificate by changing her father's name, nothing has been done as yet.

3. Mr. P.K. Mohanty, learned counsel appearing for the Board vehemently urges that the writ petition suffers from latches, as the petitioner has approached this Court after more than thirteen years and the writ petition is liable to be dismissed in limine on that ground, as no explanation for the delay has been given by the petitioner. He further submits that the Regulations of the Board do not permit correction of the father's name in the Certificate granted by the Board to a candidate after passing the HSC Examination. It is true that the Regulations of the Board have a provision that a candidate may make an application to correct any error with regard to the candidate's name or surname or any clerical error appearing in the certificate, but the Regulation is silent with regard to any provision for correction of the name of the parents of the candidate.

4. The facts of the case, however, reveal that the husband of the petitioner expired in a motor vehicle accident, who was serving as a Clerk in the office of the Accountant General, Orissa, Bhubaneswar and upon an application being made by the father of the petitioner under the Rehabilitation Scheme, the petitioner has been absorbed as a Clerk on probation in the office of the Principal Accountant General (A&E), Orissa, Bhubaneswar pursuant to the appointment letter dated 31.12.2010 as at Annexure-10. But a condition has been imposed in the said appointment letter that the appointment of the petitioner is purely provisional and subject to submission of corrected HSC Certificate within a period of two months,

failing which, her appointment is liable to be terminated without assigning any reason.

5. The question as to whether Premananda Kar is the father of the petitioner is a question of fact, which can not be adjudicated in a writ petition. No doubt, even in a writ application, where materials are provided and admitted by the parties with regard to a question of fact, the writ Court has jurisdiction to accept such material as true, but in the instant case, where a question of status of the petitioner, i.e. whether the petitioner is the daughter of Premananda Kar or not, in view of the fact that her father's name has been mentioned as "Rabindra Nath Kar" in the Matriculation Certificate, can not be adjudicated upon under Article 226 of the Constitution.

6. It is, therefore, imperative on the part of the petitioner to approach the Common Law Forum by filing a properly constituted suit for declaration that she is the daughter of "Premananda Kar" and not "Rabindra Nath Kar", as mentioned in the High School Certificate granted by the Board. However, considering the facts of the case, as stated above, it is found that in the event a corrected certificate is not provided to the employer by the petitioner, there is every chance of her losing the service and thereby the petitioner, who has become a widow, will be forced to be a destitute on account of the cruel hands of fate. It is a well settled position of law that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice and further that the jurisdiction of the High Court under Article 226 of the Constitution is extraordinary, which is normally exercisable keeping in mind the principles of equity. At this juncture, it would be profitable to refer to the decision in the case of Collector, Land Acquisition, Anantanag and another v. Mst. Katiji and others, AIR 1987 SC 1353 in the context of this case. In the said case, the Supreme Court was considering the question of condoning delay under section 5 of the Limitation Act in an appeal preferred by the State of Jammu and Kashmir arising out of a decision enhancing compensation in respect of acquisition of lands for a public purpose. While considering the said question and laying down that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice will be defeated, the Supreme Court observed that it must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so. It also laid down that when substantial justice and technical considerations are pitted against each other cause of substantial justice deserves to be preferred. This Court, therefore, is of the view that while simultaneously granting opportunity to the petitioner

to seek a declaration in a properly constituted suit, as stated above, should pass appropriate orders to give protection to the petitioner from losing her service for non-submission of a corrected High School Certificate, as directed by her employer under Annexure-10.

7. Considering the above aspect, liberty is granted to the petitioner to file a civil suit in accordance with law for declaration that she is the daughter of "Premananda Kar" and not "Rabindra Nath Kar", as mentioned in the High School Certificate granted by the Board within a period of three months from today. If such a suit is filed and the number of the suit is provided to the employer of the petitioner, the service of the petitioner shall not be terminated on the ground that she has not submitted the corrected High School Certificate till disposal of the suit. In the event, the suit is decreed, basing on such judgment of the civil court, which would amount to a judgment in rem, the Board shall correct the name of the father of the petitioner in the High School Certificate granted to her, which shall be produced before the employer and accepted.

8. The writ petition is accordingly disposed of.

Writ petition disposed of.

2011 (II) ILR- CUT- 131

R.N.BISWAL, J.

W.P.(C) NO.8603 OF 2010 (Decided on 04.03.2011)

SARPANCH, ALLAORI G.P. & ORS. …. …. Petitioners.

.Vrs.

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

ORISSA GRAMA PANCHAYAT ACT, 1964 (ACT NO.1OF1965) – S.4(3).

Fixation of headquarters of Gram Panchayat – Ordinarily it should be fixed in the village bearing the name of the Gram – Government notification under Annexure-II fixing headquarters of Allori Gram Panchayat at village Allori – Distance as well as natural barriers like hill and river in between some of the villages of the Allori Gram Panchayat and village Allori – No special reason to establish the headquarters of Allori Gram Panchayat at village Bhetia – Held, Government has rightly ordered to establish the headquarters of the Allori Gram Panchayat at Allori.

(Para 6)

Case laws Referred to:-

1.(1998) 2 SCC 1 : (Malpe Vishwanath Acharya & Ors.-V-State of Maharashtra &Ors)

2.100(2005) CLT 397 : (Smt. Babita Negi & Ors.-V-State of Orissa & Ors.

For Petitioners - M/s. Biswanath Rath, J.N.Rath, S.K.Jethy, S.K.Mishra & B.Barik.

For Opp.Parties - M/s. H.S.Mishra, A.K.Mishra, A.S.Behera, T.K.Sahu.
Addl. Govt. Advocate

R.N.BISWAL, J. Petitioner no.1 is the Sarpanch of Allori Grama Panchayat under Pallahara Block, petitioner nos.2 to 6 are ward members under the said Grama Panchayat and petitioner no.7 is a samiti member of Pallahara Block. They have filed this writ petition with prayer to quash Annexures-11 and 12 to the writ petition and to direct the opp.party no.1 to decide and declare village Bhetia as the headquarters of Allori Grama Panchayat.

2. At the time of reorganization of Grama Panchayats in the State of Orissa during the year 2001, Allori Grama Panchayat, under Pallahara Block was

newly created being bifurcated from Munduribeda Grama Panchayat. The newly created Allori Grama Panchayat comprises of 8 villages. As per the writ petition, village Biralamunda is at a distance of 12 kms, Sapajhar is at a distance of 10 kms, Nuagaon is at a distance of 6 kms and Bhetia is at a distance of 3 kms from village Allori, besides there are natural barriers like hill and river in between these four villages and village, Allori. So, the inhabitants of the said four villages would face much inconvenience to go to village Allori in Panchayat work if the headquarters is fixed there. On 4.7.2006, the B.D.O. Pallahara issued work order in favour of one Kirtan Behari Pradhan, S.I. of Schools, Pallahara to construct the G.P. building under the technical guidance of the concerned J.E. So, the Sarpanch of Allori G.P. filed W.P. (C) No.9551 of 2006 before this Court with prayer to quash the work order issued in favour of Kirtan Behari Pradhan. He also filed Misc. Case No.8424 of 2006 praying for interim stay, wherein this court on 26.7.2006 directed that if the work had not been commenced, it should not be allowed to anybody till the next date. The said writ petition is sub-judice. Again the Sarpanch of Allori Gram Panchayat filed W.P.(C) No.144008 of 2008 before this Court with prayer to direct the Govt. to decide and declare village Bhetia as the headquarters of Allori Grama Panchayat and to construct the Grama Panchayat Building there, wherein this court vide order dated 4.3.2009 held as follows:

> "Considering the above submissions of the learned counsel for the petitioner, the writ petition is disposed of directing the Project Director, D.R.D.A., Angul to conduct an enquiry as was proposed to be made under Annexure-7 to the writ petition and Annexure-11 and submit his report to the appropriate authority of the Government for enabling the Government to take a final decision in the matter with regard to fixation of headquarters of Allori Grama Panchayat. The entire exercises shall be completed within a period of three months from the date of production of a certified copy of this order before the opp.party no.1 by the petitioner. It is made clear that the decision of the Government shall not be influenced on the ground that any building has already been constructed or is being constructed to be used as the office of the Grama Panchayat at any place."

3. Accordingly, the Project Director, D.R.D.A., Angul, Sub-Collector, Pallahara, District Panchayat Officer, Angul and Collector, Angul enquired into the matter jointly and submitted a report, Annexure-11, the Government and the Government after going through the report vide order dated 19.4.2010 (Annexure-12) declared that the headquarters of Allori Grama Panchayat would continue in village Allori as fixed by the Government vide

Notification No.19194 dated 20.10.2001. As stated earlier, in this writ petition, the petitioners have prayed to quash Annexure-11 and the decision of the Government under Annexure-12.

4. Learned counsel for the petitioner submitted that because of long distance and geographical barrier between the four villages in question and village Allori, the members of the Allori Grama Panchayat passed a resolution on 18.11.2002 vide annexure-2 holding that the headquarters of Allori Grama Panchayat should be fixed at Bhetia and communicated it to the sub-Collector, Project Director, DRDA and Collector concerned so as to take steps for fixation of headquarters at Bhetia. On 26.8.2008 a similar resolution was also passed. According to learned counsel for the petitioner, when majority of the inhabitants of Allori G.P. want that the headquarters should be fixed at Bhetia as ordained in the case of ***Malpe Vishwanath Acharya and others vs. State of Maharashtra and others*** (1998) 2 SCC 1, it should be fixed there. All these factors have not been considered in Annexure-11 and without proper enquiry the Government fixed the headquarters of Allori G.P. at Allori, as such both Annexures-11 and 12 deserve to be quashed.

5. Learned counsel appearing for the opp.parties contended that as per Section 4(3) of the Orissa Grama Panchayat Act, ordinarily the office and headquarters of the Grama Sasan should be situated in village bearing the name of the Grama. In the case at hand, admittedly, the name of the Grama Panchayat is after the name of village Allori. So the office and headquarters should be established in the said village. They further contended that admittedly four villages namely Biralamunda, Sapajhar , Nuagaon and Bhetia are separated from the rest of the villages of Allori Grama Panchayat by a river. So, if it would be difficult for the inhabitants of the said villages to go to Allori, the same difficulty would also be faced by the inhabitants of other villages under the said G.P. to go to Bhetia, if the headquarters is fixed there.

6. Learned counsel for the opp.parties further contended that the distance of the four named villages from the village Allori, as given in the writ petition and under Annexure-1 series is not correct. They also dispute the signature of some of the ward members given in the resolution under Annexure-2. It was further argued on behalf of the opp.parties that even if it is held that out of 13 ward members, seven ward members have signed on the resolution supporting fixation of headquarters of Allori Grama Panchayat at village Bhetia, it can not be said that majority of the inhabitants of Allori G.P. want it. When the Government has decided that the headquarters of Allori Grama Panchayat should be situated at village Allori., it being an

administrative order, this court should not interfere with it, particularly since there is nothing to show that the Govt. thereby violated any law or acted arbitrarily. So, according to the learned counsel for the opp.parties the writ petition should be dismissed.

Section 4 (3) of the Orissa Grama panchayat Act reads as follows :

> "The office and headquarters of the Grama Sasan shall be situated within the limits of the Grama and unless otherwise ordered by the State Government in the village bearing the name of the Grama."

According to this provision ordinarily the headquarters of the Grama Panchayat should be fixed in the village bearing the name of the Grama. In appropriate case, it can be fixed in some other village. So in ordinary course Allori should be the headquarters of Allori Grama Panchayat. Now it is to be seen whether there is any special reason to establish the headquarters of Allori Grama Panchayat at village Bhetia. The distance of the four villages in question from village Allori as given by learned counsel for the petitioners has been stoutly denied by learned counsel for the opp.parties. On perusal of the writ petition, it is seen that the distance of village, Biralamunda from Allori is self contradictory. In para-6 it has been stated that the distance between those two villages is 15 kilometers, whereas in para-22, it has been shown as 12 kilometers. So, it is not safe to believe the distance of the four villages in question from village Allori as given in the writ petition, particularly when the opp.parties vehemently oppose it. As found from the joint enquiry report under Annexure-11 chhelikhai Nala intercepts the villages of Allori Grama Panchayat, five in one side including village Allori and the agitating four villages on the other side. This report of Project Director, D.R.D.A. reveals that during rain when the Nala is in spate, the villagers have to travel around the way to reach the G.P. headquarters. On the other hand, Munduribeda is conveniently accessible to the villagers of four villages in question. Thus, he has suggested to move the Government for re-inclusion of those four villages with the mother Gram Panchayat, Munduribeda. In fact if four villages in question are separated from rest of the villages of Allori G.P. by Chhelikhai Nala and during rainy season the inhabitants of those four villages would go to Allori around the way, then the same difficulty would be faced by inhabitants of the rest villages to go to Bhetia if the headquarter is fixed there. Only because a resolution has been passed that the headquarters of Allori G.P. shall be fixed at village Bhetia, it does not necessarily mean that Government ought to have agreed to it. In the case of

Smt. Babita Negi and others Vs. State of Orissa and others 100(2005) CLT 397, a division bench of this Court held that the resolution of a Grama Panchayat can not form the basis for decision of the Government to change the headquarters of a Grama Panchayat. So the resolution under Annexure-2 can not be the basis of change of headquarters of Allori Grama Panchayat. As such there is no any special reason to establish the headquarters of AlloriGram Panchayat at village Bhetia. The decision in the case of Malpe Vishwanath Acharya (supra), it has been held that law should be just to all sections of the society, it should not be unjust to one and give disproportionate benefit to the other. This decision would of no help to the petitioner in the present case. The Government has rightly ordered under Annexure-12 to establish the headquarters of the Allori Gram Panchayat at Allori,

Accordingly, the writ petition stands dismissed. No cost.

Writ petition dismissed.

2011 (II) ILR- CUT- 136

I.MAHANTY, J.

CRLMC. NO.1612 OF 2010 (28.03.2011)

MADHUSUDAN MISHRA …. …. Petitioner.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

PREVENTION OF CORRUPTION ACT, 1988 (ACT NO.49 OF1988) – S.13 (1) (d),

Misconduct by public servant need not be necessarily in connection with his own official duty.

In this case petitioner works as S.I. of Police – He registered an FIR lodged against unknown accused persons – Allegation against petitioner that he demanded illegal ratification of Rs.1000/- to assist the accused persons to falsify the medical certificate and it can not be said that the petitioner demanded illegal ratification in due discharge of his official duty and as such he filed application U/s.482 Cr.P.C. to quash the order taking cognizance – Held, it is not necessary that the public servant in question while misconducting himself should have done so in the discharge of his official duty – If a public servant takes money from a third person, by corrupt or illegal means or otherwise abusing his official position, in order to corrupt some other public servant, he commits an offence U/s. 13 (1) (d) of the 1988 Act, even though there was no question of his misconducting himself in the discharge of his own duty – Application U/s.482 Cr.P.C. dismissed.

Case laws Referred to:-

1.AIR 1989 SC 2222 : (State of U.P. –V-R.K.Srivastava & Ors.)
2.(1994) 7 OCR 783 : (Gopinath Pandhi-V-State of Orissa & Anr.).
3.AIR 1962 SC 195 : (Dhaneswar Narain Saxena-V-The Delhi Adminstration).

For Petitioner - K.P. Bhaumik
For Opp.Party – Shri P.K.Pani

Heard Mr. K.P.Bhoumik, learned counsel for the petitioner and Mr.P.K.Pani, learned Additional Standing Counsel for the Vigilance Department.

In this application under Section 482 Cr.P.C. petitioner-Madhusudan Mishra has challenged the order dated 6.3.2010 passed in T.R. No.77/79 of 09/05 passed by the learned 2nd Additional Special Judge (Vigilance), Bhubaneswar taking cognizance of offence under Section 13(1) (e)/7, (d) in place of (e) of the Prevention of Corruption Act, 1988 punishable under Section 13(2) of the Act.

Mr. Bhoumik, learned counsel for the petitioner submits that on plain reading of the F.I.R. (Annexure-1) even if the allegations made in the F.I.R. are taken at their face value and accepted in their entirety, no offence is made out against the petitioner. In this respect Mr. Bhoumik placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***State of U.P. v. R.K.Srivastava and others,*** reported in AIR 1989 SC 2222 as well as the judgment of this Court in the case of Gopinath Pandhi v. State of Orissa and another, reported in (1994) 7 OCR 783.

Mr. Bhoumik contends that the petitioner in question was working as S.I. of Police in G.R.P.S. land it would be seen that F.I.R. No.91 dated 12.12.2002 had been lodged for offences under Sections 326/307, I.P.C. against unknown accused person. It further appears that the brother-in-law of the informant had been apprehended in connection with the aforesaid case and it is alleged that the petitioner made a demand of illegal ratification of Rs.1000/- for the purpose of assisting the accused to falsify the medical certificate. Mr.Bhoumik contends that since the petitioner himself had registered the said F.I.R. and he had no control or power over the doctor who conducted the investigation in to the inquiries, on demand by such a person i.e., the petitioner can be stated to be demand for illegal ratification for due discharge of official duty. It is stated that the F.I.R. had been filed by the brother-in-law of the accused for the purpose of wrecking vengeance on the career of the petitioner.

Mr. Pani, learned Addl. Standing Counsel for the Vigilance Department on the other hand, submits that in the meantime trial has already been commenced and one witness has already been examined. Apart from that, he placed reliance on the judgment of the Hon'ble Supreme Court in the case of ***Dhaneswar Narain Saxena vs. The Delhi Administration,*** reported in AIR 1962 SC 195.

On hearing the learned counsel for the parties and on perusing the judgments referred to and relied upon by the learned counsel for the parties, whereas the case of ***State of U.P. v. R.K.Srivastava*** (supra) the Hon'ble Supreme Court reiterated the settled principle of law that, if the allegations in the F.I.R. are taken at their face value and accepted in their entirety do not

constitute an offence, the criminal proceedings instituted on the basis of such F.I.R. should be quashed. In the case of Gopinath Pandhi v. State of Orissa (supra) this Court came to hold that a Court while framing charges should be satisfied that for such purpose there must be presumption of commission of an offence, apparent from the materials before the Court and there must be some evidence in support of the accusation. If the evidence relied upon by the prosecution even if, fully accepted does not show commission of an offence, then sufficient ground for proceeding with the trial is absent, therefore due care must be exercised by the trial Court while framing the charges or examining the accused persons as these are not matters of empty formality.

With respect to the judgments referred to by the learned counsel for the petitioner, I am afraid that the same have no applicability to the fact situation that arise for consideration in the present case. The Hon'ble Supreme Court in the case of ***Dhaneswar Narain Saxena*** (supra) has clearly held that in order to constitute an offence under cl. (d) of s.5(1) of the Prevention of Corruption Act, 1947 (equivalent to s.13 (1) (d) of the 1988 Act), it is not necessary that the public servant in question, while misconducting himself, should have done so in the discharge of his duty. If a public servant takes money from a third person, by corrupt or illegal means or otherwise abusing his official position, in order to corrupt some other public servant, he commits an offence under S.5(1) (d) (equivalent to S.13(1) (d) of the 1988 Act), even though there was no question of his misconducting himself in the discharge of his own duty.

I am of the considered view that the judgment of the Hon'ble Supreme Court in the case ***of Dhaneswar Narain Saxena*** (supra) has settled the issue raised herein, therefore, I find no justification to entertain the present application. Hence, the CRLMC stands dismissed.

Application dismissed.

2011 (II) ILR- CUT- 139

H.S.BHALLA, J.

W.P.(C) NO.10536 OF 2009 (Decided on 19.04.2011)

SIBARAM PRADHAN …… Petitioner.

.Vrs.

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

(A)PAYMENT OF GRATUITY ACT, 1972 (ACT NO39 OF 1972) – S.4.

Payment of Gratuity – Duty of the Government to release the same at the earliest – Grant of gratuity is not a bounty but a right of the Government servant – Delay in settlement of such benefits must be visited with payment of penalty of interest.

In the present case the petitioner is a retired Clerk in the FFDA, Ganjam – He attained the age of superannuation on 31.08.1999 – Payment of Gratuity amount was required to be paid to the petitioner on the date when he retires or on the following day – In this case there is culpable delay in payment of Gratuity which is not excusable – Held, petitioner is entitled to interest at the rate of 9% per annum from the date of filing of the writ petition i.e. 22.07.2009 till payment of gratuity amount.

(Para 7)

(B)PAYMENT OF GRATUITY ACT, 1972 (ACT NO.39 OF 1972) – S.1(3)(C) & 1(3-A).

Opp.Parties took stand that FFDA, Ganjam is having less than 10 number of employees which is a requirement for getting benefits under the Act – Petitioner filed documents showing sanction of 16 posts to form FFDA – Held, in view of the above and in view of Section 1(3-A), the petitioner is entitled to gratuity as admissible to him under the Act, even if number of persons employed in the establishment falls below ten.

(Para 6 & 7)

For Petitioner - M/s. Rama Chandra Rath, S.Mohanty & S.K.Panda.

For Opp.Parties - M/s. Kishore Kumar Mishra & R.K.Mohanta. (for O.P.No.2)

H.S.BHALLA, J. The petitioner has filed the aforesaid writ petition with a prayer to direct the Collector-cum-Chairman, F.F.D.A., Ganjam to make

payment of the amount of gratuity as admissible to him under the Payment of Gratuity Act, 1972 within a stipulated period.

2. Sworn of unnecessary details, the short facts leading to the filing of the aforesaid writ petition are as follows:

The petitioner on being duly selected was initially appointed as a Junior Clerk under the Collectorate, Ganjam on 4.6.1964. Subsequently, his services were terminated on 5.4.1968 as he was found to be under qualified to be appointed against such post. Challenging such order of termination, the petitioner filed a writ application bearing O.J.C. No.276 of 1968 and this Court did not interfere with the order of termination and dismissed the writ application. Again challenging the said order passed by the Hon'ble Single Judge of this Court, Civil Review No.12 of 1971 was also filed and the same was also dismissed. From the service book it appears that the petitioner was terminated from service on 20.6.1972. However, the petitioner was again appointed as L.D. Clerk by the Collector, Ganjam on 9.9.1972 and subsequently, the Collector passed another order on 1.8.1972 in which it was stated that the petitioner was 'reinstated' in service in stead of "fresh appointment". Thereafter, pursuant to the decision of this Court in Civil Review No.12 of 1972 and the instruction of the Revenue Department, he was finally terminated from service by the order of the Collector, Ganjam dated 24.7.1976.

It may be mentioned here that about more than two years after passing of the order of termination, the petitioner applied to the Chairman, Fish Farmers' Development Authority on 8.9.1976 requesting for either reinstatement in service or for appointment. After considering his application, the Fish Farmer Development Authority, Berhampur, Ganjam, in short, "FFDA" appointed him as L.D. Clerk-cum-Typist under the scheme named as "Pilot Project for Intensive Development of Inland fish Culture in Orissa" by order dated 14.9.1976. He continued in the said post under the FFDA till his date of superannuation, i.e., 31.8.1999.

It is worthwhile to mention here that the service regulation of the agency staff was clarified and finalized by the Director of Fisheries and pursuant to the letter dated 23.7.1992 (Annexure-3) instruction was issued to all the Chief Executive Officers of the State for opening of G.P.F. and C.P.F. amount. Pursuant to the said instruction, the Chief Executive Officer, F.F.D.A., Ganjam communicated a letter to the Accounts Officer, Directorate of Fisheries on 9.10.1992 regarding opening of the G.P.F. account number of the petitioner.

3. Learned counsel for the petitioner vehemently argued that the petitioner has rendered service in different establishments under the State

Government and thus, he is entitled to get gratuity under the Payment of Gratuity Act, 1972, in short, "the Act".

4. Learned Addl. Government Advocate appearing on behalf of opposite party no.2 submitted that pursuant to the earlier orders of this Court, the opposite party no.2 has filed counter affidavit stating inter alia, that the petitioner does not come within the ambit of the Act after a lapse of almost ten years inasmuch as the provisions enshrined under the Act clearly reveals that the said Act is only applicable to shop or establishment in the State in which ten or more persons are employed or where employed on any date of the preceding twelve months. It is further emphatically stated that FFDA is a Society under the Society Registration Act and at best may be treated as an establishment within the meaning of the Act, then also the petitioner is not entitled to gratuity under the Act. That apart, at the relevant point of time required number of employees were not serving under the said establishment. It is also stated in the affidavit that the petitioner has rendered nine years 11 months, 22 days of service in different establishments of the State Government, but the petitioner is not entitled to get benefits of such employment under the Act, inasmuch as after being terminated from Government service, he was appointed afresh under the FFDA, which is a Society under the Society Registration Act having its own bye laws. That apart, at the relevant point of time, the establishment had never employed ten or more employees. Thus, the provision of the Act is not applicable to the case of the petitioner.

5. It is the admitted case of both the parties that the petitioner is claiming payment of gratuity for the period of his service rendered as Junior Clerk under the Fish Farmer Development Agency, Ganjam, which is controlled, managed and funded by the Government of Orissa in the Department of Fisheries. He has served in that department from 14.9.1976 to 31.8.1999, meaning thereby that he has served 22 years, 11 months and 17 days. The petitioner was initially appointed as L.D. Clerk on 22.7.1964 by the Collector, Ganjam in the regular establishment of the Collectorate and accordingly posted under Kodala Tahasil. This fact is borne out from the document Annexure-1, which is a letter pertaining to the initial appointment of the petitioner. However, after 12 years of regular service, he along with other regular staff was retrenched and thereafter a writ was preferred before this Court challenging the order of retrenchment and they were again reinstated in regular establishment of the Collectorate, Ganjam, but the petitioner was not brought back to the regular establishment of the Collectorate, Ganjam and the Collector while exercising his power as Chairman of FFDA, appointed the petitioner as Junior Clerk under the FFDA on 14.9.1976. The appointment order is available on record as Annexure-2.

6. After having gone through the Orissa Ministerial Service Regularization of Recruitment and Conditions of Service of Irregular Recruits in the office of Heads of Department, District Offices and Subordinate Offices) Rules, 1975, I find that as per clause 3 of the said Rules, an irregular recruit shall be deemed to have been validly and regularly recruited and appointed as an Assistant or Clerk, as the case may be. In the present case, the petitioner's services have been validated, which was rendered earlier with effect from 22.7.1964 to 7.9.1976. As per the stand of the opposite parties, FFDA, Ganjam is having less than 10 number, which is a requirement under the Act to extend the benefits of the Act. But this fact has been challenged by the petitioner by filing a rejoinder and along with the rejoinder he has placed on record Annexure-A/1, which clearly spells out that when the agency was formed, the Government had sanctioned 16 posts to form the FFDA, which was fully controlled, funded and managed by the Director of Fisheries and Department of Fisheries. Apart from this, the petitioner also placed on record an additional affidavit dated 19.1.2011 regarding sanction of 16 nos. of posts by the Government of Orissa in Fisheries and Animal Husbandry Department. Moreover, in Annexure-E/1 of the additional affidavit, it is clearly stated in Para-2 of the letter that the Government has been pleased to sanction posts for formation of FFDA, Ganjam and it has been concurred by the Finance Department vide letter dated 7.6.1976. In the said letter 16 nos. of posts were created and sanctioned for functioning of FFDA, Ganjam. In view of this, it is crystal clear that the contention of the opposite parties is against record and the same is not liable to be accepted. After having gone through the Act, I find that as per Section 1 (3-A) of the Act, a shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten. Therefore, seen from every angle, the claim of the petitioner is protected. According to Section 2(e) of the Act, the petitioner is an employee as defined under the Act. As per the definition, any person in any establishment, factory, mines, oil field, plantation etc. to do any skilled semi skilled, unskilled, manual, supervisory, chemical or clerical works are governed under the Act. The petitioner is a retired clerk in the FFDA, Ganjam. He attained at the age of superannuation on 31.8.1999. His retirement order is available on record as Annexure-5. Learned counsel for the petitioner has rightly pointed out that the other agencies of the State like Orissa Renewable Development Agency, State Urban Development Agency, Integrated Tribal Development Agency and District Rural Development Agency have formulated the service regulation by incorporating Payment of Gratuity Act. It is settled law that the applicability of Payment of Gratuity Act is one of the minimum service condition made available to employees and it

is constitutionality valid. The Act is a welfare measure introduced in the interest of the workman to securer economic justice and to have a sustenance after his retirement. The authorities are under legal obligation to extend the benefit to an employee as the right to pension and gratuity and the same has been considered as a fundamental right under Article 19 (1) of the Constitution. It is well settled that the retired employee of a particular establishment belong to one homogenous class. The employer must not create heterogeneity in extending the benefit to some and denying the others, which is hit by Articles 14 and 16 of the Constitution of India.

7. In view of what has been discussed above, I find that the petitioner is entitled to gratuity as admissible to him under the Payment of Gratuity Act, 1972. Accordingly, the opposite parties are directed to calculate the amount of gratuity payable to the petitioner for the period of service rendered under FFDA, Ganjam, i.e., from 24.9.1976 to 31.8.1999 and the same be disbursed to him within a period of two months from the date of receipt of a copy of this order after deducting the amount of gratuity already paid.

Before I part with this order of mine, I may observe that it is the duty of the Government to release such amounts at the earliest. Grant of gratuity is not a bounty but a right of the Government servant. Delay in settlement of such benefit is frustrating and must be avoided at all costs. This is indeed unfortunate. The case before this Court is a clear example of departmental delay, which is not excusable. The petitioner retired on 31.8.1999 and it was only after 11.1.2010, the date when the interim order was passed in this writ petition, a sum of Rs.10,000/- was paid by the Government. The amount was due to the petitioner, but even then it is being denied without any valid reason. It is crystal clear that gratuity was not paid to the petitioner well in time and the payment of gratuity with or without interest, as the case may be, does not lie in the domain of discretion of its statutory compulsion. The benefit of gratuity can not be denied in the instant case as discussed above. It is a valuable right of the petitioner to get gratuity and any delay in payment of gratuity must be visited with payment of penalty of interest. In the instant case, the petitioner attained the age of superannuation on 31.8.1999 and so far after lapse of eleven years, he has not received payment of gratuity. Payment of gratuity amount was required to be paid to the petitioner on the date when he retires or on the following day. The instant case is a glaring instance of such culpable delay in payment of gratuity amount due to the petitioner, who retired on 31.8.1999. Keeping in view all the facts and circumstances of the case, it is made clear that the petitioner would be entitled to interest at the rate of nine per cent per annum from the date of filing of the writ petition, i.e. 22.07.2009 till payment of gratuity amount.

With the aforesaid observation and direction, the writ petition is allowed. No cost.

Writ petition allowed.

2011 (II) ILR- CUT- 145

S.C. PARIJA, J.

M.A.C.A. NO.358 OF 2009 (Decided on 11.03.2011)

KIRANABALA JENA & ORS. ……..Appellants.

.Vrs.

NATIONAL INSURANCE CO.LTD. …. …… Respondent.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.147.

Third-party risk – Liability of insurer to pay compensation - Comprehensive Insurance Policy issued in respect of the offending vehicle – Policy does not cover the risk of the owner – No additional premium paid to cover the risk of death or bodily injury of the owner (insured) – Held, an owner of the motor vehicle can only made a claim when a personal accident insurance is taken out on payment of requisite premium.

(Para 15)

Case laws Referred to:-

1.(2004) 8 SCC 553 : (Dhanraj -V-New India Assurance Co.Ltd. & Anr.).
2.(1998) 1 SCC 365 : (Oriental Insurance Co.Ltd.-V-Sunita Rathi & Ors.)
3.(2006) 9 SCC 174 : (New India Assurance Co.Ltd.-V-Meera Bai & Ors.)
4.(2007) 9 SCC 263 : (Oriental Insurance Co.Ltd.-V-Jhuma Saha (Smt) & Ors.)
5.(2007) 5 SCC 428 : (Oriental Insurance Co.Ltd.-V-Meena Variyal)
6.(2009) 2 SCC 417 : (New India Assurance Co.Ltd.-V-Sadananda Mukhi & Ors.)

For Appellants - M/s. B.N.Samantray, P.Jena, D.Patnaik.
For Respondent - M/s. G.Mishra, D.K.Satpathy

S.C.PARIJA, J. This appeal by the legal heirs of the deceased owner of the vehicle (insured) is directed against the award dated 10.4.2009 passed by the 1st Motor Accident Claims Tribunal, Cuttack, in Misc.Case No.1140 of 2002, holding that the insurance policy issued in respect of the offending vehicle (truck) No.OR-04/5924, does not cover the risk of the owner (insured) and therefore the insurer is not liable to pay the compensation amount.

2. The case of the claimants in their claim application filed before the learned Tribunal under Section 163-A of the Motor Vehicles Act, 1988 (for short "M.V.Act") was that the deceased Gangadhar Jena, who is the owner of the truck No.OR-04/5924, was returning to Bhubaneswar, driving his own truck, on 2.11.2001, at about 9.30 A.M., when the said truck capsized near Badapokharia on N.H. No.5, as a result of which, Gangadhar died in the said accident. It was claimed that the deceased Gangadhar was doing transport business and was earning Rs.6,000/- per month. The plea of the claimants was that as the death of Gangadhar occurred due to the accident arising out of the use of his won vehicle, they are entitled to compensation from the insurer, as the vehicle was covered under a valid policy of insurance.

3. P.W.2, examined on behalf of the claimants stated in his evidence that while he was proceeding towards Cuttack, he found that the truck bearing No.OR-04/5924 was being driven by Gangadhar Jena, which capsized near Badapokharia on N.H. No.5, as a result of which, Gangadhar died in the said accident. The Final Form (Ext.2) filed by the claimants, revealed that the police after investigation, found that the deceased Gangadhar Jena, who was driving the vehicle at the time of the accident, was rash and negligent in causing the accident, which resulted in his death. Accordingly final report was submitted under Sections 279/337/304-A IPC, as the accused driver had died in the accident. On the basis of the evidence on record, both oral and documentary, including the police papers, learned Tribunal came to hold that deceased Gangadhar Jena died in the accident on 2.11.2001, arising out of use of the offending vehicle (truck) No.OR-04/5924.

4. As regard the liability to pay the compensation amount, learned Tribunal has come to find from the insurance policy (Ext.8) that the same did not cover the risk of deceased Gangadhar Jena (insured), who was the owner of the offending vehicle and no additional premium has been paid to cover the risk of the owner of the vehicle. Accordingly, learned Tribunal came to hold that the insurance company can not be made liable to pay the compensation amount.

5. The sole question which falls for consideration in the present appeal is whether the comprehensive insurance policy issued in respect of the offending truck No.OR-04/5924 also covers the risk of its owner (insured).

6. Provisions relating to grant of compensation, as detailed in Chapters XI and XII of the M.V. Act have been enacted by the Parliament in order to achieve the purpose and object stated therein. Section 146 of the M.V. Act

lays down the requirements for insurance against third-party risk. The requirements of insurance policy and limits of liability has been provided under Section 147 (1) of the M.V. Act, which reads as under :

> ***"147, Requirements of policies and limits of liability-*** (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-
>
> (a) is issued by a person who is an authorized insurer : and
>
> (b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-
>
> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place ;
>
> (ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place ;
>
> Provided that a policy shall not be required-
>
> (i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act,1923 (8 of 1923), in respect of the death of , or bodily injury to, any such employee-
>
> (a) engaged in driving the vehicle, or
>
> (b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or
>
> (c) if it is a goods carriage, being carried in the vehicle, or
>
> (ii) to cover any contractual liability.
>
> Explanation," for the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was

not a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place."

7. The provisions of the M.V. Act, therefore, provide for two types of insurance – one statutory in nature and the other contractual in nature. Whereas the insurance company is bound to compensate the owner or the driver of the motor vehicle in case any person dies or suffers injury as a result of an accident, in case involving owner of the vehicle or others are proposed to be covered, an additional premium is required to be paid for covering their life and property.

8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. (See- ***Dhanraj –vrs- New India Assurance Co.Ltd. and another,*** (2004) 8 SCC 553).

9. In the case of ***Oriental Insurance Co.Ltd.-Vrs- Sunita Rathi and others,*** (1998) 1 SCC 365, it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party, the insurance company has no liability also.

10. The aforesaid views expressed by the apex Court in Dhanraj case (supra) has been followed and affirmed in ***New India Assurance Co. Ltd.- vrs.- Meera Bai and others*** (2006) 9 SCC 174.

11. In ***Oriental Insurance Co.Ltd. –vrs.- Jhuma Saha (Smt.) and others,*** (2007) 9 SCC 263, the Supreme Court has held as under :

" The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving. The question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

Liability of the insurer company is to the extent of indemnification of the insured against the respondent or an injured person, a third

person or in respect of damages of property. Thus, if the insured can not be fastened with any liability under the provisions of the Motor Vehicles Act, the question of the insurer being liable to indemnify the insured, therefore, does not arise.

The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (1) (b) of the M.V. Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

12. The matter came up for consideration yet again before the apex Court in ***Oriental Insurance Co.Ltd.-vrs.- Meena Variya***l, (2007) 5 SCC 428, wherein it was observed as follows :

"As we understand Section 147(1) of the Act, an insurance policy there under need not cover the liability in respect of death or injury arising out of and in course of the employment of an employee of the person insured by the policy, unless it be a liability arising under the Workmen's compensation Act, 1923 in respect of a driver, also the conductor, in the case of a public service vehicle, and the one carried in the vehicle as owner of the goods or his representative, if it is a goods vehicle. It is provided that the policy also shall not be required to cover any contractual liability. Uninfluenced by authorities, we find no difficulty in understanding this provision as one providing that the policy must insure an owner against any liability to a third party caused by or arising out of the use of the vehicle in a public place, and against death or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of vehicle in a public place. The proviso clarifies that the policy shall not be required to cover an employee of the insured in respect of bodily injury or death arising out of and in the course of his employment. Then, an exception is provided to the last foregoing to the effect that the policy must cover a liability arising under the Workmen's Compensation Act, 1923 in respect of the death or bodily injury to an employee who is engaged in driving the vehicle or who serves as a conductor in a public service vehicle or an employee who travels in the vehicle of the employer carrying goods if it is a goods carriage. Section 149(1), which casts an obligation on an insurer to satisfy an award, also speaks only of award in respect of such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of

the policy). This provision can not therefore be used to enlarge the liability if is does not exist in terms of Section 147 of the Act.

The object of the insistence on insurance under Chapter XI of the Act thus seems to be to compulsory cover the liability relating to their person or properties of third parties and in respect of employees of the insured employer, the liability that may arise under the Workmen's Compensation Act, 1923 in respect of the driver, the conductor and the one carried in a goods vehicle carrying goods. On this plain understanding of Section 147, we find it difficult to hold that the Insurance Company, in the case on hand, we liable to indemnify the owner, the employer Company, the insured, in respect of the death of one of its employees, who according to the claim, was not the driver. Be it noted that the liability is not one arising under the Workmen's Compensation Act, 1923 and it is doubtful on the case put forwarded by the claimant, whether the deceased could be understood as a workman coming within the Workmen's Compensation Act, 1923. Therefore, on a plain reading of Section 147 of the Act, it appears to be clear that the Insurance Company is not liable to indemnify the insured in the case on hand."

13. The aforesaid views expressed by the apex Court that a insurance policy issued in respect of a motor vehicle does not ipso facto cover the risk of the owner of the vehicle (insured), unless additional premium has been paid in that regard again came up for consideration before the Supreme Court in the case of ***New India Assurance Co.Ltd. –vrs.-Sadanand Mukhi and others,*** (2009) 2 SCC 417, wherein the Hon'ble Court while affirming the views expressed in the aforementioned authoritative pronouncements, has observed that where the claim has been made for the bodily injury or death to the owner of the vehicle, the insurance company can not be made liable to pay the compensation.

14. In the present case, the admitted facts are that the deceased Gangadhar Jena was the owner of the truck No.OR-04/5924 and was driving the said vehicle on 2.11.2001 at about 9.30 A.M., when it capsized near Badapokharia on N.H. No.5, which resulted in his death. The materials available on record goes to show that the accident took place due to rash and negligent driving by Gangadhar.On the basis of such facts, learned Tribunal with reference to the insurance policy (Ext.8), has come to find that no additional premium having been paid to cover the personal risk of the owner of the vehicle, the insurance company can not be made liable to pay the compensation to the claimants.

15. From the schedule of premium given in the certificate of insurance (Ext.8) it is seen that no additional premium has been paid to cover the risk of death or bodily injury of the owner of the vehicle. It has not been shown that the said policy covers the risk of the owner (insured). An owner of the motor vehicle can only claim provided a personal accident insurance is taken out, on payment of requisite premium.

16. Applying the principles of law as discussed above to the facts the present case and keeping in view the findings of the learned Tribunal given in the impugned award and the reasons assigned in support of the same, no impropriety or illegality can be said to have been committed by the learned Tribunal, so as to warrant any interference by this Court in the present appeal.

17. The appeal being devoid of merits, the same is accordingly dismissed.

Appeal dismissed.

2011 (II) ILR- CUT- 152

B.K.PATEL, J.

W.P.(C) NO.6429 OF 2010 (Decided on 21.06.2011)

INDIAN TEA PROVISIONS LTD. …… Petitioner.

.Vrs.

RAM KRUSHNA DASMOHAPATRA
@ TIKI PUA …… Opp.Party.

CONSTITUTION OF INDIA, 1950 – ART.226.

Suit for permanent/mandatory injunction – Defendant filed petition for arrears of rent – No issue relating to question of title and relationship of landlord and tenant between the parties – Held, prayer for recovery of arrear rent can not be entertained in the suit.

(Para 12,13)

Case law Relied on:-

2011 (I) OLR (SC) 682 : (Jonnalagadda Usha Rani-V-Velamala Vasudeva Rao & Anr.)

Case laws Referred to:-

1.AIR 1968 SC 919 : (Ramamurty Subudhi-V-Gopinath)
2.AIR 1972 HP 1 : (Smt. Rajkumari Soni-V-State of H.P.)

For Petitioner - M/s. S.K.Padhi, Partha Mukherji, Supriya Patra,
S.L.Harichandan, Swetlana Das.
For Opp.Party - M/s. P.K.Routray, B.G.Mishra,
A.Routray, G.Bhuyan.

B.K. PATEL, J. In this writ petition, petitioner has assailed legality of the order dated 3.12.2009 passed by the learned Civil Judge(Junior Division), Puri in O.S.No.606 of 2001 rejecting petitioner's application to issue direction to the opposite party to deposit rent for occupation of the disputed property.

2. O.S.No.606 of 2001 is a suit for permanent and mandatory injunction not to interfere with the plaintiff's possession over the suit premises which

comprises of a hotel in the name and style "Hotel Repose, Puri" (for short, 'the hotel'). Opposite party no.1 filed suit initially against deceased-defendant no.1 Birendra Mohan Sarkar as the Managing Director-cum-Partner of the hotel; defendant no.2 the present petitioner M/s Indian Tea Provisions Ltd. (for short, 'the ITC'); and others.

3. Defendant no.2, the writ petitioner, is a lessee of the State Government in respect of the land on which the suit property is situated. Plaintiff's case is that initially due to his efforts and good offices the ITC through its Director Paresh Chandra Chatterji agreed to let out the suit property to the defendant no.1 on monthly rent of Rs.25,000/- for a period of 21 years. Thereafter, defendant no.1 invited the plaintiff to become a partner. Accordingly, an agreement dated 5.11.87 was entered into between the plaintiff and late Birendra Mohan Sarkar in presence of defendant no.2 represented by Paresh Chandra Chatterji providing therein that the hotel was to be in possession and management of defendant no.1 for the first 10 years after which plaintiff was to take over management of the hotel for 10 years. Agreement further provides that each partner during their respective period of management would pay monthly rent of Rs.25,000/- to the above said Paresh Chandra Chatterji and pay Rs.15,000/- per month to the other partner. The agreement expressly provides that defendant no.1 would handover management of the suit property to the plaintiff after completion of first 10 years w.e.f. 4.8.1987. It is also stipulated that in case defendant no.1 failed to handover management of the hotel after expiry of the tenure and overstayed beyond the 10 years, then the plaintiff would not be liable to pay rent for the period of such overstay to Paresh Chandra Chatterji. In case defendant no.1 failed to pay Rs.15000/- per month to the plaintiff during the period in which the hotel was under his management, plaintiff would be entitled to adjust the unpaid amount out of the income plaintiff derived from the hotel during the plaintiff's management. It is specifically provided that in case defendant no.1 committed breach of agreement in handing over management of the hotel after expiry of his period, plaintiff would take over management of the hotel without intervention of the court. It is averred by the plaintiff that as defendant no.1 continued to possess management of the hotel in violation of the agreement beyond the period of 10 years till 14.3.2001, plaintiff took over and is continuing with absolute possession and management of the suit property w.e.f 15.3.2001. It is alleged that defendant no.1 is making various attempts to dispossess the plaintiff from the suit property and asserted that defendant no.2 being a signatory to the agreement dated 5.11.97 is bound by the terms and conditions contained therein. Therefore, none of the defendants are entitled to dispossess the plaintiff from the suit property till he continues to pay rent stipulated in the agreement.

4. In the petition, in response to which the impugned order was passed, defendant no.2 states that T.S.No.290 of 1992 instituted by the said defendant against defendant no.1 for eviction and recovery of arrear rent was decreed. It is stated that the present plaintiff in connivance with the deceased-defendant no.1 instituted the present suit to stall execution of the decree in T.S.No.290 of 1992. It is further averred that in view of plaintiff's claim to be in exclusive possession and management of hotel as the lessee of defendant no.2, plaintiff is liable to deposit the rent.

5. Plaintiff filed objection to the petition stating that in a suit for permanent injunction prayer of defendant no.2 for recovery of arrear rent is not maintainable. It is also averred that defendant no.2 having instituted T.S.No.290 of 1992 in the court of learned Civil Judge(Senior Division), Puri against defendant no.1 for recovery of arrear and current rent, similar prayer in the present suit is liable to be dismissed. It is pointed out in the objection that in the written statement filed by the defendant no.2 in the present suit it has averred that plaintiff does not claim to have any connection with the hotel whereas in the Execution Case No.3 of 2002 instituted by defendant no.2 for execution of the decree in T.S.No.290 of 1992 defendant no.2 has pleaded that there is no existence of relationship of landlord and tenant between the plaintiff and defendant no.2 with regard to the hotel for which defendant no.2 did not accept bank draft sent by the plaintiff towards arrear rent. Thus, defendant no.2's specific stand in the said execution proceeding is that the plaintiff is a third party with regard to the suit property.

6. Learned court below considering the rival contentions held that prayer for recovery of arrear rent cannot be entertained in a suit for injunction simpliciter. Learned court below also took note of the fact that defendant no.2 did not accept bank draft towards rent tendered by the plaintiff on the ground that there is no relationship of landlord and tenant between them and observed that defendant no.2 cannot be permitted to claim rent from the plaintiff in view of denial of relationship of landlord and tenant with the plaintiff.

7. It was contended by the learned counsel for the petitioner that plaintiff is an imposter and trespasser. Suit agreement dated 5.11.87 is a forged document. ITC, defendant no.2 had filed T.S. No. 290 of 1992 for eviction of and recovery of rent from deceased defendant no.1, Birendra Mohan Sarkar, which was decreed *ex parte*. Defendant no.2 filed Execution Case No.3 of 2002 for execution of the *ex parte* decree. At that stage only plaintiff emerged in the scene. However, his application under Order 21, Rule 97 of the C.P.C. filed before the executing court in C.M.A. No. 25 of 2003 was dismissed and dismissal order was confirmed by this Court in FAO

No.422 of 2003. It was further submitted that by order dated 28.10.2006 passed in Misc. Case No.10 of 2000, a proceeding under Order 9, Rule 13 read with Section 151 of the C.P.C., instituted by deceased defendant no.1, T.S. No.290 of 1992 has been restored to file. However, legal heirs of deceased defendant no.1 were subsequently set *ex parte* in the said suit.

8. In the background of above narrated complicated scenario, it was submitted, plaintiff instituted the present suit on the basis of the forged agreement. Defendant no.2 filed written statement specifically assailing the authenticity of the agreement. By order dated 23.8.2002 application filed by defendant no.2 to send the agreement to Handwriting Expert was allowed by the learned Civil Judge (Junior Division), Puri. However, on some pretext or other plaintiff maneuvered to protract the suit and on 20.1.2006 filed objection against the direction to send the agreement to the Handwriting Expert which was allowed by the learned court below. Nonetheless, by order dated 7.4.2008 passed by this Court in W.P.(C) No.17035 of 2006 the order was set aside and learned court below was directed to send the agreement to the Handwriting Expert and to dispose of the suit preferably within six months. Thereafter also, plaintiff managed to drag the suit for which defendant no.2 was constrained to file the petition in response to which the impugned order was passed.

9. It was argued that as the plaintiff himself admits to be a tenant in respect of the suit premises, learned trial court should not have rejected the application to direct him to deposit arrear rent on the ground of denial by defendant no.2 of relationship of landlord and tenant with the plaintiff. Plaintiff has instituted the suit on the basis of a forged document. It was strenuously argued that a person who does not approach the court with clean hands is not entitled to any relief. Therefore, the suit for injunction which is a relief in equity is without foundation. There being no dispute with regard to title of defendant no.2 to the suit property as the lessee of the State Government and plaintiff having claimed his right of occupation and user of the suit property on the basis of partnership with defendant no.1 who is admitted to have been inducted as a tenant by defendant no.2, learned court below should not have refused the prayer to direct defendant no.2 to deposit rent at the admitted rate. In support of his contentions, learned counsel for the petitioner relied upon the decision of the Hon'ble Supreme Court in **Ramamurty Subudhi –vrs.- Gopinath** : AIR 1968 SC 919, wherein it has been reiterated that who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner.

10. In reply, learned counsel for the opposite party, placing strong reliance on the decision in **Jonnalagadda Usha Rani –vrs.- Velamala Vasudeva Rao & Anr.** : 2011 (I) OLR (SC) 682 submitted that in a suit for permanent injunction, defendant cannot claim deposit towards rent. It was argued that defendant no.2 having denied relationship of landlord and tenant cannot at the same time claim deposit of arrear rent. It was also argued that defendant no.2 himself having not initiated any action against plaintiff for eviction or for realization of arrear rent, or having not filed any counter claim in the present suit cannot be permitted to convert the present suit to an action for realization of arrear rent.

11. From the pleadings, averments and contentions it is evident that petitioner as defendant no.2 has filed T.S.No.290 of 1992 against deceased-defendant no.1, stated to have been substituted by his legal heirs, not only for eviction from but also for realization of arrear rent in respect of sit premises. Plaintiff's attempt to be impleaded in the proceeding in Execution Case No.3 of 2002 by filing application under Order 21, Rule 27 of the C.P.C. has failed. Admittedly, agreement dated 5.11.87, stated to be a tripartite agreement among the plaintiff, deceased-defendant no.1 and defendant no.2 is the suit document. Genuineness of the document is required to be considered on conclusion of trial on the basis of evidence of record. Any opinion at this stage with regard to authenticity of signatures appearing thereon would amount to pre-judging the suit. Therefore, it would be pre-mature to assume that the plaintiff has not approached court with clean hands. Decision in **Ramamurty Subudhi -vrs.- Gopinath** (supra) is of no assistance to defendant no.2 at this stage.

12. Defendant no.2 has altogather denied existence of relationship of landlord and tenant between him and the plaintiff. It is also not disputed that defendant no.2 did not accept rent for occupation of suit house in the shape of bank draft tendered by the plaintiff. However, defendant no.2 sought direction of the court to the plaintiff for deposit of rent of the suit property. So far as the present suit is concerned, plaintiff has prayed for relief of injunction only. Defendant no.2, obviously having denied plaintiff's tenancy, has not filed any counter-claim. In course of hearing, learned counsel for the petitioner placing reliance on the decision of the Himachal Pradesh High Court in **Smt.Rajkumari Soni –v- State of H.P**.: AIR 1972 HP 1 contended that plaintiff being in possession of suit premises belonging to defendant no.2 is liable to pay compensation, if not rent, notwithstanding absence of relationship of landlord and tenant. However, as has already been stated defendant no.2 filed application for directing the plaintiff to deposit rent and as yet he has not made any claim for compensation. Present suit involves

adjudication of prayer for grant of relief of injunction only. Payment or non-payment of rent or compensation is not an issue. Plaintiff's claim is to be adjudicated on the basis of suit agreement. Plaintiff claims possession and management of the suit premises as a partner of deceased-defendant no.1 to whom deceased-defendant no.1 admits to have inducted as tenant. In **Jonnalagadda Usha Rani –vrs.- Velamala Vasudeva Rao & Anr**. (supra) relied upon by the learned counsel for the opposite party it has been held that in a suit for permanent injunction, when the question of relationship of landlord and tenant is not in issue, the respondents-defendants cannot claim deposit towards rent. It has been observed:

> "The appellant contends that she is in possession in her own right. She filed a mere suit for injunction. The respondents claim that appellant is their tenant. If the appellant as tenant had failed to pay rent, it is open to the respondents as landlords/owners to seek possession/ eviction or seek a decree for rental arrears. In a suit for permanent injunction filed by the appellant, when the question of title and relationship of landlord and tenant is not in issue, the respondents-defendants cannot claim that the appellant-plaintiff should deposit Rs.5000/- per month towards rent."

13. Thus, considering rival contentions raised by the learned counsel appearing for the parties from all angles, there does not appear any infirmity in the impugned order by which petitioner's application to direct plaintiff to deposit rent has been rejected.

Therefore, there is no merit in the writ petition. Accordingly, the writ petition is dismissed.

Writ petition dismissed.