V.GOPALA GOWDA, CJ.

MISC. APPEAL NO. 742 OF 2000 (Dt.10.02.2012)

NEW INDIA ASSURANCE CO. LTD. ……..Appellant.

.Vrs.

MST. KOILI BAG & ORS. ……Respondents

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 41, RULE 33. r/w Section 168 M.V. Act, 1988.

The words "as the case may require" used in Rule 33 of Order 41 C.P.C. have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice – Although the power is discretionary the Court exercising jurisdiction should not refuse to exercise that discretion on mere technicalities.

In this case Insurance Company challenged the award passed by the Tribunal and the claimants made a request to the Court to enhance the compensation by invoking the power of the Court Under Order 41, Rule 33 C.P.C. as the Tribunal has not awarded just and reasonable compensation in the absence of any appeal or cross-appeal filed by them – Held, the impugned award is modified by enhancing the compensation from Rs.2,00,000/- to Rs.4,08,000/-.

Case laws Referred to:-

1.AIR 2000 SC 43 : (Delhi Electricity Supply Undertaking-V- Basanti Devi)
2.AIR 2009 SC 3104 : (Sarla Verma & Ors.-V-Delhi Transport Corpn. & Anr.)
3.AIR 1988 SC 54 : (Mahant Dhangir-V- Madan Mohan)
4.AIR 2004 SC 1531 **: (**The National Insurance Co.Ltd.-V-Swaran Singh & Ors.)

For Appellant - M/s. S.S.Rao, B.K.Mohanty, N.B.Patnaik & S.Patra.
For Respondents - M/s. S..Mohanty, R.Tripathy, C.Choudhury, Vijayashree, B.K.Mohapatra, S.Dei, B.Maharana & B.Mohanty.

V.GOPALA GOWDA, C.J. This appeal at the instance of the Insurance Company, is directed against the judgment and award dated

26.9.2000 passed by the District Judge-cum- First M.A.C.T, Sambalpur urging following grounds.

2. The first ground of attack of the impugned judgment is that the vehicle involved in the accident is a jeep. The deceased was travelling as a gratuitous passenger. Therefore, the Insurance Company is not liable to pay the compensation awarded by the Tribunal and is liable to pay compensation only towards third party and the owner of the vehicle in question is liable to pay the compensation. The second ground of attack of the impugned judgment is that the witnesses were examined namely, officer of the Insurance Company-OPW 2, clerk and the RTO is examined to prove the fact that on the date of accident, the driver who has driven the offending vehicle did not possess valid and effective licence as required in law as his licence was expired on 6.6.1993 despite there is a legal evidence in this regard. The Tribunal has not accepted the same and recorded the finding in favour of the Insurance Company and not fastened the liability upon the insured-owner of the vehicle as he has not indicated that the driver had a valid and effective licence. In view of section 149 of the Motor Vehicle Act, 1988 the awarded compensation has to be paid to the claimants by the Insurance Company with the liberty to recover the same from the owner in view of the decision of the apex Court in the case of **Swaran Singh v. National Insurance Company Ltd., AIR 2004**. Since the recovery right has not been given by the Tribunal, the finding of fact on the contentious issue recorded by the Tribunal is erroneous and liable to be set aside.

3. Learned counsel for the claimants not only sought to justify the award but also requested this Court to enhance the compensation by invoking the power of this Court under Order 41, Rule 33 of the C.P.C. as the Tribunal has not awarded just and reasonable compensation to the claimants even though an appeal or cross-appeal is not filed by the claimants placing strong reliance on the decision of the apex Court in the case of ***Delhi Electricity Supply Undertaking v. Basanti Devi,*** AIR 2000 SC 43. He further contended that the Tribunal has not discharged its statutory duty in determining just and reasonable compensation as the deceased was 30 years old and his income is taken to be `₹30,000/- per annum without applying second schedule of the Act even in absence of producing proof of actual income. As per the second schedule, the maximum annual income should have been taken as ₹40,000/-. He submits that having regard to the facts of the case, the income should have been taken at least ` 36,000/- per annum. Deducting 1/3rd therefrom, the income shall be ₹ 24,000/-. Having regard to the age, as per judgment of the apex Court in the case of ***Sarla Verma and others v. Delhi Transport***

Corporation and another, AIR 2009 SC 3104, the multiplier should have been 17 and not 16. Therefore, the claimants have prayed for enhanced compensation by modifying the impugned award, setting aside the finding on the contentious issue in fastening the liability and giving the right of recovery to the Insurance Company which has not been done by the Tribunal.

4. With reference to the aforesaid rival legal contentions, the following points would arise for determination.

(i) whether the finding recorded on the contentious issue and not giving the right of recovery to the insurer, is legal and valid ?

(ii) whether the determination of the compensation by the Tribunal is just and reasonable. If that is not so, this Court is required to enhance the compensation invoking its power under Order 41, Rule 33, C.P.C. ?

(iii) what is the enhancement, the claimants are entitled ?

(iv) what award ?

5. The first point is required to be answered in favour of the Insurance Company for the following reasons.

It is an undisputed fact that the accident had taken place on 13.3.1997. The vehicle was driven by the driver. On the date of accident, he did not possess valid and effective driving licence as the same expired on 6.6.1993 which is evident from Ext.D supported by the evidence of O.P.W.2, an officer of the office of jurisdictional R.T.O.. However, the Tribunal is erred in law in not giving the appellant the right to recover the compensation awarded, from the owner. Further the Tribunal has not taken into consideration the fact that the deceased was traveling as a gratuitous passenger. Although notice was issued by the Tribunal to the owner-respondent no.7, he did not choose to appear and accordingly he was set ex parte. Similarly, in the appeal filed in this Court, though notice was served on him, he did not appear. Mr. Rao submits that as per section 149 of the Motor Vehicles Act, right to recover the compensation is to be given to the Insurance Company with reference to the decision of the apex Court in the case of **the *National Insurance Co. Ltd. v. Swaran Singh and others,*** *2004 SC 1531*. Accordingly the right is given to the Insurance Company to recover from the owner, the amount of compensation which has already

been awarded along with the amount which is going to be enhanced in this appeal.

6. The point nos. 2 & 3 are required to be answered in favour of the claimants for the following reasons.

The accident had taken place on 13.3.1997. The Tribunal has taken the annual income of the deceased at ₹30,000/- for the purpose of computation of compensation payable to the claimants deducting ` 18,000/- towards his contribution to the family. The Tribunal has ignored the second schedule wherein even in the absence of the evidence to prove the income of the deceased, it can be taken as ₹ 40,000/- as annual income for the purpose of determining the compensation which principle is applicable to this case. It would suffice to take the annual income as ₹ 36,000/-. As he was aged 30 years and is a married person, after deduction of 1/3rd, the amount would be ₹24,000/-. Considering the fact that the deceased lost his life at an young age and the wife lost her husband, therefore, it would be just and proper for this Court to invoke its power under Order 41, Rule 33, C.P.C.. Though the cross-appeal has not been filed, in view of the decision of the Supreme Court in the case of *Delhi Electricity Supply Undertaking (supra)*, claimants are entitled for enhancement. Paragraphs 17 & 18 thereof are relevant wherein certain principles have been laid down. The same is extracted hereunder for determination of just and reasonable compensation to the claimants for which they are legally entitled.

"17. In our approach we can also draw strength from the provisions of Rule 33 of Order 41 of the Code of Civil Procedure which is as under :

"33. Power of Court of Appeal- The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or make and to pass or made such further or other decree or order as the case may require, and this power may be exercised by the Court not withstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees :

Provided that the Appellate Court shall not make any order under Section 35-A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

18. This provision was explained by this Court in Mahant Dhangir v. Madan Mohan, 1987 Supp SCC 528 : (AIR 1988 SC 54) in the following words (at P. 58 of AIR) :

" The sweep of the power under Rule 33 is wide enough to determine any question not only between the appellant and respondent, but also between respondent and co-respondents. The appellate Court could pass any decree or order which ought to have been passed in the circumstances of the case. The appellate Court could also pass such other decree or order as the case may require. The words "as the case may require" used in Rule 33 of Order 41 have been put in wide terms to enable the appellate Court to pass any order or decree to meet the ends of justice. What then should be the constraint ? We do not find many. We are not giving any liberal interpretation. The rule itself is liberal enough. The only constraint that we could see, may be these : That the parties before the lower Court should be there before the appellate Court. The question raised must properly arise out of the judgment of the lower Court. If these two requirements are there, the appellate Court could consider any objection against any part of the judgment or decree of the lower Court. It may be urged by any party to the appeal. It is true that the power of the appellate Court under Rule 33 is discretionary. But it is a proper exercise of judicial discretion to determine all questions urged in order to render complete justice between the parties. The Court should not refuse to exercise that discretion on mere technicalities." (emphasis laid by the Court)

Applying the principle laid down in the case of Sarala Verma (supra), the multiplier would be 17 and not 16. Therefore, the total compensation would be ₹ 24,000/- X 17 = ₹ 4,08,000. After deducting ₹ 2,00,000/- already awarded, the enhanced compensation would be ₹2,08,000/- which will carry interest @ 6% from 1.1.2004 till the date of payment.

The appeal is partly allowed. The impugned award is modified by enhancing the compensation from ₹ 2,00,000/- to ₹ 4,08,000/- with interest at 6% from the date as mentioned above. It is submitted that the amount awarded by the Tribunal has already been paid in the certificate proceedings. The Insurance Company is directed either to deposit or pay the enhanced amount with interest, as directed with liberty to recover the same from the insured. The enhanced compensation shall be apportioned to the claimants in the same ratio as per the impugned award of the Tribunal. The Registry is directed to draw up the award in terms of this judgment. Appeal allowed in part.

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

W.A. NO.555 OF 2011 (Dt.14.03.2012)

ASHOK KUMAR MISHRA …….Appellant.

.*Vrs.*

STATE OF ORISSA & ORS. ……Respondents.

EDUCATION - **Common Entrance Examination – Clause 4.2 of OJEE, 2011 Brochure prescribing upper age limit of 25 years as the minimum eligibility criteria for admission to Ist. year MBBS Course – Petitioner secured 141 rank in medical stream and 36 rank as green card holder in the merit list – Learned Single Judge declined to quash such clause – Hence this appeal.**

Clause 4.2 is contrary to MCI Act and Regulations and violative of Articles 14, 21, 21-A of the Constitution of India – Held, impugned order passed by the learned Single Judge is set aside – Clause 4.2 prescribed by OJEE in the information Brochure is quashed – Since last date for admission to the course for this academic year has expired on 30.9.2011 direction issued to Respondent Nos.2 & 4 to admit the appellant for the next academic year 2012-2013 in the Ist. Year MBBS Course. (Para 17)

Case laws Referred to:-

1.AIR 1999 SC 2894 : (Dr. Preeti Srivastava & Anr.-V-State of M.P.& Ors.)
2.(1998)6 SCC 131 : (Medical Council of India-V-State of Karnataka)
3.AIR 1990 SC 1075 : (Sanatan Gauda-V- Berhampur University & Ors.)
4.AIR 2011 SC 1209 : (Chowdhury Navin Hemabhai & Ors.-V-State of Gujarat &Ors.)
5.(1979)1 SCC 572 : (State of Kerala-V- Kumari T.P.Roshana & Anr.)
6.AIR 2011 SC 1974 : (Pepsu Road Transport Corporation, Patiala-V-Mangal Singh & Ors.)
7.AIR 1987 SC 400 : (Dr. Ambesh Kumar-V-Principal, L.L.R.M. Medical College, Meerut)
8.AIR 2004 SC 1861 : (State of Tamil Nadu-V- S.V.Bratheep).
9.2011(4)SCALE 578 : (Mahatma Gandhi University & Anr.-V-Jikku Paul & Ors.)

10.(1987)4 SCC 671 : (Osmania University Teachers' Association-V-State of A.P.)
11.AIR 1989 SC 341 : (Vidya Dhar pande-V-Vidyut Grih Siksha Samiti).

For Appellant - M/s. Dr. A.K.Mohapatra, Alok Ku. Mohapatra, N.C.Rout, S.K.Padhi, S.K.Mishra & S.Swain.
For Respondents- Mr. R.K.Mohapatra, Govt. Advocate (for Res. No.1 & 4)
M/s. S.palit, A.K.Mahana, A.Mishra & D.Biswal, (for Res. No.2 & 5)
M/s. R.C.Mohanty, K.C.Swain & S.Mohanty, (for Res. No.3).

V. GOPALA GOWDA,C.J. The unsuccessful petitioner in the writ petition bearing W.P.(C) No. 18599 of 2011 being aggrieved by the order dated 1.11.2011 passed by the learned Single Judge declining to quash Clause 4.2 of OJEE, 2011 Brochure prescribing the upper age limit of 25 years for the entrance examination of 2011, which is the minimum eligibility criteria for admission to the first year MBBS who has secured 141 rank in medical stream and 36 rank as Green Card holder has filed this writ appeal urging various facts and legal contentions and prayed to set aside the impugned order by allowing the Writ Appeal and quash the Clause 4.2 in the Prospectus of OJEE, 2011.

2. The brief facts are stated for the purpose of appreciating the rival legal contentions urged on behalf of the parties with a view to find out as to whether the appellant has made out a case for interference with the impugned order of the learned Single Judge and issue a writ of certiorari to quash Clause no. 4.2 of the OJEE, 2011 Prospectus prescribing the upper age limit of 25 years for admission to the first year MBBS and as to whether refusal to quash the same amounts to failure to exercise judicial review power as it is in violation of Articles 14,21, and 21A of the Constitution of India. That amounts to substantial question of law that would arise for consideration of this Court ? What order ?

3. The date of birth of the appellant is 10th of May, 1984. Clause 4.2 of the Brochure of OJEE, 2011 prescribes the upper age limit as 25 years for admission to MBBS Course and accordingly he was issued admission card for appearing at the entrance examination conducted by the OJEE, 2011 which he did. He secured 141st rank in the general category and 36th rank in the Green Card holder category in the merit list. Learned Single Judge did

not consider the fact that in the absence of prescription of the upper age limit in the regulation framed by the Medical Council of India in exercise of its power under Section 33 of the Indian Medical Council Act, 1956 and also in the Rules or Regulation under Section 4(1) of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee)Act, 2007 prescribing the upper age limit by the OJEE in its prospectus is without authority of law and the various decisions of the Supreme Court upon which strong reliance is placed by the learned counsel Mr. Ashok Mohapatra, particularly the Constitution Bench decision in the case of **Dr. Preeti Srivastava & Anr. Vs. State of M.P. & Ors**., reported in AIR 1999 SC 2894, **Medical Council of India Vs. State of Karnataka,** reported in (1998)6 SCC 131, **Sanatan Gauda V. Berhampur University & Ors.,** reported in AIR 1990 SC 1075, **Chowdhury Navin Hemabhai & Ors. Vs. State of Gujarat & Ors.,** reported in AIR 2011 SC 1209, **State of Kerala Vs. Kumari T.P. Roshana & Anr.**, reported in (1979) 1 SCC 572 and **Pepsu Road Transport Corporation, Patiala Vs. Mangal Singh & Ors.**, reported in AIR 2011 SC 1974 in support of the proposition that regulation made under Statute have the force of law. Any action or order in breach of terms and conditions of Regulations is illegal and invalid. Learned Single Judge also did not consider the prospectus of various States in the country which did not prescribe the upper age limit as per the MCI guideline. There are different entrance examination for admission to MBBS course of AIIMS and other Universities and institutions conducting entrance examination for admission to MBBS course where there is no prescription of upper age limit except the minimum age limit of 17 years. In the prospectus for AIIMS MBBS Examination August, 2011 it is mentioned that candidates born on or after 2nd January, 1995 are not eligible to apply. The aforesaid relevant facts and legal contentions have not been examined in the proper perspective by the learned Single Judge with reference to the various judgments of the Apex Court upon which strong reliance is placed. Non-consideration of the same rendered the impugned order bad in law. The clause 4.2 in the Prospectus is in violation of the provisions of Medical Council of India Act, regulations and the decisions referred to supra and fixing the upper age limit of a candidate in the prospectus by the OJEE in the State of Orissa for admission to the First year MBBS course, violates the principles of natural justice and the fundamental rights guaranteed under Articles 14, 21, 21-A of the Constitution of India. As the Medical Council of India which is the competent authority for regulating the admission of students in the MBBS Course has not prescribed the upper age limit in the Regulation and so also in the Orissa Act of 2007 and the Rules framed thereunder by the Orissa State Government. Therefore, the action of the OJEE is arbitrary and unreasonable, violative of fundamental rights referred to supra guaranteed to

the appellant. Placing reliance upon the decision of the Supreme Court in the case of **Dr. Ambesh Kumar Vs. Principal, L.L.R.M. Medical College, Meerut,** reported in AIR 1987 SC 400 and in the case of **State of Tamil Nadu Vs. S.V. Bratheep**, reported in AIR 2004 SC 1861. The case of Ambesh Kumar arose from the notification issued by the State Government laying down the qualification regarding the eligibility of a candidate to be considered for admission to Post-Graduate Medical Courses in Uttar Pradesh and the Apex Court ruled that the State Government by laying down the eligibility qualification namely, obtaining of certain minimum marks in the MBBS examination by the candidate has not in any way encroached upon the Regulations made under the Indian Medical Council Act, nor does it infringe the central power provided in Entry 66 of List-I of the Seventh Schedule of the Constitution. The same principle was followed in the case of **State of Tamil Nadu Vs. S.V. Bratheep** with reference to Entry No.25 of List III and Entry No.66 of List I of the VII Schedule have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of admission, but if certain prescription of standards have been made pursuant to Entry 66 of List I. Those decisions have been erroneously applied by the learned Single Judge to the fact situation against the appellant to deny the relief so also the decision upon which reliance is placed namely, **Mahatma Gandhi University & Anr. Vs. Jikku Paul & Ors.,** reported in 2011(4) SCALE 578 is also not applicable to the fact situation. Therefore, Mr. Ashok Mohapatra, learned counsel for the Appelant submits that the decisions upon which he has placed reliance has not been considered by the learned Single Judge. Therefore, the impugned order is vitiated in law and hence the substantial question of law would arise in this appeal. The learned Single Judge has not noticed the factual aspects namely, the Medical Council of India Regulations framed in exercise of its statutory power under Section 33 of the MCI Act with approval of the Central Government has not fixed the upper age limit in the Regulations, so also the State Government has not framed the Rule after Section 4(1) of Orissa Act 2007 was enacted prescribing the further entry condition of eligibility of maximum age of a candidate in exercise of its power vested under Entry no.25 of the Concurrent List (List III) of the Constitution for admission of candidates to the MBBS course in the State of Orissa. Therefore the order of the learned Single Judge is vitiated in law and is liable to be set aside by allowing the appeal and granting the relief by issuing a writ of certiorari to quash Clause 4.2 of the Information Brochure of OJEE 2011 in prescribing the upper age limit of 25 years as the minimum eligibility criteria for admission of a candidate to first year MBBS course.

4. It is the case of the appellant that the OJEE has allowed the

appellant to take entrance examination and he has been assigned 141st rank in the general category in the medical stream and 36th rank in the Green Card Holder category. Therefore, the OJEE is estopped in applying the said clause and to deprive the right of the appellant to get admission to the First year MBBS course. Even the juniors below the rank of the appellant have been admitted in the MBBS course whereas admission of the appellant into the course has been denied for the reason that the appellant is over aged, which action of the respondent nos. 2 and 4 is contrary to the decision of the Supreme Court in the case of Sanatan Gauda Vs. Berhampur University & others, reported in AIR 1990 SC 1075.

5. Learned counsel Mr. Palit appearing on behalf of OJEE and learned Government Advocate Mr. Mohapatra sought to justify the order of the learned Single Judge inter alia contending that Orissa JEE is empowered to prescribe the upper age limit of candidates for admission in to the First year MBBS course. The same submission is reiterated by Mr. Palit appearing for Respondent no. 2. The same is supported by Mr. Mohanty appearing on behalf of the Medical Council of India contending that the OJEE is empowered to fix the upper age limit of 25 years as on 31.12.2011. In support of the said contention, strong reliance has been placed upon the Prospectus of AIIMS-MBBS Entrance Examination in which it is stated that the candidates born on or after 2nd January, 1995 are not eligible to apply. So also in the Prospectus of Manipal University wherein it is stated that candidates born on or before 31.12.1991 are not eligible to apply. It is contended by him that even in the absence of the regulation; OJEE is competent authority to conduct entrance examination and is empowered to fix the upper age limit for admission to the MBBS course to maintain the standard of education. Therefore, they submitted that the appeal is liable to be dismissed as the impugned order passed by the learned Single Judge is a considered order after referring to the decisions of the Supreme Court with reference to the Regulation framed under the Medical Council of India and prescription of eligibility criteria approved by the Central Government in the Regulations. In addition to the same, the State Government also may laid down additional qualification regarding the upper age limit of a candidate for admission to the course and the same cannot be found fault with by this Court on the ground of lack of power of the OJEE for prescription of eligibility criteria. Therefore, the appellant was not entitled for seeking the relief in the writ petition to quash the Clause 4.2 in the Prospectus published in the academic year 2011.

6. With reference to the rival legal contentions urged by the learned counsel for the parties, the following points would arise for our consideration:-

(i) Whether fixing the upper age limit of 25 years in clause 4.2 of the Prospectus by the JEE for admission of students to the MBBS Course in the absence of prescription of such maximum age limit either in the Regulations framed by the MCI or the Rules framed by the Orissa State Government under the Orissa Act of 2007 is legal and valid?

(ii) Whether prescription of upper age limit of students in the prospectus by the JEE does not amount to violation of fundamental rights guaranteed to the appellant under Articles 14,19, 21 and 21A of the Constitution of India ?

(iii) Whether non-consideration of the legal grounds and the decisions of the Hon'ble Supreme Court referred t supra in support of the claim of the appellant by the learned Single Judge has vitiated the impugned order, and that would constitute the substantial question of law for interference with the impugned order in this appeal by this Court?

(iv) What order?

7. The aforesaid points are inter-related with each other and therefore, they are answered together in favour of the appellant for the following reasons.

It is not in dispute that the Central Government in exercise of its statutory power under Section 33 of the Indian Medical Council Act, 1956 has approved the Regulations framed by the MCI, regulating the admission of students to the MBBS Course by prescribing the eligibility criteria of minimum age and other relevant aspects for conducting the examination for admission to the MBBS course in the country. As per the decision of the Hon'ble Supreme Court in T.M.A. PAI Foundation & Ors. Vs. State of Karnataka & Ors., reported in (2002)8 SCC 481 and in the case of P.A. Inamdar & Ors. Vs. State of Maharashtra & Ors., reported in *(2005) 6 SCC 537* , the State Legislature of the Odisha State has been empowered to enact law and regulate admission to the MBBS Course in the State in exercise of its power from Entry No. 25, Concurrent List III of VII Schedule to the Constitution. As could be seen from the Regulations of the MCI, no upper age limit is fixed by the MCI approved by the Central Government under the Indian Medical Council Act, 1956 regarding the upper age limit for a candidate to admit in the MBBS Course. No doubt, the State Government after the decision of the T.M.A. PAI Foundation and P.A. Inamdar cases referred to supra, has enacted Orissa Act of 2007. Neither in the Act nor in

the Rules framed by the Orissa State Government, upper age limit of a candidate is fixed by the State Legislature or State Government in the Rules. The minimum age limit is fixed in the MCI Regulation that a candidate must have completed the age of 17 yeas on or before 31st December of the year admission to the MBBS Course but no upper age limit is fixed. Undisputedly, Clause 4.2 is framed by the OJEE who is a creature of the statute. It has no competency to fix the upper age limit of a candidate who will be seeking admission in the course as it will not have the status of framing either regulation or the Rules under the Orissa Act of 2007. Apart from the said Rule, the MCI Regulations are framed by the MCI which is approved by the Central Government, in exercise of its statutory power under Section 33 of the Indian Medical Council Act, 1956,which Act is enacted by the Parliament in exercise of its legislative powers from Entry No.66 of List I of VII Schedule regarding the qualification for admission to the MBBS Course to maintain the education standards. In the absence of Rules framed by the State Government fixing the upper age limit, the upper age limit prescribed by the OJEE authority cannot have the statutory status as it is not traceable to the provisions of the Orissa Act of 2007 or the Rules. In the absence of the same, fixing the upper age limit under Clause 4.2 in the Prospectus whereas most of the States in the country have not fixed the upper age limit for the reason that MCI Regulations do not provide for the same and therefore fixing the upper age limit in the Prospectus in the Orissa State is a clear case of discrimination unde Article 14 of the Constitution of India and it is without competency on the part of the OJEE. Denial of admission to the appellant for the reason that he is more than 25 years for admission in the MBBS Course in the State of Odisha for the academic year is certainly in violation of the fundamental rights guaranteed to him under Articles 14, 19(1)(g), 21 and 21A of the Constitution of India.

8. In this regard, reliance is rightly placed by the learned counsel for the appellant upon the Constitution Bench decision of the Hon'ble Supreme Court in the case of Dr. Preeti Srivastava & Anr. Vrs. State of M.P. & Ors referred to supra, the relevant portions of paragraph-35, 53, 55 and 57 are extracted below:-

> "35. …… Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List I. Secondly,

while considering the cases on the subject it is also necessary to remember that from 1977, education, including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

53. Secondly, it is not the exclusive power of the State to frame rules and regulations pertaining to education since the subject is in the Concurrent List. Therefore, any power exercised by the State in the area of education under Entry 25 of List III will also be subject to any existing relevant provisions made in that connection by the Union Government subject, of course, to Article 254.

55. …… Therefore, the universities have to be guided by the standards prescribed by the Medical Council and must shape their programmes accordingly. The scheme of the Indian Medical Council Act, 1956 does not give an option to the universities to follow or not to follow the standards laid down by the Indian Medical Council. For example, the medical qualifications granted by a university or a medical institution have to be recognised under the Indian Medical Council Act, 1956. Unless the qualifications are so recognised, the students who qualify will not be able to practise. ……..

57. In the case of *Medical Council of India* v. *State of Karnataka*a Bench of three Judges of this Court has distinguished the observations made in *Nivedita Jain*. It has also disagreed with *Ajay Kumar Singh* v. *State of Bihar*[1] and has come to the conclusion that the Medical Council regulations have a statutory force and are mandatory. The Court was concerned with admissions to the MBBS course and the regulations framed by the Indian Medical Council relating to admission to the MBBS course. The Court took note of the observations in *State of Kerala* v. *T.P. Roshana* (SCC at p. 580) to the effect that under the Indian Medical Council Act, 1956, the Medical Council of India has been set up as an expert body to control the minimum standards of medical education and to regulate their observance. It has implicit power to supervise the qualifications or eligibility standards for admission into medical institutions. There is, under the Act an overall vigilance by the Medical Council to prevent sub-standard entrance qualifications for medical courses.

These observations would apply equally to postgraduate medical courses. We are in respectful agreement with this reasoning.

9. In this regard, reliance is placed upon the decision of the Hon'ble Supreme Court in the case of Medical Council of India Vrs. State of Karnataka & Ors, referred to supra, the relevant portions of paragraph-27, 30, and 31 are extracted below:-

> **27.** The State Acts, namely, the Karnataka Universities Act and the Karnataka Capitation Fee Act must give way to the Central Act, namely, the Indian Medical Council Act, 1956. The Karnataka Capitation Fee Act was enacted for the sole purpose of regulation in collection of capitation fee by colleges and for that, the State Government is empowered to fix the maximum number of students that can be admitted but that number cannot be over and above that fixed by the Medical Council as per the regulations. Chapter IX of the Karnataka Universities Act, which contains provision for affiliation of colleges and recognition of institutions, applies to all types of colleges and not necessarily to professional colleges like medical colleges. Sub-section (10) of Section 53, falling in Chapter IX of this Act, provides for maximum number of students to be admitted to courses for studies in a college and that number shall not exceed the intake fixed by the university or the Government. But this provision has again to be read subject to the intake fixed by the Medical Council under its regulations. It is the Medical Council which is primarily responsible for fixing standards of medical education and overseeing that these standards are maintained. It is the Medical Council which is the principal body to lay down conditions for recognition of medical colleges which would include the fixing of intake for admission to a medical college. We have already seen in the beginning of this judgment various provisions of the Medical Council Act. It is, therefore, the Medical Council which in effect grants recognition and also withdraws the same. Regulations under Section 33 of the Medical Council Act, which were made in 1977, prescribe the accommodation in the college and its associated teaching hospitals and teaching and technical staff and equipment in various departments in the college and in the hospitals. These regulations are in considerable detail. Teacher-student ratio prescribed is 1 to 10, exclusive of the Professor or Head of the Department. Regulations further prescribe, apart from other things, that the number of teaching beds in the attached hospitals will have to be in the ratio of 7 beds per student admitted. Regulations of the

Medical Council, which were approved by the Central Government in 1971, provide for the qualification requirements for appointments of persons to the posts of teachers and visiting physicians/surgeons of medical colleges and attached hospitals.

(**Emphasis is laid by this Court**)

30. Having thus held that it is the Medical Council which can prescribe the number of students to be admitted in medical courses in a medical college or institution, it is the Central Government alone which can direct increase in the number of admissions but only on the recommendation of the Medical Council. In our opinion, the learned Single Judge was right in his view that no medical college can admit any student in excess of its admission capacity fixed by the Medical Council subject to any increase thereof as approved by the Central Government and that Sections 10-A, 10-B and 10-C will prevail over Section 53(10) of the State Universities Act and Section 4(1)(*b*) of the State Capitation Fee Act. To say that the number of students as permitted by the State Government and/or the university before 1-6-1992 could continue would be allowing an illegality to perpetuate for all time to come. The Division Bench, in our opinion, in the impugned judgment was not correct in holding that admission capacity for the purpose of increase or decrease in each of the medical colleges/institutions has got to be determined as on or before 1-6-1992 with reference to what had been fixed by the State Government or the admission capacity fixed by the medical colleges and not with reference to the minimum standard of education prescribed under Section 19-A of the Medical Council Act which the Division Bench said were only recommendatory. *Nivedita Jain case* does not say that all the regulations framed by the Medical Council with the previous approval of the Central Government are directory or mere recommendatory. It is not that only future admissions will have to be regulated on the basis of the capacity fixed or determined by the Medical Council. The plea of the State Government that power to regulate admission to medical colleges is the prerogative of the State has to be rejected.

31. What we have said about the authority of the Medical Council under the Indian Medical Council Act would equally apply to the Dental Council under the Dentists Act.

10. Reliance is placed by the learned counsel for the appellant upon the decision of the Hon'ble Supreme Court in the case of Osmania University Teachers' Associaton Vs. State of A.P., reported in (1987) 4 SCC 671 referred to supra, the relevant paragraphs-14, and 15 are extracted below:-

> **14.** Entry 25 List III relating to education including technical education, medical education and universities has been made subject to the power of Parliament to legislate under Entries 63 to 66 of List I. Entry 66 List I and Entry 25 List III should, therefore, be read together. Entry 66 gives power to Union to see that a required standard of higher education in the country is maintained. **The standard of Higher Education including scientific and technical should not be lowered at the hands of any particular State or States. Secondly, it is the exclusive responsibility of the Central Government to coordinate and determine the standards for higher education.** That power includes the power to evaluate, harmonise and secure proper relationship to any project of national importance. It is needless to state that such a coordinate action in higher education with proper standards, is of paramount importance to national progress. It is in this national interest, the legislative field in regard to "education" has been distributed between List I and List III of the Seventh Schedule.
>
> (Emphasis is laid by this Court)
>
> **15.** The Parliament has exclusive power to legislate with respect to matters included in List I. The State has no power at all in regard to such matters. If the State legislates on the subject falling within List I that will be void, inoperative and unenforceable.
>
> (Emphasis laid by this Court)

11. Reliance is placed by the learned counsel on behalf of the appellant upon the decision of the Hon'ble Supreme Court in the case of State of Kerala Vs. Kumari T.P.Roshana & Anr., reported in (1979) 1 SCC 572 referred to supra, the relevant paragraph-16 of which is extracted below:-

> **16.** The Indian Medical Council Act; 1956 has constituted the Medical Council of India as an **expert body to control the minimum standards of medical education and to regulate their observance. Obviously, this high-powered Council has power to**

> **prescribe the minimum standards of medical education. It has implicit power to supervise the qualifications or eligibility standards for admission into medical institutions. Thus there is an overall invigilation by the Medical Council to prevent sub-standard entrance qualifications for medical courses**.
>
> (Emphasis laid by this Court)

12. Further reliance is placed by the learned counsel for the appellant upon Article 256 of the Constitution which postulates that the executive power of every State shall be so exercised as to ensure compliance with the laws made by the Parliament and any existing laws which apply in that State. The said provision is aptly applicable to the fact situation as fixing of the upper age limit of a candidate for admission to the MBBS Course by the OJEE in exercise of its power is contrary to the MCI Act and Regulation which are applicable in the State of Orissa.

13. Further, he has rightly placed reliance upon the decision of the Supreme Court in the case of Pepsu Road Transport Corporation, Patiala Vs. Sharanjit Kaur, reported in AIR 2011 SC 1974 in support of the proposition that Regulations made under the Statute have the force of law, any action or order in breach of the terms and conditions of Regulation is illegal and invalid. The said principle has been laid down after referring to various earlier decisions of the Supreme Court at paragraphs 16, 17, 23 and 30 of the Judgment are extracted below:-

> "16. It is well settled law that the Regulations made under the statute laying down the terms and conditions of service of employees, including the grant of retirement benefits, has the force of law. The Regulations validly made under statutory powers are binding and effective as the enactment of the competent legislature. The statutory bodies as well as general public are bound to comply with the terms and conditions laid down in the Regulations as a legal compulsion. Any action or order in breach of the terms and conditions of the Regulations shall amount to violation of Regulations which are in the nature of statutory provisions and shall render such action or order illegal and invalid.
>
> 17. In Sukhdev Singh V. Bhagatram Sardar Singh Raghuvanshi, (1975)1 SCC 421, this Court, while elaborately discussing the nature

and effect of the Regulations made under the Statute, has observed :

> 23**.** The noticeable feature is that these statutory bodies have no free hand in framing the conditions and terms of service of their employees. These statutory bodies are bound to apply the terms and conditions as laid down in the regulations. The statutory bodies are not free to make such terms as they think fit and proper. Regulations prescribe the terms of appointment, conditions of service and procedure for dismissing employees. These regulations in the statutes are described as "status fetters on freedom of contract". The Oil and Natural Gas Commission Act in Section 12 specifically enacts that the terms and conditions of the employees may be such as may be provided by regulations. There is a legal compulsion on the Commission to comply with the regulations. Any breach of such compliance would be a breach of the regulations which are statutory provisions. In other statutes under consideration viz. the Life Insurance Corporation Act and the Industrial Finance Corporation Act though there is no specific provision comparable to Section 12 of the 1959 Act the terms and conditions of employment and conditions of service are provided for by regulations. These regulations are not only binding on the authorities but also on the public.
>
> 30. ……..In this view a regulation is not an agreement or contract but a law binding the corporation, its officers, servants and the members of the public who come within the sphere of its operations. The doctrine of ultra vires as applied to statutes, rules and orders should equally apply to the regulations and any other subordinate legislation. The regulations made under power conferred by the statute are subordinate legislation and have the force and effect, if validly made, as the Act passed by the competent legislature.

14. The relevant underlined portion of paragraph-9 of the judgment reported in Vidya Dhar Pande Vs. Vidyut Grih Siksha Samiti, reported in AIR 1989 SC 341 is extracted below:

> 9. The question whether a regulation framed under power conferred by the provisions of a statute has got statutory power and whether an order made in breach of the said regulation will be rendered illegal and invalid, came up for consideration before the Constitution Bench in the case of *Sukhdev Singh* v. *Bhagatram Sardar Singh*

Raghuvanshi. In this case it was held that: [SCC p. 438 : SCC (L&S) P. 118, para 33]

> "There is no substantial difference between a rule and a regulation inasmuch as both are subordinate legislation under powers conferred by the statute. A regulation framed under a statute applies uniform treatment to every one or to all members of some group or class. The Oil and Natural Gas Commission, the Life Insurance Corporation and Oil and Industrial Finance Corporation are all required by the statute to frame regulations inter alia for the purpose of the duties and conduct and conditions of service of officers and other employees. These regulations impose obligation on the statutory authorities. The statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violations of rules and regulations. The existence of rules and regulations under statute is to ensure regular conduct with a distinctive attitude to that conduct as a standard. The statutory regulations in the cases under consideration give the employee a statutory status and impose restriction on the employer and the employee with no option to vary the conditions."

15. In view of the aforesaid statement of law laid down by the Hon'ble Supreme Court in the case of Sukhdev Singh Vrs. Bhagatram Sardar Singh Raghuvanshi which decision has been referred to in the case of Pepsu Road Transport Corporation Vs. Mangal Singh at paragraph-18 of the judgment wherein paragraph-33 from Sukhdev Singh Vrs. Bhagatram Sardar Singh Raghuvanshi is extracted, is rightly placed reliance by the learned counsel for the appellant in support of the proposition of law that the statutory authorities cannot deviate from the conditions of service. Any deviation will be enforced by legal sanction of declaration by courts to invalidate actions in violation of rules and Regulations. The Rules and Regulations framed under statute are framed regarding the eligibility for admission in the MBBS course and such terms and conditions in order to maintain good standards in the professional Medical course for its implementation. In the absence of the Regulation framed by the Medical Council of India with prior approval of the Central Government fixing the upper age limit of a student for admission to the MBBS course in a college, fixing such upper age limit in the prospectus by OJEE who is not authorised in law and the same is in violation of the provisions of the MCI Regulations. Therefore, the same will not be binding upon the State Government and its authorities, who will be conducting the Entrance test examination for the eligible candidates to get seats allowed in

their favour for the course. Therefore, insertion of clause 4.2 in the Prospectus by the OJEE is without any authority of law and the same is liable to be quashed. The said clause is also in violation of the fundamental rights guaranteed to the petitioner under Articles 14, 19(1)(g) and 21 and 21A of the Constitution of India. Hence the Clause 4.2 is liable to be struck down as the same is contrary to the MCI Act and Regulations.

16. The action of the opposite party nos. 2 and 4 in not admitting the appellant though he was permitted to appear in the entrance examination and secured 141st rank and candidates who were below his rank have been admitted in the course is not correct. Also one Jnana Ranjan Nayak and Sonali Subhadarshini who are over aged i.e. above 25 years were permitted to appear in the OJEE Entrance Examination and Sonali Subhadarshini was admitted in the first year MBBS Course for the academic year of 2011-2012. Thereby the petitioner is discriminated in not admitting in the course for the reason that he is over aged which action of the opposite parties is in violation of Article 14 of the Constitution of India and on this ground also the appellant is entitled for the relief. Further the opposite party nos. 2 and 4 having permitted the appellant to appear in the entrance examination are now estopped from not admitting him to first year MBBS course for the reason that he had attained age beyond upper age limit. He has rightly placed reliance upon the decision of the Supreme Court in support of the aforesaid proposition of law in the case of Sanatan Gauda Vs. Berhampur University & Ors., reported in AIR 1990 SC 1075, which decision is aptly applicable to the fact situation wherein the Apex Court has held as follows:-

> 10. This is apart from the fact that I find that in the present case the appellant while securing his admission in the Law College had admittedly submitted his marks-sheet along with the application for admission. The Law College had admitted him. He had pursued his studies for two years. The University had also granted him the admission card for the Pre-Law and Intermediate Law examinations. He was permitted to appear in the said examinations. He was also admitted to the final year of the course. It is only at the stage of the declaration of his results of the Pre-Law and Inter-Law examinations that the University raised the objection to his so-called ineligibility to be admitted to the Law Course. The University is, therefore, clearly estopped from refusing to declare the results of the appellant's examination or from preventing him from pursuing his final year course.

17. In view of the aforesaid legal principle laid down by the Apex Court in the above referred case refusal of admission to the appellant in the first year MBBS course by the Respondent nos. 2 and 4 is in violation of the aforesaid judgment of the Supreme Court. The same is arbitrary and unreasonable and therefore the same cannot be allowed to sustain. Hence, we pass the following order.

(i) For the reasons stated supra, the writ appeal is allowed and impugned order of the learned Single Judge passed in W.P.(C) No. 18599 of 2011 on 1.11.2011 is hereby set aside.

(ii) Clause 4.2 prescribed by the OJEE in the Information Brochure is hereby quashed as it is in violation of the MCI Regulations and the Orissa Act of 2007 and Rules.

(iii) Since the last date for admission to the course for this academic year has expired on 30.9.2011, we direct the aforesaid Respondent Nos. 2 and 4 to admit the appellant for the next academic year 2012-2013 in the first year MBBS Course as we have struck down the Clause 4.2 in the Prospectus by allowing the writ petition holding that the same is without Authority of law and contrary to the MCI Regulation.

Appeal allowed.

2012 (II) ILR- CUT- 22

V.GOPALA GOWDA, CJ.

MACA NO. 373 OF 2001 (Dt.06.04.2012)

MAHESWAR DAS & ANR. …… Appellants.

.Vrs.

ARUN KUMAR BEHERA & ANR. …….Respondents.

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

Just compensation – Determination of – Deceased studying in +3 Class – Evidence led that he was doing Tussar and Silk business and earning Rs.11,000/- P.M. – Tribunal granted compensation of Rs.1,10,000/- which is under challenge.

Had the deceased not died in the motor accident he would have got employment in Government or private establishment and would have earned a sizeable sum – However in the absence of any legal evidence in respect of the annual income of the deceased this Court fixed Rs.40,000/- as the annual income of the deceased P.A. and after 1/3rd deduction towards personal expenses it assessed his income as Rs.27,000/- P.A. for the purpose of compensation – Since the mother of the deceased is aged about 40 years multiplier 14 is applied to assess the loss of dependency which comes to Rs.3,78,000/- + Rs.30,000 towards funeral and obsequies ceremonies and loss of love and affection. (Para 5)

Case laws Referred to:-

1.1995 ACJ 107 : (National Insurance Company Ltd.-V-Kumud Khosla & Ors.)
2.(2001) 8 SCC 197 : (Lata Wadhwa-V- State of Bihar)
3.AIR 2009 SC 3104 : (Smt.Sarla Verma & Ors.-V-Delhi Transport Corporation & Anr.)

For Appellants - M/s. Dr. T.C.Mohanty, Sr. Advocate
S.C.Swain, S.Mohanty, A.K.Rout,
S.K.Pattnaik, N.Sethy, A.K.Behuria,
S.Patra & J.Mohanty.
For Respondents - M/s. B.K.Nayak & D.K.Mohanty,
(for respondent no.2).

V.GOPALA GOWDA, C.J. This appeal has been filed by the parents of the deceased questioning the correctness of the judgment and award 20.12.2000 passed by the Ist Addl. District Judge-cum-Ist M.A.C.T., Cuttack in Misc. Case No. 509 of 1998 awarding compensation at ₹1,10,000/- disbelieving the evidence adduced by the appellants that while their deceased son was doing business, his monthly income was at ₹ 11,000/-, urging various facts and legal contentions.

2. Dr. Mohanty, learned senior counsel for the appellants placing reliance upon the judgment of the Delhi High Court in the case of ***National Insurance Company Ltd. v. Kumud Khosla and others***, 1995 ACJ 107, has claimed for enhancement of compensation by ₹ 3,40,000/-. Dr. Mohanty has attacked the impugned award on another ground that the Tribunal has erroneously recorded the claim made by the appellants though they have adduced documentary evidence by examining two witnesses. P.W.1 is the father who has stated that the deceased son was studying +3 in Bhadrak College and he had his own business (Tussar and Silk). His average income was ₹11,000/- per month. His monthly contribution to the family was ₹8,000/-. The said evidence has remained unchallenged though he was cross-examined before the Tribunal. P.W.2, the Branch Manager of the Orissa State Tussar and Silk Co-operative Society has stated that the deceased was a regular customer from their sale depot at Gopalpur. He has further stated that the annual turn over of the deceased was ₹ 5,00,000/-. He has produced the cash memos/receipts issued by the society in respect of the purchase from the said society. The said witness in cross-examination has clarified that the take over of the sale from the depot of the Co-operative Society was more than ₹ 50,00,000/- per year during 1996, 1997 and 1998. In his cross-examination, he has stated that the monthly transaction of the deceased would be ₹ 10,00,000/-.The said evidence has not been properly appreciated by the Tribunal to determine just and reasonable compensation. Therefore, Dr. Mohanty, learned senior counsel pleaded that it is a fit case for enhancement of compensation by modifying the impugned judgment.

3. Mr. Nayak, learned counsel for the Insurance Company sought to justify the impugned judgment awarding just and reasonable compensation, inter alia, contending that as the Tribunal which is the fact finding authority, on proper appreciation of the facts and the legal evidence available on record and recording valid and cogent reasons, has rightly rejected the claim made by the appellants that their son was doing businesss, the same can not be said to be erroneous or error in law. He further submitted that the

case pleaded by the appellants that their son was doing business, has been disbelieved by the Tribunal and just and reasonable compensation has been awarded by it holding that he was a student as the claimant-parents were not able to prove the income of their deceased son for determination of their loss of dependency on him. Therefore, the impugned award does not call for interference. He also submitted that the reliance placed by the claimants upon the decision of the Delhi High Court (supra) has no application to the fact situation of the present case and prayed for dismissal of the appeal.

4. With reference to the aforesaid rival legal contentions, the following points arise for consideration.

(i) Whether the compensation awarded at ₹ 1,10,000/- is just and reasonable and if not, to what extent the compensation would be enhanced by this Court in exercise of its appellate jurisdiction to award just and reasonable compensation ?

(ii) What award ?

5. The first point is required to be answered in favour of the claimant-appellants for the following reasons.

The Tribunal being the fact finding authority, on proper appreciation of the facts and legal evidence on record has answered the contentious point that the deceased son of the appellant died in a motor vehicle accident due to rash and negligent driving of the offending vehicle and the said finding of fact has not been challenged by the owner or the insurer after availing permission as provided under section 170 (b)of the Motor vehicles Act, 1988. The present appeal has been filed seeking enhancement of compensation. The compensation has been awarded in respect of a deceased boy who was studying in +3 class. If he had not died in the motor vehicle accident on the fateful day, he would have been employed as either an officer or as an employee in Government or Private Establishment and undisputedly he would have been earning a sizeable sum during his life time, which is not the basis taken by the Tribunal for computation, as it would be of future earning of the deceased son of the appellants, in the fact situation, in absence of any legal evidence on record in respect of annual income of the deceased. However, in the case of death of a school boy or a college boy, certain criteria have been laid down by the apex Court in the case of ***Lata Wadhwa v. State of Bihar***, (2001) 8 SCC 197. In the said case, compensation awarded in respect of the minor children was divided into two groups, i.e., the first group between the age group of 5 to 10 years

and the second group between the age group of 10 to 15 years. In the case of children between the age group of 5 to 10 years, a uniform sum of Rs.50,000/- has been held to be payable by way of compensation, to which the conventional figure of Rs.25,000/- is to be added and as such to the heirs of the 14 children, a consolidated sum of Rs.75,000/- each, has been awarded. So far as the children in the age group of 10 to 15 years are concerned, there are 10 such children who died on the fateful day and having found their contribution to the family at Rs.12,000/- per annum, 11 multiplier has been applied, particularly, depending upon the age of father and then the conventional compensation of Rs.25,000/- has been added to each case and consequently, the heirs of each of the deceased above 10 years of age, has been granted compensation to the tune of Rs.1,57,000/-. Applying the guidelines laid down in the case of Lata Wadhwa (supra) and also applying the structural formula in the second schedule under Section 163 of the Motor Vehicles Act, 1988, in absence of proof of annual income and not accepting the annual income of the deceased pleaded and proved by examining P.W. 2, this Court safely can take the annual income of the deceased at ₹ 40,000/-. After 1/3rd deduction, it would come to ₹ 27,000/- and odd which is rounded off to ₹27,000/-. On the basis of the age of the mother who is 40 years of age, applying the principle laid down by the apex Court in the case of ***Smt. Sarla Verma and others v. Delhi Transport Corporation and another***, AIR 2009 SC 3104, applying 14 multiplier, the loss of dependency of the claimants would be ₹ 3,78,000/-.Under conventional heads, ₹ 30,000/- is to be added towards funeral and obsequies ceremonies expenses, loss of love and affection. Therefore, the compensation is enhanced to ₹4,08,000/- in view of the facts of this case which warrants such enhancement. The respondent no.2-insurer is directed to pay the compensation to the claimants, along with interest at 6% from the date of this appeal till payment within a period of four weeks from the date of receipt of a copy of this judgtment. The Registry is directed to draw up the modified award in terms of this judgment. The appeal is accordingly allowed.

Appeal allowed.

2012 (II) ILR- CUT- 26

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

W.P.(C) NO. 2367 OF 2012 (Dt.14.03.2012)

SHEETAL SURI .....Petitioner.

.*Vrs.*

COMMISSIONER OF SALES TAX, & ORS. .....Opp.Parties.

ORISSA VAT ACT, 2004 (ACT NO.4 OF 2005) – S.74 r/w Section 25 of the Orissa Entry Tax Act, 1999.

Imposition of penalty U/s. 74(5) can not sustain unless it is clearly shown that any of the conditions in that Sub-section is satisfied – Power U/s.74 (5) cannot be exercised on suspicion or doubt – Violation of provisions of Clause (a) of subsection (2) of section 74 or submission of false or forged documents or way bills, attracts penalty U/s.74(5) of the OVAT Act – No tax or penalty can be levied unless the charging provision clearly imposed such obligation – If infraction does not fall within four corners of the provisions of taxing statute, no tax and/or penalty can be imposed by drawing inference – Imposition of penalty cannot be enlarged so as to encompass the matters not specifically mentioned in the statute. (Para 10,14,16)

Case laws Referred to:-

1.(2008)18 VST 165 : (Singhal Converter (P) Ltd.-V-Addl. Commissioner of Sales Tax, Orissa,Sambalpur & Ors.)
2.(2012)47 VST 191(Orissa) : (Vinayak Agro Industry-V-Commissioner of Commercial Taxes, Orissa,Cuttack & Ors.)
3.(2007)9 VST 425(SC) : (Sales Tax Officer & Ors.-V-Dutta Traders)
4.AIR 1972 SC 2284 : (G. Narayana Swami-V- G.Panneerselvam & Ors.)
5.(2002)7 SCC 273 : (Union of India & Anr.-V-Hansoli Devi & Ors.)
6.(2011)1 SCC 529 : (Govind Impex Private Ltd.& Ors.-V-Appropriate Authority, Income Tax Department.

For Petitioner - M/s. T.K.Satpathy, R.K.Jena & S.B.Jena.
For Opp.Parties - Mr. M.S.Raman, Addl. Standing Counsel(Sales Tax).

B.N.MAHAPATRA,J. This writ petition has been filed with a prayer for quashing the order dated 16.01.2012 (Annexure-1) passed by opposite party no.2-Additional Commissioner of Sales Tax, North Zone, Banijyakar Bhawan, Buxibazar, Cuttack and the orders dated 31.12.2011 passed by the Sales Tax Officer, Vigilance, Sambalpur under Annexures-9 and 10 on the ground that the said orders are illegal, arbitrary and contrary to the provisions of Orissa Value Added Tax Act, 2004 (for short , "VAT Act") and Orissa Entry Tax Act, 1999 (for short, "OET Act").

2. Petitioner's case in a nutshell is that he is the owner of a vehicle bearing No.CG-04-DB-5707, which was used by him for transport business. On 16.12.2011 the petitioner's vehicle carrying 230 metres of pipe proceeded from Macawber Beky Pvt. Ltd. Greater Nodia (U.P.) to M/s. Jindal Steel and Power Ltd., Angul, Odisha. The said consignment was covered with all valid required documents such as invoice No. 2172 dated 16.12.2011 for Rs.16,81,965/-, E. Waybill bearing No.21W-110694206 etc. While the vehicle was running towards its destination at Angul, opposite party no.3 on 26.12.2011 intercepted and detained the said vehicle near Chandimal. On demand, the person in charge of the vehicle immediately handed over all original documents carried with him in support of the consignment, but opposite party no.3 without assigning any reason forcefully took the vehicle to Talasara Police Station without any notice or show cause to the person in-charge of the vehicle. Statement of the driver of the vehicle was recorded, but the driver signed the statement on coercion and duress without knowing the contents thereof. On 26.12.2011, opposite party no.3 served two notices; one under the OVAT Act and another under the OET Act. In response to the said notices, the petitioner appeared and filed a petition before opposite party no.3 on 29.12.2011 praying therein to drop the proceeding and release the vehicle as the consignment is covered with all valid/required documents and there was no contravention of any provisions of Section 74(2)(b)(c)(d) of the OVAT Act. The petitioner also denied the allegation of violation of the provisions of Sections 23 and 24 of the OET Act. It was submitted that due to Maoist menace and to save time and distance the driver of the vehicle entered into the State of Odisha to reach the destination as early as possible and in the said route no check post or barrier was established by the Government of Odisha. Subsequently, opposite party no.3 transferred the proceeding to his subordinate officer i.e. opposite party no.4 to deal with the case. When no action was taken in the proceedings, the petitioner submitted another petition before opposite party no.4 on 31.12.2011 and while the same was pending, the petitioner received two orders from opposite party no.4 on 2.1.2012 wherein opposite party no.4 rejected the petitioner's show cause reply and levied tax of Rs.67,279/- and

penalty of Rs.3,36,395/- under the OVAT Act. Under the Orissa Entry Tax Act, opposite party No.4 levied entry tax of Rs.16,820/- and Penalty of Rs.33,640/-. Being aggrieved by the order passed by opposite party no.4, the petitioner filed revision under the OVAT Act and OET Act on 13.1.2012. The revisional authority passed one common order under the OVAT Act and OET Act and maintained only the imposition of penalty under the OVAT Act and OET Act made by opposite party No.4.

3. Mr. T.K. Satapathy, learned counsel appearing for the petitioner submitted that the order passed by opposite party no.2 is unjustified and untenable in the eye of law. Before opposite party no.4 passed the order of assessment, no due and proper opportunity was extended to the petitioner in the proceeding. Opposite party no.2 has erroneously created a new issue and levied penalty under the OVAT Act and OET Act. Consignment carried in the vehicle was accompanied by valid documents as required under Section 74(2)(a) of the OVAT Act and the same were immediately produced before opp. party no.3 on spot. The petitioner has not contravened any provision of sub-section (2) of Section 74 of the OVAT Act or submitted any false or forged documents to opp. party no.3 and the goods were covered by the E-way bill and as such the levy of tax and penalty under Section 74(5) of the OVAT Act is without any authority of law.

4. The petitioner has only committed a mistake for not entering into the check gate disclosed in the way-bill. Placing reliance on the judgment of the Madhya Pradesh High Court (Indore Bench) in the case of *Indore Kolhapur Road Lines-v.- Assistant Commissioner of Sales Tax and another* reported in 95 STC-141 it was argued that once it is found that goods carried in a truck are accompanied by all the documents as required under the law, initiation of proceedings for imposing penalty would not arise merely because the truck had taken a different route. Therefore, imposition of tax and penalty upon the petitioner under Section 74 (5) of the OVAT Act is per se illegal and without jurisdiction. Similarly, imposition of tax and penalty upon the petitioner under Section 25 of the OET Act is also illegal and without jurisdiction.

5. It was further argued that in the present case, both the consignee and consignor are registered dealers and the opp. parties did not find any fault in the documents produced before them by the owner of the truck. There is no provision under the OVAT Act and Rules that the Truck should pass through the Check Post or barrier when other routes are also available to the petitioner. Opp. party no.4 had not impleaded either the consignee or the consignor in the penalty proceedings. Penalty has been imposed without assigning any valid reason. Imposition of penalty is quasi-criminal in nature

and penalty will not be ordinarily imposed unless the party either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or act in conscious disregard to the statutory obligation. In the present case, there has been non-consideration of facts and materials placed by the petitioner and the orders have been passed purely on the basis of suspicion and surmises. Due to illegal and motivated actions of opposite party Nos.4 and 2, the constitutional rights as conferred under Articles 14 and 19(1)(g) of the Constitution of India have been infringed.

6. Mr. Raman, learned Addl. Standing Counsel appearing for the Revenue vehemently argued that the petitioner has misutilised the way bill. The owner of the vehicle having accompanied with the consigned goods in question in his statement dated 26.12.2011 stated that he has brought the goods vehicle into Orissa through a by-pass road avoiding border check gate at Telijore. The documents covering the consignment were not produced by him at Border Check Gate before entering into Orissa. The petitioner also avoided the other check gate established on the route through which he entered into the State of Orissa. Placing reliance on the judgment of this Court in the case of *Singhal Converter (P) Ltd. V. Addl. Commissioner of Sales Tax, Orissa, Sambalpur and others***,** reported in (2008) 18 VST 165 (Orissa), Mr. Raman argued that where the goods were carried clandestinely to evade tax, the Officer-in-charge of the check post is justified to levy penalty or both tax and penalty.

Further placing reliance on the judgment of this Court in *Vinayak Agro Industry v. Commissioner of Commercial Taxes, Orissa, Cuttack and others,* (2012) 47 VST 191 (Orissa), it was submitted that in the present case the imposition of penalty under Section 74(5) of the OVAT Act is justified. Placing reliance on the decision of the Hon'ble Supreme Court in the case of *Sales Tax Officer and others v. Dutta Traders*, (2007) 9 VST 425 (SC), Mr. Raman submitted that under Section 16 D of the OST Act, 1947 the Sales Tax Officer (Vigilance) has power not only to search and seize the documents, but also entitled to assess and recover the tax.

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

> (i) Whether in the facts and circumstances of the case, opp. party no.4-Sales Tax Officer (Vigilance), Sambalpur is justified in taking action under sub-Section (5) of Section 74 of the OVAT Act and Section 25 of the OET Act and passing the orders dated 31.12.2011 under Annexures-9 and 10 ?

(ii) Whether the order dated 16.1.2012 under Annexure-1 passed by opp. party no.2-the Revisional Authority sustaining the imposition of penalty under Section 74(5) of the OVAT Act and U/s.25 of the OET Act is valid in law ?

8. To deal with Question No.(i) as above, it is necessary to know what is contemplated under sub-section (5) of Section 74 of the OVAT Act. Same is extracted below:

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

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

(i) violation of the provisions of clause (a) of sub-section (2) of Section 74, or

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

10. Thus, imposition of penalty under sub-section (5) of Section 74 of the OVAT Act cannot sustain unless it is clearly shown that any of the conditions prescribed in that sub-section is satisfied. In other words, in order to exercise jurisdiction under Section 74(5) of the OVAT Act, the prescribed authority must be satisfied that either of the two conditions mentioned therein is fulfilled and such power cannot be exercised on some suspicion or doubt.

11. In the instant case, Sales Tax Officer, Vigilance after inspection of the goods in question and documents produced before him has issued show-cause notice under Section 74(5) of the OVAT Act and under Section 25 of the OET Act. Vide show-cause notice dated 26.12.2011 issued under Section 74(5) of the OVAT Act, the petitioner was informed that on verification of the documents produced by the person-in-charge/driver of the goods vehicle, it was found that the petitioner has contravened the provisions of Section 74(2) (b) (c) (d) of the OVAT Act 2004. The petitioner was further asked to show-cause within seven days from the date of receipt of the order as to why tax and penalty u/s.74(5) read with sub-section (7) amounting to Rs.4,03,674/- shall not be imposed on the petitioner. Similarly, vide show-cause notice issued under Section 25 of OET Act, the petitioner was informed that the vehicle carrying scheduled goods violated the provisions of Sections 23 and 24 of the OET Act, 1999 and as to why penalty of Rs.50,460/- cannot be imposed on him under the OET Act.

12. The petitioner has filed his reply to show-cause notice with a prayer to drop the penalty proceedings initiated u/s.74(5) of the OVAT Act. However, opposite party no.4, Sales Tax Officer (Vigilance), Sambalpur vide his order dated 31.12.2011 under Annexure-9 imposed tax and penalty of Rs.4,03,674/- under Section 74(5) of the OVAT Act on the ground of violation of the provisions of Sec.74(2) (b) (c)(d)(e) of the OVAT Act.

Opposite party No.4 also imposed tax and penalty of Rs.50,460/- under Section 25 of the OET Act vide his order dated 31.12.2011 under Annexure-10 on the alleged violation of provision of Sec.23 of the OET Act.

The revisional authority vide his order passed under Annexure-10 maintained imposition of penalty *inter alia* on the ground that in the way bill it was declared that the goods will be entering into check gate at Biramitrapur, but on interception of the vehicle it was found that the vehicle had avoided the check gate violating the terms of declaration made in the way bill. While holding so, the Revisional Authority further held that since the person-in-charge of the vehicle was neither the consignor nor the consignee, the opposity party no.4-Sales Tax Officer (Vigilance) is not justified in

imposing the tax. However, he upheld the levy of penalty.

13. As stated above, penalty under sub-section (5) of Sec. 74 can only be imposed on fulfilment of either of the conditions in Section 74(5) of the OVAT Act. One of such conditions is violation of provision of clause-(a) of sub-section (2) of Section 74 which provides that the driver or person-in-charge of every vehicle or carrier of goods in transit shall carry with him the records of the goods including "Challan" and "Bilties", bills of sale or dispatch memo and prescribed declaration form or way bill duly filled in and signed by the consignor of goods carried. Undisputedly, in the present case, on interception of the vehicle in question, the person-in-charge of the vehicle produced all the documents including the way bill. Opposite party no.4, Sales Tax Officer (Vigilance), Sambalpur as well as opposite party no.2-Additional Commissioner of Sales Tax, North Zone, Cuttack in their orders passed under Annexures-9 & 10 and Annexure-1 respectively, admitted that the petitioner has not violated the provisions of Clause (a) of sub-section (2) of Section 74 of the OVAT Act. It is also not the case of opposite party no.4 or opp. party no.2 that the petitioner has furnished false or forged documents or way bill either covering the entire bill or part of the goods carried in the vehicle. Opposite party nos. 2 and 4 have justified their action for imposing penalty under Sec. 74(5) on the ground that the petitioner violated the provisions of sub-section (2) (b) (c) (d) (e) of Section 74. But Section 74 (5) of the OVAT Act does not contemplate that the prescribed authority shall assume jurisdiction for imposition of penalty under the said section for contravention of provisions of Sec. 74(2) (b)(c)(d)(e) of the OVAT Act.

14. While the Legislature in its wisdom has provided that only in case of violation of provisions of clause (a) of sub-section (2) of Section 74 or for submission of false or forged documents or way bill either covering the entire goods or part of the goods carried, the prescribed authority may impose penalty as provided in sub-section (5) of Section 74, it cannot be said that the prescribed authority assumes jurisdiction for contravention of any other provision(s) of Section 74(2) or that the vehicle in question had avoided the check gate violating the terms of the declaration in way bill. The intention of Legislature is further clear when a comparison is made between sub-sections (2) and (5) of Section 74. While under sub-section (2) of Section 74, several obligations are cast on the driver or person-in-charge of the vehicle or carrier of goods in transit, under sub-section (5) of Section 74 only for violation of either of the two conditions, i.e., violation of provisions of clause (a) of sub-section (2) of Sec. 74 or for submission of false or forged documents or way bills either covering the entire goods or part of the goods penalty may be imposed.

15. The proviso to sub-rule (5) of Rule 80 of the OVAT Rules, 2005 provides that in case a goods vehicle which is not passed through a check-post or barrier is checked by an officer not below the rank of Sales Tax Officer on the way, the original copy of the way bill shall be tendered to such officer. In the instant case, admittedly at the time of interception of the vehicle in question, the person-in-charge of the vehicle has tendered all the documents to the officer who intercepted the vehicle.

16. Needless to say that no tax or penalty can be levied on any dealer/person unless the charging provision clearly imposes such obligation. If any goods or infraction of any provision does not fall within the four corners of the provision of taxing statute, no tax and/or penalty can be imposed by drawing inference. The operation of provision authorizing imposition of penalty cannot be enlarged so as to encompass the matters not specifically mentioned in the statute.

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

18. In ***Union of India and another V. Hansoli Devi and others,*** (2002) 7 SCC 273, the Hon'ble Supreme Court held that if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgivers.

19. The legal maxim, "A Verbis Legis Non Est Recedendum" means from the words of law, there must be no departure. Therefore, when the language of the statute is plain and unambiguous, then Court must give effect to the words used in the statute and it would not be open to the Court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act.

20. The Hon'ble Supreme Court in the case of ***Govind Impex Private Limited and Others V. Appropriate Authority, Income Tax Department***, (2011) 1 SCC 529, held that a penal statute which makes an act of penal offence or impose penalty is to be strictly construed and if two views are possible, one favourable to the citizen is to be ordinarily preferred.

21. The High Court of Madhya Pradesh in the case of ***Indore Kolhapur Road Lines (supra),*** held that once it is found that goods carried on a truck

are accompanied by all the documents as are required under the law, no occasion for initiation of the proceedings for penalty would arise. Merely because the truck had taken a different route, this would not be a sufficient ground for taking action under Section 29-CC of the Madhya Pradesh General Sales Tax Act, 1958.

22. The decisions of this Court in *Singhal Converter (P) Ltd. (supra),* as well as *Vinayak Agro Industry (supra),* relied upon by the Revenue have no application to the facts of the present case. In Singhal Converter's case, the vehicle carrying goods from outside the State of Orissa pursuant to the purchase order placed by the assessee, a registered dealer under the Orissa Sales Tax Act, 1949, was intercepted by the Sales Tax Officer (Vigilance), Sambalpur, Orissa and the goods were found to be not covered by any statutory waybill in Form XXXII. The Sales Tax Officer (Vigilance) levied and collected tax and penalty under Section 16C. In that case, this Court held that though the incidence of tax arises only when there is a complete sale, for achieving the object of sealing the loophole of avoidance of sales tax by unscrupulous dealers, measures have been taken by different States. Provisions are made in Sales Tax Acts and Rules to establish check-posts, to intercept vehicles carrying goods while in transit and to levy penalty or both tax and penalty where it is found that goods are carried clandestinely to evade tax and these provisions are valid.

In the *Vinayak Agro Industry's* case (supra), the petitioner, a registered dealer under the Orissa Value Added Tax Act, 2005, carried on business in manufacturing automobiles spring leaf, tractor trolly, etc. The goods purchased by the petitioner from a dealer in Kolkata and carried in a truck were verified by the Sales Tax Officer at the Jamsolaghat check gate along with the documents accompanying them and it was opined that the spring patti loaded in the vehicle were in good condition readily usable in heavy vehicles and that they could not be treated as scrap materials (scrap spring patti) as disclosed in the way-bill supporting the consignment. Taking into consideration, the report of Technical Committee, the revisional order was passed confirming the levy of tax and penalty by the Sales Tax Officer. On such fact, this Court held that from the show-cause notice and observation/findings of the Sales Tax Officer, in his order, it could be safely said that the driver of the vehicle submitted false/forged documents/way-bills covering the entire goods carried in the vehicle which is a case of fraud and vitiated everything.

In the present case, it is nobody's case that the goods carried in the vehicle was not covered by valid documents or that the person-in-charge of

the vehicle has furnished false/forged waybill/document. Therefore, the above cases relied upon by Mr. Raman are of no help to the Revenue.

23. In view of the clear and unambiguous provision of sub-section (5) of Section 74 and the proposition of law settled by the Hon'ble Supreme Court, in the above referred cases we have no hesitation to hold that the Sales Tax Officer (Vigilance), Sambalpur (opposite party no.4) and the Additional Commissioner of Sales Tax, North Zone, Cuttack (opposite party no.2), have acted illegally and the orders passed under Annexures-9 & 10 by opposite party no.4 imposing tax and penalty under the OVAT Act and OET Act and the order passed by opposite party no.2 under Annexure-1 maintaining imposition of penalty made by opposite party no.4 are not legally sustainable. Therefore, the orders passed under Annexures-1, 9 and 10 are liable to be quashed, which we direct.

24. In the result, the writ petition is allowed, but without any order as to costs.

Writ petition allowed.

2012 (II) ILR- CUT- 36

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

W.P.(C) NO. 11465 OF 2007 (Dt.22.03.2012)

DAMODAR NANDA …….Petitioner.

.Vrs.

G. M., CENTRAL BANK OF INDIA & ORS. …….Opp.Parties.

Disciplinary Proceeding – Petitioner a scale-I Officer in the Central Bank of India – Order of dismissal challenged – Rule 20(2) of Central Bank of India Officer Employees' (Conduct) Regulations, 1976 – According to the article of charges he was a Co-loanee in respect of the house building loan obtained by his father where he has not disclosed that his other savings is 10 lakhs – A bare reading of the charges and the prescribed form shows that there is no provision under the aforesaid rule to disclose if there was any other savings on that date – That apart there was no dishonesty on the part of the petitioner – Moreover the loan has been properly appraised and it has been repaid back before framing of charges.

Held, charges framed against the petitioner are due to misapplication of Rule 3(1) of the Regulations, 1976 and the allegation against him does not amount to any misconduct – Impugned order Dt.19.11.2007 passed by the Disciplinary Authority so also the entire proceeding along with charges are set aside. (Para 4,5,6)

For Petitioner - M/s. J.K.Rath, D.N.Rath, S.N.Rath & P.K. Rout.

For Opp.Parties - Mr. Utpal Bose, Mr. B.Routray, Mr. B.M.Pattnaik, Mr. S.K.Sarangi, Mr. S.K.Mishra & Mr. R.Bhatacharya.

B.P.DAS, J. The petitioner, who was working as a Scale-1 Officer under the Central Bank of India, has filed this writ petition challenging the order dated 19.11.2007 passed by the Assistant General Manager (Disciplinary Authority), Central Bank of India, O.P.2, dismissing him from service with disqualification for future employment in respect of the departmental enquiry initiated against him (Annexure-19).

Initially the petitioner challenged certain irregularities in the disciplinary proceeding but during pendency of the writ petition, the disciplinary proceeding was concluded, for which the writ petition was amended and the petitioner challenged the impugned order dated 19.11.2007.

It is worthwhile to mention here that during pendency of the writ petition, a contempt proceeding was initiated against the opposite parties for violation of this Court's order, which is also pending in this Court. Challenging the same, the O.P.-Bank moved the apex Court but the S.L.P. was dismissed.

2. Bereft of unnecessary details, the facts leading to the writ petition tend to reveal that the petitioner was initially served with an article of charge, which is re-produced here.

> "Mr. Nanda has declared the following assets and liabilities as on 31.3.2004 and 31.3.2005 in the statement submitted in terms of Regulation 20(2) of Central Bank of India Officer Employee (Conduct) Regulations, 1976. Mr. Nanda has also declared his Assets and Liabilities in the loan application dated 27.7.2004. In the declaration of Assets & Liabilities as on 31.3.2004 and as on 31.3.2005 he has suppressed the "other Savings" of Rs.10,00,000/- that he has declared in the Assets & Liabilities as on 25.7.2004 in the loan application dated 27.7.2004. He has overstated his "Other Savings" in the loan application with an intention to influence the sanctioning authority to impress that the adequate margin is available for the loan.
>
> Mr. Nanda has further understated his liabilities in the Assets and Liabilities as on 25.7.2004 in the loan application dated 27.7.2004 with an intention to influence the sanctioning authority to impress that adequate repayment capacity is available.
>
> He has, thus failed to act with utmost integrity, honesty, devotion and diligence and acted in a manner prejudicial to the interest of the Bank. Sri Nanda is charged under Regulation 3.1 read with Regulation 24 of Central Bank of India Officer Employees' (Conduct) Regulations 1976."

It is an admitted fact that the petitioner, Sri Damodar Nanda was a co-loanee in respect of a house building loan obtained by his father where he was required to give certain declarations, such as (Details of Savings) a)

LIC Policies, b) Fixed Deposits, c) National Saving Certificates, Indira Vikas Patras, Shares, etc., d) Gold and Silver Ornaments & e) Others. In clause-e the petitioner has shown as Rs.10.00 lakhs. According to the article of charges, in the statement of assets and liabilities declared by the petitioner as per the requirement of the Bank, he has not disclosed that his other savings is Rs.10.00 lakhs. The said form, inter alia, required to disclose in the statement of moveable properties, such as 1) Insurance (Life), 2) Stock & Shares, 3) Deposits/Cash, 4) Jewellery & 5) Goods.

There is a discrepancy in the assets declared by him as per the bank norms and the savings declared in the application form for housing loan. A plea has been taken by the petitioner that in the application form of housing loan, a column is there for details of other savings but no such column is available in the statement of assets and liabilities that is required by the Bank. According to the Management, the total assets were shown in the statement of declaring assets and liabilities as Rs.7,90,172/-, whereas Rs.10.00 lakhs has been shown as other savings, for which the petitioner suppressed the said amount of Rs.10.00 lakhs on other savings, which he being a co-loanee has declared in the application form and not shown in the declaration form of assets and liabilities. A plea was taken that there was no provision in the form prescribed for the purpose of declaring assets and liabilities to the Bank. So there was no chance of disclosing the other savings, which the petitioner has disclosed at the time of taking loan being a co-loanee.

3. On perusing the records produced before us, we make it very clear that the loan was sanctioned with due appraisal of the higher authorities and it is found that the father of the petitioner took the loan and the property, which was secured against the loan amount, was more than the value of the loan. That apart, during examination and cross-examination of the witnesses in the disciplinary proceeding, it is also indicated that the principal borrower, who has taken the loan, is having sound financial capacity to re-pay the same. In fact, the loan has been re-paid before due time and a clearance certificate has been issued to the loanee. But in course of enquiry, it was found that the petitioner was guilty of the charges, which were found to be proved against him and the proposed punishment was to the effect of reducing five stages in the time scale of pay for a period of three years and he would not earn any increment of pay during the period of such reduction and on expiry of period of three years, the reduction would have the effect of postponing the future increments of his pay as per Annexure-24. But the above decision of the disciplinary authority was sent for approval and vide Annexure-25, the Assistant General Manager (Vigilance), Central Bank of

India, by his communication dated 28.9.2007 intimated the disciplinary authority that without waiting for the response of Sri Nanda in the matter up to the given time, he has forwarded his proposed draft final order for approval. The said communication dated 28.9.2007 is extracted herein below :-

> "We have received a copy of your above letter addressed to Shri Damodar Nanda, Asstt. Manager on date i.e. 28.9.2007 where by a copy of the findings of the Inquiring Authority, being agreed with the same was forwarded to him for his submission by 19.9.2007. Without waiting for the response of Shri Nanda in the matter up to the given time, you have forwarded your proposed draft final order vide your letter No.RO:HRD:DAD:2007-08.40 dated 18.9.2007 for our approval.
>
> Please inform by return FAX whether you have received submission if any on the findings of the Inquiring Authority by now ? If so, please send a copy of the same for our purpose.
>
> Please ensure and confirm compliance accordingly."

Thereafter, the Assistant General (Vigilance) by his communication dated 22.10.2007 intimated the disciplinary authority the following.

> "The relevant papers related to the above said departmental inquiry along with your proposed final order were placed before the Chief Vigilance Officer for perusal/approval and he has observed that in view of solo charge having been proved by the Inquiring Authority and yourself as well, the proposed penalty is not commensurate.
>
> In view of the foregoing and under instructions of the Chief Vigilance Officer, you are advised to review/re-examine your proposed final order and submit the revised proposed final order immediately."

From the said communication dated 22.10.2007, it appears that the proposed penalty was not commensurate.

4. The disciplinary authority as per the advice of the Assistant General Manager (Vigilance) passed the proposed final order on 23.10.2007 with removal from service, which shall not be a disqualification for future

employment. Thereafter, by the impugned order dated 19.11.2007 the disciplinary authority dismissed the petitioner from service with disqualification for future employment.

This order is challenged on various grounds, inter alia, on the ground that in the charges, which were framed, absolutely there is no misconduct.

5. Let us see the provisions of Rule-20(2) of Central Bank of India Officer Employees' (Conduct) Regulations, 1976, which speak as follows :-

> "20- Movable, Immovable and Valuable Property.
>
> (2)- Every officer employee shall, every year submit a return of his movable, immovable and valuable property including liquid assets like shares, debentures, as on 31st March of that year, to the bank before the 30th day of June of that year."

A bare reading of the charges framed against the petitioner vis-à-vis the prescribed form under the aforesaid rule would certainly show that there is no provision under the aforesaid rule to disclose if there was any other savings on that date. That apart there was no dishonesty on the part of the petitioner. There is nothing to show that in any manner the loan has gone bad and the Bank has suffered any loss. The loan has been properly appraised and it has been repaid back before framing of the charges against the petitioner.

6. Without going into further details, in our considered opinion, the charges framed against the petitioner are due to misapplication of Rule-3(1) of the Regulations, 1976 and the allegation against him does not amount to any misconduct, as he has not in any manner acted prejudicial to the interest of the Bank or to Rule-24 of Regulations, 1976. Therefore, we set aside the order dated 19.11.2007 passed by the Assistant General Manager (Disciplinary Authority), Central Bank of India, O.P.2 so also the entire proceeding along with the charges.

The opposite parties are to reinstate the petitioner in service forthwith with all the consequential service benefits including backwages, which shall be restricted to 40% of the total entitlement of the petitioner and the same shall be paid within a period of one month from the date of communication of this judgment. The writ petition is allowed accordingly.

Writ petition allowed.

2012 (II) ILR- CUT- 41

L.MOHAPATRA, J & B.K.PATEL, J.

W.P.(C) NO. 21375 OF 2011 (Dt.23.12.2011)

DR. BARADA KANTA MISHRA …….. Petitioner.

.*Vrs.*

STATE OF ORISSA …….Opp.Party.

AIR (PREVENTION & CONTROL OF POLLUTION) ACT, 1981 (ACT NO. 74 OF 1981) – S.5.

Appointment of Chairman, State Pollution Control Board – Constitution of Search Committee by the Chief Minister for selection – Committee recommended a panel of three candidates in order of merit which was placed before the Chief Minister – Panel rejected and invitation made for a fresh panel – Action challenged.

A person on the select panel has no vested right to be appointed to the post for which he has been selected but he has a right to be considered for appointment – Although recommendation of the Search Committee is not binding on the Chief Minister but at the same time he can not ignore the select panel on its whims, without any justifiable reasons as to why the selected candidates were not found suitable for appointment – Held, impugned order passed by the Chief Minister is quashed and the matter is remitted back to the Chief Minister for reconsideration. (Para 8,9,10)

Case law Referred to:-

1995 Suppl(2) SCC 230 : (R.S.Mittal-V- Union of India).

For Petitioner - M/s. Jagannath Patnaik, B.Mohanty, T.K.Patnaik, A. Patnaik, S.Patnaik, M.S.Rizvi, R.P.Roy & B.S.Rayguru.

For Opp.Party - Advocate General.

L. MOHAPATRA, J. This writ application relates to appointment to the post of Chairman, State Pollution Control Board. The petitioner was a faculty of Botany Department in Ravenshaw University and thereafter he served as Deputy Controller of Examinations, Council of Higher Secondary Education, Orissa on deputation. The petitioner also worked as Deputy Director in the

Directorate of Higher Education and thereafter as Deputy Secretary to Government in the Department of Higher Education. He also worked as Principal, Rajdhani Junior College. The petitioner was also the Senior Scientist, Forest and Environment Department, Government of Orissa which is concerned with Environmental Management and Administration. After serving as Senior Scientist, the petitioner became the Member Secretary, State Pollution Control Board, Orissa and continued as such till he attained the age of superannuation. It is stated in the writ application that the petitioner is also the co-author of books published by the Orissa State Bureau of Text Book Preparation and Production. He also participated in a specialized training programme on assessment of hazardous Waste Dump, Sites and Preparation of Remediation of Plants in Germany and had also participated in a number of National Conferences and Seminars. Since January 2008 the post of Chairman, State Pollution Control Board was lying vacant. The then Chief Secretary proposed for appointment of the then Development Commissioner as the Chairman of State Pollution Control Board and at the same time an order was passed to constitute a Search Committee for choosing a suitable person for appointment to the post of Chairman, State Pollution Control Board on regular basis.

Section-5 of Air (Prevention and Control of Pollution) Act, 1981 provides for appointment of a Chairman for the State Pollution Control Board. It is provided that State Board constituted under the Act shall consist of a Chairman, being a person having special knowledge or practical experience in respect of matters relating to environmental protection, to be nominated by the State Government, provided that the Chairman may be either whole time or part time as the State Government may think fit.

2. The Hon'ble Supreme Court constituted an Expert Committee under the Chairmanship of Prof. M.G.K.Menon to examine and recommend measure for protecting the environment from the impacts of generation and trans-boundary movement of large volumes of hazards waste in the country in a Public Interest Litigation filed in the year 1995. The Committee while making recommendations on the relevant issues also suggested certain eligibility criteria required to be fulfilled for appointment to the post of Chairman, State Pollution Control Board. The said report of the Committee was accepted in principle by the Hon'ble Supreme Court of India vide order dated 31.8.2007. The Hon'ble Supreme Court also constituted a 'Supreme Court Monitoring Committee' to over see the compliance of those recommendations submitted by the Committee. Supreme Court Monitoring Committee laid down the qualifications for the candidate for appointment to the post of Chairman, State Pollution Control Board which are as follows:-

1) He should have an understanding of the complexity of the modern Science and Technology, Pollution Control matter and Environmental Management with a sense of vision and feeling for the future.

2) He should have an understanding and experience in dealing with legal matters.

3) He should be dynamic with administrative experience of leading a scientific group as evinced from his track record.

3. In view of the order passed by the Hon'ble Chief Minister to constitute a Search Committee for choosing a suitable person for appointment to the post of Chairman, State Pollution Control Board on regular basis, a Search Committee was constituted with the following as it's member.

1.	Chief Secretary	…. …	Chairman
2.	Chairman, Central Pollution Control Board, Delhi	.. ….	Member
3.	Development Commission-cum-Addl.Chief Secretary	……	Member
4.	Dr.C.R.Mohapatra, Former Chairman, SPCB, Orissa	…….	Member
5.	Principal Secretary, Forest And Environment Department	……	Member Convener

4. The Committee as per the earlier practice decided to issue an advertisement calling for applications/nominations for appointment to the said post and such advertisement was published in English Newspaper and in daily Newspaper 'The Sambada' and in the departmental website. Applications/nominations were invited from persons who had worked or were working in the State Government/Central Government Departments/Public Sector Undertakings and Universities and all the eligible criteria had also been indicated in the said advertisement. In pursuance of the said advertisement, the petitioner submitted his application. In total 51 applications were received by the Search Committee and after short listing, 13 candidates were called for interaction including the petitioner. The petitioner was called upon to appear before the Search Committee for

interaction on 23rd April 2011. On 26th April, 2011 the Search Committee selected and recommended three candidates in order of merit and name of the petitioner found place at serial no.1 in the panel of the selected candidates prepared by the Search Committee. After completion of entire selection process, a panel was prepared and the Principal Secretary, F & E Department on the basis of recommendations made by the Search Committee proposed the name of the petitioner, who was at Serial No.1 of the merit list, to the Hon'ble Chief Minister for appointment to the post of Chairman, State Pollution Control Board for a period of three years. In Annexure-1, the Hon'ble Chief Minister rejected the panel submitted by the Search Committee and recommended by the Principal Secretary with the following note.

> "None of the recommended persons is found suitable and the panel is rejected. The Search Committee may recommend a fresh panel".

Challenging the said order passed by the Hon'ble Chief Minister, this writ application has been filed.

5. Shri Jaganath Patnaik, learned Senior Counsel appearing for the petitioner at the time of hearing drew attention of the Court to paragraph-5 of the writ application and submitted that the Search Committee constituted in terms of the observation made by the Hon'ble Supreme Court in the above mentioned case formulated a procedure for selection of a candidate for appointment to the post of Chairman, State Pollution Control Board. Numerical weightage in respect of all the important parameters/attributes were decided to be given at the time of selection. The total mark was kept at 10, out of which two had been assigned for Ph.D. in Science, M.Tech and ME, six marks for twenty years service including five years in environment management/pollution control and two marks for experience in handling legal matters as evinced from the type of work performed. According to Shri Pattnaik, learned Senior Counsel appearing for the petitioner, the Search Committee consisted of creative people having ample knowledge and experience in administration and environmental affairs. The Search Committee having such experience, had formulated a procedure for selection of the candidate keeping all parameters/attributes necessary for a candidate to hold the post of Chairman, State Pollution Control Board. The Search Committee having selected the petitioner as No.1 in the panel, there was no reason on the part of the Hon'ble Chief Minister to reject the said recommendation on the ground that none of the persons is found suitable. When the Search Committee found the petitioner most suitable for

appointment to the said post and placed the petitioner at serial no.1 in the panel of three selected candidates the reason for which the Hon'ble Chief Minister found all the three selected candidates unsuitable is not spelt out in the impugned order. Reliance was placed by Shri Patnaik, learned Senior Counsel on a decision of the Hon'ble Supreme Court in the case of ***R.S.Mittal Vrs. Union of India*** reported in 1995 Suppl(2) Supreme Court Cases 230. With reference to the said decision, it was contended by the learned Senior Counsel that where there is a vacancy which can be offered to a selected candidate on the basis of his merit position, denial of appointment to him without a proper reason is unjustified.

Learned Advocate General appearing for the opposite party submitted that recommendation of the Search Committee is not binding on the Hon'ble Chief Minister and it is open for him not to accept the recommendation made by the Search Committee and direct for preparation of a fresh panel. In the impugned order, the Hon'ble Chief Minister has only done that and, therefore no fault can be found with the impugned order passed by the Hon'ble Chief Minister.

6. Undisputedly, by order of the Hon'ble Chief Minister and in terms of the direction of the Hon'ble Supreme Court, a Search Committee had been constituted for selection of a candidate to be appointed as Chairman of the State Pollution Control Board on regular basis. Undisputedly, also the Search Committee consisted of members, who were competent because of their past experience to select a candidate. It is also not disputed that 51 applications were received and 13 candidates were short listed for interaction. The petitioner was one of those thirteen candidates. The Search Committee interacted with all the thirteen candidates and came out with panel of three candidates in order of merit for the purpose of appointment to the post. The petitioner was placed at serial no.1 in the panel of the three selected candidates. The Principal Secretary, F & E Department also forwarded the recommendation of the Search Committee for appointment. From the impugned order passed by the Hon'ble Chief Minister, it is seen that none of the recommended persons was found suitable. No reason whatsoever has been assigned in the impugned order as to why any one of the three empanelled candidates was not found suitable when they had been selected by the Search Committee keeping in mind the requirements for appointment to the said post. We therefore called upon the learned Advocate General to produce the relevant records to find out as to whether any reason has been assigned in the file for rejecting the panel on account of unsuitability.

7. From the office note, we find that as per the Government order, Search Committee was constituted with the Chairmanship of the Chief Secretary, Government of Orissa. Dr.C.R. Mohapatra, the former Chairman of State Pollution Control Board and the Chairman, Central Pollution Control Board were requested to give their consent to be members of the Search Committee. From the office note dated 26.4.2010, it appears that after obtaining consent, the Search Committee was constituted. From the office note dated 4.4.2011, it appears that under the Chairmanship of Chief Secretary the Committee discussed the modalities for selection of a suitable person for the post of Chairman, State Pollution Control Board and the Committee also decided to apply two more criteria to further reduce the number of applicants to be called for interaction. Thereafter short listing was done and the short listed candidates were requested to appear for interaction with the Search Committee. From the office note dated 26.4.2011, it appears that Search Committee held three sittings and selected three candidates in order of merit for the post after interaction with thirteen candidates through a short listing process out of 51 applicants whose applications had been received in response to an open advertisement in the newspapers and on the department's website. The following are the three candidates, who had been selected by the Search Committee.

1. Dr.Barada Kanta Mishra (Petitioner)

2. Shri Suresh Chandra Mohanty.

3. Prof.(Dr.) Pramod Chandra Mishra.

The Principal Secretary in the said note stated that the petitioner, who is at serial no.1 of the Search Committee panel may, perhaps, be appointed as Chairman, Orissa State Pollution Control Board for a period of three years from the date of assuming office. The then Chief Secretary also agreed to the said proposal and the file was placed before the Hon'ble Chief Minister. The Hon'ble Chief Minister passed the order on 7.7.2011 as quoted above but the record does not disclose any reason on the basis of which, none of the three candidates selected by the Search Committee was not found suitable.

8. The decision relied upon by the learned Senior Counsel Shri Pattnaik appearing for the petitioner relates to appointment to the post of Judicial Member, Income Tax Appellate Tribunal. From the said reported judgment, it appears that for appointment to the above post a Selection Board was constituted headed by a sitting Judge and the Board prepared a panel of

selected candidates and sent its recommendations to the Central Government for consideration. The Central Government did not make any appointment and issued fresh advertisement inviting applications for the said post. The action of the Central Government was challenged before the Tribunal and ultimately the matter came before the Hon'ble Supreme Court. In paragraph-10 of the judgment, the Hon'ble Supreme Court has observed as follows.

"The Tribunal dismissed the application by the impugned judgment on the following reasoning:

(a) The selection panel was merely a list of persons found suitable and does not clothe the applicants with any right of appointment. The recommendations of the Selection Board were directory and not mandatory and were not therefore enforceable by issue of a writ of mandamus by the Court.

(b) The letter of Ministry of Home Affairs dated 8.2.1982 which extends the life of panel till exhausted is not relevant in the present case. In the circumstances the life of the panel in this case cannot go beyond 18 months and as such expired in July 1989.

It is no doubt correct that a person on the select panel has no vested right to be appointed to the post for which he has been selected. He has a right to be considered for appointment. But at the same time, the appointing authority cannot ignore the select panel or decline to make the appointment on its whims. When a person has been selected by the Selection Board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel. In the present case, there has been a mere inaction on the part of the Government. No reason whatsoever, not to talk of a justifiable reason, was given as to why the appointments were not offered to the candidates expeditiously and in accordance with law. The appointment should have been offered to Mr. Murgad within a reasonable time of availability of the vacancy and thereafter to the next candidate. The Central Government's approach in this case was wholly unjustified".

9. In view of the above observation made by the Hon'ble Supreme Court in the said reported case, no reason having been assigned in the order in Annexure-1 as to why the candidates selected by the Search Committee were not found suitable for appointment, the said order is liable to be quashed.

10. We are conscious of the fact that recommendation of the Search Committee is not binding on the Hon'ble Chief Minister but at the same time when a panel is rejected on the ground that the selected candidates were not suitable for appointment to the post, such observation has to be on the basis of justifiable reasons. No reason whatsoever having been assigned in the said order in Annexure-1 while coming to a conclusion that none of the empanelled candidate is suitable for appointment, we find no other option except quashing the order in Annexure-1 and remit the matter back to the Hon'ble Chief Minister for reconsideration of the case in the light of the judgment of the Hon'ble Supreme Court quoted above. The writ application is disposed of accordingly.

Writ petition disposed of.

2012 (II) ILR- CUT- 49

L. MOHAPATRA, J & B. K. PATEL, J.

JCRLA NO. 59 OF 2003 (Dt.02.02.2012)

RAMA CHANDRA GAUDO …….Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

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

Extra Judicial Confession – P.Ws.1,2,4,5 & 6 deposed that the appellant confessed before the villagers that he had killed his wife – Evidence of P.W.2 further discloses that the appellant was caught hold, tied and detained in the house by the said villagers – Held, extrajudicial confession made by the appellant can not be said to be voluntary and much reliance can not be placed on such extra judicial confession. (Para 7)

CRIMINAL TRIAL – Appreciation of evidence – Deceased is the wife of the appellant – P.W.3 mother of the appellant stated in Cross-examination that the appellant had not slept with the deceased in the house on the occurrence night – P.W.4 (father of the appellant) specifically stated that on the occurrence night the appellant was sleeping in the field of one Konei Gaudo as his watch man and appellant was not present in the house in the night of occurrence – So the allegation of the prosecution that the appellant was present in the house in the night of occurrence is not proved by any cogent evidence. (Para 7)

CRIMINAL TRIAL – P.M. Report shows that the deceased died a homicidal death – From the chemical examination report it appears that wearing apparels of the deceased were stained with human blood – No witness except the I.O. has stated to have seen blood stain on the wearing apparels of the appellant - Only P.W.10, the I.O. stated about the seizure of the wearing apparels of the appellants which is not supported by any independent witness – Held, the chemical examination report or seizure of the weapon of offence lying at the spot can not conclusively prove involvement of the appellant in the alleged crime. (Para 7,8)

For Appellant - Mr. Rabindra Nath Nayak.
For Respondent - Mr. Sangram Das,
Addl. Standing Counsel.

L. MOHAPATRA, J. This appeal is directed against the judgment and order dated 13.5.2003 passed by the learned Additional Sessions Judge, Nabarangpur in Sessions Case No. 18 of 2001(S.C. 145/01 of S.J.) convicting the appellant for commission of offence under Section 302 of the Indian Penal Code (for short 'the I.P.C.') and sentencing him to undergo imprisonment for life.

2. The case of the prosecution as revealed from the record is that the deceased Sanbari Gaudo is the wife of the appellant. They got married about 11 years prior to the occurrence. The appellant suspected the character of the deceased and was mentally upset. It is alleged by the prosecution that in the night of 8/9.11.2000 at about 1 A.M. while the deceased was sleeping, the appellant took out an axe and assaulted on the neck of the deceased causing severe cut injury resulting in instantaneous death. The mother of the appellant P.W.3 was sleeping in the next room. On hearing some unusual sound, she woke up and saw the deceased lying dead and the appellant going away from the house. She immediately raised hullah, hearing which, P.W.6 and some other villagers who were guarding the paddy fields, rushed to the house of the appellant. They caught hold of the appellant on the way and brought him to his house. P.W.2 and two other villagers went to the house of the Ward Member P.W.1 and informed him about the incident. P.W.1 thereafter accompanied the villagers, and came to the house of the appellant and found the deceased lying dead in a pool of blood. They also noticed a cut injury on her neck and also noticed an axe lying on the floor by the side of the dead body of the deceased. There were stains of blood on the wall. In presence of the co-villagers, the appellant on being questioned, confessed his guilt and told to have killed her wife by means of the said axe. Thereafter, P.W.1 Ward Member detained the appellant near his house and next day morning he lodged the F.I.R. On the basis of the allegation made in the F.I.R. the case was registered and investigation was taken up. On completion of investigation, charge-sheet was submitted for commission of the offence under Section 302 of the I.P.C.

3. The prosecution in order to bring home the charge examined as many as eleven witnesses but none was examined on behalf of the defence. The plea of the defence as it appears from the statement of the appellant recorded under Section 313 Cr.P.C. is denial of the prosecution allegation.

Out of the eleven witnesses examined on behalf of the prosecution, P.W.1 was the Ward Member at the relevant time and also the informant. He is also a witness to seizure under Exts. 2 and 3. P.W.2 is a post occurrence witness. P.W.3 is the mother of the appellant and P.W.4 is the father of the

appellant. P.W.5 is the paternal uncle of the appellant. P.W.6 is another post occurrence witness and P.W.7 is the doctor who conducted post mortem examination. P.Ws. 8 and 11 are witnesses to the inquest and P.W.9 is a witness to seizure under Ext.7. P.W.10 is the I.O. Out of the eleven witnesses, P.Ws.1, 2, 4, 5 and 6 stated about the extra judicial confession made by the appellant in presence of the villagers.

4. The trial court found the appellant guilty of the charge considering the following circumstances:

(i) Extra judicial confession made before P.Ws. 1, 2, 4, 5 and 6 admitting commission of the crime.
(ii) Presence of the appellant in the house in the night of the occurrence.
(iii) The chemical examination report showing human blood stains on the wearing apparels of the appellant.
(iv) Seizure of the blood stained axe.

5. Learned counsel for the appellant assails the impugned judgment on the ground that though five witnesses have stated about the extra judicial confession, it is clear from their evidence that the extra judicial confession made by the appellant in presence of the villagers cannot be a voluntary statement**.** The presence of the appellant in the house is also ruled out in view of the evidence of P.W. 4. So far as the seizure of weapon of offence is concerned, the deposition in respect of such seizure is only that of the investigating officer. No witness has stated about the blood stains on the wearing apparels of the appellant and therefore, the circumstances on which the trial court relied upon cannot be considered under law as the circumstances existing against the appellant.

Learned counsel for the State placed reliance on extra judicial confession, seizure of the axe from the spot, availability of the human blood on the wearing apparels of the appellant to support the findings of the trial court.

6. We have carefully examined evidence of all the eleven witnesses. P.W.1 was the Ward Member at the relevant time. He was informed about the incident by P.W.2 and two other villagers namely, Hari Gaudo and Jaganath Gaudo. After getting information about the incident he went to the house of the appellant and found the deceased lying dead. The deceased had severe bleeding wound on her neck and there was stain of blood on the floor. The appellant on being asked about the cause of death confessed his

guilt and said that he killed her wife by dealing blow by means of a tangia. This witness has further stated before many other persons the appellant made such confession and has named some of them. In the cross-examination, he has also stated that the appellant made confession in presence of the Grama Rakhi and many others in the early morning hours. P.W.2 is a co-villager and a post occurrence witness. Having been informed about the incident by one Jaganath Gaudo he came to the house of the appellant and found the deceased lying dead with bleeding injury on her neck and an axe was lying on the floor at a little distance from the dead body. He has further stated that in presence of the villagers on being asked the appellant confessed to have killed his wife by means of an axe. This witness is also a witness to seizure under Exts. 2 and 3. In the cross-examination this witness has stated that the appellant was tied and detained in a house. The village Gram Rakhi and many other persons were present there at the spot. The Gram Rakhi asked the appellant regarding the cause of death but the appellant did not give any reply. P.W.3 is the mother of the appellant. She has stated that in the occurrence night she was sleeping in her room and the appellant and his wife with their youngest child were sleeping in the house verandah. She woke up from her bed after night break and saw the appellant absent in the house. The southern door was lying open. The deceased was lying dead with one severe cut wound on her neck. On seeing the dead body of the deceased she raised shout and some persons of her village caught hold the appellant and brought him to the house. She has stated in cross-examination that she was not in a position to see whether the appellant had slept in the house on the occurrence night. She also admitted that she has not heard any sound. P.W.4 is the father of the appellant. He stated that in the mid-night he heard a hullah from his house and came to his house from the land. His wife P.W.3 raised hue and cry and he saw the deceased lying dead. He has further stated that the appellant was not present there in the house but subsequently he was brought by the co-villager. He has further stated that nobody asked anything to the appellant in his presence. The appellant on being asked regarding the cause of death confessed his guilt by stating that he had killed his wife. In the cross-examination he stated that on the occurrence night the appellant was sleeping in the field of Konei Gaudo as his watchman. He was not present and was not sleeping in the house. P.W.5 is the paternal uncle of the appellant. He is a post occurrence witness and he stated about the extra judicial confession made by the appellant in presence of the co-villagers. P.W.6 is also a post occurrence witness and stated about the extra judicial confession made by the appellant in presence of the villagers. P.W.7 is the doctor who conducted post mortem examination. He found one incised wound over neck which completely separate head from chest except contact

of head with chest on the right side of neck only with skin and soft tissue. He was of the opinion that cause of death was due to respiratory failure with shock due to injury to vital structure by hard heavy cutting weapon. The nature of death was homicidal. He also opined that the injuries could be caused by the axe produced before him. P.Ws. 8 and 11 are witnesses to the inquest. P.W.9 is a constable who had carried the wearing apparels of the deceased after post mortem examination and produced the same before the I.O. He is a witness to seizure of wearing apparels of the deceased under Ext.7. P.W.10 is the I.O.

7. On analysis of the evidence of all the eleven witnesses, we find that there is no eye-witness to the occurrence and the prosecution solely relied on circumstantial evidence. The first circumstance on which reliance is placed by the prosecution is extra judicial confession. From the evidence of P.Ws.1, 2, 4, 5 and 6, it is clear that an extra judicial confession was made by the appellant in presence of the villagers. From the evidence of P.W. 2 it further appears that after the appellant was caught-hold by some of the villagers and had been tied and detained in the house. Under such circumstances, any extra judicial confession made by the appellant cannot be said to be a voluntary statement and therefore, much reliance cannot be placed on such extra judicial confession.

So far as presence of the appellant in the house in the fateful night is concerned, the evidence of P.Ws. 3 and 4 is relevant. P.W.3 the mother of the appellant has stated in cross-examination that she could not say as to whether the appellant had slept with the deceased in the house on the occurrence night. P.W.4 has specifically stated in cross-examination that on the occurrence night the appellant was sleeping in the field of Konei Gaudo as his watchman and that the appellant was not present in the house in the night of occurrence. Therefore, allegation of the prosecution that the appellant was present in the house in the night of occurrence is not proved by any cogent evidence.

From the post mortem examination report it appears that the deceased died a homicidal death and from the chemical examination report it appears that wearing apparels of the deceased were stained of human blood. However, no witness except the I.O. has stated to have seen blood stain on the wearing apparels of the appellant. The I.O. P.W. 10 only stated about the seizure of the wearing apparels of the appellant and same is not supported by any independent witness.

Even if we accept the contention of the learned counsel for the State that as a matter of fact blood stains have been found on the wearing apparels of the appellant, there is no other evidence on the basis of which it can be conclusively said that the appellant and the appellant alone must have committed murder of his wife. The prosecution relied on circumstantial evidence. It has to prove the circumstances without leaving no room to entertain a doubt. In the present case, the prosecution has not been able to prove the extra judicial confession alleged to have been made by the appellant in presence of co-villagers and presence of appellant in the house in the night of the occurrence. These two major circumstances have not been proved by the prosecution. Chemical examination report or seizure of the weapon of offence lying at the spot cannot conclusively prove involvement of the appellant in the alleged crime.

8. We are, therefore, of the view that the prosecution has not been able to prove the charge against the appellant beyond all reasonable doubts. Accordingly, we allow the appeal, set aside the impugned judgment and order dated 13.5.2003 passed by the learned Addl. Sessions Judge, Nabarangpur in Sessions Case No.18 of 2001 (S.C. 145/01 of S.J.) convicting the appellant for commission of offence under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life. The appellant is acquitted of the said charge.

It is stated that the appellant is in custody. If that be so, the appellant, Rama Chandra Gaudo, be set at liberty forthwith, unless his detention is required in connection with any other case.

Appeal allowed.

2012 (II) ILR- CUT- 55

L.MOHAPATRA, J & B.K.PATEL, J.

W.P.(C) NO. 14213 OF 2004 (With Batch) (Dt.29.02.2012)

GAGAN BIHARI MAHALA & ORS. ……. Petitioners.

.Vrs.

CHAIRMAN-CUM-MANAGING DIRECTOR,ORISSA FOREST DEVELOPMENT CORPN. LTD. & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.311.

Compulsory retirement – Order should be passed in public interest – Though malafide has been pleded in all the writ petitions the same is not supported by any documentary evidence – Second ground is that the order is arbitrary and based on no material – This Court perused the recommendations made by the Review Committee in respect of each of the petitioners and found that materials were available before the committee to make recommendations for compulsory retirement of the petitioners.

Since this Court does not sit in appeal over the recommendations made by the committee and also can not examine sufficiency of materials for arriving at a conclusion as to whether the recommendation is justified or not, it is not open for the Court in exercise of judicial review to interfere with either the recommendation made by the committee or with the order of compulsory retirement – If the Court is satisfied that the committee was subjectively satisfied while recommending for compulsory retirement, it has no jurisdiction to interfere. (Para 8)

Case laws Referred to:-

1.AIR 1992 SC 1020 : (Baikuntha Nath Das & Anr.-V-Chief District Medical Officer, Baripada).
2.(1992)2 SCC 317 : (Posts & Telegraphs Board & Ors.-V-C.S.N.Murthy)
3.(1996)5 SCC 103 : (Sukhdeo-V-Commissioner Amravati Division,Amravati &Anr.)
4.(1996)5 SCC 331 : (State of Orissa & Ors.-V-Ram Chandra Das)
5.(1998)7 SCC 310 : (M.S.Bindra-V- Union of India & Ors.)

6.AIR 2002 SC 1345 : (State of U.P.-V-Vijay Kumar Jain)
7.AIR 2003 SC 1362 : (Jugal Chandra Saikia-V-State of Assam & Anr.)
8.AIR 1995 SC 111 : (S.Ramachandra Raju-V-State of Orissa)
9.(1998)7 SCC 310 : (M.S. Bindra-V- Union of India & Ors.)
10.2009 STPL((LE)41854 SC : (M.P. State Cooperative Dairy Federation Ltd. & Anr. -V- Rajnesh Kumar Jamindar & Ors.).

For Petitioners - M/s. M.K.Mishra, P.K.Das & D.Mishra.
M/s. A.K.Biswal, N.Barik, M.K.Mohanty, K.P.Mishra.
For Opp.Parties -M/s. S.K.Pattnaik, N.Satpathy, U.C.Mohanty, P.K.Pattnaik.
For Petitioner - M/s. A.K.Biswal, N.Barik, M.K.Mohanty, K.P.Mishra.
For Opp.Parties -M/s. S.K.Pattnaik, N.Satpathy, U.C.Mohanty, D.Pattnaik & P.K.Pattnaik.

L.MOHAPATRA, J. The petitioners in the above 10 writ petitions were employees of the Orissa Forest Development Corporation Limited. They have filed the writ petitions challenging the order passed by the competent authority compulsorily retiring them from service.

Gagan Bihari Mahala, petitioner in W.P.(C) No.14213 of 2004; Bibhuti Bhusan Patra, petitioner in W.P.(C) No.14214 of 2004; Dillip Kumar Kar, petitioner in W.P.(C) No.14215 of 2004; Gangadhar Mahakud, petitioner in W.P.(C) No.14216 of 2004; Santosh Kumar Gochhayat, petitioner in W.P.(C) No.14217 of 2004; and Manoj Kumar Mohanty, petitioner in W.P.(C) No.14218 of 2004 were compulsorily retired from service on the basis of the minutes of the proceedings of the Review Committee meeting in Baripada (R & B) Division under Bhubaneswar (C) Zone held on 27th and 28th June, 2003.

Bijay Kumar Mohanty, petitioner in W.P.(C) No.4524 of 2005; Madhusudan Swain, petitioner in W.P.(C) No.4525 of 2005 and Debaraj Biswal, petitioner in W.P.(C) No.4706 of 2005 were compulsorily retired from service on the basis of the minutes of the proceedings of the Committee held on 10th June, 2003 in the office of the General Manager, O.F.D.C. Limited, Berhampur (Com.) Zone and M. Manibabu Dora, petitioner in W.P.(C) No.4526 of 2005 was compulsorily retired from service on the basis of the minutes of the proceeding of Committee meeting held on 10th June, 2003 in the office of the General Manager, O.F.D.C. Limited, Berhampur (C) Zone.

2. Shri Manoj Kumar Mishra and Shri R.K. Rath, the learned Senior Counsel for the petitioners challenged the order of compulsory retirement of all the petitioners on the following grounds:

(1) The order of compulsory retirement is tainted with mala fides;

(2) The petitioners made complaint against certain officers and two of those officers were members of the Review Committee and therefore, constitution of such a Review Committee was not permissible and such members have influenced the other members of the Committee in recommending compulsory retirement of the petitioners.

(3) An order of compulsory retirement cannot be passed in lieu of a punishment in a Departmental Proceeding.

3. Jurisdiction of the Court in the matter of judicial review of an order of compulsory retirement has been settled by the Hon'ble Supreme Court in several decisions. Some of the decisions are required to be taken note of with reference to the grounds of challenge.

4. In the case of ***Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada***, reported in ***AIR 1992 SC 1020***, the Hon'ble Supreme Court has laid down certain criteria for the Courts, on which it can interfere and the criteria includes mala fide, an order based on no evidence and an arbitrary order in the sense that no reasonable person would form the requisite opinion on the given material, i.e., if the order is found to be a perverse order. The Hon'ble Supreme Court further observed that an order of compulsory retirement is not a punishment, it implies no stigma nor any suggestion of misbehaviour and the order should be passed in public interest on subjective satisfaction of the Authority and while reviewing the service record, the entire service record is to be considered. The criteria laid down by the Hon'ble Supreme Court in the said decision are as follows:

> **"(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.**
>
> (ii) The order has to be passed by the Government on forming the opinion that it is in the public interest to retire a Government servant compulsorily. The order is passed on the subjective satisfaction of the Government.

> (iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or the Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary- in the sense that no reasonable person would form the requisite opinion on the given material: in short, if it is found to be a perverse order."

This view expressed by the Hon'ble Supreme Court has been reiterated in subsequent decisions such as in the case of ***Posts and Telegraphs Board & others Vs. C.S.N. Murthy***, reported in ***(1992) 2 SCC 317; Sukhdeo Vs. Commissioner Amravati Division, Amravati & another***, reported in ***(1996) 5 SCC 103; State of Orissa & others Vs. Ram Chandra Das***, reported in ***(1996) 5 SCC 331***; and ***M.S. Bindra Vs. Union of India & others***, reported in ***(1998) 7 SCC 310***. A similar view has also been expressed by the Hon'ble Supreme Court in the case of ***State of U.P. Vs. Vijay Kumar Jain***, reported in ***AIR 2002 SC 1345***. In the case of ***Jugal Chandra Saikia Vs. State of Assam & another***, reported in ***AIR 2003 SC 1362***, the Hon'ble Supreme Court held that where the screening committee is consisting of responsible officers of the State and they have examined/assessed the entire service record and form the opinion objectively as to whether any employee is fit to be retained in service or not, in absence of any allegation of mala fide, there is no scope of a judicial review against such an order. In the said decision, the Hon'ble Supreme Court relied on previous decisions of the said Court in the case of ***S. Ramachandra Raju Vs. State of Orissa***, reported in ***AIR 1995 SC 111*** and ***M.S. Bindra Vs. Union of India & others***, reported in ***(1998) 7 SCC 310***. In the light of the above decisions, the case of each of the petitioner is required to be examined and the decisions cited by the learned counsel for the petitioners as well as by the learned counsel appearing for the Corporation will be taken note of while dealing with each individual case.

5. Before we deal with the case of each of the petitioners, the first ground taken by the learned counsel appearing for the petitioners being common in all the cases, the same is required to be addressed first.

It is the case of the petitioners that they are the office bearers of the "Karmachari Sangha" and allegations had been made by the Sangha against one Shri T.K. Mohanty to the effect that he was involved in corrupt activities such as mixing of stone cheeps with Sal seeds at Udala Godown and on the basis of the complaint made by the office bearers of the Sangha,

the then Divisional Manager had warned Shri T.K. Mohanty not to get indulged in such corrupt activities. It is also alleged that one Shri Vinod Kumar, who was working as General Manager, Baripada Zone was involved in misappropriation of Corporation fund by submitting false and excess T.A. Bills and the Karmachari Sangha had raised objection to such activities of Shri Vinod Kumar and audit was conducted and it was found that Shri Vinod Kumar had taken an excess amount of Rs.4,471/- and the said amount was also recovered from him. It is further alleged that at the instance of Shri Vinod Kumar, Shri T.K. Mohanty, the then Divisional Manager of Baripada R & B Division was inducted as a member of the Review Committee and Shri Mohanty influenced the other members to recommend for compulsory retirement of the petitioners. Similar allegations are also made so far as induction of Shri G.P. Mohanty, Divisional Manager, Berhampur (C-PL) Division in the Review Committee, who recommended for compulsory retirement of three of the petitioners in its minutes of the meeting is concerned. Shri S.K. Patnaik, the learned counsel appearing for the Corporation submitted that the Review Committee was headed by one I.F.S. Officer, one Orissa Finance Service Officer, one Forest service Officer and the Personnel Officer of the Corporate Office and therefore, it is difficult to accept the contention of the petitioners that the said outsiders could be influenced by Shri T.K. Mohanty, who had to be taken as a member of the Review Committee because of his posting at the place as Divisional Manager. Similar is the situation so far as Shri G.P. Mohanty is also concerned.

6. Undisputedly in the Review Committee headed by the General Manager, Bhubaneswar (C) Zone for Baripada office there were four more members and Shri T.K. Mohanty was one of them. Shri T.K. Mohanty at the relevant time was working as Divisional Manager of the Corporation and was posted at Baripada. Because of such posting, he had to be included in the Review Committee. Though it is alleged in the writ petition that the office bearers of the Karmachari Sangha had lodged complaint against Shri T.K. Mohanty on the basis of which he had been warned by the then Divisional Manager, there is absolutely nothing on record to show that Shri T.K. Mohanty had been warned as alleged on the basis of a complaint made by the office bearers of the Karmachari Sangh. Similarly no document has also been produced before us to show that any action had been taken against Shri G.P. Mohanty of Berhampur Division on the basis of any allegation made by the office bearers of the Karmachari Sangha. Whatever action was taken against these two Officers as reflected from the record was on the basis of their own conduct and therefore, any action taken by the Corporation in respect of the above two Officers at any point of time cannot

be said to be on the basis of any complaint made by the office bearers of the Karmachari Sangha. Both the Officers were inducted as member of the Review Committee because of the official position held by them at the relevant time. The Review Committee constituted for Baripada consisted of five members. The four other members were Shri B.L.K. Reddy, General Manager, Bhubaneswar (C) Zone; Shri C. Murmu, Chief Audit Officer from Orissa Finance Service; Shri K.C. Sahoo, Divisional Manager, Keonjhar (C) Division from Orissa Forest Service and Shri P.K. Swain, Personnel Officer of Corporate Office. It is difficult to accept the contention of the learned counsel for the petitioners that Shri T.K. Mohanty could influence all the above four senior Officers to make a recommendation for compulsory retirement of the petitioners. So far as Berhampur Division is concerned, apart from Shri G.P. Mohanty, there were six more Officers, who were members of the Review Committee. Those six members were Shri K.R. Singh, General Manager, Berhampur Commercial Zone; Shri S.B. Sasmal, Divisional Manager, Boudh; Shri S.K. Mohapatra, Divisional Manager, Muniguda; Shri M.R. Kar, Divisional Manager, Bhanjanager; Shri C. Murmu, Chief Audit Officer and Shri P.K. Swain, Personnel Officer, Corporate Office, Bhubaneswar. For the reasons stated above, we are unable to accept the contention of the learned counsel appearing for the petitioners that either induction of Shri T.K. Mohanty or Shri G.P. Mohanty in the two Review Committees was intentional or that these two Officers had influenced the other members of the Committee in recommending compulsory retirement of the petitioners. There was no mala fide. Law is well settled that when mala fide is alleged, the same has to be specifically pleaded and proved. Though mala fide has been pleaded in all the writ petitions, the same is not supported by any documentary evidence. We, therefore, find no substance in the first ground taken by the learned counsel appearing for the petitioners.

7. The second ground taken by the learned counsel for the petitioners is that the order of compulsory retirement in respect of all the petitioners is arbitrary and based on no material. In order to deal with such contention, it is required to examine the findings of the Review Committee in respect of each of the petitioner.

Gagan Bihari Mahala – W.P.(C) No.14213 of 2004

The Review Committee made the following observation in its recommendation:-

> "His date of birth is 4.3.60 and the joining date in Corporation service on daily wages is 5.11.80 and in regular service is 1.1.82. One Departmental Proceedings has been drawn against him with the following charges and the same is yet to be finalized.

Departmental Proceedings drawn vide O.O. No.9 dt.21.1.99.

CHARGES:

i) Gross misconduct and negligence in duty.

ii) Unlawful trespass with ulterior motive and threatening the staff and taking snaps.

iii) Assistance in tampering of official records.

One Criminal case is filed against Sri Mahala based on the F.I.R. bearing No.55 dt.6.8.98 filed by the Dy. D.M. (Sri M.R. Patra) in Udala Police Station for the criminal activities. The case is under trial in the court of S.D.J.M., Udala. In addition to this the Divisional Manager produced the copies of the following letters where the then General Managers have submitted reports to the Head Office against the misconduct of Sri Mahala.

i) Letter No.2705 dtd.1.8.84 of Sri D.K. Das, Ex. General Manager.

ii) Letter No.Res/12 dt.4.3.96 of Sri Vinod Kumar, I.F.S., Ex. General Manager.

iii) Letter No.Res/56 dt.20.3.96 of Sri Vinod Kumar, I.F.S., Ex. General Manager.

iv) Letter No.Res/103 dt.26.3.96 of Sri Vinod Kumar, I.F.S., Ex. General Manager.

v) Letter No.Res/113 dt.26.3.96 of Sri Vinod Kumar, I.F.S., Ex. General Manager.

The reports are found to be very serious in nature and clearly indicate official misconduct and behavioural attitude of Sri Mahala. The copies of the letters are enclosed. The letters also indicate how Sri Mahala was responsible for not allowing the General Manager to discharge his normal duties in the Zonal Office. Therefore in view of all these evidences the Committee recommends this case for Compulsory Retirement. "

From the above observation, it appears that Shri Mahala was facing one Departmental proceeding on charges of gross misconduct and

negligence in duty, unlawful trespass with ulterior motive and threatening the staff and taking snaps apart from assisting in tampering of official records. One criminal case was also filed against him at the instance of the Deputy Divisional Manager in Udala Police Station for his criminal activities. The then General Manager had also written four letters in the month of March, 1996 indicating the activities of Shri Mahala. The Committee considered the said letters, the charges in the Departmental proceeding as well as pendency of a criminal case and came to a conclusion that the allegations are very serious in nature and clearly indicate official misconduct and behavioural attitude of Shri Mahala. Accordingly the Committee recommended for his compulsory retirement. Shri Manoj Kumar Mishra, the learned Senior Counsel appearing for this petitioner submitted that the Departmental proceeding was pending and the criminal case was also pending by the time the Review Committee met. Shri Mahala was also given no opportunity to meet the allegations made by the then General Manager in his letters written in the month of March, 1996. It was also contended that in the Departmental proceeding, Shri Mahala could be punished and in lieu of such punishment, avoiding the Departmental proceeding, Shri Mahala should not have been placed on compulsory retirement. In the case of ***Baikuntha Nath Das and another v. Chief District Medical Officer, Baripada*** (supra), the Hon'ble Supreme Court held that principles of natural justice has no place in the context of an order of compulsory retirement. While the High Court or the Court would not examine the matter as an Appellate Court, they may interfere if they are satisfied that the order is passed without any evidence. The case of Shri Mahala is not a case of that nature. The Review Committee considered the serious allegations made by the then General Manager against Shri Mahala apart from the allegations made against him in the Departmental proceeding. On consideration of such serious allegations, the Committee decided to recommend for compulsory retirement. It is, therefore, difficult to accept the contention of the learned Senior Counsel Shri Mishra that the recommendation of the Review Committee is based on no material. Sufficiency of material is not a matter to be looked into while exercising the jurisdiction of judicial review. The High Court does not sit in appeal against the recommendation of the Review Committee. If on certain allegations the Committee is satisfied that it is a fit case for recommending compulsory retirement, the Court has hardly any jurisdiction to interfere with the same on the ground of insufficiency of material. We, therefore, do not find any infirmity in the recommendation made by the Review Committee for compulsory retirement of Shri Mahala.

Bibhuti Bhusan Patra – W.P.(C) No.14214 of 2004

The Review Committee made the following observation in its recommendation:-

> "The date of birth is 15.4.52 and the date of entry into service is 1.4.72. One Departmental Proceedings is drawn vide O.O.No.72 dt.4.5.2000 by the General Manager, Baripada (C) S.D. Zone with the following **charges:**

1. Suppression of facts.
2. Negligence in duty.
3. Misleading to higher authorities.

> Besides the above the Committee perused the reports submitted by the Ex. General Manager Sri Vinod Kumar, I.F.S., to Head Office vide letters given below:

1. Letter No.Res/12 dt.4.3.96
2. Letter No.Res/56 dt.20.3.96
3. D.O. Letter No.Res/103 dt.26.3.96
4. Letter No.Res/113 dt.26.3.96

> The reports are found to be very serious in nature and clearly indicate official misconduct and behavioural attitude of Sri Patra. The copies of the letters are enclosed. The letters also indicate how Sri Patra was responsible for not allowing the General Manager to discharge his normal duties in the Zonal Office.
>
> The Committee also perused the C.C.Rs.
>
> Basing on the correspondences made by the Ex. General Manager as mentioned above, it is evident that the delinquent is a liability to the Corporation and the Committee, therefore felt that this is a fit case for Compulsory Retirement and recommends for the same. "

The case of this petitioner is more or less same as that of Shri Mahala. In this case Shri Patra was facing one Departmental proceeding on charges of suppression of facts, negligence in duty and misleading the higher authorities. Apart from the above, the then General Manager Shri Vinod Kumar had written four letters in March, 1996 with regard to conduct of Shri Patra. The Review Committee found the allegations to be very serious in nature and also observed that Shri Patra was a liability to the Corporation and accordingly recommended for compulsory retirement.

Though it was contended by the learned Senior Counsel Shri Mishra for the petitioner that the recommendation is based on no material, the recommendation itself shows that the allegations made by the then General Manager were of serious in nature and considering the conduct of the petitioner as alleged in those letters, the Committee took a decision to recommend for compulsory retirement. Therefore, it cannot be also said in the case of Shri Patra the recommendation made by the Committee was based on no material.

Dillip Kumar Kar – W.P.(C) No.14215 of 2004

The Review Committee made the following observation in its recommendation:-

> "The date of birth is 7.8.1949 and the date of entry into service is 3.7.74. He completed 50 years of age and 20 years of service. In total 3 (Three) Nos. of Departmental Proceedings have drawn against Sri Kar during his incumbency in different places. Out of this 2 (Two) Nos. of proceedings have been finalized and 1 No. of proceedings is under enquiry. The details of the proceedings drawn and final orders issued are given below:

1. Departmental Proceedings drawn vide Memo No.936 Dt.18.4.1979 of the D.M., Baripada Division.

CHARGES:

A. Mala fide intention to pilferage timber from forest to his personal benefit.
B. Felling of un-marked trees.
C. Put the Corporation into troubles and spoiling its image.
D. Misappropriation of Corporation money.
E. Negligence in duty.

FINAL ORDERS PASSED VIDE O.O. NO.16 DT.5.3.81:

i) The period of suspension is treated as such.

ii) He is censured.

iii) He will remain liable to pay the compensation as may be assessed by the Forest Department for felling of trees not due for felling in Kuliana 6/3.

iv) The cost of 12 (Twelve) stack garinda firewood and 210 pcs. of Dhaw Axles amounting to Rs.1,037.93 is to be recovered from his pay.

v) His pay has been reduced to the minimum pay scale with immediate effect.

2. Departmental Proceedings drawn vide O.O. No.294 dt.8.11.91 of G.M., Sambalpur Zone with the following:

CHARGES:

i) Gross misconduct.
ii) Unauthorised absent from duty.
iii) Disobedience of orders.

FINAL ORDER PASSED VIDE O.O. NO.18 Dt.1.2.93 OF THE D.M., ROURKELA:

a) The unauthorized absence from duty for the period from 1.10.84 to 9.9.91 shall not be counted in service.

3. Departmental Proceedings drawn vide O.O.No.18 dt.22.1.96 of G.M., Baripada with the following:

CHARGES:

i) Disobedience of orders.
ii) Misappropriation of Corp. Money.
iii) Negligence in duty.
iv) Misconduct.

The Proceedings is yet to be finalized.

The proceedings involve large amount of financial implications and also unauthorized period of absence for more than 6 years. In addition to this orders have been passed in the disallowed vouchers for recovery of more than Rs.65,000/. In spite of these departmental actions there has been no improvement in his performance and is not found to be satisfactory. In view of this the Committee felt that it is a fit case for Compulsory Retirement. "

From the above recommendation, it appears that Shri Kar faced a Departmental proceeding in 1979 and was punished. He faced another Departmental proceeding in the year 1991 on the charges of gross

misconduct, unauthorized absence from duty and disobedience of orders. In the said case also he was punished. He faced the third Departmental proceeding in the year 1996 on allegations of disobedience of orders, misappropriation of Corporation money, negligence in duty and misconduct. The said Departmental proceeding was pending when the Review Committee met. From the observations made by the Review Committee, it appears that the third Departmental proceeding involved large amount of financial implications and unauthorized absence was for a period of more than six years. In spite of three Departmental proceedings, the conduct of Shri Kar did not improve and accordingly the Committee recommended for compulsory retirement. This is also not a case where the Committee recommended for compulsory retirement in absence of any material. The observations made by the Committee as quoted above clearly justify the recommendation for compulsory retirement.

Gangadhar Mahakud – W.P.(C) No.14216 of 2004

The Review Committee made the following observation in its recommendation:-

> "The date of birth is 23.5.54 and the date of entry into service is 17.4.80. He completed 20 years of service. 3 Nos. of Departmental Proceedings were drawn against Sri Mahakud during his tenure. All these three proceedings have been finalized. The details are as follows:-
>
> 1. Departmental Proceedings drawn vide O.O No.2870 dt.18.9.84.
>
> **CHARGES:**
>
> i) Willful absence from duty.
> ii) Pilferage of Corporation property
> iii) Mishandling of Corporation records
> iv) Negligence in duty
>
> **FINAL ORDER PASSED VIDE O.O. NO.183 DT.19.12.85.**
>
> i) He is severely warned for future.
> ii) The period of suspension is treated as such which will count towards his increment.
>
> 2. Departmental Proceedings drawn vide O.O. No.30 dt.24.3.01.

CHARGES:

i) Negligence in duty.
ii) Suppression of facts.
iii) Gross misconduct.

FINAL ORDERS PASSED VIDE O.O NO.20 DT.8.2.2003

i) Sri Mahakud, Watcher is cautioned for future.

3. Departmental Proceedings Drawn vide O.O.No.891 dt.5.6.98.

CHARGES:

i) Gross misconduct and indiscipline.
ii) Abusing & scandling Forest Department officials & Staff for no reason related to the matter.
iii) Provocating other Watchers and Peons of Division Office for non-cooperation in discharging their duties.
iv) Gross insubordination.

FINAL ORDERS PASSED WITH THE FOLLOWING PUNISHMENTS:

i) On consideration of the statement of Sri Mahakud, Watcher the charges made in the D.P is dropped.
ii) The period of suspension is treated as duty.
iii) He is warned not to repeat in future.
iv) He is allowed to draw his salary for the period from 21.5.98 to 1.6.98.

The Committee carefully analyzed the series of proceedings drawn against Sri Mahakud and came to the conclusion that his conduct has not improved in spite of the warnings given to him in the final orders. Further the Divisional Manager in his report, submitted based on the records of the P.C. File, states that Sri Mahakud is an unwilling and irresponsible worker. He is also in the habit of frequently availing leave. His performance is also found to be not at all satisfactory. Keeping all these analysis in view the committee felt that it is a fit case for Compulsory Retirement."

From the above observation made by the Committee, it is clear that Shri Mahakud faced series of proceedings but his conduct did not improve. The Divisional Manager also reiterated that Shri Mahakud is an unwilling

and irresponsible worker. For the reasons stated above, the Committee felt that Shri Mahakud has become a liability on the Corporation and accordingly recommended for compulsory retirement. Though it was contended by Shri Mishra, the learned Senior Counsel appearing for this petitioner that the he could be punished in the Departmental proceeding and there was no justification for recommending compulsory retirement, we find that the conduct of the petitioner as revealed from the observation made by the Committee is such that any reasonable person would come to a conclusion that in absence of any improvement in the conduct of Shri Mahakud in spite of several Departmental proceedings justifies an order of compulsory retirement. We, therefore, do not find any infirmity in the recommendation of the Review Committee so far as this petitioner is concerned.

Santosh Kumar Gochhayat – W.P.(C) No.14217 of 2004

The Review Committee made the following observation in its recommendation:-

> "His date of birth is 11.2.56 and the date of joining in service on daily wages is 21.3.83 and on regular basis from 19.10.89. One Departmental Proceeding has been drawn against him vide O.O. No.10 dt.21.1.99 on the following **charges:**

i) Gross misconduct.
ii) Act of offence by instigating a local man for assaulting the Divisional Manager in the office chamber.

The above proceeding has been finalized vide O.O. No.2 dt.2.1.01 of General Manager, Baripada and the following punishment has been awarded.

> Charge No.1 is established and the delinquent is warned for future. In addition to this a criminal case is pending in the Court of S.D.J.M., Baripada. The case has been filed vide F.I.R. No.192 dt.2.9.98. The F.I.R has been filed by the Divisional Manager, Baripada in connection with the assault on him in the office chamber. The police have investigated the case and submitted the report to the court of S.D.J.M., and the case is under trial. The case has been booked under Section 448/323 etc. of I.P.C. In addition to this the then General Manager vide their letter No.2705 dated 1.8.94, Res/12 dt.4.3.96, D.O No.103 dt.26.3.96 have also submitted detailed reports to the Head Office about the irregularities committed by him, misconduct and obstructing the General Manager from discharging

his official duties. On review of the records the Committee felt that the performance of Sri Gochhayat has been far from satisfactory and his continuance in the Corporation is not at all desirable. **Therefore the Committee recommends his case for Compulsory Retirement.** "

It is evident from the above observation of the Committee that Shri Gochhayat was punished in the Departmental proceeding and in addition to the same, a criminal case was pending against him in the Court of the learned S.D.J.M., Baripada for commission of offence under Sections 448/323 of the I.P.C. The General Manager had also written two letters indicating the irregularities committed by Shri Gochhayat. On examination of those letters, the Committee found that the performance of Shri Gochhayat has been far from satisfactory and his continuance in the Corporation is not at all desirable. The recommendation of the Committee is based on the above facts. Since this Court does not sit in the appeal over the recommendation made by the Review Committee and examine sufficiency of materials, we find no infirmity in the recommendation of the Committee which is based on the materials indicated in the recommendation itself.

Manoj Kumar Mohanty – W.P.(C) No.14218 of 2004

The Review Committee made the following observation in its recommendation:-

"The date of birth is 20.1.57 and the date of joining in service on daily wages is 15.3.80 and on regular service from 15.3.82. On perusal of the Service Book and other relevant records submitted by the Divisional Manager the Committee observed that 7 (Seven) Departmental Proceedings have been drawn with serious charges. The details of Departmental Proceedings drawn and the charges framed are as under:

1. Departmental Proceedings drawn vide O.O No.14 dt.19.5.86.

CHARGES: Not entered in the Service Book.

FINAL ORDERS PASSED VIDE O.O. NO.40 DT.21.7.86.

Three increments i.e. falling due on 15.3.87 & 15.3.88 withheld.

2. Departmental Proceedings drawn vide O.O. No.74 Dt.1.9.87.

CHARGES:

i) Severely misconduct himself.
ii) Created indiscipline in the Corporation.

3. Departmental Proceedings drawn vide O.O. No.71 dt.27.8.87.

CHARGES:

i) Gross negligence in duty.
ii) Temporary misappropriation of Rs.576.75 of the Corp.
iii) Manipulation of accounts with intension of wrongful gain amounting to misconduct.
iv) Misappropriation of Corp. money for wrongful pecuniary gain to himself to the tune of Rs.5,757.50.

FINAL ORDERS PASSED VIDE O.O NO.99 DT.30.8.90:

i) Period of suspension is treated as such.
ii) A sum of Rs.5,757.50 being the misappropriated amount be recovered from the entitlements of Sri Mohanty, if any.
iii) He is dismissed with immediate effect.

FINAL ORDERS PASSED VIDE O.O. NO.45 DT. 9.5.94 OF M.D. BBSR ON THE APPEAL PETITION DT.21.2.94 & 3.3.94 OF SRI MOHANTY AGAINST THE FINAL ORDERS PASSED VIDE O.O. NO.99 DT.30.8.90 OF PROJECT MANAGER, KEONJHAR IN THE DEPARTMENTAL PROCEEDINGS DRAWN VIDE O.O.NO.71 DT.27.8.87 & O.O.NO.74 DT.1.9.87.

AWARD:

i) He is reinstated to service as Junior Clerk with effect from the date of joining as such.
ii) The period of suspension is treated as such.
iii) A sum of Rs.5,757.50 is to be recovered from the salary in suitable monthly instalments.
iv) The period from the date of dismissal till the date of his joining in the post, he shall not be paid any kind of financial benefits as he has not worked during the said period.

4. Departmental proceedings drawn vide O.O. No. 153 dt. 18.11.98.

CHARGES:

i) Gross misconduct.
ii) Creating disturbance to run the office smoothly polluting the working atmosphere.
iii) Tampering of official records.
iv) Unlawful and illegal and illegal trespass in a gang with criminal motive into office premises, central godown and Sub-Division office at Udala without authority.
v) Violation of the official rules & conduct rules.
vi) Illegal stoppage of OFDC work & abused the staff at work.
vii) Unlawful work by obtaining the signature of staff & labourers in blank papers with mala fide intention.
viii) Leaving the office and the headquarters without prior permission from the competent authority.
ix) Loss to OFDC by illegal stoppage of ongoing works.

5. Departmental Proceedings drawn vide Memo No.1394 dt.15.9.99.

CHARGES:

i) Willful and unauthorized absence from duty.
ii) Negligence in due discharging of official duty.
iii) Disobedience of order.

6. Departmental Proceedings drawn vide O.O. No.55 dt.24.5.02.

CHARGES:

i) Unauthorised & willful absent from official duty without Application.
ii) Disobedience of orders.
iii) Negligence in duty.
iv) Gross misconduct.
v) Loss to the Corporation.

7. Departmental Proceedings drawn vide O.O.No.100 Dt.30.7.02.

CHARGES:

i) Disobedience of order.
ii) Negligence in duty.
iii) Violation of conduct rules.

> Out of the above 7 (Seven) No. of Departmental Proceedings 3 (Three) Nos. of Departmental Proceedings have been finalized. In the proceedings drawn vide O.O.No.71 dt.27.8.87 Sri Mohanty has been dismissed from service. On appeal to the Managing Director the orders have been modified vide O.O.No.45 dt.9.5.95. The rest of the 4 (Four) Departmental Proceedings have not yet been finalised. In addition to these Departmental Proceedings F.I.R. No.55 dt.6.8.88 has been filed against him in Udala P.S. by the S.D.M. (Sri M.R. Patra) of Podadia Sub-Division and he has been charged under Section 448/506/323/294/384/34 of I.P.C. and the case is under trial in the court of S.D.J.M., Udala. It is also reported by the D.M. that Sri Mohanty is absent since 17.2.03. The C.C.Rs. were also perused by the Committee. It is observed that in most of the years his performance is recorded to be very unsatisfactory and he was also found to be not fit for promotion. In some cases the adverse remarks were also given by the General Managers. His criminal activities and also the police case instituted against him vide F.I.R. No.55 dt.6.8.98 at the Udala P.S. are also reflected in the C.C.Rs. The recording authority confirmed him to be a permanent liability to the Corporation. In view of the above findings the Committee recommends his case for Compulsory Retirement."

As is evident from the recommendation made, Shri Mohanty faced several Departmental proceedings out of which in three Departmental proceedings, he had been punished. In one proceeding, he was dismissed from service but in appeal, the appellate authority modified the punishment. There is also a criminal case against Shri Mohanty for commission of offence under Sections 448/506/323/294/ 384/34 of the I.P.C. The Committee on perusal of the C.C.Rs., the allegations made in seven Departmental Proceedings, the punishment imposed in some of the proceedings and the allegations made in the criminal case, recommended for compulsory retirement. On perusal of the reasons assigned by the Committee, we find no infirmity in the same.

Bijay Kumar Mohanty – W.P.(C) No.4524 of 2005

The Review Committee met on 10.6.2003 in the Office of the General Manager, O.F.D.C. Limited, Berhampur (Commercial) Zone and made the following recommendation:-

> "On perusal of records submitted by the Divisional Manager it is found that Sri Bijay Ku. Mohanty, F.A. has been proceeded eight times for serious irregularities like tampering of records, causing

> financial loss, serious dereliction in duty and he has also been punished three times but in spite of this he continued to commit the irregularities as indicated above. Perused and found not satisfactory in view of past records. The committee observes that the continuation of such person shall be detrimental to the Corporation and recommended for compulsory retirement."

It is evident from the recommendation made by the Review Committee that Shri Mohanty had been proceeded eight times on allegations of serious irregularities like tampering of records, causing financial loss and serious dereliction in duty and he had also been punished three times. The Committee perused the records of all the proceedings and did not find the work of Shri Mohanty satisfactory and observed that continuance of Shri Mohanty shall be detrimental to the interest of the Corporation and accordingly recommended for compulsory retirement. Shri R.K. Rath, the learned Senior Counsel relied on a decision of the Hon'ble Supreme Court in the case of ***State of Gujarat v. Umedbhai M. Patel***, reported in ***2001 STPL (LE) 29384 SC***. In the said reported case there was no adverse entries in the confidential record. The employee had successfully crossed the efficiency bar at the age of 50 as well as 55. He was placed under suspension on 22.5.1986 pending disciplinary proceedings. The Review Committee did not recommend for compulsory retirement. The State Government had also sufficient time to complete the enquiry as the employee had two years service left to retire. The authorities did not wait for conclusion of the enquiry and decided to dispense with the services of the employee merely on the basis of allegations which had not been proved and in absence of any adverse entries in his service record to support the order of compulsory retirement. Under these circumstances the Hon'ble Supreme Court confirmed the order of the High Court setting aside the order of the compulsory retirement. The Hon'ble Supreme Court in the said reported judgment referring to some earlier cases decided by the same Court observed that the settled legal position is that the Government is empowered and would be entitled to compulsorily retire a Government servant in public interest with a view to improve efficiency of the administration or to weed out the people of doubtful integrity or are corrupt but sufficient evidence was not available to take disciplinary action in accordance with the rules so as to inculcate a sense of discipline in the service. In the present case, undisputedly Shri Mohanty had been proceeded with departmentally eight times on allegations of tampering of records, causing financial loss and serious dereliction in duty. In three of the Departmental proceedings, he had been punished. Therefore, the case of Shri Mohanty is distinguishable of facts. In the case of ***State of Gujarat v.***

Umedbhai M. Patel even the Review Committee had not recommended for compulsory retirement but because of pendency of a disciplinary proceeding, the order of compulsory retirement had been passed. There was no adverse entry in his C.C.R. also. Under those circumstances, the Hon'ble Supreme Court held the compulsory retirement to be bad. The case of Shri Mohanty is distinguishable on facts and therefore, has no application to the case of Shri Mohanty. We, therefore, do not find any infirmity in the recommendation of the Review Committee in this case.

Madhusudan Swain – W.P.(C) No.4525 of 2005

The Review Committee made the following observation in its recommendation:-

> "Shri Swain has been proceeded for 4 (four) times for serious irregularities like negligence in duty, causing heavy loss to Corporation to the tune of Rs.2.7 lakhs, embezzlement of firewood stock etc. In spite of punishment in these cases, Sri Swain has not improved his performances. After perusal of the C.C.Rs. and past records, his case recommended for compulsory retirement and such persons should not continue in the organization. Accordingly the committee records for compulsory retirement."

From the recommendation made by the Review Committee, it appears that Shri Swain had been proceeded against departmentally four times on allegations of negligence in duty, causing financial loss to the Corporation to the tune of Rs.2.7 lakhs, embezzlement of firewood stock etc. and he had been punished in all the four departmental proceedings. On consideration of the same and the C.C.R. of Shri Swain, the Committee recommended for his compulsory retirement. As stated earlier, this Court does not sit in appeal over the recommendation made by the Committee and cannot decide the sufficiency of materials for the purpose of recommendation. There being no dispute that Shri Swain had been proceeded four times departmentally on serious allegations and had also been punished and the fact that the Committee had also seen the C.C.Rs. of Shri Swain in order to come to the said conclusion, there is hardly any scope for this Court to interfere with such recommendation.

Debaraj Biswal – W.P.(C) No.4706 of 2005

The Review Committee made the following observation in its recommendation:-

> "Shri Biswal has been proceeded for serious irregularities for eight times such as absconding from duty, illegal disposal of F.W., connivance with smugglers and embezzlement of firewood stock, careless handling of office records and vouchers etc. Out of 8 (eight) proceedings 6 (six) has been finalized but he has not corrected himself and committed irregularities. The C.C.Rs. were verified along with the service records and found not satisfactory. In view of the past service records, the committee observes that such persons should not be continued in Corporation service and recommended that he should be given Compulsory Retirement."

The case of Shri Biswal is more or less same as the case of Shri Bijay Kumar Mohanty. Shri Biswal had also been proceeded departmentally eight times on allegations of absconding from duty, illegal disposal of firewood, connivance with smugglers and embezzlement of firewood stock etc. Out of eight departmental proceedings, six had been concluded. The Committee not only looked into the allegations proved against Shri Biswal in six of the proceedings but also considered the C.C.Rs. and recommended for compulsory retirement. The submission of the learned counsel for this petitioner that if the petitioner was found guilty of the charges in the departmental proceeding, his services could be dispensed with by way of an order of dismissal or removal does not hold good considering the fact that even if an employee is let off with minor punishment in several departmental proceedings, his performance has to be adjudged by the Committee along with the entries in the C.C.Rs. in order to come to a conclusion as to whether the employee should be compulsorily retired in public interest or not. The Committee after considering the allegations made against Shri Swain and the C.C.Rs. was satisfied that compulsory retirement of Shri Swain was required in public interest and accordingly recommended for compulsory retirement. We find no infirmity in such recommendation.

M. Manibabu Dora – W.P.(C) No.4526 of 2005

In this case the Committee meeting was held on 10.6.2003 in the Office of the General Manager, O.F.D.C. Ltd., Berhampur (C) Zone and the following recommendation was made:-

> "On verification of the service records, it is found that Sri Manibabu Dora, S/S. has been punished twice for the departmental proceedings initiated against him. It is reported by the D.M. that he has been recently suspended for obstruction of corporation work. Prior to this, he was also suspended twice. As reported by D.M. that

> he is unwilling worker and his performance is not satisfactory and he is an inefficient worker. The Committee observes that such inefficient workers should not be allowed to continue in the service and it is recommended that he should be compulsory retired from Corporation service."

The Committee observed in its recommendation that Shri Dora had been punished twice in the departmental proceedings initiated against him and had also been suspended thrice. He was an unwilling worker and his performance was not satisfactory. In this connection, reference may be made to a decision of the Hon'ble Supreme Court in the case of ***M.P. State Cooperative Dairy Federation Ltd. & another v. Rajnesh Kumar Jamindar & others***, reported in ***2009 STPL (LE) 41854 SC***. In paragraphs-32 to 38 of the judgment, the Hon'ble Supreme Court held that law relating to compulsory retirement in public interest is no longer res integra. The provisions had been made principally for weeding out dead wood. Considering the performance of Shri Dora, the Committee considered for compulsory retirement. We, therefore, do not find any infirmity in such recommendation.

8. The learned Senior Counsel Shri R.K. Rath and Shri Manoj Kumar Mishra challenged the recommendation of the Review Committees and the order of compulsory retirement on three grounds. The first ground was mala fide and the second and third ground relate to insufficiency of materials based on the fact that the petitioners had been proceeded departmentally during their tenure under the Corporation and they could be punished in those departmental proceedings. In lieu of such punishment, an order of compulsory retirement could not have been passed. We have already held that the allegation of mala fide has not been proved by any one of the petitioner. Though allegations were made in the writ petitions that on the basis of complaint lodged by the members of the Karmachari Sangha, two of the Committee members had been proceeded with departmentally, no document has been placed before the Court to show that either of the two Officers had been proceeded with departmentally on the basis of the allegations made by any of the members of the Karmachari Sangha. Therefore, the case of the petitioners on this ground fails. So far as the second and third grounds are concerned, we have perused the recommendation made by the Committee in case of each of the petitioners and found that materials were available before the Committee to make such recommendation. Since this Court does not sit in appeal over the recommendation made by the Committee and also cannot examine sufficiency of materials for arriving at a conclusion as to whether the

recommendation is justified or not, it is not open for the Court in exercise of judicial review to interfere with either the recommendation made by the Committee or with the order of compulsory retirement. If the Court is satisfied that the Committee was subjectively satisfied while recommending for compulsory retirement, it has no jurisdiction to interfere.

9. We, therefore, do not find any merit in any of the writ petitions and accordingly dismiss all the ten writ petitions

Writ petition dismissed.

2012 (II) ILR- CUT- 78

L.MOHAPATRA, J & B.K. PATEL, J.

W.P.(C) NO. 2773 OF 2012 (Dt.07.03.2012)

GOVERNING BODY OF KAPTIPADA COLLEGE,KAPTIPADA ……. Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

SERVICE – Order of dismissal – When becomes effective – Such an order can only be effective after it is communicated to the Officer concerned or otherwise published.

In this case letter of termination stated to have been sent under certificate of posting – Nothing on record to show that order of termination served on O.P.3 personally or through publication – Moreover receipt relating to under certificate of posting is not a proof for valid service of the order of termination on O.P.3 – Held, the learned Tribunal was justified to hold that the order of termination Dt.19.04.1999 had not taken effect till the same was disclosed in the counter affidavit filed by the Governing Body in the G.I.A. case pending before the Tribunal.

Moreover since the institution had already come into the grant-in-aid fold by the time the order of termination was disclosed Section 10-A of the Orissa Education Act, 1969 applies and service of O.P.3 cannot be terminated without the prior approval of the Director – Held, appeal filed by O.P.3 before the Tribunal was maintainable.

(Para 6,7)

Case laws Referred to:-

1.2003(I) OLR 91 : (Prafulla Kumar Sahoo-V- State of Orissa & Ors.)
2.AIR 1966 SC 1313 : (State of Punjab -V- Amar Singh Harika).

For Petitioner - M/s. Sameer Kumar Das, R.N.Mishra-II, S.K.Mishra.

For Opp.Parties - Addl. Govt. Advocate (for Opp.Party Nos.1 & 2)
M/s. Manoj Kumar Mishra & D.Mishra, (for Opp.Party No.3).

L.MOHAPATRA, J. The Governing Body of Kaptipada College, Kaptipada, in the district of Mayurbhanj has field this writ petition against a composite order dated 30.9.2011 passed by the State Education Tribunal in G.I.A. Case No.280 of 2009 and Appeal Case No.42 of 2010. Opposite Party No.3 had filed the G.I.A. case for release of grant-in-aid and the appeal case for a declaration that the order of termination passed by the Governing Body is void, invalid and inoperative in law. Since both the cases were dependant on each other, the Tribunal heard and disposed of both the cases in a common judgment.

2. The case of Opposite Party No.3 before the Tribunal was that in pursuance of an advertisement published in the daily "The Prajatantra" on 22.7.1992, he applied for appointment to the post of Lecturer in Oriya in Kaptipada College. He was selected in due process of law and joined the post on 25.8.1992. The institution was notified to get grant-in-aid with effect from 1.1.2004 and became an aided educational institution. His name having not been reflected in the staff position of the institution by the Governing Body, a representation was made by him to the Director, Higher Education challenging the action of the Governing Body. It is the case of Opposite Party No.3 that on his representation the Director, Higher Education condemned the action of the Governing Body as he was working as a Lecturer in Oriya against the 2nd post since 25.8.1992, but the Governing Body without any valid record had shown one Himansu Mohanty to be working against the said post. The said Opposite Party No.3 approached this Court challenging the action of the Governing Body in not permitting him to discharge his duties and this Court by order dated 1.8.1996 directed him to submit a joining report before the Principal of the College on the basis of which he would be allowed to discharge his duties. Though in compliance of the said order the Opposite Party No.3 submitted his joining report on 9.8.1996, he was not allowed to join duties. On the other hand, the Governing Body approached this Court in O.J.C. No.6333 of 1996 for release of grant-in-aid in favour of the teaching staff excluding the Opposite Party No.3. According to the Opposite Party No.3, the second post of Lecturer in Oriya was justified in the College as per the yardstick prescribed by the Government and he had been appointed in accordance with law against the said post. Though the Governing Body approached the Government for release of grant-in-aid in favour of the teaching staff, it excluded the name of Opposite Party No.3. As a result of which even though the appointment of Opposite Party No.3 was squarely covered under the Validation Act of 1998, his case was not considered for approval of his appointment and consequently release of grant-in-aid. On these allegations, the Opposite Party No.3 filed G.I.A. Case No. 280 of 2009 before the

Tribunal seeking for a direction to the State Government to release grant-in-aid.

3. In the counter affidavit filed by the Governing Body-petitioner in the said G.I.A. case, it was disclosed that the Opposite Party No.3 had been appointed by the Governing Body on 25.8.1992 against a non-existing post. His services had been terminated since 19.4.1999. The institution came into grant-in-aid fold (block grant) from 1.1.2004.

The Opposite Party No.3 therefore filed Appeal Case No.42 of 2010 before the Tribunal challenging the said order of termination on the ground that the order of termination had never been served on him and therefore, he continued in service till the same was disclosed in the counter affidavit filed by the Governing Body in the G.I.A. Case. The prior approval of the competent authority as required under Section 10-A of the Orissa Education Act, 1969 having not been obtained, the said order of termination is illegal.

In the said appeal case, the Governing Body took a stand that the order of termination having been passed during the pre-aided period, the Tribunal had no jurisdiction to entertain the appeal under Section 10-A of the Orissa Education Act, 1969 or Rule 22 (15) of the Orissa Education (Recruitment and Conditions of Service of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974. Accordingly the Governing Body took a further stand in the G.I.A. Case that the services of Opposite Party No.3 having been terminated, the question of grant of grant-in-aid in his favour does not arise.

4. The Tribunal in the impugned order held that the order of termination had never been served on Opposite Party No.3 and therefore, he is deemed to be continuing in the post. The so called termination order dated 19.4.1999 is neither valid nor effective in the eye of law. So far as the claim for grant-in-aid is concerned, the Tribunal further directed that the said Opposite Party No.3 is entitled to the grant-in-aid as per the prevailing grant-in-aid principle as well as the decision rendered by this Court in the case of Prafulla Kumar Sahoo v. State of Orissa and others, reported in 2003 (I) OLR 91. This writ petition has been filed by the Governing Body challenging the order of the Tribunal passed in the Appeal Case holding that the order of termination passed against the Opposite Party No.3 is invalid and ineffective under the eye of law and that the Opposite Party No.3 shall be deemed to be continuing in the post of Lecturer in Oriya in the said College.

5. Shri Das, the learned counsel appearing for the Governing Body-

petitioner before this Court challenged the impugned order on the following grounds:

> (1) Admittedly the institution came into grant-in-aid fold with effect from 1.1.2004 and the order of termination having been passed in the year 1999, there was no necessity of obtaining prior approval of the competent authority before terminating the service of the Opposite Party No.3.
>
> (2) The order of termination had been sent by Under Certificate of Posting and therefore, it is presumed to have been served on the Opposite Party No.3.
>
> (3) The order of termination having been passed by the Governing Body during the pre-aided period, an appeal under Section 10-A of the Orissa Education Act, 1969 is not maintainable.

6. In order to substantiate the first ground taken by the learned counsel for the petitioner, attention of the Court was drawn to several documents filed along with the writ petition which are of no relevance except the Xerox copy of the Under Certificate of Posting and the order of termination in Annexure-9. In Annexure-9, the Secretary of the Governing Body had intimated the Opposite Party No.3 that his services had been terminated as per the decision and resolution of the Governing Body with effect from 19.4.1999. The stand of the Governing Body is that the said letter of termination had been sent Under Certificate of Posting on the very same day. The Xerox copy of the receipt showing posting of a letter Under Certificate of Posting is attached to the said letter in Annexure-9. Though from Annexure-9, the intimation, it appears that an order of termination had been passed as per resolution of the Governing Body with effect from 19.4.1999, there is no proof of the statement made by the petitioner that the very same letter had been sent to the Opposite Party No.3 Under Certificate of Posting. It is, therefore, difficult in absence of any documentary evidence to accept the contention of the learned counsel for the petitioner that the order of termination in Annexure-9 had in fact been sent Under Certificate of Posting to the Opposite Party No.3. There is no other document produced on behalf of the petitioner to show that the order of termination in Annexure-9 had been served on Opposite Party No.3. On the other hand, the stand of the Opposite Party No.3 is that he came to know about such termination only from the counter affidavit filed by the Governing Body in the G.I.A. Case. Undisputedly there is no presumption under law about service of notice if the same is sent Under Certificate of Posting unlike a registered

post. The Hon'ble Supreme Court in the case of ***State of Punjab v. Amar Singh Harika, reported in AIR 1966 Supreme Court 1313*** while deciding a similar issue held that an order of dismissal passed by an appropriate authority and kept in the file without communicating it to the officer concerned or otherwise publishing it, cannot take effect as from the date on which it was actually passed by the said authority. Such an order can only be effective after it is communicated to the officer concerned or otherwise published. Paragraph-11 of the said judgment dealing with the issue is quoted below:

> "(11) The first question which has been raised before us by Mr. Bishan Narain is that though the respondent came to know about the order of his dismissal for the first time on the 28th May 1951, the said order must be deemed to have taken effect as from the 3rd June 1949 when it was actually passed. The High Court has rejected this contention; but Mr. Bishan Narain contends that the view taken by the High Court is erroneous in law. We are not impressed by Mr. Bishan Narain's argument. It is plain that the mere passing of an order of dismissal would not be effective unless it is published and communicated to the officer concerned. If the appointing authority passed an order of dismissal, but does not communicate it to the officer concerned, theoretically it is possible that unlike in the case of a judicial order pronounced in Court, the authority may change its mind and decide to modify its order. It may be that in some cases, the authority may feel that the ends of justice would be met by demoting the officer concerned rather than dismissing him. An order of dismissal passed by the appropriate authority and kept with itself, cannot be said to take effect unless the officer concerned knows about the said order and it is otherwise communicated to all the parties concerned. If it is held that the mere passing of the order of dismissal has the effect of terminating the services of the officer concerned, various complications may arise. If before receiving the order of dismissal, the officer has exercised his power and jurisdiction to take decisions or do acts within his authority and power, would those acts and decisions be rendered invalid after it is known that an order of dismissal had already been passed against him ? Would the officer concerned be entitled to his salary for the period between the date when the order was passed and the date when it is communicated to him? These and other complications would inevitably arise if it is held that the order of dismissal takes effect as soon as it is passed, though it may be communicated to the officer concerned several days thereafter. It is true that in the present

> case, the respondent had been suspended during the material period; but that does not change the position that if the officer concerned is not suspended during the period of enquiry complications of the kind already indicated would definitely arise. We are therefore, reluctant to hold that an order of dismissal passed by an appropriate authority and kept on its file without communicating it to the officer concerned or otherwise publishing it will take effect as from the date on which the order is actually written out by the said authority; such an order can only be effective after it is communicated to the officer concerned or is otherwise published. When a public officer is removed from service, his successor would have to take charge of the said office; and except in cases where the officer concerned has already been suspended, difficulties would arise if it is held that an officer who is actually working and holding charge of his office, can be said to be effectively removed from his office by the mere passing of an order by the appropriate authority. In our opinion, therefore, the High Court was plainly right in holding that the order of dismissal passed against the respondent on the 3rd June 1949 could not be said to have taken effect until the respondent came to know about it on the 28th May 1951."

The learned counsel for the petitioner has not shown any decision contrary to the above view taken by the Hon'ble Supreme Court. Admittedly there is nothing on record to show that the said order of termination in Annexure-9 had been served on Opposite Party No.3 either in person or through publication. The receipt relating to Under Certificate of Posting is not a proof of service of the order of termination on Opposite Party No.3. We are, therefore, of the view that the Tribunal was justified in holding that the order of termination passed by the Secretary in pursuance of the decision taken by the Governing Body dated 19.4.1999 had not taken effect till the same was disclosed in the counter affidavit filed by the Governing Body in the G.I.A. case pending before the Tribunal.

Once it is held that the order of termination had not taken effect with effect from 19.4.1999, it can only be said to have taken effect from the date it was disclosed in the counter affidavit filed by the Governing Body in the G.I.A. Case. There cannot be any dispute that Section 10-A of the Orissa Education Act becomes applicable, the institution having come into the grant-in-aid fold with effect from 1.1.2004. This finding answers the first two grounds taken by the learned counsel for the petitioner.

7. So far as the third ground is concerned, we have already held that the order of termination can be said to have taken effect from the date it was disclosed in the counter affidavit filed in the G.I.A. case and by that time the institution had already come into the grant-in-aid fold. The maintainability of the appeal was challenged by the Governing Body on the ground that the order of termination has been passed during the pre-aided period and this stand of the Governing Body has not been accepted by us. Therefore, the order of termination can only take effect from the date on which it was disclosed in the counter affidavit filed by the Governing Body in the G.I.A. case. Section 10-A of the Orissa Education Act, 1969 prescribes that without prior approval of the Director, the services of a teaching staff cannot be terminated. Ordinarily we would have sent the matter back to the Tribunal to decide as to whether the order of termination without approval of the Director is justified or not. Admittedly approval of the Director having not been taken and in view of the stand taken by the Governing Body that the order of termination having been passed during the pre-aided period approval of the Director was not necessary, we find no justification to remit the matter back to the Tribunal for deciding this issue. Admittedly prior approval of the Director had not been obtained before terminating the services of the petitioner and the order of termination was first made known to the Opposite Party No.3 much after the institution came into grant-in-aid fold. Therefore, the appeal filed by Opposite Party No.3 before the Tribunal was maintainable.

8. For the reasons stated above, we find no merit in this writ petition and dismiss the same.

Writ petition dismissed.

2012 (II) ILR- CUT- 85

L.MOHAPATRA, J & B,K,PATEL, J.

W.P.(CRL) NO. 1397 OF 2011 (Dt.21.03.2012)

MD. RAJU @ MD. AZIM ……..Petitioner.

.Vrs.

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

NATIONAL SECURITY ACT, 1980 - (ACT NO. 65 OF 1980) – S.3 (2).

Order of preventive detention – Representation of the detenue – Such representation must be considered with utmost diligence and promptitude –Duty of the Court to guard that liberty of a citizen is not curtailed except by complying with statutory safeguards rigidly – Delay in disposal of the representation not satisfactorily explained – Order of detention liable to be quashed.

In this case there is eight days delay from 23.10.2011 to 1.11.2011 for sending petitioner's representation by the detaining authority to the State Government and Central Government – Though representation was received by the State Government on 8.11.2011 the same was rejected on 18.11.2011 and communicated to the petitioner on 21.11.2011 – So there is no satisfactory explanation for 26 days delay in disposal of the petitioner's representation by the State Government – Held, order of detention Dt.18.10.2011 is quashed.

(Para 14,15,16)

Case laws Referred to:-

1.(2007)38 OCR : (Kalia @ Alok Kumar Das-V-District Magistrate, Dhenkanal & two Ors.)
2.2006(II) OLR 591 : (Bijaya Parida-V-State of Orissa & Ors.)

For Petitioner - M/s. Sangram Ku. Sahoo, G.Sahoo, D.P.Pattanaik & Miss A.Mohanty.
For Respondent - Mr. S.D.Das (A.S.G.I.) (O.P.2).

B.K. PATEL, J. In this petition for issue of a writ in the nature of *habeas corpus*, the petitioner has assailed legality of order of detention dated 16.10.2011 under Annexure-5 based on the grounds of detention

dated 18.10.2011 issued by opposite party no.3 detaining authority and approved by opposite party no.1 State of Odisha under sub-Section (2) of Section 3 of the National Security Act, 1980 (for short 'the Act').

2. Petitioner's case is that on receipt of grounds of detention dated 18.10.2011 under Annexure-6, he submitted representations under Annexure-7 before the Advisory Board, the State Government and the Central Government on 23.10.2011. Orders of the State Government rejecting the representation was communicated by letter dated 21.11.2011 under Annexure-2 and of the Central Government rejecting the representation was communicated by wireless message dated 18.11.2011 under Annexure-3. Further the State Government confirmed the detention order on 8.12.2011. Thus, there was delay of twenty nine days by the State Government and of twenty six days by the Central Government in considering the petitioner's representations. It is also the grievance of the petitioner that out of twelve criminal cases referred to in support of the grounds of detention the petitioner had been acquitted in eight cases by the time the detention order was passed. The other four cases were sub-judice. Without application of mind, the detaining authority placed reliance on the cases in which the petitioner had been acquitted. All those cases related to the incidents which allegedly took place between 1991 to 1996. Out of the four other cases which are sub-judice, one case relates to the alleged incident dated 18.9.2002, one case relates to the alleged incident dated 20.12.2006 and two cases relate to alleged incidents dated 10.7.2011 and 28.7.2011 respectively. Therefore, pendency of cases could not be said to constitute continuance of criminal activities as alleged in the grounds of detention. It is also averred by the petitioner that his liberty cannot be curtailed on the basis of cryptic and unreasoned orders passed by the State and Central Governments under Annexures-3 and 4 respectively.

3. In dealing with the contention that orders of the State and Central Governments rejecting petitioner's representations were cryptic and unreasoned, it is found pertinent to reproduce the orders under Annexures- 2 and 3.

Order of the State Government under Annexure-2 reads:

> "The undersigned is directed to say that his representation dtd.23.10.2011 against the orders of detention under National Security Act, 1980 has been carefully considered by the State Government. On perusal of all relevant papers alongwith PWC of the detaining authority on the representation, it is found that the

> representation of the detenu is devoid of merit. The State Government, therefore, is constrained to reject the representation dt.23.10.2011 of the detenu Md. Raju @ Azim."

Wireless Message under Annexure-3 communicating order of the Central Government rejecting petitioner's representation reads:

> "REFERENCE REPRESENTATION OF THE DETENUE MD. RAJU @ AZIM S/O MD. RAFIQ @ RAUF AGAINST THE ORDER OF DETENTION PASSED BY THE DISTRICT MAGISTRATE SAMBALPUR ON **16.10.2011** UNDER NSA-1980 (.) THE REPRESENTATION WAS DULY CONSIDERED BY THE CENTRAL GOVERNMENT (.) REQUEST OF THE DETENUE FOR REVOCATION OF THE DETENTION ORDER PASSED AGAINST HIM HAS **NOT REPEAT NOT BEEN ACCEDED** TO BY THE CENTRAL GOVERNMENT (.) KINDLY INFORM THE DETENUE ACCORDINGLY (.) MATTER MOST URGENT (.)"

In this connection, in the counter affidavit filed by the Central Government it has been averred as follows:

> "5. The Union Home Secretary after duly considering the order of detention and grounds for the same, the representation of the detenue and the comments of the detaining authority thereon, rejected the representation on 16.11.2011 and sent the file back to the Joint Secretary……."

4. Thus, it is evident that representations were disposed of by way of rejection by the State Government as well as the Central Government upon reference to all the relevant papers including the grounds of detention. The orders of rejection have to be read together conjointly with the grounds of detention under Annexure-6. By Annexures-2 and 3 orders of rejection were communicated upon finding that the grounds of detention were justified. Therefore, non-communication of detailed reasons on the basis of which representations were rejected by the State and Central Governments is inconsequential.

5. With regard to the contention that the criminal cases referred to by the detaining authority as grounds of detention do not indicate continuous criminal activities on the part of the petitioner, it is found that the following twelve criminal cases have been referred to in the grounds of detention by the detaining authority in order to arrive at the satisfaction to justify petitioner's detention:-

Sl.No.	Case Nos.	Date of occurrence	Offence/offences alleged against the petitioner	Status of the case
1.	Sambalpur Town.P.S. Case No.94of 1991	3.4.1991	S.392 I.P.C.	Trial ended in acquittal
2.	Dhanupali P.S.Case No.77of 1992	8.6.1992	Ss.147/148/435/436/395/452/332/427/ 149 I.P.C. read with S.7 of Crl. Law Amendment Act.	-do-
3.	Dhanupali P.S.Case No.78of 1992	8.6.1992	Ss.147/148/307/332/506/294/149 IPC read with S.7 of Crl. Law Amendment Act	-do-
4.	Dhanupali P.S.Case No.107of 1992	5.8.1992	S.392 I.P.C.	-do-
5.	Dhanupali P.S.Case No.117of 1992	2.9.1992	S.392 I.P.C.	-do-
6.	Burla P.S. Case No.33 of 1994	15.2.1994	Ss.302/34 I.P.C. read with S.25 of Arms Act.	-do-
7.	Dhanupali P.S.Case No.118 of 1994	30.8.1994	Ss.458/395 I.P.C.	-do-
8.	Sambalpur TownP.S. Case No.344of 1996	8.12.1996	S.379 I.P.C.	-do-
9.	Katarbaga P.S.Case No.144 of 2002	18.9.2002	Ss.399/402 I.P.C.	sub-judice

10.	Dhanupali P.S. Case No.161of 2006	20.12.2006	Ss.294-A/420/34 I.P.C. read with S.4 of Prize Chit and Money Circulation Banned Act	sub-judice
11.	Dhanupali P.S. Case No.108 of 2011	10.7.2011	Ss.468/379/411 I.P.C.	sub-judice
12.	Dhanupali P.S. Case No.122 of 2011	28.7.2011	Ss.147/148/323/324/325/307/506/149 I.P.C. read with Ss.25/27 of Arms Act	sub-judice

6. Detaining authority has also referred to Dhanupali P.S. Station Diary Entry Nos.840 dated 29.9.2011 and 844 dated 30.9.2011 in the grounds of detention. It is alleged that on 29.9.2011 receiving information that the petitioner was terrorizing the local businessmen and residents at the point of pistol for collection of illegal ransom at City Railway Station, Sambalpur, the I.I.C., Dhanupali P.S. alongwith his staff arrived there. Shops, hotels etc. were found open, but the owners were absent. Vehicles near the station were left abandoned without the drivers. The Railway Station which ordinarily remained crowded was found completely lonely and deserted. Although some truck drivers and shop keepers were present in some distance, they were found in a state of panic and reluctant to disclose anything. On being assured for security by the IIC, Dhanupali P.S., a few labourers informed that petitioner alongwith his associates came to the Railway Station in motor bikes and at the point of pistol terrorized some local residents for collection of illegal ransom and threatened all against speaking anything about the occurrence. However, none of the local residents ventured to come with any report against the petitioner.

7. It was submitted by the learned counsel for the petitioner that the eight cases in which the petitioner was acquitted related to incidents between the years 1991 to 1996. Out of four cases which are sub-judice, one case related to the incident of the year 2002 and another of the year 2006. It was contended by the learned counsel for the petitioner that the cases in which the petitioner was acquitted after trial should not have weighed in the mind of the detaining authority to arrive at the satisfaction for detaining the petitioner. All those cases related to incidents which took place long back between the years 1992 to 1996. No criminal case is alleged to have been instituted against the petitioner between the years 1996 to 2002. Prior to the year 2011 only two cases one in the year 2002 and another in

the year 2006 were instituted against the petitioner. These two cases as well as two cases instituted in the year 2011 are sub-judice and the petitioner is entitled to the presumption of innocence till found guilty by the competent court on completion of the trial. There is no material to indicate that the petitioner was engaged in continuous criminal activities. According to learned counsel for the petitioner in none of the cases there is allegation of disruption of public order. Rather, stray incidents involving offences against individuals were the basis for institution of criminal proceeding.

8. On scrutiny of individual cases, we find that even if the eight cases in which the petitioner was acquitted related to the incidents between the years 1992 to 1996, the four cases which are sub-judice either took place in public places or had the effect of disrupting public order otherwise. In Katarbaga P.S. Case No.144 of 2002 it was alleged that at about 1.00 A.M. in the night some culprits including the petitioner being armed with bhujalis, iron rod and other deadly weapons tried to detain the complainant on the way when he was coming from Thelkoli to Sambalpur in a Maruti Van. Police rushed to the spot and apprehended petitioner and some of the co-accused persons. In Dhanupali P.S. Case No.161 of 2006 it was alleged that the petitioner was involved in running illegal lottery business and thereby promoting and spreading illegal money circulation activities in Sambalpur Town. In Dhanupali P.S. Case No.108 of 2011 it was alleged that petitioner purchased stolen articles. In Dhanupali P.S. Case No.122 of 2011 it has been alleged that at 11.05 A.M. on the date of occurrence the petitioner alongwith co-accused persons demanded illegal ransom from the complainant when he was engaged in rack handling work at City Railway Station, Sambalpur. On complainant's refusal the petitioner attacked him by dealing blows on his head by means of a pistol and bhujali. As the occurrence took place in broad day light at City Railway Station, panic and fear developed in the mind of general public who fled away from the spot and the locality became deserted. Dhanupali P.S. Station Diary Entry Nos.840 dated 29.9.2011 and 844 dated 30.9.2011 related to allegations of commission of offences in a crowded public place like City Railway Station. Public at large were terrorized and nobody ventured to lodge report. Therefore, even if the cases in which the petitioner was acquitted are not taken into account, we are not persuaded to accept the contention made on behalf of the petitioner that the other four cases and the two Station Diary Entries do not indicate criminal activities having adverse effect on public order.

9. With regard to the contention of delay in disposal of the representations, in the counter affidavits filed by the State and Central

Governments averments have been made in support of the stand that there was no delay in disposal of the representations.

Paragraph-5 of the counter affidavit filed on behalf of the State Government reads:

> " 5. That in reply to the averments made in paragraphs 10 to 12 of the writ application it is humbly submitted that the representation dtd.25.10.2011 of the detenu against the order of detention, was received in the Home (Special Section) Department along with the PWC of the detaining authority on 08.11.2011. The representation was put up on 09.11.2011. A copy of the representation along with a copy of the para-wise comments was sent to the Government of India, Ministry of Home Affairs for consideration in Home (Special Section) Department letter No.3674/C., Dt.14.11.2011. After careful consideration, the State Government rejected the representation of the detenu on 18.11.2011 being devoid of merit. The file was returned to the Special Section, Home Department on 19.11.2011. The rejection of representation, being devoid of merit, was communicated to the detenu through the District Magistrate, Sambalpur in Home (Special Section) Department letter No.3738/C., dtd.21.11.2011. There were Government Holidays of four days during the above period i.e. from 08.11.2011 to 21.11.2011. Hence, the delay in disposal of the representation, if any, is not intentional."

Likewise, averments in paragraphs-4 and 5 of the counter affidavit filed by the Central Government read as follows:

> "4. That with regard to paras 10, 11 and 12 of the petition, it is submitted that representation of the detenu alongwith parawise comments were forwarded to the Central Government in the Ministry of Home Affairs by the Office of the Collector & District Magistrate, Sambalpur through its letter No.1380/Res. Dated 1.11.2011. The same was received by the Central Government in the concerned Section of the Ministry of Home Affairs on 14.11.2011. The representation was put up for consideration of Union Home Secretary (who has been delegated by the Central Government to decide such cases) on 15.11.2011.
>
> 5. The Union Home Secretary after duly considering the order of detention and grounds for the same, the representation of the detenue and the comments of the detaining authority thereon,

rejected the representation on 16.11.2011 and sent the file back to the Joint Secretary. The file reached the Section through Director (S) and US(NSA) on 18.11.2011. Accordingly, a wireless message No.II/15030/06/2011-NSA dated 21.11.2011 was sent to the Home Secretary, Government of Orissa, Superintendent, Circle Jail, Sambalpur, Orissa, District Magistrate, Sambalpur, Orissa and the detenue, informing that the representation of Md. Raju @ Azim, was considered and rejected by Central Government. A copy of this wireless message was also sent on 21.11.2011 by post to the detenue (through Superintendent Jail) as well as to the Superintendent, Circle Jail, Sambalpur, Orissa with a request to serve the copy meant for the detenue and forward the acknowledgement from the detenue to this Ministry. A copy of the wireless message is enclosed as **Annexure C.A.I.** Thus, the representation was decided and the decision conveyed with utmost promptitude and expedition."

10. It was contended by the learned counsel for the petitioner that admittedly the petitioner submitted his representations to the State Government and the Central Government on 23.10.2011. In the counter affidavit filed by the detaining authority, Collector & District Magistrate, Sambalpur it has been specifically admitted that the petitioner submitted representation through the Collector, Sambalpur on 23.10.2011 and after getting the parawise comments the representation alongwith the parawise comments were sent to the State Government in Home Department on 1.11.2011. Long delay of eight days in sending the representation to the State Government remained unexplained. It was further contended that though the representation alongwith parawise comments were received in the Home (Special Section) Department of the State Government on 8.11.2011, unexplained delay of ten days occurred in disposal of the representation. Intervening holidays like Sunday do not explain the delay in any manner. It was further contended that representation of the petitioner was dealt with by the Central Government also in a casual manner. Though the petitioner submitted representation on 23.10.2011, it was received by the Central Government in the Ministry of Home Affairs as late as on 14.11.2011. Thereafter, though the order of rejection is stated to have been passed on 16.11.2011, it was communicated on 21.11.2011 under Annexure-3. There being delay of 28 days in communicating the rejection order by the State and Central Governments, the detention order is not sustainable. Placing reliance on the decisions of this Court in **Kalia alias Alok Kumar Das –vrs.- District Magistrate, Dhenkanal & Two Ors**.: (2007) 38 OCR 386 and **Bijaya Parida –vrs.- State of Orissa and Ors**.:

2006 (II) OLR 591, it was contended that detention order is liable to be quashed and the petitioner is entitled to be set at liberty forthwith.

11. In reply, learned counsel for the State and learned Assistant Solicitor General, upon reference to counter affidavits, contended that time taken for disposal of the representations has been duly explained. There was no latches or delay in rejecting the petitioner's representations.

12. At paragraph 12 of the counter-affidavit filed by the detaining authority opposite party no.3 it has been averred that petitioner submitted representation on 23.10.2011 and the detaining authority after getting the parawise comments sent the representation along with the parawise comments on 1.11.2011. It is evident from the extracts of the counter-affidavits filed on behalf of the State Government and Central Government extracted above that petitioner's representations were sent by the detaining authority to both the Governments on 1.11.2011 only. The representation was received on 8.11.2011, rejected on 18.11.2011 and communicated to the petitioner on 21.11.2011 by the State Government. The representation sent to the Central Government was received on 14.11.2011, rejected on 16.11.2011 and communicated to the petitioner on 21.11.2011. Thus, there was an interval of more than 28 days between the date of submission of representation and date of communication of the rejection orders. There appears no explanation for delay of eight days between 23.10.2011 and 1.11.2011 for preparing parawise comments on the petitioner's representation by the detaining authority. It is further noted that though representation was received by the State Government on 8.11.2011, same was rejected on 18.11.2011 and communicated on 21.11.2011. There is no explanation as to why it took ten days for consideration of the representation and another three days for communication thereof. Likewise, though representation was rejected by the Central Government on 16.11.2011 it was communicated to the petitioner on 21.11.2011 and there is no explanation for delay of intervening five days.

13. In **Kalia alias Alok Kumar Das –vrs.- District Magistrate, Dhenkanal & Two Ors** (supra) it has been observed by this Court that Supreme Court has been repeatedly pointing out that even though no time limit is fixed in the matter of consideration of representation of the detenue, it is the Constitutional mandate under Article 22(5) read with Article 21 of the Constitution that the authorities must keep in mind that such representation must be considered with utmost diligence and promptitude. The Supreme Court has taken this view having regard to the preservation of personal liberty of a citizen specially when such liberty has been curtailed in view of

the order of preventive detention passed under the National Security Act. Courts have always zealously guarded the procedural safeguards which have been provided to see that liberty of a citizen is not curtailed except by complying with the statutory safeguards rigidly.

14. In **Kalia alias Alok Kumar Das –vrs.- District Magistrate, Dhenkanal & Two Ors** (supra) the detenu submitted his representation to the State Government on 21.12.2006 and the same was rejected and communicated by the State Government on 16.1.2007. The State Government took the stand that the petitioner's representation dated 21.12.2006 was transmitted by the detaining authority on 31.12.2006 to the State Government. It was held by this Court that ten days time taken for transmission and giving parawise comment was rather long. It was held that delay of 26 days on the part of the State Government in consideration of the petitioner's representation having not been satisfactorily explained, the order of detention was vitiated. In **Bijaya Parida –vrs.- State of Orissa and Ors.** (supra) the detenu made representation on 2.12.2005 and the same was rejected on 17.12.2005 i.e. about 15 days after submission of representation. It was held that delay of 15 days in disposal of the representation of the detenu having not been specifically explained by the State, order of detention was liable to be quashed.

15. In the present case also there has been unexplained delay of eight days from 23.10.2011 to 1.11.2011 for sending petitioner's representation by the detaining authority to the State Government and Central Government. Though representation was received by the State Government on 8.11.2011, same was rejected on 18.11.2011 and communicated to the petitioner on 21.11.2011. Therefore, there is no satisfactory explanation for delay of more than 26 days in disposal of petitioner's representation by the State Government. Therefore, we are constrained to hold that the detention order has been vitiated by delay in disposal of the representation.

16. In the result, the writ application is allowed. The order of detention dated 18.10.2011 under Annexure-6 passed by the District Magistrate, Sambalpur against the petitioner detaining Md. Raju @ Md. Azim is quashed. The petitioner be set at liberty forthwith if he is not required to be detained otherwise.

Writ petition allowed.

2012 (II) ILR- CUT- 95

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

JCRLA. NO. 84 OF 2003 (Dt. 09.05.2012)

LABA GOUDA ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

PENAL CODE, 1860 – (ACT NO. 45 OF 1860) – S.304, PART-II.

Conviction U/s.302 I.P.C. – Occurrence arose when deceased demanded Rs.10/- from the appellant in a very rude and offending tone – Appellant being provoked stabbed one arrow blow which he was holding then – Parties being tribal are prone to easy provocation when their self is eroded or self esteem is injured – Single injury on the upper part of the abdomen – The Act of the appellant comes under Exception 1 to Section 300 I.P.C. – The appellant having used a dangerous weapon like arrow in causing the injury to the deceased he may be having the necessary knowledge that he is likely by such act to cause death of the deceased – Held, the act of the appellant can be brought U/s.304 Part-II I.P.C. and not U/s.302 I.P.C. (Para 8,9)

For Appellant - Miss Sonita Biswal, Advocate.
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C.R. DASH, J. This appeal is directed against the judgment and order of sentence dated 25.07.2003 passed by learned Sessions Judge, Koraput-Jeypore in Criminal Trial No. 36 of 2002 convicting the appellant under Section 302, I.P.C. and sentencing him to suffer imprisonment for life and to pay fine of Rs.2,000/- (two thousand), in default, to suffer R.I. for one year more.

2. A compendium of the prosecution case is as follows :-

The occurrence happened at about 8.00 P.M. on 20.05.2002 in front of the house of accused-appellant Laba Gouda at village Purnabeda under Boipariguda P.S. in the district of Koraput. Lokanath Gouda (P.W.4), who happens to be the brother of deceased Ratna Gouduni, is the informant in this case. It is alleged in the F.I.R. that at about 8.00 P.M., the niece of the

informant Lokanath Gouda (P.W.4) came running to his (informant's) house and intimated that her mother has died. P.W.4 and his other brothers namely Laba Gouda (not examined) and Jagannath Gouda (not examined) rushed to the spot. They found one Sanadhar Barik to be present there. On seeing her brothers, deceased Ratna told that she had given Rs.10/- (ten) to the appellant Laba Gauda and when she demanded that money near the house of the appellant, the appellant became furious and pierced an arrow into her chest. They saw blood coming out of the wounds near the chest of the deceased. They brought her to the house. In the mid night the deceased Ratna succumbed to the injuries. On the next day investigation was taken up on the basis of the F.I.R. lodged by Lokanath Gouda (P.W.4). On completion of investigation, charge-sheet was filed implicating the appellant in offence punishable under Section 302, I.P.C.

3. Prosecution has examined nine witnesses to prove the charge. Admittedly, there is no eye-witness to the occurrence. P.W.1 is the Scribe of the F.I.R. vide Ext.1 lodged by P.W.4. P.W.3 is the witness to the seizure of the arrow (M.O.-I) from the house of the appellant. P.W.6 is a witness to the inquest on the dead body of the deceased. P.Ws.2, 4 and 7 are witnesses to the oral dying declaration by the deceased before them and extra judicial confession by the appellant before them. P.W.5 is the witness to a part of the occurrence. P.W.8 is the Medical Officer, who conducted autopsy on the dead body of the deceased and P.W.9 is the I.O.

Defence plea is one of complete denial, but none was examined by the defence.

4. Learned counsel for the appellant submits that the prosecution witnesses have been contradicted on the point of oral dying declaration and the extra judicial confession being a weak piece of evidence, conviction of the appellant under Section 302, I.P.C. is not sustainable in the eye of law. Alternatively, it is contended by learned counsel for the appellant that the occurrence arose when the deceased demanded Rs.10/- (ten) from the appellant in a very rude and offending tone, and the appellant being a tribal got provoked and stabbed her with an arrow he was holding then, causing single bleeding injury on her abdomen. Such an act of the appellant can at best be held culpable under Section 304, Part-II, I.P.C. and not under Section 302, I.P.C.

Learned Addl. Standing Counsel on the other hand supports the impugned judgment and order of sentence.

5. P.Ws. 2, 4 and 7 are the witnesses to the oral dying declaration by the deceased. P.W.2 has testified that Jagannath Goud, Laba Gouda and Trinath Goud called him from his house telling that Laba Chhota (appellant) has assaulted deceased Ratna Gouduni. All of them came to the house of Laba Gouda, where they saw Ratna lying with bleeding injury on her chest. She disclosed that Laba Chhota assaulted her by means of an arrow. They proceeded to the house of appellant Laba Chhota and on their interrogation, he (appellant) confessed that as deceased Ratna asked him to pay back her debt money of Rs.10/- and he denied to pay, Ratna abused him in filthy language and out of anger he assaulted her by means of an arrow. P.W.4 has testified that hearing from her niece about death of her sister, he ran to the spot and saw his sister Ratna lying in injured condition with bleeding injury on her left side chest. On being asked, she disclosed that appellant Laba Chhota assaulted her by means of an arrow causing the injury. She further stated that he committed this because she demanded her loan money of Rs.10/- from him. He along with others went to the house of the appellant and on being confronted, the appellant told that he has pierced the arrow on the chest of the deceased Ratna. P.W.7 has testified that he went to the spot on being called by Laba Gouda (brother of the deceased) and Ratna told him that Laba Chhota (appellant) assaulted her by means of an arrow causing that injury. Thereafter he along with four others went to the house of Laba Gouda and, on their interrogation, he confessed to have assaulted Ratna by means of an arrow from the bow.

6. P.W.4 is stated to have gone to the house of the appellant with Laichhan Naik (P.W.2), P.W.7 Sania Naik (named as Sania Member by P.W.4 in his evidence) and some others not examined. P.W.7 has named P.W.2 Laichhan Naik to have accompanied him, but he has not testified the name of P.W.4 Lokanath Gouda to have accompanied him to the house of the appellant Laba Chhota. P.W.2 has also not named P.W.4 to have proceeded to the house of the appellant where the appellant is asserted to have made extra judicial confession. P.Ws.7 and 2 have also not stated about presence of P.W.4 Lokanath Gouda near the deceased, when she made the dying declaration. There are some discrepancies in the evidence of P.Ws.2 and 7, but those are peripheral. In view of the evidence of P.Ws.2 and 7, P.W.4 cannot either be believed as a witness to the oral dying declaration made by the deceased or the extra judicial confession made by the appellant before P.Ws. 2, 7 and others. Had he been present at the time of oral dying declaration made by the deceased or the extra judicial confession made by the appellant, P.Ws.2 and 7, who are non-interested witnesses, could have testified about his presence, as they have done in the case of other witnesses who are present. P.W.2 has however been

contradicted under Section 145 of the Evidence Act, as found from his cross-examination and the cross-examination of the I.O. (P.W.9) on the point of his previous statement relating to oral dying declaration made by the deceased. P.W.4 has also been contradicted under Section 145 of the Evidence Act, as found from his cross-examination and the cross-examination of the I.O. (P.W.9) on the point that he along with others went to the house of accused Laba Chhota and interrogated him as to why he assaulted deceased Ratna by means of an arrow. We have already held that P.W.4 cannot be believed as a witness either to oral dying declaration of the deceased or extra judicial confession by the appellant and the aforesaid contradiction reinforces our findings. P.W.2 though has been contradicted on the point of oral dying declaration by the deceased, his evidence can be taken to have corroborated P.W.7 on the aspect of oral dying declaration of the deceased, in as much as there is nothing on record to disbelieve P.W.7 on that aspect. P.Ws.7 and 2 are however consistent so far as the extra judicial confession of the appellant before them is concerned. When P.Ws.2 and 7 have no axe to grind against the appellant, there is nothing to discredit their sworn testimony on the ground of some peripheral discrepancies here and there.

7. P.W.5 though was examined as a witness to a part of the occurrence relating to demand of Rs.10/- made by the deceased from the appellant, he has been thoroughly contradicted on this aspect, as found from his cross-examination and the cross-examination of the I.O. (P.W.9). We have already held that there is nothing to disbelieve P.W.7 on the point of extra judicial confession made by the appellant before P.Ws.7 and 2 and others and there is also nothing to disbelieve said P.W.7 on the point of oral dying declaration made by the deceased especially when he is corroborated by P.W.2 and other circumstances like injury on the person of the deceased and death of the deceased in the night of the occurrence itself. We are therefore of the view that there is no justification to interfere with the impugned order so far as the guilt of the appellant in causing death of the deceased is concerned.

8. Coming to the alternative plea of the appellant, we cannot loss sight of the fact that the parties are tribal people and they are prone to easy provocation, when their self is eroded or self esteem is injured. It is the contention of learned counsel for the defence that the occurrence happened when the deceased demanded Rs.10/- in a very rude and offending tone. P.W.2 in his evidence, in the examination-in-chief, has testified that when they interrogated the appellant, he confessed that as Ratna Gouduni asked him to pay back her debt money of Rs.10/- and he denied her to pay, Ratna abused him in filthy language, and out of anger he assaulted her by means

of an arrow. P.W.2 though has been contradicted under Section 145 of the Evidence Act on the point of oral dying declaration, has been believed so far as extra judicial confession by the appellant is concerned. Other witnesses like P.W.4 have also testified about demand of loan amount of Rs.10/- by the deceased. True it is that there is no exact text of the words used by the deceased in demanding the loan amount of Rs.10/- on record but from the evidence of P.W.2 it is found that the appellant got enraged by the conduct of the deceased when she started using filthy language against the appellant on refusal by him to pay back the amount. From the evidence of the Medical Officer (P.W.8), it is found that only one injury, i.e. a stab wound on the upper part of the abdomen below the sternol of size 1" long x 1 cm. broad was there on the dead body of the deceased and internally the left lobe of the liver was perforated through and through filling the abdominal cavity with clotted blood. The cause of death is opined to be sudden and excessive haemorrhage into the abdominal cavity as a result of injury to the liver. According to learned counsel for the appellant, the appellant has not used any bow to cause the injury. On being rebuked in filthy languages by the deceased, the appellant only stabbed her by an arrow, might be with the intention to stop her from abusing him further. It is further submitted by learned counsel for the appellant that if the petitioner had any intention to kill the deceased, he could have repeated the assault or could have chosen vital parts of the body. In several judicial pronouncements learned counsel for the appellant submits that the abdominal area is held to be not a vital part and the act of the appellant can at best be one under Section 304, Part-II, I.P.C. and not under Section 302, I.P.C.

9. As discussed supra, it is there on record to show that the deceased had rebuked or had used filthy language against the appellant just preceding the occurrence. There being no evidence regarding the loan taken by the appellant from the deceased, it cannot be said that refusal of the appellant to pay back the loan amount had otherwise provoked the deceased to pick up the quarrel. The appellant and the deceased being tribals and they being prone to be provoked easily, the act of the deceased using abusive words or filthy language against the appellant in front of his house may be taken to be grave and sudden provocation in the facts and circumstances of the case, especially in view of social strata to which the parties belong. The act of the appellant, therefore, will come under Exception – 1 to Section 300, I.P.C. The appellant having used a dangerous weapon like arrow in causing the injury to the deceased, he may be held to have the necessary knowledge that he is likely by such of his act to cause death of the deceased. The act of the appellant therefore can be brought under Section 304, Part-II, I.P.C.

10. In view of the above, the conviction of the appellant is modified to one under Section 304, Part-II, I.P.C. and he is sentenced to suffer rigorous imprisonment for seven years.

It is submitted at the Bar that the appellant is in custody since more than ten years. The appellant having already suffered the period of sentence awarded under Section 304, Part-II of the I.P.C., he be released from custody forthwith on calculation of his U.T.P. period, if his detention is not required in any other case. The appeal is accordingly allowed in part.

Appeal allowed in part.

2012 (II) ILR- CUT- 101

PRADIP KUMAR MOHANTY, J & INDRAJIT MAHANTY, J.

W.P.(C) NO. 9528 OF 2010 (Dt.12.03.2012)

SAPAN KUMAR BANERJEE ……Petitioner

.Vrs.

STATE OF ORISSA & ANR. ……Opp.Parties

SERVICE – Petitioner working as "Junior Clerk" in the office of the Collector, Cuttack – He was not allowed to work from 06.03.1974 to 01.09.1991 – O.A. filed – Division Bench of the Tribunal issue direction to allow the petitioner to join who shall be entitled to continuity of service and the period of absence be regularized as per leave rules but he shall not be entitled to salary and allowances for the period he did not work – Petitioner joined service but he was not given the service benefits – He filed 2nd O.A. – In second O.A direction issued to the Secretary Revenue Department to call for papers from R.D.C. and Collector and dispose of the case within three months - Instead of taking any action by the Secretary, the Collector took 8 months time to comply with the order in 2nd O.A. and passed office order Dt.18.12.2007 saying that the entire period granted leave will not be counted as qualifying service for pension and other service benefits – Petitioner challenged the same in 3rd O.A. – 3rd O.A. dismissed by the learned Member (Administration) – Hence the writ petition.

Judicial discipline demands that judgments of larger Benches are not only binding in Benches with lesser quorum but also must be implemented without commenting in any manner or frustrating the decision of the larger Bench – In this case the order passed in the Ist O.A. by a Division Bench of the Tribunal should have been followed by the Tribunal deciding 2nd & 3rd O.A. – Moreover the action of the then Secretary, Revenue clearly amounts to abdication of responsibility and non-compliance of the direction of the Tribunal – Held, Highly placed Government officials should ensure that an adequate care and caution are shown to comply with the directions of competent Courts of law in order to ensure that rule of law which is quaranted under the Constitution of India to every Citizen does not remain a mere illusion or distant dream.

Held, Judgment Dt.26.11.2009 passed by the learned Member (Administration), Orissa Administrative Tribunal, Cuttack Bench,

Cuttack in O.A. No.1249(c) of 2008 is quashed – The office order Dt.18.12.2007 passed by the Collector, Cuttack to the extend that "The aforesaid period will not count as qualifying service for pension and other service benefits" stands quashed and in its place it is held that the said period of absence shall count as qualifying service both for pension and other service benefits – This Court further directs that all service & financial benefits of the petitioner be duly computed in terms of the order passed in O.A. No.82 of 1986 as well as in O.A. No.1586 (c) of 2006. (Para 17 to 20)

Case laws Referred to:-

1.2007(3) SLR 371 : (Vijay Singh-V- Union of India)
2.2009(1)SCC(L&S)647 : (Lajpat Rai Mehta-V-Secretary, Government of Punjab, Irrigation & Power)

For Petitioner - In person.
For Opp.Parties - Addl. Standing Counsel.

I. MAHANTY, J. In this writ application, petitioner-Sapan Kumar Banerjee has sought to challenge the order dated 26.11.2009 passed in O.A. No.1249(C) of 2008 (Annexure-10), whereby, the learned Member (Administration), Orissa Administrative Tribunal, Cuttack Bench, Cuttack was pleased to dismiss his application, upholding the Office Order No.4738/Estt. dated 18.12.2007 (Annexure-9) on a finding that the same was in due compliance of the directions issued earlier by a Division Bench of the Orissa Administrative Tribunal in O.A. No.82 of 1986 vide judgment dated 02.09.1991 and other connected orders.

2. Shorn of unnecessary detail, it would suffice to note herein that the petitioner, while working as "Junior Clerk" in the Office of the Collector, Cuttack, tendered his resignation from service on 25.01.1977 and prior to any action being taken on the said resignation, he withdrew his resignation on 10.01.1978. The petitioner also submitted his joining report at Kanika Tahasil but was allegedly not allowed to join in spite of numerous representations to the Collector, Cuttack and on 05.02.1986, the Establishment Officer of Cuttack Collectorate directed the petitioner to produce his service book for consideration of his representation. The petitioner further alleged that in spite of production of the required documents, the petitioner was not allowed to join. Hence, the petitioner was compelled to file O.A. No.82 of 1986 before the Orissa Administrative Tribunal. The said O.A. came to be heard by a Division Bench of the

Administrative Tribunal consisting of the Chairman and Member (Judicial) and the said O.A. came to be disposed of by judgment dated 02.09.1991 with the following directions.

> "7. Shri K.M. Mishra, learned Government Advocate during course of hearing fairly conceded that in the facts and circumstances of the case, petitioner cannot be deemed to have ceased to be a Government servant and is entitled for reinstatement. However, Shri Mishra strenuously urged that on reinstatement he should not be allowed to claim back wages and salary for the period he remained absent and did not work. Shri R.K. Rath, learned counsel appearing for the petitioner fairly conceded that the petitioner would not claim for salary and allowances for the period he did not work, but he should be entitled to continuity in service and the period of absence should be regularized as per the Leave Rules.
>
> 8. On fair concession from both sides as stated above we direct that the petitioner be allowed to join in his post immediately. On joining the post though he shall be entitled to continuity in service and the period of absence be regularized as per the Leave Rules, he shall hot be entitled to salary and allowances for the period he did not work.
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> 9. In view of the petitioner's various representations which remained un-answered and the authorities for the reasons best known to them did not dispose of the same in time, the proceeding contemplated under the O.C.S. (CCA) Rules, 1962 for taking action against him as per Rule 72(2) of Orissa Service Code is redundant and the same is therefore quashed. In our opinion petitioner has faced sufficient harassment and non-payment of his salary for a long period should be treated as adequate punishment for the delinquency alleged to have been committed by him."

3. Pursuant to the aforesaid directions of the Tribunal, by order of the Collector, Cuttack dated 24.02.1992 under Annexure-3, the petitioner was directed to join as Junior Clerk in the office of the Tahasildar, Rajnagar and the petitioner continuously served as a Lower Division Clerk till the date of his retirement i.e. on 30.04.2005 without any promotion or any pay fixation/revision.

4. Although the petitioner rejoined the post of Junior Clerk vide direction dated 24.02.1992 under Annexure-3, he was not released his

salary, inter alia, on the purported ground that there had been bifurcation of Cuttack District and on the creation of Kendrapara District. Therefore, the petitioner was compelled to file M.P. No.431 of 1995 in the earlier disposed of O.A. No.82 of 1986. The said Misc. Petition came to be disposed of vide order dated 22.03.1995 by the learned Chairman of the Orissa Administrative Tribunal noting therein, the assurance given by the Senior Clerk in the Establishment Section of Cuttack Collectorate that within one month, the Collector, Kendrapara would make arrangement to pay the salary of the petitioner. In spite of such direction, the same was not complied with and the petitioner in O.A. No.82 of 1986 also filed another M.P. No.1857 of 1995, wherein, the learned Chairman of the Tribunal took note of the entire facts situation and came to hold that, while the petitioner was continuing at Rajnagar Tahasil, Cuttack district was divided and the petitioner was posted at Narsinghpur Tahasil.

5. In this background since the petitioner had been paid only the minimum in the scale of pay and did not receive the benefits of service during the controversial period for which he had approached the Tribunal for initiation of proceeding for contempt. Notice to show cause was issued. Since it was stated that steps were being taken to pay all the dues and on such assurance the proceeding was dropped. However, since the petitioner found that no steps had been taken and he is being harassed, he once again approached the Tribunal for initiation of a proceeding for contempt and once again notice to show cause was issued.

6. In reply to the aforesaid show cause, it was stated on behalf of the Collector, Cuttack that the petitioner's pay had not been fixed according to the pay scale because the options and other service particulars were not available and once again stated that no sooner the same are supplied by the petitioner, pay would be fixed. Keeping the aforesaid facts and circumstances, into consideration the Tribunal came to direct as follows:-

> "Pay is to be fixed by the appointing authority. If any particulars are necessary from the employee concerned the same can be called for specifically. When duty of fixing pay in the scale lies with the appointing authority, he cannot avoid the same awaiting the particulars and an employee should not be allowed to suffer on account of fixation of pay."

Considering the aforesaid statements, the Tribunal directed that the technicalities should not be adhered to by the Collector for the purpose of granting legitimate dues to an employee and keeping the matter pending on

some technical ground or other, would be of no assistance to the Collector and accordingly, the learned Chairman, Orissa Administrative Tribunal, directed that within six months of receipt of that order, the Collector shall fix the pay of the petitioner in the scale admissible and pay him the arrears on that basis. The Tribunal passed the aforesaid order keeping in view the grievance of the petitioner that his salary from the date of the decision in O.A. No.82 of 1986 i.e 02.09.1991 till the date of posting, had not been paid and further that the petitioner should be treated to be, on duty from the date of the decision in O.A. No.82 of 1986 i.e. on 02.09.1991 till the date of his reposting as Junior Clerk and the same shall be released to him.

7. In spite of the aforesaid directions both in O.A. as well as the Misc. Petition and Contempt Petitions as noted herein above, the petitioner did not get his relief and ultimately retired from service on 30.04.2005. Finding no other alternative, the petitioner filed a fresh application registered as O.A. No.1586(C) of 2006 (hereinafter referred to as the 2nd O.A) before the Orissa Administrative Tribunal. This matter was heard by the learned Vice-Chairman of the Tribunal and disposed of vide order dated 05.12.2006 with the following directions:

> " xxx xxx xxx
>
> But considering the long pending grievances of the applicant I think, this paper book would be sent to respondent No.5 i.e., Secretary to Government, Revenue Department, who would call for the papers from the R.D.C. and Collector i.e. respondents Nos.1 & 3 and all others who may be concerned in the matter, allow an opportunity of personal hearing to the applicant and pass appropriate orders for disposal of the pending representations of the applicant. Respondent No.5 also should keep in mind the observations of the Tribunal in the order dated 15.12.1995 disposing of M.P.1857/1995. In regard to the disciplinary proceedings where appeal is pending, suitable direction be issued for disposal of the appeal within a reasonable time frame. This entire exercise should be completed within a period of three months from the date of receipt of a copy of these orders. I also give liberty to the applicant to approach the Tribunal if he continues to remain aggrieved even after that.
>
> Disposed of with the above orders."

Instead of complying with the aforesaid directions of the Tribunal in the second OA. No.1586(C) of 2006, within the time stipulated, Misc. Petition No.156(C) of 2007 was filed by the Collector, Cuttack seeking eight

months time from 15.03.2007 to enable them to implement the order of the Tribunal. By order dated 21.08.2007, the Tribunal came to a conclusion that the persons who had not been complied with the order of the Tribunal are the Collector, Cuttack, Collector, Kendrapara, Tahasildar, Raj Kanika and Tahasildar, Rajnagar. While finding the said officers had failed to comply with the directions of the Tribunal, once again six months time was granted to pass final orders in compliance of its earlier directions.

8. By the Office Order dated 18.12.2007 (Annexure-9), the Collector, Cuttack passed the order to the following effect:

"OFFICE OF THE COLLECTOR: CUTTACK.
No.4738/Estt.,Dt.18.12.2007
OFFICE ORDER

In accordance with & taking into account the terms in the direction of the Hon'ble O.A.T. vide their order Dt.2.9.1991 passed in O.A. No.82/86, order Dt.5.12.06 in O.A. No.1586(C)/06 read with Govt. instruction communicated vide order No.10397/R&DM., Dt. 14.3.2007 of the Govt. in Revenue & D.M. Deptt. the period of absence from duty i.e. 17 years 6 months & 25 days with effect from 6.2.1974 to 1.9.1991 of Sri Sapan Kumar Banerjee, Ex-Jr. Clerk is hereby sanctioned as extraordinary leave being treated as without pay and allowances in his favour as per Orissa Leave Rules 1966. The aforesaid period will not count as qualifying service for pension and other service benefits.

Sd/-
COLLECTOR: CUTTACK"

9. The aforesaid Office Order claiming to be complying with the directions dated 02.091991 passed in O.A. No.82 of 1986 as well as O.A. No.1586(C) of 2006 was the subject matter of a fresh challenge in O.A. No.1249(C) of 2008 (hereinafter referred to as the 3rd O.A.). This O.A was filed by the petitioner claiming therein that the Office Order dated 18.12.2007 of the Collector, Cuttack was not in compliance of the directions of the Tribunal passed earlier. But the contention of the petitioner did not find favour of the learned Member (Administration) of the Orissa Administrative Tribunal and this O.A. came to be rejected vide judgment dated 26.11.2009. The dismissal of this O.A. is the subject matter of challenge before us in the present proceeding.

10. Mr. Sapan Kumar Banerjee (the petitioner in person) addressed us on various factual issues noted hereinabove and submitted that the Office

Order dated 18.12.2007 under Annexure-9 was a mere sham compliance and was passed merely to show token compliance of the earlier directions of the Tribunal in O.A. No.82 of 1986 as well as in O.A. No.1586(C) of 2006. It was further submitted by him that the earlier directions of the Tribunal were clear and categorical and, in fact, till date the same remain to be complied with.

The Division Bench of the Administrative Tribunal had taken note of the concessions offered by both the petitioner as well as the opposite parties (State) on the basis of which the petitioner had given up his claim for salary and allowances for the period he did not work and as a consequence of such a concession, the Tribunal directed that the petitioner to be allowed to join in his post immediately and further directed that he shall be entitled to continuity of service and the period of absence be regularized as per the Leave Rules, though he shall not be entitled to the salary and allowances for the period he did not work.

Mr. Banerjee further submits that by the impugned Office Order dated 18.12.2007 (Annexure-9), the Collector, Cuttack had sanctioned the period of petitioner's absence from duty i.e. from 06.02.1974 to 01.09.1991 as extraordinary leave without pay and allowances and while doing so further came to hold that the said period "will not count as qualifying service for pension and other service benefits".

Mr. Banerjee submits that the submission/concession made on his behalf by his counsel before the Tribunal was that he would not claim for the salary for the period for which he was not allowed to work, but, his main submission was that, the further directions of the Tribunal that, the petitioner would be entitled to continuity in service and the period of absence be regularized as per the leave rules has been disregarded and not complied with till date, as a consequence of which the petitioner never received any annual increment from the date of appointment, never granted any promotion (appointed as Lower Division Clerk and retired on the same post), no fixation of pay scale has been done till date, no revised pay scale has been extended to the petitioner, no salary has been released from 02.09.1991 (Date of judgment in O.A. No.82 of 1986) till the date of his joining i.e. 03.03.1992, no gratuity and other pensionary benefits have yet been released in favour of the petitioner. Hence, he prays that all his financial benefits as well as pensionary benefits may be released in his favour along with the interest thereon.

11. Mr. Rath, learned Additional Standing Counsel on behalf of the State submits that the petitioner should have no grievance against the impugned

Office Order dated 18.12.2007 under Annexure-9, since the same has been passed in due compliance of the directions issued by the Tribunal both in O.A. No.82 of 1986 as well as in O.A. No.1586(C) of 2006. He further submits that the period of his absence from duty has been sanctioned as extraordinary leave by the said impugned order but the said period has been correctly directed not to count as qualifying service for pension and other service benefits since the principle of 'No work no pay' would apply to the case of the petitioner. In other words, Mr. Rath submits that the petitioner cannot claim pensionary benefits for the period he did not work since the same would tantamount to granting the petitioner financial benefits, even for a period during which he did not work for the State.

12. In the light of the circumstance as noted hereinabove, the only question that arises for our consideration in the present petition, is as to whether the office order dated 18.12.2007 under Annexure-9 is in due compliance of the direction issued by the Tribunal or not. In this regard it become necessary at the outset to first of all keep in view the direction issued by the Tribunal in O.A. No.82 of 1986 as noted in Para-2 hereinabove. In the said judgment, a Division Bench headed by the learned Chairman of the Orissa Administrative Tribunal, directed reinstatement of the petitioner without making any claims for the period he did not work but directed that he shall be entitled to continuity of service and the period of absence be regularized as per the Leave Rules. In this respect, the impugned office order has been passed under the Orissa Leave Rules, 1966 and Rule 13 thereof is extracted hereinbelow for necessary reference:

> "13. (1) Extraordinary leave may be granted to any Government servant in special circumstances-
>
> (i) When no other leave is by rule admissible; or
> (ii) When other leave is admissible, but the Government servant concerned applies in writing for the grant of extraordinary leave.
>
> (2) Except in the case of permanent Government servant and a Government servant who has rendered not less than 3 years continuous service, the duration of extraordinary leave on any one occasion shall not exceed the following limits, namely :-
>
> (i) two months;
>
> (ii) four months in special cases, where such leave is supported by a medical certificate as required under the rules;

(iii) eighteen months where the Government servant is undergoing treatment for-

(a) pulmonary tuberculosis either in a recognized sanatorium or at his residence under a tuberculosis specialist recognized as such by the State Administrative Medical Officer concerned; or

(b) tuberculosis of any other part of the body by a qualified tuberculosis specialist or a (Chief District Medical Officer) or

(c) leprosy, in a recognized leprosy institution, or by a (Chief District Medical Officer) or a specialist in leprosy recognized as such by the State Administrative Medical Officer concerned:

Provided that the concession of extraordinary leave up to eighteen months under clause (iii) of this sub-rule shall be admissible only to those Government servants who have been in continuous Government service for a period exceeding one year :

Provided further that in the case of treatment of pulmonary tuberculosis at the residence, the Government servant shall produce a certificate from a specialist to the effect that he is under his treatment and that he has reasonable chances of recovery on the expiry to the leave recommended.

(Notification No.5959-Codes-183/70F., dated the 17th February, 1971)

(3) Subject to the provision of rule 14, a Government servant not in permanent employ may be granted during deputation on training extraordinary leave from the date of his relief till the date of resumption of duties on return from training provided that he has completed a minimum period of one year continuous service on the date of deputation and the authority competent to grant the leave is satisfied that such training is necessary for improving the government servant's professional knowledge.

(4) Where a Government servant who is not in permanent employ fails to resume duty on the expiry of the maximum period of extraordinary leave granted to him or where such Government servant who is granted a lesser amount of extraordinary leave that the maximum amount admissible remains absent from duty for any period which together with the extraordinary leave granted exceeds the limit up to which he could have been granted such leave under

these rules, he shall, unless the State Government in view of the exceptional circumstances of the case otherwise determine, be removed from service after following the procedure laid down in Orissa Civil Services (Classification, Control and Appeal Rules, 1962.)

(Notification No.44206-C.S. 11-26-73 F., Dt. 1st October, 1973)"

On a reading of the aforesaid rule as noted hereinabove, as well as the directions of the Tribunal in O.A. No.82 of 1986, there cannot be any doubt that, the petitioner is entitled to claim for continuity in service and the period of absence was required to be regularized as per the Leave Rules. Hence, it is clear that the said direction of the Orissa Administrative Tribunal has not yet been carried out. Therefore, we are of the considered view that the submissions made by the petitioner in this regard are well based. In the impugned office order dated 18.12.2007 while sanctioning the extraordinary leave for the period of petitioner's absence from duty, while, no objection can be raised to the same, yet, the further direction contained therein, holding that the said period of absence would not count as qualifying service for pension and other service benefits, clearly stand, vitiated in view of the direction of the tribunal as noted herein above.

13. Apart from the above, we are also constrained to take note of the manner in which the directions passed by a Division Bench of the Orissa Administrative Tribunal headed by the learned Chairman has come to be treated in the impugned order under Annexure-10. The learned Member (Admn.) of the Orissa Administrative Tribunal, rejected the petitioner's O.A., effectively negating the directions issued by a Division Bench of the Tribunal passed earlier in O.A. No.82 of 1986 and in O.A. No.1586(C) of 2006. We are constrained to note that the judicial propriety demanded that the learned Member (Admn.) act in due consonance with the earlier directions of the Division Bench of the Tribunal. Judicial discipline demands that judgments of larger Benches are not only binding on Benches with lesser quorum but also must be implemented without in any manner commenting or frustrating the decision of the larger Bench.

14. We are also of the considered view that the reference made by the learned Member, Orissa Administrative Tribunal in the impugned Judgment under Annexure-10, to the judgments of the Hon'ble Supreme Court in the case ***of Vijay Singh vs. Union of India,*** 2007(3) SLR 371 as well as in the

case of ***Lajpat Rai Mehta vs. Secretary, Government of Punjab, Irrigation and Power,*** 2009(1) SCC (L & S) 647, are of no application to the facts of the present case, since the principle of 'No work no pay' had already been adopted by the Tribunal in its judgment dated 02.09.1991 passed in O.A. No.82 of 1986. The Tribunal had recorded the concession offered by the petitioner not to claim for payment for the period he did not work. The Tribunal had directed not only reinstatement of the petitioner but also declared the entitlement of "continuity in service" and the said direction has been clearly frustrated by passing the impugned Office Order dated 18.12.2007 under Annexure-9.

15. Apart from the reasons as noted hereinabove, we are also constrained to note herein that while directions had been issued in O.A. No.1586(C) of 2006 dated 5.12.2006, the Secretary to the Government in the Revenue Department had been issued with various directions including to call for the papers from the R.D.C, Collector and from all other persons who should be concerned in the matter and also to allow an opportunity of hearing to the petitioner and had been further directed to pass final orders disposing the pending representation of the petitioner. In course of hearing, the learned counsel for the State was asked to point out as to whether this direction had been complied with and as to whether the Revenue Secretary had passed any order in compliance of the aforesaid direction.

16. Mr. Rath, learned counsel for the State produced before this Court the file containing all correspondences including the original service book. The letter dated 14.3.2007 purportedly issued by the Commissioner-cum-Secretary, the Department of Revenue and Disaster Management is extracted herein below.

"Government of Orissa
Revenue and Disaster Management Department
....
ORDER
Dated. Bhubaneswar, the 14.3.07

NO.NGE(C)III-E(Lit)28/2006 10397/R & D.M. In pursuant to order No.5 dtd.5.12.2006 of Hon'ble O.A.T., Cuttack in O.A. Case No.1586(C)/2006 between Sri Sapan Kumar Banarjee-Vrs-Collector, Cuttack and Other, the Commissioner-cum-Secretary, Revenue and D.M. Deptt. (Respondent No.5) after careful consideration of the representation of the petitioner Sri Sapan Kumar Banerjee as well as

the averment made in the O.A. Case , has been pleased to pass the following order.

(1) R.D.C. (Central Division), Cuttack (Respondent No.3) should take immediately steps to finalise the personal claims of Sri Banerjee within 15 days.

2. Collector, Cuttack (Respondent No.1) should take immediate steps to finalise the following personal claims of Sri Banerjee within the above stipulated period.

(a) Revision of his pay.

(b) Payment of his arrear salary from 2.9.1991 to 3.3.1993 and 36 days salary during service under Athagarh Tahasil alongwith house rent.

(c) Payment of his pending R.C.M. claims, the Collector should also take steps to fix up of his final pension and send the pension paper to A.G. Orissa after finalization of disciplinary proceeding immediately. Action taken in the matter shall be intimated to Govt. and Hon'ble O.A.T. immediately.

By order of Commissioner-cum-Secretary

S.K. Mishra,

Under Secretary to Government"

17. On a plain reading of the aforesaid order, it is clear that the Secretary Revenue Department has not acted in terms of the directions of the Tribunal passed in O.A. No.1586(C) of 2006. In terms of the said directions, it was incumbent upon the Secretary to call for the records, give an opportunity of hearing to the petitioner and then dispose of the representation. From the aforesaid order, it is clear that the Secretary has not called for any record but has merely directed the R.D.C., Central Division, Cuttack to take steps to dispose of the appeal of the petitioner and further directed the Collector, Cuttack to take immediate steps to finalise the personal claims of the petitioner within the stipulated time.

18. This act on the part of the then Secretary, Revenue Department clearly amounts to abdication of responsibility and/or non-compliance of the

direction of the Tribunal. Clearly it was expected that the Secretary Revenue would find the necessary time to call for the record from all concerned and also to afford an opportunity of hearing to the petitioner. It appears from the aforesaid order that none of the steps were undertaken by the Revenue Secretary. We are also constrained to take note of the aforesaid fact to highlight the plight of a common litigant who having succeeded before the Tribunal in the year 1991 continued in the same post without any promotion or revision of salary, right up to his retirement in the year 2005. We are really concerned that highly placed Government Officials should ensure that an adequate care and caution are shown to comply with the directions of competent Courts of Law in order to ensure that rule of law which is guaranteed under the Constitution of India to every citizen does not remain a mere illusion or distant dream.

19. Therefore, we are left with no other alternative other than to direct quashing of the judgment dated 26.11.2009 passed by the learned Member (Administration), Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No.1249(C). The Office Order dated 18.12.2007 passed by the Collector, Cuttack under Annexure-9 to the extent that "The aforesaid period will not count as qualifying service for pension and other service benefits" stands quashed and in its place it is held that the said period of absence shall count as qualifying service both for pension and other service benefits.

20. We further direct that all service & financial benefits of the petitioner shall be duly computed in terms of the order passed in O.A. No.82 of 1986 as well as in O.A. No.1586(C) of 2006 and the Collector shall take all necessary steps ensuring (payment to the followings):

(i) Fixation of pay scale,
(ii) Revised pay scale,
(iii) Annual increment,
(iv) Promotional benefits,
(v) Salary for the period from 02.09.1991 to 03.03.1992,
(vi) Gratuity and;
(vii) All other financial & pensionary benefits

in favour of the petitioner positively within a period of three months from today.

21. The Writ petition is accordingly allowed.

Writ petition allowed.

2012 (II) ILR- CUT- 114

M. M. DAS, J.

F.A.O. NO. 251 OF 2011 (Dt.04.01.2012)

SOUBHAGYA BEHERA .....Appellant

.Vrs.

MAMI BEHERA & ANR. .....Respondents

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

Suit filed by respondent No.1- Plaintiff for a declaration that She is the legally married wife of the appellant-defendant No.1 – She filed an application Under Order 39, Rule 1 & 2 C.P.C. to restrain the appellant-defendant No.1 from getting married to the proforma-respondent No.2 during pendency of the suit – Order impugned in this appeal.

In this case, even if the appellant-defendant No.1 gets married during the pendency of the suit either to the defendant No.2 or to any body else, such marriage would be a void marriage under law so no irreparable injury will be caused to the plaintiff if the order of interim injunction is not passed – In the other hand the appellant-defendant No.1 is aged about 26 years and if he is injuncted from getting married and in the event the suit of the plaintiff is dismissed, there is every possibility that the defendant No.1 would have crossed marriageable age so irreparable injury will be caused to the appellant-defendant No.1 if an order of injunction is passed – Held, the impugned order restraining the appellant from getting married to the proforma-respondent No.2 during the pendency of the suit is set aside.

(Para 5,6,7)

Case laws Referred to:-

1.81(1996) CLT 329 : (Biswajaya Dagara-V-Suman Lath & Ors.)
2.AIR 1980 Rajasthan 249 : (Smt. Parwati Devi-V- Harbindra Singh).

For Appellant - M/s. S.P.Mishra, Sr. Advocate,
S.Nanda, B.Mohanty, B.S.Panigrahi,
A.K.Dash & S.K.Mohanty.

For Respondent - None.

M.M. DAS, J. This appeal has been filed against an interim order dated 04.05.2011 passed in I.A. No.47 of 2011 by the learned Civil Judge (Senior Division), Angul arising out of Civil Suit No.115 of 2011, which was filed by the respondent No.1. In the aforesaid suit, the respondent No.1 filed the interim application for injunction under Order – XXXIX, Rules – 1 & 2 C.P.C. with a prayer to restrain the appellant, who is the defendant No.1 in the court below from getting married to the proforma-respondent No.2 during pendency of the suit, on the allegation that the marriage is going to take place on 05.05.2011. The suit was filed by the respondent No.1 for a decree, declaring that the respondent No.1-plaintiff is the legally married wife of defendant No.1 (appellant) and for a decree of permanent injunction against the defendants from getting married to each other during existence of the marriage of the defendant No.1 (appellant) with the plaintiff-respondent No.1. A further prayer was made for a decree of damages of Rs.20,00,000/-. In the impugned order, the learned court below taking cognizance of the fact that a criminal case has been initiated by the plaintiff and referring to the decision in the case of ***Biswajaya Dagara v. Suman Lath and others***, 81 (1996) CLT 329, passed the following order :-

> "Perused the materials available in the record including the certified copy of the F.I.R. indicated as above. In the decision reported in 81 (1996) C.L.T. at page 329 it has been held at para-4 therein that if a proper case is made out therefore, court can issue temporary injunction in the interest of justice in exercise of its inherent power. Since the suit is filed for declaration to the effect that the petitioner is the legally married wife of the O.P. No.1, it would not be proper on the part of the court at this stage to find out the truth in the matter. The O.Ps. have candidly admitted that their marriage is going to take place on 5.5.2011. Taking into consideration the pros and cons of the matter and the sensitivities involved I feel that the court should, in the interest of justice, invoke the inherent power and direct the parties, in the present circumstances, to maintain status quo ante till disposal of the suit. Hence ordered.
>
> ORDER
>
> Both the parties are directed to maintain status quo ante in so far as the status of their marriage is concerned as it prevails today till disposal of the suit. The I.A. is disposed of accordingly on contest against the O.Ps, but in the circumstances without any cost. Lawyer's fee at contested scale".

2. However, for passing the above order, the learned court below assigned reason that, if the opposite parties (defendants) are allowed to marry, the petitioner (plaintiff), being the legally married wife, would be compelled to seek for divorce against her will for which, she would suffer irreparable loss and the balance of convenience is in her favour.

3. It appears that the learned court below before adjudicating the question raised by the plaintiff with regard to her legal status as wife of defendant No.1, has presumed that she is the legally married wife and referring to a criminal case initiated by her, has erroneously held that a prima facie case exists.

4. Mr. S.P. Mishra, learned senior counsel appearing for the appellant submits that an interim order of the nature as has been passed in the impugned order is unknown to law, as a person cannot be restrained from getting married. No doubt, if ultimately it is held to be a second marriage during subsistence of the first marriage, such marriage would automatically be a void marriage as per the provisions of the Hindu Marriage Act, 1955 and the husband will also be liable to be prosecuted criminally. He further submits that if such an injunction order is allowed to stand, but ultimately, the suit is dismissed, the appellant-defendant No.1, by the time, the suit is disposed of, would have crossed the age of marriage and, therefore, according to Mr. Mishra, irreparable injury will be caused to the appellant, if the order is allowed to stand and the learned court below is incorrect in holding that the appellant-defendant will suffer irreparable loss, unless the injunction order is passed. He refers to the decision in the case of ***Smt. Parwati Devi v. Harbindra Singh*** A.I.R. 1980 Rajasthan 249,where the Rajasthan High Court dealing with an order passed under Order – XXXIX, Rule – 1 C.P.C. in a proceeding under Section 9 of the Hindu Marriage Act categorically held that during pendency of the suit filed by the husband for restitution of conjugal rights on the application of the husband, the court could not pass any interim injunction restraining the wife from marrying with another person as there is no such provision in the Act.

5. The analogy of such a suit under Section 9 or any other matrimonial dispute can be drawn to the present suit, though it is framed in the nature of a declaratory suit. This Court also finds that if, ultimately, the suit is decreed, even if, the appellant-defendant No.1 gets married during the pendency of the suit either to the defendant No.2 or to anyone else, such marriage would automatically be a void marriage under law, and, therefore, no irreparable injury will be caused to the plaintiff, if the order of interim injunction is not passed. This Court, therefore, finds that in the above premises, the three

ingredients/conditions, which are to be satisfied for obtaining an order of interim injunction under Order XXXIX, Rules 1 & 2 C.P.C. i.e., existence of a prima facie case, balance of convenience in favour of the applicant and irreparable injury would be caused to the applicant, if the injunction order is withheld, have not been satisfied in the aforesaid case.

6. Moreover, judicial notice can be taken of the fact that ordinarily a Civil Suit consumes a lot of time to be finally disposed of, there being various occasions of off-shoots arising during the pendency of the Civil Suit, which can be carried to the higher forums and there may be orders passed stalling the trial of the Civil Suit. In the instant case, the appellant – defendant no.1, who is stated to be about 26 years of age, if injuncted from getting married to the defendant no.2 or for that matter getting married to any body else, in the event, the suit of the plaintiff is dismissed, by the time the suit is finally dismissed, there is every possibility that the defendant no.1 would have crossed marriageable age. Hence, irreparable injury in the instant case will be caused to the appellant-defendant no.1, if an order of injunction is passed.

7. Therefore, the impugned order restraining the appellant from getting married to the proforma-respondent No.2 (defendant No.2) during the pendency of the suit could not have been passed by the learned court below. The impugned order dated 04.05.2011 is, therefore, set aside. Accordingly, the appeal is allowed.

Appeal allowed.

2012 (II) ILR- CUT- 118

M. M. DAS, J.

CRLMC. NO. 4118 OF 2011 (Dt.04.01.2012)

ASISH KUMAR NAYAK & ANR. ……Petitioners.

.Vrs.

STATE OF ORISSA ……Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.319.

Court exercising discretion U/s. 319 Cr.P.C. is required to consider whether the evidence adduced would be sufficient to convict the person being summoned to face trial – Mere suspicion of the involvement of the person in the offence is not enough, particularly when a large number of witnesses examined and no evidence on which conviction can be secured has been adduced on behalf of the prosecution.

In the present case the trial Court in spite of material contradictions in the statements of P.W.s.1 & 7 in the Court and the statements recorded U/s. 161 Cr.P.C. during investigation, could not have come to the conclusion that there is every chance of conviction against the petitioners, who have not been arrayed as accused in the charge sheet – Held, judicial discretion U/s.319 Cr.P.C. has not been properly exercised by the trial Court while passing the impugned order which is liable to be set aside. (Para 5,6,7)

Case laws Referred to:-

1.2000(3) SCC 262 : (Michael Machado-V- Central Bureau of Investigation)
2.(2011)48 OCR 677 : (Durga Naik@ Daroga Naik & Anr.-V-State of Orissa)
3.(2009)42 OCR(SC)453 : (Brindaban Das-V-State of West Bengal)

For Petitioners - M/s.P.K.Singh & D.Mohanty.
For Opp.Party - Mr. R.P.Mohapatra,
Addl. Govt. Advocate.

M.M. DAS, J. Order dated 29.10.2011 passed by the learned Ad hoc Additional Sessions Judge, FTC-IV, Cuttack in S.T . No. 212 of 2011

has been impugned in this application filed under section 482 Cr.P.C. By the said order, the learned Ad hoc Additional sessions Judge exercising power under section 319 Cr.P.C. allowed the prayer of the prosecution by directing issuance of process to the petitioners and further directing to bring the petitioners on record as accused persons to face the trial. Thus ordering, the learned court below issued bailable warrant against the petitioners calling upon them to be present in court and face the charge on 21.11.2011.

2. Mr. P.K. Singh, learned counsel for the petitioners submits that though initially the F.I.R. lodged by the informant- Nihar Ranjan Nayak (P.W.3) was registered as Salipur P.S. Case No. 361 of 2008 against seven persons including the petitioners, for alleged commission of offence under sections 147/ 148/307/294/452/323/325/354/379/427 I.P.C., but after investigation, which was supervised by the superior police officer, the Investigating Officer finding no cogent materials against the petitioners submitted charge-sheet against four accused persons. Thereupon, the learned J.M.F.C., Salipur took cognizance of the offences against the said charge sheeted accused persons and committed the accused persons to the court of the learned Sessions Judge, Cuttack which has been ultimately transferred to the court of the learned Ad hoc Additional Sessions Judge, FTC-IV, Cuttack for trial. During the course of trial, after examination of some of the witnesses, a petition was filed by the prosecution through the Additional Public Prosecutor making a prayer to issue process against the petitioners invoking jurisdiction of the court under section 319 Cr.P.C. The learned Ad hoc Additional Sessions Judge, contrary to the settled position of law, on the basis of presumption, has passed the impugned order issuing process against the petitioners adding them as accused persons and calling upon them to face the trial. Mr. Singh also relies upon various decisions of the Supreme Court as well as this Court with regard to the scope and ambit of exercising power under section 319 Cr.P.C. and refers to the evidence of P.Ws 1 and 7 on whose statements, the learned trial court has placed reliance for directing issuance of process to the petitioners.

3. It is felt necessary to quote the portion of the impugned order where the learned trial court has assigned the basis for exercising jurisdiction under section 319 Cr.P.C., which is as follows:

> "Having regard to the definition explained in the aforesaid two decisions coupled with the decision relied upon by the learned counsel for the defence in the aforesaid light when the case in hand is examined it reveals that P.W. 1, the informant so also the injured in the incident in his evidence on oath at para-3 has stated Asis

along with the other accused persons threatened to kill challenging as to why he reported the incident to the police. In his evidence on oath P.W. 7, another injured being the son of the informant at para-3 of his examination-in-chief stated that Asis was armed with sword and Mukesh along with others was holding lathi and forced entry inside the house along with others, pushed and pulled his father and assaulted him. Both these witnesses in course of their cross-examination asserted to have disclosed the aforesaid fact during their earlier examination made by the police as recorded under section 161 Cr.P.C. Since the FIR and the substantive evidence brought in the case as discussed above indicates the distinct overt act shown by the said Asis and Mukesh and the incident evidenced to have occurred in furtherance of common intention there is every chance of the case to end in a conviction against the said Asis and Mukesh who have not been arrayed by the police at the time of submission of final form. Having gone through the decision cited by the learned defence counsel I find the fact narrated therein goes completely different then the one in present. In all those cases either there is no evidence that would ultimately result in conviction of the persons sought to be arrayed or the allegations brought are omnibus in nature. The said decisions, barring the principles have no application in the present case and hence, the defence cannot take any advantage therefrom. Considering the fact and circumstances in the case as discussed above, I find it expedient to invoke the jurisdiction of the Court U/s. 319 Cr.P.C. and while allowing the prayer of the prosecution direct the process to be issued against the persons, namely, Asis Kumar Nayak & Mukesh Ranjan Nayak to be brought on record being arrayed as accused persons to face the trial. Issue B.W. against the said persons calling upon their presence in the Court to face the charge on 21.11.2011. Put the case on the date fixed as above."

4. In the oft quoted decision of the Supreme Court, where the essential conditions for the exercise of power under section 319 Cr.P.C. has been considered, i.e., in the case of ***Michael Machado v. Central Bureau of Investigation,*** 2000 (3) SCC 262, the Supreme Court held that the power under section 319 Cr.P.C. vested in the Court should be used sparingly and the evidence on which the same is to be invoked should indicate a reasonable prospect of conviction of persons to be summoned. The Supreme Court went to hold that mere suspicion of the involvement of the person concerned in the offence is not enough, particularly, when, a large number of witnesses have been examined and no evidence on which

conviction can be secured has been adduced on behalf of the prosecution. It was ultimately observed that in such a case, there could be no justification for proceeding against the persons summoned under section 319 Cr.P.C. which would entail recommencing the whole proceeding against the newly added persons and re-examining the witnesses already examined.

5. In a series of decisions of the Supreme Court, the scope of exercising power under section 319 Cr.P.C. has been dealt with which have been referred to by the judgment of this Court in the case of ***Durga Naik @ Daroga Naik and another v. State of Orissa*** (2011) 48 OCR 677, where this Court, applying the law as laid down in the decisions rendered by the Supreme Court and emphasizing on the ratio of the decision in the case of Michale Machada (supra), that the court must have reasonable satisfaction from the evidence already collected regarding two aspects, i.e., the other persons could as well be tried along with already arrayed accused persons, but what is conferred on the court under section 319 Cr.P.C. is only a discretion as could be discerned from the words "the court may proceed against such persons". The discretionary power so conferred should be exercised only to achieve criminal justice. Further, it is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. It would be profitable to add that in the case of Michael Machado (supra), the Supreme Court also laid down that while exercising power under section 319 Cr.P.C., a judicial exercise is called for keeping a conspectus of the case including the stage at which the trial has proceeded already and the quantum of evidence collected till then and also the amount of time which the court had spent for collecting such evidence. In the case of ***Brindaban Das v. State of West Bengal*** (2009) 42 OCR (SC) 453, while relying upon the earlier decisions, the Supreme Court laid down that the court is required to consider whether the evidence adduced would be sufficient to convict the person being summoned to face trial. It was further held that such power cannot be invoked as a matter of course but only to meet the ends of justice.

6. Keeping the law as laid down by the apex Court as well as by this Court in view, on perusing the entire evidence of the witnesses on the basis of which, the learned trial court has exercised jurisdiction under section 319 Cr.P.C. and issued process against the petitioners, this Court finds that the learned trial court in spite of contradictions in the statements of the witnesses, i.e., P.Ws 1 and 7 and the material contradictions between the statements of those witnesses given in court and the statements recorded under section 161 Cr.P.C. during investigation, could not have come to the conclusion that there is every chance of the case to end in a conviction

against the petitioners, who have not been arrayed as accused in the charge sheet. This Court, therefore, finds that the judicial discretion under section 319 Cr.P.C. has been improperly exercised by the learned trial court by passing the impugned order.

7. The impugned order dated 29.10.2011 issuing process against the petitioners and directing them to appear before the learned trial court and face the trial is accordingly set aside and the said sessions trial shall not proceed against the petitioners. However, the said trial shall continue against the other accused persons who were charge-sheeted.

8. The CRLMC is accordingly allowed.

Application allowed.

2012 (II) ILR- CUT- 123

INDRAJIT MAHANTY, J.

CRLMC. NO. 169 OF 2011 (Dt.03.03.2012)

KHAGESWAR SUNANI & ANR. ……..Petitioners.

.Vrs.

STATE OF ORISSA …….Opp.Party.

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

Quashing of cognizance – Offence U/s.498-A, 306 & 34 I.P.C. – Doctor conducted Post Mortem, reserved his opinion till receipt of the viscera report – I.O. without awaiting such report submitted charge sheet – Learned Magistrate without verifying police papers took cognizance for the above offences – Subsequently viscera report received showing the cause of death was due to Acute Myocardial Infraction (Heart attack) – In view of such report offence U/s.306 I.P.C. not sustainable – Moreover since the deceased had eloped with the son of the petitioners out of love more than four years prior to her death and admitted in the hospital due to her heart ailment there was no basis for offence U/s.498-A I.P.C. – Held, order taking cognizance U/s.498-A, 306 & 34 I.P.C. is quashed – Directions issued to the learned Magistrates to scrutinize police papers thoroughly while taking cognizance and to ensure that the I.O. has acted under relevant provisions of law and to see that committal proceedings are not delayed unnecessarily. (Para 12,14)

For Petitioners - M/s. J.N.Panda & J.B.Sahu.
For Opp.Party - Mr. D.Panda, Addl. Govt. Advocate.

I. MAHANTY, J. The petitioners, namely, Khageswar Sunani and his wife Smt. Subasini Sunani (parents of one Lingaraj Sunani) have filed the petition under Section 482 Cr.P.C. with a prayer to quash the order dated 08.09.2010 passed by the learned S.D.J.M., Talcher in G.R. Case No.527 of 2007 arising out of Colliery P.S. Case No.152 of 2007 taking cognizance of the offences under Sections 498-A/306/34 I.P.C. and issue of process against them along with other accused persons.

2. Shorn of unnecessary detail the relevant facts of the present case is that one Suresh Chandra Pradhan (informant) lodged a written report on

22.7.2007 claiming therein that his daughter Sujata had died an unnatural death, on the basis of which Collieary P.S. Case No. 152 of 2007 was registered against the petitioners and others initially under Sections 364-A/302/34 I.P.C. The body of the deceased-Sujata was lying in the hospital and hence, the same was sent for post-mortem.

The doctor who conducted post-mortem on 23.7.2007 reserved his opinion as to the cause of death till receipt of the chemical examination report of the viscera which had been sent to the State Forensic Science Laboratory, Bhubaneswar.

It appears in the present case that the Investigating Officer examined various witnesses but without awaiting/collecting the viscera report and the opinion of the doctor who conducted post-mortem regarding the possible cause of death of deceased-Sujata, submitted Charge-sheet bearing No.166 on 10.8.2010 against the petitioners and others under Sections 498-A/306/34 I.P.C.

3. In the light of the circumstances noted hereinabove, the petitioners sought to assail the order of cognizance passed by the learned S.D.J.M., Talcher and issue of process before this Court under Section 482 Cr.P.C. In course of the present proceeding, this Court by order dated 14.3.2011 directed the learned counsel for the State to obtain copy of the case diary as well as the viscera report. Pursuant to the aforesaid direction, the chemical examination report of the viscera from Forensic Laboratory, Bhubaneswar dated 23.3.2011 was produced by the learned Government Advocate and by Order dated 11.4.2011, further directions were issued to the Investigating Officer to produce such report before the Doctor who had conducted the post-mortem of the deceased-Sujata and seek his opinion as to the possible cause of death of the deceased-Sujata.

Dr. Nilamani of the Sub-Divisional Hospital, Talcher gave his report dated 15.4.2011 stating therein that, the cause of death of the deceased-Sujata was due to Acute Myocardial Infarction (Heart Attack).

4. Mr. J.N.Panda, learned counsel for the petitioner on the basis of the facts as noted hereinabove submitted that in view of the categorical opinion of the doctor relating to the cause of death of the deceased-Sujata, the order of cognizance for the offence under Section 306 I.P.C. was not sustainable and was liable to be quashed. He further submitted that as regards cognizance for the offence under Section 498-A I.P.C. is concerned, the deceased-Sujata had eloped with the son of the petitioners, namely,

Lingaraj Sunani out of love, more than four years prior to her death. She had been admitted in the Talcher hospital due to her heart ailment for her treatment. Therefore, there could be no foundation or basis for allegation of the offence under Section 498-A I.P.C. He vehemently urged that the present case is an illustration of the mechanical manner in which the Investigating Officers have submitted charge-sheet, even admittedly without awaiting the conclusion of the investigations. It is further urged that the present case also illustrates the manner in which the court taking cognizance had also acted mechanical by accepting the Charge-sheet submitted by the Investigating Officer, without even apparently verifying the police papers, as to the status of the investigation. It is submitted that had the trial court taking cognizance even bothered to look into the police papers, it would have been apparent therefrom that the charge-sheet have been submitted at the time when investigation into the alleged allegations had not been completed since the viscera report of the SFSL as well as opinion of the Doctor regarding post-mortem was awaited.

5. It is well settled that prior to quashing the order of cognizance, the power under Section 482 of the Criminal Procedure Code should be exercised very sparingly and that too in the rarest of rare cases. Such extraordinary or inherent powers ought to be exercised by the High Court in order to prevent the abuse of the process of the Court or otherwise and to secure the ends of justice. The present case is one of such cases where the petitioner has prayed for exercise of such extraordinary and inherent powers, since he alleges gross abuse of the process of the Court thereby, praying for exercise of such inherent powers in order to secure the ends of justice.

6. In the light of the aforesaid submissions on behalf of the petitioner, it is a clear case where in order to further prevent the abuse of the process of the court and secure the ends of justice, not only the order of taking cognizance under Section 498-A and 306/34 I.P.C. should be quashed but also necessary directions to be further issued to the Investigating Officer as well as the trial court to ensure that such injustice is not meted out to future litigants and also to ensure that both the Investigating Officer as well as the trial court remain cognizant on their responsibility cast upon them by the Code of Criminal Procedure, to file charge-sheet only on conclusion of investigation and to take cognizance only after verifying the police papers.

7. On the request of the Court, Mr.D.Panda, learned Addl. Government Advocate for the State has filed a written note of submissions on behalf of the State. In course of hearing of the matter, this Court made a query to the

learned counsel for the State as to whether in view of the fact that admittedly the chemical report of the State Forensic Science Laboratory had not been obtained in course of the investigation and that the opinion of the doctor conducting post-mortem, as to the possible cause of death was also duly not been obtained by the Investigating Officer, by the time of submission of charge-sheet, what were the options available to the High Court in the matter vis-à-vis quashing the order of cognizance, so far as it relates to taking of cognizance under Section 306/34 I.P.C. is concerned or to remand the matter back to the trial court, for placing the said opinion of the doctor and for re-consideration of the order of cognizance by the court below before whom a supplementary charge-sheet, containing subsequent documents i.e. report of the Forensic Laboratory as well as the opinion of the doctor as to the cause of the death of the deceased-Sujata, can be filed by the Investigating Officer.

Learned Addl. Government Advocate in response to the aforesaid query made the following submissions:

> "(A) In so far as the order of cognizance is concerned which is taken by a Magistrate U/s. 190 of the Cr.P.C. law is well settled that such an order is a final order not open to be reviewed. Under the Cr.P.C. subordinate courts lack the power of review of their own orders and the Cr.P.C. specifically provides in Section ---- thereof that orders once passed by a criminal court are not liable to be reviewed save and except for correction of clerical mistakes and it is only the High Court which can in exercise of its inherent powers quash an order of a subordinate court which suffers from an infirmity rendering it to be illegal. The Supreme court in (1992) 1 SCC 217 (K.M.Matthew vs. state of Kerala) had held that it is open to an accused on entering appearance to contend that process should not have been issued to him and seek recall but later on in (2004) 7 SCC 338 (Adalat Prasad vs. Rooplal Jindal) held that the decision in Matthew's case supra was an erroneous interpretation of the law and held that a Magistrate has no power to either review, recall or reconsider his order issuing process. This court has also in a judgment reported in (D.K.Behera, 1982) held that on passing an order of cognizance a Magistrate become functus officio and has no power to either review, recall or reconsider order taking cognizance. In such view of the matter it is respectfully submitted that the question of remand therefore cannot arise.

(B) It is true that after submitting a final form U/s.173(2) Cr. P.C the investigating Agency is not precluded from submitting further reports U/s.173(8) Cr.P.C. if further facts arise/come to his notice after submission of final form. In that event , if charges have not been framed by the learned Trial Court it is open to the Trial court on consideration of such further report placed before it to take the same into consideration and frame charges accordingly. The court however cannot review/recall his earlier order taking cognizance on the basis of materials to which he has applied his judicial mind at that stage and has found no reason to differ with the opinion of the Investigating Officer as regards the nature of offences made out in course of investigation. Where offences triable exclusively by a court of Sessions are indicated in the charge sheet and if supplementary charge sheets are submitted after commitment and before cognizance is taken by the court of sessions then there is no difficulty for the court of sessions to take note of the materials forwarded with the supplementary charge sheet and while taking cognizance U/s.193 Cr.P.C. it can send the case records to the Chief Judicial Magistrate for proceeding further if the materials enclosed to the supplementary charge-sheet do not reveal a sessions triable offence. In a case such as the present case the only course available to the Magistrate is probably to act under section 322 (1) (a) Cr. P.C. and to submit the records to the learned Chief Judicial Magistrate for taking further action.

(C) In the Cr.P.C. Section-154 empowers a police officer to record a first information and to take up investigation into cognizable offences by exercising powers vested in him by section-156 of the Cr.P.C. Section-173 of the Cr.P.C. requires every investigation to be completed without unnecessary delay and U/s.173(2) the Police Officer conducting investigation is required to forward to the Magistrate empowered to take cognizance the entire records of the investigation to which the Magistrate is required to apply his judicial mind and consider the question of taking cognizance. An order of cognizance is a judicial act which is performed after application of mind to the materials on record and it is open to the learned Magistrate to differ with the opinion of the I.O. and also to call for further reports or to take cognizance in exercise of powers u/s 190(1)(a) or (c) of the Cr.P.C. but he cannot call upon the police to submit a charge sheet (Abhinandan Jha & Ors vs. Dinesh Mishra , AIR 1968 SC 117). In the instant case since the medical opinion as to cause of death was not final and the Magistrate had sent the

viscera for chemical examination it was his duty to direct the I.O. u/s 156(3) Cr.P.C. to make further investigation obtain the viscera report as well as final opinion of the doctor and to place the same before him which he has failed to do.

(D) Rules-172(a)(b) and (c) of the Orissa Police Manual Rules as well as Section-173 Cr.P.C. enjoin upon the I.O. to prepare copies of his report under Section 173(2) Cr.P.C. for being supplied to the accused persons and he is also required to intimate the results of the investigation to the informant. These statutory requirements are however never complied with leading to unavoidable delay in taking of criminal cases for disposal."

In the light of the aforesaid submissions, learned Addl. Government Advocate submitted that the facts of the present case would justify the exercise of inherent extraordinary jurisdiction under Section 482 Cr.P.C. for quashing of the order of cognizance for the offence under Sections 306/34 I.P.C.

8. After having heard the learned counsel for the respective parties and after taking the note of submissions advanced as noted hereinabove, the facts that clearly emanate in the present case is that admittedly, at the time when charge-sheet was submitted i.e. on 10.08.2010, investigation into the complaint alleged could not be said to have been completed due to the following two reasons:

i) Viscera of the deceased-Sujata had been sent to the State Forensic Science Laboratory, Bhubaneswar for examination and report was awaited.

ii) The Doctor who had conducted post-mortem had reserved his opinion regarding cause of death till viscera report is obtained and such opinion was awaited.

Sub-section (1) of Section 173 Cr.P.C., 1973 clearly prescribes in no uncertain terms that every investigation shall be completed "without unnecessary delay" and in Sub-section (2) thereof, the officer in charge of the police station is required to forward to a Magistrate empowered to take cognizance of the offence on a police report in the form prescribed on conclusion of the investigation. Although no specific period of time has been stipulated in the court for completion of investigation, yet, it is required that investigation ought to be taken up expeditiously and police paper to be submitted only after "investigation is completed". In view of the facts noted

hereinabove, it is clear that since investigation had not been completed as on 10.08.2010, i.e. the date on which charge-sheet was submitted, no charge-sheet ought to have been submitted at that time.

9. Apart from the report of opinion of Dr.Nilamani Sahoo, Sub-Divisional Hospital, Talcher and after perusing the report of the Forensic Laboratory and viscera report of the deceased-Sujata dated 15.4.2011, the cause of death of deceased-Sujata has been declared to "Acute Myocardial Infarction" (Heart attack).

The bed head ticket of the deceased-Sujata had been seized by the police and forms part of the case diary. The said bed-head ticket was maintained by the Sub-Divisional Hospital, Talcher where the deceased-Sujata had been admitted by her father-in-law, Khageswar Sunani (Petitioner No.1) on 22.7.2007. At the time of admission of the deceased in the said hospital which is run by the Coal India, it is noted therein that she was suffering from convulsions after taking cough syrup and had been suffering from fever for the last 9 to 10 days and had been treated by Coal India Dispensary at Ananta Colliery. The bed-head ticket also indicates that the treating physician suspected that the deceased may not be sufferings from Cerebral Malaria but had started the treatment. It appears that after her admission, the treating Physician put a question mark before the word "Cerebral Malaria" as the possible cause of death. Ultimately, the deceased suffered from cardiopulmonary arrest at about 11.30 A.M. of 22.7.2007 and in spite of several steps taken by the attending doctors, she was pronounced dead at about 11.30 A.M. on the self-same date. Thereafter, the bottle which has been produced by the father-in-law (Petitioner No.1) before the treating physician and said to have been consumed by the deceased before onset of convulsions, was also seized and the contents of the bottle suspected to be organophosphorus compound and suspected that the death could be due to organophosphorus poisoning and directed registration of medico legal case.

10. The father of the deceased-Sujata on being informed arrived at the hospital and suspecting death on account of torture of the in-laws, lodged an F.I.R. Based on such F.I.R., the body of the deceased-Sujata was sent for post-mortem examination and in course of which Viscera was collected and sent for examination to the State Forensic Science Laboratory, Bhubaneswar.

11. The facts of the present case to highlight the necessity of all concerned in the investigation/prosecution to take up their responsibility with

due seriousness that such incident deserves. In the present case clearly a very serious allegation was made by the informant in the F.I.R. and death of deceased-Sujata had taken place and that too at a relatively young age. In such circumstances it was incumbent upon the investigating authorities for completing the investigation at the earliest. But, the present case is a case which exhibits complete laxity by the Investigating Officers since no follow up action whatsoever has been made to obtain the Forensic Report/opinion of post-mortem Doctor although post-mortem of the deceased was conducted on the date of her death i.e. 22.7.2007 and viscera obtained on the same day and thereafter, send to the Forensic Laboratory for testing. It was only pursuant to the direction of this Court dated 14.3.2011 that the Forensic Laboratory ultimately examined the viscera and submitted its report on 23.3.2011 i.e. after a period of nearly four years after the death of the deceased. This unfortunately illustrates a complete sorry state of affairs and, therefore, ought to be seriously looked into and shortfall and/or inadequacy need to be addressed at the earliest.

12. Apart from the aforesaid facts, the facts of the present case indicate that when the Investigating Officer investigated into the case was transferred the successors, do not necessarily study the case diaries minutely and have acted mechanically to conclude the investigation, even though, several investigating steps were yet left to be concluded. In the present case, it appears that while the original Investigating Officer got transferred, his successor acted mechanically and merely to show that the investigation was completed, submitted charge-sheet, without bothering to verify as to whether the opinion of the doctor had been obtained and/or as to whether the viscera report had been obtained from the State Forensic Science Laboratory.

13. I am of the considered view that the trial court also has failed to discharge their duty in the manner that is expected from them. The Court before whom the charge-sheet was placed on 10.8.2010, clearly acted in a mechanical manner and passed orders taking cognizance under Sections 498-A/306/34 I.P.C. without applying its judicial mind. I am of the considered view that the court taking cognizance is duty bound to peruse the police report as well as the police papers and only thereafter pass orders thereto. In the present case same has not been done. Clearly such action on the part of the judicial officer is not acceptable. All the judicial officers should be cognizant of his responsibilities and such omission on that part of the Investigating Officer should have certainly come to his notice and in such circumstances, the court could have directed the Investigating Officer to first obtain the viscera report as well as the opinion of the doctor who conducted

the post-mortem, prior to submitting the charge sheet. Clearly such inadequacies on the part of court taking cognizance cannot also be condoned nor overlooked.

14. In the circumstances as noted hereinabove, I am of the considered view that the order of cognizance dated 8.9.2010 passed by the learned S.D.J.M., Talcher in G.R. Case No.527 of 2007 taking cognizance under Sections 498-A/306/34 I.P.C is required to be quashed in order to secure the ends of justice since the same amounts to an abuse to the process of the court and this Court orders accordingly with the following directions:

a) While taking cognizance the learned Magistrate should be cautious and should thoroughly scrutinize police papers submitted before them and in the event they find that certain material points have been left out to direct the I.O. to comply therewith forthwith and defer taking of cognizance, if necessary.

b) The Magistrate must ensure while taking cognizance that the I.O. has acted in accordance with the provisions contained in Section-173(2)(ii).

c) The Magistrate must ensure that the I.O. has complied with the provisions contained in Section-173(7) Cr.P.C. as well as Rules, 172(a)(b) and (c) of the Orissa Police Manual Rules.

d) The Magistrate must ensure that the committal proceedings are not delayed unnecessarily.

In terms of the aforesaid directions, the CRLMC is allowed.

Application allowed.

2012 (II) ILR- CUT- 132

INDRAJIT MAHANTY, J.

ARBA NOS. 45/2005 & 11/2006 (Dt.03.03.2012)

PRANA KRUSHNA SATAPATHY
(DEAD) REP.BYHIS SON
PRAVAT KU. SATAPATHY
& ORS.L.Rs. ……..Appellants.

.Vrs.

UNION OF INDIA & ORS. ……Respondents.

ARBITRATION ACT, 1940 (ACT NO.10 OF1940) – S. 29.

Award of interest pendente lite and pre-reference period – Arbitrator has power to grant such interest if the agreement between the parties did not prohibit the same.

In the present case Clause 16 (2) of the General Conditions of contract specifically prohibits the Arbitrator from entertaining the claim of interest – Held, the appeal filed by the Railway Administration is partly allowed quashing the award granting interest and the appeal filed by the claimant-contractor is dismissed in toto claiming pre-reference interest.

Case laws Relied on:-

1.JT 2001(1) SC 486 : (Executive Engineer,Dhenkanal Minor Irrigation Divn. Orissa, -V- N.C. Budharaj)
2.90(2000) CLT 198(SC) : (State of Orissa-V- Sudhakar Das(dead) by his L.Rs.)

Case laws Referred to:-

1.AIR 1995 SC 763 : (Naraindas Lilaram Adnani-V-Narsingdas Naraindas Adnani & Ors.)
2.(2001)3 SCC 277 : (Union of India & Ors.-V-Manager, M/s.Jain & Associates).

For Appellants : M/s. R.B. Mohapatra, D.K. Mohanty & P.K. Sahoo
For Respondents No.1 &2 : None
For Respondents No.3 & 4 : M/s. A.K. Mishra, S.K. Ojha,

A.K. Sahoo, B.K. Jena & J.K. Mohapatra

I. MAHANTY, J. Shorn of unnecessary details it would be suffice to note herein that one Prana Krushna Satapathy (since deceased) had been awarded with a contract pursuant to tender notice dated 08.09.1989 for supply of 14000 cubic metre of 50 mm. size hard stone ballasts and loading of 18000 cubic metre of ballasts into railway wagons. The said P.K. Satapathy issued a letter of acceptance dated 29.01.1990 with a contract value of Rs.17,52,000/-. The date of completion was 31.03.1992. For the purpose of supply and loading, two separate work orders were issued and after duly signed by the contractor, P.K. Satapathy on 06.02.1990, an agreement was done on 10.05.1990 vide agreement No.19 dated 10.05.1990. The request of the contractor for extension of time was allowed and the extension was granted without penalty up to 31.12.1992 for supply and loading of the ballasts at J.K.Pur Depot. The contractor, thereafter, applied for further extension of time up to 31.03.1993 and continued the loading up to 12.02.1993. The request made by the claimant for extension of time up to 31.03.1993 could not be considered and necessary 7 days and 48 hours notices were issued under Clause-62 of the General Conditions of the Contract (in short G.C.C) and finally the contract was closed by forfeiture of full security deposit of Rs.95,100/- vide the letter dated 21.04.1994.

2. The contract submitted a demand notice under Clauses-63 & 64(i) of the G.C.C. vide his letter dated 30.04.1994. By the order dated 18.01.1997, the Civil Judge(Sr.Division), Ist Court, Cuttack in Title Suit No.85 of 1995 directed appointment of Arbitrators under Clause-64(a) of the G.C.C. In accordance with the aforesaid direction, Arbitrators were appointed and the contractor as well as the railway administration duly participated in the said arbitration proceeding. On conclusion of the arbitration proceeding, the Arbitrators submitted a reason award on 30.01.2000 before the General Manager, South Eastern Railway, Garden Reach, Calcutta and the copy of the said award was also supplied to the contractor-P.K. Satapathy. It appears from the record that the said P.K. Satapathy expired on 19.08.1996 during the pendency of the application for appointment of Arbitrators before the Civil Judge (Sr.Division) Ist Court, Cuttack in T.S. No.85 of 1995 and his legal representatives were substituted by the order dated 15.07.1997.

3. On receipt of the award the railway administration filed Misc. Case No.101 of 2003 under Sections 30 & 33 of the Arbitration Act challenging the award on the ground of misconduct and basically raised objection regarding award of interest on the ground that the same was prohibited under Section 16(II) of the G.C.C. On the other hand the contractor (legal

representatives) filed Misc. Case No.95 of 2003 claiming interest for "pre-reference period". Both the aforesaid Misc. Cases came to be dismissed by the trial court with the finding that the Arbitrators had not misconducted while passing the award and further rejected the prayer of the claimant for interest for the pre-reference period.

4. In view of the aforesaid fact, the railway administration came to file Arbitration Appeal No.11 of 2006 challenging rejection of Misc. Case No.101 of 2003 by the Civil Judge (Sr.Division) Ist Court, Cuttack and Arbitration Appeal No.45 of 2005 came to be filed by the legal representatives of the claimant once again raising the claim for interest for pre-reference period.

5. Mr. R.B. Mohapatra, learned counsel for the appellant (contractor) in ARBA No.45 of 2005, inter alia, contended that whereas the claimant had specifically raised a claim for interest for the pre-reference period before the Arbitrators, in the award while dealing with item No.18 no reason whatsoever was given by the Arbitrators for refusing to grant interest for the "pre-reference period". Relevant portion from the award is quoted herein below.

> "18. Interest Office of the 20 per annum with effect from 1.1.93.
>
> 18% interest is allowed on the awarded amount if not paid to the claimant within 60 days from the date of publishing the award by the respondent."

It is asserted by Mr. Mohapatra that since the claims are money claims and was withheld by the respondents illegally and without any basis, they are liable to pay the interest by way of damages @ 18% per annum. It is further asserted that law is well settled under the Interest Act, 1978 that when a money claim is withheld, the defendant is liable to pay interest as damages and the Arbitrators have jurisdiction and authority to award such interest from the due date till the date of payment or decree, whichever is earlier. It is, therefore, submitted that the respondents are liable to pay interest from 01.03.1993 till the date of its payment @ 18% per annum. In support of his contention, learned counsel placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Executive Engineer, Dhenkanal Minor Irrigation Division, Orissa v. N.C. Budharaj,*** JT 2001 (1) SC 486 in which it was held that an Arbitrator has authority to grant interest for "pre-reference period". It is asserted that in the instant case the Arbitrators failed to exercise power to grant interest for pre-reference period and since in the instant case the Joint Arbitrators have failed to exercise their power to grant

interest for pre-reference period, this Court in exercise of power conferred under Section 15 read with Sections 30 & 33 of the Arbitration Act, 1940 can modify the impugned award of the Joint Arbitrator to the extent of granting interest @ 18% per annum on the awarded amount with effect from 01.03.1993 i.e. the date of claim/dispute raised by the plaintiff and pre-reference of the Arbitration and accordingly the modified impugned order may be made rule of this Court by way of a decree. Further, reliance was placed on another judgment of the Hon'ble Supreme Court in the case of Naraindas Lilaram Adnani v. Narsingdas Naraindas Adnani and others, AIR 1995 Supreme Court 763 & in the case of Union of India and others v. Manager, M/s Jain and Associates, (2001) 3 Supreme Court Cases 277.

6. In ARBA No.11 of 2006, learned counsel appearing for the East Coast Railway submitted that in view of Clause-16(II) of the G.C.C., the payment of interest is prohibited and hence, the Arbitrators had acted without jurisdiction by granting interest @ 18% per annum pendente lite. Insofar as payment of "pre-reference period" interest is concerned, it is submitted that Clause-16(II) of G.C.C. would come to operation and, therefore, the Arbitrators ought to have refused to grant the interest as prayed for. In support of his contention, learned counsel has placed reliance on a decision of this Court in the case of State of Orissa v. Sudhakar Das (dead) by his L.Rs., 90(2000) C.L.T. 198(S.C.) and submits that the issue relating to the power of the Arbitrator to grant interest 'pendente lite where the agreement between the parties did not prohibit grant of interest and the dispute referred to the Arbitrator including the claim of interest, is no longer res integra and stands settled in favour of the claimant and against the State in (1992) 1 S.C.C. 508 over ruling the view of the contrary as expressed in (1988) 1 S.C.C. 418. Paragraph 3 of the said judgment is quoted herein below:

> "3. It is conceded by Ms. Mana Chakraborty, learned counsel for the State that the issue relating to the power of the Arbitrator to grant, interest pendente lite where the agreement between the parties, as in the present case, did not prohibit grant of interest and the dispute referred to the Arbitrator included the claim of interest, is no longer res integra and stands settled in favour of the claimant and against the State in *Secretary, Irrigation Department, Government of Orissa* v. G.C. Roy, (1992) 1 S.C.C. 508, overruling the view to the contrary as expressed in *Executive Engineer (Irrigation) Balimela v. Abhaduta Jena,* (1998) 1 S.C.C. 418. The decree to the extent, it awards pendente lite interest in favour of the respondents, therefore, is sustained and the challenge to it fails."

7. At this juncture, it is necessary to deal with the case laws relied upon by the learned counsel for the Contractor. In the case at hand the main dispute relates to the claim made by the contractor for payment of interest for "pre-reference period". The award has dealt with the interest pendente lite, in this respect in the case of N.C. Budharaj (supra), the Full Bench of the Hon'ble Supreme Court headed by Hon'ble G.B. Pattanaik, J. it is held as follows:

> "47. If that be the position, Courts which of late encourage litigants to opt for and avail of the alternative method of resolution of disputes, would be penalizing or placing those who avail of the same in a serious disadvantage. Both logic and reason should counsel courts to lean more in favour of the Arbitrator holding to possess all the power as are necessary to do complete and full justice between the parties in the same manner in which the civil court seized of the same dispute could have done. By agreeing to settle all the disputes and claims arising out of or relating to the contract between the parties through arbitration instead of having recourse to civil court to vindicate their rights the party concerned cannot be considered to have frittered away and given up any claim which otherwise he could have successfully asserted before Courts and obtained relief. By agreeing to have settlement of disputes through arbitration, the party concerned must be understood to have only opted for a different forum of adjudication with less cumbersome procedure, delay and expense and not to abandon all or any of his substantive rights under the various laws in force, according to which only even the Arbitrator is obliged to adjudicate the claims referred to him. As long as there is nothing in the arbitration agreement to exclude the jurisdiction of the Arbitrator to entertain a claim for interest on the amounts due under the contract, or any prohibition to claim interest on the amounts due and become payable under the contract, the jurisdiction of the Arbitrator to consider and award interest in respect of all periods subject only to Section 29 of the Arbitration Act, 1940 and that too the power of the Court thereunder, has to be upheld. The submission that the Arbitrator cannot have jurisdiction to award interest for the period prior to the date of his appointment or entering into reference which alone confers him power is too stale and technical to be countenance in our hand, for the simple reason that in every case the appointment of an Arbitrator or even resort to Court to vindicate rights could be only after disputes have cropped up between the parties and continue to subsist unresolved and that if the Arbitrator has the power to deal with and decide disputes which cropped up at a point of time and for the

period prior to the appointment of an Arbitrator, it is beyond comprehension as to why and for what reason and with what justification the Arbitrator should be denied only the power to award interest for the pre-reference period when such interest becomes payable and has to be awarded as an accessory or incidental to the sum awarded as due and payable, taking into account the deprivation of the use of such sum to the person lawfully entitled to the same.

48. For all the reasons stated above, we answer the reference by holding that the Arbitrator appointed with or without the intervention of the court, has jurisdiction to award interest, on the sums found due and payable, for the pre-reference period, in the absence of any specific stipulation or prohibition in the contract to claim or grant any such interest. The decision in **Jena's Case** [JT 1987 (4) SC 8 = 1988 (1) SCC 418] taking a contra view does not lay down the correct position and stands overruled, prospectively, which means that this decision shall not entitled any party nor shall it empower any court to reopen proceedings which have already become final, and apply only to any pending proceedings. No costs."

Therefore, in view of the judgment of the Hon'ble Supreme Court in the case of **N.C. Budharaj** (supra), it is no longer res integra that an Arbitrator does possess the necessary jurisdiction to grant interest for the pre-reference period as well. Further, it is no longer res integra in view of the judgment of the Hon'ble Supreme Court in the case of ***Sudhakar Das*** (supra) that the Arbitrator is competent to grant pendente lite interest, but only in the absence of any stipulation or prohibition in the contract to claim/grant any such interest.

8. Now it becomes necessary to consider as to whether the contract between the parties contain any clause prohibiting grant of interest. At the closure of hearing of these appeals, learned counsel for the Railway was asked to provide a copy of the G.C.C. and in particular, Clause-16 thereof and the same was provided by appending the same to the notes of arguments filed on behalf of the Railways. Clause-16(2) of the G.C.C. reads as follows :

"16(1)- Earnest Money & Security deposit :-

Xx xx xx

(2) **Interest on amounts** : No interest will be payable upon the earnest money or the security deposit or amounts payable to the Contractor under the contract, but Government Securities deposited

in terms of sub-clause (1) of this clause will be repayable with interest accrued thereon.

Interest on the said Government Security will be drawn by the Railway Administration and credited to the Contractor and the Contractor shall not be entitled to claim any other sum by way of interest or profit on the said Security Deposit than the amount actually drawn by the Railway Administration from the Government."

9. On a plain reading of the aforesaid Clause-16(2), it is clear that the Contract prohibits payment of interest upon earnest money or security deposit or the amount payable to the contractor under the contract, but excludes Government Securities deposited in terms of Clause-16(1) of the G.C.C. which would be repayable with interest accrued thereon. I am of the considered view that Clause-16(2) of the G.C.C. which is extracted hereinabove does in fact create a bar for a claim for payment of interest and as held by the Hon'ble Supreme Court in the case of ***N.C. Budharaj*** (supra), since the contract agreement obviously includes G.C.C. which excludes and specifically prohibits Arbitrator from entertaining the claim of interest thereon, the Arbitrator ought not to have awarded the interest pendente lite. Apart from the above, in view of the aforesaid prohibition as would be evident from Clause-16(2) of the G.C.C., no claim for interest for the pre-reference period as well can be entertained.

10. Therefore, in view of the conclusions reached above, the Arbitration Appeal No.11 of 2006 filed by the Railway administration is allowed in part quashing the award insofar as grant of interest contained in para-18 of the award is concerned as having been prohibited in terms of Clause-16(2) of the G.C.C. and consequently, Arbitration Appeal No.45 of 2005 filed by the claimant-contractor claiming pre-reference interest is dismissed on the self-same ground.

Appeal disposed of.

2012 (II) ILR- CUT- 139

S. PANDA, J.

W.P.(C) NO. 18396 OF 2011 (With Batch) (Dt.16.03.2012)

RIZWANI INSTITUTE OF INDUSTRIAL TECHNOLOGY, JAGATPUR & ORS. ……..Petitioners.

.Vrs.

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

EDUCATION – Petitioner-Institutions affiliated to Director General of Employment and Training (DGET) and they submitted documents and list of trainees admitted to the course in the academic session 2009-2011 – Principals of the institutions certified that the students have completed the course as per schedule – Opp.Parties neither verified documents within time nor given an opportunity to the institutions to clarify any discrepancy – Held, rejection of application by the Opp.Parties to issue registration numbers to some trainees is not only against the principles of natural justice but also against the Government's national policy on skill development - Direction issued to the Opp.Parties to take steps for submission of list of trainees for on line admission and issuance of registration numbers as per the training calendar and planner – The time schedule shall be strictly adhered to by the institutions as well as the Opp.Parties so that this type of difficulty will not arise in future – Further direction issued to grant registration numbers in favour of those trainees who have appeared in the All India Trade Test Examination, 2011 pursuant to this Courts order and publish their results and issue certificates to those trainees who have become successful in the said examination.

(Para 11,12)

For Petitioners - M/s. Dillip Ku. Mohapatra, A.Sahoo, B.B.Routray, P.K.Sahoo, K.Mohanty, S.Das, S.Jena, S.K.Samal, R.P.Dalai, B.Singh, D.Routray.
M/s. S.S.Patra, R.C.Swain,
M/s. Sidharth Prasad Mishra, C.R.Mishra, A.Sinha, S.N.Dashsharma, S.Mishra, S.R.Mishra, A.Mishra.
M/s. Dhananjaya Mund, P.K.Mahali, S.K.Lenka, S.N.Padhi.
M/s. Manoj Ku. Khuntia, A.K.Apat,G.R.Sethi, J.K.Digal, B.K.Pattnaik

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For Opp.Parties - Mr. R.K.Ray & K.C.Mishra (for SCTE & VT).
Mr. S.D.Das, (for NCVT).
M/s. M.Sinha, P.R.Sinha, M.K.Mohapatra,
(For O.P.4 in W.P.(C) No.19374 of 2011)

S.PANDA, J. Since common questions of law are involved in all these writ applications, they were heard together and are being disposed of by this common judgment.

2. Different Industrial Training Centres and the students of Manorama Institute of Industrial Training and Engineering, Chandikhole in the district of Jajpur, affiliated to Director General of Employment and Training (for short 'DGET') are the petitioners and have challenged the action of the opposite parties in disallowing some of the students to appear in the All India Trade Test Examination, 2011 even though those students are within the permissible units sanctioned in favour of the Institutions in Fitter and Electrician trades.

3. The students/trainees have taken admission in the academic session 2009-2011 and after admission, the institutions submitted all the documents for registration. The opposite parties did not verify the said documents. However, they verified the documents and issued registration number on 30.6.2011 by which time the trainees had prosecuted their studies and after completion of the courses, they were entitled to appear in the All India Trade Test Examination, 2011 which was scheduled to be held on 22.7.2011. The trainees filled up their forms and also deposited the examination fees in shape of Bank Draft with the opposite parties, which were also accepted by them. However, the opposite parties on 1.7.2011 circulated the registration numbers through their web-site in respect of some of the trainees and left out the other trainees both in Fitter as well as in Electrician trades. Therefore, the institutions on behalf of those trainees and the students in WP(C) No.19374 of 2011 filed these writ applications challenging the above action of the opposite parties.

4. Learned counsel for the petitioners submitted that as per the sanctioned unit, the institutions admitted the trainees and have given them training and on completion of the course, the trainees are eligible to appear in the test and all the certificates/documents of the trainees submitted for verification and issuance of registration numbers by the opposite parties. However, those documents were not verified in time and before the test, the opposite parties rejected some of the documents of the trainees without issuing egistration numbers to them on some flimsy ground. The learned

counsel further submitted that had the opposite parties intimated the same sufficiently before the examination, the institutions could have taken action and explain/clarify those discrepancies. But without giving an opportunity to explain all those facts, the opposite parties have unilaterally denied to give registration numbers to those trainees. Therefore, interference of this Court is necessary for violation of non-compliance of natural justice.

5. By an interim order, this Court allowed the trainees to appear in the examination which is subject to the result of the writ applications.

6. The opposite parties have filed their counter affidavit. So far as sanctioned unit and affiliation are concerned, those are not disputed. However, the learned counsel for the opposite parties submitted that a Training Calendar was prepared for smooth implementation of Craftsman Training Scheme (CTS) confirming to National Council for Vocational Training (NCVT) Norms & Standards in ITIs/ITCs. The said calendar specified regarding admission in private ITIs/ITCs which is extracted below:

> "In the cases of private ITIs, the identical date lines are to be strictly followed. Also admission should be made only in the trade/units which are NCVT affiliated as on the date. No admission should be made in anticipation of getting approval from NCVT."

7. Learned counsel for the opposite parties further stated that the DGET in its letter dated 5.5.2009 intimated to all the State Commissioners/Directors dealing with craftsman training to give wide publicity for the admission seekers to confirm and satisfy themselves before seeking admission in any trade that the trade/unit in the Industrial Training Institutes (Govt./Industrial Training Centres (Pvt.) (ITIs/ITCs) is affiliated to NCVT. Accordingly, DGET published an advertisement in the local dailies and the petitioners should have followed the guidelines of DGET. He further submitted that some of the trainees have not completed two years course; rather, the institutions have admitted them just before the test in 2011. Therefore, the opposite parties have not issued registration numbers in favour of those trainees. However, it was fairly admitted by the learned counsel for the opposite parties that the documents submitted by the petitioners were not verified within the time fixed in Training Calendar and Planner.

8. From the above facts and circumstances and the submissions made by the parties, it appears that the certificates and other documents of the trainees, who have taken admission, were submitted to the opposite parties

for verification and issuance of registration numbers. However, the opposite parties have neither given any reason after receiving the documents nor verified the certificates and other documents of the trainees within the time stipulated in Training Calendar and Planner.

9. The Principals of the Institutions submitted the detail list of the trainees, who have been admitted to the course but the opposite parties without verifying those documents within the stipulated period and without affording opportunity to the institutions to clarify any discrepancy, have rejected their applications to issue registration numbers. These institutions are affiliated institutions and the trainees have the requisite qualification to take admission as prescribed in the training manual for Industrial Training Institutes and Centres. The Principals also certified that the students have completed the course as per the schedule. Therefore, before rejecting the applications to issue registration numbers, the opposite parties should have given the petitioners an opportunity of hearing in compliance of the principle of natural justice.

10. As a part of the Government's National Skill Development Mission, National Skill Development Corporation was set up to implement Government's National Policy on skill development. It has a target to skill 500 million people by 2022. At present, the skill capacity of the country is about 5 million, a deficit of more than 7 million annually who are not getting any training to be employable. To achieve the target, the Government is encouraging public/private partnerships to set up institutions to train people in different skill sectors. The present institutions are some of such institutions.

11. Taking into the difficulties faced by the petitioners as discussed in the above paragraphs, the action taken by the opposite partiers at a belated stage and the difficulties faced by the trainees, this Court directs the opposite parties to take step for submission of list of trainees for on-line admission and issuance of registration numbers as per the Training Calendar and Planner. The time schedule shall be strictly adhered to by the institutions as well as the opposite parties so that in future, this type of difficulty will not arise.

12. Since the students of the petitioners'-institutions and the petitioners in WP(C) No.19374 of 2011 have already appeared in the All India Trade Examination, 2011, the opposite parties are directed to grant registration numbers in favour of those trainees who have appeared in the said All India Trade Test Examination, 2011 pursuant to this Court's order, publish their

results and issue certificate to those trainees who have become successful in the said examination. The writ petitions are accordingly allowed.

Writ petitions allowed.

2012 (II) ILR- CUT- 144

SANJU PANDA, J.

W.P.(C) NOS. 2440 & 1920 OF 2012 (Dt.18.04.2012)

TAPAS KUMAR SAHU & ORS. ……..Petitioners.

.Vrs.

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

EDUCATION – Recognized unaided school – Unusual hike in tution fee in the midst of the session – Condition that for non-payment students will be debarred from appearing final examination – Not in conformity with Clause 4 of the resolution Dt.23.9.96 passed by the school and Mass Education Department – Fixation of irrational fee without assigning any reason amounts to violation of fundamental /statutory right of the children – Held, impugned action of the authorities is quashed – School authorities to move an application to the committee constituted by this Court who will consider and take a decision within three months. (Para 8,9)

Case law Referred to:-

2011(II) OLR 665 : (Management of DAV Public School, Chandrasekharpur-V- State of Orissa & Anr.)

For Petitioners - M/s. K.R.Mohapatra & Associates.
For Opp.Parties - Mr. P.Panda (O.Ps. 6 & 7)
For Petitioners - M/s. P.K.Parhi & Associates.
For Opp.Parties - Mr. S.D.Das, Addl. Solicitor General(O.P.1)
Mr. P.Panda (O.P.7)

SANJU PANDA, J. Since common questions of facts and law are involved in both the writ petitions, they are heard together and disposed of by this common judgment.

2. The petitioners in W.P.C No. 2440 of 2012, who are the nominated members of the Parents' Grievance Redressal Forum, whose children are reading in St.Vincent Convent School, Balasore, hereinafter to be referred to as 'School', in short, and the petitioners in W.P.(C) No.1920 of 2012, who are the students reading in Class I and III through their mother guardian, are challenging the action of the School so far as unusual hike of school fees in the midst of the session 2011-12. They have been imposed a condition that unless the students pay the enhanced fee, they will be debarred from

appearing the final examination, which was scheduled to be held in February, 2012.

3. The short facts as revealed from the writ petitions are that the school is a recognized unaided institution affiliated to the Indian School Certificate Examination (ICSE/ISC) Board, New Delhi and the school is preparing its students for the ICSE Examination in Standard X level and ISC Examination at +2 level. The students' strength of the school is 1883. The students of the school are paying the school fees as per the fee structure, which was communicated to them in their respective fees book including tuition fees, examination fees, computer fees, development fees, Digi class solution fees etc. The students are paying the said fees regularly. While the matter stood thus, the school authorities demanded enhanced fees of Rs.700/- towards Digital Solution as well as activities fees every month from the month of February, 2011 and June, 2011 for which the petitioner-Association in an unanimous meeting held on 30.10.2011 passed a resolution and requested the management not to collect enhanced fees. Further, the Principal of the school by a notice in Annexure-3 directed to stop collection of digital and activities fees from the children. The school management pursuant to a memorandum presented by a group of parents on 30th October, 2011 formed a School Management Committee and that apart in the said reply to the memorandum it has been mentioned that the school management is willing to form a grievance redressal mechanism to address the concerns of the parents and the same will be held quarterly. This intimation was given by the school authorities sometime in November, 2011. However, till date neither they have formed such grievance redressal mechanism nor have taken any step. But before the final examination of the students, the school authorities gave a notice to the students that if the students fail to pay the dues, they will not be allowed to appear at the final examination in 2012. Challenging such action of the school authorities, the present writ petitions have been filed by the petitioners.

4. Pursuant to the interim order dated10.2.2012 in Misc. Case No. 2057 of 2012, this Court directed the school authorities to allow the children of the petitioner-association to appear in the ensuing examination, which was scheduled to be held from February, 2012.

5. Counter affidavit has been filed by the school authorities taking a stand that the school is a minority institution and it provides all sorts of facilities to the students as well as staff and it provides best education to its students. Apart from this, the school also provides curricular activities such as, music, dance (both classical and modern), Karate, Yoga, Abacus,

creative writing, public speaking and under that head, the school is collecting Rs.40/- only from Class-I to Class-V. The school has also provided all other infrastructural facilities to its students and the total expenditure of the school is depending upon the fees received from the students towards tuition fees, admission fees etc. Since the school is a purely private unaided one, the school management has decided to provide its students all modern technology like Computer and audio visual aids including Digital Solution System and accordingly, the school installed the Digital Solution System for better understanding and learning of the students. The entire system was introduced by eminent and expert resources persons from Edurite and Mexus Company. Since the said system is very expensive, before introducing the same, the school management conducted demonstration on Digital Solution System for the parents of the students of the school and after obtaining positive response from the parents, the school authorities initially installed the Digital Solution System in six rooms and all the students were availing the facility in rotation basis ,i.e., once in two weeks for each class and fee charged under the said head was Rs.25/- per student per month, which comes per annum Rs.300/- and the said fee is to be payable in two installments. Thereafter, since the students are getting benefit out of the said system, the parents persuaded the school for installation of more number of Digital Solution Systems. Accordingly, the school authorities have decided to install 20 more nos. of Digital Solution Systems. The cost of installation and maintenance of the said systems was assessed and it was decided that Rs.700/- per annum is payable by a student for availing the said facility. However, since the parents did not agree to pay the said amount, the school authorities decided to install only 10 more Digital Solution Systems instead of 20 nos. and the school authorities assessed the fees by enhancing from Rs.25/- to Rs.54.16 (Rs.25+ Rs.29.16). It was further stated that the Digital Solution System is very much helpful to the students and turned to a positive response of the parents. However, some vested interest persons are creating disturbance and also disturbing the smooth functioning of the school. Therefore, the school authorities have also suspended the fees hike and have not demanded the 2nd installment towards Digital Solution fees. It is also stated in the counter that there is proportionate representation of the parents' representative in the School Managing Committee where they agreed with the school authorities for enhancement of the fees towards Digital Solution System from Rs.25/- to Rs.54.16 from Nursery to Class XII with effect from November, 2011 and as such additional fees of Rs.29.16 is only charged per student to avail the facilities and many students have not paid the fees for 1st installment for which they have been noticed to pay the same before the final examination and the petitioners are only 1% of the students' strength, who are complaining regarding installation of the Digital

Solution System and enhancement of fees. However, in the interest of the students, the decision taken by the school authorities should not be interfered with.

6. Learned counsel for the petitioners submitted that the school authorities have enhanced the fees unilaterally and they have neither consulted the Parents Redressal Mechanism nor constituted it even though they have decided to do so and the authorities should not have enhanced the fees with a motive to get profit. It is alleged that the school authorities are violating the resolution dated 23.9.1996 passed by the State Government in the Department of School and Mass Education Department, wherein under clause 4 it deals with fees, which stipulates as follows :

> " (i) Fee and charges should be commensurate with the facilities provided by the institution. Fees should normally be charged under the heads prescribed by the Department of School and Mass Education. No capitation fee or voluntary donations for gaining admission in the school or for any other purpose should be charged/ collected in the name of the school. In case of such malpractices, the Government may take drastic action leading to withdrawal of No Objection Certificate of the school.
>
> (ii) In case, a student leaves the school for such compulsion as transfer of parents or for health reason or in case of death of the student before completion of the session, prorate return of quarterly/ term/ annual fees should be made.
>
> (iii) The schools should consult parents through parents, representatives before revising the fees. The fee should not be revised during the mid-session."

The said resolution was passed pursuant to the observation made by this Court in O.J.C. No. 2951 of 1993 taking into consideration the rapid growth of Private Educational Institutions imparting teaching in English and other Medium in the State which are affiliated to C.B.S.E. and I.C.S.E. Before according necessary recognition to the private un-aided educational institutions, the prescribed authority shall have regard to matters like provision for suitable and adequate accommodation, location of the institution, its sanitary and healthy surroundings appointment of qualified teachers, provision for equipments and teaching materials and adequate financial support for the continuous and efficient maintenance of the institution and shall have to fulfill the terms and conditions specified in the

said resolution. In the said resolution it is also stipulated that the Government may conduct an audit of the funds of the school as and when it thinks necessary to ensure that the funds/ fees collected by the school authorities are not diverted and the staff are paid salaries at par with the salaries of the State Government and any other financial irregularities. Learned counsel for the petitioners submitted that at no point of time the funds of the school have ever been audited by the Government to maintain transparency of the school authorities and as such, the present hike in the fees pursuant to the impugned notice should be quashed.

7. Learned counsel appearing for the school submitted that the school authorities in consultation with the parents' representative and after approval of the School Managing Committee have decided to revise the fees towards Digital Solution System and at no point of time any authority has ever complained regarding the financial mis-management of the school and as such, the writ petitions have no merit and should not be interfered with.

8. Considering the above rival submissions of the parties and taking into consideration the decision rendered by this Court in the case of the **Management of DAV Public School, Chandrasekharpur v. State of Orissa and another**, 2011(II) OLR, 665, the ratio decided in the said case regarding determination of fees structure of the school seems to be very reasonable. In the said case, this Court observed that the school has to be conscious of the fact that it has to be very reasonable and it cannot and should not charge parent more than what is absolutely essential and on the other hand, it has to meet the variety of expenditure on different activities, tasks and programmes so that education of high quality and for all round development of the children is imparted. Keeping in view the law laid down by the apex Court, this Court has held that fixation of irrational fee without assigning any reason amounts to violation of fundamental and statutory right of the children and directed the State Government to constitute a committee consisting of Commissioner-cum-Secretary, School and Mass Education Department, Government of Orissa, Inspector of Schools of the locality of the concerned school, the Principal/Headmaster of the concerned schools, two representatives of the parents association of the concerned school and head of the local self Government, i.e., Mayor of Municipal Corporation, Chairman of the Municipality or NAC or Sarpanch of the Gram Panchayat, in which area the school is functioning. The Commissioner-cum-Secretary may act in person or through his/her nominee not below the rank of Deputy Secretary and the Committee, if required, may cause a spot enquiry of the school and collect materials and evidence from the staff members with regard to the actual salary being received by them and may also collect

information from the parents, if required, where the school does not have a registered association of parents with regard to the facilities being provided to the students of such school. In the said decision, this Court further observed that all such materials shall be taken into consideration by the said committee while fixing the fee structure for the school and in the event of filing any application by the school before the said committee, the final decision thereon shall be taken within a period of 90 days from the date of filing of such application. That apart, the said decision of the Hon'ble Single Judge was confirmed by the Division Bench of this Court.

9. Taking into consideration the above facts and circumstances and the fact that the children are the future citizens of the Country and in order to uplift the national policy adopted by the Country to give right of free and compulsory education to the children, this Court is of the view that the school authorities should have taken reasonable decision and persuade the parents to pay the enhanced fees and should not have put such harsh condition that if they fail to pay the same, they will not be allowed to sit in the final examination, which will create a bad impact on the psychology of the minor children. Accordingly, this Court while quashing the direction regarding payment of enhanced fees towards Digital Solution System from the students of the session 2011-12, directs the school authorities to move an application to the Committee constituted by this Court in the aforesaid writ petitions, in which event the said Committee shall consider the same and take appropriate decision within a period of three months from the date of filing of such application.

10. With the aforesaid observation and direction, the writ petitions are disposed of. No cost.

Writ petition disposed of.

2012 (II) ILR- CUT- 150

B. N. MAHAPATRA, J.

M.A.C.A. NO. 169 OF 2008 (With Batch) (Dt.03.05.2012)

PUSPALATA SAHU & ORS. ….. …Appellants.

.Vrs.

JAGDISH PRASAD MOHANTY & ANR. ….. … Respondents.

(**A) MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.168.**

Just compensation – Future prospectus/income of the deceased – If the deceased had a permanent job and he was below 40 years 50% of the actual salary should be added towards future prospectus and the addition should be only 30% if the age of the deceased was 40 to 50 years.

Here in MACA No.169 of 2008 the deceased was 41 years at the time of death – Since the deceased had a stable job 30% of the salary should be added to the gross salary towards future prospectus for determining the amount of compensation – In MACA No.171/08 the age of the deceased was 37 years at the time of accident and since he had a stable job 50% of the salary should be added to the gross salary towards future prospectus while determining the amount of compensation. (Para 15 to 20)

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

Just compensation – Computation of – For the purpose of computation of just compensation, no deduction towards G.P.F., L.I.C. premium and repayment of loan shall be made from the gross salary.

Held, in the present case learned Tribunal is not justified to workout net salary deducting payments made towards G.P.F., LIC premium and repayment of house building loan – The learned Tribunal is also not justified to take average of gross and net salary for the purpose of computing just compensation. (Para 12)

(**C) MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – S.168.**

Just Compensation – Deduction towards personal expenses depends upon the size of the dependant family members – If the size of the dependant family members is less, the personal expenses of a person will be more and vise versa.

Where the deceased was married and dependant family members is 2 to 3 deduction towards personal expenses of the deceased should be 1/3rd, where the number of dependant family members is 4 to 6 deduction should 1/4th and where the dependant family members exceeds six deduction towards personal expenses should be 1/5th.

In MACA No.169/08 since dependant family members are 7 the appropriate deduction towards personal expenses of the deceased would be 1/5th of the income – Since the dependant family members are two in MACA No.171/08 the Tribunal is justified in deducting 1/3rd of his salary towards personal expenses of the deceased. (Para 13)

Case laws Referred to:-

1.2010(5) S 215 : (Shyamwati Sharma & Ors.-V-Karan Singh & Ors.)
2.2008(1) TAC 424(SC) : (National Insurance Co.Ltd.-V- Indira Srivastava & Ors.)
3.2011(1) OJR 838 : (Sabitri Panigrahi-V- Sri Bharat Kumar Swain & Anr.).
4.2009(2) TAC 677 : (Sarala Verma & Ors.-V-Delhi Transport Corpn. & Anr.)
5.2011(1)TAC 874(SC) : (K.R.Madhusudan & Ors.-V-Administrative Officer & Anr.)
6.2011(1)TAC 4 (SC) : (Shakti Devi-V- New India Insurance Co.Ltd. & Anr.).

For Appellants - M/s. A.K.Choudhury, S.R.Das, K.K.Das & Bhagirathi Dash (in both the appeals).
For Respondents- M/s. G.P.Dutta, A.Ghose & S.K.Mohanty, (for R-2) (in both the appeals)

B.N.MAHAPATRA, J. The above appeals arise out of a common judgment dated 10th December, 2007 passed by the 2nd MACT, Cuttack in Misc. Case Nos.231 and 232 of 2002. Since the issues involved in these appeals are common, they were taken up together for hearing and are disposed of by this common judgment.

2. MACA Nos.169 and 171 of 2008 were filed by the claimant-appellants Puspalata Sahoo and others, and Tapaswini Bindhini and another respectively for enhancement of the amount of compensation awarded by the learned Tribunal whereas MACA Nos.350 and 349 of 2008 have been

filed by the Oriental Insurance Company to reduce the amount of compensation on the ground that the same is high and excessive.

3. Claimant-Appellants' case in a nutshell is that on 06.02.2002 at about 7.45 AM while both the deceased persons (Ramachandra Sahoo and Ajaya Charan Bindhani) were going in a Scooter from Bhubaneswar to Cuttack keeping themselves to the left side of the road, near Flora Petrol Pump, the offending Bus bearing registration No.OSP 4939 coming from Bhubaneswar being driven in rash and negligent manner at a high speed dashed against the said Scooter from its behind. As a result, both the deceased persons fell down and sustained grievous injuries. Deceased Ajay Charan Bindhani, who was riding the Scooter died at the spot and the deceased Ramachandra Sahoo, who was pillion rider, died in S.C.B. Medical College and Hospital, Cuttack.

4. Further case of the appellants in MACA No.169 of 2008 is that deceased Rama Chandra Sahoo was 41 years at the time of death. He was working as a Khalasi under the Executive Engineer, C.P.W.D. Electrical Division, Bhubaneswar and was getting monthly gross salary of Rs.5,106/- at the time of accident. He died leaving behind his widow, daughters and parents. Case of the petitioners in MACA No.171 of 2008 is that deceased Ajay Charan Bindhani was a young man of 37 years and his monthly income was Rs.5,981/- as the Serviceman-cum-Air Conditioner Mechanic under the Executive Engineer, CPWD Electrical Division, Bhubaneswar. A criminal case vide Balianta PS Case No.14 of 2002 was registered for the alleged accident. Accordingly, charge sheet was submitted against the driver. The further case of the petitioners is that the bus was duly insured with Oriental Insurance Company Limited and driver of the offending bus had a valid driving licence on the relevant date of accident. The petitioners-appellants in MACA No.169 of 2008 filed the claim petition claiming compensation of Rs.9.0 lakhs and the petitioners in MACA No.171 of 2008 filed the claim petition for compensation to the tune of Rs.12.0 lakhs from the opposite parties making them jointly and severally liable for the same.

5. Opposite Party No.1, the owner of the offending bus was set ex parte before the Tribunal. Opposite Party, M/s Oriental Insurance Company Limited contested the case by filing written statement disputing the averments made in the claim petitions. It has also denied its liability to pay any compensation to the petitioners as claimed by them. The opposite party-Insurance Company was allowed to take defence available to it as envisaged under Section 170 of the M.V. Act.

6. On the pleadings of the parties, the following issues have been settled for determination.

(i) Is the claim maintainable?

(ii) Whether the death of the deceased persons was caused due to the rash and negligent driving of the vehicle bearing registration No.OSP 4939 (Bus) by its driver?

(iii) If the petitioners are entitled to get any compensation and if so, to what extent and from whom?

(iv) To what reliefs, if any, are the petitioners entitled?

7. After taking into consideration the oral and documentary evidence adduced/produced, the learned Tribunal came to the conclusion that the alleged accident resulting in injuries and death of the deceased persons took place due to rash and negligent driving of the offending bus by its driver. In the case of MACA No.169 of 2008, the Tribunal awarded compensation of Rs.3,92,000/- which includes Rs.5,000/- towards loss of consortium. In MACA No.171 of 2008, learned Tribunal awarded compensation of Rs.4,62,720/- which includes Rs.5,000/- towards loss of consortium. Apart from the above compensation, the learned Tribunal also awarded a cost of Rs.200/- in each of both the claim petitions. The Tribunal directed opposite party No.2-Insurance Company to pay the awarded amount along with 6% interest per annum from the date of filing of the claim petition, i.e., 16.04.2002 till the date of realization. The Tribunal further directed to keep a portion of the awarded amount in shape of fixed deposit in the names of the claimants.

8. Mr.A.K.Choudhury, learned counsel appearing on behalf of the appellants submitted that the amount of compensation awarded by the Tribunal is extremely low. It was vehemently argued that the learned Tribunal is wrong in taking the average of gross and net salary of the deceased persons for the purpose of determination of the compensation. It is further submitted that the learned Tribunal is not justified to deduct the payments made towards G.P.F., LIC premium and repayment of loan to determine the net income. Considering the number of dependants, deduction of 1/3rd of the income towards personal expenses is not correct and 1/5th of the gross salary should have been deducted towards personal expenses. The order of the Tribunal is vitiated for non-consideration of the future income of the deceased.

9. Mr.G.P.Dutta, learned counsel appearing for the Oriental Insurance Company vehemently argued that finding of the Tribunal that the vehicle was driven in rash and negligent manner is without any basis. The learned Tribunal should have computed the amount of compensation on the basis of net income of Rs.1,334/- per month in MACA No.169 of 2008 and net income of Rs.1,249/- per month in MACA No.171 of 2008. Learned Tribunal has committed error in taking average of net and gross salary for the purpose of computation of compensation.

10. On the rival contentions urged by the parties, the following questions arise for consideration by this Court.

(i) Whether due to rash and negligent driving of the driver of the offending vehicle the accident took place in which Rama Chandra Sahoo and Ajay Charan Bindhani died?

(ii) Whether the Tribunal is justified to take average of gross and net income for the purpose of determining the amount of compensation?

(iii) Whether the learned Tribunal is justified to deduct the payment towards GPF, LIC premium and repayment of loan to assess monthly net income of the deceased persons for the purpose of computation of compensation?

(iv) Whether deduction towards personal expenses @ 1/3rd of the gross income is just and proper in the facts and circumstances of the case?

(v) Whether non-consideration of the future prospects of the deceased persons by the learned Tribunal for the purpose of determining compensation is just and proper?

11. So far the first question is concerned, the learned Tribunal vide its order in the impugned judgment has elaborately dealt with it with reference to issue No.2 therein and came to the conclusion that the accident took place resulting in death of the deceased persons due to rash and negligent driving of the driver of the offending bus. Mr.Dutta learned counsel appearing for the Insurance Company has not adduced/produced any evidence oral or documentary to show that the finding of the learned Tribunal to this effect is wrong and based on no material. Therefore, this Court is not inclined to interfere with the finding of learned Tribunal with regard to question No.1.

12. Question Nos. 2 and 3 being common, those are dealt with together. No valid and cogent reason has been given by the learned Tribunal for

taking average of gross and net salary for the purpose of computation of just compensation. Law is no more *res integra* that for the purpose of computation of just compensation, no deduction towards GPF, LIC premium and repayment of loan shall be made from the gross salary.

Hon'ble Supreme Court in ***Shyamwati Sharma and others vs. Karan Singh and others****,* reported in 2010 (5) Supreme 215 held as under:-

> "We however make it clear that while ascertaining the income of the deceased any deduction shown in the salary certificate as deduction towards GPF, life Insurance Premium repayment of loan etc., should not be excluded from the income. The deduction towards income tax / surcharge alone should be considered to arrive at the net income of the deceased."

Similarly, , the Hon'ble Supreme Court in the case of ***National Insurance Co. Ltd. Vrs. Indira Srivastava and others***, reported in 2008(1) TAC 424 (SC) held as under:

> "However, therein although the words "net- income" has been used but the same itself would ordinarily mean gross income minus the statutorydeduction."

Following the aforesaid principle laid down, this Court in the case of ***Sabitri Panigrahi vs. Sri Bharat Kumar Swain and another***, reported in 2011 (1) OJR 838 held as under:-

> "….This Court is of the view that while determining the monthly income of the deceased, payment towards GPF, Life Insurance Premium repayment of loan should not be deducted from the gross income. Only statutory deduction towards tax should be deducted from the gross salary."

Therefore, the learned Tribunal is not justified to work out net salary deducting payments made towards GPF, LIC premium and repayment of house building loan. Learned Tribunal is wholly unjustified to take average of gross and net salary for the purpose of computing just compensation.

13. So far question No.(iv) with regard to deduction towards personal expenses is concerned, the learned Tribunal deducted 1/3rd towards personal expenses. Deduction towards personal expenses depends upon the size of the dependant family members. If the size of dependant family members is less, the personal expenses of a person will be more and vice versa. The Hon'ble Supreme Court in ***Sarala Verma and others Vs. Delhi***

Transport Corporation and another, reported in 2009(2) TAC 677 (SC) held as under:-

> "…We are of the view that where the deceased was married the deduction towards personal and living expenses of the deceased should be one third (1/3rd), where the number of dependant family members is 2 to 3, one fourth (1/4th), where the number of the dependent family members is 4 to 6, and 1/5th, where the number of dependant family members exceeds six."

In MACA No.169 of 2008, the dependant family members are 7 in number. Therefore, the appropriate deduction towards personal expenses of the deceased would be 1/5th of the income. Since in MACA No.171 of 2008, the number of dependant family members is two, the Tribunal was perfectly justified in deducting 1/3rd of salary towards personal expenses of the deceased.

14. Question No.(v) is with regard to non-consideration of future prospects/income of advancement in life. The Hon'ble Supreme Court in the case of *Sarala Verma's case (supra)* placing reliance in its earlier decisions in *Susama Thomas's case*, AIR 1994 SC 1631 and Abati *Bezbaruah's case*, 2003 (3) SCC 148 held as follows:-

> "In view of imponderables and uncertainties, we are in favour of adopting as a rule of Thumb, an addition of 50% of the actual salary to the income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years. Where the annual income is in the Taxable range the words "actual salary" should be read as "actual salary less tax". The addition should be only 30% if the age of the deceased was 40 to 50 years."

In ***K.R. Madhusudan and others Vs. Administrative Officer and another***, reported in 2011 (1) TAC 874 (SC), the Hon'ble Supreme Court held as under:-

> "10. The present case stands on different factual basis where there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a rise in income in the future, a fact which was corroborated by evidence on record. Thus, we are of the view that the present case comes within the 'exceptional circumstances' and not within the purview of rule of thumb laid down by the Sarala Verma (supra) judgment. Hence,

even though the deceased was about 50 years of age, he shall be entitled to increase in income due to future prospects."

xx xx xx

14. In view of this evidence the Tribunal should have considered the prospect of future income while computing compensation but the Tribunal has not done that. In the appeal, which was filed by the appellants before the High Court, the High Court instead of maintaining the amount of compensation, granted by the Tribunal, reduced the same. In doing so, the High Court had not given any reason. The High Court introduced the concept of split multiplier and departed from the multiplier used by the Tribunal without disclosing any reason therefor. The high Court has also not considered the clear and corroborative evidence about the prospect of future increment of the deceased. When the age of the deceased is between 51 and 55 years the multiplier is 11, which is specified in the II Column in the II Schedule in the Motor Vehicles Act, and the Tribunal has not committed any error by accepting the said multiplier. This Court also fails to appreciate why the High Court chose to apply the multiplier of 6."

In ***Shakti Devi Vs. New India Insurance Co. Ltd. and another***, 2011(1) TAC 4 (SC), the Hon'ble Supreme Court held as under:-

"12. So far as the present case is concerned, at the time of accident, the deceased was 22 years old and not married. He was running a general store from his house and earning about Rs.1,000/- per month from the business. In Sarala Verma (supra), this Court stated that where the deceased was self-employed, the Court shall usually take only the actual income at the time of death; a departure from there should be made only in rare and exceptional cases involving special circumstances. Does the present case involve special circumstances? In our view, it does. The evidence has come that the deceased was to get employment in the forest department after the retirement of his father. Obviously the evidence is based on the Government policy. The deceased, thus, had a reasonable expectation of the Government employment in near future. In the circumstances, the actual income at the time of deceased's death needs to be revised and taking into consideration the special circumstances of the case, in our view, the monthly income of the deceased deserves to be fixed at Rs.2,000/-."

15. In MACA No.169 of 2008, the deceased Rama Chandra Sahoo undisputedly was born on 17.05.1961 and accordingly, he was 41 years at the time of death when he was getting monthly salary of Rs.5,106/- as deposed by PW-3, the Assistant Engineer, CPWD, Electrical Division, in his deposition that the deceased would have retired in the post of Senior Wireman after getting promotion and more financial benefit of Rs.4,000/- to Rs.5,000/- at the time of normal retirement. Since the deceased had a stable job, 30% of the salary should be added to the gross salary towards future prospects for the purpose of determining the amount of compensation.

16. In MACA No.171 of 2008, the learned Tribunal held that the age of Ajay Charan Bindhani at the time of death was 37 years. It is further observed in the impugned judgment of the Tribunal that PW-3, Asst. Engineer, CPWD, Electrical Division, Bhubaneswar has proved his salary certificate and has stated that the deceased was working as a Serviceman in the Department and was drawing a gross salary of Rs.5,981/- per month at the time of accident. He has further stated that a period of 23 years 3 months and 25 days was left for the said employee till his retirement. He further testified that had the deceased Ajay Charan Bindhani been alive and continued in service he would have got all promotions with higher scale of pay and he would have retired in the post of Senior Mechanic and also he would have got more financial benefit by getting higher scale of pay. Learned Tribunal held that the deceased Ajay Charan Bindhani had more or less a stable job which will not be inappropriate to take reasonable liberal view of the prospects of the future.

In view of the above, 50% of the salary should be added to the gross salary towards future prospects for the purpose of determining the amount of compensation.

17. In MACA No.169 of 2008, deceased Rama Chandra Sahoo was getting gross salary of Rs.5,106/-. Rs.5,076/- (Rs.5,106-Rs.30/- towards professional tax) is taken for the purpose of computing compensation. This amount is to be increased by 30%, i.e., Rs.1522/- towards future income/prospects which comes to Rs.6,598/-. One fifth of the same which comes to Rs.1,319/- if deducted towards personal expenses, the resultant figure comes to Rs.5,279/-. The age of the deceased being 41 years at the time of death, the multiplier of 15 is applicable.

18. In view of the above, in MACA No.169 of 2008, the Insurance Company is directed to pay compensation amount of Rs.9,55,220/- (Rs.5,279/- x 12 x 15 + Rs.5,000/- towards consortium) along with nterest at the rate of 6% per

annum from the date of filing of the claim petition till the date of deposit before the Tribunal besides cost of Rs200/- within eight weeks from today.

19. In MACA No.171 of 2008, deceased Ajaya Charan Bindhani was getting Rs.5,981/- per month at the time of accident. Rs.60/-, i.e., Rs.30/- towards professional tax and Rs.30/- towards CGEIS when deducted from the gross salary the resultant figure comes to Rs.5921/- (Rs.5,981/- -- Rs.60/-). This amount is to be increased by 50% of the gross salary, i.e., Rs.2,960/- towards future income/prospects which comes to Rs.8,881/-. One third of the same which comes to Rs.2,960/- when deducted towards personal expenses, the resultant figure comes to Rs.5,921/-. The age of the deceased being 37 years at the time of death, multiplier of 16 is applicable.

20. In view of the above, in MACA No.171 of 2008, the Insurance Company is directed to pay compensation amount of Rs.11,41,832/- (Rs.5,921/- x 12 x 16 + Rs.5,000/- towards loss of consortium) along with interest @ 6% per annum from the date of filing of the claim petition till the date of deposit before the Tribunal besides cost of Rs.200/- within eight weeks from today.

21. On deposit of the said amount of compensation before the Tribunal, the learned Tribunal shall disburse the same to the claimants in the manner it has directed in its order.

22. In the result, MACA No.169 of 2008 is allowed and MACA No.171 of 2008 is allowed in part. Accordingly, MACA No.349 of 2008 and MACA No. 350 of 2008 filed by the Insurance Company are dismissed.

Appeal disposed of.

2012 (II) ILR- CUT- 160

B.K.NAYAK, J.

S.A. NOS. 204/1987 & 225/1988 (Dt.01.02.2012)

SUDARSAN PANDA & ORS. ……Appellants

.Vrs.

B.D.O. NARASINGHPUR & ORS. ……Respondents

Adverse Possession – Plaintiffs claim title as part of the suit tank excavated by Gadei Panda and the other part belonging to the villagers of Badabarana – Merely because the tank is locally known as "Gadei Panda Bandha" it can not give rise to a presumption that it was excavated by Gadei Panda – Held, it can not be said that villagers of Lembo have title of the suit tank – There is also no evidence that the suit tank was excavated on any royati land of the villagers of Lembo although only half of the suit tank situated inside the revenue village of Lembo – After merger, the suit tank became the property of the Government and was transferred to Grama Panchayat and had been leased out by way of auction for the purpose of pisciculture in the year 1977 and Government sanctions funds for repair and maintenance of the tank – Though villagers used water of the tank for different purposes the ownership and possession of the tank is continuing with the State – Held, plaintiffs have not acquired ownership over the tank in question and as such they have not acquired title over the suit tank by adverse possession – The finding of the lower appellate Court that the villagers of Lembo have prescriptive right of fishery over the suit tank and further direction restraining the defendants from interfering with such right of fishery can not be sustained – Plaintiff's suit dismissed with costs throughout. (para 10,11,12,14 **)**

Case laws Referred to:-

1.AIR 1951 SC 247 : (Raja Braja Sundar Deb & Anr.-V-Moni Behera & Ors.)

2.AIR (37)1950 pc.56(29 Pat.1) : (Lord Radeliffe in Lakshmidhar Misra-V-Rangalal)

For Appellants - Mr. R.P.Patnaik.

For Respondents- Mr. S.P.Mohanty (for res.nos.3 to 7)
Addl. Standing Counse (for res.no.1 & 2)

For Appellants - M/s. S.K.Mohanty, S.P.Mohanty, A.K.Nayak,

Miss. A.K.Rout & Miss. S.B.Das.
ForRespondents - M/s. D.Patra,U.S.Pattnaik, (for Res.Nos.1 to 10)
(Addl. Standing Counsel (Res.Nos.11 to 12)

B.K.NAYAK, J. Both the appeals have been filed against part judgment and decree passed by the First Additional District Judge, Cuttack in Title Appeal No.91/93 of 1983/1986 arising out of the judgment and decree dated 26.07.1983 and 30.07.1983 respectively passed by the Sub-Ordinate Judge, Athagarh in Title Suit No.9 of 1980. Therefore, both the appeals were heard analogously and are being disposed of by this common judgment. The plaintiffs in the suit are appellants in Second Appeal No.204 of 1987 whereas as defendant nos.5, 6 and 7 are the appellants in Second Appeal No.225 of 1988.

2. The plaintiffs filed the suit in representative capacity for themselves and on behalf of the villagers of their village-Lembo claiming right, title and interest over the suit tank measuring about Ac.30.00 acres and for confirmation of their possession and for permanent injunction restraining the defendants from interfering in their possession. It is the case of the plaintiffs that the suit tank locally knows as 'Gadei Panda Bandha' was excavated by Gadei Panda of village-Lembo, a philanthropist, with the help of other villagers over 'A' schedule land measuring Ac.15.78 decimals in the year 1900. The villagers of Lembo used the water of the tank for the purpose of irrigation, bathing and pisciculture and they have been in possession of the same as of right since then. The suit 'B' schedule land measuring Ac.13.62 decimals belonging to villagers of Badabarana submerged in the water of the suit tank excavated on schedule 'A' land and the villagers of Lembo gave their Stitiban land measuring Ac.13.21 decimals described in schedule 'C' of the plaint in exchange of schedule 'B' land. The subsequent claim of defendant nos.5 to 7 of village-Badabarana for getting further land from the plaintiffs in exchange was turned down by the then Darbar Administration of Narasinghpur State. However, the plaintiffs paid compensation for the excess land of village-Badabarana to Chinta Naik and others of the said village in Revenue Case No.43 of 1932-33. Therefore, the suit tank exclusively belongs to the villagers of Lembo and they have got right, title and interest over the same. Alternatively, they have perfected their right, title and interest by adverse possession. The Ex-ruler of Narasinghpur and the defendants have never interfered in the plaintiffs' possession over the suit tank. The plaintiffs have been exercising their right of ownership, possession, bathing, irrigation and pisciculture over the suit tank without any hindrance and maintaining accounts in relation to pisciculture and maintenance of the tank. At the instance of plaintiff no.1 unauthorised

occupants were evicted from a portion of the suit tank in the year 1951 by defendant no.3, the Collector, Cuttack. On 05.05.1977 defendant nos. 1 and 2, viz, Sarpanch Alara Grama Panchayat and Block Development Officer, Narasinghpur made paper transactions showing auction of the suit tank in favour of defendant no.4 which is illegal.

3. Defendant nos. 2 and 3 filed a joint written statement. Defendant nos. 1, 5, 6 and 7 adopted the written statement filed by defendant nos. 2 and 3. The case of the defendants is that the suit tank measuring Ac.30.78 decimals belongs to the State, who exercised control and possession over the same since the time of Darbar Administration, which has been recorded in the name of the Government. They denied the plaintiffs' claim of title, possession and right of pisciculture over the tank and its excavation by Gadei Panda of village-Lembo. It is stated that about the year 1887 one old existing Bandha was renovated and developed and a high embankment was raised at a cost of Rs.600/- out of which Darbar Administration spent Rs.500/- and the villagers of Lembo contributed Rs.100/- by way of imposition of levy. It is stated that there is no mention of the name of 'Gadei Panda' in the R.O.R. and it is not known as to why the tank is locally called 'Gadei Panda Bandha'. It is stated further that as a result of improvement and development, about Ac.15.00 of additional land of villagers of Badabarana got sub-merged in the water of the tank rendering it unfit for cultivation. The suit land belongs to the Government which exercised control and possession over the same and there is no obstruction for any body to take bath in the Bandha. Villagers of Badabarana, limbo and other surrounding villages get water from the Bandha for irrigation purpose. Plaintiffs have no right of pisciculture, irrigation and bathing as claimed by them. For the first time, plaintiffs have advanced a right to pisciculture in the suit tank and not at any time before. The tank has been transferred to Alara Grama Panchayat in the year 1963 after re-organisation of the Grama Panchayat. The transfer of the tank has been confirmed vide letter dated 12.02.1969 of S.D.O, Athagarh. The Grama Panchayat having the fishery right over the tank, it was put to auction sale on 05.05.1977 after due notice to all. In the auction sale held by the B.D.O., defendant no.4-Rama Chandra Panda, Prasana Kumar Panda and Trilochan Panda, all of village-Lembo, took part in the auction and defendant no.4 became the highest bidder for Rs.50/-, but on account of low bid amount it was not accepted. The tank was re-auctioned on 02.07.1977 in which defendant no.4 of village-Lembo, Sadananda Biswal of village-Nandakishorpur and Chaitan Naik of village-Badabarana were bidders and defendant no.4 became the highest bidder for Rs.2101/- and he deposited the bid amount on 04.07.1977. Claim of the plaintiffs to have created a common fund out of pisciculture is not correct. No

regular pisciculture was being carried on in the Bandha prior to 1963 when it was transferred to Grama Panchayat. Rain water from the mountains flows down to the tank and escapes through 'fera', on account of which stray fish accumulated in the Bandha during rainy season. As per custom, during summer when water of the Bandha dries up people of the surrounding villages used to catch fish after paying 1/8th of the catch to the palace. In the year 1957-58, the State Government sanctioned a sum of Rs.10,000/- for development of the Bandha under the scheme for development of Minor Irrigation Projects. Late Harihar Raiguru, father of plaintiff no.1 and plaintiff nos.3 and 5 were appointed as members of the committee constituted and executed all development works. During the period between 1957-58 and 1958-59 a total sum of Rs.6,495/- was spent from the sanctioned amount under the supervision and control of the State Officers and the unspent amount of Rs.3,505/- was refunded. The claim of the plaintiffs to have spent money for repair of tank was denied. Thus, the plaintiffs' claim of ownership and possession over the suit tank was stated to be misconceived and ill founded. The suit was also resisted on other technical grounds, such as, non-service of valid notice under Section 80, C.P.C. and undervaluation of the suit. On the pleadings of the parties, the trial court framed five issues and decreed the suit with the findings that the plaintiffs have got right, title and interest over the suit Bandha and that they exercise right of ownership and possession over the same for all purposes.

4. Defendant nos.2 and 3, viz, the B.D.O., Narasinghpur and Collector, Cuttack and defendant nos. 5, 6 and 7, who are the villagers of Badabarana filed Title Appeal challenging the judgment and decree passed by the trial court. The title appeal was heard and partly allowed by the learned Additional District Judge, Cuttack vide his judgment dated 30.04.1987 holding that the plaintiffs have no right of ownership over the suit tank, but the villagers of Lembo represented through the plaintiffs have got exclusive right of fishery over the suit tank by prescription and that cannot be interfered with by the State Authorities. In support of his decision, the lower appellate court reached the following conclusions in paragraphs-17 and 18 of its judgment:

> "17. On an analysis of the oral and documentary evidence adduced by the parties, the following features emerged.
>
> (1) The origin of the suit tank is lost in antiquity; and there is no evidence either oral or documentary regarding its excavation by Gadei Panda.

(2) The suit tank is locally known as 'Gadei Panda Bandha'.

(3) The suit tank is situated in the border of village Lembo and village-Badabarana.

(4) The suit tank consists of thirty acres of land out of which A.15.00 and odd belong to the Government and Sch-B land measuring A.13.62 dec. of land of villagers of Badabarana submerged in the water of the tank was given in exchange for the development of the suit tank in respect of the Sch-C land belonging to the villagers of Lembo consisting A.12.21 decimals and the villagers of Lembo also paid the compensation for the balance land in the shape of money to villagers of Badabarana.

(5) The right of ownership of the suit tank remains with the Ex. State Narasinghpur till the merger and thereafter with the present State Government;

(6) The villagers of Lembo being the beneficiaries of the suit tank used to enjoy the right of irrigation, bathing and fishery on the suit tank since time immemorial i.e. from the premerger days till 1977 when the suit tank was transferred to the panchayat and there was auction sale by the Panchayat in 1977.

(7) The villagers of Lembo, the Darbar administration and the State Government made improvements to the suit tank.

18. It is not the plaintiffs' case that they have right of ownership over the suit tank by way of any grant. They claim their title over the suit tank by adverse possession and by long user by way of prescription. The facts and circumstances go to show that the plaintiffs being user and enjoyment of the tank by taking water for irrigation, bathing and pisciculture since the premerger days, they have been able to establish their said right over the suit tank by way of prescription which was recognised by the State. The plaintiffs have sacrificed their valuable Stitiban land in exchange and also given contribution for the improvement of the suit tank during Darbar Administration but this is not sufficient to confer right of ownership of the suit tank on the plaintiffs as they have done so as beneficiaries of the suit tank and for their own benefit for using the water of the tank for irrigation, bathing and enjoying the fishes of the tank."

5. Against the part of the decree refusing to declare the right, title and interest of the plaintiffs over the suit land, Second Appeal No.204 of 1987 has been filed by the plaintiffs whereas against the part of the decree

declaring the exclusive right of fishery of the plaintiffs over the suit tank, Second Appeal No.225 of 1988 has been filed by defendant nos.5, 6 and 7.

6. Second Appeal No.225 of 1988 has been admitted on the following substantial question of law :

> "Whether community can have an easement right by long continuance of exercise of a particular right."

Vide order no.3 dated 26.09.1987, Second Appeal No.204 of 1987 has been admitted on ground Nos.5(a), (b) and (c) as indicated in the memo of appeal, which are as follows :

> "(a) Whether in view of his own finding to the effect that the villagers of Lembo being the beneficiary of the suit tank used to enjoy the right of irrigation, bathing and pisciulture on the suit tank by prescription since time immemorial i.e., from the time of Durbar Administration "indefeasible title in favour of the plaintiffs should have been recorded.
>
> (b) Whether the right of ownership of the suit tank remains with the villagers of Lembo or with the ex-State of Narasinghpur till the merger and thereafter with the present State Government is no more in dispute in view of his own analysis to the effect:-
>
> The suit tank consists of thirty acres of land, out of which A.15.00 and odd belong to the Government and Schedule B land measuring A.13.62 dec. of land of villagers of Badabarana sub-merged in the water of the tank was given in exchange for the Development of the suit tank in respect of the Schedule C land belonging to the villagers of Lembo consisting A.12.21 decimals and the villagers of Lembo also paid the compensation for the balance land in shape of money to villagers of Badabarana.
>
> (c) Whether the plaintiffs have established their right over a portion measuring A.15.00 of the suit tank by means of adverse possession is no longer in dispute in view of the finding 'the suit tank is locally known as Gadei Panda Bandha' because the 'name' itself is a positive proof of the ownership and unless the plaintiffs aforesaid predecessor was admittedly the owner, his name would not have been recorded in R.O.R. of the then mighty durbar Administration

and so far as other portion of the tank measuring Ac.13.62 which admittedly exists on plaintiff's stitiban lands the court was bound by law to record a finding of title in favour of the plaintiffs."

7. The plaintiffs claim title to the suit land on the assertions that part of the suit tank appertaining to Schedule 'A' land was excavated by Gadei Panda of village-Lembo, a philanthropist, and the other part appertaining to suit 'B' schedule land belonging to the villagers of Badabarana was exchanged by giving land of villagers of Lembo appertaining to schedule 'C' land and also by payment of compensation by them for the excess land of village-Badabarana. Alternatively title is claimed by adverse possession for exercising the exclusive right of irrigation, bathing and pisciluture by villagers of Lembo.

As has been found by the lower appellate court, the final court of facts, there is no acceptable evidence that the suit tank was excavated by Gadei Panda in the year 1900 or at any point of time, as asserted by the plaintiffs, though the tank is locally known as 'Gadei Panda Bandha'. Merly because the tank is locally described as 'Gadei Panda Bandha' or named as such, that cannot gave rise to a presumption that it was excavated by Gadei Panda. It is common knowledge that at times public properties such as roads, streets, chowks and tanks etc are named after some important persons. That, however, does not vest any right or title in such property with the person concerned or with the inhabitants of the locality where such person resided. There is also no evidence that the suit tank was excavated on any royati land of the villagers of Lembo although nearly half of the suit tank in question situated inside the Revenue village of Lembo. Therefore, it cannot be said that the villagers of Lembo have title of the suit tank as because it has been described as 'Gadei Panda Bandha'.

8. It appears from the evidence on record and also found by the lower appellate court rightly that the suit tank originally comprised of Ac.15.00 of land appertaining to village-Lembo but subsequently about 15 acres of land of some raiyats of village-Badabarana got submerged which was amalgamated with the original tank, for which Ac.13.62 of land of village-Lembo was given in exchange to the persons whose land got submerged in the water of the tank. It is the evidence of P.W.3 (plaintiff no.2) which has been taken note of by the lower appellate court that the original Ac.15.00 and odd of the suit tank belonged to the Government.

9. In order to decide the disputed rights of the parties over the suit tank, it is necessary to refer to the Narsinghpur Tenancy and Revenue Rules,1938

which makes provision with regard to the nature of right, which a rayat or tenant can exercise in respect of tank, water reservoir and government properties. Rule-5 of the Rules gives classification of tenants and rayats. A rayat is included within the definition of tenant. Apart from rayats holding rent free lands there are two other categories of rayats, namely, 'Thani' and 'Pahi' rayat. 'Thani' rayats are residents of village itself having right of occupancy in the land held by them in the village. A Pahi rayat is one having right of occupancy in the land held by him in the village though he is not a resident of village where he holds land. A rayat is a person, who holds land for the purpose of cultivation by himself or by members of his family or by hired servants or with the aid of partners with the express sanction of the State and also includes the successor-in-interest of the rayat. Under rule 16(1) of the Rules a Thani or Pahi rayat may use the land in any manner which does not materially impair the value of land or render it unfit for the purpose of tenancy and he has the right to use water of the tank and bandha standing on such land for irrigation purpose and appropriate the fish without express sanction of the authority of the State. Under Rule 16(4) all orchard on Sarkari lands and water reservoirs being the sole property of the State, a rayat can lay no claim to the same. A tenant can excavate any tank or Bandha on the land belonging to the State with the permission of the State. Under sub-rule (5) of Rule 16 such an excavator shall have prior right to use the water for irrigation purpose. The Rule, however, does not give any right of fishery over the Sarkari tank or reservoir to the tenant or even to the excavator of a tank dug on Sarkari land. Under rule 91(2) a tenant can also with the prior sanction of the State construct a tank or Bandha, ditch or reservoir on Sarkari land or on his own holding at his expenses for the purpose of drinking, bathing and irrigation. This rule, however, also does not concede any right of fishery. Rule 93 casts a duty on the tenants whose lands are irrigated with the water of the tank or reservoir constructed on the expenses of the State or any private person on his own land or on Sarkari land to repair the breaches thereof every year under the supervision of Sarbarkar (Village Revenue Officer).

According to the Report on Land Tenure and the Revenue System of the Orissa and Chhatishgarh State by R.K. Ramadhyani Volume-III at page-180 relating to the Narsinghpur State, the tenant of a village enjoy fruits of orchards, fish of tanks and bandhas and irrigate their lands free. The excavators of tank have a prior right to water. All the water reserviors and orchards are Sarkari. No tenant has the right to claim compensation, except remission of rent for the lands taken from the State for the benefit of the public.

10. As per the system of Revenue Administration in the Ex-State of Narsinghpur as seen from the Rules and report above the tenants of a village use to utilise the water of the tank existing in the village and also use to appropriate fish collected or grown in the tank existing on their rayati land. They have no indefeasible right of ownership over the tank in question, even though the tenants were duty bound to bear expenses for the purposes of maintenance and repair of the tank. Learned counsel for the plaintiff-appellants argues with vehemence that since part of the suit tank belonging to some tenants of village-Badabarana which was submerged in the water of the tank was exchanged by rayati land of village-Lembo and also some compensation was paid for the rest of the submerged land the plaintiffs can at least be said to have part ownership over the suit tank. In this respect reliance has been placed on Ext.4, i.e., certified copy of order sheets and report of Revenue Case No.43 of 1932-33 of the court of Dewan of Narsinghpur. The order sheet dated 02.06.1933 of the said case describes that in earlier Misc. Case No.428 of 1927-28 some tenants of village-Badabarana had been given Ac.13.21 of land in exchange for their lands acquired for the suit tank and that a further area of Ac.4.79 was necessary to be given to such tenants of Badabarana whose land had been submerged in the suit tank. The tenants, whose land was submerged under the water of the tank were given the land in exchange that belonged to some tenants of Lembo. The order, however, does not reveal the manner of exchange and that no deed of exchange, etc. is forthcoming, nor there is any evidence to that effect. Since the tank in question was mostly used by tenants of Lembo, probably some rayati lands of Lembo were taken over by the State and given in exchange to some tenants of Badabarana whose land got submerged in the tank. Therefore, it has been described in the order sheet in the Revenue Case that the land of tenants of Badabarana which submerged was acquired for the purpose of the Bandha (tank). The report dated 04.07.1993 of the Sarbarkar (Village Revenue Officer) submitted in the aforesaid Revenue Case also reveals that submerged land of some tenants of Badabarana was treated as Sarkari. Therefore, even if some rayati land of village-Lembo was given to the tenants of Badabarana whose land got submerged in the tank, that by itself would not confer right, title on the villagers of Lembo in respect of the part of the tank.

11. Admittedly, after merger the suit tank became the property of the Government and was transferred to the Grama Panchayat and had been leased out by way of auction for the purpose of pisciculture in the year 1977. It is also admitted that the Government sanctions funds for maintenance and repair of the tank in question. It is, therefore, clear that though the villagers and general public used the water of the tank for different purposes, the

ownership, control and legal possession over the tank is continuing with the State. The lower appellate court has, therefore, rightly come to the conclusion that the plaintiffs have not acquired ownership over the tank in any manner.

12. The next question is whether the plaintiffs can have a prescriptive right of fishery over the suit tank, as has been found by the lower appellate court. The discussion in paragraph-18 of the judgment of the lower appellate court gives an impression that the court got swayed away by the fact that some lands of village-Lembo were given to some tenants of village-Badabarna whose land got submerged in the water of the tank and, therefore, it held that the plaintiffs got the right to fishery by way of prescription, although it came to the conclusion that the plaintiffs have acquired no title over the suit tank by way of adverse possession. The finding of prescriptive right of fishery for which no reason has been given is also inconsistent with the finding that the plaintiffs have not acquired title by way of adverse possession.

The evidence of the plaintiffs' witnesses with regard to rearing of fish has not been accepted by the lower appellate court. Ext.1, which is said to be the statement of accounts with regard to rearing and enjoying of fish of the tank by the villagers of Lembo has been rejected by the lower appellate court while discussing the evidence of P.W.3. In fact, there is no proof with regard to the proper custody of Ext.1, which is said to be the statement of accounts with regard to the tank in question. In fact, P.W.3 has stated in his evidence that Ext.1 was being maintained by Harihar Rajgur, who was the Sarbarkar of village-Lembo. He has even identified the handwriting of the said Sarbarkar. The entries in Ext.1, however, do not exclusively relate to accounts with regard to expenditure and income by way of sale of fish of the suit tank. Ext.1 also contains entries relating to expenditure on repair and maintenance of the school, expenditure incurred in litigations and expenditure in the nature of contribution for religious purposes. Therefore, Ext.1 cannot said to be a statement of accounts regarding the suit tank only. Since it was maintained by the Sarbarkar, who was the village Revenue Officer, and not by the villagers as a community, it cannot be accepted as a document in proof of rearing and enjoying fish by the villagers of Lembo and the court below has rightly rejected the same.

13. It has been held by the apex Court in the case of ***Raja Braja Sundar Deb and another v. Moni Behera & others;*** AIR 1951 SC 247 that a right to fish from the fishery based on mere inhabitancy is capable of an increase almost indefinite and it would necessarily lead to the destruction of the

fishery itself and the same cannot be acquired by prescription. It was also held by the apex Court as follows :

> "xxx xxx xxx …. ….. We find it difficult to uphold the view of the High Court that the defendants were in possession of the disputed fishery under a lost grant. This doctrine has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. As pointed out by Lord Radeliffe in *Lakshmidhar Misra v. Rangalal,* A.I.R.(37) 1950 P.C.56: (29 Pat.1), the doctrine of lost grant originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user and that since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant, and that a right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant, there being no admissible grantees. xxx xxx …."

14. On the aforesaid analysis, the finding of the lower appellate court that the villagers of Lembo have prescriptive right of fishery over the suit tank and further direction restraining the defendants from interfering with such right of fishery cannot be sustained. I, therefore, set aside, such finding and order of lower appellate court. The Second Appeal No.204 of 1987 is accordingly dismissed and Second Appeal No.225 of 1988 is allowed and the plaintiffs' suit is dismissed with costs through out.

Appeal disposed of.

2012 (II) ILR- CUT- 171

S.K.MISHRA, J.

W.P.(C) NO. 1594 OF 2012 (Dt.03.02.2012)

HARAMANI SING …… Petitioner.

.Vrs.

STATE ELECTION COMMISSIONER, ORISSA & ANR. …… Opp.Parties.

ELECTION – Three-tier Panchayat Raj institutions – Notification issued by State Election Commission directing not to use the name of any Political Party while campaigning for the election of Wardmembers, Sarpanches and Panchayat Samiti Members – Notification challenged being violative of Article 19 of the Constitution of India.

Notification issued in pursuance of Rule 20 of Orissa Gram Panchayat (Election) Rules, 1965 and Rule 5 of Orissa Panchayat Samiti (Election) Rules, 1991 – So the right to elect or to be elected and the process/manner of participating in the election are not fundamental right as they are created by the statute – Any person desirous of contesting election must do so within the frame work of the statute and rules framed there under – Held, instruction issued by the State Election Commission does not violate any fundamental right guaranted under the Constitution of India nor it goes against the statute or Rules framed there under. (Para 8,12)

Case laws Referred to:-

1.AIR (3() 1952 SC 64 : (N.P.Ponnuswami-V-The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. & Ors.)
2.AIR 1954 SC 686 : (Jamuna Prasad Mukhariya & Ors.-V-Lachhi Ram & Ors.)
3.(1982) 1 SCC 691 : (Jyoti Basu & Ors.-V-Debi Ghosal & Ors.)
4.AIR 1995 Punjab & Haryana 71 : (Babu Lal Singal & Ors.-V-State of Haryana & Ors.)
5.(1978) 1 SCC 405 : (Mohinder Singh Gill & Anr.-V-The Chief Election Commissioner, New Delhi & Ors.)

For Petitioner - M/s. Shashi Bhusan Jena, R.C.Ray,

S.Behera, A.Mishra & S.Soren.
For Opp.Parties - Mr. Pitambar Acharya, Sr. Advocate
M/s. S.Rath, B.Bhadra, B.K.Jena & S.Rout.

S.K.MISHRA,J. In this writ application, the petitioner, a candidate for the office of the Sarpach of Mitrapur Grama Panchayat election, has assailed the Notification issued by the State Election Commission putting restrictions on the use of name of any political party in the campaigning for the election.

2. On 23.12.2011, as per the Gazette Notification, the Government of Orissa in the Panchayati Raj Department have called upon all Grama Panchayats to elect Ward Members and Sarpanches and for election of Panchayat Samiti members. The said notification also included election for the offices of the Members of Zilla Parishad. In accordance with the scheduled given by the Election Commission, the nominations have been filed. After withdrawal of candidature and allotment of symbols, the contesting candidates have started campaigning. The election is scheduled to be held in five phases i.e. on 11th, 13th, 15th, 17th and 19th February, 2012 throughout the State.

3. In the said election, almost all political parties participate and field candidates. The Election Commissioner consults and seeks cooperation from the parties to conduct free and fair election. While matters stood thus, the opposite party no.2 issued a letter on 19.01.2012 directing all the District Magistrates and Collectors of the State to bar the contesting candidates for the post of Sarpanches, Panchayat Samiti members and Ward Members not to campaign by using the name of any political party. Such notification has been assailed by the petitioner as violative of Article 19 of the Constitution of India. Hence, this writ application.

4. Learned Standing Counsel for the Election Commissioner submitted that the Notification issued the State Election Commissioner is in pursuance of Rule 20 of the Grama Panchayat Election Rules, 1965 as well as Rule 5 of the Orissa Panchayat Samiti (Election) Rules, 1991. It is further contended that the circular is basically made for a free and fair election and all the contesting candidates are directed not to write to be party sponsored candidates as it contradicts the provisions of law and destroy basic objects of 73rd constitution amendment. The Circular of the State Election Commission is stated to be justified and conforms to the standard of democracy, inasmuch as, the voting is being conducted in a free and fair manner and on the basis of the symbols allotted to the

respective candidates under the rules. The learned counsel further submitted that the claim of the petitioner that the right of the petitioner is infringed is misconceived as it is settled law that the right to elect is not a fundamental right. Therefore, it is urged by the learned Standing Counsel for the Election Commissioner to dismiss the writ application.

5. In order to understand the matters involved in this case, it is profitable to refer to the circular issued by the State Election Commission.

> "Sir, I am directed to say that the Election programme in respect of the Three tier system of election to Panchayati Raj Institutions, 2012 has started in full swing. After withdrawal of candidature and allotment of symbols, the final list of contesting candidates in respect of the different stratum of election, the candidates contesting the elections will go for campaigning in favour of their nomination which will be completed prior to 36 hours of date of poll phase wise.
>
> It is well known that except the members of Zilla Parishads no other post like Ward Members, Sarpanches or Samiti Members is contested on party lines.
>
> It has been observed in the past that some of the candidates like Sarpanch, P.S. Members and even Ward Members which are never allotted party symbols indulge in writing "Sponsored Candidates of …….. party (DALA SAMARTHITA PRARTHY). This contradicts provisions of law. Neither they shall associate their names with any party in any form nor should any party make any public claims or display their support to them in any form. Any such action would be deemed as a violation of Code of Conduct which has to be prevented.
>
> This shall be intimated to all the Election Officers down below. Action taken in the matter may be reported to this Commission from time to time. "

6. Thus, on the submissions made by the rival parties following two questions arise for determination in this case :-

Firstly, whether, the notification issued by the state Election Commission is violative of any of the fundamental rights enshrined in part-III of the Constitution and secondly, whether the said notification is in

consonance with the provisions of the relevant Act and Rules guiding the Panchayati Raj elections.

7. As far as the question of violation of fundamental right is concerned, the Supreme Court in a Constitution Bench decision i.e. ***N.P. Ponnuswami v. The Returning Officer, Namakkal Constituency, Namakkal, Salem Dist. and others,*** AIR (39) 1952 SC 64 has held that the right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it. This view has been followed by the Supreme Court consistently. In ***Jamuna Prasad Mukhariya and others v. Lachhi Ram and others,*** AIR 1954 SC 686. The Supreme Court further held that the right to stand as a candidate and contest an election is not a common law right. It is a special right created by the statute and can only be exercised on the conditions laid down by the statute. The fundamental right chapter has no bearing on a right like this created by statute. Persons have no fundamental right to be elected members of Parliament. If they want that they must observe the rules. Similar is the view taken by the Supreme Court in ***Jyoti Basu and others v. Debi Ghosal and others,*** (1982) I SCC 691, wherein the Supreme Court has held that the right to elect, to be elected and to dispute an election are neither fundamental rights nor common law rights but are simply statutory rights and therefore, are subject to statutory limitations.

8. Thus, from the aforesaid cases it is clear that right to elect or to be elected and the process of participating in election, the manner of participating in election are not fundamental right as they are created by the Statute. Any person who is desirous of contesting election must do so within the framework of the statute and rules framed thereunder.

In this connection, a Division Bench decision of the Punjab and Haryana High Court in ***Babu Lal Singal and others v. State of Haryana and others,*** AIR 1995 Punjab and Haryana 71, considered the question of not allotting a particular election symbol of a particular party to candidates belonging to that party in a Municipal election. At paragraph 9 of the said case, the Division Bench has observed that no person or a political party has a right to contest the election to the local bodies on a particular specified symbol. It is true that the political parties are inherent part of democratic polity in our system but it does not confer any special right upon such political parties to claim the allotment of a particular symbol for the purpose of election to the local bodies which are claimed to be being held on non political party basis. In that case, the Punjab and Haryana High Court upheld the election commission decision to exclude the symbols of

political parties recognized by the Election Commission at the national and State level and all political parties have been treated alike. Thus, it is clear that there has been no violation of any fundamental rights by issuing all the instruction as contained in the aforesaid letter issued by the State Election Commission.

9. Article 243K of the Constitution of India provides for elections to the Panchayats. It provides that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor. The State Election Commissioner is an independent person and he can not be removed by any authority and his removal can be sought in the manner of a Judge of the High Court is removed, i.e. through impeachment. Thus, the State Election Commissioner has been given the mandate to supervise, direct and control the preparation of the electoral rolls as well as conduct of election in the State. Similar provisions appear at Article 324, which provides for superintendence, direction and control of elections to be vested in an Election Commission. It is regarding elections to the offices of President, Vice-President as well as to the Parliament and Legislative assembly. In interpreting the power vested on the election Commission, the Supreme Court in ***Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others,*** (1978) I SCC 405, held that the scope of Election Commissioner's power has to be construed widely and powers operates in the areas left unoccupied by legislation. However, the Election Commission should act bona fide and subject to rules of natural justice. Thus, it is clear from these cases that whenever there is some grey area, the Election Commissioner has the authority to fill up the gaps by issuing circulars/notifications, which are reasonable and bona fide. The same principle shall apply to the powers conferred under the State Election Commission under Article 243K of the Constitution of India.

10. Coming to the present case, it is seen that Rule 17 of the Orissa Grama Panchayat Election Rules provides that there shall be ballot papers in two different colours or printed in different ink, one for the election of the Sarpanch and the other for election of the Ward Members in Form No.6. The ballot paper for election of the Sarpanch shall bear the six symbols as nominated. It is however provided that in case the number of contesting candidates exceeds the number of seats for the office of the Ward Member, the additional symbols (26 listed) shall be allotted to them in the same order, in which they are shown. Similar is the provision of the ballot papers for the election of Ward Member. Rule 20, which is inserted vide Orissa

Gazette Extraordinary No.939 S.R.O. No.400/2006 dated 03.07.2006, provides that the marking system of voting shall be followed and of that purpose the symbols specified in Rule 17 shall be adopted. Sub-Rule (2) provides that the list of duly nominated candidates shall be arranged in Oriya alphabetical order and symbols shall be assigned to each of them in the corresponding order in which the symbols appear in Rule 17. Sub-Rule (3) provides that in case the number of contesting candidates exceeds the number of symbols prescribed under Rule 17, the Commissioner may, by order, prescribe additional symbols to be used for the purpose. But it is provided that the Commissioner shall not prescribe such symbol as are allotted to political parties by the Election Commission of India. It is brought to the notice of the Court that all the symbols that has been mentioned in Rule 17 has not been allotted to any political party, national or regional. The prohibition on the part of the Election Commissioner not to allot symbol allotted to the political parties by the Election Commissioner is to ensure that there is no involvement of political parties in the Gram Panchayat election.

11. Similar Rule is found as far as Orissa Panchayat Samities (Election) Rules, 1991 is concerned. Rule 5 of the Panchayat Samiti Rules, 1991 provides that the symbols to be used by the Panchayat Samiti by the candidates shall be notified by the Commission from time to time and the notification under this rule shall be published in the Orissa Gazette. It is further provided that such symbols shall not include any symbol allotted to the political parties by the Election Commission of India.

12. As against such prohibition of allotment of symbols representing the political parties for the election of Grama Panchayat and Panchayat Samities, the Zilla Parishad election stands in a different footing. Rule 7 of the Orissa Zilla Parishad (Election) Rules, 1994 enables the candidates for a Zilla Parishad Election to contest in a political party basis and the candidate as such is entitled to use with the political party symbols. Thus, it is clear that the rule making authority has consciously avoided for use of symbols to contest the election for the post of Sarpanch or Ward Members and Panchayat Samiti members on political party basis. It appears that the intention of the Legislature was not to allow election to be contested at the Grama Panchayat level and the block level on party basis, otherwise they would not have made such distinction as far as symbol is concerned. Therefore, this Court comes to the conclusion that the instruction issued by the State Election Commission does not violate any fundamental right guaranteed under the Constitution of India nor it goes against the Statute or Rules framed thereunder governing the three-tier Panchayati Raj Institutions elections.

Accordingly, this Court finds no merit in the writ application and the same is dismissed. The interim order passed earlier is hereby vacated and the Misc. Cases filed are also disposed of.

Writ petition dismissed.

2012 (II) ILR- CUT- 178

S. K. MISHRA, J.

O.J.C. NO. 13426 OF 1999 (Dt.27.04.2012)

MANAGEMENT OF PRAJATANTRA PRACHAR SAMITY ……. Petitioner

.Vrs.

CUTTACK PRESS WORKERS' UNION, CTC. & ANR. ….. ….Opp.Parties

SERVICE – Regularization – A person should not be kept in a temporary and ad hoc status for long – Where temporary or ad hoc appointee is continued for long, the Court presumes that there is need for a regular post.

In this case the workmen have been continuing in service for more than a decade – Held, there is need for regular post and they should be regularized in their respective posts they are holding – Management failed to prove that it is going through any short of financial crunch and not in a position to regularize the services of the workmen – Held, Tribunal has rightly come to the conclusion that the workmen should be regularized in service.

(Para 8,9,10)

Case law Referred to:-

AIR 2011 SC 2532 : (Devinder Singh-V- Municipal Council, Sanaur)

For Petitioner - M/s. R.K.Rath & N.R.Rout.
For Opp.Parties - M/s. S.K.Mishra, P.K.Mishra, D.P.Nanda, U.N.Nayaj, P.K.Mohapatra & M.K.Pati.

S.K.MISHRA, J. In this writ application, the Management of Prajatantra Prachar Samity, Cuttack has assailed the award passed by the Industrial Tribunal, Bhubaneswar on 31.08.1999 in Industrial Dispute case no.4 of 1993 directing regularization of the services of the workmen with immediate effect. The State Government referred the dispute to the Industrial Tribunal under sub-section (5) of Section 12 read with Clause D of sub-Section (1) of Section 10 of the Industrial Disputes Act, 1947, hereinafter referred to as the 'Act', for brevity, to determine the following questions:

"Whether the action of M/s. Prajantra Pracar Samity, Cuttack in not regularizing the services of Shri Jugal Kishore Baral and 19 others as permanent workmen is legal and/or justified ?

If not, what direction in this regard is necessary ?"

The case of the workmen represented by the General Secretary of Cuttack Press Workers Union is that Jugal Kishore Baral and 19 others are workmen working with the first party Management being engaged in jobs of perennial nature ever since 1984. The first party Management is a Newspaper establishment operating under the Working Journalists and Other Newspaper Employees' (Conditions of Service) and Miscellaneous Provisions Act, herein after referred to as the "Working Journals Act" for brevity, engaged in publication of daily 'Prajatantra' and several other periodicals besides publishing newspapers and magazines. It has also undertaken the Job of printing of books and forms etc. The employees, namely, working journalists and non-journalists are getting wages as per the recommendations of the Wage Board constituted by the Government as per the provisions of the Working Journals Act. The wages paid to the workmen include the basic pay, D.A., linked with consumer price index, house rent allowance and other allowances. The minimum wage paid to workman is Rs.1377/- per month. There has been no work study in the establishment of the first party for determination of number of permanent workmen required in the regular jobs in the press. It is further pleaded that 102 workmen are engaged in the establishment of the first party permanently while 20 work temporarily apart from a large number of casual workmen who are engaged regularly.

While the permanent employees in the scale of pay with allowances as admissible, the temporary and casual workmen are paid much less, the lowest wage being paid to a Compositor in 1993 was 2420/- while a helper was being paid Rs.185 only. There has been persistent industrial unrest in the press on the issue of regularization of the workmen as per the guidelines laid down. The Union of workmen for years have been demanding the abolition of the system of two sets of workmen and for regularization of the temporary workmen but without any success. In August, 1987 the workers staged a strike for fulfillment of their demands and a bipartite settlement was arrived at on 16.08.1987. The terms of the said settlement stipulated that six Compositors and mechanical helpers be treated as permanent employees we.f. 01.08.1987 and the issue of regularisation of other workmen shall be mutually discussed and settled between the Management and the Union. Despite such agreement, the Management refused to regularize the 20 workmen concerned in the dispute and, as such, they continue to get much

less wage as compared to the permanent employees thereby being discriminated.

2. The Management filed its written statement, *inter alia,* pleading that it has to do away with the obsolete manual composing and switched over to Web Off set printing, HMT colour off-set press, computerized D.T.P. composing system replacing the manual composing to cater to the demands of the readers. For undertaking such modernization it had to raise a loan of Rs.55 lakhs from different financial institutions. It is indicated that all newspapers in Orissa have since switched over to the new process of computerized composing and with a view to meet the challenges, the updated technology was adopted by the Management for a bare survival.

It is further pleaded that in the aforesaid circumstance, it is neither financially possible nor commercially viable to retain the old system of hand composing in which the members of the second party were engaged. It is further pleaded that out of 20 workmen involved in the dispute, Kunja Behera and Bighneswar Singh are temporarily employed as Helpers in the The Foundary, which is a part of the hand composing section. As hand composing has been done away with the above named two employees employed in the type foundary cannot claim permanent status. Sri J.K.Baal and Ajit Rout are admittedly working as Helpers in the hand composing section and therefore, their claim for permanent engagement is also not workable. Saroj Sahoo engaged as a Tradleman is also faced with similar difficulty as it is a part of the hand composing process. The remaining 15 are engaged in hand composing on temporary basis which is on the brink of being closed down in favour of computerized composing through D.T.P. After a complete switch over the continuance of the workmen concerned is not feasible and as such, their claim for regularisation according to the Management is liable to be rejected.

3 The Management emphasized that the interest of the industry has privacy in the face of keen competition and improved technology and no choice is left with the Management to retain old system of the composing and continue to employ the temporary workmen on permanent basis. The Management has already changed over to the D.T.P. process as may be evident in pages 4 nd 5 of the news daily ‘Prajatantra’ and it is about to replace computerized composing of all the pages where manual composing was being adopted. In view of the re-structured plant and Machinery with the advent of new technology, the members of the second party cannot claim to be regularized.

The Management further pleaded that it represents a Trust established to develop arts, culture and literature in the State and it has its humble contributions for the development of the State. It has no oblique intention of making profit but with a view to thriving in the market and surviving in the competition, updating of the printing technology has become inevitable together with readjustment and re-structuring of the work force. On these premises, the Management has contended that the claim of the workman is misconceived and has no bearing on the requirement of the establishment. Denying the averments made in the claim statement, it is pleaded that the reference made by the Government must be answered in negative.

4.. The Management examined its General Manager as the solitary witness in the case. The workman, on the other hand, examined its General Secretary of Cuttack press Karmachari Sangaha as W.W.No.1. W.W.No.2 is one of the Compositors involved in the dispute, who got appointment as such in the year 1987 with the first party-Management and after a decade of employment during the pendency of the dispute was designated as an apprentice. W.W. No.3 is a Proof Reader of a sister concern, 'The Samaj' which is a bigger organization than the establishment represented by the first party namely, Prajatantra Prachar Samity. He stated about the fact of re-deployment of the manual compositors after the manual composing was replaced by the Mono Machine manual.

5 Learned Presiding Officer, Industrial Tribunal, after having taken into consideration the evidence led in this behalf came to the conclusion that the action of the Management in not regularizing the services of Jugal Kishore Baral and others as permanent workmen is not legal and justified. Accordingly, the issues were for their regularisation with immediate effect. Such award is challenged in this writ application.

6. In course of hearing of the writ application, the learned counsel for the petitioner argued that the Management has no other option but to lay off the workman as there was change in technology and the services of eh workman was no longer needed by the Management. It is further argued that as per the Standing order of the undertaking, the Management can lay off any of the temporary workman or apprentice at any time without any hindrance and as all these 20 workmen were designated as apprentice, their removal is no way violated of any provisions of law and, therefore, the Industrial Tribunal has no jurisdiction to direct their regularisation.

7. The scope of interfering with the findings recorded by the Industrial Tribunal in an industrial Dispute case by a Court exercising writ jurisdiction is limited. It has been held recently by the Hon'ble Supreme Court in ***Devinder Singh Vs. Municipal Council, Sanaur,*** AIR 2011 SC 2532, that :-

> Xxx "A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and the said points can not be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised."

8. Keeping in view the aforesaid limitation, this Court has to examine the correctness of the award passed by the Learned Presiding Officer, Industrial Tribunal. The Industrial Tribunal has taken into consideration the fact that the plea of the workmen gains support in the preponderance of evidence adduced by the workmen that their services were utilized in hand composing so also other jobs and that they were transferred from one place to other to work as helpers, dispatchers and the like. It is in the evidence that in the midst of the tenure of engagement of the second party, the management designated the members of the second party who has put in fairly long length of service as apprentice as per the communication dated 27.01.1997.The Industrial Tribunal weighed the fact that the management has not given any convincing evidence for the change in the status of the workmen. The Industrial Tribunal also came to the conclusion that the standing order does not authorize the management to bring out a reduction in the status of the workman from temporary to apprentice to learn work of any unskilled nature.

9. Keeping this factor in view, the Industrial Tribunal came to the conclusion that the workmen have worked for a considerable number of years as employees of the management and the process they have lost any attendance of any other engagement, and therefore, they should be regularized as worker of the said management. As regards the financial viability of the establishment, the Tribunal concerned the fact that the management has not proved balance sheet profit and profit and loss account and any such other financial statement, which would indicate that it is going through any short of financial crunch, so that it is not in a position to regularize services of the workmen. On such findings, the Tribunal has come to the conclusion that the workmen should be regularized in service.

10. While agreeing with the findings recorded by the learned Presiding Officer, Industrial Tribunal, this Court takes note of the ratio decided in ***State of Haryana and others Vs. Piara Singh and others,*** AIR 1992 SC 2130, wherein the Hon'ble Supreme Court has held that the State must be a model employer. It is for this reason, it is held that equal, pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary and ad hoc status for long. Where a temporary or ad hoc appointee is continued for long, the court presumes that there is need and warrant for a regular post, and accordingly, directs regularization. In this case, the workmen have been continuing in service for more than one decade. Therefore, this Court comes to the conclusion that there is need for

regular post and they should be regularized in their respective post they are holding.The learned counsel for the petitioner also does not argue that the order impugned suffers from any jurisdictional error not there is any allegation that the findings recorded are perverse, The only contention raised by the petitioner is that of financial crunch and lack of requirement of the services of the workmen. In view of the ratio decided by the Hon'ble Supreme Court in ***Devinder Sing's*** case (supra), there is no scope for reappreciating the evidence and come to a different conclusion.

Keeping in view the aforesaid discussion, this Court comes to the conclusion that there is no merit in the writ petition and the same is being.

Writ petition dismissed.

2012 (II) ILR- CUT- 185

B. K. MISRA, J.

W.P.(C) NO. 12880 OF 2011 (Dt.23.04.2012)

BIBHUTI BHUSAN SWAIN & ANR. ……Petitioners.

.Vrs.

KHIROD CHANDRA SWAIN ……..Opp.Party.

ORISSA CONSOLIDATION OF HOLDINGS & PREVENTION OF FRAGMENTATION OF LAND ACT, 1972 (ACT NO.21 OF 1972) – S.4(4).

Suit for declaration that the compromise decree in T.S. No.105/1989 was collusive so no title passed in favour of defendant No.1 basing upon such decree – Defendants filed petition U/s.4 (4) of the Act for abatement of the suit in view of the consolidation operation going on in respect of the suit village – Application rejected – Hence the writ petition – Held, since the suit was for a declaration that the earlier compromise decree was collusive, no relief under the consolidation Act can be obtained hence the suit does not abate – No reason to interfere with the impugned order. (Para 5)

Case law Relied on :-

1980 (Vo.50) CLT. 100 : (Bhubaneswar Mishra & Anr.-V-Srimati Ujalamani Devi & Anr.)

Case laws Referred to:-

1.1990(1) OLR. 496 : (Akuli Mallik @ Jena-V- Kusa Jena & Ors.).
2.1993 (1) OLR 90 : (Hakimatun Nisa Bibi-V- Md. Fakiruddin Khan & Ors.)

For Petitioner - M/s. Ramakanta Mohanty, D.Mohanty, S.Mohanty, D.Varadwaj, A.Mohanty, B. Kumar, A.S.N. Biswal.
For Opp.Party - M/s. Jameswar Das, H.S.Mangaraj, S.K.Routray, A.K. Dash.

B.K.MISRA, J. In this writ petition, the present petitioners, who are Defendants in C.S. No.135 of 2008 (pending in the court of learned Civil Judge (Sr. Divn.), 2nd Court, Cuttack) being aggrieved with the order dated

2.4.2011 have approached this Court for quashing the impugned order at Annexure-1 i.e. the order passed refusing the abatement of the aforementioned suit under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (for short the 'Act').

2. Admittedly, Civil Suit No.135 of 2008 was filed by the Plaintiff who is the Opposite Party in this writ petition for a declaration that the compromise decree in Title Suit No.105 of 1989 dated 12.3.1991 was a collusive and fraudulent decree and thus no title is derived by the Defendant No.1 basing upon such a fraudulent decree. When the said suit was pending in the court below Defendant No.2 was set exparte and accordingly one petition was filed by the Defendant No.2, namely, the present Opposite Party no.2 on 16.3.2011 under Order 9, Rule 7 of the Civil Procedure Code (for short 'C.P.C.') for setting aside the exparte order as against him and to permit him to adopt the written statement so filed by the Defendant No.1. Similarly, on the very same day i.e. on 16.3.2011 the Defendant No.1 filed another petition for abatement of the suit under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act. The learned court below considered both the petitions on merit and after hearing the parties dis-allowed the prayer of Defendant No.1 for abatement of the suit but allowed the prayer of Defendant No.2 in setting aside the exparte order passed against him. The learned court below allowed Defendant No.2 to be brought on record and accepted his prayer for adopting the written statement which has been filed by the Defendant No.1.

3. In this writ petition challenge has been made to the order of the learned court below with regard to refusal of the prayer for abatement of the suit as consolidation operation was going on in respect of the suit village when the suit was filed and also the Trial Court did not take into consideration the order of this Court in W.P(C) No.9109 of 2007 dated 20.9.2010 wherein this Court up-held the order of abatement of the suit i.e. C.S.No.174 of 2006 in which also the present parties were involved. Learned counsel appearing for the petitioners in course of argument drew my attention to the order of this Court in W.P(C) No.9109 of 2007 dated 20.9.2010 and also by placing reliance in a decision of this Court in **1990(1) O.L.R. 496, Akuli Mallik @ Jena –v- Kusa Jena and others** contended that the learned Trial Court should have passed order with regard to abatement of the suit in view of the consolidation operation which going on in respect of the suit village. It was also very seriously contended that the suit of the plaintiff is not at all maintainable in view of the provisions of Section 96(3) and order 43 Rule-1-A (2) and Order 41, Rule 27 of the Civil

Procedure Code. It was also contended that when a party claims that he had either no consent or consent was not voluntary the bar under Order 23, Rule-3-A of the C.P.C. is applicable and an appeal would lie as the decree passed on compromise operates "in presenti". In that context, reliance was placed in a judgment of this Court reported in ***1993 (1) OLR 90, Hakimatun Nisa Bibi –v- Md. Fakiruddin Khan and others.***

4. In this case we are concerned only with the legality of the order passed by the learned Civil Judge (Sr.Divn.), 2nd Court, Cuttack in refusing abatement of the suit i.e. C.S. No.174 of 2006 under Section 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972.

5. The question to be considered is whether the suit as laid can be entertained by the Civil Court in view of the provisions contained in Section 51 of the Consolidation Act which makes provisions regarding the ouster of jurisdiction of Civil Courts. In order to decide the question, it is incumbent upon the Court to ascertain the nature and scope of the suit by going through the pleadings of the parties. It is to be remembered that the ouster of the jurisdiction of the Civil Court is not to be readily inferred and care should be taken to see that the person aggrieved is not left without a forum to redress his grievance. No doubt the important aspect to be considered as to whether the Consolidation Authorities have the power/competence to grant relief sought for in the suit. In the instant case, a plain reading of the plaint and the prayer shows that it was a suit for a declaration that the compromise decree in the earlier suit i.e. T.S. No.105 of 1989 was the outcome of fraud, collusion and not binding on the plaintiff. This Court in ***Bhubaneswar Mishra and another –v- Srimati Ujalamani Devi and another*** as reported in ***1980 (Vo.50) CLT 100*** has categorically held that when the suit relates to a decree that the earlier compromise decree was not binding and was bad, no relief under the Consolidation Act can be obtained and the Consolidation Authorities cannot declare the Civil Court decree bad and no relief can be granted by the Consolidation Authorities even if the consolidation operation was in progress and in that context this Court has specifically held that the suit does not abate so far as it relates to the declaratory relief that the compromise decree does not bind the plaintiff. Learned court below has referred to the decision of this Court i.e. Bhubaneswar Mishra's Case (Supra). The learned court below has rightly observed that the decision of this Court rendered in W.P.(C) No.9109 of 2007 is not applicable to the facts of this case. Accordingly, I do not find any reason to interfere with the impugned order especially with regard to the refusal of prayer for abatement of the suit.

6. Now coming to the next argument of the learned counsel for the petitioners that the suit is not maintainable in view of the bar contained under Order 23, Rule-3-A of the C.P.C. I refrain from expressing any opinion on that as such a point was never agitated by the present petitioners in the court below.

In the result, the writ petition stands dismissed without interfering with the impugned order at Annexure-1.

Writ petition dismissed.

2012 (II) ILR- CUT- 189

B.K.MISRA, J.

W.P.(C) NO. 7378 OF 2011 (Dt.04.04.2012)

SATYABHAMA CHOUDHURY … …Petitioner

.Vrs.

BANSIDHARA CHOUDHURY & ORS. ……..Opp.Parties

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 22, RULE 4.

Husband of the petitioner was defendant No.16 in a suit for partition – Defendant No.16 filed W.S. along with defendant Nos.11,13 & 15 – On the death of defendant No.16 petitioner was substituted and filed separate written statement – Non acceptance of such W.S. by the learned Court below – Action challenged.

Every party in a case has a right to file a written statement – In this case W.S. filed by the petitioner is in no way different from the W.S. filed by defendant No.16 – Denial of filing W.S. would amount to violation of natural justice – Held, W.S. filed by the petitioner be accepted. (Para 9,10)

Case laws Referred to:-

1.2007(Ii)OLR (SC)811 : (Sumtibai & Ors.-V-Paras Finance Company Registered Partnershiup Firm)
2.AIR 1998 Rajasthan 98 : (Ramgopal & Anr.-V- Khiv Raj & Ors.)

For Petitioner - M/s. Balaram Ohja & Mr. A.B.Lenka.
For Opp.Parties - M/s. B.M.Pattnaik, P.C.Pattnaik, N.C.Singh, A.Baral (for O.P.1)
M/s. R.K.Sahoo, S.K.Panda, Rahul Kumar Sahoo, (For O.P.2,3,4,5,6,7)
M/s. Ambika Prasad Rath, Sukumar Kalyan, Kamil Rashid, (For O.P.9,10,11,12,13 & 14)

B.K.MISRA,J. This writ petition has been filed by the present petitioner being aggrieved with the order of the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack in Civil Suit No.151 of 2004 dated 10.2.2011 (Annexure-4) wherein the learned court below refused to accept the written

statement filed by the petitioner after she was substituted on the death of her husband, who was Defendant No.16 in the court below.

2. For the sake of clarity in brief it may be mentioned here that one Bansidhara Choudhury, who is the present Opposite Party No.1 in this writ petition, as plaintiff instituted Civil Suit No.151 of 2004 in the Court of learned Civil Judge (Sr.Divn.), 1st Court, Cuttack for partition of 'B' and 'C' schedule properties fully described in the schedule of the plaint and for carving out the specific shares of the parties. In the said suit Sachidananda Choudhury was arrayed as Defendant No.16. The said Sachidananda Choudhury the original Defendant No.16 along with Defendant Nos.11, 13 and 15 had filed their joint written statement. During pendency of the suit, the original Defendant No.16 died and accordingly his legal heirs, namely the widow and the minor daughter were substituted. Notice was issued from the Court to the substituted Defendant 16(a) by the Court to enter appearance on 30.08.2010 and accordingly the present petitioner entered appearance and applied for time for filing the written statement. The Court allowed her prayer and ultimately a written statement was filed.

3. Challenging such filing of the written statement by the substituted Defendant No. 16(a), a petition was filed by the plaintiff (present Opposite Party No.1) with a prayer not to accept the said written statement.

4. After hearing the parties, the impugned order was passed. Learned counsel appearing for the present petitioner contended that when the present petitioner and her minor daughter were substituted as the legal heirs of the deceased-Defendant No.16 notice was issued by the Court vide Annexure-1 asking her to answer the material questions relating to the suit and produce any document basing upon which she would support the defence and after appearing the petitioner prayed for time to file written statement. The Court granted time for the same and ultimately the written statement which was filed is not different from the stand which has already been taken by her husband, who is original Defendant No.16 in the suit. It was also contended that when no new fact has been introduced, the learned court below should not have rejected the prayer of the substituted D-16(a) to accept the Written Statement, as being the legal representative she has a right to take the defence by way of filing a written statement and she may adduce evidence in the suit. Accordingly, it was contended by the learned counsel for the petitioner that the impugned order at Annexure-4 should be set aside. In support of such contention reliance was placed on a decision of the Apex Court as reported in **2007(II) OLR (SC) 811, Sumtibai and others –v- Paras Finance Company Registered Partnership Firm**.

5. On the other hand, learned counsel appearing for the opposite party no1 contended that the impugned order suffers from no infirmity as a legal representative substituted in place of a deceased-Defendant cannot be permitted to make out a new case afresh in another written statement. The only right he/she has, to make a defence appropriate to his character as legal representative of the deceased Defendant. In support of such contention reliance was placed on a decision of the Rajasthan High Court as reported in **A.I.R. 1998 Rajasthan 98, Ramgopal and another V. Khiv Raj and others.**

6. Admittedly, the parties in C.S. No.151 of 2004 belong to one family and their common ancestor was late Gobinda Choudhury. The suit is for partition of the 'B' and 'C' Schedule properties fully described in the plaint. The property described in Schedule 'B' of the plaint as per the plaint averment is the exclusive property of late Laxman @ Laxmidhara Chaudhury. The present plaintiff in the court below in C.S. No.151 of 2004 happens to be the son of late Laxmidhara Chaudhury. Whereas the 'C' schedule property as per the plaint averment is the exclusive property of late Gobinda Chaudhury, the common ancestor of the parties. Late Gobinda Chaudhury had three sons, namely, Niladri, Birabara and Laximidhar. Birabara had a son namely Sridhara and the deceased-Defendant No.16 happens to be the son of late Sridhara. The present petitioner is the wife of the deceased-Defendant No.16. Since dissention arose in the family for effecting specific shares and when Defendant Nos.1 and 2 attempted to grab forcibly the valuable property and declined for an amicable partition of the 'B' and 'C' schedule property, the Plaintiff, namely the Opposite Party No.1 filed the suit for partition.

7. The Defendant Nos.11,13, 15 & 16 filed their joint written statement wherein it is their case that during the life time of Niladri, Birabara and Laxmidhara there was a notional partition amongst themselves and accordingly they remained in possession of the property separately. It is also their case that the heirs of Sridhara i.e., Defendant Nos. 10 to 14 were residing on a three storied pucca building which situates over the 'C' Schedule property for more than 50 years which was constructed by late Sridhara and those defendants have spent huge amounts of money in the said house and are all along paying the municipal tax etc. According to Defendants 11, 13, 15 and 16, they are entitled to a larger share over the 'C' Schedule Property in case there will be a partition as they have spent money for the development of the residential house standing on the 'C' Schedule of the plaint.

8. The Defendant No.16(a) who was substituted after the death of her husband filed written statement where she has stated that all the children of Sridhara were living in the ancestral dwelling house standing over the 'C' Schedule property. It is her case that she married Sachidananda Chaudhury (D-16) in the year 2000 and remained in the said house where she was also blessed with a child which is known to everybody including the plaintiff.

9. Order 22, Rule 4(2) of the C.P.C. clearly says that a person who has been made a party can only take such pleas which were appropriate to his character as a legal representative of the deceased. As I find the written statement which has been filed by the present petitioner who has been substituted as Defendant No.16 (a) is in no way different from the written statement which was earlier filed by her deceased-husband D-16 along with other Defendants. The only fact which the substituted Defendant No. 16(a) has averred in her written statement is about her marriage with D-16 in the year, 2000 and giving birth to a child in the house which stands on 'C' Schedule Property. At the cost of repetition, I may again reiterate that the Defendant Nos.11, 13, 15 & 16 in their written statement have categorically asserted that they are in possession of the 'C' Schedule property and have spent huge sum of money for its maintenance and payment of taxes. In my humble view, the written statement which has been filed by the present petitioner (D-16(a)) is in no way different from the written statement which has already been filed by deceased D-16 along with other Defendants 11, 13 and 15. The ratio propounded by Hon'ble the Apex Court in **Sumtibai's Case (Supra)** is directly applicable to the facts of this case. In **Sumitibai's case (Supra)** their Lordships of the Apex Court have categorically held that:-

> "Every party in a case has a right to file a written statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to get a hearing. The appellants in the present case have already been made parties in the suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22, Rule 4(2), CPC cannot be construed in the manner suggested by learned counsel for the respondent."

10. By applying the aforesaid ratio of the Apex Court, I am of the humble view that a party has a right to take whatever plea he/she wants to take and therefore the view taken by the learned court below does not appear to be correct. No useful purpose would be served by allowing the legal

representatives of deceased-Defendant No.16 to be impleaded but not allowing them to file written statement, as denial of the same would amount to violation of natural justice.

11. For the reasons aforementioned, the impugned order at Annexure-4 dated 10.2.2011 in C.S. No. 151 of 2004 passed by the learned Civil Judge (Sr.Divn.), 1st Court, Cuttack is set aside. The written statement filed by the substituted Defendant No.16 (a) be accepted and thereafter the suit should proceed expeditiously in accordance with law.The writ petition thus stands allowed.

Writ petition is allowed.