2013 (II) ILR - CUT- 1

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

RVWPET NO. 74 OF 2012 (Dt.12.12.2012)

RAM KRUSHNA DASMOHAPATRA @ TIKI PUA …….Petitioner

.*Vrs.*

INDIAN TEA PROVISIONS LTD. ……. .Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-47, R-1

Judgment passed by High Court in writ appeal – Judgment challenged in SLP before the Supreme Court – SLP dismissed – Thereafter Petition filed for review of the judgment before this Court – Maintainability – Held, in view of the dismissal of SLP the judgment of the High Court has not merged with the judgment of the Supreme Court so the aggrieved party is not deprived of the statutory right of review – Held, review petition is maintainable. (Para 23)

CIVIL PROCEDURE CODE, 1908 – O-47, R-1

Review – Judgment in writ appeal sought to be reviewed – Delay of 111 days – Opp.Parties played fraud on the Court as well as on the other side by not producing or bringing to the notice of the Court necessary facts and documents relevant to the litigation – Non-consideration of the above has rendered the judgment sought to be reviewed erroneous – Impugned order suffers from error apparent on the face of the record – Held, impugned judgment/order is recalled and the writ appeal be listed for hearing. (Para 23)

<u>Case law Relied on:-</u>

(2000) 6 SCC 359 (P-43) : (Kunhayammed & Ors.-V- State of Kerala & Anr.)

<u>Case laws Referred to</u>:-

1.AIR 1994 SC 853 : (Chengalveraya Naidu (dead) by L.Rs.-V- Jagannath (dead) By L.Rs. & Ors.)
2.(2001) 4 SCC 602 : (Gangadhar Palo-V- Revenue Divisional Officer & Anr.)
3.AIR 1988 SC 1531 (P-45 & 46) : (A.R. Antulay-V- R.S. Nayak & Anr.)

For Petitioner - Mr. Bijan Ray, Sr. Adv. Mr. Jagannath Pattnaik, Sr. Adv. M/s . B. Mohanty, D. Chhotray, D.R.Das, S. Mohanty, B. Moharana &

P.K. Lenka.

For Opp.Parties - Mr. S.P. Mishra, Sr. Adv.
M/s. G. Mukherji, P. Mukherji. A.Ch. Panda,
Suvalaxmi, S. Das, S.D. Ray &

V.GOPALA GOWDA, C.J. This review petition is filed by the respondent in Writ Appeal No.367 of 2011 to review the judgment dated 27.10.2011 of this Court passed in the said appeal contending that the findings and reasons recorded are erroneous and error in law apparent on the face of the record and that fraud was played upon this Court by the appellant by way of suppressing certain relevant material facts and the previous litigation between the parties in respect of the very same subject matter.

2. The review petitioner-respondent in the writ appeal filed O.S. No.606 of 2001 before the Civil Judge (Jr. Divn.), Puri for permanent injunction against opp. party-appellant in respect of the property in question. The opp. party-appellant as a lessee of the property in question filed W.P.(C) No.6429 of 2010 praying for an order directing the review petitioner to deposit the usage charges/compensation/mesne profit or rent for use and occupation of the premises in question. The prayer of the appellant opp. party was rejected by the learned Single Judge merely on the ground that the claim for rent by the appellant cannot be made in a suit for injunction. Correctness of the said order was challenged in the writ appeal alleging that the review petitioner is a trespasser on the basis of false agreement whereas the review petitioner claimed that he was a tenant and he was to pay a sum of Rs.25,000/- to the opp. party in respect of the property in question. The reliance placed upon the agreement for claiming right, title and interest was disputed by the petitioner herein. According to the agreement, the review petitioner was to pay a sum of Rs.25,000/- for each month to the present opp. party-appellant. The appeal was allowed accepting the case of the opp. party with a direction to the petitioner to deposit a sum of Rs.25,000/- per month from the date of his entering into possession of the premises in question before the trial court. It was further observed that the amount shall be deposited before the learned lower court and if the opp. party-appellant succeeds on the question of ownership right, the trial court shall record a finding in this regard, it will take the deposit towards user charges and if it fails, the lower court would be at liberty to pass appropriate order in accordance with law. The said order was challenged before the Supreme Court by the review petitioner urging various contentions by filing Special Leave to Appeal (Civil) No.35132/2011. The Special Leave Petition vide

order dated 5.1.2012 was dismissed holding that there is no ground to interfere with the order dated 27.10.2011 which is sought to be reviewed in this review petition. Thereafter the present review petition is filed by the petitioner on 16.3.2012 with an application registered as Misc. Case No.126/2012 under Section 5 read with Section 14 of the Limitation Act seeking for condonation of delay of 111 days as pointed out by the Registry in filing the review petition, and another application registered as Misc. Case No.240/2012 under Order 1, Rule 10 read with Chapter-VI, Rule 27(a) of the Orissa High Court Rules requesting this Court to implead the Collector, Puri and the Tahasildar, Puri as opp. parties contending that they are necessary parties to the proceedings particularly having regard to the facts stated in the review petition that the property in question has been resumed by the State Government from the opp. party herein. That petition was also allowed vide order dated 12.9.2012. The prayer for condonation of delay though objected to, having regard to the rival, factual and legal contentions urged in this case, this Court is of the view that the matter requires consideration. Therefore, the review petition is required to be examined. Hence, the delay of 111 in filing this review petition is condoned.

3. For the purpose of exercise of review power, it is necessary to know the relevant facts to appreciate the factual, rival and legal contentions urged with a view to find out whether the order sought to be reviewed is required to be reviewed or not.

4. The opp. party-appellant on the basis of fraudulent assertions that it continues to be the lessee of the property involved in the proceedings as averred at para-2 of the writ petition and para-1 of the writ appeal moved an application before the Civil Court in O.S. No.606/2001 for deposit of amounts towards rent/damages/compensation against the management of M/s Hotel Repose Ltd. from 15.3.2001. The said petition was rejected on 21.6.2011 holding that the said prayer is beyond the suit prayer for injunction especially when the landlord and tenant relationship had been refuted by the review petitioner. The opp. party-appellant filed W.P.(C) No.6429 of 2010 against the said order.

5. It is the further case of the review petitioner that the opp. party-appellant deliberately suppressed the admitted facts and documents from this Court that the opp. party had certified that the matter involved in the said writ petition was only in W.P.(C) No.10735 of 2006 disposed of on 7.4.2008 and OJC No,.15699 of 2001 disposed of on 12.5.2004. Further, it is certified that “the matter out of which this appeal arises was never before this Hon’ble Court in any form whatsoever except W.P.(C) No.6429 of 2010

disposed of on 21.6.2011 by one of the Hon'ble Judges of the Hon'ble Court".

6. It is stated that the opp. party-appellant willfully and deliberately suppressed that the matter was also before this Court in OJC No.12596/2001 disposed of on 10.10.2011 and W.P.(C) No.17035/2006 disposed of on 10.7.2006 and W.P.(C) No.9196/2010 disposed of on 19.5.2010.

7. Further, the opp. party willfully suppressed that the lis in question effecting lease deed 27.9.1965 expired in 1995, which fact has not been taken judicial notice by this Court in the very writ petition. The writ petitioner also did not take any step for renewal of lease on/before/after 1995. The writ petitioner also suppressed the fact that his application for renewal had long been rejected.

8. So far as the ownership and/or lease in favour of the opp. party-appellant is concerned, the same was resumed by the Tahasildar, Puri on 15.9.2006 in Resumption Case No.1 of 2006. So far as the opp. party's application for extension or renewal of the lease registered as B.P.L. Case No.150 of 1995 is concerned, the appropriate revenue authority passed orders as early as on 2.8.2010 holding that the suit land cannot be settled in its favour and the same has been resumed. Further, it suppressed that it has filed T.S. No.290 of 1992 for eviction and arrears of rent and mesne profits on 2.9.1992 and the same has been decreed by the Civil Court on 9.4.2010 whereunder the defendants therein have been directed to pay Rs.3,98,500/- to the opp. party and for eviction. It also filed an application for execution, which was registered as Execution Case No.3 of 2011 for delivery of property, eviction and recovery of the decretal dues.

9. The further case of the review petitioner is that the opp. party has abused the process of the Court by suppressing the fact from the Court that the lease of the property is expired and property is resumed in favour of the Government in 2006. The opp. party insisted for implementation of the terms of the agreement when there never existed any privity of contract between the opp. party and the review petitioner. One of the Directors was merely a witness to the signatory and thus the terms thereof are not available to be specifically performed at the instance of the opp. party, who was not a party to such agreement. Further, it was not brought to the notice of the Court that the opp. party as early as 13.7.2001 returned the review petitioner's draft for Rs.75,000/- asserting that it had never any relationship with him either as tenant or otherwise whatsoever.

10. Further, as per opp. party's own admission, the review petitioner was the guarantor for M/s Hotel Repose Ltd. and a proceeding was initiated against the guarantor by Debts Recovery Tribunal in the case filed by the State Bank of India.

11. The opp. party filed counter on 26.8.2003 before the lower court admitting that the building requires repair without which it may collapse at any time. It shows that from 2003 the building is in dilapidated condition.

12. Further, the opp. party lodged an F.I.R. against the review petitioner and the Superintendent of Police after due investigation submitted final report No.07 of 2005. The said report reveals that the said building has remained closed without any occupation. So also, the fact of pendency of L.P.A. No.23 of 2006 was also suppressed.

13. Further, in response to the proclamation notice, the opp. party had filed an application for settlement of the said property in issue registered as Urban Lease Case No.7 of 2009 in the Court of the Tahasildar, Puri. The opp. party being aware and conscious of resumption and rejection of his renewal application also appeared in the said matter and filed its objection statement. Therefore, it is stated that documentary evidence regarding the writ petition proceeding, original suit proceeding and proceeding before the Revenue authority have been fraudulently suppressed by the opp. party herein. Therefore, the same could not be earlier filed.

14. Learned Senior Counsel Mr Bijan Ray on behalf of the petitioner submitted that the legal position is that the documents filed along with the review petition are available to be considered to examine the contentious issue that needs determination by this Court as the opp. party suppressed the relevant material facts and the documents from the Court for determination of the issue that arose for consideration. Therefore, the order passed in the writ appeal is a nullity and requires to be reviewed by examining the factual and the documentary evidence against the opp. party for the purpose of finding out as to whether the opp. party is entitled for the relief granted in the writ appeal after setting aside the order of the learned Single Judge passed in the writ petition.

15. Mr Ray placed reliance upon the decision of the Supreme Court in the case of ***Chengalveraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others***, *AIR 1994 SC 853,* wherein the Supreme Court has held that withholding of vital document relevant to litigation is fraud on Court. He also placed reliance on the case of ***Kunhayammed & others v. State of***

Kerala & Anr*, (2000) 6 SCC 359 (para-43)*, relating to the Doctrine of Merger theory and maintainability of the review petition in the High Court even after dismissal of the S.L.P. by the Supreme Court under sub-rule (1) of Order 47 of the C.P.C. He further contended that the order sought to be reviewed is error apparent on the face of the record on account of suppression of the relevant material facts and the legal position is well settled.

16. Learned Senior Counsel Mr S.P. Mishra on behalf of the opp. party opposed the review petition contending that the review petition is not maintainable. He has placed reliance upon the Two-Judge Bench judgment of the Supreme Court in the case of ***Gangadhar Palo v. Revenue Divisional Officer & another***, *(2001) 4 SCC 602*, wherein Kunhayammed's case is referred to at para-7. According to this judgment, when a special leave petition is dismissed with reasons, however meager (it can be even of just one sentence) there is a merger of the judgment of the High Court in the order of the Supreme Court without giving any reasons, there is no merger of the judgment of the High Court with the order of the Supreme Court. Hence, the judgment of the High Court has attained finality. Some reason having been given by the Supreme Court in its order dismissing the SLP, the review petition seeking review of the order passed by this Court in the writ appeal is not maintainable as the order sought to be reviewed has merged with the order passed in the S.L.P.

17. Mr Mishra further contended that review petitioner to avoid payments as a subterfuge filed three petitions before the trial court: (i) for direction to depute an Engineer to assess the condition of the building in question, (ii) for payment of the amount installments, and (iii) for a direction to pay the amount in installment. Hence, when the review petitioner on his own sought for time to deposit the amount in the writ appeal which is sought to be reviewed, the review petition is not maintainable and is liable to be dismissed as the review petitioner cannot be allowed to enjoy the property without payment of rent or user charges or compensation.

18. The review petitioner has forcefully occupied the premises on the basis of the forged agreement alleged to have been executed in presence of this opp. party. In the said agreement/MOU the review petitioner agreed to pay Rs.25,000/- per month with enhancement thereof to the opposite party. It is also admitted that he had entered the premises since March 2001. Therefore, there is no infirmity/suppression of materials by the present opp. party in the writ appeal. Further, the fact remains that the review petitioner is in possession of property and it amounts to abuse of the process of the

Court and wastage of Court's time. It is contended that no litigant has right to unlimited drought on the Court time and public money in order to get his affairs settled in the manner he wishes.

19. It is further stated that the opp. party applied for renewal of khasmal lease in 1995 in BPL Case No.150 of 1995 in the month of May. As nothing was done till 2010, the present opp. party filed writ application before this Court. It has categorically mentioned about the resumption proceedings illegally initiated at the behest of the review petitioner in the said writ application. The opp. party after coming to know about the proceeding from sources as no notice was issued to the opp. party appeared through counsel and filed petition to furnish him the ground of resumption but no steps was taken by the Collector. This Court in W.P.(C) No.9196 of 2010 directed the Collector to dispose of the BPL case within three months from the date of the order and till disposal no coercive action is to be taken against the opp. party. The State Government could have filed a review to get the order modified to the extent that since the land had already been resumed, the order of the High Court could not be carried out. The opp. party immediately on 9.6.2010 intimated the Collector and the Tahasildar about the order by registered post but neither any document was supplied nor any notice of hearing was issued by the Collector. The opp. party also filed a petition for supply of documents that was not heeded to. The Collector after getting the direction from this Court issued notice to this respondent to attend the hearing of the BPL case.

20. According to the learned counsel for the opp. party, this review petition is filed on a limited question as to whether the review petitioner is liable to deposit the amount in the Court below for occupying the premises. This Court has directed the review petitioner to make the deposit before the trial court and not with the opp. party.

21. In view of the above pleadings, the following questions emerge for consideration in this review petition:

(i) Whether the review petition is maintainable despite the order sought to be reviewed not having been interfered with by the apex Court by dismissal of the SLP ?

(ii) Whether the review petition is required to be allowed in view of the error apparent on the face of the record for the reason that the decision rendered on the basis of fraudulent pleadings and suppression of material facts in relation to the lease of the property

in favour of the petitioner, non-disclosure of resumption of the property by the State Government on 15.9.2006 and non-disclosure of previous lis between the parties to the notice of this Court?

(iii) What order?

22. Point nos. (i) and (ii) are inter-related and hence the same are answered together. It is not in dispute that the judgment dated 27.11.2011 passed in W.A.No.367 of 2011 sought to be reviewed in this review petition was challenged before the Supreme Court in S.L.P.No.35132 of 2011 and the apex Court dismissed the special leave petition as the apex Court found no ground to interfere with the said order. Despite the said factual position, the present review petition is filed on two grounds, namely, suppression of relevant material facts by the opposite party which were within his knowledge and withholding of certain material documents and non-disclosure of the lease period which has already expired and non renewal of the lease and resumption of the land on 15.9.2006 by the State Government in Resumption Case No.1 of 2006 with a view to get an order from this Court in the writ appeal. Therefore, the same amounts to fraud played on the Court by the opposite party is the ground on which the review petition is filed seeking for review of the order sought to be reviewed placing reliance upon the judgment of the Supreme Court in *Chengalveraya Naidu's* case (supra), wherein the Apex Court at paragraph-8 of the said judgment held as hereunder:

> "8.The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex. B-15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations of the High Court that the appellants-defendants could

> have easily produced the certified registered copy of Ex. B-15 and non-suited the plaintiff. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party."

Hence the same is a nullity in the eye of law. The impugned judgment was not interfered with by the apex court since there was no ground to interfere. Therefore, it is urged by Shri S.P.Mishra, learned senior counsel on behalf of the opposite party, that the judgment is affirmed by the Supreme Court and placing reliance on a recent decision of the apex Court in Gangadhar Palo v. Revenue Divisional Officer (supra) he contended that by dismissal of the SLP the order passed in the SLP was merged with the order passed in the writ appeal. Learned counsel for the petitioner placed reliance on the decision of the Supreme Court in Kunhayammed and others v. State of Kerala (supra) in support of the doctrine of merger theory with the judgment of the Supreme Court after dismissal of the SLP where the Supreme Court after interpreting Order 47, Rule 1 read with Article 136 of the Constitution after referring to its earlier decision reported in Narayana Dharmasangham Trust v. Swami Prakasananda, 1997 (6) SCC 78 held that the said decision is not good law and laid down the legal proposition in para 44 that an order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed. Strong reliance is placed by the learned counsel for the petitioner upon the said decision regarding maintainability of the review petition. The said legal contention is seriously rebutted by Shri S.P.Misra, learned senior counsel for the opposite party, by placing reliance upon the following judgments. He placed reliance in the case of Sow Chandra Kanta and another v.Sk. Habib AIR 1975 SC 1500 in support of the legal contention that once the application for special leave to appeal is dismissed, application for review of order will virtually amount to a rehearing. Once an order has been passed by the Supreme Court, the said order cannot be lightly interfered with. Next decision on which he placed reliance is Abbai Maligai Partnership Firm and another v. K.Santhakumaran and others, AIR 1999 SC 1486 wherein it has been held that exercise of review jurisdiction after the special leave petition against the self-same order had been dismissed by the Supreme Court, interference by the High Court by entertaining the review petition was subversive of judicial discipline. The very entertainment of the review petition was an affront to the order of the Supreme Court. He also placed reliance on another judgment of the Supreme Court in Meghmala and others v. G.Narasimha Reddy &

others, 2010 AIR SCW 5281 and also on a Division Bench decision of this Court in Governing Body of Ispat College, Rourkela v. State of Orissa, OLR 2011 Suppl.II 455 to which judgment one of us (V.Gopala Gowda, CJ) was a party wherein this Court after interpreting Order 47, Rules 1 and 2 of the Code of Civil Procedure has held that the power of review is available only when there is a mistake or an error apparent on the face of the record and not for correcting an erroneous decision. With reference to the aforesaid rival legal contention, we are of the view that the reliance placed by Mr. Bijan Ray, learned senior counsel for the petitioner, on Kunhayammed's case supra is squarely applicable to the fact situation as the supreme court in that case threadbare examined section 100 read with Article 136 of the Constitution with regard to the doctrine of merger and also Order 47, Rule 1 C.P.C. regarding maintainability of the review petition even after dismissal of the S.L.P. against the judgment which is sought to be reviewed. It is worthwhile to extract the paragraphs wherein the apex Court dealt with the doctrine of merger and the maintainability of the review. The same reads as under:

> "34. The doctrine of merger and the right of review are concepts which are closely interlinked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed — there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits — in a case where the High Court's order had not merged with an order passed by this Court after grant of special leave — the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it.
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> 35. It will be useful to refer to Order 47 Rule 1 of the Code of Civil Procedure 1908. It reads as follows:
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> "1. *Application for review of judgment.*—(1) Any person considering himself aggrieved—

(*a*) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(*b*) by a decree or order from which no appeal is allowed, or

(*c*) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case, shall not be a ground for the review of such judgment."

36. For our purpose it is clause (*a*) sub-rule (1) which is relevant. It contemplates a situation where "an appeal is allowed" but "no appeal has been preferred". The Rule came up for consideration of this Court in *Thungabhadra Industries Ltd.* v. *Govt. of A.P.*[22] in the context of Article 136 of the Constitution of India. The applicant had filed an application for review of the order of the High Court refusing to grant a certificate under Article 133 of the Constitution. The applicant also filed an application for special leave to appeal in respect of the same matter under Article 136 along with an application for condonation of delay. The Supreme Court refused to condone the delay and rejected the application under Article 136. When the application for review came up for consideration before the High Court, it was dismissed on the ground that the special leave petition had been dismissed by the Supreme Court. This Court held that the crucial date for determining whether or not the terms of

Order 47 Rule 1(1) CPC are satisfied is the date when the application for review is filed. If on that date no appeal has been filed it is competent for the court hearing the petition for review to dispose of the application on the merits notwithstanding the pendency of the appeal, subject only to this, that if before the application for review is finally decided the appeal itself has been disposed of, the jurisdiction of the court hearing the review petition would come to an end. On the date when the application for review was filed the applicant had not filed an appeal to this Court and therefore there was no bar to the petition for review being entertained.

37. Let us assume that the review is *filed first* and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that still the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted. This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree — the one before review — becomes infructuous.

38. The review can be filed even *after* SLP is dismissed is clear from the language of Order 47 Rule 1(*a*). Thus the words “no appeal” has been preferred in Order 47 Rule 1(*a*) would also mean a situation where special leave is not granted. Till then there is no appeal in the eye of law before the superior court. Therefore, the review can be preferred in the High Court before special leave is granted, but not after it is granted. The reason is obvious. Once special leave is granted the jurisdiction to consider the validity of the High Court's order vests in the Supreme Court and the High Court cannot entertain a review thereafter, unless such a review application was preferred in the High Court before special leave was granted.

Conclusions

39. We have catalogued and dealt with all the available decisions of this Court brought to our notice on the point at issue. It is clear that as amongst the several two-Judge Bench decisions there is a conflict of opinion and needs to be set at rest. The source of power conferring binding efficacy on decisions of this Court is not uniform in

all such decisions. Reference is found having been made to (*i*) Article 141 of the Constitution, (*ii*) doctrine of merger, (*iii*) res judicata, and (*iv*) rule of discipline flowing from this Court being the highest court of the land.

40. A petition seeking grant of special leave to appeal may be rejected for several reasons. For example, it may be rejected (*i*) as barred by time, or (*ii*) being a defective presentation, (*iii*) the petitioner having no locus standi to file the petition, (*iv*) the conduct of the petitioner disentitling him to any indulgence by the court, (*iv*) the question raised by the petitioner for consideration by this Court being not fit for consideration or deserving being dealt with by the Apex Court of the country and so on. The expression often employed by this Court while disposing of such petitions are — "heard and dismissed", "dismissed", "dismissed as barred by time" and so on. May be that at the admission stage itself the opposite party appears on caveat or on notice and offers contest to the maintainability of the petition. The Court may apply its mind to the meritworthiness of the petitioner's prayer seeking leave to file an appeal and having formed an opinion may say "dismissed on merits". Such an order may be passed even ex parte, that is, in the absence of the opposite party. In any case, the dismissal would remain a dismissal by a non-speaking order where no reasons have been assigned and no law has been declared by the Supreme Court. The dismissal is not of the appeal but of the special leave petition. Even if the merits have been gone into, they are the merits of the special leave petition only. In our opinion neither doctrine of merger nor Article 141 of the Constitution is attracted to such an order. Grounds entitling exercise of review jurisdiction conferred by Order 47 Rule 1 CPC or any other statutory provision or allowing review of an order passed in exercise of writ or supervisory jurisdiction of the High Court (where also the principles underlying or emerging from Order 47 Rule 1 CPC act as guidelines) are not necessarily the same on which this Court exercises discretion to grant or not to grant special leave to appeal while disposing of a petition for the purpose. Mere rejection of a special leave petition does not take away the jurisdiction of the court, tribunal or forum whose order forms the subject-matter of petition for special leave to review its own order if grounds for exercise of review jurisdiction are shown to exist. Where the order rejecting an SLP is a speaking order, that is, where reasons have been assigned by this Court for rejecting the petition for special leave and are stated in the order still the order remains the one rejecting prayer for the grant of

leave to appeal. The petitioner has been turned away at the threshold without having been allowed to enter in the appellate jurisdiction of this Court. Here also the doctrine of merger would not apply. But the law stated or declared by this Court in its order shall attract applicability of Article 141 of the Constitution. The reasons assigned by this Court in its order expressing its adjudication (expressly or by necessary implication) on point of fact or law shall take away the jurisdiction of any other court, tribunal or authority to express any opinion in conflict with or in departure from the view taken by this Court because permitting to do so would be subversive of judicial discipline and an affront to the order of this Court. However this would be so not by reference to the doctrine of merger."

23. By careful reading of the aforesaid legal principles of the apex Court, we are of the considered view that the review petition is maintainable and the reliance placed upon the subsequent judgments which were referred to supra have not been considered in Kunhayammed's case. The subsequent judgment of the apex Court was rendered by a Bench consisting of two Judges. It is well settled principle of law that judgments rendered by larger Bench will prevail upon the judgment rendered by Bench of lesser strength and further the decision in Gangadhara Palo (supra) upon which reliance has been placed by the learned senior counsel for the opposite party having been rendered by a Bench consisting of Two-Judges, we will follow the legal principle enunciated in Kunhayammed's case in support of the case of the petitioner, which is a Three-Judge Bench decision which would prevail over Two-Judge Bench decision is the law declared by the Apex Court in the case of ***A.R. Antulay v. R.S. Nayak & another****,* reported in AIR 1988 SC 1531 (paras-45 & 46). For the aforesaid reason, we are required to answer the second point in favour of the petitioner for the following reasons.

It is an undisputed fact that the petitioner has pleaded in this review petition about the expiry of the lease period in respect of the premises in question and the opposite party filed application for renewal which was the subject matter before the Tahsildar in Resumption Case No. 1 of 2006. The same was rejected and the property was resumed. In support of the same, document Annexure-2 is produced by the petitioner. This fact was suppressed by the opposite party. Another aspect which was suppressed by the opposite party is that the application filed by it to renew the lease registered as B.P.L.Case No.150 of 1995 was rejected by the appropriate revenue authority holding that the suit land cannot be renewed in its favour as the same has been resumed. Another relevant material which has been suppressed is that it had filed T.S.No.290 of 1992 for eviction and arrear

rent and mesne profit. The same was decreed by the Civil Court on 9.4.2010 under which the defendants Hotel Repose has been directed to pay Rs.3,98,500.00 to the opposite party and for eviction. The opposite party also filed an application for execution registered as Execution Case No. 3 of 2011 for delivery of property, eviction and recovery of decretal dues. The opposite party has abused the process of Court by suppressing relevant material fact that the lease expired in the year 1995, rejection of its application for renewal and resumption of the land and without pleading the same, the petition has been filed against the order passed in the writ petition which amounts not only to fraud played on Court but is a clear abuse of the process of Court. Besides suppressing the fact from the Court that the lease in favour of the opposite party has been resumed in 2006, the opposite party insisted for implementation of the terms of the agreement when there never exists any privity contract between the opposite party and the review petitioner. One of the Directors was merely a witness to the signatory and thus the terms thereof are not available to be specifically performed at the instance of the opposite party who was not a party to such agreement. Further stand taken by the petitioner is that as early as 13.7.2001 the opposite party while returning the review petitioner's draft for Rs.75,000.00 asserted that they never had any relation either as tenant or otherwise whatsoever. This is one more important relevant aspect which has not been brought to the notice of the Court. Further the opposite party on his own admission was the guarantor for M/s Hotel Repose Ltd. and proceeding was initiated against the guarantor by Debts Recovery Tribunal in the case filed by the State Bank of India. The notice issued to him is produced as Annexure-6 and 6/1. Suppression of the said litigation between the parties and relevant admission in the correspondence between the opposite party and the petitioner was not brought to the notice of the Court. Therefore, the same amounts to fraud played on power as alleged by the petitioner. In support of the same reliance placed on paragraph-8 of the decision of the apex Court in Chengalvaraya Naidu's with all fours is applicable to this case. The opposite party did not produce or bring to the notice of the court the relevant documents and facts mentioned above which are relevant to the litigation. By withholding the same, it has played fraud on the court as well as on the other side. Non-consideration of the aforesaid facts has rendered the order sought to be reviewed erroneous and error in law and is a nullity. Therefore, we are of the view that the impugned order suffers from error apparent on the face of the record. We are therefore inclined to interfere with the order. Accordingly the impugned order is recalled and the writ appeal be listed for hearing. The parties are directed to produce all the relevant materials by filing an affidavit. The same shall be considered at the time of hearing. Review petition allowed.

2013 (II) ILR - CUT- 16

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

W.P.(C) NO. 30961 OF 2011 (Dt.20.12.2012)

SAMIR MOHANTY …..…Petitioner

.Vrs.

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

A. CONSTITUTION OF INDIA, 1950 – ART, 299

Contract between the State and Private individual – All Contracts made in exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State as the case may be and all such contracts and assurances of property made in exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct and authorize.

In this case the Governor has not authorized any body to execute the lease agreement but the Chairman-cum-M.D., OSRTC delegated the General Manager OSRTC to execute the same – Held, the impugned agreement is void abinitio, hence quashed – The O.P.5 & 6 concessionaire cannot have any right or interest over the land in question on the basis of the said void document. (Paras 41, 44)

B. P. I. L. – Transfer of Barmunda Bus Stand land in favour of O.Ps 5 & 6 – Action of the State Government is in utter disregard of the Constitutional and statutory provisions – Petitioner being a local resident challenged the action – Locus standi – Petitioner has taken genuine steps to protect the property from being misutilised and it cannot be said that it is a private interest litigation – Held, since the petitioner has espoused the cause of the public at large, the writ petition at his instance is maintainable. (Para 28)

C. MOTOR VEHICLES ACT, 1988 – S.96

Construction of Barmunda Bus Terminal – A Bus stand can only be notified by the RTA having jurisdiction over the area – If any authority other than the RTA has taken the decision selecting the place in which the Bus stand will operate, the same shall be treated as null and void in the eye of law – Since O.P. Nos.1, 2 & 3 entered into a contract with O.P.6 for construction of Barmunda Bus terminal there is

Statutory violation of the above provision – Held, petitioner can challenge the validity of the impugned agreement Dt.16.03.2011 entered in to by O.P.1, 2 & 3 with O.P. 6. (Para 29)

D. TRANSFER OF PROPERTY ACT, 1882 – S.54

"Profit a prendre" - Meaning of – It is a profit or benefit arising out of the land regarded as "immovable property" within the meaning of Section 3(26) of the General Clauses Act and Section 2(6) of the Registration Act.

In this case OSRTC executed an unregistered agreement creating permanent lease with an area of Ac.14.430 decimals in favour of O.Ps.5 & 6 for construction of modern Bus Terminus over 60% and commercial complex over 40% of the above land which is under challenge.

The right to construct modern Bus terminus and commercial complex and to appropriate profit being a "Profit a Prendre" i.e. profit or benefit arising out of the above land, it has to be regarded as immovable property and it's sale has to be by means of a registered instrument as its value is much more than Rs.100/- – Held, the impugned transaction being under an unregistered instrument it has not conferred title or interest in favour of OPs. 5 & 6. (Para 39)

**E. TRANSFER OF PROPERTY ACT, 1882 – Ss. 105 & 107
r/w Section 52 of the Indian Easement Act.**

Distinction between "lease" and "License" – A lease cannot be converted into a license merely by calling it as license but it will have to be determined from the recitals of the document itself whether the nature of transaction entered into between the parties, the interest over the property has been given or merely a right of user has been given to the adversary.

In this case an interest over the land in question has been conferred upon O.P.5 & 6 by way of an agreement to enjoy the exclusive possession of the property and to derive profit out of it – Held, this type of transaction cannot be said to have created a mere license – O.Ps. 5 & 6 are lessees and not licenses. (Paras 33 to 36)

<u>Case laws Referred to:-</u>

1.(2010) 10 SCC 282 : (Nand Kishore Gupta & Ors.-V- State of Uttar Pradesh & Ors.)

2.AIR 2010 SC 2550 : (State of Uttaranchal-V- Balwant Singh Chaufal)
3.2012(I) ILR CUT-206 : (Niranjan Tripathy-V- State of Orissa & Ors.)
4.AIR 1981 SC 344 : (Fertilizer Corporation Kamagar Union (Regd.) Sindri & Ors. -V- Union of India & Ors.)
5.AIR 1993 SC 892 : (Janta Dal-V- H. S. Choudhary)
6.(2003)7 SCC 546 : (Guruvayoor Devaswom Managing Committee-V- C.K. Rajn).
7.AIR 1987 SC 1339 : (Hari Om Gautam-V- District Magistrate, Mathura & Anr.)
8.AIR 1977 SC 2149 : (Bihar Eastern Gangetic Fishermen Co-operative Society Ltd -V- Sipahi Singh & Ors.)
9.AIR 1962 SC 110 : (State of Bihar-V- M/s.Karam Chand Thapar & Brothers Ltd.)
10.AIR 1962 SC 113 : (Bhikraj Jaipuria-V- Union of India)
11.AIR 1962 SC 779 : (State of W.B.-V- M/s. B.K. Mondal & Sons.).
12.AIR 1968 SC 1218 : (Mulamchand-V- State of M.P.)
13.AIR 1974 SC 396 : (Qudrat Ullah-V- Municipal Board, Bareilly).
14.AIR 1959 SC 1262 : (Associated Hotels of India Ltd.-V- R.N. Kapoor).

For Petitioner - M/s. N.K. Sahu, Sr. Adv. B. Swain & S.K. Sahu.
Mr. J. Pattnaik, Sr. Adv. (for Intervenor-petitioner)
For Opp.Parties - Mr. Ashok Mohanty, Advocate General (For Opp.Party Nos.1 & 2)
M/s. R.Mohapatra, A. Dash & S.Das, (For Opp.Party No.5)
M/s. R .K. Rath, Sr. Advocate, A.Das, S. Samantsinghar, (for Opp.Party No.6)
M/s. S.K. Pattnaik, U.C. Mohanty, T. Sahoo, (For Opp.Party No.3).

V. GOPALA GOWDA, CJ. This writ petition has been filed by way of public interest litigation by the petitioner who is claiming to be a social activist working for the cause of the general public in various fields representing the interest of the public at large challenging the action of the State Government in transferring a vast extent of land at Baramunda, Bhubaneswar, the prime locality of the State capital having an area of Ac. 14.430 decimals at Baramudna, Bhubaneswar, over which the inter-state and intra-state bus stand is operating, to a private company i.e. opposite party no.5 which has been designated as Concessionaire and opposite party no.6 as preferred bidder vide agreement dated 16.3.2011 by creating a permanent lease in their favour for a period of 90 years from the date of completion of the construction for the alleged commercial facility which

includes residential and shopping complex to be constructed over 40% of the lease hold land and the rest 60% of the lease hold property for a period of 15 years over which the alleged Modern Bus Terminus will be constructed by opposite party no.5 hereinafter called 'the Company' in short, having unfettered, perennial right of collection of the entry fees, user charges from the buses and parking fees from the visiting cars and other vehicles to be entered into the proposed Bus terminus. It is stated that the grant of leas hold rights for a period of 90 years in favour of a Company is detrimental to the interest of the State and therefore, the said action of the State Government has created unrestricted scope in favour of opposite party nos.5 and 6 to grab the valuable state property at the behest of none else than the State Government. Therefore, the petitioner has filed this Public Interest Litigation alleging that public interest at large is affected and there is violation of rule of law in executing the agreement dated 16.3.2011 which is produced at Annexure-11 and sought for quashing of the same as the same is contrary to public policy and violative of the constitutional mandate under Article 299 of the Constitution of India and the provisions under the Transfer of Property Act, Indian Registration Act and Indian Contract Act etc.

2. The brief facts of the case are stated for the purpose of considering the rival factual and legal contentions with a view to find out as to whether this petition has to be entertained as PIL and relief granted as prayed in this writ petition.

3. The Drawing Plot No.B/135 ® in Mouza Barmunda in Bhubaneswar City comprising of an area of Ac.14.430 decimals of land originally belong to G.A. Department of the State Government and the said Department is continuing as the owner in possession of the aforesaid vast area. After establishment of the State Capital at Bhubaneswar, rapid growth of the city took place within a very short span of time and hence the area of the old bus terminus which was functioning at Unit-II, Bhubaneswar became inadequate to accommodate large number of buses coming to Bhubaneswar City every day. Due to heavy traffic congestion, in the year 1992, the aforesaid land was leased out to Bhubaneswar Development Authority, which is a statutory body constituted under the provisions of the Orissa Development Authorities Act, 1982, hereinafter called in short 'ODA Act'. After the land in question was leased out to the Bhubaneswar Development Authority, it undertook the development of the bus stand at Baramunda and on completion of such development by obtaining loan from HUDCO, the BDA lease out the bus stand and the structures standing thereon to OSRTC by entering into an agreement on the 1st day of January, 1992 with the sole object of operating and maintaining the bus stand. The aforesaid agreement was executed

between the OSRTC and the BDA conferring the lease hold right upon the OSRTC with due permission from the Government. After execution of the aforesaid agreement, the main bus terminus of Bhubaneswar city was shifted to the disputed land at Baramunda, adjacent to N.H.5 which is passing through the middle of Bhubaneswar city. The entire area of Ac. 14.430 decimals of land is being used for the purpose of main bus stand which is being managed by the OSRTC w.e.f. 1992 till today.

4. By passage of time, the number of buses coming to Bhubaneswar from each corner of the state has increased from year to year. The present strength of the total number of buses coming and going from Bhubaneswar touching the main bus terminus at Baramunda is 750 which are making about 1500 trips in a day. The entire area of Ac.14.430 decimals of land was earmarked for operation of bus stand. At present, practically the said area is inadequate to accommodate the aforesaid number of buses to make their trips in a smooth manner.

5. It appears that on 22.5.2008, a high level meeting was held in the conference hall of the Hon'ble the Chief Minister of the State. Decision was taken for modernization of different bus terminus situated throughout the State including the bus stand situated at Baramunda through Public Private Partnership mode (ppp). Further, it was decided that the modernization of the bus stand will be regulated through Commerce and Transport Department, Government of Odisha in co-ordination with the District Collectors and the Transport Commissioner will be the Nodal Officer for this purpose.

6. After the said decision was taken, the Commerce and Transport Department, Govt. of Odisha invited tender in the form of Request for Proposal (RFP) from the intending bidders to participate in the bid process to undertake modernization of Baramunda Bus Stand. According to the counter statement filed by the opposite parties, three private Companies had participated in the bidding process in pursuance to the tender notice issued by the Commerce and Transport Department. The broad role of the intending bidders as categorized in the tender notice are as follows:-

(a) Design, finance, construct, operate and maintain the bus terminal facility till the end of the concession period.

(b) Carry out routine and periodic maintenance of the bus terminal during concession period.

(c) Design, finance, construct, Book and market commercial facilities in the balance build up area and collect lease premium for commercial facility.

7. It was further stipulated in the tender notice that the completed RFP should reach the office of the PMU, IDCO latest by 15.00 hours on 20.1.2010. The ARSS infrastructure Project Ltd-opposite party No.6 submitted the proposal to undertake the implementation of the project with a financial officer of Rs.56 crores towards concession fee (premium) subject to the terms and conditions specified in the RFP. The Secretary to Government, Commerce and Transport Department vide its letter No.4715 dated 26.7.2010 issued a letter of acceptance of the offer submitted on behalf of ARSS-opposite party no.6. In the letter of acceptance, it was clarified that the selected bidder will pay Rs.18,66,66,667/- in form of a demand draft in favour of the OSRTC and in respect of the balance concession fee (premium) of Rs.37,33,33,333/-, the Company will submit an unconditional and irrevocable demand bank guarantee from the scheduled nationalized bank acceptable to the OSRTC. The said letter further reveals that the decision for execution of the agreement in form of concession agreement between the OSRTC and opposite party No.6 was taken by the Commerce and Transport Department in the month of July, 2010.

8. In response to the letter dated 26.7.2010 issued by the Secretary, Commerce Department, the opposite party No.6 issued a letter to the opposite party No.4-Managing Director of OSRTC complying with the pre-condition for execution of the concession agreement. Before execution of the alleged agreement, the selected bidder-opposite party No.6 stated to have deposited Rs.2,33,24,038/- in the form of demand draft in favour of Odisha Project Development Company Private Limited. In compliance with the further pre-condition, with regard to payment of premium amount, the first instalment of Rs.18,66,66,667/- was paid by the Company in the form of demand draft. The Managing Director, ARSS Infrastructure Ltd. wrote a letter to the Chairman-cum-Managing Director, OSRTC in proof of compliance of further condition of depositing the bank guarantee towards the balance premium amount. The Managing Director, ARSS Infrastructure Ltd. in compliance with all the formalities issued a letter to the Commissioner-cum-Secretary, Commerce and Transport Department. Govt of Odisha acknowledging the letter of acceptance for development of Modern Bus Terminal at Barmunda. The Director of Estate and Ex-officio Additional Secretary to Government representing the G.A. Department issued the purported order of allotment of the land in question in favour of the OSRTC for development of the bus stand through ppp mode. In the said allotment letter, it is indicated that on 20.12.2010, the G.A. Department had resumed the land from B.D.A. and issued the purported order of allotment in favour of OSRTC with the following condition that :-

(1) The terms and conditions of the lease agreement between G.A. Department and Odisha State Road Transport Corporation including the amount of premium will be decided subsequently.

(ii) Pending execution of lease agreement, the Odisha State Road Transport Corporation is allowed to enter into the concession agreement with the highest bidder in order to expedite the process for development of modern bus terminal at Barmunda.

9. On 16.3.2011 after finalization of the aforesaid purported procedural requirement, the impugned agreement was executed by way of a clever drafting between the OSRTC as the Grantor and ARSS Bus terminal (P) Ltd. as the Concessionaire and M/s.ARSS Infrastructure Project Private Ltd. as the Preferred Bidder for the first time disclosing in the said agreement that in respect of 60% of the allotted land the Concessionaire will develop the Modern Bus Terminus within two years and will appropriate the entry fee, user fee, parking fee and other charges from the buses operating from the Bus Terminus for a period of fifteen years. In respect of other 40% of the allotted land, the Concessionaire will undertake the development of commercial complex, residential complex and shopping mall with a right to induct the tenants over the same for a period of 90 years and realize the premium amount from them during that period.

10. After execution of the impugned agreement, it came to the knowledge of the general public that Ac.14.430 decimals of land in prime location of Bhubaneswar have been given to a private company for an indefinite period to exercise the right of ownership over the same and appropriate the profit out of the same for a period of fifteen years in respect of 60% of the land and in respect of 40% for a period of 90 years. By knowing about the aforesaid illegal transaction, application was made under the RTI Act by one Radhamohan Kar of B.D.A. Colony on 8.8.2011 seeking detail information with regard to the ownership of the land, status of the company in whose favour of impugned agreement has been executed and the procedure followed in executing such agreement. On receipt of the application from Radhamohan Kar, the PIO-cum-Law Officer of the OSRTC supplied the information. Only after receipt of the document supplied by the OSRTC, it came to the notice of the general public that in the pretext of modernization of Bus Stand, vast extent of Government property are going to be misutilized by non-else than the Government officials, in a very perfunctory manner by giving a complete go by to all the procedure approved under the law and by violating the constitutional and statutory provisions as stated above. Further, it is stated that the decision making

process of transferring/leasing out the disputed land in favour of a private company by entering into the so-called concession agreement was against the public policy as well as the interest of the general public. Therefore, the petitioner has filed this writ petition challenging the validity of such contract.

11. On 5.1.2012, at the time of preliminary hearing, objection was raised on behalf of the State about the maintainability of the writ petition on the ground that the dispute involved in the petition is in the nature of a public interest litigation and due to non-compliance of the requirement of Rule 8 of the Orissa High Court Public Interest Litigation Rules, 2010, the writ petition is not maintainable. Therefore, the petitioner is required to ventilate his grievance before the appropriate authority as per the said Rule. This Court having regard to the importance of the dispute involved in the writ petition and the preliminary objection raised on behalf of the State, without disposing of the writ petition, directed the learned counsel for the petitioner to furnish extra copy of the writ petition upon the learned Addl. Government Advocate by 6.1.2012, who shall forward the same to opposite party no.2 and shall treat the copy of the writ petition as the representation and dispose of the same within a period of two weeks from the date of receipt of copy of the order passed by this Court. Petitioner has also prayed for interim protection of stay. Since we have directed the opposite party no.2 to consider and dispose of the representation, it is open for the petitioner to appear before opposite party no.2 and file a petition seeking for interim relief. The matter was directed to be listed after three weeks.

12. On 7.1.2012, a copy of the writ petition was served upon the Addl. Standing Counsel in the office of the Advocate General. After serving a copy of the petition upon the Addl. Standing Counsel, the petitioner himself submitted a petition to the Principal Secretary to Government in G.A. Department for consideration of the interim relief of prohibiting the Private Company-opposite party no.5 from taking any follow up action on the basis of the agreement impugned in this writ petition. Direction was given to the opposite party no.2 to dispose of the representation by treating the copy of the writ petition as representation within two weeks from the date of receipt of the same, but he did not dispose of the same within 20.03.2012 to comply with the orders of this Court and sat over the matter for more than one and half month from the date of passing of the order i.e. on 5.1.2012. Therefore, the petitioner was compelled to file an additional affidavit before this Court along with copy of the receipt issued from the office of Advocate General on 7.1.2012 to show that copy of the writ petition was served upon the Addl. Standing Counsel in compliance to the direction given on 5.1.2012. The matter was listed on 26.3.2012 for further hearing on the question of admission. On that day, learned Government Advocate, Mr. R.K. Mohapatra

sought two weeks time to comply with our order dated 5.1.2012. Even after a long gap of time, the same was not complied with. Accordingly, the matter was directed to be listed on 30.3.2012 for consideration of the interim prayer. Pursuant to the direction, opposite party no.2 did not comply with the direction this Court. On 30.3.2012, this matter was taken up for consideration of the interim prayer made in the Misc.Case. On that date, a letter dated 29.3.2012 written by the Special Secretary to the Government addressed to the learned Advocate General was produced before the Court though the copy of the same was not served upon the learned counsel for the petitioner. On the same date, another Misc.Case was filed on behalf of the State Government seeking two weeks' time to comply with the direction issued by this Court on 5.1.2012. This Court by recording the developments in the writ petition, heard the application for interim prayer and after hearing the learned counsel for the petitioner as well as learned Advocate General, as an interim measure, directed both the parties to maintain status quo as on that date with regard to the nature and character of the property in question. The Court also directed the State Government to file their counter affidavit in reply to the contention raised by the petitioner in the writ petition and the matter was directed to be listed after two weeks.

13. On 27.4.2012, OSRTC filed counter affidavit along with a petition for vacation of the interim order passed by this Court on 30.3.2012. Without adverting to the petition averments, the legal questions raised in the writ petition, counter affidavit has been filed on behalf of the OSRTC making an attempt to justify their illegal action by taking the following plea:-

i) The writ petition is not a public interest litigation;

ii) The writ petition has been filed after much delay;

It is further stated that it is a concession provided to the concessionaire for the development of the Barmunda Bus stand as per provision 2.1 of the concession agreement with certain right and obligations which are inconsonance with ppp (mode) adopted by the State Government. The Concessionaire will pay Rs.56 crores to the OSRTC and an equivalent amount of annual license fee as Rs.2.80 crores with increase of 15% after every three years for fifteen years. 90 years lease will be given to the allottees over 40% of the land which will be developed with commercial facility.

The Barmunda Bus Stand consisting of an area of Ac. 14,430 decimals of land was initially allotted by G.A. Department during 1987 in favour of the BDA for the purpose of development of the bus stand. Since the land was developed as bus stand for public purpose, the same was

subsequently allotted free from premium according the policy of the government. BDA constructed the bus stand and handed over the same to the OSRTC on 1.1.1992. The OSRTC took up the management of the bus stand, collected the parking fees and maintained the bus stand out of its own found. It was also decided by the State Government that number of bus terminals in the State of Odisha would be developed in ppp mode for providing better amenities to the general public. Accordingly, one Empower Committee was constituted by the government in Transport Department which met on 25.6.2008 and 5.7.2008 and finalized the tender document which are called as Request for Proposal (RFP) documents. The said committee subsequently met on 20.9.2011 and approved the amendments made for request for proposal document. The said document was published on 12.12.2009 in the Economic Times, The Business Standard, The Samaja and The Dharitri calling for proposal from the interested parties. Pursuant to the said notice, three bidders namely, (1) M/s. ARSS Infrastructure-O.P. No.6, (2) M/s. Lovely International Ltd. and (3) M/s. Aravali Power Infrastructure submitted their bids. The Empower Committee accepted the highest bid of the opposite party no.6. It is the case of the petitioner that the property in question belongs to the Government and before execution of the agreement by entering into a contract with the Private Company, no procedure at provided in law has been followed. It is not stated in the counter that they have followed the procedure as provided in law before the impugned contract was entered into between the parties.

14. The stand of the petitioner and the legal contention raised by the petitioner is that the impugned contract is invalid in view of the clear provision under Article 299 of the Constitution of India. In this regard, the OSRTC in paragraph-15 of its counter has stated that OSRTC being the lease holder has executed the agreement with the Concessionaire as it is known as Granter. The Chairman-cum-M.D. of the Corporation has delegated the power to the General Manager, OSRTC who executed the agreement. Therefore, there is no violation of Article 299 of the Constitution of India. It is further stated that the agreement executed in favour of the opposite party no.6 without complying with the mandatory constitutional provision referred to supra, is vitiated under the law as being opposed to public policy as provided under Section 23 of the Contract Act. In this regard, the OSRTC has not given any reply. On the other hand, OSRTC in a very slip-shod manner has given a casual reply stating that concession agreement is not a lease agreement. Since OSRTC is the lease holder of the aforesaid land, the OSRTC has been mandated upon for execution of such sub-lease agreement with different allottees over the commercial facilities only as per applicable law and as per provision of 8.5 of the concession

agreement. Therefore, the agreement is only a concession agreement and has not been registered.

15. The State Government in its counter affidavit has adopted the plea taken in this regard on behalf of opposite party no.3 stating that OSRTC being the lease holder is known as granter. The Chairman-cum-M.D. of the OSRTC has delegated the power to the General Manager, OSRTC who has executed the agreement. Therefore, there is no violation of Article 299 of the Constitution of India. In reply to the averments made in para-18 of the writ petition, it is stated that concession agreement is not a lease agreement. Since OSRTC is the lease holder of the aforesaid land, the OSRTC has been mandated upon for execution of sub-lease agreement with different allottees over the commercial facilities only as per applicable law and as per the provision of 8.5 of the concession agreement. This agreement is only a concession agreement and as such has not been registered.

16. Counter affidavit has also been filed on behalf of opp.Party nos.5 and 6. Opposite Party nos.5 and 6 being the beneficiaries by virtue of the impugned agreement have filed their counter affidavit justifying the action taken by the OSRTC as well as the State Government in finalizing the bid in their favour and various other pleas which have been adverted to contending that the writ petition is not maintainable in view of non-compliance of Rule-8 of the Orissa High Court Public Interest Litigation Rules, 2010.

17. Learned Advocate General has justified execution of the lease agreement by placing strong reliance upon the judgment of the Supreme Court in the case of Nanda Kishore Gupta & Ors. Vs. State of Uttar Pradesh & Ors., reported in (2010) 10 SCC 282 contending that the ratio decided in the said case is applicable to the facts of the present case inasmuch as the Hon'ble Supreme Court had approved the concession agreement in favour of a concessionaire granting the lease hold right for 90 years.

18. The judgment in the case of Nanda Kishore Gupta Vs. State of U.P. relied upon by the learned counsel for the petitioner will be adverted to while answering the concession issue in the reasoning portion of the judgment. Further it is contended that the agreement is not a lease agreement, it is only a license in favour of Concessionaire for development of the property as stated supra while narrating the facts of the case. Therefore, the provisions of Section 105 of Transfer of Property Act read with Section 17 (c) of Indian Registration Act and Article 299 of the Constitution of India are not attracted and the Government should authorize in favour of a delegate to sign the lease agreement as contended is wholly untenable in law.

19. By careful reading of the recitals of the agreement, it is not a lease deed in terms of the definition of Section 105 of Transfer of Property Act. Therefore, question of violation of Section 107 of the Transfer of Property Act read with the Indian Registration Act so also the public as provided under Section 23 of the Contract Act does not arise and placing reliance upon Section 10 of the Contract Act is also not attracted. Therefore, Article 299 of the Constitution f India is not violated in the present Case. Hence, the learned Advocate General submitted that the policy of the State Government adverted to its own affidavit by granting land in favour of the OSRTC in the entire State and notifying the tender in the form of Request for proposal from the intending bidders to participate in the bid process to undertake the work in the entire State on ppp (mode) which is in the public interest. The same cannot be contended that it is opposed to public policy and public interest will be affected. Therefore, there is no violation of rule of law to entertain this public interest litigation. Opposite party no.2 has considered the writ petition and he has examined one of the contention and rejected the same by giving detail reasons in justification of granting the land in favour of OSRTC after resuming the land from the BDA on 20.12.2010. Thereafter, implementing the policy decision in favour of a private Company for the development of the property as Concessionaire on certain terms and conditions is beneficial for the public, the same shall not called that it is against the public policy. There is no public interest involved in this case. The petitioner is liable to be rejected. On the same terms learned Senior Counsel appearing for opposite party no.5 and 6 by placing reliance upon Rule 8,11 and 12 of the Orissa High Court PIL Rules, 2010, placing reliance upon the judgment in the case of BALCO Employees' Union Vs. Union of India, reported in (2002) 2 SCC 333 and the judgment in the case of State of Uttaranchal Vs. Balwant Singh Chaufal, reported in AIR 2010 SC 2550 which judgment has been referred to by Division Bench of this Court in the Case of Niranjan Tripathy Vs. State of Orissa & Ors., reported in 2012 (I) ILR-CUT-206 to which judgment Chief Justice was a Member of the Bench, submitted that the writ petition is not maintainable and liable to be rejected.

20. On the basis of the aforesaid factual and rival legal contentions urged on behalf of the parties, following points arise for consideration by this Court.

(1) Whether this writ petition in the nature of Public Interest Litigation is maintainable in view of the non-compliance of Rule 8 of the Orissa High Court Public Interest Litigation Rules, 2010 ?

(2) Whether the petitioner has got the locus standi to challenge the validity of the impugned agreement dated 16.3.2011 under Annexure-11 by filing this PIL writ petition ?

(3) Whether this Court can draw legal inference as per the recitals of the agreement and right granted in favour of O.P. Nos.5 & 6 is a profit-a-prendre in respect of immovable property having regard to the period of 15 years and 90 years to the extent of 60% and 40% of land respectively in favour of O.P. Nos.5 & 6 and the agreement is enforceable under law without the same being registered under Section 17 (1) (b) of the Registration Act ?

(4) Whether the agreement in question is vitiated under the law due to non-compliance of the constitutional provision as provided under Article 299 of the Constitution of India ?

(5) Whether non-compliance of constitutional and statutory provisions at the time of execution of the impugned agreement is against the public policy as provided under Section 23 of the Contract Act?

(6) What order ?

21. Point Nos.1 and 2 are answered together as they are interrelated to each other. Rule 8 of the Orissa High Court PIL Rules, upon which strong reliance is placed by the learned Sr. Counsel on behalf of O.P. Nos.5 & 6 fell for consideration before the Division Bench of this Court in the case of Niranjan Tripathy Vs. State of Orissa & Ors., reported in 2012 (I) ILR-CUT-206, wherein this Court at paragraph 56 and 57 of the judgment, after referring to Rules 8 & 10 of the said Rules, held that compliance of said Rules is mandatory and the allegations made by the petitioner must be supported by authenticated documents, otherwise the PIL would not be maintainable. It is submitted by the learned Sr. Counsel on behalf of O.P. Nos.5 & 6 that the said decision has been rendered by this Court after referring to the judgment of the Supreme Court in the Case of State of Uttaranchal Vs. Balwant Singh Chaufal, AIR 2010 SC 2550 and held that such writ petition which is not genuine one deserves to be dismissed.

In this regard, it is worthwhile to refer to the order of this court dated 05.01.2012 passed in this writ petition at the stage of fresh admission on the basis of the objection raised by the learned Addl. Government Advocate to the effect that Rule 8 of the Orissa High Court PIL Rules has not been complied with. Relevant portion of the said order reads thus:

> "3. Learned Addl. Government Advocate raised objection to the writ petition and submits that it is a Public Interest Litigation, however, as per the requirement, Rule 8 of the Orissa High Court PIL Rules, 2010 has not been complied with. Therefore, it is submitted that petitioner is required to ventilate the grievance before the appropriate authority as per the said Rules.

4. In this view of the matter, we direct the learned counsel for the petitioner to furnish an extra copy of the writ petition upon the learned Addl. Government Advocate, by tomorrow, who shall forward the same to the opposite party No.2 immediately. Opposite party No.2 shall treat the copy of the writ petition as the representation and upon careful consideration dispose of the said representation within two weeks from the date of receipt of a copy of this order along with writ petition.

5. Learned counsel for the petitioner prays for certain interim protection of stay. Since we have directed the opposite party No.2 to consider and dispose of the representation, it is open for the petitioner to appear before the O.P.No.2 and file petition seeking interim relief."

22. By virtue of the aforesaid order this Court, instead of entertaining the writ petition, gave the petitioner opportunity to move the appropriate authority complying with Rule 8. Accordingly, on 7.1.2012 petitioner served a copy of the writ petition and submitted a petition before the Principal Secretary to the Government in the G.A. Department for his consideration of the interim relief. However, the opposite party No.2-authority did not consider the same. On the other hand on 26.3.2012 learned Government Advocate sought for two weeks time for complying the order dated 5.1.2012. Thereafter, matter was listed on 30.3.2012 for consideration of the interim prayer as no action was taken on the representation of the petitioner even after lapse of about 3 months. On the said date, taking into consideration the Misc.Case filed by the Government seeking time to go though the records of OSRTC and Commerce and Transport Department and to dispose of the representation of the petitioner & on the prayer of the learned Advocate General, granted two weeks' time to dispose of the representation. However, taking into account the fact situation of the case and after having satisfied prima facie with regard to the merit of the case, this Court passed the interim order directing the parties to maintain status quo with regard to nature and character of the land in question. This Court further directed the State Government to file counter. In view of the above fact it cannot be said that Rule 8 has not been complied with. Though the writ petition was pending, this Court granted liberty to the petitioner to move before the authority. Accordingly, petitioner moved the authority, the authority did not consider the representation for more than three months. Therefore, Rule 8 of the Rules, 2010 has been substantially complied with before entertaining the writ petition on merits.

23. Apart from the said factual position, after carefully considering and examining the said representation, the authority rejected the same vide order dated 12.04.2012 by recording the reasons.

24. Further, learned counsel for the petitioner has rightly placed reliance upon the judgment of the Privy Council reported AIR 1928 pc 162, wherein the Court has observed hereunder :

> " This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived and the parties who have acquiesced in the court exercising it in a wrong way cannot after words turn round and challenge the legality of the proceeding."

25. So far as the locus standi of the petitioner in challenging the impugned agreement is concerned, it is well settled position of law laid down by the Hon'ble Supreme Court in catena of decisions that if the petitioner shows that action of the State Government or its instrumentality is arbitrary and unlawful, even in a matter of contract, a citizen can espouse the Public Interest by approaching the Court by filing writ petition and the Court on being satisfied can grant the relief. It is also well settled preposition of law that when the act of an instrumentality of the State is contrary to the public policy, public interest, unfair, unjust and unreasonable and not in accordance with the constitutional and statutory obligation, every citizen has got locus standi to challenge the said act. The issues of public importance, enforcement of fundamental right of large number of public and the policy decision of the State and its instrumentalities are contrary to any statutory or constitutional provision, the Court even treat a letter or telegram as a public interest litigation upon telexing procedural laws.

26. In this regard, it is worthwhile to refer to the Constitution Bench decision of the Supreme Court in the case of Fertilizer Corporation Kamagar Union (Regd.) Sindri & Ors. Vs. Union of India & Ors., reported in AIR 1981 SC 344, particularly at paragraphs 37 & 38 wherein Justice Krishna Iyar while speaking for the Bench, has elaborately dealt with the locus standi. The relevant paragraphs of the said judgment reads thus :

> "37. Assuming that the Government company has acted mala fide, or has dissipated public funds, can a common man call into question in a Court the validity of the action by invocation of Art. 32 of 226 of the Constitution ? Here, we come up on the crucial issue of

access to justice and the special limitations of Art. 32 which is the passport to this Court.

38. We have no doubt that in competition between Courts and streets as dispenser of justice, the rule of law must win the aggrieved person for the law Court and wean him from the lawless street. In simple terms, locus standi must be liberalized to meet the challenges of the times. Ubi jus ibi remedium must be enlarged to embrance all interests of public-minded citizens or organizations with serious concern for conservation of public resources and the direction and correction of public power so as to promote justice in its triune facets. Lord Scarman's warning in his Hamlyn Lectures lend strength to our view:

"I shall endeavour to show that there are in the contemporary world challenges, social, political and economic, which, if the system cannot meet them, will destroy it. These challenges are not created by lawyers; they certainly cannot be suppressed by lawyers; they have to be met either by discarding or by adjusting the legal system. Which is to be ?" [English Law – The New Dimension – The Hamlyn Lectures by Sir Leslie Scarman, 1974 – Stevens – p. 1.]"

Further, learned counsel for the petitioner has also rightly placed reliance upon the judgments of the Supreme Court reported in Janta Dal Vs. H.S. Choudhary, AIR 1993 SC 892 and Guruvayoor Devswom Managing Committee V. C. K. Rajan, (2003) 7 SCC 546.

27. The arbitrary and unreasonable action of the opposite parties, in granting the lease of public property which is very valuable being situated in the heart of the Bhubaneswar city for 15 years with regard to 60% of land and 90 years with regard to 40% of land in favour of a private company to build the commercial and residential complex over the same and do its business by entering into an agreement/contract in the guise of development of Bus-terminus without following proper procedure and in violation of fundamental rights guaranteed under Article 14, is against the public interest and detrimental to the rights envisaged under Article 39 (b) and Directive Principles of State Policy.

28. The facts stated in this case reveal that the action of the State Government and OSRTC in dealing with public property is in utter disregard of the Constitutional and statutory provisions as narrated in the writ petition. Apart from that, petitioner being a local resident of Barmunda area want to

protect the public property and as it appears from the writ petition and legal contentions urged by him, it cannot be said that it is a private interest litigation, rather it is the genuine step taken by the petitioner to protect the said property from being mis-utilized. Further, in this regard, petitioner has brought certain factual aspect urging legal contention in support of the case and sought to safeguard the property of the State by approaching this Court through this Public Interest Petition. Therefore, it cannot be said that the petitioner has no locus standi to espouse the cause of the public at large in the instant case.

29. There is also violation of the statutory provisions under Section 96 read with Sub-section 2(XXI) and (XXII) of the Motor Vehicles Act on the part of the State government and OSRTC which clearly provides that the State Government shall specifically frame the Rules with regard to operation, fixation of place, and the area where the Bus Stand will operate along with the collection of fees from the users of the Bus Stand. By interpreting the provisions of Section 68 of the M.V. Act, 1939 which is in parimeteria with the provision of Section 96 of the M.V. Act, 1998, the Supreme Court in the case of Hari Om Gautam v. District Magistrate, Mathura and another, reported in AIR 1987 SC 1339, has clearly spelt out the law that a Bus Stand can only be notified by the R.T.A. having the jurisdiction over the area. Except the R.T.A., if any other authority has taken the decision selecting the place in which the Bus Stand will operate or to the extent of the Area in which the Bus Stand will function, the same shall be treated as null and void in the eye of law. The said decision of the Supreme Court, upon which reliance has been placed by the opposite party Nos.7 to 10 who are different Bus Owners' Association of Bhubaneswar, is aptly applicable to the fact situation of the case. Therefore, there is a statutory violation of the aforesaid provision on the part of the opposite party Nos.1,2 and 3 in entering into the contract in question with O.P. No.6 for construction of Barmunda Bus Terminal in 60% of the area of the total extent of land granted in favour of OSRTC.

In view of the above, aforesaid point Nos. 1 & 2 are answered in favour of the petitioner.

30. Point Nos.3, 4 and 5 are also required to be answered together as they are inter-related by assigning the following reasons.

It is well settled position of law that the award of contract by the State or its instrumentality can no doubt be judicially reviewed by this Court, if the Court comes to the conclusion that the award of the contract is vitiated by violation of any of the constitutional or statutory provisions or vitiated by

arbitrariness, unfairness, illegality or by irrationality. Learned counsel for the petitioner has rightly placed reliance upon the information supplied by the PIO-cum-Law Officer of OSRTC under the RTI Act in Annexure-3 to the writ petition, wherein it is specifically admitted at Paragraphs 2 & 7 of the said document that "The copy of the ROR is not available. Land stands recorded in the name of G.A. Department; and G.A. Department, Govt. of Odisha is the owner of the land. OSRTC is the lease holder." From the aforesaid information, it is clear that the Government of Odisha under the G.A. Department is the owner of the land in dispute. It is undisputed fact that the G.A. Department resumed the land from BDA on 20.12.2010 and on the same date the land in question measuring Ac. 14.430 dec. was allotted in favour of OSRTC and on the basis of such allotment, the right was conferred upon the OSRTC to enter into the agreement with the opposite party Nos. 5 & 6 is order to expedite the process for development of Modern Bus Terminus at Barmunda. Therefore, the legal inference is required to be drawn as to whether the OSRTC, who is a leassee of the Government, can grant the lease hold right in favour of opposite party Nos.5 & 6 by entering into an agreement.

31. Learned counsel for the petitioner has rightly placed reliance upon Article 299 of the Constitution with reference to the decision of the Supreme Court in Bihar Eastern Gangetic Fishermen Co-operative Society Ltd., V. Sipathi Singh and others, AIR 1977 SC 2149, where the apex Court has clearly laid down the law that the provisions of Article 299 of the Constitution are mandatory and while exercising the executive power the Union or a State must satisfy the following three conditions :

(1) It must be expressed to be made by the President or by the Governor of the State as the case may be :

(2) It must be executed on behalf of the President or the Governor as the case may be ; and

(3) Its execution must be by such persons and in such manner as the President or the Governor may direct or authorize. Failure to comply with these conditions nullify the contract and render it void and unenforceable.

In view of the above, it would be well established that failure to comply with the mandatory provision of Article 299 makes the contract invalid. Law is further well settled that Section 175 (3) of the Govt. of India Act, upon which reliance has been placed by the learned counsel for the petitioner, is in parimeteria with Article 299 of the Constitution of India. The

parliament intended in enacting the provisions contained in Section 175 (3) of the Govt. of India Act that the state should not be saddled with the liability for unauthorized contract and with that object provided that the contracts must show on their face that they are made on behalf of the State, i.e. by the head of the State and executed on his behalf and in the manner prescribed under law. The whole aim and object of the legislature in conferring the power upon the Head of the State would be defeated, if a contract is entered into without following due procedure of law.

32. Further, placing reliance upon the judgments of the Supreme Court reported in the cases of Bihar Eastern Gangetic Fishermen Co-operative Society Ltd., V. Sipahi Singh and others, AIR 1977 SC 2149; State of Bihar V. M/s. Karam Chand Thapar and Brothers Ltd., AIR 1962 SC 110; Bhikraj Jaipuria V. Union of India, AIR 1962 SC 113; Constitution Bench of the Supreme Court in State of W.B. V. M/s. B.K. Mondal and Sons, AIR 1962 SC 779 and in the case of Mulamchand V. State of M.P., AIR 1968 SC 1218, learned counsel for the petitioner rightly submitted that where a contract between the State and the private individual is not in the form as required by Section 175 (3) and other required statutory provisions, it cannot be enforced. The ownership of the land in question remain with the State Government as revealed from the document under Annexure-3. However, on perusal of the impugned agreement it is clear that the OSRTC represented by its General Manager has executed the impugned Concession Agreement in favour of O.P. Nos.5 & 6, who is not authorized under the law to execute such agreement transferring the interest over the Govt. property in favour of a third party as envisaged under Article 299 of the Constitution. Further, the execution of the impugned agreement by the Managing Director of OSRTC as the Grantor is not satisfying three elementary conditions as set out by the Hon'ble Supreme Court by interpreting the provision under Article 299, referred to supra.

33. It is also well settled position of law that where a dispute would arise as to whether a document is a "lease" or a "license", it is the substance of the agreement must be preferred to the form. There is a marked distinction between a "lease" and "license". The Supreme Court in the case of Associated Hotels of India Ltd. V. R.N. Kapoor, AIR 1959 SC 1262 has laid down the following proposition in that regard.

(i) to ascertain whether a document creates a "license" or "lease", the substance of the document must be preferred to the form.

(ii) The real test is the intention of the parties whether they intended to create a "lease" or a "license".

(iii) If the document creates an interest in the property, it is a “lease”, but, if only permits another to make use of the property, of which the legal possession continue with the owner, it is a “license”, and

(iv) If under the document a party gets exclusive possession of the property prima facie he is considered to be a “lessee”.

34. In the background of the aforesaid well settled legal proposition, it is necessary in the instant case to go to the relevant recitals of the agreement executed by the OSRTC under Annexure-11 granting lease hold right in favour of O.P. Nos.5 & 6 to know whether it is a lessee or merely a right of ‘concession’ has been granted in their favour without creating any interest over the land. It appears from the agreement that the Granter has decided to implement the project through private sector participation on the build, operate, and transfer basis which comprises, subject to the terms and conditions of the agreement, the development, design, financing, construction, operation and maintenance of the project facilities by the private sector participating during the concession period, including the right to develop, design, finance, construct and maintain the commercial facility and to undertake the marketing, booking and allotment of built up area therein to demand, change, collect, retain and appropriate the entry fee and user charges and premia. The relevant clauses of the agreement provides as under :

“ (i)“ Agreement” means this agreement including the recitals, schedules and attachment here to as may be amended, supplemented or modified in accordance with the provision before ;

(ii)“ Annual License Fee” means the fees payable by the concessionaire to the Granter in as per the provisions of this concession agreement;

(xii)“ Commercial facility” or “CF” means the commercial facility, comprising built up area (Shops, offices, residential complex etc.) the common areas (including the parking lost, and as applicable the green areas, internal road, landscape structure etc.) along with support in frastructure facilities and amenities that shall be developed, designed, financed, constructed, completed, commission and operated and maintain by the concessionaire at the site. (above the bus terminal facility and as a separate building/structure constructed on a standalone basis) and marketed, allotted and leased (under and pursuant to lease deals) in accordance with the provisions thereof;

(xiii)" Commercial operation" means the commercial use of the Bus Terminal Facility by charging, demanding, collecting, retaining and appropriating the entry fees and user charges;

(xviii)" Concession Fee" means the upfront fee of Rs. 56,00,00,000/- (Rupees fifty six crores only) quoted by the concessionaire in the financial proposal of the bid and accepted by the granter that shall be paid by the concessionaire to the granter in accordance with the provisions there of in consideration for the grant of concession.

(xix)" Concession period" means the period specified in Clause 2.2;

(L)" Operation Period" is the period commencing from the operation date and ending on the expire on termination of this agreement/concession or extention there of;

(LX)" Premia" means the amounts of money that the concessionaire may, subject to the provisions thereof demand, charge, collect, retain and appropriate from the applicants (persons making bookings/allottees leases/other persons in respect of the built of area in the commercial facility at the market driven rates determined by the concessionaires;

GRANT OF CONCESSION :

2.1. Concession : Subject to the terms and conditions of the agreement, the Granter grant to the concessionaire and the concessionaire hear by accepts the exclusive right and authority during the concession period to ;

(a) Develop, finance, design, construct, manage, operate and maintain the Bus Terminal facility and to manage and to handle the use thereof by third parties;

(b) Develop, finance, design and construct OSRTC facilities;

(c) Demand, charge, collect, retain and appropriate entry fees and user charges;

(d) Manage the bus movement within the bus terminal facility ;

2.2 **CONCESSION PERIOD** :

The concession period shall commence from the compliance date and shall extent for a period of 17 years from such date of up to the date of termination or up to a date extended as per the provisions of clause-12 of

agreement for the avoidance of doubt the concession period shall include the construction period of twenty four months and subsequent operation period of fifteen years.

35. From the aforesaid recitals it is clear that the sum and substance of the agreement is grant of lease hold right in favour of O.P. Nos.5 & 6. On a conjoint reading of the recitals set forth in the various clauses of the impugned Agreement it is to be ascertained as to whether the Grantor has conferred the lease hold right upon the concessionaire or a mere license has been given to use the land for a certain period. Chapter-V of the Transfer of Property Act deals with the leases of immovable property. Section 105 of the said Act deals with the definition of “lease” and Section 107 deals with the provision as to how the leases are to be made. Similarly, Section 52 of the Indian Easement Act defines the term “license”. Section 3 (26) of the general Clauses Act and Section 2(6) of the Registration Act deal with definition of “immovable property”.

36. In the instant case, by careful reading of the clauses and recitals in the agreement with reference to the aforesaid provision of the relevant Acts, it is clear that agreement executed in favour of O.P. Nos.5 & 6 in substance created an interest over the property in question, out of which the concessionaire is certainly going to appropriate the benefit arising out of the disputed land by remaining in possession for more than 15 years in respect of 60% of land over which Bus Terminus is to be constructed and operated with a further right of collection of entry fee, user fee, and other charges as mentioned in different clauses of the agreement and in respect of remaining 40% of the land, a right has been given to the concessionaire to build the commercial complex over the same and with exclusive right to induct the respective tenants over the same and collect and appropriate the premium from different tenants as has been expressly mentioned in the agreement. It is clear from the documents that possession over the land is to be handed over to the concessionaire for the entire concession period free from all encumbrances. By conjoint reading of all the relevant clauses of the agreement, it is absolutely clear that the document in question is clearly satisfying the condition of “lease” as defined under Section105 of the T.P. Act. It is well settled proposition of law that a lease cannot be converted into a license merely by calling it as license, it will have to be determined whether in the circumstance of the case, the possession of the adversary was that of a licensee or lease. Section 52 of the Easement Act defines that license comes into operation where one person grants to another a right to do or continue to do in or upon the immovable property of the Grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an interest in the property. In the case on hand, under the

agreement executed, O.P. Nos.5 & 6 are required to do or continue to do a particular type of work either in the built up area of the Bus Terminus or the portion earmarked for commercial complex. On the other hand, exclusive right over the land has been conferred upon the O.P. Nos.5 & 6 by way of this agreement to enjoy the exclusive possession of the property by developing, financing, designing and constructing, operating and maintaining the project in question at the project site and all activities incidental thereto, such as demanding, charging, collecting, retaining and appropriating the user charges for a period 15 years in respect of Bus terminus facility; and 90 years in respect of commercial facility, wherein right has been granted to O.P. Nos.5 & 6 to construct, develop and thereby to market, book and to allot the built up areas comprising the commercial facility with a right to demand, charge, collect, retain and appropriate the premium for such area from the applicants. Therefore, we have to hold that this type of transaction cannot be said to have created a mere license and hence the O.P. Nos.5 & 6 are the lessees and not the licensees, from the moment they entered into possession.

37. Learned counsel for the petitioner has rightly placed reliance upon the decision of the Supreme Court in the case of Qudrat Ullah v. Municipal Board, Bareilly, reported in AIR 1974 SC 396, wherein the Supreme Court has clearly interpreted the distinction between "lease" and "license". The relevant portion of the said judgment is extracted hereunder:

> "there is no simple litmus test to distinguish the lease as defined U/s.105 of TP Act from a license as defined U/s.52 of the Easement Act, but the character of the transaction turns on the operative intent of the parties. To put it pithily, if an interest in immovable property entitling the transferors to enjoyment, is created, it is a Lease; if permissions to use land without right to exclusive possession is alone granted a license is the legal result".

In the said judgment, the Supreme Court by quoting various paragraphs from Halsbury's Laws of England Vol-23, ultimately came to the conclusion that where, under an agreement with the municipality a person is allowed to collect the rents and Bazar dues from sheds and shops and the internal roads within the market, the deed has to be held to be a lease deed and not merely a license.

38. Learned counsel for the petitioner further placed strong reliance on the decision of the Supreme Court in the case of Associated Hotels of India Ltd. v. R.N. Kapoor, AIR 1959 SC 1262, to make purposive interpretation of

the real intention of the parties involved in the agreement in the instant case. By careful interpretation of the various recitals of the agreement we can come to the conclusion that the agreement is a “Lease Agreement” entered into between the OSRTC and O.P. Nos.5 & 6 and as the transaction in respect of the disputed property, valuation of which certainly exceeding much more than Rs.100/- and the duration of the agreement is exceeding more than one year, the document in question must have been registered as per the provision of Section 107 of the T.P. Act read with Section 17 of the Registration Act. In the absence of the same, the agreement is rendered as void in the eye of law and therefore, the same is liable to be unenforceable under the law.

39. Further, it is clear from the impugned agreement that the Grantor has created a right in favour of the so-called concessionaire to remain in possession over 60% of the land in question for 15 years and 90 years in respect of remaining 40% of land with a right to collect and appropriate the benefit arising out of the land in question, which benefit in essence is in the character of a immovable property as defined U/s.2 (6) of the Indian Registration Act. Section 2 (6) of the Registration Act and Section 3 (26) of the General Clauses Act define “immovable property”. The Supreme Court in the cases reported in AIR 1956 SC 17; and Bihar Eastern Gangetic Fishermen Co-operative Society Ltd., v. Sipahi Singh and others, AIR 1977 SC 2149, while dealing with similar cases elaborately discussed the definition of “Immovable Property” and “profit-a-prendre”. In view of the proposition of law, if the clauses of the impugned agreement are interpreted the said document would amount to sale under the Registration Act and is a “profit-a-prendre” in the character of “Immovable Property” and same requires registration in terms of Section 54 of the T.P. Act read with Section 17 of the Registration Act. As “profit-a-prendre” is regarded as “Tangible Immovable property”, and the valuation of the property in the present case, is much more than Rs.100/-, a registered instrument is required under the law to create a right in favour of the O.P.Nos.5 & 6. The ‘sale’ in the present case was under an unregistered instrument. That being the case, the impugned transaction having not conferred title or interest in favour of O.P. Nos.5 & 6, they have no fundamental right which they can enforce under the law.

40. Further, it is an undisputed fact as per the information furnished under the RTI Act referred to supra that the land in question stands recorded in the name of G.A. Department, Government of Orissa and the G.A. Department is the owner of the land. Undisputedly the G.A. Department after resuming the land from the BDA on 20.12.2010, granted the lease of the said land in favour of OSRTC. Hence, the OSRTC is the lease holder. It is

well settled proposition of law that if the action of the State Government or its instrumentality by way of entering into a contract with the private party dealing with public property is in contravention of the statutory or constitutional provisions, power of judicial review can no doubt be exercised by this Court. In the instant case, opposite parties, taking advantage of a purported order dated 20.12.2010 under Annexure-10 to this writ petition, stated to be issued by the G. A. Department, have tried to advance a plea that in order to facilitate the execution of the lease agreement in favour of the highest bidder, the G.A. Department had resumed the land from BDA vide order No.12816 dated 20.12.2012 and on the same date i.e. on 20.12.2012, pending finalization of the terms and conditions of the allotment of land, allotted the land in question to the extent of Ac.14.430 dec. in favour of OSRTC, and on the basis of such allotment, right was conferred upon the OSRTC to enter into the concession agreement with O.P. Nos.5 & 6. The essence of the plea of opposite parties is that the land having been allotted in favour of OSRTC, OSRTC is competent to enter into the agreement with the opposite party Nos.5 & 6. The said action is in violation of the statutory provisions and the same is not tenable in law. In view of the clear provision of Article 299, all contracts made in exercise of the executive power of the union or of a state shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power, shall be executed on behalf of the President or the Governor by such persons and in such manner as he may director authorize. Sub-article (2) of Article 299 states that, neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purpose of this constitution, or for the purposes of any enactment relating to the Govt. of India heretofore in force, not shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect there of.

41. In respect of the contract in the case on hand, it is not authorized by the Governor to execute the lease agreement, but the General Manager of OSRTC as per the delegation of power of the Chairman-cum-Managing Director of OSRTC executed the agreement.

42. It is the well settled legal principles that the procedure under Article 299 of the Constitution must be complied with while dealing with such matter. The effect of non-compliance of the procedure under Article 299 of the Constitution of India has been interpreted in various judicial pronouncements of the Hon'ble Supreme Court. In the case Bihar Eastern Gangetic Fishermen Co-operative Society Ltd., v. Sipahi Singh and others,

AIR 1977 SC 2149, THE Supreme Court has clearly and lucidly elaborated the provision of Article 299 and held that the same are mandatory in character and while exercising the executive power the Union or a State must satisfy three conditions:

(1) It must be expressed to be made by the President or by the Governor of the Sate as the case may be ;

(2) It must be executed on behalf of the President or the Governor as the case may be; and;

(3) Its execution must be by such persons and in such manner as the President or the Governor may direct or authorize. Failure to comply with these conditions nullify the contract and render it void and unenforceable."

That has not been done in the instant case. There is no estoppel or ratification in a case where there is contravention of the provisions of Article 299 (1) of the Constitution. The said provision is made in the public interest and therefore the word "shall" has been used to make the provision obligatory and not directory.

43. If the argument advanced and interpretation made by the opposite parties are accepted, we have to give all the statutory and constitution provisions a go by, which cannot be done by a Court. Therefore, the stand of the opposite parties that the agreement is valid cannot be accepted by this Court. In view of the discussions made above with reference to the decisions & law laid down by the Supreme Court referred to supra, point Nos.3 to 5 are also answered in favour of the petitioner and against the opposite parties.

44. Having answered all the points in favour of the petitioner due to non-compliance of statutory and constitutional provisions referred to above by the opposite parties, the impugned agreement is void ab-initio and accordingly concessionaire cannot have any right or interest over the land in question of the basis of the said void document, which is opposed to the public policy as provided under Section 23 of the Contract Act. For the reasons stated supra, the writ petition succeeds. The impugned agreement dated 16.3.2012 under Annexure-11 is hereby quashed. No order as to costs.

Writ petition allowed.

2013 (II) ILR - CUT- 42

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

W.P.(C) NO.25036 OF 2011 (Dt.19.10.2012)

M/S. BHUSAN POWER & STEEL LTD. ………Petitioner

.Vrs.

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

A. ODISHA ENTRY TAX RULES, 1999 – RULE 3 (4)

Concessional levy of tax – A manufacturer is entitled to avail concessional levy of entry tax if the scheduled goods are used as raw material by him and a declaration in Form E-15 is furnished by such manufacturer to the seller – There is nothing in Rule 3 (4) or declaration given in Form E-15 that in order to avail concessional levy of tax, manufacturer is required to sell the finished products inside the state and he will be disentitled to avail the concessional levy of tax in terms of Rule 3 (4) if goods are dispatched/transferred to out side the state – Held, benefit of concessional levy of tax under Rule 3 (4) can not be denied to the petitioner on the ground of transfer of manufactured goods to the branches situated out side the state. (Paras 8,9,11)

B. ODISHA ENTRY TAX RULES, 1999 – RULE 3 (4)

Whether petitioner is entitled to avail concessional levy of entry tax on purchase of coal which is used to generate electricity in his captive plant – Held, No.

The requirement of Rule 3(4) is that the Scheduled goods purchased must be used as raw material in manufacturing the finished product – In this case the petitioner-Company manufactures sponge iron billets and H.R. Coil so to manufacture such finished goods coal is not the raw material – Coal is a raw material for generating electricity which is in turn essential to run the plant and for that it cannot be said that coal is a raw material for manufacturing sponge iron billets and H.R. Coil – Held, petitioner is not entitled to avail concessional levy of entry tax on purchase of coal which is used to generate electricity in his captive plant. (Paras 13,14)

<u>**Case laws Referred to:-**</u>

1.(2004) 134 STC 24 : (Union of India-V- Ahmedabad Electricity Co. Ltd. & Ors.)

2. AIR 1992 SC 96 : (Union of India & Anr.-V- Deoki Nandan Agrawal)

For Petitioner - M/s . Sanjit Mohanty, Sr. Adv.
Satyahit Mohanty & Md. Shafique.
For Opp.Parties – Mr. R.K. Mohapatra, Govt. Advocate,
(for O.P.No.1)
Mr. R.P. Kar, S.C. (Commercial Tax Deptt.).

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order dated 30.7.2011 passed under Annexure-1, rectified order dated 15.9.2011 (Annexure-6) and the order dated 30.9.2011 (Annexure-8) passed by opposite party no.2-Deputy Commissioner of Commercial Taxes (LTU) , Sambalpur Range, Sambalpur under Section 9C of the Orissa Entry Tax Act, 1999 (for short, "the Act, 1999") for the period 1.7.2006 to 31.3.2009. Annexure-1 is the audit assessment order by which tax and penalty to the tune of Rs.39,22,01,484.00 has been raised. Annexure-6 is an order of rectification of mistake passed under Section 20 of the Act, 1999 making some rectification of mistakes occurred in the audit assessment order passed on 30.7.2011. By order under Annexure-8 , opposite party no.2 has rejected the petitioner's application for rectification of the audit assessment order dated 30.7.2011.

2. Petitioner's case in a nutshell is that it is a public limited Company incorporated under the provisions of Companies Act, 1956 having its Registered Office at 4th Floor, Tolstoy House, Tolstoy Marg, Connaught Place, New Delhi and plants at Chandigarh in the State of Punjab and at Kolkata in the State of West Bengal and Branches in all over India. The petitioner has set up an Integrated Steel Plant at village- Thelkoloi, Rengali in the district of Sambalpur, Odisha. The petitioner-Company is engaged in manufacturing and selling of sponge iron, steel billets and HR Coil. For manufacturing sponge iron, steel billets and HR Coil, the petitioner purchases various raw materials including iron ore, Dolomite, pig iron, sponge iron, quartz , coke breeze, coking coal etc. The said raw materials are procured from the State of Orissa and outside the State of Orissa. The petitioner paid taxes on entry of those materials into the local area as required under Section 3 of the Act, 1999. Since the materials are used as raw materials, the petitioner paid entry tax at the concessional rate of 50 per centum of the scheduled rate. Opposite party no.2 vide order dated 30.7.2011 passed under Annexure-1 has rejected petitioner's claim of concessional levy on the premise that the petitioner after using the above raw materials in manufacturing of sponge iron, billets and HR Coil has transferred the finished products so manufactured to its branches out side

the State of Orissa which is treated to be violation of rule 3(4) read with Form E-15. Opposite party no.2 also further relies upon Section 26 of the Act, 1999 read with Rule 19 of the Orissa Entry Tax Rules, 1999(for short, "the Rules, 1999") to deny the petitioner's benefits of the concessional levy of tax. The other reason given by opposite party no.2 to deny the claim of concessional levy of tax in terms of Rule 3(4) is that the coal consumption in the captive power plant of the petitioner for production of electricity cannot be treated as raw material for production of sponge iron as the end product, i.e., electricity produced out of coal consumption is non-scheduled goods. In the impugned order of assessment opposite party no.2 has also levied tax on turnover of Rs.1130,22,17,978.00 @ 2% ignoring the fact that out of the entire turnover a part of the turnover is liable to be taxed at 0.5%, 1% and 2%. The opposite party No.2 in the impugned order also levied tax on return quantity of pig iron and steel billets received from Visakhapatnum Branch despite the fact that the subsequent sales, if any, have been sold within the State of Odisha and the goods suffered from tax. Similarly, opposite party no.2 has also levied tax on returned finished goods received from other Branches due to certain defects, despite the fact that subsequent sales, if any, have been sold within the State of Orissa have also suffered tax . The petitioner's request to make rectification of the impugned order passed under Annexure-1 has been rejected by opposite party no.2 under Annexure-2 without any valid reason. Hence, the present writ petition.

3. Mr. S. Mohanty, leaned Senior Advocate appearing for the petitioner submitted that the impugned orders passed by opposite party no.2 under Section 9C of the Act, 1999 are arbitrary, illegal and bad for want of jurisdiction thereby offending Articles 14, 19(1)(g) and 265 of the Constitution of India. The impugned audit assessment order dated 30.7.2011 denying the benefit of concessional levy under Rule 3(4) on the ground that the petitioner had transferred the manufactured goods to the Branches outside the State is wholly without jurisdiction. The condition stipulated under Rule 3(4) being satisfied and the said rule being not in any way contemplated or stipulated the manner in which the goods used or disposed of, denial of benefit to the petitioner under Rule 3(4) is illegal. Form E-15 requires a declaration that the goods purchased under the said declaration shall be used for manufacture of finished products. The declaration does not contemplate nor stipulate the manner in which the goods so manufactured needs to be used or disposed of. Opposite party no.2 has no power to import any condition which is non-existent under Rule 3(4) which amounts to legislation and is not permissible under the law. Opposite party no.2 is fully unjustified to deny concessional rate of tax to the petitioner placing reliance on Section 26 of the Act, 1999 and Rule 19 of the Rules, 1999 as Section 26

deals with the case where the manufacturer sells his products under Section 3 of the Act, 1999 and not with the case of purchase of raw materials by the manufacturer. Opposite party no.2 is not justified to reject the petitioner's claim of concessional levy in terms of Rule 3(4) on the ground that consumption of coal in the captive power plant of the petitioner for production of electricity cannot be treated as raw material for production of the sponge iron and that electricity produced out of coal consumption is non-scheduled goods. The coal purchased by the petitioner is used in the manufacture of sponge iron as well as generation of power for captive use/sale. Assuming that the scheduled goods i.e. coal purchased by the petitioner is only used in the manufacture of electricity, it satisfies the above requirement for availing concession since Rule 3(4) does not mandate that the final product manufactured ought to be enumerated in the schedule . Coal is required to manufacture /generate electricity which, in turn, is essential to run the plant to manufacture sponge iron. Electricity generation also forms part of manufacturing activity. The opposite party no.2 is wholly unjustified to levy entry tax on return of goods to the petitioner's plant after cancellation of the export order inasmuch the sale of the same, if any, has suffered tax. Similarly, opposite party no.2 is also not justified to levy entry tax on return of HR coal to the petitioner's plant, the same being found defective inasmuch the sale, if any has already suffered tax. Concluding his argument, Mr. Mohanty, learned Senior Advocate prayed for quashing of the impugned orders.

4. Per contra, Mr. R.P. Kar, learned Standing Counsel appearing on behalf of the Revenue vehemently argued that in view of the proviso to Section 26, the petitioner is not entitled to avail concessional rate of tax in terms of Rule 3(4), if the finished goods are not sold inside the State and transferred/despatched to outside the State on branch transfer basis. The petitioner, in order to avail the concessional rate of tax as provided under Rule 3(4) of the Rules, 1999, is required to sell finished product inside the State itself. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Union of India v. Ahmedabad Electricity Co.Ltd. and others,* (2004)134 STC 24, Mr. Kar submitted that the coal used by an assessee as fuel for producing steam to run the machines used in their factories to manufacture the end product and in the process of burning, coal was burnt in the boilers of furnaces for producing steam. So it was used only for the ancillary purpose as fuel and coal was not transformed into the end product. He further submitted that for the purpose of manufacture the raw material had ultimately to get a new identity by virtue of the manufacturing process either on its own or in conjunction with other raw materials. Therefore, coal is not a raw material of the end product. Burning of coal for the purpose of producing heat cannot be said to be a manufacturing activity. Therefore,

coal consumed in the CPP by the instant dealer for production of electricity cannot be treated as raw material for production of sponge iron. Further, the end product i.e. electricity which is produced out of coal consumption is a non-scheduled goods under E.T. Act. The basic objective of allowing purchase of raw materials at concessional rate of tax of fifty per centum aims at collection of balanced fifty per centum of tax on sale point as provided under Section 26 of the Act, 1999. No where in the statute there is provision for waiving out balance fifty per centum tax due at the cost of Govt. revenue where the raw material is purchased at concessional rate tax, but on sale point the finished product is non-taxable. Therefore, disallowance of concessional rate of tax as provided under Rule 3(4) by opp. Party no.2 is justified.

5. Mr.Kar further submitted that petitioner is not producing any separate account with regard to purchase and consumption of coal in CPP for generation of electricity with reference to purchases made inside and outside the State. The petitioner failed to produce separate books of account of purchases, consumption out of purchases, account of finished product, sale/dispatches and account of closing stock etc. with particular reference to inside and outside the state purchase. Placing reliance on computation made at page 15 of the impugned order of assessment Mr. Kar submitted that computation of Entry Tax has been rightly made taking into consideration the various adjustment claimed by the petitioner. Mr. Kar further submitted that opposite party no.2 having assigned valid reasons for rejecting the petitioner's petition for rectification, this Court need not interfere with Annexure-8. Concluding his argument Mr. Kar prayed for dismissal of the writ petition.

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

(i) Whether transfer of finished product by the petitioner to its other branches situated outside the State disentitles the petitioner to avail concessional rate of tax as provided under Rule 3(4) of the O.E.T. Rules, 1999?

(ii) Whether in absence of any condition stipulated in Rule 3(4) of the Rules and declaration in Form E-15 to avail the concessional rate of tax, the petitioner is required to sell its finished products inside the State and debarred to transfer the same on branch transfer basis?

(iii) Whether opposite party no.2 is justified to deny the petitioner the benefits of availing concessional rate of tax as provided under Rule

3(4) placing reliance on Section 26 of the Act and Rule 19 of the O.E.T. Rules?

(iv) Whether opposite party no.2 is justified in rejecting the petitioner's claim of availing concessional levy of Entry Tax in terms of Rule 3(4) on the ground that consumption of coal in the captive power plant of the petitioner for production of Electricity cannot be treated as raw material for production of sponge iron and that electricity produced out of coal consumption is a non-scheduled goods?

(v) Whether levy of Entry Tax on the finished product sent out to other branches situated out side the State and subsequently returned for some reason is valid in law?

7. Question nos. (i) and (ii) being interlinked, they are dealt with together. To deal with the above two questions, it is necessary to quote the relevant provision of Section 3 of the Act, 1999 and Rule 3(4) of the Rules, 1999.

"**Section 3- Levy of Tax: (1)**- There shall be levied and collected a tax on entry of the scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding twelve per centum of the purchase value of such goods from such date as may be specified by the State Government and different dates and different rates may be specified for different goods and local areas subject to such conditions as may be prescribed.

(2) The tax leviable under this Act shall be paid by every dealer in scheduled goods or any other person who brings or causes to be brought into a local area such scheduled goods whether on his own account or on account of his principal or customer or takes delivery or is entitled to take delivery of such goods on such entry:

Provided that no tax shall be levied under this Act on the entry of scheduled goods into a local area, if it is proved to the satisfaction of the assessing authority that such goods have already been subjected to entry tax or that the entry tax has been paid by any other person or dealer under this Act.

Explanation- Where the goods are taken delivery of on their entry into a local area or brought into the local area by a person other than a dealer, the dealer who takes delivery of the goods from such person or makes carriage of the goods shall be deemed to have brought or caused to have brought the goods into the local area."

Thus, under sub-section (1) of Section 3 Entry Tax shall be levied and collected on entry of scheduled goods into the local area for consumption or sale therein. Rule 3(4) of the O.E.T. Rules, 1999 speaks that –

> "**Rule-3(4)** - Goods specified in Part I and Part II of the Schedule to the Act shall be exigible to tax at a concessional rate of fifty per centum of the rate to which goods are exigible under sub-rule (3) and sub-rule (2) respectively to this rule, when such goods are bought –
>
> (a) for use as raw material by the manufacturer on first entry into a local area of the State from outside the State; or
>
> (b) for use as raw material by a manufacturer on first entry into a local area from another local area; or
>
> (c) by a registered dealer into any local area and then sold to a manufacturer for use as raw material:"

8. In the instant case it is not in dispute that the petitioner paid entry tax on the entry of the scheduled goods which includes iron ore, dolomite, pig iron, sponge iron, quartz, coke breeze, coking coal etc. on entry into the local area as required under Section 3 of the Act, 1999. But the petitioner paid 50 per centum of the scheduled rate on entry of the raw materials into the local area to be used as raw material for production of finished product in terms of Rule 3(4) of the Rules, 1999. A bare reading of Rule 3(4) of Rules, 1999 makes it clear that a manufacturer is entitled to avail concessional levy of entry tax if the scheduled goods are used as raw material by a manufacturer and a declaration in Form E-15 is furnished by such manufacturer to the seller. At this juncture, it is necessary to know what is the condition stipulated in Form E-15. For ready reference, Form E-15 is reproduced below:

"FORM E15
(See Rule 3(4))
DECLARATION BY THE BUYING MANUFACTUER

> I/We……………………………………….hereby declare that the goods purchased by me/us in Cash/Credit Memo/Bill No. ……………………….Dated ……………from………. Bearing the[TIN/ SRIN/ Identification No………….. under the Orissa Value Added Tax Act, 2004] and/or Registration No………… under the Orissa Entry Tax Act, 1999 shall be used as raw material for manufacture of the finished products, namely………

Date: **Signature of buying manufacturer/dealer"**

Place:

9. A careful reading of Rule 3(4) of Rules, 1999 and the declaration given in Form E-15 reveals that the only condition to avail concessional levy of Entry Tax in terms of Rule 3(4) by a manufacturer is that he is required under the rule to use the scheduled goods as raw material for manufacture of the finished product. There is nothing in Rule 3(4) or declaration given in Form E-15 that in order to avail the concessional rate in terms of Rule 3(4), manufacturer is required to sell the finished products inside the State and he will be disentitled to avail the concessional levy of tax in terms of Rule 3(4) if the goods are dispatched/transferred to out side the State. In other words, neither Rule 3(4), which confers the benefit of concessional levy nor the corresponding declaration Form E-15 imposes a condition that the manufactured goods should be sold in Odisha or they contain an embargo against the manufactured goods being transferred to branches out side Odisha. Opposite party no.2 has no authority/power to import any condition into the Rule 3(4) of Rules, 1999 as the same results in legislation which is clearly impermissible under law. Therefore, opposite party no.2 cannot nullify the benefit conferred under Rule 3(4) by importing any condition which is non-existent.

The Hon'ble Supreme Court in the case of Union of India and another v. Deoki Nandan Agrawal, AIR 1992 SC 96 observed that the Court cannot usurp legislative function. The Court cannot re-write the legislation for the reason that it had no power to legislate. The power of legislation has not been conferred on the Courts.

10. Question No.(iii) is whether opposite party no.2 is justified to deny the petitioner the benefits of availing concessional rate of tax as provided under Rule 3(4) placing reliance on Section 26 of the Act and Rule 19 of the O.E.T. Rules. According to Mr. Kar, in view of the proviso to Section 26 of the Act, 1999 read with Rule 19 of the Rules, 1999, the petitioner is not entitled to avail the concessional levy of entry tax in terms of Rule 3(4) as finished goods were transferred by the petitioner to outside the State on branch transfer basis. At this juncture, it is necessary to quote relevant portion of Section 26 of the Act, 1999 and Rule 19 of the Rules, 1999, which are reproduced below :

> **Section 26 (1)** : **Manufacturer to collect and pay tax .-** "Notwithstanding anything contained in this Act, every

manufacturer of goods who is registered under the VAT Act shall in respect of sale of its finished products effected by it to a buying dealer or person, either directly or through an intermediary, shall collect by way of tax an amount equal to the tax payable on the value of such finished products under Section 3 of this Act by the buying dealer or person in prescribed manner and shall pay the tax so collected into the Government Treasury:

Provided that the tax so payable by a manufacturer under this sub-section during a year shall be reduced by the amount of tax paid under this Act on the raw materials which directly go into the composition of the finished products during that year in the prescribed manner:

Provided further that where a buying dealer, under the Rules providing for the rates of tax required to be specified with reference to Section 3, is entitled to pay tax at a concessional rate or not to pay any tax, as the case may be, in respect of such finished products, the manufacturer shall, on a declaration furnished by the buying dealer in the prescribed form, collect the tax at such concessional rate or shall not collect any tax, as the case may be.

Explanation.- For the purposes of this section, 'manufacturer' shall include a person who is engaged in mining and sells goods produced or extracted therefrom."

"**Rule 19:** "Every manufacturer of scheduled goods who is registered under VAT Act shall, in respect of the finished products which are scheduled goods and are sold by it to a dealer or person, as the case may be, either directly or through an intermediary, collect tax payable under Section 3 of the Act from the buying dealer or person, as the case may be."

11. Bare reading of Section 26 of the Act, 1999 and Rule 19 reveals that every manufacturer of scheduled goods who is registered under the VAT Act when sells the scheduled goods shall collect tax payable under Section 3 of the Act from the buying dealer or a person. These provisions do not envisage any thing regarding purchase of raw material by the Manufacturer. Therefore, the benefit of concessional levy under Rule 3(4) cannot be denied to the petitioner on the ground of transfer of manufactured goods to the branches situated outside the State.

In the instant case there is no dispute that the petitioner's claim is that he has purchased the scheduled goods to be used as raw material in manufacturing of finished product.

12. Question no.(iv) relates to petitioner's entailment to avail concessional levy of entry tax in terms of Rule 3(4) on coal used as raw material in manufacturing of electricity. Placing reliance on the judgment of the apex Court in ***Ahmedabad Electricity Co.*** (supra) Mr. Kar submitted that coal consumption in CPP by the instant dealer for production of electricity cannot be treated as raw material used for production of finished product i.e., sponge iron. The further contention of Mr. Kar is that the end product, i.e., electricity produced out of consumption of coal is non-scheduled goods. Petitioner's case is that the petitioner is engaged in manufacturing of sponge iron, bellets and HR Coil as well as generation of power. Coal is used as raw material for generation of power. Under Rule 3(4) the benefit of concessional levy is extended on purchase of scheduled goods subject to the condition that it is used as a raw material by a manufacturer. Mr.Sanjit Mohanty submitted assuming that the scheduled goods viz. coal purchased by the petitioner is used only in the manufacture of electricity, it satisfies the requirement of Rule 3(4) of the Rules, 1999. Further, the coal is required to manufacture electricity which in turn, is essential to run the plant to manufacture sponge iron, billet and HR Coil. Therefore, when the electricity generation is a captive arrangement and the requirement is for carrying out the manufacturing activity, the electricity generation also forms part of the manufacturing activity and the raw materials used in that electricity generation qualify for availing concessional levy of entry tax in terms of Rule 3(4) of the O.E.T. Rules.

13. The above submission of Mr. Mohanty, learned Senior Advocate for the petitioner does not enure to the benefit of the petitioner. The requirement of Rule 3(4) is that the scheduled goods purchased must be used as raw material in manufacturing the finished product. Thus, those scheduled goods are exclusively confined to 'raw material' only used in manufacture of the finished products. The petitioner-company manufactures sponge iron billets and HR coil and undisputedly to manufacture such finished goods the coal is not the raw material. Coal is a raw material for the purpose of generating electricity, which is, in turn, essential to run the plant and for that it cannot be said that the coal is a raw material for manufacturing sponge iron, billets and HR coil. The Hon'ble Supreme Court in the case of ***Ahmedabad Electricity Co.*** (supra) has categorically held that the coal is used for fuel for producing steam to run the machinery used in the factories to manufacture end product and in the process of burning coal is burnt in the boiler of furnaces for

producing steam. Thus, it is used for ancillary purpose as fuel and it is not transferred into the end product. For the purpose of manufacture, raw material has ultimately to get a new identity by virtue of manufacturing process either of its own or in conjunction with the raw material. Therefore, the coal is not a raw material of end product, i.e., sponge iron, billets and H.R. coil.

14. In view of the above, the petitioner is not entitled to avail concessional levy of entry tax on purchase of coal which is used to generate electricity in the captive plant.

15. Question no.(v) is as to whether opposite party no.2 is justified to levy entry tax on the finished goods sent by the petitioner to outside the State which are returned back to the plant of the petitioner either being not exported to foreign country or found defective. Petitioner's case is that he has transferred certain quantity of finished product to outside the State branch for export to foreign country. Because of cancellation of purchase order placed by the foreign buyer, the goods were returned by the Visakhapatnum Branch of the petitioner to its plant in the State of Odisha. Similarly some finished products were sent to Calcutta Branch. Since some manufacturing defects were noticed, the same were returned to the petitioner and the Assessing Officer is levying entry tax on those goods. The case of the petitioner is that on sale of the finished goods, if any, inside the State, the same already suffered tax and therefore, further levy of entry tax is illegal.

From the above contention of the petitioner, it transpires that the petitioner is not sure as to whether goods returned from outside State for some reason or the other were sold inside the State or not. This speaks volumes about the maintenance of accounts of the petitioner. Therefore, it is the duty of the petitioner to show how the petitioner dealt with those finished products returned to its plant. If the petitioner could establish that entry tax has been collected on sale of those goods inside the State, no further entry tax is leviable. Otherwise, it is always open to opposite party no.2 to complete the assessment in accordance with law.

16. In the fact situation, Annexures-1, 6 and 8 are set aside. The matter is remanded back to the Assessing Officer to redo the assessment in terms of the observations/direction made above.

17. In the result, the writ petition is allowed in part.

Writ petition allowed in part .

2013 (II) ILR - CUT- 53

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

W. A. NO.618 OF 2011 (Dt.30.11.2012)

ANANDARAM SUNANI ……..Appellant

.Vrs.

STATE OF ORISSA & ORS. ……..Respondents

ODISHA GRAMA PANCHAYAT RULES, 1968 – RULE 216 (a).

Secretary Grama Panchayat – Removal from service – Grounds on which the appellant was proposed to be removed have not been communicated to him in writing inviting explanation – No opportunity of hearing was given before removing him from service – Violation of Articles 14, 19 (1) of the Constitution of India – Held, appellant is entitled to be re-instated as Secretary or in any equivalent post in the concerned Grama Panchayat within 4 weeks – Appellant shall be entitled to 25% of the back salary from the date of his termination till the date of pronouncement of the judgment but the said period shall be reckoned for other service benefits such as gratuity, pension and provident fund – Held, Order of the learned single Judge and District Panchayat Officer is set aside. (Para 9, 10, 11)

For Appellant - M/s. S.K.Dalai, D.Mahakud & S. Mahapatra.

For Respondents- Mr. R.K.Mohapatra, Govt. Advocate.

B.N. MAHAPATRA, J. This writ appeal has been filed challenging the legality, propriety and correctness of the order dated 19.12.2011 (Annexure-8) passed by the learned Single Judge in W.P.(C) No.32010 of 2011, wherein the learned Single Judge has directed the appellant to prefer appeal against the order dated 16.07.2011 passed by respondent No.3-District Panchayat Officer. Further, prayer of the appellant is to declare the order dated 16.07.2011 (Annexure-6) passed by respondent No.3-District Panchayat Officer, Kalahandi, wherein he rejected the representation of the appellant dated 26.05.2011 to appoint him as Grama Panchayat Secretary in Manjari Grama Panchayat on the ground that the appointment for the post of Grama Panchayat Secretary is banned by the Government of Odisha vide letter No.19428/PR, dated 01.10.2002 of Government in P.R. Department, Odisha as illegal.

2. Appellant's case in a nutshell is that he was appointed as Grama Panchayat Secretary in Manjari Grama Panchayat under Golamunda Block in the district of Kalahandi vide resolution dated 07.02.1992 of the Grama Panchayat which was subsequently approved by the respondent No.3-District Panchayat Officer on 23.03.1992 as required under Rule 213 of the Orissa Grama Panchayat Rules, 1968 (for short, "Rules, 1968"). Pursuant to such appointment, the appellant was continuing in service peacefully, sincerely, honestly and with utmost satisfaction of the authority. During the service period, there was no allegation either by the Grama Panchayat or by any authorities regarding his misconduct, wilful violation of any direction of the Grama Panchayat or any negligence in his duty. While the appellant was continuing as such, due to his sincerity on 01.07.1997, he was promoted to the higher post and also accordingly gradation list was prepared under Annexure-2 series by the State Government, wherein the name of the appellant was available at Sl.No.28. While the matter stood thus, on 12.05.2000, the District Panchayat Officer wrote a letter to the Grama Panchayat for engagement of one Meghanada Aghria, who was earlier disengaged from service due to his involvement in a criminal case and the Grama Panchayat was directed to disengage the appellant. Pursuant to the direction made by the District Panchayat Officer under Annexurer-3, the Grama Panchayat immediately made a resolution on 24.05.2000 stating therein that in view of the direction made by the District Panchayat Officer, the appellant has been disengaged from service, which was communicated to the appellant on 26.06.2000. Being aggrieved, the appellant approached several authorities and he was assured that after retirement of Meghanada Aghria, the appellant would get service and accordingly, the appellant waited. In the meantime, Meghanada Aghria has retired from service and the said post is lying vacant. The appellant has approached this Court twice. This Court vide order dated 05.05.2011 passed in W.P.(C) No.9744 of 2011 disposed of the writ petition directing the District Panchayat Officer, Kalahandi, Bhawanipatna to dispose of the representation of the appellant strictly in accordance with law, if the same has not been disposed of within 21 days of receipt of that order. Pursuant to the said order of this Court, the District Panchayat Officer, Kalahandi vide order dated 16.07.2011 (Annexure-6) rejected the representation of the appellant on the ground that the appointment to the post of Grama Panchayat Secretary is banned by the Government of Orissa. Being aggrieved, he approached this Court in W.P.(C) No.32010 of 2011 which was disposed of on 19.12.2011 at the stage of admission giving liberty to the petitioner to prefer appeal before the Sub-Collector, Bhawanipatna, Kalahandi, who was to decide the same strictly in accordance with law. Aggrieved of the impugned order passed by the learned Single Judge in directing the appellant to approach the Appellate

Authority as there is no need for him to approach the Appellate Authority at this stage and therefore the impugned order is bad in law and the order of termination is contrary to the statutory and fundamental rights of the appellant, this Writ Appeal is filed urging various legal grounds.

3. Mr. S.K. Dalai, learned counsel appearing for the appellant submitted that order passed by the District Panchayat Officer under Annexure-6 as well as order under Annexure-8 passed by learned Single Judge of this Court are unjust and against the settled principles of law. Hence, the same are liable to be set aside. It is submitted that the appellant was appointed against a regular vacancy following due procedure of law and in accordance with the provisions made under the Grama Panchayat Act. The order disengaging the appellant without following the mandatory provisions of the Grama Panchayat Rules contained in Rule 216(a) is bad in law. No opportunity of hearing was given to the appellant before removing him from service which is in violation of the Grama Panchayat Rules. When statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following other course is not permissible. The appointment of the appellant was approved by the District Panchayat Officer and his promotion was considered and also his name was available in the gradation list for the post of Village Level Workers (VLWs). His disengagement at a belated stage is unwarranted. Working under the Grama Panchayat as a Secretary is not a civil post. Therefore, removal of the appellant at the behest of the officer of the Government is illegal. Representation of the appellant has been rejected under Annexure-6 on the ground that appointment to the post of Grama Panchayat Secretary is banned by the Government. This Court vide order dated 06.04.2009 passed in W.P.(C) No.6579 of 2003 held that such government notification is illegal and the ban to that effect is also not legal and sustainable in law. Therefore, order passed under Annexure-6 rejecting the representation of the appellant is also not sustainable in law. Concluding his argument, Mr. Dalai, prays to allow the writ appeal.

4. Mr. R.K. Mohapatra, learned Government Advocate supporting the order of the learned Single Judge submitted that there is no infirmity or illegality in the order passed by the learned Single Judge directing the petitioner to approach the appellate authority. It is further submitted that the order passed by the District Panchayat Officer under Annexure-6 rejecting the representation of the appellant on the ground that the appointment to the post of Grama Panchayat Secretary is banned is perfectly correct.

5. On the rival factual and legal contentions urged on behalf of the parties, the following questions fall for consideration by this Court:-

(i) Whether the District Panchayat Officer is justified to reject the representation of the appellant on the ground that appointment to the post of Grama Panchayat Secretary is banned by the Government of Odisha?

(ii) Whether in the peculiar facts and circumstances of the case, learned Single Judge is justified to direct the petitioner to approach the appellate authority when no disputed question of fact is involved in this case?

6. So far question No.(i) is concerned, we don't want to retain for a longer period to decide this question. The order of the Government banning appointment to the post of Grama Panchayat Secretary was challenged before this Court in W.P.(C) No.6579 of 2003 and this Court vide order dated 06.04.2009 quashed the said decision of the Government and directed to consider the proposal of four Grama Panchayats for appointment of four persons to the post of Panchayat Secretary. It is not the case of the respondents that the said order has been challenged either before this Court in Writ Appeal or the Hon'ble Supreme Court. Thus, the said order has attained finality.

7. In view of the above, we are of the view that Annexure-6 passed by the District Panchayat Officer is not legally sustainable in view of the order passed by this Court dated 06.04.2009 passed in W.P.(C) No.6579 of 2003.

8. So far question No.(ii) is concerned, the specific stand of the petitioner is that though the order of this Court dated 06.04.2009 passed in W.P.(C) No.6579 of 2003 was brought to the notice of the learned Single Judge, the same has not been considered and the impugned order under Annexure-8 was passed directing the appellant to approach the appellate authority. The order passed by the District Panchayat Officer under Annexure-6 was under challenge before the learned Single Judge. The representation of the appellant to engage him as Grama Panchayat Secretary was rejected by the District Panchayat Officer under Annexure-6 on the sole ground that the appointment to the post of Grama Panchayat Officer is banned by the Government. In such circumstances, in our view, learned Single Judge should have considered the earlier order passed by this Court on 06.04.2009 in W.P.(C) No.6579 of 2003.

9. It is not in dispute that the petitioner has been appointed since 23.03.1992 as Panchayat Secretary in Manjhari Grama Panchayat under Golanda Block in the District of Kalahandi against a regular vacancy after following proper procedure provided under the Orissa Grama Panchayat

Rules and his appointment has been approved by the District Panchayat Officer as required under Rule 213 of the Rules, 1968. The appellant has served for a period of more than eight years. During the period of his service, there was no allegation raised against the appellant either by the Grama Panchayat or any other competent authority regarding his misconduct, willful violation of any direction of the Grama Panchayat or any negligence in his duties. However, he was removed from service as one person, namely, Meghanada Aghria, who was earlier disengaged from service due to his involvement in criminal case, was acquitted from the criminal charge. Moreover, though Rule 216(a) of the Rules, 1968 provides that before removing Secretary, a reasonable opportunity of show cause and the grounds on which he was proposed to be removed shall be communicated to him in writing and after considering his explanation the Grama Panchayat shall take a decision, the said procedure has not been followed in the present case. The appellant has been removed from service at the behest of the District Panchayat Officer which is violative of statutory and fundamental rights of the appellant. Hence, the learned Single Judge should have exercised his discretionary power and granted the reliefs as prayed in the writ petition. However, Meghanada Aghria has already retired from service on attaining the age of superannuation and the post is lying vacant. As it appears from the affidavit sworn by the appellant-petitioner in this writ appeal, he was 45 years old in the year 2011, which shows that by that time he had become over-aged to apply for any other post. Apart from the above reason, the order of termination is violative of Articles 14, 19 (1) (g) and Article 21 of the Constitution of India.

10. In the peculiar facts and circumstances of the case, the appellant is entitled to be reinstated as Secretary or in any equivalent post in Manjhari Grama Panchayat within four weeks which we direct. However, the appellant shall be entitled to 25% of his back salary from the date of his termination till the date of pronouncement of the judgment, but the said period shall be reckoned for other service benefits, such as gratuity, pension and Provident Fund.

11. In view of the above, the order of the learned Single Judge under Annexure-8 as well as order of the District Panchayat Officer under Annexure-6 is set aside.

12. In the result, the writ appeal is allowed to the extent indicated above. No order as to costs.

Writ appeal allowed.

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

W.P.(C) NO.15695 OF 2006 (Dt.19.03.2012)

MANOJ KUMAR BISWAL ……..Petitioner

.*Vrs.*

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

SERVICE – DLR employees – Preparation of Gradation list – Consideration of initial date of appointment on casual or DLR basis is important.

In this case petitioner was engaged as DLR employee by C.D.A. through Balashrama w.e.f. 15.3.1989 and was getting wages through Balashrama and he got direct payments from C.D.A. w.e.f. 21.8.1992 – Private opp. Parties engaged in the year 1990 – In the provisional gradation list petitioner was placed at Sl.No.7 and Opp.Parties 5 to 9 were placed at Sl.No.8,9, 11, 12 & 13 respectively – C.D.A. took a decision to revise the provisional gradation list and make it final by taking into account the date of receipt of wages by the D.L.R. employees directly from C.D.A. which is under challenge – Held, the decision of C.D.A. is arbitrary, unreasonable, discriminating and unjust – Preparation of final gradation list is quashed – Direction issued to C.D.A. authority to prepare the gradation list of D.L.R. Junior Assts who were initially appointed/engaged on casual or DLR basis by taking into account their past service as DLR from the date of their initial appointment/engagement.

For Petitioner - Mr. S.K. Mishra.

For Opp.Parties - Mr. Dayananda Mohapatra,
(for Opp.Party Nos.1 to 3)
Mr. J. Patnaik, AGA,
(for Opp.Party No.4)
M/s. D.R. Bhokta, H.K.Behera & D.Dalai
(for Opp.Party 6)
Mr. R.B.Mohapatra (for Opp.Party No.7)
M/s.T. Rout, D.K. Dash (for Opp.Party No.8)
Mr. R.C. Mishra (for Opp.Party No.9).

B.K.NAYAK, J. In this writ application the petitioner challenges the final gradation list (Annexure-14) issued under order dated 24.11.2006

by opposite party no.1-Cuttack Development Authority (in short 'CDA') and further prays to make the provisional gradation list (Annexure-7) final maintaining position of the petitioner at Sl.No.7 of the gradation list of Junior Assistants.

2. The case of the petitioner is that on his application, the petitioner was engaged to do office work on daily wage basis on payment of Rs.20/- per day vide order of opposite party no.1 through its Finance and Accounts Member vide letter dated 15.03.1989 under Annexure-1 though the petitioner was sponsored by the Balashrama and on the very day, i.e., 15.03.1989 the petitioner reported for duty. Annexure-3 is said to be the absentee statement indicating the attendance of the petitioner on duty for the month of March,1989. While the petitioner was working on such daily wage basis, opposite party no.1 in its 38th meeting dated 10.12.1994 decided to regularise the services of DLR employees with certain stipulations and accordingly issued order No.12326 dated 19.12.1994 vide Annexure-5 regularising the services of DLR employees working under different categories and gradation, who have completed services for one year or more as on 30.11.1994. Accordingly, nineteen DLR employees including the petitioner were regularised as Junior Assistants under opposite party no.1 vide order dated 19.12.1994 under Annexure-6. Vide office order no.6114 dated 16.3.2000, opposite party no.1 prepared provisional gradation list (Annexure-7), wherein the petitioner was placed at Sl.No.7 whereas opposite party nos.5, 6, 7, 8 and 9 were placed at Sl.No.8, 9, 11, 12 and 13 respectively. Thereafter vide order of opposite party no.1 dated 23.03.2000 under Annexure-8 the petitioner along with some others was promoted to the post of Senior Assistant on ad hoc basis for one year and the petitioner joined the post on the same day and his joining report was accepted. In the meantime, the present opposite party no.7 challenged the provisional gradation list as well as the promotion order of the petitioner by filing OJC No.4988 of 2000 wherein the petitioner was impleaded as opposite party no.5 and one Yashobanta Das was opposite party no.4. The present opposite party no.5-Smt.Manasi Baral was impleaded as opposite party no.6 in the said writ petition. It is further stated that in the said writ petition, Cuttack Development Authority-opposite party no.1 filed a counter affidavit contending that the present petitioner worked under it earlier to the present opposite party no.7 (petitioner in OJC No. 4988 of 2000) and as such deserved to be ranked above him and that it had taken into consideration the date of engagement of the employees while preparing the provisional gradation list irrespective of the mode or manner of their engagement. However instead of deciding on merits, this Court disposed of the aforesaid writ application with a direction to opposite party no.1 to consider the

representation of the petitioner therein (present opposite party no.7) within a period of six weeks. Thereafter, the final gradation list under Annexure-14 has been issued by opposite party no.1 degrading the petitioner from Sl.No.7 to Sl.No.14 by placing opposite party no.5 to 9 above the petitioner at Sl.No.7, 8, 9, 11 and 12 respectively even though they had joined in the office of C.D.A. respectively on 11.01.1990, 07.03.1990, 01.12.1990, 16.09.1991 and 18.11.1991 and had been placed below the petitioner in the provisional gradation list.

It is therefore, contended on behalf of the petitioner that irrespective of the fact that he is engaged on daily wage basis under opposite party no.1 while sponsored through the Balashrama and that he was directly paid by opposite party no.1 from 21.08.1992, his seniority should be counted from the date of his initial appointment i.e., on 15.3.1989.

3. The authorities of the C.D.A. (opposite party nos.1, 2 and 3) have filed a counter affidavit stating that the C.D.A. engaged some of the employees on daily wage/NMR basis and were making payment directly to them and some of the employees were engaged being sponsored through Utkal Balashrama. Employees sponsored through the Balashrama were being paid their wages through the Balashrama for disbursement to them for which C.D.A. was paying 5% administrative and supervision charges to the Balashrama. The Utkal Balashrama was also being supplied with the absentee statement of the sponsored employees. A few sponsored employees were also receiving salary directly from the C.D.A. Sri Yashobanta Das is one of such employees. Subsequently, employees sponsored through Balashrama were allowed to receive wages directly from C.D.A. on the consent of the Balashrama. The DLR employees working in different categories and grades having been regularised vide office order dated 19.12.1994 (Annexure-5), provisional inter se seniority list was drawn up on the basis of their date of engagement by the C.D.A. irrespective of the source of engagement. Admittedly the petitioner was engaged through the Balashrama with effect from 15.03.1989 and getting his wages through the Balashrama till 20.08.1992. Thereafter, on his representation and with the consent of Balashrama, he was allowed to receive wages directly from the C.D.A. with effect from 21.08.1992. As per direction of this Court in OJC No.4988 of 2000, the Vice Chairman of the C.D.A. after giving opportunity to the affected employees and on consideration of the materials available on record decided to consider the seniority of DLR employees with effect from the date of receipt of wages by them directly from C.D.A. and accordingly the final gradation list (Annexure-14) was published on 24.11.2006. It is contended that the revision of the provisional gradation list on the basis of

the dates of receipt of direct payment by the DLR employees from the C.D.A. cannot be said to be improper or unjust. The petitioner received wages directly from C.D.A. with effect from 21.08.1992, i.e., subsequent to the dates of receipt of direct payment by other private opposite parties and, therefore, his seniority has been reckoned from the aforesaid date of receipt of direct payment. It is stated that the provisional gradation list, which was prepared on the basis of initial date of engagement of DLR employees was a tentative one as per the decision taken by the authorities, who have every right to revise the gradation list on the basis of a sound principle, which has been adopted in this case in finalising the gradation list vide Annexure-14.

4. Opposite party nos.6 and 7 have filed two separate counter affidavits taking almost identical stands. It is stated by them that Utkal Balashrama, Cuttack is a society registered under the Societies Registration Act,1860 and the petitioner was an employee of Balashrama. The Finance and Accounts member of the C.D.A. vide letter no.3689 dated 16.3.1989 (Annexure-A/7) requested the Superintendent of Utkal Balashrama to sponsor some candidates to do casual work under the C.D.A. on payment of daily wages of Rs.20/-. The arrangement indicated in the said letter was that the C.D.A. will forward the monthly attendance chart of the candidates every month to Utkal Balashrama for counter signature whereafter the bill for wages would be passed by the C.D.A. and the amount would be handed over to Balashrama for disbursement to the respective candidates and for this the C.D.A. was prepared to pay 5% as administrative charges to the Balashrama. It is alleged in the counter affidavits of opposite party nos.6 and 7 that the appointment letter filed by the petitioner vide Annexure-1 is forged one and has not actually been issued to the petitioner from the C.D.A. Similarly, it is also stated that the joining report of the petitioner vide Annexure-2 is also a fabricated document. Lastly, it is stated that the petitioner was sponsored by Utkal Balashrama for doing some casual work in the C.D.A from 21.12.1990 and on his own representation and with the consent of Balashrama authorities he received his daily wages directly from the C.D.A. from 21.08.1992. It is, therefore, contended that the private opposite parties having been engaged directly by the C.D.A. since 1990, the petitioner's claim of seniority over them is not sustainable.

5. With regard to the petitioner's initial engagement, the C.D.A. has not disputed the genuineness of Annexures-1 and 2 filed by the petitioner. On the contrary, in paragraph-6 of its counter affidavit it is clearly admitted that the petitioner was engaged through the Balashrama with effect from 15.3.1989 and getting his wages through Balashrama and that with effect from 21.08.1992 he got direct payments from the C.D.A. In such view of the

mater, the contention raised on behalf of the private opposite party nos. 6 and 7 questioning the genuineness of Annexures-1 and 2 or stating that the petitioner was not engaged since 15.3.1989 cannot be accepted. The only question that arises for consideration is whether, irrespective of the mode of engagement, the petitioner can be said to have been employed by the C.D.A. from 15.03.1989 or he was an employee of Balashrama, which was acting as a service provider to the C.D.A. and the petitioner, who was sponsored by it to work under the C.D.A. was its own employee. In case it would be held that the petitioner was appointed/engaged by the C.D.A. to render service to the C.D.A. since 15.03.1989 irrespective of the manner of payment of his salary/wages, he would be considered to be senior to the private opposite parties, who admittedly were engaged in the year 1990.

6. There is nothing on record to show that the C.D.A. engaged the Balashrama as a service provider to deploy its own staff/employees to the C.D.A. for performing any service, nor is there any acceptable material that the petitioner was an employee of the Balashrama. Admittedly, the petitioner was only sponsored by the Balashrama and was engaged by the C.D.A. since 15.03.1989. Since he was sponsored by the Balashrama his wages and the wages of similar other persons, who have been sponsored by the Balashrama, were being placed with the Balashrama for disbursement to them. For performing the work of disbursal of the wages the Balashrama was being paid by the C.D.A. 5% of the amount of wages. It is also not a case where the Balashrama was deducting any amount from the wages/remuneration of the petitioner or other similarly sponsored employees. The mere arrangement of disbursement of the wages of the petitioner through the Balashrama as because he was sponsored by the Balashrama would not be sufficient to say that the petitioner was not the DLR employee of the C.D.A. Rather it is admitted case of the parties that while continuing as a DLR employee, the petitioner directly received payment from the C.D.A. at a later date without any fresh order of engagement or appointment by the C.D.A. Therefore, irrespective of the manner of payment of wages to the petitioner, the petitioner must be treated to be a DLR employee of the C.D.A. continuing since the date of his initial engagement, i.e., 15.03.1989.

In the aforesaid circumstances, if the C.D.A. authorities decided to consider the inter se seniority of the DLR employees taking into consideration the period of their past service prior to the date of their regularisation, it would have been just and proper to take into consideration the initial date of appointment of all the DLR employees, irrespective of whether they were paid their wages directly by the C.D.A. or through their

sponsoring agency, as has been done while preparing the provisional gradation list vide Annexure-7.

Therefore, the decision of the C.D.A. authorities to revise the provisional gradation list and make it final by taking into account the date of receipt of wages by the DLR employees directly from the C.D.A. must be held to be arbitrary, unreasonable, discriminatory and unjust. We therefore, quash the final gradation list under Annexure-14 and direct the C.D.A. authorities to prepare the gradation list of DLR Junior Assistants, who were initially appointed/engaged on casual or DLR basis by taking into account their past service as DLR from the date of their initial appointment/engagement. Accordingly, the writ application is allowed.

Writ petition allowed.

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

W.P.(C) NO.12453 OF 2012 (Dt.17.08.2012)

NORTH WEST SALES & MARKETING LTD.
COMMUNITY CENTER & ORS. ……..Petitioners

.*Vrs.*

IFCI LTD. & ANR. ……..Opp.Parties

SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 – S.13 (2)

Notice U/s. 13 (2) of the SARFAESI Act challenged in writ petition – Whether writ petition is maintainable or Appeal lies U/s. 17 of the Act – Only on fulfillment of two conditions notice U/s.13(2) can be issued, firstly if the borrower who is under a liability to a secured creditor under a security agreement makes any default in repayment of the secured debt of any instalment thereof and secondly when the account of the borrower in respect of such debt is classified by the secured creditor as non-performing asset - But in this case although by the time notice U/s. 13(2) of the Act was issued the first payment towards interest over due became payable, the loan account of the petitioners was not classified as NPA so notice U/s.13 (2) of the Act

was premature – Held, remedy of appeal U/s.17 of the Act fails – Writ petition is held to be maintainable – Impugned notice U/s.13 (2) of the Act is quashed. (Para 14, 15)

Case laws Referred to:-

1.(2010) 8 SCC 110 : (United Bank of India-V- Satyawati Tondon & Or.)
2.(2011) 2 SCC 782 : (Kanaiyalal Lalchand Sachdev & Ors.-V- State of Maharashtra & Ors.)
3.AIR 2007 SC 712 : (M/s. Transcore –V- Union of India & Anr.)
4.AIR 2004 sc 2371 : (Mardia Chemicals Ltd.-V- Union of India & Ors.)

For Petitioners - M/s. Ashok Ku. Parija, S.P.Sarangi, P.P.K. Mohanty, D.K. Das, P.K. Dash & A. Singh.
For Opp.Parties - Mr. R.K. Rath.

L. MOHAPATRA, J. The petitioners in this writ application raise three issues for adjudication, such as:-

(a) whether the decision of the opposite party no.1-financial institution to cancel the undisbursed amount of Rs.15,60,84,740/- in Annexure-35 is justified or not.

(b) whether the order dated 19th June 2012 passed by the opposite party no.1-financial institution recalling the entire loan and directing the petitioners to pay a sum of Rs.45,59,44,677/- in Annexure-36 is justified or not.

(c) whether the notice issued by the opposite party no.1- financial institution under Section 13(2) of the SARFAESI Act, 2002 in Annexure-38 is premature or not.

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

Petitioner no.1 is a Company incorporated under the provision of Companies Act, 1956 and is involved in the business of developing commercial Malls and petitioner no.2 is a Company incorporated under the Companies Act, 1956 and is also involved in the same business. Petitioner No.2-Company is a wholly owned subsidiary of petitioner no.1. The opposite party no.1 is a public financial institution.

Petitioner no.1 in the month of November, 2010 purchased a plot of land measuring 2910 sq. meter, situated in Paschim Vihar, Delhi in an

auction conducted by Delhi Development Authority. It decided to construct a Mall on the said plot and, accordingly, approached the Indiabulls Financial Services Ltd. (IFSL) for financial assistance. The said financial institution by letter dtd.26.8.2010 sanctioned a loan of Rs.40 crores in favour of petitioner no.1. Against the said loan, as security, the said plot of land was mortgaged along with two other personal properties of the then promoters. Petitioner no.2-Company wanted to take over the project, but it was found that a sum of Rs.40 crores advanced by the IFSL would not be adequate to complete the Mall. Simultaneously with the commencement of the development of the project, petitioner no.1 entered into commercial arrangements for sale of the developed area with prospective customers on the agreed terms and conditions and sold about 31,648 sq. ft. of property but the sale deeds in respect of such sale have not been executed till now. Since petitioner no.2-Company was also interested to take over the project, both the petitioners approached the opposite party no.1-financial institution for financial assistance to the tune of Rs.60 crores. The said loan was sought to be refinanced by the opposite party no.1-financial institution not only for repaying the loan of Rs.40 crores taken from IFSL, but also to use the balance amount for completing the project. After a detailed discussion, the opposite party no.1-financial institution agreed to extend the total loan of Rs.60 crores and, accordingly, the corporate loan facility of Rs.60 crores was sanctioned in favour of the petitioners on certain terms and conditions contained therein. One of the conditions was to repay the IFSL loan of Rs.40 crores and use the balance to meet the cost of construction of the Mall. One of the pre-disbursement conditions was that the first tranche of approximate Rs.40 crores would be paid directly to IFSL by way of a demand draft and the original documents of the Mall property would be collected on the same day and the balance tranche would be disbursed on creation of mortgage. However, a sum of Rs.44.5 crores had to be paid to IFSL to clear the loan and the mortgage documents were collected**.** The balance was to be paid by the opposite party no.1-financial institution to the petitioners to meet the cost of construction of the Mall. The petitioners also created required security and made the same available to the opposite party no.1-financial institution to facilitate it for extending the balance loan. Unfortunately, instead of accepting the security offered by the petitioners for sanction of the balance loan amount of Rs.15,60,84,740/-, in the impugned letter under Annexure-35, the petitioners were intimated that the said proposal for sanction of balance loan has been cancelled and on the very next day, another letter was issued by the opposite party no.1- financial institution recalling the entire loan with interest, liquidated damages and other monies payable aggregating to Rs.45,59,44,677/-. Challenging the aforesaid two orders, the petitioners approached this Court in W.P.(C) No.10982 of 2012.

3. Learned counsel appearing for the present opposite party no.1-financial institution submitted that no step had been taken under the Securitization Act and no such steps would also be taken without following the procedure laid down under the Securitization Act. Therefore, the writ application was premature.

Learned Senior Counsel appearing for the petitioners in the said writ application also submitted that without issuing notice under the Securitization Act, the financial institution is forcing the petitioners to re-pay the dues within three days. This Court considering the fact that no notice had been issued under the Securitization Act, found the writ application to be not maintainable and dismissed the same. However, an observation was made that the financial institution can proceed against the petitioners after following due procedure of law. The writ application was disposed of on 26.6.2012 and on 30.6.2012 the opposite party no.1-financial institution issued a notice under Section 13(2) of SARFAESI Act, 2002, which is the subject matter of Annexure-38.

4. Shri R.K.Rath, learned Senior Counsel appearing for the opposite party no.1-financial institution raised a preliminary objection with regard to maintainability of the writ application on the ground that notice under Section 13(2) of the SARFAESI Act, 2002 having been issued, the petitioners were called upon only to submit their reply and at the stage of notice only the petitioners cannot invoke the writ jurisdiction of the High Court as no action affecting the petitioners in any manner has been taken under the SARFAESI Act till today. Reliance was placed by Shri Rath, learned Senior Counsel on a decision of the Hon'ble Apex Court in the case of ***United Bank of India Vrs. Satyawati Tondon and others*** reported in (2010) 8 Supreme Court Cases 110. With reference to Sections 13(2), 13(4) and Section 14 of the SARFAESI Act, 2002 as well as Section 128 of Contract Act, 1872, the Hon'ble Supreme Court held that the creditor Bank has a right to proceed against the guarantor directly by issuing notice under Sections 13(2) and 13(4) of the SARFAESI Act and the High Court erred in holding otherwise and restraining the creditor Bank from taking action in furtherance of its notice under Section 13(4) of the SARFAESI Act. The Hon'ble Supreme Court further held that an alternative remedy is available under Sections 17 and 18 of the Act for filing an appeal against the action taken under Section 13(4) or Section 14 of the Act and, therefore the High Court should not have entertained the writ application. Reliance was also placed on another decision of the Hon'ble Apex Court in the case ***Kanaiyalal Lalchand Sachdev and others Vrs. State of Maharashtra and others*** reported in (2011) 2 Supreme Court Cases 782. In the said decision also the Hon'ble

Supreme Court held that jurisdiction under Articles 226 and 227 of the Constitution of India should not be exercised when an appeal is provided for under Section 17 of the SARFAESI Act, 2002 against the action taken by the Bank under Section 13(4) of the said Act. Referring to the above two decisions, it was further contended by Shri Rath, learned Senior Counsel that the petitioners may give a reply to the notice issued under Section 13(2) of the SARFAESI Act, 2002 and the opposite party no.1-financial institution may accept their explanation and decide not to take any further action. Therefore, approaching this Court at the stage of notice under Section 13(2) of the SARFAESI Act makes the writ application premature.

Shri A.K.Parija, learned Senior Counsel appearing for the petitioners submitted that Section 13(2) of the SARFAESI Act has application only when the account is held to be a non-performing account. According to Shri Parija, learned Senior Counsel, as per the agreement, neither the interest had become due nor the principal on the date the entire loan was recalled and no transaction had taken place till that date. Therefore, the question of holding the account to be a non-performing asset does not arise and in absence of any intimation to the petitioners that the account has become non-performing asset, recourse to Section 13(2) of the SARFAESI Act could not be taken.

5. In order to appreciate the contention of the learned counsel appearing for both parties, it is necessary to refer to the relevant documents and dates to find out as to whether the notice issued by the opposite party no.1-financial institution under Section 13(2) of the SARFASEI Act is premature or not. No counter has been filed by the opposite party no.1-financial institution in the writ application and, therefore, the dates mentioned in the writ application in relation to certain documents have to be accepted as correct.

November,2010 Petitioner no.1 purchased a plot of land measuring 2910 Sq.Meter situated in Paschim Vihar, Delhi in an auction conducted by Delhi Development Authority to construct a Mall. In order to purchase the said property and develop the same, petitioner no.1 had taken a loan of Rs.40 crores from Indiabulls Financial Services Ltd.(IFSL) and mortgaged the said plot of land along with two personal properties of the then promoters.

When both the petitioners realized that a sum of Rs.40 crores will not be enough to complete the Mall, they approached the opposite party no.1-Financing Bank to extend the financial assistance to tune of Rs.60 crores.

Date	Event
15th February,2012-	The corporate loan agreement was executed between the petitioners and the opposite party no.1-financial institution and an amount of Rs.60 crores was sanctioned with a condition that the first tanche of approximately of Rs.40 crores shall be paid directly to India Bulls Financial Services Ltd. through a demand draft and original documents of the Mall property shall be collected on the same day and balance tranche would be disbursed on creation of mortgage.
6th March, 2012	A demand draft for an amount of Rs.44,39,15,260/- in the name of Indiabulls Financial Service Ltd.(IFSL) was sent by the opposite party no.1-financial institution.
7th March,2012	Indiabulls Financial Services Ltd. informed that the loan amount of Rs.40 crore has been repaid fully and there were no due payable and that it had no claim or right against the property held as security in respect of the said loan.
7th June,2012	The petitioners were directed by the opposite party no.1-financial institution to pay interest over dues of Rs.58,94,416/- by 9th June, 2012.
18th June, 2012	The opposite party no.1-financial institution intimated the petitioners that un-disbursed amount of Rs.15,60,84,740/- has been cancelled.
19th June, 2012	The opposite party no.1-financial institution recalled the entire loan and demanded payment of Rs.45,59,44,677/-.
30th June, 2012	Notice under Section 13(2) of the SARFAESI Act,2002 was issued.

6. The corporate loan agreement, which is annexed to the writ application as Annexure-5, stipulates that the loan was to be repaid in 16 quarterly structured installments after a moratorium of six months from the date of first disbursement. The first disbursement was made on 6.3.2012 and, therefore, the first installment towards principal was to be paid in the month of September, 2012. Therefore, it is clear that in terms of the

corporate loan agreement, repayment of the principal was to start only from September, 2012. Schedule-II of the corporate loan agreement provides that the borrowers shall pay to the Lender interest on the principal amount of the loan outstanding from time to time, quarterly in each year on 15th of each respective month at the quarter end. The first disbursement having been made on 6.3.2012, the first interest overdue was to be paid by 15th June, 2012. Therefore, as per the corporate loan agreement, even if the first interest over due was to be paid by 15th June, 2012, the opposite party no.1-financial institution issued a notice on 7th June, 2012 in Annexure-33 demanding payment of over due interest of Rs.58,94,416/-.

7. Shri R.K.Rath, learned Senior Counsel appearing for the opposite party no.1-financial institution submitted that two cheques given by the petitioners for a amount of Rs.78,90,411/- and Rs.81,53,425/- were dishonored on 15.5.2005 and 15.6.2012 respectively. According to Shri Rath, learned Senior Counsel, these two cheques had been issued by the petitioners towards payment of interest overdue.

Shri A.K.Parija, learned Senior Counsel appearing for the petitioners submitted that the said cheques had been issued in favour of the opposite party no.1-financial institution as security in terms of Article-II of the loan agreement in the form of post dated cheques. Since the interest overdue was to be paid by 15th June, 2012, there was no reason on the part of the opposite party no.1-financial institution to present the cheques before due date. We find considerable force in the above submission of Shri A.K.Parija, learned Senior Counsel considering the fact that even those two cheques had been issued towards payment of interest overdue, they could have been presented before the Bank for encashment only after 15.6.2012 when the interest overdue became payable for the first time.

Apart from the above, it appears from the reply given by the opposite party no.1-financial institution on 14.6.2012 that the petitioners have defaulted in payment of interest overdue to the tune of Rs.58,94,416/- which fell due on 15.5.2012. This does not appear to be correct as in terms of the corporate loan agreement, the first payment towards interest overdue was to be made by 15th June, 2012.

8. Coming to the question as to whether there was any justification on the part of the opposite party no.1-financial institution in canceling the disbursement of the balance amount of Rs.15,60,84,740/- is justified or not, reference has to be made again to the corporate loan agreement. As stated earlier, in terms of the corporate loan agreement, the first installment towards principal was to be paid from September, 2012 and, therefore, by

18th June, 2012 when the decision of the opposite party no.1-financial institution was intimated to the petitioners regarding cancellation of un-disbursed amount, the first installment towards principal had not become due. Obviously, it appears that the balance disbursement was cancelled for the reason stated in the reply of the Bank dated 14.6.2012. Out of the two reasons, one is that the petitioners acted in clear violation of loan agreement. which required them to take prior consent of the opposite party no.1-financial institution to sell any portion of the Mall property and the petitioners have sold some portions of the Mall property without taking such consent of the of the opposite party no.1-financial institution. This allegation was stoutly denied by Shri A.K.Parija, learned Senior Counsel appearing for the petitioners.

We called upon Shri Rath, learned Senior Counsel appearing for the opposite party no.1 to produce any document indicating sale of any part of the Mall after the loan was sanctioned and disbursed in favour of the petitioners on 6th March, 2012. Neither any counter has been filed supporting any such allegation made against the petitioners nor could any document be produced at the time of hearing of the writ application in support of the same. We are therefore of the view that even cancellation of the un-disbursed amount was without any justification.

9. In relation to the above issue, Shri Rath, learned Senior Counsel appearing for the opposite party no.1-financial institution submitted that the petitioners had earlier challenged the said notice issued by the opposite party no.1-financial institution in W.P.(C) No.10928 of 2012 and the Court having dismissed the same, it is no more open for the petitioners to challenge the said decision of the financial institution again in this writ application. Earlier the writ application filed by the petitioners was dismissed as not maintainable solely on the submission made before the Court that no step under the Securitization Act had been taken by the financial institution. Legality of the two notices in Annexures-35 and 36 had never been considered by the Court nor any finding has been rendered in relation to the said two notices. Therefore, the question of res-judicata does not arise. In view of the above discussion, the first two issues raised by the petitioners are answered in favour of the petitioners.

10. So far as the third issue is concerned, it relates to a notice issued by the opposite party no.1-financial institution under Section 13(2) of the SARFAESI Act, 2002. In relation to this issue, it was contended by Shri R.K.Rath, learned Senior Counsel for the opposite party no.1-financial institution that notice issued under the said provision does not amount to

take any action and it is a notice to bring certain facts to the notice of the borrower and it is open for the borrower to give a reply to the same. Therefore, no action under Section 13(4) of the Securitization Act having been taken, this Court may not interfere at the stage of issuance of notice under Section 13(2) of the said Act. It was contended by Shri A.K.Parija, learned Senior Counsel appearing for the petitioners that stage for issuance of such notice under Section 13(2) of the Act had not arisen and, therefore the said notice is premature.

11. For convenience, Section 13(2) of the SARFAESI Act, 2002 is quoted below:-

> "Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)".

12. Prerequisites for issuance of notice under Section 13(2) are that the borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and when the account of the borrower in respect of such debt is classified by the secured creditor as non-performing asset. Only when these two conditions are satisfied, notice under Section 13(2) of the SARFAESI Act, 2002 can be issued. From the facts narrated earlier, it is clear that by the time notice under Section 13(2) of the SARFAESI Act, 2002 was issued on 30th June, 2012, the first installment towards principal had not become due as the first installment for principal as per the corporate loan agreement was to be paid in September, 2012. The first installment towards over due interest was to be paid by 15th June, 2012 and, therefore, by the time notice was issued under Section 13(2) of the SARFAESI Act,2002 on 30th June, 2012, the first payment towards interest over due had become payable. But the second condition requiring the financial institution to classify the loan account as non-performing asset is not satisfied in this case. There is nothing on record to show that the loan account of the petitioners in respect of the present loan had ever been classified as N.P.A. Therefore, notice under Section 13(2) of the SARFAESI Act issued by the financial institution in Annexure-38 even before classifying the loan account of the petitioner as N.P.A. is premature.

13. Shri R.K.Rath, learned Senior Counsel appearing for the opposite party no.1-financial institution relied upon two decisions of the Hon'ble Supreme Court to substantiate his submission that when an alternative remedy is available to the petitioners, the writ application should not be entertained. Both the decisions relate to notice under Section 13(4) of the SARFAESI Act, 2002. An appeal is provided for against an action taken by the financial institution under Section 13(4) of the SARFAESI Act but no such appeal is provided for any notice issued under Section 13(2) of the said Act. In the case of ***United Bank of India Vrs. Satyawati Tondon and others (supra)*** and also in the case of ***Kanaiyalal Lalchand Sachdev and others Vrs. State of Maharashtra and others (supra)***, the Hon'ble Supreme Court was considering the question as to whether an alternative remedy is available against the action taken by the financial institution under Section 13(4) of the Act. Therefore, the above two decisions on facts have no application to the present case. Another decision relied upon by Shri R.K.Rath, learned Senior Counsel is the case of ***M/s.Transcore Vrs. Union of India and another*** reported in AIR 2007 SC 712. In the said decision, the Hon'ble Apex Court was again considering Section 13(4) of the SARFAESI Act, 2002 and in paragraphs 60 and 68 of the judgment, the Hon'ble Apex Court was considering the provision relating to appeal under Section 17(1) of the SARFAESI Act against an action taken by the financing institution under Section 13(4) of the said Act. Therefore, the said decision has also no application to the facts of the present case as the stage of Section 13(4) of the SARFAESI Act, 2002 has not reached. On the other hand, reliance was placed by Shri A.K.Parija, learned Senior Counsel appearing for the petitioners on a decision of the Hon'ble Apex Court in the case of ***Mardia Chemicals Ltd. Vrs. Union of India and others*** reported in AIR 2004 Supreme Court 2371. This decision has been taken note of and affirmed in the later decision of the Hon'ble Supreme Court referred to above. The decision rendered in Mardia Chemicals Ltd*.* relates to also a notice under Section 13(2) of the SARFAESI Act, 2002 and in paragraphs 50 and 51 of the judgment, the Court made the following observations:-

> "It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr.Salve, one of the counsel for respondents that there would be no bar to approach the Civil Court. Therefore, it can not be said no remedy is available to

the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the Civil Court is barred in respect of matters which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the Civil Court shall have no jurisdiction to entertain any proceeding thereof. The bar of Civil Court thus applies to all such matters which maybe taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

However, to a very limited extent jurisdiction of the Civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the Civil Court in the cases of English mortgages. We find such a scope having been recognized in the two decision of the Madras High Court which have been relied upon heavily, by the learned Attorney General as well appearing for the Union of India, namely, V. Narasimhachariar (supra) at pp.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 22:

"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams V. Scott (1859) 7WR (Eng) 213 (249). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the

clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely.(See Rashbehary Ghose Law of Mortgages. Vol.II. Forth Edn., Page 784)".

14. Therefore, we are unable to accept the contention of Shri R.K.Rath, learned Senior Counsel appearing for the opposite party no.1-financial institution that the writ is not maintainable at this stage. On the other hand, considering the fact as stated above, we are of the view that the loan account of the petitioners having not been classified as N.P.A. as on 30.6.2012, issuance of notice under Section 13(2) of the SARFAESI Act on 30th June, 2012 was premature. In the case of ***Maradia Chemicals Ltd. (supra)***, the Hon'ble Apex Court further held that policy has been laid down by the Reserve Bank of India providing guidelines in the matter for declaring an asset to be a non-performing asset known as "RBI's prudential norms on income recognition, asset classification and provisioning pertaining to advances" through a circular dated 30th August, 2001. Therefore, it cannot be said that there are no guidelines for treating the debt as a non-performing asset and classification of debt as NPA is at whims and fancies of financial institution. Therefore, before issuance of notice under Section 13(2) of the SARFAESI Act, 2002, the guidelines laid down by the R.B.I. through a circular dated 30th August, 2001 have to be followed and complied with.

15. We accordingly quash the notice under Section 13(2) of the SARFAESI Act, 2002. Before parting with the case, we would like to make an observation for benefit of both parties. By the time notice under Section 13(2) was issued on 30th June, 2012, the first interest over due could have been paid by the petitioners. It appears that the petitioners did not pay the first interest over due on or before 15th June, 2012 considering the fact that disbursement of Rs.15,60,84,740/-had been cancelled by the opposite party no.1-financial institution. Accordingly, we are of the further view that if the petitioners are given a personal hearing by the opposite party no.1-financial institution, the dispute can be resolved and a compromise can be arrived at, which would be beneficial not only for the opposite party no.1-financial institution but also to the petitioners. With the above observation, the writ application is disposed of.

Writ petition disposed of.

2013 (II) ILR - CUT- 75

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

W.P.(CRL) NO.374 OF 2012 (Dt.28.06.2012)

PANDABA @ PANDAV MUKHI ……..Petitioner

.Vrs.

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

NATIONAL SECURITY ACT, 1980 – S.3(2)

Order of detention – There is unexplained delay of seven days in forwarding the representation of the petitioner by the District Magistrate, Sambalpur and delay of ten days in disposal of the representation by the State Government and further delay of three days in communicating the rejection order to the petitioner – Held, since there was unexplained delay of 20 days in disposal of the representation the impugned order of detention is set aside.

(Para 6)

Case law Relied on:-

(2012) 51 OCR-1027 : (Md. Raju @ Md. Azim-V- State of Odisha & Ors.)

Case laws Referred to:-

1.(2007) 38 OCR 386 : (Kalia @ Alok Ku. Das-V- District Magistrate, Dhenkanal & Ors.)
2.(2006) 35 OCR 721 : (Bijaya Parida-V- State of Orissa & Ors.).

For Petitioner - M/s. B. Mohanty & A. Tripathy.

For Opp.Parties- Mr. B.P.Pradhan, Addl.Govt. Advocate(for O.Ps. 1 & 2)
Mr. S. D.Das, Asst. Solicitor General, (for O.P.3).

L. MOHAPATRA, J. The petitioner in this writ application assails the order dated 21.12.2011 passed by the District Magistrate, Sambalpur directing his detention in Circle Jail, Sambalpur in exercise of powers conferred by Sub-section 2 of Section 3 of the National Security Act, 1980 as well as the orders passed by the State Government and the Central Government rejecting his representation.

2. The District Magistrate, Sambalpur passed the order of detention in Annexure-1 and the grounds of detention were handed over to the petitioner. The grounds of detention annexed to the writ application as Annexure-2 shows involvement of the petitioner in criminal activities from 2006 till 2011.

The last incident was on 10.12.2011, when one Gokul Kusum lodged an F.I.R. in the Town Police Station alleging therein that on that day at about 3.00 P.M., 35 to 40 youngsters of Thelkopada attacked his son and opened fire with an intention to kill him. Thereafter the petitioner and his associates forming unlawful assembly carrying deadly weapons like sword, lathi, gun etc. rushed from Thelkopada to Hospital Gate and attacked his son Rupesh Kusum in front of Hospital Gate inflecting serious injuries on him. Others also terrorized the local residents with dire consequences. The case was registered for commission of offence under Section 307 apart from other sections of the Penal Code as well as under Sections 24 and 27 of the Arms Act. The previous incidents starting from the year 2006 also relate to similar nature of offences.

Against the order of detention, the petitioner submitted a representation on 7.1.2012 which was forwarded by the District Magistrate to the State Government on 15.1.2012 along with parawise comments and the same was received by the State Government on 17.1.2012 and the petitioner was intimated about the rejection of the representation on 30.1.2012.

3. Learned counsel for the petitioner assails the order of detention solely on a technical point that the representation of the petitioner was not disposed of immediately after the same was received and there was delay in disposal of the representation.

Learned counsel for the State referred to the counter affidavit filed by the Under Secretary to Government, Home Department and submitted that there was no delay in disposal of the representation by the State. Similarly, learned Assistant Solicitor General also submitted that there was no delay in disposal of the representation of the petitioner by the Central Government.

4. A date chart has been given in the counter affidavit filed by opposite party no.1. It appears from the said date chart that the petitioner was detained by order of the District Magistrate, Sambalpur on 21.12.2011. The grounds of detention were served on the petitioner on 23.12.2011. The petitioner submitted a representation to the State Government on 7.1.2012 and the same was received by the District Magistrate, Sambalpur 9.1.2012. From 9.1.2012 till 15.1.2012 the representation was kept pending with the District Magistrate, Sambalpur and only on 15.1.2012, the representation along with parawise comments were forwarded to the State Government in the Home Department. The Home Department of the State Government received the representation along with parawise comments on 17.1.2012

and it was kept pending for almost 10 days and the representation was rejected by the State Government on 27.1.2012.

5. From the counter affidavit filed by opposite party no.1, we find that no reason whatsoever has been assigned as to why the representation received by the District Magistrate, Sambalpur on 9.1.2012 was kept pending till 15.1.2012 and even the counter affidavit filed by the Additional District Magistrate is also silent about the same. It is, therefore clear from the counter affidavit filed by opposite party nos.1 and 2 that the representation filed by the petitioner on 7.1.2012 had been received in the office of the District Magistrate, Sambalpur on 9.1.2012, but it was not forwarded to the Home Department till 15.1.2012. Similarly, representation of the petitioner along with parawise comments forwarded by the District Magistrate Sambalpur were received by the Home (Special Section Department) on 17.1.2012 and it was rejected only on 27.1.2012, almost ten days after the same was received. In the counter affidavit filed by opposite party no.1, there is no mention as to why the representation had not been disposed of by the State Government immediately after the same was received and it is only stated in the said counter affidavit filed by opposite party no.1 that the representation along with the parawise comments of the District Magistrate, Sambalpur had been received by the Home Department on 17.1.2012 and the same was rejected on 27.1.2012. In this connection, reference may be made to a decision of this Court in the case of ***Md.Raju @ Md.Azim Vrs. State of Odisha and others reported in (2012)51 OCR-1027.*** The facts of the reported case are almost similar to the facts of the present case. In the said reported case, the detenue submitted a representation on 23.10.2011 and the same was forwarded to the State Government in Home Department on 1.11.2011. The delay in remitting the representation to the Home Department had not been explained. The Home Department received the representation on 8.11.2011 and rejected the same on 18.11.2011. No explanation was also offered by the State Government explaining the delay of ten days in disposal of the representation. Though the representation was rejected on 18.11.2012 by the State Government, communication was made to the detenue on 21.11.2011 and the delay of three days in communication had also not been explained. Taking all these facts into consideration, the Court held that there was no explanation for delay of more than 26 days in disposal of the representation and, accordingly allowed the writ application and set aside the detention order.

6. In the present case, there is unexplained delay of seven days in forwarding the representation of the petitioner by the District Magistrate, Sambalpur and unexplained delay of about ten days in disposal of the

representation by the State Government. There is also unexplained delay of three days in communicating the rejection order to the petitioner. Therefore, there is delay of about twenty days in disposal of the representation. In this regard, reference may also be made to two decisions of the Court i.e. ***Kalia alias Alok Kumar Das Vrs. District Magistrate, Dhenkanal and two others*** *reported in (2007)38 OCR 386* and ***Bijaya Parida Vrs. State of Orissa and others*** *reported in (2006) 35 OCR 721.*

7. Relying on the above decisions and on consideration of the fact that there was unexplained delay of 20 days in disposal of the representation, we allow the prayer and set aside the impugned order of detention passed by the District Magistrate, Sambalpur in Annexure-1. The petitioner be set at liberty forthwith unless his detention is required in any other case. The writ application is accordingly allowed.

Writ petition allowed.

2013 (II) ILR - CUT- 78

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

(W.P.(C) NOS.1331, 1332 & 1334 OF 2012 (Dt.20.09.2012)

BISWAJIT MOHAPATRA & ORS. …….Petitioners

.*Vrs.*

STATE OF ORISSA & ORS. …….Opp.Parties

SERVICE LAW – Advertisement inviting applications for appointment to the post of Director, WALMI – Petitioners applied for the post and went through the selection process and disqualified – They have not objected to the Constitution of the Selection Committee either before the interview or at the time of interview – Held, petitioners cannot challenge the advertisement as well as Constitution of Selection Committee. (Para 4)

<u>Case laws Referred to:-</u>

1.(1976) 3 SCC 585 : (Dr. G. Sarana –V- University of Lucknow & Ors.)
2.(2007)8 SCC 100 : (Union of India & Ors.-V- S.Vinodh Ku. & Ors.)
3.(2011) 1 SCC 150 : (Vijendra Ku. Verma-V- Public Service Commission,Uttarakhand & Ors.)
4.1986 (Supp.)SCC 285 : (Om Prakash Shukla-V- Akhilesh Kumar & Ors.).

For Petitioner - M/s. A.K. Mishra, Jeydev Sengupta, D.K. Nanda, G. Sinha, A.Mishra & P.P.B. Behera.
For Opp.Parties - Addl. Govt. Advocate.

L. MOHAPATRA, J. The prayer and issues involve in all the three writ applications being same, we heard the matters together and dispose of in this common judgment.

An advertisement was issued by the Additional Secretary to Government, Department of Water Resources, Government of Orissa published in daily Samaj dated 2.11.2011 inviting applications for appointment to the post of Director, WALMI (Water and Land Management Institute). The petitioners in all the three writ applications had submitted their respective applications for appointment to the said post. They also went through the selection process and having not qualified, filed these writ applications seeking for quashing the advertisement and also for a direction to issue a fresh advertisement for appointment to the post of Director, WALMI by specifying the requisite qualification, experience and remuneration at par with Institutes of National/State importance or for consideration of their cases for appointment to the post of Director/Joint Director/Professor/ Associate Professor/Deputy Director taking into account their qualifications, teaching and relevant research experiences etc.

2. Shri A.K.Mishra, learned Senior Counsel appearing for the petitioners in all the three writ applications challenged the advertisement, selection procedure and also selection of a candidate for appointment to the post of Director, WALMI on the ground that WALMI is a Society registered under the Societies Registration Act, 1860. The Memorandum of Association provides that there shall be a Governing Council, which will consist of official members as set out therein. Under Clause-36 of the Memorandum of Association, the business and affairs of the society shall be carried on and managed by the Governing Council and one of the powers and duties of the Governing Council is to sanction posts and appoint officers and employees in its office or officers and fields and regulate the terms and conditions of their service. Referring to Clause-40 of the Memorandum of Association, it was further contended by the learned Senior Counsel appearing for the petitioners that it is the Governing Council, who shall appoint a person possessing the prescribed qualifications to be the Director of the Society. Referring to the above provision contained in the Memorandum of Association, Shri Mishra, learned Senior Counsel appearing for the petitioners challenged the advertisement on the ground that the same has been issued by the Additional Secretary to Government, Department of

Water Resources, Government of Orissa, and the Selection Committee has been constituted by the said Water Resources Department and the selection has also been made by the Water Resources Department. According to Shri Mishra, learned Senior counsel appearing for the petitioners, the advertisement, constitution of the Selection Committee and selection of a candidate for the post of Director done by the Water Resources Department are in contravention of the Memorandum of Association and right to appoint the Director, WALMI only vests with the Governing Council and the Department of Water Resources had no authority to do so.

Learned counsel for the State submitted that the petitioners having submitted their applications in response to the advertisement, appeared in the selection test and being unsuccessful, now have come up challenging the advertisement, constitution of the Selection Committee and selection of candidate made by the said Selection Committee. Learned counsel for the State referred to some decisions of the Hon'ble Supreme Court in this regard, which we will deal with later on. It was further contended by the learned counsel for the State that the Governing Council by Resolution dated 17.3.2007 had authorised the Department of Water Resources to conduct the test and select a candidate for the post of Director, WALMI and, therefore, the Governing Council of WALMI had divested its power to appoint the Director of WALMI in favour of the Water Resources Department.

3. Undisputedly, the Resolution dated 17.3.2007 passed by the Governing Council, WALMI, the power for selection and appointment of Director for WALMI was given to the Water Resources Department. Resolution of the Governing Council dated 17.3.2007 is not disputed. Therefore, the authority of the Department in issuing the advertisement in Annexure-1 to all the writ applications inviting applications for selection of a candidate for appointment to the post of Director, WALMI cannot be questioned.

From the record, we find that the Selection Committee had been constituted by the Department of Water Resources to conduct the selection test and the Selection Committee consisted of Agriculture Production Commissioner, Odisha, Principal Secretary to Government, Department of Water Resources, Principal Scientist and in-charge Director, Water Technology Centre for Eastern Region, Bhubaneswar and Prof. Bipin Bihari Das, representative of Director of Xavier Institute of Management Bhubaneswar. The Committee met on 27.6.2012 and thirteen candidates were interviewed separately and three were selected in order of merit for appointment to the said post. The petitioners undisputedly participated in the

said selection test and were not selected by the Selection Committee for appointment to the said post. Now the question arises as to whether the petitioners can maintain the writ applications challenging constitution of the said Selection Committee and the process of selection, having taken a chance by appearing before the Selection Committee or not. In the case of ***Dr.G.Sarana Vrs. University of Lucknow and others*** reported in (1976) 3 Supreme Court Cases 585 , the applicant voluntary appeared before the Selection Committee and took a chance of having a favourable recommendation from it and accordingly having done so, it was no more open for him to turn round and question the constitution of the Selection Committee. Failure to take the identical plea at the earlier stage of proceedings created an effective bar of waiver against him. It was contended by Shri Mishra, learned Senior Counsel appearing for the petitioners that constitution of the Selection Committee whether proper or not can only be questioned when a candidate appears before the Selection Committee and looks at its constitution. There is no scope to challenge constitution of a Selection Committee before appearing in an interview conducted by such Selection Committee. Answer to this question is also available in the above reported judgment. In the said reported decision, the Court also held that even at the time of interview the applicant therein did not raise his little finger against constitution of the Selection Committee. Therefore, if any one of the petitioners had any doubt or objection in relation to constitution of the Selection Committee, he could have questioned the same at the time of interview also. Similar views have been expressed by the Hon'ble Apex Court in the case of ***Union of India and others Vrs. S.Vinodh Kumar and others*** reported in (2007) 8 Supreme Court Cases 100, ***Vijendra Kumar Verma Vrs. Public Service Commission, Uttarakhand and others*** reported in (2011) 1 Supreme Court Cases 150 as well as **Om Prakash Shukla Vrs. Akhilesh Kumar and others** reported in 1986 (Supp.) Supreme Court Cases 285.

4. As stated earlier, on verification of the record produced by the learned counsel for the State, we did not find any irregularity in constitution of the Selection Committee and, on the other hand, the Selection Committee constituted consists of very senior officers and professors. The petitioners having not objected to constitution of the Selection Committee either before the interview or even at the time of interview and having taken a chance, it is no more open for them to turn round and challenge constitution of the Selection Committee.

5. For the reasons stated above, we find no merit in any one of the writ applications and, accordingly, dismiss the same. Writ petition dismissed.

2013 (II) ILR - CUT- 82

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

DSREF NO.2 OF 2012 & JCRLA NO.13 OF 2012(Dt.11.10.2012)

STATE OF ORISSA …….Appellant

.Vrs.

SUKA PALEI ……..Respondent

PENAL CODE, 1860 – S.302

Murder – Death Penalty – Murder not committed to satisfy any greed or lust – Appellant has neither any bad antecedent nor he is a hard core Criminal nor an anti-social nor an anti-national element – He was illiterate, rustic being guided by the blind belief that his son has been affected by witchcraft practiced by the deceased – An illiterate and rustic when influenced by blind faith is bound to become impulsive in his act and he is bound to become mad to complete an act which in his sense of right and wrong is right – Held, this case cannot be considered as a rarest of rare case for imposition of death penalty – Sentence of death is modified to life imprisonment.

(Paras 15, 17)

Case laws Referred to:-

1.2003 (9) SCC 310 : (Dayanidhi Bisoi -V- State of Orissa)
2.2005 (4) SCC 15 : (Saibanna -V- State of Karnataka)
3.2006 (7) SCC 442 : (Renuka Bai -V- State of Maharashtra)
4.JT 2007 (11) SCC 516 : (Des Raj -V- State of Punjab).
5.1979 (3) SCR 78 : (Rajendra Prasad -V- State of U.P.)
6.1979 (3) SCR 1059 : (Dalbir Singh -V- State of Punjab).
7.2002 (3) SCC 76 : (Lehna -V- State of Haryana).
8.1983 (3) SCR 413 : (Machhi Singh-V- State of Punjab).

For Appellant - Mr. B.P. Pradhan, Addl. Govt. Advocate.
Mr. Sangram Das, Addl. Standing Counsel.
For Respondent - Mrs. Chandana Panda.

C.R. DASH, J. The appellant Suka Palei was convicted for the offence under Section 302, I.P.C. for committing murder of three persons of a family. He was condemned to suffer the sentence of death. DSREF No.2 of 2012 at the instance of the State is for confirmation of death sentence and Jail Criminal Appeal No.13 of 2012 at the instance of the condemned

accused Suka Palei is directed against the judgment and order of sentence dated 03.03.2012 passed by learned Sessions Judge, Keonjhar in Sessions Trial No.81 of 2010.

2. The occurrence happened on 10.12.2009. Appellant Suka Palei committed murder of Fulamani Deheury, her son Ramesh Dehury and her husband Sapana Dehury, suspecting Sapana Dehury, to have practised witchcraft on his (Suka Palei's) son. At about 4.00 A.M. on 10.12.2009 Sapana Dehury (deceased), Abhimanyu Dhamulia (P.W.1-informant), Bhagya Naik, Chhalu Dhamulia (P.W.5) and Sankhali Dhamudia left the village for Mushaghara Mines in the district of Sundargarh for their engagement there as labourer as a means of their livelihood. Nabati Dehury (P.W.3), who happens to be one of the daughters of deceased Sapana Dehury had also gone to Mushaghara Mines for labour work. At about 10.00 A.M., appellant Suka Palei, who is their co-villager came to the aforesaid persons. He requested them to accompany him for cremation of the dead body of his son Guru, saying that Guru has died. On his request all the aforesaid persons started returning to their village through the Ghat road on foot, as that was the regular road, they used to take for commuting their village to and fro from Mushaghara Mines. On the way at Mandatangar all of them took rest. At that place, accused Suka Palei asked deceased Sapana Dehury to take some Dukta (dry tobacco leaf powder). Appellant Suka Palei asked others to proceed ahead saying that he and Sapana Dehury shall follow them after taking Dukta. When others had proceeded a little distance, they heard shouting of Sapana Dehury "Marigali, Marigali". They rushed back and found that Sapana Dehury was lying on the foot path and appellant Suka Palei had raised a stone and was telling that Sapana had practised witchcraft on his son and for that reason he will murder him. So saying he (Suka Palei) thrashed the stone on the head of Sapana Dehury (deceased). Abhimanyu Dhamulia (P.W.1) and others shouted at Suka Palei to refrain from his act, but could not reach near him at once as it was a Ghat road. After assaulting the deceased, appellant Suka Palei ran into the jungle. Coming near Sapana, Abhimanyu (P.W.1) and others found him to be dead. They came back to the village to report about the incident to others. Coming to the village, they found that many persons had gathered in the courtyard of one Chemutu Dhamudia and sound of crying was coming from the house of the aforesaid Chemutu Dhamudia. Rushing to that place, they found to their surprise that Sapana Dehury's wife Fulamani Dehury was lying dead in the courtyard of Chemutu Dhamudia and near her dead body her ten years old son was lying unconscious and was about to die. Puni Dehury (P.W.2) another daughter of Sapana Dehury and Fulamani was present there. From her, Abhimanyu Dhamulia (P.W.1) came to know that appellant Suka Palei

fled away after assaulting her mother Fulamani Dehury and brother Ramesh. She further reported before P.W.1 that appellant Suka Palei assaulted her mother by an axe and crushed the head of her brother by a stone. Some of the villagers took Rasmesh to the hospital and Abhimanyu Dhamulia (P.W.1) came to Nayakote Police Station to lodge the report. On the basis of the report lodged by Abhimanyu Dhamulia(P.W.1), investigation was taken up by the I.O. (P.W.10). On completion of investigation, he filed charge-sheet implicating the appellant Suka Palei implicating him in offence under Section 302, I.P.C.

3. Prosecution has examined ten witnesses to prove the charge. P.W.2 is a witness to assault on her mother Fulamani and Ramesh. P.Ws.1, 4 and 5 are witnesses to the occurrence relating to assault on deceased Sapana Dehury. P.W.3-Nabati Dehury, another daughter of deceased Sapana Dehury is a post occurrence witness. P.W.9-Hengara Munda is a witness to seizure of the weapon of offence, i.e. axe (M.O.-I) with which Fulamani was assaulted and the stone (M.O.II) with which Sapana Dehury was assaulted. P.W.6 is the Medical Officer, who conducted P.M. Examination on the dead body of Fulamani. P.W.7 is the Medical Officer, who conducted P.M. Examination on the dead body of Sapana Dehury. P.W.8 is the Medical Officer, who conducted P.M. Examination on the dead body of Ramesh Dehury. P.W.10 is the Investigating Officer.

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

4. Learned trial court on the basis of the evidence on record found the appellant guilty under Section 302, I.P.C. on three counts and sentenced him to suffer death penalty.

5. Learned counsel for the appellant raises the following contentions on merit of the appeal:

(i) Puni Dehury (P.W.2) being the daughter of deceased Fulamani and sister of deceased Ramesh and she being a highly interested witness, her evidence should not have been relied on to return the finding of guilt as against the appellant.

(ii) There are discrepancies in the evidence of P.Ws.1, 4 and 5, which if taken into consideration, charge against the appellant does not sustain.

6. Mr. B.P. Pradhan, learned Additional Government Advocate supports the impugned judgment and order of sentence.

7. Puni Dehury is a girl aged about 14 years. She cannot be held to be an interested witness only on the ground of her relationship with the deceased persons when her presence at the spot at the time of occurrence is not at all doubtful. The occurrence having happened in the month of December, it was in the winter season and Puni Dehury (P.W.2) has satisfactorily explained as to how she along with her brother and mother were there in the courtyard of Chemutu Dhamudia, who is the elder brother of her father at the time of occurrence. There is no effective cross-examination of P.W.2 to discredit her sworn testimony on the ground of interestedness. So far as discrepancies in the evidence of P.Ws.1, 4 and 5 are concerned, learned counsel for the appellant is not in a position to bring about any discrepancy which would strike at the root of the prosecution case affecting the ring of truth surrounding the same. Rather, it is fairly submitted at the Bar that in view of clinching evidence of P.Ws.1, 2, 4 and 5, there is no escape from the conclusion that it was the appellant Suka Palei, who had committed murder of deceased Sapana Dehury, Fulamani Dehury and Ramesh Dehury. Learned counsel for the appellant strenuously submits that though she does not have sufficient ground to dispute the conviction of the appellant under Section 302, I.P.C., the sentence recorded by leaned Sessions Judge is however bad in law. She relied on a catena of decisions to substantiate her contention to the effect that in all fitness of things it is a fit case where the convict Suka Palei should have been sentenced to suffer life imprisonment. She also draws our attention to various mitigating circumstances including illiteracy on the part of the appellant and lack of awareness on his part and contended that the case is not a rarest of rare case where death sentence should have been awarded.

8. Learned Additional Government Advocate on the other hand relied on decision of the Hon'ble Supreme Court in the case of **Dayanidhi Bisoi v. State of Orissa**; 2003 (9) SCC 310, **Saibanna v. State of Karnataka**; 2005 (4) SCC 15 and **Renuka Bai v. State of Maharashtra**; 2006 (7) SCC 442 to contend that the appellant has rightly been sentenced to suffer death penalty. All the decisions relied on by learned counsel for the parties have been dealt with in detail in the case of **Des Raj v. State of Punjab**; JT 2007 (11) SCC 516.

9. Hon'ble Supreme Court in the case of **Rajendra Prasad v. State of U.P.**; 1979 (3) SCR 78 dealt with the question whether the number of persons killed has a bearing on the sentence to be imposed. Hon'ble Supreme Court held that neither the shocking nature of the crime nor **the number of murders committed** was the criterion to determine whether death sentence should be imposed. It was held tha t the special reasons

necessary for imposing death penalty must not relate to the crime as such but to the criminal. In **Dalbir Singh v. State of Punjab**; 1979 (3) SCR 1059, the Hon'ble Bench which decided **Rajendra Prasad**, while following **Rajendra Prasad**, put the matter in somewhat better perspective. It held:

> "Counting the casualties is not the main criterion for sentencing to death, nor recklessness in the act of murder. The sole focus on the crime and the total farewell to the criminal and his social-personal circumstances mutilate sentencing justice."

10. In the celebrated case of **Bachhan Singh v. State of Punjab**; 1980 (2) SCC 684, the Constitution Bench of Hon'ble Supreme Court however did not agree with the decision of **Rajendra Prasad** that the special reasons necessary for imposing death penalty "**must relate not to the crime as such but the criminal**". It held that for making the choice of punishment or for ascertaining the existence or absence of special reasons, the court must pay due regard **both to the crime and the criminal**. Thus, the number of persons killed when coupled with the shocking nature of other features of the crime, can certainly furnish the grounds for choice of punishment. Even if only one person is killed, the gruesome or shocking nature of the crime and/or the motive for the murder may make it the rarest among rare cases deserving death penalty. On the other hand, murder of even two or three persons may not invite death penalty where there is no premeditation, no cruelty or torture of the victim or where the act is not diabolic. In this context, Hon'ble Supreme Court in the case of **Desh Raj** (supra) has referred to the case of **Lehna v. State of Haryana**; 2002 (3) SCC 76, which runs as follows:

> "It is true three lives have been lost. But at the same time, the mental condition of the accused which led to the assault cannot be lost sight of. The same may not be relevant to judge culpability, but is certainly a factor while considering question of sentence. There is no evidence of any diabolic planning to commit the crime, though cruel was the act. Deprived of his livelihood on account of the land being taken away, the accused was, as the evidence shows, exhibiting his displeasure, his resentment. Frequency of the quarrels indicates lack of any sinister planning to take away lives of the deceased. The factual scenario gives impressions of impulsive act and no planned assaults. In the peculiar background, death sentence would not be proper. A sentence of imprisonment for life will be more appropriate."

11. In **Bachhan Singh** (supra), Hon'ble Supreme Court while upholding the constitutional validity of the provision for penalty of death for murder, indicated the broad criteria which should guide the courts in the matter of sentencing a person convicted of murder under section 302, I.P.C. The Hon'ble Court held thus:-

> "As we read sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that **for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal**. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. **In a sense, to kill to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist**.
>
> But this much can be said that in order to qualify for inclusion in the category of 'aggravating circumstances' which may form the basis of 'special reasons' in section 354(3), **circumstance found on the facts of a particular case must evidence aggravation of an abnormal or special degree**.
>
> It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in section 354(3), viz., that for persons convicted of murder, **life imprisonment is the rule and death sentence an exception**. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. **That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed**."
>
> **(Emphasis supplied)**

12. In **Machhi Singh v. State of Punjab;** 1983 (3) SCR 413, Hon'ble Supreme Court addressed the issue of practical application of the 'rarest of the rare case' rule laid down in **Bachan Singh**:

> "...every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it..... Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. **The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime....**"
>
> **(Emphasis supplied)**

13. Hon'ble Supreme Court recognized that special reasons attracting death penalty may relate to manner of commission of murder, or the motive for murder, the abhorrent nature of the crime or the magnitude of the crime, or even the personality of the victim. The Hon'ble Supreme Court gave the following illustrations though not exhaustive:

(a) **Manner of commission of murder :**

When the murder is committed in an extremely brutal grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. (Examples : setting a house ablaze to roast alive the victim inside; subjecting the victim to inhuman acts of torture or cruelty to bring about his death; cutting the body of the victim into pieces or dismembering the body in a fiendish manner).

(b) **Motive for commission of murder :**

When the murder is committed for a motive which evinces total depravity and meanness. (Examples: murder by hired assassin for money or reward; or cold-blooded murder for inheriting a property to

gain control over property of a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust; murder is committed in the course for betrayal of the motherland).

(c) **Anti-social or socially abhorrent nature of the crime :**

When the murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arose social wrath. Or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(d) **Magnitude of the crime :**

When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality are committed.

(e) **Personality of victim of murder :**

When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a public figure generally loved and respected by the community.

14. Hon'ble Supreme Court in **Des Raj's** case in paragraph 6 has held thus:

"6. The following guidelines emerging from Bachan Singh (supra) and Machhi Singh (supra) will be of assistance to decide whether death sentence is warranted, on the facts and circumstances of a case :

(i) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant facts and circumstances of the crime.

(ii) There must be special reasons for imposing the sentence of death. Except in gravest cases of extreme culpability, the extreme penalty of death should not be inflicted. The circumstances of the crime should leave no alternative but to impose death sentence even after

according maximum weightage to the mitigating circumstances. In short death penalty is warranted only in the rarest of rare cases.

(iii) A balance-sheet of aggravating and mitigating circumstances has to be drawn up. The circumstances of the 'offender' as also the circumstances of the 'crime' should go into such balance sheet. Only when the aggravating circumstances overwhelmingly outweigh the mitigating circumstances, the court should consider the option of death penalty."

15. Applying the above principles, it is seen in the present case that this is not a case where murder was committed to satisfy any greed or lust. This is not a case involving cruelty to or torture of the victim. The appellant seems to have acted in an impulsive manner on being guided by the blind belief that his son has been affected by witchcraft practised by deceased Sapana Dehury. This is not a case where the act is brutal, diabolic or revolting viewed from the sense of a prudent man. The appellant has no bad antecedent nor he is a hard core criminal nor an anti-social nor an anti-national element. As found from the postmortem reports the appellant has mounted the minimum assault though on vital parts of the body. So far as the attack on Fulamani and Ramesh is concerned, it occurred in a span of few minutes and Ramesh might be a victim as he was there with Fulamani. To top it all, the appellant was illiterate, rustic and a believer in blind faith. It is an irony that after so many years of independence, the State has not been able to create awareness among such tribal people to defeat the crime of witch hunting, which is rampant in tribal area. An illiterate and rustic when influenced by blind faith are bound to become impulsive in his act and he is bound to become mad to complete an act, which in his sense of right and wrong is right. Applying the aforesaid principle, therefore, there can be no doubt that this is not a case which calls for imposing of death sentence being a rarest of rare case, if we give due importance to the mitigating circumstances, discussed supra. On a careful balancing of the aggravating and mitigating circumstances, we find that in spite of the gravity of the culpability of the appellant, the aggravating circumstances as noticed and enumerated by the trial court do not outweigh the mitigating circumstances much less overwhelmingly.

16. Learned Additional Government Advocate has relied on some cases, out of which in the case of **Dayanidhi**, the accused who was in financial difficulties, visited the house of the deceased, enjoyed their hospitality and during night when they were asleep, stabbed and killed the entire host family of three (husband, wife and their three years child) without

provocation and stole the valuables. In the case of **Saibanna**, the appellant who was released on parole, while serving the sentence of life imprisonment, suspected the fidelity of his wife and assaulted her and their minor child with a hunting knife. He inflicted as may as twenty-one injuries on his wife and six injuries on his minor child. As a consequence, both his wife and daughter died. In the case of **Renuka Bai**, the appellant along with two others kidnapped several minor children, used them for committing thefts and other illegal activities and killed them when they were no longer useful. As many as thirteen children were kidnapped and nine out of them were killed in between 1992 and 1996. The facts of the aforesaid cases are therefore distinguishable so far as facts obtained on record in the present case.

17. We, therefore, allow this appeal in part. While confirming the conviction under Section 302 I.P.C., we modify the sentence of death imposed on the appellant to one of life imprisonment.

18. The DSREF is accordingly answered in negative and the JCRLA is allowed in part.

Appeal allowed in part

DSREF dismissed.

2013 (II) ILR - CUT- 91

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

W.P.(C) NO.2611 OF 2012 (Dt.29.01.2013)

PRAXAIR INDIA PVT. LTD. ……..Petitioner

.*Vrs*.

SUB-COLLECTOR AND
S.D.M. ANGUL & ORS. ……..Opp.Parties

ODISHA DEVELOPMENT AUTHORITIES ACT, 1982 – S.16 (8)

Application U/s.16 of the Act for construction of a pump fill station – No decision taken by O.P.2 within two months – Another application U/s.16 (7) of the Act submitted through registered post –

After lapse of one month also no communication received from O.P.2 – Held, petitioner-company is entitled to the benefit U/s.16 (8) and has been accorded deemed against of permission for construction of the above plant. (Para 16)

Case law Referred to:-

2006 (II) OLR 277 : (M/s. Z. Engineers Construction (P) Ltd.-V- Bhubaneswar Development Authority & Anr.).

For Petitioner - M/s. Pami Rath, C. Muralidhar, I. Mohanty & Mr. R.K. Rath (Sr. Advocate)
For Opp.Parties - Addl. Govt. Advocate (for O.P.No.1)
M/s. Manoranjan Das & P.P. Mohanty, (For O.P. No.2).

S.K.MISHRA, J. In this case, the petitioner company has prayed for a direction to the opposite parties to accept the status of deemed grant of permission under Section 16(8) of the Orissa Development Authorities Act, 1982 (hereinafter referred to as the "Act") and further to direct the opposite parties not to interfere with the petitioner's lawful activities at the Pump Fill Station set up at Angul and to allow the petitioner to carry on the operations at the said Pump Fill Station. Finally, it has also prayed to quash Annexure-14, the letter issued by the Secretary, Talcher-Angul-Meramandali Development Authority, Angul directing the petitioner to stop the development activities.

2. The petitioner is engaged in the manufacture of Oxygen, Nitrogen, Argon and other products, in both gaseous and liquid form. It has set up air separation plants of huge capacity at various locations across India. The products manufactured in liquid form in those plants are taken to different Pump Fill Stations located at various locations throughout the country. At the Pump Fill Stations, the products in liquid form are filled into smaller cylinders, so as to enable the use of these products by smaller consumers. The only activity the petitioner carries out at these Pump Fill Stations is the filling of Oxygen, Nitrogen and Argon from bulk containers into small cylinders. The petitioner has set up and been operating these Pump Fill Stations at different locations in due compliance with all requirements of law, without any safety related issue for several years now.

3. With an intention to set up a Pump Fill Station at Angul, the petitioner purchased about 91 cents/decimals or 0.91 acres of land at Angul, vide sale

deed dated 25.04.2008, which has been converted for industrial use under Section 8A of the O.L.R. Act. The R.O.R. in respect of the said land issued in favour of the previous owner clearly indicates that the said land is meant for industrial use. The petitioner applied for and obtained all requisite approvals for the construction of the Pump Fill Station at the said land. The petitioner received the site lay out and construction approval from Petroleum and Explosives Safety Organization under the Government of India in Ministry of Commerce and Industry. The petitioner was granted consent to establish the Pump Fill Station from the Orissa State Pollution Control Board.

4. The village Panchayat of Balukata Gram Panchayat, through its Sarpanch also granted the permission to the petitioner for construction of the Pump Fill Station on 30th August, 2008, by way of a resolution passed at the village committee meeting held on 15th August, 2008. A clearance certificate about the compliance of all fire prevention measures and the good conditions of the same has also been issued by the District Fire Office, Fire Station, Angul on 23.11.2011. The Directorate of Factories and Boilers, Odisha has also granted approval for the lay out plan and building plan of the Pump Fill Station.

5. The petitioner on 30.09.2008 applied to opposite party no.2 by making an application under Section 16 of the Act seeking permission for construction of the plant, accompanied with the required fees and documents. The petitioner was not communicated with any decision either of grant or refusal of permission within two months from the date of the receipt of the application. The petitioner again on 30.11.2008 made another application under Section 16(7) of the Act drawing attention of the Vice-Chairman of the Authority with regard to its application. Such application was sent through registered post. Even after lapse of one month of receiving such letter, no communication was received from opposite party no.2.

6. Thus, it is submitted by the learned counsel for the petitioner that by operation of Section 16(8) of the Act, the petitioner has been accorded deemed grant of permission of the construction. It is clear that opposite party no.2 has received the second application on 04.12.2008 and until 04.01.2009, there was absolutely no communication from opposite party no.2. Thus, it is argued that deemed permission was granted from 05.01.2009 under Section 16(8) of the Act.

7. On such premises, the petitioner commenced and completed construction of the Pump Fill Station in due compliance with the requirement of law. Opposite party no.1 on 01.10.2011 issued a letter to produce all relevant documents to show that the prior approval of all authorities have

been obtained by the petitioner. On 01.11.2011, the petitioner appeared before opposite party no.1 and submitted all the documents as required on 9.11.2011. Yet the opposite party no.1 on 15.11.2011 issued an order to stop construction on the ground that the petitioner has not obtained prior permission of opposite party no.2. The petitioner made a representation to opposite party no.1 stating therein that permission from opposite party no.2 is deemed to have been received by the petitioner under Section 16(8) of the Act. In the said representation, the petitioner has also submitted the Record of Rights of the land and has mentioned that the mutation for change of ROR and recording of their name in the ROR is going on. The petitioner also submitted details of all the approvals obtained till date and also provided a complete description of the activity that it would carry on at its Pump Fill Station at Angul and as to how the same is not going to be hazardous or explosive in nature. However, the opposite party no.1 has failed to appreciate this aspect of the case and issued the order not to carry on the activities in this area. Hence, this writ petition is filed with the prayer as stated above.

8. Opposite party no.1 has filed a counter affidavit, *inter alia*, pleading that the petitioner could be able to obtain the site lay out and construction approval from Petroleum and Explosive Safety Organization under the Government of India, Ministry of Commerce and Industry after notice issued vide No.3417 dated 01.10.2011. The construction work was going on before the notice issued to the petitioner organization. It is further submitted that N.O.C. has not been obtained from the District Administration before granting consent to establish the Pump Fill Station by Orissa State Pollution Control Board, Odisha. It is further submitted that the petitioner Organization could not be able to show the building permission from Talcher-Angul-Meramandali Development Authority, Angul (TAMDA). The opposite party no.1 came to know from the grievance petition filed by the nearby villagers to the Collector, Angul, which has subsequently been forwarded to opposite party no.1 vide Memo No.1625/PGC. dated 27.08.2011, that no approval has been accorded in favour of the petitioner as it has not been considered by 5th Building Permission Committee held on 18.02.2009. Since the Gas Industry is explosive in nature and may cause damage to the people in the adjacent residential area, the case was not considered and no approval has been given by TAMDA. Another grievance petition has also been filed by the adjacent villagers before the Chief Minister's Grievance Cell, which has also been forwarded to opposite party no.1. The nearby villagers are alleging time and again against the proposed Gas Plant anticipating any untoward situation due to such explosive Gas Plant. Opposite party no.1 issued a notice to the petitioner to appear on 10.10.2011 at 10.30 A.M. with all the

relevant documents. But the petitioner neither appeared on the date fixed nor showed any document before the opposite party no.1 on the date and time fixed. After lapse of one month of the notice, the petitioner appeared on 09.11.2011. It is submitted that the petitioner has been asked verbally to produce the NOC obtained from the District Administration. It is submitted that the petitioner should have obtained the NOC from the District Administration and building permission from the concerned authority as well before construction of such gas plant. But without obtaining any building permission from the concerned authority, the petitioner constructed the Explosive Gas Plant at its own sweet will.

9. On the basis of the grievance petitions filed before the Collector and the Chief Minister, which were forwarded to opposite party no.1 by the District Office to sort out the grievance of the villagers, a notice was issued to the petitioner to appear and produce the relevant documents for establishment of Gas Plant on 10.10.2011 vide letter no.3417 dated 01.10.2011 and the petitioner has failed to appear and produce the relevant documents on the date fixed. So as to avoid any untoward situation in the locality, opposite party no.1 has issued one notice vide no.3888 dated 15.11.2011 to stop such illegal construction unless and until necessary clearance has been obtained from all concerned. It was, therefore, prayed that the writ petition be dismissed.

10. The petitioner has filed a rejoinder affidavit to the counter affidavit filed by opposite party no.1. In clarifying the position, it is submitted that it is not the requirement of law that prior to applying for consent from State Pollution Control Board a person has to obtain NOC from District Administration. The petitioner had applied for the consent from the Pollution Control Board with all the documents and information required for such an application and based on the same the consent was granted to the petitioner. The Pollution Control Board never asked for such a requirement to obtain N.O.C. from District Administration and the petitioner believes that there is no such requirement under law to seek an N.O.C. from the District Administration.

11. In course of hearing of the writ petition, learned counsel for the petitioner relies upon the reported case of ***M/s. Z. Engineers Construction (P) Ltd. v. Bhubaneswar Development Authority and another,*** 2006 (II) OLR 277 and submits that under Sub-section (8) of Section 16 of the Act, the petitioner shall be deemed to have received permission of the Development Authority and, therefore, the order passed by the Sub-Collector and the letter issued by the TAMDA are illegal.

12. Section 16 of the Orissa Development Authorities Act, 1982 provides for application for permission. Sub-section (1) provides that any activity of development should be preceded by an application in writing to the Authority for permission in such form and containing such particulars and accompanied by such documents as may be prescribed by regulations. Sub-section (2) provides that every application under Sub-section (1) shall be accompanied by such fee as may be prescribed by rules. Sub-section (3) provides that on receipt of any application for permission under Sub-section (1), the Authority shall furnish the applicant with a written acknowledgement of its receipt and after making such enquiry as it considers necessary in relation to any matter specified in the development plan in operation or in relation to the regulations pertaining to planning and building standards or in relation to any other matter as may be prescribed under regulations, shall by order in writing, either grant the permission, subject to such condition, if any, as may be specified in the order or refuse to grant such permission. Sub-section (4) provides for granting of permission subject to conditions or refusing permission should be accompanied by the statement or grounds for imposing such restrictions or such refusal, as the case may be. Sub-section (5) provides that every permission granted under Sub-section (3) with or without condition shall be in such form, as may be prescribed by regulations. Sub-section (6) provides that every order under Sub-section (3) shall be communicated to the applicant in such manner, as may be prescribed by regulations.

Sub-section (7) of Section 16 provides that if the authority does not communicate its decision either granting or refusing permission to the applicant within two months from the date of receipt of the application by the Authority, the applicant shall in the form prescribed by regulations draw the attention of the Vice-Chairman of the Authority with regard to his application, by registered post.

Sub-section (8) provides that if, within a further period of one month from the date of receipt of the application drawing such attention, as mentioned in Sub-section (7), the Authority does not communicate its decision, either granting or refusing permission, such permission shall be deemed to have been granted to the applicant on the date immediately following the date of expiry of three months' period. In proviso, it has been laid down that in computing the period of two months under Sub-section (7) and further one month under Sub-section (8), the period in between the date of requisitioning any further information or documents from the applicant and the date of receipt of such information or document from the applicant shall be excluded.

13. It is argued by the learned counsel for the petitioner that there has been a deemed sanction of the petitioner's permission for construction of the plant and, therefore, Talcher-Angul-Meramundali Development Authority cannot now issue an order for stopping construction/operation of the Pump Fill Station on the pretext of non-existence of sanction by it.

14. In the aforementioned case of ***M/s. Z. Engineers Construction (P) Ltd. v. Bhubaneswar Development Authority and another*** (supra), Division Bench of this Court has held that the deeming provision in Sub-section (8) and the time limit in Sub-section (7) has been introduced with the dominant purpose to see that the applications which are filed for grant of sanction by the applicants do not remain pending with the authorities for an unreasonably long period. On the other hand, the legislative intention is that such an application should receive immediate attention of the sanctioning authority. So the deeming provision introduced in Sub-section (8) of Section 16 of the Act is meant to expedite the entire process of sanction under the threat of a deemed sanction. Further, in order to attract the deeming provision of Sub-section (8), their Lordships have further held that the first condition is that it has to be in the form prescribed by the Regulation and the second condition is that the application has to be sent by registered post. Thus, it is necessary to see whether in this case the two conditions have been fulfilled or not.

15. Annexure-9 is the notice sent under Section 16 of the Orissa Development Authorities Act drawing attention of the Vice-Chairman of TAMDA about the application for permission made by the petitioner-company. Regulation 9 of the Talcher-Angul-Meramandali Development Authority (TAMDA), Angul (Planning and Building Standards) Regulation, 2011 provides for permission and the method to be adopted in disposing of the applications. Clauses 5 and 6 are relevant for this purpose, which read as follows:

"(5) If the authority, does not communicate its decision either granting or refusing permission to the applicant within 60 days from the date of receipt of the application by the Authority, the applicant shall draw the attention of the Vice-Chairman of the Authority with regard to his application, by registered post in Form-III. The Planning Member shall within the fifteen days from the date of receipt of notice in Form-III place the details of the case before the Vice-Chairman.

(6) If, within a further period of one month from the date of receipt of the application drawing such attention as mentioned in sub-regulation (5)

above, the authority does not communicate its decision, either granting or refusing permission, such permission shall be deemed to have been granted to the applicant on the date following the date of expiry of the three months period."

It is further seen that Form-III of the Regulations is the specimen of the application for drawing of attention under Sub-section (7) of Section 16 of the Orissa Development Authorities Act, 1982. The petitioner has sent the said notice in the prescribed format and it also appears from Annexure-9 at page 48 that the document has been sent through registered post and it has been received by the office of the Vice-Chairman of the TAMDA on 04.12.2008. It may be noted here that the TAMDA has not filed any counter affidavit denying the assertion of the petitioner that a notice drawing attention of the Vice-Chairman, TAMDA was sent by office on 04.12.2008. Since all the technical requirements have been satisfied in this case, this Court finds no impediment to come to a conclusion that the benefit of the deemed provision should be extended to the petitioner-company. Therefore, the order issued by the TAMDA through its Secretary on 08.02.2012 asking the petitioner to stop further construction claiming the construction to be unauthorized is illegal.

15. It is further noted that as far as carrying an industrial activity is concerned, the petitioner has obtained the no objection certificate from the Pollution Control Board. The nature of the land has been changed to industrial purpose and in such view of the matter, the District Authority has no jurisdiction to stop the operation of the petitioner company. Accordingly, the order passed by the Sub-Collector and Sub-divisional Magistrate, Angul is illegal.

16. Hence, the writ application is allowed. Annexures 10 and 14, the notice issued by the Sub-Collector and Sub-Divisional Magistrate, Angul and the order of the Secretary, TAMDA, Angul respectively are hereby quashed. The opposite parties are directed to accept the status of the petitioner as having granted deemed permission under Section 16(8) of the Orissa Development Authorities Act, 1982.

Writ petition allowed.

2013 (II) ILR - CUT- 99

M. M. DAS, J.

W.P.(C) NOS. 457 & 3613 OF 2010 (Dt.20.06.12)

THE MANAGEMENT OF EXECUTIVE ENGINEER, JAJPUR IRRIGATION DIVISION,JAJPUR. ……..Petitioner

.Vrs.

THEIR WORKMEN NUMBERING 89 & THROUGH JAJPUR IRRIGATION N.M.R. EMPLOYEES UNION. JAJPUR. ………Opp.Party

INDUSTRIAL DISPUTES ACT, 1947 – S.25-F

Termination of workmen – Eighty nine N.M.R. employees working during 1985 and 1996 – They have worked more than 240 days in one calendar year – Letter of termination indicating reasons have not been served on them – They are entitled protection U/s.25-F as well as back wages – Held, petitioner-management is directed to reinstate the available N.M.R. employees from where they were retrenched – They shall be paid Rs.30,000/- each as lump sum compensation in lieu of back wages. Para 13)

(**Case laws Referred to:-**

1.69 (1990) CLT 357 : (Shyam Sundar Rout-V- OSRTC & Ors.)
2.AIR 1967 SC 1206 : (National Iron & Steel Co. Ltd. & Ors.-V- State of West Bengal)
3.(2010)9 SCC 126 : (In-charge Officer & Anr.-V- Shankar Shetty)
4.2003(97) FLR 110 : (Promod Jha & Ors.-V- State of Bihar & Ors.).
5.AIR 1964 SC 477 : (Syed Yakoob-V- K.S. Radhakrishnan & Ors.)
6.(2009)15 SCC 327 : (Jagbir Singh –V- Haryana State Agriculture Mktg. Board)
7.(2010)6 SCC 773 : (Telegraph Department-V- Santosh Kumar Seal).
8.2008(Supp-1) OLR 637 : (M/s. Bhubaneswar Electrical Division (GRIDCO) -V- The General Secretary, OSEB Sramik Mahasangha & Anr.).

For Petitioner - Addl. Govt. Advocate.
For Opp.Party - M/s. S.K.Mishra & P.K.Mohapatra.

M.M. DAS, J. Both the aforementioned writ petitions arise out of one industrial dispute. W.P.(C) No. 457 of 2010 has been filed by the

Management and W.P.(C) No. 3613 of 2010 has been filed by the Union representing the workmen, for which both the cases were heard together and disposed of by this common judgment.

2. 89 workmen working under the Management of Executive Engineer, Jajpur Irrigation Division, Jajpur as NMR workers in between 1985 and 1996 having been intimated by the management that their services are no more required with effect from 21.11.2003 afternoon raised an industrial dispute being represented by NMR Employees Union, Jajpur (for short 'Union'). Conciliation having failed and failure reports submitted to the appropriate authority, a reference under Sections 10 and 12 of the Industrial Disputes Act, 1947 (hereinafter referred to as 'The I.D. Act') was made to the ndustrial Tribunal, Bhubaneswar, to the following effect:

> "Whether the action of the Executive Engineer, Jajpur Irrigation Division, Jajpur by terminating the services of Sri Malay Kumar Senapati and 88 N.M.R. employees (as per list enclosed to the order of reference) with effect from 21.11.2003 of his Division is legal and/or justified? If not, what relief they are entitled to?"

3. Respective parties filed their statement of the case and written statement and led evidence in support of their cases. The Tribunal by the impugned award dated 8.7.2009 passed in Industrial Dispute Case No. 8 of 2004 on appreciating the materials before it, holding that the retrenchment of the second party-members (workmen) is not as per the requirement of law, directed the management to absorb/reinstate the second party-members under its Division in a phased manner according to their seniority, which shall be prepared again basing on all documents with scope to the Union to have their say in the matter, by placing proper documents. The Tribunal clarified that the exercise of absorbing the second party-members in the management concerned be completed within a period of three months from the date of the award. Being aggrieved by the above award, the management has preferred W.P.(C) No. 457 of 2010. The workmen being aggrieved by non-grant of back wages, have preferred W.P.(C) No. 3613 of 2010 challenging such omission in the award.

4. The case of the workmen before the Tribunal was that all the 89 workmen working under the management of Jajpur Irrigation Division, Jajpur (hereinafter referred to as 'the Management') were being deployed in different sections of the said Division. All of themwere engaged as N.M.R. workers in between 1985 and 1996 and during course of their employment, they performed various duties, such as, digging of earth for canal,

maintenance, office clerical works, driving of the vehicles, operating pumps and motors, carpentry, watch and ward duty etc., most sincerely and to the utmost satisfaction of their employer. During course of employment, there was never any charge-sheet drawn up against any one of them nor they have faced any proceeding for any misconduct. All of a sudden, while they were performing their duties, the management without any reason and rhyme informed the workmen that their services are no more required with effect from 21.11.2003 afternoon. The further case of the workmen was that even though they were resent and performing their respective duties on 17.11.2003, no termination letter indicating the reasons therefor was served on any one of them and on 21.11.2003, they were refused employment. They claimed that they have worked for more than 240 days in one calendar year under the management and were entitled to the protection of the provisions of Section 25-F of the I.D. Act, but the management contrary to the said provisions took the action against them in an arbitrary and whimsical manner. They also alleged that he management has contravened the provisions of Sections 25-G and 25-H of the I.D. Act inasmuch as without a valid gradation list/seniority list of the workers of the Division, the termination of the employment of the workmen was effected and consequently after effecting such termination, the management allowed some junior employees to continue in employment. The workmen further alleged that prior to the termination of employment of the workmen, there was a constant demand on behalf of the workers for non-payment of their dues for last seven months and for payment of wages at revised rates and in that matter, some of the workmen approached the State Administrative Tribunal for regularization of their services for which the management being vindictive towards them and to avoid such liabilities, terminated their services. It was the further case that when the Division was running with less number of staff as pointed out by the Executive Engineer in his letter no. 3417 dated 20.5.2002, the retrenchment of the workmen without considering their deployment in required places is unjustified, uncalled for and can be construed as a colourable exercise of power. When the Governmentof Orissa in Water Resources Department vide its letter dated 0.10.2003 has allowed continuance of NMR and DLR personnel of ifferent categories engaged after 12.4.1993 in some other Divisionsof the State basing on the requirements, the management instead of taking similar decision in respect of its Division by deploying the workmen to the places where work was required, malafidely retrenched them without due application of mind in an arbitrary manner. The workmen pleaded that after being terminated, they are not employed gainfully anywhere and are still unemployed, living in penury having no scope to support their families. The workmen, therefore, prayed for their reinstatement in service with full back wages and other consequential benefits.

5. The management contested the claim of the workmen and filed their written statement before the Tribunal pleading, inter alia, that for the self-same cause, the workers having approached the State Administrative Tribunal in O.A. No. 1567 of 2003, the Industrial Tribunal has no jurisdiction to adjudicate the dispute. It was specifically pleaded that keeping in view the decision of the Government, 89 workmen who are N.M.Rs/D.L.Rs. have been retrenched with effect from 21.11.2003, those who were engaged prior to 12.4.1993 i.e. the date of promulgation of ban order by the Government and such retrenchment was effected after receiving clarification from the District Labour Officer and on complying with the provisions embodied in Section 25-F of the I.D. Act. It was further pleaded that before effecting retrenchment, the seniority list after due verification was issued to the Union Secretary on demand vide letter dated 10.7.2003 and as such, the allegations made on that score are baseless. According to the management, all the workers were served with the retrenchment order dated 17.11.2003 through the Assistant Engineer under whom they were working. All of them having been paid their retrenchment benefits which includes all back wages, retrenchment compensation, pay in lieu of one month notice and gratuity as defined under Section 25-F of the I.D. Act, they are not entitled to any relief in the dispute case. The management specifically denied that the juniors to the workmen are continuing in employment after effecting retrenchment of the present disputants. In that connection, it was averred that some workmen in essential posts, like Pump Driver, Jeep Driver, Electrician, Mechanics etc., possessing technical experience, have been allowed to continue under other managements as per the provisions of the Act, their services being essential for the interest of the business. In the above premises, the management prayed that the reference should be answered in the negative against the workmen.

6. Considering the respective cases of the parties as made out before the Tribunal, the Tribunal upon hearing the parties who adduced both oral and documentary evidence, came to the conclusion in the impugned award, as already mentioned. During course of hearing of these writ petitions, an affidavit was filed on behalf of the NMR Employees Union representing the workmen in W.P.(C) No. 457 of 2010, inter alia, stating that in a meeting held on 1.11.2011 by the Principal Secretary to Government of Odisha, Department of Water Resources for finalization of re-engagement and posting of the retrenched work-charged employees, it has been decided to prepare a Data Base of NMR/DLR/Work-Charged employees of all the Irrigation Projects in the State. It has been further decided that the Data Base Panel should contain a list of fully submerged, partly submerged and other retrenched NMR/DLR/Work-Charged employees in respect of each

category of posts even if they are involved in court cases. The said decision was communicated by the Addl. Secretary to Government in its Department of Water Resources to the Engineer-in-Chief, Department of Water Resources, Orissa, Bhubaneswar and a general letter was also issued on 26.11.2011 by the Director, Personnel requesting all Chief Engineers for submitting information in respect of retrenched Work-Charged/NMR/DLR in a consolidated manner pertaining to the respective project/circle for preparation of their inter se seniority as desired by the Government in DOWR vide its letter dated 8.11.2011. The aforesaid two letters are quoted hereunder.

" Government of Odisha
Department of Water Resources.

No. FE-IV-Misc.105/2011 26902/WR, Bhubaneswar,
dated the 8.11.11.

From

Shri P. Pradhan,
Addl. Secretary to Government.

To

The Engineer-in-Chief,
Water Resources, Odisha, Bhubaneswar.

Sub: Re-engagement of the retrenched Work-Charged employees of R.I.P., Samal and R.D.P., Rengali belonging to partly sub-merged category.

Sir,

I am directed to say that in the meeting held by Principal Secretary to Government, Deptt. of Water Resources on 01.11.2011 for finalization of re-engagement & posting of the retrenched Work-charged employees belonging to partly submerged category, it has been decided to prepare a data base of retrenched NMR/DLR/ Work-charged employees of all irrigation projects in the tate. The data base panel should contain list of fullysubmerged, partly submerged and other retrenched NMR/ DLR/Work-charged employees in respect of each category of post even if they are involved in Court cases and continuing as NMR & DLR. Care should be taken to maintain inter-se seniority and wide publicity should be made before finalization of the list of above mentioned retrenched employees and ensure that a single such case should not be left out to prevent any kind of litigation in future.

You are, therefore, requested to prepare the data base scrupulously as per the above stipulations and furnish the same to this Deptt. at an early date for further necessary action.

Yours faithfully,
Sd/-
Additional Secretary to Government

Office of the Engineer-in-Chief, Water Resources, Odisha, Seeha Sadan, Keshari Nagar, Bhubaneswar.

Letter No. CSL-W/C-Rev-2/09-14972 (WE) Dated 26.11.11

From:

Er. Biswajit Mohanty,
Director Personnel.

To

All the Chief Engineer & Basin Manager/
Chief Engineer/Chief Construction Engineer/
Superintending Engineer and Director, Research/
Hydrometry/SS&DS.

Sub: Re-engagement of retrenched Work-Charged/ NMR/ DLR-Preparation of panel-reg.

Sir,

On the above subject, I am directed to request that the information in respect of the retrenched Work-charged/ NMR/DLR may please be furnished in a consolidated manner pertaining to the respective project/circle with dated signature in each page of the statement (both Hard Copy & Soft copy) in the proforma enclosed, so as to maintain a data base panel in this office for preparation of their inter-se-seniority as desired by Govt. in DOWR vide their letter No. 26902 dated 08.11.2011.

It may please be ensured that the information furnished in the desired proforma contains the names of allthe Work-charged/NMR/DLR who have been declared surplus for retrenchment and the list is free from any omission/commission, so as to avoid any legal complicacy in future.

The information (both Hard copy & Soft copy) should reach this office within 30th November, 2011 positively along with a certificate to the effect that "***The names of all the W/C /NMR/DLR who have been declared surplus for retrenchment have been incorporated in the list"***.

This may be treated as URGENT.

Yours faithfully,
Sd/-
Director, Personnel

7. On perusal of the impugned award, it appears that the Tribunal upon considering the respective cases and the materials available on record found that there was absence of evidence to show that the order of retrenchment was served on the workmen. Relying on the decision in the case of ***Shyam Sundar Rout –v- OSRTC and others***, 69 (1990) CLT 357, where this Court held that payment should be simultaneously complied with the order of retrenchment in order to constitute a single transaction, the tribunal found that no such order of retrenchment has been served on the workmen. The action of retrenchment was in violation of the provisions of the Act. Evidence led in support of the case of the management that in lieu of one month notice, wages for one month were paid to the retrenched workmen, was also not believed by the Tribunal due to want of particulars in the vouchers produced by the management under Exts. A, C and N series. The Tribunal, therefore, came to the conclusion that the management was duty bound to lead cogent documentary evidence clearly showing the amount paid to the workmen representing one month's notice pay; retrenchment compensation; arrear salary and gratuity, if any, of each individual workman. Payment of a lump sum amount without clarifying/substantiating the details of such payment made to the workmen cannot be said to be sufficient in compliance of the requirements of the Act. The Tribunal on the above basis found that there has been no proper compliance of the provisions of Section 25- F of the I.D. Act, which is mandatory. With regard to noncompliance of the provisions of Section 25-G of the I.D. Act, the Tribunal on considering the evidence adduced by the parties categorically found that the management has not based the order of retrenchment on a valid/proper gradation list to come to the conclusion that the workmen, who have been terminated/retrenched are junior most. Hence, the same is contrary to the provisions of Section 25-G of the I.D. Act. It also found that 23 numbers of N.M.Rs. in Prachi Division, Bhubaneswar who even joining after 12.4.1993 have been engaged by orders of the Government and are continuing.

8. Learned counsel for the management vehemently urged that as decided by the Supreme Court in the case of ***National Iron & Steel Co. Ltd. and others –v- State of West Bengal***, AIR 1967 SC 1206, offering or tendering the amount by the management to the workmen before the date of retrenchment or termination is sufficient compliance under the statute. In the present case, payments made to the workmen should have been held to be in sufficient compliance of the provisions of Section 25-F of the I.D. Act. Reliance was also placed by the management on the decision in the case of ***In-charge Officer and another –v- Shankar Shetty***, (2010) 9 SCC 126, in support of his contention that the petitioners (workmen) claim for full back wages as made out in W.P.(C) No. 3613 of 2010 is unsustainable.

9. Mr. Mishra, learned counsel for the workmen, on the contrary, submitted that no fault with regard to the finding of the Tribunal that the retrenchment of the workmen was illegal, can be found, as the Tribunal has discussed in detailed, the evidence adduced by the parties before it and placing reliance on the ratio of the decision in the cases of ***Promod Jha & others –v- State of Bihar and others***, 2003 (97) FLR 110 and ***Shyam Sundar Rout –v-OSRTC***, 69 (1999) CLT 357, has rightly found that there has been violation of the provisions of Section 25-F of the I.D. Act. He further submitted that this being a writ of certiorari, the Court while exercising jurisdiction under Article 226 of the Constitution is not required to enter into the questions of fact and the Court is not to act as a Court of appeal. He further contended that unless it is shown that there is any error of record or admissible and material evidence has not been admitted or inadmissible evidence affecting the findings has been admitted by the forum below, a writ of certiorari should not be issued. In support of his above contention, he relied upon the decision in the case of ***Syed Yakoob –v- K.S. Radhakrishnan and others***, AIR 1964 SC 477.

10. On perusing the judgments cited by the learned counsel for the respective parties, I do not find any necessity to reiterate the position of law which is well settled with regard to the exercise of jurisdiction of this Court under Article 226 of the Constitution for issuing a writ of certiorari against an order passed by any authority subordinate to the High Court. It is naïve to state that by now it is well settled that the writ Court while considering the question of issuance of a writ of certiorari, is not to act as if it is a Court of appeal and enter into the realm of disputed questions of fact unless the order impugned in such writ petition clearly disclose commission of error of record, admissible evidence, refused to be admitted into evidence or passed without jurisdiction. In the instant case, no such fault can be found with the impugned order to be interfered with by issuance of a writ of certiorari. This

Court further takes note of the fact that the Government in its Department of Water Resources has made a move for preparing and maintaining an inter se seniority list of NMRs or DLRs as well as Work-Charged employees working under the said Department in various projects either involved in court cases or retrenched, for finalization of the process of re-engagement and posting of such retrenched employees as per the letters quoted above. This Court, therefore, comes to the conclusion that by taking such decision, the Government has accepted the impugned award and there is no scope for the management to challenge the same.

Now coming to the question of payment of back wages as claimed by the workmen in W.P.(C) No. 3613 of 2010, this Court finds that law with regard to payment of full back wages when an order of reinstatement was passed in an industrial dispute in a reference made under the provisions of the I.D. Act, has in the meantime undergone radical change by the decisions of the Apex Court. Various aspects have been taken into consideration by the Supreme Court while laying down in the case of ***Jagbir Singh –v- Haryana State Agriculture Mktg. Board***, (2009) 15 SCC 327 as follows:

> "7. It is true that the earlier view of this Court articulated in many decisions reflected the legal position that if the termination of an employee was found to be illegal, the relief of reinstatement will full back wages would ordinarily follow. However, in recent past, there has been a shift in the legal position and in a long line of cases, this Court has consistently taken the view that relief by way of reinstatement with back wages is not automatic and may be wholly inappropriate in a given fact situation even though the termination of an employee is in contravention of the prescribed procedure. Compensation instead of reinstatement has been held to meet the ends of justice.
>
> xxx xxx xxx
>
> 14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25- F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

11. Following the decision in the case of Jagbir Singh (supra), the Supreme Court in the case of ***Telegraph Department – v- Santosh Kumar Seal****,* (2010) 6 SCC 773 held as follows:

> "11. In view of the aforesaid legal position and the fact that the workmen were engaged as daily wagers about 25 years back and they worked hardly for 2 or 3 years, relief of reinstatement and back wages to them cannot be said to be justified and instead monetary compensation would subserve the ends of justice."

12. The question with regard to entitlement of the workmen to full back wages for the period for which they were out of service due to illegal termination has also been exhaustively considered by this Court in the case of ***M/s. Bhubaneswar Electrical Division (GRIDCO) –v- The General Secretary, OSEB Sramik Mahasangha and another***, 2008 (Supp.-I) OLR 637, where this Court also took note of the several decisions of the Supreme Court and directed to pay 50% of the back wages from the date of retrenchment till the date of reinstatement without any interest. It is, therefore, clear that even when a termination/retrenchment is held to be illegal and reinstatement of a workman is directed, the workman is not entitled to full back wages as of right and the Court/Tribunal considering the facts and circumstances of the case may pass necessary orders'directing payment of a percentage of back wages or lump sum amount in lieu of back wages, as compensation.

Applying the law as it stands with regard to payment of back wages and considering the facts of the present case as well as the submission made by Mr. Mishra on behalf of the workmen, this Court finds that it would be just and proper to direct the management to pay compensation of Rs. 30,000/- (Rupees thirty thousand) each to the retrenched workmen, in lieu of back wages.

13. In view of the above, W.P.(C) No. 457 of 2010 stands dismissed with a direction to the petitioner-management to reinstate the disputant available workmen in their previous places as N.M.R. employees from where they were retrenched in a phased manner according to their seniority as per the list to be prepared in ccordance with the letters of the Government quoted above. Such exercise shall be completed within a period of three months hence. W.P.(C) No. 3613 of 2010 is disposed of by modifying the impugned award and directing that in addition to the directions issued/reliefs granted to the workmen as above, each of the workmen shall be paid Rs. 30,000/- (Rupees thirty thousand) as lump sum compensation, in lieu of back wages,

by the management. Such payments shall also be made within the period as stipulated above.

W.P.(C) No.457/2010 dismissed.
W.P.(C) No.3613/2010 disposed of

2013 (II) ILR - CUT- 109

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

W.P.(C) NO. 8628 OF 2011 (Dt.30.01.2013)

SARAT CHANDRA DAS ……….Petitioner

.Vrs.

ORISSA STATE WAREHOUSING CORPORATION ………Opp.Party

SERVICE LAW – Continuance of disciplinary proceeding against petitioner after retirement – Petitioner an employee in Odisha State Warehousing Corporation and he is governed under Odisha State Warehousing Corporation (Staff) Regulations 1985 – No specific provision in the Regulation for continuance of departmental proceeding after retirement – Held, disciplinary proceeding against the petitioner is quashed – Direction issued for payment of retiral benefits to him forthwith. (Paras 3,5)

Case law Relied on:-

(1999) 3 SCC 666 : (Bhagirathi Jena-V- Board of Directors, O.S.F.C. & Ors.).

Case laws Referred to:-

1.AIR 2003 SCW 2889 : (Chandra Singh-V- State of Rajasthan & Anr.)
2.(109)2010 CLT 12 : (Pratap Kishore Dash-V- High Court of Orissa).

For Petitioner - M/s. J. Mohanty & Pami Rath.
For Opp.Party - M/s. B. K. Sahoo & K.C. Sahoo.

M.M.DAS, J. The petitioner in this writ petition has sought for quashing the disciplinary proceeding bearing D.P. No.1 of 2009 initiated against him and also for quashing the order dated 17.3.2011 as at Annexure-7.

2. In order to appreciate the contentions raised by the parties, it is necessary to delineate the facts involved in this case in gist. The petitioner after joining in service in the Orissa State Warehousing Corporation (hereinafter referred to as the Corporation) on 7.5.1973 has served the Corporation in different capacity and has been superannuated from service on 30.4.2009. While in service as the Zonal Manager, Bhawanipatna, he was served with a memorandum of the charges under Regulation 19 of the Orissa State Warehousing Corporation (Staff) Regulation, 1985 (in short 'Staff Regulation') on 25.4.2009 vide Disciplinary Proceeding No.1 of 2009. Thereafter, additional charges were framed on 29.4.2009. The petitioner has averred that he was not supplied with documents upon which the employer relied upon in the disciplinary proceeding for which the petitioner repeatedly made request and as the documents were not supplied to him, he did not get any opportunity to explain the charges leveled against him. The petitioner also alleges that as the disciplinary proceeding was initiated just three days prior to the date of his superannuation, leveling such action is an out come of personal vendetta.

3. Mrs. Pami Rath, learned counsel for the petitioner contended that the Orissa State Warehousing Corporation (Staff) Regulation, 1985 which governs the employees of the Corporation does not specifically provide for continuation of the disciplinary proceeding against an employee after he is superannuation. The petitioner after being superannuated made several representations to the opposite party for release of the retrial dues, but the same has not been released till date. After being superannuated on 6.11.2010, the documents were supplied to the petitioner who received the same on 19.11.2010. The Enquiry Officer submitted a report on 6.11.2010, which was received by the petitioner on 19.11.2010 i.e. on the same date when he received the documents, in which the petitioner was found guilty of all the charges. The question raised in this writ petition is as to whether under the Staff Regulation, the disciplinary proceeding could not have continued after superannuation of the petitioner. In the case of ***Bhagirathi Jena –V- Board of Directors, O.S.F.C. and others*** (1999) 3 SCC 666. The Supreme Court, on facts, finding that the disciplinary proceeding was initiated against the appellant therein under Regulation 44 of the Orissa State Financial Corporation Staff Regulations, 1975 and charge-sheet was served on him on 22.7.1992, but the enquiry could not be completed against him till his retirement on 30.6.1995, held that no specific provision exists in the Orissa State Financial Corporation Staff Regulations, 1975 for deducting any amount from the provident fund consequent to any misconduct determined in the departmental enquiry, nor is there any provision for continuance of the departmental enquiry after superannuation. In the

absence of any such provisions, it must be held that the respondent-Corporation had no legal authority to make any reduction from the appellant's retiral benefits.

There is also no provision for conducting a disciplinary enquiry after the appellant's retirement, nor is there any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Holding thus, the Supreme Court concluded that once the appellant retired from service on 30.6.1995, there was no authority vested in the Corporation for continuing departmental enquiry even if for the purpose of imposing any reduction in retiral benefits payable to the appellant therein. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits.

The Orissa State Warehousing Corporation (Staff) Regulations, 1985 provides that the said Regulation shall apply to all the employees of the Corporation. "Employee" has been defined to mean a person who is in the whole time service of the Corporation but does not include a person employed by the Corporation on daily wages. Similarly, "Regular Employee" has been defined to mean an employee who has been declared to have completed the period of probation to the satisfaction of the appointing authority and is holding a post which has been declared as a regular post by the Board. Under Chapter-III, Regulation 1 provides that every employee shall retire on attaining the age of 58 years. In Chapter-V Regulation 18 under the heading ***"IMPOSITION OF PENALTIES AND DISCIPLINARY AUTHORITY".*** It is provided that where an employee is found guilty of breach of any of the Regulations or of any negligence, deficiency or indolence in the performance of his duties, or anything detrimental to the interest of the Corporation or any other act of misconduct, the penalty of dismissal from service amongst other penalties as prescribed there under may be imposed. There is absence of any provision in the Staff Regulation to continue a disciplinary proceeding after the employee is superannuated. As a matter of fact, from the definition clause, it is clear that an employee after being superannuated, the relationship of an employer and employee ceases and even if a disciplinary proceeding has been initiated when he was continuing as an employee, after superannuation, the relationship having severed and there being no provision to continue such disciplinary proceeding under the Regulation, continuation of a disciplinary proceeding after superannuation of an employee cannot be held to be legal and valid. On comparison, it is seen that Staff Regulation of the Corporation is in pari materia with the Staff Regulation of the Orissa State Financial Corporation, on the basis of which the judgment was passed by the Apex Court in the case of Bhagirathi Jena (supra). The above decision of the Supreme Court

as well as the decision in the case of ***Chandra Singh –V- State of Rajasthan and another,*** AIR 2003 SCW 2889, were relied upon by this Court in the case of ***Pratap Kishore Dash –V- High Court of Orissa***, (109) 2010 CLT 12 for holding that in the absence of any specific provision under the relevant rules, the disciplinary proceeding could not have been continued against the petitioner therein after his retirement. The Supreme Court has reiterated the views in a number of judgments delivered thereafter.

4. A counter affidavit has been filed denying the allegations made in this writ petition, but, however, with regard to the contention that the Staff Regulation do not provide for continuation of the disciplinary proceeding after superannuation of an employee, the same is not denied in the counter affidavit. However, it has been stated that since the enquiry is in process and it relates to financial loss to the Corporation, the like amount has been held up and other dues has been processed to be released in favour of the petitioner.

5. Law is, therefore, well settled that in the absence of any specific rule it would not be permissible to continue the disciplinary proceeding even if initiated during the period of service of an employee, after his superannuation and on that ground, payment of the retiral benefits to the superannuated employee cannot be withheld on the ground that if found guilty, money is to be recovered from him.

6. In view of the above, this Court unhesitating quashes the disciplinary proceeding initiated against the petitioner in its entirety and directs that all retiral benefits be paid to the petitioner forthwith. This writ petition is accordingly allowed.

Writ petition allowed.

2013 (II) ILR - CUT- 112

M. M. DAS, J.

CRLMC. NO. 3684 OF 2010 (Dt.04.02.2013)

MIDEAST INTEGRATED STEELS LTD. & ORS. ………Petitioners

.*Vrs.*

STATE OF ORISSA & ANR. ………Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.482

Complaint Case – Cognizance taken U/ss. 406, 468, 420, 422,34 I.P.C. – Dispute is basically Civil in nature – No prima facie material to find out that the offences for which cognizance taken have been committed in the instant case – Continuance of Criminal Proceeding will be nothing but an abuse of the process of law – Held, order taking cognizance as well as the complaint proceeding quashed.

(Para 14)

Case laws Referred to:-

1.AIR 1975 SC 1002 : (Superintendent & Remembrancer of Legal Affairs, West Bengal-V- Mohan Singh & Ors.)
2.(1992)1 SCC 217 : (K.M. Mathew -V- State of Kerala)
3.(2004) 7 SCC 338 : (Adalat Prasad -V- Rooplal Zindal & Ors.).
4.(2005) 1 SCC 568 : (State of Orissa-V- Debendra Nath Padhi)
5.(2008) 14 SCC 1 : (Rukmini Narvekar-V-Vijaya Satardekar & Ors.)
6.(2011) 3 SCC 351 : (Harshendra Kumar D.-V- Rebatilata Koley & Ors.)
7.AIR 1996 SC 2452 : (Central Bureau of Investigation, SPE, SIU (X),New Delhi -V-Duncans Agro Industries Ltd., Calcutta.).

For Petitioners - M/s. J.K. Das, Sr. Advocate, A.Pal & B.K. Mishra.
For Opp.Parties - M/s. Devashis Panda, D.P. Dhal & A.K. Parida (for O.P.No.2).

M. M. DAS, J. The petitioners in this Criminal Misc. Case assail the order dated 26.8.2000 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. Case No. 248 of 2000 taking cognizance of offence under sections 406/468/420/422/34 IPC and seek for quashing of the said proceeding in its entirety.

2. The opp. party no. 2 – IPICOL through its the then Secretary filed the aforesaid complaint case, i.e., I.C.C. Case No. 248 of 2000 before the learned S.D.J.M., Bhubaneswar alleging, inter alia, that the petitioners, who are accused in the said complaint case availed a short term loan of Rs. 25.00 crores from the complainant by securing the same on creating second charge on the assets of the company and by pledging of shares. Accordingly, certain shares of Mideast India Limited and MESCO Pharmaceuticals Ltd. were pledged. The complainant on verification found that out of the pledged shares, some of the share certificates were earlier pledged as security for the loan taken from the IDBI. It is also stated in the complaint petition that when clarification was sought for in this regard from

the accused persons, the accused – company by letter dated 23.1.1999 informed the complainant – IPICOL that the shares which were earlier pledged to the IDBI were pledged with the IPICOL due to error in the computerized data system which was discovered in September, 1998 and was duly intimated to IPICOL by the accused – company Mideast Integrated Steels Ltd. (for short, 'the MISL') on 9.10.1998, which according to the complainant, was not received by it. The MISL wanted to pledge 262.98 lakhs numbers of its shares in place of the shares which were already pledged with IDBI, but no pledge agreement has been executed so far. Basing on the above allegations, the complainant alleged that the accused persons have committed offences under sections 406/468/420/422/34 IPC. The learned S.D.J.M. took cognizance of the offences, as stated above, which is challenged before this Court.

3. It appears from the annexures made to the Criminal Misc. Case Petition that as per the 14th High Power Committee meeting of the complainant-IPICOL on 24.2.1999 and as per their advise, the petitioner no. 1 pledged further share of 46.65 lakhs against the erroneous double pledged shares and, accordingly, the petitioners submitted additional pledge of shares and also submitted additional security which amounted to Rs. 24.59 crores as per the market value of the shares and value of the assets. On 30.3.2000, the petitioner no. 1 executed the hypothecation deed/pledge letter showing pledge of shares as additional security to cover the loan amount of Rs. 17.00 crores. After taking the additional security and pledge, as stated above, the IPICOL filed Money Suit No. 8/42/145 of 2009/2004/2000 before the learned Civil Judge (Senior Division), Bhubaneswar for realization of an amount of Rs. 34, 54, 63, 014/- out of which Rs. 17.00 crores is towards the principal and the balance towards interest @ 30% per annum. The said suit was decreed on 15.10.2009. Challenging the said decree, the petitioners have preferred RFA No. 23 of 2010 before this Court and pursuant to the orders passed on 27.4.2011 and 11.5.2011 in the said RFA, the petitioners paid an amount of Rs. 17.00 crores to IPICOL towards the principal amount and the interest portion is now subjudice in the First Appeal. A further sum of Rs. 4.00 crores has been paid on 14.8.2012 pursuant to the direction in the said RFA No. 23 of 2010 in respect of OTS proposal.

4. It may be mentioned here that after the petitioners received the summons in the complaint case from the court of the learned S.D.J.M., Bhubaneswar, they filed an application to recall the order of cognizance along with the application under section 205 Cr.P.C. The learned S.D.J.M., however, by a common order dated 18.7.2001 rejected both the applications,

which were challenged by the petitioners in Criminal Revision Nos. 444 of 2001 and 726 of 2001 before this Court which ultimately stood dismissed.

5. A preliminary objection was raised by Mr. D. Panda, learned counsel appearing for the opp. party no. 2 with regard to the maintainability of the application under section 482 Cr.P.C. in view of dismissal of the earlier criminal revisions.

Mr. Panda submitted that this Court in the Criminal Revisions, while examining the rejection order passed by the learned S.D.J.M. on the application filed by the petitioners to recall the order taking cognizance of the offences and after perusing the complaint petition as well as the materials, recorded a finding that cognizance has been taken on the basis of a prima facie case and the petitioners can raise the issue relating to absence of prima facie case at the stage of hearing before charge. He, therefore, submitted that the application under section 482 Cr.P.C. in view of the findings of this Court in the Criminal Revisions cannot be maintained.

6. Mr. J.K. Das, learned senior counsel appearing for the petitioners, on the contrary, with regard to the question of maintainability, submitted that the revisional power of this Court cannot be equated to the inherent power under section 482 Cr.P.C. The power provided under section 482 Cr.P.C. to this Court is not a provision endowing power upon the High Court, but a declaration by the Parliament that nothing which has been provided in the Cr.P.C. can limit the inherent power of the High Court. Such declaration by the Parliament in respect of the inherent power of the High Court overrides the other prescription in the Cr.P.C. Hence, the revisional power under section 397 Cr.P.C. cannot affect the amplitude of the power preserved under section 482 Cr.P.C. The question, therefore, remains as to whether the High Court would exercise its inherent power after rejection of a revision application challenging an order refusing to recall the order issuing process.

7. The Supreme Court in the case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal v. Mohan Singh and others,*** AIR 1975 SC 1002, in a similar situation, has held that the High Court in exercise of its inherent power can take into account the situation prevailing at the point of time when its inherent jurisdiction is invoked and consider whether on the facts and circumstances, continuation of the proceeding against the respondent therein would constitute an abuse of the process of Court or its quashing was necessary to secure the ends of justice. The present application under section 482 Cr.P.C. is not a review of the earlier order of rejection of the revisions. The application for recalling the order of cognizance and issuance of process was filed by the accused

persons basing on the ratio of the decision in the case of ***K.M. Mathew v. State of Kerala, (***1992) 1 SCC 217, where the Supreme Court has held that the court issuing summons had the power to recall the same. This view of the Supreme Court was again overruled in the case of ***Adalat Prasad v. Rooplal Zindal and others*** , (2004)7 SCC 338, wherein it was held that the learned Magistrate does not have power to recall its own order.

Therefore, the position of law as it stands now is that a Magistrate has no power to recall its own order of taking cognizance of any offence. Hence, as on today, the order rejecting the prayer for recalling the order of taking cognizance was an order without jurisdiction passed by the learned S.D.J.M. and any order passed without jurisdiction can be considered to be a nullity.

8. This Court, while dismissing the revisions filed against the said order, was not holding all the materials to independently examine whether prima facie the offences as alleged have been made out against the petitioners. However, within the limited scope of interference by exercise of power under section 397 Cr.P.C. this Court finding that the learned trial court has passed the order of cognizance on the basis of a prima facie case did not interfere with the said order. I, therefore, find that the said order passed in the revision petition in Criminal Revision No. 726 of 2001 cannot stand on the way of this Court in exercising its inherent power under section 482 Cr.P.C. to examine as to whether continuance of the complaint case would amount to abuse of the process of the Court and such quashing of the order of cognizance is essential to be passed to secure the ends of justice.

9. Mr. Das appearing for the petitioners has raised the following questions:-

(a) Whether the complainant – opp. party no. 2 - IPICOL invoking the jurisdiction of the criminal court on the allegation of the petitioners' committing offences under sections 406/468/420/422/34 IPC, amounts to an abuse of the process of law ?

(b) Whether the allegations made in the complaint petition are purely civil in nature, there being absence of any criminality ?

(c) Whether the High Court while exercising jurisdiction under section 482 Cr.P.C. can consider all documents including public documents filed by the accused persons ?

10. Now coming to the last two questions first, it would be profitable to refer to the decision in the case of ***State of Orissa v. Debendra Nath Padhi,*** (2005) 1 SCC 568, where the Supreme Court has held as follows:-

> "Regarding the argument of the accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under section 482 of the Code and Article 226 of the Constitution is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal case."

The aforesaid legal position was further reiterated by the Supreme Court in the case of ***Rukmini Narvekar v. Vijaya Satardekar and others***, (2008)14 SCC 1. This has also been reiterated in subsequent decision by the Supreme Court, i.e. in the case of ***Harshendra Kumar D. v. Rebatilata Koley and others***, (2011)3 SCC 351, where the Supreme Court went to the extent of holding that in order to prevent injustice or abuse of the process or to promote justice, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

11. Now, therefore, taking into consideration the documents annexed to the application as well as the undisputed facts, it would be seen that double pledging of the shares as alleged by the complainant was admitted by the accused persons earlier to raising of such objection by the complainant. The accused persons also replaced the double pledge shares by offering fresh securities. The complainant has even filed a Money Suit for recovery of the amount, which is pending before this Court in an appeal and pursuant to the interim orders passed in the said appeal, the accused persons admittedly have paid a considerable amount of the outstanding in the loan account, i.e., an amount of Rs. 17.00 crores and again for consideration of a proposal for one time settlement, as per the direction of this Court, they have deposited a further sum of Rs. 4.00 crores.

12. The gist of the entire allegations made in the complaint case is that the accused persons offered some shares as security for the loan advanced by the complaint which were earlier pledged to IDBI. This Court, taking into consideration all the undisputed documents and facts, finds that the entire claim of the complainant is with regard to depriving the complainant from recovering the money advanced. The complainant thus has made an attempt to couch the case in such manner so as to make out a case of commission of the offence of criminal breach of trust and cheating.

On careful consideration of the nature of allegations made in the complaint petition, the subsequent developments in the case and the undisputed documents, it is found that the entire allegations made in the complaint case is of civil nature and no offences, as alleged, have been,

prima facie, made out, as the basis of all the allegations made in the complaint petition are with regard to double pledging of certain shares, which were admitted by the accused persons before such complaint was made to them by the complainant and the said shares were replaced by the accused persons inasmuch as, subsequent to the decree passed, a substantial amount has been paid by the accused persons to the complainant.

13. On considering the above in the light of the decision in the case of ***Central Bureau of Investigation, SPE, SIU (X), New Delhi v. Duncans Agro Industries Ltd., Calcutta***, AIR 1996 SC 2452, it would be seen that there is enough justification to hold that the case is basically a matter of civil dispute and no criminality can be attributed to the accused persons.

14. Now with regard to the question as to whether in such circumstances, the complaint proceeding should be allowed to continue or not, as this Court has come to the conclusion that the nature of the dispute is basically civil and there is no prima facie material to find out that the offences for which cognizance has been taken, have been committed in the instant case, further continuance of the criminal proceeding will be nothing but an abuse of the process of law and it is highly essential that to secure the ends of justice, the order of cognizance should be quashed along with the entire complaint case.

15. In the result, therefore, the order dated 26.8.2000 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. Case No. 248 of 2000 taking cognizance of the offences under sections 406/468/420/422/34 IPC against the petitioners – accused persons stands quashed and as a consequence, the complaint case, i.e., I.C.C. Case No. 248 of 2000 also stands quashed in its entirety.

16. The CRLMC is accordingly allowed.

Application allowed.

2013 (II) ILR - CUT- 118

INDRAJIT MAHANTY, J.

CRLMC NO. 2696 OF 2012 (Dt.15.05.2013)

ABHITOSH DEBATA & ANR. ....Petitioners

.Vrs.

STATE OF ORISSA ………Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.482

Cognizance taken for the offences U/ss. 341, 323, 307, 354, 506 & 34 I.P.C. – Quashing of – All the offences are compoundable except offence U/s.307 I.P.C. – Injury sustained on the informant was simple in nature and none of the ingredients of an offence U/s.307 I.P.C., even prima facie, exists in the present case – The informant-Russian Couple submitted a petition for compromise before the P.S. amicably settling the dispute against the petitioners – No useful purpose would be served by continuing the above proceeding as there is a bleak chance of conviction – Held, in the ends of justice Criminal Proceeding is quashed. (Para 7)

<u>Case laws Referred to:-</u>

1.(2008) 39 OCR. 567 : (Khirod Kumar Dash & Ors.-V- State of Orissa)
2.2010 (I) OLR 225 : (Biju @ Biraja Prasad Parida & Ors.-V- State of Orissa & Anr.)

For Petitioners - M/s. D. Nayak, U.R. Jena, S.K. Das, B. K. Das & B. Nayak.
For Opp.Party - Mr. M. Sahu, A.S.C.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by two petitioners herein, namely, Abhitosh Debata and Omkar Swain with a prayer to quash the order of cognizance dated 04.06.2012 passed by the learned S.D.J.M., Puri in G.R. Case No.2044 of 2011 under Annexure-2.

2. Mr. D. Nayak, learned Senior Counsel appearing for the petitioners submits that while petitioner No.1 is a resident of Cuttack and after completion of BDS Course from the Rajiv Gandhi University, Bangalore and was preparing MDS Course, petitioner No.2 is also a permanent resident of Cuttack and has completed his MBA from a reputed university and was working as a Team Leader in Home Loan Section of H.D.F.C. Bank, Bhubaneswar.

It is further submitted that during the Christmas holidays of 2011, both the petitioners had gone together to Puri by a motorcycle for ‘darshan’ of Lord Jagannath and after darshan of Lord Jagannath, the petitioners proceeding towards the sea beach. While they were in front of hotel Lotus on

Chakratirtha Road, an old man suddenly came in front of petitioners' motorcycle and while petitioner No.2 tried to save the old man, the motorcycle dashed against a Russian couple, who were walking along the road, leading to an altercation between the parties. It appears that pursuant to the aforesaid incident, Sea Beach P.S. Case No.174 dated 23.12.2011 was registered under Sections 341,323,307,354,506/34 I.P.C. against the petitioners. Once the aforesaid F.I.R. was lodged by the complainant-Russian couple, the petitioners explained to them at the P.S. about the seriousness of the provisions of law under which the F.I.R. was filed and there was every likelihood that the petitioners would be sent to jail custody. The informant-couple realizing the gravity of the offences alleged against the petitioners, submitted a petition for compromise before the P.S. Such compromise petition was filed by the informant, on the basis of which, it is stated that the matter had been amicably settled and they do not want to proceed against the petitioners any further.

3. It is further averred that in spite of the compromise petition, the police took up investigation and submitted charge sheet against the petitioners under Sections 341, 323, 307, 354, 506/34 I.P.C. and on submission of such charge sheet, the impugned order of cognizance dated 04.06.2012 has been duly taken by the learned S.D.J.M., Puri.

4. It is submitted on behalf of the accused-petitioners that all the offences as alleged in the F.I.R. are compoundable, except the offence under Section 307 of the I.P.C. It is further submitted that the offence under Section 307 I.P.C. was incorporated without any basis only to harass the petitioners and the entire allegation made in the F.I.R. against the petitioners essentially relates to allegation of rash and negligent driving of the motorcycle. It is further submitted that the "injury sustained on the informant", was clearly simple in nature and none of the ingredients of an offence under Section 307 I.P.C. was neither made out in the F.I.R. nor any material collected in course of investigation supports such an offence. In the light of the aforesaid submissions, learned counsel for the petitioners prays that since no prima facie case under Section 307 I.P.C. is made out against the petitioners and all other offences as alleged against the petitioners are compoundable in nature and the same have been compromised between the informant and the petitioners, whereafter, the informant left India for their home country, further continuance of the proceeding would amount to abuse of the process of law. In this respect, in support of their contentions, learned counsel for the petitioners has placed reliance on the judgments of this Court in the case of ***Khirod Kumar Dash and others vs. State of Orissa***, (2008) 39 O.C.R.-567 and ***Biju @ Biraja Prasad Parida and two others vs. State***

of Orissa and another, 2010(I) O.L.R.-225.

5. Mr. M. Sahu, learned Additional Standing Counsel produced the case diary and copies of the injury reports dated 23.12.2011 along with a memo. The injury reports dated 23.12.2011 of Melnikov Dmitry and Semenova Natalia issued by the Medical Officer, D.H.H., Puri received from the Sub-Inspector of Police, Sea Beach Police Station, Puri with reference to F.I.R. No.174 of 2011 and a copy of the opinion of the Orthopedic Specialist of D.H.H., Puri submitted for perusal of the Court.

6. From the medical report of Semenova Natalia wife of Melnikov Dmitry, it appears that "no external injury" was detected. Insofar as Melnikov Dmitry is concerned, the doctor noted two bruises of 3 cm X 2 cm and 5 cm X 2 cm respectively one over the forehead which was described as "simple" and another over the left foot. The opinion in respect of second bruise was reserved and the said Melnikov Dmitry was referred to Orthopedic OPD for "suspected fracture of metatarsal bone of left leg". It appears that the said Melnikov Dmitry was also examined by the Orthopedic Specialist of the D.H.H., Puri and by report dated 29.12.2011 Dr. S.K. Kundu, Orthopedic Specialist informed the I.I.C. Sea Beach Police Station, Puri that on examining the X-ray of the injured, the nature of injury was found to be "simple".

7. In the light of the circumstances as noted hereinabove and in particular, the injury report of the Orthopedic Specialist, it would be clear therefrom that although the F.I.R. was lodged, charge sheet has been submitted and cognizance has been taken of the alleged offences including under Section 307 I.P.C., this Court is of the considered view that none of the ingredients of an offence under Section 307 I.P.C., even prima facie, exists in the present case. The informant and the petitioners have amicably settled their disputes and the informant has declared that they do not desire to proceed any further with the case, whereafter, they have left for Russia. In the circumstances of the present case, considering the compromise petition of the informant under Annexure-1, the opinion of the Orthopedic Specialist as referred to hereinabove and further, there being no real likelihood of the informant appearing before the court to prosecute the case and also considering that all other alleged offences apart from one under Section 307 I.P.C., being compoundable in nature, this Court is of the view that no useful purpose would be served by continuing the aforesaid proceeding any further when there is if at all a bleak chance of conviction. Therefore, the ends of justice would be better served if the same is quashed.

8. Accordingly, the CRLMC is allowed and the proceeding in G.R. Case No.2044 of 2011 arising out of Sea Beach P.S. Case No.174 dated 23.12.2011 pending before the learned S.D.J.M., Puri is hereby quashed.

Application allowed.

2013 (II) ILR - CUT- 122

B. N. MAHAPATRA, J.

W.P.(C) NO. 1716 OF 2012 (With Batch) (Dt.14.12.2012)

RASHMIREKHA PATRA & ORS. ………Petitioners

.*Vrs.*

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

EDUCATION – Whether the benefit provided under Resolution Dt.16.02.2008 to Education Volunteers working in EGS Centres should be extended to the Education volunteers working in AIE Centres ? – Held, Yes.

In this case both Education volunteers working in EGS/AIE Centres were disengaged pursuant to Resolution Dt.16.02.2008 – Both the Centres are functioning under the same scheme – It is also not disputed by the Opp.Parties that similarly situated persons in other districts have been engaged as Ganasikshyaks under Sarba Sikshya Abhiyan – Discrimination and violation of Articles 14 & 16 of the Constitution of India – Held, O.P.1 is not justified to hold that petitioners who are working as Education volunteers in AIE Centres are not entitled to be engaged as Ganasikshyak and only Education volunteers working in EGS Centres are to be rehabilitated as Ganasikshyaks under Sarba Sikshya Abhiyan. (Paras 12 to 16)

For Petitioners - M/s. K.P. Mishra & S.K.Nath.
M/s. Prafulla Ku. Mohapatra,
S,K,Nath & S.C. Sahoo
(W.P.(C) No.5570/2012 only).
For Opp.Parties - Standing Counsel
(School & Mass Education Deptt.).

B.N. MAHAPATRA, J. These writ petitions have been filed to quash the order dated 09.12.2011 passed under Annexure-6 by opposite party

No.1-Commissioner-cum-Secretary, School and Mass Education Department, Odisha, Bhubaneswar, wherein it has been held that petitioners having being disengaged as Education Volunteers working in Alternative Innovative Education (for short 'AIE') Centres under the Employment Guarantee Scheme (for short 'EGS') their case cannot be considered for engagement as Ganasikshyak under Sarba Sikshya Abhiyan pursuant to Resolution No.3358 dated 16.02.2008 (Annexure-1) of School and Mass Education Department under which only the disengaged Education Volunteers working in EGS Centres have been engaged. Further prayer of the petitioners is for a direction/order to opposite parties to engage them as Ganasikshyak in view of the engagement of similarly situated Education Volunteers and to declare that the Education Volunteers of A.I.E. Centres are eligible to be considered for the post of Ganasikshyak in terms of the Resolution of the Government and to provide all the benefits accrued under the said Scheme as provided to Education Volunteers of EGS Centres.

2. In W.P.(C) No.21156 of 2010, prayer has been made to hold/declare non-inclusion of the Education Volunteers of AIE Centres in the Resolution dated 16.02.2008 of the School and Mass Education Department, Government of Odisha for rehabilitating the said Education Volunteers as Ganasikshyak illegal, unconstitutional and unsustainable in the eye of law. Further prayer is to modify the resolution dated 16.02.2008 by extending the benefit to all Education Volunteers working in AIE Centres at par with the similarly situated persons in EGS Centres and to consider the case of the petitioners for their engagement as Ganasikshyak.

3. Since issues involved in all the writ petitions are similar in nature, they are dealt with together in this common judgment.

4. Petitioners' case in a nutshell is that they were disengaged as Education Volunteers in the district of Nuapada. Their appointment was made by the competent authority in due process of selection. Accordingly, an agreement was executed between the VEC and the petitioners and they joined on 14.07.2003 in different AIE Centres as Education Volunteers and were disengaged during May, 2007. Since the date of engagement, the petitioners had been discharging their duties till closure of EGS/AIE Scheme. During the service period they have attended different training programmes for imparting better education to the children as per the direction of the authorities. After closure of EGS/AIE Scheme, the State Government in School and Mass Education Department introduced a Resolution dated 16.02.2008, wherein it is stipulated that the disengaged Education Volunteers will be rehabilitated as Ganasikshyak under Sarba Sikshya Abhiyan in different schools of the State. Accordingly, to implement the Scheme, the

State Project Director, OPEPA issued clarification dated 05.04.2008 (Annexure-2) to the various queries of the Collectors relating to rehabilitation of Education Volunteers, who can be appointed as Ganasikshyak. It is clarified that in procedure No.1, Education Volunteers of all EGS/AIE guidelines of the Government of Odisha, in School and Mass Education Department shall be eligible for rehabilitation as Ganasikshyaks subject to satisfaction of other norms. As per the instruction of the Government in School and Mass Education Department, all the District Offices including the District Office, Nuapada prepared a list of status report of disengaged Education Volunteers for engagement of Ganasikshyaks and the petitioners have been placed in the said list. From the said list, Education Volunteers, who were working in EGS Centres, have been rehabilitated as Ganasikshyaks but the petitioners were not rehabilitated as Ganasikshyaks on the ground that they were not working in EGS Centres but working in AIE Centres. Collector, Nuapada submitted his detailed report to opposite party No.1 on 09.06.2008 for consideration of petitioners' case but no action has been taken till filing of the present writ petitions despite several letters written to opposite parties 3 and 4. District Project Coordinator, SSA, Nuapada on 13.04.2010 had issued a letter to opposite party No.2 furnishing detailed information along with a list of Education Volunteers, who were working in AIE Centres and the same is pending with the Government for decision. Since no action was taken by the authority, petitioner No.1 [in W.P.(C) No.1716 of 2012] filed writ petition bearing W.P.(C) No.11081 of 2011 which was disposed of on 10.05.2011 directing opposite party No.1 to consider the case of the petitioner. Pursuant to such direction of this Court, opposite party No.1 vide impugned order dated 09.12.2011 (Annexure-6) rejected the claim of the petitioners.

5. Mr. K.P.Mishra, learned counsel appearing for the petitioners submitted that rejection of petitioner's claim vide order dated 09.12.2011 under Annexure-6 is illegal, arbitrary, discriminatory and unconstitutional in nature. Most of the similarly situated Education Volunteers working in AIE Centres have already been engaged in different districts but petitioners are ignored illegally. Such action of opposite parties is violative of Articles 14 and 16 of the Constitution of India as the petitioners have fundamental right to get the said benefit. Sheer discrimination created by opposite parties among one class of Education Volunteers is not permissible under law. As per the resolution dated 16.02.2008 of School and Mass Education Department opposite parties issued engagement order only to Education Volunteers who were working in EGS Centres whereas the petitioners although working simultaneously along with Education Volunteers of EGS Centres and disengaged on the same date, their cases have been ignored. After abolition of NFE Scheme, Government introduced EGS Scheme in the year 2002.

Accordingly, petitioners were engaged as Education Volunteers as per the order of the authorities. Some of the Education Volunteers were engaged in EGS Centres and some of Education Volunteers were engaged in AIE Centres. Ninety-one numbers of AIE Centres were opened in Nuapada district during the year 2003. Sixty-eight numbers of AIE centres including the petitioners' centres were closed during May, 2007 and twenty-three AIE Centres were closed in the year 2008. According to Rules, all the Centres should have been converted to EGS Centres/Primary Schools. Schools were functioning as per the formal school time, i.e., 10:00 AM to 4:00 PM. Petitioners in the mean time have gathered much experience in the filed of teaching. There is no difference between Education Volunteers of EGS Centres and AIE Centres. Both the Centres are functioning under one Scheme by the Government and they are similar in all respects. They attended different types of programmes for imparting different education to children as per direction of authorities. The State Government issued another resolution dated 03.07.2008 on the basis of which all the retrenched persons would be considered as Ganasikshyaks. Non-consideration of the case of the petitioners is clear violation of the Resolution of the Government as well as constitutional provisions under Articles 14 and 16 of the Constitution of India.

6. In W.P.(C) No.32955 of 2011, opposite party No.4-District Project Coordinator, SSA, Nuapada has filed counter affidavit on behalf of opposite parties 1 to 3. Referring to the said counter affidavit, learned Standing Counsel for School and Mass Education Department submitted that the claim of the petitioners in the said writ petitions is contradictory to each other. On the one hand, the petitioners seek direction for their absorption as Ganasikshyaks as per the Resolution dated 16.02.2008 in School and Mass Education Department and on the other, they challenge the said Resolution for non-inclusion of Education Volunteers working in AIE Centres. Therefore, the writ petition is liable to be dismissed. Petitioners were initially employed as Education Volunteers in AIE Centres to impart education to children of migrant people, children engaged in household work, child labour, urban deprived children, children deprived due to social and religious reasons, adolescent girls etc. As per the guideline, the activities of the AIE Centres are meant for mainstreaming the students where even if there is schooling facility but they are out of school for different reasons. EGS Centres were established where there was a demand of community and no Primary School existed within one kilometre radius in the habitation and basing on the demand of the community EGS Centres were established if at least 25 children are available in the community. Subsequently, the Primary School is established by the Government in that location by upgrading the EGS Centres where continuous primary education was provided to the children of

that locality, whereas the AIE Centres were not providing continuous education. It clearly depends on the availability of pupils. While the matter stood thus, Government in School and Mass Education Department passed the resolution dated 16.02.2008 after careful consideration of problems of Education Volunteers under the EGS Scheme and decided to rehabilitate Education Volunteers in EGS Centres who have been disengaged or facing disengagement under the EGS Scheme as Ganasikshyak under Sarba Sikshya Abhiyan. But the aforesaid resolution did not contemplate inclusion of Education Volunteers working in AIE Centres. It was exclusively meant for Education Volunteers working in EGS Centres and accordingly the present petitioners who continued as Education Volunteers in the AIE Centres till their closure cannot be absorbed as Ganasikshyaks in accordance with the above said Resolution.

7. On the rival contentions, the questions that fall for consideration by this Court are as follow:-

(i) Whether benefit provided under Resolution dated 16.02.2008 to Education Volunteers working in EGS Centres should be extended to the Education Volunteers working in AIE Centres?

(ii) Whether opposite party No.1-Commissioner-cum-Secretary, School and Mass Education Department is justified to hold that petitioners who are working as Education Volunteers in AIE Centres are not entitled to be engaged as Ganasikshyak in terms of Resolution No.3358/SME dated 16.02.2008 of School and Mass Education Department according to which only Education Volunteers working in EGS Centres are to be rehabilitated as Ganasikshyaks under Sarba Sikshya Abhiyan?

8. Since both the questions are inter-linked, they are dealt with together.

9. Undisputed facts are that the petitioners were appointed as Education Volunteers in AIE Centres after due process of selection and agreements were executed between the VEC and the petitioners. They were engaged on 14.07.2003 in different AIE centres as Education Volunteers and disengaged in May, 2007. They have attended different programmes for imparting different education to the children as per the direction of the authorities. The Resolution dated 16.02.2008, for the purpose of universalization of Elementary Education through EGS Scheme, which is an integral part of Sarba Sikshya Abhiyan, was operationalized in Odisha from the year 2001-02. Due to upgradation of EGS Centres to

regular Schools and for various reasons, the Education Volunteers engaged in such EGS Centres have been disengaged. Government of Odisha after careful consideration of the Education Guarantee Scheme decided to rehabilitate Education Volunteers working in EGS Centres, who have been disengaged or facing disengagement under the EGS Scheme. As per the said Scheme, such disengaged Education Volunteers would be rehabilitated as Gana Sikshyaks under Sarba Sikshya Abhiyan. Pursuant to such Resolution, opposite parties are rehabilitating only Education Volunteers working in EGS Centres and they are not absorbing Education Volunteers working in AIE Centres. Petitioners' case is that as per EGS/AIE guideline, Education Volunteers were engaged in the State in both the Centres, i.e., EGS Centres and AIE Centres. Education Volunteers were working in both the Centres with same remuneration and terms and conditions of service. Both AIE/EGS Centres are Government Centres opened as per the same guideline and created by one resolution from the beginning till closure of the Scheme. The source of recruitment is one. Therefore, they cannot be treated differently. As it appears, non-inclusion of Education Volunteers working in AIE Centres for engagement as Ganasikshyak under Sarba Sikshya Abhiyan in the Resolution dated 16.02.2008 is an omission. Otherwise also, non-inclusion of all the Education Volunteers working in AIE Centres in Resolution dated 16.02.2008 amounts to violation of rights guaranteed under Articles 14 and 16 of the Constitution of India. The sole contention of opposite parties is that since, according to Resolution dated 16.02.2008, the disengaged Education Volunteers working in EGS Centres are only to be rehabilitated, the case of Education Volunteers working in AIE Centres cannot be considered.

10. At this juncture, it is necessary to refer to letter dated 05.04.2008 (Annexure-2) addressed by State Project Director, OPEPA to Commissioner-cum-Secretary to Government, School and Mass Education Department, Odisha. In the said letter referring to Resolution No.3358/SME dated 16.02.2008, several suggestions have been given for rehabilitation of Education Volunteers of erstwhile EGS Centres. As per Procedure-1, Education Volunteers of all EGS Centres approved and operationalised as per the norms of EGS/AIE Guidelines of Government of Odisha, School and Mass Education Department shall be eligible for rehabilitation as Gana Sikshyak subject to satisfaction of other norms. Thus in Procedure-1, it was suggested that the Education Volunteers working in all EGS Centres approved and operationalised as per the norms of EGS/AIE Guidelines shall be eligible for rehabilitation as Ganasikshyak. As per paragraph-3 of letter dated 09.06.2008 (Annexure-4) written by Collector-cum-Chairperson, DPEP/SSA, Nuapada to the Under Secretary to Government, School and

Mass Education Department, Odisha, the list of selected Education Volunteers, who were engaged in AIE Centres, was duly approved by District EGS Committee.

11. As per paragraph 2 of letter dated 13.04.2010 issued by the District Project Coordinator, SSA, Nuapada to the Assistant Director (Access), OPEPA, Bhubaneswar the condition of engagement of Education Volunteers of AIE centres is the same as Education Volunteers of EGS Centres. They were given same remuneration as EVs of EGS Centres. All AIE Centres were functioning as per the formal School time.

12. The stand that similarly situated persons in other districts have been engaged as Ganasikshyaks under SSA is not disputed by opposite parties. It is nobody's case that both Centres are not functioning under the same Scheme. It is also not disputed that their process of recruitment and rehabilitation etc. are same. Appointment was made as per the decision taken by the competent authority. Both Education Volunteers working in EGS/AIE Centres were disengaged pursuant to Resolution dated 16.02.2008. It appears that the Government after careful consideration of the case of the Education Volunteers under EGS Scheme decided to rehabilitate them in EGS Centres, who have been disengaged or facing disengagement under EGS Scheme. It is not understood as to when the Education Volunteers working in EGS Centres as well as AIE Centres were disengaged and they were facing problems as to why Government has issued Resolution dated 16.02.2008 only considering the case of Education Volunteers working in EGS Centres who have been disengaged but did not consider the case of Education Volunteers working in AIE Centres. In the Counter, no valid reason has been assigned as to why the case of Education Volunteers working in AIE Centres was not considered. The only stand taken by the opposite party No.1-Commissioner-cum-Secretary, School and Mass Education Department, Odisha, Bhubaneswar is that in view of Resolution dated 16.02.2008, the case of Education Volunteers working in AIE Centres could not be considered. Mr.Pandey has not satisfactorily met the allegation of the petitioners that the action of opposite parties is a clear case of discrimination and violates the constitutional mandates of equality enshrined in Articles 14 and 16 of the Constitution of India.

13. In the present case, no valid and cogent reason has been assigned by learned Standing Counsel to justify the Resolution dated 16.02.2008 passed by the Government of Odisha in School and Mass Education Department only in rehabilitating disengaged Education Volunteers working

under EGS Centres and ignoring the case of similarly situated persons in AIE Centres.

14. The fact of the case decided by this Court on 03.08.2010 in W.P.(C) No. 20566 of 2009 is not similar to the fact of the present case. Apart from that, there is hardly any detailed discussion about the fact and scenario involved in the aforesaid cases. Therefore, the decision in that case is not applicable to the case of the present petitioners.

15. In the fact situation, this Court directs the State Government to consider the matter afresh and pass appropriate order within a period of two months from today taking into account various stands taken by the petitioners and observations of this Court made above and the fact that different yardsticks have been followed in different districts.

16. So far the order passed under Annexure-6, Opposite party No.1 only followed the resolution dated 16.02.2008 passed by the Government, and rejected the representations of the petitioners. Therefore, in the circumstances, the order passed by opposite party No.1 (Annexure-6) is quashed and he is directed to reconsider the case of the petitioners in the light of the decision that would be taken by the Government pursuant to this judgment.

17. In the result, the Writ Petitions are allowed with aforesaid observation/directions.

Writ petitions allowed.

2013 (II) ILR - CUT- 129

B. N. MAHAPATRA, J.

W.P.(C) NO.6890 OF 2012 (Dt.15.03.2013)

INDIAN RED CROSS SOCIETY ………Petitioner

.Vrs.

BANKANIDHI MISHRA ………..Opp.Party

A. PAYMENT OF GRATUITY ACT, 1972 – S.4

Payment of Gratuity – Whether entitlement of an employee under the Gratuity Act, 1972 can be curtailed by Rules, 2001 framed by the Petitioner-Society – Held, No.

In this case O.P.1 served the Petitioner-Society as Director for more than 28 years – As per his last drawn salary he is entitled to gratuity of Rs.3,48,034 under the Act, 1972 but the Petitioner-Society paid him only Rs,50,000/- as per Clause 28 (a) of the Service Rules, 2001 framed by it – Held, statutory entitlement available to an employee can not be curtailed by the Petitioner-Society by framing any Rule of its own – There is no infirmity or illegality in the impugned order calling for interference by this Court. (Para 24)

B. PAYMENT OF GRATUITY ACT, 1972 – S.1(3)(B)

Whether the petitioner, Indian Red Cross Society Orissa Branch comes within the meaning of "establishment" U/s.1 (3) (B) of the Gratuity Act, 1972 – Held, Yes.

The Petitioner Society sells blood, conducts different pathological/medical tests and collected fees from the customers – Held, petitioner comes within the meaning of establishment U/s.1 (3) (b) of the payment of Gratuity Act,1972 . (Paras 9,18)

C. PAYMENT OF GRATUITY ACT, 1972 – S.4

Whether provisions of payment of Gratuity Act, 1972 is applicable to the employees of Indian Red Cross Society – Held, Yes.
(Para 18)

<u>Case laws Referred to:-</u>

1.(1998) 7 SCC 221 : (Municipal Corpn.of Delhi-V- Dharam Prakash Sharma & Anr.)
2.AIR 2009 SCW 7667 : (Allahabad Bank-V- All India Allahabad Bank Retired Employees Association)
3.110(2010) CLT 338 : (Paradeep Port Trust-V- Controlling Authority & Ors.).
4.(2004) ILLJ 802 Guj. : (Indian Red Cross Society-V- Vidyaben H. Vyas)
5.AIR 1970 SC 919 : (Delhi Cloth & General Mills Co. Ltd.-V- Its Workmen & Ors.)
6.AIR 1960 SC 251 : (Indian Hume Pipes Co.Ltd.-V- Its Workmen & Anr.)
7.1991(II) OLR 251 : (Administrator, Shree Jagannath Temple,Puri-V- Jagannath Padhi & Ors.).
8.AIR 1979 SC 1981 : (State of Punjab-V- The Labour Court. Jullundur)

9.1991(I) OLR 175 : (The Executive Officer, Puri Municipality (in all)-V- Rama Naik & Ors.)
10.(1994) 1 SCC 9 : (Bakshish Singh-V- M/s. Darshan Engineering Works & Ors.)

For petitioner - M/s. Santanu K. Sarangi, B.K. Behera & A.K. Nayak.

For Opp.Party - M/s. Manoj Ku. Mishra, Sr. Advocate
M/s. P.K.Das, D.K. Pattnaik, M.K. Rajguru, B.K. Mishra, J.K.Mohapatra, D.Tripathy, T. Mishra & D.P.Das.

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer for quashing the order dated 29.11.2010 (Annexure-2) passed by the Controlling Authority under Payment of Gratuity Act-cum-Asst. Labour Commissioner, Cuttack in P.G. Case No.23 of 2009 allowing the claim of opposite party in part and directing the Honorary Secretary, Indian Red Cross Society, Orissa State Branch, Bhubaneswar to deposit Rs.3,00,000/- before the said Court along with 10% interest per annum within 30 days from receipt of the order for onward disbursement to the applicant as per Section 7(3) of the Payment of Gratuity Act, 1972 (for short, “Act, 1972”) and also the execution proceeding initiated under Annexure-3 dated 30.12.2011.

2. Petitioner’s case in a nut-shell is that the petitioner-society was constituted by an Act of Parliament, 1920 and it is neither a registered society under the Societies Registration Act, 1860 nor a Co-operative Society. Opposite party is a doctor employed in Blood Bank. On 31.10.1977, the opposite party entered into service as Medical Officer. He was appointed as Director, Central Red Cross, Blood Bank, Cuttack on 31.05.2006. He retired from service on attaining the age of superannuation on 31.05.2007. He was paid Rs.50,000/- towards retiral benefit, gratuity etc. as per Clause 28 (a) of the Service Rules, 2001. Petitioner’s claim is that his last drawn salary was Rs.21,545/- per month and considering his length of service of 28 years he is entitled to get a sum of Rs.3,48,034/- against payment of Rs.50,000/- towards gratuity. Since his representation with regard to higher gratuity was not considered by the authorities, he moved the Controlling Authority-cum-Asst. Labour Commissioner, Cuttack in P.G. Case No.23 of 2009 under the Act, 1972 and the Controlling Authority passed the impugned order allowing the claim of the petitioner by granting Rs.3,50,000/- towards gratuity. Hence, the writ petition.

3. Mr. S.K. Sarangi, learned counsel appearing for the petitioner submitted that the petitioner does not come under the Act, 1972 since it is not a factory, mine, oil field, plantation, port and railway company as provided under Section 1(3)(a) of the Act, 1972. It is not a shop or establishment as defined under Section 1(3)(b) of the Act, 1972. It is also not an establishment/establishments as notified by the Central Government under Section 1(3)(c) of the Act, 1972. Referring to Sections 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956, it was submitted that "establishment" means a shop or a commercial establishment and "shop" means any premises where any trade or business is carried on or where services are rendered to customers respectively. The petitioner-society has already paid a sum of Rs.50,000/- towards full and final settlement of gratuity as per Rule 28(a) of the Indian Red Cross Society, Orissa State Branch (Recruitment & Conditions of Service) Rules, 2001 (for short, "Rules, 2001") framed by the petitioner-society which came into effect from 05.11.2001. The term 'employee' has been defined under Section 2(e) of the Act, 1972. The term 'employer' has also been defined under Section 2(f) of the Act, 1972. It is further submitted that the applicant was a Director (Chief Executive under Class-I Officer) of Central Red Cross Society, Blood Bank and does not come within the ambit of "employee" under the Act. He retired on 31.05.2007. His services were governed by the Rules, 2001 framed by the petitioner-Indian Red Cross Society. The provisions of the Act, 1972 are not attracted. The Controlling Authority is not justified to bring the petitioner under the fold of Section 1(3)(c) of the Act, 1972. Blood is a necessary ingredient of the medical treatment upon which the life and death of a patient depends. The tests conducted in the Blood Bank are in the nature of excluding some diseases which are carried by blood and unless such tests are conducted, donors' blood can neither be accepted nor the contaminated blood can be issued. Therefore, the activities of blood test can neither be termed as test in order to earn profit nor the same is commercial in nature. Apart from the voluntary donors, blood is collected from willing donors on payment of certain amount. The same is generated through sale of Blood to different patients. In addition to this, donors are also given food after donating blood and those expenses are met out of the sale of Blood. Thus, the finding of learned Controlling Authority is erroneous and not sustainable in law. Getting exemption under Section 5 of the Act, 1972 from the Central Government is not at all necessary in view of self contained Rules of the petitioner which prescribes the limit of gratuity. The entire finding of the Controlling Authority is based on surmises and relied on extraneous matter. Therefore, the same is not sustainable in law. The certificate proceeding initiated pursuant to the order of the learned Controlling Authority vide Certificate Case No.551 of 2011, which is pending in the Court of Special Certificate Officer, Bhubaneswar to enforce the

said order is also not equally sustainable in law. Concluding his argument, Mr. Sarangi prays to allow the writ petition in the interest of justice and equity.

4. Per contra, Mr. M.K. Mishra, learned Senior Advocate appearing for opposite party submitted that the present writ petition is not maintainable as there is statutory alternative remedy available to the petitioner. The impugned order has been passed on 29.11.2010. The period of limitation for appeal under Section 7(7) of the Act, 1972 is 60 days. The order having not been challenged before the appropriate forum within the period of limitation it has attained finality. The petitioner has also participated in the certificate proceedings bearing Certificate Case No.551 of 2011 filed by opposite party which is pending in the Court of Special Certificate Officer, Bhubaneswar. The petitioner cannot challenge the certificate proceedings having accepted the order and not preferred any appeal against the same. The petitioner's action in challenging the order by way of the present writ petition after one and a half years suffers from the well established principles of waivers, acquiescence and estoppels. Applicability of the Rules for exempting the petitioner from the Act is dependent upon two essential conditions as envisaged under Section 5 of the Act, 1972. The first requirement under Section 5 of the Act, 1972 is that the establishment must obtain exemption from the appropriate government and there must be a notification to that effect. The second requirement is that the gratuity payable under the Rules should not be less favourable than the benefit conferred under the statute. The Rules, 2001 framed by the petitioner are deficient on both counts. It is also not the case of the petitioner that the establishment is exempted under Section 5 of the said Act. Since the society is not exempted under Section 5 of the Act, 1972 the Act has full application to the petitioner-society. Section 4 of the Act, 1972 enumerates that an employee is entitled to get his gratuity subject to maximum of Rs.3,50,000/-. The said benefit cannot be taken away by limiting the entitlement to Rs.50,000/- only. No rule can be framed and made applicable to the employees which is less favourable in comparison to what one is entitled under the statute. Statutory entitlement cannot be curtailed by any rules framed by the employer.

In support of his contention, Mr. Mishra places strong reliance upon the decisions of the Hon'ble Supreme Court in the cases of *Municipal Corporation of Delhi vs. Dharam Prakash Sharma and another,* (1998) 7 SCC 221, *Allahabad Bank vs. All India Allahabad Bank Retired Employees Association,* AIR 2009 SCW 7667 and judgment of this Court in the case of *Paradeep Port Trust vs. A. Controlling Authority & Others,* 110 (2010) CLT 338.

5. Mr. Mishra, further submitted that definitions under Section 1(3)(b) and (c) are wide enough to include all establishments in which more than 10

employees are employed. Undisputedly, more than 40 employees are employed in the petitioner's establishment. Section 1(3)(b) of the Act, 1972 includes all shops and establishments. Section 2(8) of the Orissa Shops and Commercial Establishments Act, 1956 defines "establishment" as shop or a commercial establishment. Section 2(19) of the Act defines "shop" as any premises where any trade or business is carried on or where service are rendered to customers. The definition provided under Sections 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956 are wide enough to include all premises where any transaction is carried on. Opposite party comes within the definition of "employee" under Section 2(e) of the Act, 1972. Rule 3(b) of the Rules, 2001 defines "employee" as all persons employed by the society. The petitioner is involved in commercial activities. It sells blood, conducts different types of medical/pathological tests/ examinations where testing fees and service charges are collected from the customers. When the opposite party retired in the year 2007, over Rs.3 crores of fixed deposit was available with the petitioner establishment.

Placing reliance upon the judgment of Gujarat High Court in the case of *Indian Red Cross Society vs. Vidyaben H. Vyas*, (2004) ILLJ 802 Guj, it is submitted that the Indian Red Cross Society is a shop or establishment under the Act, 1972 and is liable to pay gratuity.

6. It is further submitted that some of the petitioner's employees preferred appeal under Section 4 of the Act, 1972 claiming gratuity. Order was passed for payment of gratuity. The petitioner in those cases had complied with the orders and paid gratuity under the Act, 1972. The opposite party is now old and physically disabled. After retirement, he is suffering by running from pillar to post and is being denied of his statutory post-retiral dues. No pension is provided by the petitioner to opposite party. The opposite party is solely dependent on the gratuity amount for his living. Concluding his argument, Mr. Mishra, learned counsel for the opposite party prayed for dismissal of the present writ petition.

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

(i) Whether the Indian Red Cross Society is an establishment as per definition in any law operating in the State?

(ii) Whether the provision of Payment of Gratuity Act, 1972 is applicable to the employees of Indian Red Cross Society?

(iii) Whether the entitlement of an employee under the Payment of Gratuity Act, 1972 can be curtailed by Rules, 2001 framed by the petitioner-Indian Red Cross Society?

(iv) What order ?

8. Since question Nos.(i) and (ii) are interlinked, they are dealt with together.

9. In the present writ petition, the petitioner is Indian Red Cross Society. On 31.10.1977, opposite party entered into service as Medical Officer. He was appointed as Director, Central Red Cross Society, Blood Bank, Cuttack on 31.05.2006. He retired from service on attaining the age of superannuation w.e.f. 31.05.2007. He has served more than 28 years of continuous service. His last drawn salary was Rs.21,545/- per month. As per the Rules, 2001 framed by the petitioner-society, opposite party was paid gratuity amount of Rs.50,000/- as against the claim of Rs.3,48,034/-. In the impugned order at paragraph 14, the Controlling Authority taking into consideration the evidence available on record has stated that the organization is also involved in some commercial activities. It sells blood, conducts different types of Medical/Pathological tests/examination where testing fees and service charges are collected from the customers. Accordingly, it is held that petitioner establishment is coming within the meaning of Section 1(3)(b) of the Act, 1972.

Case of petitioner is that it is a Society which is purely a non profit making voluntary organization, as such, it is not a factory mine etc. as defined under Section 1(3)(a) of the Act, 1972. Further contention of the petitioner is that it is not an establishment as defined under Section 1(3)(b) of the said Act nor it is an establishment as provided under Section 1(3)(c) of the said Act. It is further submitted that the petitioner-Society has its own set up rules namely, Rules, 2001. In terms of Rule 28(a) of the said Rules, 2001, all the employees are entitled to get maximum amount of Rs.50,000.00 towards retiral benefits.

10. At this juncture, it is necessary to know what is the meaning of “gratuity”.

The term “Gratuity” as observed by the Hon’ble Supreme Court in its etymological sense, means a gift, especially for services rendered or return for favours received. (See *Delhi Cloth and General Mills Co. Ltd. vs. Its Workmen and others,AIR1970SC919*).Thegeneral principle underlying the gratuity scheme is that by their length of service, workmen are entitled to claim a certain amount as a retiral benefit. (See *Indian Hume Pipes Co. Ltd. vs. Its Workmen and another, AIR 1960 SC 251).* Gratuity has to be considered to be an amount paid connected with any consideration and not resting upon it, and has to be considered something given freely or without

recompense. It does not have foundation on any legal liability, but upon a bounty steaming from appreciation and graciousness. Long service carries with its expectation of an appreciation from the employer and a gracious financial assistance to tide over post retrial difficulties. (See *Administrator, Shree Jagannath Temple, Puri vs. Jagannath Padhi and others,* 1991 (II) OLR-251.

11. To deal with the issue involved in the present case, it is necessary to extract Sub-sections (3) (a), (b) and (c) of Section 1, Sub-sections (1) and (2) of Section 4 and Sub-sections (7) and (8) of Section 7 of the Act, 1972.

"Section 1 xx xx xx

(3) It shall apply to-

(a) every factory, mine, oil field, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State in which ten or more persons are employed, or were employed, on any day of the preceding in this behalf;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."

xx xx xx

"Section 4 xx xx xx

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not les than five years, -

(a) on his superannuation, or

(b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution as may be prescribed, until such minor attains majority, if no nomination has been made, to his heirs.

Explanation.- For the purpose of this section, disablement means such disablement as incapacities an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

4(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned;

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

Explanation.- In the case of a monthly-rated employee, the fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen".

xx xx xx

"7(7) Any person aggrieved by an order under sub-Section (4) may, within sixty days from the date of receipt of the order, prefer an appal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf :

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant

was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits with the appellate authority such amount.

7(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the Controlling Authority."

12. The term "establishment" has not been defined under the Act, 1972. Section 1(3)(b) of the said Act makes it clear that it applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

13. In the case of ***State of Punjab vs. The Labour Court, Jullundur,*** AIR 1979 SC 1981, the Hon'ble Supreme Court while interpreting Section 1(3) of the Act, 1972 has observed that Section 1(3)(b) of the said Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State.

Thus, the Hon'ble Supreme Court held that the establishment having a wide meaning which includes commercial establishment as well non commercial establishments and no limited meaning can be given to the word 'establishment' which has been referred to in Section 1(3)(b) of the Act, 1972

14. This Court in the case of *Administrator, Shree Jagannath Temple, Puri (supra)* has held as under:

"4. According to the Compact Edition of the Oxford English Dictionary, Volume I, Page 897 (Reprinted 1972), "establishment" means a public institution; a school; factory; a house of business etc. In 1851, D. Wilson in Preh Ann (1863) II. Iv. i. 192 referred to "the religious establishment founded at loan". "Establishment" also has been defined to be the ecclesiastical system established by law. As

observed by the Allahabad High Court in 1986 (53) FLR 227 : Municipal Board v. Appellate Authority and Addl. L.C. to which reference was made by this Court in Executive Officer, Puri Municipality's case (supra), the definition of establishment is very wide, and keeping in view the objective of the Act, it was held that the same is applicable to the retired persons of municipalities. Keeping in view the laudatory objects of the Act, and the same being a part of the social justice, this Court observed that the legislation was to be applied liberally and a wider meaning was to be given."

15. In the case of ***The Executive Officer, Puri Municipality (in all) vs. Rama Naik and others,*** 1991 (1) OLR 175, this Court has held that the Act, 1972 is not restricted to only commercial establishments, but to establishments within the meaning of any law for the time being in force in relation to establishments in a State.

16. The Gujarat High Court in the case of ***Vidyaben H. Vyas*** *(supra),* has held as under:

"11. Similar question has been raised before the Punjab and Haryana High Court to effect that whether Indian Red Cross Society is an 'Industry' or nor within the meaning of Section 2(j) of the Industrial Disputes Act, 1947. Punjab and Haryana High Court has taken the decision in case of INDIAN RED CROSS V. ADDITIONAL LABOUR COURT, CHANDIGARH & OTHERS 1994 (3) LLJ (SUPPL.) 919. The relevant discussion made in paragraph 6 is quoted as under:

"As already observed, the said case dealt with the State Activities and not with the activities of the institutions which are statutory or companies. In the present case, the society is a corporate body like a registered company. In Bangalore Water Supply's case 1978 (52) F.J.R. 197, it has been held by the Supreme Court that the term 'industry' as defined in Section 2(j) of the Act has a wide import. According to the Supreme Court in the said case, whether there is : (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, e.g., making, on a large scale, Prasad or food) prima facie, there is an 'industry' in that enterprise. If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking. Applying the

said tests, it was held that (i) professions, (ii) clubs, (iii) educational institutions, co-operatives, (iv) research institutes, (v) charitable projects, and (vi) other kindred adventures, if they fulfil the triple test listed above, cannot be exempted from the scope of Section 2(j). In view of this authoritative pronouncement, it could not be successfully argued that the society is not an industry within the meaning of Section 2(j) of the Act.

12. While considering Section 1(3)(b) of the Payment of Gratuity Act, whether the word 'commercial' which has been used in the said provision; it only covered the 'commercial' establishments' or 'non-commercial establishment' or 'charitable institutions' or not, the said question has been examined by the Madras High Court in the case of MANAGEMENT OF GOOD SAMARITAN RURAL DEVELOPMENT PROJECT V. T.A. RAMAIAH & OTHERS, 2003(I) CLR 3, wherein, the Madras High Court has held the Hospital to be an 'establishment' to which Payment of Gratuity Act applies. The relevant discussion made in paragraph 9 is quoted as under:

"A careful perusal of the order passed by the appellate authority would reveal that it had not only traced the facts and circumstances encircling the whole case, but also would go through each and every ground of appeal and based on such facts and the position of law, would analyze the controlling authority's order and decision and the manner in which it has been arrived at and would take up two points for its consideration, viz., (i) whether the Payment of Gratuity Act will not apply to the appellant hospital ? and (ii) whether, in any event, the reasonable amount of gratuity would be Rs.6,473 on the basis of basic pay of Rs.l850 and dearness allowance of Rs.279 per month ? Taking up the issue one by one and applying the facts with the position of law as it is prescribed under section 1(3)(b) of the Payment of Gratuity Act and remarking that the establishment is covered by the Minimum Wages Act, 1948, and since the hospital is an 'establishment' within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972, and remarking that there is no distinction made between both these Acts, pertaining to the meaning of 'establishment' and further there is no classification made under the law between an institution which is run on commercial basis and a majority institution which is run on the charitable basis so far as the applicability of the Act is concerned. Therefore, for the first point framed, the appellate authority would arrive at the conclusion holding that the eye hospital run by the management falls within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972."

17. The object of the Act, 1972 is to achieve social justice. Therefore, a liberal interpretation and wider meaning has to be given while interpreting the word 'establishment'.

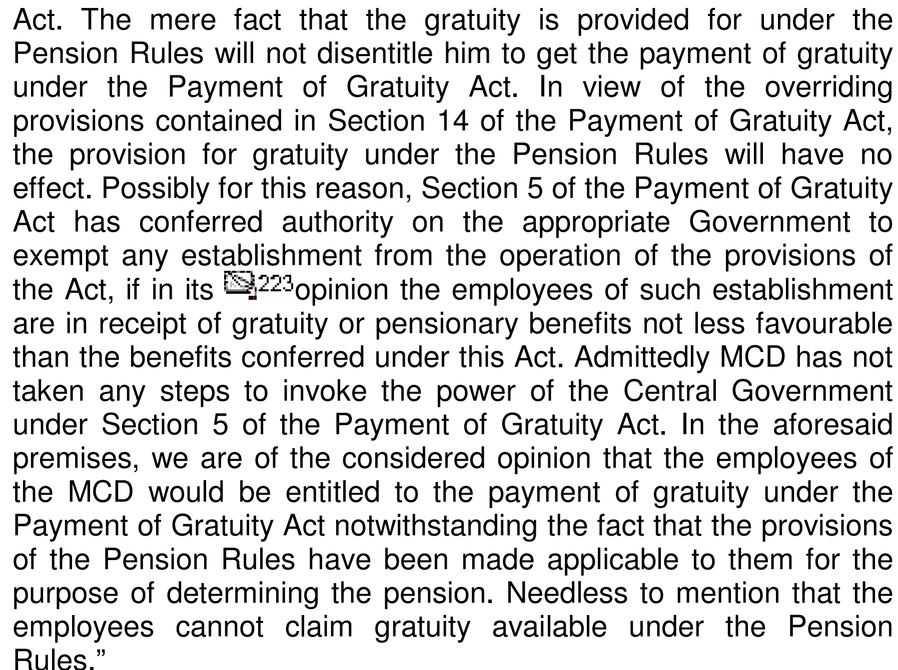
18. In view of the above, the petitioner-Indian Red Cross Society, Orissa Branch comes within the meaning of 'establishment' and the provisions of the Act, 1972 is applicable to it. Accordingly, questions Nos.(i) and (ii) are answered.

19. Question No.(iii) is as to whether the entitlement of an employee under the Act, 1972 can be curtailed by Rules, 2001 framed by the petitioner-Indian Red Cross Society.

20. No rule can be framed by the employer and made applicable to the employees which is less favourable in comparison to what an employee gets under the Act, 1972.

21. The Hon'ble Supreme Court in the case of ***Municipal Corpn. of Delhi v. Dharam Prakash Sharma,*** (1998) 7 SCC 221 has held as under:-

> "2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(*e*) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity

Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its 223opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules."

22. The Hon'ble Supreme Court in the case of *All India Allahabad Bank Retired Employees Association (supra),* has held as under:

"21. Learned counsel for the appellant relying upon the decision of this Court in *Bank of India & Ors. V. P.O. Swarnakar & Ors. c*ontended that once the employees have exercised their option to avail pension made available to them under the Old Pension Scheme, and having drawn the benefits thereunder cannot be permitted resile from their stand. In that case a group of employees of the State Bank of India accepted the amount of ex-gratia under the scheme known as 'the Employees Voluntary Retirement Scheme" and thereafter made an attempt to resile from the very Scheme itself. It is under those circumstances this Court observed that "those who accepted the ex-gratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom." In the present case the real question that arises for our consideration is whether the employees having exercised their option to avail the benefits under the pension scheme are estopped from claiming the benefit under the provisions of the Act ? The appellant being an establishment is under the statutory obligation to pay gratuity as provided for under Section 4 of the Act which is required to be read along with Section 14 of the Act which says that

> the provisions of the Act shall have effect notwithstanding anything inconsistent therein contained in any enactment or in any instrument or contract having effect by virtue of any enactment other than this Act. The provisions of the Act prevail over all other enactment or instrument or contract so far as the payment of gratuity is concerned. The right to receive gratuity under the provisions of the Act cannot be defeated by any instrument or contract."

23. The Hon'ble Supreme Court in the case of ***Bakshish Singh vs. M/s. Darshan Engineering Works and others,*** (1994) 1 SCC 9, has held as under:-

> "27. It would thus be apparent both from its object as well as its provisions that the Act was placed on the statute book as a welfare measure to improve the service conditions of the employees. The provisions of the statute were applied uniformly throughout the country to all establishments covered by it. They applied to all employees drawing a monthly salary up to a particular limit in factories, shops and establishments etc. whether the employees were engaged to do any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work. The provisions of the Act were thus meant for laying down gratuity as one of the minimal service conditions available to all employees covered by the Act. There is no provision in the Act for exempting any factory, shop etc. from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. The payment of gratuity under the Act is thus obligatory being one of the minimum conditions of service. The non-compliance of the provisions of the Act is made an offence punishable with imprisonment or fine. It is settled law that the establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the Statute have no right to exist [vide *Bijay Cotton Mills Ltd.* v. *State of Ajmer*, *Crown Aluminium Works* v. *Workmen* and *U. Unichoyi* v. *State of Kerala*]."

24. For the reasons stated above, this Court is of the view that the statutory entitlement available to an employee cannot be curtailed by the petitioner by framing any Rules of its own. Hence, there is no infirmity and illegality in the impugned order passed under Annexure-2 warranting interference of this Court. Consequently, there is also no illegality in the consequential order passed under Annexure-3.

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

Writ petition dismissed.

2013 (II) ILR - CUT- 144

B. N. MAHAPATRA, J.

BLAPL NO.29609 OF 2012 (Dt.03.04.2013)

TIKI @ PRASANT BARIK …….. Petitioner

.Vrs.

STATE OF ORISSA ……...Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S. 439

Bail – Offence U/ss.457, 395 I.P.C. – In a broad day light the petitioner along with other co-accused persons entered into the house of the informant on the pretext of Courier agent and on the point of pistol committed dacoity and took away cash and gold ornaments – In T.I. parade accused persons were identified – So far his past antecedents are concerned he has involved in seven earlier Criminal Cases – He prays bail on the ground of parity as co-accused has been released on bail – Accused persons are not identically placed as there is factual difference - Since bail granted to the co-accused is not supported by reasons the same cannot form the basis for granting bail to the petitioner on the ground of parity – Held, bail petition is rejected.

(Paras 13 to 17)

<u>Case laws Referred to:-</u>

1. (2012) 4 SCC 134 : (Dipak Shubhashchandra Mehta-V- CBI & Anr.)
2. 2003 ALL LJ 625 : (Salim-V- State of U.P.)
3. 1998 CRI.L.J. 2374 : (Chander @ Chandra-V- State of U.P.).

For Petitioner - M/s. S.R. Mulia, R.C. Moharana,
M. Mulia, R.R. Nayak, H.K.Singh.
For Opp.Party - Mr. R.R. Mohanty, Addl. Standing Counsel.

B.N.MAHAPATRA, J. This bail application has been filed under Section 439, Cr. P.C. by the applicant Tiki @ Prasant Barik in connection with G.R. Case No. 2976 of 2011 pending before the learned S.D.J.M., Bhubaneswar corresponding to Laxmisagar P.S. Case No. 187 of 2011 for grant of bail to the applicant solely on the ground of parity.

2. The petitioner is alleged to have committed offences punishable under Sections 457/395, I.P.C. read with Sections 25 and 27 of the Arms Act.

3. Prosecution case in a nutshell is that on 30.9.2011 at about 12 noon some unknown persons entered into the house of the informant on the pretext of a Courier Agent. Immediately, thereafter, other five unknown persons entered into

the house and all of them asked the informant to handover the godrej almirah keys on the point of pistol and knife. The maid servant Laxmi and driver Rajendra, who were present at the house, were tied by the accused persons. Being scared the complainant handed over the Almirah keys to them. After opening all the almirahs, they took away the gold, silver ornaments and cash. On being lodged FIR by one Smt. Manju Behera, Laxmisagar P.S. Case No.187 dated 30.09.2011 under Sections 450 and 395, I.P.C. read with Sections 25 and 27 of the Arms Act was registered and investigated into. During investigation the petitioner along with other accused persons were apprehended except Prasant @ Dilip Das. The confessional statements were recorded from the accused persons and they led to discovery of stolen properties which were seized in presence of witnesses. One country made pistol used during commission of offence has been seized from the petitioner-Tiki @ Prasant Barik. The said pistol has been sent to SFSL for examination and opinion. In T.I. Parade, accused persons were identified. Prayer was made to the Commissioner of Police, Bhubaneswar-Cuttack to accord sanction for prosecution under Sections 25 and 27 of the Arms Act and the same was received vide Letter No.26/CP-Judl. Dated 01.08.2012.

4. In the bail application grounds taken by the petitioner are that petitioner has no complicity in the alleged crime; he has been falsely implicated; there is no clinching legal evidence available against the petitioner to connect him with the alleged crime; he has been implicated on the basis of the statement of co-accused which is a weak piece of evidence and the petitioner is entitled to be released on the ground of parity as he is similarly situated with that of the co-accused person, namely, Kunia Behera @ Goura @ Sampad Behera who has been granted bail vide order dated 8.10.2012 in BLAPL No.24420 of 2012.

However, Mr. Mulia confined his argument for release of the petitioner on the ground of parity. He emphatically argued that the petitioner as well as Kunia was implicated in the case on the basis of statement of co-accused, namely Chakua @ Ramesh Mallick who was arrested at the spot.

Mr. Mulia in order to show as to how the petitioner is similarly situated with that of Kunia submitted that confessional statement was recorded from the accused-petitioner, who led to recovery of stolen properties and one country made pistol which was seized in presence of the witnesses. Similarly, confessional statement of Kunia was recorded who led to discovery of stolen properties. So far as the criminal antecedent is concerned, the petitioner as well as Kunia has criminal antecedents. Both the petitioner and Kunia were identified in the T.I. parade. In support of his contentions, he filed a copy of the order dated 8.10.2012 passed in BLAPL No. 24420 of 2012 wherein Kunia has been granted bail and a comparative chart showing how the present petitioner Tiki is similarly situated with Kunia. Therefore, it was submitted that in the interest of justice and

to maintain parity this petitioner should be released as co-accused Kunia has already been released on bail.

5. Mr. R.R. Mohanty, learned Additional Standing Counsel for the State vehemently opposed the prayer for grant of bail to the petitioner. He submitted that the petitioner is involved in a heinous crime. In a broad daylight the petitioner along with the co-accused persons entered into the house of the informant on the pretext of courier agent and on the point of pistol and knives committed dacoity and took away cash, gold and silver ornaments. Petitioner led to discovery of one country made Pistol, two mobile phones, one motorcycle used in the crime and cash of Rs.5,000/-. Petitioner was identified in the T.I. Parade. Referring to the statement of the co-accused and the petitioner's own statement, Mr. Mohanty also stated that the petitioner has criminal antecedents which show that he is involved in seven criminal cases. If bail will be granted to such type of accused persons, then life and property of the people in the society will be unsafe. Further it is submitted that the petitioner does not stand on the similar footing with Kunia. It is also argued that even if co-accused-Kunia has been granted bail despite that his statement led to the discovery of stolen property, golden chain; he is involved in other four criminal cases and he was identified in T.I. Parade, no bail should be granted to the present petitioner in the interest of justice.

6. On the rival contentions of both parties, the only question that arises for consideration by this Court is whether the petitioner has made out a case for grant of regular bail on the ground of parity.

7. To decide the above question, it would be necessary to extract the order dated 08.10.2012 passed by this Court in BLAPL No.24420 of 2012, wherein bail has been granted to the accused Kunia.

> "This is an application for bail filed under Section 439, Cr.P.C.
>
> Heard learned counsel for the petitioner and learned counsel for the State. Perused the case diary.
>
> Considering the submissions made and the materials available on record, the prayer for bail is allowed. Petitioner be released on bail by the learned S.D.J.M., Bhubaneswar, in G.R. Case No.2976 of 2011, arising out of Laxmisagar P.S. Case No.187 of 2011, on such terms and conditions, as the learned Court below may deem just and proper.
>
> The BLAPL is accordingly disposed of.
> Issue urgent certified copy as per rules."

8. Now, the question arises as to whether on the basis of the above order, the petitioner is entitled to be released on bail on the plea of parity.

9. At this juncture, it would be appropriate to refer the judgment of the Hon'ble Supreme Court in the case of ***Dipak Shubhashchandra Mehta v. CBI and another,*** (2012) 4 SCC 134**,** wherein it has been held as under**:**

> "32. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted, particularly, where the accused is charged of having committed a serious offence. The court granting bail has to consider, among other circumstances, the factors such as (a) the nature of accusation and severity of punishment in case of conviction and the nature of supporting evidence; (b) reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; and (c) prima facie satisfaction of the court in support of the charge. In addition to the same, the court while considering a petition for grant of bail in a non-bailable offence, apart from the seriousness of the offence, likelihood of the accused fleeing from justice and tampering with the prosecution witnesses, have to be noted."

10. A plain reading of the order dated 08.10.2012 (extracted above) granting bail to the accused Kunia in BLAPL No.24420 of 2012 does not reveal that the above aspects have been highlighted. In the said order, no reason has been indicated for coming to a prima facie conclusion as to why bail was granted particularly when the petitioner along with other co-accused persons is alleged to have committed a serious offence, i.e., dacoity in a broad daylight.

No doubt the above order dated 08.10.2012 has been passed after hearing the learned counsel for the petitioner, learned counsel for the State and perusal of the record. Mere recording of so, will not suffice that various aspects of the case as observed by the Hon'ble Supreme Court in the case of ***Dipak Shubhashchandra Mehta*** (supra) for granting bail have been considered.

11. Needless to say that while granting bail, the Court must record reasons. Merely writing "perused the case diary", has no compliance. (*See Pratihosh vs. Mohan Singh, 1991 Cr.L.J. 784 (M.P.).*

12. The order dated 8.10.2012 passed in BLAPL No.24420 of 2012 on the basis of which the petitioner claims parity does not indicate that various aspects of the case, i.e., nature of offence committed by the accused Kunia, identification of accused in T.I. Parade, recovery of stolen property or weapon, his statement leading to discovery and his criminal antecedents have been considered. Therefore, it is not possible to accept the plea of parity claimed by the petitioner on the basis of the order dated 08.10.2012 passed in BLAPL No.24420 of 2012 in which bail has been granted to the co-accused Kunia. Hence, it will be appropriate to extract here the comparative chart furnished by the learned counsel for the petitioner in course of hearing, claiming the right of parity:

"Comparative Chart		
	Petitioner-Tiki @ Prasanta Barik	Kunia @ Gora @ Sampad Behera, who was granted bail in BLAPL No.24420 of 2012
1.	Basis of implication: Statement of co-accused namely Chakua@ Ramesh Mallick, who arrested at the spot.	Statement of co-accused namely Chakua@ Ramesh Mallick, who arrested at the spot.
2.	Statement recorded u/s.27 of Indian Evidence Act.	Statement recorded u/s.27 of Indian Evidence Act.
3.	Identified in T.I. Parade	Identified in T.I. Parade
4.	<u>Seizure</u> One country made pistol, two mobile phones, a motorcycle and a cash of Rs.5,000/-, Country made pistol was not put into T.I. Parrade to ascertain, it was used in the crime and the motor cycle was also not used in the alleged occurrence.	One gold chain, was recovered, as the gold chain was stolen property for which, it was given in zima of the informant by the investigating officer.
5.	<u>C.A. –</u> Seven cases	Four cases"

13. On the basis of the above chart, the petitioner wanted to highlight the factual similarity between the petitioner and Kunia, a co-accused who has been released on bail. Since no details have been recorded in the order

dated 08.10.2012 passed in BLAPL No.24420 of 2012 quoted above, there is no question of making comparison. However, significant differences need to be highlighted are that while Kunia is involved in four earlier criminal cases, the present petitioner is admittedly involved in seven earlier criminal cases. Additionally, a pistol stated to have been used for commission of offence was recovered from the possession of the petitioner. These factual differences also clearly rule out the claim of parity.

14. At this stage, it would be relevant to refer to some of the judgments of the Hon'ble Supreme Court and High Court.

In Special Leave Petition No.4059 of 2000 (***Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another,*** *decided on 12.3.2001)*, the Hon'ble Supreme Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court, the Hon'ble Supreme Court observed as under :-

> "The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier.
>
> xx xx xx xx
>
> Suffice it to say that for a serious charge where three murders have been committed in broad day light, the High Court has not applied its mind to the relevant materials, and merely because some of the co-accused, whom similar role has been ascribed, have been released on bail earlier, have granted bail to the present accused respondents. It is true that State normally should have moved this Court against the order in question, but at the same time the power of this Court cannot be fettered merely because the State has not moved, particularly in a case like this, where our conscience is totally shocked to see the manner in which the High Court has exercised its power for release on bail of the accused respondents. We are not expressing any opinion on the merits of the matter as it may prejudice the accused in trial. But we have no doubt in our mind that the impugned order passed by the High Court suffers from gross illegality and is an order on total non-application of mind and the judgment of this Court referred to earlier analyzing the provisions of sub-section (2) of section 439 cannot be of any use as we are not exercising power under sub-section (2) of section 439 Cr.P.C."

15. The Allahabad High Court in the case of ***Salim Vrs. State of UP,*** 2003 ALL LJ 625 has held that there is no absolute hidebound rule that bail must necessarily be granted to the co-accused where another co-accused has been granted bail irrespective of the gravity of offence.

16. The Allahabad High Court in the case of ***Chander alias Chandra vs. State of U.P.,*** 1998 CRI.L.J. 2374, held as under:

> "21. Our answers to the questions referred are as follows:
>
> 1. If the order granting bail to an accused is not supported by reasons, the same cannot form the basis for granting bail to a co-accused on the ground of parity.
>
> 2. A judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant factors essential for granting bail."

17. Keeping in mind the gravity of offence, materials available on record and the above principles of law, now I have to consider the present petition for grant of bail.

Undoubtedly in the present case, accusations are of serious in nature. In a broad daylight, the petitioner along with other co-accused persons entered into the house of the informant on the pretext of courier agent. On the point of pistol and knives, they took the godrej almirah keys from the informant, committed dacoity and took away cash, gold and silver ornaments. The materials already on record are recovery of stolen properties from the possession of the accused, discovery of weapons stated to have been used in commission of offence from the possession of the accused-petitioner and identification of the accused-petitioner in the TI parade. The petitioner has criminal antecedents as he is involved in seven other criminal cases. The order granting bail to the co-accused Kunia is not supported by reasons. Therefore, the same cannot form basis for granting bail to the petitioner on the ground of parity.

18. In view of the above, I am not inclined to accept the prayer of the petitioner for grant of bail. Accordingly, the Bail Petition is rejected.

Application rejected.

2013 (II) ILR - CUT- 151

B. K. PATEL, J.

RSA NO.136 OF 2012 (Dt.07.09.2012)

PRAMILA DAS ....Appellant

.Vrs.

JUGMAPRAVA MOHANTY & ORS. ....Respondents

LIMITATION ACT, 1963 – ART.113.

Whether counter claim of the appellant is governed by the provision under Article 113 of the Limitation Act – Held, Yes.

In this case plaintiff filed suit for eviction based on claim of title where as defendant No.2-appellant filed counter claim praying for declaration of title on the basis of adverse possession – Since Articles 64 and 65 Limitation Act prescribe period of limitation for suits for possession of immovable property or any interest there on, there is no basis for the appellant to urge that the period of limitation for the counter claim in this case is governed under Articles 64 and 65 – Held, both the Courts below rightly held that the counter claim of defendant No.2 is barred under Article 113 of the limitation Act.

(Para 10)

Case laws Referred to:-

1.2011 (I) OLR (SC) 875 : (Gayathri Womens Welfare Association-V- Gowramma & Anr.).
2.AIR 1989 Orissa 50 : (Mangulu Pirai-V- Prafulla Kumar Singh & Ors.).
3.AIR 1997 Orissa 67 : (Satyananda Sahoo-V- Ratikanta Panda).
4.(1987)3 SCC 265 : (Mahendra Kumar & Anr.-V- State of M. P. & Ors.).

For Appellant - M/s. Samir Ku. Mishra, J.Pradhan, P.Prusty & D.K. Pradhan)

For Respondent – M/s. Shyamananda Mohapatra,(Sr.Adv.), Prasanna Panda & Tapas Ku. Praharaj, (for Respondent No.1).

B.K. PATEL, J. The second appeal is directed against the judgment and decree dated 31.1.2012 passed by learned District Judge, Cuttack dismissing R.F.A. No.179 of 2011 and confirming the order dated 5.9.2011

passed by learned Civil Judge (Senior Division), 1st Court, Cuttack in T.S. No.531 of 1996-I rejecting, and refusing to admit, counter-claim of the appellant as being barred by limitation.

2. Appellant is defendant no.2 and respondent no.1 is the plaintiff in T.S. No.531 of 1996-I. Originally respondent no.5 as plaintiff instituted the suit for eviction of the appellant from the suit property. On 6.8.1997 the appellant filed written statement disputing the claim of the original plaintiff. Issues were settled on 2.2.2000. On 30.12.2002 registered sale deed in respect of the suit property was executed by original plaintiff in favour of the respondent no.1. On 9.3.2004 in view of application filed by the respondent no.1, respondent no.1 was added as a plaintiff. Thereafter, on 8.9.2004 the appellant filed counter-claim. By order dated 19.4.2005, in response to application filed by respondent no.1, original plaintiff was transposed as proforma defendant no.9. On 25.7.2011 the present plaintiff, i.e., respondent no.1 filed application under Order 7, Rule 11 of the C.P.C. for rejection of the counter-claim on the ground of being time barred under Article 113 of the Limitation Act.

3. On consideration of the rival contentions, order dated 5.9.2011 was passed by the learned trial court rejecting the counter-claim which order was confirmed by the lower appellate court and is under challenge in the present second appeal.

4. The following substantial question of law has been formulated for adjudication in this second appeal:

> "Whether counter claim of the appellant is governed by the provision under Article 113 of the Limitation Act?"

5. In support of the appeal, it was contended by the learned counsel for the appellant that both the courts below failed to appreciate the nature of claim made by the defendant no.2-appellant in the counter-claim and the implications thereon of the provision under Order 8 Rule 6A of the Code of Civil Procedure. It was contended that in the counter-claim defendant no.2 has sought relief of declaration of right, title, interest and confirmation of possession over the suit property. A bare reading of the counter-claim would reveal that counter-claim of title of defendant no.2 is based on plea of adverse possession. It was argued that as the claim of defendant no.2 is based on the plea of adverse possession, the period of limitation of the counter-claim would be governed under Articles 64 and 65, and not under Article 113, of the Limitation Act.

6. In reply it was contended by the learned counsel for the respondent no.1 that relief prayed for in the suit by the original plaintiff as well as the present plaintiff is eviction of the defendant no.2 from the suit premises. The claim is based on title. Therefore, admittedly, defendant no.2 is in possession over the suit property.Present plaintiff being *lis pendent* purchaser has been allowed to step into the shoes of the original plaintiff initially as one of the plaintiffs and subsequently as the sole plaintiff. Original plaintiff has been relegated to the position of proforma defendant no.9. Defendant no.2 delivered his defence to the claim of title made in the suit by filing written statement way back on 6.8.1997. Thereafter, issues were settled on 2.2.2000. However, counter-claim was filed on 8.9.2004 when the suit was posted for recording of evidence of P.W.1 in course of her cross-examination by pleader commissioner. Articles 64 and 65 of the Limitation Act relate to suits for possession. In the present case, in his counter-claim defendant no.2 prays for declaration of title on the basis of possession. Therefore, admittedly, counter-claim is not a prayer for relief of possession. In such circumstances, both the courts below rightly held that the period of limitation for the appellant's counter-claim is governed under Article 113 of the Limitation Act.

7. Learned counsel for the respondent no.1 has drawn attention of the court to the observation of the Hon'ble Supreme Court at paragraph 33 of the decision in **Gayathri Womens Welfare Association –vs- Gowramma & Anr.**: 2011 (I) OLR (SC) 875, on which lower appellate court has placed reliance, to the effect that generally speaking the counter-claim not contained in the original written statement may be refused to be taken on record, especially if issues have already been framed.

8. In order to appreciate rival contentions it will be profitable to refer to the provision under Order 8 Rule 6A of the C.P.C. for filing of counter-claim by defendant. It reads:

> "(1) A defendant in a suit may, in addition to his right of pleading of set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not;
>
> Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints. "

9. It is now well settled that counter-claim in a suit can be filed by defendant in respect of any right or claim in respect of a cause of action which accrues to the defendant against a plaintiff either before or after filing of the suit but before defendant has delivered his defence or before time stipulated for delivery of defence expires. In this connection, decision of this Court in **Mangulu Pirai –vs-Prafulla Kumar Singh & others**: AIR 1989 Orissa 50 may be referred to. Counter-claim is required to be treated as plaint in a suit and is governed by rules applicable to plaint including rules of limitation applicable to such suit. Under section 3(2)(b)(ii) of the Limitation Act, counter-claim is to be treated as a separate suit deemed to have been instituted on the date such counter-claim is made in court. Therefore, counter-claim has to be made in court before expiry of period of limitation prescribed for a suit in which relief of the nature similar to the counter-claim is made. In the decision of **Satyananda Sahoo –vs- Ratikanta Panda :** AIR 1997 Orissa 67, it has been held by this Court that trial court should keep in mind that the cause of action is relatable to the period of limitation. It is well settled in law that limitation need not be set up as a defence under section 3(1) of the Limitation Act. It is the duty of the court to find so. Duty is cast on the court to entertain a plaint to look into the averments in the plaint in proper perspective and consider the plaint as a whole to scan the essence of the cause of action and arrive at a conclusion whether the cause of action as indicated and understood as a bundle of facts giving rise to a grievance of the plaintiff saves the limitation or not. Court may examine the point before admitting the plaint. It is also pertinent to note that in the present case, in the impugned judgment of the lower appellate court reference has been made to the decision of the Hon'ble Supreme Court in **Mahendra Kumar and another vs. State of Madhya Pradesh and others**: (1987) 3 SCC 265 in which, under the facts and circumstances of the case, it was held that the counter-claim having been filed within three years from the date of accrual of the right to sue, is within the period of limitation as provided under Section 113 of the Limitation Act.

10. Admittedly, in the present case, plaintiff's suit is a suit for eviction based on claim of title whereas counter-claim of defendant no.2 is for declaration of title on the basis of plea of adverse possession. The very basis of the counter-claim being plea of adverse possession, defendant no.2 admits to be in possession of the suit property. Therefore, counter-claim is not in the nature of suit for possession. Both the Articles 64 and 65 prescribe for period of limitation for suits for possession of immovable property or any interest thereon. Therefore, there is no basis for the appellant to urge that the period of limitation for the counter-claim in the present case is governed under Articles 64 and 65 of the Limitation Act. Both the courts below rightly held that the counter-claim of defendant no.2 is barred under Article 113 of the Limitation Act.

11. There is no merit in the second appeal. Accordingly, the RSA is dismissed. No cost.

Appeal dismissed.

2013 (II) ILR - CUT- 155

B. K. NAYAK, J.

W.P.(C) NO. 6797 OF 2002 (Dt.21.01.2013)

CHANDABAI SHARMA … …..Petitioner

.*Vrs.*

ADDL. D. M., BARGARH & ORS. **………**Opp.Parties

A. ODISHA LAND REFORMS ACT, 1960 – S.37 (b)

Ceiling proceeding – Definition of "Family" – Petitioner a married daughter prior to the appointed date i.e. 26.09.1970 – Ceiling proceeding against her father after his death – Subsequently draft statement was revised in the name of the petitioner and four others being Class-I heirs of her father.

Held, petitioner being married prior to the appointed date, she cannot be considered to be a member of the family of her father but she being a Class-I heir of her father each one of such heir would be treated as a separate and distinct "Family" within the definition of Section 37 (b) of the Act for the purpose of ceiling proceeding and they

cannot also be considered an "association or body of individuals" so as to be treated as a single person within the meaning of Section 37 (a) of the Act. (Para 7)

B. ODISHA LAND REFORMS (GENERAL) RULES, 1965 – RULE 30 (2).

Notice in ceiling proceeding – Proceeding against five persons including the petitioner as Class-I heir of the deceased land holder – Notice not issued in the name of the petitioner – Violation of natural justice – Issuance of notice to any one of the heirs cannot be treated as sufficient compliance of the mandate of the Rule – Allegation that the petitioner had knowledge of the proceeding – Held, provision of Rule 30 (2) of the Rules being mandatory in nature mere knowledge of the proceeding by a person interested cannot be a justification for dispensing with service of notice. (Para 6)

Case laws Referred to:-

1.1992 (I) OLR 85 : (Smt. Satrupa Dei-V- Land Reforms Commissioner, Orissa, Cuttack & Ors.)
2.71(1991)CLT 843 : (Ramnaryan Ram & Ors.-V- Revenue Officer-cum-Tahasildar, Darpan & Ors.)
3.66(1988)CLT 774 : (Smt. Anusuya Rath & Anr.-V- State of Orissa & Ors.)
4.2001(II) OLR (SC) 225 : (State of Orissa-V- K.Srinivasa Rao(dead) through L.Rs.)
5.62(1986) CLT 116 : (Surendra Prasad Parida-V- State of Orissa through Secretary to Govt. of Orissa, Revenue Department & Ors.).

For Petitioner - M/s. N.K. Sahu, B. Swain & M.K. Nayak.

For Opp.Parties - M/s. S. Mohapatra, K.R. Mohapatra, S.Ghosh, (for Opp.Party Nos.4 & 5)
Addl. Govt. Advocate (for Opp.Party Nos.1 to 3) Mr. N. K. Das (for Opp.Party No.6).

B.K.NAYAK, J. In this writ application the petitioner challenges the order dated 18.12.2002 (Annexure-7) passed by the Additional District Magistrate, Bargarh in OLR (R) Case No.1 of 2002.

2. The admitted facts are that one Manohar Sharma was the owner of Ac.36.57 of land in two villages, namely, Barhaguda and Talsriguda, which was his self acquired property. M.S. Khata no.308-Ac.28.10 and Khata

no.309-Ac.1.60 situated in village-Barhaguda whereas M.S. Khata No.317-Ac.5.28, Khata No.379-Ac.1.07 and Khata No.380-Ac.0.52 situated in village-Talsriguda. The said Manohar Sharma left behind three sons, namely, Surajmal, Harisankar and Ramkishan (opposite party no.6) and two daughters, namely, Chandbai, the present petitioner, and Gitabai (opposite party no.7). Surajmal pre-deceased Manohar Sharma issueless. Harisankar is dead and his two daughters, namely, Jayshree and Pramila are opposite party nos.4 and 5. Manohar died in 1972 and till the year 1968 he sold Ac.17.51 of his land. The settlement R.O.R. prepared in the year 1972 stood in the name of Manohar Sharma alone. In the year 1976 a suo motu ceiling proceeding bearing OLR Case No.261 of 1976 was initiated against Manohar Sharma by the Tahasildar-cum-Revenue Officer, Bargarh, opposite party no.3 under Section 42 of the Orissa Land Reforms Act,1960 (hereinafter referred to as 'the Act'), though Manohar Sharma was already dead by then. On 20.04.1976 notice was issued and the local R.I. was directed to submit report regarding the detail particulars of the land held by Manohar. On 01.09.1982 R.I. submitted report. On 19.05.1982 Harisankar, who is one of the sons of late Manohar appeared and raised objection and stated that out of the entire family property some lands have been sold by Manohar himself, and that in a family partition the disputed property has been partitioned between himself, his father and his younger brother-Ramkisan and by virtue of such partition they are possessing their shares separately. The Revenue Officer observed that with regard to sale of land no sale deed or affidavit had been filed and with regard to the plea of partition no paper was produced nor any witness was cited. The Revenue Officer, however, directed for preparing a draft statement showing the names of Banibai, W/o. Surajmal, Harisankar, Ramkisan, Chandbai and Gitabai showing Ac.24.96 as ceiling surplus since they are entitled to only 10 standard acres of land and the five persons were treated as body of individuals. On 21.05.1982 the draft statement was prepared and signed by the Tahasildar and direction was given for service of the draft statement on all the parties interested in the property.

It is the contention of the petitioner that despite such direction no notice was ever served on the daughters of late Manohar, who were interested parties.

The further admitted position is that Ramkisan and Harisankar filed their objection to the draft statement on 22.6.1982. But their objection was rejected on 18.08.1982 since they were absent on call and the draft statement was confirmed under Section 44 (1) of the O.L.R. Act as per order sheet unde r Annexure-3. Aggrieved by the order under Annexure-3

Ramkisan and Harisankar preferred OLR Appeal No.60 of 1982 before the Sub-Collector, Bargarh (opposite party no.2) under Section 44 (2) of the O.L.R. Act. The appeal was allowed and the order under Annexure-3 was set aside and the matter remanded back to the Revenue Officer-cum-Tahasildar for fresh hearing by giving due opportunity to the appellants to substantiate their case. After such remand, the Revenue Officer vide his order dated 15.01.1985 under Annexure-4 accepted the contention of Ramkisan and Harisankar and disposed of the proceeding holding that both the brothers were living separately in mess and property for more than 20 years and they were married prior to the appointed date, i.e., 26.09.1970 and that their father was dead and that both are entitled to two separate ceilings and that taking into consideration the land which had already been sold, i.e., Ac.16.95, there was no ceiling surplus as both the brothers are possessing less than what they are legally entitled to retain.

3. In the meantime, after passing of the order under Anenxure-4, consolidation operation started in the villages but the present petitioner, 15 years after passing of the order under Annexure-4, preferred OLR Appeal No.2 of 2000 challenging the order of the Revenue Officer under Annexure-4 mainly on the ground that in the ceiling proceeding no notice as required under Rule 30(2) of the Orissa Land Reforms General Rules,1965 (in short 'the Rules') was issued to her by the Revenue Officer even though she had $1/4^{th}$ interest in the properties left by her late father Manohar Sharma and that there was no partition of the properties. She also asserted that the other sister, Gitabai was also entitled to $1/4^{th}$ share in the suit property. The Sub Collector (opposite party no.2) by his order dated 29.09.2001 (Annexure-6) allowed the appeal and set aside the order under Annexure-4 holding that notices contemplated under Rule 30(2) and 30(3) of the Rules were not served on the appellant and there was complete violation of principle of natural justice in disposal of the proceeding before the learned Tahasildar and accordingly the whole proceeding stood vitiated. The appellate authority having set aside the order under Annexure-4 remanded the ceiling case for fresh hearing after giving due opportunity to the appellant and other holders.

Challenging the aforesaid appellate order, the present opposite party nos.4 and 5, daughters of Harisankar filed OLR Revision Case No.1 of 2002 before the Additional District Magistrate, Bargarh (opposite party no.1). The revision was allowed by order dated 18.12.2002 (Annexure-7) by opposite party no.1 holding that the appellant and the other daughter of Manohar Sharma were major and married prior to 26.09.1970 and, therefore, they were not to be included in the family of their father or brothers and they cannot claim any land allotted to their brothers, and that the appellant had

sufficient knowledge regarding the disposal of the ceiling case and, therefore she will not derive any benefit of Rule 30 (2) of the Rules. Opposite party no.1 accordingly set aside the appellate order under Annexure-6.

4. It is submitted by the learned counsel for the petitioner that admittedly by the date of initiation of the ceiling proceeding the petitioner's father Manohar Sharma, the recorded owner of the land, was already dead and, therefore, the petitioner acquired interest in the property by way of inheritance and that after correction of the draft statement by order of opposite party no.3 dated 19.5.1982 with direction to issue notice on 21.5.1982 and that issuance of notice under Rule 30 being a mandatory requirement and no notice having been served on the appellant, the entire proceeding stood vitiated and, therefore, the impugned order of the revisional authority cannot be sustained. He further submits that even where a person interested has knowledge of a proceeding, the mandatory requirement of notice cannot be dispensed with. He also submits that even otherwise the finding of the revisional authority that the present petitioner had knowledge of the ceiling proceeding is not based on any material on record. It is also his submission that the petitioner having inherited the property on the death of her father and that she being a major daughter married prior to the appointed date, she cannot be considered as a member of the family of her father or brother and instead she would be regarded as a separate unit and her own family would consist of herself, her husband and her children.

The learned counsel for contesting opposite party nos.4 and 5 submits that the married daughter does not come within the definition of family as given in Section 37 (b) of the Act and hence she cannot be said to be a person interested in the land held by Manohar Sharma. In this respect, he relies on the decision reported in ***1992(I) OLR 85: Smt. Satrupa Dei v. Land Reforms Commissioner, Orissa, Cuttack and others***. It is his further submission that the Tahasildar on assessment of evidence found that there was amicable partition between the two brothers, who were staying in separate mess and property and that even if for the sake of argument it is held that there was no partition, then notice to Harisankar would be sufficient notice to all the persons interested as he was the eldest member and was looking after the affairs of the family and, therefore, issuance of notice under Rule 30(2) to the petitioner was not necessary and non-issuance of the same cannot be said to be fatal to the ceiling proceeding. It is also submitted by him that the petitioner's claim for share over the land held by her father late Manohar Sharma is beyond the scope of adjudication by the Revenue Officer in a ceiling proceeding and that when the Revenue Officer has already held that there was no ceiling surplus land, the petitioner may work

out her remedy with regard to her claim in the land in any other competent court of law. He, therefore, submits that the impugned revisional order warrants no interference.

5. Admittedly, the disputed land forming the subject matter of the ceiling proceeding was the self acquired property of late Manohar Sharma, who died in the year 1972. Though the proceeding was initiated in 1976 against the dead man, subsequently realising that Manohar Sharma was already dead since 1972, the Tahasildar revised the draft statement in the names of the sons, daughters and widow of a pre-deceased son of Manohar Sharma and directed to issue notice and the draft statement to those five persons. All five persons were Class-I heirs of late Manohar Sharma as per provision of Hindu Succession Act, 1956. The heirs including the petitioner inherited the property as tenants-in-common and not as joint tenants, meaning thereby, each one of the heirs held his share independently. Therefore, each one of the heirs of Manohar was entitled to notice. The question whether Harisankar and Ramkisan divided the property among themselves and became separate should have been decided in presence of all the legal heirs of Manohar Sharma and this is more so, particularly when the petitioner takes the plea that there was no partition as claimed by Harisankar and Ramkisan. Rule 30 (2) of the Rules provides that a copy of the draft statement prepared in the ceiling proceeding shall be sent by registered post with acknowledgment due to the person to whom it relates together with a notice intimating such person for filing objection, if any. A division Bench of this Court in the decision reported ***71 (1991) C.L.T. 843: Ramnaryan Ram & others v. Revenue Officer-cum-Tahasildar, Darpan & others*** held as follows :

> "5. In the present case, on inquiry when the Revenue Officer came to hold that the present three petitioners were entitled to separate ceiling of lands being major, married and separate sons prior to the appointed date and the property in the draft statement related to them, as they held part of the said property. It was incumbent upon the Revenue Officer to issue notice to them under Rule 30(2) of the Rules and this having not been done, the impugned order passed was void being violative of the principles of natural justice.
>
> 6. The principles of audi alteram partem which required that no one shall be condemned unheard is a part of the rules of natural justice and has universal application irrespective of any statute requiring the party to be heard. By now, the law is well settled that even to an

> administrative action which involves civil consequences, the doctrine of natural justice must be held to be applicable.”

7. The requirement of the Rule about issuance of notice to the person to whom the draft statement relates must be interpreted to mean all such persons to whom it relates, and issuance of a notice to any one of them cannot be taken to be sufficient compliance of the mandate of the Rule so far as the persons who have not been served with notice, particularly where a person has interest in the land independent of the interest of others.

There is no dispute that no notice as required under Rule 30(2) of the Rules was served on the petitioner. Therefore, the order of the Tahasildar-cum-Revenue Officer dated 15.01.1985 under Annexure-4 was vitiated. The appellate order of the Sub-Collector vide Annexure-6 passed in OLR Appeal No.2 of 2000 remanding the ceiling case to the Tahasildar to hear afresh after giving opportunity to all the persons to whom the draft statement related was quite justified. There is no material on record that the petitioner had the knowledge of the ceiling proceeding as observed by opposite party no.1 in the impugned order. Even otherwise, provision of Rule 30(2) of the Rules being mandatory in nature, mere knowledge of a proceeding by a person interested cannot be a justification for dispensing with service of notice.

8. The contention of the learned counsel for opposite party nos.4 and 5 that the petitioner’s claim for share over the land held by her father late Manohar Sharma is beyond the scope of adjudication by the Revenue Officer in the ceiling proceeding cannot be accepted as because each of the Class-I heirs of late Manohar Sharma, who succeeded to the disputed properties has interest independent of others. Each one of such heirs should be treated as a separate ‘person’ or ‘family’ within the meaning of Section 37 of the Act. The question of partition of the properties between Manohar and his two sons which has the effect of dislodging the natural course succession to Manohar requires to be determined later on the basis of the pleas and evidence led by all the heirs/successors. A Full Bench of this Court in the decision reported in ***66 (1988) C.L.T. 774: Smt. Anusuya Rath and another v. State of Orissa and others*** held that a daughter already married by the appointed date, i.e. 26.09.1970, would not come under the definition of “family” of his father as defined in Section 37(b) of the Act. The apex Court in the decision reported in ***2001 (II) OLR (SC) 225: State of Orissa and others v. K. Srinivasa Rao (dead) through L.Rs***. upheld the aforesaid Full Bench decision.

In the instant case being the daughter of late Manohar Sharma and being married prior to the appointed date, the petitioner cannot be

considered to be a member of the 'family' of her father after the marriage. In any event the corrected draft statement in the proceeding being prepared in the name of the Class-I heirs of late Manohar Sharma, each one of such heir would be treated as a separate 'family' within the definition of Section 37 (b) of the Act for the purpose of the ceiling proceeding. They cannot also be considered an 'association or body of individuals' so as to be treated as a single person within the meaning of Section 37(a) of the Act. This proposition has stood settled by a Division Bench of this Court in the decision reported in ***62 (1986) C.L.T.116: Surendra Prasad Parida v. State of Orissa through Secretary to Government of Orissa, Revenue Department and others,*** where it has been observed as under :

> "… …. Without being exhaustive where the members of a family as understood in common parlance hold land by inheritance, succession or by acquisition, they cannot be treated as an association or a body of individuals, but as a "family" or "families", as they case may be, within the purview of Section 37(b).
>
> In *Jaga alias Jagannath Naik and others v. The State of Orissa and another,* one Baraja died leaving behind his wife and three sons. It was held that while determining the ceiling area and surplus lands of one of the brothers, the property held by the two others could not be taken into account. The brothers were not treated as a body of individuals, i.e., as a 'person' within the purview of Section 37(a). They were treated as distinct "families".
>
> 6. We, therefore, quash the decisions of the Revenue Officer and the appellate and revisional authorities and hold that the petitioner and his brother Debendra shall be treated as two separate and distinct "persons" and direct that determination of their respective ceiling areas observations made by us above and law after giving them an opportunity of being heard and option to select if there be surplus lands in their hands."

8. In the light of the aforesaid discussions, this writ application is allowed and the impugned revisional order under Annexure-7 is quashed and it is directed that the Tahasildar-cum-Revenue Officer, Bargarh (opposite party no.3) shall hear and dispose of expeditiously the ceiling case afresh after giving notice to all the persons to whom the draft statement relates. No costs.

Writ petition allowed.

2013 (II) ILR - CUT- 163

B. K. NAYAK, J

CRLREV. NO. 742 OF 2012 (Dt.07.03.2013)

LAXMAN PRUSTY ……..Petitioner

.Vrs.

STATE OF ORISSA ………Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.227

Discharge – Petitioner alleged to have tampered his date of birth in service record – He retired in 1986 but F.I.R. lodged in 2002 – Initiation of Criminal Proceeding being barred Under Rule 7 (2) (c) of Orissa Civil Service (Pension) Rules, 1992 he filed an application for discharge – Application rejected on the ground that charge already framed against the petitioner – Hence this revision.

Criminal Proceeding itself being not maintainable, no charge could have been framed against the petitioner, even though, cognizance has already been taken – Held, mere taking of cognizance does not debar the Court to consider the question of maintainability of the proceeding at the time of hearing on charge – Held, impugned order is set aside and the Criminal Proceeding is quashed.

For Petitioner - M/s. Savitri Ratho
For Opp.Party - Mr. Zafrulla, Addl.Standing Counsel.

Heard learned counsel for the petitioner and Mr.Zafrulla, learned Additional Standing Counsel. Perused the records.

Order dated 03.09.2012 passed by the learned J.M.F.C., Balasore in C.T.No.1505 of 2007 rejecting the application for discharge and framing charge against the petitioner under sections 466, 467, 468, 471 of the Indian Penal Code has been challenged in this revision.

It was urged in the petition and also argued before the learned magistrate that the proceeding arising out of Balasore Town P.S.Case No.402 of 2007 initiated on the basis of the F.I.R. lodged by the Reserve Sub-Inspector, Reserve Office, Balasore was not maintainable/entertainable in view of the bar contained in Clause (c) of sub-Rule-(2) of Rule-7 of Orissa Civil Services (Pension) Rules, 1992 (in short ‘the Rules’).

Learned J.M.F.C., Balasore rejected the contentions raised on behalf of the petitioner simply holding that since cognizance has already been taken, the question of non-maintainability of the proceeding cannot be entertained at the stage of framing of charge.

As per the F.I.R. allegation the petitioner was a driver Havildar in the Police department and he entered into service as a Constable on 21.12.1964 and in his service record his date of birth was mentioned as 01.07.1940. Subsequently the petitioner obtained a School Leaving Certificate from Sisua M.E.School, Banki on 13.12.1986 and on the basis of the said School Leaving Certificate he tampered the date of birth in service record and altered the same to 01.07.1945 in connivance with some other employees of the Reserve Sub-Inspector section and in the process he continued in service illegally from 01.07.1998 to 25.07.2002, as a result the Government sustained pecuniary loss of Rs.3,55,669/-.

Admittedly on the basis of the alleged manipulation, the petitioner retired from service on 25.07.2002,

It is submitted by the learned counsel for the petitioner that Clause (c) of Sub-Rule-(2) of Rule-7 of the Rules creates a specific bar for institution of a judicial proceeding in respect of a cause of action which arose in respect of an event taking place more than four years before such institution, if such institution is after retirement of the Government servant.

For proper understanding of the submission, the relevant provision under Rule-7 of the Rules is extracted hereunder:-

> "**7.Right of Government to withhold or withdraw pension**- (1) The Government reserve to themselves the right of withholding a pension or gratuity, or both either in full or in part, or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Government, if in any departmental or judicial proceedings, the pensioner found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement:
>
> Provided that the Orissa public Service Commission shall be consulted before the final orders are passed:
>
> Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.

(2)(a) xx xx xx xx

(b) xx xx xx xx

(c) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his re-employment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.

(d) In the case of Government servant who has retired on attaining he age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Clauses (a) and (b), a provisional pension as provided in Rule 66 shall be sanctioned.

(e) Where the Government decide not to withhold or withdraw pension but order recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.

Explanation – For the purpose of this rule –

(a) Departmental proceedings shall be deemed to be instituted on the date on which the statement of charges are issued to the Government servant or pensioner, or if the government servant has been placed under suspension from the date of his suspension; and

(b) Judicial proceedings shall be deemed to be instituted-
(i) in the case of criminal proceedings, on the date on which the complaint or report of a police officer, of which the Magistrate takes cognizance, is made; and

ii) in the case of Civil proceedings, on the date of presentation of the plaint in the Court."

Sub-Rule-(1) of Rule 7 of the Rules, which is substantive in nature, confers right on the Government for withholding the pension or gratuity or withdrawing pension in respect of whole or part of the pecuniary loss caused to the Government if the petitioner has been found guilty of grave misconduct or negligence in duty during the period of his service in any departmental or judicial proceeding.

Clause(c) of sub-Rule(2) bars institution of a judicial proceeding, if not so instituted while the Government servant was in service, more than four years after arising of the cause of action or taking place of the event.

Explanation (b) to Rule-7 provides the manner to determine the date of institution of a judicial proceeding. According to the explanation a criminal proceeding shall be deemed to be instituted on the date on which the complaint or a police report was filed before the Magistrate.

Admittedly the F.I.R. in the present case has been lodged more than five years after the retirement of the present petitioner in relation to an event allegedly taking place in 1986 and therefore, such initiation of the criminal proceeding is definitely barred by Clause (c) of Sub-Rule (2) of Rule-7 of the Rules. Hence the criminal proceeding itself being not maintainable, no charge could have been framed against the petitioner even though cognizance has already taken. Mere taking of cognizance does not debar the Court to consider the question of maintainability of the proceeding at the time of hearing on charge.

In such circumstances, I allow the revision, set aside the impugned order and also quash the criminal proceeding in C.T.No.1505 of 2007 pending on the file of the learned J.M.F.C., Balasore.

Revision allowed.

2013 (II) ILR - CUT- 166

B. K. NAYAK, J.

CRLREV. NO. 20 OF 2012 (Dt.07.03.2013)

DEBASIS ROUT ……..Petitioner

.*Vrs*.

MANOJ KUMAR PARIDA ………Opp.Party

NEGOTIABLE INSTRUMENTS ACT, 1881 – S.147.

Offence U/s. 138 N.I. Act – Joint petition by the complainant and the accused for compounding of the offence – Held, such compounding can be made at any stage of the proceeding i.e. during appeal, revision or even before the Supreme Court.

In this case complainant has already received the compensation amount of Rs.65,000/- and he has no objection if order of conviction and sentence against the petitioner is set aside – Held, petition for compounding the offence is allowed – Order of conviction and sentence passed by the trial Court is set aside and the petitioner is acquitted of the charge U/s.138 N.I. Act subject to deposit of Rs.8400/- by way of cost with the Orissa State Legal Services Authority, Cuttack.

Case law Referred to:-

(2010) 45 OCR (SC) 449 : (Damodar S.Prabhu-V- Sayed Babalal H.).

For Petitioner - M/s. Pabitra Kumar Nayak
For Opp.Party - M/s. Radharaman Das Nayak

Heard learned counsel for the petitioner and learned counsel for the opposite party.

This is an application for compounding the offence filed jointly by the petitioner and the opposite party, who are respectively the accused and the complainant in I.C.C.No.567/2008 of the Court of S.D.J.M., Panposh, Rourkela. The petitioner having been convicted in that complaint case under Section 138 of N.I. Act was sentenced to undergo simple imprisonment for six months and to pay compensation of Rs.65,000/- to the opposite party-complainant. The order of conviction and sentence passed by the S.D.J.M. was confirmed by the Additional Sessions Judge, Rourkela, by judgment dated 26.10.2010 passed in Criminal Appeal No.27 of 2010. Challenging the aforesaid concurrent judgments of both the courts below, the present Revision has been filed.

The amount of the dishonoured cheque is Rs.56,000/-. In the present petition both the parties have averred that at the behest of their well-wishers the matter has been settled out of court and that the complainant-opposite party has already received the compensation amount of Rs.65,000/- (rupees sixty-five thousand) and that he has no objection if the order of conviction and sentence of the petitioner is set aside.

The offence under Section 138 of N.I. Act is compoundable as per the provision under Section 147 of N.I. Act. Such compounding can be made at any stage of the proceeding, i.e., during appeal, revision or even before the Supreme Court. In the case of ***Damodar S.Prabhu vrs. Sayed Babalal H.*** reported in (2010)46 OCR (SC) 449 while allowing compounding of the offence under Section 138 of N.I. Act, the apex Court issued

some general guidelines to be followed in the matter of compounding, which are as follows :-

"a) That directions can be given that the Writ of Summons be suitably modified making it clear to the accused that he could make an application for compounding of the offences at the first or second hearing of the case and that if such an application is made, compounding may be allowed by the Court without imposing any costs on the accused.

b) If the accused does not make an application for compounding as aforesaid, then if an application for compounding is made before the Magistrate at a subsequent stage, compounding can be allowed subject to the condition that the accused will be required to pay 10% of the cheque amount to be deposited as a condition for compounding with the Legal Services Authority, or such authority as the Court deems fit.

c) Similarly, if the application for compounding is made before the Sessions Court or a High Court in the revision or appeal, such compounding may be allowed on the condition that the accused pays 15% of the cheque amount by way of costs.

d) Finally, if the application for compounding is made before the Supreme Court, the figure would increase to 20% of the cheque amount."

Considering the facts and circumstances of the case, the petition for compounding is allowed and the order of conviction and sentence passed by the trial court, as confirmed by the appellate court, is set aside and the petitioner is acquitted of the charge under Section 138 of N.I. Act subject to condition that he shall deposit a sum of Rs.8400/- (rupees eight thousand four hundred) by way of cost with the Orissa State Legal Services Authority, Cuttack within six weeks from today. The Misc. Case as well as the Revision stand disposed of.

Application disposed of.

2013 (II) ILR - CUT- 169

S. K. MISHRA, J.

W.P.(C) NO.4491 OF 2013 (Dt.17.04.2013)

BALARAM DIXIT & ORS. … …..Petitioners

.Vrs.

TADIT KUMAR ROUT ………Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-8, R-1 & O-8, R-9.

Written statement filed after one year along with a petition U/o-8, R-9 to accept the same – No party should ordinarily be denied the opportunity of participating in the proceedings of the Court.- Nature of the provision contained in Order 8, Rule 1 C.P.C. is procedural and not substantive – Object of the provision to expedite the hearing and not to scuttle the same – Petition filed by the defendants that there was talk of compromise between the Parties, is a good ground for extending time beyond prescribed limit – Held, petition filed by the defendants-petitioners to accept the W.S. is allowed on payment of cost before the Court below.

In this case application filed under O-8, R-9, C.P.C. is not appropriate as the petitioner has not filed any written statement and as such there is no question of filing subsequent pleadings.

(Paras 5,9)

Case laws Referred to:-

1.(2009) 3 SCC 513 : (Mohammad Yusuf-V- Faij Mohammad & Ors.)
2.(2005)4 SCC 480 : (Kailash-V- Nanhku & Ors.)
3.(2007) 6 SCC 420 : (M/s. R.N. Jadi & brothers & Ors.-V- Subhash Chandra).
4.2009(I) OLR 48 : (Smt. Sarbati Devi Goinka-V- Durga Prasad Agarwal).

For Petitioners - M/s. Ramakant Mohanty, D.Mohanty, Ch. N. C. Das, A. Mohanty, D.Haradwaj, S.Mohanty, S.N. Biswal.
For Opp.Party - M/s. Sanjib Swain, S.C. Panda & B.R. Swain.

S.K.MISHRA, J. In this writ petition, the petitioners, who are defendants in Civil Suit No. 650 of 2011, assail the order passed by the learned Civil

Judge (Senior Division), Ist Court, Cuttack rejecting their application under Order VIII, Rule 9 of the Code of Civil Procedure, 1908, hereinafter referred as the 'Code' for brevity, to accept the written statement –cum-counter claim filed by the defendants.

2. The defendants on 13.09.2012 filed their written statement-cum-counter claim along with a petition to accept the same. The defendants contended that the statutory period prescribed under Order VIII, Rule 1 of the Code had expired, but the defendants were not yet set ex parte. However, the defendants were precluded from filing their written statement and the case was posted for hearing. They further contended that due to bona fide reasons they could not file their written statement in time. It is the case of the petitioner that both the parties belong to same locality and there was possibility of mutual settlement at the intervention of Sahi Panchayat, for which defendants were advised not to file their written statement. But such possibility of mutual settlement no more subsists due to high handed attitude of plaintiff. They have also stated that hearing of suit not yet commenced, so no prejudice would be caused to the plaintiff if the time period for filing of written statement is extended and the written statement is accepted. On the other hand, there will be failure of justice, if the matter is not properly contested by both the parties and the defendants are not allowed to file their written statement. It is further contended that unless the written statement is accepted, they will suffer irreparable loss and injury which cannot be compensated in any manner. The defendants also stated that there has been no deliberate laches or negligence on their part. On the above averments the defendants prayed to accept their written statement cum counter claim and allow them to contest the suit.

3. The plaintiff-opposite party filed his objection challenging the maintainability of petition filed by the defendants. The plaintiff specifically stated that pursuant to the summons, the defendants entered appearance on 26.09.2011 by executing Vakalatnama and the matter was adjourned to 03.11.2011 for filing of written statement. On 03.11.2011, 16.01.2012 and 17.03.2012, time was allowed on the prayer of defendants to file their written statement and the case was posted on 07.05.2012 for filing of written statement subject to period of limitation. In spite of specific order, the defendants did not file any written statement and again filed a petition for time to file written statement on 07.05.2012, which was rejected and the defendants were precluded to file written statement and the case was posted on 13.09.2012 for hearing of suit. On 13.09.2012, the defendants have filed their written statement cum counter claim along with petition under Order VIII, Rule 9 of the Code for acceptance of the written

statement. It is also stated that on various dates, the defendants prayed for time for arranging documents for preparation of written statement, but in the petition for acceptance of the written statement, they have stated that they could not file the written statement within the time as there was possibility of mutual settlement of the parties. The plaintiff also submitted that as per Order VIII, Rule 1 of the Code, the defendants should have filed their written statement within 30 days from the date of receipt of summons and where the defendants failed to file written statement within the period of 30 days, they may be allowed to file the same on such other day as would be specified by the Court for reasons to be recorded in writing, but the same shall not be later than 90 days from the date of receipt of summon. The plaintiff further stated that in the present case, the defendants appeared on 26.09.2011 and after lapse of one year i.e. on 13.09.2012, they filed written statement along with the petition without any other petition for condonation of delay. The plaintiff also stated that the provision under Order VIII, Rule 9 of the Code is not applicable to the fact of the present case and the averments of the petition are absolutely false. On such pleading, the plaintiff submitted to reject the petition filed by the defendants.

4. After hearing the parties and considering the materials on record, learned Civil Judge (Senior Division), Ist Court, Cuttack rejected the petition, *inter alia,* holding that the inordinate delay of eleven months after appearance of defendants for filing of their written statement has not been explained satisfactorily. It is further noted by the learned Civil Judge (Senior Division) that the ground stated in the time petitions filed on various dates and the ground stated in the petition under Order VIII, Rule 9 of the Code are contradictory. Such order of rejection has been assailed in this writ petition.

5. Order VIII, Rule 1 of the Code provides for filing of written statement by the defendants, which reads as follows :

> "1. **Written statement –** The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence :
>
> Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons. "

Order VIII, Rule 9 of the Code provides for subsequent pleadings, which reads as follows:

> "9. **Subsequent pleadings –** No pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter-claim shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time of not more than thirty days for presenting the same. "

On a simple reading of the provision, it is clear that an application filed under Order VIII, Rule 9 of the Code is not appropriate in this case, because the petitioner has not filed any written statement and therefore, there is no question of filing subsequent pleadings.

6. However, the nomenclature of the petition filed by the litigant should not be taken into consideration, if it is held that the petitioners are entitled to the relief claimed. It has to be examined, whether the petitioners are entitled to file the written statement/counter claim in the suit beyond the time period prescribed under Order VIII, Rule 1 of the Code. Learned counsel for the opposite party has relied upon the reported case of **Mohammad Yusuf v. Faij Mohammad and others,** (2009) 3 SCC 513, wherein the Supreme Court took into consideration the reported case of **Kailash v. Nanhku and others,** (2005) 4 SCC 480 and **M/s. R.N.Jadi & brothers and others v. Subhash Chandra,** (2007) 6 SCC 420 and held that in the facts of the case the defendants may be permitted to file written statement after expiry of period of ninety days only on exceptional situations.

7. In the case of **Kailash v. Nanhku and others** (supra), a Three-Judge Bench of the Supreme Court considered the impact of Order VIII, Rule 1 of the Code and held that all the rules of procedure are handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of the Code or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The Supreme Court further held that merely because a provision of law is couched in a negative language implying mandatory character, the same is

not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form. The aforesaid case is taken note of by the Supreme Court in **M/s. R.N.Jadi & brothers and others v. Subhash Chandra** (supra), wherein the Supreme Court has held that the Order VIII, Rule 1 of the Code after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the Court to take the written statement on record though filed beyond the time as provided for. The Supreme Court further held that the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the Court for quick relief and also to the serious inconvenience of the Court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried. The aforesaid two cases have been taken note of by this Court in **Smt. Sarbati Devi Goinka v. Durga Prasad Agarwal,** 2009 (I) OLR 48; wherein the delay in filing of a written statement was condoned and the written statement has been accepted.

8. Coming to the case in hand, it is seen that the main ground on which the opposite party resisted the application of the petitioners is that the defendant has filed time petitions on several occasions indicating that they need adjournment because of the fact that they were collecting certain documents for filing the written statement. However, in the petition to accept the written statement, they have stated that there was a chance of settlement between the parties at the behest of the Sahi Panchayat. There is an apparent contradiction. Learned Civil Judge (Senior Division) has rejected the application of the defendants-petitioners on such facts. However, the fact remains that the time petitions do not contain verification of the parties. Time petitions are filed by the Advocates without signature of the parties. It is also well known that petitions for adjournment are most often drafted/prepared by junior associates of the conducting counsel. Sometimes, it is written by the Advocates' clerks. Therefore, the same cannot be taken into consideration to hold that the party himself has instructed the lawyer to file a petition for time on the ground stated therein. On the other hand, the petition filed for acceptance of the written statement

is supported by an affidavit sworn by a party. Thus, the grounds submitted or pleaded in a petition supported by an affidavit of the party have to be accepted as the version of the party or the litigant and merely because a petition for time does not reflect the same ground it cannot be rejected. It will cause injustice to the party.

9. In that view of the matter, this Court comes to the conclusion that approach adopted by the learned Civil Judge (Senior Division) was erroneous. This Court however held that the petition filed by the defendants that there was talk of compromise between the parties, is a good ground for extending time beyond prescribed limit by filing written statement. Hence, the writ petition succeeds. The petition filed by the defendants-petitioners to accept the written statement is allowed, subject to payment of cost of Rs.1,000/- (Rupees one thousand) by 6th May, 2013 before the court below. The parties are directed to appear before the Court on 6th May, 2013. The Court of original jurisdiction shall accept the written statement-cum-counter claim filed by the defendants-petitioners. With the aforesaid observation, the writ petition is allowed.

Writ petition allowed.

2013 (II) ILR - CUT- 174

B. K. MISRA, J.

W.P.(C) NO.9098 OF 2004 (Dt.05.02.2013)

ANANTASWAR DEB & ORS. ……….Petitioners

.Vrs.

HARIHAR ACHARYA ………Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-6, R-17.

Amendment of written statement – Objection raised that it was filed after closure of evidence – Trial Court allowed amendment – Order challenged.

In this case suit is of the year, 1999 – As proviso to Order 6, Rule 17 C.P.C. was inserted w.e.f. 1.7.2002 in view of the C.P.C. Amendment Act, 2002 it has no application to the suit filed in the year

1999 – Held, impugned order passed by the learned Court below calls for no interference by this Court. (Para 8,9)

Case laws Referred to:-

1.(2008)7 SCC 85 : (Gautam Sarup-V- Leela Jetly & Ors.)
2.(2009)10 SCC 84 : (Revajeetu Builders & Developers-V- Narayanaswamy & Sons & Ors.)
3.2010(II) OLR 871 : (Barendra Biswal-V- Rama Roy @ Das & Anr.).
4.AIR 2007 Orissa 138 : (Harachand Nayak & Ors.-V- Ramamani Mohapatra & Ors.)
5.2007(1) OLR (SC) 406 : (State Bank of Hyderabad-V- Town Municipal Council).

For Petitioners - Mr. Aditya Kumar Mohapatra.
For Opp.Party - Dr. Sujata Dash, Ansuman Bhuyan.

B.K.MISRA, J The petitioners, who were the defendants in Title Suit No.294 of 1999 pending in the court of the learned Civil Judge (Jr.Divn.), Puri being aggrieved with the order of the said court dated 12.8.2004 under Annexure-5, allowing the prayer of the opposite party-defendant for amendment of the written statement, has approached this Court for quashing of the same.

2. The present petitioners as plaintiffs filed the suit for declaration that the plaintiffs 1 and 2 are the public deities and therefore the entire body of the villagers has the right to worship and perfrom Sebapuja. The plaintiffs also prayed for a declaration that the defendant No.1 is not the sole marfatdar of the daities plaintiffs 1 and 2 and has no exclusive right of worship and Sebapuja. Besides that a prayer was also made in the said suit for permanent injunction restraining the defendant from debarring the villagers to worship and perform Sebapuja of the deities. In the said suit the sole defendant entered appearance and filed written statement. Evidence from both sides were taken in the court below and the matter was posted for argument. At that stage a petition was filed by the sole defendant who is the present opposite party in this writ petition praying for an amendment to the written statement i.e. in respect of substituting the word ‘rather’ by the word ‘and’ in Paragraph-8 of the said written statement on the ground that such amendment was necessary for correcting a typographical mistake. The prayer for amendment was objected to on the ground that it was filed at a very belated stage and that too after closure of evidence. It was also the case of the plaintiffs that by the proposed amendment the nature and character of the suit is going to be changed.

3. Learned Civil Judge (Jr.Divn.), Puri by the impugned order at Annexure-5 allowed the prayer for amendment of the written statement subject to payment of cost of Rs.100/- which is under challenge in this writ petition.

4. Mr. A.K.Mohapatra, learned counsel appearing for the petitioners by placing reliance on several decisions of the Apex Court as reported in ***(2008) 7 SCC 85, Gautam Sarup –v- Leela Jetly and others, (2009) 10 SCC 84, Revajeetu Builders and Developers –v- Narayanaswamy and Sons and others and also on a decision of this Court as reported in 2010(II) OLR 871, Barendra Biswal –v- Rama Roy @ Das and another*** contended that when the amendment petition is filed only to linger the matter and when the party has tried to introduce a new story and also wants to withdraw the earlier admission made in the pleading, the prayer for amendment should be disallowed. Mr. Mohapatra, learned counsel very strenuously contended that after the amendment incorporated to the Civil Procedure Code in the year 2002 and in view of the proviso inserted to Order 6, Rule 17 of the Civil Procedure Code (hereinafter referred to as the ("C.P.C.") the learned Trial Judge should not have allowed the amendment of the written statement after commencement of the trial and the learned trial court ignored the mandatory provision of law resulting in mis-carriage of justice. It is accordingly urged on behalf of the petitioners the impugned order be qushed.

5. Dr. Sujata Dash, learned counsel appearing for the opposite party on the other hand refuted the contention of the learned counsel for the petitioners contending that the proviso inserted to Order 6, Rule 17 of the C.P.C. after amendment of the year 2002 is not applicable to the facts of this case as the suit in this case was filed in the year 1999 and in that context reliance was placed on a decision of this Court as reported in ***AIR 2007 Orissa 138, Harachand Nayak and others –v- Ramamani Mohapatra and others***. Besides that she also placed reliance on a decision of the Apex Court as reported in ***2007(1) OLR (S.C.) 406, State Bank of Hyderabad –v- Town Municipal Council.***

6. By now it is the settled position of law that the jurisdiction of the Court to allow an amendment of pleadings is very wide and the dominant purpose of allowing the amendment is to minimize the litigation. Rules of procedure are intended to be a hand-maid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. However negligent or careless may have the first omission, and, however

late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.

7. In the instant case, the defendant by the proposed amendment only wanted to correct the typographical error in Para-8 of the written statement and wanted to replace the word "rather" by the word "and" only. I have gone through the written statement filed by the sole defendant in the court below by substituting the word "and" in place of "rather". No new introduction of fact was intended to be introduced nor there any change in the nature and character of the original pleadings in the original written statement. The learned court below has passed a very well reasoned order by allowing the prayer of the amendment to the written statement and I do not find any infirmity in the said order calling for interference by this Court. The contention of the learned counsel for the petitioners that the court below should have refused the amendment in view of the proviso to Order 6, Rule 17 of the C.P.C., which was introduced by way of amendment in the year, 2006, is not tenable in the eye of law in view of the settled position that the said proviso to Rule 6, Rule 17 of the C.P.C. is not applicable to the suit which was filed in the year 1999.

8. Section 16(2) of the Amending Act of 2002 reads as under:-

> "16(2) Notwithstanding that the provisions of this Act have come into force or repeal under Sub-section(1) has taken effect, and without prejudice to the generality of the provisions of Section 6 of the General Clauses Act, 1897.
>
> (a) *** ***
>
> (b) the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and by Section 7 of this Act shall not apply to in respect of any pleading filed before the commencement of Section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and Section 7 of this Act".

Thus, in view of the aforesaid provision there cannot be any doubt whatsoever that the present suit having been filed in the year 1999, proviso to Order VI, Rule 17 of the Code is not applicable.

9. Thus from the aforesaid discussion of the provision of law and analyzing the impugned order and materials on record, I find no merit in this writ petition and there is nothing to interfere with the impugned order at

Annexure-5. Accordingly, the writ petition stands dismissed, but in the circumstances without any costs. The interim order dated 27.8.2004 stands vacated. The learned Civil Judge (Jr.Divn.), Puri is directed to proceed with the hearing of the suit as expeditiously as possible and to complete the same by end of first quarter, 2013.

Writ petition dismissed.