2011 (I) ILR- CUT- 826

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

W.P.(C) NO.18267 OF 2010 (Decided on 23.12.2010)

BIRLA TYRES ……Petitioner.

.Vrs.

COMMISSIONER (APPEALS), CENTRAL EXCISE, CUSTOMS & SERVICE TAX & ORS. …. … Opp.Parties.

CENTRAL EXCISES AND SALT ACT, 1944 (ACT NO. 1 OF 1944) – S.35-F.

Appeal – Stay petition seeking waiver of pre deposit - Prima facie two conditions are to be kept in mind for dispensing pre-deposit i.e. undue hardship to such person and to safeguard the interest of Revenue – Stay petitions not to be disposed of in a routine manner and no rule of Universal application is applicable – In this case on analysis of factual scenario the Hon'ble Court found that the assessee did not lay any evidence before the adjudicating authorities – Held, the appellate authority has rightly rejected the stay application seeking for waiver of pre-deposit amount imposed upon the petitioner.

(Para 2,9 & 10)

Case laws Referred to:-

1.2008 (221) E.L.T. 7 (SC) : (Indu Nissan Oxo Chemicals Industries Ltd.-V-Union of India)
2.2009(237) E.L.T.3(SC) : (Ravi Gupta-V-Commissioner of Sales Tax, Delhi).
3.1995 (76) E.L.T. 497(SC) : (Collector of Central Excise-V-H.M.M. Limited).
4.2007 (208) E.L.T. 336 : (Grasim Industries-V-Commissioner of Central Excise, Indore).
5.2010 (249) E.L.T. 366 : (Ghanshyam Dyeing & Printing P.Ltd.-V-C.C.E. & C., Belarpur).
6.2010 (253) E.L.T. 178 : (Commissioner of LTU, Bangalore-V-Toyota Kirloskar Pvt. Ltd.).

For Petitioner - M/s. Dr. S.Chakraborty, B.Mohnati, C.R.Dash & S.K.Mishra.
For Opp.Parties - M/s. A.Pattnaik
Jr. Standing Counsel (for O.P.No.1)

V.GOPALA GOWDA,C.J. The petitioner has approached this Court questioning correctness of the stay order dated 07.10.2010 (Annexure-1) passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax (O.P. No.1) [for short, 'Commissioner (Appeals)'] in file No.V(2)XAP/67/B-I/2010 directing the petitioner to deposit a sum of Rs.35,00,000/- by 25.10.2010 towards duty as against a total demand confirmed amounting to Rs.36,35,722/- payable along with interest and penalty of the aforesaid amount imposed in the case. On deposit of this amount, the requirement of pre-deposit of the balance amount of duty with interest and penalty imposed on the petitioner/appellant shall be dispensed with and the appeal will be taken up for final hearing on due communication of compliance of stay order by 25.10.2010.

2. Urging various facts and legal contentions, petition was filed before the appellate authority, i.e., Commissioner (Appeals) on 6th April, 2010 raising various grounds, *inter alia*, contending that the Addl. Commissioner has not taken into consideration the grounds on which the appeal filed by the petitioner challenging the validity and legality of the said order dated 29.12.2009 (Annexure-2) of the Addl. Commissioner, and the grounds of appeal urged before the Commissioner (Appeals) in appeal would make it clear and apparent that the order under Annexure-2 passed by the Addl. Commissioner is erroneous and unsustainable on the face of it, and the petitioner has got a strong *prima facie* case in its favour, and further requiring the petitioner to deposit a part of the duty demanded and penalty imposed as pre-deposit to maintain the appeal before the appellate authority would be inequitable, unjustified and unfair which will result in undue hardship to the petitioner and balance of convenience shall be entirely in favour of the order as prayed, viz., stay operation of any further action on the basis of the order in original No.06/STAY/CE/BBSR-I/2010 challenged in the appeal. The said application has been examined and in support of its contention Dr. Samir Chakraborty, learned counsel for the petitioner placed reliance upon the judgments of the Hon'ble Supreme Court in ***Indu Nissan Oxo Chemicals Industries Ltd. Vs. Union of India***, 2008(221) E.L.T. 7 (S.C.) and ***Ravi Gupta Vs. Commissioner of Sales Tax, Delhi***, 2009 (237) E.L.T. 3(S.C.), wherein the apex Court held that for dispensation of pre-deposit, two requirements, i.e., consideration of undue hardship and imposition of conditions to safeguard the interest of Revenue have the relevant consideration. Therefore, while dealing with an application for dispensation of pre-deposit in an appeal prima facie two conditions, viz., undue hardship to such person and safeguarding the interest of Revenue are to be kept in mind. The said order is passed after examining Section 129E of Customs Act, 1962

3. In ***Ravi Gupta (supra)***, the apex Court with reference to Section 43(5) of Delhi Sales Tax Act, 1975 held that stay petition should not be disposed of in a routine manner unmindful of the consequences. The apex Court further observed that there can be no rule of universal application in such matter and the order has to be passed keeping the factual scenario in view.

4. Reliance was also placed on another decision of the Hon'ble Supreme Court ***in Collector of Central Excise Vs. H.M.M. Limited***, 1995 (76) E.L.T. 497 (S.C.) wherein it is held that show cause notice must contain an averment to that effect pointing out specifically as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of Central Excises & Salt Act, 1944 had been committed by assessee and adjudicating authority must specifically deal with assessee's contention in rebuttal thereof. Penalty not imposable unless Department is able to sustain its demand show cause notice which was under challenge on the ground of limitation.

5. Reliance was also placed upon the larger Bench decision of the Principal Bench of CESTAT, New Delhi in ***Grasim Industries Vs. Commissioner of Central Excise, Indore,*** 2007 (208) E.L.T. 336 that no condition regarding reversal of credit should taken in respect of inputs used in such destroyed goods provided under Rule 49 of erstwhile Central Excise Rules, 1944 and Rule 21 of Central Excise Rules, 2002. Another decision of the Tribunal of CESTAT, West Zonal Bench, Mumbai in ***Ghanshyam Dyeing & Printing P. Ltd. Vs. C.C.E. & C., Belarpur***, 2010 (249) E.L.T. 366 in support of the proposition reversal of credit on inputs and packing materials used in final products destroyed in fire Notification No.33/07-C.E. (N.T.) has only prospective operation in the said case. In view of the larger Bench decision in Grasim Industries referred to (supra) where remission was allowed of duty paid on finished goods, destroyed in fire, it was held that there was no provision for reversal credit taken on inputs. The High Court of Karnataka in ***Commissioner of LTU, Bangalore Vs. Toyota Kirloskar Motors Pvt. Ltd.,*** 2010 (253) E.L.T. 178 after examining and considering Section 11A(2) of Central Excise Act, 1944 on the question of demand held that the same is barred by limitation. In such regard, the said Court relied upon judgment of Hon'ble Supreme Court in *Kaur & Singh Vs. Collector of Central Excise, New Delhi*, 1997 (94) E.L.T. 289 (S.C.) and *Pratibha Processors Vs. Union of India*, (1996 (88) E.L.T. 12 (S.C.).

6. Learned counsel for the petitioner further invited our attention to the reasons assigned in the order impugned contending that Commissioner (Appeals) has not considered the valid grounds urged in the appeal against

the order of Addl. Commissioner reversing the Cenvat credit availed by the appellant/petitioner to the extent of Rs.36,35,772/-towards excise duty under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944 for recovery of interest from the petitioner with effect from the date of taking credit till the date of payment /reversal in terms of Rules, 2004 and Act, 1944 and penalty of Rs.36,35,772/- under Rule 15 of the said Rules read with Section 11AC of the said Act, 1944 prima facie bad in law as the assessing authority has failed to take into consideration the reply to the show cause notice submitted by the petitioner on 28.07.2009 along with particulars furnished giving details of machineries, stores and spares burnt or destroyed in fire broke out on 25.10.2005 in the chemical floor of the factory. Therefore, imposing interest and penalty in the order impugned in the appeal is erroneous finding and non-consideration of the show cause notice is a good ground for setting aside the impugned order in the appeal and therefore made out a prima facie case to dispense with the pre-deposit as required under the statute. Non-consideration of this important aspect of the matter has rendered the order failure of exercise of discretionary power properly by the appellate authority and reasons assigned in paragraphs 8 and 9 of the impugned order with reference to their letter dated 19.04.2007 is erroneous in law. Therefore, the same is subject to judicial review of this Court under Articles 226 and 227 of the Constitution and justified for grant of the prayer otherwise it would cause huge financial hardship and injustice to the petitioner if not deposits the pre-deposit amount along with interest and penalty imposed on it within the date specified. Therefore, it is contented by the learned counsel that the impugned order is a non-speaking one and hence the same is liable to be quashed.

7. Mr. Pattnaik, learned Jr. Standing Counsel on behalf of the O.P.-Department sought to justify the impugned order placing strong reliance upon the findings/reasons recorded at paragraphs 8 to 12 of the impugned order contending that the appellate authority with reference to the grounds urged in the application filed by the petitioner seeking dispensing with the pre-deposit and also the finding and reasons recorded by the assessing authority, namely, the Addl. Commissioner (Adjudication). He contends that the same is passed on the materials available before him and after considering all the records and written submissions made by the assessee. The plea taken in the reply to the show cause notice that the machineries or the stores or the spares involved which were damaged in the fire are whether goods under Cenvat credit / Modvat credit has not been availed by them does not disclose from the materials in support of such assertion and those materials were goods and procured/purchased prior to March, 1994 and further he placed reliance on the assessee-petitioner having offered opportunity of being heard in person on four different dates but he did not

appear for personal hearing. Hence, the assessing authority had no option but to adjudicate the case basing on the evidence available on record after giving sufficient opportunity to the petitioner under Section 33A of the Central Excise Act. Therefore, he submits that the grounds urged in the appeal showing that the finding and reasons recorded, which are contrary to the particulars furnished by the petitioner in the reply to show cause notice, are not considered; Therefore, the finding and reasons recorded are erroneous and therefore a prima facie case made out in the appeal for non-deposit of the pre-deposit amount, as required under law, and the same is not tenable in law. Therefore, he has prayes for dismissal of the writ petition.

8. With reference to the above said rival legal contentions we have carefully examined the impugned order and also the order impugned in the appeal filed by the petitioner before the Commissioner (Appeals) with a view to find out as to whether the interim order passed by the appellate authority warrants interference when the same has been passed in proper exercise of discretionary power and what order?

9. Our answer to the aforesaid first point is in the negative for the following reasons. Before the assessing authority, the petitioner has not appeared and produced the records in support of his claim as contented in the reply to the show cause notice. This fact is recorded in paragraphs 5.2 and 5.3 of the order impugned in the Appeal and thereafter in the finding recorded it is held that there is no material disclosed in support of this assumption or in support of the purported conclusion that alleged credit was availed on the machineries, stores and spares at the rate of 16.32% that those were damaged in fire and destroyed and the goods which were damaged in fire, were the goods whereon no Cenvat credit or Modvat credit had been availed by them. Further, with reference to claim of the assessee that no excise duty element in claiming compensation from the Insurance Company has been included in respect of the machinery, stores and spares and the said claim has not been ratified by any authentic material particulars. Therefore, it is held that the contention of the assessee under reply is neither corroborated nor produced any valid documents in support of its claim. The finding and reasons recorded in the order impugned in the appeal is based on records and written submissions made by the assessee. With reference to the said finding and reasons the stay application for waiver of pre-deposit was examined by the appellate authority. In paragraph 8 of the impugned order, the appellate authority held that the petitioner has not furnished any documents to prove that no credit has been availed against such capital goods and further he is of the view that as the case involves huge revenue, the same cannot be decided without going through the documents, on which the claim relies but it did not furnish before the original authority and the

appellate authority as well. The claim made by the petitioner that it was intimated by the Audit Officers vide their letter dated 19.04.2007(Annexure-C to the appeal memorandum) that there was no duty involvement on machineries, stores and spares and duty involvement of Rs.33,20,536/- on raw materials was reversed by them. It is urged by the petitioner that overlooking the said letter, the Addl. Commissioner had issued the show cause notice and then confirmed the said letter. The said letter has been examined by the appellate authority who made an observation that it does not carry any supporting evidence that the goods destroyed were capital goods purchased much before introduction of the Modvat Scheme. Neither the same contains the list of such goods nor the date of purchase. The detailed statement attached to the said letter only had one column "Insurance claimed for Rs.5,91,37,738/- on account of fire at chemical floor". Therefore, the claim made by the petitioner that it had given all documents in support of its assertion is erroneous in law and the legal ground urged by the counsel for the petitioner that the appellate authority did not examine the same with reference to the citations sited before the authority is also tenable in law. We have examined the decisions of the Supreme Court, the decisions of CESTATS and the High Court of Karnataka. In fact, those decisions did not support the case of the petitioner having regard to the finding and reasons recorded in the order of determination passed by the determining authority. Therefore, reliance placed upon the decisions of the Supreme Court, CESTAT as well as the High Court are misplaced and attributions are also not applicable to the facts situation either on record or the waiver of the imposed duty, interest and penalty was examined on merits with reference to legal contentions urged herein with regard to the reversal of input credit and imposition of duty, interest and penalty in the backdrop of the contentions urged by the assessee in some of the cases on the question of limitation and merits of the case. Therefore, the reliance placed upon the decisions of the CESTATs, Mumbai and New Delhi and High Court of Karnataka referred to supra have no application to the fact situation; hence the reliance placed upon those decisions are not applicable.

10. For the reasons stated supra we are of the view that the order impugned in the writ petition does not call for interference both on merits and the legal grounds urged in the writ petition are not tenable in law. Apart from the said reasons, having regard to the categorical finding recorded in the order by the determining authority and the reasons recorded by the appellate authority are cogent reasons on the basis of which the records perused by the determining authority the same were required to be considered by the appellate authority. Therefore, the appellate authority has rightly rejected the

stay application seeking for waiver of pre-deposit amount imposed upon the petitioner. Hence, the writ petition fails being devoid of merit.

The writ petition is accordingly dismissed.

Writ petition dismissed.

2011 (I) ILR- CUT- 833

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

W.P.(C) NO.2334 OF 2010 (Decided on 16.07.2010)

EIMCO ELECON (INDIA) LTD. … ….. Petitioner.

.Vrs.

MAHANADI COAL FIELDS LTD. & ORS. …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ petition by Company – Who can be a person to file writ petition – Whether the writ petition filed by the Company represented by its Sales Manager is maintainable in law ? Held, No.

In the present case the Board of Directors of the petitioner-company passed resolution authorizing the Director to represent the Company to institute the proceedings on behalf of the Company – The Director has no further authority to execute the power of attorney infavour of the Sales Manager to act on his behalf in the Court Proceedings – Held, Sales Manager can not file a writ petition representing a Company.

(Para 5,6)

Case laws Relied on:-

1.AIR 1962 SC 1044 : (Calcutta Gas Company Ltd.-V-State of West Bengal & Ors.)
2.AIR 1951 SC 41 : (Chiranjit Lal Chowdhury-V-Union of India)
3.AIR 1952 SC 12 : (State of Orissa-V-Madan Gopal Rungta)

Case laws Referred to:-

1.AIR 1987 SC 88 : (Sarguja Transport Service-V-State Transport Appellate Tribunal, Gwalior & Ors.)
2.AIR 1991 DELHI 25 : (M/s.Nibro Ltd.-V-National Insurance Co.Ltd.).

For Petitioner - S.D. Das
For Opp.Parties - J.Pattnaik

After dictation of the order on 7.7.2010, Mr. S.D.Das, learned Asst. Solicitor General, requested this Court to give him an opportunity to produce the original Power of Attorney executed in favour of the Sales Manager of

the Company by its Director and thereafter this Court may pass necessary order. Therefore, on that day we adjourned the matter for the above purpose to the next date i.e. 8.7.2010. On 8.7.2010 Mr. Das produced the original Power of Attorney executed in favour of the Sales Manager by the Director of the Company, who have authorized him to represent the Company in the Court proceedings. On that date, the Court further directed Mr. Das to produce the Resolution passed by the Board of Directors of the Company. Pursuant to the said order, on 14.7.2010, Mr. Das has filed a Misc. Case along with four documents including the Resolution of the Board of Directors. Mr. Das has placed strong reliance upon the Resolution under Annexure-3 regarding re-appointment of whole time Director under Sections 198, 269, 309 and 310 of the Companies Act. In support of the aforesaid legal submission made by Mr. Das, learned Senior Advocate who substantiate the same that the petition filed by the Sales Manager as the Power of Attorney Holder of the Director in whose favour the Company has passed resolution to institute he proceedings on behalf of the Company is maintainable. He has placed reliance upon the decision of the Supreme Court in the case of Sarguja Transport Service Vs. State Transport Appellate Tribunal, Gwalior & Ors, reported in AIR 1987 SC 88 in support of his contention that the provisions of the Order 29, Rule 1 CPC are not applicable to the writ petition filed by the Company. Therefore, the decision of the Delhi High Court in the case of M/s. Nibro Limited Vs. National Insurance Co.Ltd. relied upon by the learned counsel for the opposite party no.4 is misplaced.

2. On the other hand learned counsel for the opposite party No.4 has seriously questioned the said documents under Annexure-3 contending that the same is not legal and valid and it is not in exercise of the power under Section 291 of the Companies Act. He placed reliance upon the decision of the Delhi High Court in the case of M/s. Nibro Limited Vs. National Insurance Co. Ltd., reported in AIR 1991 DELHI 25 wherein it has been held as under:

> " Order 29, Rule 1 CPC does not authorize persons mentioned therein to institute suits on behalf of the Corporation…….. It is well settled that under Section 291 of the Companies Act except where express provision is made that the powers of a company in respect of a particular matter are to be exercised by the company in general meeting and in all other cases the Board of Directors are entitled to exercise all its powers".

3. Relying on the aforesaid judgment, learned counsel for opposite party No.4 submitted that on the basis of the said documents the Sales Manager can not file a writ representing a Company.

4. Learned counsel for opposite party No.4 submitted that the principle enshrined in the C.P.C. is applicable to the writ proceedings and therefore the decision of the Delhi High Court referred to supra can be applied to the fact situation of the present case. He has also placed strong reliance upon the decisions of the Supreme Court in the case of Calcutta Gas Company Ltd. Vs. State of West Bengal & Ors. AIR 1962 SC 1044; Chiranjit Lal Chowdhury Vs. Union of India, reported in AIR 1951 SC 41 ; and in the case of State of Orissa Vs. Madan Gopal Rungta. Reported in AIR 1952 SC 12, wherein the Apex Court succinctly aid down the law as to who can be a person to file a writ to enforce his legal and fundamental rights and also held that the right that can be enforced under Article 226 shall ordinarily be the personal or individual right of the petitioner himself. Pleading reliance upon the aforesaid judgments, the learned counsel for the opposite party No.4 vehemently contended that the Sales Manager, representing the Company on the basis of a Power of Attorney given by the Director of the Company, is not a legal person who can maintain the writ petition to enforce the fundamental rights guaranteed to a citizen under Part-III of the Constitution of India. Therefore, it is submitted that the writ petition filed by the petitioner is not at all maintainable and is liable to be dismissed.

5. We have carefully examined the averments made in the writ petition, the documents filed and also the decisions on which reliance has been placed by the learned counsel for the parties with a view to answer the rival legal contentions urged on behalf of the parties with a view to find out as to (1) whether the writ petition filed by the Company represented by its Sales Manager is maintainable in law ?

6. This writ petition has been filed by a Company being represented by its Sales Manager on the basis of a Power of Attorney given by the Director. The Board of Directors of the petitioner-Company passed resolution authorizing the Director to represent the Company to institute the proceedings on behalf of the Company. Therefore, the Director has no further authority to execute the power of attorney in favour of the Sales Manager to act on his behalf in the Court proceedings. The power can only be given by the Board of Directors of the Company in exercise of its statutory power by passing the resolution under the provisions of Section 291 of the companies Act in favour of a Director of Principal Officer of a Company who is well versed with facts to speak, sign and verify the same in the pleadings. Therefore, the documents, namely, Power of Attorney and the Resolution passed by the Board of Directors of the Company giving Authority to its Director to sue in the Court of Law on its behalf, produced by Mr. Das, learned Senior Counsel will not support the case of the petitioner. Hence, the contention urged in this regard by the learned counsel for the petitioner is

wholly untenable in law. Further, the Constitution Bench decisions of the Supreme Court cited by the learned counsel for opposite party No.4 in the case of Chiranjit Lal Chowdhury (supra); Madan Gopal Rungta (supra) & Calcutta Gas Company Ltd. (supra) are aptly applicable to the fact situation of the case.

7. In view of the above, we do not find any merit in the case and the writ petition is accordingly dismissed. The order dated 7.7.2010 dictated in the open Court stands.

Writ petiton dismissed.

2011 (I) ILR- CUT- 837

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

W.A. NO.380 OF 2010 (Decided on 19.11.2010)

PANAPATRI PODHA …….. Appellant.

.Vrs.

KESHAB PODHA & ORS. …. …. Respondents.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.100-A.

Writ appeal – Interlocutory Order passed in Second Appeal – No L.P.A. is maintainable against an interlocutory order – Whether writ appeal is maintainable or not – Held, writ appeal is not maintainable.
(Para 9)

Case laws Referred to:-

1.AIR 2009 Ori. 46 : (Mahammed Saud & Ors.-V-Dr.Maj, Shaikh Mahfooz & Anr.)
2.AIR 1995 MP 128 : (Smt.Seema Mitra -V-Smt.Latika Mitra).
3.AIR 2002 MP 262 : (Kamla Bajpai & Ors.-V-Smt.Sharda Devi Bajpai).

For Appellant - Mr. Gautam Mukherji
For Respondent- Mr. U.K.Samal

Heard Mr. Goutam Mukherji, learned counsel for the appellant and Mr. U.K.Samal, learned counsel for the respondents.

2. This writ appeal is directed against the interlocutory order passed by the learned Single Judge dated 29.9.2010 passed in Misc. Case No.571 of 2009 and order dated 1.11.2010 passed in Misc. Case No.618 of 2010 arising out of R.S.A. No.289 of 2008 which is still pending before the learned Single Judge.

3. Mr. Mukherji, learned counsel for the appellant on the previous date of hearing i.e. on 16.11.2010 made oral submission before the Court to convert this writ appeal as Laters Patent Appeal. On that date Mr. Samal taken notice on behalf of the respondents and contended that the objection raised by the Office regarding the maintainability of the writ appeal is correct. So he requested the Court to list the matter today for preliminary hearing.

4. Mr. Samal, in support of his submission has placed reliance upon a Full Bench decision of this Court in the case of Mahammed Saud & Ors. Vs. Dr. Maj) Shaikh Mahfooz & Anr., reported in AIR 2009 Ori. 46 as well as on a

Full Bench decision of the Madhya Pradesh High Court in the case of Smt. Seema Mitra Vs. Smt. Lotika Mitra, reported in AIR 1995 MP 128. He has also placed reliance on a Division Bench decision of Madhya Pradesh High Court in the case of Kamla Bajpai & Ors. Vs. Smt. Sharda Devi Bajpai, reported in AIR 2002 MP 262 wherein the aforesaid Full Bench decision of the M.P. High Court has been referred to in support of his legal submission against the interlocutory order passed in RSA, the writ appeal is not maintainable before this Court. He has also placed reliance upon Section 100-A of the Civil Procedure Code (CPC) which provides for No further appeal in certain cases. The provisions of the said Section is extract below :

> **"100-A** : Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an original or appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

5. He has further placed reliance upon the decision of this Court in the case of Dhani Mohanty Vs. Hari Mohanty & Ors., reported in 27 (1961) CLT (Notes 157) at page 99 in support of the legal proposition that the miscellaneous appeal against the order passed in the in Misc. Case arising out of second appeal is not at all maintainable. It is submitted that except an appeal against a final decree, that could be passed by the learned Single Judge, no appeal against such any other order is maintainable. Therefore, the question of filing this writ appeal against an interlocutory order of the learned Single Judge does not arise and is not at all maintainable. Therefore, this writ appeal should be dismissed as not maintainable.

6. On the other hand, Mr. Mukherji, learned counsel for the appellant strongly rebutted the submission made by the learned counsel for the respondents placing reliance upon Section 100-A CPC and submits that the aforesaid provision prescribes for not filing an appeal against the order that may be passed against the final decree in the second appeal by the learned Single Judge of the High Court, however, it does not prohibits to file an appeal against an interlocutory order. Further it is submitted that Rule 27 of Chapter-VI of the Orissa High Court Rules provides that Misc. Application in respect of Second Appeal can be filed. Therefore, against the impugned order passed by the learned Single Judge in such miscellaneous petition in the second appeal, the writ appeal is maintainable.

7. With reference to the aforesaid rival legal contentions, we have very carefully examined the relevant provisions of the C.P.C. as well as the Full Bench decisions of this High Court and M.P. High Court. This aspect of the

matter has been extensively considered by the Full Bench of this Court and laid down the law at paragraph 47 of the judgment which reads thus :

> "47. We have heard learned counsel for the parties patiently, noted the citations carefully, perused the materials meticulously and considered the submission pragmatically and for the discussions made above, we have arrived at the following conclusions :-
>
> (1) After introduction of S.100-A in the Code of Civil Procedure by 2002 Amendment Act, no Letters Patent Appeal is maintainable against a judgment/order/decree passed by a learned single Judge of a High Court.
>
> (2) The decision of a Division Bench of this Court in Birat Ch. Dagara case (supra) has not laid down the correct position of law. On the other hand, the conclusions arrived at by Division Benches of this Court in V.N.N. Panicker and Ramesh Ch. Das cases (supra) are held to be good law and are confirmed.
>
> (3) A writ appeal shall lie against the judgment/orders passed by a learned single Judge in a writ petition filed under Art.226 of the Constitution of India. In a writ application filed under Arts.226 and 227 of the Constitution, if any order/judgment/decree is passed in exercise of jurisdiction under Art.226, a writ appeal will lie, whereas no writ appeal will lie against judgment/order/decree passed by a Single Judge exercising powers of superintendence under Art.227 of the Constitution.
>
> (4) No Letters Patent Appeal shall lie against judgment/order passed by a learned single Judge in proceedings arising out of Special Acts."

8. Further by careful reading of the aforesaid two judgments of the M.P. High Court it appears that one judgment i.e. Kamla Bajpai (supra) is before the amendment of Section 100-A CPC, which came into force w.e.f. 1.7.2002. However, the aforesaid Full Bench of the M.P. High Court has rightly held that no appeal lies against the order passed in the second appeal.

9. Therefore, in our considered view, the decision rendered in the aforesaid cases are applicable in the fact situation of this case against the appellant herein. Further, in view of the amended provision of Section 100-A CPC, no LPA is maintainable against an interlocutory order. The aforesaid submissions made by Mr.Mukherji, learned counsel for the appellant is not acceptable in view of the amended provision of Section 100-A and in view of

the Full Bench decision of this Court and Madhya Pradesh High Court referred to supra.

In view of the above, the writ appeal is not maintainable and accordingly the same is dismissed.

Writ appeal dismissed.

2011 (I) ILR- CUT- 841

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

W.P.(C) NO.13033 OF 2009 (Decided on 06.12.2010)

GUNAMANI SWAIN AND ORS. .....Petitioner.

.Vrs.

ORISSA STATE FINANCIAL CORPORATION & ORS. .....Opp.Parties.

(A) STATE FINANCIAL CORPORATION ACT, 1951 – S.29.

OSFC sell out properties mortgaged with it by the guarantors in exercise of power U/s.29 of the SFC Act – Action challenged – Held, OSFC in exercise of power vested U/s.29 of the SFC Act can not sell out the properties mortgaged to it by the guarantors.

(B) **STATE FINANCIAL CORPORATION ACT, 1951 – S.31.**

Properties of the guarantors put to auction by the OSFC U/s. 29 of the SFC Act without resorting to the provisions prescribed U/s.31 of the said Act –Flagrant violation of the statutory provisions contained in section 31 of the SFC Act – Held, sale of the properties of the guarantors and subsequent execution of the deed of transfer are liable to be quashed – Auction purchaser is entitled to get refund of the money with interest and OSFC to issue fresh demand notice to be served upon the loanee as well as the guarantors.

(Para 14)

Case laws Referred to:-

1.AIR 2008 SC 179 : (Karnataka State Financial Corporation -V- N.Narasimahaiah & Ors.).
2.(2007)10 SCC 448 : (Lachman Dass-V-Jagat Ram & Ors.)
3.AIR 1973 SC 855 : (Sirsi Municipality by its President, Sirsi -V-Cecelia Kom Francis Tellis).
4.AIR 1972 SC 1967 : (R.N.Nanjundappa-V-T. Thimmaiah & Anr.)
5.AIR 1972 SC 1967 : (Sultan Sadik-V-Sanjay Raj Subba & Ors.)
6.AIR 2000 SC 3243 : (Badrinath-V- State of Tamil Nadu & Ors.).
7.AIR 1993 SC 935 : (Mahesh Chandra-V-Regional Manager,U.P.Financial Corporation & Ors.).

For Petitioners - Dr. A.K.Rath & Mr. A.K.Panda.

For Opp.Parties - M/s. P.K.Routray, B.G.Mishra, N.K.Deo, A.Routray & J.Bhuyan (for O.P.No.1)
M/s. S.R.Mulia, R.C.Moharana & S.Mohanty (for O.P.No.2)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer for quashing Annexure-2 by which the properties of the petitioners were sold on 9.2.2009 as well as the deed of transfer executed on 31.03.2009 under Annexure-5 pursuant to such sale on the ground that the properties in question were sold at a lesser price than the market price without giving adequate publicity in daily newspaper (s) and such action of opposite parties tantamounts to colourable exercise of power.

2. The facts and circumstances giving rise to the present writ petition are that the properties in question appertaining to Khata No.51 Plot No.122 measuring an area of Ac.0.85 dec., Plot No. 131 measuring an area of Ac.0.05 dec., Plot No. 132 measuring an area of Ac.0.08 dec., Plot No.140 measuring an area of Ac.0.21 dec. and Plot No.141 measuring an area of Ac.2.17 dec., thus in total Ac.3.36 dec. in Mouza Belda in the district of Keonjhar are the ancestral properties of late Manmohan Swain. Opp. Party no.3-Sanjukata Swain purchased a TATA truck bearing registration No.OR-09C-8177 by availing a loan from opp. party no.1-Orissa State Financial Corporation (in short, "OSFC"). Accordingly, on 19.3.2002 an agreement was entered into between opp.parties 1 and 3. In the said loan, late Manmohan Swain, opp. party no.4-Ganeswar Swain and opp. party no.5-Ghanashyam Swain stood as guarantors and created equitable mortgage in respect of the properties in question in favour of opp.party no.1. Since the loan amount was not paid, the OSFC published a notice for sale of the mortgaged properties in the Oriya daily "The Samaja" on 31.1.2009. The said properties were put to auction on 9.2.2009 and the same was finalized in favour of opp. party no.2-Subhransu Sekhar Padhi for a total consideration of Rs.10,09,000/-. Pursuant to such sale, Sale deed dated 31.03.2009 was executed between opposite party Nos.1 and 2. Thereafter, on 10.6.2009 OSFC sent a notice by registered Post with A.D. to the petitioner no.2-Prafulla Chandra Swain, the son of late Manmohan Swain to take refund of Rs.2,85,486/-. Being dissatisfied with such action of OSFC, the petitioners have filed the present writ application.

3. Dr. A.K. Rath, learned counsel appearing on behalf of the petitioners submits that under Section 29 of the State Financial Corporations Act, 1951 (for short, "SFC Act"), OSFC has no authority to put the properties of the guarantors to auction. Section 31 of the SFC Act empowers the OSFC to proceed against the guarantor. Though the properties in question are the ancestral properties of late Manmohan Swain, in the Hal settlement of

records of right published in 1977, the properties were recorded in the name of late Manmohan Swain and the same have not been partitioned between the petitioners and opp. parties 4 and 5 by metes and bounds. Therefore, opp. parties 4 and 5 have no authority to create equitable mortgage in favour of opp. party no.1 and this averment made in paragraph 6 of the writ petition has not been denied by the OSFC while replying the same in paragraph 15 of their counter affidavit. Before putting the properties to auction, opp. party no.1 has not made any endeavour to make correct valuation of the properties in question. No valuation report was obtained from any authority by opp. party no.1 before putting the properties to auction. Though the market value of the properties would be Rs.15 lakhs, opp. parties fixed the upset price at Rs.10,08,000/-. It is further submitted that had there been adequate publicity of the notice giving details of the properties, more persons would have participated in the auction. Since only one person, i.e., opp. party no.2 has participated, the same cannot be deemed as auction. OSFC has also not issued/served any notice on the petitioners to participate in the auction. Moreover, the petitioners were not aware of the auction of their properties as the details of the said properties were not given in the auction notice (Annexure-1). It is further submitted that though the petitioners are not legally liable to liquidate the dues of the loanee, still they are ready and willing to settle the dues. The OSFC is under legal obligation to satisfy itself that the auction has been conducted with strict adherence to the procedure prescribed in the statute and price fetched by it was reasonable.

4. Per contra, Mr. Mishra learned counsel appearing on behalf of the OSFC submits that the OSFC had sanctioned a loan of Rs.5,26,500/- for purchase of a TATA Truck in favour of opp. party no.3- Sanjukta Swain in the year 2002-2003. Late Manmohan Swain being the father-in-law of opposite party no.3 mortgaged his collateral properties by depositing the original title deeds pertaining to Khata No. 51 as per Annexure-3. The OSFC has also obtained no objection from the three sons of late Manmohan Swain, namely, Prafulla Kumar Swain (petitioner no.2), Ghanashyam Swain and Ganeswar Swain (opp. party nos.4 & 5 respectively). On failure of the borrower-Sanjukta Swain to repay the dues of the OSFC, the OSFC after issuance of several notices including recall notice was constrained to take over possession of the collateral properties on 30.10.2007. Since the hypothecated vehicle was not traceable, on 7.12.2007 the seized properties were advertised in the daily Oriya newspaper “The Samaja” for sale. After publication of the sale notice, loanee, Smt. Sanjukta Swain came forward and proposed to settle the loan dues under O.T.S.-07 Scheme. The OSFC considering all the aspects, decided to settle the loan at Rs.4,97,000/- and settlement order was issued on 21.1.2008. Since the loanee failed to pay the settled dues as per the condition of the settlement order, the said settlement

order was cancelled vide letter no.863 dated 21.1.2009 and the seized properties were again advertised for auction in The Samaja on 30.1.2009 and the guarantors/mortgagors along with the borrower were communicated vide letter No.855 dated 03.02.2009 to appear before the auction meeting on 09.02.2009 to be conducted by BLDC for release of the mortgaged assets. Since neither the loanee nor any of the guarantors responded to the said letter, the Corporation decided to sell the mortgaged properties to opp. party no.2- Subhransu Sekhar Padhi at a negotiated price of Rs.10,09,000/- after observing all the formalities. The said decision of sale was communicated to the borrower and guarantors vide letter No. 918 dated 11.2.2009. After deposit of the entire sale consideration of Rs.10,09,000/- by the purchaser the possession was handed over to him on 31.3.2009 and the deed of conveyance (Annexure-5) was executed on the same day. Thus, all the sale formalities have been completed. Since the properties were sold at a higher price than the outstanding loan, the OSFC refunded the excess sale proceeds in terms of Section 29(4) of the SFC Act, and accordingly issued a letter dated 10.6.2009 to three sons of the mortgagor since he was dead. The petitioners instead of receiving the excess sale proceeds filed the present writ petition arraying two of the sons and one daughter-in-law of late Manmohan Swain as opp. parties/guarantors and trying to make out a case. The OSFC has not done any illegality by selling the properties of the mortgager who himself executed the mortgage document with the OSFC during his life time. The valuation of the properties has been arrived at on the basis of the Bench Mark valuation fixed by the Government. The advertisement under Annexure-1 was never challenged instantly by any of the petitioners or the guarantors. The details of the properties were duly mentioned in the Website.

5. Learned counsel appearing for opp. party no.2 Subhransu Sekhar Padhi, the auction purchaser submits that the auction was held in accordance with law with proper notice to the present petitioners. The mortgage was made with due knowledge of the petitioners. The petitioners had never objected to the auction in question at any point of time. Late Manmohan Swain being the recorded tenant and being the manager and 'Karta' of the family was competent under the law to stand as guarantor in respect of the mortgaged properties. The auction price was just and reasonable. The petitioners have no right to challenge the said auction. Opp. party no.2 is the *bona fide* auction purchaser and is in possession of the property. Opp. party no.1 took over possession of the mortgaged property on 31.10.2007 under Section 29 of the SFC Act. The present opp. party no.2 took over possession on 31.3.2009 pursuant to the auction held on 9.2.2009. Hence, the writ petition is liable to be dismissed.

6. On the above rival contentions the questions that fall for consideration by this Court are as under:

(i) Whether in exercise of the power vested under Section 29 of the SFC Act, the OSFC can sell out the properties mortgaged with it by the guarantors?

(ii) Whether the OSFC is justified in selling out the properties of the guarantors through public auction in BLDC meeting held on 9.2.2009 as well as executing the deed of transfer on 31.03.2009 under Annexure-5 in favour of opp. party no.2 without adhering to Section 31 of the SFC Act?

7. To deal with the question no.(i) it is necessary to know what is contemplated in Section 29 of the SFC Act which is relevant for our purpose. Section 29 of the said Act is extracted below:

"**29. Rights of Financial Corporation in case of default** .-(1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any installment thereof in meeting its obligations in relation to any guarantee given by the corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concern, as well as the right to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is

received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern."

Section 29 speaks about the right of financial Corporation in case of default in repayment of loan. The default contemplated thereby is of the industrial concern. When an industrial concern makes any default in repayment of any loan or advance or any instalment thereof under the agreement or in meeting its obligation in relation to any guarantee given by the Corporation, the financial Corporation shall have the right to take over the management or possession or both of the industrial concern. It further gives right to the Corporation to transfer by way of lease or sale and realize the property pledged, mortgaged, hypothecated as assigned to the financial Corporation by the industrial concern. The right of financial Corporation in terms of Section 29 must be exercised only on a defaulting party. Section 29 does not empower the Corporation to proceed against the surety even if some properties are mortgaged or hypothecated to it. Our view is further strengthened by the provisions of sub-section (4) of Section 29 which lays down appropriation of sale proceeds with reference to only industrial concern and not surety or guarantor.

8. At this juncture, it would be profitable to refer to the judgment of the apex Court in **Karnataka State Financial Corporation v. N. Narasimahaiah and others,** AIR 2008 SC 1797, wherein the apex Court has held as under :

"8. A lender of money under the common law has the remedy to file a suit for realization of the amount lent if the borrower does not repay the same. The Act, however, provides for a special remedy in favour of the Financial Corporation constituted thereunder enabling it to exercise a statutory power of either selling the property or take over the management or possession or both belonging to the industrial concern.

9. Section 29, therefore, confers an extraordinary power upon the 'Corporation'. It, being a 'State' within the meaning of Article 12

of the Constitution of India, is expected to exercise its statutory powers reasonably and bona fide.

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12. If special provisions are made in derogation to the general right of a citizen, the statute, in our opinion, should receive strict construction. 'Industrial concern' has been defined under the Act. For the purpose of enforcing a liability of an industrial concern, recourse can be taken both under Sections 29 and 31 of the Act. Right of the Corporation to file a suit or take recourse to the provisions contained in Section 32G of the Act also exists.

13. The heading of Section 29 of the Act states "Rights of Financial Corporation in case of default". The default contemplated thereby is of the industrial concern. Such default would create a liability on the industrial concern. Such a liability would arise when the industrial concern makes any default in repayment of any loan or advance or any installment thereof under the agreement. It may also arise when it fails to meet its obligation(s) in relation to any guarantee given by the Corporation. If it otherwise fails to comply with the terms of the agreement with the Financial Corporation, also the same provisions would apply. In the eventualities contemplated under Section 29 of the Act, the Corporation shall have the right to take over the management or possession or both of the industrial concern. The provision does not stop there. It confers an additional right as the words "as well as" is used which confers a right on the corporation to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothetical or assigned to the Corporation.

14. Section 29 of the Act nowhere states that the Corporation can proceed against the surety even if some properties are mortgaged or hypothecated by it. The right of the Financial Corporation in terms of Section 29 of the Act must be exercised only on a defaulting party. There cannot be any default as is envisaged in Section 29 by a surety or a guarantor. The liabilities of a surety or the guarantor to repay the loan of the principal debtor arises only when a default is made by the latter.

15. The words "as well as" in our opinion play a significant role. It confers two different rights but such rights are to be enforced against the same person, viz., the industrial concern. Submission of the learned senior counsel that the second part of Section 29 having

not referred to 'industrial concern', any property pledged, mortgaged, hypothecated or assigned to the Financial Corporation can be sold, in our opinion cannot be accepted. It is true that sub-section (1) of Section 29 speaks of guarantee. But such a guarantee is meant to be furnished by the Corporation in favour of a third party for the benefit of the industrial concern. It does not speak about a surety or guarantee given in favour of the Corporation for the benefit of the industrial concern.

16. The legislative object and intent becomes furthermore clear as in terms of sub-section (4) of Section 29 of the Act only when a property is sold, the manner in which the sale proceeds is to be appropriated has categorically been provided therein."

In view of the above, we are of the considered view that the OSFC in exercise of power vested under Section 29 of the SFC Act cannot sell out the properties mortgaged to it by the guarantors.

9. Question No. (ii) relates to legality of the action of OSFC in putting the properties of the guarantor to auction without adhering to the provisions of Section 31 of the SFC Act and execution of the deed of transfer pursuant to said sale. For better appreciation, the provisions of Section 31 of the SFC Act is reproduced below:

"**31. Special provisions for enforcement of claims by Financial Corporation.-** (1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any installment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under section 30 and the industrial concern fails to make such repayment, then, without prejudice to the provisions of section 29 of this Act and of section 69 of the Transfer of Property Act, 1882 (4 of 1982), any officer of the Financial Corporation, generally or specially authorized by the Board in this behalf, may apply to the District Judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:-

(a) for an order for the sale of property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended.

(2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and such other particulars as may be prescribed."

10. Section 31 of the SFC Act provides for a special provision for enforcement of claims by the financial Corporation against a surety or guarantor. The financial Corporation can proceed against a surety or mortgagor invoking the provision under Section 31 for the default committed by the industrial concern, and also where the financial Corporation requires the industrial concern to make immediate repayment of loan or advance in terms of Section 30 and the industrial concern fails to make such repayment. The OSFC can resort to the provision of Section 31 without prejudice to its right under the provision of Section 29 of the SFC Act and Section 39 of the Transfer of Property Act, 1882. To exercise power under section 31, the OSFC is required to apply to the District Judge having appropriate jurisdiction.

Thus, where Section 29 is concerned with the property of industrial concern, Section 31 takes within its sweep both the property of industrial concern and that of the surety. The statute provides an additional remedy for recovery of the amount in favour of the OSFC by proceeding against the surety in terms of Section 31 of the OSFC Act. Such a power is not vested with the Corporation under Section 29.

11. Needless to say that public money has to be recovered from the defaulters, who do not repay the loan amount to the financial institutions. This does not mean that financial institutions are at liberty to dispose of the secured asset of the defaulters in unreasonable or arbitrary manner in flagrant violation of the statutory provisions and principles of natural justice.

In Lachman Dass v. Jagat Ram & Ors. (2007) 10 SCC 448, the apex Court held that the right to hold property is a constitutional right as well as human right. A person cannot be deprived of his property except in accordance with provisions of the statute. (Also see Chairman, Indore Vikas Pradhakaran v. Pure Industrial Coke & Chemicals Ltd. & Ors., AIR 2007 SC 2458 and Commissioner of Municipal Corporation, Shimla vs. Prem Lata

Sood & Ors. (2007)11 SCC 40). Thus, the condition precedent for taking away someone's property or disposing of the secured asset is that the authority must ensure compliance of the statutory provisions.

It is the settled law that when the action of the State or its instrumentalities is not at par with the rules or regulations and supported by the Statute, the Court must exercise its jurisdiction to declare such an act to be illegal and invalid. In ***Sirsi Municipality by its President, Sirsi v. Cecelia Kom Francis Tellis****, AIR 1973 SC 855*, the Hon'ble Supreme Court observed that the ratio is that the rules or the regulations are binding on the authorities.

Whenever any action of the authority is in violation of the provisions of the statute or the action is constitutionally illegal, it cannot claim any sanctity in law; and there is no obligation on the part of the Court to sanctify such an illegal act. Wherever the statutory provision is ignored, the Court cannot become a silent spectator to such an illegality and it becomes the solemn duty of the Court to deal with the persons violating the law with heavy hands. (See R.N. Nanjundappa v. T. Thimmaiah & Anr., AIR 1972 SC 1967, Sultan Sadik v. Sanjay Raj Subba & Ors., AIR 2004 SC 1377)

Thus, the legal position remains, every statutory provision requires strict adherence for the reason that the statute creates rights in favour of the citizens, and, if any order is passed de hors the same, it cannot be held to be a valid order and cannot be enforced. [See Swastik Agency and 2 Ors. V. State Bank of India, Main Branch, Bhubaneswar and 3 Others, 107 (2009) CLT 250)]. The Apex Court in ***Badrinath v. State of Tamil Nadu and Ors***., AIR 2000 SC 3243, observed that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically. Non-compliance of mandatory requirements vitiates the proceedings.

12. It is not in dispute that in the present case the properties of the guarantors were put to auction by the OSFC exercising power under Section 29 of the SFC Act. The procedure provided under Section 31 of the said Act has not been complied with before putting the properties of the guarantors to public auction for sale.

Apart from the above, it comes to our notice that the manner in which the properties of the guarantors were put to sale in public auction is not fair at all. When the upset price was fixed at Rs. 10,08,000/- the same was sold to a single bidder for a consideration of Rs.10,09,000/- which is just Rs.1000/- over and above the upset price. In the newspaper advertisement details of the properties have not been given.

13. The apex Court in **Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and others** ; AIR 1993 SC 935 has held as under:

> "18. The Corporation or its officers or servants as trustee are bound to exercise their power in good faith in selling or dealing with the property of the debtor as a ordinary prudent man would exercise in the management of his own affairs to preserve and protect his own estate. Therefore, the acts of the officer or servant of the Corporation should be reasonable, just and fair which must meet the eye and the offer accepted must be of competitive and every attempt should be made to secure as maximum price as possible to liquidate the liabilities incurred by the industrial concern or the debtor under the Act.
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> 21. The sale by public auction or tender or private negotiation should be bona fide action. First is universally recognized to be the best and most fair method. It is expected to fetch best competitive price and is beyond reproach. Second should be restored to rarely only if first is an impossibility. Generally tenders would be calling quotation to execute public work or to award contracts etc. And third should always be avoided as it cannot withstand public gaze. It casts reflection on Corporation and its officials and is against social and public interest. In case transfer cannot be effected by public auction and it is necessary to resort to sale by tender it is both fair and necessary to inform the unit holder, if unit has been got valued for purposes of transfer of the estimated value for sale as he is as much interested as the Corporation. Sale of public property by calling tenders escape attention of many an intending participants. Every endeavour should, therefore, be made to give wide publicity and to get the maximum priced. Bureaucracy feels that accountability is an impediment to efficient discharge of the duty. Accountability is no more and no less than, the concept of accountability of a private concern to their shareholders. There is a distinction between prying into details of day to day administration and of the legitimate actions or resultant consequences thereof. To enthuse efficiency into administration, a balance between accountability an autonomy of action of management in public enterprises should be carefully maintained. Over emphasis on either would impinge upon public efficiency. But undermining the accountability would give immunity or carte blanche power to deal with the public property or of the debtor at whim or vagary. Whether the public authority acted bona fide and

in the best interest as prudent owner in the given facts would do, be gazed from impugned action and attending circumstances. The authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner."

14. In view of the above, sale of the properties of the guarantors and subsequent execution of deed of transfer under Annexure-5 are liable to be quashed for being done in flagrant violation of the statutory provision contained in Section 31 of the SFC Act which we direct accordingly. In such fact situation, opp. party no.2, the auction purchaser is entitled to get refund of the amount deposited by him with opp. party no.1 towards consideration money of the properties in question. Opp. party no.1-OSFC shall refund the said amount with interest @ 9% per annum within a period of eight weeks from today. Opp. party no.1-OSFC is directed to recalculate the amount due from the loanee including interest accrued thereon and issue a fresh demand notice to be served upon the loanee as well as the petitioner-guarantors within the time stipulated hereinabove. It is further directed that as opp. party no.1-OSFC proceeded illegally it is not entitled to claim for legal expenses from the loanee/petitioners/ guarantors. On receipt of the recomputed demand from the OSFC, the petitioner-guarantors shall deposit the same within a period of eight weeks from the date of receipt, failing which the OSFC shall be at liberty to proceed against the petitioner-guarantors for making full recovery of the outstanding dues in accordance with law.

15. In the result, the writ petition succeeds. No costs.

Writ petition allowed.

2011 (I) ILR- CUT- 853

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

W.P.(C) NO.13941 OF 2010 (Decided on 24.11.2010).

M/S. BIRLA TYRES WORKERS UNION …….. Petitioner.

.Vrs.

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

INDUSTRIAL DISPUTES ACT, 1947 – S.10 (3).

Statutory power of the State Government U/s. 10(3) – Two conditions are to be satisfied – Firstly there must be an industrial dispute existing and secondly such industrial dispute must have been referred to Labour Court / Tribunal U/s. 10 (1) – Section 10 (3) can not operate with regard to such disputes which are not referred U/s. 10 (1) of the Act.

In this case Labour Commissioner directed the petitioner-Union to refrain from strike – The industrial dispute with regard to strike has not been referred for adjudication in the order of reference – Held, Order prohibiting continuance of strike is illegal as the same is contrary to section 10 (3) of the I.D.Act.

(Para 8)

Case law Referred to:-

AIR 1978 SC 976 : (Delhi Administration, Delhi-V-Workmen O Edward Keventers & Anr.).

For Petitioner - Mr. Debendra Mohapata
For Opp.Parties - Addl. Govt. Advocate (For O.P. 1 to 3)
M/s. B.N.Rath, J.N.Rath, S.K.Jethy (for O.P.4)

B.N.MAHAPATRA,J. In the present writ application, the petitioner-M/s. Birla Tyres Workers Union seeks for a direction to quash the letter dated 09.08.2010 and the order dated 30.07.2010 under Annexures 1 & 11 respectively. Annexure-1 is a letter issued by opp.party no.2-Labour Commissioner, Orissa on 9.8.2010 directing the President of petitioner-Union to refrain from the strike situation and to advise the workers to report for duty by 10.8.2010 and ensure peace and harmony in the industry and in case of failure on the part of the petitioner-Union legal action would be initiated against it under the Industrial Disputes Act, 1947 (for short 'I.D. Act') and Rule 20 of the Verification of Membership and Recognition of Trade

Union Rules, 1994 (for short, "Rules 1994") which might also lead to cancellation of recognition of trade union. Under Annexure-11 Government in Labour and Employment Department in exercise of power u/s. 10(3) of the I.D. Act, passed order dated 30.7.2010 prohibiting continuance of the strike/lock out in the premises of M/s Birla Tyres Workers Union.

2. Shorn of unnecessary details, the facts and circumstances leading to filing of the present writ petition are that the petitioner is a trade union registered under the Trade Unions Act, 1926 and operates in the industry of opp. party no.4. On 25.9.2007 the said Union submitted an application for verification of membership and recognition of the trade union under Rules 1994. Since no effective steps were taken on its application, the petitioner-Union approached this Court in W.P.(C) No.5911 of 2005 which was disposed of on 14.9.2005 with a direction to hold the election within four months from the date of the order. Since the said direction of this Court was not carried out, on 07.11.2008 a direction was issued for personal appearance of Labour Commissioner and District Labour Officer. On 21.12.2008 the Labour Commissioner was directed to comply with the direction given in the said writ petition within four weeks. On 12.12.2008 the election under the Rules, 1994 was held and the petitioner-Union came out successful and opp. party no.4-employer declared the petitioner-Union as the recognized Union. The petitioner's case is that though opp. party no.4 declared the petitioner-Union as a recognized Union, it did not comply with the provisions of Rules 1994. On the other hand, opp. party no.4 entered into an agreement with the other unions. Since certain aspect relating to the service conditions of the workers was not followed, the petitioner-Union submitted a charter of demand of twenty three points in the prescribed manner. Though the labour machinery wanted to settle the issue by way of discussion, the Management of opp. party no.4 did not participate in the discussion. On the other hand, to frustrate the cause, opp. party no.4 started creating unpleasant situation for which opp. party no.3, Assistant Labour Commissioner issued a letter dated 31.12.2009 u/s. 30(b) of the Code of Civil Procedure. On 28.04.2010 the petitioner-Union also sent a memorandum to the Collector, Balasore regarding highhanded action of opp. party no.4. Though the workers and the office bearers of the petitioner-Union submitted application before opp. party no.4 for leave, the latter without considering the same deducted 8 days' wages of the said workers. This very fact having been brought to the notice of the labour machinery, opp. party no.3, issued letter dated 7.5.2010 to opp. party no.4 indicating therein that such deduction of wages is not in accordance with the provisions of Payment of Wages Act, 1936 and requested opp. party no.4 to pay the wages of the workers without any deduction. Since opp. party no.4 did not comply with the above direction of opp. party no.3, opp. party no.3 issued a letter dated

24.5.2010 requiring the presence of the representative of the petitioner-Union and the representative of the Management on 8.6.2010 in his office to discuss on the issue. Though the representative of opp. party no.4 attended the discussion, on the said day the Management deducted 10% of the wages of the workers and degraded 26 workers as casual workers. This very fact was brought to the notice of opp. party no.2. Since no fruitful result could come out, the petitioner-Union finding no other alternative on 29.06.2010 served a notice of token strike on 16.07.2010 in protest against such high handed action of opp. party no.4. Immediately thereafter, opp. party no.4 suspended one of the protected workmen on some vague grounds. When such action of opp. party no.4 was objected to by the workers, the said workers were allowed to report to their duties. In the meantime, on 16.07.2010 from B-Shift opp. party no.4 declared lock out of the industry. The Management did not participate in the discussion on 17.7.2010. The petitioner came to know from the paper publication made by the Management that 46 workers have been put under suspension pending inquiry. When the matter stood thus, the Government of Orissa passed order dated 30.7.2010(Annexure-11) prohibiting continuance of strike/lock out. The further case of the petitioner is that immediately after receipt of the order prohibiting strike/lock out, the petitioner-Union made statement in general body meeting and informed the workers about the said fact. In furtherance of the same, the petitioner-Union made necessary communication to the district administration, Labour machinery to the effect that the Union had never gone on strike as would be reflected from the proceedings before opp. parties 2 and 3. When the matter stood thus, opp. party no. 2 issued the letter dated 9th August, 2010 under Annexure-1.

3. Mr. Debendra Mahanta, learned counsel appearing for the petitioner-Union submits that the impugned letter/order passed under Annexure-1 and Annexure-11 are without any basis or material on record. Annexure-1 has been issued on the basis of the allegation made by opp. party no.4. At no point of time the petitioner Union has gone on any strike. The petitioner all along tried to maintain peace and harmony in the industry. Hence, order passed under Annexure-11 is not sustainable in law. Rule 20 of the Rules, 1994 provides the circumstances under which recognition of a Union is to be cancelled. In the absence of any finding to the effect that the Union has ever instigated, aided or assisted in commencement or continuance of any strike proposed action under Rule 20 is illegal. Consequently, the impugned letter under Annexure-1 is not sustainable as it speaks of illegal intention of opp. party no.2. Opp. party no.4 till date is continuing the lock out with a view to avail some ancillary benefits and victimize the office bearers as well as the executive body members of the Union. Opp. party no.2 being swayed away

by opp. party no.4, issued Annexure-1 with mala fide intention. Therefore, the same is liable to be quashed.

4. Per contra, Mr. B.N. Rath, learned counsel appearing for opp. party no.4 submits that the petitioner-Union is preventing the workmen of other unions from attending their works for smooth running of the industry. There are nine unions altogether including the petitioner-Union in the establishment of opp. party No.4 In spite of desire of eight unions to have a bargaining power in all important decisions of the establishment, the petitioner-Union did not agree to the proposal and requested the Labour authority to start with the recognition process under the Verification of Membership of Trade Union (through secret ballot system) Rules, 1994. The last recognition process was conducted in the absence of involvement of the rest of the unions. The Management was constrained to recognize the petitioner-Union. Some of the members of the petitioner-Union are making a sabotaging attempt to cause severe damage to the boiler of the industry by staging an illegal strike commenced from 'A' shift of 15.7.2010 till 'B' shift of 15.7.2010. A large number of workmen members of the petitioner-Union are facing a disciplinary proceeding in connection with the same. The petitioner-Union created all sorts of disturbance to see that the industrial working should come to a halt. Finding no other way out, the Management was constrained to approach the Labour authority to declare the strike at the instance of the petitioner-Union as illegal. Finding no other immediate remedy/solution and apprehending damage to its own property on account of failure of district Administration and Labour authority in tackling the illegal agitation by the petitioner-Union, the Management of opp. party no.4 was constrained to declare lock out of the industry. Keeping the interest of larger section of the workmen, the Labour Department was constrained to declare both the strike as well as lock out as illegal. In spite of declaration of lock out and strike as illegal by the appropriate authority of the Government, 62% of the workmen resumed their duty in the industry and rest 38% of workmen belonging to the petitioner-Union did not resume their duty by 8th August, 2010. Consequently, the Labour Commissioner passed an order under Annexure-1 directing the petitioner-Union to refrain from the strike situation and advise the workers to resume their duty by 10.8.2010 and ensure peace and harmony in the industry. Thus, there is no illegality in issuance of the order under Annexure-1, which yielded in curbing the illegal strike. The petitioner-Union is in the habit of filing false F.I.R. against the high officials of the Company. The police, in the meantime, after making due investigation has come to hold that the F.I.R. lodged against the high officials of the Company is false. Benefit guaranteed by way of agreement under Annexure-3 is to the benefit of the workmen to mitigate their financial hardship and it is not at all adverse to any of the persons of the Establishment. It is not correct that opp.

party no. 4 did not participate in the discussion during the conciliation proceedings. The petitioner having admitted that it has resorted to strike, the submission that the said strike was recalled due to intervention of Labour authority is not correct. Even though the petitioner submitted before the Labour authority to recall the strike, it did not allow its workers to resume their work which ultimately compelled the Labour authority to issue letter under Annexure-1. There is no law prohibiting disciplinary proceedings against the protesting workmen. The petitioner-Union is not correct in saying that it has not resorted to any strike. The letter under Annexure-4 is concocted and prepared with oblique motive. The issuance of orders under Annexures-1 & 11 is valid and justified. The petitioner Union circulated strike notice under Annexure-7 which contains two disputes and the reference dated 30.7.2010 under Annexure-A/4 clearly discloses about both the issues contained in the strike notice and those issues have already been referred for industrial adjudication. Therefore, there is full compliance of Section 10(3) of the Industrial Disputes Act before issuing the order prohibiting the strike in Annexure-11. Even if there is any lapse in issuing order vide Annexure-11, the same is curable and direction can be issued to the State Government to refer both the strike as well as lock out for industrial adjudication.

5. In the rejoinder to the counter affidavit the petitioner-Union has stated that the other Unions travelling with the opposite party No.4 have no support of the workers which is evident from the report of the State Implementation & Evaluation Officer-Cum-Labour Commissioner, Orissa, Bhubaneswar. The petitioner-Union at no point of time had ever sabotaged anything or ever gone on strike as contended. The allegation of attempt to cause severe damage to the boiler of the industry is also false; the same has been made against the workers when most of them were not on duty on the very day. The petitioner is a recognized Union, but the settlements are being arrived at with the other Unions ignoring the petitioner-Union. The workers were getting employment throughout the year. Now without any notice, the management, after lifting of the lock out, has imposed a condition that no work shall be provided to the workers in any shift on Sunday. Most of forty-seven employees, who are office bearers of the Union, have been put under suspension during the period of lock out on some flimsy grounds. The president of the Union is not also being allowed to go inside the factory.

6. On the above rival contentions, the questions that fall for consideration by this Court are as follows:-

(i) Whether order dated 30.07.2010 passed under Annexure-11 in exercise of power under Section 10(3) of the I.D. Act, 1947 by the

State Government prohibiting continuance of strike is legally sustainable?

(ii) Whether the letter under Annexure-1 issued by opposite party No.2-Labour Commissioner on 09.08.2010 directing the President of petitioner-Union to refrain from the strike situation and to advise the workers to report for duty by 10.08.2010 and ensure peace and harmony in the factory premises and in case of failure on the part of the petitioner-Union legal action would be initiated against the petitioner-Union under the I.D. Act, 1947 and Rule 20 of the Rules, 1994 which might also lead to cancellation of recognition of trade union is legally sustainable ?

7. To deal with the first question, it is felt necessary to know what is contemplated in sub-Sections (1) and (3) of Section 10 of the I.D. Act. Those two sub-sections are reproduced below.

> "10. **Reference of disputes to Boards, Courts or Tribunals**.— (1) Where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing—
>
> xx xx xx xx
>
> (3) Where an industrial dispute has been referred to a Board, Labour Court, Tribunal or National Tribunal under this section, the appropriate Government may by order prohibit the continuance of any strike or lock-out in connection with such dispute which may be in existence on the date of the reference."

Sub-Section (3) contemplates that two conditions are to be satisfied to ensure the statutory power by the State Government under Section 10(3). Those are – (i) there must be an industrial dispute existing, and (ii) such industrial dispute must have been referred to a Board, Labour Court, Tribunal or National Tribunal under sub-Section (1) of Section 10.

At this juncture, it would be profitable to refer to the judgment of the apex Court in ***Delhi Administration, Delhi Vs. Workmen of Edward Keventers & Anr.,*** AIR 1978 SC 976, wherein the apex Court held that before an appropriate Government can pass an order under S. 10 (3) prohibiting a strike two conditions must exist, firstly, there must be an industrial dispute in existence and secondly, such dispute must have been already referred for adjudication. Where several demands are raised by the workmen but some of them only are referred for adjudication, Section 10(3) cannot operate in regard to such disputes which are not referred under Section 10(1) of the I.D. Act. If the Government feels that it should prohibit a

strike under S. 10 (3) it must refer the demand for adjudication. A demand which is suppressed by a prohibitory order and is not allowed to be ventilated for adjudication before a Tribunal will explode into industrial unrest and run contrary to the policy of the industrial jurisprudence. There is a distinction between strikes being illegal under other sections of the Act and penalties being leviable against such illegal strikes on the one hand and strikes being illegal to invoke power by the State Government under Section 10(3) of the I.D. Act and liable to be prohibited thereunder.

8. In the instant case, petitioner's case is that since certain aspect relating to the service conditions of the workers was not followed, the petitioner-Union submitted a charter of demand of twenty-three points in prescribed manner. Various orders/letters of the opposite parties reveal that the management of Birla Tyres did not cooperate in the conciliation proceedings initiated by the Conciliation Officer-cum-District Labour Officer, Balasore in reaching an amicable settlement of dispute for better and harmonious industrial situation. By letter dated 31.12.2009 (Annexure-4) the Conciliation Officer expressed his displeasure on O.P. No.4 in not extending its cooperation in the conciliation proceeding. In the said letter, the Conciliation Officer observed that it was unfortunate that the management misconceived the fact and issued notice to all other trade unions to create an unpleasant situation which might adversely affect the industrial peace and harmony and advised the employer to desist from such practice and take a positive attitude to attend the conciliation proceeding. The Management was further directed to treat the said notice under Annexure-4 as notice under Section 30(b) of the Code of Civil Procedure for attendance and production of registers on 05.01.2010. Out of several disputes, some of the disputes have been referred to under Section 10(1) for adjudication by the civil courts. Thereafter, the management has also initiated various actions against the employees and the members of the petitioner-Union. The District Labour Officer, Balasore vide his letter No.3446 dated 28.07.2010 intimated the Labour Commissioner, Orissa that the conciliation for three demands of the Union was failed due to non-attendance of the management. The report of the conciliation proceedings has been submitted to Government in Labour and Employment Department by the Labour Commissioner vide letter No.3305(2) dated 19.07.2010. Thereafter, in a tripartite meeting held on 20.07.2010, the Management brought to the notice of the Labour Commissioner that it has suspended forty-seven workmen for their gross misconduct during the period from 14.07.2010 to 16.07.2010. The Union demanded for revocation of said suspension order to which the Management did not agree. Now, it appears that suspension of forty-seven workmen is the main bone of contention of the parties. However, the suspension orders have not been served upon those workmen. Due to continuation of the strike & lock-out, about five thousand workmen both directly and indirectly engaged in the industry have been affected.

On the other hand, the specific stand of the petitioner-Union is that it has never gone on strike at any point of time. Thus, the very fact that the petitioner-Union has gone on strike is itself a dispute which is connected with and relevant to the industrial dispute and the same should have been referred to the appropriate Court/Tribunal for adjudication in terms of Section 10 of the I.D. Act. As could be seen the industrial dispute with regard to whether the workmen had gone on with strike or not and the same was illegal or the opposite party No.4, has illegally declared lockout , has not been referred for adjudication in the order of reference vide Annexure-11. Without referring the above disputes for adjudication prohibiting the strike is illegal, as the same is contrary to section 10(3) of the I.D. Act and law laid down by the apex Court.

In view of the above, the order passed on 30.07.2010 under Annexure-11 in exercise of power under Section 10(3) of the I.D. Act prohibiting continuance of strike is not sustainable.

9. To deal with second question, it is necessary to know what is contemplated under Section 24(1) of the I.D. Act.

> "24. **Illegal strikes and lock-outs.—**(1) A strike or a lock-out shall be illegal if –
>
> (i) xx xx xx
>
> (ii) it is continued in contravention of an order made under sub-section (3) of section 10 or sub-section (4A) of section 10A."

Section 24(1)(ii) of the I.D. Act provides that a strike or lock-out shall be illegal if it is continued in contravention of an order made under sub-section (3) of section 10 of the I.D. Act.

Since we have held that the order passed by the Government under sub-section (3) of Section 10 of the I.D.Act is not legally sustainable in law in prohibiting strike without referring that dispute to the Labour Court/Tribunal for its adjudication, who alone are competent to declare that strike by the workmen, if any, is illegal or otherwise, the provision of Section 24(1) (ii) has no application to the present case.

10. The proposed initiation of legal action under Rule 20 of the Rules, 1994 for cancellation of recognition of the petitioner-Union on the ground of assisting the continuance of strike, which is deemed to be illegal under the I.D. Act, is also not legally sustainable in view of our finding that the very fact of existence of strike on the date of reference is in dispute.

11. In the result, the writ petition is allowed and issued Rule and Annexures-1 and 11 are hereby quashed. No order as to costs.

Writ petition allowed.

2011 (I) ILR- CUT- 862

B.P.DAS, J & S.PANDA, J.

O.J.C. NO.12807 OF 2001 (Decided on 07.01.2011)

LAMBODHARA PANDA …. …Petitioner.

.Vrs.

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

SERVICE – Scale of pay – Untrained Intermediate teachers and trained Matric teachers were allowed one scale of pay as per 1985 Pay Rules – However in 1989 revision of pay the trained Matric teachers allowed scale of pay of Rs.1080-1800/- .

Decision has been taken by the State Govt. under annexure-4 to allow the untrained persons having higher qualification and continuing as teachers in primary, M.E. Schools & High Schools against trained Matric posts and enjoying fixed salary of Rs.225/- P.M. will get the scale of pay prescribed for trained Matriculate – Resolution Dt.12.09.1990 can not help the State Govt. as the petitioner is protected by the decision taken under annexure-4 – Held, petitioner is entitled to get the benefit of the scale of pay of untrained Intermediate teacher – Since the petitioner has already retired direction issued to Opp.parties to compute his arrear differential salary and fix his pensionary benefit taking the scale of pay of the petitioner as Rs.1080-1800/- as per O.R.S.P. Rules, 1989 from the year 1989.

(Para 5 to 9)

For Petitioner - M/s. P.C.Acharya, S.K.Acharya.
For Opp.Parties - Senior Standing Counsel,
School & Mass Education Deptt.

B. P. DAS, J. The petitioner while continuing as an Assistant Teacher in Khandadeula M.E. School in the district of Mayurbhanj against the Trained Matric post, has filed this writ petition seeking a direction to the opposite parties to fix his scale of pay at Rs.1080-1800 from 1.5.1989 in terms of the Govt. Resolution dated 28.6.1991.

2. The brief facts as delineated in this writ petition, tend to reveal as follows:-

2.1 Pursuant to the appointment order dated 2.1.1972 issued by the Managing Committee, the petitioner who was then a Matriculate, joined the

school as an Assistant Teacher (Trained Matric) on 3.1.1972. While continuing as such, he passed the intermediate examination on 9.8.1975. Thereafter the petitioner represented to the authorities for sanction of untrained Intermediate scale of pay, i.e. Rs. 265-360/- and accordingly the said scale was sanctioned in favour of the petitioner with effect from 9.8.1975 as per Orissa Revised Scales of Pay (ORSP) Rules, 1974. Thereafter, the Government of Orissa, Department of Education and Youth Services, vide its letter No. 28292 dated 10.8.1979 permitted to appoint untrained persons with higher qualification in M.E. Schools against Trained Matric Posts. Though such teachers were untrained, as they were having higher qualification, they were allowed to draw untrained Intermediate scale of pay. The petitioner was also allowed the untrained intermediate scale of pay i.e. Rs.265-360/- from 9.8.1975 which was at par with Trained Matric Scale of Pay. When the ORSP Rules, 1981 came into force, the petitioner was also allowed the revised scale of pay. Again when the 1985 ORSP Rules came into operation, the scale of the petitioner was fixed in the untrained Intermediate Scale of pay of Rs.840-1240/-. However, after introduction of ORSP Rules, 1989, the petitioner's pay was fixed in the scale of pay of Rs.975-1660/-, instead of Rs.1080-1800/-.

2.2 Against the aforesaid discrimination, the petitioner filed a writ application being OJC No. 8439 of 1997, which was disposed of on 12.9.2000 with a direction to the present opposite parties to reconsider the claim of the petitioner for allowing him the scale of pay of Rs.1080-1800/- taking into consideration the Resolution of the Government in the Department of Education & Youth Services bearing No.28292-YES dated 10.8.1979 and take a decision with regard to fixation of scale of pay as per the 1989 Revised Pay Rules.

2.3 Thereafter the representation made by the petitioner was rejected by O.P.2-Director of Elementary Education, Orissa by his order dated 17.5.2001 (Annexure-10) on the ground that the petitioner was an untrained teacher having I.A. qualification and was enjoying scale of pay Rs.840-1240/- and advancement scale of pay Rs.840-1345/- under ORSP Rules 1985. As per the prescribed provisions of the ORSP Rules, 1989 and its amended Rules, 1990, read with Government Resolution No. 3006 OE/ 28.6.1991, the pay of the petitioner has been rightly fixed in the scale of pay of Rs.975-1660/- and the petitioner is not entitled to scale of pay of Rs.1080-1800/-. Challenging the order in Annexure-10, the present writ application has been filed.

3. Mr. Acharya, learned counsel for the petitioner submits that as per the ORSP Rules, 1985, the scale of pay of untrained intermediate teachers was Rs.840-1240/-. As per Government Resolution dated 28.6.1991,

consequent upon revision of pay of teaching and non-teaching posts in Government Educational Institutions under the ORSP Rules, 1989 and the ORSP (Amendment) Rules, 1990 and in pursuance of the Finance Department Resolution No. 37376-F dated 3.10.89 and No. 25667-F dated 27.7.90, Government was pleased to decide to allow the Revised Scales of Pay to their counter-part posts in the aided Non- Government educational institutions with effect from 1.5.1989. This Resolution came into force with effect from May, 1989. Under Annexure-B to the said Resolution, untrained Intermediate and trained Matriculate teachers were given one scale of pay, i.e. Rs.1080-1800/-, whereas untrained Matric teachers were given the scale of pay of Rs.950-1500/-.

4. Counter affidavit has been filed by the opposite parties taking a stand that under the 1989 revision of pay, the untrained Intermediates who were drawing trained Matric scale of pay as per Government Resolution dated 31.3.1982 at the rate of Rs.840-1240/- have been allowed the scale of pay of Rs. 975-1660/-, whereas the trained Matriculates have been allowed the pay scale of Rs.1080-1800/-, even though both classes were given the same scale of pay earlier.

5. From the above, it appears, in 1985 Pay Rules, the untrained Intermediate teachers and trained Matric teachers were allowed one scale of pay, whereas in 1989 revision of pay, the untrained Intermediate teachers, who were drawing trained Matric scale of pay, have been allowed the scale of pay of Rs. 975-1660/- and the trained Matric teachers have been allowed the scale of pay of Rs.1080-1800/-. The letter bearing No. XIIEP.Sch.9/82 29253/EYS dated 25.8.82 (Annexure-4) reveals that a decision has been taken to the effect that untrained persons having higher qualification already continuing as teachers in Primary, M.E. Schools and High Schools against trained Matric posts and enjoying fixed salary of Rs.225/-P.M. will also get the scale prescribed for trained matriculates with effect from the date of issue of that resolution and they may continue against the posts in the above scale of pay if they like.

6. From the aforesaid, it appears that decision has been taken by the State Government to allow the untrained persons having higher qualification and continuing as teachers in Primary, M.E. Schools and High Schools against trained Matric posts and enjoying fixed salary of Rs.225/- P.M. will also get the scale of pay prescribed for Trained Matriculate. Therefore, according to the petitioner, he is entitled to get the benefit of the Resolution under Annexure-4.

7. Now learned counsel for the School & Mass Education Department places reliance on the Finance Department Notification dated 12.9.1990 (Annexure-B/3) and submits that the scale of pay, which the petitioner is claiming, is no more in existence in the said notification. We also find that no such scale of pay, which the petitioner claims, is available.

8. In our considered opinion, the resolution dated 12.9.1990 will no way come to the help of the State Government as the petitioner is protected by a decision taken in Annexure-4. The petitioner is entitled to get the benefit of the scale of pay of untrained Intermediate Teacher. That apart, the petitioner has already enjoyed the said scale of pay from 1975 to 1989.

9. In view of the above, we allow the writ application. Since the petitioner has already retired from service, we direct the opposite parties to compute his arrear differential salary and accordingly fix his pensionary benefit taking the scale of the pay of the petitioner as Rs.1080-1800/- as per ORSP Rules, 1989, from the year 1989. The entire dues of the petitioner be paid within a period of three months from the date of communication of this order. No cost.

Writ petition allowed.

2011 (I) ILR- CUT- 866

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

W.P.(C) NO.688 OF 2011 (Decided on 04.02.2011)

CENTRAL BANK OF INDIA & ANR. ……Petitioners.

.Vrs.

RAM CHANDRA SAHOO & ORS. ….. …Opp.Parties.

SECURITISATION & RECONSTRUCTION OF FINANCIAL ASSETS & INFORCEMENT OF SECURITY INTEREST ACT, 2002 (ACT NO.54 OF 2002) – S.13 (2) (4).

Bank loan availed by O.P.1 – For non payment of loan Bank issued possession notice U/s. 13 (4) of the Act – O.P.1 filed complaint case before the District Consumer Disputes Redressal Forum, Puri and obtained an order of stay with a direction to the Bank not to sell out the pledged property mortgaged against the loan – Hence the writ petition.

In view of Section 34 of the Act jurisdiction of Civil Court is ousted – Held, learned District Forum had transgressed its jurisdiction in entertaining the application of O.P.1 – Impugned order is illegal, arbitrary and without jurisdiction hence set aside.

(Para 8,9,10)

Case laws Referred to:-

1.AIR 1983 SC 603 : (Titaghur Paper Mills Co.Ltd.-V-State of Orissa)
2.AIR 2010 SC 3413 : (United Bank of India-V-Satyawati Tondon & Ors.).
3.AIR 1967 SC 1857 : (Rajasthan State Electricity Board,Jaipur-V-Mohan Lal 7 Ors.)

For Petitioners - M/s. Tuna Sahu & F.Ahmed.
For Opp.Parties - None

B. P. DAS, J. The Central Bank of India represented by the Branch Manager of its Puri Branch and the Assistant General Manager-cum-Authorised Officer of its Regional Office at Bhubaneswar have filed this writ petition against the interim order dated 12.10.2010 passed by the District Consumer Disputes Redressal Forum, Puri, in C.D.Case No.157/2010 directing them not to sell out the pledged property till final disposal of the said C.D.Case, which was mortgaged against the loan.

2. Opposite party no.1-Ram Chandra Sahoo availed a Cash Credit loan amounting to Rs.8,70,000/- from the Puri Branch of the Bank and his wife (O.P.2) stood as the guarantor to such loan. When O.P.1 defaulted to repay the loan amount, the Bank issued notice to both O.Ps.1 & 2 under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "Securitisation Act"). Thereafter, the Authorised Officer of the Bank issued the possession notice under Section 13(4) of the Securitisation Act (Annexure-4). Challenging the possession notice, O.P.1 filed a complaint case being C.D.Case No.157/2010 before the District Consumer Disputes Redressal Forum, Puri, which passed the impugned interim order dated 12.10.2010 in Annexure-1.

Aggrieved by the said impugned order dated 12.10.2010 (Annexure-1), the petitioners have filed this writ petition with a prayer to set aside the said order in Annexure-1 and quash the proceeding in Annexure-2.

3. This Court by its order dated 18.1.2011 while issuing notice to the opposite parties by special messenger stayed the operation of the impugned order dated 12.10.2010, which has been challenged in this case on the ground that opposite party no.1 being the borrower and since the Bank has invoked the power under the provision of the Securitisation Act, the District Forum has no jurisdiction to entertain the application of the complainant leave apart passing an order of injunction in contravention of the provisions made in the Securitisation Act.

4. Now the question arises whether the District Consumer Forum has any jurisdiction to interfere with the proceeding initiated under the Securitisation Act and pass the interim order as has been passed in C.D.Case No.157/2010 filed by opposite party no.2. It appears, the complaint petition filed under Section 12 of the Consumer Protection Act, 1986, vide Annexure-2, that the complainant has filed an interim application before the District Forum under Section 13(3-B) of Consumer Protection Act, 1986. Let us have a look at the provision made in Section 13(3-B) of Consumer Protection Act, 1986, which provides as follows :-

> "Where during the pendency of any proceeding before the District Forum, it appears to it necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case."

Before delving into the merit of the case, if we peruse the statement of objects and reasons of the Consumer Protection Act, 1986, it can be said that it was enacted to promote and protect the rights of consumers such as –

a) the right to be protected against marketing of goods which are hazardous to life and property;
b) the right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices ;
c) the right to be assured, wherever possible, access to an authority of goods at competitive prices;
d) the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums ;
e) the right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers ; and
f) right to consumer education.

5. Law is also well settled that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This observation was made by the apex Court while dealing with the question of interference by the High Court in Securitisation Act and D.R.T. Act in exercising the power under Articles 226 of the Constitution of India. This decision has been rendered in the case of **Titaghur Paper Mills Co. Ltd. vrs. State of Orissa** reported in AIR 1983 SC 603.

6. The moot question that arises for decision in this case is whether in view of Section 34 of the Securitisation Act, the Consumer Forums have any jurisdiction to entertain the application, pass the interim order and decide the same finally.

Let us notice the provision of Section 34 of the Securitisation Act, which reads thus :-

> "34. Civil Court not have jurisdiction-No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and financial Institutions Act, 1993."

The said Act was put to test of judicial scrutiny in many decisions; one of such is the case of **United Bank of India vrs. Satyawati Tondon & Others**, AIR 2010 SC 3413, wherein the apex Court observed thus :-

> "Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them

did not repay the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil Courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular Courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in un-producting ventures. In order to redeem the situation, the Government of India constituted a Committee under the chairmanship of Shri T.Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures.

Xxx xxx xxx

The Parliament enacted the Recovery of Debts Due to Banks and Financial Institutuions Act, 1993 (for short, 'the DRT Act'). The new legislation facilitated creation of specialized forums, i.e., the Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due to banks and financial institutions. Simultaneously, the jurisdiction of the civil courts was barred and all pending matters were transferred to the Tribunals from the date of their establishment."

In paragraph-5, the Court further held as follows :-

"5. Section 34 lays down that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

In view of the aforesaid observations of the apex Court, Section 34 of the Securitisation Act also creates a bar that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the

Recovery of Debts Due to Banks and Financial Institutions Act, 1993. So there is a total bar for passing any interim order of injunction against the action taken by the secured creditor under Section 13(4) of the Act.

7. Furthermore, Section 20 of the D.R.T. Act has been enacted with a view to provide a special procedure for recovery of Debts Due to the Banks and the Financial Institutions. There is a hierarchy of authorities provided in the Act, particularly for filing of an appeal under Section 20 of the Act and this procedure cannot be allowed to be ignored either by taking recourse to proceedings under Article 226 of the Constitution of India or by filing a civil suit, which have been expressly barred. Even though a provision under particular Act cannot expressly oust the jurisdiction of this Court under Article 226 of the Constitution, judicial prudence demands that the Court should refrain from exercising its jurisdiction under the said constitutional provisions, particularly, when alternative remedy is available.

8. In the case at hand, there is express bar for passing of any order of injunction and the Civil Court or other authority has no jurisdiction to entertain any suit in respect of any matter. The words, "other authority" have been interpreted by the Hon'ble apex Court in the case of **Rajasthan State Electricity Board, Jaipur vrs. Mohan Lal & Others,** AIR 1967 SC 1857, paragraph-5 of which is quoted herein below :-

> "(5) The meaning of the word "authority" given in Webster's Third New International Dictionary, which can be applicable, is a public administrative agency or corporation having quasi-governmental powers and authorised to administer a revenue-producing public enterprise. This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution.

The meaning of "other authority" though in the aforesaid case has been interpreted for the purpose of Article 12 of the Constitution of India, the same interpretation is applicable to the District Consumer Disputes Redressal Forum and it comes within the meaning of "authority".

In the case at hand, we have no hesitation to say that the District Consumer Disputes Redressal Forum, Puri has transgressed its jurisdiction

in entertaining the application of opposite party no.1 and also by passing the impugned interim order as at Annexure-1, which the Forum is not empowered.

9. It is stated at the Bar that passing of such type of order by the District Forum now-a-days is rampant and the District Forum, Puri has crossed all its limits in passing the interim order without insisting opposite party no.1 to approach the appropriate forum under the Statute. It is also stated that now the borrowers of various other Banks are approaching the Consumer Forums and getting the orders of stay of realization of the loan amount availed by them.

10. The Consumer Forums and its Members should know their limitation and they should be aware of their jurisdiction. In our considered opinion, the order dated 12.10.2010 passed by the District Consumer Disputes Redressal Forum, Puri is illegal, arbitrary and without jurisdiction and has been passed without application of mind. We, therefore, set aside the order dated 12.10.2010 passed by the District Consumer Disputes Redressal Forum, Puri, in C.D.Case No.157/2010 and direct the Bank authorities to proceed against the opposite parties in accordance with law. The further proceeding in C.D.Case No.157/2010 is also quashed.

As it is stated at the Bar that the District Consumer Disputes Redressal Forums of the State are passing certain orders, which are neither within their jurisdiction nor in conformity with legal provisions, either deliberately or due to lack of adequate legal knowledge, we direct the Commissioner-cum-Secretary to Government in Food and Civil Supplies and Consumer Affairs Department as well as the Principal Secretary to Government in Law Department to probe into the matter and if necessary, make adequate arrangement for improvement of the libraries and orientation programme for the Presidents and Members the District Consumer Disputes Redressal Forums of the State enabling them to be acquainted with provisions of different Statute vis-à-vis Consumer Protection Act.

It is further alleged that sometimes the President and the Members of the Consumer Forum being appointed in the same district are influenced by the local litigants.

If any such event comes to the notice of the Government, it would be open to them to make inter-district transfer of the President and Members of the Forum. That apart, we direct to circulate this judgment to all the District Consumer Disputes Redressal Forums of the State. Despite this judgment, if any order of restraint or injunction in the matter covered under the D.R.T. Act

and SARFAESI Act is passed by the District Forum, that shall be construed to be an act of contempt. The writ petition is allowed accordingly.

Let a free copy of this judgment be supplied to the learned counsel for the State.

Writ petition allowed.

2011 (I) ILR- CUT- 873

L.MOHAPATRA, J.

CRL.MC. NO.1389 OF 2010 (Decided on 04.3.2011)

BAHLAB CHARAN SAHOO …….. Petitioner.

.Vrs.

STATE OF ORISSA …… Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.173, 190.

When the police after investigation submits a report U/s. 173 Cr.P.C. stating that there is no evidence to submit a charge sheet, the complainant/informant is noticed to file a protest petition – If a protest petition is filed, the Magistrate has three options (a) he may decide that there is no sufficient ground for proceeding further and drop the proceeding, (b) he may take cognizance of the offence U/s. 190 (1) (b) of the Code of Criminal Procedure on the basis of the police report and issue process; (c) he may take cognizance of the offence treating the protest petition as complaint and there after proceed U/s. 200 & 2002 Cr.P.C. if necessary.

In the present case learned Magistrate after receipt of the protest petition adopted the first procedure and having found no evidence against the accused dropped the proceeding and it was not necessary for the Magistrate to adopt the procedure prescribed U/s. 200 or 202 of the Cr.P.C. having not taken cognizance of the alleged offence – Moreover the Magistrate has passed a lengthy order as he has assigned reasons while dismissing the protest petition – Held, application U/s.482 Cr.P.C. is dismissed having no merit in the same.

(Para 4,5)

Case laws Referred to:-

1.AIR 1989 SC 885 : (M/s. India Carat Pvt.Ltd. -V- State of Karnataka & Anr.)
2.AIR 1980 SC 1883 : (H.S. Bains-V- The State (Union Territory of Chandigarh).
3.AIR 2008 SC 207 : (Sanjay Bansal & Anr.-V-Jawajarla Vats & Ors.)

For Petitioner - M/s. U.C.Mishra, R.Acharya, A.Mishra & S.r.Parija.
For Opp.Party - M/s. Jagannath Patnaik, S.P.Panda & B.Mohanty

Standing Counsel, Vigilance Department

L.MOHAPATRA, J. This application under Section 482 of the Cr. P.C. has been filed against the order dated 30.4.2010 passed by the learned Special Judge (Vigilance), Bhubaneswar in V.G.R. No.7 of 2009 dismissing the protest petition.

2. The case of the prosecution is that the petitioner, who is the informant and is working as a Junior Assistant in Puri Konark Development Authority had applied for sanction of E.L. for 140 days and the said file was pending with Shri Prasant Kumar Pattnaik, who was the Planning Member and Secretary of P.K.D.A. The leave application of the petitioner having not been sanctioned, he approached Shri P.K. Pattnaik for sanction of leave and it is alleged that there was a demand for payment of Rs.30,000/- from out of the leave salary. The petitioner promised to pay the amount after receipt of the leave salary and accordingly the same was sanctioned on 24.11.2008. However, at the time of approving the draft sanction letter, Shri Pattnaik demanded Rs.5,000/- to issue the letter and when the petitioner expressed his unwillingness to pay, Shri Pattnaik did not issue the letter. Finding no way, the petitioner again approached Shri Pattnaik and the demand was reduced from Rs.5,000/- to Rs.3,000/-. Therefore, the petitioner under compulsion paid a sum of Rs.3,000/- to Shri Pattnaik as bribe on 17.3.2009 and reported the matter to the S.P., Vigilance, Bhubaneswar. On the strength of the said information, Bhubaneswar Vigilance P.S. Case No.7 dated 16.3.2009 was registered for commission of offence under Section 7 of the Prevention of Corruption Act, 1988 and a trap was laid. After investigation, the Vigilance Department did not find sufficient evidence to submit a charge-sheet and accordingly Final Form was submitted on 14.12.2009 after obtaining necessary orders from the S.P., Vigilance. After receipt of the Final Form, the Court issued notice to the petitioner (informant) to file protest petition. After receipt of notice, the petitioner filed a protest petition and the said protest petition having been rejected in the impugned order, this application under Section 482 Cr.P.C. has been filed.

3. Shri Mishra, the learned counsel appearing for the petitioner assailed the order mainly on two grounds:

(1) The protest petition is required to be treated as a complaint petition and the enquiry under Section 202 of the Cr.P.C. should have been conducted. Without following the procedure prescribed, the learned Special Judge (Vigilance), Bhubaneswar rejected the protest petition.

(2) While rejecting the protest petition, the learned Special Judge (Vigilance) analysed the evidence as if he was writing a judgment after a full-fledged trial and the same is not permissible under law.

The learned counsel appearing for the Vigilance Department as well as Shri P.K. Pattnaik referring to some decisions of the Hon'ble Supreme Court submitted that the learned Special Judge (Vigilance) has adopted the correct procedure and enquiry under Section 202 of the Cr.P.C. was not necessary in the present case, the learned Special Judge having found no material available on record for taking cognizance. So far as the second ground is concerned, it was contended on behalf of the Vigilance Department as well as Shri P.K. Pattnaik that while rejecting the protest petition, the Special Judge (Vigilance) is required to give reasons and merely because the reasons have become lengthy, it cannot be said that the learned Special Judge was writing a judgment after a full-fledged trial.

4. An offence committed under the Prevention of Corruption Act is trialable by the Special Judge as Section 5 of the Prevention of Corruption Act, 1988 prescribes that the Special Judge shall follow the procedure for trial of warrant cases and therefore, so far as the trial of cases is concerned, the learned Special Judge stands in the footing of a Magistrate. Section 190 of the Code of Criminal Procedure prescribes that a Magistrate upon receipt of a complaint of facts which constitute such offence or upon a police report of such facts may take cognizance of any offence. Once cognizance is taken, the Magistrate may proceed to examine the complainant upon oath and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. The Magistrate may postpone the issue of process and conduct an enquiry under Section 202 of the Cr.P.C. to find out against which accused process is required to be issued. If the Magistrate does not find any material against any of the accused for issuance of process, he may also dismiss the complaint under Section 203 of the Code of Criminal Procedure. From the aforesaid provisions, it is clear that the stages of Section 200 and 202 of the Cr.P.C. shall come only after taking cognizance and the procedure adopted under Section 200 and 202 of the Cr.P.C. is only to find out against which accused process is required to be issued. In this connection, reference may be made to a decision of the Hon'ble Supreme Court in the case of ***M/s. India Carat Pvt. Ltd. v. State of Karnataka and another, reported in AIR 1989 Supreme Court 885***. Paras 13 and 14 of the judgment are quoted below:

"13. From the provisions referred to above, it may be seen that on receipt of a complaint a Magistrate has several courses open to him. The Magistrate may take cognizance of the offence at once and proceed to record statements of the complainant and the witnesses present under Section 200. After recording those statements, if in the opinion of the Magistrate there is no sufficient ground for proceeding, he may dismiss the complaint under Section 203. On the other hand if in his opinion there is sufficient ground for proceeding he may issue process under Section 204. If, however, the Magistrate thinks fit, he may postpone the issue of process and either inquire into the case himself or direct an investigation to be made by the police officer or such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. Yet another course open to the Magistrate is that instead of taking cognizance of the offence and following the procedure laid down under Section 200 or Section 202, he may order an investigation to be made by the police under Section 156(3). When such an order is made, the police will have to investigate the matter and submit a report under Section 173(2). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and issue process straightway to the accused. The Magistrate may exercise his powers in this behalf irrespective of the view expressed by the police in their report whether an offence has been made out or not. This is because the police report under Section 173(2) will contain the facts discovered or unearthed by the police as well as the conclusion drawn by the police therefrom. If the Magistrate is satisfied that upon the facts discovered or unearthed by the police there is sufficient material for him to take cognizance of the offence and issue process, the Magistrate may do so without reference to the conclusion drawn by the Investigating Officer because the Magistrate is not bound by the opinion of the police officer as to whether an offence has been made out or not. Alternately the Magistrate, on receiving the police report, may without issuing process or dropping the proceeding proceed to act under Section 200 by taking cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statement upon oath of the complainant and the witnesses present and thereafter decide whether the complaint should be dismissed or process should be issued.

14. Since in the present case the Second Additional Chief Metropolitan Magistrate has taken cognizance of offences alleged to have been committed by the second respondent and ordered issue of process without first examining the appellant and his witnesses, the question for consideration would be whether the Magistrate is entitled under the Code to have acted in that manner. The question need not detain us for long because the power of a Magistrate to take cognizance of an offence under Section 190(1)(b) of the Code even when the police report was to the effect that the investigation has not made out any offence against an accused has already been examined and set out by this Court in Abhinandan Jha v. Dinesh Mishra (1967) 3 SCR 668 : (AIR 1968 SC 117) and H.S. Bains v. State (1981) 1 SCR 935 : (AIR 1980 SC 1883). In Abhinandan Jha v. Dinesh Mishra (supra) the question arose whether a Magistrate to whom a report under Section 173(2) had been submitted to the effect that no case had been made out against the accused, could direct the police to file a charge-sheet, on his disagreeing with the report submitted by the police. This Court held that the Magistrate had no jurisdiction to direct the police to submit a charge-sheet but it was open to the Magistrate to agree or disagree with the police report. If he agreed with the report that there was no case made out for issuing process to the accused, he might accept the report and close the proceedings. If he came to the conclusion that further investigation was necessary he might make an order to that effect under Section 156(3) and if ultimately the Magistrate was of the opinion that the facts set out in the police report constituted an offence he could take cognizance of the offence, notwithstanding the contrary opinion of the police expressed in the report. While expressing the opinion that the Magistrate could take cognizance of the offence notwithstanding the contrary opinion of the police, the Court observed that the Magistrate could take cognizance under Section '190(1)(c)'. The reference to Section 190(1)(c) was a mistake for Section 190(1)(b) and this has been pointed out in H.S. Bains (supra)."

In the case of ***H.S. Bains v. The State (Union Territory of Chandigarh), reported in AIR 1980 Supreme Court 1883*** and in the case of ***Sanjay Bansal & another v. Jawajarla Vats & others, reported in AIR 2008 Supreme Court 207***, it was decided that when police after investigation submits a report under Section 173 Cr.P.C. stating that there is no evidence to submit a charge-sheet, the complainant/ informant is noticed to file a protest petition. If a protest petition is field, the Magistrate has three options (a) he may decide that there is no sufficient ground for proceeding further and drop the proceeding; (b) he may take cognizance of the offence

under Section 190(1)(b) of the Code of Criminal Procedure on the basis of the police report and issue process; (c) he may take cognizance of the offence treating the protest petition as complaint and thereafter proceed under Section 200 and 202 of the Cr.P.C., if necessary. In the present case, the learned Magistrate after receipt of the protest petition adopted the first procedure and having found no evidence against the accused Shri P.K. Pattnaik, dropped the proceeding. Therefore, it was not necessary on the part of the learned Magistrate to adopt the procedure prescribed under Section 200 or 202 of the Cr.P.C., having not taken cognizance of the alleged offence. In view of the above settled position of law, I do not find any substance in the first ground taken by the learned counsel for the petitioner.

5. So far as the second ground taken by the learned counsel is concerned, it is a fact that the Magistrate has passed a lengthy order while dismissing the protest petition. But on perusal of the Case Diary produced by the learned counsel for the Vigilance Department, I find that for assigning reason while dismissing the protest petition, it is necessary to refer to the materials placed before the Court and accordingly a reasoned order has to contain all such materials which the learned Special Judge in this case has taken note of. One or two stray observations made by the learned Special Judge were brought to the notice of this Court but such observations have not affected the ultimate decision of the learned Special Judge.

6. In view of the above findings, I do not find any merit in this case and accordingly dismiss the same.

Application dismissed.

2011 (I) ILR- CUT- 879

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

O.J.C. NO.3501 OF 1994 (Decided on 18.2.2011)

BRUNDABAN SAHU ….. .. ..Petitioner.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

Service law – Petitioner retired as Senior Stenographer – Up-gradation of the post – Petitioner represented to give him the benefit – Prayer of the petitioner was turned down as he had retired on superannuation – Hence the writ petition.

The petitioner was promoted to the post of senior Stenographer with effect from 11.4.1984 and by that time the policy had already come into existence – Held, petitioner is entitled to the benefit of the up-gradation from 11.04.1984 till he retired on superannuation.

(Para 4)

Case law Relied on:-

1989 (3) SLR 537 : (Dr. S.S.Kabotra-V-State of Haryana & Anr.)

For Petitioner - M/s. Milan Kanungo, L.Kanungo, S.Das & K.K.Sahu.
For Opp.Parties - Addl. Standing Counsel

L.MOHAPATRA, J. The petitioner, who retired as a Senior Stenographer while working in the Court of the District Judge, Phulbani, has filed this writ application praying for a direction to the opposite parties to give him the benefit of the upgradation of the post from the date the petitioner was appointed as Senior Stenographer, i.e., from 11.4.1984.

2. The case of the petitioner is that a policy decision was taken by the Government of Orissa on 21.5.1980 to upgrade the post of Grade-I Stenographers to that of Personal Assistants in the Heads of Departments in the pay scale of Rs.2,000/- to Rs.2,500/-. Initially this policy decision was made applicable to the Grade-I Stenographers working in the Heads of the Department specified in the Appendix to the said policy decision. Subsequently this benefit was also extended to other Heads of the Department from time to time. The District and Sessions Judge who is also recognized as Heads of the Department under the Orissa Service Code was

not included in the list as a result of which the Grade-I Stenographers working in the Court of the District and Sessions Judges did not get the benefit of the said upgradation. The petitioner along with some others working in same posts in other districts approached this Court in O.J.C. No.1340 of 1990. The said writ application was allowed on 7.5.1992. In paragraphs-8 and 9 of the judgment, the following observations were made and directions were issued.

> "8. We may add here that ordinarily 15 persons were before us of whom 13 were senior stenographers attached to 13 District and Sessions Judges of the State and the remaining two were senior Stenographers to Special Judges at Sambalpur and Bhubaneswar. Subsequently one Sri Ajoy Chandra Ray was allowed to be impleaded as petitioner No.16 in this case. He, however, is a stenographer in the civil Court. As Special Judges are also recognized as Heads of Department as stated in the aforesaid Appendix, the upgradation has to be made available to these Stenographers also. In so far as petitioner No.16 is concerned, we do not think if he could take the benefit of upgradation.
>
> 9. The petition is accordingly allowed. The Registrar (Administration) shall take steps as ordered immediately, and thereafter the Government shall upgrade the posts within a period of six months. This long time is being allowed at the prayer of Shri Nayak."

The State of Orissa challenged the said judgment in appeal before the Hon'ble Supreme Court in S.L.P. No.166 of 1992 but the same was dismissed on 7.12.1992. In the meantime, the petitioner retired on superannuation on 31.10.1992. The petitioner after retirement went on representing to the authorities to give him the benefit of the said judgment and his prayer ultimately having been turned down by the Home Department, this writ application has been filed. It is the case of the petitioner that after dismissal of the S.L.P. by the Hon'ble Supreme Court, a decision was taken by the State Government to upgrade the posts of Senior Stenographers to that of Personal Assistants in the judgeships including the judgeship of District and Sessions Judge, Phulbani where the petitioner was working. The upgradation having taken effect from 11.4.1984, the petitioner is entitled to the benefit thereof.

3. A counter affidavit has been filed by opposite party No.4 and it is stated in the counter affidavit that as per the judgment of this Court quoted earlier, the State Government upgraded the post of Senior Stenographer to

the post of Personal Assistant on 2.4.1993 and by the time the said decision was taken, the petitioner had already retired on superannuation. Therefore, the petitioner is not entitled to the claim. State has not filed any counter in this case.

4. There is no dispute about the fact that the policy decision had been taken on 21.5.1980 to upgrade the post of Grade-I Stenographers to that of Personal Assistants of the Heads of the Departments, the list of which had been attached to the said policy decision as appendix. Subsequently other Heads of Departments were also included in the list but the district and Sessions Judges as well as Special Judges who are considered as Heads of Departments were not included. Because of the judgment of this Court in O.J.C. No.1340 of 1990, the Courts of District and Sessions Judges as well as Special Judges were included in the list and upgradation was allowed by the State Government in its letter dated 2.4.1993 annexed to the counter filed by opposite party No.4 as Annexure-A/4. By the time the said letter was issued, the petitioner had already retired on superannuation on 31.10.1992. Therefore, the sole question for consideration is as to whether the petitioner is entitled to the claim, he having retired prior to the decision taken by the State Government to extend the benefit of upgradation to the Senior Stenographers working in different judgeships. In the letter dated 2.4.1993, the Registrar of this Court was informed that upgradation of three posts of Senior Stenographers attached to the District Judges of Keonjhar, Kalahandi and Phulbani to that of Personal Assistants has been sanctioned by the Governor from the date on which the posts are actually filled up until further orders. It is, therefore, clear that an incumbent of the said post shall be entitled to upgradation the day he assumed the charge of Senior Stenographer and it has got nothing to do with the date of retirement. The petitioner was promoted to the post of Senior Stenographer with effect from 11.4.1984 and by that time the policy had already come into existence. Therefore, even in terms of Annexure-A/4, the petitioner is entitled to the benefit of the upgradation from 11.4.1984 till his retirement on superannuation. Reliance was placed by the learned counsel for the petitioner on the judgment of Punjab and Haryana High Court in the case of ***Dr. S.S. Kabotra v. State of Haryana and another, reported in 1989(3) SLR 537***. The learned Single Judge of the said High Court held that even if pay against a post is revised after retirement of an incumbent of the said post but with effect from the date when he was in service, such incumbent shall be entitled revised pay and pension on the basis of enhanced pay.

5. For the reasons stated above, we allow this writ application and direct the opposite parties to grant the benefit of up gradation to the

petitioner from 11.4.1984 till he retired on superannuation.

Writ petition allowed.

2011 (I) ILR- CUT- 883

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

W.P.(C) NO.9647 OF 2010 (Decided on 08.03.2011)

SUSHANTA SEKHAR BANCHHOR … …..Petitioner.

.Vrs.

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

Service - Contractual Employment – Services of the contractual employee comes to an end on completion of the period of contract – No order of termination is required in such type of employments – When termination is attached with a stigma the Court may insist upon observance of principles of natural justice.

In the present case the decision to disengage the petitioner and engage persons by way of outsourcing is not a stigma and it being a pure policy decision of the State Government the same can not be interfered with in the writ petition.

(Para 6)

Case law Referred to:-

AIR 1982 SC 1107 : (K.Rajendra & Ors.-V-State of Tamil Nadu & Ors.)

For Petitioner - M/s. Shashi Bhusan Jena, S.Behera
S.S.Mohapatra, S.Soren.
For Opp.Parties - Addl. Government Advocate

L.MOHAPATRA, J. The petitioner in this Writ Petition prays for quashing of the order dated 09.4.2010 under Annexure-8 passed by the Commissioner-cum-Secretary to Government of Orissa, Panchayati Raj Department and also prays for a further direction to opposite parties to allow the petitioner to continue in the post of Additional Computer Programmer on contractual basis.

2. The case of the petitioner is that in order to implement the National Rural Employment Guarantee Act, 2005 (hereinafter referred to as "NREGA") the Government of Odisha undertook number of project works for providing employment guaranteed to the unemployed citizens through a three tire Panchayat Raj system/agency. All the Collectors of 19 districts by letter dated 25.8.2006 were directed to engage the required staff at Grama Panchayat /Block Level for smooth execution of NREGA work. The staff

constitute Multi Purpose Assistant (Grama Rozgar Sevak), Grama Panchayat Technical Assistant and Additional Computer Programmer. For appointment to such post the eligibility criteria had been prescribed and the manner of selection had also been prescribed. The petitioner was an applicant for appointment to the post of Additional Computer Programmer in the district of Sambalpur. After being selected he was offered appointment in Annexure-4 on a consolidated pay of Rs.4,000/- per month and he was advised to report before the concerned Block Development Officer on or before 26.12.2006. The petitioner accordingly joined the post and continued as such till the decision in Annexure-8 was taken. In Annexure-8 a decision was taken to engage Additional Computer Programmers on outsourcing basis through a firm and accordingly apprehending termination the petitioner approached this Court in this Writ Petition and at the stage of admission an interim order was passed on 25.5.2010 permitting the petitioner to continue in the post.

3. Learned counsel appearing for the petitioner referred to a decision of this Court in the case of **Nilachal Das Vs. State of Orissa and others** vide W.P.(C) No.18821 of 2009 disposed of on 15.12.2009 annexed to the Writ Petition as Annexure-6. In the said case the petitioner therein Nilachal Das was working as an Additional Computer Programmer. The Project Director, District Rural Development Agency, Kandhamal directed the Block Development Officers to disengage all Additional Computer Programmers appointed on contractual basis and such decision was challenged in the aforesaid Writ Petition. In paragraph-9 of the judgment it is observed that when the salary paid to the petitioner therein was a consolidated pay of Rs.4,000/- per month and the person to be engaged through outsourcing is also to be paid a consolidated pay of Rs.4,000/-, there is no reason why the system of middleman is sought to be introduced for the purpose of engaging Additional Computer Programmers. Another observation made by the Court is that in this modern era, generally steps are taken to avoid middleman-ship so as to give maximum benefit to the person who discharges the work and also to avoid exploitation. The State Government being an ideal employer is expected to look after the welfare of the citizens who discharge their duties under the State or the instrumentalities of the State. Relying on the observation of the Court, it was contended by learned counsel for the petitioner that the decision taken in Annexure-8 is contrary to the above observation.

4. Learned Addl. Government Advocate drew attention of the Court to the agreement executed by the petitioner in relation to the contractual appointment and submitted that with completion of the project, employment

of a contractual employee comes to an end. He further submitted that from the very beginning a conscious decision had been taken to appoint the Additional Computer Programmers by outsourcing but inadvertently appointments were made by the district authorities through advertisement directly and therefore, the said mistake has been rectified in Annexure-8.

5. Annexure-1 is the letter written to the Collectors of 19 Districts where projects under NREGA have been undertaken. The subject matter of the letter relates engagement of staff at Grama Panchayat/Block Level for smooth execution of NREGA works. The said letter also authorizes the district authorities to engage Additional Computer Programmers on a consolidated pay of Rs.4,000/- per month. The said letter was written by the Commissioner-cum-Secretary to Government of Orissa, Panchayat Raj Department on 25.8.2006 and appointments were made accordingly. Subsequently by letter dated 04.12.2009 the Collectors of the aforesaid districts were informed in Annexure-5 that they should engage Additional Computer Programmers at the Block Level on outsourcing basis and if any such engagement has been made to the contrary, the same should be immediately terminated and fresh engagement will be made on outsourcing basis only. The said letter reads as follows:-

" Government of Orissa
Panchayati Raj Department

No.1-WE-55/08-38377/PR dated 04.12.09

To

All Collectors / All PD, DRDAs,

Sub :- Engagement of Additional Computer Programmer at Block Level for NREGS work.

Sir,

I am directed to say that instructions were earlier issued vide this Department letter No.17146 dated 25.08.06 (addressed to Collectors of Phase-I NREGS Districts), letter No.27127 dated 18.08.07 (addressed to Collectors of Phase-II NREGS Districts) and letter No.11547 dated 10.03.08 (addressed to Collectors of Phase-III NREGS Districts) to engage Additional Computer Programmer at the Block Level for NREGS work on outsourcing basis only.

Any such engagement if made to the contrary should be terminated immediately and fresh engagement may be made on outsourcing basis only.

You are therefore, requested to follow this instruction failing which money spent shall be recovered from persons responsible for the same.

Yours faithfully,
Sd/-
Commissioner-cum-Secretary ”

Therefore, there is some force in the contention of learned Addl. Government Advocate that the State intended to appoint Additional Computer Programmers at Block Level on outsourcing basis from the beginning but there being no mention of appointment through outsourcing basis, in Annexure-1 the District Collectors proceeded for such appointment by way of advertisement. Coming to know about the same, immediately letters were written in phases to all the districts to terminate such appointments and engage afresh by way of outsourcing. The decision in Annexure-5 is only repeated in Annexure-8. In the case of Nilachal Das (supra) the Court examined similar question and held that disengagement of an employee on account of change of policy or abolition of post held by him, is not an action, which is proposed to be taken as a personal penalty, but it is an action concerning policy of the State. Change of policy may have consequence of termination of the services of an employee and such termination does not amount to dismissal or removal within the meaning of Article 311 of the Constitution. The method as to how the post is to be filled up is a policy decision of the Government. Referring to a decision of the Hon’ble Supreme Court in the case of **K.Rajendran and others Vs. State of Tamil Nadu and others** reported in **AIR 1982 Sc 1107**, the Court further observed that in modern administration it is necessary to recognize the existence of powers with the legislature or the executive to create or abolish the posts. The volume of administrative work, the measures of economy and the need to streamline the administration, to make it more efficient, may induce the State Government to make alteration in the staffing pattern. It is the executive that lays down the conditions of service subject to the law laid down by the appropriate legislature. The Court comes into picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service. The Court in the said case, therefore, did not interfere with the decision to disengage Nilachal Das, who was working on contractual basis but because of the

observations made permitted the petitioner therein i.e. Nilachal Das to submit a representation.

6. Therefore, the aforesaid decision goes against the argument advanced on behalf of the petitioner and supports the case of opposite parties. Apart from the above law is well settled that in case of contractual employment the services of contractual employee comes to an end on completion of the period of contract. No order of termination is also required in such type of employments. Only when the termination is attached with a stigma the Court may insist upon observance of principles of natural justice. In the present case, the decision to disengage the petitioner and engage persons by way of outsourcing is not a stigma and it is a pure policy decision of the State Government which cannot be interfered with in the Writ Petition. Accordingly, for the reasons stated above, we do not find any merit in the Writ Petition and dismiss the same.

Writ petition dismissed.

2011 (I) ILR- CUT- 888

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

W.P.(C) NOS.7282, 22771 OF 2010 (Decided on 18.03.2011)

HARAPRASAD MOHAPATRA …….. Petitioner.

.Vrs.

BANK OF INDIA & ORS. ……. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ Petition questioning the legality of the show cause notice issued by the Disciplinary Authority – A writ lies when some right of any party is infringed – A show cause notice or charge sheet does not infringe the right of any one – It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance – However in some very rare and exceptional cases the High Court can quash a charge-sheet or show cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal.

The present case is not a case where the charge has been framed or show cause notice has been issued by the authority who has no jurisdiction nor the same can be termed as wholly illegal – Held, writ petition is not maintainable.

(Para 13,14)

Case laws Referred to:-

1.AIR 2004 SC 1469 : (Viswanath Pillai -V- State of Kerala & Ors.)
2.AIR 2007 SC 906 : (Union of India & Anr.-V-Kunisetty Satyanarayana)

For Petitioner - M/s. Ashok Kumar Mohapatra, A.K.Mohapatra, N.C.Rout & A.K.Padhi.
For Opp.Parties - M/s. K.K. Jena & D.Mohanty. Nos. 1 to 4

S.K.MISHRA, J. The petitioner, in W.P.(C) No.7282 of 2010, assails the initiation of the proceeding and charge, the findings of the Enquiry Officer and the Disciplinary Authority. He further prays to quash Annexure-3, which happens to be the show cause notice, issued by the Disciplinary Authority to the petitioner on the proposed substitution of the findings of the Enquiry Officer with respect to Charge No.II. In W.P.(C) No.22771 of 2010 the petitioner assails the order of suspension.

2. The case of the petitioner, bereft of unnecessary details, is that he is a staff in the Bank of India and has completed twenty five years of continuous service. While he was continuing as a staff clerk in Puri Branch, he received the charge sheet dated 24.4.2009 consisting of four charges. He further alleges that the charge sheet was framed with malafide intention and official bias with a revengeful attitude because of the petitioner's union activities. The petitioner further pleads that all the four charges are vague, unspecific and are not definite which is apparent from the record of the enquiry and the document submitted by the opposite parties.

The petitioner further pleads that because of non-availability of the required number of staff in Puri Branch, with the full knowledge of the Branch Manager, the sub-ordinate staff, Bharat Kumar Panda, used to sit in the cash counter and work as a clerical staff in the Bank of India, Puri Branch before 20.6.2008 and after 20.6.2008. There was a preliminary enquiry in the Bank of India, Puri Branch, behind the back of the petitioner, report of which was not supplied to the petitioner along with the charge sheet. After receipt of the charge sheet, the petitioner denied the charges and thereafter Sri D.K.Meher, Staff Chief Manager, Bank of India, Zonal Office, was appointed as an Enquiry Officer to enquire into the charges. Thereafter, it is further alleged that the enquiry was conducted in the most illegal manner without affording reasonable opportunity of hearing to the petitioner. In course of enquiry the Management submitted eight management witnesses, out of which seven management witnesses were examined, and thirty two documents were exhibited. From the defence side, seven witnesses were examined and seventeen documents were exhibited. After completion of the enquiry, the Enquiry Officer submitted report to the Disciplinary Authority stating that out of four charges, three are established against the petitioner.

The Disciplinary Authority after receiving the enquiry report issued a notice to the petitioner on 25.3.2010, which was received by him on 30.3.2010, stating his disagreement with the Enquiry Officer's report. The petitioner was intimated that all the charges were considered to be proved. The petitioner alleges that non-examination of Pramod Kumar Mohanty is fatal to the case of the Management. Moreover, it is contended that no loss has been caused to the Bank and therefore the report submitted by the Enquiry Officer is wrong. On such pleadings the petitioner prayed to quash the charge and the findings of the Enquiry Officer and the Disciplinary Authority.

3. The opposite parties appeared and filed their counter affidavit. It is pleaded that the petitioner is a staff clerk of the Bank of India, Puri Branch. He has been placed under suspension since 29.12.2009 for having misappropriating the customer's money/public money to the tune of Rs.1,000/-. He has also been charged by the Disciplinary Authority vide charge sheet dated 24.4.2009. The disciplinary proceeding against the delinquent employee/petitioner in accordance with the procedure laid down in the bipartite settlement, after a proper enquiry, in which the petitioner and his defence representative actively participated. The Disciplinary Authority after having considered the representation of the petitioner on the findings of the Enquiry Officer vis-à-vis on the substituted findings, issued a show cause notice for inflicting punishment and proposing therein a gross punishment of compulsory retirement. It is further pleaded that at this stage the petitioner has prayed the Court to quash the proceeding and charge as well as the findings of the Enquiry Officer and the Disciplinary Authority. The opposite parties further plead that Annexure-3 is the notice to show cause, issued by the Disciplinary Authority, to the petitioner as to why the findings of the Enquiry Officer dated 19.12.2009 relating to Charge No.II shall not be substituted by the Disciplinary Authority. In the said show cause notice, the petitioner was advised to submit his reply/representation in writing to the Disciplinary Authority within seven days of receipt of memorandum with regard to the Enquiry Officer's findings and the tentative reasoning of the Disciplinary Authority proposing substitution thereto in respect of Charge No.II. The opposite parties further plead that a mere notice of show cause or charge sheet does not infringe the right of anyone. Thus, the opposite parties challenged the maintainability of the writ petition at this stage.

4. The opposite parties further plead that the petitioner has not been able to demonstrate even, *prima facie,* any infringement of his legal or constitutional right or any error of law apparent on the face of the record, which can entitle the petitioner to invoke the jurisdiction of the Court to interfere in the matter at this stage. It is further pleaded that the petitioner has no cause of action to file this writ petition and the same is premature. It is further pleaded that the petitioner having participated in the enquiry, cannot challenge the charges framed against him on the ground that the same were vague, since he has waived his right to challenge the charge just before submission of explanation or before participating in the enquiry. He can challenge the same after passing of the final order of punishment, if any, by the Disciplinary Authority. On such plea, the opposite parties prayed that the writ petition should be dismissed.

5. The petitioner filed a rejoinder affidavit wherein he took a new plea inasmuch as that the petitioner's preliminary enquiry memorandum dated 02.9.2008, vide Annexure-C(of the counter affidavit filed by the opposite parties) for explanation was issued by Sri D.K.Meher, the Chief Manager, i.e. opposite party no.4, to the petitioner and the same D.K.Meher was appointed as the Enquiry Officer to enquire into the charges, vide Annexure-1, against the petitioner. The appointment of Sri Meher as Enquiry Officer, it is further pleaded, is illegal and void as violative of principles of natural justice and the enquiry by Sri D.K.Meher, the Chief Manager, and the enquiry report submitted by him, vide Annexure-2, is illegal and one cannot be the judge of his own case. Therefore, the enquiry report, Annexure-2, is a nullity.

6. In course of hearing, learned counsel for the petitioner submitted that Sri D.K.Meher, who had conducted the preliminary enquiry, has been appointed as the Enquiry Officer in this case and, therefore, it violates the principles of natural justice. Therefore, the report submitted by him is void *ab initio*. Secondly, learned counsel for the petitioner submits that the charges levelled against the petitioner are all vague and, therefore, the same may be quashed. Thirdly, learned counsel for the petitioner submitted that Annexure-3 has been issued without giving any opportunity to the petitioner to submit his explanation to the proposed substitution of findings by the Disciplinary Authority. Hence, it is argued that the charges should be quashed and the reports submitted by the Enquiry Officer and the Annexure-3, i.e. the findings recorded by the Disciplinary Authority, should be quashed.

7. Learned counsel for the opposite parties submitted that the petitioner having subjected himself to the jurisdiction of the Enquiry Officer cannot challenge the report on the ground of violation of natural justice. It is further submitted that the petitioner's writ petition is against the show cause notice issued by the Disciplinary Authority for a proposed substitution of finding as the disciplinary proceeding has not come to a logical end, the writ petition is not maintainable.

8. It is undisputed that the principles *nemo debet esse judex in propria causa* is applicable to all cases of this nature. Simply stated the principles means no man shall be the judge of his own case. Therefore, the question remains to be seen is whether opposite party no.4, Sri D.K.Meher, has in fact conducted a preliminary enquiry and issued Annexure-C and thus became the complainant of the case.

9. Mr. Mohapatra, learned counsel for the petitioner, relied upon Annexure-2, wherein it has been referred by the Enquiry Officer, that preliminary hearing was scheduled on 14.5.2009 and notice was served to the P.O. and the charge sheeted employee. It is emphatically submitted that the Enquiry Officer, therefore, held a preliminary investigation. It is further brought to the notice of this Court a memorandum issued by Sri D.K.Meher, the Chief Manager, on 02.9.2008, vide Annexure-C, to the present petitioner indicating the act of omission and commission alleged against him. In the said letter, the Chief Manager further called for an explanation from the petitioner with respect to the allegations made therein. Thus, it is contended by the learned counsel for the petitioner that the Enquiry Officer himself was the complainant. It appears from Annexure-2 that on 24.4.2009, opposite party no.4, the Chief Manager, was appointed as the Enquiry Officer. However, the memorandum was issued much prior to that i.e., on 02.9.2008. Thereafter a preliminary enquiry was held on 14.5.2009. Thus it cannot be said that the preliminary enquiry as held on 14.5.2009 was prior to issuing of the memo or charge basing on such enquiry conducted by Sri D.K.Meher. Furthermore, from the nature of allegations made against the present petitioner, it is borne out that the Chief Manager is not the complainant of the case. He has only issued the memorandum on 02.9.2008 in his official capacity. Thus, the contentions raised by learned counsel for the petitioner on this score is not tenable.

10. The next contention, which the petitioner alleges, is that the charges framed against him are all vague and baseless. This is a factual aspect of the case and the same cannot be examined by the Court in exercise of its jurisdiction under Article 226 of the Constitution of India. This Court not being a Court of appeal refrains from scrutinizing the materials placed before it to find out whether the charges farmed are specific or vague. Such an exercise is to be undertaken by the appellate forum for that reason and we do not see any reason to usurp the jurisdiction of the appellate forum on this score.

11. The third contention raised by the learned counsel for the petitioner is that before issuing Annexure-3, which according to the learned counsel for the petitioner is the finding recorded by the Disciplinary Authority , a reasonable opportunity should have been given to the petitioner on the issue of proposed substitution of the findings recorded by the Enquiry Officer. However, a careful examination of Annexure-3 reveals that at paragraph-iii of page-2, the Disciplinary Authority has enumerated the tentative reasoning for differing with the Enquiry Officer's observations/findings. At paragraph-3 of page-4 the Disciplinary Authority

has clearly intimated the petitioner that on the basis of the reasoning given therein the petitioner was advised to show cause as to why the enquiry findings dated 19.12.2009 relating to Charge-II should not be substituted by the Disciplinary Authority. A copy of the said enquiry findings dated 19.12.2009 was also enclosed thereto and he was called upon to submit his reply/representation in writing with regard to the findings of the E.O. and the tentative reasoning of the Disciplinary Authority proposing substitution thereto in respect of Charge-II. Thus, in actuality Annexure-3 is a notice of show cause issued to the petitioner giving him reasonable opportunity of filing representation as to why the findings of the Enquiry Officer with regard to Charge-II should not be substituted by the Disciplinary Authority. Therefore, it does not violate the principles of natural justice.

12. In course of hearing, learned counsel for the opposite parties has contended that the writ petition is not maintainable as it seeks to quash the show cause notice. In the case of **R. Viswanath Pillai v. State of Kerala and others**; AIR 2004 SUPREME COURT 1469, the Hon'ble Apex Court has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. It is further observed by the Hon'ble Supreme Court that unless the High Court is satisfied that the show cause notice was totally non est in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the Court.

13. A similar view has been taken in the case of **Union of India & Anr. V. Kunisetty Satyanarayana**; AIR 2007 SUPREME COURT 906, wherein the Hon'ble Supreme Court held that ordinarily no writ lies against a charge sheet or show cause notice. The reason why ordinarily a writ petition should not be entertained against a mere show cause notice or charge sheet is that at that stage the writ petition may be held to be premature. A mere charge sheet or show cause notice does not give rise to any cause of action, because it does not amount to an adverse order which affects the rights of any party unless the same has been issued by a person having no jurisdiction to do so. It is quite possible that after considering the reply to the

show cause notice or after holding an enquiry the authority concerned may drop the proceedings and/or hold that the charges are not established. The Hon'ble Supreme Court further held it is well settled that a writ lies when some right of any party is infringed. A mere show cause notice or charge sheet does not infringe the right of any one. It is only when a final order imposing some punishment or otherwise adversely affecting a party is passed, that the said party can be said to have any grievance. No doubt, in some very rare and exceptional cases the High Court can quash a charge sheet or show cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal.

14. Applying these principles to the case in hand, we are of the view that this is not a case where the charge has been framed or a show cause notice has been issued by the authority, who has no jurisdiction nor the same can be termed as wholly illegal. The petitioner has the liberty to raise all such issues, which have been taken in this writ petition before the Disciplinary Authority and in such case the Disciplinary Authority is competent to take appropriate decision in accordance with law.

15. Since we have come to the conclusion that the grounds raised in original writ challenging the initiation of proceeding, issuing notices etc. are not tenable, the relief claimed for setting aside the order of suspension is also without any merit.

Thus on such observations, we find no merit in the writ petitions filed by the petitioner and, therefore, we dismiss the same being devoid of any merit.

Writ petition dismissed.

2011 (I) ILR- CUT- 895

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

JCRLA. NO. 204 OF 2000 (Decided on 19.01.2011)

TAPA HO @ LAGURI …. … .Appellant.

.Vrs.

STATE OF ORISSA …. ….Respondent.

Criminal Trial – Appreciation of evidence – P.W.1 suspected the appellant to have killed his Cocks – He went to the house of the appellant and asked about the same which gave rise to the occurrence – Immediately there after brother of P.W.1(deceased) intervened – From the evidence it is clear that provocation was made by P.W.1 and the deceased and the appellant was assaulted and sustained injuries – Thereafter being annoyed the appellant came armed with a Bhala and gave blows on the head and legs of the deceased – Held, the case can not be said to be one of murder but one of culpable homicide not amounting to murder – This Court modified the case to one U/s.304-I I.P.C. and sentenced the appellant to undergo R.I. for a period of ten years in place of life imprisonment U/s.302 I.P.C.

(Para 8)

For Appellant - Mr. Rabindra Ku. Sahoo.
For Respondent - Mr. Anupam Rath
(Additional Standing Counsel)

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment and order of conviction dated 31.01.2000 passed by the learned Sessions Judge, Mayurbhanj, Baripada in S.T. Case No.74 of 1997 by which the learned Sessions Judge convicted the present appellant (Tapa Ho @ Laguri) and sentenced him to undergo imprisonment for life for commission of offence under Section 302 I.P.C. and one year for commission of offence under Section 307 I.P.C and acquitted the co-accused (Budhuni Ho @ Laguri) of the charge under Section 307 I.P.C.

2. The case of the prosecution is that on 21.10.96, when the informant (P.W.1) did not find his missing cocks, he asked the appellant at about 7:00 PM of the very same day, suspecting that the appellant had eaten away his cocks. At this, the appellant came out from his house and assaulted him by means of a stick. Hearing hullah, his elder brother-Kalhei Ho @ Laguri (deceased) came and intervened. At that time, the appellant brought a Bhala from his house and assaulted the deceased with that Bhala. The

deceased sustained bleeding injury and fell down at the spot and died. The accused assaulted the informant also. P.W.1 lodged the FIR (Ext.16) and on receipt of the same, police registered the case, investigated into the matter and on completion of the investigation, filed charge-sheet against both the accused persons.

3. The plea of the appellant is that on the date of occurrence at about 7:00 PM, the informant, being armed with Thenga and deceased being armed with Bhala, came to his house and said that he had eaten away his cocks. When he denied, they assaulted him. To save his life, the appellant snatched away the Bhala from the deceased and brandished the same and the same might have hit the deceased. He has further pleaded that whatever he had done, he had done the same in his self-defence.

4. In order to prove its case, the prosecution examined as many as 11 witnesses including the doctor & I.O. and exhibited 22 documents and the defence examined none.

5. Mr.Sahoo, learned counsel for the appellant assails the judgment and order of conviction on the following grounds:

> "(i). P.W.1 is the sole eye witness to the occurrence and also a partisan witness. Therefore, his evidence cannot be accepted in toto. He developed the story in Court;
>
> (ii). injuries were found on the person of both the accused and the prosecution has not explained the same. The informant (P.W.1) along with the deceased came with weapons of offence and assaulted the appellant;
>
> (iii). the present appellant snatched away the Bhala from the deceased and brandished the same. Therefore, the appellant sustained injuries and he had no intention to kill the deceased. The case is not coming under the purview of culpable homicide; and
>
> (iv). there are major contradictions in the evidence of the prosecution witnesses. Therefore, P.W.1 is not a believable witness.

6. Mr.Rath, learned Additional Standing Counsel contended that the injuries on the person of the appellant are superficial in nature and that has been explained by P.W.1. The evidence of P.W.1 is very clear and cogent that the appellant assaulted the deceased by means of a Bhalla. The injuries sustained by P.W.1 has been proved by the prosecution. The

medical evidence corroborated the same and the appellant had an intention to kill the deceased. No provocation was there by the deceased or P.W.1. Therefore, the learned Sessions Judge has rightly convicted the present appellant.

7. Perused the LCR. P.W.1 is the informant and brother of the deceased. In his chief, he has stated that when he returned to his house in the evening, he found his cocks were missing. Since he could not trace them after thorough search, he had been to the house of the appellant and asked him about his missing cocks. At this, the appellant assaulted him by means of stick. Hearing hullah, his brother (deceased) came and protested against the assault. At this, the appellant got annoyed, ran to his house and came being armed with a Bhala and gave Blows to the head and legs of the deceased, who fell down on the spot with bleeding injuries. When he tried to save his brother, the appellant gave Bhala blows to different parts of his body. To save his life, the informant ran towards the hosue of Dama and requested him to give water. The informant also told the incident to Dama and on return to the spot, he found his brother lying dead. On the next day morning, the informant lodged a report before the Ghagarbeda Police Out Post. He also deposed that the accused person also sustained injuries on his person in course of the incident due to the scuffle between them. In his cross-examination, he has stated that he suspected that accused killed his chickens through medicines and could get the killed chickens near the house of the appellant. He did not bring the dead chickens. He has also stated that by the time of occurrence, the other people of the locality had already slept and he alone had been to the house of the appellant and asked him as to why he had killed his chickens. The appellant dealt four blows by M.O.I on his back as a result of which he fell down and sustained bleeding injuries. He tried to snatch away the Bhala from the appellant and in the process of push and pull between them, the Bhala held by the appellant stroke against him as a result of which he sustained injury on his head. He has further stated that the appellant had started a case against him and others for the alleged incident on the allegation that he along with others assaulted him and his wife, which is registered as S.T. Case No.73 of 1997 and pending for trial.

P.W.2 is the wife of the deceased and a post occurrence witness. She stated that the daughter of Dama informed her that her husband was killed. She came to the house of Dama where P.W.1 was found sleeping. She asked P.W.1 about the deceased to which he told that the deceased was lying at the spot in front of the house of the appellant but he could not say as to whether the deceased was alive or dead. Accordingly, she had been to the house of the appellant where she found her husband lying dead.

P.W.1 told her that in the previous night, the appellant picked up quarrel with him and assaulted him by sticks when he asked him about his missing cocks. Hearing hullah, when the deceased came to the spot and intervened, the appellant caused cut injuries. Nothing has been elicited from his cross-examination.

P.W.3 is an independent witness to leading to discovery of the seized Bhala u/s 27 of the Evidence Act. In his presence, police seized some blood soaked earth and sample earth and prepared the seizure list (Ext.1). He is also a witness to the inquest (Ext.2). He has specifically stated that after arrest, while the appellant was under police custody, he made a disclosure statement that he would give recovery of the weapon of offence (Bhala) by which he assaulted the deceased. From the Police Station, he accompanied the police and the appellant to his house where he concealed the Bhala inside a bush in the backside of his house. The police seized the said Bhala in his presence under Ext.3. Police also seized the bamboo stick lying inside the courtyard of the appellant in his presence and prepared the seizure list under Ext.4. Nothing has been elicited from his cross-examination to demolish the evidence of this witness.

P.W.4 is a witness to the seizure under Exts.5 and 6.

P.Ws.5, 6 and 7 turned hostile.

P.W.8 is the doctor, who treated P.W.1 and both the accused and opined that all the injuries are simple in nature and might have been caused by blunt, hard and rough object. In his cross-examination, he had admitted that he did not notice any other injury on P.W.1.

P.W.9 is the doctor, who had conducted the post-mortem examination over the dead body of the deceased and found as many as eight serious injuries. On dissection, he found the membrane covering the parieteal lobe on right side and frontal lobe on the left side are incised and injured corresponding to the external incised injury no.1 on the frontal eminence. The cause of death was due to haemorrhage and shock and injury arising out of popleteal vessel bleeding and injury to vital organ i.e. brain. All the injuries are ante-mortem in nature and might have been possible by heavy sharp cutting weapon with forceful impact. In his cross-examination, he has admitted that by one stroke through M.O.II (Bhala) on a vital part, one can die. Each external injury as per the post-mortem report (Ext.14) is individually sufficient to cause death in ordinary course of nature.

P.W.10 is the IO who investigated the case. He registered the case, seized the wearing apparels of the deceased, sent the deady body for post-mortem examination, recorded the statement of the witnesses and

ultimately, filed charge-sheet against accused person u/s 302/307/34 IPC. In his cross examination, he has stated that P.W.1 admitted that for the same incident, a counter case has been started against him at the instance of the appellant on the allegation that P.W.1 along with his deceased brother assaulted him and his wife near his hosue.

P.W.11 is the ASI, who received the FIR in the Out Post and sent the same for registration, visited the spot, collected the sample earth in presence of the witnesses. Subsequently, the OIC took over the charge of the investigation. In his cross-examination, he admitted that this case is the counter-blast of S.T. Case No.73/97. He sent both the accused persons for medical examination.

8. On scrutiny of the evidence, it is clear that P.W.1 suspected that the appellant had killed his cocks. So he went to his house and asked him about his missing cocks. At this, the appellant assaulted him by means of stick. Hearing hullah, his brother (deceased) came and protested against the assault. At this, the appellant got annoyed, ran to his house and came being armed with a Bhala and gave Blows to the head and legs of the deceased, who fell down on the spot with bleeding injuries. When he tried to save his brother, the appellant gave Bhala blows to different parts of his body. From the evidence of this witness, it is clear that he suspected the present appellant to have killed his cocks. Therefore, he went to his house and asked him which gave rise to the occasion. Thereafter, immediately occurrence started and at that time, his brother (deceased) intervened. From the evidence, it is clear that provocation was made by P.W.1 and the deceased and the appellant has assaulted. Counter assault was done by the prosecution party and thereby accused also sustained some injury.

In view of the above, the case cannot said to be one of murder but one of culpable homicide not amounting to murder. Considering the number of injuries and weapon of offence, this Court comes to a conclusion that this case is covered under Section 304-I IPC. Therefore, this Court modifies the case to one under Section 304-I IPC and sentenced the appellant to undergo RI for a period of ten years in place of life imprisonment under Section 302 IPC. So far as the conviction and sentence u/s 307 IPC is concerned, there is no acceptable material against the appellant. P.W.1 specifically implicated the other accused person-Budhuni, who assaulted him. Therefore, this Court acquitted the appellant from the charge u/s 307 IPC and sets aside the order of conviction and sentence passed thereunder.

The Jail Criminal Appeal is partly allowed.

Appeal partly allowed.

2011 (I) ILR- CUT- 900

M.M.DAS, J.

W.P. (C) NOS.16459, 16795 & 17180 OF 2010(Decided on 22.11.2010).

ARIJIT MAITRA & ORS. ….. … Petitioners.

.Vrs.

BIJU PATTNAIK UNIVERSITY OF TECH. ORISSA & ORS. ….. ….Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART. 21, 226.

Ragging in College – Show cause notice issued – Ragging is a form of torturing "freshers" who enter in to the College and have not adjusted to the new environment – University debarred the petitioners from continuing their studies and from appearing in the examination for two years – Action challenged.

In the present case the complainant is not a fresher – Enquiry reports of different authorities & investigation report of police do not disclose any case of ragging – University has no jurisdiction to issue such direction but to constitute a body known as "Monitoring Cell" for prevention of ragging – Held, the incident does not constitute a case of ragging but a case of scuffle between some students – Punishment imposed is quashed and Opp.Parties are directed to allow the petitioners to continue to prosecute their course in B. Arch and appearing in the ensuing examination to be conducted by the institutions/university.

(Para 17 & 18)

Case laws Referred to:-

1.AIR 2009 SC 2223 : (University of Kerala-V-Council of Principals of College in Kerala & Ors.).

2.AIR 2001 SC 2793 : (Vishwa Jagriti Mission Through President-V-Central Govt. Through Cabinet Secretary & Ors.).

For Petitioners - M/s. A.A.Das, M.B.Ray, A.K.Behera, B.K.Parida, S.Mohanty, Shelly Das, S.Ray & R.K.Das.

For Opp.Parties - M/s. Bijay Ray, B.Mohanty, S.Mohanty, P.Chhotray & B.Moharana (for O.P.3).
Addl. Standing Counsel (for O.P.2)
Mr. S.Palit (for O.P.1)

For Petitioner - M/s. B.K.Ray, B.K.Barik &S.K.Das Mohapatra.
For Opp.Parties - M/s. S.Palit, A.K.Mahana,A.Mishra, D.N.Pattnaik & A.Kejariwal (for O.P.1)

For Petitioner - M/s. S.S.Mohapatra, P.K.Mohapatra & P.K.Hajare.
For Opp.Parties - M/s. Subir Palit, A.Mishra, D.N.Patnaik & A.Kejarwala (for Caveator)

M.M. DAS, J. The petitioners are B. Arch. Students, who were continuing the said course at Pilu Modi College of Architecture, Cuttack. They are aggrieved by the directions given in letter dated 13.09.2010 to the College authority and the office order dated 16.09.2010 of the Principal-in-Charge of the College communicating the order dated 13.09.2010 issued in the letter of the Registrar-in-Charge, Biju Pattnaik University of Technology, Odisha.

2. Facts leading to this case, as stated by the petitioners, show that there was some untoward incident on 07.08.2001 in the College campus, when one Soubhagya, Kumar Mishra, while coming from one side and the petitioner no.2 proceeding from opposite direction collided with each other unintentionally. But Soubhagya being aggrieved misbehaved unexpectedly with the petitioner no.2 and there giving rise to an altercation between them and others. Said Soubhagya is a student of 2nd year B. Arch. in the said College, who gave it a colour of ragging and submitted a report before the Markat Nagar Police Station, which has been investigated. The attention of the College authority being drawn in this regard an enquiry was conducted by one Professor L. Nayak, who was asked to submit a report to the Director of the institution on 16.08.2010. In this report after investigation, he clearly observed that this scuffle among the students was mainly due to showing of finger as a mark of vulgar gesture by Sri Soubhagya and it is not a case of ragging, but it is a case of clash between those students on one hand and the said Soubhagya on the other, due to some previous rivalry.

3. This issue was published in the print and broad casted in the electronic media as a case of ragging. After the police investigation was made and the investigation was also made by the College authority, the Government was also informed about the incident on the issue of alleged ragging by the College authorities wherein the College authorities clearly stated that it was a clear case of friction between the students leading to unrest and not a case of ragging but has been deliberately given a colour of ragging. The College authorities also, while intimating the Government, strongly refuted any incident of ragging and it has been clearly stated in the said annexure that since the establishment of the College for last 17 years

the institution has been pursuing anti-ragging policies and a student like Soubhagya with his poor academic record has single handedly tried to pollute the academic atmosphere of the institution.

4. The petitioners have also stated several incidents alleging that the said Soubhagya is the cause of the disturbance of the academic atmosphere of the College. One of such incident has been stated disclosing that the said Soubhagya assaulted a 7th semester B. Arch. student, namely, Miss Pabitra Sahoo and when called for discussion, he himself expressed regret for the incident and the matter was settled therein by the committee constituted by the College authorities upon collecting an undertaking from both the students.

5. When the matter stood thus, the opposite party no.1-University issued a letter on 09.08.2010 to the Principal of the College asking him to show cause on the incident of ragging of Soubhagya basing on the news clipping published in the daily 'The Samaja' dated 08.08.2010. On receipt of the said letter, the College authority submitted the reply in detail on 18.08.2010 enclosing the report as well as the investigation details of Professor L. K. Nayak and clearly mentioning therein that in course of investigation, it was revealed that the alleged incident took place owing to the vulgar physical gesture of Sri Soubhagya shown to the other students and there was no other motive or incident which can be termed as ragging. It was also mentioned that a minor injury found in the form of a reddish mark on his left cheek and a bruise on his left side neck might have occurred during the scuffle.

6. The petitioners allege that notwithstanding the above clarification given by the college authorities, the University issued a letter on 13.09.2010 on the subject of ragging of Soubhagya, the 2nd year B. Arch. student, which is said to have been issued basing on the finding of the enquiry committee and action directed to be taken was that the petitioners along with others be debarred from studies and University examination for two years with effect from 13.09.2010. According to the said direction, the Principal-in-Charge passed the office order dated 16.09.2010 debarring the present petitioners from continuing their studies and the University examination for two years.

7. A counter affidavit has been filed on behalf of the University stating that, on going through the news item published on 08.08.2010 in a local daily 'The Samaja' relating to ragging in the opposite party no.3-College, the University issued a show cause notice to the Principal of the College with regard to the ragging in the said College. The University was also directed by the higher authorities to conduct a detailed enquiry about the said incident since the Human Rights Commission has sought for a report on the

said issue. Subsequently, the Principal filed his show cause reply before the University on 20.08.2010. After receiving the said reply, the University conducted a spot enquiry on 24.08.2010-28.08.2010 by collecting version of the students of different semesters. During the course of enquiry, said Soubhagya also filed his written version before the Inquiring Officer. While conducting enquiry, it was found out that prior to the incident on 07.08.2010, said Soubhagya also filed a complaint before the local Police Station alleging ragging by senior students for which the University requested the Inspector-in-Charge to provide information to the Inquiring Officer. Thereafter, from the said documents, it was found out that Soubhagya had also lodged an F.I.R. on 27.10.2010. His father also on 28.07.2010 brought this fact to the notice of the Principal regarding ragging by senior students. The University has alleged that the College authorities disputed the fact of ragging and tried to patch up the said incident and have joined hands with the senior students without taking strict action against such students.

8. Mr. A. A. Das, learned counsel for the petitioners raised two questions before this Court being (i) as to whether the BPUT has the power and authority to issue the impugned order under Anneuxre-6 series, debarring the students from the studies and examination, and (ii) whether the incident as per the material available on record is a case of 'ragging' as per the interpretation and the law laid down by the Hon'ble Supreme Court in the case of ***University of Kerala V. Council of Principals of College in Kerala and others,*** A.I.R. 2009 SC 2223. He vehemently urged that the University notifications dated 03.09.2009 and 10.09.2009 prescribing guidelines for prevention of ragging in professional educational institutions annexed as Anneuxre-D/1 series and the Regulation of University Grant Commission in that regard annexed as Anneuxre-G/1 to the counter affidavit filed by the University dealing with ragging and the measures to be taken for prevention of ragging at the institution nowhere authorize the University to take action against the students as has been done. Rather, as per the University Grants Commission as well as the decision of the Hon'ble Apex Court, it is the duty of the institutional authority to deal with the case of ragging. Mr. Das, learned counsel submitted that there has been no power given in the University under the Regulation or the Notification to issue the directions as has been done under Anneuxre-6 series and the same are liable to be quashed. Referring to Paragraph-15 of the case of the University of Kerala (supra), he submitted that the Supreme Court has interpreted the word 'ragging' as a form of systematic and sustained physical, mental and sexual abuse of fresh students at the college/university/any other educational institution at the hands of senior students of the same institution and sometimes even by outsiders. Ragging means causing, inducing, compelling or forcing a student, whether by way of a practical joke or

otherwise, to do any act which detracts from human dignity or violates his person or exposes him to ridicule or to forbear from doing any lawful act, by intimidating, wrongfully restraining, wrongfully confining, or injuring him or by using criminal force on him or by holding out to him any threat of such intimidation, wrongful restrain, wrongful confinement, injury or the use of criminal force.

Mr. Das, learned counsel further submitted that in the instant case, the complainant Soubhagya being a 2nd year B. Arch. student is not a 'fresher'. The enquiry report, conducted by the College authority, the police and the Sub-Collector do not at all disclose any such case so as to satisfy any of the ingredients for constituting a case of ragging. Therefore, the University cannot justify the incident as a case of ragging by a so-called committee report of their own as the Constitution of the said committee is without any authority of law and not in accordance with the regulation and the guidelines provided by the Hon'ble Supreme court.

9 Miss. Pabitra Sahoo-petitioner in W.P.(C) No.17180 of 2010 is not connected with the alleged incident that took place on 07.08.2010.

10. Mr. Bijan Ray, learned senior counsel appearing for the opposite party no.3-College also supported the case of the petitioners, inter alia, submitting that a thorough inquiry was conducted by the college authorities upon which they came to the conclusion that it is not a case of ragging and, accordingly, reply was given to the University. He also submitted that the action of the University in debarring the petitioners from continuing their studies in the institution and from appearing in the examinations for two years is without authority of law.

11. Mr. Palit, learned counsel appearing for the B.P.U.T. while reiterating the assertions made in the counter affidavit submitted that as per the U.G.C. Regulation, 2009, ragging constitutes one or more, of any of the acts mentioned in the Regulation-3. He further urged that the University authorities conducted the enquiry fairly giving full opportunity to the students and upon considering the same passed the impugned directions under Anneuxre-6 series.

12. On the issue of ragging, the Hon'ble Supreme Court had the occasion to deal with the same in the case of University of Kerala (supra) and previous to that in the case of ***Vishwa Jagriti Mission Through President V. Central Government Through Cabinet Secretary and Ors***, A.I.R. 2001 SC 2793. According to Mr. Palit, the case at hand is a clear case of ragging and the University had the authority to pass the directions given in Anneuxre-6 series.

In the case of University of Kerala (supra), on 16.05.2007 the Hon'ble Supreme Court passed an interim order considering the report of the committee constituted pursuant to a previous order to suggest remedial measures to prevent ragging in educational institutions. In the said interim order, discussing the suggestions given by the committee, the Supreme Court, during pendency of the said case felt that some of the recommendations given by the committee should be implemented without any further lapse of time, which are follows:-

"1. The punishment to be meted out has to be exemplary and justifiably harsh to act as a deterrent against recurrence of such incidents.

2. Every single incident of ragging where the victim or his parent/guardian or the Head of institution is not satisfied with the institutional arrangement for action, a First Information Report must be filed without exception by the institutional authorities with the local police authorities. Any failure on the part of the institutional authority or negligence or deliberate delay in lodging the FIR with the local police shall be construed to be an act of culpable negligence on the part of the institutional authority. If any victim or his parent/guardian of ragging intends to file FIR directly with the police, that will not absolve the institutional authority from the requirement of filing the FIR.

3. Courts should make an effort to ensure that cases involving ragging are taken up on a priority basis to send the correct message that ragging is not only to be discourages but also to be dealt with sternness.

4. In addition, we direct that the possibility of introducing in the educational curriculum a subject relating to ragging shall be explored by the National Council of Educational Research and Training (NCERT) and the respective State Council of Educational Research and Training (SCERT). This aspect can be included in the teaching of the subjects "Human Rights".

5. In the prospectus to be issued for admission by educational institutions, it shall be clearly stipulated that in case the applicant for admission is found to have indulged in ragging in the past or if it is noticed later that he has indulged in ragging, admission may be refused or he shall be expelled from the educational institution.

6. The Central Government and the State Governments shall launch a programme giving wide publicity to the menace of ragging and the consequences which follow in case any student is detected to have been involved in ragging.

7. It shall be the collective responsibility of the authorities and functionaries of the concerned institution and their role shall also be open to scrutiny for the purpose of finding out whether they have taken effective steps for preventing ragging and in case of their failure, action can be taken; for example, denial of any grant-in-aid or assistance from the State Governments.

8. Anti-ragging committees and squads shall be forthwith formed by the institutions and it shall be the job of the committee or the squad, as the case may be, to see that the Committee's recommendations, more particularly those noted above, are observed without exception and if it is noticed that there is any deviation, the same shall be forthwith brought to the notice of this Court.

9. The Committee constituted pursuant to the order of this Court shall continue to monitor the functioning of the anti-ragging committees and the squads to be formed. They shall also monitor the implementation of the recommendations to which reference has been made above."

13. As to what 'ragging' means, the Supreme court in Paragraph-10 of the said judgment in the case of University of Kerala (supra) observed that ragging is a set of undisciplined activities undertaken by the seniors to break the ice with the juniors, who have been suddenly thrown into a totally new environment. The contention of seniors behind all such activities is simply to bring the freshers down to earth because in their opinion the freshers do not respect the seniors and by doing all such inhuman activities under the garb of "Introduction" the seniors rag the freshers so that the freshers may respect them and be under their control. The Supreme Court described such act of the seniors as "fist of steel against ice" and observed that likewise by doing so they shatter the ambition, aim and object of freshers and they become aloof in this practical world. It took note of the case of Vishwa Jagriti Mission (supra), wherein series of guidelines were given to educational institutions whether being Central, State or private institutes. It described 'ragging' to be in essence a human rights' abuse. Ragging can be in various forms, such as, physical abuse or mental harassment. Deprecating and defining ragging in so many words, and referring to various incidents in our country as well as abroad, the Supreme Court ultimately held in paragraph – 27 thereof as follows and directed the matter to be listed again before it.

"A question raised was regarding giving opportunity to the offender before taking actions like expulsion etc. Delay in taking action in many cases would frustrate the need for taking urgent action. In such cases if the authorities are prima facie satisfied about the errant act of any student, they can in appropriate cases pending final decision, suspend the student from

the institution and the hostel if any and give opportunity to him to have his say. Immediately, the police shall be informed and criminal law set into motion. If it comes to the notice of the university or controlling body that any educational institution is trying to shield the errant students, they shall be free to reduce the grants in aid and in serious cases deny grants in aids."

14. Pursuant to the interim orders passed by the Hon'ble Supreme Court on 16.05.2007 in the above case, the U.G.C. framed regulations of curbing the mense of ragging in higher educational institutions. Regulation No.3 prescribes as to what constitutes ragging which reads as follows:-

"3. What constitutes Ragging- Ragging constitutes one or more of any of the following acts:

a. any conduct by any student or students whether by words spoken or written or by an act which has the effect of teasing, treating or handling with rudeness a fresher or any other student;

b. indulging in rowdy or indisciplined activates by any student or students which causes or is likely to cause annoyance, hardship, physical or psychological harm or to raise fear or apprehension thereof in any fresher or any other student;

c. asking any student to do any act which such student will not in the ordinary course do and which has the effect of causing or generating a sense of shame, or torment or embarrassment so as to adversely affect the physique or psyche of such fresher or any other student;

d. any act by a senior student that prevents, disrupts or disturbs the regular academic activity of any other student or a fresher;

e. exploiting the services of a fresher or any other student for completing the academic tasks assigned to an individual or a group of students,

f. any act of financial extortion or forceful expenditure burden put on a fresher or any other student by students;

g. any act of physical abuse including all variants of it: sexual abuse, homosexual assaults, stripping, forcing obscene and lewd acts, gestures, causing bodily harm or any other danger to health or person;

h. any act or abuse by spoken words, emails, post, public insults which would also include deriving perverted pleasure, vicarious or sadistic thrill

i. from actively or passively participating in the discomfiture to fresher or any other student;

j. any act that affects the mental health and self-confidence of a fresher or any other student with or without an intent to derive a sadistic pleasure or showing off power, authority or superiority by a student over any fresher or any other student."

15. Reading the entire regulations, this Court finds that Regulations - 5 and 6 provide measures for prohibition of ragging and prevention of ragging at the institution level. Regulation-7 deals with the action to be taken by the head of the institutions. Administrative actions to be taken have been envisaged in Regulation-9 of the said Regulation. The role of the University to which a College is affiliated where ragging takes place is given in Regulation-6.3(g) and in Regulation - 9(c) as well as Regulation - 9.2 which are as follows:

"6.3**. Every institution shall constitute the following bodies, namely**,

(a) to (f) xx xx xx

(g) Every University shall constitute a body to be known as Monitoring Cell on Ragging, which shall coordinate with the affiliated colleges and institutions under the domain of the University to achieve the objectives of these Regulations; and the Monitoring Cell shall call for reports from the Heads of institutions in regard to the activities of the Anti-Ragging Committees, Anti-Ragging Squads, and the Monitoring Cells at the institutions, and it shall also keep itself abreast of the decisions of the District level Anti-Ragging Committee headed by the District Magistrate.

9.(c) An appeal against the order of punishment by the Anti-Ragging Committee shall lie,

i. in case of an order of an institution, affiliated to or constituent part, of a University, to the Vice-Chancellor of the University ;
ii. in case of an order of a University, to its Chancellor.
iii. in case of an institution of national importance created by an Act of Parliament, to the Chairman or Chancellor of the institution, as the case may be.

9.2. Where an institution, being constituent of, affiliated to or recognized by a University, fails to comply with any of the provisions

Of these Regulations or fails to curb ragging effectively, such University may take any one or more of the following actions, namely ;

(i) Withdrawal of affiliation/recognition or other privileges conferred.
(ii) Prohibiting such institution from presenting any student or students then undergoing any programme of study therein for the award of any degree/diploma of the University.

Provided that where an institution is prohibited from presenting its student or students, the Commission shall make suitable arrangements for the other students so as to ensure that such students are able to pursue their academic studies.

(ii) Withholding grants allocated to it by the University, if any

(iv) Withholding any grants channelized through the university to the institution.
(v) Any other appropriate penalty within the powers of the university."

16. From the said Regulation by which the B.P.U.T. is governed, it is clearly manifest that the University is to constitute a body known as "Monitoring Cell" on ragging which shall coordinate with the affiliated Colleges and institutions to achieve all the objectives of the regulation, it shall call for reports from the heads of the institutions in regard to the activities of the Anti-Ragging committees, Anti-Ragging squad and the Monitoring Cells at the institutions and it shall also keep itself abreast of the decisions of the District Level Anti-Ragging Committee headed by the District Magistrate. Under regulation 9.1 (c) as quoted above, an appeal shall lie against the order of the Anti-Ragging committee to the Vice-Chancellor of the University.

17. The student mass are at youth, but lack the experience of an adult, always anxious to express valour. Result, therefore, amongst such young mass reading in the college is inconsequential ego clashes. Very often, it is found that students for flimsy reasons combine together in groups and over-trifle matters such groups clash amongst themselves resulting, may be, in some instances to injuries on person of such students. It may also lead to commission of criminal offences under the Penal Code. However, such clashes cannot be termed as a 'ragging'. A holistic reading of the observations of the apex Court in the case of University of Kerala (supra) would lead to the irresistible conclusion that ragging is a form of torturing 'freshers' who enter into the college and have not adjusted to the new environment. Keeping the above in view, this Court on going through the

inquiry reports conducted at the institution level as well as the investigation conducted by the police and the report of the committee constituted by the University, finds that the incident, in question, in the light of the observations made by the Hon'ble Supreme Court does not constitute a case of 'ragging' but a case of scuffle between some students of the institution. This Court also finds that under the Regulation, the University has no jurisdiction to pass the order as has been done under Annuexre-6 series. However, considering the anguish expressed by the Hon'ble Supreme Court with regard to rampant cases of ragging in institutions situate in various parts of the country, this Court has no hesitation to hold that the opposite party no.3-institution should strictly and meticulously follow the regulations framed by the U.G.C. for curbing ragging and taking strict measures for prohibition of ragging as envisaged in the Regulation as well as expressed by the Hon'ble Supreme Court in the aforesaid interim orders passed in the case of University of Kerala (supra).

18. In the result, therefore, the punishment imposed, debarring the petitioners from further prosecuting their course in B. Arch. and from appearing in the examinations for two years, by the University, communicated to the petitioners by the institution are quashed and the opposite parties are directed to allow the petitioners to continue to prosecute their course in B. Arch. and appearing in the ensuing examinations to be conducted by the institutions/ University.

19. The writ petitions are accordingly allowed. No costs.

Writ petition allowed.

2011 (I) ILR- CUT- 911

M.M.DAS, J.

W.P.(C) NO.9150 OF 2008 (Decided on 12.11.2011)

GIRISH CHANDRA KAR ……..Petitioner.

.Vrs.

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

Examination – Rechecking of marks in answer papers – No provision in the Regulations of the Board of Secondary Education – Petitioner appeared Annual H.S.C. Examination 2008 – He secured 749 marks out of the total marks of 800 – He applied for rechecking of marks – No change of marks in rechecking – Hence the writ petition.

Policy adopted by the Board to recheck and re-evaluate the answer scripts of the top 100 Candidates by a Committee – During evaluation of answer scripts of the petitioner the petitioner was awarded with 752 marks but on rechecking and re-evaluation of answer scripts by the Committee the said marks reduced to 749 – No direction issued by this Court in Bismaya Mohanty's case to continue the procedure and to re-examine and re-evaluate the answer scripts of top 100 Candidates of every subsequent H.S.C. Examination.

Direction issued in Bismaya Mohanty's Case was never meant for repeating the said principle and applying the same repeatedly in all succeeding H.S.C. Examinations - Such procedure adopted in case of the petitioner is quashed with a direction that the Board of Secondary Education shall stop such practice of re-evaluating the answer scripts of the top 100 Candidates by a committee of three chief examiners in all future H.S.C. Examinations – Held, direction issued to the Board of Secondary Education to issue a revised mark-sheet to the petitioner awarding him 752 marks.

Case laws Referred to:-

1.(2004)13 SCC 383 : (Board of Secondary Education-V-Pravas Ranjan Panda & Anr.)
2.1996(I) OLR 134 : (Bismaya Mohanty-V-Board of Secondary Education, Orissa).

For Petitioner - M/s. K.K.Swain & P.N.Mohanty.
For Opp.Parties - M/s. Gitimoy Mishra (O.P.No.1).

M. M. DAS, J. The petitioner appeared in the Annual H.S.C. Examination, 2008 conducted by the Board of Secondary Education, Orissa as a regular candidate from the Police High School, Puri Center. Upon the results being published, he found that he has secured 749 marks out of the total marks of 800 and has been placed in first division. The petitioner stated that he was a brilliant student and has earned many accolades. He has also stated that he secured very high marks in the pretest and test examinations conducted by the School and expected that he will secure much higher marks than 749 as has been awarded to him. He applied for rechecking of marks in the Second Language English (SLE), Compulsory Mathematics (CMT), Compulsory Science Papers (CSC-I & CSC-II) Social Sciences (SSC-I & SSC-II), Optional Mathematics (OMT) and Optional Science Papers (OSC-I & OSC-II). Finding that the Board of Secondary Education, Orissa in such applications in a stereo type reply to all candidates is intimating that there is no change of marks on rechecking and re-addition of marks, has approached this Court apprehending that there may be mistakes in tabulation of marks or evaluation of the additional sheets used by him in the aforementioned papers or answers not valued at all.

2. It may be noted here that the regulations of the Board of Secondary Education do not provide for reevaluation of answer sheets. A counter affidavit has been filed by the Board of Secondary Education, Orissa stating that the answer papers of the petitioner will be checked up by the committee to be constituted for rechecking such answer papers and the petitioner will be duly informed within the stipulated period regarding result of such rechecking and, therefore, the writ petition is premature and should be dismissed.

3. A rejoinder affidavit has been filed by the petitioner to the counter affidavit filed on behalf of the Board of Secondary Education, that the Board has no authority to reevaluate the answer scripts of the petitioner by a committee and in the case of ***Board of Secondary Education V. Pravas Ranjan Panda and another***, (2004) 13 SCC 383, the Supreme Court though referred to the case of ***Bismaya Mohanty v. Board of Secondary Education, Orissa***, (1996) I OLR 134, but set aside the order of this Court. There, this Court directed the Board to scrutinize and recheck the answer scripts of all the examinees securing 90% and above marks in aggregate in H.S.C. Examination, 2003 in the manner directed in Para-11 of Bismaya Mohanty's case and if there is any change or variance of marks, the petitioner shall be informed accordingly within a period of six weeks from the date of communication of the said order.

4. An additional affidavit has been filed by the Board stating that the

land mark judgment in the case of Bhismya Mohanty (supra) has not been set aside by the apex Court, basing on which the Board adopted the policy from 1995 onwards to recheck and reevaluate the answer scripts of the top 100 candidates by a committee. The opposite party-Board of Secondary Education also mentioned the mark secured by the petitioner before rechecking and reevaluation by the committee and after such rechecking and reevaluation by the committee. Particulars of the same are mentioned below:-

"Roll No.	Subject	Marks awarded earlier"	Revised marks awarded after scrutiny of 3 Chiefs
1	2	3	4
19TA115	FLO	91	92
	SLE	83	84
	TLS	100	99
	CMT	99	99
	CSC-I	48	48
	CSC-II	46	45
	SSC-I	46	45
	SSC-II	46	45
	OMT	99	99
	OSC-I	38	38
	OSC-II	36	35
	Practical	20	20
		752	749"

From the above, it appears that during evaluation of the answer scripts of the petitioner, the petitioner was awarded with 752 marks. But after rechecking and reevaluation of answer scripts by the committee, the said mark has been reduced to 749.

5. The moot question, therefore, arises in this case is as to whether the Board of Secondary Education could have constituted the committee of three Chief Examiners and reevaluate the answer scripts of the top 100 candidates even though there is no such provision in the regulation of the Board of Secondary Education. In Bismaya Mohanty's case, a Division Bench of this Court while noted that scope for interference in matters of evaluation of answer papers is very limited and for compelling reasons and apparent infirmity in evaluation, the Court can step in.

6. Considering the facts of the said case and observing that large number of writ petitions are filed every year alleging improper evaluation, which create an alarming situation, came to the conclusion that the Board has a bounden duty to take stock of the whole situation block the loophole. Observing thus, this Court held as follows:-

> "One thing which cannot be lost sight of is the marginal difference of marks which decide the placement of candidates in the merit list. We find that the Chief Examiners have been given power to carefully examine the answer scripts carrying fail marks upon 15% shortage and papers securing very high marks above 90% in Mathematics and 75% in all other subjects. To eliminate the possibility of injustice on account of marginal variation in marks, we feel that after the answer scripts and the mark-foils are received back by the Board, it shall find out the highest marks secured by a candidate. By way of illustration, we may take it to be 650. Let a Committee of three Chief Examiners examine all papers of candidates securing marks 636 or above. Their papers shall be independently examined and the average of marks of three Chief Examiners shall be taken to be the marks secured by the concerned candidate. However, in case difference of marks between two Chief Examiners exceeds 5 in a paper, it shall be sent to another Chief Examiner whose opinion shall be final. In case the marks given by the fourth Examiner is less than the average of other three, the average marks shall prevail. It shall be ensured by the Board authorities that a Chief Examiner does not belong to the school to which the candidate belongs. All possible care and caution should be taken to keep the identity of the candidate and the school secret. "

There was no direction issued by this Court in Bismaya Mohanty's case to continue the procedure and more so to re-examine and reevaluate the answer scripts of top 100 candidates of every subsequent H.S.C. Examination. Before examining as to whether the procedure directed to be adopted in Bismaya Mohanty's case has been disapproved by the Supreme Court in the case of Board of Secondary Education (Supra), it would be opt to note that the above quoted direction issued by this Court in Bismaya Mohanty's case is not the ratio of the said decision but was issued considering the facts of the said case.

7. This Court is, therefore, of the view that the Board of Secondary Education, Orissa could not have constituted a committee to reexamine and reevaluate the answer scripts of top 100 candidates of each H.S.C. Examination after delivery of judgment in Bismaya Mohanty's case following

the above direction issued in the said case. The Board has no authority to interpret the direction issued by this Court in Bismaya Mohanty's case to mean that the committee should reexamine and reevaluate the top 100 candidates in every H.S.C. Examination following thereafter. It would be further noted that in the case of Board of Secondary Educaiton (Supra) the Board went in appeal to the Hon'ble Apex Court against the judgment of this Court in the writ petition filed by Pravas Ranjan Panda and another (Supra), where this Court directed the Board to scrutinize and recheck the answer scripts of the examinees securing 90% and above marks in aggregate in H.S.C. Examination, 2003 in the manner directed in Para-11 of Bismaya Mohanty's case and if there is variation of marks of the petitioner to inform the petitioner accordingly. The Hon'ble Supreme Court while quoting the direction of this Court in the said case and also quoting Paragraph-11 of the judgment in the Bismaya Mohanty's case held as follows and allowed the appeal by setting aside the order passed by this Court.

> "The High Court though observed that the writ petitioner who has taken the examination is hardly a competent person to assess his own merit and on that basis claim for re-evaluation of papers, but issued the aforesaid direction in order to eliminate the possibility of injustice on account of marginal variation in marks. It is an admitted position that the regulations of the Board of Secondary Education, Orissa do not make any provision for reevaluation of answer-books of the students. The question whether in absence of any provision to that effect an examinee is entitled to ask for reevaluation of his answer books has been examined by us in Pramod Kumar Srivastava v. Chairman, Bihar Pubic Service Commission decided on 6-8.2004. It has been held therein that in absence of rules providing for reevaluation of the answer books no such direction can be issued. It has been further held that in absence of clear rules on the subject, a direction for re-evaluation of the answer-books may throw many problems and in the larger public interest such a direction must be avoided. We are, therefore, of the opinion that the impugned order of the High Court directing for re-evaluation of the answer-books of all the examinees securing 90% or above marks is clearly unsustainable in law and must be set aside".

8. It can be, therefore, clearly inferred that the Hon'ble apex Court though in not so many words overruled the direction given in Bismaya Mohanty's case but set aside the order of this Court in which direction was issued to scrutinize and recheck the answer scripts in accordance with the directions given in Para-11 of the judgment in Bismaya Mohanty's case. It can, therefore, safely be inferred that it was concluded by the Hon'ble Apex

Court that the said direction issued in Bismaya Mohanty's case cannot be followed by the Board in the case of Pravash Ranjan Panda and another. Hence, the considered view of this Court is fortified by the aforesaid decision of the Apex Court that the directions issued in Bismaya Mohanty's case was never meant for repeating the said principle and applying the same repeatedly in all succeeding H.S.C. Examinations and, more so, by modifying the same and making it applicable to the top 100 candidates of each examination. The action of the Board of Secondary Examination, therefore, in following such a procedure cannot be sustained. However, since no other candidates have challenged such procedure, the said procedure adopted in case of the petitioner is quashed with a direction that the Board of Secondary Education shall stop such practice of reevaluating the answer scripts of the top 100 candidates by a committee of three Chief Examiners in all future H.S.C. Examinations. Even though the petitioner has filed an affidavit claiming that he was entitled to more marks in some of the answers given by him with regard to the subjects mentioned above, this Court is not inclined to enter into the same. In the result, therefore, the writ petition is partly allowed by directing the Board of Secondary Education to issue a revised mark-sheet to the petitioner awarding him the marks which were awarded to him by the examiners of the answer scripts wherein he secured a total mark of 752 thereby increasing the total marks awarded to him from '749' to '752'. This shall be done within a period of two weeks from the date of production of certified copy of this order before the Controller of Examination, Board of Secondary Education, Orissa, Cuttack.

Writ petition partly allowed.

2011 (I) ILR- CUT- 917

R.N.BISWAL, J.

W.P.(C) NO.22852 OF 2010 (Decided on 04.03.2011)

SANKAR DAS …….. Petitioner.

.Vrs.

P.O., INDUSTRIAL TRIBUNAL,
BBSR & ANR. …. …. Opp.Parties.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.33 (2)(b).

Dismissal of workman from service – Non-approval of the order of dismissal by the Tribunal U/s. 33 (2) (b) of the Act – Dismissal becomes ineffective – Employee entitled to wages from the date of dismissal till the date he filed petition U/s.33-C(2) of the Act.

In the present case departmental proceeding started against the workman for unauthorized absence from duty – His service was terminated without supplying him copy of the enquiry report – Order of dismissal not approved by the Tribunal – Management filed writ petition – Writ dismissed – Order challenged in writ appeal – In writ appeal this Court loathed to interfere with the finding of facts recorded by the Courts below and passed orders that it was open for the management to take up the enquiry from the point it stood vitiated – Since dismissal of the petitioner is not approved he is deemed to be continuing in service – Held, Opp.Party management is directed to pay the petitioner the amount as claimed by the petitioner under Section 33-C (2) of the Act.

(Para 7,8)

Case laws Referred to:-

1.AIR 2002 SC 643 : (Jeypore Zilla Sahakari Bhumi Vikas Bank Ltd.-V-Sri Ram Gopal Sharma & Ors.)
2.1995(I) LLJ 395 : (Municipal Corporation of Delhi-V-Ganesh Razak & Anr.)
3.2000(I) LLJ 1472 : (Jeet Lal Sharma-V-Presiding Officer,Labour Court IV & Anr.)
4.AIR 1994 sc 1074 : (Managing Director,ECIL Hyderabad etc. V-B.Karunaka Etc.etc.)
5.2000(7) SC 545 : (State Bank of India-V-Rama Chandra Dubey & Ors.)

For Petitioner - M/s. Aurovinda Mohanty & K.S.Satapathy

For Opp.Parties – M/s. N.K.Mishra, A.K.Ray & A.Mishra
(O.P.No.2)

R.N.BISWAL,J. The petitioner has assailed the order dated 18.9.2010 passed by the learned Presiding Officer, Labour Court, Bhubaneswar dismissing the Misc. Case No.58 of 2008 as not maintainable.

2. As per the case of petitioner, he was working as a Junior Accountant under the Opp. party-Management. While continuing as such, he applied for casual leave for one day, i.e., 8.2.2006 and it was sanctioned. Due to his illness, he extended his leave from time to time. However, a departmental proceeding was initiated against him on the ground that he remained absent unauthorisedly from 5.3.2006 to 4.3.2006 and on some other grounds. The enquiry was conducted ex parte, wherein it was held that the charges were proved against the petitioner. The disciplinary authority terminated his service with effect from 24.4.2006 without supplying him the copy of enquiry report. The petitioner was served with the order of dismissal on 21.8.2006. As the petitioner was a concerned work man in a pending I.D. Case the Management filed a petition under Section 33 (2) (b) of the I.D. Act before the Presiding Officer, Industrial Tribunal, Bhubaneswar for approval of the order of dismissal. The said petition was registered as I.D. Misc. Case No.1 of 2006. The Tribunal, vide order dated 8.4.2008 dismissed the said I.D. Misc. Case and did not approve the action of the Management. Being aggrieved with the said order, the Management preferred W.P. (C) No.6715 of 2008 before this Court, wherein a single judge of this Court vide order dated 9.5.2008, dismissed the writ petition and upheld the order of the Industrial Tribunal. Challenging the said order, the Management preferred Writ Appeal No.97 of 2008 before this Court, wherein it was held as follows:

> "There is no occasion for us to interfere with the finding of fact recorded by the courts below. However, it is the settled legal proposition that in such fact situation the enquiry can be restarted from the point it stood vitiated. Learned counsel for the respondent does not dispute the said legal proposition.
>
> In view of the above, it shall be open to the employer to take up the enquiry from the point it stood vitiated and complete the same expeditiously, preferably within a period of two months in accordance with law."

3. On 31.7.2008, the petitioner filed a petition under Section 33-C (2) of the I.D. Act claiming his wages from 21.8.2006 to 31.7.2008, before the Presiding Officer, Labour Court, Bhubaneswar, which was registered as I.D. Misc. Case No.58 of 2008. Notice was issued to the Management to show

cause. In their show cause they contended that the application was not maintainable, particularly since there was no predetermined right in favour of the petitioner; that neither the Industrial Tribunal under Section 33 (2) (b) proceeding nor this Court ordered for reinstatement of the petitioner and that the order of learned Presiding Officer, Industrial Tribunal passed under Section 33 (2) (b) of the I.D. Act was rendered infructuous in view of the order passed on 17.3.2009 by this Court in Writ Appeal No.97 of 2008.

To substantiate his case, the petitioner-workman examined himself as A.W.1 before the Presiding Officer, Labour Court, Bhubaneswar in I.D. Misc. Case No.58 of 2008. The Management did not prefer to examine any witness. On assessing the evidence and hearing the counsel for the parties, the learned Labour Court, Bhubaneswar vide order dated 18.9.2010 dismissed the Misc. Case holding that in view of the order passed in the Writ Appeal, there was no force in the order passed by the Industrial Tribunal, Bhubaneswar in I.D. Misc. Case No.1 of 2006 and that the Labour Court cannot determine the dispute of entitlement or the basis of claim in absence of prior adjudication or recognition by the employer. As stated earlier, being aggrieved with the said order, the workman has preferred the present writ petition.

4. Learned counsel for the petitioner submitted that in the writ appeal this court did not interfere with the finding of facts recorded by the courts below, albeit it ordered that it would be open to the employer to take up the enquiry from the point it stood vitiated. In I.D. Misc. Case No.1 of 2006 the Industrial Tribunal vide order dated 8.4.2008 did not approve the order of termination of the service of the petitioner since the enquiry report was not supplied to him before passing the order of dismissal and the said order was confirmed by the single judge of this Court in W.P.(C) No.6715 of 2008. So, the order of dismissal passed against the petitioner-workman became ineffective, when the said order was not approved. The workman is entitled to get his wages from the date of his dismissal till the date he filed the petition under Section 33-C(2) of the I.D.Act. In support of his submission, learned counsel for the petitioner relied on the decision "***Jeypore Zilla Sahakari Bhumi Vikas Bank Limited Vs. Sri Ram Gopal Sharma and others***" AIR 2002 SC 643. He further submitted that, admittedly in a petition under Section 33-C(2) of the I.D.Act the Presiding Officer, Labour Court cannot determine a dispute with regard to entitlement of a workman. Unless there is an existing right in favour of the workman, the petition under Section 33-C(2) is not maintainable. But in the case at hand, since the order of dismissal dated 21.8.2006 passed by the Management against the petitioner was not approved, it would be deemed that no order of dismissal ever had been passed. In other words, the workman deemed to have been continuing

in service entitling him to all the benefits available. So question of determining the entitlement of the petitioner does not arise.

5. On the contrary, learned counsel appearing for the Management contended that pursuant to the final order passed in Writ Appeal No.97 of 2008 the Management took up the domestic enquiry from the stage it stood vitiated, put the petitioner under suspension on 16.4.2009 and dismissed him from service on 18.12.2009. It is specifically ordered in the order of dismissal that the petitioner is not entitled to any wages from 9.2.2006 to 26.3.2009 on the principle of 'No work no pay". So in view of the said order, the petitioner is not entitled to get any wages. Learned counsel for the Opp.party-Management further contended that the proceeding under Section 33-C (2)of the I.D.Act is in the nature of an execution proceeding. It is not the function of the Labour Court to first decide any disputed fact, which pertains to be the basis of determination of money due and then to compute the same. In support of his submission, he relied on the decision **Municipal Corporation of Delhi** Vs. **Ganesh Razak and another**, 1995(1)LLJ 395 and **Jeet Lal Sharma** Vs. **Presiding Officer,Labour Court IV and another** 2000(1)LLJ 1472. He further submitted that a petition under Section 33(2)(b) of the I.D.Act, filed before the Industrial Tribunal for approval of the order of dismissal dated 18.12.2009 passed against the petitioner having been pending consideration before the Industrial Tribunal, the petition under Section 33-C(2)of the I.D.Act is not maintainable. In support of his submission, he relied on the decision of **Managing Director, ECIL Hyderabad etc.etc**.Vs. **B.Karunakar etc.etc** AIR 1994 SC 1074 and **State Bank of India** Vs. **Rama Chandra Dubey and other**s 2000(7)SC 545.

6. Admittedly, the petitioner was dismissed from service with effect from 24.04.2006. The Management filed a petition under Section 33(2)(b)of the I.D. Act in I.D. Misc. Case No.1 of 2006 for approval of the order of dismissal before the Industrial Tribunal, but it was rejected on 8.4.2008. The said order was challenged before this Court in W.P.(c) No 6715 of 2008 which was dismissed on 9.5.2008. Again, against the said order Writ Appeal No 97 of 2008 was filed, where this court loathed to interfere with the finding of facts recorded by the courts below and only ordered that it was open for the Management to take up the enquiry from the point it stood vitiated and complete the same expeditiously. The order of the Industrial Tribunal passed in I.D. Misc. Case No.1 of 2006 refusing to approve the order of dismissal by the Opp.party-Management against the petitioner was not interfered with. In the case of Jeypore Zilla Sahakari Bhumi Vikas Bank Limited (supra), the apex court held:

> "Where an application is made under Section 33(2)(b),Proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not, etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if order of discharge or dismissal never had been passed. The order of dismissal or discharge passed invoking Section 33(2)(b)dismissing or discharging an employee brings an end of relationship of employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval. If approval is not given, nothing more is required to be done by the employee, as it will have to be deemed that the order of discharge or dismissal had never been passed. Consequence of it is that the employee is deemed to have continued in service entitling him to all the benefits available. This being the position there is no need of a separate or specific order for his reinstatement."

7. In the present case, since the order of dismissal was not approved by the Industrial Tribunal, in view of the above decision, it would be deemed that no order of dismissal was passed against the petitioner. In other words, it is deemed that the petitioner continued in service entitling him to get all the service benefits. Even if the petitioner was dismissed from service by the Management from 18.12.2009 and it was specifically ordered in the dismissal order that the petitioner was not entitled to get any back wages for the period from 9.2.2006 to 26.3.2009 and the said order would be approved by the Tribunal, still then it cannot debar the petitioner from getting his legitimate dues as claimed. The decisions cited by the Management would not be applicable in the present case. In the decision Managing Director, ECIL(supra)it has been held by the apex court that when an employee is dismissed from service by the disciplinary authority and the order of dismissal is set aside because of non-furnishing of the enquiry report to the delinquent, reinstatement with back wages in all cases cannot be passed mechanically. In other words, in appropriate cases, the order for payment of back wages should not be passed. The fact in the above cited case is quite different from the fact and circumstance of the present case. In the case of State Bank of India (supra) the workman was dismissed from service. He challenged the order of dismissal. Conciliation having failed, the matter was referred to Industrial Tribunal, where it was ordered for reinstatement. But

there was no order with regard to back wages. The workman filed a petition under Section33-C(2)of the I.D. Act claiming back wages. There the apex court held that since there was no any pre-existing right or benefit in favour of the workman, the petition under Section 33-C(2) was not maintainable. The fact in the case at hand is quite different from the facts of the cited case. If the impugned order is not interfered with, it would lead to miscarriage of justice.

8. Accordingly, the writ petition is allowed, the impugned order dated 18.9.2010 passed by the learned Presiding Officer, Labour Court, Bhubaneswar is quashed and the Opp.party-Management is directed to pay the amount as claimed by the petitioner under Section 33-C(2)of the I.D. Act in I.D. Misc. Case no.1 of 2006. No Cost.

Writ petition allowed

. **2011 (I) ILR- CUT- 923**

INDRAJIT MAHANTY, J.

CRLMC. NO.2829 OF 2010(Decided on 25.02.2011)

MOHAMMED JABIR @ DHANA .....Petitioner

.Vrs.

MANOJ KUMAR BEHERA .....Opp.Party.

NEGOTIABLE INSTRUMENT ACT, 1981 (ACT NO.61 OF 1981) – S.138.

When a notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause(b) of proviso to Section 138 of the N.I. Act stands complied with.

In the present case the complainant had issued registered notice intimating dishonour of cheque and the same was returned back to the complainant with the report that the accused-petitioner was absent – No averment in the present application that the notice was not sent in the correct address and the said envelope forms part of the complaint – Held, no ground to recall the order taking cognizance.

(Para 5 & 6)

Case laws Referred to:-

1.AIR 2009 SC 1168 : (M/s. Harman Electronics (P)Ltd.-V-M/s.National Panasonic India Ltd.)
2.(2007) 38 OCR (SC) 58 : (C.C.Alavi Haji -V-Palapetty Muhammed & Anr.)

For Petitioner - M/s. N.Vaheed, P.K.Mohapatra S.Ahamed & A.A.Sagufta.
For Opp.Party - None.

I.MAHANTY, J. This application under Section 482 Cr.P.C. has been filed seeking to challenge the order dated 7.8.2010 passed in ICC Case No.987 of 2006 whereby the learned S.D.J.M.,Sadar, Cuttack rejected the application filed by the petitioner for recalling the order of cognizance.

2. From the impugned order it appears that the application was filed by the petitioner on 19.5.2010 to recall the order of cognizance on various grounds taken in the said petition which came to be rejected on the ground that the court has no power to call its own order.

3. Learned counsel for the petitioner submits that the order of cognizance ought not to have been passed by the learned S.D.J.M. in view of non-compliance of Proviso (b) of Section 138 of the N.I. Act. He further asserts that it is mandatory that all the provisions contained under Provisos (a), (b) and (c) need to be complied with before the occasion arises for initiating a compliant under Section 138 N.I.Act.

In this respect, reliance is placed on a decision of the Hon'ble Supreme Court in the case of ***M/s. Harman Electronics (P) Ltd. Vrs. M/s. National Panasonic India Ltd.,*** AIR 2009 SC 1168. Learned counsel for the petitioner has placed stress on paragraph-14 of the said judgment and states that for the purpose of proving its case that the accused had committed an offence under Section 138 of the N.I. Act, the ingredients thereof are required to be proved. What would constitute an offence under Section 138 of the N.I. Act is stated in the main provision and the proviso appended thereto, however, imposes certain further conditions which are required to be fulfilled before cognizance of the offence can be taken.. It is further stated therein that receipt of notice by the accused would ultimately give rise to cause of action for filing the complaint.

4. Learned counsel for the petitioner submits that no notice was received by the accused-petitioner and hence, the order of cognizance should have been quashed. He submits that although the petitioner had issued the registered notice to the accused-petitioner, but the same was not received by him since he was absent from the house.

5. This aspect of the matter regarding compliance of Section 138 (b) of the N.I. Act came to be considered by a three Judges Bench of the Hon'ble Supreme Court in the case of ***C.C.AlaVi Haji Vrs. Palapetty Muhammed & Another,*** (2007) 38 OCR (SC) 58, in which, the Hon'ble Supreme Court dealt with the scope and ambit of Section 138(b) of the N.I. Act, and came to hold in paragraph-15, that in so far as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act is concerned, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, there is no material difference between the two provisions. It was held that when a notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the N.I. Act, the court is required to be prima facie satisfied that a case under the said Section is made out and the procedural requirements are complied with. It is then for the drawer to rebut

6. the presumption about the service of notice and show that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect.

7. In the instant case, as admitted by the learned counsel for the petitioner, the complainant had issued registered notice intimating dishonour of cheque and the same was returned back to the complainant with the report that the accused-petitioner was absent. There is no averment in the present application that the notice was not sent in the correct address and the said envelope forms part of the complaint. In the aforesaid case the Hon'ble Supreme Court came to conclude that in the facts and situation of the said case, the requirement of Section 138 of the N.I. Act had been complied with.

8. In view of the aforesaid judgment of the Hon'ble Supreme Court, the present case has no merit and the same stands rejected.

Application dismissed.

2011 (I) ILR- CUT- 926

INDRAJIT MAHANTY, J.

CRLMC. NO.3396 OF 2010 (Decided on 04.03.2011)

GANGA @ GANGADHAR SETHY … …. Petitioner.

.Vrs.

STATE OF ORISSA …… Opp.Party.

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN ACT, 2000) (ACT NO.56 OF 2000) – S.7-A, r/w Rule 12 of the Relevant Rules.

Claim of juvenility – Accused-petitioner prayed before the learned J.M.F.C., Aska – Application rejected vide Order Dt. 2.1.2009 – Hence this petition.

In the present case School Admission Register showing the date of birth of the petitioner is exhibited as required under Rule 12 (3) (a) (i) (ii) & (iii) – Rule 12 (3) (b) mandates that medical opinion would be sought for from a duly constituted Medical Board only in the absence of evidence as contemplated under Rule 12 (3) (a) (i) (ii) (iii) – Held, no justification for the Magistrate to seek for any medical opinion far less an ossification test as the Magistrate is competent to determine the age of the accused as the accused raised his claim before such Court – Held, impugned Order Dt.2.1.2009 is quashed – The date the birth of the petitioner being 12.5.1991 and the date of occurrence being 28.3.2008 the accused petitioner is clearly below 18 years of age as on the date of occurrence and he is declared to be a juvenile in conflict with law.

(Para 9,10,11)

Case laws Referred to:-

1.(2009) 13 SCC 211 : (Hari Ram-V-State of Rajasthan & Anr.).
2.AIR 2005 SC 2731 : (Pratap Singh-V-State of Jharkhand).

For Petitioner - M/s. M.Kanungo, S.Das & P.R.Singh.
For Opp.Party - Additional Government Advocate

I. MAHANTY, J. This application under Section-482 Cr.P.C. has been filed by the petitioner-Ganga @ Gangadhar Sethy seeking to challenge the order dated 02.01.2009 passed by the learned J.M.F.C., Aska in G.R. Case No.114 of 2008, whereby, a petition filed by the accused-petitioner claiming to be a juvenile as on the date of occurrence came to be rejected.

2. It appears from the case record that an F.I.R. was registered on 28.3.2008 for alleged commission of offence under Sections 302, 307, 326, 109, 120-B I.P.C. read with Sections 25(1-B) (a) & 27 of the Arms Act. In course of investigation, the present petitioner along with other accused persons were arrested and forwarded to the judicial custody. The present accused-petitioner filed a petition before the learned J.M.F.C., Aska on 26.06.2008 claiming therein that his date birth is 12.05.1991 and as such prayed to be declared as a 'juvenile' and to be provided with the benefits under the Juvenile Justice (Care and Protection of Children) Act, 2000. This petition came to be rejected by order dated 02.01.2009, which is the subject matter of challenge in the present proceeding.

3. Mr. M. Kanungo, learned counsel for the accused-petitioner placed reliance on Rule-12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 and in particular Sub-Rule-3 thereof which is quoted herein below.

> **"Rule-12(3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-
>
> (a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (iii)the date of birth certificate from the school(other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;
>
> (b) and only in the absence of either (i),(ii) or (iii) of clause(a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause(b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

Mr. Kanungo, learned counsel for the petitioner submits that Rule-12(3)(b) of Juvenile Justice (Care and Protection of Children) Rules, 2007 clearly stipulates that medical opinion can only be sought for from a duly constituted Medical Board, in the absence of evidence of either (i), (ii) or (iii) of Sub-Clause(a) of Rule 12 of the said Rules.

4. It is asserted by the learned counsel for the petitioner that in the present case, admittedly, the documentary evidence as contemplated under Rule-12 (3)(a)(ii) of Juvenile Justice (Care and Protection of Children) Rules, 2007 i.e. date of birth certificate from the school (other than a play school) first attended, is available on record. Therefore, once such evidence is available, the same ought to have been relied upon and accepted by the learned J.M.F.C., Aska but instead of doing so, the learned J.M.F.C., sought for medical opinion when such opinion ought not have been called for in terms of the aforesaid rule.

5. Mr. K.K. Mishra, learned Additional Government Advocate on behalf of the State, fairly admitted that Rule-12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 applies to the facts of the present case. But Mr. Mishra raised a further contention that, the determination of age ought not to have been made by the learned J.M.F.C. and the learned J.M.F.C. ought to have referred the matter to the Board constituted under the said Act for determination of the age. He further submits that Section-6 of the Juvenile Justice (Care and Protection of Children) Act, 2000 clearly stipulates that a Board has been constituted for any district and such Board has the power to deal "exclusively" with all proceedings under this Act relating to juvenile in conflict with law and, therefore, submits that the matter should be remitted to the Board for determination of the age of the petitioner.

6. Mr. Kanungo, learned counsel for the petitioner on the other hand submits that, Section-7-A was brought into statute by way of amendment with effect from 22.8.2006. In this respect Mr. Kanungo, placed reliance on a judgment of the Hon'ble Supreme Court in the case of ***Hari Ram v. State of Rajasthan and another,*** (2009) 13 Supreme Court Cases 211. In the said judgment the Hon'ble Supreme Court took note of the fact that after the decision of a Constitutional Bench of the Hon'ble Supreme Court in the case of ***Pratap Singh v. State of Jharkhand,*** A.I.R. 2005 S.C. 2731, the legislature amended the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 and incorporated Section-7-A into the statute. The same is noted herein below:

> ***"7-A. Procedure to be followed when claim of juvenility is raised before any court-(1***) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:
>
> Provided that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.
>
> (2) If the Court finds a person to be a juvenile on the date of commission of the offence under Sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a Court shall be deemed to have no effect."

While Section-7-A provided that a claim of juvenility could be raised before "any court" or if a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall require to conduct an inquiry, take evidence and determine the age of a person by recording a finding whether the person in question is a juvenile or not.

7. The manner in which determination would take place was provided by legislature by enacting the Juvenile Justice (Care and Protection of Children) Rules, 2007 and providing Rule-12 thereunder, which provides for the procedure to be followed by the Court, the Board and the Child Welfare Committee for the purpose of determination of age in every case.

In the case of Hari Ram (supra), Hon'ble Supreme Court held that to determine the special clause of Rule-12 was that, once the age of juvenile is found to less than 18 years on the date of offence on the basis of any proof specified under Sub-Rule(3), the Court or the Board or as the case may be, the Child Welfare Committee has to pass written order stating the age of the Juvenile and no further inquiry is to be conducted by the Court or Board after obtaining any documentary proof referred to under Sub-Rule(3) of Rule-12. Rule-12, therefore, indicates the procedure to be followed to give effect to a petition filed under Section-7-A when a claim of juvenile is raised.

8. In the light of the judgments of the Hon'ble Supreme Court and on a plain reading of Section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 with Rule 12 of Juvenile Justice (Care and Protection of Children) Rules, 2007, it would be clear therefrom that, the contention advanced by the learned counsel for the State, that the learned J.M.F.C., Aska had no power to determine the age of the accused-petitioner has no substance. The term 'any court" has also been earlier determined by the Hon'ble Apex Court, in the case ***of Pratap Singh v. State of Jharkhand*** and in paragraph 31 thereof which is quoted below.

"The term "any court" would include even ordinary criminal Courts".

9. In view of the above, I am of the considered view that the learned J.M.F.C., Aska being the court before whom the accused-petitioner was produced by the prosecution, therefore, the said court is competent to determine the age of the accused-petitioner since he raised his claim to be a juvenile before such court.

10. Now on perusal of the impugned order, it is seen that the School Admission Register of U.P. School, Dhanantar and Natheswar High School, Dhanantar were exhibited. The School Admission Register of Natheswar High School was produced and exhibited as Ext.1. From the said exhibit, it reveals that the date of birth of the accused-petitioner was 12.5.1991 and in the Transfer Certificate issued in favour him, the date of birth was also indicated as 12.5.1991. An Assistant Teacher of Natheswar High School, who had produced the School Admission Register and had been examined as P.W.2. Whereafter the learned J.M.F.C., called upon the Admission Register of U.P. School, Dhanantar. The same was produced through P.W.3 and was marked as Ext.2. The said register also reveals that the date of birth of the accused-petitioner was 12.5.1991. These limited facts alone clearly indicate that Rule-12(3)(a)(ii) was satisfied, although certain suspicion was raised by the learned J.M.F.C. on the basis of the said entries and also on the oral evidence given by the mother of the accused-petitioner, but the same, could not form a lawful basis for directing the ossification test of the accused-petitioner. Rule-12(3)(b) clearly mandates that medical opinion would be sought for from a duly constituted Medical Board only in the absence of evidence as contemplated under Rule-12(3)(a)(i),(ii) or (iii). In the present case since the School Admission Register of the U.P. School, Dhanantar had been exhibited under Ext.2 and the said register revealed that the date of birth of the petitioner as 12.5.1991, there was no lawful justification for the learned J.M.F.C. to seek for any medical opinion far less an ossification test as directed.

11. In view of the judgment of the Hon'ble Supreme Court referred hereinabove and the facts of the present case, I quash the impugned order dated 2.1.2009 passed by the learned J.M.F.C., Aska in G.R. Case No.114 of 2008 to the extent of direction relating to determination of the age of the accused-petitioner is concerned and hold that the date of birth of the petitioner is being 12.5.1991 and since the alleged occurrence was on 28.3.2008, the accused-petitioner is clearly below 18 years of age as on the date of occurrence and is, therefore, declared to be a juvenile in conflict with law, since he had not completed 18 years of age as on the date of the commission of the alleged offence. Therefore, the accused-petitioner shall be forwarded to the Board to pass appropriate orders and to conduct the further proceeding against the juvenile.

12. Accordingly, the CRLMC is allowed & disposed of in terms of the directions noted hereinabove.

Application allowed.

2011 (I) ILR- CUT- 932

H.S.BHALLA, J.

W.P.(C) NO.1860 OF 2011(With Batch) (Decided on 29,03.2011)

RATIKANTA DUTTA & ORS. ……..Petitioners.

.Vrs.

STATE OF ORISSA …. …Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.21-A.

Posts of Sikhya Sahayak – Minimum qualification fixed as +2 C.T. excluding Matric C.T. – Change of eligibility criteria – Petitioners are Matric C.T. and they prayed modification of the Government resolution.

Imparting good quality education to students studying in Class-I till Class-VIII – Quality education can only be provided by a person having higher qualification – Government has a right to change its policy – Courts will be slow to interfere unless it is shown that the decision is unfair, malafide or contrary to any statutory direction – Held, state is fully justified in amending the requisite qualification.

(Para 16)

Case laws Referred to:-

1.(2002) 8 SCC 481 : (T.M.A. Pai Foundation-V-State of Karnataka).
2.(2005) 6 SCC 527 : (P.A. Inamadar-V-State of Maharastra)
3.1995(II) OLR 145 : (Miss. Alakha Das-V-Director, T.E. & SCERT)
4.2007(II) OLR 577 : (Chandramani Jena & Ors.-V-State of Orissa & Ors.)
5.AIR 2000 SC 1576 : (Govind A.Mane & Ors.-V-State of Maharashtra & Ors.)
6.AIR 1971 SC 2303 : (Minor A.Periakaruppan-V-State of Tamil Nadu)
7.2010 .LAB.I.C. 2388 : (Gajendra Singh & Ors.-V-Ajaya Singh & Ors.)
8.1997 (10)SCC 419 : (State of Rajasthan-V-R.Dayal & Ors.)
9.1983 (3) SCC 284 : (Y.V.Rangaiah & Ors.-V-J.Sreenivasa Rao & Ors.)
10.1995 (Supp)1 SCC 192 : (Ganga Prasad Verma (Dr.) -V-State of Bihar).

For Petitioners - M/s. P.C.Acharya & associates
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M/s. D.K.Mohapatra & associates

M/s. S.K.Ojha & associates
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M/s. M.R.Behera & associates
M/s. Prahalad Sahu & associates
M/s. S.K.Ratha & associates
M/s. S.K.Dalei
M/s. S.K.Sahu & associates
M/s. B.Ratha & associates
M/s. S.K.Ratha-1 & associates
M/s. Deepak Kumar & associates
M/s. S.B.Jena & associates
M/s. K.P.Mishra & associates
M/s. S.K.Das & associates
M/s. N.Lenka & associates
M/s. A.K.Mishra & associates
M/s. K.K.Swain & associates
M/s. K.K.Rout & associates
M/s. P.K.Kar & associates
M/s. C.R.Swain & associates
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M/s. L.K.Mohanty & associates
M/s. S.B.Jena & associates
M/s. C.R.Nandi & associates
M/s. N.N.Mohapatra & associates
M/s. B.Routray & associates
Mr. Manoranjan Nayak
M/s. P.K.Ratha & associates.

For Opp.Parties - Mr. K.K.Rath, Standing Counsel, SME.
Mr. P.K.Mohanty for OPEPA

H.S.BHALLA,J. The petitioners in these batch of writ petitions are seeking modification of the Government resolution dated 10.1.2011 by virtue of which the minimum qualification has been fixed as +2 C.T. excluding Matric C.T. The petitioners have also prayed for a direction to opposite party no.1 to fill up the posts of Sikhya Sahayak on the ratio of 60:40 between the Matric C.T. and B.Ed. candidates. Thus, the question of law and facts involved in these petitions being same and arise from the same cause of action, they are heard together and are disposed of by this common order.

2. A thick better took place on the better field of the Government resolution and in order to appreciate the point involved in these writ petitions,

it is necessary to reproduce clauses 4.2 and 6.1 of the aforesaid resolution dated 10.1.2011, which runs as under:

> "*4.2. Vacant posts as well as newly created posts in the elementary schools on account of opening of new Primary/upper Primary Classes or due to Up-gradation of existing Primary Schools to Upper Primary Schools or opening of Class-VIII by way of up-gradation of existing Upper Primary Schools shall be filled up by the candidates having the qualification of +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and C.T. Training or +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and 2 year Diploma in Education (Special Education) a course recognized by Rehabilitation Council of India (RCI) and B.A., B.Sc. (or as equivalent Examination declared by appropriate authority) and B.Ed. or B.A., B.Sc. (or its equivalent examination declared by appropriate authority) and one year B.Ed (Special Education) a course recognized by Rehabilitation Council of India (RCI) as per the requirement under each category.*
>
> *As per Section 23(2) of the said Act, read with rule 16(2) and (4) of the said Rules the State Government shall request the Central Government for relaxation of the prescribed minimum qualification as laid down by the academic authority for appointment of teachers. The candidates with lesser qualification will be considered for appointment only on the basis of qualification so relaxed by the central Government.*
>
> *Untrained candidates selected as per the relaxed standard shall furnish an affidavit at the time of engagement to the effect that they shall acquire the required training qualification within a period of 5 years at their own cost."*
>
> *"6.1. The candidates must have passed +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and C.T. Training from a recognized Board/University or +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and 2 year Diploma in Education (Special Education) a course recognized by Rehabilitation Council of India (RCI) or B.A., B.Sc. (or its equivalent examination declared by appropriate authority) and B.Ed. from a recognized University or B.A., B.Sc. and one year B.Ed. (Special*

Education) a course recognized by Rehabilitation Council of India (RCI). The +2 candidates must have odia as a subject up to class-VII and B.Ed. candidates must have Odia as a subject up to class-X."

3. Most of the petitioners being Matric with C.T qualification are seeking engagement in the post of Sikshya Sahayak. As per their case the qualification of a teacher in the Primary Schools was Matric with C.T training and the Government of Orissa, School and Mass Education had published the resolution dated 10.01.2011 for engagement of Sikshya Sahayaks in different districts in the State of Odissa. As per the said resolution, the policy of engagement of Sikshya Sahayak is to provide free and compulsory education to all children of the age group of six to fourteen years. In order to provide free and compulsory education to every child, opp. party no.1 is proposing to fill up all the vacant posts as well as newly created posts in the elementary schools on account of opening of new primary/upper primary classes or due to up-gradation of existing primary schools to upper primary schools or opening of class-VIII by way of up-gradation of existing upper primary schools. The petitioners have further pleaded that the Orissa Elementary Education (Method of Recruitment and conditions of Teachers and Officers) Rules, 1997, hereinafter to be referred as "Rules, 1997" is the only Rule for the elementary teachers which deals with method of recruitment, qualification, and promotion of teachers of elementary schools, i.e., Primary schools and Upper primary schools. It is further pointed out that the existing statutory Rule, i.e. Rules, 1997 clearly stipulates that the Orissa Elementary Education Service, Level-V shall consist of the post of Asst. Teachers of Govt. Primary Schools and also Assistant Teachers of Govt. Upper Primary Schools. It further stipulates that in order to be eligible for direct recruitment to the post belonging to Level-V of the service, a candidate must have passed High School certificate Examination or an equivalent Examination and must have completed Secondary Teachers Training/Certified Teachers course from a recognized Board or University. Therefore, the case of the petitioners is that the minimum eligibility for an Asst. Teacher of Primary and Upper Primary schools is H.S.C. pass with C.T. Training, i.e. Matric with C.T. training. As per the said resolution, Sikshya Sahayaks will be recruited to work in Primary, Upper Primary and Upgraded Upper Primary Schools i.e. up to Class-VIII, but the minimum eligibility entry qualification has been prescribed in the said resolution as +2 Sc./Arts/Commerce with C.T. Training or +2 Science/Arts/Commerce without training and excludes the trained Matric qualified candidates from the eligibility criteria. So the petitioners have filed the present writ petitions challenging exclusion of Matric C.T. qualified candidates as well as exclusion of those persons who have become over age due to non-recruitment for a

number of years, from the eligibility criteria as per the Rules, 1997, which is the only available statutory Rule in the State of Orissa for recruitment and promotion of elementary teachers. Finally it has been prayed by the present petitioners that direction be issued for modification of the resolution as stated above with other ancillary prayer.

4. On the other hand, the writ petitions were contested by the opposite parties and opposite party no.1 has filed a counter affidavit in W.P.(C). No. 1860 of 2011, which was also adopted by the opposite parties for the purpose of other writ petitions and a statement was suffered by the learned counsel for the opposite parties that the counter be read in all other writ petitions. Most of the assertions raised by the petitioners have been denied by the opposite parties. However, it is categorically pleaded that the petitioners have sought for modification of resolution of the Government dated 10.01.2011, inter alia, on the ground that there is no avenue for the Matric C.T. candidates for being absorbed as Sikshya Sahayak, which violates the procedure for recruitment of elementary Teachers of Level-V, under the Rules, 1997. As per the case of the opp. parties, there has been provisions for appointment of the candidates having minimum qualification of +2 (Senior Secondary) trained onwards. Hence, this trained qualification is reflected therein under the facts and circumstances of the case. Therefore, the case of the petitioners is not liable to be accepted on facts and law. It is further pleaded that recruitment process under the impugned resolution is completely different from the recruitment of Primary teachers so envisaged under the Rules, 1997, because it has now become paramount consideration of the circumstances which has arisen in the context of 86th Amendment of the Constitution of India by introducing Article 21-A of the Constitution, providing that the State has to make endeavour to provide fundamental right of free and compulsory education to the children up to Class-VIII. In order to regulate the same, the Parliament has enacted the law and the State has taken minimum steps to ensure the right of children to free and compulsory education. The eligibility criteria has been stipulated for engagement of Sikshya Sahayak to teach the children in elementary level. It is further pointed out that the earlier recruitment of Sikhya Sahayak pursuant to the resolution dated 19.11.2009 was called in question in W.P.(C) No. 1361 of 2010 and many other cases, which were decided in a common judgment on 29.06.2010. But the facts and circumstances at that point of time when the judgment was delivered, are totally different than the present stage. The petitioners in the present writ petitions have attempted to equate the facts and circumstances of the present case with the judgment in the aforesaid case, which is totally not justified in the eye of law because at that point of time, the Sikshya Sahayaks were sought to be appointed under

different circumstances and were given the chance of being absorbed after some years. As against the said resolution, it was contended that as they (Sikshya Sayaks) were to be absorbed in future, the mode of selection prescribed therein will be conflicting with regard to procedure of recruitment of the Elementary Teacher as envisaged under the Elementary Teacher Recruitment Rule, 1997. It was further pleaded on behalf of the State that such recruitment of Sikshaya Sahayaks at that point of time was sought on the pretext of the Right to Education Act, which came into being and the Court after analyzing all the facts and submissions, came to the conclusion that by such time, since the effect of Right to Education Act had not come into being, the State could not have resorted to such procedure on the pretext of the Right of Children to Free and Compulsory Education Act, 2009, hereinafter to be referred to as the "Act, 2009". In that background, this Court quashed the resolution, however, gave liberty to the Government to take further steps for appointment of Sikshya Sahayak as per the existing Rules and procedure. It is further categorically pleaded that the existing Rules and procedure, so indicated, obviously means that by the impugned resolution which has come into force by virtue of the Act, 2009, the Right of Children to Free and Compulsory Education Rules, 2010, and other ancillary steps taken therein. Now by strictly adhering to the same, steps are taken for appointment of Sikshya Sahayaks, which are completely different from the teachers recruited under the Rules, 1997. It is further pleaded that resolution has been issued keeping in view the norms fixed by National Council for Teachers Education (NCTE) being an academic authority for appointment of teachers (Sikshya Sahayak) in elementary schools. It is further pleaded that the State Government has prescribed the minimum qualification as +2 with C.T. and accordingly clauses 4.2 and 6.1 have been provided under the resolution in consonance with the above statutory Act and Rules. It is also pleaded that Sikhya Sahayak scheme has been introduced for engagement of Sikshya Sahayaks by the Collector-cum-CEOs, Zilla Parishads on annual contract basis under the financial assistance of Government of India and State Government. The said contractual appointment will be renewable subject to satisfactory performance of the candidate during the operation of the scheme of Sarva Sikhya Abhijyan and the Rules, 1997 is not applicable to the Sikshya Sahayaks as per the Act, 2009. By denying other assertions raised in the writ petitions the opp. parties have prayed that all writ petitions be dismissed.

5. Some of the petitioners opted to file rejoinder, wherein they have reiterated the stand taken in the petitions and denied the assertions raised by the other side in their counter.

6. have heard learned counsel for the petitioners, learned Counsel appearing for the School and Mass Education Department and OPEPA.

7. At this stage, I would like to observe that it is the paramount consideration of the State in view of 86th Amendment of the Constitution of India by introducing Article 21-A of the Constitution to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The Parliament has enacted the law by virtue of the said amendment and as per the power under Entry No. 25 under concurrent list of the constitution namely the Right of Children to Free and Compulsory Education Act, 2009 which has come into force w.e.f. 01.04.2010. Under Section 38 of the Act, 2009, the State Government has framed Rules titled as "the Orissa Right of Children to Free and Compulsory Education, 2010" (in short called as "Rules, 2010"). In view of this, the State is required to take immediate steps to ensure the right of the children to free and compulsory education to the children and the impugned resolution has been issued by the Government by virtue of the powers under the said Act and Rules and the eligibility criteria has been fixed for engagement of Sikshya Sahayak to teach the children up to elementary level.

8. Before proceeding further, it is necessary to peep through Section 2 (f) of the Act, 2009 which defines "elementary education" as education from class-I to class-VIII and as per the counter affidavit filed by the State, Class-VIII has already been opened in 6774 Upper Primary (M.E.) Schools having classes up to Class-VIII, thereby upgrading the said schools. The Schedule to the Act clearly spells out that for sixth class to eighth class at least one teacher per class so that there shall be at least one teacher each for (i) Science and Mathematics, which presupposes that teacher having both Science and Mathematics is one of the subjects,(ii) Social Studies, (iii)languages. In this manner, it is crystal clear that from classes VI to VIII, there being three classes, there should be three teachers, who are required to be (i) Science and Mathematics, (ii) Social Studies and (iii) Languages and it was on account of all these, the Government have superseded all the earlier resolutions for engagement of Sikhya Sahayaks under the Sarva Sikhya Abhiyan. To my mind, therefore, as a special right, such special recruitment of Sikhya Sahayaks is being made, which is entirely on a different platform for recruitment of teachers under the Elementary Rules, 1997. It appears that they will also perform the duties of helper and as such, they are totally different from each other and there is no conflict and all these being introduced to achieve a different object. It is true that earlier also recruitment of Sikhya Sahayaks on account of the resolution dated

19.11.2009 was called in question in W.P.(C) No. 1361 of 2010, which was decided on 29.6.2010, but the judgment was passed on the basis of the facts and circumstances existing at that point of time. The petitioners tried to equate the facts and circumstances of that case and the judgment in the present circumstances, which is totally not justified in the eye of law because it is the admitted case of both the parties that at that point of time the Sikhya Sahayaks were sought to be appointed under a different circumstances and were given chance of being absorbed after some years. Moreover recruitment of Sikhya Sahayaks at that point of time was sought under the Right to Education Act and this Court after analyzing the entire case came to the conclusion that by such time since the effect of Right to Education Act has not come into being, the State could not have resorted to such procedure in the pretext of the Act, 2009 and in that background, this Court quashed the resolution and liberty was granted to the Government to take further steps for appointment of Sikhya Sahayaks as per the existing Rules and Procedure and now steps are being taken by the State Government which are completely different from the teachers recruited under the Rules, 1997. The eligible candidates of the State in respect of their respective place of residence has a right to apply for such Education District and a candidate of a particular district may apply in his own district or for any other district of his choice. It was also clarified that a candidate has to limit his application for one district, meaning thereby, that the candidate has the option to choose the district. In the instant case, the resolution in question, to my mind, has been issued for implementation of the newly enacted Central Act, namely, "The Right of Children to Free and Compulsory Education Act, 2009", and the Orissa Right of Children to Free and Compulsory Education Rules, 2010, which were framed in consonance with the said Act. It is further admitted case that the appointment of Sikhya Sahayaks is going to be made under the Sarva Sikhya Abhiyan, a time bound scheme of the Central Government, which is being implemented by the State Government in accordance with the norms fixed by National Council for Teachers Education (NCTE), being an academic authority for appointment of teachers in elementary schools, which is followed by the State Government. As per the criteria laid down by the NCTE, the State Government has prescribed the minimum qualification as +2 with C.T. and accordingly, clause 4.2 and 6.1 have been provided under the Resolution No.587/S & ME dated 10.01.2011 in accordance with the guidelines laid down under the Act and allied Rules. It is settled law that any qualification fixed in contravention of the prescribed qualification determined by the Regulation made by the NCTE.was bad. After having gone through the resolution, I find that the government in school and mass eduction Department fixed the guideline for engagement of Sikhya Sayakhak in accordance with the revised norms of Sarva Sikhya Abhiyan, a Centrally

sponsored plan scheme and in consnace with the provisions of Act.2009. The NCTE being the academic authority authorized by the Central Government in exercise of the powers conferred by sub-section (1) of Section 23 of the Act, 2009, by notification dated 23.8.2010 has laid down minimum qualification for a person to be eligible for appointment as teachers in Class –I to Class-V and Class-VI to Class-VIII in the schools referring to clause (n) of Section 2 of the Act, 2009. It is true that the word 'teacher' has not been used in the resolution, but after having gone through the resolution in its entirety, I find that the Sikhya Sahayaks in same manner would step into the shoes of the teacher either by helping a teacher to teach the students or by directly teaching the students in the elementary level. As per the notification of the NCTE, the minimum qualification for a teacher of schools having classes I to Class-V is +2 (Senior Secondary) with two years Diploma in Elementary Education (C.T.) and the minimum qualification for a teacher of a school having Class-VI to VIII is B.A., B.Sc. with B.Ed. In view of all these, I find that the clauses 4.2 and 6.1 of the resolution are justified and in consonance with the revised norms of Sarva Sikhya Abhiyan and as per the provisions of Act, 2009.

9. The Sikhya Sahayak are going to be engaged within a particular time frame for implementation of the Central sponsored Scheme, namely, Sarva Sikhya Aviyan. In the scheme the sharing pattern of funds of the Central Government and the State Government is at the ratio of 65% and 35% respectively. If the Scheme is not implemented within the stipulated period, the State will have to refund the amount pertaining to the share of the Central Government which may be detrimental to public interest of the State. It is the obligation of the State to furnish the utilization of fund so as to justify funding for the next financial year in the interest of the State's progress and development and unless the State utilizes the fund in proper implementing the scheme in time, the object to ensure the fundamental right to education under Article 21-A of the Constitution will be frustrated. In such a situation the State may be de-listed of getting the benefit and implementing the scheme under the Act, 2009. Moreover Rules, 1997 is applicable for the recruitment of regular teacher who hold the civil post under the elementary cadre and the said Rule is not applicable so far as engagement of Sikhya Sahayaks under a particular scheme is concerned. The resolution further spells out that the employees are to be engaged on annual contract basis subject to operation of the scheme. As per the provision under Section 23(1) of the Act, 2009 and Rule 15 of the Rules, 2010, the eligibility criteria with regard to qualification for engagement of teacher has been framed, which lays down that any person possessing such minimum qualification by an academic authority authorized by the Central Govt. by a notification shall be

eligible for appointment as a teacher whereas Act 23(2) lays down that if a State does not have adequate institution offering courses or teaching in teacher education or teachers possessing minimum qualification as laid down under sub-Section (1) are not available in sufficient numbers the Central Government may, if it deems necessary, by notification, relax the minimum qualifications as required for appointment as a teacher for such period not extending five years, as may be specified in that notification provided that a teacher who at the commencement of the Act does not possess the qualification as laid down in sub-section (1), shall acquire such minimum qualification within a period of five years.

10. The Government of India by way of notification dated 31.03.2010 in exercise of the power conferred by sub-section-I of Section 29 of the Act, 2009 authorised the NCTE to formulate all curriculum and evolution procedure for elementary education as an academic authority. In exercise of the powers conferred under sub-section (1) of Section 23 of the Act, the Central Government also authorized the NCTE as academic authority to lay down minimum qualification for a person to be eligible for appointment as a teacher. The relevant portion of notification dated 23.8.2010 of NCTE stipulating the minimum qualification runs as under:

> "In exercise of the powers conferred by Sub-section (1) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009(35 of 2009) and in pursuance of Notification No.S.O.750(E) dated 31st March, 2010 issued by the Department of School Education and Literacy, Ministry of Human Resource Development, Government of India, the National Council for Teacher Education (NCTE), hereby lays down the following minimum qualifications for a person to be eligible for appointment as a teacher in Class I to VIII in a school referred to in clause (n) of Section 2 of the Right of Children to Free and Compulsory Education Act, 2009 with effect from the date of this notification:
>
> 1. Minimum qualifications:
>
> (i) Classes I-V
>
> (a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)
>
> OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations 2002

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.E.Ed)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET) to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

(ii) Classes VI-VIII

(a) B.A./B.Sc. and 2-year Diploma in Elementary Education (by whatever name known)

OR

B.A./B.Sc. with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

B.A./B.Sc. with at least 45% marks and 1-year Bachelor in Education (B.Ed.) in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.E.Ed).

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A./B.Sc. Ed. Or B.A.Ed/ B.Sc.Ed

OR

B.A./B.Sc. with at least 50% marks and 1-year B.Ed.(Special Education)

(b) Pass in the Teacher Eligibility Test (TET) to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose."

11. The State Government published the impugned resolution and the consequential advertisement by quoting the aforesaid minimum eligibility criteria with regard to educational qualification of Sikhya Sahayaks from Class I to Class-VIII in accordance with the norms, procedure, guidelines, Act, 2009 and Rules, 2010. The State Government has also clarified that the policy decision was taken by the State by by eliminating the residential status in consonance with Articles 14 and 16 of the Constitution of India and in pursuance of the earlier decision of this Court. I find that in order to avoid multiplicity of litigation, the applicants have been instructed to file application in their respective education district on his/her own choice and as such, I find that the State has not committed any illegality so far as residential part is concerned. With regard to age, as has already been stated, age relaxation cannot be done as such relaxation has already been given in the resolution and the advertisement that a candidate under general category up to 42 years can apply for the post. Moreover, the petitioners have not challenged the Act, 2009 or the Rules, 2010, basing upon which the impugned resolution has been passed and the advertisement has been published. Unless the said Act and Rules are set aside, the claim of the petitioners are devoid of merit and as such, the same are liable to be rejected.

12. Now at this stage I would also like to assess the case of the petitioners from different angle and to my mind unless and until there is infringement of fundamental right, the policy decision of the State or the Union cannot be interfered with. At the cost of repetition, in the present case, the Constitution has introduced Article 21-A in the 86th amendment that the State has to make endeavour to provide fundamental right to free and compulsory education to the children up to Class-VIII. In order to regulate the same, the Parliament has enacted the law by virtue of the said amendment so also as per power under Entry 25 under concurrent list of Constitution, namely, Act, 2009 and the State was given power to frame rule under Section 38 of the said Act and pursuant to which the State framed the Rules, 2010. The impugned resolution is in consonance with the existing Act and Rules and moreover, it is settled that the policy decision cannot be challenged and the petitioners cannot take any benefit if the State has taken policy decision in the interest of the public. The State has authority and power to specify the method of recruitment and under its inherent power to revise and substitute the same and the petitioners have no right to claim the appointment on the basis of earlier notification. The petitioners cannot dictate their terms to the Government in order to change the eligibility criteria and the State has passed the resolution declaring the eligibility criteria strictly in accordance with the criteria laid down by the academic authority, i.e. NCTE.

13. It is settled law that the Government has a right to change its policy from time to time according to administrative exigencies and demands of the relevant time. As a matter of fact, the Courts would be slow in interfering with the matters of Government policy except where it is shown that the decision is unfair, malafide or contrary to any statutory directions. In the instant case, in response to the advertisement, 1,88,000 applications were received by the Government for engagement of Sikhya Sahayak in their newly created policy in order to fill up 24,000 posts, meaning thereby that 24,000 persons who are eligible as per the resolution in question are being engaged and the present petitioners cannot stall their engagement nor can they dictate their terms to the Government in order to change the eligibility criteria, which has been fixed by the Government strictly in accordance with the policy of the academic authority, i.e., NCTE. There is no justification for this Court to interfere with the policy of the Government merely on the ground of change in the policy. The Government has taken a different policy decision in order to implement the scheme floated by the Central Government, the major portion of which is being funded by the Union of India. Moreover, to my mind, keeping in view the facts and circumstances put-forward by both the parties, the prescribed eligibility qualification for engagement of Sikhya Sahayak in the newly floated scheme under the Act, 2009 and the Rules, 2010 are the matters to be considered by the appropriate authority. It is not for the Courts to decide whether a particular educational qualification should or should not be accepted. Learned counsel appearing for the opposite parties have rightly submitted that the resolution has been issued strictly in accordance with the norms fixed by the academic authority with regard to educational qualification. Moreover, it does not appeal to reasoning that the Sikhya Sahayaks having qualification of Matriculate would be able to assist the teachers or in other words would be able to teach the students at elementary level-V. Higher qualification is always good for the betterment of the children, and quality education can only be provided by a person having higher educational qualification. It does not appeal to reasoning at all that a teacher having qualification of Matric would be able to impart good quality education to the students studying in Class I till Class-VIII. The present petitioners cannot force the candidates, who are being appointed, to board a sinking ship. It is in the public interest of the State of Orissa that the policy which has been formulated by the Government of India wherein the Government of India is contributing 65% of the funds for the scheme specially floated for appointment of Sikhya Sahayak under the Sarva Sikhya Aviyan, which continues without any interruption and no hurdle can be created by the petitioners in the policy matter of the Government of India as well as State of Orissa.

14. I have gone through the law referred to by the learned counsel for the petitioners in **T.M.A. Pai Foundation v. State of Karnataka**, (2002) 8 SCC 481, **P.A.Inamadar v. State of Maharastra**, (2005) 6 SCC 527, **Miss. Alakha Das v. Director, T.E. & SCERT**, 1995(II) OLR, 145,Chandramani Jena and others v. State of Orissa and others, 2007(II) OLR,577, Govinf A.Mane and others v. State of Maharashtra and others,AIR 2000 SC 1576, Minor A.Periakaruppan v. State of Tamil Nadu, AIR 1971 SC 2303 **Gajendra Singh and others v. Ajaya Singh and others**, 2010 LAB.I.C., 2388, **State of Rajasthan v. R.Dayal and others**, 1997 (10) SCC 419, and **Y.V.Rangaiah and others v. J.Sreenivasa Rao and others**, 1983(3) SCC 284. A reading of the aforesaid rulings would show that they bear no resemblance to the facts of the instant case and do not in any manner support the point canvassed in the context of the nature and circumstances of the present case.

15. It is well settled principle of law that Court cannot read anything into a statutory provision, which is plain and unambiguous. The language employed in a statute is determinative factor of legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. In **Ganga Prasad Verma (Dr.) v. State of Bihar,** 1995(Supp) 1 SCC, 192, it has been held that where the language of the Act is clear and explicit, the court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

16. The State has no competence to make Rules in contravention of the regulations/notifications issued by the Union of India and declared by the academic authority. I am of the considered opinion that in such circumstances, the State is fully justified in amending the requisite qualification. Moreover, in view of Article 254 of the Constitution, Rules, 1997 have got absolutely no application to the matter in question.

17. In view of what has been discussed above, I find that no modification is required in the impugned resolution and there is nothing to be set right and in the final analysis, the writ petitions are dismissed. Parties are left to bear their own cost.

Writ petition dismissed.

2011 (I) ILR- CUT- 946

H.S.BHALLA, J.

MISC.CASE NO.1893 OF 2008
(Arising out of M.A.C.A .No.853 of 2008)
(Decided on 04.03.2011)

S.SIBA RAO ….. ..Appellant.

.Vrs.

NABIN MAHAKUR & ANR. ……..Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.173 (1).

The word "shall" used in the proviso to sub-Section (1) of Section 173 M.V. Act is mandatory and appellant is required to deposit Rs.25,000/- as statutory deposit failing which the appeal will not be maintainable.

In the present case Tribunal found the owner liable to pay compensation and has given a breathing time to the owner by directing the Insurance Company to pay the award to the claimant and recover the same from the owner – Appeal filed by owner with an application to exempt him from depositing the statutory deposit – Held, without the statutory deposit appeal can not be entertained.

(Para 15 & 17)

Case laws Referred to:-

1.AIR 1992 SC 1981 : (Nelson Motis-V-Union of India)
2.AIR 2001 SC 1980 : (Gurudevdatt VKSSS Maaryadit -V-State of Maharashtra).
3.AIR 2005 SC 294 : (State of Jharkhand-V-Govind Singh).
4.AIR 2007 SC 1711 : (Tamil Nadu State Electricity Board -V-Central Electricity Regulatory Commission)
5.AIR 1961 SC 751 : (State of U.P.-V-Babu Ram)
6.AIR 1961 SC 1480 : (Sainik Motors-V-State of Rajasthan).
7.AIR 1976 SC 263 : (Govindlal Chagganlal Patel-V-Agriculture Produce MarketCommittee).

For Appellant - M/s. J.R.Dash & Associates.
For Respondents - None

H.S.BHALLA, J. Heard learned counsel for the appellant.

2. The appellant has filed this application to exempt him from paying the statutory deposit.

3. Perusal of the file clearly spells out that the appellant has not made statutory deposit of Rs.25,000/- as per the requirement of Section 173 of the M.V. Act, 1988 for maintaining this appeal. Learned counsel for the appellant has urged that since the liability of the Insurance Company at the first instance has been fixed by the Tribunal, therefore, the appellant, who is the owner of the vehicle in question is not required to deposit the statutory deposit of Rs.25,000/- for maintaining this appeal and he filed an application for exempting the appellant from making the statutory deposit of Rs.25,000/-. But at a later stage, he also undertook to deposit the amount and number of opportunities were granted to him but so far the statutory deposit has not been made.

4. Learned counsel for the appellant has further submitted that the requirement of Section 173 of the M.V. Act, 1988 is satisfied as the Insurance Company has been directed by the Tribunal to deposit the entire amount to pay compensation and no useful purpose would be served directing the appellant, who is the owner of the vehicle to deposit Rs.25,000/- for filing the appeal. The purpose of this Section is to ensure deposit of Rs.25,000/- only with a view to pay the said amount to the aggrieved party. But in the present case, since the entire amount at the first instance is required to be deposited by the Insurance Company, therefore, the object of Section 173 has already been achieved and there will be no use to direct the appellant to deposit Rs.25,000/- for the same award under challenge. He further submitted that if the application is not allowed, serious prejudice would be caused to the appellant. Therefore, his exemption application should be allowed.

5. Before examining the prayer of the appellant with regard to exemption to deposit Rs.25,000/- for filing the present appeal, the language used in sub-section (1) of Section 173 of the M.V. Act, 1988 is required to be looked into, which is re-produced below:

> " 173. Appeals (1) Subject to the provisions of sub-section (2) any person aggrieved by an award of a Claims Tribunal may, within ninety days from the date of the award, prefer an appeal to the High Court;
> Provided that no appeal by the person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it twenty-five thousand rupees of fifty percent of the amount so awarded, whichever is less, in the manner directed by the High Court:
>
> Provided further that, the High Court may entertain the appeal after the expiry of the said period of ninety days, if it is satisfied that the

appellant was prevented by sufficient cause from preferring the appeal in time.

(2) No appeal shall lie against any award of a Claims Tribunal if the amount in dispute in the appeal is less than ten thousand rupees."

6. From plain reading of the proviso to sub-section (1) of Section 173, it is apparent that any person, who is required to pay any amount under the award passed by the Claims Tribunal, his appeal can be entertained by the High Court only if he makes deposit of specific amount as required by the said proviso and can not claim exemption from making the deposit on the ground that the amount under challenge is required to be deposited at the first instance by the Insurance Company.

7. The first and preliminary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. The question of interpretation arises only when the language is ambiguous, and is capable other interpretation also.

8. From a bare perusal of the language of the proviso of sub-section (1) of Section 173 of the Motor Vehicles Act, 1988, it is apparent that the language is clear and unambiguous and no second meaning as contained in the Section itself can be given.

9. The Apex Court in the case of Nelson Motis v. Union of India, A.I.R. 1992 S.C., 1981; Gurudevdatt VKSSS Maryadit v. State of Maharashtra, AIR 2001 S.C. 1980; State of Jharkhand v. Givind Singh, A.I.R., 2005 S.C. 294, has held that if the words of statute are clear, plain or unambiguous, they are reasonably susceptible to only one meaning are bound to give effect to that meaning irrespective of consequences.

10. The Apex Court in the case of Tamil Nadu State Electricity Board v. Central Electricity Regulatory Commission, A.I.R. 2007 S.C. 1711, has held that the results of construction are not matter for the Court even though they may be strange or surprising, unreasonable or unjust or oppressive.

11. The matter can be examined from another angle also. The proviso to sub-section (1) of Section 173 of the Act contains the word "shall" and where in the statute the word "shall" is used, it is normally read as must and in other words mandatory.

12. The Apex Court in the case of State of U.P. v. Babu Ram, A.I,.R., 1961 S.C. 751, has held that the use of word "shall" raises presumption that particular provision is imperative.

13. The decision are otherwise also. The Apex Court in the case of Sainik Motor v. State of Rajasthan, A.I.R. 1961 S.C. 1480, has held that the word "shall" is ordinarily mandatory but it is sometimes not so interpreted if the context or intention otherwise demands.

14. The Apex Court in the case of Govindlal Chagganlal Patel v. Agriculture Produce Market Committee, A.I.R. 1976 S.C. 263, has held that when the statute uses word "shall" prima facie, it is mandatory, but the Court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute.

15. From the perusal of the above decisions of the Apex Court, it is clear that the word "shall" used in the statute is normally mandatory and sometimes it is directory also if the circumstances so demand but here in the particular case since the Tribunal has found the liability of the appellant to pay the amount of compensation to the claimant and only given a breathing time to the appellant by directing the Insurance Company to pay the awarded amount to the claimant and then recover from the appellant, therefore, the initial liability is of the appellant and not of the Insurance Company. In view of this, it can not be said that any prejudice will be caused to the appellant in case he is required to deposit Rs.25,000/- as required under Section 173 of the Motor Vehicles Act.

16. Since, the Insurance Company has not come before this Court and the owner of the vehicle has filed the present appeal and in view of the Tribunal's judgment awarded amount paid to the claimant has to be recovered from the appellant, therefore, pre-requisite condition of deposit of Rs.25,000/- or 50% whichever is less in view of Section of the Motor Vehicles Act for the purposes of filing the appeal is applicable in full force in view of the language used in the section.

17. In view of that I am of the opinion that the provisio of sub-section (1) of Section 173 of the Motor Vehicles Act, 1988 is mandatory and the appellant is required to deposit Rs.25,000/- as per the scheme of the Act and without statutory deposit by the appellant, the appeal will not be maintainable.

18. As already observed above, learned counsel for the appellant thrice undertook to deposit the statutory amount as is evident from the orders dated 16.3.2010, 25.11.2010 and 14.1.2011, but even then the same was not deposited. In view of series of lapses on the part of the appellant, particularly when he undertook to deposit the statutory deposit on number of times, no case is made out to allow any further time for deposit of the statutory amount.

19. In the final analysis, in the absence of statutory amount and for the reasons discussed above, the present appeal can not be entertained and the same is dismissed.

Appeal dismissed.

. **2011 (I) ILR- CUT- 951**

SANJU PANDA, J.

O.J.C. NO.13331 OF 2000 (Decided on 09.03.2011)

PANIKA BHOI …. …Petitioner.

.Vrs.

KUNU BARIHA & ORS. …….. Opp.Parties.

(A) TRANSFER OF PROPERTY ACT, 1882 (ACT NO.4 OF 1882) – S.41.

A benamidar is an ostensible owner – If a person purchases from a benamidar without knowing anything about the benami transaction after due enquiry and the benamidar has also not disclosed anything, in that case the purchaser for his bonafides is protected U/s.41 of the T.P.Act.

(Para 16)

(B) ORISSA LAND REFORMS ACT1960 (ACT NO.16 OF1960) – S.23.

Plea of benami transaction – Since none of the parties claim property as real owner or benamidar rather the petitioner claims that he is the owner of the property being the bonafide purchaser for consideration and he was in possession of the property when the proceeding was initiated and he is also a Schedule Tribe person can the OLR authorities restore back the properties in favour of other parties by evicting the petitioner from the disputed property – Held, No. -Impugned orders passed by the OLR authorities are illegal and liable to be set aside.

(Para 23 & 24)

Case laws Referred to:-

1.AIR 1974 SC 171 : (Jaydayal Poddar through L.Rs and Anr.-V-Mst. Bibi Hazra & Ors).
2.AIR 1996 SC 238 : (R.Rajagopal Reddy(dead) by L.Rs.& Ors.-V-Padmin Chandrasekharan(dead) by L.Rs.).
3.(38) 1972 CLT 1323 : (Sri Madan Mohan Das Babji-V-Brundaban Pal).
4.AIR 1991Orissa 131 : (Gopal Bariha-V-Satyanarayan Das & Ors.)
5.(1996)7 SCC 55 : (Sankara Hali & Sankara Institute of Philosophy & Culture -V- Kishori Lal Goenka).

For Petitioner - M/s. N.C.Pati, A.K.Mohapatra, S.Mishra, S.Tripathy, N.Singh & A.K.Panda.
For Opp.Party No.1. – M/s. Ajodhya Ranjan Dash & S.K.Nanda

S. PANDA, J. The petitioner has filed this writ petition challenging the impugned orders in Annexures 4 to 6 passed by opposite parties 5 to 7 respectively under Section 23 of the Orissa Land Reforms Act (in short, "the OLR Act").

2. The brief facts of the case are that basing on the report of A.D.W.O, Patnagarh, Revenue Misc. Case No.8/6 of 1994 was initiated before the Sub-Collector, Patnagarh under Section 23 of the Act. It was alleged that the disputed land originally belonged to Lochana Bariha, the grand-mother of opposite parties 1 and 2, who is a Scheduled Tribe. She transferred the same in favour of one Rohitaswa Bariha, who also belongs to Scheduled Tribe, by executing a registered sale deed dated 5.2.1974. Rohitaswa Bariha, in his turn, sold the land in question to Panika Bhoi, the present petitioner, by executing two registered sale deeds dated 5.7.1985 and 6.7.1985. However, opposite parties 3 and 4 Kairu Sahu and Rasika Sahu respectively are the real owners of the disputed land. They purchased the property Benami in the name of Rohitaswa Bariha as they do not belong to Scheduled Tribes. As the sale deeds were executed without obtaining permission from the competent authority, they claimed for restoration of the said property. In the said case, they did not implead the present petitioner as a party but subsequently the present petitioner was made a party on an application being filed by him. He filed his show cause. Opposite parties 3 and 4 filed their show cause taking a plea that they had neither purchased the property ever in the name of Rohitaswa Bariha nor had any interest in the disputed land. A false case had been foisted against them due to party-faction in the village. Rohitaswa Bariha had purchased the disputed property and executed the two sale deeds in favour of the present petitioner. The purchaser was in possession of the property in pursuance of the said registered sale deeds. The present petitioner being a third party purchaser filed his show cause stating therein that Lochana Bariha was the real owner of the disputed land and she transferred the property in the name of Rohitaswa Bariha on 5.2.1974. Both the vendor and the purchaser belong to Scheduled Tribe. Subsequently Rohitaswa Bariha transferred the disputed land by two registered sale deeds dated 5.7.1985 and 6.7.1985 in favour of the present petitioner. The present petitioner is also a Scheduled Tribe person. Therefore, prior permission was not necessary and from the date of purchase he is in possession of the property in question.

3. Opposite parties examined six witnesses in support of their claims. The present petitioner also examined six witnesses and filed certain documents i.e. registered sale deeds, current record-of-right which showed

that the petitioner was in possession of the disputed land and some affidavits. Rohitaswa Bariha filed an affidavit supporting the case of oppositeparties 1 and 2. Subsequently he filed another affidavit supporting the case of the present petitioner. The Sub-Collector, without appreciating the matter in its proper perspective, relying on the affidavit filed by Rohitaswa Bariha passed the impugned order, under Annexure-4 on 27.3.1996 in favour of opposite parties 1 and 2. Against the said order, the petitioner filed OLR Appeal No.6 of 1996 before the Addl. District Magistrate, Bolangir who dismissed the appeal holding that the ROR of the current settlement showed that the name of Rohitaswa Bariha had been recorded in the remarks column as "in illegal possession". The ROR would have been prepared in his name, had he been the real owner. Challenging the said order, OLR Revision No.21 of 2000 was filed before the Collector, Bolangir. The revisional authority also dismissed the revision holding that Rohitaswa Bariha was the Benamidar and the two contradictory affidavits filed by Rohitaswa Bariha created doubt regarding the proof of transfer of land through execution of a registered sale deed in the name of a Benamidar. Since the proceeding under Section 23 of the OLR Act is of summary nature and enquiry should be conducted before disposal to the full satisfaction of the Revenue Officer, the provision of Sections 91 and 92 of the Indian Evidence Act, 1872 cannot be taken into consideration in respect of the cases under the provisions of the OLR Act. Hence this writ petition.

4. Learned counsel appearing for the petitioner submitted that the impugned orders passed by the OLR authorities are vitiated for the reason that the said authorities, while passing the orders, did not keep in mind the essential ingredients of Benami transaction. Opposite parties 1 and 2 having failed to prove the ingredients of Benami transaction, their claim should have been dismissed by the OLR Authorities. Since the affidavits of Rohitaswa Bariha are oath against oath, the OLR authorities should have discarded the same as contradictory. The petitioner who is a Scheduled Tribe person purchased the disputed property and is in possession thereof as the real owner of the same. The claim of opposite parties 1 and 2 should have been rejected as the proceeding was initiated in the year 1994 in view of the provisions of the Benami Transactions (Prohibition) Act which came into force in the year 1988. Therefore, interference of this Court is warranted by quashing the impugned orders passed by the OLR authorities. In support of his contentions, he cited the decisions of the apex Court in the cases of **Jaydayal Poddar through L.Rs and another v. Mst. Bibi Hazra and others**, **AIR 1974 SC 171** and **R.Rajagopal Reddy (dead) by L.Rs and othrs v. Padmini Chandrasekharan (dead) by L.Rs.**, **AIR 1996 SC 238** and the decision of this Court in the case of **Sri Madan Mohan Das Babaji v. Brundaban Pal**, **(38) 1972 CLT 1323.**

5. Learned counsel appearing for opposite party no.1 supporting the impugned orders submitted that the petitioner being third party to the transaction, the provision of the Benami Transactions (Prohibition) Act is not applicable to them and rightly the OLR authorities did not entertain the application and coming to a finding that the property was purchased Benami by opposite parties 3 and 4, it directed for restoration of possession of property to opposite parties 1 and 2. In pursuance of the said order, opposite parties 1 and 2 came to possess the disputed property on 30.6.2000. In support of his submission, he cited the decision of the apex Court in the case **Gopal Bariha v. Satyanarayan Das and others**, **AIR 1991 Orissa 131**.

6. Considering the above submissions of the parties, this Court has to determine the following questions;

(i)Whether the Benami Transactions (Prohibition) Act, 1988 is applicable to the present proceeding?, and

(ii)Can the OLR authorities restore back the properties evicting the present petitioner, who is a Scheduled Tribe person and is a bona fide purchaser, from the disputed property?

7. This Court, after perusal of the impugned orders passed by the Revenue authorities, finds the followings admitted facts:

(a) The property originally belongs to the grand-mother of opposite parties 1 and 2 i.e. Lochana Bariha who belongs to Scheduled Tribe. She executed the sale deed on 5.2.1974 in favour of Rohitaswa Bariha.

(b) Thereafter Rohitaswa Bariha executed two registered sale deeds dated 5.7.1985 and 6.7.1985 in respect of the disputed land in favour of the present petitioner-Panika Bhoi who is in possession of the disputed property. The proceeding under Section 23 of the OLR Act was initiated in the year 1994.

(c) The ROR reveals the possession of "Rohitaswa Bariha".

8. For better appreciation, Section 23 of the OLR Act is extracted below:

"**23. Effect of transfer in contravention of Section 22 –**

(1) In the case of any transfer in contravention of the provisions of sub-section (1) of S.22 the Revenue Officer on his own information or on the application of any person interested in the land may issue notice in the prescribed manner calling upon the transferor and

transferee to show cause why the transfer should not be declared invalid."

9. Opposite parties 1 and 2 filed an application to restore the possession of the disputed land as they are the legal heirs of the original owner-Lochana Bariha who belongs to Scheduled Tribe and opposite parties 3 and 4 purchased the property from their grand-mother Lochana Bariha illegally in the name of Rohitaswa Bariha. They filed their show cause taking a specific plea that at no point of time they purchased the property or they were in possession of the property; rather a false case had been foisted against them due to party-faction in the village. However, the present petitioner filed an intervention application before the OLR authorities. His application was allowed and he was permitted to contest the proceeding. He purchased the property through two registered sale deeds and after purchase he is in possession of the property. He also produced the original registered sale deeds before the OLR authorities. Since he belongs to a Scheduled Tribe and the transfer was made by a Scheduled Tribe person in favour of another Scheduled Tribe person, no permission was necessary.

10. So far as transfer made by Lochana Bariha in favour of Rohitaswa Bariha is concerned, the allegation of opposite parties 1 and 2 is that Rohitaswa Bariha is a Benamidar. The real owners of the properties are opposite parties 3 and 4. However, opposite parties 1 and 2 while advancing the plea of Benami transaction did not adduce any evidence from which it can conclusively be inferred that the transaction between Lochana Bariha and Rohitaswa Bariha was a benami transaction.

11. Benami transactions were the recognized species of legal transactions pertaining to immovable properties and the said transactions were recognized prior to coming into operation of Benami Transactions (Prohibition) Act (45 of 1988). Therefore, it was a legal right of a party to contend in those days that even though the transfer of the property had been effected in the name of a Benamidar for a party from whom the consideration had moved, the party was the real owner. Hence, the Benamidar was bound to restore such property to the real owner. If the Benamidar took up a different attitude then the law provided, a substantive right accrued to the party to come to the court for getting appropriate declaration and relief of possession on that ground. However, after coming into operation of the Benami Transactions (Prohibition) Act in the year 1988, such transactions are prohibited. The Act No.45 of 1988 in its preamble states that it is an Act to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto.

12. The apex Court in R.Rajagopal Reddy's case (supra) held that the Act cannot be treated to be declaratory in nature. Declaratory enactment declares and clarifies the real intention of the legislature in connection with an earlier existing transaction or enactment, it does not create new rights or obligations. On the express language of Section 3, the Act cannot be said to be declaratory but in substance it is prohibitory in nature and seeks to destroy the rights of the real owner qua properties held benami and in this connection it has taken away the right of the real owner both for filing a suit or for taking such a defence in a suit by benamidar. Such an Act which prohibits benami transactions and destroys rights flowing from such transactions as existing earlier is really not a declaratory enactment. Therein, the apex Court further held, with respect, that the decision of the apex Court in Mithilesh Kumari v. Prem Bihari reported in AIR 1989 SC 1247 does not lay down correct law so far as the applicability of Section 4(1) and Section 4(2) to the extent indicated in that judgment, to pending proceedings when these Sections came into force, is concerned.

13. Therefore, from the said decision it appears that the Act 1988 is prospective and nobody can take a plea of benami transaction after coming into operation of the said Act. The contention of learned counsel for opposite parties 1 and 2 is that a third party can raise the said question as held by this Court in Gopal Bariha's case (supra). Hence, OLR authorities have rightly determined the said question in the present case. The aforesaid proceeding was initiated before the 1988 Act came into force. However, from the orders of the OLR authorities it appears that they did not take into consideration whether the transaction between Lochana Bariha and Rohitaswa Bariha was a benami transaction or not. They have not given any finding on that score.

14. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. The question as to what his intention has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc.

15. Though the question, whether a particular sale is Benami or not, is largely one of fact, and for determining this question, no absolute formulae or

acid test, uniformally applicable in all situations, can be laid down, in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances.

16. The benamidar is an ostensible owner and if a person purchases from a benamidar without knowing anything about benami transaction after due enquiry and the benamidar has also not disclosed anything, in that case the purchaser is protected for his bona fide as per Section 41 of the Transfer of Property Act.

17. For better appreciation, Section 41 of the Transfer of Property Act is quoted below:

> **"41. Transfer by ostensible owner**
>
> Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:
>
> Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

18. The said principles are really the law on the subject of equitable estoppel. This section is an exception to the general rule that a person cannot convey a better title than he himself has in the property. The conditions set forth in the section must, therefore, be strictly complied with. Under the proviso to Section 41, the transferee must show that after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith as a bona fide purchaser.

19. In the light of the aforesaid principle of law, it is to be decided whether the transferee is protected under Section 41 of the T.P. Act. The said principle is the settled principle.

20. The apex Court in **Sankara Hali & Sankara Institute of Philosophy and Culture v. Kishori Lal Goenka**, **(1996) 7 SCC 55** while setting aside the Full Bench decision of the Calcutta High Court has held that the Act prohibits entering into benami transactions and says that no person shall enter into any benami transaction and further provides that whoever enters into such a transaction, shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Section 4 bars a

suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is so held or against any other person by or on behalf of a person claiming to be the real owner of such property. Similarly, no defence based on any right, in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. Section 41 of the Transfer of Property Act is clearly intended to protect third party transferees who is a bona fide purchaser and after due care and caution purchase the property from the ostensible owner believing him to be the real owner. It may next be noted that even if it is so assumed, the Court is of the opinion that in the instant case the ostensible owner having already released his right, title and interest as ostensible owner of the property in favour of the firm, the firm had acquired complete title over the property long before the Act came into force. Such a transaction which preceded the coming into force of the Act has not been voided by any specific provision in the Act.

21. Taking into consideration the above decisions of the apex Court, no doubt in the present case the OLR authorities have jurisdiction to enquire into benami transactions. However, opposite parties 1 and 2 signally failed to prove by admissible evidence regarding benami transactions by opposite parties 3 and 4. The OLR authorities have also not determined as to whether the transaction is a Benami transaction as indicated in Jaydayal Poddar's case of the apex Court referred to above paragraphs. However after coming into operation of the Benami Transactions (Prohibition) Act, it is not permissible to a party to claim the property as real owner against the Benamidar and the said Act is not applicable to the present case. The conduct of the parties also reveals that the person in whose name the properties stand, he acted and sold the property like a real owner.

22. The contesting parties adduced evidence regarding possession over the disputed land. Without considering the same, the OLR authorities had given weightage to the report of the ADWO (Adivasi Development Welfare Officer) which is rebuttable. The parties have also adduced rebuttal evidence by filing ROR and examining the witnesses in support of their possession. The ROR shows the possession of Rohitaswa Bariha and the evidence available on record as noted by the appellate authority in OLR Appeal No.6 of 1996 were totally ignored and come to an abrupt conclusion that the transaction is a benami transaction. As such, the finding reached by the OLR authorities ignoring the materials available on record is not sustainable in law. Question No.(i) is answered accordingly.

23. Since none of the parties is claiming the property as a real owner or benamidar; rather the petitioner's claim is that the property is his own and he is a bona fide purchaser for consideration and is in possession of the property when the proceeding was initiated and he is a Scheduled Tribe person, can the OLR authorities restore back the properties evicting him from the disputed property? The answer is obviously "No". The petitioner has not contravened any provision of law. Question No.(ii) is answered accordingly.

24. Therefore, the impugned orders passed by the OLR authorities are illegal and liable to be set aside. Accordingly, this Court sets aside Annexures 4,5 and 6 and directs that the disputed property be restored back to the petitioner within a period of one month from the date of communication of this order.

The writ petition is accordingly allowed. No costs.

Writ petition allowed.

2011 (I) ILR- CUT- 960

S.C.PARIJA, J.

M.A.C.A. NO.289 OF 2010 (Decided on 18.03.2011)

BAJAJ ALLIANZ GENERAL INSURANCE CO.LTD. …….. Appellant.

.*Vrs.*

PARBATI JENA & ORS. ……. Respondents.

MOTOR VEHICLE ACT, 1988 (ACT NO.59 OF 1988) – Ss. 147, 149.

Liability of Insurance Company – Driver of the offending tractor-trailer authorized to drive a light motor vehicle and tractor (non transport) – Insurance Policy issued in respect of the tractor-trailer was exclusively for agricultural purpose – Burden is on the insurer to show that at the time of accident tractor was not used for agricultural purpose but for commercial purpose – Tribunal held there being no evidence that the offending tractor was not used for agricultural purpose the Insurance Company is liable to pay the compensation amount – Hence the appeal.

No evidence on record that the offending vehicle was used for commercial purpose i.e. for carriage of goods – The insurer has not been able to show that the driver of the tractor-trailer not possessing a licence to drive a transport vehicle was the main or contributory cause of the accident – Moreover, the driving licence not containing an endorsement, authorizing the driver to drive a transport vehicle is not a fundamental breach of Policy condition but a mere technical breach, especially when the driving licence authorized the driver to drive a tractor – Held, the Insurance Company can not be permitted to avoid its liability.

Case laws Referred to:-

1.AIR 2009 SC 2151 : (Oriental Insurance Co.Ltd.-Vrs.-Angad Kol & Ors.)
2.AIR 2001 SC 3356 : (Nagashetty-Vrs.-United India Insurance Co.Ltd.)
3.AIR 2004 SC 1531 : (National Insurance Co.Ltd.-Vrs.-Swaran Singh & Ors.)

For Appellant - Adam Ali Khan, S.K.Mishra.
For Respondent - B.Singh, M.Mohapatra, P.B.Sinha, S.K.Baral, T.K.Dash (Res.No.1 to 3)

Pradip Ku.Mishra, P.P.Mishra, Sankar San Sahu. (R-4)

M.A.C.A. No.289 of 2010

18.03.2011 Heard learned counsel for the parties.

This appeal by the Insurance Company is directed against the award dated 24.02.2010, passed by the Motor Accident Claims Tribunal-I, Balasore, in M.A.C. No.95 of 2007, awarding an amount of Rs.2,79,848/- as compensation along with interest @7.5% per annum from the date of filing of the claim application, i.e.,25.6.2007, to be paid within two months.

Learned counsel for the appellant-Insurance Company submits that as the driver of the offending vehicle (tractor-trailer) bearing No.OR-01-K/3239 and 3240 did not possess a valid and effective driving licence at the time of the accident, learned Tribunal erred in saddling the liability on the present appellant, as the insurer of the offending tractor-trailer. In this regard, it is submitted that as the driving licence issued to the driver of the offending tractor-trailer authorized him to drive light motor vehicle and tractor (non-transport) and the vehicle in the question was registered as a transport vehicle, the said driving licence was not valid and effective, which is a breach of conditions of the insurance policy and therefore no liability could have been saddled on the present appellant. It is further submitted that the assessment of the compensation amount by the learned Tribunal is not proper and justified inasmuch as, there is no evidence on record to show that the deceased was working as a Raj Mistry and was earning Rs.2,600/- per month. Accordingly, it is submitted that the impugned award is not supported by materials on record and there being gross violation of the policy condition, the appellant, as the insurer of the offending vehicle, is not liable to pay the compensation amount.

Learned counsel for the appellant-Insurance Company has relied upon a decision of the apex Court in the case of Oriental ***Insurance Co.Ltd.-Vrs.- Angad Kol and others***, AIR 2009 SC 2151, in support of his contention that as the driver of the offending tractor-trailer did not possess a driving licence authorizing him to drive a transport vehicle and as the said tractor-trailer had been registered as a transport vehicle, there is no valid and effective driving licence, which is a breach of policy condition and therefore the appellant, as the insurer of the offending tractor-trailer, can not be saddled with the liability to pay the compensation amount.

On a perusal of the impugned award it is seen that the learned Tribunal has come to find that the driving licence (Ext.A) authorized the

driver Harish Chandra Singh to drive a light motor vehicle and tractor (non-transport) with effect from 10.6.1998. Learned Tribunal further found that the R.C. Book (Ext.B) revealed that the tractor had been registered as a transport vehicle. Learned Tribunal also found that the insurance policy (Ext.C) clearly disclosed that the warrantee was exclusively for use of the tractor and trailer for agricultural purpose. Learned Tribunal observed that a tractor can be used both for the agricultural purpose as well as commercial purpose and the burden is on the insurer to show that at the time of the accident, the tractor was not used for agricultural purpose but for commercial purpose. Accordingly, learned Tribunal proceeded to hold that the driver of the tractor was holding a valid and effective driving licence authorizing him to drive a tractor and trailer for agricultural purpose and there being no evidence to show that the offending tractor was not used for agricultural purpose, the Insurance Company is liable to pay the compensation amount.

In the case of ***Nagashetty –Vrs.- United India Insurance Co.Ltd***., AIR 2001 SC 3356, the Supreme Court had observed as follows:

> "xx xx xx Undoubtedly under Section 10 a licence is granted to drive specific categories of motor vehicles. The question is whether merely because a trailer was attached to the tractor and the tractor was used for carrying goods, the licence to drive a tractor becomes ineffective. If the argument of Mr. S.C. Sharda is to be accepted then every time an owner of a private car, who has a licence to drive a light motor vehicle, attaches a roof carrier to his car or a trailer to his car and carries goods thereon, the light motor vehicle would become a transport vehicle and the owner would be deemed to have no licence to drive that vehicle. It would lead to absurd either to a tractor or to a motor vehicle by itself does not make that tractor or motor vehicle a transport vehicle. The tractor or motor vehicle remains a tractor or motor vehicle. If a person has a valid driving licence to drive a tractor or a motor vehicle he continues to have a valid licence to drive that tractor or motor vehicle even if a trailer is attached to it and some goods are carried in it. In other words a person having a valid driving licence to drive a particular category of vehicle does not become disabled to drive that vehicle merely because a trailer is added to that vehicle."

In the case of National Insurance Co. Ltd.-Vrs.- Swaran Singh and others, AIR 2004 SC 1531, the Supreme Court observed as under:

> "Section 3 of the Act casts an obligation on a driver to hold an effective driving licence for the type of vehicle which he intends to

drive. Section 10 of the Act enables Central Government to prescribe forms of driving licences for various categories of vehicles mentioned in sub-section (20) of said section. The various types of vehicles described for which a driver may obtain a licence for one or more of them are (a) Motor cycle without gear, (b) motor cycle with gear, (c) invalid carriage, (d) light motor vehicle, (e) transport vehicle, (f) road roller and (g) motor vehicle of other specified description. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy passenger motor vehicle', 'invalid carriage, 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motor cycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer', and 'transport vehicle',. In claims for compensation for accidents, various kinds of breaches with regard to the conditions of driving licences arise for consideration before the Tribunal. A person possessing a driving licence for 'motor cycle without gear', for which he has no licence. Cases may also arise where a holder of driving licence for 'light motor vehicle' is found to be driving a ',maxi-cub, 'motor-cab' or 'omnibus' for which he has no licence. In each case on evidence led before the Tribunal, a decision has to be taken whether the fact of the driver possessing licence for one type of vehicle but found driving another type of vehicle, was the main or contributory cause of accident. If on facts, it is found that accident was caused solely because of some other unforeseen or intervening causes like mechanical failures and similar other causes having no nexus with driver not possessing requisite type of licence, the insurer will not be allowed to avoid its liability merely for technical breach of conditions concerning driving licence."

In the present case it is seen that the insurance policy issued in respect of the tractor-trailer was a Farmers Package Policy, specifying that the vehicle is to be used exclusively for the agricultural purpose. The driving licence issued to the driver Harish Chandra Singh authorized him to drive light motor vehicle and tractor (non-transport), which was valid and effective at the time of the accident. The Registration Certificate of the offending tractor shows that it was registered as a transport vehicle. As the tractor-trailer was used exclusively for agricultural purpose and the insurance policy issued to the said tractor-trailer was only for the said use, the vehicle can not be said to be a 'transport vehicle', as has been defined under Section 2(47) of the M.V.Act, 1988. Moreover, a tractor is a 'light motor vehicle', as defined in Section 2(21) of the said act. Further, there is no evidence on record to

show that the offending vehicle was being used for commercial purpose, i.e., for carriage of goods. Even otherwise, the insurer has not been able to show that the driver of the tractor-trailer not possessing a licence to drive a 'transport vehicle', was the main or contributory cause of the accident. Moreover, the driving licence not containing an endorsement, authorizing the driver to drive a 'transport vehicle' is not a fundamental breach of policy condition but a mere technical breach, especially when the driving licence authorized the driver to drive a tractor and therefore the Insurance Company cannot be permitted to avoid its liability on that score.

Coming to the decision cited by the learned counsel for the appellant in the case of Angad Kol (supra), the same has no application to the facts of the present case, inasmuch as, in the said case the driver was found to be driving a goods vehicle, while holding a driving licence authorizing him to drive M/cycle+LMV.

Coming to the assessment of the compensation amount, it is seen that though P.Ws.1,2 and 3 had stated in their evidence that the deceased Akshya Jena was working as a Raj Mistry and was earning Rs.120/- per day at the time of his accidental death. Learned Tribunal has taken the minimum wages approved by the Govt. of Orissa, applicable to skilled labour, which was prevalent at that point of time and excluding four holidays of the month, has taken the monthly income of the deceased to be Rs.2,600/-. After deducting 1/3rd towards personal expenses of the deceased, learned Tribunal has assessed the monthly contribution of the deceased to his family at Rs.1,733/-. As the deceased was aged about 50 years, as per the post-mortem report, learned Tribunal has applied the multiplier of '13' to calculate the loss of dependency. Learned Tribunal has further awarded Rs.9,500/- towards general damages.

Considering the findings of the learned Tribunal as given in the impugned award and the reasons assigned in support of the same, no impropriety or illegality can be said to have been committed by the learned Tribunal, so as to warrant any interference.

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

The appellant-Insurance Company is directed to deposit the awarded compensation amount and interest with the learned Tribunal within six weeks hence.

M.A.C.A. is accordingly dismissed.

Appeal dismissed.

2011 (I) ILR- CUT- 965

B.K.PATEL, J.

W.P.(C) NO.11143 OF 2010 (Decided on 30.3.2011)

KANAKA SAHU .....Petitioner.

.Vrs.

KRUSHNA CHANDRA SAHU & ORS. ..... Opp.Parties.

(A) CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – S.10.

Stay of suit –Requirements to attract applicability of Section 10 C.P.C. (1) the matter in issue in both suits must be substantially the same, (2) the previously instituted suit must be pending in the same Court in which the subsequent suit is brought, or in a different Court in India having jurisdiction to grant the relief claimed, or in a Court established or continued by the Central Government and having like jurisdiction, or before the Supreme Court, (3) both the suits must be between the same parties or their representatives, or such parties must be litigating in both the suits under the same title.

(Para 9)

(B) **CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – Ss.10, 151**.

Stay of suit – Earlier suit is for partition but the present suit is for permanent injunction – Parties to the present suit are not litigating against one another in the earlier suit – Matter in issue in both the suits are different – Provisions U/s. 10 C.P.C. has no application to the facts and circumstances of this case for which the trial Court without exercising jurisdiction U/s.10 C.P.C. passed the impugned order staying the present suit in exercise of power U/s.151 C.P.C. – Hence the writ petition.

Held, the impugned order staying the present suit till disposal of the earlier suit in exercise of power U/s.151 C.P.C.is without jurisdiction.

(Para 10,11,14)

Case laws Referred to:-

1.AIR 2005 SC 242 : (National Institute of M.H. & N.S.-V-C.Parameshwara)
2.104(2007) CLT 692 : (Smt. Suryamani Sarangi-V-Pravakar@Prava Shankar Sarangi)

For Petitioner - M/s. Biswanath Rath, B.B.Barik & S.K.Mishra.
For Opp.Parties - M/s. D.K.Mohapatra, B.B.Routray, D.Routray, S.Jena & S.K.Samal(for O.P.No.1)

B.K.PATEL,J. In this writ application, petitioner has assailed legality of the order dated 19.4.2010 passed by the learned Civil Judge (Junior Division), Berhampur in C.S.No.172 of 2006 (for short 'present suit') passed on the application under section 10 read with section 151 of the C.P.C. filed by the opposite parties to stay further proceeding in the present suit in the ground of pending of T.S. No.75 of 1980 (for short 'earlier suit') in the aforesaid Court.

2. Present suit is a suit for permanent injunction in which petitioner is the plaintiff and opposite parties are defendants. Earlier suit is a suit for partition. Suit property in present suit is included in B-schedule property in earlier suit. Plaintiff in present suit is defendant no.22 and defendants in present suit are defendant Nos.15 to 17 in earlier suit. Plaintiff in present suit has purchased the suit land on the strength of two registered sale deeds dated 20.9.2006 executed by Khirod Kumari Devi who is defendant no.2 in earlier suit. Earlier suit has been instituted by the plaintive against her co-sharers and their transferees. Plaintiff and defendants in the present suit have been impleaded in earlier suit as pendent lite transferees of some of the property therein

3. In the application under section 10 read with section 151 of the C.P.C. defendants made prayer to stay further proceeding in the present suit till disposal of earlier suit or, alternatively, to take up both the suits for hearing analogously. It is contended, inter alia, that right, title, interest and possession of the plaintiff in respect of the suit property in present suit may arise for consideration in the earlier suit also as the plaintiff in the earlier suit has denied execution of sale deeds in favour of the plaintiff in the present suit.

4. In the written objection filed against application under section 10 read with section 151 of the C.P.C. it is averred by the plaintiff that subject-matter in the present suit is different from earlier suit. In the earlier suit entire joint family property is the subject matter of dispute. By way of adjustments members of the joint family held and possessed different shares and accordingly mutation has been effected. Recorded owners have sold some of their respective share lands to different persons. Plaintiff in the present suit being a *bona fide* purchaser of the suit property, without notice of the earlier suit, result of earlier suit shall have no effect on the rights of the

parties of the present suit. In the meanwhile, members of joint family have relinquished their right over the suit property in the present suit as a result of which suit property in the present suit no longer forms part of the suit property in the earlier suit. It is specifically averred that causes of action, reliefs claimed as well as parties and issues in both the suits are different. Result of the present suit shall not be governed by the result of the earlier suit inasmuch as in the suit for partition the present suit property shall be adjusted against the shares of plaintiffs vendor.

5. While considering the application learned Civil Judge (Senior Division) appears to have taken note of the fact that in the earlier suit some of the defendants including the plaintiff in the present suit have filed applications to strike out their names in view of relinquishment deeds executed by successors of their vendors in respect of different parcels of land sold to them. In such circumstances, learned trial court in exercise of power under section 151 of the C.P.C. appears to have passed the order impugned in this writ petition to stay the suit till disposal of petitions filed by the above said defendants in the earlier suit, including present plaintiff, to strike out their names.

6. In assailing the impugned order learned counsel for the petitioner would strenuously contend that facts and circumstances in the present case do not at all justify exercise of discretion to stay the present suit by invoking provision under section 10 of the C.P.C. It is submitted that earlier suit is a suit for partition whereas present suit is a suit for injunction simpliciter. Earlier suit is not a suit between plaintiff and defendants in the present suit. Both plaintiff and defendants in the present suit figure as defendants in the earlier suit. Nor the earlier suit is a suit between the parties under whom plaintiff and defendants in present suit claim title over the suit property in the present suit. Parties to the present suit have been impleaded in the earlier suit as *pendent lite* purchasers. Present suit has been instituted by the plaintiff to maintain and protect enjoyment over the suit property which she has purchased from one of the co-sharers of the joint family property involved in the earlier suit. In such circumstances, learned trial court has rightly refrained from exercising jurisdiction under section 10 of the C.P.C. to stay the present suit. However, present suit has been stayed in purported exercise of jurisdiction under section 151 of the C.P.C. without jurisdiction. In the absence of any of the ingredients to satisfy requirements under section 10 of the C.P.C., court has no jurisdiction to stay suit in exercise of inherent power under section 151 of the C.P.C. It is well settled that when the C.P.C. deals expressly with any particular matter, inherent jurisdiction cannot be exercised so as to nullify the said provision. In support of his

contention, learned counsel for the petitioner relied upon a number of decisions of the Hon'ble Supreme Court and some of the High Courts.

7. In reply, learned counsel for the opposite parties contended that plaintiff as well as defendants in the present suit are parties to the earlier suit. Suit property in present suit is part of suit property in earlier suit. It is admitted by the plaintiff that despite execution of relinquishment deed in respect of suit property in the present suit executed in her favour by the plaintiff and defendant no.2 in the earlier suit, and application filed by her to strike out her name, plaintiff's name is yet to be struck out from the earlier suit. In such circumstances, learned trial court has rightly passed order staying the present suit till disposal of petition filed by the plaintiff to strike out her name in the earlier suit.

8. In order to appreciate the rival contentions it is necessary to reproduce provision under section 10 of the C.P.C. which reads:

> "Stay of suit – No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court."

9. In order to attract applicability of the provision under section 10 of the C.P.C. (1) the matter in issue in both suits must be substantially the same, (2) the previously instituted suit must be pending in the same Court in which the subsequent suit is brought, or in a different Court in India having jurisdiction to grant the relief claimed, or in a Court established or continued by the Central Government and having like jurisdiction, or before the Supreme Court, (3) both the suits must be between the same parties or their representatives, or such parties must be litigating in both the suits under the same title.

10. Earlier suit is a suit for partition among the co-sharers of the entire family property involved in that suit. Present suit is a suit for injunction in respect of part of the suit property in the earlier suit. Plaintiff in the present suit has been impleaded in the earlier suit as a *pendent lite* purchaser. Issue in the earlier suit is the claim of plaintiff therein that she has share over to

the joint family property. Issue in the present suit is plaintiff's right to enjoy the suit property against alleged interfence by the defendants. Therefore, matter in issue in both the suits are different. Also, earlier suit is not a suit between the plaintiff on the one hand and defendants on the other in the present suit. Both plaintiff and defendants in the present suit are defendants in the earlier suit. Parties to the present suit are not litigating against one another in the earlier suit. Therefore, provision under section 10 of the C.P.C. has no application to the facts and circumstances of the present case. Presumably, for the said reason learned trial court has not passed the order staying the present suit in exercise of jurisdiction under section 10 of the C.P.C.

11. Nonetheless, learned trial court passed the impugned order staying present suit in exercise of power under section 151 of the C.P.C. till disposal of petitions filed in the earlier suit to strike out the names of plaintiff consequent upon execution of relinquishment deeds in favour of the plaintiff in respect of the suit property in the present suit.

12. It has been held in **National Institute of M.H. & N.S. –vrs.- C. Parameshwara** : AIR 2005 SC 242:

> "In the present case of Manohar Lal Chopra –v- Rai Bahadur Rao Raja Seth Hiralal reported in (AIR 1962 SC 527), it has been held that inherent jurisdiction of the Court to make orders ex debito justitiae is undoubtedly affirmed by section 151,CPC, but that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as exhaustive. In the present case, as stated above, section 10,CPC has no application and consequently, it was not open to the High Court to bye-pass section 10, CPC by invoking section 151,CPC."

13. This Court also held in **Smt.Suryamani Sarangi –v- Pravakar @Prava Shankar Sarangi**: 104(2007)CLT 692:

> "The provisions of Section 10 C.P.C. are clear, definite and mandatory. A Court in which a subsequent suit has been filed is prohibited from proceeding with the trial of that suit in certain specified circumstances. When there is a special provision in the Code for dealing with the contingencies of two such suits being instituted exercise of inherent power under Section 151 C.P.C. is not justified. When there is specific provision in the statute, the Court should not exercise inherent power vested in it…"

14. Thus, not only facts and circumstances of the present case do not satisfy requirements for exercise jurisdiction under section 10 of the C.P.C. staying the present suit till disposal of the earlier suit but also the impugned order staying the suit till disposal of the petitions filed in the earlier suit strike out names of some defendants under section 151 of the C.P.C. is without jurisdiction. Therefore, the impugned order is liable to be set aside.

15. Accordingly, order dated 19.4.2010 passed by the learned Civil Judge (Junior Division), Berhampur in C.S.No.172 of 2006 is quashed.

The writ petition is allowed.

2011 (I) ILR- CUT- 971

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

CRLA. NO.109 OF 1998 (Decided on 10.03.2011)

RAGHUNATH @ ABHAYA @ ABHI JENA & ORS. …. ….. Appellants.

.Vrs.

STATE OF ORISSA …. ….. Respondent.

Criminal Trial – Murder Case – Appreciation of evidence – Two of the appellants received several injuries including incised injury and fracture which have not been explained by the prosecution – Difficult for the Court to rely on the ocular evidence of the prosecution witnesses, particularly when all the eyewitnesses have lied by stating that they did not see any injury on the person of those accused – Considering the evidence led from the side of the defence coupled with the non-explanation of the injuries of two of the appellants by the prosecution and the suspicious nature of the FIR this Court is of the view that the prosecution has suppressed the genesis of the prosecution case and the defence plea appears to be probable – Held, prosecution has failed to prove the guilt of the appellants beyond reasonable doubt and the appellants are entitled to the benefit of such doubt – Conviction and sentences passed on the applicants are set aside.

(Para.14 &16)

Case laws Referred to:-

1.AIR 1976 (SC) 2263 : (Lakshmi Singh & Ors. Etc.-V-State of Bihar)
2.1986(I) OLR 275 : (Kambhu Das & Anr.-V-State of Orissa)
3.(1992) 5 OCR 529 : (Krushna Podha & three Ors.-V-State of Orissa)
4.(2008) 3 SCC 709 : (Babu Ram & Ors.-V-State of Punjab).

For Appellants - Miss Deepali Mohapatra.
For Respondent - Mr. S.K.Nayak,
Addl. Govt. Advocate

B.K.NAYAK, J. The common judgment dated 12.05.1998 passed by the learned Additional Sessions Judge, Jajpur in S.T. No.80/10 of 1997 and S.T. No.384 of 1997 convicting accused-appellant no.1-Raghunath @ Abhaya @ Abhi Jena, appellant no.3-Kulamani Jena, appellant no.9-Santosh Jena and appellant no. 12-Ananta @ Kumar Jena under Section

302 of the I.P.C. read with Section 149 of the I.P.C. and sentencing them to imprisonment for life and convicting the rest of the accused-appellants under Section 324 read with Section 149 of the I.P.C. for causing hurt to P.Ws.9 and 16, namely, Golakha Jena and Bharat Jena and sentencing them to undergo R.I. for one year has been challenged in this appeal.

2. The prosecution case is that on 16.07.1996 P.W.9-Golakha Jena, P.W.16-Bharat Jena and the deceased-Dibakar Jena while at work in the coal-briquette factory of one Nanda Kishore Mohanty, heard an uproar in the nearby Hat (Market). They came out to see what was the uproar for and found that the accused persons being armed with various weapons like, Tenta, Sword, Farsha, Thenga etc. were rushing towards them. Apprehended danger to their life while they were trying to escape, accused-Ananta @ Kumar Jena dealt a sword blow to Dibakar Jena and accused-Raghu Jena dealt a farsha blow to Bharat Jena, who having received the blow ran away from the spot to save his life. When Golakha Jena came to the rescue of his brother Dibakar, accused-Kumar Jena dealt a blow to him by sword, as a result of which Golakha Jena's finger was cut. The wife of Dibakar having seen the occurrence raised cry, but accused-Kulamani gave her a push for which she fell down. Having seen that rest of the accused persons have surrounded them, Golakha Jena ran away from the spot. In order to save himself Dibakar snatched away the sword from the hand of Kumar Jena and dealt two blows to him. At that time accused-Madhab Jena, Raghunath Jena, Arta Jena, Santosh Jena, Basanta @ Basudeb Jena and Kulamni Jena surrounded Dibakar and assaulted him by dealing murderous blows. While Dibakar was lying on the ground injured, the villagers came to the spot whereupon the accused persons left. Dibakar and Golakha were removed to the Hospital and later on taken to the S.C.B. Medical College, Cuttack, but ultimately Dibakar succumbed to his injuries. Soon after the occurrence F.I.R. was lodged by P.W.1-Kamini Jena, wife of Dibakar, which was registered under Sections 147/148/307 of the I.P.C. along with other sections read with Section 149 of the I.P.C. After Dibakar succumbed to his injuries, the case turned to one under Section 302 of the I.P.C. During the course of investigation, injury reports in respect of the deceased and other injured persons were obtained; postmortem examination on the dead body of Dibakar was conducted. The I.O., apart from examining witnesses, also effected seizures of several articles and ultimately submitted charge-sheet. The accused persons were, however, committed to court of Sessions in two batches giving rise to two Sessions Cases, which were clubbed and tried together.

3. The defence plea is one of denial of the prosecution case. Further, in their statements under Section 313, Cr.P.C. the accused persons have taken the plea that there was prior enmity between them on one hand and the

informant's party on the other and that on the date of occurrence while Bira Jena was going for his work, on the way Dibakar Jena and Golakha Jena assaulted him. Hearing the cries of Bira Jena, accused- Ananta @ Kumar Jena came to the spot but he was chased by Golakha and Dibakar and assaulted by Dibakar by means of a sword. This incident created a hue and cry and the supporters of both the groups assembled on the spot and there was fighting between them during the course of which some of the accused persons sustained injuries and were medically examined.

4. During trial, the prosecution examined as many as 17 witnesses to prove the charges against the accused persons. P.Ws.1 to 7 are said to be eye-witnesses to the occurrence, P.W.8 is the scribe of the F.I.R., P.W.9 and P.W.16 are injured eye-witnesses, P.W.10 is the post occurrence witness, P.W.11 is the doctor, who conducted autopsy over the dead body of the deceased, P.W.12 is the Asst. Surgeon, P.W.13 is the constable, who carried the dead body of deceased-Dibakar for postmortem examination, P.W.14 is an A.S.I of Mangalabag Police Station, who registered U.D.Case on getting information about the death of Dibakar at the S.C.B. Medical College, Cuttack, P.W.15 is the Investigating Officer and P.W.17 is the person in whose factory the deceased-Dibakar and his brothers were working immediately before the occurrence.

From the side of the defence, accused-Bira Kishore Jena was examined as the only defence witness.

5. On consideration of the evidence on record, the trial court found appellants, Raghunath @ Abhaya @ Abhi Jena, Kulamani Jena, Santosh Jena and Ananta @ Kumar Jena guilty under Section 302 read with Section 149 of the I.P.C. for committing murder of the deceased. The trial court found the rest of the accused-appellants not guilty of offence under Section 302 of the I.P.C., but found them guilty under Section 324 read with Section 149 of the I.P.C. for causing hurt to P.W.9-Golakha Jena and P.W.16-Bharat Jena.

6. In assailing the impugned judgment the learned counsel for the appellants contends that there is a counter case arising out of the same occurrence where some of the accused persons sustained injuries and that the prosecution having failed to explain the injuries sustained by the accused persons, the prosecution must be held guilty of suppression of truth and the genesis of prosecution case. It is further contended that the prosecution witnesses have deliberately resorted to falsehood and their evidence is full of contradictions and inconsistencies which should not be believed in view of their interestedness and enmity with the appellants.

Learned Additional Government Advocate urges with vehemence that the injuries sustained by accused-Ananta @ Kumar Jena being minor in nature it is not incumbent on the prosecution to explain such injuries, more particularly when the prosecution evidence clearly and cogently proves the guilt of the appellants. It is further submitted by him that contradictions and inconsistencies in the evidence of the prosecution witnesses, if any, are very minor and insignificant in nature and the same do not affect the credibility of the witnesses with regard to the material aspect of the prosecution case.

7. We have perused the record and gone through the evidence carefully. As has been seen earlier, the defence plea was that there was prior enmity between the accused persons on the one hand and the prosecution party on the other and that on the date of occurrence while accused-Bira Kishore Jena was going for work, on the way the deceased-Dibakar Jena and Golakha Jena (P.W.9) assaulted him and hearing his cries accused-Ananta @ Kumar Jena came to the spot but he was chased by Golakha and Dibakar and assaulted by Dibakar by means of a sword. The incident created hue and cry and the supporters of both the groups assembled on the spot and there was fighting between them in which some of the accused persons were assaulted by the prosecution party members and received serious injuries. The prosecution case is that while the deceased, his brother-Golakha Jena (P.W.9) and Bharat Jena (P.W.16) were working in the coal-briquette factory of P.W.17-Nanda Kishore Mohanty, hearing uproar from the side of nearby market they came out and saw the accused persons coming towards them being armed with weapons and while they were trying to run away the accused persons assaulted them and in the process the deceased was killed.

8. Almost all the eyewitnesses have stated in a parrot like manner that accused Ananta dealt a blow to the deceased by sword and when P.W.9 came to the rescue of the deceased he was assaulted by Ananta and Raghu by sword and farsa whereafter he ran away from the spot. It is further stated by the witnesses that after the deceased fell down all the accused persons assaulted him by different weapons, though there is some inconsistency about the particular weapon used by each of the accused. Although, it is mentioned in the F.I.R. (Ext.2) that after the first blow was given by accused-Ananta by sword, the deceased snatched away the sword from Ananta and dealt two blows to him by that sword, none of the P.Ws. including the informant testified to that effect. There is also no mention in the F.I.R. as to how Ananta again got possession of a sword to further assault the deceased. It is to be seen whether the eyewitnesses are to be believed when they have not spoken to a material aspect of the prosecution case described in the F.I.R.

9. F.I.R. was lodged by P.W.1, the wife of deceased-Dibakar Jena. As per evidence of P.W.4, who is the brother of P.W.17, the F.I.R. was scribed by one Ranjan Kumar Behera according to the instruction of P.W.1 and the same was read over and explained to P.W.1, who put her L.T.I. on the report. P.W.4 has further testified that he identified the L.T.I. of P.W.1 as an attesting witness. He proved the F.I.R-Ext-2. It is also stated by him that the F.I.R. was scribed and lodged after injured-Dibakar Jena was removed to the Hospital where he subsequently succumbed to the injuries. P.W.1, however, in her cross-examination stated that she lodged the report at 1.00 P.M. on the date of occurrence, but the said report was not read over to her. Contrary to what P.W.1 stated, the I.O. (P.W.15) in his evidence stated that P.W.1 lodged the F.I.R. at 9.30 A.M. Although initially trying to plead ignorance, in paragraph-11 of his cross-examination the I.O. has admitted that on the date of registration of present case he also registered P.S. Case No.44 of 1996 giving rise to G.R. Case No.659 of 1996 on the basis of F.I.R. lodged by accused-Bira Kishora Jena. He further admits that in that case accused-Basudeb Jena and Ananta @ Kumar Jena were injured and he issued requisition for their medical examination. It is further admitted by him that both the cases arise out of the same transaction and both sides were injured in course of the incident. Accused-Bira Kishore Jena has been examined as D.W.1 and has reiterated the defence plea in his evidence and has admitted that several people from both the sides were injured in the occurrence which was initiated by the deceased while he (D.W.1) was going to his work. It is also stated by him that starting from 1985 Nanda Kishore Mohanty (P.W.17) and the prosecution party members have filed 4 to 5 cases against the accused persons. Certified copy of the F.I.R. in the counter case lodged by D.W.1 has been proved as Ext.A. In the said F.I.R., 14 accused persons have been named including Dibakar Jena (deceased) and the present P.Ws.7, 9, 10 and 16. Charge-sheet against all the 14 accused persons have been filed, certified copy whereof has been proved as Ext.C. The present appellant no.12-Ananta @ Kumar Jena was medically examined on police requisition and the injury report, Ext.D reveals that he sustained two incised injuries on face and back, one bruise and one fracture. The incised injuries were caused by sharp cutting weapon. Though the incised injuries and the bruise were simple in nature, the fracture was a grievous one inflicted by blunt weapon. Accused-Basudev Jena was also medically examined on police requisition in the counter case and his injury report, Ext. E reveals that he has also sustained one laceration on the parietal region of the head and three other bruises on his arm, back and leg, though the injuries were simple in nature.

10. With regard to the previous enmity P.W.4, who is the brother of P.W.17, has admitted that in the year 1995 he filed a written report against

the accused persons, though he pleaded ignorance, if the said G.R. Case No.1465 of 1995 was still pending trial. P.W.9 has admitted in his cross-examination that on the date of occurrence of the present case, the accused persons have filed a counter case against him and others which was pending trial. Although most of the material witnesses for the prosecution were given suggestions that they were accused persons in some previous G.R. Case and also second party members in Section 107 proceeding, some of them pleaded ignorance and some others denied the suggestion.

11. The prosecution story as revealed from the F.I.R. and spoken by the eyewitnesses except P.W.7 remains confined to assault made by the accused persons on the deceased, Golakha Jena (P.W.9) and Bharat Jena (P.W.16). There is no allegation nor there is any evidence adduced by the prosecution that any other person or witness belonging to the prosecution party members was assaulted and injured. However, the evidence of P.W.7-Natabar Jena reveals that he and his brother-Govinda Jena (not examined) were assaulted and injured by accused-Basanta @ Basudev Jena and Madha @ Madhav Jena. P.W.12 is the doctor, who on the date of the occurrence examined P.W.7 on police requisition and found three bruises on his person and accordingly prepared his report, Ext.6. On the same day, P.W.12 also examined on police requisition Govinda Jena, the brother of P.W.7 and found five bruises on different parts of his body. The injuries sustained by P.W.7 and first three injuries sustained by Govinda Jena were simple in nature but in respect to injury nos. (iv) and (v) of Govinda Jena he referred the injured for x-ray examination and opinion. No x-ray opinion with regard to the nature of the said two injuries is available. Though, prosecution claimed and also led oral evidence to the effect that P.W.16-Bharat Jena received a solitary farsa blow from accused-Raghu Jena and that P.W.9-Golakha Jena received one cut injury on his right thumb being assaulted by accused-Ananta with sword and 2 to 3 other blows from accused-Santosh and was treated in the Hospital, no injury report with respect to their injuries are forthcoming. There is no explanation from the side of the prosecution as to why the injury report in respect of P.Ws.9 and 16, which would have been the best evidence, have not been proved. On the other hand, there is also no explanation as to why none of the occurrence witnesses have spoken about some of the accused persons assaulting and injuring P.W.7-Natabar Jena and his brother-Govinda Jena. This leads us to believe that the prosecution has not come up with a true case.

12. As has been seen earlier accused-Ananta @ Kumar Jena sustained two incised injuries, one bruise and one grievous injury, i.e., a fracture and accused-Basudev Jena sustained one laceration on his head and three other bruises on other parts of the body in course of occurrence. The prosecution

witnesses have, however, completely suppressed the fact of receipt of injuries by these two accused persons during the course of occurrence. When they were suggested during cross-examination, they denied to have seen accused-Ananta having received the injuries during the course of occurrence. It was stated in the F.I.R. that Ananta Jena dealt a blow by the sword to the deceased and the latter snatched away the sword from Ananta @ Kumar Jena and dealt two blows to him. This statement was apparently inserted in the F.I.R deliberately in order to explain two incised injuries sustained by accused-Ananta @ Kumar Jena. However, during the course of evidence none of the prosecution witnesses have spoken about the deceased having snatched away the sword from Ananta and dealing him two blows by the same. Even they have not admitted to have made any statement to this effect before the I.O. The F.I.R. being not a substantive piece of evidence and the prosecution witnesses having remained totally silent about the assault on accused-Ananta and Basudev and even having denied to have seen any injury on their person, it can be safely concluded that not only the prosecution has failed to explain the injuries sustained by two of the accused persons but it has deliberately suppressed the same.

13. The learned counsel for the appellants has drawn the attention of this Court to the decision of the Apex Court reported in AIR 1976 (SC) 2263; ***Lakshmi Singh and others etc. v. State of Bihar*** wherein it is held as follows :

> "It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:
>
> (1) that the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
> (2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;
> (3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.
>
> The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one."

Similar views have also been expressed in the cases of ***Kambhu Das and another v. State of Orissa*****;** 1986 (I) OLR 275, ***Krushna Podha and three others v. State of orissa****;* (1992) 5 OCR 529 and ***Babu Ram and others v. State of Punjab*****;** (2008) 3 SCC 709.

14. In the instant case, when it is found that two of the appellants received several injuries including incised injury and fracture which have not been explained by the prosecution, it is difficult for the Court to rely on the ocular evidence of the prosecution witnesses, particularly when all the eyewitnesses have lied by stating that they did not see any injury on the person of those accused. True, there may be cases where the non-explanation of injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial in nature or where the evidence is so clear and cogent, so independent and disinterested and so probable and credit-worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries.

15. It has been seen earlier that there is material discrepancy in the evidence of the informant (P.W.1) and that of the I.O. (P.W.15) about the time of lodging of F.I.R. (Ext.2). P.W.10, who had himself taken the deceased to Cuttack hospital has stated in his evidence that on their way to Cuttack hospital they came to the Police Station where Kailash Jena (P.W.3) orally reported the incident to the I.O. and that they also showed the deceased, who was then in a fit state to talk. It is not understood as to why the oral report of P.W.3 which was lodged at the first instance was not recorded and registered and why the I.O. did not take the statement of the deceased, who was fit to speak. This leads us to believe that ignoring the report of P.W.3, the present F.I.R. (Ext.2) was prepared after due deliberation only with motive to suppress the true facts and project an embellished version.

16. Considering the evidence led from the side of the defence coupled with the non-explanation of the injuries of two of the appellants by the prosecution and the suspicious nature of the F.I.R. we are of the view that the prosecution has suppressed the genesis of the prosecution case and the defence plea appears to be probable. We, therefore, hold that the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt. The appellants are, therefore, entitled to the benefit of such doubt.

17. The appeal is accordingly allowed, the conviction and sentences passed on the appellants by the trial court are set aside and they are acquitted of the charges.

Appeal allowed.

2011 (I) ILR- CUT- 979

S.K.MISHRA, J.

G.A. NO.30 OF 1994 (Decided on 18.03.2011)

STATE OF ORISSA …. ….. Appellant.

.Vrs.

MANOJ KUMAR SINGH …. ….. Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – Ss.375, 376, 377.

Rape and unnatural sexual inter course – Victim girl was less than twelve years –Trial Court should have framed charge U/s. 376 (2) (f) IPC – Trial should have been conducted in Camera and name of the victim should not have been reflected in the Judgment.

Definition of rape U/s.375 IPC – Complete penetration not required even slight penetration is sufficient – Victim categorically implicated the accused that the accused ravished her both in the vagina as well as in her anus – Her evidence finds corroboration from the testimony of the doctor – It is not material that there was no spermatozoon in the swab collected from the vagina of the victim as it is not the case of the prosecution that the respondent did actually ejaculated – Non-finding of semen stains in the wearing apparels of the victim is of no consequence as it is nobody's case that the respondent ejaculated after completion of the act – Acquittal of the appellant U/s.376 and 377 IPC and conviction U/s.354 IPC challenged – Held, appeal allowed – Trial Court judgment set aside – Respondent is convicted U/s. 376 and 377 IPC and conviction U/s.354 IPC merges with the aforesaid conviction – The respondent is sentenced to undergo R.I. for 7 years on each count for the offences U/s.376 and 377 IPC – Sentences to run concurrently and the period undergone as UTP and as convict be set off.

(Para 12 to 15)

Case laws Referred to:-

1.2009(1) SCC (Cril) 60 : (Ghurey Lal -V- State of Uttar Pradesh)
2.(1996) 2 SCCs 384 : (State of Punjab-V-Gurmit Singh & Ors.)

For Appellant - Addl. Government Advocate
For Respondent - Mr. Abhijit Pal

S.K. MISHRA, J. The State of Orissa, in this case, assails the acquittal of the respondent of the charges under Sections 376 and 377 of the Indian Penal Code, 1860, hereinafter referred to as the 'IPC' for brevity, in S.T. Case No.27/5 of 1994 of the court of Assistant Sessions Judge, Sambalpur. The learned Assistant Sessions Judge, while acquitting the respondent of the aforesaid two charges, convicted him for the offence under Section 354 of the IPC and sentenced him to undergo rigorous imprisonment for six months. Such judgment has been assailed in this appeal.

2. The respondent was charged for the aforesaid offences for committing rape and unnatural sexual intercourse with the victim girl, who was aged about six years old on 02.07.1993. It is alleged by the prosecution that, on the date of occurrence, in the afternoon, the respondent called the victim girl near a temple, removed her chaddi and lifted her frock. Then the accused pushed his penis into her vagina and anus, as a result of which, she sustained bleeding injury and cried. She came back to her house by wearing the chaddi and reported the incident to her parents. The matter was reported to the police after few hours. On such FIR, police took up investigation of the case and after completion of investigation finding a *prima facie* case against the respondent, charge-sheet was laid for the offences under Sections 376 and 377 of the IPC.

3. The respondent took the plea of denial. He further stated that he has been falsely implicated in this case.

4. In order to prove its case, the prosecution examined seven witnesses. The victim has been examined as P.W.1. P.Ws. 2 and 3 are her parents. P.W.4 is the witness to the seizure of the wearing apparels of the victim girl. P.W.5 is the doctor, who medically examined the victim. P.Ws. 7 and 6 are the Investigating Officer, out of whom, later submitted the charge sheet.

5. In course of hearing, the learned counsel for the State submitted that the materials on record point to the guilt of the respondent unerringly and in a perverse appreciation of the same, the learned Asst. Sessions Judge has acquitted the respondent of the charges and has punished him for a minor charge. The learned *amicus curiae*, on the other hand, submitted that the respondent is not guilty, and therefore, the judgment passed by the learned Asst. Sessions Judge is correct, which requires no interference.

6. The scope of the Appellate Court against acquittal has been discussed in detail by the Hon'ble Supreme Court in ***Ghurey Lal Vs. State of Uttar Pradesh***, 2009(1) SCC (Cril) 60. In that reported case, the

Supreme Court after taking into consideration all its previous decisions on the point has summarised the principles that govern appeals against acquittal. They are as follows:

> (1) The Appellate Court may review the evidence in appeals against acquittal u/ss 378 & 386 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "Code" for brevity). Its power of reviewing evidence is wide & the Appellate Court can re-appreciate the entire evidence on record. It can review the Trial Court's conclusion with respect to both facts and law.
>
> (2) The accused is presumed to be innocent until proven guilty and the accused possessed this presumption when he was before the Trial Court. The Trial Court's acquittal bolsters the presumption that he is innocent.
>
> (3) Due or proper weight and consideration must be given to the Trial Court's decision. This is especially true when a witnesses' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the Trial Court was wrong.

Hon'ble Supreme Court further held that in view of the above, the High Court & other Appellate Courts should follow the well-settled principles crystallized by number of judgments if it is going to overrule or otherwise disturb the order of acquittal passed by the Trial Court.

> (1) The Appellate Court may only overrule or otherwise disturb the Trial Court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the Appellate Court would have "very substantial and compelling reasons" to discard the Trial Court's decision. "Very substantial & compelling reasons" exist when:
>
> (i) the Trial Court's conclusion with regard to the facts is palpably wrong;
> (ii) the Trial Court's decision was based on an erroneous view of law;
> (iii) the Trial Court's judgment is likely to result in" grave miscarriage of justice".
> (iv) the entire approach of the Trial Court in dealing with the evidence was patently illegal;
> (v) the Trial Court's Judgment was manifestly unjust and unreasonable;

(vi) the Trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc. (This list is intended to be illustrative, not exhaustive.)

(2) The Appellate Court must always give proper weight and consideration to the findings of the Trial Court.

(3) If two reasonable views can be reached one leads to acquittal and the other to conviction the High Court/Appellate Court must rule in favour of the accused. "

Only when the aforesaid conditions are satisfied, the Appellate Court should interfere with the findings recorded by the trial court acquitting an accused. So, it is apposite to consider the evidence in the case in the light of the observations made by the Hon'ble Supreme Court in Ghurey Lal's case.

7. The first error committed by the learned trial judge is that he framed charges under Section 376 of the IPC simplicitor. Instead, he should have framed charges under Section 376(2)(f) of the IPC. The charge which was read over and explained to the respondent also does not mention that the victim girl was less then twelve years of age on the date of the alleged rape. On this score alone the appeal could be remanded. However, the Court is of the view that after so many years remand of the case is inexpedient.

8. The P.W.1, the victim herself has been examined on 02.05.1994. It is borne out from the order-sheet that the trial was not conducted in camera as the learned Assistant Sessions Judge has not recorded the same in the order-sheet dated 02.05.1994. Further more, at paragraph-5 of the judgment the name of the victim has been reflected. Though it is settled principle of law that in a case of rape or sexual assault the name of the prosecutrix should be withheld, it stands to no reason why the learned Asst. Sessions Judge has reflected only the name of the victim girl, who was examined as P.W.1 and has not reflected names of the other witnesses in the judgment. It appears that the learned Asst. Sessions Judge was not sensitive while trying the case. In her statement, the victim has stated that on the date of occurrence in the afternoon while she was playing, the accused came to her and called her to Hanuman Mandir. There, he removed her chaddi and lifted the frock. Then he penetrated his penis in her anus and also into her vagina. Due to such penetration, blood came out from her vagina. She felt pain. She then came to her house crying and reported the incident to her mother and father. In the cross-examination she stated that she was playing with other children in the lane. The accused called her. Hence, she followed. Other children did not go. Some boys were playing at the temple. The accused

turned her and from her back side in half bent position pushed his penis into her anus. She shouted. So the accused pressed her mouth and ran away. Other children came out. She has also stated that she did not know what is the meaning of vagina and penis, but she knew what is anus. When she came back her mother was present in her house. The children came with her also. She further stated she did not know the name of the accused prior to the occurrence and when her mother asked she could not say the name of the accused but she said 'yes' when her mother suggested the name of the accused. She denied the defence suggestion that the accused did not penetrate his penis to her vagina and anus.

9. She was examined by the doctor. So the doctor, P.W.5 has stated on oath that on 03.07.1993 she was the L.T.R.M.O. (Asst. Surgeon), District Headquarters Hospital, Sambalpur. On that day on police requisition, she examined the victim at about 1.30 p.m. She found the girl to be six years old from her appearance and her mother's statement. She further stated the mental condition of the child was depressed and frightened. She found blood stains on her lower part of the frock. There was no mark of violence on the body. The child was unable to walk because of severe pain on her perineal region. She complained pain around the anus. On examination of the private parts, she found redness and swelling of the labia majora, perineal tear, longitudinal, of size 1 c.m. x 1 c.m. x 1 c.m. in the mid-line midway between anus and vulva. There was bruising, laceration and swelling of the anus, the anus was oedematous and oozing. Ext.1 is the report prepared by the Doctor. In the report she has mentioned that a rape cannot be excluded. In cross-examination she has stated that there is possibility of corresponding injury on the private parts (penis) of the accused. The defence has proved the report of the pathologist, which has been marked as Ext. 'A', which reflected that no spermatozoa was found in the swab, which was sent for examination.

10. P.W.2 happens to be the father of the victim, who has stated about complaint made by her daughter. P.W.3 happens to be the mother of the victim, who has stated that about a year prior to her cross examination, at about 4.30 p.m., her daughter came crying and reported about the incident. She found stains of blood on her chaddi. She stated this matter to her husband and then they proceeded to the police station and lodged the report. In cross-examination, she has denied the suggestion that she had not stated before the Investigating Officer that her daughter reported to her that the accused penetrated his penis. A cross reference to the evidence of P.W.7 reveals that the witness stated before the I.O. that her daughter told her that the accused has committed "Pasabika Atyachar". This is the sum and substance evidence on record.

11. While appreciating the evidence on record, the learned Assistant Sessions Judge has held that the victim only stated that the accused penetrated his penis to her anus. Thereafter, discussing the evidence of the doctor the learned Assistant Sessions Judge has come to the conclusion that the evidence of the doctor goes to show that there was no internal injury on the vagina or anus of the victim girl though there was redness and swelling of the libia majora and tears, bruises, laceration on the other part between valve and anus. The learned Assistant Sessions Judge further held that all these do not suggest that there was penetration. These injuries might have been caused by pressing the penis and rubbing it violently on the anus and vagina of the victim. In cross-examination the doctor could not opine if there was penetration of the penis into the vagina of the victim girl. The learned Assistant Sessions Judge further held that she deposed that there is possibility of the injury of the penis of the accused, in case of penetration into the private part of the girl.

The learned trial court has further taken into consideration the report of the Pathologist, which shows there was no spermatozoa in the swab collected by the doctor.

Thus, on the basis of such discussion, the learned Assistant Sessions Judge has come to the conclusion that the evidence does not reveal that there was actually penetration of the penis of the accused to the vagina and anus of the victim girl. He also gave much weightage to absence of semen on the chaddi of the victim girl. The learned trial court has further held that it is settled law that the penetration is essential in a case of rape and unnatural offences. The learned Sessions Judge acquitted the respondent of the offences under Sections 376 and 377 of the IPC but proceeded to convict him for the offence under Section 354 of the IPC.

12. The Hon'ble Supreme Court in ***State of Punjab vs. Gurmit Singh and others***, (1996) 2 SCCs 384 has held that:

> " xxx….. The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not

> overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman, who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type or rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable".

In the said case, the Hon'ble Supreme Court has further held that the court should shoulder greater responsibility while considering a case of rape. It should be considered with utmost sensitivity. The Court should examine the broader probabilities and should not be swayed away by minor contradiction or insignificant discrepancy in the statement of the prosecutrix.

12. It is settled principle of law that while appreciating evidence of a victim of sexual assault, the court should adopt rational approach and judge the evidence by its intrinsic worth animus of the witnesses in arriving at a conclusion about the truth. The court should not reject evidence of a victim of sexual assault by adopting hyper-technical approach. Considering these settled principles of law, this Court finds that the reasoning resorted to by the learned Sessions Judge is not only fallacious but also it is perverse. It is further seen that for constituting the offence of rape as defined under Section 375 of the IPC, it is not necessary that there should be a complete penetration, even a slight penetration is sufficient to hold that the victim was ravished. Moreover, in this case, the learned Asst. Sessions Judge has accepted that the respondent penetrated his penis in her anus. Then there is no reason why the accused was not convicted by the learned Sessions Judge for the offence under Section 377 of the IPC.

13. It is seen from the materials on record that the victim though a child witness is capable giving evidence, which is clear from the certificate given by the learned Assistant Sessions Judge to her before recording her evidence. Furthermore, she has very categorically implicated the accused-respondent to have ravished her both in the vagina as well as in her anus. Her evidence finds sufficient corroboration from the testimony of the doctor and it is not material that there was no spermatozoon in the swab collected from the vagina of the victim as it is not case of the prosecution that the respondent did actually ejaculated. The chemical examination report also reveals that the chaddi and the frock of the victim were stained with blood though semen was not found. It is nobody's case that the respondent ejaculated after completion of the act. So non-finding of semen stains in the wearing apparels of the victim is of no consequence keeping in view the facts of the case.

14. Thus, keeping in view the materials on record and the perverse reasoning resorted to by the learned Asst. Sessions Judge while appreciating the evidence, this Court comes to the conclusion that this is a fit case where the findings recorded by the learned Asst. Sessions Judge should be reversed. Another aspect of the case, which requires attention of this Court, is that in the meanwhile the respondent has preferred a criminal appeal to the court of the Sessions Judge, Sambalpur against the order of his conviction under Section 354 of the IPC. Such appeal has already been dismissed and he has under-went the sentence. Thus, the argument of learned *amicus curie* in the appeal, wherein the findings are not challenged by the appellant, that there is doubt of identification of the accused is of no consequence. However, the period the accused-respondent has already

undergone for the offence under Section 354 of the IPC requires set off against the sentence that is being passed in the appeal.

15. In the result, the appeal is allowed. The Judgment dated 21.05.1994 passed in S.T. Case No. 27/5 of 1994 is hereby set aside. The respondent is convicted for the offences under Sections 376 and 377 of the IPC. So, the conviction under Section 354 of the IPC, therefore, merges with the aforesaid conviction. The respondent is hereby sentenced to undergo R.I. for 7 years on each count for the offences under Sections 376 and 377 of the IPC. Sentences to run concurrently and the period undergone as U.T.P and as convict be set off.

The learned Asst. Sessions Judge shall take expeditious steps for re-commitment.

Appeal allowed.

2011 (I) ILR- CUT- 988

C.R.DASH, J.

W.P.(C) NO. 16053 OF 2010 (Decided on 20.04.2011)

LINGARAJA MOHANTY ……. Petitioner.

.Vrs.

BINODINI MOHANTY & ORS. …. …..Opp.Parties.

TRANSFER OF PROPERTY ACT, 1882 (ACT NO. 4 OF 1882) – S.52. r/w Order 1 Rule 10 & Order 22, Rule 10 C.P.C.

Lis pendens purchaser – Defendant No.1 sold the disputed property – Plaintiff filed petition under Order 1 Rule 10 read with order 22 Rule 10 C.P.C. to implead the lis pendens purchaser as a party in the suit – Application dismissed by the trial Court as the lis pendens purchaser is neither a necessary party nor a proper party – Hence this writ petition.

In the present case the pendente lite purchaser has not come forward to be impleaded as a party – He does not apprehend any collusion between the defendants and the plaintiff – He also does not apprehend that his interest may not be protected unless he is impleaded as a party.

Held, this Court finds no justification to allow the motion of the petitioner for impleading the lis pendens purchaser as a party at the behest of the plaintiff-petitioner.

(Para 16)

Case laws Referred to:-

1.2009 SAR (Civil) 557 : (Marurudraiah & Ors.-V- B.Sarojamma & Ors.)
2.2010(I) OLR 97 : (Shuvam Construction Pvt.Ltd.-V-Smt. Babita Mohanty & Anr)
3.AIR 2007 SC 1062 : (Dhanalakshmi & Ors.-V- P.Mohan & Ors.)
4.AIR 1992 Orissa 47 : (Sri Jagannath Mahaprabhu-V- Pravat Chandra Chatterjee & Ors.)
5.AIR 1956 SC 593 : (Nagubai Ammal -V- Shama Rao)
6.AIR 1969 Orissa 142 : (Uchhab Patra -V- Brundaban Mallik)
7.(1976) 42 CLT 330 : (Rusi Behera- V- Mst. Pancha Behera).
8.AIR 2005 SC 2209 : (Amit Kumar Shaw & Anr.-V- Farida Khatoon & Anr.).

9.AIR 2001 SC 2552 : (Dhurandhar Prasad Singh -V- Jai Prakash University & Ors.)
10.91 (2001)CLT. 58 : (Orissa Mining Corporation Ltd.-V- M/s.Ashok Transport Agency & Ors.)
11.2008 (II) OLR 747 : (Panjum Bibi @ Ramjan Bibi & 7 Ors.-V-Najma Alim & Anr.)

For Petitioner - M/s. Amit Prasad Bose, R.K.Mohapatra & Ashok Ku.Das.
For Opp.Parties- M/s. Samir Ku.Mishra, P.Prusty, K.r.Mohanty & J.Pradhan (for O.P.No.8)
Mr. Subrat Kumar Nayak (O.P.No.9)
(In person)

C.R.DASH, J. Whether a lis pendens purchaser should be added as a party either Under Order-1 Rule-10 or Order-22, Rule-10, Code of Civil Procedure is the main question that arises for consideration in the present writ petition.

2. The present petitioner is the plaintiff. He filed Civil Suit No.75 of 2003 in the court of learned Civil Judge (Junior Division), Puri inter alia for declaration that he (plaintiff) is the only legal successor of Swarnalata Mohanty and Radhashyam Mohanty of Kumbharpada, Puri and defendant no.1 (present opp. Party no.8) is not the legally married wife of said Radhashym Mohanty and defendant no.2 (present opp. Party no.1) is not the daughter of said Radhashyam Mohanty. He also sought for other incidental and ancillary reliefs as enumerated in paragraph-3 of the writ petition. Subrat Kumar Nayak (opp. party no.9) is the husband of Binodini Mohanty (defendant no.2-present opp. party no.1) and son-in-law of Bainamani Mohanty, (defendant no.1-present opp. party no.8). The aforesaid defendant no.1 and 2 filed their joint written statement denying the plaint averments. They appeared in the court through aforesaid Subrat Kumar Nayak (opp. party no.9), who is a practising advocate. In course of the proceeding in the suit, defendant no.1 (Bainamani Mohanty) sold the disputed property, which is the subject matter of the suit in favour of Subrat Kumar Nayak (opp. party no.9). Such fact regarding devolution of interest of the suit property on Subrat Kumar Nayak (opp. party no.9) was not brought to the notice of the court. When Subrat Kumar Nayak (opp. party no.9) tried to take possession over the suit property by force, the plaintiff came to know about the lis pendens transfer which was effected in the year 2006. In order to avoid multiplicity of proceedings and to ensure that the suit reaches its logical, legal and effective determination, the plaintiff (present petitioner) filed a

petition under Order-1, Rule-10 read with Oder-22, Rule-10, C.P.C. for impleading aforesaid Subrat Kumar Nayak (opp. party no.9), the purchaser of the suit property as a party in the suit. Defendant no.2 (present opp. party no.1) contested the petition by asserting that she is in peaceful possession of the suit property and no attempt had been made by her husband (Subrat Kumar Nayak) to enforce possession over the disputed property.

3. Learned court below on consideration of the inter se pleadings of the parties in the proceeding and their submissions, ruled that a lis pendens purchaser being neither a necessary party nor a proper party need not be impleaded when the suit has been posted for argument. Accordingly the petition filed by the present petitioner (plaintiff) under Order-1, Rule-10 read with Order-22, Rule-10, C.P.C. was dismissed. The petitioner has, therefore, been obliged to move this Court under Article 227 of the Constitution of India.

4. Mr. Amit Prasad Bose, learned counsel for the petitioner submits that when Order-22, Rule-10, C.P.C. clearly states in favour of the substitution of the assignee on assignment, creation or devolution of any interest during pendency of the suit, the learned trial court should have impleaded Subrat Kumar Nayak (opp. party no.9) as a party by invoking its jurisdiction under Order-1, Rule-10 read with Order-22, Rule-10, C.P.C. It is further submitted that the learned court below having failed to follow the decision of the Hon'ble Supreme Court in the case of **Marurudraiah & ors.** ***v.*** **B. Sarojamma and ors**.; 2009 SAR (Civil) 557 and the decision of this Court in the case of **Shuvam Construction Pvt. Ltd.** ***v.*** **Smt. Babita Mohanty and another**; 2010 (I) OLR 97, the order impugned is not sustainable in the eyes of law. He also relies on the decision of Hon'ble Supreme Court in the case of **Dhanalakshmi and others** ***v.*** **P. Mohan and others**; AIR 2007 S.C. 1062, to substantiate his contention that a lis pendens purchaser would be a necessary and a proper party to the suit.

Learned counsel for the contesting opp. parties on the other hand supports the impugned order.

5. Before addressing the question raised by the parties it is pertinent to state the facts admitted at the Bar that (1) the suit is one for declaration and other consequential reliefs; (2) Sri Subrat Kumar Nayak (opp. party no.9) is a lis pendens purchaser; (3) defendant no.2 (present opp. party no.1) who is the wife of aforesaid Subrat Kumar Nayak is on record to contest the suit; (4) Sri Subrat Kumar Nayak (opposite party No.9) has not opted to be impleaded as a party and (5) the plaintiff wants that Subrat Kumar Nayak

(opp. party No.9) be impleaded as a party either Under Ofder-1, Rule-10 or Under Order-22, Rule-10 C.P.C. The grounds on which Subrat Kumar Nayak (opp. party No.9) is sought to be impleaded are that, if he is not impleaded as a party, he may take the plea that the decision in the suit shall not be binding on him and there may be multiplicity of litigation.

6. To appreciate the question involved, it is necessary to bear in mind the principles embodied in Section 52 of the Transfer of Property Act, which I do not propose to quote to avoid burden on the judgment. The said Section is based on the English common law maxim ***"ut lite pendente nihil innovetur"*** i.e. during litigation nothing new should be introduced. This doctrine aims at the prevention of multiplicity of suits. The Section provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. The Section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens the following elements must be present :-

(I) There must be a suit or proceeding pending in a Court of competent jurisdiction.

(II) The suit or proceeding must not be collusive.

(III) The litigation must be one in which right to immovable property is directly and specifically in question.

(IV) There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.

(V) Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.

The object of Order 1, Rule 10, C.P.C. is to discourage contest on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Under this Rule, a person may be added as a party to the suit in the following two contingencies :-

(i) When he ought to have been joined as plaintiff or defendant, and is not joined so, or

(ii) When, without his presence, the questions in the suit cannot be completely decided.

The power of a court to add a party to the proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

Order 22, Rule 10, C.P.C. speaks of cases of an assignment, creation or devolution of any interest during the pendency of a suit and the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. The scope and ambit of the aforesaid provisions shall be discussed at the appropriate stage.

7. Learned counsel for the petitioner having raised the contention to the effect that learned court below has failed to appreciate the principles decided in the case of Shuvam Construction Pvt. Ltd 2010(I) OLR 97 supra, I propose to discuss the principles decided by the Full Bench of this Court in the Case of **Sri Jagannath Mahaprabhu *v.* Pravat Chandra Chatterjee and other; AIR 1992 Orissa 47,** which is the very basis of the decision in the case of Shuvam Construction Pvt. Ltd. This Court, in the case of Sri Jagannath Mahaprabhu (supra), while discussing the principles under Section 52 of the Transfer of Property Act, observed thus :-

> "The principle embodied in Section 52 borrowed from the Common Law doctrine was aptly stated by Turner, L.J. in Bellamy v. Sabine, (1857) 1 Deg and J 566, in the following words:
>
> "It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding."
>
> And Lord Cranworth said :
>
> "It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him

not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party."

The rule is based not on the doctrine of notice but on principle of expediency and public policy. Hence, no question of good faith or bona fides arises."

This Court proceeded further and observed about the effect of Section 52 of the Transfer of Property Act in the following words :-

"The effect of S.52, therefore, is that a lis pendens transferee is bound by the decree whether on contest, ex parte or on compromise. The plaintiff is under no obligation to implead a lis pendens transferee. We do not agree with the view expressed by the Full Bench of the Kerala High Court in Lakshmanan V. Kamal (AIR 1959 Kerala 67) (supra) that "the effect of Section 52 is to render void as against the decree-holder transfer or other dealing with the suit property pendent elite and he is entitled to ignore it "because Section 52 has been enacted with a view to safeguarding the interest of the plaintiff so that his decree is not defeated at the instance of a third party in whose favour there has been a lis pendens transfer. Our view is fortified by a decision of the Supreme Court in Nagubai Ammal v. B. Shama Rao, AIR 1956 S.C. 593."

This Court proceeded further and quoted and referred to the decision of Hon'ble Supreme Court at Page 602 in the aforesaid case of **Nagubai Ammal *v.* B. Shama Rao** -

"…….That sale was no doubt pendent elite, but the effect of S.52 is not to wipe it out altogether but to subordinate it to the rights based on the decree in the suit. As between the parties to the transaction, however, it was perfectly valid, and operated to vest the title of the transferor in the transferee……"

This Court observed further that "the contention that the words 'the property cannot be transferred' in Section 52 rendered a transfer which fell within the mischief of Section 52 non est was repelled with the following observation" by Hon'ble Supreme Court in **Nagubai Ammal**'s case :-

"This contention gives no effect to the words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", which make it clear that the transfer is good

except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendent elite have been held to be valid and operative as between the parties thereto."

"……We are, therefore, unable to accede to the contention of the appellants that a transferor pendente lite must, for purposes of S.52, be treated as still retaining title to the properties."

With the aforesaid discussion in mind and taking note of decision of this Court in the case of **Uchhab Patra *v.* Brundaban Mallik,** AIR 1969 Orissa 142 and **Rusi Behera *v.* Mst. Pancha Behera** (1976) 42 CLT 330, this Court in **Sri Jagannath Mahaprabhu**'s case (supra), in Paragraph-8, observed thus:-

"We hope, the aforesaid discussion would have made it clear that a transferee pendent lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, whether the transfer is of the entire interest of the defendant, the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. That is the reason why G.K. Misra, J. (as he then was) observed that Order 22, Rule 10(1) enabled the transferee to continue the suit with the leave of the Court and though there was no bar operating against the transferor continuing the suit for the benefit of the transferee, Order 22, Rule 10 was an alternative procedure which safe-guarded against the danger that the original plaintiff being no longer interested in the proceedings might not vigorously prosecute the same or might even collude with the adversary and B.K. Ray, J concurred with the aforesaid view in Rusi Behera's case (1976 (42) Cut LT 330) (supra). Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party; under Order 22, Rule 10 an alienee pendente lite may be joined as party. The plaintiff is not bound to make him a party. But the Court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. (See Mulla's Transfer of Property Act, seventh edition, page 253)."

Proceeding further in the matter, this Court in paragraphs 9 and 10 of the judgment in the case of **Sri Jagannath Mahaprabhu** (supra) held thus :-

"9. Though in Basant Ram's case (ILR (1974) Him Pra 276) (supra), it has been held that a lis pendens transferee is not a proper

party, we are of the view that even if a lis pendens transferee is not a necessary party and the plaintiff can ignore the transfer even if he has notice thereof and a decree or order obtained by him would be binding on the lis pendens transferee, when a motion is made by the lis pendens transferee to be impleaded as a party, the court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits.

10. Assuming that he is not a proper party, he may be impleaded as an assignee under the provisions of O.22, R.10 (1). Even if an application has been filed under O.1, R.10, labelling of the application being misconceived, the court should ignore the labelling of the application as one under O.1, R.10 and treat the same as one filed under O.22, R.10 (1), C.P.C., if the ingredients thereof are satisfied. This aspect of the law was not brought to the notice of the Division Bench which decided Pranakrushna's case (AIR 1989 Orissa 148) (supra) and rejected the application of the pendente lite transferee solely upon a consideration of the principles embodied in Order 1, Rule 10, CPC."

8. In the case of **Sri Jagannath Mahaprabhu *v.* Pravat Chandra Chatterjee and others** (supra) the petitioner had instituted the suit for a decree for eviction of the defendant, recovery of possession and damages for illegal occupation. Opposite Party No.1 denied the assertions of the petitioner and his title. By registered sale deed dated 27.02.1984, a portion of the property involved in the suit was sold by opposite party No.1 in favour of opposite parties 2 and 3 who filed an application on 01.10.1985 under Order 1, Rule 10 of the Code of Civil Procedure to be impleaded as parties. Despite objection of the petitioner, by the impugned order the learned Munsif allowed their payer holding that though no doubt the transfer was hit by the rule of lis pendens, inasmuch as the defendant-opposite party No.1 might not be interested after sale in properly conducting the suit and that might cause prejudice to the lis pendens purchasers, they should be arrayed as parties under Order 22, Rule 10 of the Code of Civil Procedure.

9. This Court in the aforesaid case, as the discussion shows, brought under the sweep of Order 22, Rule 10, C.P.C. even a transaction culminating in assignment, creation or devolution of interest by act of parties and held that when there is apprehension regarding collusion of transferor with the adversary party in the suit and there is also apprehension to the effect that the transferor may not prosecute the lis as diligently as he would have, had he not transferred the property, the transferee pendente lite is to be held to

be having substantial interest in the suit and without being swayed away by the nomenclature of the petition, the competent court has the judicial discretion to implead a lis pendens transferee as a proper party in the suit in such a situation.

10. Same is the view of the Hon'ble Supreme Court in the Case of **Amit Kumar Shaw and another *v.* Farida Khatoon and another**; AIR 2005 S.C. 2209, and in that case also the transferees pendente lite had come forward to be impleaded as parties. Hon'ble Supreme Court in the case of **Dhanalakshmi and others *v.* P. Mohan and others**, AIR 2007 SC 1062 held that a lis pendens purchaser would be a necessary and a proper party. In the case of Dhanalakshmi, the appellants had purchased the undivided shares of some of the co-sharers and Hon'ble Supreme Court ruling as aforesaid, allowed those appellants to be impleaded as parties for effective carving of shares in the final decree proceeding. This Court in the case of **Shuvam Construction Pvt. Ltd** (supra), where also the lis pendens transferee had come forward to be impleaded as parties, has taken the same view by observing thus :-

> "On an analysis of the principles of law, as discussed above, it is evident that the proposition of law that a lis pendens purchaser is not a necessary party to the suit is not an absolute one and the question depends upon facts and circumstances of each case and the Court in a given case has the discretion to add a *pendente lite* transferee as a party to the suit for a substantial justice and effectual adjudication of the suit, and also to avoid multiplicity of litigations. As per the provision of Section 52 of the T.P. Act, a transferor *pendent lite* is treated in the eye of law as a representative-in-interest of the transferee, who shall be bound by the decree that may be passed against the transferor. Therefore, a transferee *pendente lite* has vital interest in the suit property. In a contingency where the transferor after alienating the suit property and having no more any interest, does not properly defend the suit and colludes with the adversaries, the alienee *pendente lite* may be joined as a party and on motion being made, the Court should exercise its discretion judicially and an alienee should ordinarily be allowed to join the suit as a party to enable him to protect his interest."
>
> * (the underline words may be read as transferee in place of transferor and transferor in place of transferee)

11. The fact in **Shuvam Construction Pvt. Ltd** (supra) was almost similar to the facts in the case of Sri Jagannath Mahaprabhu (supra). In both the aforesaid Orissa cases and in both the Supreme Court cases referred to supra, the transferees pendente lite had moved the competent court to be added as parties to protect their interest as the transferors after the transfer had lost interest in prosecuting the lis. Taking into consideration the facts and circumstances peculiar to the aforesaid cases this Court and Hon'ble Supreme Court had allowed the lis pendens purchasers to be added as parties to safeguard their interest.

12. In the case of **Dhurandhar Prasad Singh *v.* Jai Prakash University and others**, AIR 2001 S.C. 2552, Hon'ble Supreme Court has addressed the question as to whether application under Order 22, Rule 10, C.P.C. seeking leave of the Court is required under law to be filed by that person alone, upon whom interest has devolved during the pendency of the suit and by no body else. Hon'ble Supreme Court in paragraph-25 of the judgment held thus :

> "25. Plain language of Rule 10 referred to above does not suggest that leave can be sought by that person alone upon whom the interest has devolved. It simply says that the suit may be continued by the person upon whom such an interest has devolved and this applies in a case where the interest of plaintiff has devolved. Likewise, in a case where interest of defendant has devolved, the suit may be continued against such a person upon whom interest has devolved, but in either eventuality, for continuance of the suit against the persons upon whom the interest has devolved during the pendency of the suit, leave of the Court has to be obtained. If it is laid down that leave can be obtained by that person alone upon whom interest of party to the suit has devolved during its pendency, then there may be preposterous results as such a party might not be knowing about the litigation and consequently not feasible for him to apply for leave and if a duty is cast upon him then in such an eventuality he would be bound by the decree even in cases of failure to apply for leave. As a rule of prudence, initial duty lies upon the plaintiff to apply for leave in case the factum of devolution was within his knowledge or with due diligence could have been known by him. The person upon whom the interest has devolved may also apply for such a leave so that his interest may be properly represented as the original party, if it ceased to have an interest in the subject-matter of dispute by virtue of devolution of interest upon another person, may not take interest therein, in ordinary course, which is but natural, or

by colluding with the other side. If the submission of Shri Mishra is accepted, a party upon whom interest has devolved, upon his failure to apply for leave, would be deprived from challenging correctness of the decree by filing a properly constituted suit on the ground that the original party having lost interest in the subject of dispute, did not properly prosecute or defend the litigation or, in doing so, colluded with the adversary. Any other party, in our view, may also seek leave as, for example, where plaintiff filed a suit for partition and during its pendency he gifted away his undivided interest in the Mitakshara Coparcenary in favour of the contesting defendant, in that event the contesting defendant upon whom the interest of the original plaintiff has devolved has no cause of action to prosecute the suit, but if there is any other co-sharer who is supporting the plaintiff, may have a cause of action to continue with the suit by getting himself transposed to the category of plaintiff as it is well settled that in a partition suit every defendant is plaintiff, provided he has cause of action for seeking partition. Thus, we do not find any substance in this submission of learned counsel appearing on behalf of the appellant and hold that prayer for leave can be made not only by the person upon whom interest has devolved, but also by the plaintiff or any other party or person interested."

13. This Court in paragraph 9 of the judgment in **Sri Jagannath Mahaprabhu's** Case observed, "…… when a motion is made by the lis pendens transferee to be impleaded as a party, the Court may, in exercise of its discretion judicially, add him as a proper party to prevent multiplicity of suits." What are the rights of a lis pendens assignee, not joined in the suit as a party has been well explained by Hon'ble Supreme Court in **Dhurandhar Prasad Singh's** Case supra. Hon'ble Supreme Court in the aforesaid case on thorough discussion of different provisions of C.P.C. and especially provisions contained in Order 22 Rule10, C.P.C. has held that though the decree passed in absence of the assignee, i.e., the university in that case upon whom the interest of the original defendant devolved, would not make the decree void ab initio so as to invoke application of Section 47 of the Code of Civil Procedure and entail dismissal of the execution, yet the validity or otherwise of the decree can be challenged by filing a properly constituted suit or taking any other remedy available under law on the ground that original defendant absented himself from the proceeding of the suit after appearance as it had no longer any interest in the subject of dispute or did not purposely take interest in the proceeding or colluded with the adversary or any other ground permissible under law. The rights of an

assignee, not joined as a party in the suit as explained by the Hon'ble Supreme Court as aforesaid though not explained by this Court in so many words in **Jagannath Mahaprabhu's** Case, had prompted this Court, as it seems, to rule in favour of impleading a lis pendens transferee in the suit by exercise of judicial discretion under Order 22 Rule 10, C.P.C. to prevent multiplicity of suits.

14. The aforesaid discussion must have made clear relative scopes and ambits of Section 52 Transfer Property Act, Order 1 Rule 10 and Order 22 Rule 10 C.P.C. In all the aforesaid provisions, in view of the context of the discussion in the present case, the common thread running through the provisions is lis pendens transfer and the common question involved is status / position of a lis pendens transferee in relation to a pending suit. The discussion may be summed up in the following propositions :-

(I) The effect of Section 52 Transfer of Property Act is that a lis pendens transferee is bound by the decree whether on contest, ex parte or on compromise. The plaintiff is under no obligation to implead a lis pendens transferee.

(II) A lis pendens transferee has substantive interest over the property transferred in favour of him and he has the obligation to protect such interest being the representative in interest of the transferor because as between the parties to the transaction a lis pendens transfer is perfectly valid and it operates to vest the title of the transferor in the transferee, though Section 52 by its operation sub-ordinates such lis pendens transfer to the rights based on the decree of the suit.

(III) Regard being had to the scope of Order 1 Rule 10, C.P.C. and the doctrine of lis pendens enshrined in Section 52 of the Transfer of Property Act which does not obligate the plaintiff to implead a lis pendens transferee, such a lis pendens transferee is not a necessary party within the meaning and scope of Order 1 Rule 10, C.P.C. but he is a proper party as held supra in different judicial pronouncements. The plaintiff, in view of the rule of lis pendens is under no obligation to add lis pendens transferee as a party by invoking the provisions of Order 1 Rule10, C.P.C. and the plaintiff can ignore such transfer, even if he has notice thereof and a decree or order obtained by him (plaintiff) would be binding on the lis pendens transferee. The lis pendens transferee may however, move the court under Order 1 Rule 10, C.P.C. and the court may in exercise of its judicial discretion add him as a proper party by

invoking provisions of Order 22 Rule 10, C.P.C., which is an alternative provision to prevent multiplicity of suits.

(IV) If the lis pendens transferor, may he be the plaintiff or the defendant in the suit, after the transfer of the subject matter of the suit or a part thereof does not prosecute the lis with due diligence, loses interest in the lis, absents himself from the suit or collude with the adversary party, the lis pendens transferee being an assignee and having substantial interest in the property transferred shall have the right to seek leave of the court under Order 22 Rule 10, C.P.C. to implead him as a party to protect / safeguard his interest solely as representative in interest of the transferor.

(V) The motion under Order 22 Rule 10, C.P.C. can be made by the lis pendens transferee or by the plaintiff or by any other party or by any person interested. If the lis pendens transferee / assignee opts not to implead himself, he shall be bound by the decree that may be passed against the assignor.

(VI) Though the lis pendens transferee is not a necessary party within the scope and meaning of Order 1 Rule 10, C.P.C. read with Section 52 of the Transfer of Property Act and though he may not be impleaded as a party in presence of the transferor himself in the suit by invoking Order 1 Rule 10, C.P.C., he being an assignee within the meaning of Order 22 Rule 10, C.P.C. and the lis pendens transfer being not non est in the eyes of law, and he having substantial interest over the property, as the representative in interest of the transferor and he having the obligation to protect such interest, he is a proper party within the meaning and scope of Order 22 Rule 10, C.P.C. read with Order 1 Rule 10, C.P.C. and he should ordinarily be impleaded by judicial exercise of discretion under Order 22 Rule 10, C.P.C. to prevent multiplicity of suits.

(VII) On being moved under Order 22 Rule 10, C.P.C. or under any other provision by the lis pendens transferee, the Court without being swayed away by the nomenclature shall have to exercise its discretion judicially and may allow the lis pendens transferee to be impleaded as a party to safeguard his interest. Even on a petition under Order 1 Rule 10, C.P.C. the Court in appropriate case can exercise judicial discretion under Order 22 Rule 10, C.P.C., which is held to be an alternative provision.

15. Though not necessary in the context of the discussion, I feel persuaded to mention here that an Order passed or purported to have been passed under Order 1 Rule 10, C.P.C. being not revisable after the amendment of Section 115, C.P.C., such an order, as in the present case can only be assailed under Article 227 of the Constitution of India. But any order passed or purported to have been passed under Order 22 Rule 10, C.P.C. irrespective of the label or nomenclature of the petition is appealable in view of Order 43 Rule 1 (l).

16. The case in hand is, however, totally different. The pendente lite purchaser Subrat Kumar Nayak (opp. party No.9) has not come forward to be impleaded as a party. He does not apprehend any collusion between the defendants and the plaintiff, who is none other than the present petitioner and he also does not apprehend that his interest may not be protected / safeguarded unless he is impleaded as a party. Said Subrat Kumar Nayak (opp. party No.9) being the assignee had the option to bring himself on record by invoking judicial discretion of the court under Order 22, Rule 10, C.P.C. himself or he could have come on record on the basis of the petition filed before the Court below by the present petitioner. Subrat Kumar Nayak (O.P.9) having not brought himself on record either on his own motion or on the motion by the present petitioner, he cannot take the plea subsequently to the effect that the decree in the suit is not binding on him. It is settled law that the decree against the assignor binds the assignee (See **Orissa Mining Corporation Ltd. *v* M/s Ashok Transport Agency & Others**; 91 (2001) C.L.T. 58 . It is also settled that a lis pendens purchaser is only the representation-in-interest of the lis pendens transferor and the decree against the transferor binds the transferee. In view of such position of law and in view of such fact, I do not find any justification to allow the motion of the petitioner for impleading Subrat Kumar Nayak (opp. party no.9), the lis pendens purchaser as a party at the behest of the plaintiff- petitioner, as said Subrat Kumar Nayak (opp. party no.9) having not impleaded himself as party in spite of opportunity, cannot subsequently take the plea that the decree is not binding on him. He cannot also institute a separate suit, in view of the discussion supra, on the grounds discussed in Dhurandhar Prasad Singh's Case. The court below in view of such facts cannot be held to have exercised its judicial discretion improperly and it cannot be said that learned court below did not follow the decisions cited before it.

17. The first contentions raised by the learned counsel for the petitioner having failed the next contention which remains to be considered is to the effect that non-impleading Subrat Kumar Nayak (opp. party no.9) may lead to multiplicity of suits. This Court in the case of **Panjum Bibi @ Ramjan Bibi**

and 7 others *v.* Najma Alim and another; 2008(II) OLR 747 has held that avoidance of multiplicity of litigation cannot be the sole criteria for deciding an application under Order 1, Rule 10, C.P.C. and further the discussion supra shows that Subrat Kumar Nayak (opp. party no.9) in view of the facts and circumstances of the case has already owned the risk of binding himself to the decree in the suit.

In view of the above, I do not find any merit in the writ petition and the same is accordingly dismissed. Learned Court below is directed to conclude the suit as expeditiously as possible as the suit is a year-old one.

Writ petition dismissed.

2011 (I) ILR- CUT- 1003

B.K.MISHRA, J.

TRP (CRL) NO.32 OF 2008 (Decided on 21.04.2011)

SUNAKAR BEHERA & Ors. …. ….. Petitioners.

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.407 (1) (c) (iii).

Two Cases out of same occurrence - Transfer of Criminal Case pending before a Magistrate to the Court of Sessions – Court of Sessions has no power to direct commitment of a case pending before a Sub-ordinate Magistrate to the Court of Sessions – High Court's power to pass an order U/s.407 (1) (c) (iii) is not limited in its scope only to cases triable by the Court of Sessions but it can alone exercise the power of transfer in respect of any type of Criminal Cases – Held, Direction issued to the SDJM, Kendrapara to commit G.R.Case No.390 & 391 of 2003 to the Court of the learned Addl. Sessions Judge, Kendrapara.

(Para 6,7)

Case law Referred to:-

1.(2000) 18 OCR 174 : (Pitabas Behera & Ors.-V-State of Orissa)
2.VolXLI(1975)CTC.Law Times 607 : (Gundi Sahu & Ors.-V-State of Orissa & Ors.)

For Appellants - Mr. Sangam Kumar Sahoo, Smt. Gitanjali Sahoo, M.K.Muduli & D.P.Pattnaik.
For Respondents - Mr. Subhakumar Mishra, Susanta Kumar Jethy, P.K.Mohapatra.

B.K. MISRA, J. The petitioners being aggrieved with the order of the learned Additional Sessions Judge, Kendrapara dtd. 23.06.2008 in S.T. Case No.37 of 2008 (corresponding to I.C.C. Case No.174 of 2003 have filed this case under Section 407 of the Code of Criminal Procedure (for short 'Cr.P.C.) praying therein for transfer of G.R. Case No.390 and 391 of 2003 corresponding to Kendrapara P.S. Case No.179 and 180 of 2003 pending in the court of learned S.D.J.M., Kendrapara to be transferred to the file of the Additional Sessions Judge, Kendrapara so that the case and cross

cases to be tried by one Court in the best interest of justice and for proper appreciation of the cases of the parties.

2. Learned counsel for the petitioners contended that I.C.C. Case No. 174 of 2003 i.e. the complaint case was filed by one Bhramarbara Sethy alleging therein that on 10.07.2003 around 6.00 A.M. accused Ranjan Kumar Behera, the son of opposite party no.2-Muralidhar Behera was assaulted by the accused persons and on seeing that when the father of the said Ranjan Kumar Behera protested the accused persons also attempted to assault the said Murlidhar Behera, the complainant and on seeing that the opposite parties, namely, accused Yudhistira Sethy, Brundaban Sethy, Raghunath Sethy and Babula Sethy and others protested and when intervened in the matter, accused Sunakar Behera and the other accused persons abused the complainant and others in obscene words by uttering the caste of the petitioners. It is further alleged that accused Ajaya Kumar Behera, Bijay Kumar Behera and Sunakar Behera indiscriminately went on assaulting the complainant and others and because of the lathi blow of Bijay Kumar Behera, the complainant sustained bleeding injuries on his neck and left hand fingers. Similarly, Yudhistir Sethy was assaulted by Bijay Kumar Behera and Sunakar Behera with lathi for which he sustained bleeding injuries on his right hand. Raghunath Sethy also sustained injuries on his chest because of thrust blow given by the accused Bijay Kumar Behera with lathi. On those allegations, learned S.D.J.M., Kendrapara took cognizance of the offences under Sections 341/323/342/294/354/452/506 of the Indian Penal Code (for short 'I.P.C.') read with Section 34 of the I.P.C and under Section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and the case was committed to the court of Additional Sessions Judge, Kendrapara which was registered as S.T. Case No.37 of 2008. For the same occurrence on the F.I.R. lodged by the petitioner no.2, Bijaya Kumar Behera, Kendrapara P.S. Case No.180 of 2003 corresponding to G.R. Case No.391 of 2003 was registered under Section 341/ 323/342/354/294/452 and 506 of the I.P.C. and read with Section 34 of the I.P.C and cognizance of the offences were taken and the case is pending before the S.D.J.M., Kendrapara. Similarly, for the same occurrence i.e. 10.07.2003 on the report of Murlidhar Behera, Kendrapara P.S. Case No.179(9) dtd. 11.07.2003 under Section 341/323/ 294/379 I.P.C. read with Section 34 of the I.P.C. was registered and on completion of investigation charge sheet has been placed against the accused persons under Section 341/323/294 and 506 of the I.P.C. read with Section 34 of the I.P.C.

3. On perusal of the certified copies of the F.I.Rs., the Charge Sheets in G.R. Case Nos.390 and 391 of 2003 and Annexure-1 i.e., complaint petition registered as I.C.C. Case No.174 of 2003, it is established that the

accused persons in one case are the witnesses in other cases and vice-versa. As I have already stated above, the allegation and counter allegations relates to the same occurrence, the same day and the same time so also the place. It is not at all disputed that the accused persons in one case are the witnesses in other cases and persons have been injured from both the sides.

4. The Code of Criminal Procedure nowhere provides specifically the manner in which trial of cases and cross cases be taken up. The terms 'cross-cases', 'counter cases' or 'case and counter cases' have not been defined in the Code of Criminal Procedure, but in common paralance when in a fight between the rival factions which culminates to registration of two cases one against each of the rival factions, those are termed as 'cross cases', 'counter cases', or 'case and counter case'.

5. It is no more res integra that if two cases are pending which arise out of the same occurrence, then interest of justice requires that one should be tried after the other by the same Judge. It is the settled position of law that in case trial of cross cases where one is triable by the court of sessions and other is triable in the court of Magistrate, the Sessions Court does not have the power to order for commitment of the second case and such orders can only be passed under Section 407 of the Cr.P.C. by the High Court, if it would appear do so in the greater ends of justice. In that context reliance can be placed on (2000) 18 OCR 174 in the case of Pitabas Behera and others –v- State of Orissa and Vol XLI (1975) Cuttack Law Times 607 in the case of Gundi Sahu and others –v- State of Orissa and others. Thus in view of the such settled position of law, when the learned Additional Sessions Judge, Kendrapara declined to direct the S.D.J.M., Kendrapara to commit G.R. Case Nos.390 and 391 of 2003 on the ground that he has no jurisdiction to issue such direction to the S.D.J.M., Kendrapara, the same is perfectly justified in the eye of law and do not call for any interference.

6. Be that as it may, the petitioners are not remediless, as this Court can pass appropriate orders in exercise of powers conferred under Section 407 of the Cr.P.C.

Section 407 of the Cr.P.C. reads as follows:-

"407. Power of High Court to transfer cases and appeals. (1) Whenever it is made to appear to the High Court –

xx xx xx

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice.

It may order –

xx xx xx

(iii) that any particular case be committed for trial to a Court of Session

xx xx xx

Section 407 (1) (c) of the Cr.P.C. relates to transfer of a case from one court to another if it tends to the general convenience of the parties or witnesses. It is true that convenience and expediency are factors to be considered in trial of a case and most important consideration is that justice should be done. The prayer of transfer is always to be considered with reference to the facts and circumstances of each case and no hard and fast rule can be laid down as a matter of principle. The High Court's power to pass an order under Section 407 (1)(c) (iii) is not limited in its scope only to cases triable by the court of Sessions. The wordings of the provision clearly show that the High Court can exercise the power of transfer in respect of any type of criminal cases. So the petition for committing criminal case pending before a Magistrate to the court of sessions is clearly maintainable in law. There can be no controversy over the settled position of law that the High Court alone can exercise the power to the above effect and the court of Sessions has no power to direct the commitment of a case pending before a subordinate Magistrate to the Court of Sessions and therefore the proviso to Sub Section (2) of Section 407 of the Cr.P.C. does not apply to a matter of this nature.

7. In the circumstances I feel expedient in the interest of justice that S.T. Case No.37 of 2008 and its counter cases namely, G.R. Case Nos.390 and 391 of 2003 are to be tried in the court of learned Additional Sessions Judge, Kendrapara. Accordingly, I direct the learned S.D.J.M., Kendrapara to commit G.R. Case Nos.390 and 391 of 2003 pending before him to the court of learned Additional Sessions Judge, Kendrapara, so that those cases can be tried and disposed of with S.T. Case No.37 of 2008. On commitment, learned Additional Sessions Judge, Kendrapara shall pass appropriate orders for taking up trial of the three cases in his court one after the other.

Accordingly, the TRP (CRL) is disposed of.

Application disposed of.