2012 (I) ILR- CUT- 889

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

W.A. NO. 75 OF 2005 (Dt.03.08.2011)

KEDARESWAR MOHAPATRA ……Appellant.

.Vrs.

THE PRESIDING OFFICER,
LABOUR COURT, BBSR & ANR. …….Respondents.

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

"Workman" – How to determine – Nature of duties performed by an employee are relevant to determine his/her status as workman, but not his designation, at the time of termination.

In this case the appellant was functioning as an advertisement manager – He had adduced both oral and documentary evidence to show that the functions discharged by him were supervisory but not managerial in nature and he was drawing less than Rs.1600/- per month – The finding arrived at by the Labour Court and confirmed by the learned Single Judge that the appellant is not a workman in terms of Section 2(s) of the I.D. Act is erroneous in law and the termination of the appellant is not justified – Held, impugned award passed by the Labour Court and confirmed by the learned single Judge are quashed – Direction issued to the respondent-employer to pay full salary and other consequential benefits such as provident fund, Bonus and all other service benefits taking in to consideration of the wage revision from the date of termination till the date of attaining the age of superannuation.

(Para 12,22,23)

Case laws Referred to:-

1.(1994)5 SCC 737 : (H.R.Adyanthaya & Ors.-V-Sandoz(India) Ltd. & Ors.)
2.(2005)5 SCC 91 : (Haryana State Co-operative Land Development Bank-V-Neelam)
3.2008(Ii)OLR(FB)725 : (Mahammed Saud & Ors.-V-Dr.(Maj)Shaikh Mahfooz & Anr.)

For Appellant - M/s. N.K.Mishra, P.K.Sahoo, D.Misra, P.K.Pani, M. Rath & B.Dasmohapatra.
For Respondents - M/s. S.Das, Mrs. S.Jena & S.Mohanty, (for Respondents No.2)

V.GOPALA GOWDA, CJ. This appeal is directed against the order dated 20.6.2005 passed in OJC No.5059 of 1996 affirming the award dated 31.10.1995 passed by the learned Presiding Officer, Labour Court, Bhubaneswar in I.D. Case No.46 of 1987 urging various grounds for setting aside the impugned order and quash the award and to pass such other order/orders as may be deemed fit in the facts of this case.

2. The required brief facts are stated for the purpose of appreciating rival legal contentions urged in this appeal with a view to find out as to (1) whether the impugned order in affirming the award is vitiated on account of erroneous finding or error in law which constitute substantial question of law ? (II) Whether non consideration of the relevant legal aspect namely, the order of retrenchment passed against the appellant is an admitted fact, but the post being abolished is not a fact, and for that reason the order of termination is not in conformity with the provisions of Section 25F red with 25G of Industrial Disputes Act and thereby the order is vitiated in law ?

3. The appellant had worked in the Respondent-2 Management for a period of nineteen years in the post of Advertisement Manager. According to him, his nature of work was mostly clerical and supervisory and his monthly salary was Rs.1472.80 paise at the time of termination on 6.11.1986. Therefore, he has pleaded that he is covered under the definition of Section 2(s) 'workman' of the Industrial Disputes Act, 1947 (hereinafter called 'I.D.Act').

4. Further case of the appellant is that when he was continuing as an Advertisement Manager in the Respondent-Management, Sri Basanta Kumar Biswal joined the management as Working Chairman. At his instance, many new employees were appointed by the management. One Amitabh Swain joined in the Advertisement Section as an Advertisement Executive. Subsequently, the management took away from the appellant important jobs slowly and steadily, so that he would be forced to leave the service as he did not toe the line of Sri Biswal. It is further pleaded that by order dated 3.3.1986, some of the material jobs of the appellant were handed over to the said Amitabh Swain. The said document is marked as Ext.F before the Labour Court. Being deprived of such powers of him, as per the aforesaid order, he left with only supervisory function and no managerial powers or duties was with him. The appellant applied for one week's ESI Leave from 4.11.1986 on the advice of E.S.I. doctor. While he was on sick leave on 7.11.1986, to his utter surprise, he received an order of termination on 6.11.1986 on the ground of abolition of the post of Advertisement Manager. He was paid one month's notice pay and retrenchment

compensation as per the provisions of the I.D. Act, 1947. It is the further case that after his retrenchment, Sri Amitabh Swain continued to perform the duties of the appellant.

5. The appellant being aggrieved by the illegal and unjustified termination of the appellant from the service, raised the Industrial Dispute. On account of the failure of the conciliation proceeding, the State Government being the appropriate Government referred the dispute to the Labour Court, Bhubaneswar for adjudication. The order of reference reads thus:-

> " Whether the termination of the services of Sri Kedareswar Mohapatra by the management of M/s. Prajatantra Prachar Samity with effect from 6.11.1986 is legal and justified ? If not, to what relief Sri Mohapatra is entitled?"

6. A Case was registered as I.D. Case No.46 of 1987 before the Labour Court. Parties have filed their claim statement and written statement respectively.

7. The appellant has examined himself as witness no.1. On behalf of the management, two witnesses were examined and several documents were produced by the parties as Exhibits. On 29.10.1992, the learned Presiding Officer, Labour Court passed the award holding that status of the appellant was that of a 'workman' and his termination amounts to retrenchment, but without appreciating the facts on record held that the termination of the services of the appellant was legal and justified. However, the Labour Court directed the management to pay the balance retrenchment compensation and full back wages from the date of termination till the date of reference only at the admissible rate.

8. Aggrieved by the said award, both the appellant and the Respondent No.2 Management filed OJC No.2368 of 1993 and 1161 of 1993 respectively challenging the very same award urging various grounds. Both the matters were heard together and disposed of by a common judgment dated 28.3.1995 passed by this Court by setting aside the award impugned in the said writ petition and remanding the matter to the Labour Court for re-disposal of the same after hearing the matter afresh on existing materials on record.

9. In pursuance of the remand order and direction of this Court, both the parties appeared before the Labour Court and made their factual and legal submissions. The Labour Court has passed the award dated 21.101995 by

holding that the appellant is not a 'workman' and accordingly refused to extend the benefits to him under the I.D. Act. It is the case of the appellant that a bare perusal of the award reveals that the Labour Court was swayed away by the designation of the appellant alone, ignored and failed to appreciate the legal evidence on record and acted contrary to the intendment of the judgment of this Court dated 28.3.1995 in remanding the case to it.

10. It is the further case of the appellant that the findings on the terms of reference in the impugned award passed by the Labour Court was not only perverse, but also contrary to the intent of the judgment of this Court. Therefore, he approached this court by filing OJC No.5059 of 1996 urging various tenable and legal contentions. In support of his contention it is stated that the findings of the Labour Court on the term of reference are not only erroneous but suffers from error in law. Further the appellant has pointed out about the erroneous approach of the learned Labour Court in considering the irrelevant and non-existing materials and also non-consideration of specific and important materials available on record in favour of the appellant and helpful for deciding the lis.

The second respondent appeared in the case and filed its counter affidavit to which rejoinder affidavit has also been filed by the appellant.

11. The following grounds are urged by the learned counsel Mr. Mishra appearing on behalf of the appellant. Both the Labour Court and the learned Single Judge have not accepted the well settled legal position that the nature of duties performed by an employee are relevant to determine his/her status as workman, but not his designation as workman under Section 2(s) of the I.D. Act. In the earlier writ petition this Court while disposing of the writ petition remanded the matter to the Labour Court for re-appraisal of the facts after referring to the judgment of the Supreme Court in the case of S.K.Maini Vrs. M/s. Carona Sahu Co. Ltd. & Ors, reported in 1994-II LLJ 1153, wherein the Supreme Court has held that designation of the employee is not of much importance and what is important is the nature of duties. The determinative factor is the main duties and not some work incidentally done by an employee. It is the contention urged by the learned Senior Counsel that the learned Single Judge failed to take into consideration the erroneous findings on the basis of non-existing material evidence against the appellant regarding the duties mainly performed by the appellant. Learned Presiding Officer has dealt upon some parts of the duties of the appellant related to a period beyond twelve years prior to his retrenchment and also failed to exercise judicial mind to render justice to the appellant. Another legal

submission is that while questioning the correctness of the finding of the award before this Court, the appellant has pointed out specific irregularities committed by the Labour Court invoking the supervisory jurisdiction of this Court pointing out such apparent incongruities and perversities in the award. Learned Single Judge has not considered such vital aspects and appears to have been swayed away by the designation held by the appellant as Advertisement Manager and has completely failed to look into the nature and performance of duties mainly discharged by the appellant at the time of impugned termination. Learned Single Judge has manifestly erred in law in negativing the contention of the appellant that he is a 'workman' which is contrary to the decision of the Apex Court and also the specific directive of this Court. Therefore, he has prayed for to set aside the impugned order.

12. Learned counsel for the appellant has also pointed out with reference to paras 11 to 14 of the order of the learned Single Judge in which he had discussed as to how the appellant is not a workman in holding that there is no error in the finding of the Labour Court on the term of reference. Learned Single Judge while holding that appellant is not a workman as per Section 2(s) has extracted the definition of the said provision and taken into consideration only a fraction of the statement in chief of the appellant and Annexure-1, besides considering an extraneous material, i.e. the Wage Board Award and approved the finding as held by the Labour Court that the employee was not a workman and further erred in holding that the Labour Court has not committed any error of jurisdiction nor there is any error of law apparent on the face of the award, so as to interfere with the award. The said finding and reasoning of the learned Single Judge in the impugned order has been on the fact that the appellant being designated as Advertisement Manager all through his tenure, he cannot be anything else than a Departmental Manager and as such, it is concluded that he discharged the managerial functions. Further he has not made reference to Annexure-1, which has not at all been considered and the effect of the earlier judgment of this Court has not been considered at all. Therefore, the impugned order of the learned Single Judge is unsustainable in law. The impugned judgment has been passed by the learned Single Judge on the basis that the appellant is not a workman on the erroneous comprehension that the appellant was appointed and terminated while holding the post of Advertisement Manager notwithstanding the innumerable evidence both oral and documentary in the case to arrive at a conclusion that the appellant has not discharged the managerial function. The said observation has been arrived at by the learned Single Judge on the basis that the appellant had failed to produce any material to come under the four exceptions as per Section 2(s) of I.D. Act. However, repeated reference has been made by the

appellant to the oral and documentary evidence on record to show that the functions discharged by him were supervisory in nature and he was drawing admittedly less than Rs.1600/- per month. In view of this undisputed fact, the conclusion arrived at by the learned Single Judge that the appellant is not a workman is a blatant error and deserves to be set aside.

13. The other ground urged is that the learned Single Judge has erroneously taken into consideration the Wage Board Award wherein the appellant was included in Group-II of the administrative staff being a Departmental Manager for which it has been concluded that he discharged the managerial functions. Such finding is patently based on perverse consideration of the Wage Board Award and is totally extraneous to the oral and documentary evidence on record and as such, the learned Single Judge had no jurisdiction under certiorari powers to traverse the same while deciding the matter. Even if such Wage Board Award not being a matter of lower court records was taken into account, the co-employee of the appellant namely, Sri Artatran Buxi, Recovery Manager being also a Departmental Manager was construed to be a 'workman' by the management as also by the Labour Court. Therefore, the finding and observation in the impugned order passed by the learned Single Judge is wholly irrational and discriminatory.

14. Learned Single Judge has not discussed that the admitted fact of termination of the appellant as per the management amount to retrenchment and notice pay and retrenchment compensation as per their calculation under the I.D. Act had been remitted to the appellant. Learned Single Judge has not noticed that the respondent-employer has been adopting the principle of blowing hot and cold or approbation or reprobation. Therefore, the impugned judgment rendered is bad in law.

15. Another ground of challenge to the correctness of the finding that the appellant is not a workman is on the basis that the Labour Court has considered the following materials and arrived at a finding that he is not a workman. Reliance placed upon the said materials is fraught with incurable illegalities and jurisdictional improprieties as briefly indicated below:-

(I) Most of the above materials taken into consideration are stale and old material having no life nor nexus with the time, when the services of the appellant were terminated.

(II) Out of the said materials the following are manifestly error of record.

(a) There is no document as Ext.C dated 18.6.68 indicating that the appellant was in charge of Recovery Section and that the employees therein were under this contract.

(b) Ext.7 dated 18.4.73 nowhere reveals that the appellant was an independent officer in-charge of the administration of Advertisement Department.

(c) Exts. 8 to 10 relate to communication by the appellant as Recovery Manager with regard to disciplinary matters and not as Advertisement Manager. However, the relevant oral evidence of M.W.2 discloses that the appellant had no such independent powers, except to comply with the orders of his higher authorities, such as Chairman, Managing Trusty etc.

(d) Exts. 12 and 13 relate to long past and have the same consequences as at Ext.1 to 11 in respect of powers of the appellant.

(e) Exts. 14 and 15 never disclosed that the appellant issued warning to Jadu Sahu for remaining on leave. On the contrary, the said Exhibits are leave application forms, which have been finally considered by the Working Chairman.

(f) Exts. 20 and 20/a relate to 11.3.90 and 30.12.89 respectively and are release orders of one advertising agency. The same are no way connected with the duties of the appellant, since he had been illegally and unjustly retrenched w.e.f. 6.11.86.

(g) Exts. 16 is an explanation of the Peon but it no where suggests that the appellant sanctioned his leave application.

(h) Exts. 17 and 17/b no where reveal that the appellant sanctioned leave application of subordinate employees. On the contrary, such leave was granted either by the Working Chairman or General Manager.

(i) Under Ext. 18, the allotment of duties to an employee on leave vacancy was only recommended by the appellant for being allowed by his higher authorities.

(j) Ext. 19 to 19/p and 22,22/f, 22/g, 22/h series relate to signing of contract by the appellant prior to 3.3.86. The said duties were performed by Sri Amitav Swain thereafter till the retrenchment of the appellant Ext.22/a to

22/c are Xerox copies of Exts.19 to 19/b. Ext.22/j is not a rate contract document signed by the appellant but a Xerox copy of Ext.18/a.

(k) M.W.1 and M.W.2 in cross examination have stated that the appellant had never attended to the duties of publishing text of advertisement, signing of contract and fixing rate of advertisement after issuance of the order dated 3.3.86 (Annexure-1). The said duties thereafter used to be performed by Sri Amitav Swain and his duties admittedly were clerical and supervisory.

(l) There is no term as non-working journalist in the Working Journalist and Other News Paper Employees (Conditions of Services and Miscellaneous Provisions) Act, 1955. On the contrary, the appellant and other employees designated as Departmental Manager were covered under different Wage Board awards as other Non-Journalist Newspaper employees.

16. It is further contended that non-consideration of the aforesaid materials both oral and documentary which is a serious error of law committed by the Presiding Officer, Labour Court which has been concurred by the learned Single Judge has prejudiced the case of the appellant as documentary evidence Exts. A to E discloses the arrangement and policy decision taken by the Managing Trustee and the appellant had no such power in respect of the Advertisement Section. Ext. F is the most important office order dated 3.3.1986 issued by the Managing Trustee which is very relevant in support of the case of the appellant relating to allocation of duties between the appellant and Sri Amitav Swain. Ext. G is the advertisement published in the 'Prajatantra' dated 24.12.1988 showing the management's intention to continue the post of Advertising Manager which clearly shows that the reason for termination on the ground that such post is abolished is non-existing fact. Ext.4 is the order of termination of the appellant showing payment of retrenchment compensation and notice pay at the time of such termination Exts. Y and Y/1 are respectively the memorandum of settlement and the award in I.D. Case No.50 of 1987 relating to Sri Artatrana Buxi, wherein the Recovery Manager was accepted as a workman. Further the uncontroverted oral evidence of W.W.1 and the relevant cross-examination of M.W.1 and M.W.2 have also been lost sight of by the learned Labour Court as well as the learned Single Judge.

17. It is further contended that had the aforesaid material piece of evidence placed before the Labour Court been considered by the learned Presiding Officer, Labour Court, its finding would have been changed for the

reason that Annexures 4 and 4/1 reveal that the post of Recovery Manager has been accepted by the Management as workman's post.

18. This Court in its earlier writ petition referred to supra while remanding the case to the Labour Court directed it to re-examine the matter by taking into consideration the evidence of M.W.1 and Exts.6 to 10 specifically from the side of the management and several provisions of Industrial Disputes Act as contended by the appellant. Learned Presiding Officer completely misdirected himself in overlooking the said direction of this Court and passed an award on surmises and conjectures. Besides on a thorough misreading of the deposition and documents on record, learned Single Judge has erred materially by making a solitary but incorrect observation that there is no case for interference in the award as it is not irrational or perverse. Therefore, the impugned judgment requires interference.

19. Learned counsel for the respondent-employer sought to justify the impugned judgment of the learned Single Judge placing strong reliance upon the finding and reasons recorded at paras 11 to 14 of the impugned judgment, learned Single Judge in exercise of judicial review power has concurred with the findings of learned Presiding Officer in answering to term of reference against the appellant and further declining to quash the award impugned in the writ petition as the nature of duties performed by the appellant does not come under the exception of Clauses (i) to (iv) of Section 2(s) of the Industrial Disputes Act, 1947 as he was designated as the Advertising Manager. The Labour Court on appreciation of evidence on record in exercise of its original jurisdiction has arrived at and recorded a finding that appellant is not a workman. Further, he has contended that on the basis of the pleadings learned Single Judge has rightly made observation at para-14. The apart, from the pleadings, the status, position, pay-scale, etc. of the appellant had been determined as that of a Departmental Manager coming under Group-II of the administrative staff. Since the Advertisement Managers as per the Wage Board Award are held to be Departmental Managers, it can be safely concluded that they discharge managerial functions. The power of the learned Single Judge in the matter of interference with the award of the Tribunal has been well settled by a series of decisions of the Supreme Court. It is no more res integra that this Court merely exercises supervisory jurisdiction over an inferior tribunal and can interfere with the award of an Industrial Tribunal when it comes to the conclusion that the said Tribunal has committed any error of jurisdiction or error of law apparent on the face of the award which vitiates the ultimate conclusion by taking inadmissible evidence into consideration or by ignoring the material evidence. Learned Single Judge cannot re-appreciate the

evidence on record and come to the conclusion to interfere with the finding arrived at by the Labour Court. Therefore, he submitted that it is not a fit case for interference. He has placed reliance in support of its submission at paragraph 13 of the decision of the Supreme Court in the case of H.R. Adyanthaya & Ors. Vrs. Sandoz(India) Ltd. & Ors., reported in (1994) 5 SCC 737. Further on the principle of estoppel, he has placed reliance upon the decision of the Supreme Court in the case of Haryana State Co-operative Land Development Bank Vrs. Neelam, reported in (2005)5 SCC 91 and the Full Bench decision of this Court in the case of Mahammed Saud & Ors. Vs. Dr.(Maj) Shaikh Mahfooz & Anr., reported in 2008(II)OLR(FB) 725 to contend that the appeal against the order of the learned Single Judge is not maintainable. Therefore, he contends that the appeal is liable to be dismissed being devoid of any merit and prayed for dismissal of the appeal.

20. Considering the rival legal contentions, the following substantial questions of law would arise for consideration; (i) whether the appeal against the impugned judgment of the learned Single Judge in view of the Full Bench decision of this Court reported in 2008(II) OLR 725 is maintainable ? (ii) Whether the concurrent finding of fact recorded by the learned Single Judge in holding that appellant being a Advertising Manager, does not come within the exception clause nos. I to IV of Section 2(s) of the I.D. Act is an erroneous finding or error in law which would constitute substantial question of law in this appeal required to be answered in favour of the appellant ? What order ?

21. The first point is required to be answered in favour of the appellant in view of the decision of the Full Bench where in it has considered the provisions of the Rules of the Orissa High Court and also the decision of the Supreme Court and in view of the decision of the Supreme Court referred to supra, the impugned judgment of the learned Single Judge is appealable before this Court. Hence this position has been stated at paragraph 47 of the judgment which reads thus :-

"47. We have heard the learned counsel for the parties patiently, noted the citations carefully, perused the materials meticulously and considered the submissions pragmatically and for the discussions made above, we have arrived at the following conclusions :

(1) After introduction of Section 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. Dagra 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 Article 226 of the Constitution of India. In a writ application filed under Articles 226 and 227 of the Constitution, if any order/judgment/decree is passed in exercise of jurisdiction under Article 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 Article 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.

Accordingly, the first point is answered in favour of the appellant holding that the appeal is maintainable against the judgment of the learned Single Judge.

22. The second point is also required to be answered in favour of the appellant for the following reasons :-

It is an undisputed fact that the order of termination is passed by the employer on the ground that Advertising Manager post is abolished and treating the same as retrenchment, paid the retrenchment compensation and notice pay in lieu of issuance of one month's notice, as per the calculation under the provisions of I.D. Act. This material evidence on record in favour of the appellant has been conveniently ignored by the Labour Court and the learned Single Judge. Learned Single Judge could have noticed that having regard to the undisputed fact of termination of the services of the appellant treating it as retrenchment and paid the retrenchment benefit and one month's notice pay under the provisions of I.D. Act. The contention urged by the respondent employer that appellant is not a workman in terms of definition of Section 2(s) of the I.D. Act and therefore the reference is not maintainable in law is wholly untenable in law. According to him adopting the principle of blowing hot and cold or approbation or reprobation by the respondent-employer is not permissible in law. This important aspect has not been considered at all by the learned Single Judge. Therefore, the finding on the question that the appellant is not a workman in terms of Section 2(s) of I.D. Act is erroneous in law. Further, the appellant's counsel has rightly

invited our attention to the finding recorded by the Labour Court in holding that the appellant is not a workman placing reliance upon the various materials which are extracted above as ground nos.(a) to (1) which are prior to the date of office order dated 3.3.86 as the status, position of the appellant were lower. No doubt, the learned Single Judge has extracted the same at paragraph-13, but he has not noticed the material evidence in support of the case of the appellant that his status, position and nature of duties were lowered which certainly comes within the exception of clauses I to IV of Section 2(s) of I.D. Act and further even assuming that he is being employed in supervising capacity discharging the nature of duties as such, the wages does not exceed Rs.1600/- per month. The undisputed fact is that the salary paid to the appellant is a sum of Rs.1472.80 paise as retrenchment compensation and one month pay is remitted to the appellant. Therefore, non-consideration of the said relevant material evidence and provisions of Section 2(s) and not considering the office order dated 3.3.86 has certainly rendered the finding on the contentious issue perverse, which is an error apparent on the face of the record. Further non-consideration of abundant material evidence in support of the case of the appellant namely, the various aspects mentioned in the ground no.15 at sub-paras (a) to (1), the documentary as well as oral evidence elicited in the cross-examination of M.W.1 and M.W.2 wherein they have stated that the appellant had never attended to the duties of publishing the text of the advertisement, signing of contracts and fixing rate of advertisement after issuance of the order dated 3.3.86 and the said duties thereafter used to be performed by Sri Amitav Swain and his duties admittedly were clerical and supervisory has rendered the decision perverse. However, in the case of Aratatrana Buxi, by consent the award was passed by the Labour Court in I.D. Case No.50 of 1987 wherein who was designated as Recovery Manager was accepted as workman by entering into a memorandum of settlement. In the case of appellant all legal evidence adduced to show the nature of duties which are performed by him for the purpose of determination as to whether the appellant is a workman or not in terms of Section 2(s) of I.D. Act, has not been taken into consideration and the Labour Court has recorded a finding against the appellant which is erroneously confirmed by the learned Single Judge. Therefore, the concurrent finding of fact recorded by the learned Single Judge on the status of the appellant holding that the conclusion arrived at by the Labour Court that the appellant is not a workman in terms of the definition of Section 2(s), is not legal and valid. Further, the learned Single Judge has placed reliance upon the award of Wage Board which was not the material evidence produced before the Labour Court. Further there is no term as ‘non-working Journalist’ in the Working Journalist and other News Paper Employees (Conditions of Services and Miscellaneous Provisions)

Act, 1955. On the contrary, the appellant and other employees designated as Departmental Manager were covered under different Wage Board Awards as other non-Journalist Newspaper employees. Therefore, the wage board award relied upon by the learned Single Judge has no application to the fact situation. Exts. A to L disclose about the arrangement and policy decision taken by the Managing Trustee. The appellant had no such power in respect of the advertisement section is also an important material evidence on record which has been omitted to be considered by the Labour Court at the time of appreciation of evidence on record. Further placing reliance upon Exts. A to L and recording a finding against the appellant is an erroneous approach of the Labour Court, which has been mechanically accepted by the learned Single Judge without scrutinizing the said finding in the backdrop of the evidence which has no relevance for the purpose of recording a finding against the appellant that he is not a workman in terms of Section 2 (s). The workman has produced voluminous documentary evidence on record apart from the admission that Advertising Manager is not a workman. Non-consideration of the material evidence produced by the appellant and recording a finding on the contentious issue that appellant is not a workman is not only erroneous in law but an error apparent on the face of the record which has rendered the award of the Labour Court and the order of learned Single Judge irrational and perverse in not complying with the principle in exercise of judicial review power of the learned Single Judge has certainly construed the second point as substantial question of law for consideration of this court and the same is answered in favour of the appellant for the reasons stated supra. Further the reason assigned for determination that the Advertisement Manager post is abolished is contrary to the documentary evidence Ext.G advertisement published in the 'Prajatantra' dated 24.12.1988 showing the management's intention to continue the post of Advertisement Manager. Therefore, termination order passed against the appellant on a non-existing fact is void in law. Therefore, the order of termination is liable to be set aside by answering the terms of reference made in the order of reference to the Labour Court for adjudication holding that the order of termination is not justified as the alleged abolition of the Advertisement Manager's post is only a ground made out to terminate the services of the appellant which is a clear case of mala fide exercise of power by the employer and totally unsustainable in law.

Point No.3

23. Since we have held that the findings recorded in the impugned award on the contentious issue concurred by the learned Single Judge in the impugned judgment are erroneous and error in law the same are liable to be

set aside and accordingly we direct. While answering to point no.3, we grant the following relief to the appellant as indicated in the operative portion of this judgment for the following reasons :-

Since we have already held that the termination of service of the appellant on non-existing ground is a mala fide exercise of power on the part of the employer and it is also colourable exercise of power by the employer to terminate the services on the ground of abolition of the post of Advertisement Manager which is factually incorrect as evidenced from Ext. G for which we have answered the term of reference in favour of the appellant by holding that termination of the appellant is not justified, in the normal course, the workman is entitled for all service benefits. Since the workman has attained the age of superannuation during the pendency of the appeal, therefore, he is entitled for full salary and the consequential benefits. Accordingly, we direct the respondent-employer to pay the full salary and other consequential benefits from the date of termination till the date of attaining the age of superannuation, i.e. 58 years, by granting all consequential benefits, such as, Provident Fund, Bonus and all other service benefits applicable to the workman by computing the same taking into consideration the Wage revision and other monetary benefits for which the workman is entitled to and pay the same to him within a period of six weeks from the date of receipt of certified copy of this order.

24. Accordingly, we allow this appeal in the above said terms by setting aside the impugned judgment of the learned Single Judge and quash the award passed by the Labour Court in the I.D. Case No.46 of 1987 and pass the award in the above terms by answering the terms of reference in favour of the appellant.

Appeal allowed.

2012 (I) ILR- CUT- 903

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

W.P(C) NOS. 3323, 17028 OF 2011 (Dt.25.11.2011)

KEONJHAR NAVA NIRMAN PARISHAD & ANR. ……..Petitioners.

.Vrs.

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

INDIAN PORTS ACT, 1908 (ACT NO.15 OF 1908) – S.5.

Alteration of limits of Ports – Central Government issued notification Dt.22.10.2010 U/s.5 of the Act in relation to "Major Port" extending the limits of Kolkota Port Trust (KOPT) encroaching upon non Major Ports in the State of Orissa, which have been notified much earlier under the said provision by the State Government fixing its limits – Failure on the part of the Central Government to consult the State Government and the lessees who are having lease hold rights over such Ports before exercising the said power – Basing on the Central Government notification KOPT made notification Dt.10.11.2010 altering the limits of the Kolkota Port – It limits maritime activities in the state and will deprive the livelihood of lakhs of people of Orissa – PIL filed challenging the above action – Held, notification issued by the Central Government will not prevail over the notification issued by the State government in relation to other Ports – Held, the impugned notification issued by the Central Government and the subsequent notification issued by KOPT are arbitrary, illegal violative of the principles of natural justice and Article 14 of the Constitution of India, hence quashed. (Para 53)

Case laws Referred to:-

1.AIR 1959 SC 648 : (Deep Chand-V- State of U.P. & Ors.)
2.AIR 1964 SC 1284 : (State of Orissa & Anr.-V- M/s.M.A. Tulloch & Co.)
3.(1984)Supp.SCC 28 : (Fertilizers & Chemicals Travancore Ltd.-V-Kerala State Electricity Board & Anr.)
5.(2004)10 SCC 201 : (State of West Bengal-V-Kesoram Industries Ltd.& Anr.)
6.(2011)3 SCC 139 : (Offshore Holdings Pvt. Ltd.-V-Bangalore Development Authority & Ors.)
7.AIR 1951 Punjab 409 : (Piara Kishen-V-Crown)
8.AIR 1982 Allahabad 451 : (Mittra Nand Kaushik & Anr.-V-State of U.P.& Ors.)

9.AIR 1979 SC 898 : (M.Karunanidhi-V- Union of India)
10.(2007)12 SCC 462 : (Sheel Kr. Roy-V-Secretary, Ministry of Defence)
11.(2001)2 SCC 386 : (Om Kumar & Ors.-V-Union of India)
12.(2004)2 SCC 130 : (Teri Oat Estates (P) Ltd.-V-U.T.,Chandigarh).
13.(2006)1 SCC 228 : (C.Albert Morris-V-K.Chandrasekaran & Ors.)

For Petitioner(s) - M/s. Narsingh Mishra, R.K.Pradhan, S.N.Panda, B.K.Baral (W.P.(C) No.3323/2011)
Mr. Sanjay Sen, Sr. Advocate,
M/s. S.Ratho, D.Mishra, J.Dash, M.K.Das, (W.P.(C) No.17028/2011)

For Opp.Parties - Mr. Parag Tripathi, Addl. Solicitor General,
Mr. Sakti Dhar Das, Asst. Solicitor General, (for Union of India in both the writ petitions)
Mr. Ashok Mohanty, Advocate General, (for O.P.No.2 State of Orissa in both writ petitions)
Mr. S.K.Kapur, Sr. Advocate
M/s. S.K.Sarangi, B.Behera, J.Acharya & A.K.Jena, (for O.P.No.3 in the writ petition)
M/s. A.K.parija, S.P.Sarangi, B.C.Mohanty, D.K.Das P.K.Dash & R.K.Tripathy(for intervenor-O.P.No.4 in

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V. GOPALA GOWDA,C.J. The first writ petition (W.P.(c) No. 3323 of 2011) has been filed as a Public Interest Litigation by the petitioner-organization, which is claiming to be a registered organization and is engaged in taking up various common problems of the people for seeking redressal thereof. The second writ petition (W.P.(C) No. 17028 of 2011) has been filed by the petitioners M/s Subarnarekha Port Pvt. Ltd. and two other associate companies which are companies incorporated under the Companies Act, 1956 and engaged by the Government of Orissa for development of the Subarnarekha Port project vide MOU executed on 11.01.2008 and which have made substantial investments in the development of the Subarnarekha Port and therefore, they are severely affected and prejudiced by the illegal and arbitrary action on the part of the opposite parties.

2. Both the writ petitions have been filed questioning the correctness of the Notification No. 2609(E) dated 22.10.2010 issued by the Central Government in exercise of power under Section 5 of the Indian Ports Act, 1908 and Section 2 (q) of the Major Port Trust Act, 1963 and Notification No. Adm/01250/VI dated 10.11.2010 issued by the Kolkata Port Trust

(hereinafter called the 'KOPT') in exercise of power conferred by Section 132(2) of the Major Port Trusts Act, 1963 and contending that altering the limits of the Port of Kolkata to the detriment of the interest of the people of Orissa as well as Orissa State and therefore the impugned notifications are perverse, malafide, vitiated with arbitrariness and suffer from violation of Articles 14 and 245 of the Constitution of India as well as federalism and the principle of separation of powers which are the basic structure of the constitution.

3. The grievance of the petitioner in first writ petition is that as a result of the said notifications the extension of Kolkata Port limits will not only jeopardize the development of ports in Orissa coast and severely limits the maritime activities in the State but also have serious ramification for the coastal environment. It will also deprive the livelihood of lakhs of people of Orissa State.

4. The grievance of the petitioners in the second writ petition is that the Central Government by the impugned notification dated 22.10.2010 has altered/extended southwards port area limits of the Kolkata Port Trust (hereinafter called the "KOPT") as a result of which 200 kilometers south of Haldia into the Bay of Bengal covering around 28,646 Sq. kilometers has been included in the navigable limits of the KOPT and as a result the area of several Minor Ports in north Orissa including the Port area limits of Subarnarekha Port which is being developed by the petitioner under an agreement dated 11.01.2008 executed with the Government of Orissa stands encroached upon by the KOPT. Apart from that the impugned notifications infringed upon the sovereignty of the State of Orissa over its coastal water and is also directly and substantially in conflict with a subsisting notification dated 1.12.2009 issued by the Government of Orissa under Section 5 of the Indian Ports Act, 1908.

5. The case of the petitioner in first writ petition in brief is that the State of Orissa, which is endowed with a vast coastline, was historically renowned for its great ports and maritime activities stretching far offs. History bears ample testimony of the prosperity of the ancient Orissa emanating from predominantly maritime activities and sea trades. The modern State of Orissa, which is one of the poorest States in Indian Union, is also trying to revive and establish new ports to exploit the sea trades for greater economic benefits of its millions of poor. It is stated that apart from its deep sea port at Paradeep, which is a major port, the Government of Orissa has already notified seven non-major ports in northern parts of the State, namely, Dhamra, Chudamani, Chandipur, Inchudi, Subarnarekha mouth, Bichitrapur

and Bahabalpur to give a fillip to maritime activities of Orissa coast and to support a vast hinterland containing huge mineral resources and mineral based industries. While the Dhamara port is nearing completion, all other ports are in different stages of development. It is stated that India comprises of 13 major ports and around 176 non-major ports along the coast and islands. The Major Ports are under the Union List (Schedule VII) whereas the other ports are under the Concurrent List (Schedule VII) of the Constitution of India. The 13 major ports are administered by the Central Government under Ministry of Shipping and the remaining other ports which are referred to as non-major ports are administered by the nine maritime States and three Union territories within their respective coastlines. The total volume of traffic handled by all the India Ports during 2009-10 was 849.9 million tones. Non-major ports account for around one-third of the total seaborne trade. The growth in cargo handled at Major and Non-major ports in 2009-10 was 5.8% and 35.4% respectively as compared to 2.2% and 3.3% achieved in 2008-09. The phenomenal growth in the cargo handling at non-major ports in the past year shows the importance of non-major ports in the over all economic development. As per current indications, non-major ports will have an edge over major ports due to their growth rates as a number of green field ports are coming up with huge capacities through private sector in non-major ports. The effectiveness of non-major ports in meeting the growing volume of cargo traffic cannot be overemphasized. Recognizing the importance of non-major ports, many maritime states have launched initiatives for their development, through the participation of private sector. This has led to significant growth in the cargo capacity and cargo traffic handled by the non-major ports in the past few years. It is stated that Orissa lags away behind other maritime States in developing other ports (non-major ports) and Orissa's share in the maritime trade is negligible. While the role of non-major ports in the overall economic development cannot be overstated, there is lot to be done by the State Government and the Central Government to increase Orissa's share in the maritime activities which would lead to economic development in this under developed State.

6. It is submitted by Mr. Narasingh Mishra, learned Senior Counsel for the petitioner that while the country needs more ports for its economic development and the Central Government should extend all help for development of non-major ports exploiting long coast line of the State of Orissa, the Opposite party No.1-Union of India is trying to scuttle such development of non-major ports of Orissa coast in stead through arbitrary extension of Kolkata port limits into Orissa territory. In the maritime agenda 2010-20, the Central Government recognized the need for development of

non-major ports in Orissa and it was clearly stipulated in the agenda that the east coast ports are expected to handle over 75% of future imports with the ports in Orissa and Andhra Pradesh accounting for much of the traffic owing to steelmaking capacity being largely located in this region. Therefore, after recognition of such need and future projection, the extension of the jurisdiction of Kolkata Port by the impugned notifications is wholly unjustified as it is a colourable exercise of power and mala fide and illegal being vitiated with arbitrariness and abuse of power by discriminatory action of the opp. Party No.1. It is submitted that as per the report published in the 'New Indian Express' dated 01.02.2011, the arbitrary extension of Kolkata Port limits is a design to bail out shipping companies who want to use their old vessels for transloading operations. The report points out that the notification for extension of Kolkata port limit coincided with invitation by the Kolkata Port regarding the application for transloading. Bigger vessels which cannot come to Kolkata due to shallow draft, would now berth in the Orissa coast and unload cargo to transloaders (old vessels) which would act as floating stock yards. It is stated that such transloading operation involving old vessels will result in increasing environmental pollution of Orissa coast with devastating consequences for its people living at coastal areas.

7. It is further submitted by Mr. Narasingh Mishra, learned Sr. Counsel for the petitioner that when the country needs more port capacity, the approach of the Central Government-Opp. Party No.1 to extend the Kolkata Port Limit is laced with naked favoritism to KOPT. To add few extra million tones to the capacity of the Kolkata Port, the Central Government is jeopardizing the development of seven modern ports in Orissa, each of which can handle much larger quantity of cargo after completion. The Central Government by extending the limit of KOPT into Orissa territory, deliberately intrude upon the State's sphere. The law is well settled that federalism in the Indian Constitution is not a matter of administrative convenience, but one of the principle, the outcome of historical process and a recognition of ground realities. The interpretation of Entries can afford to remove imbalance, so far as it can. Any conscious whittling down of the power of the State can be guarded against by the Courts. It is further submitted that the treatment of Kolkata Port in a preferential manner and allow the newer ports in Orissa to die natural death by the Central Government is wholly unjustified and illegal. It is also against larger public interest. It would have serious repercussion on the economy of the State of Orissa and deprive the livelihood of its lakhs of people, therefore, the impugned notifications are malafide, without any cogent material to support it and is based on mere ipse dixit and it is prayed that the impugned notifications are liable to be quashed.

8. The case of the petitioners in the second writ petition in brief is that not only the petitioners but also the Government of Orissa are taking substantial steps towards ensuring development of the project by processing request for handing over the land and taking other steps as envisaged under the Concession Agreement-MOU including steps to secure environment clearance for the project. The Government of Orissa has expressly notified the Port area limits of the Subarnarekha Port by a notification (being Notification No. 8027-GPP-128-06/Com) dated 1.12.2009 in exercise of power under Section 5 of the Indian Ports Act, 1908. It is alleged that the KOPT, which is the beneficiary of the illegal action on the part of the Central Government, has illegally conspired with the Central Goernment to extend its jurisdiction over the Port area limit previously notified for other ports in Orissa including the Port area limit of Subarnarekha Port with an ulterior motive to secure its own commercial interest at the cost of the development of other ports in the State of Orissa. The KOPT certainly does not want any developement of Minor other ports in Orissa coast because the traffic will get diverted and there is likelihood of loss of revenue as a result thereof. The KOPT after securing the Notification of the Central Government issued a Notification on 10.11.2010 under Section 132(2) of the Major Ports Act, 1963 whereby it has sought to give effect to the Notification issued by the Central Government on 22.10.2010. The KOPT in its impugned notification dated 10.11.2010 acknowledges that the Central Government has amended its earlier notification dated 19.06.2001. As a result of such notifications the Subarnarekha Port will cease to exist as an independent non-major port as its entire port limit will now be under the jurisdiction and control of the KOPT. It is stated that Entry-27 in List-I of Schedule VII of the Constitution of India relates to Ports which are declared as Major Ports in terms of the Major Port Trusts Act, 1963 and Entry 31 in the List III of Schedule VII of the Constitution of India relates to Ports other than major ports. By virtue of that, Subarnarekha Port being a non-major port (other port) falling within the coastline of the State of Orissa, the Government of Orissa has the competence to legislate all necessary legislations and issue notifications in relation to the minor ports in Orissa. The Government of Orissa vide its Notification dated 5.4.1997 notified the port limits for the ports at Subarnarekha Mouth, Chudamani, Chandipur, Inchuri, Astaranga, Baliharichandi, Palur and Bahuda. Hence the decision of the State Government to create/ develop Minor Ports in the northern part of the State's coastline was well established as early as 1997. On 19.06.2001, the Central Government issued a notification bearing No. GSR 439(E) revising the Port area limits of the KOPT. The said notification revised the limits of the navigable channel to facilitate its trans-loading operations at Sandheads. This identifies an area for fair weather trans-loading operations in deep

waters around the 20 m. contour and is far away from the Orissa coast. The said notification prescribes a western limit of 87 Degrees 40'E and this limit ends at the eastern limit of the Subarnarekha Port of Orissa.

Mr. Sen, learned Sr. Counsel for the petitioners in 2nd writ petition submitted that, the Central Government was well aware of its jurisdictional limits and did not seek to encroach on the coastal waters of the State of Orissa while revising the port area limits of the KOPT. The said notification dated 19.06.2001 issued by the Central Government does not in any manner interfere with the ports limits in northern Orissa and all such ports had access to the open sea. The 2001 Notification of the Central Government which defines the port area of KOPT constituted a representation and expression of intent to the State Government as well as the private investors, such as the petitioners for enabling development of minor ports in Orissa under the guidance of the State Government. It is submitted that the map will disclose the impact of the impugned notification dated 22.10.2010 which illegally revises the earlier notification of 19.06.2001 and encroaches on the port area limits of the Subarnarekha Port and how the KOPT violated the jurisdictional sovereignty of the State of Orissa over its coastal waters. It is stated that the Government of India which accepted the earlier stand of the State Government, now in colourable exercise of power has tried to circumvent the right, title and interest of the State of Orissa and the private concessionaire by issuing the impugned notification dated 22.10.2010.

9. It is further submitted by Mr. Sen, learned Sr. Counsel that when the promoters and the new financial partner had resolved all outstanding issues and were focusing entirely on the implementation of the Subarnarekha Port Project, the Central Government without prior notice or intimation, has issued the impugned notification dated 22.10.2010 altering/extending southwards jurisdictional limits of the KOPT, as a result, the entire port area limits of the Subarnarekha port has been encroached upon by the KOPT and as such Subarnarekha Port project is left without any port area limit of its own to allow entry or exit of ships/ vessels. The impugned notifications in effect are to take away the vested rights of the petitioners as well as the State Government. Therefore, it is submitted by Mr. Sen, learned Sr. Counsel that the notification dated 22.10.2010 issued by the Central Government is illegal as the Central Government has no jurisdiction to unilaterally modify port limits in a manner which takes away the area already notified for other ports in the region. The State Government is the competent authority to notify the port area limits of minor ports within its territorial jurisdiction. Therefore, the Government of Orissa in exercise of power under Section 5 of the Indian Ports Act issued a notification on

1.12.2009 in relation to the port area limit of the Subarnarekha port and the said notification is presently valid and subsisting. For that reason, it is submitted that, in relation to the other ports (non-major), the notification of the State Government dated 1.12.2009 occupies the field and there cannot be a subsequent notification of the Central Government altering the decision of the State Government in relation to the limit of the port area of the other ports (non-major ports). It is further submitted that the Central Government does not have the jurisdiction over the State Government's notification dated 1.12.2009 in relation to the port area limits of non-major ports and such action of the Central Government is excess of jurisdiction and hence it is arbitrary and in colourable exercise of power and hence it is liable to be quashed.

10. Mr. Narasingh Mishra, learned Sr. counsel for the petitioner contended that the impugned notifications challenged by the petitioner in the Public Interest Litigation petition will affect the economic development of the Orissa State as the extension of the KOPT limits 200 k.m. south of Haldia, is going to block the entire coast of North Orissa where seven ports, namely, Dhamara, Chudamani, Chandipur, Inchudi, Subarnarekha South, Bichitrapur, & Bahabalpur are in different stages of development. By extending the limits of KOPT, access of vessels to the aforesaid ports will be blocked. By an additional affidavit dated 5.5.2011 the petitioner has submitted that extension of area of KOPT will deprive employment to the people of Orissa, besides loss of revenue to the State. It is submitted in the additional affidavit that the revenue loss to the State will be approximately Rs.684 crores per year and loss of employment would approximately be 875. Therefore, the extension of the area of KOPT by the impugned notifications will definitely affect the interest of the people of Orissa. So far as the attempt has been made by the Union of India and KOPT during their submission to the court that since there is no physical obstruction, entering of vessels, to the non-major ports, will not be prevented in any way is not at all correct. Learned counsel for the petitioner, referring to Section 31 of the Indian Ports Act and Sections 38, 49(B) and Section 50(B) of the Major Port Trust Act and paragraph 30 of the writ petition, contended that the averments made by the petitioner in the first writ petition at paragraphs 9 and 30 and in paragraphs 1 to 4 of the additional affidavit dated 5.5.2011 have not been disputed either by the Union of India or by KOPT. Therefore, there is no dispute that entering of vessels to seven non-major ports of Orissa coast will be subjected to the control of the KOPT i.e. O.P. No.3 if the impugned notifications are not quashed.

11. It is further submitted by Mr. Mishra, learned Sr.counsel that Port limits are notified under the Indian ports Act, 1908 and Sections 4 & 5 of the

said Act provide for notification and alteration of Port limits. It may be seen that Section 4 lays down although in a disjointed manner, the purposes for which Port limits are fixed, they include : (1) to cover any part of any navigable river or Channel which leads to port (Section 4.1.a); (2) Section 4.3 defines "Convenience of traffic"; (3) Section 4.3 defines "Safety of Vessels"; (4) "Maintenance of the good governance of the port and its approaches" (Section 4.3) Section 5 provides for alteration of Port Limits, but it would be prudent to infer that the alteration serves the same purposes as fixation under Section 4.2. The Government under Sections 4 & 5 of the Indian ports Act can fix port limits. "Government" has been defined in Section 3(9) as Central Government for 'Major Ports' and State Government for 'other Ports' so far as the power of fixing or altering limits is concerned. Since both the Governments derive their powers from the same Central legislation, the powers can be said to be equal in respect of the ports under each one's control.

12. Mr. Narasingh Mishra, learned Sr. Counsel submitted that the KOPT limits were last fixed/altered in 1977, 2001 and then 2010. A perusal and comparison of these notifications would show that the notifications have three parts- one pertaining to the port per se, the other pertaining to rivers and channels leading to the port. However, the limits of all the three above constitute port limits under the Indian Ports Act which include rivers and channels leading to the port. It is in respect of these rivers of Kolkata port has been substantially extended and expanded in 2010 so much so that it encroaches into the pre notified limits of certain ports and even the onshore location of two of the proposed ports and in all cases it surrounds the ports of Orissa north of Paradeep in such a manner that no ship can enter these ports without passing through the Kolkata port limits. Mr. Mishra, learned Sr. Counsel contended that the extension of port limits of KOPT is grossly illegal for following more reasons that the extended limits encroach into the pre notified limits of number of ports of Orissa including the onshore location of two of the proposed ports. The contention of the opposite parties to the effect that a central notification overrides a notification of the State Government is misleading and not at all correct. The question of repugnancy or overriding due to conflict between central law and State law, would arise when there is a conflict between the two laws. In the instant case all the notifications, both of the State and Union Governments are under the same provision of the same central law which gives power to the appropriate Government to notify the port limits and the State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Opposing the contention of the opposite parties that the extension of KOPT is purely for transloading, Mr.

Mishra submitted that it is purely unacceptable for the reason that it is not the provisions of Indian Ports Act and Indian Major Ports Act. It provides levy of charge on every ship passing through the port limits of Kolkata. Further, so far as transloading is concerned, it is not necessary that transloading to take place within the port limits of receiving port, such transloading can take place within the limits of any other ports.

13. The Indian Ports Act, 1908 is a Central legislation, under which certain powers are vested in the State Government and once the power vested in the State Government is exercised under Section 5 of the Indian Ports Act, the right has accrued and such right can not be divested by a notification issued by the Central Government. On a reading of the provisions of the Indian Ports Act, it cannot be contended that there is any conflict of power between the State Government and Central Government. The power of the State Government and Central Government has been clearly defined by a Central legislation and therefore, it is binding both on the Central Govt. and State Government and once the vested power with the State Government is exercised fixing and notifying the port area, such notification cannot be cancelled or modified by the executive action such as by issuing the notification by the Central Government. It is further submitted that before issuing the impugned notification dated 22.10.2010, the Union of India should have consulted and discussed with the Government of Orissa. However, instead of doing that, it is now contended that the Union of India is willing and prepared to direct O.P. No3-KOPT not to charge any fee for using the KOPT area, which is quite illegal and such statement indicates that the Central Government is admitting its mistake. The mandate of law as enumerated in Section 31 of the Indian Ports Act and Sections 49(B) and 50(B) of the Major Port Trust Act cannot be taken away, either by any executive instruction or by any notification of the Central Government. Therefore, it is submitted by Mr. Narasingh Mishra, learned Sr. Counsel that the impugned notifications are liable to be quashed.

14. On behalf of the Government of Orissa, counter affidavit has also been filed supporting the case of the petitioners. It is submitted by the learned Advocate General Mr. Ashok Mohanty that the main constitutional issue involved in these cases is when the Notifications are issued by the Government of Orissa in exercise of its power under Section 5 of the Indian Ports Act, 1908 for development of other ports in its north coast at Dhamra, Chudamani, Inchudi, Chandipur, Bahabalpur, Subarnarekha mouth and Bichitrapur vide Notification Nos. 1691 dated 11.3.1998, 2380 dated 5.4.1997, 2780 dated 5.4.1997, 5230 dated 3.4.1991, 8027 dated 01.12.2009 and 7847 dated 24.11.2009 respectively and are still in force and

duly recognized by various Departments of the Government of India, can the Ministry of Shipping, Government of India, issue the impugned notification 22.10.2010 delimiting /altering the limits of the KOPT encroaching upon the limit of such ports notified and developed by the Government of Orissa.

15. Learned Advocate General submitted that the Government of India as well as the KOPT for some obvious reasons have issued the impugned notifications claiming the entire northern coastal territory of Orissa State whereby taking away the constitutional & statutory rights of the State of Orissa without following any procedure known under the law and the said unilateral act of Union of India in the guise of delimiting the KOPT is per se illegal, unconstitutional, arbitrary and without jurisdiction and therefore, the same are liable to be quashed.

It is further submitted that the Government of Orissa have no other way than to support the cause of the petitioners as the matter could not be resolved administratively in the discussion with the Union Government. The State Government have tried their level best to administratively resolve the so called dispute through negotiations with the Union Ministry of Shipping and in this regard several rounds of discussions were held, but the matter could not be settled. It is the submission of the Union of India & KOPT that the terms and purpose and intent of the notification is that it will facilitate transloading for KOPT. However, they lost their sight to the extent that for the purpose of transloading no prudent Government would issue such a notification which would have greater ramification and resultant damages would be more on the part of the State of Orissa. Therefore, it is crystal clear that either there is no valid reason or there must be some malafide motive behind the notifications which was never disclosed by the Union of India & KoPT. The Union of India and KoPT have exceeded their jurisdiction in issuing the impugned notifications. Admittedly, the Government of Orissa had issued valid notifications as stated earlier completely in accordance with Section 5 of the Indian Ports Act, 1908 under the power and authority guaranteed under Entries 31 & 32 of List III of Schedule VII of the Constitution of India which is also recognized by the Union of India and the same has been acted upon. The impugned notifications have been issued encroaching upon the territorial jurisdiction of the Government of Orissa and giving a complete go bye to the provisions of law. The collusive submissions made by the Union of India & KOPT would only demonstrate an undemocratic, unreasonable and unconstitutional approach to the effect that the Union of India have unlimited power and authority to delimit a major port by imposing unreasonable restriction upon the Government of Orissa, which matters are exclusively under the purview and control of State Government

under the provisions of Section 3(9) read with Sections 4 & 5 of the Indian Ports Act. Therefore, it is a clear case of excessive exercise of jurisdiction and power by the Union of India and KOPT in issuing the impugned notifications and as such the same are liable to be set aside.

16. Mr. Mohanty, learned Advocate General further submitted that the question of "repugnancy" would not arise in this case since the Government of Orissa exercised its power in accordance with law as stated supra and has been acted upon and also recognized by the Union of India. Under these circumstances, the Union of India has no legislative competence to issue the impugned notification. Further, there is no restriction imposed under Article 162 of the Constitution of India against the State of Orissa with regard to the territorial port claim. The necessary provisions are already available in Sections 3(9), 4 and 5 of the Indian Ports Act, 1908, which preceded the Constitution of India, thereby recognizing the State Government's power, unless and until the parliament passes subsequent enactment in that regard. The claim of the Union of India that the Major Port Trust Act, 1963 empowers the Union of India, in terms of Article 162 is not acceptable, since the said Act deals with the management and governance of Major Ports and not about fixing the port limits of Minor Ports.

17. Mr. A.K. Parija, learned Sr. Counsel, on behalf of the intervener-opp. Party No.4-Dhamara Port, supporting the stand taken by the petitioners as well as the Government of Orissa contended that the impugned notifications have been issued by the Central Government and KOPT in excess of jurisdiction and the same are ultra virus being hit by Sections 1,3(9), 4 and 5 of the Indian ports Act, 1908.

18. On the other hand the Union of India-O.P. No.1 in the Ministry of Shipping & Transport has filed counter affidavit traversing the averments made by the petitioners in the writ petitions, however not denied the publication of the impugned notifications. It is stated in the counter that the entire North Eastern Part of the country including the land locked countries like Nepal and Bhutan have to move their cargo through Kolkata Port which is a major port under the Central Government. However, being a riverine port, that port suffers from perennial draft restrictions for which most of the large bulk carriers carrying cargo destined/generated from that port is forced to make two ports called by lighterage/topping up of approximately 40%-50% of the cargo at Paradeep port, which is then carried by rail and road to their final destinations. The trade, however, has always preferred that the entire cargo be brought to Haldia because of law freight and better rail connectivity as compared to the neighbouring ports. Moreoever, transportation of cargo

by sea is always cheaper and eco-friendly than the alternative modes of transportation like rail and road. Therefore, the shipping industry has been requesting the KOPT to make alternative arrangement for handling the entire cargo nearer to the port and transport them through sea river route. It is further stated that in terms of Territorialwaters, Continental Shelf, Exclusive Economic Zone & Other Maritime Zones Act, 1976, no State has any jurisdiction on the territorial waters of India and territorial waters are the exclusive jurisdiction of Central Government. However, the State of Orissa vehemently opposed KOPT plan to undertake lighterage operation in 2005 outside the limit of Dhamra Port on the plea that this would adversely affect the business prospects of non-major ports on the Orissa coast limits which were notified by it in an arbitrary manner without due consideration of the existing limits of other major and non-major ports in the vicinity. The Government of Orissa also have not consulted the Ministry of Shipping before issuance of any such notifications.

19. Denying the averments made at paragraphs 1 to 8 of the writ petition, it is stated by the O.P.No.1 that by extension of the limits of KOPT there will neither be any physical boundary in the sea nor will there be any obstruction for the vessels to have free access to any port of Orissa. KOPT neither intends to handle cargo that is destined for any Orissa Port nor will impose any restrictions legally or financially on any vessel destined for other ports for their free passage while passing through the limits of KOPT. Therefore, the extension of the limit of KOPT has no bearing whatsoever for movement of ships to any other port, their operation, further expansion and development. In reply to paragraph 11 of the writ petition, it is stated that the transshipment facilities being set up by KOPT could also be gainfully utilized by the trade carrying cargo for all neighbouring ports. The transshipment facilities will help the trade in reducing the cost of import & export as the vessel could be serviced to their full capacities and thus would overcome the issue of low draft availability. It is stated that the Government of India has taken a conscious decision to promote transportation of cargo by barges through the National Waterways, so as to reduce congestion on rail & road, transportation cost and to reduce pollution. The transloader and all vessels associated with the operation will be certified by the statutory authorities with regard to their safety as well as from pollution angle. Therefore, there is no scope of any increase in the environmental pollution as alleged in the writ petition.

20. In reply to paragraphs 13 to 16 of the writ petition, it is submitted by Mr.P. Tripathi, learned Addl. Solicitor General that the Central Government is fully empowered to issue such notifications in exercise of its powers under

Section 5 of the Indian Ports Act, 1908 and Clause (q) of Section 2 of the Major Port Trust Act, 1963. The Central Government has also the powers to alter the limits of any port by uniting with that port, any other port or any part of any other port under the provisions of Section 5 of the Indian Ports Act 1908. The action taken by the Central Government is for the interest of public and for reducing the outflow of national exchequer towards high cost of transportation of goods. Therefore, it is prayed that both the writ petitions are devoid of any merit and liable to be dismissed.

21. One counter affidavit has also been filed by the KOPT-O.P.No.3 traversing the averments made by the petitioners and supporting the counter filed by the Union of India. Questioning the maintainability of the first writ petition, it is stated by the KOPT that the said writ petition is actually proxy litigation for the purpose of achieving the private interest of the parties who are in control of the ports of Dhamra and Chudamani seems to have been similarly divested by the State of Orissa. It is self evident that no public interest is intended to be achieved in the above writ petition and it is therefore fit and proper that the same should be summarily rejected.

It is stated by the KOPT that the territorial waters along the coast lines do not belong to the coastal states such as Orissa but are under the exclusive control of the Central Government. No state has any constitutional powers or rights to define the limits of any port along its waterfront; and the power to do so is exclusively vested in the Central Government. In particular, the Government of Orissa has no power, authority or jurisdiction to fix the limits of the ports along its waterfront and any action to this effect is out of its jurisdiction. The KOPT is a major port within the meaning of Major Port Trust Act and is under the direct control of the Central Government. The limits of the territorial waters forming part of the KOPT were earlier prescribed by notifications, the last of which was published in the year 2001 which shows the limits of the KOPT. Thereafter, on 22.10.2010 the Government of India by virtue of powers under Section 5 of the Indian Ports Act published a Notification prescribing an extension of the limits of the KOPT in the manner and to the extent specified therein. Consequent to the said Notification, the KOPT published the Notification dated 10.11.2010. It is submitted that the said notifications have been published extending the limits of the KOPT so as to enable the transloading operation system to be installed and become functional for the purpose. Therefore, the extension of the limits of the KOPT has no connection or relevance or bearing whatsoever with the movement of any ships or vessels to or from any port of Orissa or the operation, future expansion or development of any port in Orissa. Traversing the averments made in the writ petitions, at paragraph 11

of its counter the KOPT stated that the KOPT has no objection or impediment to put in the way of development of the State of Orissa or any new ports by the State Government and any aspersions or allegations in this behalf is wholly wrong. Therefore, it is submitted that the case of the petitioners is entirely speculative, pretentious and without any substance and both the writ petitions are liable to be dismissed.

22. Mr. S.K. Kapur, learned Sr. Counsel on behalf of the KOPT submitted that the impugned notification is within the jurisdiction of the Central Government for the reason that "major port" is a subject matter of Entry 27 of List I of the VIIth Schedule of the Constitution of India and "other ports" are the subject matter of Entry 31 of List III of the VIIth Schedule. Hence, whether it be in the Union List (in respect of Major Ports) or the Concurrent List (in respect of other ports), the Union Government is constitutionally empowered to legislate in respect of both. It is submitted that under Section 3(8) of the Indian Ports Act, the Central Government is empowered to determine as to which port would be a major port, and under Section 5 of the said Act, the Central Government is empowered to alter the limits/delineate a Major Port. After the Central Government notifies and delineates a "major port", it is only the residuary of the Ports as also the residuary of the limits which a State Government is empowered to notify for such 'other ports'. Hence, it is submitted that in the instant case, the Central Government, having notified the limits of the KOPT, it is only the residuary or the available area that is available with the State Government within which it can notify the limits of 'other ports'.

23. It is further submitted by Mr. Kapur, learned Sr. counsel that the Central Government's power to notify and delineate a Major Port's limit under Section 5 of the Indian Ports Act is not subservient to the power of the State Governments to notify the limits of an "other port". In fact, constitutionally, the primacy vests in the Union of India cannot be overridden or taken away by exercise of any rights of the State. Hence only after the Central Government notifies and delineates a Major Port, could the jurisdiction of the State Government would commence. It is therefore submitted that, as in the present case, it is only after the Central Government has notified and delineated the limits of the KoPT the jurisdiction of the State Government would commence to delineate the "other ports". It is clear that if there is any conflict between the two, there can hardly be any doubt that the Central Government notification under Section 5 would prevail. Mr. Kapur further submitted that notifications are issued by the Governments as delegates of the legislature. They are thus delegated legislation. The delegated legislation cannot stand on a higher footing than legislation. In

case of competing legislations (including delegated legislation) of the Centre and the States, under Articles 246 and 254 the legislation of the centre (including delegated legislation) must supersede and override the legislation (including delegated legislation) of the State. In this regard, Mr. Kapur, placed reliance upon the judgment of the Supreme Court in the case of Deep Chand Vs. State of U.P. & Ors., AIR 1959 SC 648.

24. On the basis of the aforesaid rival legal contentions urged on behalf of the parties, the following points would arise for our consideration in these writ petitions.

(1) Whether the exercise of power by the Central Government in issuing the impugned notification in relation to Major Port extending/altering the limits of KOPT encroaching upon the other-ports (non major ports) in the State of Orissa, which have already been notified by the State Government fixing its limits in exercise of its powers under Section 5 of the Indian Ports Act, 1908, is legal ?

(2) Whether the impugned notification issued by the Central Government altering the limits of KOPT will prevail over the notifications issued by the State Government in relation to the 'other ports' in exercise of its power and whether such notification can be treated as repugnant to the notification issued by the Central Government and the principle of repugnancy as provided under Article 254 is applicable?

(3) Whether the Central Government in exercise of its power under Section 5 can alter the limits of any ports to which the act is inforce or applicable without consultation with the State Government / lessees who are having lease hold rights over such other ports and whether it would be violative of principles of natural justice ?

(4) Whether the exercise of power by the Central Government under Section 5 of the Indian Ports Act invading upon the other ports of the Orissa coastal line is violative of Article 14 and is arbitrary, unreasonable and against the doctrine of proportionality ?

(5) Whether the subsequent notification issued by the KOPT basing on the notification of the Central Government dated 22.10.2010 and in exercise of power conferred by Section 132(2) of the Major Port Trusts Act, 1963 altering the limits of the Port of Kolkata is legal and valid ?

(6) What order ?

25. Before considering the questions formulated above, it is necessary to mention here that in the counter affidavit filed in the first writ petition on behalf of the KOPT certain allegations abusing the petitioner were made at paragraphs 3(b) to 3(e) which were taken exception by Mr. Mishra, learned Sr. Counsel for the petitioner, who submitted on 21.6.2011 that the KOPT may take steps either to delete those averments which are totally unnecessary for the purpose of determining the issue in this case, otherwise the Court may exercise its power under Order 6, Rule 16 of the CPC to strike down the said averments. By order dated 21.6.2011 this Court directed the KOPT to justify the said allegation. When the matter was again taken up on 15.9.2011, this Court again directed the KOPT to file affidavit to substantiate the allegations against the petitioner in the said paragraphs along with documents. Further on 23.9.2011 the matter was taken up however the KOPT did not take any steps regarding deletion of the said allegations nor filed any affidavit substantiating the same. Starting from 21.6.2011 repeatedly chances were given directing the KOPT either to produce sufficient documents to substantiate the allegations against the petitioner at paragraphs 3(b) to 3(e) of the counter or to file petition for striking down the said averments. However, till the last date of hearing, KOPT did not comply with the same. Therefore, we have no other alternative than to expunge the said allegations and hence the same are expunged.

Point No.1 :

26. This point is required to be answered in favour of the petitioners and the State Government for the following reasons.

First of all it may be noted the undisputed fact that the impugned notifications have been issued altering the limits of the KOPT encroaching upon the other ports area in respect of which notifications have already been issued by the State Government much prior to the notifications of the Central Government. It is also evident from the counter submitted by the Union of India as well as KOPT that the said notifications have been published extending the limits of the KOPT so as to enable the transloading operation system and the purpose and intent of the notifications is that it will facilitate transloading for KOPT.

27. In view of the legal submissions made by Mr. P. Tripathi, learned Addl. Solicitor General on behalf of the Union of India, Mr. Ashok Mohanty, learned Advocate General for the State, Mr. A.K. Parija, learned Sr. Counsel on behalf of Dharma Port, Mr. Mishra, learned Sr. Counsel for the petitioner in first writ petition and Mr. Sen, learned Sr. Counsel for the petitioners in

connected 2nd writ petition, it is necessary to extract the relevant definitions and provision of Indian Ports Act, 1908 and Major Port Trusts Act, 1963.

28. Section 2(q) of the Major Port Trusts Act, 1963 defines **"port"** to mean any major port to which the Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of the Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act; where as Section 3(4) of the Indian Ports Act, 1908 defines **"port"** includes also any part of a river or channel in which this Act is for the time being in force. Section 3(8) of the Indian Ports Act defines **"major port"** means any port which the Central Government may by notification in the Official Gazette declare, or may under any law for the time being in force have declared, to be a major port; and Section 3(9) defines **"Government"**, as respects major ports, for all purposes, and, as respects other ports for the purposes of making rules under clause (p) of section 6(1) and of the appointment and control of port health officers under section 17, means the Central Government, and save as aforesaid, means the State Government. Further, the Indian Ports Act is referable to Entry 31 of List III (Concurrent List) of the Schedule VII of the Constitution, which reads thus :

> "31. Ports other than those declared by or under law made by Parliament or existing law to be major ports."

29. In the cases in hand the notifications issued in the year 1977, 2001 and so also the impugned Notification issued by the Central Government are in relation to Major Port of KOPT at Kolkata in the West Bengal State and no doubt the same is based on the existing law, namely, the Indian Ports Act, 1908 but not for 'other ports' (non-major ports) in respect of which notifications have already been issued by the State Government much earlier. The said conclusion can be arrived at by careful reading and interpretation of the statutory provisions under Section 5 as well as the definition of "Major Port" and "Government" under Section 3 of the Indian Ports Act, 1908. Section 5 of the Act with its explanation is relevant to be extracted, which reads thus :

> "**5.** Alteration of limits of ports. (1) The [Government] may,subject to any rights of private property, alter the limits of any port in which this Act is in force.
>
> [Explanation.--For the removal of doubts, it is hereby declared that the power conferred on the Government by this sub-section includes

> the power to alter the limits of any port by uniting with that port any other port or any part of any other port.]
>
> (2) When the [Government] alters the limits of a port under sub-section (1), it shall declare or describe, by notification in the Official Gazette, and by such other means, if any, as it thinks fit, the precise extent of such limits.

As per the definition clause referred to supra "port" is an exclusive definition both in respect of 'major ports' and 'other ports' as it defines any part of a river or the channel in which the Indian Ports Act is for the time being in force. In respect of the 'major ports' the Central Government is empowered as per the definition by giving Notification under Section 5 in the official gazette to declare as such including alteration of limits of the 'major ports'. A careful reading of definition of term "Government" under Clause 3(9) so also Section 5 of the Indian Ports Act, 1908 along with its explanation, referred to supra, would show that the State Government is empowered to issue notification and declaration in relation to 'other ports' in the coastal line of the respective States. In the instant case, it is not in dispute that the Notification in relation to KOPT which is a major port is issued /published by the Central Government in the official gazette declaring as such in exercise of its power under Section 4 and impugned notification under Section 5 respectively. The State Government also in relation to seven other ports in the coastal line of Orissa has also issued notifications as such in exercise of its statutory power under Section 5 read with Section 3(9) of the Indian Ports Act. Therefore, it is clear that the State Government has issued the notifications in accordance with Section 5 of the Indian Ports Act under the power and authority guaranteed in Entry 31 & 32 of List III of the VIIth Schedule of the Constitution. Indisputably the Indian Ports Act, 1908 is a pre-constitutional law which is in existence. The Major Ports are declared by issuing notification by the Central Government and other ports by the State Government has to be interpreted in view of the inclusive definition of Section 3(4) of the Indian ports Act. Therefore, the notifications issued both by the Central Government in relation to KOPT and the State Government for other ports is in exercise of their statutory power under Section 4 & 5 read with Section 3(9) of the Indian Ports Act. Reliance is placed upon Section 2(q) of the Major Port Trusts Act, 1963 which is enacted from the Entry 27 of the List I of the VIIth Schedule. The said entry reads thus :

> "27. Ports declared by or under law made by Parliament or existing law to be major ports, including their delimitation and the constitution and powers of port authorities therein."

The definition 'Port' under Section 2(q) of the Major Port Trusts Act, 1963 is relevant to be extracted, which reads thus :

> "2(q) "port" means any major port to which this Act applies within such limits as may, from time to time, be defined by the Central Government for the purposes of this Act by notification in the Official Gazette, and, until a notification is so issued, within such limits as may have been defined by the Central Government under the provisions of the Indian Ports Act."

30. In view of the above, it is clear that the limits of the Major Port could not be fixed by the Central Government by issuing notification by encroaching upon the limits of the other ports under Section 5 of the Indian Ports Act. Further the Major Port Trusts Act, 1963 is from the List-I enacted by the Parliament which is inclusively applicable to the 'Major Ports'. There is a reference to the notification in respect of 'Major Ports' and such notification could be only under Sections 5 of the Indian Ports Act, originally declaring the 'Major ports' and altering its limit. Therefore, the submissions on behalf of the Union of India and KOPT, to the extent that the Central Government has got primacy power over the State Government in alteration/fixation of the Port limits and for that reason extending/altering the limits of KOPT by the impugned notification is perfectly legal and valid, cannot be accepted by this Court. If such submission is accepted, the inclusive definition of 'Port' which includes 'major ports' and 'other ports' or 'Government' includes both Central Government and State Government in relation to 'major ports' and 'other ports' respectively will become nugatory and power conferred upon the State Government will become meaningless. Such interpretation is not permissible in law. Hence the point No.1 is answered against the Union of India and KOPT.

Point No.2 :

31. It is submitted by the learned Addl. Solicitor General that the notifications issued by the State Government under Section 5 in relation to 'other ports' conflicted with the notification that is issued by the Central Government altering the limits of the 'Major Ports' and further Section 2(q) of the Major Port Trusts Act is applicable in the instant case altering the limits of Major Port of KOPT and as the State Government's notifications are in conflict with the Central Government notification, it amounts to repugnancy under Article 254 of the Constitution of India. In this regard learned Addl. Solicitor General has also placed reliance upon the proviso to Article 162 of the Constitution of India. Article 162 reads thus:

> "162. **Extent of executive power of State** :- Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws.
>
> Provided that in any matter with respect to which the Legislature of a State and parliament has power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by parliament upon the Union or authorities thereof."

With reference to the said provision, he placed reliance upon the proviso contending that the executive power of the State shall be subject to and limited by executive power expressly conferred by the Constitution or by any law made by Parliament on the Union or authorities thereof.

32. Reiterating and supporting the said submission, Mr. Kapur, learned Sr. Advocate on behalf of the KOPT also placed reliance upon various decisions of the Supreme Court in the cases of Deep Chand VS. State of U.P. & Ors., AIR 1959 SC 648; State of Orissa & Anr. Vs. M/s. M.A. Tulloch & Co., AIR 1964 SC 1284; Fertilizers & Chemicals Travancore Ltd. Vs. Kerala State Electircity Board & Anr., (1984) Supp. SCC 28; State of West Bengal Vs. Kesoram Industries Ltd. & Anr., (2004) 10 SCC 201; and Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority & Ors., (2011) 3 SCC 139.

33. The said contentions of Mr. Tripathi, learned Addl. Solicitor General and Mr. Kapur, learned Sr. Advocate cannot be accepted for the following reasons.

Article 254 of the Constitution provides the inconsistency between laws made by Parliament and laws made by the State Legislature and regarding repugnancy it clarifies that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2) the law made by Parliament, shall prevail over the law made by the Legislature of the State.

However, in the instant case the Indian Ports Act, 1908 is relatable to Entry No. 31 of the Concurrent List and from the said existing law, in exercise of power under Section 5 of the Indian Ports Act, notifications have

been issued both by the Central Government and State Government in respect of KOPT and 'other ports' in the coastal line of State of Orissa, respectively.

34. The primary requirement for Article 254 to come into play is that there must be an inconsistency between a 'law made by the Parliament' and a 'law made by a Legislature of a State' on the same subject matter from the entry in the concurrent list. The notifications issued by the Central and the State Governments respectively cannot, by any stretch of imagination, be treated as 'either law made by the Parliament and State Legislature". So when there is no conflict between two competing statutes and when the conflict is confined to two orders/notifications issued by two independent authorities, both acting in exercise of the powers delegated to them by another authority, the help of this provision cannot be invoked. Nor can a conflict between two such orders/notifications be referable to Article 254, for it is a well known principle of law that provisions of law cannot be extended by analogy. ***(See Piara Kishen Vs. Crown, AIR 1951 Punjab 409).***

35. A Division Bench of the Allahabad High Court in the case of Mittra Nand Kaushik and another Vs.. State of U.P. and others, reported in AIR 1982 Allahabad 451 held as under :

> *"15. In order to decide the question of repugnancy it must be first shown that the two enactments contained inconsistent provisions, and that they cannot stand together- An obvious inconsistency about the requirement leading to two different legal result when applied to the same facts is the primary requirement for finding out repugnancy."*

In M. Karunanidhi v. Union of India, reported in AIR 1979 SC 898, a Constitution Bench of the Supreme Court has laid down the test for determining the question of repugnancy and held as under :

> "It is well settled that the presumption is always in favour of the constitutionality of a statute and the onus lies on the person assailing the Act to prove that it is unconstitutional. Prima facie, there does not appear to us to be any inconsistency between the State Act and the Central Acts. Before any repugnancy can arise, the following conditions must be satisfied:
>
> 1. That there is a clear and direct inconsistency between the Central Act and the State Act.

2. That such an inconsistency is absolutely irreconcilable.

3. That the inconsistency between the provisions of the two Acts is of such nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other."

36. In view of the above it is clear that the question of repugnancy or overriding due to conflict between central law and State law, would arise when there is a conflict between the two laws or statutes. In the instant case all the notifications, both of the State and Union are under the same provision of the same central law which gives power to the appropriate Government to notify the port limits. The State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Therefore, it cannot also be said that the impugned notification issued by the Central Government under Section 5 of the Indian Ports Act, altering the limits of the KOPT will prevail over the notifications issued by the State Government in relation to 'other ports', which is also in exercise of its statutory power under Section 5 of the Indian Ports Act, 1908.

37. Further, the reliance placed by the learned Sr. Advocate Mr. Kapur upon the various decisions of the Supreme Court referred to supra have no application to the instant case for the following reasons.

38. In the case of Kailash Nath (supra), the Supreme Court while dealing with an illegal imposition of tax by the State Government observed that a notification which has been made in accordance with the power conferred by the statute has statutory force and validity.

There is no dispute that a notification which has been made in accordance with the power conferred by the statute has no statutory force. In the instant case, notifications made by both the State Government and Central Government are in exercise of their statutory power under Section 5 of the Indian Ports Act. Therefore, the question does arise in the case in hand that whether the Central Government can issue any notification extending/altering the limits of the 'major port' encroaching upon the pre-notified limits of other ports of the State Government which are duly notified by the State Government in exercise of its statutory power? Therefore, the case of Kailash Nath (supra) is not applicable to the present case.

39. In Deep Chand (supra), the Constitution Bench of the Supreme Court decided the principles of repugnancy. In the said case the test is restricted to two statutes and not notifications and other delegated legislation. Referring to the Nicholas' test of repugnancy the Constitution Bench held that repugnancy between two statutes may be ascertained on the basis of the following three principles: (*1*) Whether there is direct conflict between the two provisions; (*2*) Whether Parliament intended to lay down an exhaustive code in respect of the subject-matter replacing the Act of the State Legislature and (3) Whether the law made by Parliament and the law made by the State Legislature occupy the same field.

In the instant case the subject matter is clearly defined in Section 5 of the Indian Ports Act, 1908, wherein the Central Government, as per the definition of 'Government' under Section 3(9), has power over 'major ports, and the State Government has power over 'other ports' in its State. Further, the actual conflict has arisen out of notifications issued by the Central Government and State Government in exercise of the similar power vested under Section 5 of the Indian Ports Act and not out of any 'competing statutes' or 'provisions'. In the instant case all the notifications, both of the State and Union are under the same provision of the same central law which gives power to the appropriate Government to notify the port limits and the State Government of Orissa has appropriately and legally notified the limits of the ports of Orissa in exercise of its constitutional powers and powers conferred under the statute. Therefore, the question of repugnancy will not be attracted in this case and hence the case of Deep Chand (supra) has no application to the present case.

40. In M.A. Tulloch & Co. (supra) the Supreme Court held that repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one legislature has superiority over the other then to the extent of the repugnancy the one supersedes the other. However, in the instant case both the notifications issued by the State Government as well as the Central Government are in exercise of power under the same provision of the Act and further, as explained above, the Central Government cannot alter the limits of the 'major port' encroaching upon the limits of 'other ports' in respect of which the State Government has issued notifications in exercise of the power vested under the said provision. Therefore, the case of M.A. Tulloch & Co.(supra) has also no application to the instant case.

41. The cases of Ram Chandra Mawa Lal(supra), I.T.C. Ltd.(supra), Kesoram Industries Ltd. (supra), and Offshore Holdings Pvt. Ltd. (supra) have also no application for the reason that the said cases also involve the question of repugnancy of two statues as well as law made by the parliament and state legislature.

Point Nos. 3 & 4 :

42. These points are also required to be answered against the Union of India and KOPT for the following reasons. It is an undisputed fact that much earlier to the impugned notifications issued by the Central Government, the State Government had issued the notification in exercise of its statutory power under the Indian Ports Act, 1908 in relation to seven other ports in the State of Orissa fixing its limits. It is also evident from the map produced by them. It is also an undisputed fact that the alteration of the limits by the KOPT encroaches upon the other ports which are established in the coastal line of Orissa State. Therefore, the Central Government could not have extended the limits of the KOPT, which is a major port, encroaching into the pre-notified limits of other ports of the Government of Orissa in exercise of the self same power under Section 5 of the Indian Ports Act, 1908 in view of explanation to the above provision.

43. It is a fact that some of the ports, as per the Central Government guidelines, have been leased out by the Government of Orissa to some private parties for better management and development and the developmental works are in progress. Some of the affected private parties are the parties in these proceedings opposing the impugned notifications.

44. It is also a fact that if the 'other ports' area of the Government of Orissa is encroached upon by the KOPT extending its limits, not only the interest of State of Orissa but also the private companies/lessees who are having the lease hold rights will be grossly affected. It is an well settled principles of law that an affected party should be given an opportunity before taking any decision affecting the interest of the said party. In the instant case, there is neither any consultation with the State Government or its lessees before exercising power under Section 5 by the Central Government in altering the limits of the KOPT which transgresses into the vested rights of both the State of Orissa as well as its lessees and the same is also in violation of principles of natural justice. In this regard, it would be worthwhile to refer to the Constitution Bench decision of the Supreme Court in the case of Maneka Gandhi Vs. Union of India, reported in AIR 1978 SC 597, wherein the Supreme Court held as under :

" It is well established that even where there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. This principle was laid down by this Court in the *State of Orissa* v. *Dr (Miss*) *Binapani Dei*[146] in the following words:

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore arise from the very nature of the function intended to be performed: it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.""

45. In the case of the Sheel Kr. Roy Vs. Secretary, Ministry of Defence, (2007) 12 SCC 462, the Supreme Court held that the doctrine of proportionality is one of the grounds on the basis whereof the power of judicial review could be exercised.

46. In the case of Om Kumar & Ors. Vs. Union of India, (2001) 2 SCC 386, the Supreme Court placing much reliance upon the various decisions of the Foreign Courts very lucidly elaborated the doctrine of proportionality and held as under :

"28. By "proportionality", we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority* "maintain a *proper balance* between

the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve". The legislature and the adminis-trative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

29. The above principle of proportionality has been applied by the European Court to protect the rights guaranteed under the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and in particular, for considering whether restrictions imposed were restrictions which were "necessary" — within Articles 8 to 11 of the said Convention [corresponding to our Article 19(1)] and to find out whether the restrictions imposed on fundamental freedoms were more excessive than required. (*Handyside* v. *UK*). Articles 2 and 5 of the Convention contain provisions similar to Article 21 of our Constitution relating to life and liberty. The European Court has applied the principle of proportionality also to questions of discrimination under Article 14 of the Convention (corresponding to Article 14 of our Constitution). (See *European Administrative Law* by J. Schwarze, 1992, pp. 677-866)

32. So far as Article 14 is concerned, the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the courts considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality. There are also cases where legislation or rules have been struck down as being arbitrary in the sense of being unreasonable [see *Air India* v. *Nergesh Meerza* (SCC at pp. 372-373)]. But this latter aspect of striking down legislation only on the basis of "arbitrariness" has been doubted in *State of A.P.* v. *McDowell and Co*.

33. In Australia and Canada, the principle of proportionality has been applied to test the validity of statutes [see *Cunliffe* v. *Commonwealth* Aust LJ (at 827, 839) (799, 810, 821)]. In *R.* v. *Oakes* Dickson, C.J. of the Canadian Supreme Court has observed that there are three important components of the proportionality test. First, the measures adopted must be carefully designed to achieve

the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, must not only be rationally connected to the objective in the first sense, but should impair as little as possible the right to freedom in question. Thirdly, there must be "proportionality" between the effects of the measures and the objective. See also *Ross* v. *Brunswick School Dishut No. 15* (SCR at p. 872) referring to proportionality. English Courts had no occasion to apply this principle to legislation. The aggrieved parties had to go to the European Court at Strasbourg for a declaration.

34. In U.S.A., in City of *Boerne* v. *Flores* the principle of proportionality has been applied to legislation by stating that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end".

35. Thus, the principle that *legislation* relating to restrictions on fundamental freedoms could be tested on the anvil of "proportionality" has never been doubted in India. This is called "primary" review by the courts of the validity of legislation which offended fundamental freedoms.

III-A Proportionality and Administrative Action (in England)

36. In administrative law, the principle of "proportionality" has been applied in several European countries. But, in England, it was considered a *future possibility* in the *GCHQ case* by Lord Diplock. In India, as stated below, it has always been applied to administrative action affecting fundamental freedoms."

In the case of Teri Oat Estates (P) Ltd. v. U.T., Chandigarh, (2004) 2 SCC 130, the Supreme Court held as under :

"The doctrine of primary review was held to be applicable in relation to the statutes or statutory rules or any order which has the force of statute. The secondary review was held to be applicable inter alia in relation to the action in a case where the executive is guilty of acting patently arbitrarily. This Court in E.P. Royappa v. State of T.N. noticed and observed that in such a case Article 14 of the Constitution of India would be attracted. In relation to other administrative actions as for example, punishment in a departmental

proceeding, the doctrine of proportionality was equated with Wednesbury unreasonableness

47. In the instant case, undisputedly the impugned notification has been issued by the Central Government altering the limits of the KOPT in exercise of its power under Section 5 of the Indian Port Trusts Act,1908 without consulting with the State Government and its lessees which affects the vested rights of the State Government and its lessees, and has got serious civil consequences upon them. Therefore the impugned notification is vitiated in law and also is in violation of the principles of natural justice and Article 14 of the Constitution as the same would amount to arbitrary, unreasonable, unfair & a colourable exercise of power and the principle of doctrine of proportionality would be aptly applicable to the case on hand as it encroaches the limits of other ports of the State, even assuming without admitting that the Central Government has got power to issue notification.

Point Nos.5 & 6 :

48. In the instant case, it is an undisputed fact that the Government of India has published the impugned Notification on 22.10.2010 prescribing an extension of the limits of the KOPT in the manner and to the extent specified therein. Consequent thereto, basing on the said Notification, the KOPT published the Notification dated 10.11.2010.

49. It is settled legal proposition that if initial action is not in consonance with law, the subsequent proceedings would not sanctify the same. In such a fact situation, the legal maxim *"sublato fundamento cedit opus"* is applicable, meaning thereby if in a case foundation is removed, the superstructure falls.

50. In the case of Badrinath Vs. State of Tamil Nadu & Ors., AIR 2000 SC 3243, the Apex Court observed that once the basis of a proceeding is gone, all consequential acts, actions, orders would fall to the ground automatically.

51. In C. Albert Morris Vs. K. Chandrasekaran & Ors., (2006) 1 SCC 228 the Apex Court held that a right in law exists only when it has a lawful origin. A person can be said to have a right to something when it is possible to find a lawful origin for that right.

52. Therefore, if the initial notification of the Government of India impugned herein is bad in law, the subsequent notification of the KOPT cannot survive and KOPT cannot claim any right over the same.

53. Considering all the fact situation of the case referred to supra, all the points are answered against the Union of India and KOPT and in view of the above, the writ petitions are allowed. The impugned Notification No. 2609(E) dated 22.10.2010 issued by the Central Government is hereby quashed. As we have quashed the said notification, the impugned Notification No. Adm/01250/VI dated 10.11.2010 issued by the Kolkata Port Trust is also accordingly quashed. In the result, the writ petitions are allowed.

Writ petitions allowed.

2012 (I) ILR- CUT- 933

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

W.P.(C) NO. 10148 OF 2010 (Dt.02.01.2012)

ORISSA PUBLIC SERVICE COMMISSION ……Petitioner

.Vrs.

THE ORISSA INFORMATION COMMISSIONER, BBSR & ANR. ……...Opp.Parties.

RIGHT TO INFORMATION ACT, 2005 (ACT NO.22 OF 2005) – S.6.

Application filed by O.P.2 U/s.6(1) of the RTI Act 2005 read with Rule 4 (1) of the RTI Rules 2005 for supply of photocopies of his A answer sheets in the examination conducted by O.P.SC – PIO (OPSC) rejected the application saying that it comes under the exempted category covered U/s.8(1)(e) & 8(1)(j) of the Act – Appeal preferred before the Ist appellate authority was rejected – Second Appeal against such order having allowed by SCIC the OPSC challenged the same in this writ petition.

Held, the SCIC, State Information Commission, Orissa has rightly passed the impugned order directing the petitioner, to supply the photocopies of evaluated answer sheets, on the request of the concerned examinee(s) by blanking out the name of the examiner(s), Chief Examiner, their initials and code number etc - No reason to interfere with the impugned order.

(Para 10)

Case laws Referred to:-

1.(2011)8 SCC 497 : (Central Board of Secondary Education & Anr.-V-Aditya Bandopadhyay & Ors.)
2.(2011)8 SCC 781 : (Institute of Chartered Accounts of India-V-Shaunak H.Satya & Ors.)
3.(2004)2 SCC 476 : (People's Union for Civil Liberties-V-Union of India)

For Petitioner - Mr. Bijaya Ku. Dash, Advocate.
Prasanna Ku. Bhuyan, Z.P.Kanungo(O.P.2)
For Opp.Parties - M/s. Biswanath Rath, J.N.Rath, S.K.Jethy, S.K.Mishra, B.Barik (for O.P.1)

Heard Mr. Bijaya Ku. Dash, learned counsel for the petitioner-OPSC and Mr.B. Rath, learned counsel on behalf of O.P. No.1 and Mr. Bhuyan learned counsel on behalf of O.P. No.2.

2. This writ petition has been filed by the petitioner-Orissa Public Service Commission (OPSC), Cuttack questioning the correctness of the impugned order dated 08.04.2008 passed by the State Chief Information Commissioner, Orissa Information Commission (hereinafter called the 'SCIC') in Second Appeal No. 349 of 2007 under Annexure-6 wherein the SCIC while allowing the Second Appeal filed by the present O.P.No.2, directed the petitioner to provide the information as sought for under the RTI Act,2005 by the O.P. No.2 within 30 days by speed post after blanking out relevant portions indicated in paragraph-5 of the said order and report compliance thereof.

3. The fact situation giving rise to this writ petition in nutshell is that O.P. No.2 had made an application in prescribed format under Section 6(1) of the R.T.I. Act, 2005 read with Rule 4(1) of the R.T.I. Rules, 2005 for supply of photocopies of his Answer Sheets of English Paper-I & II, Arithmetic, General Knowledge, Intelligence test of Junior Assistant Examination conducted by the OPSC. The Public Information Officer-cum-Secretary (PIO), OPSC did not agree to furnish the photo copies of the answer scripts and rejected the application of the O.P.No.2 on the ground that it comes under the exempted category covered under Sections 8(1)(e) & 8(1)(j) of the R.T.I. Act. Against the said rejection order, O.P. No.2 preferred First Appeal before the Special Secretary of OPSC-First Appellate Authority. The First Appellate Authority rejected the said appeal with a finding that the authority conducting the examination and the examiners evaluating the answer papers stand in a fiduaciary relationship between each other and such matter warrants maintenance of confidentiality by both the manners and method of evaluation. Being aggrieved O.P. No.2 filed Second Appeal No.349/2007 before the SCIC. The SCIC after hearing the parties, allowed the Second Appeal and directed the PIO to provide information sought for by the O.P.No.2 within 30 days by speedpost. The relevant portion of the findings of the SCIC reads thus:

> "…The State Commission in many cases have held, by giving consistent and reasoned decisions, that photocopies of evaluated answer sheets are to be supplied, on request to the examinee(s) by blanking out the name of the examiner(s), Chief Examiner etc, their initials and code number etc. The PIO, perhaps has lost sight of the overriding provisions contained in Section 22 of the RTI Act, which

supercedes the extant instructions/orders/decisions etc in this regard."

4. Learned counsel for the OPSC in support of the rejection of application of O.P.No.2 by the PIO as well as First Appellate Authority submits that the O.P.No.2 is not entitled to get the information sought for as per the statutory provisions under Sections 8(1)(e) & 8(1)(j) of the R.T.I. Act, 2005 for the reason that it will affect the fiduciary relationship of the examiners and the OPSC, which is conducting the examination and if it will be disclosed there will be no confidentiality in the manners and method of evaluation and it may have a serious effect if the same will be disclosed and therefore the PIO as well as First Appellate Authority have rightly rejected the prayer of the O.P.No.2 seeking the information. Hence, it is prayed by the learned counsel for the petitioner-OPSC to set aside the impugned order passed by the SCIC.

5. On the other hand Mr. B.N. Rath, learned counsel on behalf of the State Information Commission-O.P.No.1, placing reliance upon the counter filed by the O.P.No.1, and recent judgments of the Hon'ble Supreme Court in the cases of Central Board of Secondary Education & Anr. Vs. Aditya Bandopadhyay & Ors., (2011) 8 SCC 497; and Institute of Chartered Accounts of India Vs. Shaunak H. Satya & Ors., (2011) 8 SCC 781 sought to justify the impugned order passed by the SCIC. It is submitted that the impugned order is not only based on through scrutiny of materials available on record but also on clear assessment of pleadings/averments made and after due compliance of the principle of natural justice. The Act, 2005 clearly debars any challenge to orders finally passed by the State Commission in terms of Section 19(7) read with Section 23. Therefore, the writ petition preferred by the OPSC is nothing but an appeal against the Second Appeal and for that reason the writ petition is not maintainable.

6. It is further submitted that decision of both Public Information Officer as well as the First Appellate Authority contravened the provisions of the Act and the disclosure of documents sought for by the O.P.No.2 do not fall within the ambit of either Section 8(1)(e) or 8(1)(j) of the Act. Moreover, after the publication of the results of the examination, there was no reason for withholding the information sought for by the O.P.No.2. Further, considering the fiduciary aspect or the confidentiality in the matter, the State Commission has made it abundantly clear that the evaluated answer sheets are to be supplied by blanking out/blocking the names of the Examiners, Chief Examiner, their initials/signatures and code number etc. so as to maintain necessary secrecy and to protect individuals from vandalism and strengthen the credibility of the examination system. Therefore, it is

submitted that the impugned order of the SCIC is perfectly legal and valid and it is prayed by the learned counsel for the opposite parties for dismissal of the writ petition.

7. We have heard the rival legal contentions urged on behalf of the learned counsel for the parties and perused the records with reference to the R.T.I. Act, 2005 and the judgments upon which the reliance has been placed.

8. While considering a similar questions, the Hon'ble Supreme Court in the case of Central Board of Secondary Education & Anr. Vs. Aditya Bandopadhyay & Ors., (2011) 8 SCC 497, placing reliance upon its earlier decisions, held as under :

> "22. In people's Union for Civil Liberties Vs. Union of India, (2004) 2 SCC 476, this Court held that right to information is a facet of the freedom of "speech and expression" as contained in Article 19(1)(a) of the Constitution of India and such a right is subject to any reasonable restriction in the interest of the security of the State and subject to exemptions and exceptions.
>
> 36. Section 22 of the RTI Act provides that the provisions of the said Act will have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Therefore, the provisions of the RTI Act will prevail over the provisions of the bye-laws/rules of the examining bodies in regard to examinations. As a result, unless the examining body is able to demonstrate that the answer books fall under the exempted category of information described in clause (e) of Section 8(1) of the RTI Act, the examining body will be bound to provide access to an examinee to inspect and take copies of his evaluated answer books, even if such inspection or taking copies is barred under the rules/bye-laws of the examining body governing the examinations……
>
> 38. The terms "fiduciary" and "fiduciary relationship" refer to different capacities and relationship, involving a common duty or obligation. "Fiduciary" is one whose intention is to act for the benefit of another so as to matters relevant to the relation between them….
>
> 51. We, therefore, hold that an examining body does not hold the evaluated answer books in a fiduciary relationship. Not being information available to an examining body in its fiduciary relationship, the exemption under Section 8(1)(e) is not available to

the examining bodies with reference to the evaluated answer books. As no other exemption under Section 8 is available in respect of the evaluated answer books, the examining bodies will have to permit inspection sought by the examinee.

53. The answer book usually contains not only the signature and code number of the examiner, but also the signatures and code number of the scrutiniser/co-ordinator/head examiner. The information as to the names or particulars of the examiners/co-ordinators/scrutinisers/head examiners are therefore exempted from disclosure under section 8(1)(g) of RTI Act, on the ground that if such information is disclosed, it may endanger their physical safety. Therefore, if the examinees are to be given access to evaluated answer- books either by permitting inspection or by granting certified copies, such access will have to be given only to that part of the answer-book which does not contain any information or signature of the examiners/co-ordinators/ scrutinisers/ head examiners, exempted from disclosure under section 8(1)(g) of RTI Act. Those portions of the answer-books which contain information regarding the examiners/co-ordinators/ scrutinisers/ head examiners or which may disclose their identity with reference to signature or initials, shall have to be removed, covered, or otherwise severed from the non-exempted part of the answer-books, under section 10 of RTI Act."

9. Similar view has also been taken by the Hon'ble Supreme Court in the case of Institute of Chartered Accounts of India Vs. Shaunak H. Satya & Ors., (2011) 8 SCC 781 relying upon the aforesaid decision in Aditya Bandopadhyay (supra).

10. Considering the aforesaid entire fact situation of the case we are of the view that the SCIC, State Information Commission, Orissa has rightly passed the impugned order directing the petitioner to supply the photocopies of evaluated answer sheets, on the request of the concerned examinee(s) by blanking out the name of the examiner(s), chief examiner, their initial(s) and Code number etc. The various contentions and legal grounds urged in this writ petition are wholly untenable in law and cannot be accepted. We do not find any cogent reason to interfere with the impugned order.

The writ petition is accordingly dismissed being devoid of any merit.

Writ petition dismissed.

2012 (I) ILR- CUT- 938

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

W.P.(C) NO.4554 OF 2011 (Dt.15.12.2011)

ORISSA RURAL HOUSING DEVELOPMENT CORPN. LTD. .....Petitioner.

.Vrs.

ASST. COMMISSIONER OF INCOMD TAX, BBSR. .....Opp.Party.

A. INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – S.139 (5).

Revised return – An assessee has a right to file revised return to correct bonafide mistake, omission or wrong statement in the original return – Held, Assessing Officer has no power to entertain fresh claim after filing of original return except a revised return. (Para 12,16)

B. INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – S. 139 (5).

There is distinction between a revised return and a correction in the originally filed return – If an assessee files an application for correcting a return already filed or for making some amendments there in, it would not certainly mean that he has filed a revised return. (Para 13)

C. INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – S.142 (1), 143(2).

Purpose of service of notices U/s.142 (1) and 143 (2) is different – Nothing to say that the notice U/s.142(1) should precede notice U/s.143(2) so far as production of documents/accounts is concerned. (Para 24)

D. INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – S. 264.

Section 264 of the I.T. Act is an alternative / additional remedy available to the petitioner-assessee who does not want to avail remedy by way of appeal. (Para 27)

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

Grant of return can be allowed by an order under the statute but not in exercise of power under Article 226 and 227 of the Constitution of India.

F. INTERPRETATION OF STATUTE – Conflict between two Central statute, Viz, Income Tax Act, 1961 and National Housing Bank Act, 1987

– No provision in the later Act giving overriding effect over the Income Tax Act. (Para 19)

Case laws Referred to:-

1. (2006) 284 ITR 323 (SC) : (Goetze (India) Ltd. –V-Commissioner of Income Tax)2.(1876)1 Ch.D.426 : (Taykir-V-Taylor; Nazir Ahmed-V- King Emperor)
3.AIR 1936 PC 253 : (Ram Phal Kundu-V-Kamal Sharma)
4.AIR 2004 SC 2615 : (Indian Bank's Association-V-Devkala Consultancy Service).
5.(1965)16 STC398(SC) : (Suganmal-V-State of Madhya Pradesh & Ors.)

For Petitioner - Mr. B.K.Mahanti, Sr. Advocate
For Opp.Parties - Mr. A.K.Mohapatra
Standing Counsel (I.T.Dept.)

B.N. MAHAPATRA, J. This writ petition has been filed for quashing the following orders:-

(i) The order of assessment dated 23.12.2008 (Annexure-1) passed by opposite party No.1-Asst. Commissioner of Income Tax, Circle-I (1), Bhubaneswar (for short, "Assessing Officer");

(ii) The order issued under Section 264 of the I.T. Act dated 11.03.2010 (Annexure-1A) passed by the Commissioner of Income Tax, Bhubaneswar; and

(iii) The order dated 15.09.2010 (Annexure-1B) passed by the Commissioner of Income Tax (Appeals)-I, Bhubaneswar.

The further prayer of the petitioner is for refund of tax collected on the ground that such collection is without authority of law.

2. Petitioner's case in a nutshell is as follows:

The Government of India as well as Government of Orissa in their respective Policies decided to finance the Housing Sector and it was conceived that the same shall be done through agencies and instrumentality

of the State, both in the Centre as well as the State through non-banking financial companies. In furtherance of such a policy, the State Government through its Housing and Urban Development Department decided to promote and float a Public Limited Company in the name and style of Orissa Rural Housing Development Corporation Ltd. and accordingly the petitioner Company was incorporated on 19.08.1994 under the Companies Act, 1956. The authorized share capital was Rs.50 crores divided into equity share of Rs.10 each and there was redeemable preference share of Rs.100/- each for Rs.10.0 crores whereas share capital was Rs.48,16,00,000/- which was paid entirely by the State of Orissa.

3. The petitioner carries on the business of a non-banking financial institution. To carry on its business, the petitioner borrows and lends money under various schemes, either on its own approval or concurrence from the Government. The petitioner maintains details of account for the purpose of Income Tax. It commenced its business during the year 1994-95 and follows mercantile system of accounting to recognize income and expenses to compute its total income. It had got its account audited for the financial year ending on 31st March, 1995 and up to 31st March, 2006 and returns of income were filed with the Income Tax Department for those periods. Difficulty of the petitioner arose when the statutory auditors were not appointed in time and its own appointed auditor delayed in completing its audit.

4. The petitioner submitted its return for the assessment year 2006-07 on 30.11.2006 within the due time wherein it disclosed its total loss at Rs.1,94,48,311/-. The Assessing Officer issued notice (Annexure-3A) to the petitioner on 10.10.2007 under Section 143(2) of the Income Tax Act (for short, "I.T. Act") requiring the petitioner to attend his office on 09.01.2008 either in person or by a representative duly authorized in writing on this behalf or produce or cause to be produced any documents, accounts and any other evidence on which the petitioner may rely in support of the return filed by it. Subsequently, on 03.10.2008 a notice (Annexure-3B) under Section 142(1) of the I.T. Act was issued to the petitioner to produce or cause to be produced accounts and documents mentioned in the said notice for the assessment year 2006-07. On 08.12.2008, the petitioner filed a petition under Annexure-3C before opposite party No.1-Asst. Commissioner of Income Tax, Circle-1, Bhubaneswar (for short 'Assessing Officer') for revising its return of income. Learned Assessing Officer without taking this fact into consideration passed the impugned order dated 23.12.2008 (Annexure-1) computing the income at Rs.22,52,92,540/- and demanded Rs.7,58,33,470/- towards tax, surcharge and education cess and also

charged interest under Section 234B for Rs.2,50,25,022/-, total of which was Rs.10,08,58,492/-.

5. Being aggrieved by the said order, the petitioner filed a revision petition on 18.02.2009 before opposite party No.2-Commissioner of Income Tax. On 11.02.2009, the petitioner moved a petition before the Additional Commissioner of Income Tax, Range-I, Bhubaneswar for grant of stay of the tax demanded till disposal of the case under Section 264 of the Income Tax Act. The Asst. Commissioner refused to grant stay by order dated 05.05.2009 (Annexure-3/F). Being aggrieved by such order, the petitioner approached the Commissioner of Income Tax on 27.07.2009 and the learned Commissioner disposed of the revision petition by his order under Annexure-1A refusing to interfere with the assessment on the ground that the assessee after filing original return cannot make a fresh claim other than by way of filing a revised return. The petitioner on receiving the order of the Commissioner filed First Appeal on 26.03.2010 before the Commissioner of Income Tax (Appeals), who dismissed the appeal *inter alia* holding that the delay in filing the appeal is not condonable and that the appeal is not maintainable as the appellant has waived its right to appeal by going for a revision under Section 264 of the Act. The C.I.T. (Appeal) further held that the order of the Assessing Officer against which an appeal is sought to be filed has since merged with the order passed under Section 264 of the I.T. Act by the Commissioner of Income Tax no appeal before him can lie against the order passed by the learned CIT. Hence, the present writ petition.

6. Mr. B.K. Mahanti, learned Senior Advocate appearing on behalf of the petitioner submitted that learned Assessing Officer has committed an error by not considering the revised statement of income filed before him on 08.12.2001 while passing the order of assessment. At the time of filing the return, the statutory audit was not completed. Returns were filed on the basis of the provisional accounts and interest on Non-Performing Asset (for short, 'NPA') account was wrongly recognized in contravention with the provisions of National Housing Bank (for short, 'NHB) guidelines and the petitioner-assessee has also claimed expenses in contravention of Section 43D of the I.T. Act. On the basis of petition dated 08.12.2001, though the petitioner explained before the learned Assessing Officer that the National Housing Bank Act (for short, 'NHB Act') has overriding effect over the Income Tax Act and on a reworking of the figure the loss shown would go up to Rs.43,63,93,492/-. the learned Assessing Officer has not considered the same. Both the learned Assessing Officer and the Commissioner of Income Tax are wrong in holding that the petitioner-assessee has no right of claim fresh exemption before the Assessing Officer after filing the original return

other than by way of filing revised return. Even if the assessee-follows mercantile system of accounting to recognize income and expenses to compute its total income there is no bar for the assessee to revise its return of income by way of filing revised statement of income as the income of NPA account was wrongly recognized in contravention of National Housing Bank guidelines expenses were claimed in contravention of Section 43B of the I.T. Act. The learned Assessing Officer should have issued notice under Section 139(9) to rectify the defect in the return. Notice under Section 143(2) without issue of notice under Section 142(1) was premature. Notice issued under Section 142(1) itself was time barred having served after one year from the date of filing of the return. The statutory audit was over on 06.12.2010 and approval of the CAG has been given on 07.02.2011. Thereafter, the petitioner had submitted a revised return by registered post. The petitioner is subjected to an unjust and undue assessment against which the petitioner has no redressal, and particularly because, the petitioners business would come to a stand still when it will be forced to pay tax which is not payable under law.

7. Mr.Mohanty further submitted that after disposal of the revision petition by learned Commissioner, the Assessing Officer on 17.03.2009 has collected Rs.16,47,224.00 by an attachment from the petitioner's bank account as informed by its bankers, the SBI, Union Bank of India and UCO Bank. Unless there is a direction of this Court, the petitioner would not get the refund of amount collected by attachment. The petitioner has no real income and it is liable to pay back the amount borrowed from HUDCO.

8. Mr.A.K.Mohapatra, learned Senior Standing Counsel appearing on behalf of the Income Tax Department submitted that there is no infirmity or illegality in the orders passed by the Assessing Officer under Annexure-1, the order passed by the Commissioner of Income Tax dated 11.03.2010 (Annexure-1A) as well as order of the Commissioner of Income Tax (Appeals) dated 15.09.2010 (Annexure-1B) for the reasons stated in the respective orders. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of ***Goetze (India) Ltd. vs. Commissioner of Income Tax, (2006) 284 ITR 323 (SC),*** it is submitted that the Assessing Officer has no power to entertain a fresh claim made by the Assessee after filing of the original return other than by filing of a revised return. Supporting the order of the Commissioner of Income Tax (Appeals), Mr. Mohapatra submitted that the petitioner having invoked the provision of Section 264 of the IT Act, thereafter he has no right to approach the Commissioner of Income Tax (Appeals) invoking its appellate jurisdiction. Referring to Section 264(4) of the I.T. Act, he further submitted that the statute in this regard is amply clear and therefore, the Commissioner of Income Tax (Appeals) is justified to hold

that the appeal filed by the petitioner before him is not maintainable. Concluding his argument, Mr.Mohapatra prayed for dismissal of the writ petition.

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

(i) Whether an assessee can revise his return of income by way of filing a revised statement of income after filing original return other than by way of filing revised return as contemplated under Section 139(5) of the I.T. Act?

(ii) Whether the learned Assessing Officer as well as the Commissioner of Income Tax is justified in holding that the petitioner-assessee has no right to claim fresh exemption before the learned Assessing Officer after filing of the original return other than by way of filing revised return?

(iii) Whether an assessee who follows Mercantile system of accounting and furnishes the return of income on the basis of accrued interest income can revise its return of income by way of filing a revised statement of income on the ground that the interest on NPA account was wrongly recognized in contravention of NHB guidelines and expenses were claimed in contravention of Section 43D of the I.T. Act?

(iv) Whether the National Housing Bank Act,1987 overrides the Income Tax Act, 1961?

(v) Whether there is any sequence prescribed under the Income Tax Act as to in what manner two notices, i.e., notice under Sections 142(1) and 143(2) of the I.T. Act are to be issued so far production of documents and/or accounts is concerned?

(vi) Whether the Commissioner of Income Tax (Appeals) is justified in holding that the appeal filed by the petitioner after rejection of its petition under Section 264 by the Commissioner of Income Tax is not maintainable under the Income Tax Act?

(vii) Whether any refund can be granted by exercising power under Articles 226 and 227 of the Constitution when refund does not flow from an order passed under the Statute?

10. Question Nos.(i), (ii) and (iii) being interlinked, they are dealt with together.

11. The undisputed facts are that the petitioner assessee follows mercantile system of accounting and has filed its return of income for the financial year 2005-06 on 30.11.2006. Subsequently, on 08.12.2008 the petitioner filed a petition before opposite party no.1-Assessing Officer with a revised statement of income stating therein that at the time of filing of returns, the statutory audit was not completed. The returns were filed on the basis of the provisional account and interest on NPA was wrongly recognized in contravention of NHB guidelines and it also claimed expenses in contravention of Section 43D of the I.T. Act. On the basis of the original return filed on 30.11.2006 notice was issued on 10.10.2007 under Section 143(2) of the I.T. Act. Notice under Section 142(1) dated 03.10.2008 was also issued to the petitioner to produce the documents/accounts. Assessment was completed under Section 143(3) on the basis of the original return on 23.12.2008. The petitioner filed a revised return by registered post on 07.01.2011.

12. It is quite possible and natural that in submitting a return, some bona fide omission or wrong statement may have occurred. In order to obviate this possibility the legislature has made provisions in section 139(5) enabling an assessee to furnish a revised return. Thus, the assessee has a right to file revised return if he discovers any omission or any wrong statement in the originally filed return. Such a revised return can be furnished at any time before expiry of one year from the end of the relevant assessment year or the completion of the assessment, whichever is earlier. Thus, the statute provides safeguard to an assessee in case he discovers any omission or wrong statement in his original return to file a revised return. The further requirement is that this omission or wrong statement in the original return must be due to a bona fide inadvertence or mistake on the part of the assessee.

13. There is a distinction between a revised return and a correction in the originally filed return. If an assessee files an application for correcting a return already filed or for making some amendments therein, it would not certainly mean that he has filed a revised return. Such a petition is not recognized under the Income Tax Act. The basis of assessment is the return filed by the assessee. If a revised return is filed under Section 139(5) of the I.T. Act the assessment can be completed only on the basis of revised return and not otherwise.

14. Where an assessee, following mercantile system of accounting, furnishes a return of income on the basis of accrued income, the filing of a revised statement of income, on the ground that such interest income had not been received during the relevant previous year, is of no avail. In absence of the revised return as provided under Section 139(5), the Assessing Officer is bound to make assessment on the basis of original return. Further, a change over from mercantile system to cash system is not permissible by filing a revised return much less a revised statement of income.

15. There is no provision under the Income Tax Act to enable an assessee to revise his income by way of filing a revised statement of income as has been done by the petitioner. In the instant case, a revised statement of income was filed on 08.12.2008 before the Assessing Officer after commencement of assessment proceedings. If such revised statement of income is accepted, then the very purpose of enacting Section 139(5) under the I.T. Act for filing revised return shall be frustrated and provision of said section becomes redundant. During the relevant time, as the assessee had maintained the accounts on mercantile basis, it was bound to file the returns on that basis.

16. The Hon'ble Supreme Court in the case of ***Goetze (India) Ltd. (supra),*** held that the Assessing Officer has no power to entertain fresh claim made by the assessee after filing of the original return other than by filing of revised return.

17. Law is well settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim "*Expressio unius est exclusion alteris*", meaning thereby that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following of other course is not permissible. (*See* ***Taylor v. Taylor, (1876) 1 Ch.D.426; Nazir Ahmed v. King Emperor, AIR 1936 PC 253; Ram Phal Kundu v. Kamal Sharma; and Indian Bank's Association v. Devkala Consultancy Service, AIR 2004 SC 2615***).

18. Therefore, we are of the view that the learned Assessing Officer is fully justified in completing the assessment under Section 143(3) of the I.T. Act on the basis of the original return filed under Section 139(1) without taking into consideration the revised statement filed on 08.12.2008 in absence of the revised return as contemplated under Section 139(5) of the

I.T. Act and the CIT is also justified in confirming the view of the learned Assessing Officer.

19. Question No.(iv) is as to whether the National Housing Bank Act, 1987 overrides the Income Tax Act, 1961?

Though both the Acts are Central Act they are occupying different fields. The purpose of enacting both the Acts are different. Income Tax Act has been enacted to levy tax on income which is covered under Entry No.82 of List-I-Union List of Seventh Schedule to the Constitution. The National Housing Bank Act, 1987 has been enacted to promote housing finance institutions both at local and regional levels to provide financial and other support to such institutions which are covered under Entry-45 of List-I-Union List of Seventh Schedule to the Constitution of India. There is no such provision in the National Housing Bank Act that it will override the Income Tax Act. Since the impugned orders are passed under the Income Tax Act, 1961, they are governed by the provisions of Income Tax Act. Therefore, the contention of the petitioner that National Housing Bank Act, 1987 overrides the Income Tax Act, 1961 is wholly untenable in law.

20. Question No.(v) is as to whether there is any sequence prescribed under the Income Tax Act as to in what manner two notices, i.e., notice under Sections 142(1) and 143(2) of the I.T. Act are to be issued so far as production of documents and/or accounts is concerned?

21. Under Section 142(1) of the I.T. Act, the Assessing Officer for the purpose of making assessment may serve on any person who has made a return under Section 139 or in whose case time allowed under Section 139(1) for furnishing return has expired, a notice requiring him on a date therein specified:

(i) Where such person has not made a return within the time allowed under Section 139(1) to furnish a return of his income or income of any person in respect of whom he is assessable under the Act in the prescribed Form, or

(ii) To produce or cause to be produced such accounts or documents as the Assessing Officer may require or to furnish in writing and verify in the prescribed manner on such points or matter as the Assessing Officer may require.

Thus, as stated above, Section 142(1), *inter alia*, empowers the Assessing Officer to issue notice under Section 142(1) for production of accounts and/or documents for the purpose of making assessment.

22. At this juncture, it is necessary to reproduce Section 143(2) of the I.T. Act:

> "***143. Assessment***
>
> xx xx xx
>
> (2) Where a return has been furnished under Section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,—
>
> (i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and required him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:
>
> Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003,
>
> (ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not under-stated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced there, any evidence on which the assessee may rely in support of the return:
>
> Provided that no notice under [clause (ii)] shall be served on the assessee after the expiry of twelve months from the end of the month in which the return is furnished."

23. Thus, notice issued under Section 143(2) is issued requiring the assessee to produce his accounts, evidence, and particulars on which the Assessee may rely in support of his claim made in the return. The return is the basis on which the Assessing Officer examines the accounts and/or documents and passes the order of assessment. In the instant case, return of income for the assessment year 2006-07 was filed on 30.11.2006 and notice under Section 143(2) was issued on 10.10.2007, which is within the

period of limitation, i.e., before expiry of twelve months from the end of the month in which the return was furnished.

24. The purpose of service of notices issued under Section 142(1) and 143(2) is different. There is no sequence prescribed as to in what manner two notices are to be issued. Therefore, there is nothing to say that the notice under Section 142(1) should precede notice under Section 143(2) so far as production of documents/accounts is concerned.

25. Question No.(vi) is as to whether the Commissioner of Income Tax (Appeals) is justified in holding that the appeal filed by the petitioner after rejection of his petition under Section 264 by the Commissioner of Income Tax is not maintainable under the Income Tax Act.

26. Under Section 264 of the I.T. Act, the Commissioner is empowered to revise the order passed by an authority subordinate to him on his own motion or an application filed by the assessee for such revision. Section 264(4) of the I.T. Act provides the circumstances where the Commissioner shall not revise any order under Section 264. For better appreciation, Section 264(4) of the I.T. Act is reproduced below:

> "264. ***Revision of other orders***
>
> xx xx xx
>
> (4) The Commissioner shall not revise any order under this section in the following cases:-
>
> (a) where an appeal against the order lies to the Deputy Commissioner (Appeals) or to the Commissioner (Appeals) or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or, in the case of an appeal to the Commissioner (Appeals) or to the Appellate Tribunal, the assessee has <u>not waived his rights of appeal</u>."
>
> xx xx xx
>
> (underlined for emphasis)

27. Thus, the assessee can invoke the provisions of Section 264 of the I.T. Act only after the time for filing the appeal is expired or after waiver of his right of appeal. Section 264 of the I.T. Act is an alternative remedy available to the petitioner-assessee, who does not want to avail remedy by way of

appeal. Thus, remedy available under section 264 of the I.T. Act is an alternative remedy and not an additional remedy and the assessee is not permitted to pursue both the remedies either simultaneously or one after another. In the instant case, it is only after rejection of the petition under Section 264 by the Commissioner of Income Tax, the assessee has filed appeal, which right as stated above, by approaching the Commissioner under Section 264, the petitioner has lost. Apart from the above, once the revisional power vested with the Commissioner under Section 264 of the I.T. Act is invoked and the Commissioner passes the order by exercising his jurisdiction under that section, the order of assessment merges with the order of revision. The order passed by the Commissioner under Section 264 is also not an appealable order under Section 246/246A of the I.T. Act.

28. In view of the above, the Commissioner of Income Tax (Appeals) is justified in not entertaining the appeal filed by the petitioner before him on the ground that the same is not maintainable.

29. Question No.(vii) is as to whether any refund can be granted by exercising power under Article 226 and 227 of the Constitution when refund does not flow from an order passed under the Statute.

30. The prayer in the present writ petition is for grant of refund. Since we have not quashed the order of assessment dated 23.12.2008 (Annexure-1), order dated 11.03.2010 passed under Section 264 of the I.T. Act (Annexure-1A)and first appellate order dated 15.09.2010 (Annexure-1B) for the reasons stated above, no order granting refund of tax collected against the demand raised in the impugned assessment order can be passed. Moreover, such a prayer in the writ petition is thoroughly misconceived in law because refund must flow from an order passed under the Statute. While exercising power under Article 226 of the Constitution, the High Court is not acting as authority under any Statute.

31. The Hon'ble Supreme Court in the case of ***Suganmal vs. State of Madhya Pradesh and others,*** *(1965) 16 STC 398 (SC),* held that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of *mandamus* directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

32. In view of the above, the prayer of the petitioner in this writ petition for grant of refund cannot be granted.

33. For the reasons stated supra, the writ petition is dismissed. No order as to costs.

Writ petition dismissed.

2012 (I) ILR- CUT- 951

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

W.P.(C) NO.1141 OF 2009 (Dt.02.02.2012)

BIPIN BIHARI SAHOO .....Petitioner.

.Vrs.

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

SERVICE LAW – Voluntary Retirement Scheme – Petitioner applied for VRS vide application Dt.25.07.2008 – Subsequently he realized his mistake and vide letter Dt.05.08.2008 and Dt.06.08.2008 requested the authorities for withdrawal of his application Dt.25.07.2008 – He was served with an order Dt.31.08.2008 relieving him from service w.e.f. Dt. 14.08.2008 – Order challenged.

As per Clause 6.1 of the scheme application for voluntary retirement can not be with drawn after its acceptance – So until the petitioner is relieved of the duty after acceptance of the offer of voluntary retirement jural relationship of the petitioner with his employer does not come to an end – Since the representation of the petitioner Dt.5.8.2008 and Dt.6.8.2008 filed prior to the date of acceptance of VRS application on Dt.08.08.2008 the Opp.Parties have no other option than to allow the VRS application of the petitioner to be withdrawn – Held, impugned order Dt.31.08.2008 is quashed – Opp.Parties are directed to reinstate the petitioner in service with all consequential benefits including arrear salary and continuity of service. (Para 5,6)

Case laws Referred to:-

1.2006(I) OLR.240 : (M.S.P.Dora-V-Orissa Road Transport Corporation & Ors.)
2.AIR 1987 SC 2354 : (Balaram Gupta-V- Union of India)
3.AIR(1997)4 SCC 280 : (Power Finance CorporationLtd.-V-Pramod Kumar Bhatia).

For Petitioner - M/s. D.Chhotrary, S.Mohanty, S.Pattnaik & B.Moharana
For O.Ps.1 & 2 - Mr. J.P.Pattnaik Addl. Govt. Advocate
For O.Ps.3 & 4 - M/s. S.L.Patnaik & S.Sethi.

B.P.DAS, J. The case of the petitioner is that while he was working as Jr.Assistant in Lahunipada Branch of Sundargarh district under the Tribal

Development Cooperative Corporation of Orissa Ltd. (in short, "T.D.C.C."), the T.D.C.C., Bhubaneswar, issued a circular dated 5.7.2008 inviting applications for availing retirement under the Voluntary Retirement Scheme (in short, "V.R.S."). The said circular provides for Model Voluntary Retirement Scheme for the employees of the Public Sector Undertakings of Orissa to downsize the manpower in the Corporation due to deterioration of its financial position. The said Scheme in Annexure-1 provides for objective, eligibility, procedure and Voluntary Retirement Benefits. In Clause-6.1 of the said Scheme, there is a provision for withdrawal of the V.R.S.application, which is reiterated hereunder :-

> "6.1-Application for Voluntary Retirement cannot be withdrawn after its acceptance is communicated to the employee concerned."

According to the petitioner, he applied for V.R.S. as per the aforesaid scheme vide his application dated 25.7.2008. But after realizing the hardship that would be caused to him and his family members after his retirement and that the Scheme would not be beneficial for him, as his superannuation would be in the year 2016, he immediately by letters dated 5.8.2008 and 6.8.2008 requested O.P.4, Managing Director and O.P.3, President of T.D.C.C. respectively for withdrawal of his application for availing the benefit of the Scheme and the same were sent by fax as well as Post. But surprisingly, the petitioner was served with an order dated 31.8.2008 passed by the Branch Manager, T.D.C.C., Sundargarh, reliving him from service with effect from that date pursuant to the order of the Head Office dated 14.8.2008. The order dated 31.8.2008 is impugned in this case. Hence this writ petition.

According to the learned counsel for the petitioner, the petitioner had applied for withdrawal of his option for V.R.S. before the impugned order dated 31.8.2008 was communicated to him. Therefore, there is no scope for the Management to pass the impugned order accepting the V.R.S. application of the petitioner.

2. In the instant case, notice was issued to the opposite parties on 10.2.2009 and considering the hardship of the petitioner, this Court by order dated 3.11.2011 passed an interim order with a direction to the Management to pay a sum of Rs.50,000/- to the petitioner by 30.11.2011 in shape of Demand Draft and the payment would be subject to the result of the writ petition.

3. Counter affidavit has been filed by O.Ps.3 & 4 through one Bamadev Mishra, Branch Manager (Marketing), T.D.C.C., Bhubaneswar. Apart from

rebutting the allegations made by the petitioner in this writ petition, a plea has been taken that the Scheme of voluntary retirement was floated in order to downsize the manpower of the Corporation to avoid imminent financial disasters. The averments made in paragraph-12 of the said counter affidavit are reiterated hereunder :-

> "12. That with regard to the averments made in paragraph-9 of the writ peititon, it is humbly submitted that the petitioner was not illegally and arbitrarily relieved from service as his VRS application has been accepted by the competent authority vide O.O.No.3601, dated 14.8.2008 as per provision laid down in Model V.R.Scheme. Besides this, the competent authority has also rejected the withdrawal application of the petitioner, as there is no provision for withdrawal of VRS application, due to poor financial condition of the Corporation as well as no substantial business of the Corporation."

In the counter affidavit, a further stand has been taken that the competent authority has rejected the withdrawal application of the petitioner, as there is no provision for withdrawal of VRS application under the Scheme.

After hearing learned counsel for the parties and perusing their pleadings, we have to examine (I) whether the scheme provides for withdrawal of V.R.S. application and (II) whether the petitioner has withdrawn his application before it is accepted.

Admittedly, acceptance of V.R.S. application of the petitioner was communicated on 14.8.2008, as it is indicated in paragraph-12 of the counter affidavit. But in paragraph-10 thereof it is indicated that it was accepted on 8.8.2008. Annexure-B/3 to the counter affidavit, i.e., communication dated 19.1.2009 issued by the Manager (Finance & Audit), T.D.C.C., says that the competent authority has rejected the representations of the petitioner filed on 5.8.2008, 6.8.2008, 20.10.2008, 12.11.2008 and 12.12.2008.

4. From the above as well as from the documents produced by the O.Ps., specifically the communication dated 19.1.2009, it is clear that the representations of the petitioner dated 5.8.2008 and 6.8.2008 were filed prior to the date of acceptance of V.R.S. application on 8.8.2008, which was communicated to the petitioner vide letter dated 14.8.2008. If we go by Clause-6.1 of the Scheme, the O.Ps. had no other option than to allow the V.R.S. application of the petitioner to be withdrawn, as the same was prior to the date of acceptance of V.R.S. scheme. In this regard, we may refer to a decision of this Court in the case of **M.S.P.Dora vrs. Orissa State Road**

Transport Corporation & Others, 2006 (I) OLR-240, wherein this Court held that looking at various decisions, law is well settled in the case of **Balaram Gupta vrs. Union of India**, reported in AIR 1987 SC 2354 that it was held that dissolution of contract of employment would be brought only on the date of acceptance of option for voluntary retirement and up to that date the appellant therein continued as Government employee. In the case of **Power Finance Corporation Ltd. vrs. Pramod Kumar Bhatia,** AIR (1997) 4 SCC 280, the Court has held that it is now settled legal position that unless the employee is relieved of the duty after acceptance of the offer of voluntary retirement or resignation, jural relationship of the employee and the employer does not come to an end. In the case of M.S.P.Dora (supra), this Court held as follows :-

> "15. Before we part with and proceed to pass the final order we would like to note here that a person proposing to resign often wavers in his decision and even in a case where he has taken a firm decision to resign, he may not be ready to go out on change of his mind as in the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty; a certain amount of flexibility is required, and if such flexibility does not jeopardize or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the person concerned to withdraw his letter of retirement. As a model employer government or government run Corporation must conduct themselves with high probity and candour with its employees."

6. For the aforesaid reasons, we quash the order dated 31.8.2008 passed by the Branch Manager, T.D.C.C., Sundargarh (Annexure-4) and direct the opposite parties to permit the petitioner to join his duties. On his joining, the petitioner is entitled to be reinstated in service with all consequential benefits including arrear salary and continuity of service. The opposite parties, however, shall be entitled to deduct the amount of Rs.50,000/- (rupees fifty thousand), which was paid to the petitioner by virtue of the order of this Court dated 3.11.2011.

7. The writ petition is accordingly allowed. No cost.

Writ petition allowed.

2012 (I) ILR- CUT- 955

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

W.P.(C) NO. 8409 OF 2011 (Dt.30.03.2012)

KEONJHAR NAVANIRMANA PARISHAD & ORS. … …..Petitioners.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

A. ELECTRICITY – Hike in tariff – Challenged in writ petition – Held, writ petition so far as the correctness of fixation of tariff is not maintainable – Petitioners may raise the same before the appropriate statutory forum. (Para 5)

B. ELECTRICITY – PIL – Report of comptroller and Auditor General (CAG) showing loss of huge public money due to inept attitude of the distribution companies – No improvement to the quality of supply of electricity in the Hydro Electricity Sector – Failures on the part of the public Sector undertakings and apathetic attitude of private companies managing the distribution system requires scrutiny of this Court in the interest of the public – OERC lacked control over generating companies and distribution companies – Direction issued to state Government to make policy within 3 months for optimum use of water in the reservoirs and to see that Hydro Electricity Projects would not suffer or run under capacity due to over drawal of water by the industries – Government to compute and recover compensation from the Industrial Units which had used over drawal of water and the said amount be paid to OHPC failing which such Industrial Units shall not be allowed to draw water from the reservoirs – Proper legislation be made for controlling/distributing water amongst Industrial Units and Hydro Electricity Projects from the water reservoirs – Direction issued for payment of pending electricity bills with different departments/organizations of the State Government (in case any dispute, the admitted bills) by the end of April,2012 failing which DISCOMs to disconnect power supply with seven days notice – Direction issued for implementation of orders passed by OERC with penal action against the violators for non-compliance of its orders – OERC to direct the DISCOMs to upgrade new distribution transformers to improve the existing system of generation and transmission.

((Para 24)

Case law Referred to:-

(2007)8 SCC 418 : (Dhampur Sugar (Kashipur)Ltd.-V-State of Uttaranchal).

For Petitioners - M/s. Kedanath Jena, P.K.Jena, B.P.Bal, S.N.Panda,B.K.Baral, P.Das & D.P.Mohapatra.

For Opp.Parties - Addl. Govt. Advocate (O.P.No.1 and 11)
M/s. Samareswar Mohanty, Sr.Advocate, H.Parida, S.Sen & R.Yadav (O.P.No.2)
Mr. R.K.Rath, Sr.Advocate
M/s. B.K.nayak, D.K.Mohanty (O.P.3)
M/s. N.C.Panigrahi, S.R.Panigrahi, N.K.Tripathy, D.Dhal & B.Mohanty.(O.P.4 & 5)
Mr. Jagannath Pattanaik, Sr. Advocate (O.P.No.5)
M/s. Milan Kanungo, Y.S.P.Babu, S.K.Mishra & S.N.Dash, (O.P.Nos.6,7,8)
M/s. P.K.Mohanty, L.N.Mohapatra, D.N.Mohapatra, Smt.J.Mohanty, P.K.Nayak, S.N.Dash (O.P.9)
M/s. S.K.Padhi, Sr.Advocate & Mrs. M.Padhi(O.P.10)
Mr. S.D.Das, Asst.Solicitor General of India (O.P.14)
M/s. S.C.Lal, Sumit Lal & Sujit Lal (Interveners).

B. P. DAS, J. Petitioner No.1-Keonjhar Navanirmana Parishad claims that it is a Registered Trust and is working throughout the State for upliftment of the poor and downtrodden, and for protection of their interest besides taking up various issues concerning the consumers of the State.

Petitioner No.2-the Federation of Consumers' Organizations of Orissa claims that it is a society registered under the Societies Registration Act and is the apex body of voluntary consumer organizations and other organizations having more than 200 affiliated members in the State and is working since 1990 for the welfare, education, awareness, interest of consumers and for protection of their rights and interest under various laws of the land.

The aforesaid two petitioners along with one Arun Kumar Sahoo, who is a bona fide consumer of electricity, have filed the present writ application with a prayer to direct the State of Orissa, represented through the Commissioner-cum-Secretary, Energy Department, (O.P.1), the Orissa

Electricity Regulatory Commissioner (OERC) (O.P.2) and the Orissa Hydro Power Corporation Ltd. (OHPC) (O.P.3) to take immediate steps for improvement of generation of electricity to meet the requirement of consumers in the State and to comply with the directions issued by OERC from time to time within a time-frame.

The petitioners have also prayed :-

(i) to direct opposite party no.2-OERC to ensure compliance of its orders passed from 2004 till date by opposite parties 3 to 9 within a time frame;

(ii) to call for the tariff orders passed by the OERC on the applications filed by the licensees-opposite parties 3 to 9 for the financial year 2011-12, quash the same and not to implement the said tariff orders; and

(iii) to direct opposite party no.10, the Central Bureau of Investigation, to investigate into the loss of public money as pointed out by the Comptroller and Auditor General (CAG) in his report vide Annexure-1 and submit a report against the persons responsible for loss of such public money and to take action against them.

This writ application has been filed mainly basing upon a news item published in an Odia daily, "The Sambad" dated 19.3.2011, to the effect that the electricity tariff has been sky-rocketed by virtue of the Tariff Order passed by the OERC for the year 2011-12 giving effect from 1st April 2011.

2. During the course of hearing the Tariff Orders was produced before this Court and learned counsel for the petitioners submitted that the general consumers are over-burdened with the hike in the rate of electricity and alleged that the OERC lacked control over the generating companies as well as the distribution companies and the distribution companies are not fulfilling their obligations as required under the agreements, for which every year the loss sustained by the generating companies and distribution companies is being over-loaded on the consumers.

3. Along with this writ application, another writ application, being W.P.(C) No. 8451 of 2011, had also been filed by Utkal Chambers of Commerce highlighting the grievances of the industries, which are consuming high power by paying higher tariff and due to hike in the rate of electricity, the cost of their product has become higher in the market for which the industries have ultimately become sick and unviable. According to

Mr. P. Acharya, learned counsel for the petitioner in W.P.(C) No.8451 of 2011, the writ petitioner has virtually challenged the fixation of tariff, i.e. Retail Supply Tariff (RST) for the financial year 2011-12, which has been made under Section 64 of the Electricity Act, 2003 (hereinafter "the Electricity Act").

The ground raised by the petitioner-Utkal Chambers of Commerce to challenge the Tariff Orders was that the computation of cross-subsidy had not been made in accordance with the Electricity Act and the Rules framed thereunder.

According to Mr. Acharya, the cross-subsidy was to be calculated on the basis of cost of supply to the consumer category and tariff of each of the consumer categories was to be within $\pm$ 20% of the average cost of supply.

So the sum and substance of the argument advanced by Mr. Acharya, on behalf of the industries consuming high power was that cross-subsidy for different consumer categories was to be determined taking into account the voltage-wise cost of supply to all types of consumers.

After a much debated hearing was done on the question of maintainability of the said writ application and on the Tariff Policy, Mr. Acharya wanted to withdraw the writ application on the ground that the petitioner had approached the Appellate Tribunal for Electricity against the Tariff Order and had also got the relief. The petitioner was allowed to withdraw the writ application but was directed to pay cost for having consumed considerable length of time of the Court in hearing the matter.

4. However, initially the question of maintainability of the present writ application was raised by Mr. N.C. Panigrahi, learned Senior Counsel for CESU as well as GRIDCO, who submitted that the writ application against the Tariff Order was not maintainable.

Learned counsel for the respective parties also vehemently argued on the question of maintainability of the writ application.

5. We are of the view that in a matter of fixation of tariff, this Court should not exercise its jurisdiction under Articles 226 and 227 of the Constitution of India and, therefore, we are not inclined to entertain the writ application, so far as the correctness of the fixation of tariff is concerned and it is open to the petitioners to raise the same before the appropriate statutory forum.

6. As the present writ application has been filed in the shape of a Public Interest Litigation highlighting the irregularities and inefficiencies as pointed out in the report of the CAG under Annexure-1 and the inept attitude of the distribution companies and as there is no improvement to the quality of supply of electricity in the Hydro Electricity Sector despite a huge amount of

capital is being dumped into these sectors, in the interest of the public, all these failures on the part of public sector undertakings and apathetic attitude of private companies managing the distribution system require a close scrutiny of this Court, and this Court has the jurisdiction to go into all those issues.

7. Much debated question of computation of cross-subsidy has been raised by Mr. Pitamber Acharya, learned counsel for the Utkal Chambers of Commerce. Though he ultimately withdrew the writ application, since the said issue is likely to arise in future pertaining to interpretation of the provisions relating to computation of cross-subsidy, we heard Mr. Acharya on the said issue at great length.

8. While hearing arguments on the issue, a question was raised whether the method adopted by the OERC for computation of cross-subsidy is correct.

On this aspect, we have also heard Mr. K.N. Jena, learned counsel for the petitioners, Mr. N.C. Panigrahi, learned counsel for CESU and GRIDCO and Mr. Samareswar Mohanty, learned counsel for the OERC.

9. Let us now refer to the provisions made in this regard in the Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2004, (hereinafter called “2004 Regulations”)

Chapter-III of the 2004 Regulations deals with the principles of determination of tariff under Section 62 (1)(d) of the Electricity Act which empowers the appropriate Commission to determine the tariff in accordance with the provisions of the Electricity Act for retail sale of electricity.

In Regulation 5 (i)(f), it has been indicated that the Commission may require a long-term business plan from each licensee for adopting the multi-year tariff regime, which the licensee shall scrupulously comply.

Regulation 7 deals with Tariff Principles and Clause (c) deals with surcharge. Sub-clause (iii) of Clause-(c) of Regulation-7 provides that for the

purpose of computing cross-subsidy payable by a certain category of consumers, the difference between average cost-to-serve of all consumers of the State taken together and average tariff applicable to such consumers shall be considered.

Let us now refer to the Tariff Policy published on 6.1.2006.

Clause-8.3 of such Policy deals with Tariff Design: Linkage of tariff to cost of service and Clause-8.5 deals with cross-subsidy surcharge and additional surcharge for open access.

It is profitable to quote hereinbelow Clause 8.3 and Clause 8.5.1 of the Tariff Policy.

"8.3 Tariff design : Linkage of tariffs to cost of service

It has been widely recognized that rational and economic pricing of electricity can be one of the major tools for energy conservation and sustainable use of ground water resources.

In terms of the Section 61 (g) of the Act, the Appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.

The State Governments can give subsidy to the extent they consider appropriate as per the provisions of section 65 of the Act. Direct subsidy is a better way to support the poorer categories of consumers than the mechanism of cross subsidizing the tariff across the board. Subsidies should be targeted effectively and in transparent manner. As a substitute of cross-subsidies, the State Government has the option of raising resources through mechanism of electricity duty and giving direct subsidies to only needy consumers. This is a better way of targeting subsidies effectively.

Accordingly, the following principles would be adopted;

1. In accordance with the National Electricity Policy, consumers below poverty line who consume below a specified level, say 30 units per month, may receive a special support through cross subsidy. Tariffs for such designated group of consumers will be at lease 50% of the average cost of supply. This provision will be re-examined after five years.

2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

   For example, if the average cost of service is Rs. 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidized categories excluding those referred to in para 1 above should not be lower than Rs.2.40 per unit and that for any of the cross-subsidizing categories should not go beyond Rs.3.60 per unit."

3. While fixing tariff for agricultural use, the imperatives of the need of using ground water resources in a sustainable manner would also need to be kept in mind in addition to the average cost of supply. Tariff for agricultural use may be set at different levels for different parts of a state depending of the condition of the ground water table to prevent excessive depletion of ground water, Section 62 (3) of the Act provides that geographical position of any area could be one of the criteria for tariff differentiation. A higher level of subsidy could be considered to support poorer farmers of the region where adverse ground water table condition requires larger quantity of electricity for irrigation purposes subject to suitable restrictions to ensure maintenance of ground water levels and sustainable ground water usage.

4. Extent of subsidy for different categories of consumers can be decided by the State Government keeping in view various relevant aspects. But provisions of free electricity is not desirable as it encourages wasteful consumption of electricity besides, in most cases, lowering of water table in turn creating avoidable problem of water shortage for irrigation and drinking water for later generations. It is also likely to lead to rapid rise in demand of electricity putting severe strain on the distribution network thus adversely affecting the quality of supply of power. Therefore, it is necessary that reasonable level of user charges are levied. The subsidized rates of electricity should be permitted only up to a pre identified level of consumption beyond which tariffs reflecting efficient cost of service should be charged from consumers. If the State Government wants to reimburse even part of the cost of electricity to poor category of consumers the amount can be paid in cash or any other suitable way.

Use of prepaid meters can also facilitate this transfer of subsidy to such consumers.

5. Metering of supply to agricultural / rural consumers can be achieved in a consumer friendly way and in effective manner by management of local distribution in rural areas through commercial arrangement with franchisees with involvement of panchayat institutions, user associations, cooperative societies etc. Use of self closing load limitors may be encouraged as a cost effective option for metering in cases of "limited use consumers" who are eligible for subsidized electricity.

"8.5 Cross-subsidy surcharge and additional surcharge for open access.

8.5.1 National Electricity Policy lays down that the amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that the provision of the Act, which requires the open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

Accordingly, when open access is allowed the surcharge for the purpose of sections 38, 39, 40 and sub-section 2 of section 42 would be computed as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class. In case of consumer opting for open access, the distribution licensee

could be in a position to discontinue purchase of power at the margin in the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges.

Surcharge formula:

$S = T – [C (1+L/100) + D]$
Where
S is the surcharge
T is the Tariff payable by the relevant category of consumers;
C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power
D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage.

The cross-subsidy surcharge should be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11."

In sub-clause (2) of Clause 8.3 of the Tariff Policy, it has been indicated that for achieving the objective, tariffs are to be within $\pm$ 20% of the average cost of supply. It does not differentiate between the class of consumers. It refers to average cost of all categories of consumers. So the subsidy category is kept below 20%.

Mr. Samareswar Mohanty appearing for the OERC submitted that 2004 Regulations relate to surcharge and it has nothing to do with the Tariff Policy. Chapter-II of the 2004 Regulations deals with Principles of determination of tariff under Section 62 (1) of the Electricity Act for (A) supply of power from a generating company to a distribution company, (B) transmission of electricity and (C) wheeling of electricity. In the said Chapter, it has also been indicated in Regulation-3 (a) that the Commission, i.e. OERC, shall be guided by nine principles as laid down in sections 61 (a) to 61 (i) of the Electricity Act. Section 61 (i) relates to the National Electricity Policy and Tariff Policy.

According to Mr. Mohanty, Regulation-7(c) (iii) of 2004 Regulations deals with surcharge and it has nothing to do with the Tariff Policy and if 2004 Regulations is taken as the tariff and not surcharge, then it would be in violation of the National Tariff Policy. According to him, 2004 Regulations have been framed in accordance with the 9 principles laid down in Section 61 of the Electricity Act.

He further drew our attention to Regulation 7 (c) of the 2004 Regulations, which deals with surcharge.

It would be profitable to quote herein below Regulation 7 (c) of the 2004 Regulations.

"7. c) Surcharge

i) Surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

ii) The Commission may adopt requisite principle for computing surcharge, which shall compensate for the entire loss of cross subsidy for any given consumer category for which supply is given, as the Act clearly states that such surcharges shall be utilized to meet the requirements of current level of cross subsidy. The entire amount of cross subsidy lost by the incumbent licensee needs to be compensated.

iii) For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve of all consumers of the State taken together and average tariff applicable to such consumers shall be considered."

So, according to Mr. Mohanty, there cannot be any confusion between 2004 Regulations and the National Tariff Policy dated 6.1.2006.

According to Mr. Mohanty, the argument advanced by Mr. Pitamber Acharya regarding computation of cross-subsidy and failure of Clause-7 (c) of 2004 Regulations is wrong because Clause-7 (c) does not at all relate to tariff but it relates to surcharge for the purpose as enumerated in Chapter-III of 2004 Regulations. According to him, this Regulation is formulated for the purpose of surcharge, but tariff is different.

He further submitted that OERC (Determination of Open Access Charges) Regulations, 2006 provides for surcharge. Regulation 4 (2) of such Regulation deals with surcharge and clause (iv) thereof speaks that –

> "Cross-subsidy surcharge shall be computed by the licensee as the difference between (1) the tariff applicable to relevant category of consumers and (2) the cost of the distribution licensee to supply electricity to the consumers of the applicable class, and the same shall be submitted for necessary approval of the Commission."

So, according to Mr. Mohanty, cross-subsidy is only on surcharge.

However, our attention was drawn to Section 62 of the Electricity Act, which speaks of determination of tariff. This tariff does not contain any surcharge and there is no reference to subsidy. There is also no definition of cross-subsidy under any Regulation or Act. Part VII of the Electricity Act deals with tariff under Sections 61 to 66. Section 62 provides for determination of tariff. There is no provision for subsidy or concept of cross-subsidy on tariff.

Section 64 deals with procedure for tariff order.

The OERC to conduct its proceedings and discharge its functions made the OERC (Conduct of Business) Regulations, 2004 in exercise of the powers conferred by Section 181 of the Act and sub-section (2) of Section 9 and sub-Section (2)(a) of Section 54 of the Orissa Electricity Reform Act, 1995.

Clause 58 of such Conduct of Business Regulations dealing with subsidy from the State Government, provides thus:-

58. Subsidy from State Government.

1. The State Government may, at any time as it considers to be appropriate, propose any subsidy to any class or classes of consumers in the tariff determined by the Commission and upon receiving such proposal, the Commission shall determine the amount to be paid as subsidy and the terms and conditions of such payment including the manner of payment of subsidy amounts by the State Government to the person affected by the decision of the subsidy.

2. While determining the tariff, the Commission shall take into account any subsidies, which the State Government had agreed to give to any class or classes of consumers.

3. The tariff determined by the Commission shall be published duly taking into account such subsidy offered by the State Government as on the date of the decision of the Commission.

4. Notwithstanding anything contained above no direction of the State Government shall be operative if the payment is not made by the State Government in accordance with the provisions of Section 65 of the Central Act and in the event of such directions being not operative the amount of subsidy to be made by the State Government shall be added in the tariff to be charged by the Distribution Licensees to the concerned class or classes of consumers.

5. The Distribution Licensee shall be required to furnish documents to the satisfaction of the Commission that the subsidy amount received by the Distribution Licensee from the State Government is duly accounted for and utilized for the purpose for which the subsidy is given."

In this regard our attention was drawn by Mr. Samareswar Mohanty to 2004 Regulations. Surcharge falls under Regulation 7 (c). Regulation 7 (c) (iii) speaks as follows:-

"7. Tariff Principles

xxx

c) Surcharge

xxx

iii) For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve of all consumers of the State taken together and average tariff applicable to such consumers shall be considered."

So, according to Mr. S. Mohanty, a bare reading of Regulation 7 (c) (i) shows that surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

According to him, Regulation 7 (c) only provides how surcharge is to be determined on wheeling consumers and the procedure by which it would be levied. According to him, there is no category of HT and EHT concept of surcharge, it is only when there is open access, and it should be read with the Electricity Act.

Sub-section (4) of Section 42 of the Electricity Act reads as follows:-

> "Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licencsee arising out of his obligation to supply."

"Open access" has been defined in sub section-47 of Section-2 of the Electricity Act to mean –

> "the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;"

So, according to learned counsel for the OERC, the Tariff Policy is totally different and surcharge is only applicable when there is open access. Surcharge is levied only when powers are purchased from outside sources and only the grid is used. Surcharge is to meet the difference between the amount which the licensee is taking from the Industrial Consumers, and subsidizing to the domestic consumer and that component is surcharge.

According to him, tariff is different from surcharge and tariff is to be computed in terms of the principles indicated in sub-clause (2) of Clasue-8.3 of the National Tariff Policy, i.e. $\pm$ 20%.

In this regard, we may also refer to Section 62 (3) of the Electricity Act, which reads thus:-

> "The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the

geographical position of any area, the nature of supply and the purpose for which the supply is required."

Section-62 is the provision under the statute providing for computation/determination of tariff. Clasue-8.3 (2) of the National Tariff Policy provides the only method to compute the tariff and it is conclusive from reading Section 61 (g) of the Electricity Act that the tariff progressively

reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission and Section 61 (i), provides to follow the National Electricity Policy and Tariff Policy.

In this regard, our attention was drawn to Paragraph-1.3 of the Statement of Objects and Reasons of the Electricity Act, 2003. So, it appears that the cross-subsidy in tariff is a matter which was continuing long before the Electricity Act 2003 came into force and the reforms were made to address the issue of cross-subsidies which have reached unsustainable levels.

It would be appropriate to quote hereunder paragraph 1.3 of the Statement of Objects and Reasons of the Electricity Act, 2003:-

"1.3 Over a period of time, however, the performance of SEBs has deteriorated substantially on account of various factors. For instance, though power to fix tariffs vests with the State Electricity Boards, they have generally been unable to take decisions on tariffs in a professional and independent manner and tariff determination in practice has been done by the State Government. Cross subsidies have reached unsustainable levels. To address this issue and to provide for distancing of Government from determination of tariffs, the Electricity Regulatory Commissions Act, was enacted in 1998. It created the Central Electricity Regulatory Commission and has an enabling provision through which the State Government can create a State Electricity Regulatory Commission. 16 States have so far notified/created State Electricity Regulatory Commissions either under the Central Act or under their own Reforms Act."

10. So, a reading of Section 61 (g) and Clause 8.3 (2) of the National Tariff Policy makes it clear that cross-subsidies in tariffs should be in conformity with the National Tariff Policy. In other words, the cross-subsidy is for open access in which subsidy was taken from the banks of Industrial consumer to subsidise the domestic and agriculture consumers from that money. Once it is open access, one has to pay surcharge. So surcharge is

over and above tariff. The computation of surcharge is different from computation of tariff as rightly indicated above. Regulation 7 (c) (iii) has no application to fixation of tariff.

We may state here that a conjoint reading of Section 61 (g) of the Electricity Act and Paragraph-8.3 (2) of the National Tariff Policy makes it clear that it does not provide for any category of consumers and it is also an admitted fact that there is no methodology provided for computing cross-subsidy. Such computation may be the average cost of supply or cost of supply voltage wise or cost of supply to various consumer categories.

At present the OERC is guided by the notion of subsidy by average cost of supply for the State as a whole, which has been recommended by the Forum of Regulator (FOR) and, in our considered opinion also, the same is a practical solution, at least in the present context of the Indian Power Sector.

11. At last, we may make it very clear that computation of surcharge is totally different from computation of tariff and Regulation-7.3 (c), as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers.

Hence, though the writ application filed by Utkal Chambers of Commerce was withdrawn, the argument advanced by Mr. Pitamber Acharya is fallacious and the computation made by the OERC on the basis of average cost of supply to the State as a whole is not illegal but the same is in accordance with the National Tariff Policy.

12. Now a question arises, whether any element of public interest is involved in enhancement of the cost of electricity and overloading the same on the consumers.

13. Mr. K.N.Jena, learned counsel for the petitioners referred to the order dated 20.3.2011 passed by the OERC in Case No.146 of 2009, wherein the Distribution Companies ('DISCOM' in short) have been directed to comply with certain directions, such as, to ensure 100% of the billing for the power supply and to collect the current revenue to the full extent, failing which it would be difficult on the part of the DISCOMs to meet the establishment expenditure and other essential expenses. It was further directed that the Departments of State Government and Organizations functioning under the State Government were to be treated as any other consumer while resorting to disconnection of power supply in case outstanding dues are not paid and,

therefore, the DISCOMs cannot take a plea that the Government Departments are not paying electricity dues.

According to Mr. Jena, these directions have not been complied with by the DISCOMs as well as the State Government and the DISCOMs without complying with such directions of the OERC are resorting to the method of increasing the tariff every year, which is a never ending process. Apart from that, the DISCOMs are not functioning in accordance with the terms and conditions of the licence as responsible licensees.

Mr. Jena submitted that there is no improvement in the quality of service of the DISCOMs and no steps have been taken to curb the theft of power and correct the billing method. So, a prayer has been made in the writ application to direct opposite parties 1 to 3, i.e. State of Orissa, OERC and OHPC to take steps to improve the generation of electricity to meet the requirement of the consumers in the State and to comply with the directions of the OERC issued from time to time.

14. Section-23 of the Electricity Act empowers the appropriate Commission to give directions to the licensees if it is necessary and expedient so to do for maintaining the efficient supply, securing equitable distribution of electricity and promoting competition. Section-24 empowers the appropriate Commission to suspend the distribution licence and sale of utility, if at any time the appropriate Commission is of the opinion that a distribution licensee:-

(a) has persistently failed to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(b) is unable to discharge the functions or perform the duties imposed on it by or under the provisions of this Act; or

(c) has persistently defaulted in complying with any direction given by the Appropriate Commission under this Act; or

(d) has broken the terms and conditions of licence.

According to learned counsel for the petitioners, though the DISCOMs have persistently failed and defaulted in complying with the directions issued by the OERC, no action has been taken against them.

A serious allegation has been made by the petitioners that though a direction has been given by the OERC to infuse owner's capital by the

DISCOMs, from the audited accounts of WESCO, NESCO and SOUTHCO for the financial year 2009-10, it is revealed that there has been no infusion of owner's capital by the DISCOMs.

So, according to the petitioners, owner's capital has not been infused till date and virtually the DISCOMs like WESCO, NESCO and SOUTHCO are running without any investment and totally basing on the infrastructure and properties created by the State and State owned authorities, which were existing earlier. They have also failed to pay the outstanding dues mentioned in the tariff order of different years.

15. Mr. N.C. Panigrahi, learned Senior Advocate appearing for GRIDCO and CESU, raised the question of maintainability of the writ application, which we have already dealt with in the foregoing paragraph. The allegations made against GRIDCO and CESU have been rebutted in the counter affidavit filed by them. Mr. Panigrahi submitted that CESU is being managed by a Board of Management created and appointed by the OERC under Section 22 of the Act. According to him, electricity dues to a huge amount is yet to be paid by the State Government, Public Sector Undertakings and Municipalities as well as industrial consumers. Some of the Government Organizations are also raising dispute on the bills raised for Delayed Payment of Surcharge, which as per law, has been charged on them due to non-payment of electricity dues within time.

16. Mr. Jagannath Patnaik, learned Senior Advocate also appearing for the CESU, submitted that so far as the terms and conditions of the licence is concerned, CESU has been discharging its role and responsibility as per the conditions of the licence, and the guidelines enumerated under OERC (Licenses' Standard of Performance) Regulations, 2004. According to him, despite several operational hurdles, the performance of the CESU has improved since 2001. As to overall reduction in the loss level, efforts have been made to maintain the quality of supply and system improvement. According to Mr. Patnaik, among other things the factors which have direct bearing on the retail tariff, are reduction of the ratio of Hydro Power in comparison to Thermal Power, absence of surplus power for trading outside the State and the rising cost of generation. He further submitted that earlier 60% of the State's total demand of power was being met from the low-cost Hydro Generation Power, but now only 17% of the demand of power is being met from Hydro Power sources and the balance is being met from comparatively costlier Thermal Power sources.

17. Mr. Milan Kanungo, learned counsel appearing for the other DISCOMs, such as NESCO, WESCO and SOUTHCO, opposite parties 6 to 8 respectively, referred to the Status Report submitted by the Special Officer appointed by Appellate Tribunal for Electricity and submitted that the DISCOMs require allocation of funds for utilization of the information technology in distribution system and upgradation of network system because of explosion in the number of consumers, particularly in the context of implementation of the RGGVY Programme in Orissa.

That apart, according to Mr. Kanungo, it has become difficult on the part of these private entrepreneurs, i.e. the DISCOMs, to recover the huge outstanding dues from the consumers as there is no special legal mechanism available with them save and except filing civil suit.

According to Mr. Kanungo, earlier the State Electricity Board was able to recover the outstanding dues by applying the provisions of the Orissa Public Demand Recovery Act, but since the same is no more available with the DISCOMs, the DISCOMs have virtually become handicapped in recovering the outstanding electricity dues from the consumers.

18. Though Mr. Kanungo presented before us a very lofty pictures regarding the precautionary measures to curb the theft of power, billing and collection of dues, etc, yet the same are to be practised in full force. So far as infusion of owner's capital is concerned, there is no clear answer to the same.

19. So the moot question that survives for consideration is non-compliance of the direction of the OERC by the DISCOMs.

20. Relying upon the report of the CAG for the year ended 31st March, 2009, Mr. Jena, learned counsel for the petitioners, drew our attention to the comments made by the CAG regarding the performance review relating to Orissa Hydro Power Corporation Limited.

Mr. Jena submitted that despite availability of hydro potential and demand for power in the State, the OHPC did not take any proactive step for capacity addition. There was also no capacity addition despite expenditure to the tune of Rs.206.07 crores. It was also pointed out by the CAG that there is a wasteful expenditure on Potteru Small Hydro Electric Project in Malkangiri district. The Potteru Small Hydro Electric Project consisting of two canal-based power houses in Malkangir district was transferred from the Government of Orissa to the OHPC at a cost of Rs.14.30 crores before

completion of the project consequent upon unbundling of the Orissa State Electricity Board. As a part of capacity addition (6MW) during the Eleventh Plan, the company spent Rs.22.70 crores during the period from April, 1996 to March 2009 for completion of the project without assessing the availability of water in Surlikonda Barrage for running the project. Thereafter it was decided to get the approval of the Government of Orissa for disposal of the unit. According to the report, in this process, the company has incurred wasteful expenditure to the tune of Rs.37 crores due to taking up the project without assessing the availability of water.

21. It was also pointed out in the report that there was loss of revenue to the extent of Rs.71.63 crores since in four generation stations, the actual generation was less than the salable design energy fixed by OERC for calculation of tariff.

The CAG also pointed out that the company sustained avoidable generation loss of 4.274 MU worth Rs.156.05 crore due to forced outage of 1.17 lakh hours, i.e. 121 times turbine problem, 110 times failure of generator, 186 times protection equipment and 270 times for other reasons. According to the CAG, there is lack of internal control measures like non-availability of instruction manual for periodic maintenance of plants and machineries and non-maintenance of history-sheets of the generating units and had there been proper preventive measure for maintenance, the forced outages could have been reduced.

In the Report, it has been further indicated that the Company sustained loss to the tune of Rs.164 crores during the period from 2004 to 2009 on account of keeping the machine idle during monsoon period.

It was also pointed out by the CAG that since drawal of water from the reservoir by the industrial units affected power generation, the Government of Orissa, while according permission to those industrial units to draw water from the reservoirs, directed them to compensate the Company towards loss of generation of electricity at the prevailing rate. However, the company had computed such cost in respect of only one industrial user and received the compensation, but in respect of several other industrial users, the company had neither computed the amount of compensation nor raised any claim. As per the computation made in the audit, the company was to receive Rs.28.49 crores from 18 industrial units against drawal of water from the reservoirs during 2004-09.

22. A Counter affidavit has been filed on behalf of opposite party no.3-OHPC and Mr. R.K. Rath, learned Senior Advocate appearing for O.P.3,

relying on the counter affidavit submitted that OHPC being the generating company is to generate power from the Hydro Power Stations. Apart from raising the question of maintainability of the writ application, so far as fixation of tariff is concerned, Mr. Rath, while explaining the lapses and the deficiencies of the OHPC as observed by the CAG in his repot, referred to Annexure-A/3 to the counter, which was the compliance report submitted on the Audit Report of the CAG.

According to him, all the Hydro Power Stations under OHPC are reservoir based. The storing and regulation of water in the reservoir is under the control of the Water Resources Department. Hence, OHPC has no role to play to increase the water potential in the reservoir.

According to Mr. Rath, the deficiencies and lapses pointed out by the CAG in his report may be lapses on the part of the OHPC, but that did not lead to any misappropriation or corruption to be investigated by the CBI, as argued by learned counsel for the petitioners.

In the counter affidavit, it is indicated that due to renovation, modernization & upgrading, the life of the machines of unit #1 to #4 of Burla Power House, which is more than 50 years old, has been extended for a further period of 35 years.

With regard to capacity addition, it is submitted that OHPC has successfully commissioned two units of 75 MW each at Balimela, thereby increasing the capacity of Balimela Power House from 360 MW to 510 MW.

It was also indicated that due to acute weeds problem in Chipilima, it was not possible to generate electricity up to its full capacity. So far as Hirakud reservoir is concerned, it was submitted that the Industrial Units have been permitted by the Department of Water Resources to draw water from the reservoir. With regard to the collection of compensation amount, it was submitted that the same is under process.

With regard to wasteful expenditure so far as Potteru Small Hydro Electricity Project is concerned, it was submitted that though the company spent some amount for completion of the project, it could not generate upto its full capacity due to non-availability of rated water flow apart from the unfavourable peripheral circumstances such as:

(1) The canal which is under the control of the Water Resources Department is unable to carry the required quantity of water to the unit intake due to its weak banks.

(2) At the time of inception, it was planned to construct 35 km long 33 KV line to Balimela for evacuation of power, which could not be materialized for want of record of rights of OHPC, as it was passing through the forest area.

(3) The project was situated in a heavily naxal infested area and it was very difficult on the part of the OHPC to open its establishment in the area to make the two units operational.

For the aforesaid prevailing circumstances, the Government's approval was sought for to dispose of the unit through open bidding on 'as-is-where-is' basis, in order to check any further expenditure on this idle project.

Mr. Rath, learned counsel for the OHPC submitted that this is a matter of experiment, which has been done so far as Poteru Project is concerned. According to him, there may be experiment and failure of experiment, but Potteru Project is an experiment, over which despite the investment of some money by the Government, the same has failed.

In support of his contention, Mr. Rath, relied upon a decision of the apex Court in the case of **Dhampur Sugar (Kashipur) Ltd. v. State of Uttaranchal, (2007) 8 SCC-418** and referred to paragraph-71 thereof, which reads thus:-

> "71. Referring to the decision of the Supreme Court of the United States in Metropolis Theater Co. the Court observed : (Nandlal Jaiswal case, SCCpp 605-06, para 34)
>
> "34…… We must not forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call 'trial and error method' and, therefore, its validity cannot be tested on any rigid 'a priori' considerations or on the application of any straitjacket formula. The court must while adjudging the constitutional validity of an executive decision relating to economic matters grant a certain measure of freedom or 'play in the joints' to the executive….
>
> '….. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void….'

> … The court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The court can interfere only if the policy decision is patently arbitrary, discriminatory or malafide."

23. In the present case, as it appears, the Government has not taken a decision to experiment, what one may call "trial and error" method. This was a positive policy decision of the Government taken basing upon technical reports. The project was taken up and money was spent over it. As it

appears from the counter affidavit, that one of the reason for failure of the project was that the Water Resources Department was unable to strengthen the weak banks. So if the State Government had taken a policy decision to have the project transferred to OHPC, it was the bounden duty of the State Government to see that the project is implemented with full cooperation of the other Departments. Projects are floated, but the departments through which the projects are to pass, fail to discharge their duty regarding implementation of such projects. Projects should not end either with MoUs or on experiments. The same has to be implemented and infrastructure should be provided. Here is a case where the reason for failure of the project, as has been indicated in the counter affidavit, should have been taken care of by the Water Resources Department. It was the Water Resources Department, which had to strengthen the weak banks of the reservoirs to enable it to carry the required quantity of water.

If the 35 km long 33 KV line to Balimela for evacuation of power could not be constructed due to want of record-of-rights, the same could have been pointed out right from the very inception of the project. The project should not have been continued to such an extent by spending huge amount of public money. The project could have been saved right at the inception.

So the Potteru Small Hydro Electric Project cannot be said to be a project of experiment for which huge amount of public money has been wasted. It is due to the inefficient, inept and negligence on the part of the authorities, which the Government should have enquired into and fixed the responsibility on the official responsible for the same. It is open to the State Government to take proper step in this regard.

24. In the aforesaid premises we would like to dispose of the writ application with the following directions/observations:-

(i) In order to make optimum use of the water in the reservoirs, the Government should come forward with a policy within a period of three months from today, if such a policy has not yet been framed, to maintain a balance between the use of water by the Industrial Units and running of Hydro Electricity Projects with their optimum capacity, so that the Hydro Electricity Projects would not suffer or run under-capacity due to over-drawal of water by the industries.

(ii) The State Government is directed to take steps to compute the amount of compensation to be recovered from the industrial units which had used the water and ensure that the said amount is recovered and paid to the OHPC within a period of three months from today, failing which such industrial units shall not be allowed to draw water from the reservoirs. Proper legislation should be made for controlling and distributing the water among the Industrial Units from the water reservoirs, the water of which is also utilized by the Hydro Electricity Projects. Apart from that, we direct that a corpus should be created by imposing a levy on the industries drawing water from different reservoirs for the purpose of maintenance of the reservoirs and water sources, by making periodical dredging and removal of shoals etc. In that respect, appropriate legal provisions should be made within three months.

(iii) Since the power produced by the thermal power stations is becoming costlier day-by-day because of higher production cost due to utilization of imported coal, which ultimately brings burden to the consumers, we require the OERC to look into this aspect and, if required, to cause an enquiry into the reason for utilization of the costly imported coals in the thermal power stations run by the NTPC at Talcher and Kania, which are virtually sitting over the abundant coal resources, which are controlled and managed by the Coal India Ltd. and its subsidiaries. If the contention of learned counsel for the petitioners that the Coal India and its subsidiaries are making huge ugly profits by not optimizing their coal extraction from the mines and raising the price of coal as well as forcing the thermal power companies to depend upon imported coal, which has a cascading effect on the power tariff affecting general consumers of electricity, is correct, then question arises whether the coal import is at all necessary to run the thermal power stations in Orissa, which is rich in coal reserve, or the entire thing, i.e. right from the under-extraction of coal by Coal Companies and import of coal by Thermal Power Stations is a part of the plan meticulously designed for the purpose

of giving benefit to certain individuals/organizations at the cost of the common people, who are the consumer of electricity. This requires a thorough enquiry and accordingly, we require the OERC to do so. If it is not possible on the part of the OERC, then the State Government shall cause an enquiry into the same and take appropriate steps in that regard. We would have issued a direction to the Central Government, but as neither the Central Government nor the NTPC is a party to this writ application, we are unable to issue such direction to them, but we leave it open to the State Government to approach this Court, if it faces any difficulty, by filing an application, in which case this Court may direct for an investigation into the same by an independent agency.

(iv) As it is observed in some cases that there is lack of co-ordination between different Departments of Govt., for which the Project like Poteru Small Hydro Electricity Project failed, it may be indicated that the failure is not due to trial and error method, but it is due to the short-sightedness of different Departments. The reasons ascribed for the failure of the project to take up, such as (i) the weak canal banks could not carry the required quantity of water, (ii) land being forest land, over head electric lines could not be drawn and (iii) the manual works could not be possible as the area was naxal infested, cannot be said to be unforeseen reasons. This could have been anticipated when the project was conceived. The failure of the aforesaid project cannot be compared with that of the case of Dhampur Sugar (supra). However, in order to avoid such wasteful expenditures in future, we direct that there should be an Inter-Departmental Co-ordination Committee consisting of the Secretaries of different consultative Departments, so that the projects can be worked out by taking clearance from the concerned Departments under a single window system.

(v) As it is complained by different DISCOMs that huge amount of bills are pending with different Departments and Organizations of the State Government as well as the State Government Undertakings, we direct such State Government Organizations/Undertakings of the State Government to pay the electricity dues and in case of any dispute, the admitted dues be paid by end of April, 2012, failing which DISCOMs are at liberty to disconnect the power supply by giving them seven days' notice.

(vi) As it is found that certain orders have been passed by the OERC in case Nos. 140, 142, 145 and 146/2009, we direct the OERC to take

effective steps for implementation and compliance of its own orders by giving a time-frame to the respective parties, because, mere passing of orders will have no meaning if it remains unimplemented. The OERC should take effective steps, even penal action against the violators for non-compliance of its orders without showing any sympathy to them. The OERC should also take steps to direct the DISCOMs to up-grade the new distribution transformers on priority basis, complete the audit of each distribution system and also ensure that financial investment of funds by DISCOMs is raised for

development and improvement of the existing system of generation and transmission.

(vii) At this stage, we are not inclined to accede to the prayer made by the petitioners for an investigation by CBI into the loss of public money because we hope and trust that the effort of the OERC and the State Government will certainly make a substantial change in the system.

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

Writ petition disposed of.

2012 (I) ILR- CUT- 980

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

JCRLA NO. 42 OF 2002 (Dt.10.02.2012)

MANGULI KIRSANI ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.27

Confession – Where the accused makes a statement giving out some facts, which if true, would bring his/her act within the general exception of Section 96 to 105 of the Penal Code, such statement cannot held to be a confession.

In the present case the appellant stated before the panch that her deceased husband took attempt thrice to stab her by means of a knife and out of fear she gave a tangia blow on the deceased causing his death – Held, extra judicial confession made before the panch can not be treated as a confession – In the absence of any evidence to support such extra judicial confession it will be unsafe to convict the appellant – Held, the appellant is entitled acquittal.

(Para 8,9)

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

Evidence of P.W.3 shows that the appellant was not willing to come before the Panch but she was brought to the place of meeting – Held, extra judicial confession made by the appellant before the members of the panch can not be said to be voluntary.

Case law Referred to:-

AIR 1939 PC 47 : (Narayanaswamy-V- Emperor)

For Appellant - Mr. Santosh Kumar Nanda.
For Respondent - Mr. Sangram Das,
Additional Standing Counsel.

L.MOHAPATRA, J. This appeal is directed against the judgment and order dated 07.08.2002 passed by learned Additional Sessions Judge, Malkangiri in Sessions Case No. 135 of 1999 (S.C. 271/99 of Sessions Judge, Koraput-Jeypore) convicting the appellant for commission of offence

under Section 302 of the Indian Penal Code (for short 'the I.P.C.') and sentencing him to undergo imprisonment for life.

2. The case of the prosecution as revealed from the record is that on 16.4.1999 at about 8.00 P.M. Sukra Kirsani who is the headman of village Nuaguda was informed by his cousin that the appellant has killed her husband, Soma Kirsani, in the night at about 9.30 P.M. On receipt of this information P.W. 3 went to the village and convened a panch. The appellant was called to the panch and on being asked, the appellant made a confession before the members of the panch by stating that her deceased husband took attempt thrice to kill her with a knife and chased her and she being apprehensive of being killed by her husband dealt a blow by means of a tangia and caused his death. The appellant thereafter handed over the tangia to P.W. 6. The matter was thereafter informed to the police on the basis of which the case was registered and investigation was taken up. On completion of investigation, charge sheet was submitted for commission of offence under Section 302 of the I.P.C.

3. In course of trial, the prosecution examined eleven witnesses. P.Ws. 1 and 2 are two constables who were witnesses to seizure of the nail clippings. P.W. 3 is the informant and witness to extra judicial confession. Similarly, P.Ws. 4, 5 and 6 are also witnesses to extra judicial confession. P.Ws. 7 and 8 were also examined by the prosecution to state about the extra judicial confession but did not say anything about the case. P.W. 9 is a constable who accompanied the dead body of the deceased for post mortem examination. P.W. 10 is the doctor who conducted post mortem examination and P.W. 11 is the investigating officer.

The plea of defence was denial of the prosecution case.

4. The trial court on the basis of evidence of P.Ws. 3, 4, 5 and 6 who stated about the extra judicial confession made by the appellant coupled with the evidence of P.W.10, the doctor who conducted post mortem examination and the chemical examination report, found the appellant guilty of the charge and convicted him thereunder.

5. Learned counsel for the appellant assails the impugned judgment on the ground that the appellant has been convicted solely on the basis of the so-called extra judicial confession made before the village panch. Any confession made before the village panch cannot be treated as a voluntary confession and therefore, no reliance could be placed on such extra judicial confession. Apart from that the exact confession made before the panch

varies from witness to witness and therefore, P.Ws. 3, 4, 5 and 6 should not have been relied upon. So far as the appellant handing over the tangia to P.W. 6 is concerned, there is also variations in the statements of above said witnesses. Learned counsel for the appellant also submits that even if extra judicial confession made before the panch is accepted, such extra judicial confession being a weak piece of evidence, in absence of corroboration from other independent witnesses, an order of conviction can not lie solely on the basis of extra judicial confession.

6. Learned counsel for the State relies on the extra judicial confession made in presence of P.Ws. 3, 4, 5 and 6 and submits that the said extra judicial confession gets corroboration from the evidence of P.W. 10 who conducted the post mortem examination as well as the chemical examination report which shows that the tangia contained human blood of 'A' group.

7. We have carefully examined the evidence of all the eleven witnesses. P.Ws. 1 and 2 are two constables who had produced five bottles containing nail clippings and were witnesses to seizure of the same. P.Ws. 3, 4, 5 and 6 are the four witnesses who have stated about the extra judicial confession. P.W.6 deposed that the appellant first stated before him to have killed her husband and so saying she handed over the tangia to him. He had handed over that blood stained taniga to the police. Thereafter, the appellant came before the panch and confessed to have killed her husband. Evidence of P.W. 3 shows that the appellant was called to the Panchayat where she confessed before the members to have murdered the deceased by means of a tangia and saying so she handed over the tangia to P.W.6. P.W. 4 is another witness to the extra judicial confession. He stated that the appellant was called to the Panchayat where she told before the panch members that the deceased was throwing away the food served by her for which she dealt a tangia blow to him causing his death. In cross-examination P.Ws. 3 and 4 and in examination-in-chief P.W. 5 have stated something else. These witnesses have stated that before the Panchayat the appellant stated that her deceased husband took attempt thrice to stab her by means of a knife and out of fear she gave a tangia blow on the deceased causing his death. Therefore, there is also variation so far as the nature of extra judicial confession made before the panch is concerned. From the evidence of P.W. 3 it further appears that the appellant was not willing to come before the panch but she was brought to the place of meeting. In view of such nature of evidence, it cannot be held that the extra judicial confession made before the members of the panch was a voluntary act on the part of the appellant.

8. As stated earlier from the evidence of P.Ws. 3, 4, 5 and 6, it appears

that the appellant stated before the panch that her deceased husband attempted thrice to stab her by means of a knife and out of fear she dealt blows by means of a tangia on the deceased. It is well settled that where the accused makes a statement giving out some facts, which if true, would bring his act within the general exceptions of Sections 96-105 of the Penal Code, such statement cannot held to be a confession *(See* ***Narayanaswamy v. Emperor***: AIR 1939 PC 47). Therefore, the extra judicial confession made before the panch also cannot be treated as a confession.

9. Moreover, law is also well settled that extra judicial confession by itself is a weak piece of evidence and as a matter of prudence the courts seek corroboration from independent source. There is no other evidence except the chemical examination report which shows that tangia seized had contained human blood. On examination of the entire evidence, we do not find any corroboration to extra judicial confession from any other source. Though from the evidence of P.W. 10 it appears that the deceased met with homicidal death, in absence of any evidence to support the so-called extra judicial confession, it will be unsafe to convict the appellant for commission of the alleged offence.

10. Accordingly, we allow the appeal, set aside the impugned judgment and order dated 7.8.2002 passed by the learned Addl. Sessions Judge, Malkangiri in Sessions Case No. 135 of 1999 (S.C. 271/99 Sessions Judge, Koraput-Jeypore) convicting the appellant for commission of offence under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life. The appellant is acquitted of the said charge.

From the record, it appears that the appellant is in custody. If that be so, the appellant, Manguli Kirsani, be set at liberty forthwith, unless his detention is required in connection with any other case.

Appeal allowed.

2012 (I) ILR- CUT- 984

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

W.P. (CRL.) NO. 83 OF 2012 (Dt.24.02.2012)

SUBODHA MOHANTA @
SUBRATA KU.MOHANTY ……..Petitioner.

.Vrs.

GOVERNMENT OF INDIA & ANR. ……...Opp.Parties.

NATIONAL SECURITY ACT, 1980(ACT NO.65 OF 1980) – S.3(2), 14.

Representation U/s.14 (1) – Detaining authority required to forward the representation to the Central Government for consideration – Central Government has power to revoke an order of detention passed by the State Government – No time limit prescribed for disposal of the representation – Held, there being nothing on record to show that the representation of the petitioner had been disposed of by the Central Government within a reasonable time, further detention of the petitioner is impermissible and he may be released immediately.

Case laws Referred to:-

1.1985 STPL (LE-Crim)14335 BOM : (Vinayak Ramchandra Sakhalkar & etc.etc.-V-D.Ramchandran, Commissioner of Police,Thane & Ors.etc.)
2.1987 STPL(LE)13461 SC : (Haji Mohd. Akhlaq-V-District Magistrate).
3.AIR 1984 SC. 1095 : (State of U.P. -V-Zavad Zama Kahn).

For Petitioner - M/s. Srinivas Mohanty, S.Moharana, S.Routray, S.R.Mohanty, N.Tripathy & B.Patra.
For Opp.Parties - Mr. S.D.Das, Asst. Solicitor General of India (for Opp.Party No.1)

L.MOHAPATRA, J. The petitioner in this writ application has challenged the legality of the order dated 26.12.2011 rejecting his representation dated 29.11.2011 for revocation of the order of detention and prayer is made to hold the detention illegal.

2. The petitioner by order of the District Magistrate and Collector, Balasore dated 26.12.2011 passed under sub-Section (2) of Section 3 of the

National Security Act, 1980 was detained in custody. The said order of detention was confirmed by the Board as well as the State Government. Challenging the said order of detention, the petitioner had approached this Court in W.P. (Crl.) No.410 of 2011. The said writ application challenging the order of detention was dismissed on 29.7.2011. Thereafter the petitioner submitted a representation under Section 14 of the National Security Act, 1980 to revoke the order of detention on personal grounds. The said representation having been rejected by the State in Annexure-3, this writ application has been filed.

3. Shri Mohanty, the learned counsel appearing for the petitioner challenged the order in Annexure-3 solely on the ground that his representation addressed to the District Magistrate, Balasore under Section 14 of the National Security Act, 1980 was not considered by the Government of India in the Ministry of Home Affairs (Internal Security) and no order having been passed by the Government of India on the said representation, the order in Annexure-3 passed by the State Government rejecting the representation is liable to be set aside and further detention of the petitioner is illegal.

4. No counter has been filed either on behalf of the State authorities or on behalf of the Union of India.

5. Admittedly the earlier writ application filed by the petitioner challenging the order of detention passed by the District Magistrate, Balasore in exercise of power under sub-Section (2) of Section 3 of the National Security Act had been dismissed. Thereafter the petitioner submitted the representation before the District Magistrate, Balasore under Section 14 of the National Security Act for revocation of the order of detention on personal grounds. A copy of the representation annexed to the writ application as Annexure-2 shows that a copy of the same had been forwarded to Government of India, represented through its Secretary, Ministry of Home Affairs, New Delhi. The representation of the petitioner addressed to the District Magistrate had been forwarded to the State Government and in the impugned order the State Government rejected the representation.

Section 14 of the National Security Act, 1980 provides that without prejudice to the provisions of section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified. Invoking this provision, the petitioner had submitted his representation in Annexure-2. Section 14 does not provide for any time limit for disposal of representation

by the Union of India. Faced with the situation, the learned counsel for the petitioner submitted that the representation submitted by the petitioner should have been forwarded to the Central Government for consideration by the State Government but instead of doing so, the same has been rejected by the State Government. In support of such contention, the learned counsel relied on two decisions annexed to the writ application. The first decision in Annexure-4 is a judgment of the Bombay High Court in the case of ***Vinayak Ramchandra Sakhalkar and etc. etc. v. D. Ramchandran, Commissioner of Police, Thane and others etc., reported in 1985 STPL (LE-Crim) 14335 BOM***. In the said reported decision, the challenge was in respect of the order of detention passed under sub-Section (2) of Section 3 of the National Security Act and Section 14 of the Act was never under consideration. The second decision in Annexure-5 relied upon by the learned counsel for the petitioner is in the case of ***Haji Mohd. Akhlaq v. District Magistrate, reported in 1987 STPL (LE) 13461 SC,*** which relates to Section 14 (1) of the National Security Act, 1980 read with Article 22 (5) of the Constitution of India. In the said reported case the detenu made a representation to the Central Government through the State Government for revocation of the order of detention. There was delay on the part of the State Government in forwarding the same to the Central Government. The Court held that the Central Government has the power under Section 14 (1) to revoke an order of detention passed by the State Government or its officers and that power in order to be real and effective, must imply a right in a detenu to make a representation to the Central Government. Failure on the part of the State Government deprives the detenu of his right to have his detention revoked. With the above findings, the Court further held that the detention was constitutionally impermissible. In this connection, reference may be made to a decision of the apex Court in the case of ***State of U.P. v. Zavad Zama Khan, reported in AIR 1984 Supreme Court 1095.*** This judgment has been rendered by a Bench consisting of three Hon'ble Judges whereas the decision relied upon by the learned counsel in Annexure-5 is a decision rendered by two Hon'ble Judges. In paragraph 13 of the above judgment, the Court observed as follows:

> "The principle that emerges from all these decisions is that the power of revocation conferred on the Central Government under S. 14 of the Act is a statutory power which may be exercised on information received by the Central Government from its own sources including that supplied by the State Government under sub-sec. (5) of S. 3 or from the detenu in the form of a petition for representation. It is for the Central Government to decide whether or not it should revoke the order of detention in a particular case. In the

present case, the detenu was not deprived of the right of making a representation to the detaining authority under Art. 22 (5) of the Constitution read with S. 8 (1) of the Act. Although the detenu had no right to simultaneously make a representation against the order of detention to the Central Government under Art. 22 (5) and there was no duty cast on the State Government to forward the same to the Central Government, nevertheless the State Government forwarded the same forthwith. The Central Government duly considered that representation which in effect was nothing but a representation for revocation of the order of detention under Section 14 of the Act. That being so it was not obligatory on the part of the Central Government to consider a second representation for revocation under S. 14. We may profitably refer to Phillippa Anne Duke's case. (AIR 1982 SC 1178) (supra), where in somewhat similar circumstances it was held that failure of the Central Government to consider a representation for revocation of an order of detention under S.11 (1) (b) of the COFEPOSA Act handed over to the Prime Minister during her visit to England did not render the continued detention invalid. It was observed:

> "Representations from whatever source addressed to whomsoever officer of one or other department of the Government cannot be treated as a representation to the Government under S. 11 (1) (b) of the COFEPOSA Act."

It is observed in the said paragraph that there was no duty cast on the State Government to forward the representation to the Central Government. This decision has not been taken note of in the judgment relied upon by the learned counsel in Annexure-5. We are, therefore, bound by the view expressed by the Larger Bench of the Hon'ble Supreme Court in the case of State of U.P. v. Zavad Zama Khan (supra) and hold that no duty is cast upon the State Government to forward the representation of the petitioner to the Central Government under Section 14 of the National Security Act, 1980.

6. Even though we have found that there was no duty cast on the State Government to forward the representation of the petitioner to the Central Government, the detaining authority was required to forward the representation of the petitioner to the Central Government for consideration. No counter having been filed either by the State Government or by the Central Government, it is not possible to know as to whether the said representation was forwarded to the Central Government by the detaining

authority and the same was considered or not. In the case of Haji Mohd. Akhlaq v. District Magistrate (supra), on the ground of inordinate delay in disposal of the representation invoking the power of the Central Government under Section 14 of the Act, the Hon'ble Supreme Court held the detention to be constitutionally impermissible. There being nothing on record to show that the representation of the petitioner had been disposed of by the Central Government within a reasonable time, we have to accept the case of the petitioner that the representation invoking Section 14 (1) of the Act has not been considered by the Central Government and accordingly hold that further detention of the petitioner is constitutionally impermissible.

7. We, therefore, allow this writ application and direct release of the petitioner with immediate effect.

Writ petition allowed.

2012 (I) ILR- CUT- 989

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

JCRLA NO. 51 OF 2002 (Dt. 17.01.2012)

CHHATISH @ CHHAKADI BEHERA & ORS. …….Appellants.

.Vrs.

STATE OF ORISSA …….Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.397.

Section 397 I.P.C. is attracted only against the particular accused who used the deadly weapon – The use of weapon by the offender for creating terror in the mind of the victim is sufficient to attract the provision.

In this case evidence is not cogent with regard to the specific weapon used by each of the culprits individually – Held, commission of offence U/s.397 I.P.C. by the appellants has not been clearly established and as such they are entitled acquittal of the above charge.
(Para 11,12,13)

Case laws Referred to:-

1.AIR 2007 SC 3234 : (Dilawar Singh-V- State of Delhi).
2.AIR 1975 SC 905 : (Phool Kumar-V- Delhi Administration).

For Appellants - Mrs. Madhusmita Panda.
For Respondent - Mr. Sangram Das,
Addl Stand.ing Counsel.

B.K. PATEL, J. The three appellants, namely, Chhatish @ Chhakadi, Landa @ Bipin and Ashok @ Santosh alongwith eight co-accused persons faced trial for commission of offences under Sections 396/397/412 of the Indian Penal Code (for short 'the I.P.C.') and 9(b) of the Indian Explosive Act (for short 'the I.E. Act) in the court of learned Additional Sessions Judge, Angul in Sessions Trial No.106 of 2001/9 of 2001. By judgment and order dated 25.6.2002 the appellants and co-accused Gagan were convicted under Sections 396 and 397 of the I.P.C. and sentenced to undergo imprisonment for life under Section 396 of the I.P.C. and to undergo rigorous imprisonment for three years under Section 397 of the I.P.C. Other co-accused persons were acquitted of all the charges and appellants, and co-

accused Gagan were acquitted of the charges under Sections 412 of the I.P.C. and 9(b) of the I.E. Act. Being aggrieved, the appellants have preferred this appeal.

2. Informant P.W.3 is deceased's husband's brother. Occurrence took place in the night of 8.5.2000.

3. Prosecution case is that at about 11 P.M., due to previous enmity, accused persons exploded bombs in the occurrence village Khirakolipasi and broke opon the door of informant's house, and assaulted deceased, informant's brother-in-law P.W.4, informant's mother Jema and informant's nephew Trailokya by means of tangis and bhujalis causing injuries. They also took away Rs.7,000/- and gold ornaments such as tulasi patri, kana pendi and nakaputki etc. from the box and chumki from informant's wife. Thereafter, accused persons entered into and exploded bombs in the house of Raja Naik, assaulted the inmates, and took away Rs.5,000/- and gold ornaments. Accused persons also entered into the house of Bhaskar Naik.. On the basis of F.I.R. Ext.1 lodged by P.W.3, P.W.16 registered the case under Sections 395 and 397 of the I.P.C. and 9 of the I.E. Act and took up investigation. The deceased succumbed to injuries while receiving treatment in the hospital. On completion of investigation, charge-sheet was submitted against the appellants and co-accused persons.

4. Accused persons took the plea of denial.

5. In order to substantiate the charge, prosecution examined sixteen witnesses. P.Ws.1 to 8 are occurrence witnesses. Some of them are injured persons and victims. P.W.9 is the doctor who medically examined deceased, P.W.2, P.W.4, P.W.6 and other injured persons. P.W.10 is the doctor who conducted post-mortem examination over the dead body of the deceased. P.Ws.11 and 12 are witnesses to seizure of stolen articles. P.W.13 is a police constable who assisted in investigation. P.W.14 is a goldsmith who deposed to have purchased stolen gold ornaments from co-accused Dibakar and converted the same to gold ring. P.W.15 deposed to have purchased gold ring from P.W.14. P.W.16 is the investigating officer. Prosecution also relied upon documents marked Exts.1 to 23. No defence evidence was adduced.

Placing reliance on the evidence of informant P.W.3 and other occurrence witnesses stated to have been corroborated by medical evidence of P.Ws.9 and 10 and other incriminating circumstances, trial court held the

appellants guilty of offences under Sections 396 and 397 of the I.P.C. as stated supra.

6. In assailing the impugned judgment it was contended by the learned counsel for the appellants that informant P.W.3 and other occurrence witnesses developed the prosecution case in course of trial and implicated the accused persons who had not been implicated in course of investigation. Evidence of the occurrence witnesses is replete with infirmities, inconsistencies and contradictions for which no reliance can be placed on P.Ws. 1 to 8. It was further contended that the prosecution has not been able to establish complicity of five or more persons for which conviction under Section 396 of I.P.C. is not sustainable. Also placing reliance on the decision of the Supreme Court in **Dilawar Singh –v- State of Delhi** : AIR 2007 S.C. 3234 it was argued that in absence of cogent evidence regarding use of deadly weapons in course of the occurrence by each of the appellants, conviction under Section 397 of the I.P.C. is misconceived.

7. Placing reliance on the evidence of P.Ws. 1 and 8 and the medical evidence of P.Ws. 9 and 10, learned counsel for the State supported the impugned judgment.

8. Informant P.W.3 testified that in the night on 8.5.2000 he was sleeping on his verandah. He saw the appellants, co-accused Gagan and others came and exploded bomb in front of his house. When P.W.3 entered into his house, the culprits followed him and broke the door by explosion of bomb. Another bomb was exploded on the belly of the deceased as a result of which she expired. P.W.1, P.W.4, Jema and Trailokya also sustained injuries. Culprits took away Rs.7000/- as well as golden ear ring, nose ring, etc. P.W.3 concealed himself in the Autu for which they could not assault him. After committing the crime, culprits went away to the house of others. P.W.3 lodged F.I.R. Ext.1. In P.W.3's cross-examination it has been elicited that appellant Landa assaulted P.W.4 with tangi.

9. In the F.I.R. Ext.1 it has been alleged that due to previous enmity appellants Landa and Ashok along with 4 to 5 others exploded bombs as a result of which villagers were terrorized. They broke opon the door of informant's house and assaulted informant's mother Jema, informant's brother's wife deceased Gava, informant's brother-in-law P.W.4 and informant's brother's son Trailokya with tangis and bhujalis causing injuries on them. The culprits assaulted others causing injuries on them also. They took away Rs.7000/- and gold ornaments. Culprits exploded bombs, assaulted and caused injuries, and committed dacoity in the house of Raja

Naik and Bhaskar Naik also. Thus, contents of the F.I.R. with regard to the occurrence materially corroborate P.W.3's testimony in Court. However, none of the accused persons except the appellants Landa and Ashok were named in the F.I.R. Implication of appellants Landa and Ashok by P.W.3 in his evidence has not been discredited in any manner.

9.1 P.W.1 stated in his evidence that in the occurrence night when he was sitting near the house of Cheru Naik, the three appellants as well as co-accused persons Nabina, Gagan and others came and threw a bomb which struck him as a result of which he sustained injuries on his chest, hand and belly and became senseless. In cross-examination P.W.1 not only stated that the Investigating Officer had not examined him but also deposed that he was sleeping at the time of incident. He got up when the bomb struck on him and lost his sense. He got his sense at hospital. Thus, P.W.1 has developed the prosecution case in court and his evidence shows that he had not seen any of the culprits.

9.2 P.W.2 testified in her evidence that she was sleeping on her verandah. By hearing sound of bomb she got up. The three appellants, co-accused Gagan and others entered into her house. They assaulted Raja and P.W.6 and demanded money. Culprits snatched away two Fasia from P.W.6, one Dandi and nose ring from her and one nose ring from her sister-in-law. Out of fear, she gave the ornament to the culprits. Due to assault, she herself, P.W.6 as well as Raja sustained injuries. This witness also stated in her cross-examination that she had not stated anything to the Investigating Officer. In her cross-examination, it has been elicited that appellant Ashok was armed with bomb and appellant Landa was armed with bhujali. Culprits were armed with bomb, bhujali and tangi.

9.3 P.W.4 also implicated appellants as well as co-accused Gagan with the occurrence and alleged that appellant Landa assaulted on his wrist and explosion of bomb caused injury on his eye and that deceased, P.W.1 and Trailokya sustained injuries. In his cross-examination, P.W.4 stated that as he sustained injury on his eye, he could not be able to see anything for which he cannot say who assaulted whom. He also admitted that he was not examined by the I.O. Thus, P.W.4's evidence also amounted to development of prosecution case in court.

9.4 P.W.5 implicated the three appellants as well as co-accused Gagan with commission of offence. It is alleged that they exploded bomb and entered into the house along with others. Appellant Ashok put a bhujali on her neck and took away her mali and others took away ornaments and

money. In her cross-examination, this witness stated that she did not know accused persons prior to the incident, but denied to the suggestion that she had not stated names of accused persons before the investigating officer. She explained that she could know names of accused persons immediately.

9.5 P.W.6 also implicated the three appellants as well as co-accused Gagan and other unnamed persons with the occurrence in course of which culprits exploded bomb causing injuries to the deceased and others. She alleged that appellants Ashok and Landa assaulted them and demanded money and ornaments. Out of fear, she gave her dandi and nose ring. However, she admitted in her cross-examination that I.O. has not examined her.

9.6 P.W.7 stated that appellants as well as co-accused Gagan and others entered into the house and exploded bomb. He concealed himself behind a Doli. Appellant Ashok assaulted P.W.4 with tangi. Culprits took away ornaments from the body of women and went away. Nothing has been brought out in cross-examination of P.W.7 to discredit his testimony.

9.7 The other occurrence witness P.W.8 implicated the three appellants as well as co-accused Gagan and other unnamed persons with the occurrence. However, he also stated to have not been examined by the I.O.

9.8. P.W.9 medically examined the deceased and other persons who sustained injuries in course of occurrence. Deceased was found to have sustained injuries including burst abdomen and multiple small punctured wounds caused by blasting weapon. Injuries were also found on P.Ws.2, 4, 6, Trailokya Naik, Raja Naik, Jema Naik and Kaya Naik.

9.9 P.W.10 conducted post-mortem examination over the dead body of the deceased. He opined that injuries on the deceased were sufficient to cause death in ordinary course of nature and could be caused by blasting of bomb.

10. On analysis of evidence of P.Ws.1 to 10 it is found that from the very beginning, in the F.I.R. itself, P.W.3 had alleged involvement of appellants Landa and Ashok as well as four to five others in commission of offences of dacoity with murder of the deceased. Though informant P.W.3's implication in court of appellant Chhatish is a development by him in course of trial, evidence of P.Ws.5 and 7 alleging participation of all the three appellants in commission of offence has no t been discredited I n any manner. Also,

evidence of informant P.W.3 as well as P.Ws.5 and 7 is corroborated by the evidence of P.Ws.9 and 10. P.Ws.5 and 7 testified also regarding participation of appellants, co-accused Gagan and others in commission of the offence. Though no intrinsic value can be attached to the evidence of P.Ws.1, 2, 4, 6 and 8 due to their non-examination in course of investigation, their evidence also corroborates evidence of informant P.W.3 as well as P.Ws.5 and 7 with regard to complicity of the appellants in commission of offence under section 396 of the I.P.C. Hence, we do not find any infirmity in the impugned judgment convicting the appellants under Section 396 of the I.P.C.

11. So far as commission of offence under Section 397 of the I.P.C. is concerned, though it is evident that in course of occurrence culprits brandished and used bomb, tangis and bhujalis causing fatal injuries to the deceased and injuries to others, evidence is not cogent with regard to the specific weapon used by each of the culprits individually. P.W.3 deposed that appellant Landa used tangi whereas P.W.2 deposed appellant Landa to have used bhujali. P.W.5 testified that appellant Ashok used bhujali whereas P.W.7 deposed that appellant Ashok used tangi. P.W.2 alleged appellant Ashok to have been armed with a bomb.

12. In **Dilawar Singh –v- State of Delhi** (supra) it has been observed and held as follows:

"22. The essential ingredients of Section 397, IPC are as follows:

Accused committed robbery.

1. While committing robbery or dacoity (i) accused used deadly weapon (ii) to cause grievous hurt to any person (iii) attempted to cause death or grievous hurt to any person.

2. "Offender" refers to only culprit who actually used deadly weapon. When only one has used the deadly weapon, others cannot be awarded the minimum punishment. It only envisages the individual liability and not any constructive liability. Section 397 IPC is attracted only against the particular accused who uses the deadly weapon or does any of the acts mentioned in the provision. But other accused are not vicariously liable under that Section for acts of co-accused.

23. As noted by this court in Phool Kumar v. Delhi Administration (AIR 1975 SC 905), the term "offender" under Section 397, IPC is

confined to the offender who uses any deadly weapon. Use of deadly weapon by one offender at the time of committing robbery cannot attract Section 397, IPC for the imposition of minimum punishment on another offender who had not used any deadly weapon. There is distinction between 'uses' as used in Sections 397, IPC and 398, IPC. Section 397, IPC connotes something more than merely being armed with deadly weapon.

24. In the instant case admittedly no injury has been inflicted. The use of weapon by offender for creating terror in mind of victim is sufficient. It need not be further shown to have been actually used for cutting, stabbing or shooting, as the case may be.

25. Therefore, the offence under Section 397, IPC has clearly not been established.

13. On an appraisal of evidence on record in the light of **Dilawar Singh –v- State of Delhi** (supra), in the present case also it is found that commission of offence under Section 397 of the I.P.C. by the appellants has not been clearly established. Therefore, the appellants are entitled to be acquitted of the charge under Section 397 of the I.P.C.

14. In view of the above discussions, the appeal is allowed in part. While upholding conviction of the appellants under Section 396 of the I.P.C. and imposition of sentence thereunder, conviction of the appellants under Section 397 is set aside.

Appeal allowed in part.

2012 (I) ILR- CUT- 996

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

JCRA. NO. 245 OF 2000 (Dt.14.09.2011)

BALI GOLARI & ANR. ……. Appellants.

.*Vrs.*

STATE OF ORISSA ……..Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – Ss. 300, 304-II.

Sudden quarrel between the informant (P.W.1) and both the appellants – When appellant No.2 was assaulting the informant with a lathi the deceased intervened and dealt lathi blows to appellant No.1 for which appellant No.1 gave an axe blow on the head of the deceased.

In this case occurrence took place without premeditation upon a sudden quarrel in the heat of passion without acting in a cruel or unusual manner which attracts Exception 4 of Section 300 I.P.C. – Held, appellants found guilty U/s.304-II/34 I.P.C. (Para 10)

For Appellants - Mr. Biswajit Mohanty-3.
For Respondent - Mr. Sangram Das
Addl. Standing Counsel

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment dated 02.08.2000 passed by the Additional Sessions Judge, Malkangiri in Sessions Case No.116 of 1999 (S.C.22/99 of Sessions Judge, Koraput-Jeypore) whereby both the appellants (Bali Golari and Saheb Golari) have been convicted under section 302/34, IPC for committing murder of the deceased Dasiri Khillo and appellant no.2 Saheb Golari has been further convicted under section 325, IPC for causing hurt to the informant Basana Khilla.

2. The case of the prosecution is that on 20.09.1998 at about 8.00 PM the informant Basana Khilla, his brother Dasiri Khillo (deceased) and both the appellants returned from the market. After reaching the village, appellant no.1-Bali Golari told the informant that he is not doing any work and living on theft. When the informant protested the remark made by appellant no.1-Bali

Golari, his son appellant no.2-Saheb Golari being armed with a lathi came and dealt a blow to the informant aiming at his head. As the informant changed his position, the blow hit on his right hand, as a result of which his right hand was broken. When appellant no.2 gave further blow on the shoulder of the informant, he raised hullah. Hearing the hullah of the informant, his deceased brother (Dasiri Khillo) came to the spot to save him. Seeing the deceased, appellant no.2 assaulted him on his right hand, chest and back. At that time, appellant no.1 brought an axe from his house and gave a blow on the head of the deceased, as a result of which the deceased succumbed to the injury at the spot. The said incident was witnessed by Damu Golari(P.W.3), Jagannath Khilla (P.W.2) and Sani Khilla (P.W.4). On the next day, i.e., 21.09.1998 at about 4.30 PM the informant Basana Khilla lodged the written report (Ext.12) at Govindapalli Outpost before the A.S.I. of police (P.W.12). On receipt of the report, the A.S.I. of police (P.W.12) made an entry in the station diary, took up investigation and sent the report to O.I.C. Mathili Police Station for registration of the case. The O.I.C. (P.W.13) registered the case and after completion of the investigation, filed charge sheet against the appellants under Sections 302/325/34 I.P.C.

3. The plea of the appellants is one of the complete denial.

4. In order to prove its case, the prosecution examined as many as fourteen witnesses. Of them, P.W.1, who is the brother of the deceased, is the informant of this case and an injured occurrence witness. P.Ws.2 and 3 are witnesses to the occurrence. P.W.4 is a post-occurrence witness. P.W.5 is the doctor who conducted autopsy over the dead body of the deceased. P.W.6 is the doctor who examined appellant no.1-Bali Golari. P.W.7 is a witness to the extra judicial confession. P.Ws.8 and 11 are seizure witnesses. P.W.9 is the doctor who examined the informant (P.W.1). P.W.10 is a hostile witness. P.W.12 is the ASI of police, who conduct part of the investigation. P.W.13 is the O.I.C., Mathili P.S., who conducted investigation and filed charge sheet. P.W.14 is the police constable, who guarded the dead body and took the same to the hospital for post-mortem examination. Besides examining the above witnesses, the prosecution has also adduced as many as seventeen documents in evidence. The appellants have not adduced either any oral or documentary evidence in support of their plea.

5. Learned Additional Sessions Judge, who tried the case, on assessment of the evidence on record found both the appellants guilty under section 302/34, IPC for having committed murder of the deceased Dasiri Khillo and sentenced them to undergo imprisonment for life. He also found appellant no.2 Saheb Golari guilty under section 325, IPC for having caused

grievous hurt to the informant Basana Khilla, but imposed no separate sentence. In order to arrive at the aforesaid conclusion, he placed reliance on the ocular testimony of P.Ws.1, 2 and 3, disclosure statement made by the appellants under Section 27 of the Indian Evidence Act and subsequent leading to discovery of the weapons of offence as also the chemical examination report from which it reveals that the weapons of offence (M.O.I and II) were found stained with human blood.

6. Mr.Mohanty, learned counsel for the appellants submits that the so-called eye witnesses, i.e., P.Ws.1 to 3 could not have seen the occurrence, since it took place in a dark night and as per their own evidence there was no electric light at the place of occurrence. Furthermore, P.W.1, being the brother of the deceased is an interested witness and, therefore, no reliance can be placed on his evidence. The prosecution is guilty of suppression of genesis and origin of the case, since it has failed to explain the injury found on the vital part of the body of accused-appellant no.1. Leading to discovery of the weapons of offence has not been proved by the prosecution. In the alternative, learned counsel submits that even if the case of the prosecution is accepted in its entirety, at the worst the appellants can be liable for conviction under Section 304-II, IPC and not under Section 302, IPC.

7. Mr. Das, learned Additional Standing Counsel strongly contends that the evidence of P.W.1 is very clear, cogent and trustworthy. Since P.W.1 himself was assaulted by the appellants and got injured by them before the deceased was done to death, the question of wrong identification does not arise even though the occurrence took place in a dark night, particularly when the parties are known to each other. P.Ws.2 and 3, the independent witnesses, corroborate the evidence of P.W.1 with regard to assault. The ocular testimony gets support from the medical evidence. Furthermore, the appellants themselves confessed their guilt before the villagers in a village meeting. The police seized one Gamuchha and one lungi on production by the appellants so also an axe and a lathi stained with blood. The chemical examination report reveals that blood stains of human origin were found on the above material objects. Therefore, the trial court has rightly convicted the appellants and there is no scope for this Court to interfere with the impugned judgment.

8. Keeping the above rival submissions in mind, this Court minutely examined the oral and documentary evidence available in the LCR. P.W.1 is the brother of the deceased and the informant of this case. In his examination-in-chief he testified that appellant no.2 (Saheb Golari) gave him a lathi blow on his right hand. When the deceased came and intervened,

appellant no.1 (Bali Golari) dealt a blow on his head by means of an axe and appellant no.2 (Saheb Golari) also assaulted him by a lathi on his back, as a result of which the deceased died in the night. He reported the matter at Govindapali Outpost. In cross-examination, he admitted that it was a dark night and there was no electric light at the place of occurrence. Hearing hullah, the people came. He further admitted that there was no previous enmity between the appellants and the deceased prior to the occurrence and that the deceased gave a lathi blow to appellant no.1 and thereafter appellant no.1 gave the axe blow on the head of the deceased.

P.W.2 is a co-villager who stated that hearing hullah he came to the spot and saw appellant no.2 giving lathi blow to the informant (P.W.1) on his right hand. Hearing hullah, when the deceased came, appellant no.1 dealt an axe blow on his head. The deceased fell down and appellant no.2 assaulted him by lathi. After some time, the deceased died. He is also a witness the inquest and proved the inquest report (Ext.1). In cross-examination, he admitted that the deceased gave a lathi blow to appellant no.1 for which appellant no.1 assaulted to the deceased on his head by an axe.

P.W.3 is another co-villager who stated that he saw appellant no.2 assaulting the informant on his right hand. Hearing the cry of the informant when the deceased came, appellant no.1 dealt an axe blow on his head and then appellant no.2 assaulted him by a lathi, for which the deceased died after some time. In cross-examination, he stated that he did not see the deceased assaulting appellant no.1 and that he was witnessing the occurrence by sitting on his verandah.

P.W.4 is the wife of the informant (P.W.1). She stated that on getting information that her husband (P.W.1) was being assaulted she proceeded to the spot and brought him back to house and that her husband's right hand was broken. Nothing has been elicited from her in cross-examination to demolish her evidence.

P.W.5 is the doctor who conducted autopsy over the dead body of the deceased. He opined that all the injuries were ante mortem in nature and that the cause of death was due to shock leading to cardio respiratory failure as a result of haemorrhage and severe injury to head. To the query made by the I.O, he opined that injury no.iv was possible by the axe, injury nos.(i) to (iii) were possible by the bamboo lathi and injury no.iv caused the death of the deceased. He proved the post mortem report (Ext.2) and the opinion report (Ext.3). He further deposed that on the next date (22.09.1998) he also

examined appellant no.1 and found one scalp injury of size 1¼"X 1¼"X2" on the frontal area left side irregular in margin which was simple in nature.

P.W.6 is another Medical Officer who examined the informant (P.W.1) and found one lacerated wound of size 2" X ½" X ½" on the lateral part of right arm which was simple in nature and caused by hard and blunt weapon. He stated that P.W.1 was referred for x-ray examination since there was fracture of right forearm just above the wrist joint.

P.W.7 is a co-villager who stated that in the village meeting the appellants confessed to have murdered the deceased. P.W.8 is a seizure witness in whose presence police seized blood stained axe and lathi under Ext.6, blood stained Gamuchha under Ext.7, one lungi of appellant no.2 under Ext.8, one check lungi of appellant no.1 under Ext.9 and also seized sample earth and blood stained earth under Ext.10.

P.W.9 is the Medical Officer who also examined the informant (P.W.1) and opined that injury no.3 found on his person was grievous in nature because there was fracture of right radious bone as per x-ray plate. P.W.10 did not support the case of the prosecution. P.W.11 is a witness to the seizure of lathi, axe, Gamuchha and lungi.

P.W.12 is the A.S.I. of Police, who was then attached to Govindapali Outpost. In his examination-in-chief, he stated that on 21.09.1998 at 4.30 PM P.W.1 presented a report before him. On the basis of the said report, he made the station diary and took up investigation after sending the report to the OIC, Mathili Police Station for registration of the case. Ext.12 is the said report. During investigation, he examined the complainant and other witnesses, sent the injured to hospital for medical examination, visited the spot and prepared the spot map. He seized the sample earth and blood stained earth from the spot, conducted the inquest over the dead body and sent the same for autopsy. He also seized the the wearing apparels of the appellants and the weapons of offence, i.e., axe and bamboo lathi from the house of appellant no.1. He arrested both the appellants and produced them before the OIC who took charge of the investigation from him.

P.W.13 is the OIC of Mathili Police Station who registered the case and directed P.W.12 to proceed with the investigation. On 23.09.1998, he took charge of the investigation from P.W.12 and examined both the appellants and forwarded them to court. He examined the scribe of the F.I.R. and other witnesses, received the post-mortem report and injury reports of

P.W.1 and appellant no.1 and after completion of the formalities filed charge-sheet against the appellants under Sections 302/ 325/323/34 I.P.C.

P.W.14 is the constable of police attached to Govindapali Outpost who guarded the dead body of the deceased and took the same to the hospital for autopsy.

9. Undisputedly, the death of the deceased was homicidal in nature. The eye witness account of P.Ws.1, 2 and 3 is very clear, cogent and trustworthy. According to them, appellant no.2 Saheb Golari assaulted P.W.1 by a lathi and when the deceased intervened appellant no.1 Bali Golari assaulted him by an axe on his head and then appellant no.2 Saheb Golari assaulted him by a lathi on his back, as a result of which the deceased died. There is nothing on record to disbelieve their evidence. The weapons of offence were seized by police from the possession of the appellants along with their wearing apparels. The chemical examination report (Ext.1) reveals that the weapons of offence (M.Os. I and II) were stained with human blood from which it can be safely concluded that the deceased was assaulted by these weapons. Ext.1 further reveals that blood stains of human origin were found on the wearing apparels of the appellants, but no satisfactory explanation has been given by them with regard to the same. P.W.7, who is a co-villager, has stated about the extrajudicial confession made by the appellants. The contention of the appellant that the occurrence having taken place during night hours the ocular witnesses could not have identified the actual assailant due to darkness is not acceptable since the parties are known persons and close relatives and the informant (P.W.1) himself is an injured occurrence witness. Merely because P.W.1 is the brother of the deceased his evidence cannot be thrown out of consideration, as it otherwise inspires confidence. Hence, taking into consideration the direct and circumstantial evidence available on record, this Court comes to the conclusion that both the appellants in furtherance of their common intention committed murder of the deceased.

10. Now, it is to be seen if the acts of the appellants attract any of the exceptions of Section 300, IPC. The facts and circumstances as narrated in the FIR and as recorded in the evidence of the witnesses make it clear that there was a sudden quarrel between the informant (P.W.1) and both the appellants and when appellant no.2 was assaulting the informant with a lathi, the deceased intervened and dealt lathi blows to appellant no.1, for which appellant no.1 gave an axe blow to the head of the deceased. From this, it can be safely concluded that in the instant case the occurrence took place without premeditation in a sudden fight in the heat of passion upon a sudden

quarrel and without taking undue advantage or acting in a cruel or unusual manner, which attracts Exception 4 of Section 300, IPC. Therefore, this Court holds the appellants guilty under Section 304-II/34, IPC.

11. As indicated above, appellant no.2 Saheb Golari has also been convicted under section 325, IPC for having caused hurt to the informant Basana Khilla (P.W.1). Besides P.W.1 himself, the other two eye witnesses (P.Ws.2 and 3) have deposed that it is appellant no.2, who assaulted P.W.1 by a lathi, as a result of which he sustained fracture injury on his right hand and also other injuries. The FIR (Ext.12) lends corroboration to their testimony. There is no discrepancy between the ocular testimony and the evidence of the doctor (P.W.6) with regard to assault on the informant (P.W.1). The other doctor (P.W.9) has opined that injury no.3 of Basana Khilla is grievous in nature as per x-ray plate. Therefore, this Court is not inclined to set aside the conviction made under Section 325, IPC.

12. In the result, the Jail Criminal Appeal is allowed in part. The conviction of both the appellants under Section 302/34, IPC is converted to one under Section 304-II/34, IPC and they are sentenced to undergo R.I. for ten years each. The conviction of appellant no2 (Saheb Golari) under Section 325 IPC is confirmed, but no separate sentence is imposed. The judgment dated 02.08.2000 passed by the learned Additional Sessions Judge, Malkangiri in Sessions Case No.116 of 1999/S.C. No.22 of 1999 is accordingly modified.

It is stated at the Bar that both the appellants (Bali Golari and Saheb Golari) have already remained in custody for more than ten years. If that be so, they be set at liberty forthwith, if their detention is not required otherwise.

Appeal allowed. In part.

2012 (I) ILR- CUT- 1003

M. M. DAS, J.

CRLMC. NO. 215 OF 2011 (Dt.19.12.2011)

SIDDHARTH ARORA ……Petitioner.

.Vrs.

STATE OF ORISSA ……..Opp.Party.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.306, r/w Section 482 Cr.P.C.

Cognizance U/s. 306 I.P.C. – Basic constituents of an offence U/s.306 I.P.C. are suicidal death and abatement there of – To attract the ingredients of abatement, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary.

In the present case there is absolutely no prima facie material to show that the petitioner has abetted the suicidal death of the deceased in any manner – The learned Magistrate has mechanically took cognizance of the above offence without considering the materials produced before him – Held, continuance of the criminal proceeding will amount to an abuse of the process of the Court and the proceeding is liable to be quashed. (Para 9,11,12)

Case laws Referred to:-

1.(2011)48 OCR (SC) 961 : (M.Mohan-V-State represented by Dy. S.P.)
2.(2010)47 OCR(SC) 376 : (S.S.Chheena-V-Vijay Kumar Mahajan & Anr.)
3.1995 SCC(Criminal)943 : (Swamy Prahaladdas-V-State of M.P. & Anr.)

For Petitioner - M/s. S.K.Sahoo, G.Sahoo, D.P.Pattanaik, B.P.Mohant & Y.A.Mohanty.
For Opp.Parties- Mr. R.P.Mohapatra, Addl. Govt. Advocate, (for O.P.No.1).

M.M. DAS, J. The petitioner in this application under section 482 of the Code of Criminal Procedure, 1973 has challenged the order dated 10.11.2010 of the learned S.D.J.M. (P), Rourkela in G.R. Case No. 1903 of 2009 in taking cognizance of the offence under section 306 I.P.C. and issuance of process against him.

2. On verification of the materials produced, it is seen that the opp. Party no. 2-Subhendra Das lodged the F.I.R. (Annexure-2) before the Inspector –in-Charge, Jhirpani Police Station on 30.10.2009 on the basis of which Jhirpani P.S. Case No. 38 of 2009 was registered.

3. It is alleged in the F.I.R. that on 18.10.2009 at about 9.45 P.M., while calling his daughter Pragnya Priyadarsini (hereinafter referred to as 'the deceased') for dinner, the informant and his wife noticed that the deceased had locked her room from inside and did not respond after repeated calling for which the door was broke open and she was found hanging from a fan. The deceased was immediately shifted to I.G.H. Rourkela, where the doctors declared her dead. It is further alleged in the F.I.R. that the mobile phone which was found from the spot disclosed that the last call was made to the Cell phone No. 9238373635 which belongs to the father of the petitioner. The mobile phone was handed over to the investigating officer on 20.10.3009. The petitioner is alleged to be harassing the deceased since mid of 2007 through different means, i.e., letters, anonymous telephone calls by impersonating himself in different names. One of the letters of the petitioner written in August, 2007 was handed over to the police on 29.10.2009.

3. It is pertinent to note that though the incident took place on 18.10.2009 night, the F. I.R. was lodged only on 30.10.2009. In connection with the death of the deceased, basing on the casualty memo of I.G. Hospital, Rourkela, Jhirpani P.S. U.D. Case No. 7 of 2009 was registered. The inquest over the dead body was conducted on 19.10.2009 in connection with the said U.D. Case, in presence of the informant, Subhendra Das, and he has written in column no. 9 of the inquest report that the deceased has committed suicide by hanging herself and that there is no doubt about it. In column no. 10, it has been written that there is no suspicion of any foul play.

4. The post mortem of the deceased was conducted and the doctor found the deceased to be aged about 16 years and found ligature mark around her neck and no other injury was found on her body. The cause of death was opined to be asphyxia due to hanging.

5. During course of inquiry of the U.D. Case, the informant as well as Ansuman Das, the brother of the deceased gave their statements which indicate that the deceased committed suicide inside her bed room and the door was broke open and she was shifted to I.G.H. for treatment where she was declared dead. They have further stated that the deceased had affair with the petitioner for which she committed suicide. After registration of the

case on the basis of the F.I.R. submitted by the informant on 30.10.2009, during course of investigation, the family members of the deceased i.e., Subhendra Das –informant, father, mother – Smt. Madhumita Das, grand-father – Debendranath Das, grand-mother, elder brother – Ansuman Das and cousin sister – Amrita Priyadarsini of the deceased respectively were examined and they have stated that the petitioner was harassing the deceased since 2007 for which she was mentally disturbed. There was discussion between both the families over this issue and the petitioner was advised not to harass the deceased.

6. The friends of the deceased, namely, Prachi Nanda and Swayam Prava Pradhan were examined and they stated that the deceased was in love with the petitioner and most of the time, they used to meet each other and talk with each other over mobile phone and that the family members of the deceased were opposing such affair.

7. In the above back-drop, it is to be seen, if this is a fit case, where this Court by exercise of inherent powers under section 482 Cr.P.C. should quash the proceeding.

8. It is long settled in law that on accepting all the available materials collected during investigation culminating in a charge sheet filed by the Investigating Agency, if no offence is made out, this Court can exercise its inherent power under section 482 Cr.P.C. and quash the proceeding in its entirety, as otherwise, it would amount to a travesty of justice and an abuse of the process of court. The materials collected, as discussed above, are to be examined as to whether any case is made out against the petitioner for the alleged offence under section 306 IPC keeping the above position of law in mind.

9. Section 306 IPC prescribes the punishment for abetting a suicidal death and provides that a person committing an offence of abetment of suicide can be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. The basic constituents of an offence under section 306 IPC are suicidal death and abetment thereof. To attract the ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary.

10. In the case of ***M.Mohan v. State represented by Dy. S.P.*** (2011) 48 OCR (SC) 961, the Supreme Court held that "abetment" involves a mental process of investigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in

committing suicide, offence under section 306 IPC cannot be made out. The deceased was found to be hypersensitive to ordinary petulance, discord and differences, which happen in day to day life. Human sensitivity of each individual differs from the other. Different people behave differently in the same situation. (See ***S.S. Chheena v. Vijay Kumar Mahajan and another,*** (2010) 47 OCR (SC) 376).

In the case of ***Swamy Prahaladdas v. State of M.P***. ***and another,*** 1995 SCC (Criminal) 943, the Supreme Court laid down that the words uttered by the accused during quarrel remarking the deceased to go and die and the deceased going home and committing suicide, it cannot be said that the suicide was the direct result of the words uttered inasmuch as the words are casual in nature and nothing serious is expected to follow thereafter and it does not reflect requisite mens rea on the assumption that these words would be carried out in all events, the deceased had plenty of time to weigh the pros and cons of the act by which he ended his life.

11. In the present case, from the facts, as narrated above, it is clear that the deceased died by committing suicide. However, with regard to the offence of abetment of suicide by the petitioner, in view of the interpretation of law, in the aforesaid decisions, it is clear that there is absolutely no prima facie material to show that the petitioner has abetted the suicidal death of the deceased in any manner. The offence under section 306 IPC alleged to have been committed by the petitioner is not at all prima facie made out from the materials collected during the investigation. The learned S.D.J.M. (P) Rourkela, while passing the impugned order taking cognizance of the offence under section 306 IPC against the petitioner and issuing process, has not considered the materials produced along with the charge sheet by the Investigating Officer and, mechanically has taken cognizance of the above offence against the petitioner without due application of judicial mind and issued process.

12. Since there is absolutely no case made out under section 306 IPC against the petitioner, continuance of the criminal proceeding will amount to an abuse of the process of Court. Hence, the proceeding is liable to be quashed. It is, therefore, ordered that the proceeding in G.R. Case No. 1903 of 2009 pending before the learned S.D.J.M. (P), Rourkela stands quashed.

13. The CRLMC is accordingly allowed.

Application allowed.

2012 (I) ILR- CUT- 1007

M. M. DAS, J.

W.P.(C) NO. 20278 OF 2010 (Dt.10.01.2012)

GANGADHAR MUDULI ……Petitioner.

.Vrs.

MAGUNI MOHANTY & ANR. ……Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 6, RULE 17.

Amendment of plaint after commencement of trial – Discretion of the Court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence and to avoid multiplicity of proceedings – Amendments which do not totally alter the character of an action should he granted and care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the Opp.Party under pretence of amendment.

In the present case the plaintiff-petitioner has described defendant No.2 as son of Khetra Muduli – Defendant No.2 refusing the same stated that he is the son of late Jujhar Muduli and as such a natural brother of the plaintiff – Thereafter plaintiff sought to amend the plaint by introducing the fact that defendant No.2 Biswanath Muduli is the natural son of late Jujhar Muduli but has been given in adoption to Khetra Muduli – The amendment if allowed will not change the nature and character of the suit although it introduces a fact which was not originally stated in the plaint – If the amendment will not be allowed the same would lead to multiplicity of proceedings – In the alternative if the amendment is allowed no prejudice of an irremediable character will be inflicted upon the defendants-Opp.Parties – Held, amendment need be allowed with costs to compensate the prejudice caused to the defendants as some witnesses examined in the suit.

(Para 6,7,8)

Case laws Referred to:-

1.AIR 2009 SC 1433 : (Vidyabai & Ors.-V-Padmalatha & Anr.)
2.(2005) 4 SCC 480 : (Kailash-v- Nanhku).
3.2009(II) OLR (SC)880 : (Surendra Kumar Sharma-V-Makhan Singh)
4.AIR 2008 SC 2234 : (Chander Kanta Bansal-V-Rajinder Singh Anand)

For Petitioner - Mr.B,KNayak
For Opp.Parties - M/s. Pratyusha, N.P..Paraja, S.K. Rout

Heard.

2. This writ application has been filed challenging the order of the learned Civil Judge (Junior Division), Puri dated 02.03.2010 passed in Civil Suit No.171 of 2008 partially rejecting the application for amendment filed on behalf of the plaintiff.

3. The petitioner as plaintiff impleaded the opposite party no.2 as defendant no.2 mentioning in the plaint that the defendant no.1 is the son of Khetra Muduli. The defendant No.2 filed his written statement taking a specific stand that he is the son of Jujhari Muduli, who is the father of the plaintiff and therefore, he has got a right over the property. The suit is one for declaration of right, title and interest. After filing of the evidence on affidavit on behalf of the plaintiff, on 19.10.2009, the plaintiff filed a petition seeking amendment of the plaint on 06.01.2010. The proposed amendment was to introduce the pleadings that the defendant No.2 is the natural brother of the plaintiff, but has been given in adoption to Khetra Muduli. The learned court below, in the impugned order observing that the plaintiff wants to introduce a new fact which shall change the nature and character of the suit, rejected the prayer for amendment of the plaint to the above extent. However, with regard to the typographical error, which was sought to be amended, the said prayer of the plaintiff was allowed.

4. Learned counsel for the petitioner submits that the learned trial Court should have allowed the amendment as sought for, since the said fact goes to the root of the matter and it is required for complete adjudication of the suit.

5. It is submitted by Miss Pratyusha, learned counsel for the opposite party No.2 that prior to filing the writ application, the learned trial court proceeded to examine the witnesses and evidence has been recorded, which amounts to commencement of the trial. She relies upon the decision in the case of ***Vidyabai and others V. Padmalatha and another*** A.I.R. 2009 SC 1433, where the Supreme Court relying upon the earlier judgment in the case of ***Kailash V. Nanhku*** (2005) 4 SCC 480 held that in a civil suit, the trial begins when issues are framed and the case is set down for recording of the evidence. Dealing with the provision of Order-6 Rule-17 of the Code of Civil Procedure as amended by Code of Civil Procedure (amendment) Act, 2002, the Supreme Court in the aforesaid decision held that the amendment is ouched in the mandatory form and the Court's jurisdiction to

allow such an application is taken away unless the conditions precedent thereto are satisfied, i.e., it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial. In paragraph – 8 of the judgment, the Supreme Court held that filing of an affidavit in lieu of examination-in-chief of the witness would amount to commencement of the proceeding. On the contrary, the learned counsel for the petitioner relies upon the decision in the case of ***Surendra Kumar Sharma V. Makhan Singh,*** 2009 (Ii) O.L.R. (SC) 880, where the Supreme Court, while considering the question of allowing or disallowing the amendment held that it is well settled that under Order-6, Rule-17 of the C.P.C. wide powers and unfettered discretion has been conferred on the Court to allow amendment of the pleading to a party in such a manner and on such terms, as it appears to the Court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused, if it is found that for deciding the real controversy between the parties, it can be allowed on payment of cost. The Supreme Court therefore expressed the view that mere delay and latches in making application for amendment cannot be a ground to refuse amendment and while considering such belated amendment, the Court must bear in favour of doing full and complete justice in case, where the party against whom, the amendment is to be allowed, can be compensated by cost or otherwise.

6. In the case of ***Chander Kanta Bansal V. Rajinder Singh Anand***, AIR 2008 SC 2234, the Supreme Court considering the scope of the proviso to Order 6, Rule 17 C.P.C. laid down that Rule 17, order-6 was omitted by the Code of Civil Procedure (Amendment) Act, 1999. However, before the enforcement of the said amending Act, the original rule was substituted and restored with an additional proviso. The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the Court to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised and the liberal principles, which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment.

7. Examining the facts of the present case in the touch stone of the ratio of the aforesaid decision, it would be seen that the petitioner in the plaint

described the defendant no.2 as son of Kehtra Muduli. The defendant no.2, however, refuting the said fact stated that he is the son of late Jujhar Muduli and, thus, a natural brother of the plaintiff. The plaintiff, there after, sought for amending the plaint by introducing the fact that defendant no.2 Biswanath Muduli is the natural son of late Jujhar Muduli, but has been given in adoption to Khetra Muduli. Thus, the amendment as sought for, if allowed, will not change the nature and character of the suit though, no doubt, it introduces a fact which was not originally stated in the plaint. It is further seen that if the amendment will not be allowed as proposed, the same would lead to multiplicity of the proceedings. In the alternative, if the amendment is allowed, no prejudice of an irremediable character will be inflicted upon the opposite parties – defendants.

8. This Court, therefore, is of the view that the learned trial court should have allowed the amendment as proposed by the plaintiff. Since it is submitted that in the meanwhile, some of the witnesses have been examined, the prejudice whatever caused to the defendants can be compensated by imposing cost on the plaintiff.

9. This Court, therefore, while allowing the writ petition, modifies the impugned order and directs that the amendment sought for by the petitioner to the plaint shall be carried out and the plaintiff shall file a consolidated copy of the plaint before the learned trial court incorporating the amendment within a period of three weeks hence. The above order is subject to the petitioner-plaintiff paying a cost of Rs. 1500/- (Rupees one thousand five hundred) to the defendants in the court below.

Writ petition allowed.

2012 (I) ILR- CUT- 1011

R.N.BISWAL, J.

CRA. NO. 428 OF 2008 (Dt.30.03.2012)

SUSANTA KUMAR TRIPATHY ……Appellant.

.Vrs.

STATE OF ORISSA …….Respondent.

PREVENTION OF CORRUPTION ACT, 1988 (ACT NO. 49 OF 1988) – Ss.13 (2) & 13(1)(e).

Conviction of appellant U/s.13(2) & 13(1) (e) of the Act – Allegation that the appellant amassed wealth in his name and in the name of his wife, disproportionate to his known source of income.

In the present case a sum of Rs.2,01,966/- remains unexplained – If the said amount is spread over the period from 1981 to 1993 then the alleged unexplained income remains a paltry sum which any government employee can save every year – Held, the judgment of the trial Court is set aside and the appellant is acquitted of the charge U/s.13(2) read with Section 13(1) (e) of the P.C. Act – The seized assets, both movable and immovable including documents be released in favour of the appellant and his wife. (Para-9,10)

Case law Relied on :-

AIR 2011 SC 1363 : (Ashok Tshering Bhutia-V-State of Sikkim)

For Appellant - M/s. Manas Mohapatra, L.N.Sahoo, S.K.Routray, S.Mohanty, P.K.Mohanty, R.P.Kar, A.N.Ray & S.Pattnaik.

For Respondent - Standing Counsel (Vigilance).

R.N.BISWAL, J. This appeal is directed against the judgment and order dated 27.09.2008 passed by the learned Special Judge (Vigilance), Cuttack in T.R. Case No.141 of 2007 convicting the appellant for the offence under Section 13 (2) read with Section 13 (1) (e) of the Prevention of Corruption Act, 1988 (hereinafter referred as P.C. Act) and sentencing him to undergo R.I. for one year and to pay a fine of Rs.1,00,000/-(Rupees one lac) and in default of payment of fine to undergo R.I. for a further period of six months.

2. The appellant entered into Government service as a Junior Engineer in March 1981 and was posted at different places and while he was working as Junior Engineer (Electrical) OTDC, Bhubaneswar, getting reliable information that he amassed wealth both movable and immovable in his name and in the name of his wife disproportionate to his known source of income, an enquiry was taken up. On the strength of a search warrant issued by the learned C.J.M., Cuttack his rented house at Bhubaneswar and the government quarters at WALAMI Project, Pratapnagari, Cuttack were simultaneously searched on 15.12.1993 by the Vigilance Personnel of Vigilance Cell Cuttack in presence of witnesses and the appellant and his wife and it was found that during the check period i.e. 27.2.1981 to 15.12.1993 his income was Rs.2,36,500/- and expenditure Rs.1,82,425/- and as such his probable saving was Rs.54,075/- but he was found in possession of property both movable and immovable to the tune of Rs.3,37,562.95 paise in his name and in the name of his wife . So, the disproportionate asset was Rs.2,83,487.95 paise during the check period. On 3.1.1994 the Inspector of Vigilance Cell, Cuttack (P.W.9) lodged a written report in this regard before the Superintendent of Police (Vigilance), Cuttack Division, Cuttack and accordingly Cuttack Vigilance P.S. Case No.2 of 1994 corresponding to V.G.R.case No.2/94 of the court of C.J.M.Cuttack was registered under Section 13 (2) read with Section 13 (1) (e) of the P.C. Act and the S.P. (Vigilance) directed P.W.9 to investigate into the case.Accordingly,P.W.9 investigated into it and after conclusion of investigation and obtaining sanction order from the competent authority submitted charge sheet before the C.J.M.Cuttack under the aforesaid Sections showing that the appellant was in possession of property both movable and immovable in his name and the name of his wife, Archana Tripathy to the tune of Rs.3,12,058.65 paise disproportionate to his known source of income for which he could not satisfactorily account for. After preparation of two sets of copies of police paper, the learned C.J.M. transferred the case record along with the connected papers including the copies of police papers to the Special Judge (Vigilance) Bhubaneswar, who registered the case as T.R.Case No.111 of 1999 and took cognizance of the offence under the aforesaid sections. Sometime thereafter, the case was transferred to the court of Special Judge (Vigilance) Cuttack, who renumbered it as T.R.Case No.141 of 2007 and framed charged against the appellant for the aforesaid offence. The plea of the appellant was that even though he entered into Government service in 1976 and made a substantial income from his salary, it was not taken into account. His income from house rent was also not taken into consideration. The income of his wife from Diary Farm and Prawn culture business and the property gifted to her at the time of marriage were added to his income and assets illegally.

3. In order to establish its case, prosecution examined nine witnesses, as against, three witnesses examined on behalf of the appellant. After assessing the evidence on record, the trial court held that during the check period, the total income of the appellant was Rs.2,89,250/-,his expenditure and the expenditure of his family members was Rs.2,04,087.72 paise, which was rounded up to 2,04,088/-and as such his probable saving was Rs.85,162/-, but he was found to have acquired movable and immovable property of Rs.3,38,339/- in his name and in the name of his wife,so, the disproportionate assets were of Rs.2,53,177/- which he failed to account for satisfactorily. Accordingly the trial court convicted the appellant for the offence under Section 13 (2) read with Section 13 (1) (e) of the P.C. Act and sentenced him there under which is under challenge in this appeal as stated earlier.

4. Learned counsel for the appellant submits that as found form the evidence of D.W.1, Archana Tripathy, (wife of the appellant) 15 to 16 Bhari (150-160 gms) of gold ornaments were gifted to her by her father at the time of her marriage. This has also been reflected by the appellant in his property statement (Ext.20). As found from the evidence of P.W.3, at the time of search of the rented house of the appellant, D.W.1 had also stated that the gold ornaments seized, had been gifted to her by her father at the time of her marriage. But the trial court disbelieved it holding that the appellant in his property statement reflected that his wife, (D.W.1) was having 200 gms of gold ornaments, but on 15.12.1993 during search of the rented house of the appellant only 74.550 gms of gold ornaments were recovered. In fact D.W.1 during his cross-examination stated that she sold some gold ornaments for Rs.30,000/- during 1993. So, it can be inferred that she sold 75.450 to 76.450 grams of gold in the year 1993.According to learned counsel for the appellant adding the value of 74.500 gms gold to the asset of the appellant is absolutely illegal.

On perusal of the trial court judgment, it is found that the trial court disbelieved that 200 grams of gold ornaments were gifted to the wife of the appellant(D.W.1) by her father at the time of her marriage not only because at the time of house search 74.45 grams of gold ornaments were found, but also the property statement given by the appellant on 15.3.1993(Ext.20) reflected that 200 grams of gold ornaments were acquired by D.W.1 in the year 1981,while D.W.1 in her evidence stated that she got married to the appellant in the year 1980.. So the trial court rightly held that the seized gold ornaments were not gifted to D.W.I. at the time of her marriage in the year 1980. I am not in one with the submission of learned counsel for the appellant in this regard.

5. Learned counsel for the appellant further submits that as it appear from Ext.A, Ghanasyam Tripathy, the father of appellant authorized the appellant to collect rent from his self acquired house situated at Berhampur and enjoy the same since due to his old age, he along with his wife was staying with him, but despite it, the income derived from the rent of the said house was not taken into consideration by the trial court, which is illegal.

D.W.2 the brother of appellant in his evidence stated that Ext.A was executed in favour of the appellant to collect rent from the house mentioned therein on the apprehension that there might arise any dispute at the time of execution of house rent agreement with the tenants. Since the recital in Ext.A did not tally with the evidence of D.W.2 and the parents of the appellant nor any of their belongings could be seen by the raiding party at the time of raid of the house of the appellant, the trial court did not rely upon it. Moreover, it held that if in fact house rent was collected from the house as described in Ext.A and utilized for the maintenance of the parents of the appellant, then there could be no saving from the house rent. Furthermore, since Ext.A was not produced at the time of raid or investigation of the case, the finding of the trial court cannot be branded as illegal.

6. Learned counsel for the appellant further submits that as found from the evidence of D.W.1, her father gifted her three heads of Jorsey Cow all of whom had conceived, at the time of her marriage in the year 1980. All the three cows delivered in her husband's residence. Each cow was giving 10 to 15 litres of milk per day. She sold the milk in the colony and hotels from 1981 to 1989 and earned Rs.25,000/- to Rs.30,000/- per annum. In the year 1989 the cattle increased to eight in number and she sold all the cattle in the same year. But,the trial court erroneously disbelieved the claim of milk business of D.W.1, only because during cross-examination she could not give any data as to the expenditure made for each cow nor could she produce any document in respect of her milk business and further she could not name the customers to whom she was selling milk and the name of persons to whom he sold the cattle and the sale proceeds thereof.

Admittedly, no permission was obtained by the appellant for starting of milk business by his wife. There is no document to show that ,in fact D.W.I was running milk business. In her cross examination, she could not name the person to whom she was selling milk and the name of the person whom she sold the cattle. She also failed to say about the expenditure towards maintenance of each cow. So, the trial court rightly did not believe that D.W.1 was running milk business.

7. Learned counsel for the petitioner further submits that as found from the evidence of D.W.3 (appellant) in the year 1976 he was engaged as N.M.R. in Bargarh Electrical Construction Division on a salary of Rs.540/- per month and continued as such till 1979 and during that period he received Rs.19,000/- towards his salary and that from 1979 till 1981 he worked as an electrician under Burla-Sambalpur Irrigation Division and received Rs.11,000/- as salary which has been supported by documentary evidence viz Ext. B,C to C/3 and D to D/4. During 1976 to 1981 he saved Rs.18000/-. But the trial court illegally held that the documents in respect of his previous salary have no evidentiary value.

Ext.C is a certificate shown to have been granted by the Executive Engineer, Electrical Construction Division which indicates that the appellant was a student trainee under his Division from 1.6.1974 to 31.12.1974.Ext.C/1 is also a certificate shown to have been granted on 4.12.1976 by the then Asst. Engineer General Electrical Sub-Division No.III (R & B)Berhampur which indicates that the appellant was a student trainee under his Sub-Division from 1.1.1976 to 30.6.1976.ExtC/2 is a certificate shown to have been granted by the Sub-Divisional Offficer, Electrical Construction Sub-Division, Bargarh, which indicates that the appellant was working under the said Division from 108.1976 to 31.7.1979 as N.M.R. Exts C and C/1 show that the appellant was a student trainee from 1.6.1974 to 31.12.1974 and 1.1.1976 to 30.6.1976,so there was no scope for him to save anything.Ext.C/2 shows that the year of engagement and the year when the appellant ceased to work as N.M.R. have been interpolated. The author of the certificate has not been examined. So, the trial court rightly did not rely upon it. I am one with the finding of the trial court that there is no reliable evidence to show that appellant was serving as N.M.R. from 1976 to 79. Ext.'B' the duplicate Service Book of the appellant shows that he joined as an Electrician Grade-II(W/C)on 7.2.1979 and was relieved there from with effect from 26.2.1981. Ext.D, the pay particulars of the said period shows that the appellant received Rs.10977.15 paise during this period. But there is no document to show that he saved any amount during the said period. Moreover, this period does not fall within the check period. So, the trial court rightly did not add anything to the income of the appellant for the said period.

8. Learned counsel for the appellant further submits that as found from the evidence on record, the appellant obtained permission from his department before his wife (D.W.1) purchased a car and Ac.0.126 decimals of land in her name from her own income. But the trial court disbelieved that the same were purchased by D.W.1 from her own income on the ground

that had she purchased the same from her own income, the appellant was not required to obtain departmental permission for such purchase and accordingly held that the appellant purchased the same in the name of D.W.1. According to learned counsel for the appellant, this reasoning is quite illegal and absurd in view of Rule 21(I) of the Orissa Government Servants Conduct Rules, 1959(hereinafter referred as Conduct Rules).

At this stage it would be profitable to quote sub-rule (I) and (3) of Rule 21 of the Conduct Rules, which read as follows:-

> " 21(1) No Government servant shall except with the previous knowledge of the prescribed authority acquire or dispose of any immovable property by lease, mortgage, purchase, sale, gift or otherwise, either in his own name or in the name of any member of his family or a benamidar;
>
> Provided that any such transaction conducted otherwise than through a regular or reputed dealer shall require the previous sanction of the prescribed authority.
>
> Xx xx xx xx xx
>
> Xx xx xx xx xx"
>
> (3) A Government servant who either in his own name or in the name of any member of his family enters into any transaction concerning any movable property, exceeding in value of Rs.4000/-in case of gazetted officers and Rs.2000/- in case of non.-Gazetted officers, whether by way of purchase, sale or otherwise, shall forthwith report such transaction to the prescribed authority referred to in sub rule(1);
>
> Provided that no Government servant shall, except with the previous sanction of Government either in his own name or in the name of any member of his family enter into any transaction with or through any person, other than a reputed dealer or agent of standing.
>
> Explanation:- For the purpose of this sub-rule, the expression " movable property" includes inter alia, the following property, namely:-
>
> (a) Jewellary insurance policies, shares, securities and debentures;

(b) loans advanced by such Government servant whether secured or not;

(c) motor cars, motor cycles, horses or any other means of conveyance."

So, as per sub-rule (1) of Rule 21 of the Conduct Rules,1959,a Government servant cannot acquire or dispose of any immovable property in any mode in his name or in the name of any member of his family or a Benamidar without the pervious knowledge of the competent authority. If any such transaction is conducted otherwise than through a regular or reputed dealer previous sanction of the competent authority is required. Similarly, as per sub-rule 3 of Rule 21 of the aforesaid Rules, if a Government servant enters into any transaction concerning any movable property exceeding in value of Rs.4000/- in case of gazetted officer and Rs.2000/- in case of non-gazetted officer, either in his name or in the name of any of his family member forth with report such transaction to the appropriate authority. If he enters into any such transaction with or through any person other than a reputed dealer or agent of standing he must obtain previous sanction of Government. So the finding of the trial court that permission is not required for purchase of any movable or immovable property by any family member including wife of a Government servant in his/her name out of his/her income cannot be said as illegal.

9. Learned counsel for the appellant further submits that even if such permission is not required, it cannot be held that D.W.I did not purchase the car and land from her own income only because the appellant obtained permission for such purchase. There is ample evidence that D.W.1 had her independent income out of Prawn culture. P.W.9, the I.O. himself has stated that on the basis of information given by the Income Tax Authority he held that the net income of D.W.1 from prawn culture business was Rs.96,222/- during the financial year 1989-90 and 1990-91. This fact has also been reflected in clause(f),of the charge sheet under income heading which reads as follows:;-

"Income from prawn farming of Smt. Archana Tripathy, wife of Susanta Kumar Tripathy during the financial year 1989-90 Rs.26,000/-and during the year 1990-91 is Rs.70,222 total Rs.96,222."

D.W.1 is an income tax assessee and submitted her income tax returns from 1988 till date. According to learned counsel for the appellant the trial

court erroneously held that the appellant run Prawn culture business Benami in the name of his wife (D.W.1).

The trial court disbelieved the claim of D.W.I that she was running prawn culture business on the ground that the sale deed executed in the year 1991 (Ext.2) reflected that she was doing household work and that during her cross examination she stated that in the year 1993 she sold some gold ornaments to raise funds for starting prawn culture business, meaning thereby that till 1993 she had not started prawn culture business and that D.W.I. submitted the income tax returns on 31.7.1990 for the assessment year 1988-89,1989-90 and 1990-91 instead of submitting year wise in due time, with ulterior motive. As found from Ext.3, on 9.12.1988 D.W.I. took A 3.99 decimals of land on lease at the rate of Rs.2000/- per year for 15 years for prawn culture business. It has been reflected in the charge sheet that D.W.I. earned Rs.26,000/- during the financial year 1989-90 and Rs.70,222/- during the financial year 1990-91 from prawn farming. It is also found from the evidence of the I.O. (P.W.9) that on the basis of information furnished by the income tax authority he gave relaxation of Rs.96,222/- as the relevant income tax returns indicated the same to be the income of D.W.I. Under such premises, only because in the sale deed executed in the year 1991(Ext.12), it has been reflected that she was doing house- hold work and that during cross examination, it could be elicited from her that during the year 1993 she sold some of her gold ornament to raise funds to start prawn culture business, but the claim of gift of gold ornaments was disbelieved, the trial court ought not to have held that the appellant was running the said business in the name of his wife, in absence of any evidence to that effect. The court below ought to have taken into consideration the income of the wife of appellant for the year 1991-92 and 1992-93 from prawn culture business, particularly when she has submitted income tax returns for the said period as per Ext.G/3 and G/4, to be her own income. Ext.G/3 shows that D.W.1 earned Rs.25,202/- in the year 1991-92 and Ext.G/4 shows that she earned Rs.26,009/- in the year 1992-93 from her business. So, in toto, she earned Rs.51,221/-in these two years which requires to be deducted from the alleged unexplained income of Rs.2,53,177/-. On deduction of the said amount from the unexplained disproportionate asset it (disproportionate) will come to Rs.2,01,966/-,

In the case of **Ashok Tshering Bhutia v. State of Sikkim** AIR 2011 Supreme Court 1363, the appellant therein joined the Special Branch of Police in the State of Sikkim as a constable in 1972. He faced trial for the offence under section 13(2) read with section 13(1)(e) of the P.C. Act. It was found that during the period between 1987 to 1995 he amassed wealth of

Rs.271613.69/- paise disproportionate to his known source of income which he could not explain. In this context, the Apex Court held as follows:-

> "Even if the said amount is spread over the period from 1987 to 1996, the alleged unexplained income remains merely a marginal/paltry sum which any government employee can save every year".

In the present case a sum of Rs.2,01,966/- remains unexplained. If the said amount is spread over the period from 1981 to 1993 then the alleged unexplained income remains a paltry sum which any government employee can save every year as per the decision cited above.

10. Therefore, under such premises the appeal is allowed, the judgment of the trial court is hereby set aside and the appellant is acquitted of the charge under Section 13 (2) read with Section 13 (1)(e) of the P.C. Act and he is set at liberty. The seized assets, both movable and immovable including the documents be released in favour of the appellant and his wife. The bail bonds shall be cancelled.

Appeal allowed.

2012 (I) ILR- CUT- 1020

INDRAJIT MAHANTY, J.

CRLMC. NO.3698 OF 2009 (Dt.03.03.2012)

PRAVAKAR MOHANTY ……..Petitioner.

.Vrs.

PRAHALLAD PRADHAN ……. .Opp.Party.

NEGOTIABLE INSTRUMENT ACT, 1881 (ACT NO. 26 OF 1881) – S.138.

Cause of action to file complaint U/s.138 of the Act arises, once, with the issuance of notice after dishonour of the cheque and the receipt there of by the drawer.

In the present case first advocate notice Dt.25.2.2008 was not received by the petitioner and the same was returned with postal endorsement "addressee always absent" – Since first notice was never served on the petitioner nor received by him, no cause of action arises with the return of the first advocate notice nor do the said facts constitute any "deemed service of notice" – Only the second advocate notice issued on 23.06.2008 was received by the petitioner on 10.07.2008 and the petitioner not effecting payment within 15 days there from, cause of action arises and at no earlier point of time – Held, there is absolutely no irregularity in the impugned order passed by the learned S.D.J.M. either condoning delay or taking cognizance of the offence. (Para -7,8)

Case laws Referred to:-

1.(1998)6 SCC 514 : (Sadanandan Bhadran-V-Madhavan Sunil Kumar)
2.(2010)45 OCR (SC) 555 : (Tameeshwar Vaishnav-V- Ramvishal Gupta)
3.(2009)1 SCC 500 : (S.L.Constructions & Anr.-V-Alapati Srinivasa Rao & Anr.)

For Petitioner - M/s. Anirudha Das, G.P.Panda, A.Das & S.K.Rout.
For Opp.Party - M/s. Anjan Kumar Biswal, S.S.Ray, A.P.Rath.

I. MAHANTY, J. The present application under section 482 Cr.P.C. has been filed by the petitioner (accused) challenging orders dated 18.2.2009

and 24.3.2009 passed in 1.C.C. No.315 of 2008, whereby the learned S.D.J.M., Jagatsinghpur has been pleased to condone the delay in filing the complaint under Section 138 N.I. Act and had thereafter taken cognizance of an offence under Section 138 N.I. Act.

2. The essential contention of Sri A. Das, learned counsel for the petitioner is to the effect is that, whereas the petitioner has issued a cheque on 31.01.2008 in favour of the Complainant-Opposite Party, the complainant had presented the cheque for encashment on the self-same date i.e., 31.01.2008 and received intimation of dishonour from the bank on 08.02.2008. It is further submitted that the complainant sent an advocate notice on 25.2.2008 which was returned to the sender with an endorsement "addressee always absent".

It is further averred that on 10.3.2008, the complainant contacted the petitioner and he was given assurance that the cheque would be honoured if presented again and the complainant, once again presented the same cheque for encashment on 28.05.2008, but the same was once again dishonoured and intimation of dishonour was received by the complainant on 11.6.2008. The complainant sent another advocate notice to the petitioner on 23.6.2008. Such advocate notice was received by the petitioner (accused) on 10.7.2008, which is the cause of action for initiating the complaint.

3. In the light of the aforesaid facts, learned counsel for the petitioner asserts that the Hon'ble Supreme Court in the case of ***Sadanandan Bhadran-V- Madhavan Sunil Kumar,*** (1998) 6 SCC 514 had came to hold that, the cause of action to file a complaint on non-payment despite issue of notice arise only once, and another cause of action would not arise on the repeated dishonour cheque on re-presentation.

4. Learned counsel for the petitioner submitted that, whereas the opposite party was free to present the cheque repeatedly within its validity period, once notice had been issued on 25.2.2008 and payment was not received within 15 days of the said notice, the complainant had to avail the remedy by filing complaint, and that the present complaint not having been filed on the basis of the advocate notice dated 25.2.2008 but on the basis of second advocate notice dated 23.6.2008 entertaining the present complaint was wholly without jurisdiction. It is asserted by the learned counsel for the petitioner that, the cause of action in the present complaint arose on the petitioner not making payment within 15 days of the first advocate notice dated 25.2.2008 and while the payee-opposite party (complainant) was

entitled to present the cheque for payment during its validity period, yet the said act on the part of the complainant would not give rise to a fresh cause of action.

5. In this respect, reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of ***Tameeshwar Vaishnav v. Ramvishal Gupta,*** (2010) 45 OCR (SC) 555.

6. Sri Biswal, learned counsel for the complainant-opposite party, on the other hand, submitted that the plea advanced by the learned counsel for the petitioner is wholly misplaced. He further submitted that none of the judgments cited by the learned counsel for the petitioner apply to the facts of the present case. As would be evidenct from the pleadings of the parties, no doubt an advocate notice was issued to the petitioner on 25.2.2008 but the same had returned back to the complainant-opposite party with an endorsement "addressee always absent". In view of such endorsement, it is asserted that no "cause of action" in fact arose since, admittedly, the said advocate notice had not been served on the petitioner. He further asserted that it is only the subsequent advocate notice dated 23.6.2008 which was served/received by the petitioner on 10.7.2008 and on non-payment by the petitioner within 15 days therefrom, only the cause of action arose for filing the present complaint and at no earlier point of time. In this respect, reliance was placed by the learned counsel for the opposite party-complainant on a judgment of the Hon'ble Supreme Court in the case of ***S.L. Constructions and another v. Alapati Srinivasa Rao and another,*** (2009) 1 SCC 500.

7. In the light of the submissions made by the learned counsel for the respective parties as noted hereinabove, the issues raised herein are no longer res intergra. In the latest judgment of the Hon'ble Supreme Court in this respect in the case of ***Tameeshwar Vaishnav*** (supra), a Division Bench headed by Hon'ble Justice Altamas Kabir took into consideration of the earlier judgment of the Hon'ble Supreme Court in this respect including the case of S.L. Constructions (supra), and in Paragraphs 14 and 15 came to the following conclusion:

> "14. On careful scrutiny of the decision in S.L. Construction's case (supra), it would appear that the facts on the basis of which the said decision was rendered, were different from a case of mere presentation and dishonour of the cheque after issuance of notice under the proviso to Section 138 of the Act. While the decision in *Sadanandan Bhadran*'s case (supra), clearly spells out that a cheque may be presented several times within the period of its validity, the

cause of action for a complaint under Section 138 of the Act arises but once, with the issuance of notice after dishonour of the cheque and the receipt, thereof by the drawer. The same view has been reiterated in Prem Chand Vijay Kumar's case (supra). The only distinguishing feature of the decision in S.L.Construction's case (supra) is that of the three notices issued, the first two never reached the addressee. It is only after the third notice was received that the cause of action arose for filing the complaint. In effect, the cause of action for filing the complaint in the said case did not arise with the issuance of the first two notices since the same were never received by the addressee.

15. The provisions of Section 138 and clauses (a), (b) and (c) to the proviso thereof indicate that a cheque has to be presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. Clause (b) indicates that the payee or the holder in due course of the cheque, has to make demand for the payment of the said amount of money by giving a notice in writing to the drawer of the cheque within 30 days of the receipt of information by him from the bank regarding the return of the cheque as unpaid and clause (c) provides that if the drawer of the cheque fails to make the payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of receipt of the said notice, the payee or the holder of the cheque may file a complaint under Section 142 of the Act in the manner prescribed."

In the present case, it is clear that the first advocate notice dated 25.2.2008 was, admittedly, not received by the petitioner and the same was returned with the postal endorsement "addressee always absent". In view of such fact, since the first notice was never served on the petitioner nor received by him, no cause of action could have arisen with the return of the first Advocate notice nor do the said facts constitute any "deemed service of notice". In the present case, admittedly, it is only the second advocate notice issued to the petitioner on behalf of the complainant on 23.6.2008 which was received by him on 10.7.2008 and the petitioner by not effecting payment within 15 days there from, cause of action could be said to have arisen and at no earlier point of time.

8. In view of the aforesaid finding, I find no irregularity either in the impugned order condoning delay or taking cognizance of the offence and accordingly, this Court is left with no other alternative other than to reject the

prayer of the petitioner in the present case. Hence, the CRLMC stands dismissed. The interim order dated 11.12.2009 passed in Misc. Case No.3158 of 2009 stands vacated.

Application dismissed.

2012 (I) ILR- CUT- 1025

INDRAJIT MAHANTY, J.

O.J.C. NO.4739 OF 1994 (Dt. 03.03.2012)

G. NAGESWAR PATRA ……Petitioner.

.Vrs.

ADDL. SECRETARY TO GOVT.
IN THE FOOD SUPPLIES &
CONSUMER WELFARE
DEPTT. ORISSA& ANR. ……..Opp.Parties.

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO.10 OF 1955) – S.6-A.

Seizure of food grains – Section 6-A of the Act requires that the report of seizure need be placed before the District Collector – Since in the present case such report was placed before the sub- Collector there is non Compliance of the mandatory requirement – Held, order of confiscation passed by the Collector, Ganjam and confirmed by the appellate Authority are quashed – Direction issued to the appropriate authority to grant consequential relief to the petitioner.

(Para 15)

Case laws Referred to:-

1.1993(I) OLR-66 : (M/s. Gouri Shankar Traders. Rayagada-V-State)
2.74(1992) CLT 330 : (M/s. Ganesh Traders-V-State of Orissa & Ors.)
3.AIR 1991 SC 515 : (Muralilal Jhunjhunwala-V-State of Bihar & Ors.)

For Petitioner - M/s. N.Patra & A.K.Patra.
For Opp.Parties - Addl. Govt. Advocate.

I. MAHANTY, J. This writ application has been filed by the petitioner-Sri G.Nageswar Patra, partner of M/s. Shyam Sundar Traders, Berhampur, Dist. Ganjam seeking to challenge the order of confiscation dated 12.10.1990 passed by the Collector, Ganjam under Annexure-9 as well as the order dated 18.6.1994 passed by the Additional Secretary to Government of Orissa in the Food Supplies and Consumer Welfare Department in Appeal Case No.43 of 1990 under Annexure-10 dismissing the same and thereby confirming the order of confiscation passed by the Collector, Ganjam.

2. The facts of the present case in brief is that the petitioner-G.Nageswar Patra is one of the partners of a registered firm in the name and style "M/s.Shyam Sundar Traders", Berhampur in the district of Ganjam. The said partnership is found under Section 185 of the Income Tax Act and has been duly assessed from time to time. It is also averred that the firm M/s.Shyam Sundar Traders has been doing business on the strength of the licence bearing No.108/78 granted under the Orissa Pulses, Edible Oil Seeds and Edible Oils Dealers (Licencing) Order, 1977 (in short 'the Control Order') and the said licence was being renewed from time to time. The petitioner had applied for renewal of licence in the year 1988-89 and after such application was made at the appropriate time, the licence was not renewed nor any order of rejection was communicated to the petitioner. Accordingly, for the years, 1989-90 and 1990-91, the petitioner duly made applications for renewal like in the previous years and continued his business of pulses and edible oil seeds on the bona fide understanding that the petitioner was legally entitled since the applications of renewal made earlier have not been rejected by the licencing authority.

3. It appears that the petitioner-firm took another house on rent on 10.4.1990 from Sri Sheo-Bhagawan Ram Gopal Mundra at Aska Road to store the goods and accordingly informed the Collector, Ganjam on 10.4.1990 of the said factum. This letter addressed to the Collector, Ganjam was received by the Berhampur Civil Supply Office on the same day. Copy of the said letter was also posted to the Collector on the same day with a request to effect necessary changes in the licence for storing the commodities in the new godown and to add such address in the licence, copy of which is annexed as Annexure-3.

4. Learned counsel for the petitioner further stated that on 14.4.1990, the petitioner moved 162 quintals of Black gram and 32 quintals of peas from their original godown at Aska Road, Berhampur and stored the same in their new godown. On the same day, i.e on 14.4.1990, it is stated that the petitioner also received further 111 bags of mustard seeds weighing 99.9 quintals from one M/s. Mahesh Trading Company, Kesinga at about 6.00 P.M. It is stated that while the said mustard seeds were being unloaded from the truck on the petitioner's new godown, the Inspector of Supplies along with the Supervisor of Supplies, Berhampur seized 162 quintals of Blackgram, 32 quintals of peas and 99.9 quintals of Mustard seeds from the new godown at Aska Road. As a result of the seizure effected by the Inspector of Supplies, final orders directing confiscation of the seized articles under Section 6-A of the Essential Commodities Act, 1955 came to be passed by the Collector, Ganjam vide order dated 12th October, 1990

finding that the petitioner had indulged in trading and business without a valid licence and storing pulses, oilseeds exceeding 10 quintals is in contravention of Clause-3 of the Orissa Pulses, Edible Oilseeds, Edible Oil Dealers (Licensing) Order, 1977.

5. The petitioner against the order of the Collector preferred an appeal before the Secretary to the Government of Orissa in the Department of Food and Civil Supplies under Section 6-C of the Essential Commodities Act, 1955 which came to be registered as Appeal Case No.43 of 1990. This appeal came to be rejected by the lower appellate authority by order dated 18.6.1994 thereby confirming the order of confiscation passed by the Collector based on a finding that even if it is accepted that the seized stock belonged to M/s. Shyam Sundar Traders and the said Firm shall be deemed to be having a valid licence as the renewal application were pending and that the godown was an authorized godown, contravention of Clause 3(i) and 12(i) of the Control Order stand established.

6. Learned counsel for the petitioner sought to assail the order of confiscation under Annexure-9 as well as dismissal of appeal under Annexure-10, inter alia, on the ground that it is the admitted case of the prosecution that M/s. Shyam Sundar Traders had a valid licence and necessary application for renewal till 1991 was pending with the Licencing Authority and no action had been taken against M/s. Shyam Sundar Traders on that basis. Admittedly, the seized stock belonged to the M/s. Shyam Sundar Traders. Insofar as violation of Clause-3(i) and 12(i) of the Control Order is concerned, since it is not the case of the prosecution that the godown from which the commodities were seized, was placed on the business of the petitioner was merely a place of storage, no question of stock position and price of the commodities were required to be assessed there. M/s. Shyam Sundar Traders was carried out its business at its original godown located at Holding No.476 and the godown from which the seizure was effected, was a new godown taken on hire four days prior to the seizure and necessary intimation has also been issued to the Civil Supplies Office as well as the Collector four days prior to the seizure. Therefore, no mens-rea could be attached to the storage of essential commodities at the new godown. Since the petitioner was under the bona fide impression that he had the necessary authority to store such commodity at the new godown and since he had informed the licencing authority of having hired the new godown for such storage purpose, there was no illegality on such conduct.

Learned counsel for the petitioner further submitted that the allegation of violation of Clause-12(1) of the Control Order to maintain

accounts of the pulses and edible oil is unsubstantiated since admittedly, the goods in question has been seized at the time when the mustard seeds were being unloaded from the truck at the new godown at Aska Road on 14.4.1990 while the petitioner was a licensee as required to maintain daily accounts, yet, at the same time, the necessary bills under which the mustard seeds was purchased was produced before the Inspector of Supplies and since unloading of the goods had not been completed at the time of raid took place, the petitioner had no opportunity to endorse the said goods in its books of accounts at the time of raid took place. Apart from the above, learned counsel for the petitioner asserted that the alleged violation of Clause-3(i)(ii)(iii) is merely technical and the impugned order cannot be legally justified and the same ought to be quashed.

He further submits that on the finding of the lower appellate court that there had been contravention of Clause-3(i) and 12(i) of the Control Order is totally misconceived since the lower appellate authority itself in Paragraph-3 of the said judgment found that the petitioner's application for renewal of licence is pending and no action can be taken against M/s. Shyam Sundar Traders for not having valid licence on the date of seizure. Since the lower appellate authority came into the aforesaid finding on the Firm, there is no question of a partner of the said firm is guilty while the Firm is held to be not guilty. He further submits that the fact of storing the commodity in a new godown had been duly intimated to the licencing authority within 48 hours of such storage as required under the terms of the licence and the licencing authority had been admittedly, informed on 10.4.1990 by serving a copy of the letter to the office of the Civil Supplies as well as the posting of the said letter to the Collector on the same day. The seizure took place on 14.4.1990 and that too about 7.30 P.M. and the said place of seizure was an additional godown taken by the petitioner for storage only. It is averred by the petitioner that the books of accounts of M/s. Shyam Sundar Traders had at their original place of business and since the same had been questioned on that day on account of Maha Vishuva Sankranti, it had been practicable or possible to produce the accounts for inspection.

7. It is further submitted on behalf of the petitioner that the requirement of Section 6-A of the E.C.Act has not been complied with strictly by the prosecution since the Inspector of Supplies who effected seizure all the materials on 14.4.1990, submitted a report of seizure before the Sub-Collector, Berhampur on 16.4.1990 and not before the Collector, Ganjam as required under the said provision. It is asserted that ultimately, the Collector passed final orders of confiscation, which cannot wash away the illegality

occurred in the initiation of the proceeding itself. Admittedly, no report by the Inspector was effected seizure to the Collector and hence, the initiation of the proceeding itself is invalid.

8. Learned counsel for the petitioner placed reliance on the judgment of this Court in the following cases:

(i) ***M/s. Gouri Shankar Traders, Rayagada v. State*****,** 1993 (I) OLR-66

(ii) ***M/s.Ganesh Traders v. State of Orissa and others***, 74 (1992) C.L.T. 330.

9. Learned Additional Government Advocate for the State vehemently supported the order of the confiscation as well as the order passed by the lower appellate authority. He asserted that the mere application for renewal of licence and/or mere intimation to the Civil Supplies Office or the Collector of hiring of a new godown, cannot absolve the petitioner from the requirement of a licence to trade pulses and seeds nor does it authorize the petitioner to operate a new godown for which no expressive permission had been obtained from the licencing authority.

10. Considering the fact situation that arises in the present case and after hearing the learned counsel for the respective parties and after having taken into all the contentions advanced, the undisputed fact that merges to the fact that the petitioner-Firm in the name and style M/s. Shyam Sundar Traders is a registered partnership firm under the Income Tax Act, is admittedly a licensee under the Orissa Pulses, Edible Oil Seeds and Edible Oils Dealers (Licencing) Order, 1977 since 1982-83. The petitioner had sought for renewal in the year 1988-89, 89-90 and 90-91. Although the renewal applications were duly made, the same were not issued within the time and kept pending for orders. Seizures in this case was effected on 14.4.1990 and four days prior thereto, i.e. on 10.4.1990, the petitioner's partnership Firm has duly intimated to the Collector from the office of the Civil Supplies Officer as well as by post of the additional godown for the storage purpose. No responsibility whatsoever has been made either by the Collector or the Civil Supplies Office for such intimation and four days thereafter when certain goods/commodities were removed to the new godown in the evening of 14.4.1990 which was holiday on account of Maha Vishuva Sankranti and raid was taken place leading to such seizure. Clearly, the lower appellate authority has held in Paragraph-2 of its judgment under Annexure-10 to the writ petition that M/s. S.S.Traders had a valid licence till 1988 for dealing in pulses, edible oil seeds and edible oils and applications for renewal for the subsequent years had been duly filed

and "since no decision on renewal of application was communicated, the licence was deemed to have been renewed and no action for carrying on business without a licence can be taken". Therefore, once the allegation of non-possession of licence against M/s. Shyam Sundar Traders has been wiped out by the aforesaid finding and only the thing remains as to whether the petitioner had failed to maintain appropriate books of accounts at the new site of the godown on the date of seizure.

11. In the case of *M/s.* ***Gouri Shankar Traders, Rayagada*** (supra), the Bench presided over by Hon'ble Shri Justice L.Rath categorically came to hold that this Court relied upon the judgment of the case of ***Muralilal Jhunjhunwala v. State of Bihar and others*****,** AIR 1991 SC 515. In the said case, the dealer had been granted a licence for one year and applied for subsequent years by depositing the necessary fees and was carried out the business under the bona fide believe that he had licence and his application has neither been rejected nor any defect of the same has been pointed out. The Hon'ble Supreme Court came to held that "*the appellant was legitimately entitled to the licence which has been unreasonably withheld from him. It would be indeed wrong on the part of the Licensing Authority to prosecute the appellant*".

12. The next point comes for consideration is the requirement on the allegation of non-compliance of the requirement of Section 6-A of the E.C. Act which is quoted hereunder:

> "6-A. Confiscation of foodgrains, edible oilseeds and edible oils:
>
> (1) Where any essential commodity is seized in pursuance of an order made under section 3 in relation thereto a report of such seizure shall, without unreasonable delay, delay, be made to the Collector of the district or the Presidency-town in which such essential commodity is seized and whether or not a prosecution is instituted for the contravention of such order, the Collector, may, if he thinks it expedient so to do, direct the essential commodity so seized to be produced for inspection before him, and if he is satisfied that there has been a contravention of the order, may order confiscation of:
>
> (a) The essential commodity so seized;
>
> (b) Any package, covering or receptacle in which such essential commodity is found; and

(c) Any animal, vehicle, vessel or other conveyance used in carrying such essential commodity.

xx xx

(2) Where the Collector, on receiving a report of seizure or on inspection of any essential commodity under sub-section (1), is of the opinion that the essential commodity is subject to speedy and natural decay or it is otherwise expedient in the public interest so to do, he may:

(i) Order the same to be sold at the controlled price, if any, fixed for such essential commodity under this Act or under any other law for the time being in force; or
(ii) Where no such price is fixed, order the same to be sold by public auction.

xx xx"

13. On a reading of the aforesaid provision, it is clear therefrom that the authority effecting seizure has to report such seizure without unreasonable delay to the Collector of the district and it is only the Collector of such district if he thinks it expedient may direct the commodity so seized to be produced before him for inspection and if he is satisfied that there has been a contravention of the order, may direct its confiscation. The term "Collector" is defined in the E.C. Act under Section 2(i)(a) which has been inserted in the Amendment Act, 1992 of 1976 giving it an expanded meaning by including the Additional Collector and any such officer, not below the rank of Sub-divisional Officer, as may be authorized by the Collector to perform the functions and exercise the powers of the Collector under the Act. Therefore, ordinarily wherever the word 'Collector' is used under Section 6-A of the E.C. Act as per the definition, it would mean not only the Collector of the district but also such other officers who are authorized within the scope of the definition to function as the Collector.

14. In the case of ***M/s.Ganesh Traders*** (supra), the aforesaid contention was considered by the Division Bench of this Court presided over by Hon'ble Shri Justice L.Rath (as His Lordship the then was) in Paragraph-4 thereof which is quoted hereinbelow:

"4. Section 6-A directing confiscation of commodities was introduced by Act 25 of 1966. The provision originally provided for

production of the seized commodity before the Collector which was amended by Act 92 of 1976 substituting production of the seized commodity before the Collector to that of making a report of seizure only to him and by the very Amendment Act the definition of "Collector" as referred to above was introduced by expanding the concept of the word "Collector". The Statement of objects and Reasons of Act 25 of 1966 stated, so far as section 6-A is concerned, that the purpose of insertion of the new provision was for confiscation of commodities by the Collector of the district. The subsequent enlargement of the definition of the word "Collector" and use of both the expressions "Collector of the district" and "Collector" in section 6-A(1) would go against the interpretation that the power of confiscation was specifically reserved only for the District Collector. The provision consists of two parts: (1) making the report and (2) directing the seized commodity to be produced for inspection and the power, if satisfaction is reached of contravention of the order, to direct confiscation of the seized commodity. Undoubtedly, so far as the first part is concerned, the authority contemplated is the District Collector, he alone having been so named in the provision. So far as the second part is concerned, there is no binding necessity that such function must be carried out by the same District Collector himself. An additional Collector or a Sub-divisional Officer may also be authorized as per the definition of "Collector" to function as the Collector. Such authorization may follow either by general or a specific order. It is possible for the Collector to authorize any of such officers to carry on the functions of inspection and confiscation, if necessary, after receipt of the report. Thus after receipt of the report as to seizure, the Collector may himself, if necessary, direct production of the commodity before him for inspection and himself continue the confiscation proceeding if he so decides because of the peculiar circumstance or importance of the case, or he may after receipt of the report and perusal of the same direct that the follow-up actions may be taken by other officers, authorized by him to act as the Collector. For the same purpose it is also possible for him to pass a general order. So far as the power of directing disposal of the commodity under sub-section (2) is concerned, the position is the same that the power can be exercised by the Collector of the district if he so desires or where on perusal of the report he directs the other authorities, the power can also be exercised by them. Giving any other meaning to the provisions would render the amendment to the definition of the word "Collector" meaningless. The conclusion so reached is also fortified by the very statements of objects and

reasons of the Amendment Act 92 of 1976 which was to the following effect:-

In order to intensify the drive against hoarders and profiteers, it is proposed to provide that the powers of the Collector may also be exercised by an Additional Collector and such other officers not below the rank of a Sub-divisional Officer, as may be authorized by the Collector. The definition of the expression "Collector" is being inserted in the Act to achieve the said object."

15. In view of the aforesaid authoritative conclusion of this Court where in the present case, admittedly, the report of seizure has not been placed before the District Collector and, therefore, the mandatory requirement of the first part of Section 6-A has clearly not been satisfied. Although other contentions have been raised in course of the argument since I am of the considered view that the mandatory requirement of Section 6-A of the E.C. Act has not been complied with as determined by this Court in the case of ***M/s.Ganesh Traders*** (supra), this Court has no longer necessary to deal with the contentions. Accordingly, the order of confiscation dated 12.10.1990 passed by the Collector, Ganjam under Annexure-9 as well as the order dated 18.6.1994 passed by the Additional Secretary to Government of Orissa in the Food Supplies and Consumer Welfare Department in Appeal Case No.43 of 1990 under Annexure-10 is quashed and direct the appropriate authority to grant consequential relief to the petitioner.

16. In terms of the aforesaid observations and directions, the writ petition is allowed.

Writ petition allowed.

2012 (I) ILR- CUT- 1034

SANJU PANDA, J.

M.A. NO.58 OF 1999 (Dt.20.04.2012)

N**EW INDIA ASSURANCE CO. LTD.** ……..Appellant.

.Vrs.

SMT.SUKUN MUNDA & ORS. ……..Respondents.

A. EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.114.

Service of notice through courier service – Held, can not be presumed to be a valid communication.

In this case Insurance Company received cheque towards premium of the Insurance Policy and issued cover note – Cheque dishonoured – Insurance Company issued notice through courier service to the owner and the concerned authority intimating about the cancellation of the policy – Held, the plea of the Insurance Company that they have intimated the fact of cancellation of the policy to the owner through courier service cannot be presumed to be a valid communication.

(Para 8)

B. MOTOR VEHICLE ACT, 1988 (ACT NO.59 OF 1988) – S.149.

Insurance Company received cheque towards premium for the Insurance Policy and issued cover note – Cheque dishonoured – Insurance Company stated to have cancelled the policy and intimated the same to the owner through courier service – Held, service of notice through courier service cannot be presumed to be a valid communication and claim of the third party cannot be defeated for the said reason – Insurance Company is liable to pay compensation and realize the same from the owner of the offending vehicle.

(Para 10,11)

Case laws Referred to:-

1.2006 AIR SCW 162 : (State of Maharashtra-V- Rashid Babubhai Mulain)
2.AIR 2005 SC 3353 : (Salem Advocate Bar Association, Tamil Nadu-V- Union of India)
3.85(1998) CLT 485 : (M/s. United India Insurance Company Ltd.-V - Abada Khatun & Ors.)

For Appellant - M/s. G.P.Dutta
For Respondent Nos.1 to 3 - M/s. B.P.Behera, S.Pujari.

S. PANDA, J. The appellant-Insurance Company has filed this appeal challenging the award dated 27.10.1998 passed by the Second MACT, Northern Division, Sambalpur in Misc. (A) Case No.122 of 1993 (S).

2. The facts of the case as narrated are as follows:

The respondent-claimants being the legal heirs of the deceased filed an application claiming compensation of Rs.1,50,000/- due to death of Dubraj Munda in a vehicular accident. The accident took place on 4.4.1993 at 4.00 A.M. while the deceased was returning to his house by riding a bicycle. The offending bus bearing registration number OSS 2411 came in a high speed from the Jharsuguda side and near Pipalpada chhak dashed the deceased from his backside. He sustained injuries on his head, spinal cord and bleeding injuries on right side of the body. He was taken to the District Headquarters Hospital, Sambalpur, where he succumbed to the injuries on 7.4.1993. On being noticed, the owner of the offending vehicle being the insured and the Insurance Company being the insurer appeared and filed their written statements separately. The owner of the offending vehicle admitting the accident stated that the vehicle was validly insured with the Insurance Company. Since the policy was valid upto 21.3.1994, the Insurance Company is liable to indemnify him. The present appellant-Insurance Company had taken a plea in the written statement that there was no valid insurance policy on the date of the accident, i.e., on 4.4.1993. It had also taken a plea that the vehicle was sold by the so-called owner to one Uttam Das who issued a cheque bearing No.1194356 dated 22.3.1993 for Rs.7075/- drawn on United Bank of India, Sambalpur towards the premium of the insurance policy of the vehicle but the said cheque was dishonoured due to lack of fund in the Bank. Therefore, the cover note no.024644 dated 22.3.1993 issued was void. In the absence of actual acceptance of consideration money towards premium, the cover note was invalid and there was no contract of insurance from 22.3.1993 when the said cheque was dishonored by the Bank. Accordingly, policy was cancelled and the said fact was intimated to the owner of the vehicle and the RTO, Sambalpur. As such, the insurance company is not liable to pay any compensation in the absence of valid insurance policy. On the above pleadings, the Tribunal framed two issues, i.e., (i) Whether the accident took place on 4.4.1993 due to rash and negligent driving of the offending vehicle resulting in the death of Dubraj Munda; and (ii) whether the applicants are entitled to get any compensation ? If so, to what extent and from whom?

3. The parties adduced evidence in respect of their respective pleas. The claimants examined two witnesses. The Insurance Company examined five witnesses. The FIR, post-mortem report and R.C book were exhibited on behalf of the claimants. The Insurance Company exhibited the documents, i.e., proposal form, letter of U.Das addressed to opposite party no.1, cheque, cover note intimation regarding dishonor of cheque, office copy and letter addressed to opposite party no.2, office copy of the letter sent to RTO, receipt of courier service, etc. On analyzing the evidence adduced by the parties, the Tribunal came to the finding that the accident took place due to rash and negligent driving of the driver of the offending vehicle bearing registration OSS 2411 resulting in the death of Dubraj Munda. The cover note, Ext.D stands in the name of opposite party no.1 which was issued on 22.3.1993. The opposite party no.2 being the insurer of the offending vehicle is liable to pay the compensation and the Tribunal assessed the quantum of compensation at Rs.1,24,000/-.

4. Learned counsel for the appellant-Insurance Company submitted that the appellant duly intimated the fact to the owner that the policy was cancelled due to dishonor of the cheque and the appellant proved the intimation of cancellation of policy to the owner as well as RTO through courier service by filing a receipt thereof. The Tribunal took into consideration the said fact while disposing of the claim application. Since the insurance policy was cancelled and there was no valid insurance covering the date of the accident, the impugned award is liable to be set aside.

5. Learned counsel for the claimant-respondents submitted that the plea of the Insurance Company is not acceptable. The claimants being the third parties, they should not suffer as the Insurance Company issued a cover note of the policy on receipt of the cheque towards premium.

6. Considering the above facts and circumstances of the case and from the rival submissions made by the learned counsel for the parties, the questions arise for consideration to be decided in this appeal are; (a) Whether intimation of cancellation of insurance policy through courier service can be treated as sufficient in absence of any evidence to prove that the cancellation of policy was within the knowledge of the owner of the offending vehicle?, (b) Whether the Insurance Company having issued the cover note of the policy on receipt of the cheque in respect of premium can claim immunity thereunder to absolve itself from the liability?

7. Law is well settled that Section 27 of the General Clauses Act, 1897 deals with topic – 'Meaning of service by post' and says that where any

Central Act or Regulation authorizes or requires any document to be served by post, then unless a different intimation appears, the service shall be deemed to be effected by properly addressing pre-paying and posting it by registered post, a letter containing the document and unless the contrary is proved to have been effected at the time at which the letter would be delivered in ordinary course of post. The section thus raises a presumption of due service or proper service if the document sought to be served is sent by properly addressing, prepaying and posting by registered post to the addressee and such presumption is raised irrespective of whether any acknowledgment due is received from the addressee or not. It is obvious that in such a case the presumption is that the service shall be deemed to have been effected on the addressee to whom the communication is sent. The Court may presume that the common course of business has been followed in a particular case, that is to say, when a letter is sent by the post by pre-paying and properly addressing it, the same has been received by the addressee under the Evidence Act. The said presumptions are rebuttable but in the absence of proof to the contrary, the presumption of proper service is effected even if the addressee refused to accept the same. However, no such presumption under General Clauses Act as well as Section 114 of the Indian Evidence Act can be imputed in case of a service through courier.

8. The apex Court in the case of State of Maharashtra v. Rashid Babubhai Mulani reported in **2006 AIR SCW 162** has held that a certificate of posting obtained by a sender is not comparable to a receipt for sending a communication by registered post. When a letter is sent by registered post, a receipt with serial number is issued and a record is maintained by the Post Office. But when a mere certificate of posting is sought, no record is maintained by the Post Office either about the receipt of the letter or the certificate issued. The case with which such certificates can be procured by affixing ante-dated seal with the connivance of any employee of the Post Office is a matter of concern. The Department of Posts may have to evolve some procedure whereby the record in regard to issuance of certificates is regularly maintained showing a serial number, date, sender's name and addressee's name to avoid misuse. In the absence of such a record, a certificate of posting may be of very little assistance, where the dispatch of such communication is disputed or denied. Likewise though the courier services are maintained by the private persons, one cannot presume that the letter was delivered to the addressee and there is no certainty that the addressee has received the letter like registered post which was made through Post Office. Therefore, the plea of the Insurance Company that they have intimated the fact of cancellation of the policy to the owner through courier service cannot be presumed that it was a valid communication.

9. The apex Court in the case of Salem Advocate Bar Association, Tamilnadu v. Union of India, **AIR 2005 SC 3353** has held that service of summons through courier can be made in case the High Court makes appropriate rules and regulations and issue practice directions to ensure that such provisions of service are not abused so as to obtain false endorsements. The High Courts can consider making a provision for filing of affidavit setting out details of events at the time of refusal of service. The guidelines as to the relevant details to be given can be issued by the High Courts. The apex Court further suggested that the High Courts would issue, as expeditiously as possible, requisite guidelines to the trial courts by framing appropriate rules, regulations etc. However, till date no such rules or regulations have been issued to accept the service through courier service treating the same as sufficient which is sent through courier service.

10. In the present case, the appellant issued notice of cancellation through courier service in the year 1994 to the owner and the authority. For the reasons stated in the above paragraphs, service of notice of cancellation through courier service cannot be treated as sufficient.

11. The Insurance Company cannot take advantage that it has duly intimated the owner of the offending vehicle and the authority regarding cancellation of policy due to dishonour of cheque. The claim of the third party cannot be defeated for the said reason.

This Court in the case of M/s. United India Insurance Company Ltd. v. Abada Khatun and others, 85 (1998) CLT 485 has held that the claim of the third party, therefore, cannot be defeated for the self-created predicament of the insurer in issuing a policy without receiving the premium. Hence, the Insurance Company is liable to pay the compensation which it may realize from the owner of the offending vehicle.

Both the questions are answered accordingly.

12. In view of the above position of law and taking into consideration the finding of fact reached by the Tribunal, this Court feels that the interest of justice would be best served, if the compensation amount awarded by the Tribunal is reduced from Rs.1,24,000/- to Rs.1,05,000/- with 6% interest per annum.

13. Accordingly, this Court reduces the compensation amount awarded by the Tribunal from Rs.1,24,000/- to Rs.1,05,000/- (rupees one lakh five thousand) with interest 6% per annum from the date of the award till the date

of payment and directs that out of Rs.1,05,000/-, the Insurance Company shall deposit Rs.95,000/- (rupees ninety five thousand) in the name of the claimants in any Nationalized Bank under the fixed deposit scheme for a period of six years and the balance amount with interest shall be disbursed to the claimants on proper application/ identification. The entire exercise shall be completed within a period of four weeks from today.

14. Statutory deposit made by the Insurance Company before this Court be refunded to it after showing the receipt of deposit of the modified compensation along with interest before the Tribunal on proper application.

With the aforesaid modification of the impugned award, the appeal is partly allowed.

Appeal allowed in part.

2012 (I) ILR- CUT- 1040

SANJU PANDA, J.

W.P.(C) NO. 4050 OF 2012 (Dt.18.04.2012)

DAVIAN PARENTS ASSOCIATION, BBSR & ANR. .....Petitioners

.Vrs.

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

EDUCATION – D.A.V. Public School an unaided recognized school – Admission to higher class in the same school – School authorities can not fix cut off marks for taking admission in the higher class.

In the present case petitioner No.2 is a student of Class-X of D.A.V. Public School, Unit-VIII Bhubaneswar – He challenged notice issued by the school fixing cut off mark for taking admission in Class-XI by the students of the said school who have appeared Class-X CBSE Examination 2012 – Held, fixation of cut off mark for its own students as the eligibility criteria for being admitted in Class-XI is illegal, arbitrary – Direction issued to OP.3 school that after giving admission to their own students in Class-XI it may follow the entrance test for filling up the remaining vacant seats by outside candidates on the basis of merit. (Para 11,12)

Case laws Referred to:-

1.AIR 2002 SC 834 : (The State Financial Corporation & Anr.-V-M/s.Jagdamba Oil Mills & Anr.)

2.AIR 1996 SC 118 : (Principal,Cambridge School & Anr.-V-Ms. Payal Gupta &Ors.)

3,AIR 2009 SC 608 : (Principal, Kendriya Vidyalaya & Ors.-V-Saurabh Choudhury & Ors.)

For Petitioners - M/s. B.Routray & Associates.
For Opp.Parties - Mr. Pandey, Addl. Standing Counsel for SME (O.P.1)
M/s. T.Patnaik & Associates (O.P.2)
M/s.P.Panda & Associates (O.P.3)
M/s.B.Mohanty & Associates (O.P.4).

SANJU PANDA, J. Petitioner no.1, who is the parents' Association of the students of DAV Public School and petitioner no.2 is a student of Class-X of DAV Public School, Unit-VIII, Bhubaneswar, have filed the present writ petition assailing the stipulations made in the notice dated 27.8.2011 and 1.02.2012 under Annexure-1 & 2 respectively issued by the DAV Public School, Unit-VIII, opp.party no.4 fixing the cut-off mark for taking admission in Class-XI by the students of the said school who have appeared the Class-X C.B.S.E. Examination, 2012.

2. The short facts of the case are that the wards of the members of the petitioner no.1-association have been prosecuting their studies in the D.A.V. Public School, Unit-VIII, Bhubaneswar, which is affiliated to the Central Board of Secondary Education. The grievance of the petitioner no.1-association is that while the students of Class-X are going to appear at the CBSE Examination, 2012 in the month of March, 2012, the impugned notice dated 27.8.2011 has been published by opposite party no.4 stipulating the eligibility criteria for taking admission in Standard XI during the academic session 2012-13. The criteria are as follows :

> (1) Provisional admission to Class XI shall be made on the basis of the result score in SA-I (Examination), 2011 in Class-X.
>
> (2) Students securing 300 and above marks in aggregate out of 400 (Full Mark 80 x 5 subjects) and 60 in mathematics will be eligible to take admission in Class XI with the following subject groups.
>
> English (Compulsory), Physics, Chemistry, Maths, Biology/ Comp. Sc./ Phy. Edn.
>
> (3) Students securing 240 and above marks in aggregate out of 400 (Full mark 80 x 5 subjects will be eligible to take admission in Class XI with the following subject groups.
>
> English (Compulsory), Economics, Business Studies, Accountancy, Phy.Edn./ Maths/Comp.Sc./ Odia
>
> (4) Students securing 132 and above marks in aggregate out of 400 (Full Mark 80 x 5 subjects) will be eligible to take admissioin into Class XI with the following subject groups.
>
> English (Compulsory), History, Economics, Geography, Phy. Edn./ Pol.Sc.Psychology/ Odia.

(5) The above group of electives will be offered subject to availability of minimum 20 number of students."

Subsequently another notice was made on 01.02.2012 (Annexure-2) stipulating some other conditions for admission into Class XI of the school. The relevant conditions are as follows:

(i) If a candidate does not clear AISSE-2012 in the first chance, he/she will not be allowed for final admission and money deposited at the time of provisional admission will be refunded except tution fee.

(ii) The merit list of candidates for counseling and provisional admission will be displayed on 26.03.2012 at 5.00 P.M. on the School Notice Board. No individual letter of intimation will be sent to the candidates. Provisional admission will be on 28.3.2012 at 11.00 A.M.

The grievance of the petitioners is that the school authorities have fixed the cut-off marks as minimum eligibility criteria for provisional admission into Class-XI, which is contrary to the guidelines of the CBSE. It is submitted that as per the CBSE circular dated 29.7.2009 first preference shall be given to the own students on the basis of the common admission criteria. It is further submitted that fixation of minimum cut-off mark, i.e., 75% for Science Stream in the SA-1 examination in Class X can never be said to be a qualifying examination for Class-XI because the SA-1 examination covers only 50% of the courses of Class-X syllabus and carries only 20% weightage in the final marks obtained in Class-X by the students as per the Continuous Comprehensive Evaluation system prescribed by the CBSE. That apart, neither the CBSE nor the School has conducted the final examination for Class-X as on 1.2.2012 and therefore, issuance of such notification is misconceived. Learned counsel for the petitioners vehemently argued that because of fixation of such arbitrary stipulations in the notice dated 27.8.2011 under Annexure-1, many meritorious students, who have secured more than CGPA 8 out of total 10, have been denied admission into Class-XI, the list of such students is annexed as Annexure-5. Therefore, it is submitted that the eligibility criteria fixed by the school in the notice dated 27.8.2011 is arbitrary and is not sustainable in law as the school authorities cannot fix the cut-off mark as minimum eligibility criteria to eliminate its own students for taking admission in higher class, i.e., Class-XI in the same school.

3. Counter affidavit has been filed by opp.party no.3 refuting the allegations of the petitioners wherein a stand has been taken that they have evolved their own criteria to admit the students in Class-XI as per the C.B.S.E. guidelines and provisional admission has been given before publication of the result of Class-X to enable the students to complete in All India level examination for admission and to continue their studies pursuant to the letter issued by the C.B.S.E. on 20.7.2007, copy of which is annexed as Annexure-A/3 to the counter affidavit. Further, it is stated that the eligibility criteria fixed by the school for admission in Class XI was prepared having due regards to the academic level required for different groups of subjects on the basis of performance in SA-1. The C.B.S.E. guidelines dated 29.7.2009 (Annexure-3) also stipulate that first preference for Class-XI admission shall be given to the own students on the basis of common admission criteria evolved by the school and in view of the said guidelines the school has invariably given admission to its own students into Class-XI and thus, there is no violation of the C.B.S.E. guidelines by the school authorities. It is further averred in the counter affidavit that the cut-off mark has been rationally fixed keeping in view the intellectual demands of different streams/courses and after the school students are admitted in different streams as per the cut-off marks, if any seat remains vacant appropriate strategy has been decided to be taken up to fill up such seats in a fair and transparent manner. Accordingly, the school authorities have already given provisional admission to 125 students as per the criteria fixed in Annexure-1. It is further stated that the total number of students appeared the Class-X C.B.S.E. Examination was 273, but in science stream in Class-XI, the total seats is only 168. As per the criteria fixed in Annexure-1, all total 125 students have been provisionally admitted in Class-XI in science stream in total exclusion of outsiders and the balance 43 students of the said school in science stream will get an opportunity for selection on the basis of merit in the entrance test for which necessary applications have been invited. So far as the other streams like Commerce and Humanities are concerned, out of total 56 nos. of seats in Commerce, 16 nos. of students of the said school have been provisionally admitted in Class-XI and the rest 40 nos. of seats are to be filled up through the common entrance test though the total nos. of 35 students of the said school have applied for Commerce wing and out of total 56 nos. of seats in Humanities subject, only four nos. of students have applied for the same, but no students have been admitted in Class-XI in Humanities subject of the said school. The notice for the entrance test was published in the newspaper on 31.3.2012 (Annexure-C/3) and thus, the school authorities have given chance to the left out students of the school for taking admission in Class-XI through the entrance test along with outside students. Further, the opp.party no.3 has taken a stand that the school is a

private school and does not get any aid from the Government and being unaided school, it has its own fee structure. Further, on account of a dispute relating to fee revision effected in 2009-10, the school authorities are collecting the fee as per the direction of this Court and continuing to admit / re-admit the students on the basis of the fees applicable during 2008-09 and the school authorities have challenged the order of the Court before the apex Court, which is pending. Therefore, they have also given notice vide Annexure-2 that the fee structure will be notified at the time of publication of the merit list and finally prayed for dismissal of the writ petition as the school authorities have not discriminated the students and no cause of action arose for filing the writ petition by the petitioners. In support of the aforesaid decision, he placed reliance on the decision of the Supreme Court in **The State Financial Corporation and another v. M/s.Jagdamba Oil Mills and another**, AIR 2002 S.C. 834 and submitted that Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed and the observations of the Courts are not to be read as Euclid's thermos nor as provisions of the statute and these observations must be read in the context in which they appear. In the said decision it has also been held that the judgments of the Courts are not to be construed as statutes.

4. Mr.T.Pattnaik, learned counsel appearing for the C.B.S.E., opposite party no.2 submitted that the C.B.S.E. has issued guidelines on 29.7.2009 taking into consideration that +2 course is crucial and turning point of the career of a student and the same depends on the higher studies and bright future of a student and specifically has given instruction to its affiliated schools regarding admission of its own students so that the students will not be harassed or prohibited to take admission in Class-XI keeping in view the psychology of the students and uncertainty of admission in Class-XI in the same school, where they have studied upto Class-X.

5. The moot question that arises for consideration in this writ petition is as to whether the school authorities are justified in fixing the cut-off mark for taking admission of their own students in Class-XI in different streams pursuant to the notice in Annexures-1 and 2 and allowing the left out unsuccessful students of the school to appear the entrance test with outsiders for taking admission in Class-XI in different elective group of subjects.

6. Mr.B.Routray, learned Senior Counsel relying upon the decision of the Supreme Court in the **Principal, Cambridge School and another v. Ms.Payal Gupta and others**, AIR 1996 SC 118, submitted t hat that the

head of an educational institution is not authorized to prescribe a cut-off level of marks for continuance of further studies in higher class in the same school by a student who passes a public examination. Therefore, where a student passed Xth class which was a public examination of Central Board of Secondary Education in unaided recognized school, he/she cannot be denied admission in XIth class of the same school by the head of the institution by prescribing cut-off level of marks (in the instant case 75% in SA-1). It was further observed that once a student is admitted to a school, the same admission continues class after class until he passes the last examination for which the school gives training and no fresh admission or readmission is contemplated from one class to the other. Therefore, in a Higher Secondary School, the examination of tenth class cannot be regarded as a terminal examination for those who want to continue their study in eleventh and twelfth classes of the said school. The question of an admission test or the result in a particular class or school for the purpose of admission would arise only if a student of one institution goes for admission in some other institution. The question of admission test on the basis of result in a particular class will not be taken into account in the case of a student of the same school who passes the public examination.

7. Similar view has also been taken by the Supreme Court in the case of **Principal, Kendriya Vidyalaya and others v. Saurabh Chaudhary and others**, AIR 2009 SC 608. In the said case, the Supreme Court while dealing with admission of students to Class XI in Central School has categorically laid down as follows :

> "x x x a Central School cannot deny admission to Class XI to one of its own students on the ground that he/she failed to secure the cut-off marks in the Class-X C.B.S.E. examination. It was observed by the Supreme Court that there cannot be no objection to a school laying down cut-off marks for selection of suitable stream/ course for a student, giving due regard to his/her aptitude as reflected from the Class-X marks where there are more than one stream. Xx x x "

8. Learned Senior Counsel also cited an unreported decision of this Court in W.P.(C) No.11028 of 2010 disposed of on 16.7.2010 (Udayabhanu Pani and others v. State of Orissa and others), wherein this Court also relying upon the aforesaid decisions of the Supreme Court held that:

> "The school authorities cannot fix the cut-off marks for giving admission in Class –XI for the students of the same school, who passed Class-X examination conducted by the C.B.S.E. and the

> students cannot be prohibited for attending the classes of XI on the above ground of eligibility on account of non-securing the cut-off marks as prescribed in Class-X examination."

9. On perusal of the circular issued by the C.B.S.E dated 29.7.2009 (Annexure-3), under the heading "Admission of students", clause (b) reads as follows:

> "It is noted that some schools are giving preference to outside students for admission in Class-XI on the basis of higher marks which should be avoided to prevent unhealthy competition. First preference for Class XI admission shall be given to own students on the basis of common admission criteria evolved by the school.
>
> (emphasis supplied)

But nowhere in the said circular the C.B.S.E. has made fixation of any such cut-off mark of 75% in SA-1, i.e., Pre-Board Examination of Class-X. That apart, learned Sr. Counsel appearing for the petitioners drew attention to Annexure-5, the list of some of the students of the said school, who have secured CGPA above 8.4 and less than 9.6 in the Class-X CBSE Examination during the year 2011, and have been illegally denied admission in Class-XI.

10. In the case in hand, this Court finds that there is no reason to fix two cut-off marks so far as Science stream is concerned, i.e., a student has to secure 300 marks and above in aggregate and 60 marks in Mathematics in S.A.1. However, in course of argument, learned counsel for opposite party no.3 produced a copy of the minutes of the proceedings of the Advisory Committee meeting held on 22.8.2011 comprising of three experts, wherein it was observed that the students who have been very good in Mathematics in Class-X have coped up well with the science subjects in Class XI and XII. If that is the reason to fix the cut-off marks, then why again the school authorities have fixed 300 marks in aggregate and 60 marks in Mathematics in S.A.-1 for taking provisional admission in Class-XI. Further, on perusal of the detailed marks statement of the eligible students applied for admission in Class-XI (science stream), it reveals that the school authorities have given provisional admission upto Sl.No. 125 and the students from Sl.No. 126 to 136 who have secured 300 marks in aggregate and above 60 marks in Mathematics, have been denied to take provisional admission in Class-XI. Thus, this Court is of the view that there is no nexus between the aggregate marks and the marks secured in Mathematics in fixing the cut-off marks for taking provisional admission in Class-XI for its own students.

11. In view of the foregoing discussions and the authoritative pronouncements of the Supreme Court as well as this Court and the clear guidelines issued by the C.B.S.E., this Court finds that the opposite party no.3-School could not have fixed the cut-off marks for giving provisional admission to Class-XI for the students of the same school, who passed Class-X examination conducted by C.B.S.E. and therefore, the fixation of cut-off mark as the eligibility criteria for being admitted in Class-XI so far as the students of the opp.party no.3-school is concerned, is illegal, arbitrary and unreasonable. Accordingly, the notices dated 27.8.2011 and 1.2.2012 under Annexures-1 & 2 respectively are quashed.

12. In the result, the writ petition -is allowed and the opp.party no.3-School is directed to give admission to their own students in Class-XI in Science, Commerce and Humanities stream and after giving admission to their own students, the opposite party no.3-School may follow the entrance test for filling up the remaining vacant seats by outside candidates in the respective courses on the basis of merit. No costs.

Writ petition allowed.

2012 (I) ILR- CUT- 1048

B.K.NAYAK, J.

W.P.(C) NO. 20547 OF 2010 (Dt. 16.03.2012)

PRADEEP KUMAR MOHANTY ……. Petitioner.

.Vrs.

BANA BEHARI MOHANTY & ORS. ……..Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 1, RULE 10(2).

Impletion of party – Suit for partition – Parties injuncted from alienating any portion of the suit property during pendency of the suit – In defiance of the restraint order Defendant Nos.1 & 2 sold specific portion of the suit property to the petitioner – Petitioner filed petition to be impleded as a party-defendant which was rejected by the learned Civil Judge, Bhubaneswar – Hence the writ petition.

Held, since the petitioner has himself filed petition to be impleded as a party and there was no material to the effect that he was aware of the order of injunction and in order to facilitate the petitioner to workout equity in the final decree proceeding he should be impleded as a party. (Party 10)

Case laws Relied on:-

1.AIR 1999 SC 976 : (Savitri Devi-V- District Judge,Gorakhpur & Ors).
2.1988(II) OLR-521 : (Pranakrushna@ Ramakrishna Panda & Ors.-V-Umakanta Panda & Ors.)
3.2007(I) OLR.(SC)-494 : (Dhanalakshmi & Ors.-V-P.Mohan & Ors.)

Case laws Referred to:-

1.(1996)5 SCC 539 : (Sarvinder Singh-V- Dalip Singh & Ors.)
2.AIR 2007 SC 1332 : (Sanjay Verma-V- Manik Roy & Ors.)
3.AIR 1996 SC 135 : (Surjit Singh & Ors.etc.etc.-V-Harbans Singh & Ors.etc.etc.)
4.1992(I) OLR-17 : (Sri Jagannath Mahaprabhu, rep.by Marfatder Jagannath Ballav Endowment Trustree Board through the Executive Officer-V-Pravat Chandra Chaterjee & Ors.)

For Petitioner - Mr. Samir Kumar Mishra.
For Opp.Parties - Mr. S.P.Mishra.

B.K.NAYAK, J. In this writ application the petitioner assails the order dated 13.10.2010 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No.423 of 2004 whereby the learned Civil Judge has rejected his petition under Order 1 Rule 10(2), C.P.C. to be impleaded as a party-defendant to the suit.

2. The present opposite party no.1 has filed the aforesaid civil suit against the present opposite party nos. 2 to 11 seeking relief of partition of the suit property and allotment of his separate share. Admittedly in FAO No.278 of 2005 (arising out of the suit) between the parties to the suit, this Court vide order dated 07.11.2006 injuncted the parties from alienating any portion of the suit property during the pendency of the suit. While the injunction order was operating, defendant nos. 1 and 2 sold a specific portion of the suit property appertaining to Plot No.1000, Khata No.1416 measuring Ac.0.200 in Mouza-Bhubaneswar to the intervenor-writ petitioner vide two registered sale deeds on 13.11.2009. Thereafter, the present petitioner filed a petition under Order 1 Rule 10 (2), C.P.C. before the trial court stating that after purchase of the said portion of the suit land while he was constructing a house thereover, the plaintiff-opposite party no.1 along with some others prohibited him from proceeding with the construction stating that the said property is the subject matter of a partition suit. It was further asserted by the petitioner that his vendors (defendant nos.1 and 2) never disclosed before him about the pendency of the suit and rather represented that the property was free from all encumbrances and litigation. It was, therefore, stated that the intervenor having purchased the property bona fide for value has acquired interest therein and, therefore, he being a necessary as well as proper party should be impleaded as a defendant in the suit.

The court below has rejected the said petition by the impugned order stating that this Court in FAO No.278 of 2005 not only restrained the parties from alienating any portion of the suit property but also targeted the suit for disposal within six months and that in the meantime evidence from the side of the plaintiff has already been closed.

3. In assailing the impugned order, the learned counsel for the petitioner contended that even though the petitioner is a lis pendense purchaser, he is a bonafide transferee for value and has acquired right to the property and, therefore, he is a necessary party to the suit and should be impleaded. It is his further submission that the petitioner purchased the property being unaware of the order of injunction passed by this Court in the earlier FAO and that the sale by his vendors in violation of the injunction order does not become invalid.

Learned counsel for the contesting opposite party no.1(plaintiff), on the other hand, relying on the decisions of the apex Court reported in (1996) 5 SCC 539; ***Sarvinder Singh v. Dalip Singh and others*** and AIR 2007 SC 1332; ***Sanjay Verma v. Manik Roy & Ors***, submits that defendant nos. 1 and 2 were prohibited by the injunction order from selling any portion of the suit property affecting the right of the plaintiff and, therefore, the sale by them of a part of the suit land in favour of the intervenor-petitioner is hit by the doctrine of lis pendens and, as such the intervenor-purchaser cannot be considered to be either a necessary or proper party to the suit. He also relies on the decision reported in AIR 1996 SC 135; ***Surjit Singh and others etc. etc., v. Harbans Singh and others etc. etc.***

4. The first question to be decided is whether the petitioner by virtue of his purchase of part of the suit land from defendant nos.1 and 2 in violation or breach of the injunction order has acquired valid right, title and interest thereto or the sale is invalid ? In the case of ***Surjit Singh*** (supra) where in a partition suit, in spite of order of injunction restraining the parties from alienation of any part of the suit property one of the defendants transferred his rights under the preliminary decree, and the transferees made an application under Order 22 Rule 10, C.P.C. to be impleaded as parties, the apex Court held as follows :

> "**4.** As said before, the assignment is by means of a registered deed. The assignment had taken place after the passing of the preliminary decree in which Pritam Singh has been allotted 1/3rd share. His right to property to that extent stood established. A decree relating to immovable property worth more than hundred rupees, if being assigned, was required to be registered. That has instantly been done. It is per se property, for it relates to the immovable property involved in the suit. It clearly and squarely fell within the ambit of the restraint order. In sum, it did not make any appreciable difference whether property per se had been alienated or a decree pertaining to that property. In defiance of the restraint order, the alienation/assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes. Once that is so, Pritam Singh and his assignees, respondents herein, cannot claim to be impleaded as parties on the

> basis of assignment. Therefore, the assignees-respondents could not have been impleaded by the trial Court as parties to the suit, in disobedience of its orders. The principles of lis pendens are altogether on a different footing. We do not propose to examine their involvement presently. All what is emphasised is that the assignees in the present facts and circumstances had no cause to be impleaded as parties to the suit."

It appears that the apex Court did not consider the question of validity or invalidity of the assignment/alienation made in violation of any injunction order. It only emphasized that if the alienation is made while the order of injunction is in force, the court has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes.

In the case of ***Sarvinder Singh*** (supra) the apex Court, applying the principle of lis pendens as envisaged in Section 52, T.P. Act, held that a lis pendense purchaser is neither a necessary nor proper party. Similar view was expressed in the case of ***Sanjay Verma*** (supra).

5. Learned counsel for the petitioner has invited the attention of this court to a larger Bench decision of the apex court reported in AIR 1999 SC 976; ***Savitri Devi v. District Judge, Gorakhpur and others*** in support of his contention that the decision in the case of ***Surjit Singh*** (supra) was noticed in the said case and the same was distinguished explaining that the lis pendens alienation in ***Surjit Singh*** (supra) was made, while both the transferor and the transferee were aware of the order of injunction that was operating. On going through the decision in the case of ***Savitri Devi*** (supra), it found that in a suit filed by the mother against the sons for maintenance and creation of a charge over the ancestral property, the court granted injunction restraining her sons from alienating the suit property. One of the sons, however, sold his share in the property and the purchasers filed application under Order 1 Rule 10 read with Section 151, C.P.C. for their impleation in the suit with allegation that the plaintiff and the defendants had colluded together in order to cause loss to the purchasers and that they were bonafide purchasers for value and have acted in good faith. In the aforesaid facts and circumstances, the apex Court upheld the impletion of the purchasers holding as follows :

> "**8**. The facts set out by us in the earlier paragraphs are sufficient to show that there is a dispute as to whether the first defendant in the suit was party to the order of injunction made by the Court on 18.08.1992. The proceedings fo r punishing him for contempt are

admittedly pending. The plea raised by him that the first respondent had played a fraud not only against him but also on the Court would have to be decided before it can be said that the sales effected by the first defendant were in violation of the order of the Court. The plea raised by respondents 3 to 5 that they were bona fide transferees for value in good faith may have to be decided before it can be held that the sales in their favour created no interest in the property. The aforesaid questions have to be decided by the Court either in the suit or in the application filed by respondents 3 to 5 for impleadment in the suit. If the application for impleadment is thrown out without a decision on the aforesaid questions, respondents 3 to 5 will certainly come up with a separate suit to enforce their alleged rights which means multiplicity of proceedings. In such circumstances, it can not be said that respondents 3 to 5 are neither necessary nor proper parties to the suit.

9. Order I, Rule 10, C.P.C. enables the Court to add any person as party at any stage of the proceedings if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision in the Code."

In paragraph-11 thereof the Court also observed as follows :

"11. In Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524: (1992 AIR SCW 846), this Court discussed the matter at length and held that though the plaintiff is 'dominus litis' and not bound to sue every possible adverse claimant in the same suit, the Court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the facts and circumstances of a particular case……."

While distinguishing the case of ***Surjit Singh*** (supra), the apex Court in paragraph-12 of the judgment explained as follows :

"xxx xxx …. …. There was no dispute in that case that the assignors and the assignees had knowledge of the order of the injunction passed by the Court. On those facts, this Court held that the deed of assignment was not capable of conveying any right to the assignees and the order of impleadment of the assignees as parties was unsustainable. xxxx xxxx …."

6. A Division Bench of this Court in the case of ***Pranakrushna @ Ramakrishna Panda and others v. Umakanta Panda & Others;*** 1988 (II) OLR-521 has held that alienation in violation of an injunction order is not void but valid inasmuch as the only consequence of such transfer is that the transferor (person injuncted) is liable to be punished.

7. Considering the question of impletion of lis pendense purchaser a Full Bench of this Court in the case of ***Sri Jagannath Mahaprabhu, represented by Marfatder Jagannath Ballav Endowment Trustree Board through the Executive Officer v. Pravat Chandra Chaterjee and others;*** 1992 (I) OLR-17 held as follows :

> "**9.** Though in Basanta Ram's case (supra), it has been held that a lis pendense 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 Order 22, Rule 10(1). Even if an application has been filed under Order 1, Rule 10, labelling the application being misconceived, the Court should ignore the labelling of the application as one under Order 1, Rule 10 and treat the same as one filed under Order 22, Rule 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 (supra) and rejected the application of the pendente lite transferee solely upon a consideration of the principles embodied in Order 1,Rule 10, C.P.C."

8. The apex Court in the case of ***Dhanalakshmi and others v. P. Mohan and others;*** 2007(I) OLR (SC)-494 have held that bona fide purchasers for value are entitled to come on record in order to work equity in their favour in the final decree proceeding and, therefore, they are necessary and proper parties to the suit.

9. It is not borne out from the record that the petitioner-transferee-intervenor was aware of the order of injunction passed by this Court in the FAO restraining the parties from transferring any part of the suit land. In such

circumstances, the decision in the case of ***Surjit Singh*** (supra) will have no application.

10. Considering the ratio of the aforesaid decisions including the larger Bench decision in the case of ***Savitri Devi*** (supra), since the intervenor-petitioner has himself filed the petition to be impleaded as a party and in the absence of any material to the effect that he was aware of the order of injunction restraining the parties from transferring any part of the suit land and in order to facilitate the petitioner to work out equity in the final decree proceeding, he should be impleaded as a party.

Accordingly, I allow the writ application, set aside the impugned order and allow the petitioner's prayer to be impleaded as a party to the suit. Interim order of stay stands vacated. The parties are directed to appear before the court below on 30.03.2012. The writ application is disposed of.

Writ petition allowed.

2012 (I) ILR- CUT- 1055

S.K.MISHRA, J.

W.P.(C) NO.4715 OF 2010 (Dt.01.11.2011)

KUNI PALAI ……..Petitioner.

.Vrs.

SUB-COLLECTOR, PURI & ORS. …….Opp.Parties.

SERVICE – Anganwadi Worker – Applicant should be a resident of the village in which the Anganwadi Centre was proposed to be established – In order to take advantage of being a resident of the Anganwadi Centre area, the applicant must file a residential certificate along with her application on or before the last date of submission of application.

In this Case last date of submission of application was 26.11.2007 – O.P.3 applied for the post but has not annexed the residential certificate - O.P.3 got married on 28.11.2007 and granted a residential certificate on 30.11.2007, so she must have submitted the certificate after expiry of the last date of filing of the application – Held, order of the Sub-Collector, Puri appointing O.P.3 as Anganwadi Worker is set aside and direction issued to the C.D.P.O. for appointment of the petitioner.

Case laws Referred to:-

1.2011(I)I.L.R. Cut 123 : (Padmabati Pattnaik @ Nayak-V- State of Orissa & Ors.)
2.AIR 2009 SC 935 : (Diptimayee Parida-V- State of Orissa & Ors.)
3.2011(II) I.L.R. Cut 184 : (Sakhi Pradhan-V- State of Odissa & Ors.)
4.2007(II) OLR 577 : (Chandramani Jena & Ors.-V-State of Orissa & Ors.)
5.2010(II) OLR 188 : (Sasmita Sahoo-V-State of Orissa)
6.(2007)11 SCC 681 : (State of Karnataka & Ors.-V-Ameerbi & Ors.)

For Petitioner - M/s. D.P.Dhal, K.Dash, B.K.Tripathy, S.Mohapatra, A.K.Mishra & K.Mohanta.
For Opp.Parties - Addl. Govt. Advocate (for O.P.1 & 2)
M/s. H.N.Mohapatra & A.Samantaray (for O.P.3)

S.K.MISHRA, J. Short question that arises for determination in this writ petition is whether the applicant to be engaged as Anganwadi worker should file the requisite residential certificate along with her application on or before

the last date of submission of application or the same can be condoned, so as to enable her to file the residential certificate issued at a date subsequent to the last date of application.

2. The C.D.P.O., Krushnaprasad issued Notification No.140 dated 02.11.2007 inviting applications for selection of Anganwadi Worker for Nuagaon Anganwadi Centre. The last date of application was 26.11.2007. One of the conditions that needs to be satisfied by the applicant is that the applicant should be a resident of the village in which the Anganwadi Centre was proposed to be established. In pursuance to such advertisement, the petitioner, opposite party no.3 and two others submitted their applications. It is also not disputed that though the petitioner had submitted residential certificate along with her application, such certificate was not annexed by the opposite party no.3. It further transpires from the record that opposite party no.3 married to one Papu Palai on 28.11.2007 in a temple of that village and immediately thereafter she applied for a residential certificate. The application was allowed and she was granted a residential certificate on 30.11.2007. However, on scrutiny, her name was rejected because the application submitted by her was not complete and the petitioner was given appointment.

3. Such a decision taken by the Selection Committee was assailed by opposite party no.3 before the Sub-Collector, Puri, which was registered as A.W.W. Misc. (A) No. 42 of 2008, wherein the learned Sub-Collector, mainly relying on the fact that opposite party no.3 has secured more mark in the H.S.C. examination, allowed the appeal and set aside the selection of the petitioner. Such order has been assailed in this writ petition.

4. In assailing the order passed by the learned Sub-Collector, learned counsel appearing for the petitioner submitted that opposite party no.3 was not a resident of the Anganwadi Centre area on the last date of application and her application was incomplete as she has not annexed copy of the residential certificate to the application. Hence, the application was rightly rejected by the Selection Committee. Therefore, it is submitted that the order passed by the learned Sub-Collector is erroneous and is liable to be set aside. Learned counsel for opposite party no.3, on the other hand, submitted that the marriage between opposite party no.3 and her husband was solemnized much prior to the relevant date before a Notary and, therefore, she was a resident of the Anganwadi Centre area on the last date of application. Hence, her application should not have been rejected. It is further emphasized by the learned counsel for the opposite parties that she

being more meritorious of the two candidates, she should be given preference over the petitioner.

5. A similar question arose before a Bench of this Court in ***Padmabati Pattnaik alias Nayak v. State of Orissa and others,*** 2011 (I) I.L.R. Cut 123, wherein this Court came to the conclusion that ordinarily qualification or extra qualification laid down for the recruitment should be considered as on the last date for filing of the application. In the said case, reference has been made to the reported case of ***Diptimayee Parida v. State of Orissa and others,*** AIR 2009 SC 935, wherein it has been held that as per the Government Circular, the candidate can be given additional mark because of the fact that she was married but only if her marriage has been solemnized before the last date of filing of the application. So the moot question was whether she has that requisite qualification as on the last date of application. Such a decision has been taken by the Hon'ble Supreme Court in a case involving selection and engagement of Anganwadi worker.

A Division Bench of this Court in a case ***Sakhi Pradhan v. State of Odissa and others,*** 2011 (II) ILR Cut-184 has also examined this point and in a very clear terms laid down that as per the condition of the advertisement, production of residential certificate is essential. The appellant applied for the post with an undertaking to produce the residential certificate later but failed to produce the same even on the last date of receipt of the application. The Court held that non-filing of the residential certificate along with the application pursuant to condition no.1 of the advertisement has rendered the application invalid.

6. Thus, from the aforesaid discussion, it is clear that in order to take advantage of being a resident of the Anganwadi Centre area, the applicant must file a residential certificate along with her application on or before the last date of submission of application, in this case it is 25.11.2007. It is admitted that she has obtained the certificate on 30.11.2007. So there is no dispute that she has filed the residential certificate after expiry of last date of filing of the application. Hence, her application was rightly rejected by the Selection Committee and engagement order was issued in favour of the petitioner.

7. Learned counsel for the petitioner further assailed that the condition requiring the applicant being a resident of the Anganwadi centre area is unconstitutional in view of the ratio decided in ***Chandramani Jena and others v. State of Orissa and others,*** 2007 (II) OLR 577, wherein this Court has held that the condition in the advertisement which seeks to confine

such appointment only to the residents of the block in question for appointment of Swechhasevi Sikhya Sahayak is violative of Articles 14 and 16 of the Constitution of India. However, the case was in relation to Swechhasevi Sikhya Sahayak, who becomes a Junior Teacher or Primary School Teacher on completion of certain years of qualifying service. But in this case, the petitioner is an applicant for being engaged as an Anganwadi worker, which is a voluntary service. In the case of ***Sasmita Sahoo v State of Orissa,*** 2010 (II) OLR 188, this aspect of the case has been considered and in view of the ruling of the Supreme Court in ***State of Karnataka and others v. Ameerbi and others,*** (2007) 11 SCC 681. This Court has come to the conclusion that the requirement of the applicant being a resident of the Anganwadi Centre area is not violative of Articles 14 and 16 of the Constitution. Such a question is no more *res intigra* and it cannot be re-agitated.

8. In view of the aforesaid discussion, this Court comes to the conclusion that the order passed by the learned Sub-Collector, Puri in the aforesaid case is unsustainable and is liable to be set aside. Accordingly, the writ application is allowed without cost. The order dated 04.03.2010 passed by the learned Sub-Collector, Puri in A.W.W. Misc. (A) No.42 of 2008 is hereby set aside. It is directed that the C.D.P.O. shall issue order of appointment against the petitioner within a period of one month from the date of communication of this order. The petitioner is directed to file requisites for communication of this order within a week.

Writ petition allowed.

2012 (I) ILR- CUT- 1059

S.K.MISHRA, J.

W.P.(C) NO.23726 OF 2011 (Dt.14.03.2012)

M/S. ADHUNIK METALIKS LTD. & ANR. ……..Petitioners.

.Vrs.

WESTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LTD. & ORS. ……. Opp.Parties.

ELCTRICITY ACT, 2003 (ACT NO.36 OF 2003) – S.126.

"**Unauthorized use of electricity" for the purpose of this section means usage of electricity by any artificial means; or by a means not authorized by the concerned person or authority or licensee; or through a tampered meter; or for the purpose other than for which the usage of electricity was authorized; or for the premises or areas other than those for which the supply of electricity was authorized.**

In this case WESCO granted power supply to the petitioners company i.e. M/s. Adhunik Metaliks Ltd. for its own use – Petitioners company extended power supply to M/s. Vedvyas Ispat Ltd. which was not agreed upon between WESCO and the petitioners company – Held, "unauthorized use of electricity" also means the usage of electricity for premises or areas other than those for which the supply of electricity was authorized – It can not be said that the action of the assessing officer in passing the provisional order of assessment is without jurisdiction as stated by the petitioners. (Para 12,16,17)

Case laws Referred to:-

1.AIR 2003 SC 2120 : (Harbanslal Sahnia & Anr.-V-Indian Oil Corpn. Ltd. & Ors.)
2.101(2006)CLT 160 (SC) : (U.P. State Spining Co.Ltd.-V-R.S. Pandey & Anr.)
3.AIR 1999 SC 22 : (Whirlpool Corporation-V- Registrar of Trade Marks, Mumbari & Ors.)

For Petitioners - M/s. Ashok Ku.Parija, Sr. Advocate
S.P.Sarangi,P.P.Mohanty, D.K.Das,
P.K.Das, H.P.Das, A.Pattnaik & L.Swain.

For Opp.Party Nos.1 & 3 - M/s. Pradipta Mohanty, D.N.Mohapatra, Smt.J.Mohanty, P.K.Nayak, S.N.Dash.

S.K.MISHRA,J. In this writ petition, the petitioners, a Limited Company, have assailed the final assessment order dated 1.8.2011 passed by the Assessing Officer-Cum-Assistant General Manager (Elect.), Rajgangpur Electrical Division, Rajgangpur, Sundargarh, opposite party no.2, under Section 126 of the Electricity Act, 2003 (for short "the Act" for brevity).

2. On 6.7.2011 a provisional order of assessment was passed under Section 126(1) and (2) of the Act against the petitioners company on the allegation that during inspection on 29.6.2011 at 16.59 hours it was detected that the petitioners company had unauthorisedly extended power supply to M/s.Vedvyas Ispat Limited and, accordingly, it was called upon to either deposit an amount of Rs.42,46,644/- or to show cause as to why the amount shall not be realised within seven days. The petitioners company filed its show cause contending, inter alia, that M/s.Vedvyas Ispat Limited has amalgamated with the petitioner company w.e.f. 1.4.2008 pursuant to the order dated 5.11.2009 passed by the Hon'ble Company Judge of this Court and, therefore, ceased to exist. The premises on which the impugned order of assessment has been passed is without any basis and, therefore, the provisional order of assessment be withdrawn.

3. The petitioners company contend that since M/s.Vedvyas Ispat Limited did not exist after 1.4.2008, the question of it unauthorisedly extending power supply to it thereafter or even on 29.6.2011 was misconceived. Notwithstanding such submissions, the final order of assessment has been passed calling upon the petitioners company to deposit an amount of Rs.42,46,644/-.

4. The opposite parties, i.e. the Western Electricity Supply Company of Orissa Ltd.(hereinafter referred to as the "WESCO") has, inter alia, pleaded that the writ petition is not maintainable in view of the availability of the alternative remedy under Section 127 of the Act. Secondly, it is contended that the scheme/order of agreement has not come to effect on the date on which the provisional order of assessment was passed and even on 1.8.2011 when the final order of assessment was passed. Adjudication of the dispute, which arises in the writ petition, involves disputed technical issues and this Court should not entertain the writ petition.

5. Thus, at the outset the question regarding maintainability of the writ application is taken up. It is not disputed that the assessment impugned is appealable under Section 127 of the Act. Learned counsel for the petitioners company submitted that in spite of such alternative remedy, this case comes within the purview of the exceptions to such self-imposed restraint by the Court. It is contended that the assessment is without jurisdiction and, therefore, the same is amenable to writ jurisdiction.

6. The Supreme Court in ***Harbanslal Sahnia and another v. Indian Oil Corpn. Ltd. and others***; AIR 2003 SUPREME COURT 2120 has held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is rule of discretion and not one of compulsion. In an appropriate case in spite of availability of alternative remedy the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

7. Similar view has been taken in ***U.P. State Spining Co. Ltd. Vrs. R.S. Pandey & another***; 101(2006) CLT 160 (SC), wherein the Supreme Court held that not exercising the power in case of availability of alternative remedy is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case of that there exist good grounds to invoke the extraordinary jurisdiction.

8. The Supreme Court, in an unreported case of ***NIVEDITA SHARMA VS. CELLULAR OPERATORS ASSN. OF INDIA & ORS***.; CIVIL APPEAL N0.10706 OF 2011, has examined the question of maintainability of a writ petition before the High Court under Articles 226 and 227 of the Constitution in spite of existence of a statutory remedy of appeal available to the parties under Section 19 of the Consumer Protection Act, 1986. The Supreme Court held as follows:-

> "We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation – L. Chandra Kumar v. Union of India (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

Thus, the Supreme Court further held that the existence of alternative remedy is not a bar to entertain a writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge. Holding thus, the Supreme Court has set aside the order passed by the Delhi High Court.

9. In ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others***; AIR 1999 SUPREME COURT 22, it has been laid down that the jurisdiction of the High Court in entertaining a Writ Petition under Art.226 of the Constitution in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. Thus, the Supreme Court has held that the High Court was not justified in dismissing the Writ Petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction The Supreme Court has further held that in view of pendency of these proceedings in the High Court and specially in view of Section 107 of the Trade and Merchandise Marks Act, 1958, the Registrar could not legally issue any suo motu notice to the appellant under section 56(4) of the Act for cancellation of the

Certificate of Registration/Renewal already granted. In view of Section 56(4), the Registrar has not jurisdiction to issue such a notice.

10. Now coming to the case at hand, it is contended by the learned counsel for the petitioners that M/s.Vedvyas Ispat Limited having been amalgamated with the petitioners company, the WESCO should not have made an assessment under Section 126 of the Act and as such the assessment is without jurisdiction.

11. Section 126 of the Act provides as follows:

> "126.Assessment.-(1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assess to the best of his judgment the electricity charges playable by such person or by any other person benefited by such use.
>
> (2) The order of provisional assessment shall be served upon the person in occupation or possession or in charge of the place or premises in such manner as may be prescribed.
>
> (3) The person, on whom an order has been served under sub-section (2), shall be entitled to file objections, if any, against the provisional assessment before the assessing officer, who shall, after affording a reasonable opportunity of hearing to such person, pass a final order of assessment within thirty days from the date of service of such order of provisional assessment, of the electricity charges payable by such person.
>
> (4) Any person served with the order of provisional assessment may, accept such assessment and deposit the assessed amount within the licensee within seven days of service of such provisional assessment order upon him.
>
> (5) If the assessing officer reaches to the conclusion that unauthorized use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorized use of electricity has taken place cannot be

ascertained, such period shall be limited to a period of twelve months immediately proceeding the date of inspection.

(6) The assessment under this section shall be made at a rate equal to (twice) the tariff applicable for the relevant category of services specified in sub-section (5).

12. This clause provides that if the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, he shall provisionally assessed the electricity charges payable by such person. Then the order of provisional assessment shall be served upon the person concerned. The person concerned is entitled to file an objection before the assessing authority. After filing of such objection, the assessing authority, after affording a reasonable opportunity of hearing to such person, shall pass a final order of assessment of electricity charges payable by such person. As far as unauthorized use of electricity is concerned, for the purpose of the section, usage of electricity by any artificial means; or by a means not authorized by the concerned person, or authority or licensee; or through a tampered meter; or for the purpose other than for which the usage of electricity was authorized; or for the premises or areas other than those for which the supply of electricity was authorized.

13. Coming to the case in hand, it is seen that Annexure-16 is the provisional assessment order, which also contains the observations made by the assessing officer. The assessing officer, after inspection, has made the following remarks;

> "During special checking to the premises of M/s.Vedvyas Ispat Limited bearing Consumer No.RRKL/3-0120 locates at Bijabahal with the undersigned WESCO executives, it was found that the meter was showing very low current, but the industry was availing load. Then the power supply on the feeder was made 'OFF', but still the industry was running on load. It was confirmed from the Electrical In-charge Mr. J.K. Rath that the industry is availing power supply from M/s.Adhunik Metalics bearing consumer No.RRKL/3-. This arrangement of extension of power supply from Adhunik Metalics to Vedvyas Ispat is unauthorise and attracts in violation of Regulation of 104 & 105 of OERC conditions of supply. Hence, penal bill may be raised and necessary steps may be taken for disconnection of power supply and removal of such type of arrangement. On further verification it was observed that the industry was availing power supply from Adhunik Metalics through a breker & Isolator

> arrangement. The personnels present from Vedvyas Ispat whose names were given in the Ist page of this report agreed regarding such extension of power supply, but refused to sign on this report. Photo copy has been taken for future reference."

14. On such factual findings the WESCO served a notice on the petitioner to pay a sum of Rs.42,46,644/-. The petitioners company thereafter replied that M/s.Vedvyas Ispat Limited has been amalgamated with M/s.Adhunik Metaliks Ltd. in the year 2009. Accordingly, they had intimated the Executive Engineer, Rajgangpur Electrical Division, WESCO about the amalgamation of M/s.Vedvyas Ispat Limited with M/s.Adhunik Metaliks Ltd. Supporting documents, as required, were also submitted on 12.3.2010. It was indicated that their application for amalgamation was forwarded to the Corporate Office of WESCO, Burla. Formal permission was accorded by the General Manager(Commerce), WESCO after a long lapse of time. It was further indicated that the agreement between WESCO and M/s.Vedvyas Ispat Limited was for power supply to one DRI Kiln, with a Contract Demand of 500 KVA at 33 KV. This power supply to the DRI Kiln is continuing even to that date. After amalgamation of the companies additional three DRI Kilns were installed in the amalgamated premises. No agreement has been executed with WESCO for power supply to these three Kilns at 33 KV. Therefore, the petitioners company contended that there has been no unauthorized power supply to the premises of M/s.Vedvyas Ispat Limited, which has been amalgamated with the petitioners company.

15. As per Annexure-20, the WESCO replied to the petitioners company that the provisional assessment, under Section 126 of the Act, of Rs.42,46,644/- for unauthorized extension of power supply to M/s.Vedvyas Ispat Limited is payable as per the relevant provisions of the Electricity Act and Rules framed thereunder.

16. In course of hearing of the writ petition, however, it was contended that the petitioners company have a captive power plant and the electricity supplied to the premises of erstwhile M/s.Vedvyas Ispat Limited is from such captive power plant. Learned counsel for the WESCO, on the other hand, contended that even though the petitioners company has a captive power plant they have made arrangement for supply of electricity to M/s.Adhunik Metaliks Ltd. and, therefore, any use of electricity by the petitioners company, which is not agreed upon between the WESCO and the petitioners company, shall be termed as unauthorized use of electricity power.

17. As has been noted earlier the unauthorize use of electricity also means the usage of electricity for the premises or areas other than those for which the supply of electricity was authorized. It is not disputed that power supply to M/s.Adhunik Metaliks Ltd. was for its own use of and not for use of electricity in the premises of the erstwhile M/s.Vedvyas Ispat Limited. This being the fact situation, it cannot be said that the action of the assessing officer is without jurisdiction as contended by the learned counsel for the petitioners company. Therefore, the existence of an alternative remedy, i.e. appeal to the Electrical Inspector under Section 127 of the Electricity Act shall be a bar to entertain the writ petition.

18. This Court comes to the conclusion that the writ petition is not maintainable. However, the petitioners company are at liberty to file an appeal before the appellate authority and agitate all grounds taken in the writ petition. Keeping in view the peculiar facts of the case, no costs.

Writ Petition dismissed.

2012 (I) ILR- CUT- 1067

S.K.MISHRA, J.

W.P.(C) NO. 24835 OF 2011 (Dt. 21.03.2012)

RABINDRANATH CHOUBEY ……Petitioner.

.*Vrs.*

CHAIRMAN-CUM-MANAGING DIRECTOR, MAHANADI COALFIELD LTD. & ANR. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ jurisdiction – Alternative remedy – Existence of alternative remedy is not a bar to entertain a writ petition filed for the enforcement of any of the fundamental rights or where there has been violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of a statute is under challenge.

In the present case the order impugned being appealable U/s.7(7) of the payment of Gratuity Act, 1972, this Court refrains from entertaining the writ petition but given an option that the petitioner may file appeal before the appellate authority within 21 days.

(Para 5,8)

Case laws Referred to:-

1.AIR 2003 SC 2120 : (Harbanslal Sahnia & Anr.-V-Indian Oil Corpn. Ltd. & Ors.)
2.101(2006)CLT 160(SC): (U.P.State Spining Co.Ltd.-V-R.S.Pandey & Anr.)
3.AIR 1999 SC 22 : (Whirlpool Corporation-V-Registrar of Trade Marks, Mumbai & Ors.)

For Petitioner - M/s. C.Ananda Rao, S.K.Behera, A.K.Rath, G.B.Panda.
For Opp.Party 1- M/s. Debraj Mohanty & Sujit Mohanty.

S.K.MISHRA,J. In this writ petition, the petitioner, a retired employee of Mahanadi Coal Fields Ltd., has assailed the order dated 15.4.2011 passed by the Controlling authority under payment of Gratuity Act, 1972 and Regional Labour Commissioner (Central), Rourkela, opposite party no.2, in Application No.36(3)/2010. As per the said order opposite party no.2 rejected the claim of the petitioner filed under Section 7(3) of the Payment of

Gratuity Act, 1972 (for short "the Act" for brevity) on the ground that a disciplinary proceeding is still pending against the petitioner.

3. At the outset the question arose whether the writ petition is maintainable in view of the fact that the order impugned is an appealable one under Section 7(7) of the Act. Sub-section (7) of Section 7 of the Act provides that any person aggrieved by an order under sub-section (4) may, within sixty days from the date of receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf. There is also a provision for condonation of delay. Sub-section (3) of Section 7 of the Act provides that the employer shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable. Clause (a) of sub-section (4) of Section 7 of the Act provides that if there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him. Clause (b) of the said sub-section provides that where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute. Thus, the order passed by opposite party no.2 is in exercise of sub-section (4) of Section 7 of the Act and, therefore, the same is appelable. The question, therefore, arise at the outset is whether in the event an alternative Forum is available, this writ petition should be entertained by the Court. In this regard, the Asst. Solicitor General has filed a notification issued by the Ministry of Labour and Employment on 4th January, 2006. The relevant portion is quoted below:-

> "8.0.362- In exercise of the powers conferred by Sub-Section (7) of Section 7 of the Payment of Gratuity Act, 1972 (39 of 1972) and in supersession of the Notification of the Government of India in the Ministry of Labour No.S.O.1252 dated 12th April 1999, the Central Government hereby specified the officers mentioned in the Column (2) of the Schedule specified hereunder to be Appellate Authority for the area/jurisdiction as specified in Column (3) of the said schedule in relation to all establishments for which the Central Government is the appropriate Government under Clause (a) of Section 2 of the said Act.
>
> SCHEDULE
>
> | Sl.No. | Officers | Jurisdiction |
> |---|---|---|

1	2	3
1.	Regional Labour Commissioner (Central)	The State of Gujrat and Union Territories Ahmedabad. of Dadra, Nagar Haveli, Daman and Diu
	xxx	xxx
5.	Regional Labour Commissioner (Central) Bhubaneswar.	The State of Orissa
	xxx	xxx".

Thus the appellate forum is available to assail an order passed by opposite party no.2.

3. The Supreme Court in ***Harbanslal Sahnia and another v. Indian Oil Corpn. Ltd. and others***; AIR 2003 SUPREME COURT 2120 has held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is rule of discretion and not one of compulsion. In an appropriate case in spite of availability of alternative remedy the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged.

4. Similar view has been taken in ***U.P. State Spining Co. Ltd. Vrs. R.S. Pandey & another***; 101(2006) CLT 160 (SC), wherein the Supreme Court held that not exercising the power in case of availability of alternative remedy is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made

out a strong case of that there exist good grounds to invoke the extraordinary jurisdiction.

5. The Supreme Court, in the case of ***NIVEDITA SHARMA VS. CELLULAR OPERATORS ASSN. OF INDIA & ORS***.; CIVIL APPEAL N0.10706 OF 2011, has examined the question of maintainability of a writ petition before the High Court under Articles 226 and 227 of the Constitution in spite of existence of a statutory remedy of appeal available to the parties under Section 19 of the Consumer Protection Act, 1986. The Supreme Court held as follows:-

> "We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation – L. Chandra Kumar v. Union of India (1997) 3 SCC 261. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority, and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

Thus, the Supreme Court further held that the existence of alternative remedy is not a bar to entertain a writ petition filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where the order under challenge is wholly without jurisdiction or the vires of the statute is under challenge. Holding thus, the Supreme Court has set aside the order passed by the Delhi High Court.

6. In ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others***; AIR 1999 SUPREME COURT 22, it has been laid down that the jurisdiction of the High Court in entertaining a Writ Petition under Art.226 of the Constitution in spite of the alternative statutory remedies, is not

affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. Thus, the Supreme Court has held that the High Court was not justified in dismissing the Writ Petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction The Supreme Court has further held that in view of pendency of these proceedings in the High Court and specially in view of Section 107 of the Trade and Merchandise Marks Act, 1958, the Registrar could not legally issue any suo motu notice to the appellant under section 56(4) of the Act for cancellation of the Certificate of Registration/Renewal already granted. In view of Section 56(4), the Registrar has no jurisdiction to issue such a notice.

7. It is not the case of the petitioner in this case that the case comes within the exceptions as described above.

8. Thus in view of the existence of an appellate forum, this Court refrains itself from entertaining the writ petition. However, the petitioner may file an appeal before the appellate authority within twenty one days. On such an event, the appellate authority shall take up the matter for hearing and dispose of the same as expeditiously as possible preferably within a period of three months there from. The writ petition is, accordingly, disposed of.

Writ petition disposed of.

2012 (I) ILR- CUT- 1072

B. K. MISRA, J.

W.P.(C) NO.1052 OF 2012 (Dt.17.04.2012)

BIJAY KUMAR PANI & ANR. ……...Petitioners.

.Vrs.

BINITA PANI & ORS. ……Opp.Parties.

BAR COUNCIL OF INDIA RULES, 1975 - RULE 39.
r/w Rule 482 (G) of the GRCO (Civil) Vol-1.

Trial Court accepted Vokalatnama of a party appointing new set of Lawyers without consent of previously engaged advocates – Order challenged – Held, it is the discretion of the Court to accept a Vakalatnama of a party in the absence of consent of the previously engaged advocate.

A litigant must have freedom to change his advocate when he feels that the advocate engaged by him is not capable of espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason.

In the present case the trial Court accepted Vakalatname executed by plaintiff No.2 in favour of the advocates Shri P.K.Swain and Shri S.K. Ghosh on her prayer who herself present in the Court - Learned Trial Court has also assigned good reasons for accepting such Vakalatnama – Held, no fault can be found with the learned Trial Court in accepting the above Vakalatnama calling for enterference of this Court – However the learned Trial Court should avoid to take up any matter on a date other than the date fixed and should not pass orders in the absence of a party even if the record is put up on the date being advanced. (Para 14.15)

Case laws Referred to:-

1.AIR 2000 SC 2912 : (R.D.Saxena -V- Balram Prasad Sharma)

2.AIR 1966 SC 1910 : (State of Madhya Pradesh-V- Shobharam)

3.AIR 2004 SC 311 : (New India Assurance Company Ltd.-V-A.K.Saxena).

4.AIR 1987 A.P. P.254: (Damodardas Agarwal & Ors.-V-R.Badrilal & Ors.)

For Petitioners - Dr. A.K.Mohapatra, P.K.Sahoo, G.Mohapatra & S.K.Rout.
For Opp.Parties - M/s. D.Mohapatra, A.Dash, M.Mohapatra, G.R.Mohapatra, (for O.P.No.1)
M/s. A.P.Bose, N.Hota, R.K.Mohapatra, M.Pradhan, S.S.Routray, (for O.P.No.2)
M/s. N.P.Parija, P.Pradhan, S.K.Rout, A.K.Mohanty (for O.P.No.3)
M/s. A.R.Dash, S.N.Sahoo, S.K.Nanda-1, & B.N.Mohapatra,(for O.P.No.4)
M/s. P.K.Swain & N.K.Senapati (for caveator).

B.K. MISRA, J. Challenging the propriety of the order passed by the learned Addl. Civil Judge (Sr.Divn.), Puri in C.S. No. 364 of 2010 dated 14.11.2011 at Annexure-1, the writ petition has been filed.

2. Dispensation of social justice has become an integral part of our legal system and for achieving the goals set forth in the Constitution the role of the members of the legal fraternity is very much essential. The members of our legal fraternity have always been in the vanguard of progress and development of not only law but the polity as a whole. Let not the anguish of the great Philosopher-cum-Poet Shakespear “the first thing we do, let us kill all the lawyers” be not retold. Citizens of this country have reposed great confidence, hope and expectations on the legal profession. The profession by and large till date has undoubtedly performed its duties and obligations. The lawyers are a force for the preservance and strengthening of the Constitutional Government as guardians of modern legal system. The legal practitioner must be extremely careful and conscious about his dealings with his client to justify his role as a social engineer.

3. In this writ petition challenge is being made to the orders of the court by accepting the Vakalatnama appointing new sets of lawyers by one Suhasini Pani, who was the defendant No.2 in C.S. No. 364 of 2010 pending in the court of learned Addl. Civil Judge (Sr.Divn.), Puri and that too without the consent of the previously engaged advocates Mr.Gokulananda Mohapatra and associates.

4. Civil Suit No. 364 of 2010 was filed by the three plaintiffs namely, Hotel Paradise represented by plaintiff Nos. 2 and 3, Suhasini Pani and Bijaya Kumar Pani. Plaintiffs 1 and 3 are the present petitioners and the other plaintiff No.2 has been arrayed as opposite party No.4 in this writ petition.

5. According to the petitioners, right from the date of institution of the suit on 7.7.2010 Mr. Gokulananda Mohapatra and his associates were the counsel for the plaintiffs and Sri Mohapatra and his associates also had filed appeals arising out of the main suit and defendings the plaintiffs till September, 2011. But all of a sudden, on 21.9.2011 the opposite party No. 4 namely, Suhasini Pani (the plaintiff No.2) filed two petitions through one Advocate Arun Mohanty and his associates expressing her intention not to proceed in the suit and filed power in favour of Sri Arun Mohanty. The matter was ordered to be taken up on 25.10.2011. On 25.10.2011 the Court did not accept the Vakalatnama so filed by Mr. Arun Mohanty as it was without the written consent of the engaged counsel of the Plaintiffs. It was however ordered by the Court that the Plaintiff No.2 can appear on the date if she wants to have anything to submit. The suit was posted to 18.11.2011 for hearing on the petition under Order, 7 Rule, 11 of the C.P.C. which was filed by opposite party Nos. 1 to 3 on 13.9.2011. It is alleged by the petitioners that on 14.11.2011 behind the back of the petitioners the present opposite party No.4 appeared in court and filed Vakalatnama in favour of one Sri Prasanna Kumar Swain and Sri Sudhir Kumar Ghosh advocates without obtaining no objection or consent from the previously engaged advocate and such Vakalatnama was accepted. It is alleged that when the suit was posted to 18.11.2011 without hearing Mr.G.N.Mohapatra the previously engaged advocate the court should not have accepted the Vakalatnama on 14.11.2011 and therefore, it is prayed that the order dated 14.11.2011 be quashed.

6. The opposite party No.4 who was plaintiff No.2 in C.S. No. 364 of 2010 filed her counter wherein she has prayed that the writ petition should be dismissed with exemplary cost as her signatures were obtained by Sri G.N.Mohapatra advocate who was accompanied by petitioner No.1 on the pretext of filing a Civil Suit against opposite party Nos. 1 to 3 who were unnecessarily harassing petitioner No.1 in managing the affairs of the hotel and for obtaining injunction. But subsequently when on 27.8.2011 she came to know of the order passed by the Inspector General Registration in cancelling the registration of Hotel Paradise and on coming to know that fraud has been played on her, she filed a petition on 12.12.2011 for withdrawing herself from the suit and she is independently contesting the litigations through Advocate P.K.Swain and associates.

7. I have heard the learned counsel appearing for the respective parties in detail. Perused the materials placed on record including the impugned order passed by the learned Addl. Civil Judge (Sr.Divn.), Puri and the citations which have been relied upon. In hearing the matter this Court has

taken the assistance of Mr.A.Parija, Chairman, Bar Council of India as well as Mr.G.K.Mohanty, Chairman of the Bar Council of Orissa also.

8. Rule, 39 of the Bar Council of India reads as follows:-

> " 39. An Advocate shall not enter appearance in any case in which there is already a vakalat or memo of appearance filed by an Advocate engaged for a party except with his consent; in case such consent is not produced he shall apply to the Court stating reasons why the said consent should not be produced and he shall appear only after obtaining the permission of the Court."

9. Clause (g) of Rule, 482 of the General Rules and Circular Orders of the High Court of Judicature Orissa (Civil Vol-1) reads as follows:-

"(g) An Advocate or a Pleader proposing to file a Vakalatnama or an appearance in a suit, appeal or other proceedings, in which there is already an Advocate or a Pleader on record, shall not do so unless such Advocate or Pleader is dead or has retired from the case or unless a written consent of such Advocate or pleader is produced which consent will not be refused when his dues according to the written terms of his engagement signed by the client or his duly authorized agent, or in the absence of such terms in writing as aforesaid the minimum fees according to the prescribed scale have been paid to him subject, however, to the discretion of the Court to pass orders to the contrary in either of the case or when the consent of such Advocate or Pleader is refused, unless he obtains the permission of the Court."

10. Dr. Ashok Kumar Mohapatra, learned counsel appearing for the petitioners contended that Sri G.N.Mohapatra and his associates are always willing to give consent if opposite party no.4 has the desire to engage any counsel of her choice. But the manner in which the learned court below accepted the Vakalatnama the same is against the established practice and rules. It was also very strenuously urged that Court cannot adopt different standards in a judicial proceeding because when the same very Court refused to accept the vakalatnama filed by Advocate Sri Arun Kumar Mohanty and his associates on behalf of Suhasini Pani, who is the plaintiff no.2, as no written consent of the previously engaged counsel of the plaintiff has been obtained then how come the same Court accepted the Vakalatnama executed by the same Plaintiff No.2 by appointing Sri Prasanna Kumar Swain and Sri Sudhir Kumar Ghosh Advocates on her behalf by its order dated 14.11.2011. I have perused the orders passed on

different dates in Civil Suit No.364 of 2010 right from 21.9.2011 till 21.11.2011. The order dated 25.10.2011 shows that on that day while refusing to accept the Vakalatnama filed by the Advocate Sri Arun Kumar Mohanty without written consent of the engaged counsel of the plaintiff, the Court directed that the Plaintiff No.2 if so wants can appear in person and submit if she has anything and accordingly the matter was posted to 18.11.2011. The order dated 14.11.2011 shows that the record was put up on that day on the strength of an advance petition. Plaintiff No.2 Suhasini Pani who was present that day filed one Vakalatnama executed in favour of the Advocate Sri Prasanna Kumar Swain and Sri Sudhir Kumar Ghosh along with other documents with a further affidavit sworn by the said Suhasini Pani without taking consent from the previous advocates contending that the previous vakalatnama executed on 7.7.2010 does not contain her signature and accordingly she prayed that the vakalatnama in favour of Sri Prasanna Kumar Swain and Sri Sudhir Kumar Ghosh be accepted. Accordingly, the Court on the prayer of Suhasini Pani, accepted the vakalatnama and the matter was directed to be put up on the date fixed i.e. 18.11.2011. When the record was put up on 18.11.2011 serious objection was raised by plaintiffs 1 and 3 advocate Sri P.K. Misra with regard to the acceptance of the vakalatnama by the Court executed by the Plaintiff No.2 in favour of Sri P.K.Swain and Sri S.K.Ghosh, Advocates and also prayed to recall the order dated 14.11.2011. In view of the allegation and counter allegation, the Court thought it proper to decide the matter in presence of Plaintiff No.2 who would be the competent person to say as to whom she wants to engage as her advocate and accordingly the matter was adjourned to 21.11.20111 when Plaintiff No.2 was to appear in person. Pursuant to the direction of the Court the counsel for both sides and Plaintiff No.2 Suhasini Pani appeared before the Court on 21.11.2011. The said Suhasini Pani disclosed before the Court that she had earlier engaged Sri G.N.Mohapatra but now she has engaged Advocate Sri P.K.Swain. Thus, the Court gathered an impression that the Plaintiff No.2 Suhasini Pani had the desire to engage Sri P.K.Swain, Advocate in place of her previously engaged Advocate Sri G.N.Mohapatra. The Court passed the order refusing to recall its own order dated 14.11.2011 for the reasons stated in the order and the matter was set at rest.

11. The issue as to whether a lawyer has a right to continue in litigation against the wishes of the litigant has been considered by the Apex Court time and again. In ***R.D.Saxena –v- Balram Prasad Sharma*** reported in ***AIR 2000 S.C. 2912*** it has been held by the Apex Court that:-

> "A litigant must have the freedom to change his Advocate when he feels that the Advocate engaged by him is not capable of

espousing his cause efficiently or that his conduct is prejudicial to the interest involved in the lis, or for any other reason. For whatever reason, if a client does not want to continue the engagement of a particular advocate it would be a professional requirement consistent with the dignity of the profession that he should return the brief to the client. It is time to hold that such obligation is not only a legal duty but a moral imperative."

It has been further held by the Apex Court that:-

"No effort should be made or allowed to be made by which a litigant could be deprived of his right, statutory as well as constitutional, by an Advocate only on account of exalted position conferred upon him under the judicial system prevalent in the country."

12. The Apex Court also in the case of ***State of Madhya Pradesh –v- Shobharam, AIR 1966 S.C. 1910*** considered the question as to whether an accused has unfettered right to change his counsel. The Apex Court after considering the provision of Section 22 (2) of the Constitution of India held that the right of the accused to change an Advocate to whom he once engaged in the same case, cannot be whittle down by that Advocate by withholding the case file on any ground including the claim of fee for the services already rendered by him. Similarly, in ***New India Assurance Company Limited –v- A.K.Saxena , AIR 2004 S.C. 311*** the Hon'ble Apex Court has held that the right of the litigant to have the files returned to him is a corresponding counter-part of the professional duty of the advocate and that dispute regarding fees would be a lis to be decided in an appropriate proceeding in Court.

13. At any rate if the litigation is pending the party has the right to get the papers from the advocate whom she has changed so that the new counsel can be briefed by him effectively. It is impermissible for the erstwhile counsel to retain the case file on the premise that fees is yet to be paid.

14. On going through the provisions of Rule 39 of the Bar Council of India and also as per Rule 482 (G) of the General Rules and Circular Orders of the High Court of Judicature, Orissa (Civil) Vol.I it is seen that it is the discretion of the Court in accepting a vakalatnama when the consent of the previously engaged advocate is not there but in that case permission of the Court is required. Dr. Ashok Mohapatra, learned counsel appearing for the petitioners very fairly conceded that the Court has ample power to accept the

vakalatnama even in absence of any consent of the previously engaged counsel. The order dated 14.11.2011 and 21.11.2011 clearly shows that the Court accepted the vakalatnama executed by the Plaintiff No.2, Suhasini Pani in favour of Advocate Sri P.K.Swain and S.K.Ghosh on the prayer of the plaintiff No.2 who was herself present in Court. The learned trial court has assigned good reasons for accepting such Vakalatnama in his order dated 21.11.2011.

When a client expresses his desire to change his counsel the advocate who is prosecuting the case, feels offended but readily gives away the brief without any second thought about the fees payable to him, such a conduct on the part of the practitioner is undoubtedly an ideal one. **(*AIR 1987 Andhra Pradesh P. 254, Damodardass Agarwal and others –v-R.Badrilal and others).***

15. Thus looking from any angle no fault can be found with the learned trial court in accepting Vakalatnama executed by the Plaintiff No.2 Suhasini Pani, the present opposite party no.4 in favour of Sri Prassana Kumar Swain and Sri Sudhir Kumar Ghosh, advocates and therefore calls for no interference by this Court. However the Trial Court should avoid in taking up any matter on date other than the date fixed and that too pass any order in the absence of a party even if the record is put up on the date being advanced.

16. Before parting with this case, I am to observe that a social and moral duty is bestowed upon the learned members of the legal fraternity to show the people beckon light by their conduct and actions. No effort should be made or allowed to be made by which a litigant could be deprived of his rights, statutory as well as constitutional. An advocate like any other citizen has a right to recover the fee or other amounts payable to him by the litigant by way of legal proceedings but subject to such restrictions as may be imposed by law or the rules made in that behalf. It is high time for the members of the legal fraternity to join hands and evolve a Code for themselves in addition to the mandate of the Advocates Act and Rules made there under so that the common man would repose their confidence in the legal profession as well as in the institution of justice, as creation of such a faith would not only enhance the image of majesty of law but also can speak of the excellence of the profession.

With the aforesaid observations, the writ petition stands disposed of.

Writ petition disposed of.