2013 (I) ILR – CUT- 922

C. NAGAPPAN, CJ & INDRAJIT MAHANTY, J.

W.P.(C) NO.24023 OF 2011 (Dt.24.04.2013)

SANJEEV KU. SHARMA & ORS. ……. Petitioners

.Vrs.

UNION OF INDIA & ORS. ……..Opp.Parties

A. NATIONAL HIGH WAYS ACT, 1956 – Ss. 3-A, 3-C

Widening / four laning of National High Way No.203 – Notification for land acquisition – Petitioner challenged the same as his property is sought to be acquired – Allegation that favouritism shown to Braja Gopika Seva Mission and others is not correct since they filed objection within the statutory period and the alignment of the original plan was changed in the second notification – Petitioners land finds place in the first and second notifications which are vitally required for completion of the above project – Held, the importance of the project i.e. completion of National High Way No.203 from Bhubneswar to Puri having great public interest, especially, keeping in view the fact that the Nabakalebar of Lord Jagannath is due in the early part of 2015 for which the NHAI have taken all necessary steps to complete the National High Way to accommodate more than 50 lakh people to visit Puri during the said period –Writ petition is liable to be dismissed. (Para 15)

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

Land acquisition proceeding – Courts have to weigh public interest vis-à-vis the private interest – When larger public interest is involved quashing of acquisition proceeding was not the only mode of redress but the persons interested may be compensated by way of damages. (Para 8)

Case laws Referred to:-

1.(2011) 12 SCC 69 : (Union of India-V- Kushala Setty)
2.(2008) 7 SCC 53 : (Girias Investment Pvt. Ltd. & Anr.-V- State of Karnataka &Ors.)
3.AIR 1997 SC 1236 : (Ramniklal N. Bhutta & Anr.-V- State of Maharashtra & Ors.)
4.AIR 2011 SC 3210 : (Union of India-V- Dr. Kushala Shetty & Ors.)

For Petitioners - Mr. J. Das, Sr. Advocate.

For Opp.Parties - Mr. S.D. Das, Asst. Solicitor General(for O.P.No.1)
M/s. S. Mohanty, Sr. Advocate &
Amitav Das (for O.P.Nos.2 & 3).

C. NAGAPPAN, C.J. The petitioners claiming to be the lawful owners of the properties have sought for a declaration that the course adopted by the opposite party no.3 in publishing the Ministry of Road Transport and Highways Notification dated 24.1.2011 (Annexure-7) issued under Section 3A(1) of the National Highways Act, 1956 in so far as the stretch of land covering KM 54180 to KM 67480 (Malatipatapur-Sipasurubali Section) in the district of Puri is illegal and contrary to Section 3C of the Act and thereby prayed to quash the same with a further direction to proceed with the acquisition as per original plan approved by the opposite party no.1.

2. The facts as discerned from the pleadings of the parties are as follows:-

As per the requirement of the Central Government, Intercontinental Consultation (P) Ltd. prepared a Land Acquisition plan for Bhubaneswar-Puri Section National Highway No.203 Puri bi-pass after due survey of the area in question. Initial alignment plan was furnished on 24.5.2007 and the National Highways Authorities of India approved the same on 30.5.2007. On the basis of the plan, steps have been taken for building, widening/four laning etc. of National Highway No.203 on the stretch of land from Bhubaneswar to Puri with number of sections. One of such sections is Malatipatapur-Sipasurubali in the district of Puri from KM 54180 to KM67480. The Ministry of Road Transport and National Highways, Government of India issued a notification on 30.11.2009 (Annexure-1) under sub-section 3A(1) of the Act declaring their intention to acquire the land for building, widening/four laning etc. and for operation of National Highway No. 203 on the stretch of land from KM 54180 to KM67480. Substance of the said notification was published in the "The Samaya' and "The Odisha Bhaskar" on 14.1.2010 under sub-Section (3) of Section 3A of Act and objections were called for from any person interested in the land within 21 days from the date of publication of the notification.

3. Dr. Susanta Kumar Tripathy of Braj Gopika Seva Mission, Tutumbarpalli and 64 other objectors filed objections on 3.2.2010 before the competent authority, namely, opposite party no.3. The first petitioner, namely, Sanjeev Kumar Sharma also filed objection on 17.2.2010 to change the alignment as the portion of his property was under land acquisition. A letter dated 1.12.2009 was addressed by Mr. Motilal Vora, M.P. to the former Minister of Road Transport and Highways Mr. Kamal Nath requesting

him to consider the alternative proposal of Dr. Sushant Tripathy. All those who objected the use of land in reference to the notification, as their lands were not excluded from the notification, were heard and the contents of the technical objections raised by them were sent to the National Highway Authorities of India to consider their technical views and the alternative suggestions proposed by them. Some portion of the land notified on 30.11.2009 was no longer required for land acquisition and the same has been dropped completely from the orbit of land acquisition. After observing formalities, Ministry of Road Transport and Highways issued notification dated 12.10.2010 under sub-section 3-D(1) of the Act along with a public notice declaring the land specified in the schedule to be acquired for the purpose. The modified alignment plan was submitted by Intercontinental Consultation (P) Ltd. and the Central Government on being satisfied took corrective measures and changed the alignment by issuing notification again on 24.1.2011 under Section 3A of the Act. Twenty eight objectors filed their objections to use the land for the purposes mentioned in the said notification. The said objections were scrutinized and disallowed. The Central Government by notification dated 28.12.2011 issued under Section 3D(1) of the Act declared that the land should be acquired for the purpose of N.H.No.203 from KM 63880 to KM 67255.

4. It would be relevant to take note of the gist of the contentions raised by the petitioners, which is as follows:

(A) After Notification dated 30.11.2009, the alignment of the original plan was unilaterally changed considering the objection of Brajagopika Seva Mission and 64 others, which were filed beyond the stipulated period of 21 days (90 days from the Gazette Notification dated 30.11.2009) and as per Section 3C(1) of the Act those objections ought to have been straightaway rejected.

(B) Change of alignment was made only to favour certain specific institutions and/or individuals narrated hereinabove and, therefore, it is vitiated by mala fide.

5. In this respect, learned counsel for the petitioners placing reliance on the judgment of the Supreme Court in the case of ***Union of India vs. Kushala Setty,*** (2011) 12 S.C.C. 69, contended that the objections raised beyond the time schedule specified in Section 3C(1) of the Act are not required to be considered and Court can nullify such act which runs contrary to the mandate of law and tainted by mala fide. He also placed reliance on another judgment of the Hon'ble Supreme Court in the case of ***Girias Investment Pvt. Ltd. & another vs. State of Karnataka & others,*** (2008) 7

S.C.C. 53, and contended that a case of mala fide can be made out in the two following ways:

(i) that the action, which is impugned, has been taken with the specific object of demanding the interest of the party; and

(ii) such action is aimed at helping some party, and resulting in damage to the party alleging mala fides.

6. Learned counsel appearing for the opposite parties-National Highways Authority of India, on the other hand, submitted that the land of petitioner No.1 finds place both in the first and the second notifications issued under Section 3A of the Act and such plots of the petitioner are vitally required for completion of N.H. No.203 from Bhubaneswar to Puri and without which the said project cannot be completed in time during Nabakalebara of the Lord Jagannath as it is expected that more than 50 lakhs peoples are likely to visit Puri and for which reason the National Highways Authority (for short, "the NHAI") has planned for completion of N.H. No.203 by the end of 2014.

It is contended by the learned counsel for NHAI that the actual extent of the land of petitioner No.1 in original under Section 3A Notification was Ac.6.470 decimals and in the second 3A Notification the area has been reduced to Ac.3.735 decimals. It is further contended that the nature (Kisam) of the land belonging to petitioner No.1 has been categorized as Adi, Sarada-3, Jalasaya-2, Bagayat-2 and Bagayat-3 respectively and none of his land proposed to be acquired is either homestead or Gharabari. It is further pleaded on behalf of the NHAI that the length of N.H. No.203 has been reduced by 0.225 KM and the actual area of acquisition of land has also been reduced by Ac.5.123 decimals.

It is submitted on behalf of the opposite parties-NHAI that the objection of Brajagopika Seva Mission filed on 03.02.2010 was beyond the statutory period of 21 days as contemplated under Section 3A(1) read with Section 3C(1) of the Act is wholly incorrect. It is further submitted that under Section 3A(3) of the Act, the competent authority is statutorily required to cause publication of the notification in two local newspapers including one in vernacular language and such newspaper publication was made on 14.01.2010 (even though the Gazette publication of Section 3A notification had already been made on 30.11.2009). It is further submitted that the period of 21 days would be computed from the date of publication of such notification in local newspapers i.e. 14.01.2010 including the vernacular newspaper and, therefore, the objections filed on behalf of Brajagopika

Seva Mission on 03.02.2010 was within the statutory period of 21 days as contemplated under Section 3C(1) of the Act and not beyond the statutory period as alleged.

It is further submitted by the learned counsel appearing on behalf of the NHAI that the petitioners have neither impleaded Brajagopika Seva Mission nor the other parties as opp. parties against whom allegation of favouritism has been made. In this respect, he placed reliance on the judgment of the Supreme Court in the case of **Girias Investment Pvt.** Ltd.(supra), wherein the Apex Court held that "in the absence of specified individuals, who are to be made parties in a litigation alleging mala fides and an enquiry into such an allegation was impermissible".

7. Apart from the above, prayer has been made in the writ application for quashing of the Notification dated 24.01.2011 (Annexure-7) issued under Section 3A of the Act with a further direction to proceed with the acquisition as per the original plan approved by opposite party No.1.

In this respect, it is further submitted on behalf of opposite parties-NHAI that the writ application came to be filed on 06.09.2011. The first notification issued under Section 3A was notified on 30.11.2009 and the same was followed up by the Notification issued under Section 3D on 12.10.2010. Although the lands of the petitioners are covered under the first Notification issued under Section 3A dated 30.11.2009, the lands of the villagers as well as the petitioners were omitted in the Notification issued under Section 3D dated 12.10.2010. Thereafter, upon realignment of the road, which was duly approved by the statutory authority, a second Notification was issued under Section 3A dated 24.01.2011 once again bringing the petitioners' lands and the villagers. Thereafter objections were called for, hearing was taken place and ultimately a fresh notification under Section 3D was duly published on 28.12.2011.

Further, it is contended by the learned counsel for the opp. parties-NHAI that since the petitioners have not challenged the 3D notifications published on 12.10.2010 and 28.12.2011, their prayer to quash 3A notification cannot be entertained and on this ground the writ petition is liable to be dismissed.

8. Further, reliance was placed by the opposite parties on the judgment of the Supreme Court in the case of **Ramniklal N. Bhutta & another vs. State of Maharashtra & others**, A.I.R. 1997 S.C. 1236, wherein the Supreme Court has directed that the Courts have to weigh the public interest vis-à-vis the private interest while exercising the power under Article

226 and even in a case where a High Court finds that any acquisition has been vitiated on account of non-compliance with some legal requirements, the persons interested would also be compensated by way of damages and quashing the acquisition proceeding was not the only mode of redress and it was stated that it is ultimately a matter of balancing the competing interests. Further, reliance has also been placed by the opposite parties on the judgment of the Hon'ble Supreme Court in the case of **Union of India vs. Dr. Kushala Shetty & others**, A.I.R. 2011 S.C. 3210, wherein the Hon'ble Court came to be concluded that the Courts are not at all equipped to decide upon the viability and feasibility of the particular project and whether the particular alignment would subserve the larger public interest or not and, therefore, it was submitted that the scope of judicial review in such cases were extremely limited.

9. On perusal of the records of the case and the pleadings, the admitted facts are as follows:

• There are two Notifications under Section 3A and consequent upon two 3D Notifications.

First- Notification U/s.3A dtd. 30.11.2009
Notification U/s.3D dtd. 12.10.2010

Second- Notification U/s.3A dtd. 24.01.2011
Notification U/s.3D dtd. 28.12.2011

1) No lands/plots of the first Notification under Section 3D dtd.12.10.2010 have been repeated in the second Notification under Section 3D dtd.28.12.2011.

2) The lands/plots and village i.e. Sankarpur, Samanga, Kasijagannathpur and Sipasarubali of first Notification under Section 3A were omitted in first Notification under Section 3D dtd.12.10.2010.

3) Upon realignment of the road from KM 63,880 to KM 67,255, once again new/second Notification under Section 3A dtd.24.01.2011 was published, objections were called for, hearing was taken place and consequently Notification under Section 3D dtd.28.12.2011 vide Annexure-G/2 was published.

4) That in reply to para-5 of the Rejoinder Affidavit, it is submitted that it has been alleged by the petitioner that the O.P.s No.2 & 3 being the public authorities have not disclosed the fact regarding some patch of land which

has been deleted. In this regard, it is submitted that in pursuance to notification dtd.30.11.2009 under Section 3-A of N.H. Act, some patch of land have been deleted at the time of publication of 3-D notification on 12.10.2010 as those lands are not required for alignment. Since other lands are required for alignment without which the road would not have been completed from Malatipatpur to Sipasurubuli Chainage (Km.54,180 to Km.67,255), was published again on 24.01.2011 u/s.3-A of N.H. Act. Therefore, the Notification U/s.3-A of N.H. Act published on 24.01.2011 is completely a new one and it has no relation with the earlier 3-A Notification dtd.30.11.2009. However, taking consideration of the rejoinder affidavit of the petitioner, the following facts are indicated for proper adjudication of the matter:-

(i) The Plot No.1362 pertaining to village Samang which had been notified vide SO No.3054(E), dtd.30.11.2009 U/s.3A of NH Act for an area of Ac.5.860 decimal had been notified U/s.3D of NH Act with an area of Ac.5.660 dec. vide SO No.2545(E), dtd.12.10.2010 deleting an area of Ac.0.200 dec. However, for requirement of additional area of Ac.0.440 land, the Notification dtd.24.01.2011 was published U/s.3-A of N.H. Act taking into consideration of modification of alignment and omission of area from earlier notification. Moreover, the Plot No.275, 276, 277, 278, 278/436 pertaining to village Sipasurubuli were notified U/s.3A of NH Act on dtd.30.11.2009. These plots were completely deleted at the time of 3-D notification published vide SO No.2545 dtd.12.10.2010. The same was notified again U/s.3A of NH Act published vide SO No.157(E) dtd.24.01.2011 due to modification alignment and omission of area from earlier notification. It is important to point out here that without publication of the notification on dtd.24.01.2011 pertaining to the above plots the NH-203 would have not been completed in the village Samang & Sipasurubuli.

(ii) When the matter to modify the alignment was under the active consideration of Central Government, a map pertaining to such modification has been submitted by M/s. I.C.T. Pvt. Ltd., New Delhi and the same was forwarded to the CALA for its super-imposition on the Cadastral Maps. After super-imposition of the proposed modified alignment on the cadastral maps, a draft proposal in form of 3-A notification was processed to the Central Government. The Central Government being satisfied on the same, published the notification U/s.3-A of NH Act in the Gazette of India vide SO No.157(E) dtd.24.01.2011.

(iii) The date on which M/s. Intercontinental Consultant & Technocrats Pvt. Ltd., New Delhi had furnished the initial alignment plain in respect of NH-203 from Bhubaneswar to Puri was 24.05.2007 and the date of approval of the same by the National Highways Authority of India was 30.05.2007.

(iv) The date of submission of modified alignment plan by M/s. Intercontinental Consultants & Technocrats Pvt. Ltd. was 09.02.2010 and the date of approval of this revised alignment by the National Highways Authority of India was 04.03.2010.

The O.Ps. No.2 & 3 have no intention to suppress any fact before this Hon'ble Court. The photocopy of notification of SO No.157(E), dtd.24.01.2011 and SO No.3054(E) dtd.30.11.2009 had already been submitted in preliminary affidavit as Annexure-A/2 & B/2. The map detailing of both the notifications from Samang to Sipasurubuli has been combined in one trace map and submitted at present as Annexure-I/2.

10. In the light of the pleadings made and submissions advanced by the learned counsel for the respective parties, we are of the considered view that the following issues arise for our consideration:

I) Whether the objections of Brajagopika Seva Mission and 64 others, which were taken into consideration by the NHAI to the first Notification under Section 3A dated 30.11.2009 was filed beyond the stipulated period of 21 days as stipulated under Section 3D(1) of the N.H. Act?

II) Whether the change of alignment by the NHAI was stated mala fide or not?

III) Whether non-impletion of Brajagopika Seva Mission and others against whom the allegation of favouritism has been made were necessary parties and proper parties for adjudication of the issues raised in the present proceeding?

IV) Whether this Court is in exercise of jurisdiction under Article 226 can go into the merits or the reasons for which NHAI decided to the original road alignment?

11. Insofar as issues are concerned under Section 3A and Section 3C are quoted herein under:

"**3A. Power to acquire land, etc.-**(1) Where the Central Government is satisfied that for a public purpose any land is required for the building, maintenance, management or operation of a national highway or part thereof, it may, by notification in the Official Gazette, declare its intention to acquire such land.

(2) Every notification under sub-section (1) shall give a brief description of the land.

(3) The competent authority shall cause the substance of the notification to be published in two local newspapers, one of which will be in a vernacular language."

"3C. Hearing of objections.-(1) Any person interested in the land may, within twenty-one days from the date of publication of the notification under sub-section (1) of Section 3A, object to the use of the land for the purpose or purposes mentioned in that sub-section.

(2) Every objection under sub-section (1) shall be made to the competent authority in writing and shall set out the grounds thereof and the competent authority shall given the objector an opportunity of being heard, either in person or by a legal practitioner, and may, after hearing all such objections and after making such further enquiry, if any, as the competent authority thinks necessary, by order, either allow or disallow the objections.

(3) Any other mode by the competent authority under sub-section (2) shall be final."

12. On a plain reading of Section 3A and 3C quoted hereinabove, it would be clear that under Section 3A, every Notification under Section 3A(1) is mandatorily required to be published in two local newspapers, one of which will be in a vernacular language.

In this respect, the records of the NHAI were called for by the Court. At the conclusion of hearing and from the records it appears that first Notification under Section 3A was duly published by the Gazette of India on 30.11.2009 but the substance of such Notification was only published in the local newspapers in vernacular language i.e. 'Samaya' and 'Odisha Bhaskar' on 14.01.2010. Therefore, in view of the aforesaid facts and filing objection under Section 3C, the period of computing 21 days for the parties would commence only from the date in which the newspaper notification in the local vernacular was issued and as averred by the writ petitioner,

Brajagopika Seva Mission and 64 others have filed their objection on 03.02.2010. We are of the considered view that the same was within the statutory period as under Section 3A read with Section 3C and not beyond 21 days as alleged by the petitioner. Therefore, we are of the considered view that since the objections of Brajagopika Seva Mission and 64 others are within the time, the allegation to the contrary is completely baseless and, therefore, the first issue is answered in favour of the opposite parties and against the petitioners.

13. Issue Nos.(II) & (III) are taken up together. What has been alleged by the petitioners is that in order to benefit few persons and due to certain politician by purview of the land loser, the NHAI has changed the alignment. It is also admitted fact that the petitioners have not impleaded the individuals, who they claim were the beneficiaries of the realignment in the writ application. Squarely, the decision of the Hon'ble Supreme Court in the case of **Girias Investment Pvt. Ltd. & another vs. State of Karnataka & others**, (2008) 7 S.C.C. 53 and in particular paragraph-21 comes into operation, which is quoted hereinbelow:

> "21. The learned counsel for the respondents has also taken pains to point out that in the absence of specified individuals, who are to be made parties in a litigation alleging mala fides, an enquiry into such an allegation was impermissible. The learned counsel has placed reliance on State of Bihar v. P.P. Sharma and All India State Bank Officers' Federation v. Union of India. In P.P. Sharma case it was observed that " (SCC pp.261-62, para 55)
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> "55. It is a settled law that the person against whom mala fides or bias was imputated (six imputed) should be impleaded eo nominee as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity."

In view of the above, issue Nos.(II) & (III) are also answered in favour of the opposite parties and against the petitioners.

14. Insofar issue No.(IV) is concerned, apart from the above, we are also of the considered view that the judgment of the Hon'ble Supreme Court in the case of **Union of India vs. Dr. Kushala Shetty & others,** A.I.R. 2011 S.C. 3210 and in particular paragraph-28 being extremely relevant, which is quoted hereunder.

> "28. Here, it will be apposite to mention that NHAI is a professionally managed statutory body having expertise in the field of development and maintenance of national highways. The projects involving construction of new highways and widening and development of the existing highways, which are vital for the development of infrastructure in the country, are entrusted to experts in the field of highways. It comprises of persons having vast knowledge and expertise in the field of highway development and maintenance. NHAI prepares and implements projects relating to development and maintenance of national highways after thorough study by experts in different fields. Detailed project reports are prepared keeping in view the relative factors including intensity of heavy vehicular traffic and larger public interest. The courts are not at all equipped to decide upon the viability and feasibility of the particular project and whether the particular alignment would subserve the larger public interest. In such matters, the scope of judicial review is very limited. The court can nullify the acquisition of land and, in the rarest of rare cases, the particular project, if it is found to be ex facie contrary to the mandate of law or tainted due to mala fides. In the case in hand, neither has any violation of mandate of the 1956 Act been established nor has the charge of malice in fact been proved. Therefore, the order under challenge cannot be sustained."

In view of the above, issue No.(IV) is also answered in favour of the opposite parties and against the petitioners.

15. In view of the findings arrived at as noted herein, we are of the considered view that the importance of the project i.e. completion of N.H.-203 from Bhubaneswar to Puri is of great public interest, especially, keeping in view the fact that the Nabakalebara of Lord Jagannath is due in the early part of 2015 for which reason the NHAI have taken all necessary steps to complete the National Highway to accommodate more than 50 lakhs peoples to visit Puri during the said period.

In view of the above, the writ application stands dismissed and all the interim orders stand vacated. No costs.

Writ petition dismissed.

2013 (I) ILR - CUT- 933

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

O.J.C. NOS. 8819 & 6311 OF 2000 (Dt.17.09.2012)

SK. ABDUL AHAD & ANR. .....Petitioners

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Compensation – Death of three maternity patients with two new born babies due to administration of contaminated IV fluid (Saline) supplied in SCB Medical College and Hospital, Cuttack – Negligence and lack of care by Hospital Authorities – Violation of right to life of the patients – Held, State to pay compensation of Rs.5.00 lakhs each to the legal heirs of three maternity patients for the tortious act committed by its employees and may recover the same from the negligent doctors responsible for their death and initiate action against Drug Controller of Odisha and EPM Authorities for their lapses and to expedite departmental action against defaulting doctors.

(Paras 21, 32, 33)

Case laws Referred to:-

1.(1964) AC 465 (HL) : (Hedley Bryne & Co. Ltd.-V- Heller & Partners Ltd.)
2.(1970) All ER 294(HL) : (Home Office-V- Dorset Yacht Co. Ltd.).
3.AIR 1995 SC 922 : (Consumer Education & Research Central & Ors.-V- Union of India & Ors.)
4.AIR 1996 SC 2426 : (Paschim Banga Khet Mazdoor Samity & Ors.-V- State of West Bengal & Anr.)
5.AIR 1993 SC 1960 : (Smt. Nilabati Behera @ Lalita Behera-V- State of Orissa & Ors.).
6.AIR 1983 SC 1086 : (Rudul Sah-V- State of Bihar & Anr.)
7.AIR 1992 SC 2069 : (Kumari Smt.-V- State of Tamil Nadu & Ors.).
8.AIR 1962 SC 933 : (State of Rajasthan-V- Mst. Vidhyawati).

For Petitioner - M/s. Jagabandhu Sahoo, S.K. Mohanty & P.K.Das.

For Opp.Parties - Mr. Ashok Mohanty, Advocate General (for O.P.Nos.1,2,3 & 5).
M/s. R.K.Mohanty, D.K. Mohanty, P.K.Ratha, A.P. Bose, S.N.Biswal, P.K.Samantray &

J.K. Kanungo (for O.P.No.4).

For Petitioner - M/s. G.N. Pattnaik, Y.S.P. Babu,
For Opp.Parties - Mr. Ashok Mohanty,A.G. (for O.P.Nos.1 to 4).

B.N. MAHAPATRA, J. Writ Petition bearing O.J.C. No.8819 of 2000 has been filed with a prayer to direct opposite parties-State and its functionaries to pay a sum of Rs.10 lakhs as compensation to the petitioner within a stipulated period.

Writ Petition bearing O.J.C. No.6311 of 2000 has been filed in the nature of a PIL seeking direction to Central Bureau of Investigation to investigate into death of two young women and their two new born babies and another pregnant woman who met death in Gynecology Department delivery ward of S.C.B.Medical College and Hospital, Cuttack due to administration of spurious and contaminated transfusion of fluid supplied by the Hospital authorities and to unearth the racket in supply and purchase of drugs and fluids etc.

Since cause of action for filing of above two writ petitions is same they are dealt with together.

2. Petitioner's case in O.J.C. No.8819 of 2000 is that the wife of the petitioner was pregnant and was supposed to deliver her second child. On 29.6.2000, at about 2.00 P.M., when the petitioner's wife suffered from acute delivery pain she was taken to nearby Government Hospital at Raisunguda. The Doctor attending the wife of the petitioner advised the petitioner to take his wife to Cuttack for further treatment. Accordingly, on the said date the petitioner took her wife to City Hospital by ambulance where she was admitted. On the next day, i.e., 30.6.2000 at about 2.00 P.M., the doctor attending the petitioner's wife at City Hospital advised the petitioner to take her to S.C.B. Medical College & Hospital, Cuttack for the purpose of operation. As per the advice of the doctor of the City Hospital, the petitioner at about 3.00 P.M. took her wife to S.C.B. Medical College & Hospital by ambulance for further treatment. Petitioner's grievance is that in spite of his request to the doctor on duty at the S.C.B. Medical College & Hospital no treatment was offered to his ailing wife. At about 4.00 P.M., the petitioner's wife was formally admitted into the Hospital vide Registration No.4616 dated 30.6.2000. Nearly two hours thereafter, his wife was taken to the labour room where she was left without any treatment by the doctor through out the night. On the next day, i.e., 1.7.2000 as no treatment was offered by the doctors in the hospital petitioner's wife was helplessly crying. The petitioner and his mother-in-law, who were also helplessly waiting, requested opposite party no.4-Dr. S.N. Das, Prof. & Head of the Department of Obstetrics &

Gynaecology, S.C.B. Medical College & Hospital to give treatment to his wife and said opposite party no. 4 did not pay any heed to the request of the petitioner. For want of treatment, the condition of his wife deteriorated gradually. The petitioner was again constrained to approach said opposite party no.4 and thereafter at about 7.30 P.M. at night, the petitioner was instructed with a slip to purchase medicines for the purpose of operation. The petitioner immediately brought medicines as instructed by the doctor and his wife was thereafter taken to the O.T. Room at about 8.00 P.M. for operation. After few minutes, the wife was brought from the O.T. Room on the plea that, as the child inside the womb was dead, there was no need of any operation and the patient will give delivery to the said child in usual course. After hearing the news of death of the child, the petitioner wanted to know the reason of death of his child inside the womb, but no reply was given to the petitioner. The petitioner further requested the doctor to save his wife by offering due and proper treatment. The petitioner's wife was again taken to the labour room at about 11.00 P.M. on the said date, i.e., 1.7.2000 and was impregnated with a saline. Shortly after the saline was pricked on the body of the petitioner's wife, she suffered from acute thrill and was thereafter covered with a blanket. Nobody was allowed to enter inside the labour room to see the condition of the patient. The petitioner helplessly waited outside as a mute and dumb spectator and thereafter at about 12.00 P.M. the peon on duty informed that his wife is dead and he has to make arrangement to shift the dead body from the hospital. After sometime, two other patients in the same Department of Obstetrics & Gynecology, namely, Mamata Behera and one Bhanumati Das also died while being administered with saline. On 2.7.2000, the Superintendent, S.C.B. Medical College & Hospital directed for post mortem of the dead body. The petitioner was thereafter issued with a dead body carrying certificate by Autopsy Surgeon after conducting the post mortem examination. Hence, the present writ petition.

3. O.J.C. No.6311 of 2000 has been filed in the nature of a Public Interest Litigation before this Court by Sri Dibya Keshari Deo, Advocate. Mr. Deo, claims himself to be a social worker and public spirited person always fights for social justice and human rights. The petitioner stated that on 2nd or 3rd July, 2000 two young women along with their two newly born babies and another pregnant woman met "violent death" in the Gynaecology Department's Delivery Ward of SCB Medical College and Hospital following administration of spurious/contaminated I.V. fluid (saline) supplied by the Hospital Authorities. His further allegation is that serious complications were also noticed in respect of other patients belonging to different wards for such administration of contaminated/ spurious IV fluids. The incident was totally

unexpected and struck terror amongst the patients of the hospital. Referring to the publication of a news item in Asian Age on 07.07.2000 that in Cabin No.5 of Surgery Department of SCB Medical College & Hospital, Cuttack one Sri S.K. Mishra of Nayagarh district had undergone a hernia operation on 01.07.2000 and was administered with saline procured by the Hospital Authorities from M/s. Om Pharmaceutical Pvt. Ltd., Industrial Estate, Cuttack-10 with manufacturer licence No.53 and Batch No.9571. After administration of this saline, the patient developed high fever and the fluid was to be withdrawn by the nursing staff and Sri Mishra could recover from the hazards of this spurious saline later on. He also described another incident pertaining to Smt. Geetanjali Ray of Cabin No.8 of the Gynaecology Department, who had removed the tumor from her uterus. This patient also developed complications following administration of hospital supplied saline which was of M/s. Kelvin Pharmaceutical Pvt. Ltd., Industrial Estate, Cuttack bearing Batch No.D-1163. It was alleged that some white thread like particles were seen in the saline bottle and its colour was unusually slight green. The saline was seized on 05.07.2000 by the Mangalabag Police. He further stated that the Professor of Neurosurgery and Asst. Professor of Anaesthesia complained about supply of hydrocortisone injection by the hospital authorities to the Ward which was sub-standard quality. The matter was brought to the notice of the Superintendent of SCB Medical College & Hospital, Cuttack. The petitioner highlighted that some medicine mafia having nexus with the hospital officials are continuously supplying the substandard/ spurious medicines to the Government hospitals.

It is further alleged that there is unholy alliance between the top Government officials and the Manufacturers/Suppliers of salines, medicine etc. In the PIL petition, the petitioner prayed for investigation into the matter by an independent agency preferably by the CBI.

4. Mr. J. Sahu, learned counsel appearing for the petitioner in O.J.C. No.8819 of 2000 submitted that all the medical documents including bed-head ticket and other papers were not handed over to the petitioner and the same were denied to the petitioner on the plea that the same are no more necessary. After death of the petitioner's wife, the Mangalabag Police registered a Case bearing P.S.U.D. Case No.540(3) of 2000 and A.S.I.-Sri S.K. Sahu was directed to enquire into the matter after receiving report from Dr. Trupti Patnaik of S.C.B. Medical College & Hospital, Cuttack. After a number of patients in Gynaecology Department succumbed to death due to contaminous saline and gross negligence of the attending doctors and other staff, opposite party no.2-the Director, Medical Education & Training allowed to conduct an enquiry into the matter. Opposite party no.2 in his letter no.

12619 dated 14.07.2000 called upon the petitioner's father to speak about the incident for the purpose of enquiry. In response to the said letter, the petitioner offered a written submission stating the entire chain of events that took place in the S.C.B. Medical College & Hospital. No ostensible steps have been taken to save his wife and the child for which the petitioner has been passing through deep shock and grave mental agony. Mr. Sahu submitted that the death of the petitioner's wife and the unborn child inside the womb was on account of gross negligence committed by the doctors and other staff of the Department of Obstetrics & Gynaecology, S.C.B. Medical College & Hospital. The repeated request and approach of the petitioner to provide necessary treatment to his wife did not yield any result and ultimately his wife and the child inside the mother womb died. The petitioner has the information that the attending doctors and other staff before administering saline on her body, have not conducted any test and at the same time spurious and contaminous saline was impregnated into her body which apparently caused immediate shivering of her body and shortly after pricking of the saline his wife succumbed to death. The petitioner is entitled to be compensated adequately by the State in the interest of justice and equity for gross negligence of doctors and staff of the S.C.B. Medical College & Hospital. Every doctor who enters into the medical profession has a duty to act with a reasonable degree of care, caution and skill. This is what called "implied undertaking" by a member of the medical profession that he shall be fair, reasonable and have the competent degree of skill. Mr. Sahu further submitted that where Hon'ble Court finds gross negligence on the part of the doctors and hospital authorities appropriate compensation is awarded to the victims for the economic loss and other damages sustained. Placing reliance in the case of Allen vs. Bloomsbury Health Authority (1993) 1 All ER 651 (QBD), it was submitted that damages were awarded in the case of negligence in the termination of pregnancy. Failure for sterilization operation on account of negligence by surgeon was also held to be negligence warranting grant of compensation. Placing reliance in the case of Miss Arnapurna Dutta vs. M/s. Appolo Hospital Enterprisers Ltd. And others; AIR 2000 Mad. 340, Mr. Sahu argued that compensation was awarded for medical negligence in the Hospital on account of doctor performing operation leaving behind foreign objects in the abdomen. The death of the wife of petitioner caused serious set back and mental sufferings to the petitioner, who had to survive with his one surviving child of 2 years for rearing for the rest of his life without mother. In the case at hand, as the doctors of S.C.B. Medical College & Hospital have caused gross medical negligence in their duty resulting in death of petitioner's wife and unborn child, appropriate action should be taken against such erring doctors and staff.

5. Learned Advocate General appearing on behalf of opposite party no.2 submitted that after death of three women patients in the O & G Ward of S.C.B. Medical College & Hospital on 1st and 2nd July, 2000 the matter was investigated by the Superintendent of S.C.B. Medical College. Besides, a fact finding committee (Internal) was constituted comprising Prof. S.K. Palit, Prof. & Head of Department of Nephrology, Prof. Sindhunandini Tripathy, Prof and H.O.D. O & G, Dr. Umesh Chandra Patra, Asst. Prof. Medicine, Dr. A.K. Patra, Blood Bank Officer along with Administrative Officer of the S.C.B. Medical College & Hospital. After enquiry, the fact finding report regarding the death of the patients of O & G Department (including the wife of the petitioner) was submitted by the Superintendent to opposite party no.2, vide his office letter no. 105 (8) dated 21.7.2000. The wife of the petitioner was referred from a peripheral Hospital as a case of obstructed labour. Before the patient was admitted to S.C.B. Medical College & Hospital on 30.6.2000 she was admitted to City Hospital, Cuttack on 29.6.2000 at 7.55 P.M., examined by the Emergency Medical Officer Dr. Minati Kumari Majhi and her statement was recorded. On 30.06.2000 at 9.30 A.M. the patient was examined by Dr. Kalyani Patnaik, Asst. Surgeon, a P.G. Degree holder in O &G City Hospital and confirmed that there is no progress in labour. After discussion with her senior Dr. Pravabati Nayak and considering condition of the patient, she advised for LSCS. But even after much motivation, attendants of the patient refused for LSCS and ultimately the wife of the petitioner was referred to S.C.B. Medical College on 30.6.2000 at about 1.30 P.M. In S.C.B. Medical College the wife of the petitioner was admitted to Labour room at 5.20 P.M. on 30.6.2000 vide Registered no.4616 by Suparana Behera, a P.G. student. Thereafter the patient was examined and treatment was given by eight doctors. Detailed treatment was given to the wife of the petitioner from 5.20 P.M. of 30.6.2000 to 1.7.2000 as has been mentioned in the enquiry report of opposite party no.2 and the fact finding report of the Superintendent, S.C. B. Medical College & Hospital. Despite all these efforts the patient did not survive and expired on 1.7.2000 at 11.30 P.M. Due to the incident of death of three women patient in O&G Department of S.C.B. Medical College being directed by the State Government to Dr. R.N. Nanda, the then DMET conducted the enquiry on 11.7.2000. After perusal of the relevant drugs testing report and thread bare technical deliberations on the same, the expert committee opined that since the impugned LVP fluids have neither been declared as spurious, adulterated and contaminated with fungal growth or toxic substances by the Government Analyst (CDL, Calcutta), it is not likely to be the cause of any serious complication and adverse reactions on the patients and they have passed all other pharmacopoeal parameters except the single test for bacterial endotoxin.

6. Learned Senior Advocate Mr. R.K.Mohanty, appearing for opposite party no.4 submitted that the petitioner's allegation against opposite party no. 4 is limited to what has been stated in para 3(c) of the writ petition wherein he has alleged that the petitioner had purportedly requested this opposite party no.4 to treat his wife to which opposite party no.4 allegedly did not pay any heed. Mr. Mohanty submitted that all the allegations made against opposite party no.4 in the writ petition are false. ccording to the clinical working protocol, the petitioner's wife was directly admitted to Unit No.IV headed by Dr. S.K. Mohapatra and treated by the doctors allotted to such unit. Opposite party no.4 had thus no role to play in the treatment of the petitioner's wife. Opposite party no.4 was never faced with any occasion when his experience was requisitioned as H.O.D. by head of the Unit IV where the petitioner's wife was being treated. On a plain reading of the writ petition it transpires that the pleadings are inconsistent. On one hand the petitioner asserts that he was not allowed to enter the labour room, but on the other he seems to have described the condition of his wife while being treated inside the labour room. So far as the saline is concerned, the requirement is indicated by the in-charge sister of the labour room. The requisite saline is procured directly from the store of the S.C.B. Medical College and Hospital and not from the Department. Therefore, opposite party no.4 had no occasion nor was he required to know about the administration of saline to a patient in a unit headed by another Professor/Associate Professor. There is absolutely no occasion for the labour room doctors to deal with the H.O.D. while treating a patient not belonging to his unit. Hence the petitioner's wife having been admittedly treated in unit no.IV there was absolutely no occasion for this opposite party no.4 to poke his nose for treatment in the labour room. The H.O.D. is only the administrative head of the Department and has no authority to interfere in the matter of treatment by other doctors unless requested or requisitioned. After the said incident was complained by the petitioner, as the administrative head of the Department, opposite party no.4 had written to Dr. S.K. Mohapatra heading Unit No.IV at the relevant time to enquire into the incident. This unfortunate incident could not have happened had an operation been done at the point when the patient was in City Hospital. The situation in S.C.B. Medical College and Hospital was "too late" one particularly in absence of the senior teachers, their supervision and guidance. There was administration of contaminated I.V. fluid (saline) as per the opinion of the experts.

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

(i) Whether administration of spurious/contaminated I.V. Fluid (saline) to three maternity patients in course of their treatment in O & G

Department of S.C.B., Medical College and Hospital caused their death in July, 2000?

(ii) Whether due to negligence and lack of care by the Hospital authorities, such spurious contaminated I.V. fluid (saline) was administered in course of treatment of three patients?

(iii) If the answer to question Nos.(i) and (ii) is in affirmative, whether petitioner is entitled to any compensation from the State? (iv) What order?

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

9. In an unfortunate incident, three maternity patients namely, Rosy Bibi, aged about 22 years, W/o. Sk. Abdul Ahad, Mamata Behera, aged about 20 years, W/o. Ajaya Behera and Bhanumati Das, aged about 30 years, W/o. Duryodhan Das died in O & G Department of S.C.B., Medical College and Hospital in July, 2000. The said incidents were highlighted in the Press and Media.

10. This Court vide order dated 14.08.2007, passed in O.J.C. No.6311 of 2000 directed the D.G. Police of Vigilance to be present before this Court on 20.08.2007 after making the following observation:

> "….This writ application has been filed in the year 2000 and in this matter an affidavit has been filed by the State running into several pages giving various detail. A portion of the affidavit shows that there is a report of the Expert Committee dated 29.9.2000. The relevant portion of the said report is set out below:
>
> "After perusal of the relevant drugs testing reports and threadbare technical deliberations on the same, the expert committee is of the opinion that since the impugned LVP fluids have neither been declared as spurious, adulterated and contaminated with any fungal growth of Toxic substances by the Government Analyst (C.D.L. Calcutta); it is not likely to be the cause of any serious complications and adverse reactions in the patients, in view of the fact that they were all sterile products and that they have passed all other pharmacopoeal parameters except the single test for bacterial endotoxin"
>
> We find the saline was injected to the patients and three such patients died namely Rosy Bibi, Mamata Behera and Bhanumati Das.

> The report which was obtained from the Government analyst shows that the sample does not pass the test nor does it conform to I.P. in respect of 'Bacterial Endotoxin'. In view of such report, the Expert Committee's findings appear a littleincongruous. Therefore, the Court takes judicial notice of the fact that the question of fake medicine which is now agitating public mind has been going on for quite some time. It is the common experience of most of the consumers as this Court has been told by various members of the Bar that genuine medicines are not normally available to an ordinary patient.
>
> We do not know if the suppliers who had supplied the saline in question are still supplying the same to different hospitals or not. It appears that no steps have been taken against the suppliers despite the fact that the fake saline given by the suppliers indicates are substandard. In such a situation, we are of the view that the matter should be properly inquired into by the D.G. of Police (Vigilance), Orissa, Cuttack. We, therefore, direct the D.G. of Police (Vigilance) to be present before this Court on next Monday (20.08.2007) at 2.00 P.M."

11. Pursuant to the said direction, the D.G. of Police (Vigilance) was present before this Court and this Court directed the Registry to handover the Xerox copy of the entire record including counter affidavit and the report regarding of three women patients in the O & G Department of SCB Medical College & Hospital to the learned Standing Counsel for the Vigilance Department, who will make it over to the D.G. Police (Vigilance), Odisha, Cuttack. This Court further made it clear that the inquiry would be held under the supervision of the D.G. of Police (Vigilance), Odisha, Cuttack and the report be submitted in a sealed cover by 30th October, 2007. Pursuant to the said order of this Court, the D.G. of Police (Vigilance) submitted the inquiry report.

12. Since this Court has not inspired confidence for the reasons stated vide order dated 14.08.2007, directed the D.G. of Police (Vigilance) to investigate into the matter. The argument of learned Advocate General on the basis of the report of the Committee dated 29.09.2000 does not merit consideration. The Vigilance Inquiry Report dated 22.08.2007 reveals that the inquiry was conducted covering the following aspects.

(i) To find out the details of prevalent Rules and Regulations governing procurement of medicines and medical consumables for Medical College and Hospitals of the State including SCB Medical College &

Hospital, Cuttack either by the Government of Odisha or by the SCB Medical College & Hospital Authorities themselves.

(ii) To find out the details regarding the selection of manufacturers for supply of medicines and medical consumables for the Medical College Hospitals and
others and to ascertain the details of receipt and supply of medicines and medical consumables by the SCB Medical College & Hospital Authorities and its
consequent supply to different departments of the hospital including O & G Department on the relevant days.

(iii) To ascertain the adopted procedures and practice in the hospital relating to indent by different departments and supply of the required items to such departments by the Central Medical Store of the SCB Medical College & Hospital, Cuttack.

(iv) Finally to ascertain and establish if the 3 deaths of maternity patients with 2 new born babies were due to the administration of spurious/contaminated I.V. fluid (saline) in the O & G Department and if so who are its manufacturer/Supplier and if there was any lack in proper treatment and follow up action in course of treatment of the patients. If so who are they and how they have been dealt with to prevent future recurrence of such unfortunate incidents in the Government Hospitals that too in the premier Medical Institution of Odisha like SCB Medical College & Hospital, Cuttack.

13. It appears that the vigilance report contains 59 pages. The Enquiry Officer also took into consideration the report of Dr. R.N. Nanda, the then DMET, Odisha, Bhubaneswar, who in his report observed different lapses on the part of Dr. Trupti Pattnaik, Asst. Surgeon, Dr. Annapurna Mohanty, In-charge of Labour Room and Dr.S.K. Mohapatra, Unit Head for their failure in maintaining clinical protocol in the Department and for not undertaking any investigation of the patient Rosy Bibi although she survived for about 30 hours from the time of her admission.

14. In case of Mamata Behera, the then DMET has also recorded his finding that initially in the BHT, the address of the patient was not recorded correctly. Dr. A. Mohanty who visited the patient at 9.15 A.M. on 01.07.2000, except advising LSCS, has not given any definite advice. No investigation has been made. Medical protocol is not maintained. Emergency call was given at 1.25 AM to the Emergency Resident Physician, who

attended the patient at 1.40 AM and death was declared at 1.50 AM on 02.07.2000. Moreover, the reason for keeping the saline bottle for examination has not been specified.

15. In case of Bhanumati Das, the said DMET in his report dated 31.07.2000 has also reflected the following lapses on the part of the treating physicians.

(i) failure of the Resident Surgeon to record her advice in the BHT at the time of admission,

(ii) failure of doctor to look into medical aspect of the suffering of patient by collecting blood slide for MP,

(iii) failure to take up routine investigation of the patient,

(iv) ambiguity in the findings of PG student Dr. Sanjib Patra by recording pulse at 178/minute and BP 110/74,

(v) failure for not consulting the seniors like the Unit Head, Assistant Professor or Associate Professor, at the time of need, and

(vi) failure to maintain proper medical protocol.

16. The Vigilance Inquiry Officer also took into consideration the report of the I.I.C., Mangalabag Police Station in the cases of Rosy Bibi, Mamata Behera and Bhanumati Das and the report of the Government Analyst, Central Drugs Laboratory, Calcutta after examining the samples of Dextrose Injection I.P. 5% of Batch No.D-1163 manufactured by M/s. Kelvin Pharmaceutical Laboratories Pvt. Ltd., Cuttack. In the said report, it has been opined that "it to be not of standard quality as it failed the parameter test on bacterial endotoxin". Similarly, in respect of all other I.V. fluids sent for examination, the Government Analysts found it not to be of standard quality. This relates to the samples taken by the Drugs Inspector, Cuttack-3ange from the Central Store, SCB Medical College & Hospital, Cuttack.

17. Dr. R.N. Nanda, the then DMET, Odisha, Bhubaneswar, in his report has stated that he has conducted a detailed inquiry as regards the circumstances vis-à-vis facts leading to death of the three maternity patients in the O & G Department of SCB Medical College & Hospital, Cuttack in July 2000. Mr. Nanda submitted his report dated 31.07.2000. Later on, on the direction of the Government, an Expert Committee consisting of the then Drugs Controller, Odisha, Bhubaneswar, the then Direction, Health and Family Welfare Department, Odisha, the then Director Health Services and

the then DMET, Odisha sat in the chamber of Addl. Secretary to Government, Department of Health & Family Welfare Department on 29.09.2000 and held a detailed discussion regarding the incidents of death of 3 maternity patients in the O & G Department of SCB Medical College & Hospital, Cuttack. The Government after careful examination of the Enquiry Report of the then DMET, Odisha, Bhubaneswar asked the said authority for taking disciplinary action against seven doctors of the SCB, Medical College and Hospital, Cuttack, namely, (1) Dr. Suryanarayan Das, Ex-Prof. & HOD, (2) Dr. S.K. Mohapatra, Associate Professor, (3) Dr. B.S. Parija, Associate Professor, (4) Dr. Annapurna Mohanty, Associate Professor, (5) Dr. Sabita Patnaik, Associate Professor, (6) Dr. Tushar Jyoti Kar, Asst. Professor, all of O & G Department, and (7) Dr. Trupti Patnaik, Asst. Surgeon. Since Dr. B.S. Parija has expired and Dr. S.N. Das, Dr. S.K. Mohapatra, Dr. Annapurna Mohanty and Dr. Sabita Patnaik have already retired from Government Service, draft charges have been framed under Rule 15 of the OCS (CCA) Rules, 1962 against Dr. Tushar Jyoti Kar for negligence in duty in violation of the Government Servants Conduct Rules. 18. In the Vigilance Inquiry Report, it is reiterated that the Superintendent of SCB Medical College & Hospital, Cuttack during 2000 prior to occurrence along with the Store Medical Officer also required to satisfy themselves on the quality of I.V. fluids procured by them from local SSI Units as per the condition prescribed by the Director, EPM while selecting such SSI Units. This has been apprised to all concerned by the Director, EPM in his letter No.3807(200)/EPM dated 26.04.1999 vide Para-III. This responsibility has not been discharged either by the Superintendent or the Store Medical Officer of SCB, MCH, Cuttack while procuring I.V. fluids from the local SSI Units.

19. As regards the negligence of the treating doctors in charge of the treatment of three deceased persons, their negligence and lapses have been duly examined by the fact finding Committee comprising experienced and Senior Professors of the Medical College in their report dated 15.07.2000. Thereafter, the then DMET, Odisha, Bhubaneswar had vividly discussed about the lapses and negligence of the doctors in his enquiry report dated 31.07.2000 and finally in the report of the Expert Committee dated 29.09.2000 leading to a decision for departmental action against the defaulting seven senior doctors.

20. From the Vigilance report and also the report of the DMET, it is clearly evident that there were lapses on the part of the Licensing Authority i.e. Drugs Controller, Odisha, Bhubaneswar for unusual delay in taking a decision for cancellation of Drug Licence thereby resulting in a free-hand to the manufacturers to carry on their business taking advantage of the benefit

of the provisions of Rules 72 and 77 of D & C Rules, 1945. The fact that the EMP authorities have omitted to take notice of the adverse performance record of the firms is quite clear. This reveals the role of EPM Authorities in callous manner in the process of selecting and finalizing the list of EMP rate contract SSI Units. The negligence on the part of doctors in charge of treatment of deceased has also come to surface directly or indirectly by the Fact Finding Committee and the DMET, Bhubaneswar which was followed by initiation of departmental action by the Government. In the Vigilance Report recommendation has been made for initiation of appropriate action against the Drugs Controller of Odisha and EPM Authorities for their lapses and expediting the departmental action against all the defaulting doctors.

21. In view of the above, it can be safely concluded that administration of spurious/contaminated I.V. Fluid (saline) to the three maternity patients in course of their treatment in O & G Department of SCB Medical College and Hospital caused death in July, 2000 and due to negligence and lack of care by the hospital authorities such spurious/contaminated I.V. Fluid (saline) was administered to the three patients in course of their treatment.

22. Question No.(iii) is as to whether the petitioner is entitled to any compensation.

The present case is governed by the legal maxim *respondeat superior* and thus, the State is liable for wrong done by the doctors, who are no other than the Government Officers employed by it. 23. Negligence as a tort is defined by Winfield as “the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff.” The existence of a duty-situation or a duty to take care is, therefore, essential before a person can be held liable in negligence. In the classical words of Lord Atkin:

> “At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of “culpa”, is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you ust not injure your neighbour; and the lawyer’s question, who is my neighbour, receives a restricted reply. You must

> take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be— persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

It is now an obsolete view that "the duty to be careful only exists where the wisdom of our ancestors has decreed that it shall eixst". In *Donoghue v. Stevenson* itself the House of Lords recognized a new dutysituation and a manufacturer was held to owe a duty of care not only to the wholesale dealer, but also to the ultimate consumer of his product. As stated by Lord Macmillan in that case:

> "The conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. [p.619]."

Then in *Hedley Bryne and Co. Ltd. V. Heller and Partners Ltd*. (1964) AC 465 (HL), again a new duty-situation was recognized. It was held that the law will imply a duty of care when a party seeking information from a party possessed of a special skill trusts him to exercise due care and that a negligent, though honest, misrepresentation in breach of this duty may give rise to an action for damages apart from contract or any fiduciary relationship. Lord Pearce in that case said:

> "How wide the sphere of the duty of care in negligence is to be laid depends ultimately upon the Courts' assessment of the demands of society for protection from the carelessness of others.[p.536]."

The principles governing the recognition of new duty-situations were more recently considered in the case of *Home Office v. Dorset Yacht Co. Ltd*. (1970) All ER 294 (HL). In that case, some Borstal trainees escaped due to the negligence of Borstal Officers and caused damages to a yacht. The owner of the yacht sued the Home Office for damages and a preliminary issue was raised whether on the facts pleaded, the Home Office or its servants owed any duty of care to the owner of the yacht. It was held that the causing of damage to the yacht by the Borstal trainees ought to have been foreseen by the Borstal Officers as likely to occur if they failed to exercise proper control or supervision and, therefore, the officers *prima facie* owed a duty of care to the owner of the yacht. It was argued in that case that there was virtually no authority for imposing a duty. This argument was rejected

and in that connection, Lord Reid made the following pertinent observations:

> "About the beginning of this century most eminent lawyers thought that there were a number of separate torts involving negligence each with its own rules, and they were most unwilling to add more. They were of course aware from a number of leading cases that in the past the Courts had from time to time recognized new duties and new grounds of action. But the heroic age was over, it was time to cultivate certainty and security in the law; the categories of negligence were virtually closed. The learned Attorney-General invited us to return to those halcyon days, but, attractive though it may be, I cannot accede to his invitation. In later years there has been a steady trend towards regarding the law of negligence as depending on principle so that, when a new point emerges, one should ask not whether it is covered by authority but whether recognized principles apply to it. *Donoghue v. Stevenson* may be regarded as a statement of principle. It is not be treated as if it were a statutory definition. It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion."

[See *Madhya Pradesh State Road Transport Corporation and another vs. Mst. Basantibai and others, 1971 MP LJ 706]*

24. The right to health and medical care is a fundamental right under Article 21 read with Articles 39(e), 41 and 43 of the Constitution of India, right to life includes protection of health (See ***Consumer Education and Research Centre and others vs. Union of India and others,*** AIR 1995 SC 922).

25. The Hon'ble Supreme Court in the case of ***Paschim Banga Khet Mazdoor Samity and others vs. State of West Bengal and another, AIR 1996 SC 2426,*** held as under:

> "9. The Constitution envisages the establishment of a welfare State at the federal level as well as at the State level. In a welfare State the primary duty of the Government is to secure the welfare of the people. Providing adequate medical facilities for the people is an essential part of the obligations undertaken by the Government in a welfare State. The Government discharges this obligation by running hospitals and health centres which provide medical care to the

person seeking to avail of those facilities. Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the State and the medical officers employed therein are duty-bound to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21. In the present case there was breach of the said right of Hakim Seikh guaranteed under Article 21 when he was denied treatment at the various government hospitals which were approached even though his condition was very serious at that time and he was in need of immediate medical attention. Since the said denial of the right of Hakim Seikh guaranteed under Article 21 was by officers of the State, in hospitals run by the State, the State cannot avoid its responsibility for such denial of the constitutional right of Hakim Seikh. In respect of deprivation of the constitutional rights guaranteed under Part III of the Constitution the position is well settled that adequate compensation can be awarded by the court for such violation by way of redress in proceedings under Articles 32 and 226 of the Constitution. (See: Ruddul Sah v. State of Bihar, (1983) 3 SCR 508 : (AIR 1983 SC 1086); Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 : (1993 AIR SCW 2366); Consumer Education and Research Centre v. Union of India, (1995) 3 SCC 42 : (1995 AIR SCW 759)."

26. At this juncture, it is profitable to refer to the decision of the Hon'ble Supreme Court with regard to the award of compensation for contravention of human rights. The Hon'ble Supreme Court in ***Smt. Nilabati Behera @ Lalita Behera vs. State of Orissa and others, AIR 1993 SC 1960***, held:"A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode

of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

27. In ***Consumer Education and Research Centre*** *(supra)*, the Hon'ble Supreme Court held:

> "In public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and protection of fundamental and human rights. The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the constitution of the law".

28. The Hon'ble Supreme Court in the case of ***Rudul Sah v. State of Bihar and another,*** AIR 1983 SC 1086, observed that in appropriate cases, the Court discharging constitutional duties can pass orders for payment of money in the nature of compensation consequent upon deprivation of a fundamental right to life and liberty of a person as State must repair the damage done by its officers to such person's right.

29. In ***Kumari Smt. vs. State of Tamil Nadu and others,*** AIR 1992 SC 2069, the Hon'ble Supreme Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years' old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Hon'ble Supreme Court directed the State to pay compensation.

30. The Hon'ble Supreme Court in the case of ***State of Rajasthan v. Mst. Vidhyawati,*** AIR 1962 SC 933, held as under:

> "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant

> within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India……."

31. In view of the above, the petitioner as well as the legal heirs of other deceased namely, Mamata Behera and Bhanumati Das are entitled to compensation for the death caused due to negligence on the part of the treating doctors, who are Government employees, and the opposite party-State is liable to pay such compensation to them.

32. Keeping in view the peculiar facts and circumstances of the case, we direct the opposite party-State to pay compensation of Rs.5.00 (Rupees five lakhs) to the petitioner as well as the legal heirs of Mamata Behera and Bhanumati Das in each case on proper identification within a period of two months from the date of receipt of this judgment. Otherwise, they are entitled for interest at the rate 6% per annum on the compensation awarded till the date of payment. The State is at liberty to recover the same from all the concerned who are responsible for their death.

33. Since the incident of deaths in S.C.B. Medical College, Cuttack due to administration of spurious and contaminated transfusion of fluid supplied by the Hospital authorities has been investigated under the supervision of Director General of Police (Vigilance), Odisha, Cuttack and in the vigilance report recommendation has been made for initiation of appropriate action against the Drug Controller of Odisha and EPM authorities for their lapses and for expediting departmental action against all the defaulting doctors there is no need to further direct the C.B.I. to investigate the said incident.

34. In the result, the writ petition bearing O.J.C. No.8819 of 2000 is allowed with the aforesaid observations and directions and O.J.C. No.6311 of 2000 is disposed of accordingly, but without any order as to costs.

O.J.C. No. 8819 /2000 allowed.
O.J.C.No. 6311/2000 disposed of.

2013 (I) ILR - CUT- 951

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

W.P. (C) NO. 21315 OF 2011 (Dt.16.11.2012)

SUJATA KHAMARI .....Petitioner

.*Vrs.*

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

CONSTITUTION OF INDIA, 1950 – ART.226

Opening of 24 hours Day and Night Medicine shop – Criteria for selection – As per Government guidelines allottee should be an unemployed registered Pharmacist and in case no registered Pharmacist applies only those applicants willing to engage a registered Pharmacist may be considered.

In this case although petitioner is an unemployed registered pharmacist, his application was rejected for non-production of income and solvency certificates and O.P.5,though not a registered pharmacist was selected – Selection of O.P.5 challenged – Held, rejection of petitioner's application on the ground of non-production of income certificate as well as solvency certificate in her name is not justified – Discrimination – Held, order selecting O.P.5 and rejecting the application of the petitioner is quashed – Direction issued to the Government to delete impracticable and unrealistic conditions from the guide lines and to frame appropriate guidelines and select befitting candidate for the purpose on the basis of fresh guidelines.

(Paras 10, 11)

For Petitioner - M/s. A.A. Das, M.B. Ray, A.K. Behera, B.K. Parida, S. Mohanty & B. Sahu.
For Opp.Parties- Mr. P.K. Muduli, Addl. Standing Counsel(for O.Ps 1 to 4) Dr. B.R. Sarangi (for O.P.5).

B.N.MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order of the Chief District Medical Officer, Bargarh dated 18.7.2011 under Annexure-4 by which Opposite party No.5-Mamata Ratha was selected for opening of 24 hours Day and Night Medicine Shop inside the campus of C.H.C., Bheden in the district of Bargarh on the ground that such selection is illegal being contrary to the guidelines issued by the Government in H&F Welfare Department. Further prayer of the petitioner is for issuance of necessary direction to opposite parties to declare the

petitioner as selected candidate for opening of 24 hours Day and Night Medicine Shop in the campus of the said C.H.C.

2. Petitioner's case in a nutshell is that an advertisement was published by the Chief District Medical Officer (in short "C.D.M.O."), Bargarh on 17.03.2011 in the daily news paper, namely "The Samaja" inviting application for opening of 24 hours Day and Night Medicine Store inside the Hospital Campus of C.H.C., Bheden in the district of Bargarh. In the advertisement it had been clearly mentioned that the selection will be made as per the guidelines issued by the Government in Health & Family Welfare Department and the shop in question is reserved for women candidate only. Pursuant to the said advertisement, the petitioner having all requisite qualifications and satisfying all the criteria contained in the advertisement submitted her application. She has passed Diploma in Pharmacy in the year 2009 and is a registered Pharmacist. She is an unemployed having no source of income. Opposite party No.5 had also submitted her application along with the petitioner. In the said selection, opposite party No.5 was selected vide order dated 18.7.2011 and opposite party No.3-C.D.M.O., Bargarh issued a direction to opposite party No.5 to execute the agreement with him. Hence, the writ petition.

3. Mr. Asim Amitav Das, learned counsel appearing for the petitioner submitted that the petitioner having all the requisite qualifications had satisfied the criteria contained in the advertisement. Referring to the guidelines issued by the Government of Orissa in Health & Family Welfare Department vide letter dated 28.1.2004, it is submitted that the applicant should be an unemployed registered Pharmacist and if no registered pharmacist applies, then those applicants who are willing to engage registered pharmacist may be considered. Since the petitioner is an unemployed registered Pharmacist and there was no other applicant, who is unemployed registered Pharmacist, the petitioner should have been selected. Therefore, among all the applicants, the petitioner is the only eligible candidate who is an unemployed registered Pharmacist having Diploma in Pharmacy, but opposite party No.5 does not possess such qualification nor she is a registered Pharmacist. As per the guidelines, the petitioner stands in a better footing than opposite party No.5 as would be evident from the testimonials and other relevant documents furnished. The petitioner is not only more qualified than opposite party No.5, but also she is unemployed registered Pharmacist. Concluding his argument, Mr. Das submitted to allow this writ petition by granting the reliefs as prayed.

4. Mr. Muduli, learned Addl. Standing Counsel appearing for Opp. Parties 1 to 4-State authorities reiterating the stand taken in the counter

affidavit submitted that the petitioner has not approached this Hon'ble Court with clean hands. The petition is an abuse of judicial process for which it is liable to be dismissed with cost. Selection process has been made legally and no injustice has been caused to the petitioner. The application of the petitioner was rejected due to non-submission of required document i.e. Solvency Certificate of her own and Income Certificate from the concerned Tahasildar, which are very much relevant and mandatory for the purpose of opening of 24 hours Day and Night Medicine Shop by a Pharmacist claiming to be unemployed. The petitioner does not possess all the requisite qualifications. The petitioner with her application dated 24.3.2011, which was received in the office of the C.D.M.O., Bargarh on 26.3.2011, did not submit the Solvency Certificate which is mandatory requirement on the part of an applicant to open a 24 hours Day and Night Medicine Shop. Along with the application dated 24.3.2011 the petitioner submitted a report of the Revenue Inspector and an undertaking to produce the Solvency Certificate as soon as possible. The Solvency Certificate dated 26.3.2011 annexed at page 13 of the writ petition belongs to the father of the petitioner and not of the petitioner. It is further contended by Mr. Muduli that no Solvency Certificate was produced before opposite party No.3 till 20.4.2011, when the Selection Committee met for selection. The statements made at serial Nos.5 & 6 of the Application Form at page 8 of the writ petition do not tally with the original application. It is submitted that Serial No.4 of the application form at page 8 of the writ petition provides for submission of an affidavit by the registered Pharmacist indicating that the applicant is unemployed and an Income Certificate from the concerned Tahasildar. In the instant case, the petitioner has not submitted the Income Certificate of her own from the concerned Tahasildar. Rather, petitioner submitted an Income Certificate of her father-Magan Khamari which is evident from page 12 of the writ petition. Petitioner has failed to fulfill the criteria as mentioned at serial Nos. 4 & 6 of the Application Form by not submitting the required documents. The Selection Committee consisting of six members under the Chairmanship of the C.D.M.O., Bargarh in its meeting held on 20.4.2011 found that the petitioner had not produced the Solvency Certificate, either with her application or till 20.4.2011. Due to oversight, a typographical error has crept in, in the short listed statements of candidates at column Nos. 11 & 12 in respect of the present petitioner. Column No.11 should have been blank and Column No.12 should have been mentioned as "No". Mentioning "Yes" at Column No.11 is an inadvertent mistake and contrary to the documents filed by this petitioner. Therefore, the Committee found the petitioner not to have fulfilled the criteria for her selection to open the 24 hours Day and Night Medicine Shop inside the campus of CHC, Bheden. Though the petitioner is an unemployed registered Pharmacist and as per the Government guidelines

dated 28.1.2004 preference should have been given to her, but she has not fulfilled the mandatory criteria. Therefore, she was not considered as a suitable candidate. Accordingly, the application of the petitioner was rejected. Opposite party No.5 fulfilled all the criteria laid down by the State and also submitted all the required documents. Though opposite party No.5 is not a registered Pharmacist, but along with her application she submitted her willingness to run the 24 hours Day & Night Medicine shop by engaging registered Pharmacist. Opposite party No.5 along with her application submitted her Solvency Certificate as well as other documents like affidavit regarding willingness of engaging a registered Pharmacist as required against column No.5 of the application form. Except opposite party No.5, no other applicant has submitted Solvency Certificate. The case of opposite party No.5 was considered as there was no unemployed registered Pharmacist available to be considered for selection. Accordingly, Opposite party No.5 has been selected by the Selection Committee to open the 24 hours Day and Night Medicine Shop in the campus of CHC, Bheden. The documents filed at pages 13, 14 and 17 having been manufactured/prepared for the purpose of this case; the said documents cannot be relied upon.

5. Mr. B.R. Sarangi, learned counsel appearing for opposite party No.5 while supporting the stand taken by opp. Parties 2 & 3-State authorities and referring to the counter affidavit submitted that the petitioner has not fulfilled the eligibility criteria as provided in notification No.2731(4)/H. dated 28.1.2004 and letter No. 22424/H. dated 15.9.2005 and corrigendum issued vide letter No.5837/H. dated 28.2.2006. To judge the suitability of the candidate the C.D.M.O., Bargarh constituted a Selection Committee taking into account other five Medical Officers, out of which three were Asst. District Medical Officers, one Medical Officer and District Malaria Officer in which the C.D.M.O. was the Chairman. Pursuant to the advertisement, nine applications were received which were placed before the Selection Committee for determination of inter-se merit to judge the suitability and to find out the most eligible person to be selected for opening of 24 hours medicine store within the C.H.C. campus, Bheden. After thorough scrutiny of applications, opposite party No.5 was selected and petitioner's application was rejected due to non-submission of Solvency Certificate. In her application, which was received in the office of the C.D.M.O.,Bargarh on 26.3.2011 the petitioner had submitted a Solvency Certificate. She had submitted an R.I. report with an undertaking. Apart from this, the petitioner had furnished the Income Certificate of her father-Magan Khamari though the Income Certificate of the petitioner was required to be attached in the said application form. Therefore, the income certificate of father cannot be taken into consideration for selection of petitioner. In the application form

attached to the writ petition it is stated that the "Solvency Certificate" attached, but in the original application form, the same has not been mentioned. Thus, the petitioner has not approached this Hon'ble Court with clean hands. The Solvency Certificate issued in the name of father cannot be taken into consideration in the selection process of the petitioner. The petitioner is now continuing her higher study in B. Pharma 3rd year 5th Semester bearing Roll No.1023252007 in the Pharmaceutical College, Samaleswawri Vihar, Tingipali, Barpali in the District of Bargarh under BPUT. In respect of his contention, Mr. Sarangi submitted a certificate issued by the Principal of the above said Pharmaceutical College which is annexed as Annexure-F/5.

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

(i) Whether the candidature of the petitioner can be rejected on the ground of non-submission of Solvency Certificate and Income certificate of her own?

(ii) Whether the conditions stipulated at paragraph 6 of the guidelines issued by the Health and Family Welfare Department dated 28.1.2004 to the extent of production of Solvency Certificate and the condition stipulated in para-2 (ii) read with corrigendum dated 28.2.2006 issued by the Government of Orissa in H&F Welfare Department that Pharmacist claiming to be unemployed should furnish Income Certificate from the Tahasildar of the Tahasil to which she belongs and consequently such condition stipulated again in Serial Nos. 4 & 6 of the Application Form are valid ?

(iii) Whether the Solvency Certificate of the father of a candidate can be taken into consideration for the purpose of making selection of an applicant for opening of Day and Night Medicine Shop and the Solvency Certificate in the name of the applicant is necessary for the purpose?

(iv) Whether in the fact situation of the case, selection of opposite party No.5 who is not an unemployed registered Pharmacist contravenes the criterion stipulated in paragraph 4(ii) which provides that if no registered Pharmacist applies, only then those willing to engage registered Pharmacist may be considered; and therefore, selection of opposite party No.5 is valid?

(v) What order ?

7. Question nos. (i), (ii) and (iii) being interlinked, they are taken together. To deal with the above questions, it is necessary to extract here some of the relevant paragraphs of the guidelines dated 28.1.2004, Letters dated 15.9.2005 and 28.2.2006.

Guideline dated 28.1.2004:

"4. The criteria indicated below should be followed in regard to selection of candidates to open a medicine shop within the premises of hospitals.

(i) The allottee should be an unemployed registered pharmacist.

(ii) If no registered pharmacist applies, only then those willing to engage registered pharmacists may be considered.

(iii) Young persons who are just above the maximum age limit admissible for Government employment and just below 45 years may be given preference over older persons

xx xx xx

6. The Superintendents/Chief District Medical Officers/Chief Medical Officer shall verify the solvency certificate and assess the applicant's capability to run the medicine shop."

Letter dated 15.9.2005:

"2.(ii) Regarding submission of certificate by the applicant claiming to be unemployed Pharmacists, it is clarified that the Pharmacists claiming to be unemployed should furnish an affidavit to the effect that he is unemployed along with an income certificate from the Tahasildar under whose jurisdiction, the medical institution is situated. It is further clarified that on selection of the applicant for opening of a medical store, if it is subsequently detected that the applicant has made a false certificate and false affidavit, the permission so granted, shall be cancelled and he will be liable for other legal action as per law. This is in partial modification of the para 4 of the aforesaid guideline."

Corrigendum dated 28.2.2006:

"The relevant portions appearing in the Second part of the first sentence of the Government Letter No. 22424 dated 15.9.2005 under Para-2(ii) may be read as Pharmacists claiming to be unemployed should furnish affidavit to the effect that he is

unemployed along with an Income Certificate "from the Tahasildar of the Tahasil to which he belongs" in place of "from the Tahasildar under whose jurisdiction the Medical Institution is situated."

8. It is not in dispute that the petitioner is an unemployed registered Pharmacist. Therefore, she satisfies the first criterion No.4(i) of the guideline dated 28.1.2004. Merely because, she is a student of 3rd year 5th Semester of B. Pharma, that will not alter her status of unemployed registered Pharmacist. Had she been selected for opening of 24 hours Day and Night Medicine Shop in question, an option would have been left with her to leave the study if the same would have not been completed. Therefore, on the above ground her candidature cannot be rejected as alleged by opposite party No.5. However, in fact her candidature has been rejected on the following two grounds; (i) she has not furnished the Income Certificate from the Tahasildar of the Tahasil to which she belongs in her name along with the application as required against column No.4 of the Application Form which is in conformity with the guideline; (ii) she has not furnished Solvency Certificate in her name along with the application as required against Column No.6 of the Application Form which is also in conformity with the guideline. The question now arises as to whether the opp. Parties-authorities are justified to stipulate such condition in the guideline on the basis of which the application form has been prepared. If we look to the criterion under clause no. 4(i) of guideline dated 28.1.2004, it would show that the allottee should be an unemployed registered Pharmacist. Such being the requirement, the further requirement of furnishing Income Certificate as well as the Solvency Certificate in the name of such unemployed registered Pharmacist is totally impracticable and unrealistic. Opp.party-Government authority cannot stipulate any condition asking a candidate to do certain thing which is not possible. As per clause 6 of the guideline dated 28.1.2004, the Superintendent/Chief District Medical Officer are required to assess the applicant's capability to run the medicine shop. Therefore, in the guideline some stipulation should be made requiring the applicant to produce consent certificate from relatives, bankers, financier willing to finance the applicant, if she is selected for opening of 24 hours Day and Night Medicine Shop. Otherwise also the applicants, belonging to the lower strata of the society, who by dint of their own efforts, have acquired Pharmacy qualification and are eligible to be selected pursuant to the advertisement for opening of 24 hours Day and Night Medicine Shop shall be deprived of their right on the ground that they do not have any ostensible source of income or any solvency of their own. In a democratic socialistic country, where equal treatment is the basic structure of the Constitution, the

people belonging to lower strata of the society should not be discriminated on the ground of their weak financial status.

9. In view of the above, the condition stipulated in the guideline needs to be amended and rejection of petitioner's application on the ground of non-production of Income certificate and Solvency Certificate in her name is not justified.

10. Question no.(iv) relates to legality of selection of opposite party No.5. Admittedly, opposite party No.5 is not a registered Pharmacist. Paragraph 4(ii) of the Guideline dated 28.1.2004 says that if no registered Pharmacist applies only then those willing to engage registered Pharmacist may be considered. Therefore, the question of selection of opposite party No.5 for opening of 24 hours Day and Night Medicine Shop arises only when no registered pharmacist applies. In the instant case, undisputedly the petitioner is an unemployed registered Pharmacist, who applied for opening of 24 hours Day and Night Medicine Shop. Therefore, selection of opposite party No.5 is bad in law and rejection of the application of the petitioner is also bad in law, which liable to be quashed.

11. In the fact situation, we direct the Government in Health & Family Welfare Department to delete the impracticable and unrealistic condition from the guidelines framed by it and frame appropriate guideline keeping in view our observations made above for the purpose of selection of 24 hours Day and Night Medicine Shops in the campuses of Medical Hospitals in the State including the C.H.C., Bheden and ensure that on the basis of such guideline the befitting candidate/candidates is/are selected for the above purpose within a period of eight weeks from the date of receipt of this judgment.

12. With the aforesaid observations and directions, the writ petition is allowed by quashing the selection of opposite party No.5 and also the rejection of the application of the petitioner.

Writ petition allowed.

2013 (I) ILR - CUT- 959

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

W.P.(C) NO. 11404 OF 2004 (Dt.16.11.2012)

GIRIDHARI MISHRA ……..Petitioner

.Vrs.

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

P. I. L. – Crop loss due to natural calamites – Central Government introduced National Agricultural Scheme through concerned State Governments for Crop insurance by farmers – In Odisha each "Block" has been taken as an unit i.e. "Defined area" under the Scheme for assessment of loss of Crops – Petitioner's land sustained crop loss but he failed to receive insurance claim as most of the agricultural lands of his block are irrigated and not decland crop loss – Hence the writ petition.

When premium have been collected by the Insurance Company on individual basis the Insurance claim should be settled on individual basis or taking Gram Panchayat as "Defined area" – Held, direction issued to the State Government to consider petitioners claim declaring the "Defined area" under the Scheme to take "Gram Panchayat" as a unit and not the "Block" for the purpose of granting insurance claim.

(Paras 16, 22)

Case laws Referred to:-

1.(2004) 5 SCC 232 : (Union of India & Anr.-V- Manu Dev Arya)
2.2002 (2) ALD 486 (DB) : (Andhra Pradesh Rythu Sangham-V- Union of India & Ors.)

For Petitioner - Mr. Jateswar Nayak,
M/s. M.K. Das, S. Mallick, L. Dash,
Mrs. M. Das.

For Opp.Parties - Mr. R.K. Mohapatra, Govt. Adv.
Mr. P.K. Muduli, Addl. Standing Counsel.
Mr. S.D.Das, A.S.G. (for O.P.No.3)
M/s. S.S. Rao, B.K. Mohanty & N.C. Nayak, (for O.P.No.6)
M/s. N. Sahani & K. Pradhan (for O.P.No.7).

B.N.MAHAPATRA, J. The present writ petition has been filed in the nature of a Public Interest Litigation with the prayers to (i) direct/order that

each Grama Panchayat shall be taken as a unit for the purpose of assessment of crop yield or loss caused to the farmers due to natural calamities, (ii) direct/order that an independent enquiry shall be conducted to assess the loss sustained by the petitioners' village due to natural calamities from the year 1999 till date, (iii) direct/order that the petitioners shall be paid compensation by settling their insurance claims either individually or as a unit on Grama Panchayat basis to compensate the loss caused to their crops due to natural calamities, and (iv) pass such other orders/direction as this Court may deem fit and proper in the interest of justice.

2. Petitioners' case in a nut-shell is that they are the residents of the villages of Barasara and Govindpur of Govindpur Grama Panchayat of Tihidi Block in the district of Bhadrak. They have challenged the illegal action of the opposite parties in not settling their claims and not paying them the compensation for loss of crops grown by them on account of natural calamities. The petitioners had grown paddy by obtaining agricultural loan as per the National Agricultural Insurance Scheme. The crops grown by them were insured compulsorily and the petitioners had paid insurance premium through their Bankers, i.e. the Central Co-operative Bank Ltd., Balasore. However, their insurance claims have not been settled though they have incurred loss in yielding their crops. Hence, the present writ petition.

3. Mr. J. Nayak, learned counsel appearing on behalf of the petitioners submitted that the petitioners are small farmers and they maintain their livelihood mostly by growing paddy. The agricultural fields in the aforesaid villages are rain fed as no irrigation facility is provided to them. In case of heavy rain fall, their agricultural fields are flooded out and in case of low rain fall, they will be subjected to loss on account of drought. In the year 1999 a Scheme namely, National Agricultural Insurance Scheme was introduced by the Government of India through the concerned State Governments for insuring the crops grown by the farmers. Both loanee and non-loanee are eligible to avail the benefits under the aforesaid Scheme. Under the said Scheme, comprehensive risk insurance is provided to cover yield losses arisen due to non-preventable risks, such as flood, drought, cyclone and typhoon. It was decided to operate the Scheme on the basis of "Area approach" for wide spread calamities and on an individual basis for localized calamities. The petitioners are growing paddy by obtaining agricultural loan from the Balasore District Central-Co-operative Bank Ltd. and Credit Cards have been issued in their favour for the purpose. While obtaining their loans, they are compelled to insure the crops and to pay the insurance premium. From the year 1999, till date the petitioners have been losing about 50% to 75% of their crops each year due to natural calamities. However, they have

not been compensated for the losses they have suffered though they have insured the crop and paid the insurance premium. As per the National Agricultural Insurance Scheme, defined area of notified crops for wide-spread calamities was taken as a unit for deciding the insurance claim of that area. In the State of Odisha, each Block has been taken as a Unit i.e. as the "Defined Area" for paddy crops. In view of such area approach, if any individual farmer or any independent villager suffers loss due to any wide-spread calamity such as drought, flood etc., such individual farmer or individual villager will not be entitled to get the insurance claim. For enabling the farmers to get the insurance claim, the State Government have to declare the entire Block area as affected area, so that all the farmers in that defined area will be eligible to get the insurance claim. In view of such wrong area approach, the petitioners are not able to get their legitimate insurance claims though actually they have suffered loss of about 50% to 75% of their crops on account of wide-spread calamities. In Tihidi Block of Bhadrak District, most of the agricultural lands are covered by irrigation facilities. Such irrigation facilities have not been extended to the petitioners' villages. In case of drought in the entire area, most of the agricultural fields are provided with irrigation facilities except some few villages like that of the petitioners in the Block. The State Government, therefore, are not declaring the entire Block i.e. the "defined area" under the Scheme as the drought affected areas. However, the petitioners reliably learn and verily believe that the revenue authorities on proper verification have declared the villages of the petitioners as drought affected areas and they have measured the loss to the extent of 50% to 75%, but on account of non-declaration of the affected area as 'defined area', the petitioners are unable to get their legitimate rights of insurance claims.

4. It was incumbent upon the State Government to declare any area as a Unit. Clause 9 of the Scheme is crystal clear that the "Defined Area" or a Unit may be a Grama Panchayat/Mandal/Circle/ Block or Taluk. In the instant case, had the unit or defined area been a Grama Panchayat or a particular circle, the petitioners would have been able to get their insurance claim. However, as the entire Block area has been taken as a single unit, the petitioners have been deprived of getting their legitimate insurance claim as only the petitioners' villages have been affected while other places in the Block to which irrigation facilities are provided have not been affected. Therefore, the right approach would be to settle the claim on an individual basis instead of deciding the claim on "Area approach" specifically when premiums have been collected by the insurance company on an individual basis while advancing agricultural loans on each Kisan Credit Card.

5. Mr. Nayak, further submitted that the petitioners reliably learnt that till the year 2000, each G.P. was taken as a unit for settling the insurance claim of any loss to the farmers on account of such wide-spread calamities. After the year 2000, the State Government instructed to take the Block as a Single Unit. However, the State Government lost sight of the fact that there are certain Blocks specifically in Bhadrak district in which more than 50% of the area have been provided with irrigation facilities and the farmers of that area will not be affected or at a loss anything in spite of the wide-spread calamities. On the other hand, the farmers of the rest of the area will definitely be affected in the event of such wide-spread calamities. The State Government, however, are not declaring the entire area as affected area as a result of which, the affected farmers have been deprived of settling their insurance claims. The petitioners are the small farmers of villages Barasara and Gobindpur under Tihidi Block of Bhadrak district. The petitioners' villages have not been provided with any irrigation facilities while other areas approaching the main road, have been provided with irrigation facilities. For the last five years, they have been suffering being affected by natural calamites mostly by drought in view of untimely rain-fall in the State. Being aggrieved by the inaction of the authorities in not settling their insurance claims the petitioners submitted a representation to the Collector, Bhadrak to compensate their loss caused due to such natural calamities. The petitioners reliably learnt that the local Tahasildar though reported that such villages have been affected by drought, no such report was communicated to the State Government by the Collector as more than 50% area of the Block to which irrigation facilities have been provided have not suffered such loss. Reports were submitted by taking samples from the irrigated areas. The non-irrigated areas have been left out though the local Tahasildar in his report had submitted individual village-wise report in which the petitioners' villages have been shown as affected areas. The petitioners are paying insurance premium on their crops and such insurance was made compulsory. While extending agricultural loans, they are entitled for compensation from the Insurance Company individually on the assessment of loss to their crops. The petitioners' villages though affected by natural calamities repeatedly each year since 2000, no such investigation has been made in the petitioners' villages and no reports have been submitted. Concluding his argument, Mr. Nayak, requested this Court to direct the State Government to conduct independent inquiry regarding loss sustained by the petitioners-farmers due to natural calamities from the year 1999 till 2004.

6. Mr. S.S. Rao, learned counsel appearing on behalf of the opposite party No.6-Insurance Company submitted that the contentions raised in the writ petition are the outcome of misconception of fact and law. The

Agricultural Insurance Company of India Ltd., (for short, "AICIL") is merely an implementing agency of National Agricultural Insurance Scheme (for short, "NAIS") on behalf of both Central and State Government. As an implementing agency, the AICIL is bound to follow the notifications and resolutions issued by the State Government and the Central Government in this regard from time to time. The Scheme NAIS has been introduced by the Government of India and has been accepted by the Government of Odisha and that has been implemented in Odisha since 1999-2000 Rabi Season. Initially the Government of India started a scheme called "Comprehensive Crop Insurance Scheme" covering the farmers who availed loan from different banks as per the scheme. The Central Government thereafter introduced NAIS in which even non-loanee farmers can opt for crop insurance, if they so desire. As per the salient features of the Scheme, it would operate on the basis of 'area approach' inasmuch as it defines areas, as may be notified by the Government and in respect of notified crops and for wide spread calamities like cyclone, flood etc. Under the Scheme, if any loss is found in a unit by calculating the difference between the actual crop grown otherwise known as 'actual yield' and the 'threshold yield' that is taken to be the factor for considering whether there was any loss. The AICIL (IA) in respect of notified areas basing on crop cutting experiments calculated the threshold yield for paddy crop applying specified indemnity level to the moving average of last three years yield data. At the end of the season, actual yield, crop cutting experiment was done in the area will be ascertained basing on CCE by DES (Directorate of Economics & Statistics). If the actual yield is less than the threshold yield, the difference shall be treated to be the loss sustained in the area. If the actual yield is more than the threshold yield it would be taken that there is no loss in the area. These experiments and conclusions are arrived at in respect of the defined areas irrespective of the fact whether a particular farmer individually is benefited or not. Thus, even if, a particular farmer was not put to any loss due to any calamity, if on the basis of the area approach loss is found he will also be entitled for the benefit under the Scheme. Similarly, if a particular farmer sustains loss and in the area there is no loss then he will not be entitled to the benefits. This being the scheme, the role of the insurance company is only to implement the scheme and has no right or authority to deviate from the same. Therefore, unless there is loss in the area there is no scope for making any claim.

7. Further the assessment of loss or otherwise as per the scheme shall be by the designated authorities under the Scheme. Any declaration by any authority is not acceptable. The opposite parties having disbursed the compensation to all the eligible claims strictly as per Scheme, the writ

application against opposite party no.6 is not maintainable and the same is liable to be dismissed for non-joinder of necessary party like Director of Economics and Statistics who is the authority to provide yield data for each season and for each notified area. The allegations made in the writ petition against opposite party no.6 are incorrect. Payment of crop insurance premium by the petitioners from the year 1999-2000 to Khariff 2004 are beyond the specific knowledge of opposite party no.6. It is submitted that opposite party No.6 deals directly with the designated Nodal Bank. The Nodal Bank submits the month-wise declaration to opposite party no.6. The declaration contains the month of loaning, crop season, name of the crop grown, notified area (Block), total number of farmers, total area, total sum insured and premium etc. Therefore, opposite party No.6 cannot confirm the coverage of individual farmers. Except the data provided through the Cooperation Department of the Government of Odisha, no other data furnished either by the Revenue Department or any other Department is acceptable under the Scheme. Claims are calculated for each season by AICIL after receipt of yield data from 'Directorate of Economics and Statistics', through Department of Cooperation, Government of Odisha. If the actual yield per hectare of the insured crop for the notified area on the basis of requisite number of crop cutting experiments in the insured season, falls short of the specified "Threshold Yield", all the insured farmers growing that crop in the notified area deemed to have suffered short fall in their yield. The Scheme seeks to provide coverage against such contingency according to percentage of shortfall in yield. The AICIL (Implementing Agency) calculated the Threshold Yield for paddy crop by applying specified indemnity level, i.e. 80% for Rabi 1999-2000 to Rabi 2003-2004, Kharrif 2004 seasons (as per notification and guidelines) to the moving average of last three years yield data. As there was no short fall in yields in Tihidi Block for paddy crop in all the said seasons no claims are payable for the said notified area. In the counter affidavit at paragraph 12 it can be noticed that the short fall for the Tihidi Block for the years 1999 to 2004 being Nil as the actual yield exceeded the Threshold yield no claim is payable. In our State for paddy crop the unit of insurance was Block for all the said seasons as notified by the State Government. As per the Scheme and operational modalities, the Scheme operate on the basis of 'Area Approach' i.e. defined areas for each notified crop for widespread calamities such as drought. The Implementing Agency has direct contract with the Nodal Banks only for collection of premium, disbursement of claims of any etc. Opposite party No.6 has no knowledge of individual insured farmers, nor there is any necessity of knowing them as per the scheme provisions. Opposite party No.6 put forth that Rabi 1999-2000 Block was taken as a unit for settling the claim since the State Government notified Block as the unit of insurance for paddy crop.

8. Mr.R.K. Mohapatra, learned Government Advocate appearing for opposite party No.1 to 4 submitted that as per the provisions of National Agricultural Insurance Scheme it is compulsory for the loanee farmers growing notified crops in the notified areas to ensure these crops. As the petitioners have availed crop loan for notified crop in the notified area, they have paid the premium under the National Agricultural Insurance Scheme. The claims of the eligible farmers have been settled as per the provisions of the National Agricultural Insurance Scheme. In respect of the State of Odisha, the assessment of loss is being done in area approach basis and not individually. As per the guidelines of the scheme, at the beginning of each crop season the State Government is to notify the crops and define areas which is to be covered during the season in accordance with the decision taken by the State Level Coordination Committee on Crop Insurance. The claim of the petitioner relates to paddy crop. As per notification of the State Government for assessment of loss of paddy crop the unit area was the 'Block' for the insured period. Estimation of the crop yield was made by conducting minimum 16 nos of Crop Cutting Experiment in the Block. Under the Scheme, Crop Insurance is compulsory for all loanee farmers growing notified crops in the notified areas. Compensation is made on the basis of the yield data. If the actual data on the basis of Crop Cutting Experiments is less than the Threshold Yield (last three years average yield) of paddy crop of a unit area (Block) in a crop season then all the insured farmers cultivating the notified crop of that Block area are eligible for crop insurance benefits. In the State, the defined unit area for paddy was 'Block' during Khariff season and 'Block' or 'Cluster of Blocks' during Rabi season. But from Rabi 2010-2011 season 'Gram Panchayat' has been taken as unit of Insurance in our State. The State Government have decided in principle to take Grama Panchayat as unit of Insurance for paddy during Rabi 2010-2011. The crop yield data furnished by the Director of Economics & Statistics after conducting requisite number of Crop Cutting Experiments (CCEs) is considered for crop Insurance purpose and no other data are accepted for this purpose as per the policy.

9. Mr. S.D. Das, learned Assistant Solicitor General appearing on behalf of opposite party No.3 submitted that the National Agricultural Insurance Scheme (NAIS)/Rashtriya Krishi Bima Yojana is being implemented in the country since Rabi 1999-2000 under the Order No.13011/15/99/credit II dated 16.07.1999 issued by the Ministry of Agriculture, Department of Agriculture and Cooperation. The Government of India formulated the above crop insurance scheme to mitigate the hardship of the farmers. The Agriculture Insurance Company of India is the Nodal Implementing Agency of the National Agricultural Insurance Scheme. The subject matter of the writ

petition is with regard to claims pertaining to the year 1999 onwards which are to be settled as per the provisions under the Scheme and it is for the Agriculture Insurance Company of India to settle all the eligible claims. The State Government is free to notify any unit area of insurance provided that the State Government has the requisite yield data and has the capacity to conduct the requisite number of CCEs on single series basis in the notified area. The Scheme authorizes the State Government to notify the unit. The State Government has the obligation to explain the names and the mode of notifying the unit.

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

(i) Whether the Block as a unit for purpose of granting insurance benefit is reasonable?

(ii) Whether the State Government is justified to make an assessment of loss of area approach basis i.e. Block as unit and not Grama Panchayat basis in case of failure of crop due to drought when the crop of the individual farmers are compulsorily insured to indemnify their crop?

11. Facts which are not in dispute are that in the year 1999 a Scheme namely, National Agricultural Insurance Scheme was introduced by the Government of India through the concerned State Governments for insuring the crops grown by the farmers. Both loanee and non-loanee are eligible to avail the benefits under the aforesaid Scheme. One of the objects of the Scheme is to provide insurance coverage and financial support to the farmers in the event of failure of any of the notified crop as a result of natural calamities, pests and diseases. The Scheme would operate on the basis of 'Area Approach' i.e., Defined Areas for each notified crop for widespread calamities and on an individual basis for localized calamities. Clause 9 of the Scheme reads as follows:

> "9. AREA APPROACH and UNIT OF INSURANCE:
> The Scheme would operate on the basis of 'Area Approach' i.e., Defined Areas for each notified crop for widespread calamities and on an individual basis for localized calamities such as hailstorm, landslide, cyclone and flood. The Defined Area (i.e. unit area of insurance) may be a Gram Panchayat, Mandal, Hobli, Circle, Phirka, Block, Taluka etc. to be decided by the State/UT Govt. However, each participating State/UT, Govt. will be required to reach the level

of Gram Panchayat as the unit in a maximum period of three years…."

12. In the State of Odisha each 'Block' has been taken as a unit as the defined area for paddy crops. In view of such area approach, if any individual farmer or independent village suffers loss due to any calamities i.e. drought, flood and cycle etc. such individual farmer would not be entitled to get insurance claim. For enabling the farmers to get the insurance claim, the State Government have to declare the entire Block areas as affected area, so that all the farmers in that defined area will be eligible to get the insurance claim. It is known to everybody that the entire State of Odisha is not provided with irrigated facilities. Thus, in a Block some of the villages are while being provided with irrigation facilities other villages are deprived of such facility and in case of drought the village(s) where there is no irrigation facility suffers loss of the crops on account of drought. Similarly, in case of heavy flood it is not necessary that each and every village of the Block is affected, while some villagers are affected, other villages of same Block may not be affected. Thus, in view of such wrong approach to take the 'Block' as a unit, the farmers in fact whose crops are compulsorily insured for their benefit and they have paid insurance premium will not be benefited though they have suffered loss of their crop on account of drought and flood etc. Since the entire Block area is taken as a single unit, the petitioners have been deprived of getting their legitimate insurance claim.

13. Petitioners' specific case is that in Tihidi Block in the district of Bhadrak most of the agricultural fields are provided with irrigation facilities except some few villages like that of the petitioners in the block. The State Government, therefore, are not declaring the entire block as drought affected area. This assertion of the petitioners has not been denied by the opposite parties.

14. The case of opposite parties is that under the Scheme the State Government has taken the 'Block' as a unit for the purpose of awarding compensation under the Insurance Policy and the block of the petitioners has not been declared as affected area for which no compensation has been paid to the petitioners. Therefore, it is only because the State Government has decided to take the 'Block' as a unit for the purpose of granting compensation under the Insurance Policy, the petitioners are not getting any compensation for the crop loss suffered by them.

15. Further, in the writ petition the petitioners have stated that they reliably learn and verily believed that the revenue authorities on proper verification have declared the villages of the petitioners as drought affected

area and they have measured the loss to the extent of 50% to 75%, but on account of non-declaration of the 'defined area' as 'Grama Panchayat' or 'village', the petitioners are unable to get their legitimate right for insurance claims.

16. In the facts situation, the right approach would have been to settle the claim on an individual basis or taking 'Grama Panchayat' as defined area for the purpose of awarding insurance claim to the drought affected persons; more particularly, when premiums have been collected by the insurance company on an individual basis while advancing agricultural loans to individual farmers. Further case of the State-opposite party is that from 2010-2011 each Grama Panchayat has been taken as a 'Unit' for settling the insurance claim towards any loss due to farmers on account of wide spread calamities.

17. In the counter affidavit, it is admitted that under the provisions of the Scheme, it is compulsory for the loanee farmers growing notified crops in the notified areas to insure those crops. As the petitioners have availed crop loan for notified crop in the notified area, they have paid the premium under the National Agricultural Insurance Scheme. The stand of the State Government is that compensation is made on the basis of the yield data furnished by the Director in respect of paddy crop. If the actual yield on the basis of Crop Cutting Experiments (CCEs) is less than the threshold yield (last three years average yield) of paddy crop of a Unit area (Block) in a crop season, then all the insured farmers cultivating the notified crop of that Block area are eligible for crop insurance benefit. It is not stated that actual yield was calculated on the basis of the Crop Cutting Experiments (CCEs) and also the threshold yield was determined. If the same would be calculated on the basis of the yield of the villages which are affected by drought, the result will certainly be different from the calculation of yield made taking into consideration the yield of crop of the villages coming under the same block which are not affected by drought.

18. In paragraph 10 of the said counter affidavit it is stated that the State Government have decided in principle to take 'Grama Panchayat' as a unit of insurance for paddy during Rabi 2010-2011.

19. The table showing threshold and actual yield furnished by opposite party No.6 on the Block basis for paddy crop cannot be a determining factor where the villagers are entitled to get insurance claim and there is no denial that they have sustained loss of paddy crops.

20. As per clause 9 of the Scheme extracted above, the defined area may be a 'Grama Panchayat'.

21. In view of the above, the claim of the villagers, who have suffered crop loss due to drought, cannot be denied to such farmers for the reasons stated above.

22. In the facts situation, we direct the State Government to consider the claim of the petitioners declaring the "Defined Area" under the Scheme to take Grama Panchayat as a unit and not the Block for the purpose of granting insurance claim.

23. There is no quarrel over the principle decided by the Hon'ble Supreme Court in the case of *Union of India and another vs. Manu Dev Arya,* (2004) 5 SCC 232 and by the Andhra Pradesh High Court in the case of *Andhra Pradesh Rythu Sangham vs. Union of India and others, 2002 (2) ALD 486 (DB).* In the writ petition, the legality and validity of the scheme is not challenged. On the other hand, the challenge is for not implementing the scheme in its proper perspective and considering the ground realities with regard to sustaining of loss by the farmers of Grama Panchayat-wise as a result of which they are deprived of their legitimate claim available under the Scheme.

24. With the aforesaid observation and direction, the writ petition is allowed, but without any order as to costs. The insurance amount shall be computed and paid to the farmers who have insured under the Scheme within eight weeks from the date of receipt of this judgment.

Writ petition allowed.

2013 (I) ILR - CUT- 970

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

CRLA. NO.126 OF 2006 (Dt.05.09.2012)

PATHANI JENA & ORS. ……. Appellants

.Vrs.

STATE OF ORISSA …….Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.161.

Delayed disclosure of incident by witnesses – Explanation offered not convincing – Held, it would not be safe to accept the testimony of such dubious witnesses.

In this case occurrence took place on 11.11.2004 and P.Ws. 3 and 4 stated to be eye witnesses were not examined till 18.11.2004 although police had made several visits to the occurrence village – P.W.3 has also admitted that he is in inimical terms with the accused persons – P.W.4 has given false explanation that he was examined on the next day of the incident – P.W.10, the I.O. introduced P.Ws.3 & 4 as eye witnesses just to solve the case – Held, evidence of P.Ws.3 and 4 is highly infirm and it is not safe to rely on their evidence – Impugned judgment and order of sentence are set aside. (Paras 11, 12)

Case laws Referred to:-

1.AIR 1974 SC 284 : (Ram Pukar Thakur & Ors.-V- State of Bihar)
2.AIR 1975 SC 216 : (Ravulappali Kondaiah & Ors.-V- State of Andhra Pradesh)
3.AIR 1976 SC 2488 : (State of Orissa-V- Brahmananda Nanda)
4.1986 Crl. L.J.1226 : (Sobrati Mian-V- State of Bihar)
5.1987(II) OLR 215 : (Dambu Lohara & Ors.-V- State of Orissa)
6.(1989)2 OCR 463 : (Prasanta Kumar Pati @ Prasanna-V- State of Orissa)
7.AIR 1973 SC 2773 : (Kali Ram-V- State of Himachal Pradesh)
8.AIR 1980 SC 102 : (Mahadeo & Ors.-V- State of Maharashtra)
9.(1998)4 SCC 298 : (State of Uttar Pradesh-V- Sikandar Ali & Ors.)
10.AIR 1973 SC 1409 : (Ranbir-V- State of Punjab)
11.AIR 1979 SC 135 : (Ganesh Bhavan Patel-V- State of Maharashtra)
12.(2005)3 SCC 114 : (State of Uttar Pradesh-V- Satish)
13.(2009) 16 SCC 59 : (Gunnana Pentayya-V- State of Andhra Pradesh).

For Appellants - M/s. M. Chand, D.R. Parida, S. Khan, M.K. Mohapatra & B. Parida (for Appellant No.1,2 & 3)
M/s. S.C. Mohapatra, A.K. Acharya, S. Mishra, S.S.Dash, for Appellant Nos.4,5 & 6)
For Respondent - Mr. Sangram Das, Addl. Standing Counsel.

C. R. DASH, J. This appeal is directed against the judgment and order of sentence dated 22.02.2006 passed by learned Sessions Judge, Keonjhar in S.T. Case No.123 of 2005, convicting the appellants for offence under Sections 302, I.P.C. and sentencing each of them to suffer imprisonment for life.

2. The occurrence happened at about noon on 11.11.2004 at Sailong Hudi. Deceased Sanjeeb and his brother-in-law (sister's husband) named Chittraranjan Jena were returning on a motorcycle. The heard shout from behind. Looking back they saw Dillip (Appellant No.5) and Manu (Appellant No.6) chasing them being armed with swords. Other two persons put stones in front of their motorcycle. Finding no way out, they left the motorcycle there and started running for their safety. The appellants, however, surrounded deceased Sanjeeb and assaulted him with sword, farsa, etc., they were armed with. Sanjeeb fell down with bleeding injuries and others also chased Sanjeeb's brother-in-law (Chittaranjan). He could, however, escape. Prior to the incident, there was dispute between the deceased and the accused persons and the accused persons were threatening to kill the deceased. The matter was reported to the police and on completion of investigation charge-sheet was filed implicating the appellants in the offence.

3. Prosecution has examined 10 witnesses to prove the charge . Out of them, P.Ws.1, 2 and 8 have not deposed anything against the appellants. P.W.5 is a post-occurrence witness, who heard about the incident over telephone and saw the injured at the hospital. P.W.6 is the Medical Officer, who had examined Prakash Jena (Appellant No.2). P.W.7 is the Medical Officer, who had conducted the autopsy. P.Ws.3 and 4 are the eye witnesses, on whose evidence the entire prosecution case rests. P.Ws.9 and 10 are the Investigating Officers.

The defence plea is one of complete denial. None is, however, examined on behalf of the defence.

4. Learned Trial Court, on consideration of the evidence obtained on record, found the appellants guilty under Section 302, I.P.C. and acquitted them of the charge under Section 120-B, I.P.C.

5. It was the main contention before the trial court and the sole contention before this Court that there being unexplained delay in examination of the alleged eye witnesses, i.e., P.Ws.3 and 4, conviction of the appellants under Section 302, I.P.C. is not sustainable in the eye of law. Learned counsel for the appellants relies on a number of decisions to substantiate his contentions.

Learned Addl. Standing Counsel on the other hand supports the impugned judgment and submits that no question having been asked to the Investigating Officer regarding the delay in examining P.Ws.3 and 4, he (the Investigating Officer) cannot be blamed for any defects without eliciting an explanation from him.

6. It is admitted at the Bar that the case must stand or fall by the evidence of P.Ws.3 and 4. The infirmity from which their evidence suffer is that both of them (P.Ws.3 & 4) were not examined till 18.11.2004, as testified ipse dixit by the Investigating Officer (P.W.10), though the occurrence happened at about 11.20 A.M. to 12.00 Noon on 11.11.2004 and they (P.Ws.3 and 4) were present throughout in the spot village, which the police had already made several visits to.

7. Learned Counsel for the appellants has relied on some decisions. Those decisions are discussed below:

In the case of Ram Pukar Thakur and other v. State of Bihar, AIR. 1974 S.C. 284, the sole eye witness named Nakuldeo did not disclose the names of the assailants to anyone whosoever, not any other members of the family mentioned the names of the assailants to any one of the several persons gathered in their house and said Nakuldeo had involved one Biswanath Pandey falsely. Hon'ble Supreme Court held the evidence of the sole eye witness Nakuldeo to be unbelievable. In the case of Revulappali Kondaiah and others v. State of Andhra Pradesh, A.I.R. 1975 S.C. 216, the defence had examined one witness as D.W.3. What he stated before the Court in course of his examination as defence witness had not been stated by him before the Investigating Officer and Hon'ble Supreme Court dismissed his evidence as worthless. The principle as culled by learned counsel for the appellants from this case (A.I.R. 1975 S.C. 216) is not applicable to the fact of the present case. In the case of State of Orissa v. Brahmananda Nanda, A.I.R. 1976 S.C. 2488. Hon'ble Supreme Court held the evidence of the sole eye witness to be infirm, as the witness had not disclosed the name of the assailant for a day and half after the incident and the explanation offered for such non-disclosure was not believable. Same is the view of Patna High Court in Sobrati Mian v. State of Bihar, 1986 Cri. L.J.

1226, where the solitary eye witness did not disclose the incident to the police for seven days and the explanation offered was not convincing. Hon'ble Patna High Court held that normally it would not be safe to accept the testimony of such a dubious witness. This Court in the case of Dambu Lohara and others v. State of Orissa, 1987 (II) OLR 215 and Prasanta Kumar Pati @ Prasanna v. State of Orissa (1989) 2 OCR 463 took the same view and held that delayed disclosure of the incident by the witness(s) is a piece of infirm evidence and cannot be acted upon, if the explanation offered is not convincing. Same is the view of Hon'ble Supreme Court in the case of delayed disclosure and non-convincing explanation in Kali Ram v. State of Himachal Pradesh, A.I.R. 1973 S.C. 2773. Mahadeo and others v. State of Maharashtra, A.I.R. 1980 S.C. 102.

8. Hon'ble Supreme Court in the case State of Uttar Pradesh v. Sikandar Ali and others (1998) 4 S.C.C. 298 accepted the explanation of the Investigating Officer justifying delayed examination of the eye witness (P.W.2), as the Investigating Officer explained that for his engagement to up-keep the law and order in the area, he did not find any time to examine P.W.2. In the said case, however, the informant (P.W.1) had already brought on record the details about the assailant and the manner of assault etc. In view of such position Hon'ble Supreme Court found no fault so far as delayed examination of P.W.2 is concerned. It has been observed by Hon'ble Supreme Court in the case of Ranbir v. State of Punjab, A.I.R. 1973 S.C. 1409 thus :-

> "The question of delay in examining a witness during investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing the got-up witness to falsely support the prosecution case."

In **Ganesh Bhavan Patel v. State of Maharashtra**, A.I.R. 1979 S.C. 135 a three Judge Bench of Hon'ble Supreme Court observed that delay in examining a witness by itself cannot amount to any serious infirmity in the prosecution case, but it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witness to be introduced. Hon'ble Supreme Court in the case of State of Uttar Pradesh v. Satish, (2005) 3 S.C.C. 114 referred to in Gunnana Pentayya v. State of Andhra Pradesh (2009) 16 S.C.C. 59 has observed that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses, the defence cannot take advantage there from. In that case no such question had been asked to the

Investigating Officer (P.W.53) regarding the reason for delay and there was even no suggestion to P.W.2 that he was not present in the house when the incident took place.

9. From the case law discussed supra it emerges that, question of delayed examination of a witness itself would not make the evidence of such a witness infirm. If there are, however, circumstances suggestive of some unfair practice by the Investigating Officer for the purpose of introducing a got-up witness or there are concomitant circumstances to suggest that the Investigating Officer is deliberately gaining time with a view to decide about the shape to be given to the prosecution case and the eye witness to be introduced, the delayed examination of a witness would certainly make evidence of such a witness infirm and unbelievable. A three judge bench of Hon'ble Supreme Court in the case of Ganesh Bhavan Patel v. State of Maharashtra (supra) has ruled regarding existence of concomitant circumstances to suggest unfairness by the Investigating Officer to come to conclusion regarding the probative effect of delayed examination of a witness. A two Judge Bench of Hon'ble Supreme Court in the case of State of Uttar Pradesh v. Satish (supra) has, however, held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses, the defence cannot take advantage there from.

10. Learned counsel for the appellants submits that number of questions have been asked by the defence to the Investigating Officer regarding delayed examination of the witnesses, i.e., P.Ws.3 and 4. Per contra, however, learned Additional Standing Counsel oppugns such a contention.

11. In the present case the occurrence happened on 11.11.2004. The Investigating Officer (P.W.10) in his cross examination has stated thus:-

> "Till 18.11.2004 I had not examined any eye witness. I had not noted in my Case Diary that I searched for eye witnesses till 18.11.2004. Till 19.11.2004 nobody disclosed before me about the name of eye witnesses. I had not noted in my Case Diary that my sources had not revealed the name of any eye witnesses…… The Case Diary does not reveal who were the eye witnesses. I had not examined the family members of the witnesses to cross-check their version. It is not a fact that as there was no eye witness, I had planted these persons as eye witnesses to implicate the accused persons."

P.W.10 had taken the charge of the investigation on 15.11.2004 from the initial Investigating Officer (P.W.9). He (P.W.9) examined some witnesses, but none of them as stated by P.W.9 in his cross-examination had implicated the appellants. P.Ws.3 and 4 are the eye witnesses to the occurrence. The spot where the occurrence took place is at a distance of about 9 Kms. from their village as testified by P.W.3 P.W.3 in his cross-examination has testified that he was the friend of deceased Sanjeeb and was in inimical terms with the accused. He has further admitted that for five days he did not tell about the incident to police though he saw the police at the village. Both P.Ws.3 and 4 were in custody for the murder of one Narahari and one of the sons of Narahari is an accused in the present case. P.W.4 has testified that on the next day of occurrence he orally informed the incident to the police at Ghasipura Police Station and Police recorded his statement, on which he had signed. Such an evidence by P.W.4 is found to be false on cross-reference to the evidence of Investigating Officer (P.W.10) who is totally silent on this aspect. P.Ws.3 & 4 in their examination-in-chief, which is very short, have implicated all the appellants in an omnibus manner. Going by the principle decided by the Hon'ble Supreme Court in the case of Ganesh Bhavan Patel v. State of Maharashtra (supra), the evidence of P.Ws.3,4,9 and 10 read together are suggestive and indicative of circumstances that P.Ws.3 and 4 had no reason to keep quiet if they had seen the occurrence of murder especially when there are nothing for them to be afraid of or to hide. In spite of visit by the police to the village, P.Ws.3 and 4 kept quiet for no reason, P.W.3 has ipse dixit admitted that he is in inimical terms with the accused person. P.W.4 has given a false explanation to the effect that on the next day of the occurrence he had reported the incident orally at Ghasipura Police Station, his statement was recorded and he had put his signature thereon. The Investigating Officer (P.W.10) has been asked at length as to what he has reflected in the Case Diary regarding eye witnesses. He (P.W.10) is, however, was only in a denial tone. Both the Investigating Officers seem to have conducted themselves casually and P.W.10 has introduced P.Ws.3 and 4 as eye witnesses just to solve the case. The evidence of P.Ws.3 and 4 on the point of implication of the appellants is also quite omnibus. All the aforesaid facts make the evidence of both P.Ws.3 and 4 highly inform and it is not safe to rely on their evidence to sustain the conviction of the appellants.

The informant, who is one of the eye witnesses, has not been examined, though he is cited as an eye witness. Learned Additional Standing Counsel, however, is not in a position to clarify as to why the informant has not been examined. The impugned judgment is also silent on this aspect. Such a fact is another dubious feature in the case to suspect the

veracity of the prosecution case. Taking into consideration all the aforesaid aspects, we feel inclined to set aside the impugned judgment.

12. In the result, the appeal is allowed. The impugned judgment and order of sentence are set aside. The appellants are acquitted of the charge(s). They be released from custody forthwith, if their detention is not required in any other case.

Appeal allowed.

2013 (I) ILR - CUT- 976

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

W.P.(C) NO. 5554 OF 2013 (Dt.16.04.2013)

INDU BEHERA ……..Petitioner

.Vrs.

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

TRANSPLANTATION OF HUMAN ORGANS & TISSUES ACT, 1994 – S.2(i), r/w Rule 6-F (d) of the Transplantation of Human Organs Rules, 1995.

Kidney transplantation – Unrelated donor – "Authorisation Committee" Refused permission for non-supply of documents in support of residence proof of the dooner and in the absence of any cogent reasons as to why the donor wishes to donate her kidney.

No finding before the Committee that the donor is being exploited and/or there has been any commercial transaction between the donor and the recipient – Since the donor did not have a photo identity card the Corporater of Ward No.36 of Cuttack Municipal Corporation identified the donor and issued a certificate to that effect –

The donor and her daughter expressed before this Court to have donated the kidney out of own volition – Held, there was no justification by the "Authorization Committee" to refuse "No objection Certificate" to the donor and the recipient for transplantation of kidney – Direction issued to O.P.2 DMET (O) to issue "No objection Certificate" for performance of surgery for transplantation of kidney in Apollo Hospital, Bhubaneswar in favour of the husband of the petitioner who is to receive a kidney on donation from Smt. Vijayalaxmi.

(Para 10)

Case law Referred to:-

(2012) 189 DLT 42 : (Parveen Begum & Anr.-V- Appellate Authority & Anr.)

For Petitioner - M/s. Ajit Ku. Choudhury & K.K.Das.

For Opp.Parties - Addl. Govt. Advocate.

S.K.MISHRA, J. In this writ petition, the petitioner seeks a direction from the Court to the opposite parties for according necessary permission for kidney transplantation of her husband from a unrelated donor.

2. The petitioner's husband namely Dillip Kumar Behera belongs to Scheduled Caste community. He is suffering from bilateral chronic medical reneal diseases since 2010. He is also suffering from paralysis and other multiple diseases. He is under constant dialysis and under Intensive Care Unit of different hospitals including Apollo Hospital, Bhubaneswar. Due to non-functioning of both the kidneys, the petitioner's husband is in serious condition and is under constant treatment of Dr. Nitish Kumar Mohanty, who is the Senior Consultant, Nephrology and Transplant Consultant of Apollo Hospital, Bhubaneswar. Doctor has advised him for immediate kidney transplantation. The petitioner therefore approached the doctors of the Apollo Hospital, Bhubaneswar and the S.C.B. Medical College & Hospital, Cuttack for transplantation of kidney, but however despite her request the treating doctor has not forwarded the application of the petitioner's husband for approval of the Authorisation Committee constituted under the Transplantation of Human Organs and Tissues Act, 1994 (hereinafter referred to as "the Act" for brevity).

3. When the matter came up before this Bench on 15.3.2013 after hearing parties this Court directed the Managing Director, Apollo Hospital, Bhubaneswar, opposite party no.4, to process the application forthwith and send it to the Authorisation Committee. It was further directed that the Authorisation Committee shall process the same and take a decision within

twenty-four hours from receipt of such application and report to this Court on 20.3.2013. On 25.3.2013 the matter was again taken up wherein this Court was informed that the Apollo Hospital, Bhubaneswar is only authorized to take up transplantation in respect of near relatives in terms of Section 2(i) of the Act and there is non-compliance of Rule 6F(d) of the Transplantation of Human Organs Rules,1995. That apart pursuant to the proceeding dated 19.3.2013, the Authorisation Committee asked for nine documents for the decision in this matter. This Court perused the files produced by learned Addl. Government Advocate and directed the petitioner to submit the documents asked by the Authorisation Committee within three days. It was further directed that the Authorisation Committee will take a decision in the matter within three days thereafter and give its report to this Court with a copy of the same to the petitioner.

4. The Authorisation Committee met in an emergent meeting on 3.4.2013 at 4.30 P.M. in the office Chamber of Director Medical Education and Training, Odisha(hereinafter referred to as the "DMET(O)") under the Chairmanship of Prof.(Dr.) Sonamali Bag. After considering the matter in a cryptic order the Committee resolved as follows:-

> "As per the kind orders of the Hon'ble High Court dated 25.3.2013 in W.P.(C) No.5554/2013 an emergent meeting of Authorisation Committee was held under the Chairmanship of Prof.(Dr.) Sonamali Bag, DMET(O) on 3.4.2013 at 4.30 P.M. During this meeting Sri Dillip Ku. Behera (Recipient) was absent. The donor Smt. G. Vijayalaxmi and wife of the recipient Smt. Indu Behera were present. The Committee interacted with them and on such interaction the Committee is of the opinion that no cogent reasons have been given as to why the donor wishes to donate her kidney. Further Domicile/Residence proof of the donor is not supported by relevant documents. Hence, the Committee unanimously resolved not to grant NOC."

On such resolution the petitioner filed an additional affidavit, inter alia, contending that the Authorisation Committee under Rule-6F(d) of the Transplantation of Human Organs Rules, 1995(hereinafter referred to as "the Rules" for brevity) refused to accord permission on the ground that the Apollo Hospital is only authorized to take up kidney transplantation in respect of near relatives in terms of Section 2(i) of the Act. Being satisfied with the order, on 25.3.2013 this Court directed the petitioner to submit documents before the Authorisation Committee. This Court further directed the Committee to take a decision in the matter within three days as per Rule-

6F(d) of the Rules. The Authorisation Committee again conducted enquiry on 3.4.2013 and declined to grant "No Objection Certificate" for kidney transplantation as there was no cogent reasons given as to why the donor wishes to donate the kidney, even though the committee did not dispute that there was any commercial transaction between the recipient and the donor. The deponent further brought to the notice of the Court that the Authorisation Committee vide Officer Order No.3733 dated 15.3.2013 has accorded permission by issuing "No Objection Certificate" in case of Mr. Jena Aditya Pratap Baghsingh, Bhagatpur and Surendra Kumar Sahu of Keuta Sahi, Old Town, Nayagah in allowing kidney transplantation at Apollo Hospital from the unrelated donors, but in the petitioner's case the said Authorisation Committee refused to accord permission and to issue No Objection Certificate with regard to kidney transplantation from unrelated donor. Thus, according to the petitioner the action of the Authorisation Committee is unreasonable, arbitrary and inequal treatment has been meted out to them, hence it is violative of Article 14 of the Constitution of India.

5. The Act does not prohibit the transplantation of organs from unrelated donors. In fact Rule-6F(d) of the Rules provides the procedure to be adopted where the proposed transplant between individuals who are not "near relatives". It reads as follows:-

> "6F(d) Where the proposed transplant is between individuals who are not "near relatives'" the Authorization Committee shall evaluate-
>
> (i) that there is no commercial transaction between the recipient and the donor. That no payment of money or moneys worth as referred to in the Act, has been made to the donor or promised to be made to the donor or any other person. In this connection, the authorization Committee shall take into consideration -
>
> (a) an explanation of the link between them and the circumstances which led to the offer being made;
>
> (b) documentary evidence of the link, e.g., proof that they have lived together, etc.;
>
> (c) reasons why the donor wishes to donate; and
>
> (d) old photographs showing the donor and the recipient together.
>
> (ii) that there is no middleman or tout involved;

(iii) that financial status of the donor and the recipient is probed by asking them to give appropriate evidence of their vocation and income for the previous three financial years. Any gross disparity between the status of the two, must be evaluated in the backdrop of the objective of preventing commercial dealing;

(iv) that the donor is not a drug addict or a known person with criminal record;

(v) that the next of kin of the proposed unrelated donor is interviewed regarding awareness about his/her intention to donate an organ, the authenticity of the link between the donor and the recipient and the reasons for donation. Any strong views or disagreement or objection of such kin may also be recorded and taken note of."

6. In interpreting this provision, the Delhi High Court in the case of ***PARVEEN BEGUM AND ANR –VRS- APPELLATE AUTHROITY AND ANR*** (2012) 189 DLT 427 has observed as follows:

"From the above statutory provisions and the scheme of the Act, it becomes clear that the Act and the Rules do not seek to prohibit, but to only regulate the transplant of organs and tissues from cadavers and living human beings. What is prohibited is the commercial transaction in the giving and taking of organs and tissues. However, donations offered out of love and affection- even amongst those who are not near relatives, is permitted. The aforesaid scheme under the Act recognizes two of the greatest human virtues of love and sacrifice, and also the fact that such intense love and affection need not necessarily be felt only for one's own blood or spouse, but could also extend to those not so closely related, or for those not related at all.

From the scheme of the Act and the Rules it appears that organ/tissue donation by a person before his death can be made not only for the therapeutic purposes of a recipient who is a near relative, i.e., son, daughter, father, mother, brother, sister, grandfather, grandmother, grandson or grand daughter, but also for therapeutic purposes of persons/recipients who do not fall within the definition of the expression "near relative". Section 9(1) of the Act, while generally providing that no human organ or tissue, or both, removed from the body of a donor before his death shall be transplanted into a

> recipient, unless the donor is a near relative of the recipient saves from application of this general rule, cases which fall under sub-section (3) of section 9. Therefore, a donor, who is not a near relative of the recipient may by reason of "affection, or attachment towards the recipient or for any other special reasons" authorize the removal of his human organ or tissue or both for transplantation in a recipient for therapeutic reasons. The caveat is that in such circumstances prior approval before removal and transplantation, would be required of the Authorisation Committee."

7. The aforesaid case has also been taken note of by Delhi High Court in W.P.(C) No.6105/2011 which was disposed on 1st September, 2011.This Court in W.P.(C) No.17447 of 2012 disposed of on 21.9.2012 has also given specific direction to the Authorisation Committee to grant permission for transplantation of organ/kidney from an unrelated donor.

8. From the above, it is clear that the Authorisation Committee is required to examine the individual case and assess whether there has been a commercial transaction between the donor and the recipient. This aspect has been determined from the various provisions of the Act and the Rules.

In this case, though the Authorisation Committee has rejected the application filed by the recipient and the donor, it does not say that there has been a commercial transaction between the parties.

9. In addition to the above, the Authorisation Committee is also required to take greater precaution in case of a woman donor. Rule-6F(g) of the Rules reads as follows:

> "In case where the donor is a woman greater precautions ought to be taken. Her identity and independent consent should be confirmed by a person other than the recipient. Any document with regard to the proof of residence or domicile and particulars of parentage should be relatable to the photo identity of the applicant in order to ensure that the documents pertain to the same person, who is the proposed donor and in the event of any inadequate or doubtful information to this effect, the Authorisation Committee may in its discretion seek such other information or evidence as may be expedient and desirable in the peculiar facts of the case."

10. The provisions quoted are in fact safeguards built in the Act and the Rules to exclude commercial transaction and to ensure that there is no exploitation of any poor or woman. Organ transplantation without one's

independent consent is to be stopped. In this case, since the Authorisation Committee did not record its minute nor the interviews of the donor and her relations have been videographed, as required in law, this Court called the DMET(O) as well as the donor and her daughter to the Court. They were present on 9.4.2013. On our query, the donor and her daughter stated that out of own volition, the donor is willing to donate her kidney to the husband of the petitioner. They also state that the donor is staying with the petitioner at Cuttack since last three years. Prior to that, the donor was staying with the family of the petitioner at Rourkela. The petitioner's paternal house and the house of the donor are at same place at Tata Nagar and both of them are neighbour. Miss. G. Laxmi, the daughter of the donor, who is present in the Court, stated that they came in contact of the petitioner and her husband at Tata Nagar and the recipient is looking after her family after death of her father. The donor states that her family is part and parcel of the petitioner's family. It is further noted that Miss. G. Laxmi, the daughter of the donor, is a student of Diploma in Mechanical Engineer at Tata Nagar and she seems to be aware of her mother's intention to donate a kidney to the recipient, i.e. the petitioner's husband. As far as provision of Rule Rule-6F(g) of the Rules is concerned the donor did not have a photo identity card, but the Corporater of Ward No.36 of Cuttack Municipal Corporation has identified her and issued a certificate to that effect, so that the identity of the donor and her independent consent are confirmed. Moreover, the Authorisation Committee do not even suggest that there has been any commercial transaction between the donor and the recipient. There is no finding that the donor is being exploited. Therefore, this Court finds no reason to uphold the decision of the Authorisation Committee to refuse 'No Objection Certificate' to the donor and the recipient for transplantation of kidney.

11. In that view of the matter the writ petition is allowed. We direct opposite party No.2, the DMET(O), to issue 'No Objection Certificate' for performance of surgery for transplantation of kidney in Apollo Hospital, Bhubaneswar in favour of the husband of the petitioner, who is to receive a kidney on donation from Smt. G. Vijayalaxmi.

Writ petition allowed.

2013 (I) ILR - CUT- 983

M. M. DAS, J.

W.P.(C) NOS. 29388 & 29389 OF 2011 (Dt.11.09.2012)

THE SECRETARY, SUBHADRA MAHATAB SEVA SADAN OF KOLATHIA & ANR. .....Petitioners

.Vrs.

STATE OF ORISSA .....Opp.Party

JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 – S.41

Adoption of abandoned children – Application seeking permission for adoption – Held, application need be considered under the Juvenile Justice Act, 2000.

In this Case Petitioner No.1– Agency rescued two small girl children – Petitioner No.2 has executed a Foster Care agreement with petitioner No.1 and has taken both the children under her foster care – Both the petitioners filed applications U/s.9 (4) of the Hindu Adoption and Maintenance Act, 1956 seeking permission of the learned District Judge for adoption – District Judge relied on the report from the Orissa State Council for Child Welfare that Petitioner No.2 is not eligible to adopt two children U/s.11 of the 1956 Act and rejected the application – Hence, the writ petitions.

District Judge is erred in deciding the applications under 1956 Act without due application of mind as the said applications need be considered under the Juvenile Justice Act,2000 – Held, impugned orders set aside – Necessary permission be given to petitioner No.2 to adopt both the miner children. (Paras 11,12)

Case law Referred to:-

AIR 1984 SC 469 : (Lakshmi Kant Pandey-V- Union of India).

For Petitioners - M/s. S.S. Das, K.Behera, S.Modi, S.S.Pradhan & K.Pradhan.
For Opp.Party - Addl. Govt. Advocate.

M.*M.DAS, J.* As both the writ petitions have been filed against two verbatim orders passed in CMA Nos. 222 and 223 of 2009 by the learned

District Judge, Khurda at Bhubaneswar on two applications filed by the same petitioners, i.e., the writ petitioners, both the matters were heard together and are being disposed of by this common judgment.

2. Both the petitioners filed the aforesaid two CMAs purportedly under section 9 (4) of the Hindu Adoption and Maintenance Act, 1956 (for short, 'the Act, 1956') seeking permission of the learned District Judge for the adoption of two minor female children, namely, Kuni and Gudly by petitioner no.2. In both the cases, the petitioners filed the following documents:

(i) Child Study Report

(ii) Home Study Report

(iii) Release order for adoption

(iv) Medical report of petitioner no.2.

(iv) Salary certificate of petitioner no.2.

(v) Foster Care Agreement

(vi) Photograph of the petitioner no.2, i.e., the prospective adoptive mother,

(viii) Photographs of both the minor children.

The Child Welfare Committee, Khurda, District – Khurda has passed the release order for adoption of both the children as per the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, 'the J.J. Act'). The Adoption Co-ordinating Agency, Karnataka prepared Home Study Report of the petitioner no. 2 with her detailed family history.

4. The learned District Judge in course of hearing the matters called for a report from the Orissa State Council for Child Welfare, who reported that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Act, 1956. It may be mentioned here that the petitioner no. 1 is the legal guardian-cum-Adoption Placement Agency, which has been recognized by the State and in whose custody, both the above minor children were kept.

5. It is argued before me by Mr. S.S. Das, learned counsel for the petitioners in both the writ petitions that though the petitions were nomenclatured to be under section 9(4) of the Act, 1956, but, in substance, both the petitions were filed under the J.J. Act. He further submitted that all the required necessary documents for appreciation of the learned District

Judge to grant permission for adoption of both the minor girl children by the petitioner no. 2 were produced before the learned District Judge, who has not appreciated the same though they satisfied all requirements as per the J.J. Act for grant of permission to the petitioner no. 1 to give both the minor girl children in adoption to the petitioner no.2. With regard to the finding of the learned District Judge that the petitioner no. 2 cannot adopt both the girl children in view of the bar under section 11 of the Act, 1956, he submitted that the learned District Judge has failed to interpret and apply the decision of the apex Court in the case of ***Lakshmi Kant Pandey v. Union of India,*** AIR 1984 SC 469.

The opp. party – State, however, contended that under sub-section (4) of section 9 of the Act, 1956, permission is to be accorded by the competent authority for adoption of the child and section 9 (5) of the said Act states that if the court would be satisfied that the adoption will be for the welfare of the child, it will grant permission to that effect. He submitted that in the instant case, the petitioners instead of filing application under section 41 (6) of the J.J. Act, filed an application under section 9 (4) of the Act, 1956, which the learned District Judge considered to be one under the Act, 1956 and disposed of the same in accordance with law and, therefore, the impugned orders are not liable to be interfered with.

6. In order to appreciate the rival contentions, it is necessary to refer to the various provisions of the J.J. Act with regard to adoption of a child. Under section 2 (d) (v) of the J.J. Act, "child" in need of care and protection has been defined, as a child, who does not have parent and no one is willing to take care of or whose parents have abandoned (or surrendered) him or who is missing and run away child and whose parents cannot be found after reasonable enquiry.

Admittedly, the two small girl children sought to be adopted by the petitioner no.2 were abandoned children rescued by the petitioner no. 1 – Agency. Section 2 (f) of the J.J. Act defines "committee" to mean a Child Welfare Committee constituted under section 29. Under Chapter-IV of the said Act, provision is made with regard to rehabilitation and social reintegration of a child in need of care and protection. Section 41 of the J.J. Act under the said Chapter-IV deals with adoption, which reads thus:-

"41. **Adoption**.-(1) The primary responsibility for providing care and protection to children shall be that of his family.

(2) Adoption shall be restored to for the rehabilitation of the children who are orphan, abandoned or surrendered through such mechanism as may be prescribed.

(3) In keeping with the provisions of the various guidelines for adoption issued from time to time, by the State Government, or the Central Adoption Resource Agency and notified by the Central Government, children may be given in adoption by a court after satisfying itself regarding the investigations having been carried out as are required for giving such children in adoption.

(4) The State Government shall recognize one or more of its institutions or voluntary organizations in each district as specialized adoption agencies in such manner as may be prescribed for the placement of orphan, abandoned or surrendered children for adoption in accordance with the guidelines notified under sub-section (3):

Provided that the children's homes and the institutions run by the State Government or a voluntary organization for children in need of care and protection, who are orphan, abandoned or surrendered, shall ensure that these children are declared free for adoption by the Committee and all such cases shall be referred to the adoption agency in that district for placement of such children in adoption in accordance with the guidelines notified under sub-section (3).

(5) No child shall be offered for adoption-

(a) until two members of the Committee declare the child legally free for placement in the case of abandoned children;

(b) till the two months period for reconsideration by the parent is over in the case of surrendered children, and

(c) without his consent in the case of a child who can understand and express his consent.

(6) The Court may allow a child to be given in adoption-

(a) to a person irrespective of marital status or;

(b) to parents to adopt a child of same sex irrespective of the number of living biological sons and daughters; or

(c) to childless couples".

Based on the judgment in the case of Lakshmi Kant Pandey (supra) and section 41 (3) of the J.J. Act, the Central Adoption Resources Agency (in short, 'the CARA'), has framed a set of guidelines. As per the said guidelines, in Clause 23 (2) thereof, the Specialized Adoption Agency (the agency like the petitioner no.1) shall file a petition in the competent court of jurisdiction for obtaining necessary adoption order under the Act, within ten days of acceptance of referral by the prospective adoptive parents and shall pursue the same regularly with the court so that the provision of legal adoption is completed at the earliest. The said clause also envisages that the competent court is required to dispose of the case within a maximum period of two months from the date of filing in accordance with the direction of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra). Rule 33 (5) of the Rules framed under the J.J. Act envisages that for the purpose of section 41 "court implies a civil court" which has jurisdiction in matters of adoption and guardianship and may include the court of District Judge, Family Courts and City Civil Courts. Keeping the aforesaid provisions in view and on analysis of the material produced by the petitioners, it is amply clear that the petitioner no. 1 has been recognized as a Specialized Adoption Agency under section 41 (4) of the J.J. Act.

Under section 41 (5) (a), no child shall be offered for adoption until two members of the Committee declare the child legally free for placement in case of abandoned children. Rule 25 speaks about the functions and powers of the Committee. Rule 25 (m) envisages that the Committee shall declare a child legally free for adoption. Under Rule 33(3)(b), a child becomes eligible for adoption when the Committee has completed its enquiry and declares the child legally free for adoption.

Therefore, a conjoint reading of section 41 (5) and Rules 25 (m) and Rule 33(3)(b) makes it crystal clear that when an abandoned child lis offered for adoption, the Child Welfare Committee, which is a quasi judicial authority has to declare the child free for adoption, where-after the competent court has to pass necessary orders under section 41 allowing a child to be given in adoption.

7. It is, therefore, seen that it is only the Child Welfare Committee under the J.J. Act, who is authorized to declare a child free for adoption and law does not require any other agency, be it the State Council for Child Welfare or any other body, to have any say in regard to adoption. Section 41 (6) (b) of the J.J. Act, as quoted above, specifically provides that the court may allow a child to be given in adoption to a person irrespective of marital status. Clause 44 (5) of the CARA Guidelines prescribes that siblings of different ages shall, as far as possible, be placed in adoption in the same

family and such children shall also be categorized as special need children. The CARA guidelines were notified in a notification issued by the Ministry of Women and Children Development, Government of India on 24.6.2011 for the purpose mentioned therein. For better appreciation, the said notification is quoted hereunder:-

"MINISTRY OF WOMEN AND CHILD DEVELOPMENT
NOTIFICATION

New Delhi, the 24th day of June, 2011.

Guidelines Governing the Adoption of Children, 2011.

S.O. (E). In pursuance of the powers by sub-section (3) of section 41 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) and in supercession of the Guidelines for In-country Adoption, 2004 and the Guidelines for Adoption from India, 2006, except as respects things done or omitted to be done before such supercession, the Central Government hereby notifies the Guidelines issued by the Central Adoption Resource Authority to provide for the regulation of adoption of orphan, abandoned or surrendered children.

Note:

(1) In order to ensure smooth functioning of the adoption process, Central Adoption Resource Authority, from time to time, issues Adoption Guidelines laying down procedures and processes to be followed by different stakeholders of the a adoption programme. The Adoption Guidelines draw support from:

(a) The Juvenile Justice (Care and Protection of Children) Act, 2000;

(b) Judgment of the Hon'ble Supreme Court in the case of L.K. Pandey vs. Union of India in WP No. 1171 of 1982;

(c) UN Convention on the Rights of the Child, 1989;

(d) The Hague Convention on Protection of Children and Cooperation in respect of Inter-country Adoption, 1993.

(2) These Guidelines shall govern the adoption procedure of orphan, abandoned and surrendered children in the country from the date of notification and shall replace (i) Guidelines for In-country Adoption, 2004 (ii) Guidelines for Adoption from India, 2006.

(Sudhir Kumar)
Additional Secretary,
Ministry of Women and Child Development."

8. This Court, therefore, considering the provisions of law under the J.J. Act with regard to adoption of a child finds that both the minor girl children, namely, Kuni and Gudly as required under the said Act were declared by the Child Welfare Committee to be fit and free for adoption, who also determined the date of birth of both the girl children being 7.2.2006 in case of Kuni and 13.3.2007 in case of Gudly. It also transpires from the records that the petitioner no. 2 has executed a Foster Care agreement with the petitioner no.1 and has taken both the minor girl children under her foster care. The petitioner no. 1 asserted in the petition that both Kuni and Gudly were being reared as siblings. Hence, as per the guidelines framed pursuant to the judgment of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra), such siblings of different ages shall, as far as practicable, be placed in adoption in the same family, the corollary of which means that Kuni and Gudly should not be separated.

9. The Supreme Court in the case of *Lakshmi Kant Pandey* (supra) set out various principles for care and protection of children who are orphan or abandoned. The Court observed that when the parents of a child want to give it away in adoption or the child is abandoned and it is considered necessary in the interest of the child to give it in adoption, every effort must be made first to find adoptive parents for it within the country because such adoption would steer clear of any problems of assimilation of the child in the family of the adoptive parents which might rise on account of cultural , racial or linguistic differences in case of adoption of the child by foreign parents. With regard to small children, who have been brought up as siblings, the Supreme Court in the said case held as follows:

> "……It is also necessary while considering placement of a child in adoption to bear in mind that brothers and sisters or children who have been brought up as siblings should not be separated except for special reasons and as soon as a decision to give a child in adoption to a foreigner is finalized, the recognized social or child welfare agency must if the child has reached the age of understanding, take steps to ensure that the child is given proper orientation and is prepared for going to its knew home in a new country so that the assimilation of the child to the new environment is facilitated."

Moreover, following the aforesaid judgment of the apex Court, the CARA guidelines has also specifically prescribed that siblings should be placed in adoption in the same family. As already discussed above, there is no dispute that both Kuni and Gudly were being reared as siblings by the petitioner no.1. From the Home Study Report of the petitioner no.2 prepared by the Adoption Co-ordinating Agency, Karnataka, which was produced before the court below, it is also clear that the petitioner no. 2 is capable and competent under law to adopt the minor children in question. As both the said minor children have been growing up as siblings under the care and protection of petitioner no. 1 – Agency and are now with the petitioner no.2 on her executing a Foster Care agreement, they cannot be separated and given in adoption to two different families contrary to the decision of the Supreme Court in the case of *Lakshmi Kant Pandey* (supra) and the CARA Guidelines.

10. Now, the only question which remains to be answered is whether the learned District Judge erred in deciding both the applications strictly under section 9(4) of the Act, 1956 without due application of judicial mind by not considering the same to be applications made under the J.J. Act.

11. Law is well settled that it is the substance and not the form which is to be looked in to by a court of law while deciding any lis and appropriate relief to which a party may be entitled to should not be withheld on the technical ground that the nomenclature of an application has been made wrongly. The documents which were produced before the learned District Judge clearly envisage that the petitioners intended to obtain an order of allowing adoption under the J.J. Act and not under the Act, 1956. It was, therefore, incumbent upon the learned District Judge to deal with both the applications to be under the J.J. Act. Further, in view of the documents produced and in view of the provisions of the J.J. Act , as discussed above, there was no s cope on the part of the learned District Judge to call for a report from the Orissa State Council for Child Welfare, who in an evasive manner only stated in their report in one line that the petitioner no. 2 is not eligible to adopt two girl children under section 11 of the Hindu and Adoption and Maintenance Act, 1956 and relying upon which the learned District Judge mechanically held that section 11 is a bar for the petitioner no. 2 to adopt both the girl children without considering the ratio of the decision in the case of *Lakshmi Kant Pandey* (supra) in its proper perspective and the CARA Guidelines. In such cases, it is always incumbent upon the learned District Judge to carefully scrutinize as to whether giving an approval/sanction for adoption is in the best interest of the child in question, who needs care and protection as per the provisions of the

J.J. Act for which the petitioners produced all required documents before him. The learned District Judge, therefore, keeping the spirit of the provisions of the J.J. Act in section 41 thereof and the law as laid down by the apex Court should have allowed the applications for rehabilitation and reintegration of both the girl children in the family of the petitioner no.2.

12. In view of the materials available on record, this Court has, therefore, no hesitation to hold that both Kuni and Gudly were under the custody and care of the petitioner no. 1 and being reared as siblings, are now under the petitioner no.2 pursuant to her executing the Foster Care agreement. Both the said children are in need of care and protection and as already held are required to be rehabilitated and socially reintegrated as early as possible within the period prescribed by placing them in the family by giving them in adoption to the petitioner no. 2 so that such children will feel themselves to be an integral part of the society and will not be looked down upon.

13. In view of the above findings, this Court is of the opinion that the impugned orders are unsustainable and necessary permission should be allowed permitting the petitioner no. 2 to adopt both Kuni and Gudly, who are under her Foster Care.

14. In the result, the impugned orders dated 20.9.2010 under Annexure-6 to both the writ petitions are, therefore, set aside and both the writ petitions stand allowed. Necessary steps be taken by the petitioner no. 2 to take both Kuni and Gudly in adoption in accordance with law.

Writ petitions allowed

2013 (I) ILR - CUT- 992

M. M. DAS, J.

R.S.A. NO. 266 OF 2004 (Dt.14.03.2012)

PANDA KANOJIA ……..Appellant

.Vrs.

SANKAR BAGHEL & ORS. ……..Respondents

CIVIL PROCEDURE CODE, 1908 – S.100

Substantial question of law – No specific pleading in the plaint regarding adverse possession – Plaintiff claims title over the suit property basing on an unregistered sale deed – Suit dismissed – Lower appellate court without assigning reasons reversed the finding of fact and decreed the suit – The above question assume the character of substantial question of law – Held, judgment passed by the learned lower appellate court is set aside and judgment and decree passed by the trial Court is restored. (Paras 9,10)

For Appellants - M/s. B. Mohanty, K.K. Mohapatra, S. Mohanty & B. Moharana.
For Respondents - M/s. A.K. Mohapatra, S.K. Jena.

M.M. DAS, J. This appeal has been filed against a reversing judgment in a suit filed by the respondents for declaration of right, title and interest. The appeal was admitted on the following substantial question of law :-

> "Whether the lower appellate court has acted contrary to law by decreeing the suit filed by the plaintiffs on the finding that the plaintiffs have perfected their title over the disputed property by way of adverse possession even though no such case was pleaded by the plaintiff in the plaint and the plaintiff based his claim of title on an unregistered sale deed which was not accepted by either of the court below ?

2. Mr. Mohanty, learned counsel for the appellant submits that the respondents as plaintiffs have never pleaded in the plaint that they have perfected their title over the disputed property by way of adverse possession except stating in paragraph – 8 of the plaint that the plaintiffs are entitled to declaration of their title over the suit land on the basis of a sale, alternatively, if the sale is held to be invalid for any infirmity whatsoever, by way of

uninterrupted open possession over the suit land on the strength of such invalid sale since more than four decades, they have perfected their title by adverse possession. According to Mr. Mohanty, these pleadings cannot be construed to be specific pleadings claiming declaration of title by way of adverse possession over the disputed property. The defendant–appellant denied the plaint allegations by specific assertions.

3. The learned trial court, on the pleadings of the parties, framed various issues out of which, issue No.1 was, as to whether the plaintiffs have right, title and interest over the suit land ? While discussing the cases of the respective parties and the evidence adduced by them before the learned trial court, it held, that the so-called sale deed relied upon by the plaintiffs marked as Ext.1 was scribed on a plain paper and not on stamp paper and was not registered. Further analyzing the evidence, the learned trial court found that Ext.1 seems to be a fabricated document and, therefore, the learned trial court refused to raise any presumption on Ext.1 under Section 90 of the Evidence Act and took Ext.1 out of consideration. The learned trial court also discussed the question with regard to the claim of the plaintiffs' title by way of adverse possession and came to the finding that the plaintiffs were never in possession over the disputed property. The learned trial court also found that the so-called plain paper unregistered sale deed having never been produced before the settlement authorities as is evident from Ext.2, the order sheet in Rent Objection Case No. 2518 -109/1993-48 maintained till 15.3.1993 though the settlement authority found possession of the father of the plaintiffs, the said Ext. 1 was not in existence even till 18.12.1993, when the R.O.R. under Ext. 4 was published and, therefore, question of remaining in possession for more than the statutory period over the disputed property as claimed by the plaintiffs does not arise. The plaintiffs being aggrieved, preferred an appeal, being, Title Appeal No.2 of 2002 against the judgment passed by the learned trial court in T.S.No.30/19 of 1999 – 2001.

4. The learned lower appellate court confirmed the findings of the learned trial court with regard to the alleged sale deed executed on a plain paper, which was also not registered, i.e., Ext.1. The learned lower appellate court also disbelieved the endorsement made in the remarks column of the ROR with regard to the possession of the father of the plaintiffs over the suit property and, as such, in effect, disbelieved the case of the plaintiffs that they are in possession over the disputed property.

5. Strangely, however, the learned lower appellate court, while confirming the findings of the learned trial court with regard to Ext.1 that it is a created document, placing reliance on the said Ext.1, came to the conclusion that

even if Ext.1 is found to be invalid, possession of the plaintiffs pursuant to Ext.1, can confer title against the granter including the vendor by adverse possession, if the possession is more than the statutory period.

6. It is no more res integra that a party claiming title by way of adverse possession is required to prove the essential ingredients of adverse possession, i.e., possession with hostile animus adversely to the interest of the true owner for more than the statutory period openly as of right and peaceably without any hindrance to the knowledge of the true owner, specifically mentioning the starting point of such adverse possession. Further, to establish title on the basis of adverse possession, a party is required to specifically plead such fact of adverse possession in its pleading.

7. In the instant case, however, except a bare statement made in the plaint with regard to adverse possession, no specific pleading has been advanced by the plaintiff in support of such claim. The learned lower appellate court, while concluding that even if Ext.1 is an invalid document, the same would not be sufficient to throw out the oral and documentary evidence adduced by the plaintiffs, committed an error in holding that "law is well settled that possession for more than 12 years under an invalid title deed will confer title against the grantor including the vendor." This finding is contrary to law, since even calculating the possession of the plaintiff from the date of Ext.1, i.e., the plain paper unregistered sale deed, though it appears that from the said date, if the plaintiffs actually took possession of the disputed property and continued to remain in possession, the period would be more than the statutory requirement for claiming adverse possession, but the learned lower appellate court has not dealt with the findings of the learned trial court that Ext.1 is a created document having mentioned the plot number, which was only assigned to the suit land during the major settlement, which was conducted from 1959 to 1965, even though the said Ext.1 has been allegedly executed in 1956.

8. Without meeting the reasons assigned by the learned trial court, it appears that the learned lower appellate court has been swayed away by the entries made in the remarks column of the R.O.R. – Ext.4.

9. Though the question of adverse possession is a mixed question of law and fact and the second appellate court is not to interfere with the finding on such question, but in the instant case, as it is found that the bare requirements of pleading to establish adverse possession is absent from the plaint and further the learned lower appellate court, which is the final court of fact and is required to meet the reasonings given by the learned trial court and assigns specific reasons as to why it disagrees with such reasonings,

while reversing the finding of fact, which has not been done in the instant case, the above two questions assume the character of substantial question of law, which can be dealt with and examined by this Court as a substantial question of law.

10. In view of the foregoing analysis, this Court finds that the judgment of the learned lower appellate court is not sustainable. Accordingly, the said judgment of the learned lower appellate court, i.e., the court of the Additional District Judge, Nuapada passed in Title Appeal No.2 of 2002 is set aside and the judgment and decree passed by the learned trial court in T.S. No.30/19 of 1999 – 2001 is restored.

11. The Second Appeal is accordingly allowed. However, there shall be no order as to cost with regard to this appeal.

Appeal allowed.

2013 (I) ILR - CUT- 995

M. M. DAS, J. & C.R.DASH, J.

W.P.(C) NO.13932 OF 2012 (Dt.30.01.2013)

USHADEVI SUKHANI …….Petitioner

.Vrs.

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

ODISHA DEVELOPMENT AUTHORITIES ACT, 1982.

Allotment of residential plots at "Bidanasi Project Area " – Delay in making construction – Violation of Clause in the Brochure – Cancellation of allotment if there is negligence on the part of the allottee and the reasons assigned in the show cause are not bona fide.

Since Clause mentioned in the Brochure are not statutory in nature drastic action should not be taken mechanically – Held, cancellation of allotment should be adopted as a last resort – Fresh directions issued for issuance of notices to allottees. (Para 13)

Case law Referred to:-

(2004) 2 SCC 130 : (Teri OAT Estates (P) Ltd.-V- U.T. Chandigarh & Ors.).

For Petitioner - M/s. Dr. A.K. Rath, A.K.Nath, H.P. Mohanty.
For Opp.Parties - M/s. Dayananda Mohapatra, M. Mohapatra, G.R. Mohapatra, A. Dash & S. Mallick, (for O.Ps.1 & 2).

M. M. DAS, J. The petitioner in this writ petition has prayed for quashing the order dated 16.4.2012 passed by the Planning Member, Cuttack Development Authority (hereinafter referred to as 'the C.D.A.') – opp. party no. 3 vide Annexure-4 and for a direction to accord permission to the petitioner for construction of a residential house over the plot allotted to her by the C.D.A.

2. Facts of the case disclose that pursuant to an advertisement made by the C.D.A. for sale of plots for construction of residential houses in Sector-9, Markat Nagar under the scheme of Abhinaba Bidanasi Cuttack, the petitioner applied for a plot. Thereafter, a lottery was drawn and the petitioner was selected in the said lottery. On 13.12.1995, the Secretary, C.D.A. – opp. party no. 2 sent a letter to the petitioner stating therein that she has been allotted with plot No. 64 of 'C' category measuring an area of 3147.62 sqr. Ft. in Markat Nagar, Sector–9 at Bidanasi Project Area. She was requested to take over possession of the said plot on or before 30.12.1995 by depositing the balance amount of Rs. 29,918/-, the total cost of the land being Rs.1,15,058/- and the petitioner having paid the rest of the amount earlier. Thereafter, she paid the balance amount of Rs. 29,918/- and a possession handing over memo was given to the petitioner on 23.5.1996. The petitioner made an application for approval of the plan for construction of a residential house, before the opp. party no. 3 and as required, deposited an amount of Rs. 3540/- on 29.3.2012. However, by letter dated 16.4.2012, the opp. party no. 3 intimated the petitioner that as per the order of the Secretary dated 21.1.2012, any application for permission applied after expiry of the show cause period should not be considered till disposal of the show cause. The petitioner has further averred that on 25.11.2009 the Administrative Officer, C.D.A. sent a letter to one Promod Kumar Choraria requesting him to appear in person on 8.12.2009 regarding handing over possession of his allotted plot No. 1C/62. A copy of the said letter was endorsed to the petitioner requesting her to appear on the said date to settle the dispute. On 15.12.2009, again a letter was sent to the said Pramod Kumar Choraria to appear on 21.12.2009 regarding handing over

possession of allotted plot No. 1C/62 and a copy of the said letter was also endorsed to the petitioner requesting her to appear on the said date to settle the dispute. When the matter stood thus, on 23.12.2009, the Administrative Officer, C.D.A. deputed one Srikanta Das, Amin to conduct the spot enquiry in presence of the allottees of plot No. 1C/62 and 1C/63 in Sector-9 and demarcate their respective areas allotted in their favour on 29.12.2009. It may be mentioned that the petitioner is the adjacent plot owner of plot Nos. 1C/62 and 1C/63. On 7.6.2012, the opp. party no. 2 sent a letter to the petitioner stating therein that during demarcation, it was found that area of plot No. 1C/62 is 103 sqr. ft. less than the allotted area and there are some excess area in plot No. 1C/61, 1C/63 and 1C/64 than the area handed over to the allottees. The petitioner along with the adjacent plot owners were requested to be present on the site on 12.6.2012 for taking measurement of the aforesaid plots.

3. Dr. A.K. Rath, learned counsel appearing for the petitioner submits that though in pen and paper, possession of plot No. 1C/64 in Sector-9 was handed over to her by means of a possession handing over memo dated 23.5.1996, the C.D.A. authorities have not properly measured the land which is evident from the subsequent act and the letter of possession was a formal one. After refusal to accord permission for construction of the house, the petitioner on enquiry from the C.D.A. authorities came to know that a show cause notice was issued to her on 25.8.2011 calling upon her to show cause as to why the allotment in her favour should not be cancelled on the grounds, inter alia, that the petitioner had not constructed the residential house over plot allotted to her within five years from the date of allotment. The petitioner denies to have received such notice at any point of time. The petitioner on 5.3.2012 intimated the C.D.A. authorities that due to unavoidable circumstances and shortage of finance, she was not in a position to construct the house. Dr. Rath, learned counsel submitted that it is due to latches of the authorities, the exact plot allotted to the petitioner was not demarcated for which the petitioner amongst other reasons could not submit the plan for approval earlier and no latches can be attributed to the petitioner for the said act. He, therefore, submitted that the letter under Annexure-4 is contrary to law and should be quashed with a direction to the C.D.A. authorities to approve the building plan submitted by the petitioner.

4. A counter affidavit has been filed by the Secretary, in-charge, C.D.A., Cuttack, inter alia, stating that many of the allottees who were allotted plots in the year 1995-96 and before have not undertaken construction within the time stipulated in the Brochure or in the allotment letter as the case may be. Consequently, a number of plots fell vacant

though number of other eligible persons are waiting for a plot in C.D.A. Project Area. Attention of this Court has been drawn in the counter affidavit to the order passed in W.P. (C) No. 20427 of 2009.

It was submitted by Mr. Dayananda Mohapatra, learned counsel appearing on behalf of the C.D.A. that consequent upon the direction issued by this Court in W.P. (C) No. 20427 of 2009, the C.D.A. directed the field staff to make survey of those plots in different sectors where constructions have not been undertaken and after receipt of the report, issued notice to show cause to such allottees. In the present case, the petitioner was issued show cause in letter No. 17740 dated l25.8.2011. The petitioner also submitted a reply on 5.3.2012. The C.D.A. also issued a public notice widely circulating the same calling upon such allottees to show cause, who has not received notice in spite of sending the same through post and those who have not undertaken construction. The C.D.A. in order to grant sufficient opportunity for construction and for the purpose of according permission as required under the Orissa Development Authorities Act, considered those applications submitted before the date fixed in public notice. The present petitioner did not submit any application for permission before the aforesaid date. The petitioner having not applied for permission for building the house for about sixteen years nor having prayed for any extension of period for construction as per the conditions of the Brochure and the allotment letter, her plan submitted for approval was not considered. Mr. Mohapatra further submitted that the process of considering show cause filed by various allottees on similar categories is continuing in accordance with the order passed by this Court in W.P. (C) No. 20427 of 2009. He further submitted that in view of the order passed in the said writ petition, i.e., W.P. (C) No. 20427 of 2009, the C.D.A. is undone and is not in a position to consider granting of permission for raising construction by approving the plan submitted by such allottees.

5. Considering the facts of the present case, we come to the conclusion that the C.D.A. authorities practically taking the plea that the order passed by this Court in W.P. (C) No. 20427 of 2009 is a bar for them to consider applications for grant of permission to raise construction and as per the said order, such allotments are to be cancelled, have rejected the application for approval of the plan made by the petitioner. .

6. On perusal of the order dated 24.2.2011 passed in W.P. (C) No. 20427 of 2009 by this Court, it appears that in the said case, the petitioner sought for a direction from this Court to the C.D.A. for allotment of a residential plot of ‘G’ Category measuring an area of 300 sqr. ft.

7. An additional affidavit was filed by the C.D.A. in the said case, wherein it was stated that the C.D.A. has proposed to develop the area in sector-15 on phased manner and in the meanwhile, nearly 11383 number of plots have been allotted including group housing and commercial –cum-residential plots, but many of the allottees have not undertaken construction over the said plots which are lying vacant. Therefore, the C.D.A. proposed to have a detailed survey sector-wise, to find out the particulars of vacant plots available and to apprise the matter to the authorities with a request to take necessary steps for cancellation of allotment of those plots, affording reasonable opportunity of hearing to such allottees and only if there is cancellation of allotment, it would recommend the authority to allot such cancelled plots to eligible persons in accordance with law. It was further stated in the said affidavit that it would request the revenue authorities for transfer of additional piece of land within the scheme area and after such transfer is made by the revenue authority, the C.D.A. shall propose to carve out some more number of 'G' category plots and on approval of the authorities, the C.D.A. shall proceed to allot the aforesaid plots to the eligible persons in accordance with law with reference to Rule 54 of the O.D.A. Rules.

8. Considering the said additional affidavit, this Court on 24.2.2011 in W.P. (C) No. 20427 of 2009 has issued the following direction:

> "In view of the aforesaid statement in the form of the affidavit filed by the Secretary, Cuttack Development Authority, we dispose of the writ petition with a direction to take necessary action against the allottees who have not yet started construction over the plots allotted to them and thereafter allot the same in favour of the eligible persons in accordance with law. It is further directed that the CDA shall proceed with the proposal for requesting the Revenue Authority as stated above to obtain some additional land for the purpose of carving out the plots to cater the need of the eligible persons including the physically handicapped persons including the petitioner for allotment of 'G' category plots". ***(emphasis supplied)***

9. From a reading of the aforesaid directions in the context of the facts of the said case, it appears to us that this Court was conscious that many of the plots allotted have remained vacant and no steps by the allottees have been taken to raise construction thereon upon submission and approval of the building plan. The said order can never mean that allottees who have been recently allotted with plots, if have not raised construction, their allotments will also be cancelled. This Court was further conscious that such allotments can be cancelled only in accordance with law.

10. In the case of ***Teri OAT Estates (P) Ltd. v. U.T. Chandigarh and others,*** (2004)2 SCC 130, the Supreme Court was considering the question which centers round the power of resumption of land/building of the respondent therein, leased out in favour of the appellant under the Capital of Punjab (Development and Regulation) Act, 1952 read with the Chandigarh Leasehold of Sites and Buildings Rules, 1973 and the Public Premises (Eviction of Unauthorized Occupants) Act, 1971. The appellant therein being the highest bidder purchased the site bearing No. SCO 126-27, Sector-34-A Chandigarh on leasehold basis in open auction held on 13.3.1988. It was stipulated that in the event the purchaser opting for payment in instalment, 7% interest was payable. 25% of the allotment price was required to be deposited within 30 days of auction and on compliance of the said term, the Estate Officer, Chandigarh was to confirm the lease of the land site in favour of the purchaser by issuing an allotment letter. 7% interest as prescribed was leviable on the balance 75% premium as contained in the letter of allotment in three equal instalments together with ground rent. Clause 8-A of the said letter of allotment, however, stipulated levy of interest at the rate of 12% per annum, penalty and power of resumption in the event of delayed payment of instalments upon grant of an opportunity of being heard in the terms mentioned in the said clause. The appellant therein deposited certain amounts. But, thereafter, he did not pay the instalment in time. A proceeding for cancellation of lease by way of resumption of land and building was initiated by affording an opportunity of hearing. Ultimately, an order was passed in exercise of powers vested under Rule 12 (3) of the Chandigarh Leasehold of Sites and Building Rules, 1973 cancelling the allotment and forfeiting the deposit made. The Hon'ble Supreme Court after noting such facts in determining the question framed with regard to the power of resumption of land under the rules mentioned above, in paragraph – 24 of the judgment held as follows:-

> "It is, therefore, not a case where the court will have to take one stand or the other in the light of the statutory provisions. The question as to whether the extreme power of resumption and forfeiture has rightly been applied or not will depend upon the factual matrix obtaining in each case. Each case may, therefore, have to be viewed separately and no hard-and-fast rule can be laid down therefor. In a case of this nature, therefore, the action of the Estate Officer and other statutory authorities having regard to the factual matrix obtaining in each case must be viewed from the angle as to whether the same attracts the wrath of Article 14 of the Constitution of India or not".

11. The Hon'ble Supreme Court in the said decision has referred to various earlier decisions of the said Court, where the Hon'ble Supreme Court categorically held that resumption and forfeiture is a drastic step. In paragraph – 57 of the said judgment, it has been held as follows:-

> "We may, however, hasten to add that we do not intend to lay down a law that the statutory right conferring the right of the respondent should never be restored to. We have merely laid down the principle giving some illustrations where it may not be used. There cannot be any doubt whatsoever that if the intention of the allottee is dishonest or with an ill motive and if the allottee does not make any payment in terms of the allotment or the statute with a dishonest view or any dishonest motive, then Section 8-A can be taken recourse to".

12. The ratio of the aforesaid decision in the case of Teri OAT Estates (P) Ltd. (supra) is, therefore, clear that the Hon'ble Supreme Court in no uncertain terms expressed that the drastic power of resumption and forfeiture should be exercised only as a last resort.

While issuing the directions in W.P. (C) No. 20427 of 2009, this Court was cautious in holding and directing the C.D.A. authorities to take necessary action as per law against the allottees before cancellation of allotment. The said direction has been issued taking into consideration the additional counter affidavit filed on behalf of the C.D.A. in the said case, i.e., in W.P. (C) No. 20427 of 2009, wherein it was mentioned that opportunity of hearing to such allottees shall be granted. It is, therefore, clear that as per the judgment of the Hon'ble Supreme Court in the case of Teri OAT Estates (P) Ltd. (supra), the authorities are required to examine each case by taking the show cause into consideration and cannot just mechanically cancel the allotment just because the allottee has not been able to raise construction within the stipulated period as envisaged in the Brochure as well as the allotment letter.

13. Keeping in view the conclusion of the Supreme Court that cancellation of allotment should be adopted as a last resort as the same is a drastic action, the directions issued in W.P. (C) No. 20427 of 2009 are required to be supplemented by issuing specific directions with regard to dealing with the show cause shown by the allottees, who have not been able to build their houses over the allotted lands within the stipulated period. The right of the C.D.A. to cancel such allotment is derived from the clause mentioned in the Brochure and the allotment letter which are not statutory in

nature Hence, we add the following directions to the directions issued in the order dated 24.2.2011 passed in W.P. (C) No. 20427 of 2009:-

(i) Before issuing a show cause notice to any allottee, who has failed to raise construction over his allotted plot within five years from the date of handing over possession, as an initial step, the C.D.A. shall issue a public notice that if such allottees submit building plans for approval within a reasonable period to be specified in the said notice, such building plans will be taken up for consideration for approval and, if approved, the allottees shall be required to start raising construction in accordance with the approved plan as early as possible from the date of approval, preferably, within a period of three months from the said date.

(ii) The C.D.A., thereafter, shall issue notice to show cause to such allottees, who have not raised construction over their allotted plots nor have responded to the public notice to be published as per the directions given above.

(iii) Upon receiving the show cause, a fair, impartial and pragmatic approach should be made for considering the reasons assigned in the show cause by the allottees by giving an opportunity of hearing to such allottees;

(iv) In the event, the C.D.A. authorities find the show cause to have explained the delay in raising the construction, which are bona fide in nature, they, instead of cancelling such allotment should give an opportunity to such allottees to submit their building plan for approval within a specified time if no such application was made earlier and start such construction within a stipulated period to be fixed by the authority from the date of approval of the plan.

(v) However, if the C.D.A. authorities find that the reasons assigned in the show cause are not bona fide and there is negligence on the part of the allottee for which the land has remained vacant, it would be open for them to cancel such allotment.

(vi) In case, where the C.D.A. authorities come to the conclusion that the allottee under some circumstances beyond his control has not been able to raise construction over the allotted land and further wants to alienate such land to any other third party and seeks permission of the C.D.A. authorities in that regard, the C.D.A. authorities shall consider the emergent requirement of the allottee for obtaining funds, viz. for undertaking any special treatment for any

serious disease or for any imminent expenses which he is required to meet and accord such permission to transfer the allotted plot.

(vii) The C.D.A. authorities will be free to consider approval of building plan submitted by any such allottees even beyond the period stipulated in the Brochure/letter of allotment, if it comes to the conclusion that the allottee has genuine reasons for not applying for such building plan earlier.

14. It may be clarified here that the above directions will be issued only in respect of plots where allotments have been made, but no lease deed has been executed and registered by the C.D.A. in favour of the allottees, as, in case, where such deed has been executed and registered by the C.D.A., the right of resumption of such lease shall be governed in accordance with law and in accordance with the provisions of the Transfer of Property Act, 1882/Specific Relief Act, 1963.

15. Now coming to the facts of the present case, we find that the petitioner having already made an application for approval of building plan though beyond time and has also filed a show cause giving the reason that due to unavoidable circumstances and shortage of finance inasmuch as the boundary dispute between the petitioner's allotted plot and other adjacent plots was not settled up to 7.6.2012, it cannot be presumed that the plot allotted to the petitioner was demarcated before or at the time of issuance of the possession handing over memo to her. Therefore, no latches can be attributed to the petitioner. The C.D.A. authorities are, therefore, directed to consider the plan submitted by the petitioner for approval and approve the same, if the same is in accordance with the regulations. This shall be done within a period of thirty days from the date of communication of this order to the Planning Member – opp. party no. 3. However, it is made clear that the petitioner shall start raising the construction within three months from the date of receiving the approved plan. In view of the above conclusion, the order under Annexure-4 stands quashed.

16. In the result, the writ petition is allowed with the above directions. No costs.

Writ petition allowed**.**

2013 (I) ILR - CUT- 1004

M. M. DAS, J & B. N. MAHAPATRA, J.

W.P.(CRL.) NO. 279 OF 2013(Dt.25.03.2013)

ISWAR CHANDRA DASH …….Petitioner

.*Vrs.*

FIRST ADDL. DISTRICT & SESSIONS JUDGE, CTC & ORS. …….Opp.Parties

A. CRIMINAL PROCEDURE CODE, 1973 – S.439 (2)

Cancellation of bail – Conduct subsequent to release on bail and other supervening circumstances are relevant.

Once bail granted to an accused and application U/s.439 (2) Cr.P.C. filed before the said Court and the Court finds that the accused while on bail has misused his liberty and has acted in such manner which is prejudicial to the case of the prosecution, i.e. if the accused has attempted to gain over witnesses, has committed further criminal acts on the informant or any other person belonging to the prosecution party or has attempted to threaten the witnesses, the bail granted earlier to him can be cancelled by the Court granting such bail. (Para 9)

B. CRIMINAL PROCEDURE CODE, 1973 – S.439 (2)

Cancellation of bail – A bail order once granted can only be cancelled under the provisions of Section 439 (2) Cr.P.C. and not otherwise. (Para 12)

C. CONSTITUTION OF INDIA, 1950 – ART.226

Writ petition to set aside the order granting bail – Questioning public accountability on the part of the learned Court below who granted such bail – Held, writ petition is not maintainable since remedy available to the petitioner to move appropriate application U/s.439 (2) Cr.P.C. (Paras 7 & 15)

Case laws Referred to:-

1.AIR 2000 SC 1851 : (R. Rathinam-V- The State & Anr.).
2.(2002) 9 SCC 670 : (Salim Khan-V- Sanjai Singh & Anr.)
3.(2000) 9 SCC 344 : (Pollution Control Board-V- Mahabir Coke Industry).
4.1994 SCC (Cri.)1609 : (N. Nagendra Rao & Co.-V- State of A.P.).

For Petitioner - In person.
For Opp.Parties -

M.M.DAS, J. **I**n this writ petition, the petitioner, who is a member of this Bar and appears in person, has made the following prayer:-

"It is therefore prayed that this Hon'ble Court be pleased to issue notice of show cause to the opp. parties and after hearing the parties be pleased to-

(i) Pass appropriate order setting aside the impugned order under Annexure-1;

AND

(ii) Pass appropriate order fixing public accountability on the Opp. party No. 2, who has committed serious error of facts which are not borne out on record and is negligently/superfluously acted in dereliction of duty empowered on him by the statute and he is liable to pay compensation, which is assessed at Rs1/- (rupees one only).

AND

(iii) Pass appropriate order invoking sou-moto power for cancellation of bail or to pass any other directions directing the State to do well in preferring appeal against the order impugned".

2. As stated in the writ petition, the grounds on which the petitioner challenges the order granting bail to the opp. parties 4 to 7 are :

(a) The act of granting bail with a perverse finding which is non-existent in the record, amounts to judicial indiscretion. Thus, the granting of bail is for extraneous consideration.

(b) No greater damage can be cause to the administration of justice and to confidence of people in judicial institution, when Judges of Higher Courts publicly express perverse finding. Respect for judiciary is not in hand by using extraneous, non-existent fact.

(c) The interest of justice would be served if the opp. party No. 2, who has mis-utilized the seal of the Court to be held attributable and fixing public accountability for commission of illegality, irregularity actuated with bias and influenced otherwise.

3. As per the prosecution case, as disclosed in the F.I.R., in the fateful night, two unknown persons came in a motor cycle to the residential house

of the petitioner-informant while he was taking rest after dinner and abused him in filthy language. The petitioner-informant came down from his up-stairs of the residential house and found that the culprits have already left the place in their motor cycle. Then the petitioner-informant and his son followed the culprits to one end of the village and challenged them as to why they abused him in filthy language. Soon-after four other unknown culprits joined with the earlier two and started assaulting the petitioner-informant and his son by means of sharp cutting weapon resulting in injuries on their body including eyes. Basing on the above F.I.R., a case was registered under sections 307/326/324/294/34 IPC at Bidanasi Police Station and investigation commenced. In course of investigation, the police arrested the private opp. parties and took them to custody.

4. It is an admitted case that since the petitioner-informant is a practicing Advocate and a member of the High Court Bar Association due to the assault caused by the accused persons on the petitioner, the members of the Bar expressed their solidarity by abstaining from court work for a good number of days**.** Even at the behest of the Bar Association, WPCRL No. 1215 of 2013 has been registered. The accused persons were identified by the petitioner and his son in a T.I. Parade. The accused persons have filed BLAPL No. 11 of 2013 and BLAPL No. 12 of 2013. The said applications were transferred to the learned First Additional Sessions Judge, Cuttack. On 16.1.2013 by a common order, the learned First Additional Sessions Judge, Cuttack enlarged the accused persons on bail by arriving at a finding that the injury inflicted on the informant are simple in nature. The relevant extract of the order of the learned First Additional Sessions Judge, Cuttack is quoted below:-

> "Perused the injury reports placed on record in respect of informant, Iswar Chandra Das and his son Maheswar Das wherein it is mentioned that informant Iswar Chandra Das sustained lacerated injuries on his forehead and below right eye apart from a hematoma, simple in nature and his son Maheswar Das sustained one swelling, two abrasions and a laceration, simple in nature. So from the nature of injuries, it is difficult to presume if any sharp cutting weapon was used by assailants. It is admitted on behalf of the prosecution that the petitioners have no criminal antecedents".

5. The petitioner submits that though one of the injuries mentioned in the medical report was grievous in nature, the learned First Additional Sessions Judge has committed an error in holding that the injuries were simple in nature, which were not borne out from the record. He, therefore, submits that a presumption of bias and/or otherwise being influenced,

motivated in granting bail to the accused persons can be raised from the above finding which is attributable to the learned First Additional Sessions Judge, Cuttack.

6. When asked by the Court as to how the writ petition is maintainable and why the petitioner instead of filing application for cancellation of bail, if there is instance of the accused persons mis-utilizing their liberty granted to them, has filed the present writ petition, the petitioner submits that this Court under Article 226 of the Constitution can decide the question of public accountability on the part of the learned First Additional Sessions Judge.

The petitioner first of all relies upon the decision in the case of ***R.Rathinam v. The State and another,*** AIR 2000 SC 1851 in support of his submission that the writ petition is maintainable before this Court. Secondly, with regard to the public accountability, he relies upon the decisions in the case of ***Salim Khan v. Sanjai Singh and another,*** (2002)9 SCC 670, ***Pollution Control Board v. Mahabir Coke Industry***, (2000)9 SCC 344 and ***N. Nagendra Rao & Co. v. State of A.P.***, 1994 SCC (Cri.) 1609.

7. In the case of R.Rathinam (supra), the Hon'ble Supreme Court was considering the judgment of a Division Bench of the Madras High Court. The facts of the said case reveal that 75 advocates practicing in various courts situated in Tamilnadu presented two petitions addressed to the Hon'ble Chief Justice of the Madras High Court for cancellation of the bail granted to certain persons. It was prayed in the said petitions that the Hon'ble Chief Justice might place the matter before a Division Bench of the High Court for its consideration.

The Hon'ble Chief Justice on 4.5.1998 directed that the petitions be placed before the Division Bench. The learned Judges of the Division Bench held that the petitions presented before the Hon'ble Chief Justice are not maintainable and hence, no proceedings could be initiated thereon. Accordingly, the said Bench closed the suo motu proceedings by an order passed on 24.9.1998. The matter was brought before the Hon'ble Supreme Court. The said applications were filed before the Madras High Court with regard to a Carnage which took place on 30.6.1997 at a village Madurai district. In the Gory Episode, six persons belonging to a Scheduled Caste community were done to death. One of the deceased was described as President of the Local Panchayat Committee. The police arrested 34 persons in connection with the said massacre. Though initially, they were not released on bail, subsequently, by orders passed by the Madras High Court in the months of March and April, 1998, many of them were released

on bail. The Hon'ble Chief Minister of Tamilnadu was moved by a brother of one of the deceased in association with some others for placing to move the High Court to cancel the bail granted to those accused persons for the reasons which were stated in the representation. But the Government did not favaourably respond to the same. It was in such a situation that the Advocates from the Bar filed a petition before the Hon'ble Chief Justice. The Division Bench which heard the petition categorically came to the conclusion that when there is a statutory remedy to the aggrieved party by filing applications/petitions for cancellation of bail granted by the learned Judges of that court, the representations/petitions made by some Advocates, who have nothing to do with the said case could not be entertained when remedy in a proper forum was available. The High Court was of the clear view that the Division Bench cannot by-pass the statutory provision. The Hon'ble Supreme Court while agreeing with the said view and while examining the question as to whether the same High Court can cancel the bail for other reasons, referred to section 439 (2) Cr.P.C. and held that the frame of the sub-section (2) of section 439 indicates that it is a power conferred on High Court or Sessions Court to cancel bail. Exercise of that power is not banned on the premise that bail was earlier granted by the High Court on judicial consideration. In fact, the power can be exercised only in respect of a person who was released on bail by an order already passed. There is nothing to indicate that the said power can be exercised only if the State or Investigating Agency or even a Public Prosecutor moves for it by a petition. Thus holding, the Hon'ble Supreme Court further held in the case of R. Rathinam (supra) as follows:

> It is not disputed before us that the power so vested in the High Court can be invoked either by the State or by any aggrieved party. Nor is it disputed that the said power can be exercised suo motu by the High Court. If so, any members of the public, whether he belongs to any particular profession or otherwise, who has a concern in the matter can move the High Court to remind it of the need to invoke the said power suo motu. There is no barrier either in Section 439 the Code or in any other law which inhibits a person from moving the High Court to have such powers exercised suo motu. If the High Court considers that there is no need to cancel the bail for the reasons stated in such petition, after making such considerations it is open for the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court fells that the reasons stated in the petition are sufficient enough for doing so. It is, therefore, improper to refuse to look into the matter on the premise that such a petition is not maintainable in law.

8. Applying the above principle to the facts of the present case, it is seen that in the present case, appeal was granted by the learned First Additional Sessions Judge, Cuttack and not by this Court. Section 439 (2) of the Cr.P.C. provides that a High Court or a Court of Session may direct that any person, who has been released on bail under this Chapter be arrested and commit him to custody**.**

9. It is well settled in law that once a bail is granted to an accused, if the Court granting the bail on being moved by an application under section 439 (2) Cr.P.C. finds that the accused on bail has mis-utilized his liberty and has acted in such manner which is prejudicial to the case of the prosecution, e.g. has attempted to gain over witnesses, has committed further offences on the informant or any other person belonging to the prosecution party or has attempted to threaten the witnesses, the bail granted earlier to him can be cancelled by the court granting such bail.

10. No doubt, the High Court being a superior court can also invoke this power under section 439 (2) Cr.P.C. by initiating suo motu proceeding for cancellation of bail if such grounds are prima facie made out. This Court, however, on examining the materials produced and the averments made in the writ petition do not find any prim facie case to have been made out for initiating a suo motu proceeding for cancellation of bail granted to the accused persons by the learned First Additional Sessions Judge, Cuttack.

11. The petitioner has further alleged that the learned First Additional Sessions Judge, Cuttack having held that the injuries were simple in nature, basing upon which, he has granted bail, has committed an illegality as one of the injuries was grievous in nature and a presumption of bias/mala fide can be raised therefrom as well as his submission that even a Judicial Officer is accountable to the public and the order granting bail ipso facto shows that there is negligence and misfeasance on the part of the learned First Additional Sessions Judge , the said bail order should be quashed.

12. With regard to the above , this Court is of the view that the power to grant bail by a Sessions Judge is discretionary power. No doubt, such power should not be arbitrarily used. But, however, if the learned Sessions Judge, on perusal of the materials comes to the conclusion that it is a fit case where bail should be granted, the said bail order cannot be interfered with on the ground that it suffers from error of record in a proceeding under Article 226 of the Constitution as such a proceeding cannot be considered to be an appeal against the order of bail. A bail order once granted can only be cancelled under the provisions of section 439 (2) Cr.P.C. and not otherwise.

13. The decisions with regard to public accountability cited by the petitioner are found to be not relevant to the facts of the present case, which relate to public accountability in case of administrative or executive function and not to an order of bail even if assumed to have been granted by misreading the documents produced by the Investigating Agency. In the case of Salim Khan (supra), the Hon'ble Supreme Court was dealing with a bail under Article 136 of the Constitution against grant of bail, where the Hon'ble Supreme Court decried inaction on the part of the State and its officers in not moving an application for cancellation of bail by deprecating such action. The said decisions do not relate to the question of public accountability in any manner.

14. Even if, a judicial officer while exercising his judicial discretion passes a wrong order, such order can be only questioned in accordance with the provisions of law and not on the ground of public accountability.

15. We, therefore, while dismissing the writ petition, observe that in accordance with the decision in the case of R. Rathinam (supra), the petitioner may move appropriate application under section 439 (2) Cr.P.C., if such cause exists, for cancellation of the bail granted to the accused persons. But, however, not on the ground that the learned First Additional Sessions Judge, Cuttack has misread the medical report.

16. The writ petition is accordingly dismissed.

Writ petition dismissed.

2013 (I) ILR - CUT-1011

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

W.P.(C) NO. 7984 OF 2010(Dt.07.02.2013)

SUSHANTA KUMAR GOUDA …….Petitioner

.Vrs.

UNION OF INDIA & ORS. …….Opp.Parties

SERVICE LAW- Petitioner belonged to Para-Military Organization – He remained un-authorizedly absent from duty for 511 days – Plea that he was looking after his ailing mother in the absence of any other male member in the family was not believed – Punishment of removal from service cannot be said as disproportionate or shocking – Held, order of removal from service is justified.

(Paras 7,8)

Case laws Referred to:-

1.AIR 1992 SC 786 : (Dr. Dattatraya Mahadev Nadkarni-V- Municipal Corporation of Greater Bombay)
2.AIR 2005 SC 4289 : (Union of India & Ors.-V- Gulam Mohd. Bhat)
3.1996(1) SCC 302 : (U.P.-V- Ashok Kumar Singh)
4.2003(3) SCC 309 : (Mithilesh Singh-V- Union of India & Ors.).
5.(2006)9 SCC 583 : (Union of India & Ors.-V- Gulam Mohd. Bhat(supra), S.C. Saxena-V- Union of India & Ors.)
6.2011(i) ILR Cut.712 : (Santosh Ku. Sahu(dead) after him Sabita Sahu-V- Addl. D.I.G.P., Group Centre, C.R.P.F., BBSR & Anr.)
7.2011(II) ILR Cut.100 : (Laxmidhar Nayak-V- Union of India & Ors.).

For Petitioner - M/s. A. P.Bose, R.K. Mahanta, S.K. Mohanty, N. Hota & M. Pradhan.
For Opp.Parties - Mr. S.D. Das, Asst. Solicitor General.

B.K.MISRA, J In this writ petition the petitioner has challenged the order of removal from service recorded by the opposite party nos. 3 and 4 vide Annexures 1 and 3 respectively.

2. The undisputed facts of the case is that the petitioner was posted as CT/Bug attached to the Group Centre of the Central Reserve Police Force, Bhubaneswar (hereinafter referred to as "C.R.P.F."). The petitioner was transferred from the CRPF Group Centre, Bhubaneswar with a direction to report to 52 Battalion of the CRPF. Though the petitioner was relieved on

transfer from the Group Centre CRPF, Bhubaneswar in the afternoon of 12.10.2007, but he did not join his new place of posting soon thereafter. But after a long lapse of 511 days he reported to 52 Battalion of the CRPF in the afternoon of 16.3.2009. It is the case of the petitioner that he could not join 52 Battalion Group Centre CRPF as he being the only male member available in the house was looking after the treatment of his old ailing mother and had requested for leave, but the authorities without considering his genuine prayer for grant of leave initiated disciplinary action and without affording him any opportunity of being heard and without following the principles of natural justice removed him from the service, which amounts to an arbitrary exercise of the powers by his authorities and therefore needs interference by this Court in exercise of the extra-ordinary jurisdiction under Articles 226 and 227 of the Constitution of India. Resultantly, the petitioner has prayed for quashing the impugned orders under Annexures-1 and 3 and with a further direction to the opposite parties to readmit him into the service on humanitarian consideration.

3. The opposite parties entered appearance and filed their counter affidavit. It is the case of the opposite parties that the action of the petitioner in not joining at his new place of posting after being relieved from his former post is an act of gross indiscipline and though the petitioner was asked to report to his duties first and thereafter his leave would be considered but the petitioner showed a recalcitrant attitude for which he was declared a "deserter" and necessary departmental action was initiated against him. It is the further stand of the opposite parties that adequate opportunity had been given to the petitioner and all procedures have been followed by sending the memorandum along with Annexures in the home address of the petitioner with regard to holding of the departmental enquiry. In the enquiry when the petitioner was found guilty of gross misconduct, he was removed from service with effect from the afternoon of 15.5.2009 and his appeal as well as the revision have been dismissed by the appellate as well as the revisional authority by considering the materials on record and not with any caprice or malice. Thus, it is the case of the opposite parties that when there were no procedural irregularities in conducting the departmental enquiry and in view of the gravity of the offence, the punishment awarded to the petitioner cannot amount to shockingly disproportionate to the alleged delinquency and it is prayed that the writ petition being devoid of merit should be dismissed.

4. We have heard Mr. A.P.Bose, learned counsel for the petitioner as well as learned Asst. Solicitor General appearing for the opposite parties. Mr. Bose, learned counsel for the petitioner very strenuously contended that

the petitioner is a young person and has long years to serve for the cause of nation and when he was forced to remain on leave because of the illness of his mother, the authorities should have taken a compassionate view and could have imposed minor penalty within the meaning of Section-11(1) of the Central Reserve Police Force Act, 1949. This argument of Mr. Bose was seriously countenanced by the learned Asst. Solicitor General on the ground that the tendency of not reporting at the new place of posting especially in a Para Military Organisation should not be viewed leniently and the same needs to be curbed with a firm hand and when the petitioner has been removed from service as he did not comply with the order of transfer for a long period i.e. to say 511 days, removal from service is the most appropriate order which the Disciplinary Authorities have imposed and there is no reason to interfere with the same.

5. We have perused the materials placed before us. Admittedly the petitioner did not carryout the order of transfer from Group Centre C.R.P.F., Bhubaneswar to 52 Battalion C.R.P.F. after he was relieved on 12.10.2007 and joined at the new place of posting after 511 days. It is the plea of the petitioner that he could not join his new place of posting as he was looking after his ailing mother in the absence of any other male member in the family. But this plea of the petitioner cannot at all be believed for a moment in view of the own assertion of the petitioner in the writ petition that his father is a Senior Clerk in the Office of the Inspector of Ayurveda at Rayagada. The elder brother of the petitioner is a businessman, the younger brother of the petitioner is a student. It is something fallacious to believe that the father of the petitioner who is a Senior Clerk in the Office of the Inspector of Ayurveda could not find any time to look after the treatment of his wife. Without entering into the genuiness of the treatment papers furnished in support of the illness mother of the petitioner, suffice is to say that the petitioner un-authorisedly remained absent from duty for 511 days and did not join at his new place of posting.

6. It is needless to reiterate the settled position of law that a Government servant is duty bound to comply with the order of transfer and when the present petitioner himself had no physical incapacitation he having failed to join at his new place of posting and applying leave for a long period, the same amounts to gross misconduct on the part of the person belonging to a Para-Military organization.

7. Coming to the contention of Mr.Bose, learned counsel for the petitioner that Section 11(1) of the C.R.P.F. Act does not contemplate removal from s ervice but speaks of imposition of minor punishment and

therefore the impugned orders at Annexures-1 and 3 are bound to be quashed. We find that on a bare perusal of Section 11 of the C.R.P.F. Act, 1949, it appears that the said Section deals with minor punishment as compared to the major punishments prescribed in the preceding section. It lays down that the Commandant or any other authority or officer as may be prescribed, may subject to any rules made under the Act, award any one or more of the punishments to any member of the force who is found guilty of disobedience, neglect of duty or remissness in the discharge of his duty or of other misconduct in his capacity as a member of the force. The use of words 'in lieu of, or in addition to, suspension or dismissal' appearing in sub-section (1) of Section 11 before clauses (a) to (e) shows that the authorities mentioned therein are empowered to award punishment of dismissal or suspension to the member of force who is found guilty and in addition to, or in lieu thereof, the punishment mentioned in clause (a) to (e) may also be awarded. It is the fairly well settled position of law that removal is a form of dismissal as both stand on the same footing and bring about termination of service. Rule 27 of the C.R.P.F. Rules clearly permits removal by the competent authority. In the instant case the Commandant who had passed the order of removal was the competent authority to pass the order. ***(A.I.R. 1992 S.C. 786, Dr.Dattatraya Mahadev Nadkarni V. Municipal Corporation of Greater Bombay, A.I.R. 2005 S.C.4289, Union of India and others V. Gulam Mohd. Bhat)***. The Apex Court in the case of the State of ***U.P. V. Ashok Kumar Singh, 1996 (1) SCC 302 and Mithilesh Singh V. Union of India and Others reported in 2003 (3) SCC 309*** have held that a police constable who overstayed though belong to a disciplined force for such act of indiscipline he has to be dealt with sternly. It is for the employee concerned to show how that penalty was disproportionate to the proved charges. In the instant case no mitigating circumstance has been placed by the petitioner to show as to how the punishment could be characterized as disproportionate and/or shocking. Therefore, the order of removal from service in our considered views cannot be faulted as the petitioner without any justifiable reason stayed away from duty for over a period of 511 days.

8. Under the circumstances, we are of the view that retaining the petitioner in service or showing any leniency in the matter of punishment would set a bad example for other members of a disciplined organization like C.R.P.F. In support of our conclusions, we draw support from the case of ***Union of India and others V. Gulam Mohd. Bhat (supra), S.C. Saxena V. Union of India and others (2006) 9 S.C.C. 583*** and two decisions of this Court reported in ***2011(I) ILR Cuttack 712, Santosh Kumar Sahu (dead) after him Sabita Sahu V. Addl . D.I.G.P., Group Centre, C.R.P.F.,***

Bhubaneswar and another and 2011(II) ILR Cuttack 100, Laxmikdhar Nayak V. Union of India and Others.

For the reasons stated above, we find no material in this writ petition and accordingly the same stands dismissed.

Writ petition dismissed.

2013 (I) ILR - CUT-1015

M. M. DAS, J & S.C. PARIJA, J.

O.J.C. NO. 6874 OF 1996 (Dt.09.04.2013)

SUBHENDU KUMAR MOHANTY ……..Petitioner

.Vrs.

M.D., ORISSA POWER GENERATION CORPN. & ORS. …. …Opp.Parties

SERVICE – Promotion – Preparation of gradation list – Retrospective promotion of O.P.Nos. 4 to 22 to the post of Sr. Asst. Manager in E-2 grade w.e.f. the date they completed three years of service, dehors Odisha Power Generation Corporation Ltd. Recruitment and Promotion Rules for Executives, 1992 – Redesignation of O.P. Nos.19, 20 and 21 as Sr. Asst. Manager in E-2 grade subsequent to the petitioner's appointment as Sr. Asst. Manager in E-2 grade and placing them in the gradation list above the petitioner is illegal – Held, the action of O.P.G.C. is not in accordance with Rules, 1992 – Direction issued to O.P.Nos.1 to 3 to consider the Case of the petitioner for promotion to the post of Deputy Manager in E-3 grade from the date his juniors i.e. O.P. Nos.4 to 14 (except O.P. No.10) and 17 were promoted to the said post and to refix his seniority with all consequential benefits. (Paras 14 to 17)

For Petitioner - M/s. Saroj Ku. Das, H.M. Dhal, B. Mohanty, M.K. Das, R.P. Das, J. Patnaik.

For Opp.Parties - M/s. S.P.Mohanty, P.K. Lenka, (O.P. No.s 1,,2, & 3)

M/s. B.S.Tripathy, N. Sankar, J. Sahoo,
H.S. Sahoo (O.P.Nos.4 to 8,12,14,16 to 18)
M/s. S.Mishra (2), S.Mantry, A.K. Mishra,
A.K. Sharma, N. Mahanty, M.K. Dash,
(O.P.Nos. 19 to 21).

S.C. PARIJA, J. This writ petition has been filed challenging the gradation list published by the Orissa Power Generation Corporation Ltd. ('O.P.G.C.' for short), showing opposite party nos.4 to 22 above the petitioner as Senior Assistant Manager in E-2 grade and giving promotion to the opposite parties 4 to 14 (except opposite party no.10) and 17 to the next higher post of Deputy Manager in E-3 grade, in gross violation of the provisions of the Orissa Power Generation Corporation Ltd. Recruitment and Promotion Rules for Executives, 1992 ('1992 Rules' for short).

2. The case of the petitioner is that pursuant to an advertisement issued by O.P.G.C. for the post of Deputy Superintendent (Mechanical), petitioner filed application and attended the interview. On being selected, he was offered the post of Senior Assistant Manager (Mechanical) in E-2 grade and appointed as such vide appointment order dated 18.02.1993. The petitioner joined as Sr. Asst. Manager (Mechanical) on 16.04.1993. At that time, opposite party nos.4 to 22 were working as Asst. Manager and their work and duties were supervised by the petitioner.

3. It is the further case of the petitioner that while he was discharging his duties as Sr. Asst. Manager (Mechanical) in E-2 grade, O.P.G.C. issued office order dated 25.06.1993 (Annexure-3 series) promoting opposite party nos.4 to 18 and 22 to the rank of Sr. Asst. Manager in E-2 grade in the scale of pay of Rs.2100-3500 with retrospective effect from various dates in between March to November, 1992, i.e. the date of their completion of three years in the lower post of Asst. Manager in E-1 grade. Subsequently, by office order dated 18.03.1994 (Annexure-7), opposite party nos.19, 20 and 21, who were working as Asst. Managers, were redesignated as Sr. Asst. Managers in E-2 grade from the date of their joining the service.

4. O.P.G.C. published the provisional gradation list of Sr. Asst. Managers in E-2 grade dated 11.02.1994 (Annexure-4 series), showing opposite party nos.4 to 22 as senior to the petitioner. Being aggrieved, petitioner submitted his representation questioning the seniority of opposite party nos.4 to 22, as had been reflected in the provisional gradation list. However, no action was taken to restore the seniority of the petitioner and instead, O.P.G.C. issued office order dated 03.04.1995 (Annexure-8) promoting opposite party nos.4 to 14 (except opposite party no.10) and

opposite party no.17 to the next higher post of Dy. Manager in E-3 grade in the pay scale of Rs.2700-3930, on the basis of the said gradation list. The petitioner again filed representation questioning the action of the O.P.G.C. granting promotion to his juniors and praying for promotion to the post of Dy. Manager from the date his juniors were promoted. No action having been taken, the petitioner has approached this Court in the present writ petition with the following prayers:

i. It shall not be declared that the promotion of the Opp. Parties 4 to 18 to the post of Senior Assistant Manager retrospectively is illegal, arbitrary, and discriminatory.

ii. It shall not be declared that the redesignation of the Opposite Parties 19, 20 and 21 in the post of Senior Assistant Manager is illegal and arbitrary.

iii. It shall not be declared that the seniority list as circulated under Annexure-4 series is liable to be quashed.

Iv It shall not be declared that the petitioner is senior in the post of Senior Assistant Manager than the Opp. Parties 4 to 22.

v. It shall not be declared that the promotion of the Opposite Parties 4 to 14(except Opposite party no.10) and 17 to the post of Deputy Manager shall not be quashed.

5. Learned counsel for the petitioner with reference to the various provisions of 1992 Rules submits that the said Rules came into force w.e.f 01.01.1993 and is applicable to recruitment and promotion of all executives of O.P.G.C. As the said 1992 Rules prescribes the entire procedure and modalities for promotion for different executive grades, including promotion from E-1 to E-2 and from E-2 to E-3 grades, the non-compliance of the same by the O.P.G.C., on the plea of giving effect to the earlier staffing pattern, which existed prior to the coming into force of the 1992 Rules, cannot be sustained.

It is the further case of the petitioner that automatic promotion of any incumbent merely on the completion of three years of service is not contemplated under the 1992 Rules. In this regard, it is submitted only Rule 25 of the 1992 Rules provides for time bound promotion on completion of seven years in a particular grade for executives of E-3 grade and below. Accordingly, it is submitted that en masse promotion of opposite party nos. 4

to 18 and 22 to the post of Sr. Asst. Manager in E-2 grade with retrospective effect, i.e. from the date of their completion of three years service in the lower grade as Asst. Manager, is wholly improper and illegal. Further, the redesignation of opposite party nos. 19, 20 and 21 as Sr. Asst. manager with effect from their date of joining service as Asst. Manager is completely illegal, as there is no such provision in the 1992 Rules for redesignation of a post. Learned counsel for the petitioner further submits that as the opposite party nos. 19, 20 and 21 had joined service as Asst. Manager in the year 1992 and were redesignated as Sr. Asst. manager in E-2 grade vide office order of O.P.G.C. dated 18.3.1994, they could not have been shown as senior to the petitioner in the gradation list published on 11.02.1994. Accordingly, it is submitted that granting further promotion to opposite party nos. 4 to 14 (except opposite party no.10) and 17 to the next higher post of Dy. Manager in E-3 grade, on the basis of such an erroneous gradation list, ignoring the rightful claim of the petitioner, is wholly improper and illegal.

6. The opposite party nos.1 to 3 have filed a counter affidavit stating therein that as per the earlier staffing pattern approved by the management of O.P.G.C., E-1 grade was divided into two special grades i.e. E-1 and E-1B. In E-1 grade, the corresponding scale of pay was Rs.1800-2805/- and experience required for the appointment to the said post was three years, whereas, in E-1B grade, corresponding pay scale prescribed was Rs.2100-3500/- and the minimum experience required for appointment to the post of Asst. Manager in the said grade was six years. It is stated that opposite party nos.4 to 18 were initially appointed as Asst. Manager in the year 1989-1990 in E-1 grade in the scale of pay of Rs.1800-2805/- . In the year 1992, opposite party nos.19, 20 and 21 were appointed as Asst. Manager in E-1B grade in the pay scale of Rs.2100-3500/-. It is stated in the said counter affidavit that after joining of opposite party nos.19 to 21 as Asst. Manager in E-1B grade in the higher pay scale of Rs.2100-3500/-, there was lot of discontentment amongst Asst. Managers (opposite party nos.4 to 18), who were working in the E-1 grade in the pay scale of Rs.1800-2805/-. Their grievance was that they having completed three year in the lower scale of Rs.1800-2805/-, they were due to get higher pay scale of Rs.2100-3500/-, as otherwise they would be junior to opposite party nos.19, 20 and 21. It is stated that in the new staffing pattern introduced under 1992 Rules, the post of Asst. Manager in E-1B grade in the pay scale of Rs.2100-3500/- has been designated as Sr. Asst. manager in E-2 grade with the same pay scale.

7. The plea of opposite party nos.1 to 3 is that the Management of O.P.G.C., taking into consideration the representation of the Asst. Managers working in E-1 grade in the pay scale of Rs.1800-2805/- under the earlier staffing pattern, decided to give them promotion to the next higher post of Sr.

Asst. Manager in E-2 grade in the pay scale of Rs.2100-3500/-. Accordingly, O.P.G.C. issued order of promotion with retrospective effect from the date/dates they individually completed three years in the lower pay scale of Rs.1800-2805/- . It is further stated that as the promotion to opposite party nos.4 to 22 have been considered in accordance with the prevailing procedure prior to the coming into force of the 1992 Rules, such promotions are not to be affected after coming into force the said Rules.

It is submitted by the learned counsel for the opposite party nos. 1 to 3 that in the mean time petitioner has been promoted to the post of Dy. Manager in E-3 grade w.e.f. 20.05.2005. It is further submitted that subsequently during pendency of this writ petition, a disciplinary proceeding was initiated against the petitioner for misconduct and he having been found guilty of the charges, was dismissed from service by the order of the Managing Director, O.P.G.C., dated 25.03.2008, which was confirmed by the appellate authority. Against the said order of dismissal, petitioner had moved this Court in W.P.(C) No.13706 of 2010. This Court by judgment dated 26.06.2012 set aside the order of dismissal and directed the O.P.G.C. to reinstate the petitioner in service immediately and thereafter take a decision for imposing any lesser punishment other than dismissal, removal or compulsory retirement. Against the said judgment of this Court, the O.P.G.C. has moved the apex Court in S.L.P. (C) No.27831 of 2012, which is now pending for final adjudication and that the petitioner is not in service till date.

8. The private opposite party nos.4 to 18 in their counter affidavit have reiterated the stand taken by opposite party nos.1, 2 and 3 and have justified their promotion to the post of Sr. Asst. Manager in E-2 grade with retrospective effect, from the date of their completion of three years service as Asst. Manager, which was in conformity with the earlier staffing pattern which was in force prior to coming into force of the 1992 Rules. It is further submitted that as the said opposite party nos.4 to 14 (except opposite party no.10) and 17 are senior to the petitioner in service as Sr. Asst. Manager in E-2 grade, as per the gradation list published by the O.P.G.C., they were entitled to be considered for promotion to the next higher post of Dy. Manager in E-3 grade and therefore the same cannot be faulted.

9. The 1992 Rules framed by the O.P.G.C. provides for an elaborate procedure for recruitment and promotion of executives. The said Rules prescribes executive posts, i.e. E level posts with pay scale, which are as follows:

Grades of E level Posts.	Rank	Scale as on 01.10.92
E0	Jr. Executive	1525-55-1800-65-2125-75-2500
E1	Asst. Manager	1800-65-2125-85-2805
E2	Sr. Asst. Manager	2100-85-2525-95-3000-100-3500
E3	Dy. Manager	2700-95-3270-110-3930
E4	Manager	2930-100-3430-124-4050
E5	Sr. Manager	3500-115-3845-125-4345
E6	D.G.M.	3850-130-4500
E7	General Manager	4500-150-4800-200-5000
E8	Exec.Director/ Managing Director	5000-200-5600
E9	Chairman	As determined by Government/ Board

10. Rule 4 of the 1992 Rules provides for centralized recruitments and promotions and Rule 4.5 provides for integration of Electrical Engineering and Mechanical Engineering cadres from E-1 grade, for promotion to higher grades. Rule 10.1 of the Rules provides that there shall be a Corporate Selection Committee ('CSC' for short) for selection and recommendation of candidates. Rule 16 deals with general conditions for promotion. Rule 16.1 reads as under:

"16.1 - Promotion shall be made on the basis of select list for promotion as approved by the Board on recommendation of the Corporate Promotion Committee (hereinafter referred to as C.P.C.)"

Rule 16.2 read as follows:

"16.2 - The C.S.C. constituted for recruitment to posts in grades E1 to E4 in rule 10.2 and, posts in grades E5 and above in rule 10.3, shall respectively be the C.P.C. for promotion to posts in grades E0 to E4 and E5 and above. Specialists from outside the Corporation may be nominated by the Management for inclusion in the C.P.C. as and when considered necessary."

Rule 20. 1 of the Rules provides as follows:

"20.1 - Recommendation of C.P.C. on suitability for promotion to E1 grade and above shall be made on the basis of evaluation of reports on performance and/or interview as may be expedient. In case of promotion to E0 grade, in addition to evaluation of performance and interview, the C.P.C. may, if considered necessary by the Chairman hold practical and theoretical tests as considered necessary. The tests shall be held before the interview by the P&A Department with the assistance of appropriate personnel. The results of the tests shall be place before the C.P.C. by the P&A Deptt."

Rule 20.3 reads as under:

"20.3 – For promotion in executive grades E1 to E4, the recommendation of C.P.C. shall be based on merit & suitability with due regard to seniority and potential for team leadership, technical ability, communication and management skill and integrity, arrived after appraisal of performance in lower grade and overall career record & assessment in interview"

11. Rule 25 of the 1992 Rules provides for time bound promotion. Rule 25.1 provides as under:

"25.1- If an executive of grade E3 and below, gets stagnated in a particular grade due to non-availability of vacancy or otherwise for seven years or more and, against whom no minor or major punishment has been awarded during the seven years period in question, he shall be promoted to the next higher grade without change of designation. "

12. Rule 34, which is the saving clause, reads as under:

"On the date of enforcement of these rules, all persons regularly employed or provisionally employed by the Corporation in any executive grade or engaged as an apprentice by the Corporation after due selection from open market following advertisement, shall be deemed to have been so employed or engaged under these rules. "

13. Admittedly, when the petitioner joined service of O.P.G.C. as Sr. Asst. Manager in E-2 grade on 16.4.1993, the private opposite party nos. 4 to 22 were not even in the said grade and all of them were working as Asst. Managers in E-1 grade. It is the stand of the opposite party nos. 1 to 3 that considering the representations of the Asst. Managers in E-1 grade and keeping in view the earlier staffing pattern, the management of O.P.G.C. decided to give them promotion to the next higher post of Sr. Asst. Manager

in E-2 grade with retrospective effect from the date/dates they individually completed three years in the lower post of Asst. Manager in E-1 grade. It is admitted by the opposite party nos.1 to 3 in their counter affidavit that such promotions of Asst. Managers in E-1 grade to the next higher post of Sr. Asst. Manager in E-2 grade was in accordance with the procedure prevalent prior to the coming into force of the 1992 Rules. Relevant portion of the counter affidavit of opposite party nos.1 to 3 is extracted below:

> "… However promotions, in question, have been considered in accordance with the prevailing procedure prior to Recruitment Promotion Rules, 1992 came into force. Such cases of promotion are not to be affected after the "Rules, 1992" came into force. The settled principle being that, as in the instance case, the incumbents having had earned their right of promotion, would not be deprived of such right after the new rule came into force."

14. From the above, it is abundantly clear that the promotions given to opposite party nos.4 to 22 to the next higher post of Sr.Asst. Manager in E-2 grade with retrospective effect, from the dates they completed three years service in the lower post of Asst. Manager, is dehors the 1992 Rules. Even otherwise, as the opposite party nos.4 to 22 were admittedly working as Asst. Manager in E-1 grade when the petitioner joined service as Sr. Asst. Manager in E-2 grade by way of direct recruitment, on their subsequent promotion to the post of Sr. Asst. Manager in E-2 grade, they could not have been placed above the petitioner in the gradation list prepared by the management.

15. As regard the redesignation of opposite party nos.19 to 21 as Sr. Asst. Manager in E-2 grade with effect from the date of their joining service in O.P.G.C. as Asst. Manager in E-1 grade, we find the same to be not in accordance with the 1992 Rules, which does not provide for such redesignation. Moreover, it is not understood as to how the management had included the names of opposite party nos.19 to 21 in the gradation list published on 11.02.1994 and placed them above the petitioner, when admittedly the said opposite party nos.19 to 21 were redesignated subsequently as Sr. Asst. Manager in E-2 grade vide office order dated 18.3.1994.

16. In view of the above and without interfering with the order of promotion of private opposite party nos.4 to 22, we direct the opposite party nos.1 to 3 to consider the case of the petitioner for promotion to the post of Deputy Manager in E-3 grade from the date his juniors i.e. opposite party

nos.4 to 14 (except opposite party no.10) and 17 were promoted to the said post and to re-fix his seniority accordingly, with all consequential benefits.

17. However, our above directions shall be subject to the final outcome of S.L.P. (C) No.27831 of 2012, pending before the Hon'ble Supreme Court. Writ petition is accordingly allowed. No costs.

Writ petition allowed.

2013 (I) ILR - CUT- 1023

I. MAHANTY, J & RAGHUBIR DASH, J.

STREV NO.19 OF 2011 (Dt.15.03.2013)

M/S.ANDREW YULE & CO. …….petitioner

.Vrs.

STATE ….....Opp Party.

ODISHA SALES TAX RULES, 1947 – R-61

Appellant-assessee procured necessary declaration forms after disposal of the First Appeal – It submitted those documents at the Second Appellate stage before the Tribunal without filing a petition under Rule-61 seeking permission to adduce the said forms as additional evidence – Tribunal dismissed the Second Appeal – Hence this revision – Held, in a suitable case, such declarations can be produced as additional evidence before the Tribunal in Second Appeal after complying with the requirements of Rule 61 of the Rules – Held, impugned order is quashed – Appellant to file an application under Rule 61 of the Rules where after the Tribunal will dispose of the Second Appeal in accordance with law.

Case laws Referred to:-

1.1994 (95) STC 343 : (TATA Refractories Limited -V- Commissioner of Sales Tax, Orissa & Ors.)
2.1983 (54) STC 122 : (Sahu Trading Co.-V- State of Orissa)

3. (1966)18 STC 17(SC) : (State of Orissa-V- Babu Lal Chappolia).

For Petitioner - Mr. Jagabandhu Sahoo, Sr. Advocate.
For Opp.Party - Mr. R.P. Kar, Standing Counsel, for Commercial Tax.

Heard Mr.Jagabandhu Sahoo, learned Senior Advocate for the petitioner and Mr.R. P. Kar, learned Standing Counsel for the Commercial Tax.

In the present Sales Tax Revision, challenge has been made to an order of the Sales Tax Tribunal, Cuttack dated 24.11.2010 whereby, the Tribunal came to dismiss the Second Appeal filed by the petitioner by affirming the order passed by the first appellate authority.

Mr.Sahoo, learned Senior Counsel for the petitioner, inter alia, asserts that admittedly, the petitioner had not submitted certain declaration forms including Form-IV for sales effected to M/s. SOUTHCO for setting up of electricity distribution system and the first appellate authority concluded the assessment on such basis. He further asserts that inability of the assessee to submit declaration forms was not intentional and beyond the control of the petitioner and since it obtained the said declaration forms after disposal of the First Appeal the petitioner filed the same along with the Second Appeal before the Tribunal.

He asserts that although the Tribunal recorded the submissions of the appellant to the fact that the declaration forms collected was admitted in the record, yet, no reason had been provided by the Tribunal for non-acceptance of the said declaration forms and in spite of that, proceeded in the matter on the basis that such declaration forms had never been provided. Hence, it is incumbent upon the Second Appellate Authority to deal with the same and not to proceed on the basis that the appellant had failed to provide such declaration forms before the First Appellate Authority. In this respect, he placed reliance in the case of **TATA Refractories Limited v. Commissioner of Sales Tax, Orissa and others,** 1994 (95) STC 343.

Mr.Kar, learned Standing Counsel for the Commercial Tax Department submits that while it may be a fact that the petitioner had filed the declaration forms along with its grounds of appeal before the Sales Tax Tribunal but such “additional evidence” had been sought to be filed without the necessary petition as required under Rule-61 of Orissa Sales Tax Rules,

1947 (hereinafter referred to as the 'Rules'). In this respect, he placed reliance in the case of **Sahu Trading Co. v. State of Orissa,** 1983 (54) STC 122.

Having heard the learned counsel for the respective parties and on perusing the impugned order of the Tribunal, it is clear therefrom that the Tribunal appears to have not dealt with the issue about the declaration forms including Form-IV which were submitted before it and clearly proceeded ignoring the same, proceeded on the understanding that such declaration forms had not been submitted at all.

For better appreciation of the case, Rule-61 of the Rules, 1947 is quoted hereunder:

"**61. Fresh evidence and witnesses**-

(1) No party to an appeal shall be entitled to adduce fresh evidence whether oral or documentary, before the Tribunal:

Provided that –

(a) if the authority from whose order the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) [if any party including] the State Government seeking to adduce additional evidence satisfies theTribunal that such evidence notwithstanding the exercise of due diligence was not within [its] knowledge or could not be produced by [it] at or before the time when the order under appeal was passed, or

(c) If the Tribunal requires any documents to be produced or any witness to be examined to enable it to pass order or for any other substantial cause, the Tribunal may allow such evidence or document to be produced or witnesses examined and in such case the other party shall be entitled to produce rebutting evidence, if any.

(2) When fresh evidence has been adduced the parties may, if they so desire, address the Tribunal on points arising out of the fresh evidence."

Admittedly, in the present case, no petition under Rule-61 of OST Rules appears to have been filed and the submissions of the declaration form has been made by way of assertion made in the memo of the Second Appeal. The same cannot be accepted as satisfaction of the requirement of Rule-61 of the Rules. On perusa l of the judgment in the case of **TATA**

Refractories Limited (supra), the Hon'ble Division Bench of this Court presided over by Justice A.Pasayat (as the then was) came to hold in Paragraph-4 which is as follows:

> "4. It is trite law that when the assessee shows sufficient cause for non-production of declaration forms at the stage of assessment, they can be accepted at the first appellate stage, and in a given case they may also be accepted as additional evidence by the Tribunal. xx xx xx"

The said judgment appears to be in consonance with the views expressed by this Court in the case of **Sahu Trading Co.** (supra). In the said judgment, this Court presided over by Justice R.N.Misra (as the then was) placed reliance on the judgment of Hon'ble Supreme Court in the case of ***State of Orissa v. Babu Lal Chappolia***, (1966) 18 STC 17 (SC) and came to hold as follows:

> "Undoubtedly, rule 27 requires that the declarations should be furnished before assessment is made. In the scheme of the procedure for assessment, the declarations are bound to be produced before the assessment is completed in case the assessee is to be given the deductions he claimed. There is however no provision in the Act or the Rules to the effect that declarations not furnished at the original stage could not be produced later. There may be cases where for some good reason deductions though claimed could not be supported by production of declarations at the assessment stage. In the absence of any prohibition they can be certainly produced as evidence before the first appellate authority and in view of what has been said by the Supreme Court in the case reported in State of Orissa v. Babu Lal Chappolia (1966) 18 STC 17 (SC), such additional evidence could be received by the first appellate authority. In a suitable case, such declarations can even be produced as additional evidence before the Tribunal in second appeal after complying with the requirements of rule 61 of the Rules."

Therefore, in view of the judgments as cited by the learned counsel for the respective parties and after perusing the relevant rule concerned in the present case, the appellant had procured the necessary declaration forms prior to filing of the Second Appeal and had submitted before the Tribunal but without filing a petition under Rule-61 seeking permission to

adduce as additional evidence before the Tribunal as required under Rule-61 of the Rules.

Therefore, in consideration of the aforesaid submissions made and the cases cited above, in the interest of justice, we hereby quash the order of the Tribunal dated 24.11.2010 passed in S.A. No.515/2004-05 and remit the matter back before the Tribunal. Liberty is also granted to the appellant to file petition under Rule-61 of the Rules. If such petition is filed, the Tribunal shall do well to deal with the same strictly in accordance with law.

Nothing stated in this order shall be construed as an expression of any opinion on the merits of the case and it shall be open for the Tribunal to consider the rival contentions of the parties and adjudicate the matter afresh. Since the matter has been substantially delayed, the petitioner undertakes to file copy of this order along with the petition under Rule-61 of the Rules within a period of four weeks from today whereafter, the Tribunal shall do well to dispose of the appeal in accordance with law expeditiously preferably, within a period of three months from the date of filing of such an application.

Free copy of this order be handed over to the learned counsel for the revenue for necessary communication and compliance.

Revision allowed.

2013 (I) ILR - CUT- 1027

SANJU PANDA, J.

W.P.(C). NO. 1698 OF 2013 (Dt.13.02.2013)

ANANDA CHANDRA OJHA .....Petitioner

.Vrs.

ASHOK SAHOO .....Opp.Party

ELECTION DISPUTE – Grama Panchayat Election – Recounting of votes, when can be ordered ? – Election Petition seeking re-counting of votes must contain serial number of ballots illegally accepted or rejected and the source of information, the name of the agent who had furnished such information and the note book on the

basis of which such details had been furnished in the election petition out of which the Tribunal must be prima facie satisfied that in order to decide the dispute between the parties such an order is imperatively necessary.

In the present case learned trial Court is totally misconceived regarding pleadings raised and the evidence adduced by the election petitioner while passing the impugned order – Held, the impugned order is set aside – Direction issued to the learned trial Court to proceed with the trial. (Paras 9,10)

Case laws Referred to:-

1.AIR 2000 SC 3230 : (Vaduvelu-V- Sundaram & Ors.)
2.2010(I) OLR (SC) 66 : (Kattinokkula Murali Krishna-V- Veeramalla Koteswara Rao & Ors.)
3.AIR 1970 SC 276 (V 57 C 55) : (Jitendra Bahadur Singh-V- Krishna Behari & Ors.)
4.2009(Supp-I) OLR 513 : (Narayan Chandra Nayak-V- Harish Chandra Jena & Ors.)
5.(2006)6 SCC 255 : (Sadhu Singh-V- Darshan Singh & Anr.)
6.AIR 2007 SC 581 : (Virendra Nath Gautam-V-Satpal Singh & Ors.)
7.2006 (I) OLR 799 : (Sri Ramji Pandey-V- Smt.Jayanti Majumdar)
8.AIR 2005 SC 2441 : (Kailash-V- Nanhku & Ors.)
9.(2008) 7 SCC 604 : (Sudarsha Avasthi-V- Shiv Pal Singh).
10.AIR 2005 sc 541 : (M.Chinnasamy-V- K.C.Palanisamy & Ors.)
11.AIR 2004 SC 2036 : (Chandrika Prasad Yadav-V- State of Bihar & Ors.).

For Petitioner - M/s. S.K. Nayak-2, K. Jena & S. K. Nayak.
For Opp.Party - M/s. S.P.Misra, Sr. Advocate Soumya Mishra, A.K.Dash, & S.K. Sahoo.

S.PANDA, J. The petitioner has filed this writ petition challenging the order dated 17.1.2013 passed by the learned Civil Judge (Junior Division), Bhadrak in Election Misc. Case No.49 of 2012 allowing the recounting of votes for the post of Sarapanch of Basantia Grama Panchayat under Bonth Block in the district of Bhadrak.

2. Opposite party raised an election dispute challenging the election of Sarapanch of Basantia Grama Panchayat under Bonth Block. He pleaded that due to wrong folding of the ballot papers, the impression mark appeared

in another symbol which was not assigned to any of the candidates and those votes were illegally rejected even though the vote was in his favour. Similarly, 7 votes were illegally counted in favour of the elected candidate though 4 votes were cast on the symbol "Umbrella" and 3 votes in the symbol "Fish". Likewise, he also pleaded that the Grama Panchayat is having 17 wards and he raised objection regarding counting of votes in respect of Ward Nos.1,2,4,5,6,9,11,12,13,15 and 17. He came to know about all these irregularities from the polling agents who raised objections. However, the same was not taken into consideration and the result was declared. Therefore, recounting of votes in those wards was necessary for just decision of the dispute. After receiving notice, the present petitioner appeared and filed his show cause traversing the allegations made by the election petitioner. While the matter stood thus, another application was filed by him for recounting of votes. The petitioner filed his objection on the ground that the election petitioner did not produce or prove the allegations made by him in respect of total 29 disputed votes either through oral evidence or documentary evidence. The petitioner has examined 4 witnesses. Out of them, P.W.2 is an agent of Ward No.2, P.W.3 is an agent of Ward No.17 and P.W.4 is an agent of Ward No.15. Opposite party did not specifically aver the name of the agents, who were present in respect of the wards where the irregularities are said to have been committed. Therefore, on the said allegations, recounting and inspection should not have been directed for the purpose of fishing inquiry but the learned Civil Judge (Junior Division), Bhadrak, without passing the order for recounting and inquiring into the allegations made, in order to find out the truth has directed for counting of the ballot papers for the just decision of the case.

3. Mr.S.K.Nayak-2, learned counsel for the petitioner submitted that mere allegations are not sufficient to support the order for inspection of the ballot papers. Secrecy of ballot papers is sacrosanct which are to be maintained. In support of his contention, he has cited the decision of the apex Court in the case of ***Vadivelu v. Sundaram and others*** AIR 2000 SC 3230, ***Kattinokkula Murali Krishna v. Veeramalla Koteswara Rao & others***, 2010 (I) OLR (SC) 66, ***Jitendra Bahadur Singh v. Krishna Behari and ors.*** AIR 1970 SC 276.(V 57C 58) and the decision of this Court in the case Narayan Chandra Nayak v. Harish Chandra Jena and two others 2009 (Supp.-I) OLR 513 .

4. Mr.S.P.Mishra, learned Senior Advocate appearing for the opposite party, while supporting the impugned order submitted that the election petitioner has specifically pleaded in the election petition as well as in his application for recounting of the votes on the ground of irregularities in

counting. Since the margin of votes is only 25 between the winning candidates and the election petitioner, the court below has rightly passed the impugned order. In support of his contention, he has cited the decisions of the apex Court in the case of Sadhu Singh v. Darshan Singh and another **(2006) 6 SCC 255**, Virender Nath Gautam v. Satpal Singh & others **AIR 2007 SC 581.** and the decisions of the Court in this case of Narayan Chandra Nayak v. Harish Chandra Jena **2009 (Supp.-I) OLR 513** Sri Ramji Pandey v. Smt. Jayanti Majumdar 2006 (I) OLR 799 .

5. From the rival submissions of the parties and after going through the record, it appears that the election petitioner raised dispute with regard to 29 votes which were cast in different wards. From the petition which is annexed to this writ petition, it appears that the election petitioner though specifically stated how many votes were disputed in different wards he did not specifically disclose from whom he came to know about the irregularities in counting. In support of his pleadings, the election petitioner examined four agents as witnesses who supported the case of the election petitioner. However, it is not the case of the election petitioner that those 4 agents were present in all the 11 disputed booths at different times and they pointed out those irregularities at different disputed counting booths nor in the pleadings the election petitioner has pleaded as to who were the specific agents present at which booths and found all those irregularities as stated above.

6. Law is well settled that before an Election Tribunal can permit scrutiny of ballot papers and order re-count, two basic requirements are necessary, viz. (i) the election petition seeking re-counting of the ballot papers must contain an adequate statement of all the material facts on which the allegations of irregularity or illegality in counting are founded, and (ii) on the basis of evidence adduced in support of the allegations, the Tribunal must be, prima facie, satisfied that in order to decide the dispute and to do complete and effectual justice between the parties, making of such an order is imperatively necessary, are satisfied.

In an election petition, the issues are to be decided differently and the order for recounting of votes may not be a final relief.

7. The apex Court in the case of Kailash v. Nanhku & others reported in **AIR 2005 SC 2441** has held that the trial of an election petition is entirely different from the trial in civil suit as in a civil suit trial commence on framing the issues while the election trial encompasses all proceedings commencing from the filing of the election petition upto the date of decision. Therefore, the procedure provided for the trial of civil suits under CPC is not applicable in its

entirety to the trial of the election petition. For the purpose of the election petition, the word "trial" includes the entire proceedings commencing from the time of filing the election petition till the pronouncement of the judgment. The applicability of the procedure in Election Tribunal is circumscribed by two riders; firstly, the procedure prescribed in CPC is applicable only "as nearly as may be", and secondly, the CPC would give way to any provisions of the Act or any rules made thereunder. Therefore, the procedure prescribed in CPC applies to election trial with flexibility and only as guidelines.

8. In Sudarsha Avasthi v. Shiv Pal Singh, (2008) 7 SCC 604, the apex Court insisted that an election petition for declaration of the election of a return candidate as void can be entertained only if the petitioner furnishes all material facts and full particulars and inefficiency thereof, is to be fatal. More so, unbelievable and impracticable allegations of serious nature should be taken more seriously as it may amount to totally a cock and bull story.

9. It is solemn duty of the appellant to plead material facts. The case of illegally accepting or rejecting the ballots has to be pleaded giving the serial number of ballots and the source of information. Merely saying that petitioner's agent had told him was not enough. The name of the agent, who had furnished such information was to be disclosed in the election petition itself, note book on the basis of which such details had been furnished must be produced (Vide Jitendra Bahadur Singh v. Krishna Behari, **AIR 1970 SC 276,** M.Chinnasamy v. K.C. Palanisamy & others, **AIR 20054 SC 541**, and Chandrika Prasad Yadav v. State of Bihar and others, AIR 2004 SC 2036).

In view of the above settled position of law and from the impugned order, it appears that the trial court has totally misconceived and misdirected regarding pleadings raised and the evidence adduced by the election petitioner while passing the impugned order. Therefore, this Court in exercise of its jurisdiction under Article 227 of the Constitution of India sets aside the same and directs the trial court to proceed with the trial in accordance with the above settled principles of law. The writ petition is accordingly allowed. No costs.

Writ petition allowed.

2013 (I) ILR - CUT-1032

B. N. MAHAPATRA, J.

MACA NO. 861 OF 2005 (Dt.05.11.2012)

BENUDHAR PADHAN ……. Appellant

.Vrs.

MADAN DHARUA & ANR. ……..Respondents

MOTOR VEHICLES ACT, 1988 – S.168

Motor Accident – Award of compensation – Compensation required to be paid by the Driver or Owner or insurer – No term as "Registered owner" used in the Act – Ordinarily the driver used the vehicle and he remains in possession/control over the same – Owner of the vehicle has nothing with the use of the vehicle at the time of accident but he is constructively liable as the employer of the driver – So while passing an award it is essential to find out the liability of the persons who are involved in the use of the vehicle or the persons who are vicariously liable.

In this case although the appellant purchased the offending tractor the same could not be reflected in the R.C. Book – Thereafter the vehicle met with an accident and as the vehicle was not insured liability fixed on the appellant to pay compensation – The appellant took the plea that he is not liable as he is not the registered owner – Held, owner in actual possession of the vehicle is liable to pay the compensation – Direction issued to the appellant to pay the compensation to the claimants. (Para 9 to 16)

Case laws Referred to:-

1.2011(1) TAC 778 (SC) : (Pushpa @ Leela & Ors.-V-Shakuntala & Ors.)
2.2010 ACJ 176 : (Vinod Kumar & Anr.-V- Nirmala Devi & Anr.)
3.2010(1) OLR 795 : (Tulasi Sahukar-V- New India Assurance Co. Ltd.).
4.(2008)5 SCC 107 : (M/s. Godavari Finance Co.-V- Degala Satyanarayanama & Ors.)

For Appellant - M/s. B.K.Mohanty, P.K.Bhuyan, P.K.Sahoo, C.R.Mallick, M.B.Mohanty & Mrs.R.Mohanty.
For Respondents - M/s. P.K.Mishra & S.K.Dash (for Res.Nos.1 to 6).

B.N.MAHAPATRA, J. This appeal has been directed against the judgment dated 28.09.2005 passed by the Additional District Judge-cum-MACT(III), Sonepur in M.A.C.T. Case No.45/14 of 2001-2004, wherein the learned Tribunal has directed the appellant to pay a compensation of Rs.1,00,000/- to respondent No.1.

2. Appellant's case is that respondent No.1 claimed compensation before the Tribunal under Section 166 of the Motor Vehicles Act on account of death of her husband Meghu Dharua in a vehicular accident. As per the claim petition filed by the respondents, Meghu Dharua was working as a field servant under the appellant. On 04.08.2000 at about 2 P.M., while the deceased was working in the paddy field of the appellant, the tractor bearing Registration No.OIS 8366 belonging to the appellant, which was plouging the field, due to rash and negligent driving of the vehicle, deceased-Meghu Dharua met with the accident and died instantaneously. At the time of death, the deceased Meghu Dharua was getting Rs.1,000/- per month. The appellant was the registered owner of the offending tractor. The deceased was the sole earning member of the family. The appellant resisted the claim of the respondents on the grounds *inter alia* that he was not the registered owner of the offending tractor and the deceased was neither his field servant nor was working at the relevant time in his field. Due to previous enmity, a false case was foisted and respondent No.1 lodged F.I.R. which was registered as Binka P.S. Case No.25 of 2000 in which final report was submitted as the alleged occurrence was found to be false.

3. Learned Tribunal has framed following four issues:

1) Whether the claim petition is maintainable ?

2) Whether the deceased Meghu Dharua died due to accident caused by tractor bearing registration No.OIS-8366?

3) Whether the accident occurred due to rash and negligence of the driver of the offending vehicle ?

4) Whether the petitioners are entitled to compensation and if so, to what extent ?

4. During trial before the learned A.D.J.-cum-M.A.C.T.-III, Sonepur as many as four witnesses were examined by the claimant-respondents and Exts. 1,2,3,4,5,6,7 and 8 were proved by the claimants. On behalf of the appellant, three witnesses were examined and Exts. A, B and C were proved.

5. Learned Tribunal taking into consideration both oral and documentary evidence, passed the impugned judgment dated 28.09.2005

awarding compensation of Rs.1,00,000/- with interest in favour of respondent No.1 to be paid within three months by the appellant. Hence, the present appeal.

6. Mr. B.K. Mohanty, learned counsel appearing for the appellant submitted that the award passed by the Tribunal is against the evidence available on record. The evidence of O.P.Ws.1 to 3 has not been given due consideration so also the documentary evidence to establish that appellant was not the owner of the tractor in question. Without any evidence, the Tribunal has come to the conclusion that the appellant was the registered owner of the tractor. The documentary evidence filed by the respondents do not refer to any document brought from the registering authority to indicate ownership of the tractor. Xerox copy of the affidavit and application with Form No.29 of the appellant have been exhibited to show ownership of the tractor. The documents such as, Exts. 1 to 8, do not prove that the appellant was the owner of the tractor in question. Xerox copy of the application and affidavit, even if, these are taken to be true, in the absence of registration book and other documents from the concerned registering authority, should not have been considered as sufficient to hold that the offending tractor belonged to the appellant. The Tribunal should have examined Exts. A, B and C and should have held that the appellant was not the owner of the tractor in the absence of post-mortem or any other document showing death of the deceased. The Tribunal is wrong in saying that the appellant was liable to pay compensation. In support of his contention, Mr. Mohanty, learned counsel for the appellant placed reliance upon the decisions of the Hon'ble Supreme Court in the cases of *Pushpa alias Leela and others vs. Shakuntala and others, 2011(1) T.A.C. 778 (S.C.); Vinod Kumar and another vs. Nirmala Devi and another, 2010 ACJ 176.*

7. Mr. P.K. Mishra, learned counsel appearing for claimant-respondents submitted that the sole question to be determined is as to whether without transfer of ownership of the tractor in the name of the appellant by necessary entry in Registration Book, the award passed by the learned Tribunal saddling the liability on the appellant for payment of awarded amount is legally sustainable. Further referring to Section 168 of the M.V. Act, Mr. Mishra submitted that the compensation amount shall be paid by the insurer or owner or driver of the vehicle involved in the accident or jointly and severally by all or any of them, as the case may be. Therefore, it is submitted that Section 168 of the M.V.Act refers to owner not registered owner. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *Smt. Tulasi Sahukar vs. New India Assurance Company Ltd., 2010 (I) OLR 795,* Mr. Mishra submitted that the transfer of goods (movable) takes place as per the provision of the Sale of Goods Act. Chapter-IV of the Motor

Vehicles Act deals with Registration of Motor Vehicle which also includes the provision for change of ownership. Section 39 of the Act deals with the necessity of registration of the vehicle. It is further submitted that registration is required in respect of the vehicle but not in respect of the owner. In the Registration Book, the name of the owner is entered. Therefore, the "Owner" and "Registered Owner" are two different things.

8. Mr. Mishra further submitted that in the instant case, the offending vehicle was purchased by the appellant and he was managing the vehicle at the relevant time of accident. From the report of the Superintendent of Police, it appears that the deceased was working as a labourer under the appellant and on the date of occurrence, the regular driver of the appellant was absent and the appellant directed the deceased to drive the tractor and while the deceased was driving the vehicle overturned on the deceased resulting in his instantaneous death.

9. Further placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *M/s. Godavari Finance Co. vs. Degala Satyanarayanama & Ors., (2008) 5 SCC 107,* Mr. Mishra submitted that the owner in actual possession of the vehicle is the person liable to pay the compensation and not always the "Registered Owner".

10. On the rival contentions advanced by the parties, the only question that falls for consideration by this Court is as to whether the appellant is the owner of the offending tractor so as to be liable to pay amount of compensation under Section 168 of the M.V. Act, even though transfer of ownership has not been effected in the R.C. Book in the name of the appellant.

11. The learned Tribunal relying on oral evidence of the witnesses and a letter addressed by the appellant to R.T.O., Bargarh which was marked as Ext. 4 and wherein it was stated that the appellant-Benudhar Padhan had purchased the tractor and trolly bearing Registration Nos.OIS-8366 and O.R.R.8097 from Narendra Pradhan, Surendra Pradhan and Birendra Pradhan, has come to the conclusion that the appellant-Benudhar Padhan is owner of the vehicle and liable to pay compensation. The appellant in his letter had sought permission from the RTO, Bargarh to pay tax and penalty in three instalments. Though respondents have failed to produce the R.C. book in respect of the offending vehicle, but they have produced xerox copies of Form No.29 of Notice of Transfer of ownership (Ext.5). Ext. 6 is Form, Part-II for use of the transferee, Ext.7 and the affidavit sworn before the Notary Public, Bargarh (Ext.8) shows that ownership of the offending vehicle has been transferred to B. Pradhan. Apart from the documents,

evidence of the witnesses shows that the appellant is the owner of the offending tractor.

12. From the above finding of the learned Tribunal, it transpires that the name of the appellant has not been entered in R.C. Book issued by the Registering Authority in respect of the vehicle in question. However, the evidence shows that ownership of the vehicle in question has been transferred to the appellant. On this backdrop, a question arises as to whether the liability to pay compensation can be fastened on the appellant.

13. Section 168 of the M.V. Act deals with "Award of Claims Tribunal". The said section inter alia provides that in making award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. The said provision nowhere provides that award is to be passed against the "Registered Owner". Transfer of ownership in respect of goods (moveable) takes place from the date of sale when the transferee purchases the vehicle. Registration certificate does not confer title. In other words, change of entry in the registration certificate does not convey the ownership. Transfer of ownership of goods (moveable) is governed by the provision of Sale of Goods Act or the Law of Succession, as the case may be.

14. Chapter IV of the Motor Vehicles Act deals with Registration of Motor Vehicle which also includes the provision for change of ownership. Section 39 of the Act, 1988 deals with "Necessity of Registration". According to Section 39, no person shall drive any motor vehicle and no owner of a motor vehicle shall cause or permit the vehicle to be driven in any public place or in any other place unless the vehicle is registered in accordance with the law and the Chapter and the certificate of registration of the vehicle has not been suspended or cancelled and the vehicle carries a registration mark displayed to the prescribed manner. Therefore, registration has nothing to do with the change of ownership. Section 50 deals with change of ownership of vehicle. As per said provision, the registration of vehicle is the primary requirement under the M.V. Act. Name of the owner is reflected in the R.C. Book solely for the purpose that in case of violation of any of the provision, the right person can be prosecuted against.

15. The Hon'ble Supreme Court in the case of ***Godavari Finance Co*** *(supra),* held as under:

> "15. An application for payment of compensation is filed before the Tribunal constituted under Section 165 of the Act for adjudicating upon the claim for compensation in respect of accident involving the

death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Use of the motor vehicle is a sine qua non for entertaining a claim for compensation. Ordinarily if driver of the vehicle would use the same, he remains in possession or control thereof. Owner of the vehicle, although may not have anything to do with the use of vehicle at the time of the accident, actually he may be held to be constructively liable as the employer of the driver. What is, therefore, essential for passing an award is to find out the liabilities of the persons who are involved in the use of the vehicle or the persons who are vicariously liable. The insurance company becomes a necessary party to such claims as in the event the owner of the vehicle is found to be liable, it would have to reimburse the owner inasmuch as a vehicle is compulsorily insurable so far as a third party is concerned, as contemplated under Section 147 thereof. Therefore, there cannot be any doubt whatsoever that the possession or control of a vehicle plays a vital role.

16. The question came up for consideration before this Court in *Rajasthan SRTC* v. *Kailash Nath Kothari*[1] where the owner of a vehicle rented the bus to Rajasthan State Road Transport Corporation. It met with an accident. Despite the fact that the driver of the bus was an employee of the registered owner of the vehicle, it was held: (SCC p. 488, para 17)

"*17*. … Driver of the bus, even though an employee of the owner, was at the relevant time performing his duties under the order and command of the conductor of RSRTC for operation of the bus. So far as the passengers of the ill-fated bus are concerned, their privity of contract was only with RSRTC to whom they had paid the fare for travelling in that bus and their safety therefore became the responsibility of RSRTC while travelling in the bus. They had no privity of contract with Shri Sanjay Kumar, the owner of the bus at all. Had it been a case only of transfer of services of the driver and not of transfer of control of the driver from the owner to RSRTC, the matter may have been somewhat different. But on facts in this case and in view of Conditions 4 to 7 of the agreement (*supra*), RSRTC must be held to be vicariously liable for the tort committed by the driver while plying the bus under contract of RSRTC. The general proposition of law and the presumption arising therefrom that an *employer*, that is, the person who has the right to hire and fire the employee, is generally responsible vicariously for the tort committed

by the employee concerned during the course of his employment and within the scope of his authority, is a rebuttable presumption. If the *original employer* is able to establish that when the servant was lent, the *effective control* over him was also transferred to the hirer, the original owner can avoid his liability and the *temporary employer or the hirer*, as the case may be, must be held vicariously liable for the tort committed by the employee concerned in the course of his employment while under the command and control of the hirer notwithstanding the fact that the driver would continue to be on the payroll of the original owner. The proposition based on the general principle as noticed above is adequately rebutted in this case not only on the basis of the evidence led by the parties but also on the basis of Conditions 6 to 7 (*supra*), which go to show that the *owner* had not merely transferred the services of the driver to RSRTC but actual control and the driver was to act under the *instructions, control and command* of the conductor and other officers of RSRTC." (emphasis in original)

17. The question again came up for consideration recently before this Court in *National Insurance Co. Ltd.* v. *Deepa Devi*[2]. This Court in that case was dealing with a matter where the vehicle in question was requisitioned by the State Government and while holding that the owner of the vehicle would not be liable it was opined: (SCC p. 417, para 10)

"*10*. Parliament either under the 1939 Act or the 1988 Act did not take into consideration a situation of this nature. No doubt, Respondents 3 and 4 continued to be the registered owners of the vehicle despite the fact that the same was requisitioned by the District Magistrate in exercise of the power conferred upon him under the Representation of the People Act. A vehicle is requisitioned by a statutory authority, pursuant to the provisions contained in a statute. The owner of the vehicle cannot refuse to abide by the order of requisition of the vehicle by the Deputy Commissioner. While the vehicle remains under requisition, the owner does not exercise any control thereover. The driver may still be the employee of the owner of the vehicle but he has to drive it as per the direction of the officer of the State, who is put in charge thereof. Save and except for legal ownership, for all intent and purport, the registered owner of the vehicle loses entire control thereover. He has no say as to whether the vehicle should be driven at a given point of time or not. He cannot ask the driver not to drive a

> vehicle on a bad road. He or the driver could not possibly say that the vehicle would not be driven in the night. The purpose of requisition is to use the vehicle. For the period the vehicle remains under the control of the State and/or its officers, the owner is only entitled to payment of compensation therefor in terms of the Act but he cannot not (sic) exercise any control thereupon. In a situation of this nature, this Court must proceed on the presumption that Parliament while enacting the 1988 Act did not envisage such a situation. If in a given situation, the statutory definitions contained in the 1988 Act cannot be given effect to in letter and spirit, the same should be understood from the common sense point of view."
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> In so opining the Court followed *Kailash Nath Kothari*[1].
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> 18. The legal principles as noticed hereinbefore, clearly show that the appellant was not liable to pay any compensation to the claimants."

16. In view of the above settled legal proposition, this Court is of the view that the appellant is liable to pay compensation of Rs.1,00,000/- (rupees one lakh) to the claimants.

17. In ***Pushpa alias Leela and others*** *(supra),* the Hon'ble Supreme Court has held that registered owner is also equally liable to pay the amount of compensation to the claimant. Nowhere, it is stated that transferee shall not be liable to pay the compensation amount.

In the instant case, the transferee is made a party. Therefore, the decisions relied upon by the appellant is of no help to him.

18. In the fact situation, the appellant is directed to pay a compensation of Rs.1,00,000/- (rupees one lakh) to the claimant-respondents as directed by the Tribunal in its impugned judgment.

19. In the result, the appeal is without any merit and accordingly the same is dismissed. No order as to costs.

Appeal dismissed.

2013 (I) ILR - CUT- 1040

B. N. MAHAPATRA, J.

BLAPL NO. 2282 OF 2013 (Dt.04.04.2013)

DR. TIRUPATI PANIGRAHI & ORS. ……..Petitioners

.*Vrs.*

STATE OF ORISSA ……...Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.439.

Bail – Offence U/ss.341, 323, 294, 506, 420, 471 & 34 I.P.C. read with Section 3(1)(x) of the SC & ST (P.A.) Act.

Petitioners induced public to invest money for residential plots – Complainant and many others deposited money but not provided with plots in spite of repeated requests – Petitioners not even in possession of genuine transferable homestead land to sell the investors as per their own promise – Petitioners with dishonest intention cheated the public and misappropriated their money knowing very well that they were not in a position to provide land to the applicants – It cannot be said that it is a case of breach of contract simplicitor and it would not constitute any offence U/ss. 420, 406 I.P.C. – In this case, although the dispute is Civil or Commercial in nature it contains ingredients of Criminal Offences and subsequent assurance of the petitioners to handover plots or to refund money with interest would not wash away the culpability of the petitioners – Held, the application for bail is rejected. (Paras 24 to 33)

Case laws Referred to:-

1.AIR 2012 SC 830 : (Sanjay Chandra-V- Central Bureau of Investigation)
2.(2005)10 SCC 228 : (Anil Mahajan-V- Bhor Industries Ltd. & Anr.)
3.2007 AIR SCW 6667 : (All Cargo Movers(I) Pvt. Ltd.-V- Dhanesh Badarmal Jain & Anr.)
4.1998(15) OCR(SC)542 : (Nageswar Prasad Singh @ Sinha-V- Narayan Singh & Anr.)
5.2005(31) OCR 640 : (Srimati Sabita Sundari Sahoo-V- State of Orissa)
6.2010(II) OLR 243 : (Mukul Kumar Verma-V- State of Orissa)
7.(2013)2 SCC 801 : (Arun Bhandari-V- State of U.P.)

8.(2003) 3 SCC 641 : (Ramnarayan Popli-V- CBI.)
9.(1999)3 SCC 259 : (Rajesh Bajaj-V- State of NCT Delhi).
10.(1987) 2 SCC 364 : (State of Gujarat-V- Mohanlal Jitamalji Porwal & Anr.)
11.(2001) 4 SCC 280 : (Prahalad Singh Bhati-V- NCT, Delhi).
12.(2012) 4 SCC 134 : (Dipak Shubhashchandra Mehta-V- CBI & Anr.).

For Petitioners - Mr. J. K. Das, Sr. Advocate,
M/s. J. Pal, B.K. Mishra & A.K. Behera.
For Opp.Party - Mr. V. Narasingh(Add.Govt. Advocate).

B.N.MAHAPATRA, J. This bail application has been filed under Section 439, Cr.P.C. by the petitioners in connection with C.T. Case No.53 of 2013, now pending in the Court of learned S.D.J.M., Bhubaneswar corresponding to Saheed Nagar PS Case No. 7 of 2013 (now EOW Bhubaneswar PS Case No. 1 of 2013) with prayer to release the petitioners on bail on any terms and conditions.

2. Petitioners in the present case are three in number. They are Dr. Tirupati Panigrahi, Chairman, Hi-Tech Medical College and Hospital, Bhubaneswar and Managing Director, Hi-Tech Estates and Promoters Private Limited, (2) Sri Tirupati Choudhury, Director of Hi-Tech Estates and Promoters Private Limited, Bhubaneswar, and (3) Sri Madhusudan Panigrahi, Director, Hi-Tech Estates and Promoters Private Limited, Bhubaneswar.

3. The petitioners are alleged to have committed offence punishable under Sections 341/323/294/506/420/468/471/34, I.P.C. read with Section 3(1)(x) of the S.C. & S.T. (P.A.) Act.

4. Prosecution case in a nutshell is that the complainant-Gopal Chandra Bindhani being a Central Government employee working as Chief Office Superintendent under DRM (P) East Coast Railway, Khurda Raod Division was interested to purchase a plot and contacted the petitioner No.2-Sri Tiriputi Choudhury, the Director, Hi-Tech Estates and Promoters Pvt. Ltd.,. The complainant was shown the plot in mouza Uttar Munda Muhana under the Scheme named as 'Kunja Vihar, Phase-I and thereafter the complainant executed an agreement with the petitioners in the capacity of the Director, Hi-Tech Estates and Promoters Pvt. Ltd. towards purchase of plot in the said area. The complainant had deposited Rs.15,000/- vide cheque No.311580 dated 05.12.2000 and subsequently paid Rs.47,400/- by cash for which he was issued with money receipts on 05.12.2000 and 23.02.2004 and also

paid monthly instalments. In total, the complainant deposited Rs.96,450/- towards purchase of the plot. As per the condition of the agreement, the petitioners issued a letter of allotment of plot No.88 in Kunja Vihar Phase-I vide letters dated 05.12.2000 and 22.10.2004. Though the complainant met the petitioners for registration of land in question in his favour, with some plea or the other, petitioners avoided to give plot to the complainant. On 01.09.2012, the complainant along with his younger brother went to the office of the petitioners at Saheed Nagar and asked them to register the plot in his favour. Hearing this, the petitioners became furious and abused the complainant in filthy languages where after he left the place. Being aggrieved, the complainant filed complaint petition before learned S.D.J.M., Bhubaneswar on 10.10.2012. Vide order dated 02.01.2013, the learned Magistrate sent the complaint petition to the Inspector in-charge, Saheed Nagar Police Station for investigation and registration of the F.I.R. Though the Saheed Nagar Police station on 02.01.2013 registered the F.I.R. vide Saheed Nagar PS Case No.7 of 2013, but on the next day, the Economic Offence Wing of CID (Crime Branch), Bhubaneswar took over the charge of investigation and renumbered the case as EOW Bhubaneswar PS Case No.1 of 2013 and started investigation of the case.

Since the petitioners were arrested in connection with another case and were sent to jail custody on 25th December, 2012, after the case was registered, a custodial warrant was issued and the petitioners were arrested in this case, while they were in jail custody. Petitioners filed application before the learned S.D.J.M., Bhubaneswar under Section 437, Cr.P.C. and the learned Magistrate rejected the bail application. Being aggrieved, petitioners filed petition under section 439, Cr.P.C. before the learned Sessions Judge, Bhubaneswar in B.A. No.23 of 2013 and thereafter the learned Sessions Judge, Bhubaneswar transferred the case to the Court of the 2nd Additional Sessions Judge, Bhubaneswar which was renumbered as B.A. No.23/63 of 2013 and finally the learned 2nd Additional Sessions Judge, Bhubaneswar rejected the bail application vide order dated 18.01.2013.

5. Mr.J.Pal, learned counsel appearing for the petitioners submitted that prosecution case is false and concocted one. Petitioners are Managing Director and Directors of the Company, named and styled as Rajadhani Systems and Estates Private Limited. The Company has purchased land measuring Ac.90.322 decimals in and around Bhubaneswar for the purpose of this project. Out of said land Ac.40.350 decimal of land have already been registered in favour of 676 applicants. Agreement for sale of land in respect of the Kunja Vihar Project have been entered into with 723 applicants out of which the Company has already allotted plots and completed registration in

respect of 676 persons and the company is required to allot plots to 47 persons who have completed payments and executed agreement. The company still has Ac.49.646 decimal of land available with them in respect of this project and after calculation of plots the company requires only Ac.2.924 decimal of land to distribute among 47 persons. Since the Company had faced difficulties with regard to the Consolidation Operation and for making the land free hold and for income tax search and seizure operation the Company in the year 2010, gave a notice to different applicants including the present informant clearly mentioning therein that the Company faced income tax search in the year 2005. During search, all the relevant original documents have been seized by the Income Tax Department. Kunja Vihar Project comprises of chaka land. The Chaka land can not be sold out by fragmenting into sizeable sub-plots except after conversion of the same by the competent authority. After completion of the Scheme the Company would have made the conversion process of the same before the concerned authority and by making into sub-plots, transfer the same to its customers as per their Scheme through registered sale deed. But due to seizure of the relevant original documents, the conversion process could not be materialized. Therefore, the petitioners were undone to make registration of sale deed in favour of the informant and other customers even after completion of the Scheme. It was expected that the matter will be solved within 2 to 3 years. Therefore, the informant should cooperate and bear with the petitioners for such period. Otherwise, the Company is ready to refund the amount deposited by the informant in case the informant is not in a position to wait further. In the meantime, the Company has already refunded money to 921 applicants, who have refused to wait for 2-3 years. Therefore, the Company in no way has cheated the informant and is avoiding the informant to deliver the land or to refund the money.

6. Mr.Pal further submitted that the allegations made in the FIR transpire that it is a contractual breach, i.e., breach of contract simpliciter. It is not the case of the informant that the Company has closed or gone away with his money. Specific case of the informant is that the petitioners have not handed over the plots for which he has deposited the money with the Directors and Managing Director. The informant has also not disclosed the fact regarding receipt of notice in the year 2010 informing him the problem for which the land could not be handed over and to wait for 2 to 3 years. Since both the Companies, i.e., Hi-Tech Estates and Promoters Pvt. Ltd. and Rajdhani Systems and Estates Pvt. Ltd. committed to their project and due this bad publicity and false cases were lodged, the Company thought it proper to make an appeal vide Annexure-5 to written notes of submission to the general public/to its applicants/customers wherein the details of the

Companies have been given. It was specifically mentioned that the Company has 460 aces of land available with them which can easily be allotted to the interested customers for which they have to wait for some period for delivery of the land and if any person who is not desirous to wait for that period he may give in writing for refund of money with interest. In the said public notice, the petitioners mentioned that due to seizure of documents relating to the land in question by the Income Tax Department and because of some lands are chaka lands they are unable to sell out the said land to applicants by fragmenting the same into sizeable sub-plots.

7. Learned counsel Mr.Pal further submitted that the offence under which FIR has been registered are not made out. In case of violation of contract between the Company and the customers, i.e., in case of failure of contract at subsequent stage, the offence of cheating cannot be made out since the breach of contract simpliciter committed by the parties will not constitute any offence punishable under Sections 420/406, I.P.C. In support of his contention, reliance is placed on various judicial pronouncements which are referred hereinafter.

8. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Sanjay Chandra Vrs. Central Bureau of Investigation*, AIR 2012 SC 830, Mr. Pal submitted that grant/refusal to grant the bail is at the discretion of the Court. Grant/denial of bail is required to be examined in each particular case. Right to bail is not to be exercised merely because of the sentiment of the community is against the accused.

9. In written notes of submissions filed on behalf of the petitioners, it is stated that the petitioners are ready to give undertaking that they are committed to the project which they have started and they are duty bound as per the contract to allot plots to the customers as per their desire and if any customer does not want to take the land and want refund of his money the Company is also under obligation to return the money to the customers/applicants with interest. Concluding his argument, Mr. Pal made prayer for release of the petitioners on bail.

10. Mr. Narasingh, learned Addl. Government Advocate vehemently opposed the grant of bail to the petitioners. It was submitted that investigation was taken up and during the course of investigation it revealed that the petitioner no. 1 as the Managing Director and the other petitioners as Directors have duped thousands of innocent investors and committed fraud in an organized manner. It has been prima facie established beyond reasonable doubt that floating of the alleged plotting schemes in the name

and style “Hi-Tech Estates and Promoters Pvt. Ltd.” and “Rajdhani Systems and Estates Pvt. Ltd.” through public advertisements was with an dishonest intention making false promises and thereby induced people to part with their money which were subsequently misappropriated and converted to their own use. The present BLAPL relates to Kunja Vihar Project. During the course of investigation, it has come to light, in the similar fashion the petitioners have floated four more projects, namely; (i) Bhagya Nagar, (ii) Kunja Vihar, (iii) Puspanjali Enclave and (iv) Kalyan Vihar and adopting similar modus operandi have cheated the persons who have made investment in response to their advertisement.

11. A bare reading of the agreement entered into with the informant it clearly reveals that on the date of execution of such agreement the Company has acquired the land and made them suitable for the purpose of proposed house sites under the name and style of Kunja Vihar. From the agreement, it further reveals that the petitioners induced the investors to part with their valuable consideration and because of such dubious designs, the petitioners have gained wrongfully thereby causing wrongful loss to the investors. In respect of Kunja Vihar the investigating agency has received 50 complaints and the total amount invested by the applicants is Rs.45,64,350/-. Since, the matter is under investigation and if at that stage the petitioners are allowed to be released on bail because of their standing in the society they will interfere with the ongoing investigation and thereby subverting the course of justice. The subsequent assurance in the Court to the effect that the petitioners are ready to handover the plots or refund the money with interest is of no significance and the petitioners are liable to prosecuted under the Criminal law. The Investigating Officer has received about 1379 complaints from different persons belonging to the different parts of the State in connection with five projects which are subject matters of the various BLAPLs. On scrutiny of the documents, it is found prima facie that the petitioners received money from 3385 persons with a promise to provide them residential plots. As yet 2457 investors are yet to be provided with plots.

12. The petitioners have falsely and fraudulently represented before the prospective purchasers that the Hi-Tech Estates and Promoters Pvt. Ltd. and Rajdhani Systems and Estates Pvt. Ltd. had transferable right and title in respect of the Kunja Vihar project area and other projects. Kunja Vihar Project started in 2000 and the Income Tax authorities seized the original land documents on 30.9.2005, but despite this the petitioners without intimating the same to the purchasers went on collecting money even after

Income Tax raid. The petitioners are involved in other economic offence cases relating to other projects.

There is nothing wrong in the order passed by the 2nd Additional Sessions Judge warranting interference of this Court. It is submitted that the judgments of the Hon'ble Supreme Court relied upon by the petitioners are of no help to them as they are not applicable to the facts and circumstances of the cases and in none of the cases the Hon'ble Supreme Court considered the matter pending investigation. The Hon'ble Supreme Court in several cases observed that the economic offences need to be visited by the Courts with a different approach, considering large scale public interest involved therein. In support of his contention, Mr. Narasingh relied upon some decisions of the Hon'ble Supreme Court which are referred to hereinafter. Concluding his argument, Mr. Narasingh prayed for rejection of the petition.

13. From the rival contentions of both parties the only question that arises for consideration by this Court is whether the petitioners have made out a case for grant of regular bail to them on the basis of the points urged by them.

14. Mr. Pal, learned counsel appearing on behalf of the petitioners has urged the following points for grant of bail to the petitioners:

(a) As per the allegations raised against the petitioners the dispute is of civil in nature and therefore, the criminal proceedings are not maintainable in law. At best, a case for breach of contract simplicitermay be made out which will not constitute offence punishable under Sections 420 and 406, I.P.C.

(b) The lands under the project could not be sold and handed over to the applicants including the informant for the following reasons:

(i) Due to facing of Income Tax problems;

(ii) Lands purchased by the Company being chaka lands, the same cannot be sold out to the applicants by fragmenting into sizeable sub plots unless they are converted into homestead lands.

(c) The petitioners are ready and willing to sell and deliver the land if the applicants shall wait for 2 to 3 years or it is open to them to get back their money with interest.

15. The first contention of the petitioners is that the case is of civil nature and the criminal proceedings are not sustainable in law. At best a case for breach of contract simpliciter may be made out i.e. failure to keep promises within the agreed period. Offence of cheating cannot be made out. Placing reliance on the judgment of the Hon'ble Supreme Court in the cases of *Anil Mahajan vs. Bhor Industries Ltd. and another,* (2005) 10 SCC 228; *All Cargo Movers (I) Pvt. Ltd. vs. Dhanesh Badarmal Jain and another*, 2007 AIR SCW 6667*; Nageswar Prasad Singh alias Sinha vs. Narayan Singh and another,* 1998 (15) OCR (SC) 542*; Srimati Sabita Sundari Sahoo vs. State of Orissa,* 2005(31) OCR 640 and in the case of *Mukul Kumar Verma v. State of Orissa,* 2010 (II) OLR 243, it was submitted that breach of contract simpliciter committed by the petitioners will not constitute any offence under Sections 420 and 406, IPC.

16. Now let's see whether the present case is a breach of contract simpliciter as contended by Mr. Pal. This petition relates to the project Kunja Vihar. The petitioners in their own admission in the written note of submission states that agreement for sale of land in respect of the Kunja Vihar Project have been entered into with 723 applicants out of which the Company has already allotted plots and completed registration in respect of 676 persons and the company is required to allot plots to 47 persons who have completed payments and executed agreement. The company still has Ac.49.646 decimal of land available with them in respect of this project and after calculation of plots the company requires only Ac.2.924 decimal of land to distribute among 47 persons. However, the land in question could not be transferred to the applicants as the lands available with the company are chaka lands which cannot be sold out by fragmenting the said land into sizeable sub-plots unless they are converted to homestead land. From own admission of the petitioners it is clear that agreements have been entered into with various applicants on receiving full payment when the Company was not in possession of genuine transferable/ saleable homestead land. This prima facie shows that the action of the petitioners is not bona fide and the intention is to cheat the gullible investors from the very beginning. The petitioners through their companies entered into the agreements with the innocent applicants to sell them plots without having the ownership of saleable/ transferable right over the land in question. Thus, the petitioners have received full payment from the innocent applicants for sale of certain homestead plots to them which were in face not in existence.

17. Further case of the prosecution is that public advertisements were floated with a dishonest intention making false promises and thereby induced public to part with their money which were subsequently

misappropriated and converted for their own use. On a bare reading of the agreement entered into with the informant reveals that on the date of execution of such agreement the Company has acquired land and made them suitable for the purpose of proposed house site under the name and style Kunja Vihar. Such Assurance made in the agreement is not correct and petitioners from the very beginning were aware that they did not have transferable/saleable homestead land, still then they induced investors to part with their valuable consideration and because of such dubious designs the petitioners have gained wrongfully thereby causing wrongful loss to the investors.

Further case of the prosecution is that the investigating agency has received 50 complaints and the matter is under investigation and if at that stage petitioners are allowed to be released on bail, taking advantage of their position in the society they will interfere with the on going investigation and thereby subverting the course of justice. Investigating Officer, in the meantime, has examined many victims. The complainants have invested Rs.45,64,350/- with petitioners' Company. The said amount has been siphoned away to the Bank accounts of Vigyan Bharati Charitable Trust, Vidya Sagar Charitable Trust and other charitable Trusts in which the petitioners are trustees. These trustees run various educational institutions in different parts of the State. The I.O. ascertained that the amount collected by the petitioners against the present project and against similar other eight projects have been invested or concealed by them which have not been traced out so far. All the bank accounts seized by the I.O. during the investigation of E.O.W. PS Case No.11/2012 there is only Rs.4.14 crores. Rest of the moneys of the investors is yet to be traced out by the I.O. Further, during investigation of audited accounts of these two Companies, it was revealed that a sum of Rs.315.96 crores was due to the investors who had applied for getting plots on the assurance and clear indication by the petitioners that they have saleable/transferable right in the land in question. Though the informant and others have invested their hard earned money in project of Kunja Vihar since 2000, till date they have not yet been provided with the plots.

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

The Hon'ble Supreme Court in the case of ***Arun Bhandari v. State of U.P.,*** (2013) 2 SCC 801 has held as under:-

> "26 At this stage, we may usefully note that sometimes a case may apparently look to be of civil nature or may involve a

commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. In this context, we may reproduce a passage from Mohd. Ibrahim v. State of Bihar15: (SCC p.754, para 8)

"8. This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurise parties to settle civil disputes. But at the same time, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. (See G. Sagar Suri v. State of U.P.16 and Indian Oil Corpn. v. NEPC India Ltd.17)"

19. The Hon'ble Supreme Court in the case of ***Ramnarayan Popli v. CBI,*** (2003) 3 SCC 641 clearly negatives the contention of the petitioners regarding non-applicability of Sec. 420 and other allied sections.

20. In the case of ***Rajesh Bajaj v. State of NCT Delhi***, (1999) 3 SCC 259; the Hon'ble Supreme Court has held as under:

"10. It may be that the facts narrated in the present complaint would as well reveal a commercial transaction or money transaction. But that is hardly a reason for holding that the offence of cheating would elude from such a transaction. In fact, may a cheatings were committed in the course of commercial and also money transactions. One of the illustrations set out under Section 415 of the Indian Penal Code (illustration) is worthy of notice now :

"(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

11. The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether

there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realized later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

21. In the case of ***State of Gujarat v. Mohanlal Jitamalji Porwal and another,*** (1987) 2 SCC 364, the Hon'ble Supreme Court held as under:

> "The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even-handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest."

22. Taking into account the nature and magnitude of the offence and its ramification as alleged, it cannot be said that it is a case of breach of contract simpliciter committed by the petitioners and the same would not constitute any offence under Sections 420 and 406, I.P.C. On the other hand, apparently a prima facie case is made out which constitutes offence under Sections 420 & 406, IPC.

23. In view of the above judicial pronouncements relied upon by the petitioners in support of their contention that the present case is a breach of contract simpliciter and no offence under Section 420 and 406 IPC has been made out by the petitioners, are of no help to the petitioners in the factual scenario described above.

24. The first difficulty for not transferring the land to the applicants as stated by the petitioners is that there were income tax problems because of seizure of land documents by the Search party during search and seizure operation. It is the specific case of the prosecution that the Income tax

authorities seized the land documents on 30.9.2005, but the petitioners without intimating the fact of seizure of land documents by the Income Tax Department to the purchasers went on collecting money after such search and seizure operation. Further case of the prosecution is that the petitioners have collected maximum amount after Income tax raid. Had the petitioners not been able to transfer/ sell the land in question to the applicants due to income tax search and seizure operation, they should have intimated the same immediately after the income tax seizure and should not have collected the money/installments from the applicants. This prima facie shows that the petitioners with dishonest intention have cheated the public and misappropriated their money knowing very well that they were not in a position to provide land to the applicants. Hence, their plea of income tax raid for not transferring the lands to the applicants is not tenable in law.

25. The second reason for not transferring the land in favour of the applicants is that the lands available with the company are chaka lands which cannot be sold out to the applicants by fragmenting the chaka land into sizeable sub-plots unless they are converted to homestead land. The declaration made in the agreement shows that the company had acquired lands and made those suitable for the purpose of proposed house site under the name and style of Kunja Vihar. After making such declaration, the subsequent plea of the petitioners that there are some chaka lands which could not be converted to homestead and chaka lands cannot be fragmented into sub-plots itself prima facie shows the dishonest intention of the petitioners.

26. The third contention of the petitioners that they are ready and willing to allot plots to the customers as per their desire and if any customer does not want to take the land and wants refund of his money, the Company will return the same to the customers/applicants along with interest. Such an undertaking before this Court after the petitioners being faced with criminal liability would not wash away the culpability of the petitioners and that cannot be a ground for grant of bail to the petitioners.

27. As it reveals from the investigation made so far, thousands of innocent investors mostly belonging to lower and lower middle class were duped and their hard earned money were misappropriated by the petitioners. The investors are spread over throughout the State of Odisha and some of them are from out side the State. Since the petitioners did not sell the plots to the investors as per agreement, F.I.Rs and complaints were lodged against the petitioners. In course of investigation, as stated above, many things have been unearthed against the petitioners showing their dishonest intention in collecting money from the gullible investors and diverting the same to other

sister concern for their benefit. It is alleged that investors are not provided with plots in spite of repeated requests and persuasions. The magnitude of dishonest intention is writ large.

28. The paper publication made by both the Companies, i.e., Hi-Tech Estates and Promoters Pvt. Ltd. and Rajdhani Systems and Estates Pvt. Ltd. in "The New Indian Express", "The Samaja", "The Samaya', "The Dharitri" to the effect that the Companies have 460 acres of land available with them which can be easily allotted to the interested customers, if they wait for some period and if any person who is not desirous to wait for that period, he may give in writing for refund money with interest. Such paper publication being dated 31.01.2013, i.e, the F.I.Rs. were lodged against the petitioners, the petitioners cannot take advantage of the same to prove their bona fide.

The claim of the petitioners that in the year 2010, the investors were intimated that due to several problems the Company is not able to register the plots immediately, is also of no help to the petitioners to prove their bona fide, as in the instant case, Kunja Vihar project started in May, 1999 and was to complete in April, 2004. Besides, as stated above, as per petitioners' own admission, they are not in possession of genuine transferable/saleable homestead land in question to sell the informant and other investors in pursuance of their own promise.

29. The Hon'ble Supreme Court in several cases observed that economic offences need to be visited by the Court with a different approach, considering the large scale public interest involved therein. The economic offenders strike a serious blow at the socio-economic structure of the country and consume the economic fiber of the society by financially exploiting the common people.

30. In ***Prahalad Singh Bhati v. NCT, Delhi***, (2001) 4 SCC 280 the Hon'ble Supreme Court held that;

> "8..... While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable ground for believing' instead of 'the

evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

31. The Hon'ble Supreme Court in the case of ***Dipak Shubhashchandra Mehta v. CBI and another,*** (2012) 4 SCC 134**,** held as under**:**

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

32. Considering the nature of offence, its magnitude and ramification as alleged, materials available on record, the rival contentions of the parties and keeping in mind the principle of law laid down by the Hon'ble Supreme Court, I am not inclined to accept the prayer for bail to the petitioners. It is, however, made clear that the observations made above are in the context of prayer for bail and shall not be treated to be conclusive and determinative for the purpose of trial, if any.

33. Accordingly, the bail petition is rejected.

Application rejected.

2013 (I) ILR - CUT-1054

B. K. PATEL, J.

CRLMC NO.2541 OF 2008 & CRLREV. NO.272 OF 2008 (Dt.15.03.2012)

M/S. RANBAXY LABORATORES LTD. & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA & ANR. ……..Respondents

CRIMINAL PROCEDURE CODE, 1973 – S. 482.

Prosecution report submitted and cognizance taken against accused persons for commission of offence punishable under a non existent statutory provision – Held, impugned order taking cognizance is set aside and the Criminal Proceeding is dropped.

(Paras 26, 27)

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Case laws Referred to:-

1.1980 SCC (Cri.) 200 : (State of Tamil Nadu-V- R. Krishnamurty)
2.AIR 1966 SC 1676 : (M.V. Krishnan Nambissan-V- State of Kerala)
3.2002 CRI. L.J. 2525 : (m. Mohammed Ajmal-V- Antony & Ors.).
4.JT 1999 (1) SC 39 : (Calcutta Municipal Corpn.-V- Pawan Kumar Saraf & Anr.)_
5.AIR 1981 SC 1387 : (Chetumai-V- State of Madhya Pradesh & Anr.)
6.1988 CRI. L.J. 260 : (Bhagirathi Das & Anr.-V- State of Orissa).

For Petitioner - M/s. Nihar Ranjan Rout & D.Bhattacharya.
For Opp.Parties - Mr. S.D. Das, Addl. Standing Counsel.
For Petitioner - M/s. H.S. Mishra & T. K. Sahoo.
For Opp.Party - Addl. Standing Counsel.

B.K. PATEL, J. In these proceedings prayer has been made to quash the order of taking cognizance dated 12.10.2007 and the criminal proceeding in 2(c) C.C.No.42 of 2007 of the court of learned S.D.J.M., Bolangir.

2. The facts of the case, in brief, are as follows:

The criminal proceeding was initiated against the petitioners and others upon receipt of prosecution report submitted by the complainant A.D.M.O. (P.H.), Balangir. It was alleged that on 26.7.2007, as per requisition of the District Administration, the complainant inspected medical shop of accused no.1, who is petitioner no. 1 in Crl. Rev. No. 272 of 2008 in presence of others including the Executive Magistrate who had previously

sealed the shop. Upon verification of articles in the shop, the complainant suspected certain articles including Revital Liquid manufactured by the petitioner in CRLMC No. 2541 of 2008 and supplied by accused no. 5 who is petitioner no. 2 in Crl.Rev. No. 272 of 2008 to be adulterated/misbranded. The complainant collected, *inter alia*, three sealed bottles of each of the suspected articles. In accordance with the provisions under the Act and the Rules framed thereunder, the complainant sent one of the bottles of each of the articles to the Public Analyst for analysis. In the Public Analyst Reports it was stated that the samples of Zerolac, Revital Liquid, Protinol-C Chocolate and Glucose-D powder were found to be adulterated. On receipt of the Public Analyst Reports the complainant placed prosecution report before the Chief District Medical Officer, Balangir (for short 'the C.D.M.O.') for obtaining sanction under section 20 of the Prevention of Food Adulteration Act,1954 (for short, 'the Act'). In the prosecution report accused persons were alleged to have committed offences under sections '7(i), 5(i), 2(ia), (c) and (k)' of the Act and the Rules read with 'item index A.11.02, 18.01, NSI(2) and A.07.07 of Appendix-B' of the Rules punishable under section '16(a)(i)(i-a)' of the Act. Accordingly, by order dated 12.10.2007 learned S.D.J.M., Bolangir took cognizance of offence under section '16(a)(i)(i-a)' of the Act and issued processes against the petitioners and co-accused persons.

In response to the applications filed by the accused persons, learned S.D.J.M., Balangir appears to have sent one part of each of the samples under section 13(2) of the Act to Central Food Laboratory, Kolkata. However, articles sent to Central Food Laboratory, Kolkata were returned without any test or analysis on the ground that the samples were found to be Vitamin Tablets, Dietary Supplements, etc. and "not the food items as included under Rule 22 of the Rules". In the letter received from Central Food Laboratory it was also stated that the Laboratory "deals with the food articles only as stated under the provision" of the Act and the Rules. Upon receipt of samples back from Central Food Laboratory, learned S.D.J.M., by order dated 16.1.2008, called for a clarification from the C.D.M.O. as to whether seized samples come under the purview of Rule 22 of the Rules or not. It appears from the order dated 21.2.2008 that by his Memo No.517 dated 2.2.2008 the C.D.M.O. reported that the samples belong to the category of 'proprietary food' and therefore are food items. Upon receipt of the report from the C.D.M.O., learned S.D.J.M., Bolangir proceeded ahead with the case.

3. In assailing the criminal proceeding, it was first submitted by the learned counsel for the petitioners that none of the articles taken for analysis is a food item as defined under section 2(v) of the Act and rather, being a

dietary substitutes, belongs to the category of proprietary food for which no standard of quality has been prescribed under the Rules. However, in the prosecution report allegations of adulteration of food under sections '7(i), 5(i), 2(ia)(c) and (k)' punishable under section '16(a)(i)(ia)' of the Act have been made. It was contended that no standard having been prescribed under Appendix-B to the Rules for dietary food supplement and proprietary food, there is no basis to allege commission of offence of adulteration punishable under the Act. In this connection, learned counsel for the petitioners relied upon the decisions of the Hon'ble Supreme Court in ***State of Tamil Nadu –v- R.Krishnamurty***, 1980 S.C.C.(Cri.) 200; ***M.V.Krishnan Nambissan –v- State of Kerala***, AIR 1966 S.C.1676 and ***M.Mohammed Ajmal –v- Antony and others***, 2002 CRI. L.J. 2525.

It was next contended by the learned counsel for the petitioners that neither under the Act nor under the Rules, the C.D.M.O. is competent to furnish clarification in response to the requisition made by the learned S.D.J.M. with regard to the letter received from Central Food Laboratory, Kolkata. Under the Act, certificate of Central Food Laboratory overrides and supersedes the report of the Public Analyst. Referring to sub-sections(3) and (5) of section 13 of the Act, it was strenuously contended that the letter received from the Director of Central Food Laboratory, Kolkata being final and conclusive evidence of the facts alleged in the case, there is absolutely no scope to continue with the criminal proceeding. In support of his contention, learned counsel for the petitioners relied upon decisions of the Hon'ble Supreme Court in ***Calcutta Municipal Corporation –v- Pawan Kumar Saraf and another***, JT 1999(1) SC 39; ***Chetumai –v- State of Madhya Pradesh and another***, AIR 1981 SC 1387 and of this Court in ***Bhagirathi Das and another –v- State of Orissa***, 1988 CRI. L.J. 260.

4. In reply, it was contended by the learned counsel for the State that even through no standard of quality has been prescribed for dietary food supplements, undisputedly it is proprietary food which is a species of food. There is no scope to urge that dietary substitute is not food. The term 'proprietary food' itself indicates that it is a kind of food. It was further argued that articles in questions being meant for human consumption attracts the mischief of adulteration under the Act. The definition of the term 'adulterated' occurring under section 2(ia) of the Act is too wide to include all kinds of food including proprietary food. It was argued that non-conformity with the prescribed standard is not the only mode of adulteration. In the present case, the articles sent for analysis being not of the nature, standard and quality as purported and represented in the labels of the packages, it shall

be deemed that the articles were adulterated in view of the provision under sub-clause (a) of Clause (ia) of section 2 of the Act.

5. Learned counsel for the petitioners is not correct in urging that an item for which no standard has been prescribed under Annexure-B is not food. In fact, learned counsel for the petitioners themselves urged that dietary supplement is a 'proprietary food' within the meaning of Rule 37-A of the Rules. Clause(1) of Rule 37-A of the Rules provides that proprietary food "means a food" which has not been standarised under the Prevention of Food Adulteration Rules,1955. The very language in clause(1) of Rule 37-A indicates that proprietary food is a food. That apart, the term 'adulterated' as defined under sub-clause(ia) of clause(i) of section 2 of the Act itself goes to show that non-conformity with the prescribed standard of quality under Appendix-B of the Rules is not the only circumstance which renders an article of food adulterated. When an article of food is injurious or insect-infected or is otherwise unfit for human consumption, then also such article shall be deemed to be adulterated.

6. The definition of 'food' provided under clause(v) of Section 2 of the Act is too wide to include within its purview 'proprietary food' also. Unlike drugs and water, proprietary foods or dietary food supplements have not been specifically excluded from the purview of definition of 'food' under the Act. Clause(v) of section 2 of the Act reads:

> " 'Food' means any article used as food or drink for human consumption other than drugs and water and includes-
>
> (a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,
>
> (b) any flavouring matter or condiments, and
>
> (c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purpose of this Act."

7. Thus, it is evident that definition of 'food' under the Act is inclusive. Decision in ***State of Tamil Nadu –v- R.Krishnamurty(supra)*** does not help the petitioners in any manner in the attempt to exclude 'proprietary food' from its purview. Petitioners do not dispute that dietary substitute is meant for human consumption and it has no other use. Interpreting definition of 'food' in the Act it was held in ***State of Tamil Nadu –v- R.Krishnamurty(supra)*** as follows:

"According to the definition of 'food' which we have extracted above, for the purpose of the Act, any article used as food or drink for human consumption and any article which ordinarily enters into or is used in the composition or preparation of human food is 'food'. It is not necessary that it is intended for human consumption or for preparation of human food. It is also irrelevant that it is described or exhibited as intended for some other use. It is enough if the article is generally or commonly used for human consumption or in the preparation of human food. It is notorious that there are, unfortunately, in our vast country, large segments of population, who, living as they do, far beneath ordinary subsistence level, are ready to consume that which may otherwise be thought as not fit for human consumption. In order to keep body and soul together, they are often tempted to buy and use as food, articles which are adulterated and even unfit for human consumption but which are sold at inviting prices, under the pretence or without pretence that they are intended to be used for purposes other than human consumption. It is to prevent the exploitation and self-destruction of these poor, ignorant and illiterate persons that the definition of 'food' is couched in such terms as not to take into account whether the article is intended for human consumption or not. In order to be 'food' for purposes of the Act, an article need not be 'fit' for human consumption; it need not be described or exhibited as intended for human consumption; it may even be otherwise described or exhibited; it need not even be necessarily intended for human consumption; it is enough if it is generally or commonly used for human consumption or in the preparation of human food. Where an article is generally or commonly not used for human consumption or in the preparation of human food but for some other purpose, notwithstanding that it may be capable of being used, on rare occasions, for human consumption or in the preparation of human food, it may be said, depending on the facts and circumstances of the case, that it is not 'food'. In such a case the question whether it is intended for human consumption or in the preparation of human food may become material. But where the article is one which is generally or commonly used for human consumption or in the preparation of human food, there can be no question but that the article is 'food'."

8. In ***M.V.Krishnan Nambissan(supra)*** it was held in absence of any standard prescribed under the Act and the Rules framed thereunder for butter-milk, a person selling butter-milk cannot be convicted for an offence under section 16(1)(a)(i) and section 7 of the Act read with Rule 44 of the Rules by applying the standard prescribed for some other food item. Upon

reference to item 'butter-milk' occurring at serial no.A.11.03 under Appendix-B to the Rules it was held :

> "Where dahi or curd, other than skimmed milk dahi is sold or offered for sale without any indication as to whether it is derived from cow or buffalo milk, the standards prescribed for dahi prepared from buffalo milk shall apply.
>
> It will be seen from the said provisions that it is not an ingredient of the definition of butter-milk that it should contain any particular percentage of solids-not-fat. Indeed, no standard in regard to its contents is prescribed. The only standard, if it may be described as one, is that it shall be a product obtained after removal of butter from curd by churning or otherwise. It is not suggested that the butter-milk in question was not a product obtained in the manner described thereunder. Prima facie, therefore it follows that the appellant has not committed any offence with which he was charged, namely, that he had added water to the extent of 11 per cent to butter-milk."

However, while holding that accusation as made in the case was unfounded, the Hon'ble Apex Court concluded the judgment with the dictum:-

> "We should not be understood to have expressed any view on the question whether a prosecution could be launched for adulteration of butter-milk under some other clauses of the definition of 'adulterated' in Section 2 of the Act, for in the present case the prosecution was only for not maintaining the standard."

9. Letter of the Director, Central Food Laboratory, Kolkata reveals that admittedly none of the articles was subjected to analysis on the ground that the articles were found to be "Vitamin Tablets, Dietary Supplements, etc, not the food items as included in Rule 22 of the PFA Rules" . The worth of Certificate of the Central Food Laboratory has been statutorily recognized under Sub-sections (2-D), (3) and (5) of Section 13 of the Act which provisions read:-

> "**Sub-section (2-D)** – "Until the receipt of the certificate of the result of the analysis from the Director of the Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution."

Sub-section (3) – "The certificate issued by the Director of the Central Food Laboratory(under sub-section (2-B) shall supersede the report given by the public analyst under sub-section(1)."

Sub-section (5) – "Any document purporting to be a report signed by a public analyst, unless it has been superseded under sub-section(3), or any document purporting to be a certificate signed by the Director of the Central Food Laboratory may be used as evidence of the facts stated therein in any proceeding under this Act or under sections 272 to 276 of the Indian Penal Code(45 of 1860):

Provided that any document purporting to be a certificate signed by the Director of the Central Food Laboratory, not being a certificate with respect to the analysis of the part of the sample of any article of food referred to in the proviso to sub-section (1-A) of section 16, shall be final and conclusive evidence of the facts stated therein."

10. In ***Chetumai(supra)*** it has been held by Hon'ble Supreme Court that under section 13(3) of the Act, the report of the Public Analyst stood superseded by the certificate issued by the Director of Central Food Laboratory. Having been so superseded the report of the Public Analyst could not, therefore, relied upon to base a conviction.

11. It has been held in ***Calcutta Municipal Corporation –v- Pawan Kumar Saraf and another(supra) :***

"Section 13 of the Act contains provisions regarding report of Public Analyst as well as the Certificate of the Director of Central Food Laboratory. After institution of prosecution against the person from whom the sample of the article of food was taken (and/or the person whose name and address were disclosed under section 14-A), the accused has the right to apply to the court to get one of the remaining parts of the sample of the food article analyzed by the Central Food Laboratory. It is a right conferred on the aforesaid accused in order to defend the prosecution launched against him or them. For availing themselves of the aforesaid statutory right all that they have to do is to make application to the court within the prescribed time. Once the application is made it is not the look out of the accused to get the result of the analysis made by the Central Food Laboratory.

Sub-section(2-B) of Section 13 requires the court to dispatch one of the parts of the sample under its own seal to the Director of Central Food Laboratory. Once it is dispatched it is the duty of the Director to send a Certificate to the court "in the prescribed form within one month from the date of receipt of the part of the sample specifying the result of analysis". Sub-section(3) of Section 13 is important in this context and it is extracted below:

'The certificate issued by the Director of Central Food Laboratory under sub-section(2-B) shall supersede the report given by the public analyst under sub-section(1)'.

When the statute says that certificate shall supersede the report it means that the report would stand annulled or obliterated. The word "supersede" in law, means "obliterate, set aside, annul, replace, make void or inefficacious or useless, repeal". (vide Black's Law Dictionary, 5th Edn.). Once the Certificate of the Director of Central Food Laboratory reaches the court the Report of the Public Analyst stands displaced and what may remain is only a fossil of it.

In the above context the proviso to sub-section(5) can also be looked at which deals with the evidentiary value of such certificate. The materials portion of the proviso is quoted below:

"Provided that any document purporting to be a certificate signed by the Director of Central Food Laboratory…… shall be final and conclusive evidence of the facts stated therein."

If a fact is declared by a statute as final and conclusive, its impact is crucial because no party can then give evidence for the purpose of disproving that fact. This is the import of Section 4 of the Evidence Act which defines three kinds of presumptions among which the last is "conclusive proof". "When one fact is declared by this Act to be conclusive proof of another the court shall, on proof of the one fact regard the other as proved and shall not allow evidence to be given for the purpose of disproving it."

Thus the legal impact of a Certificate of the Director of Central Food Laboratory is three-fold. It annuls or replaces the report of the Public Analyst, it gains finality regarding the quality and standard of the food article involved in the case and it becomes irrefutable so far as the facts stated therein are concerned. "

12. In this context, it was rightly urged by the learned counsel for the State that letter received from the Central Food Laboratory is not a certificate in terms of provisions under section 13 of the Act and the Rules framed thereunder. The letter itself goes to show that articles received from the S.D.J.M., Balangir were not subjected to analysis. Sub-section(2-B) of Section 13 of the Act provides that the Director of Central Food Laboratory has to submit a certificate in prescribed form upon analysis of the sample article received from the Court. Sub-Rules(5) and (7) of Rule 4 of the Rules provide that after test or analysis, the certificate thereof signed by the Director shall be supplied to the Court forthwith by the Central Food Laboratory in Form II.

13. The letter received from the Director of Central Food Laboratory, Kolkata in the present case is not in the prescribed form. Therefore, there is no basis for the petitioners to urge that such letter has the sanctity of a certificate as contemplated under the Act so as to supersede or override the Public Analyst Report. In the facts and circumstances of the case, it has to be assumed that though food articles were sent by the S.D.J.M., Balangir for analysis to the Central Food Laboratory, Kolkata, no certificate of the test or analysis has yet been furnished. Sub-section (2-D) of Section 13 of the Act provides that until the receipt of the certificate of the result of the analysis from the Director of Central Food Laboratory, the Court shall not continue with the proceedings pending before it in relation to the prosecution.

14. In course of hearing learned Assistant Solicitor General was requested to obtain a report from the Director, Central Food Laboratory, Kolkata in the matter. In response thereto, learned Assistant Solicitor General filed in Court letter dated 2.12.2011 received by him from the Central Food Laboratory, Kolkata. The letter reads:

> "This is with reference to the subject cited above and to clarify that the samples in question did not fall under the definition of 'Food' as defined under PFA Act,1954, and therefore, returned back as Central Food Laboratory, Kokata analyses the samples of food only."

15. In the peculiar facts and circumstances of the case, until and unless result of analysis of food articles is communicated by the Central Food Laboratory, Kolkata under the prescribed form is received, learned S.D.J.M. could not have continued with the criminal proceeding. Continuance of the proceeding without receipt of the certificate of the analysis from the Central Food Laboratory is not only abuse of process of court, but also illegal being contrary to statutory provisions under Section 13 of the Act.

16. Moreover, the term 'adulterated' has been defined under sub-clause (ia) of clause (i) of section 2 of the Act. It provides various circumstances under which an article of food shall be deemed to be adulterated. The circumstances are :

"(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance or quality which it purports or is represented to be;

(b) if the article contains any other substance which affects, or if the article is so processed as to affect, injuriously the nature, substance or quality thereof;

(c) if any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof;

(d) if any constituent of the article has been wholly or in part abstracted so as to affect injuriously the nature, substance or quality thereof;

(e) if the article had been prepared, packed or kept under insanitary conditions whererby it has become contaminated or injurious to health;

(f) if the article consists wholly or in part of any filthy, putrid, rotten, decomposed or diseased animal or vegetable substance or is insect infected or is otherwise unfit for human consumption;

(g) if the article is obtained from a diseased animal;

(h) if the article contains any poisonous or other ingredient which renders it injurious to health;

(i) if the container of the article is composed, whether wholly or in part, of any poisonous or deleterious substance which renders its contents injurious to health;

(j) if any colouring mater other than that prescribed in respect thereof is prevent in the article, or if the amounts of the prescribed colouring mater which is present in the article are not within the prescribed limits of variability;

(k) if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits;

(l) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which renders it injurious to health;

(m) if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability but which does not render it injurious to health;

Provided that, where the quality or purity of the article, being primary food, has fallen below the prescribed standards or its constituents are present in quantities not within the prescribed lists of variability, in either case, solely due to natural causes and beyond the control of human agency, then, such article shall not be deemed to be adulterated within the meaning of this sub-clause."

17. Under sub-clauses (l) and (m) of Clause(ia) of Section 2 of the Act, an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities not within the prescribed limits of variability. Rule 5 of the Rules prescribes standards of quality of the various articles of food specified in Appendices -B, C and D to the Rules. In the prosecution report, there is no reference to violation of standards prescribed under Appendix-C or Appendix-D of the Rules. Obviously, Rule 5 and Appendix-B do not prescribe standards and limits of all articles of food but only for those specifically mentioned therein. Where no standards are prescribed in Appendix-B for an article of food, it cannot be held to be adulterated within the meaning of sub-clauses (l) and (m) of clause(ia) of section 2 of the Act. However, it may be deemed to be adulterated if it falls within any of the other clauses of section 2(ia) of the Act.

18. In the present case, cognizance of offence under section 16 of the Act has been taken on the allegation of commission of offences under sections 7(i), 5(i), 2(ia), (c) and (k) of the Act. Reference has also been made in the prosecution report of some of the items under the Appendix-B to the Rules, as adverted to at paragraph 2 above.

19. Clause (i) of section 5 of the Act provides that no person shall import into India 'any adulterated food'. In the prosecution report, there is no allegation that accused persons imported into India any article.

20. Clause(i) of section 7 of the Act provides that no person shall himself or by any person on his behalf manufacture for sale or store, sell or distribute 'any adulterated food'.

21. There is no allegation in the prosecution report of adulteration under any of the specific substances of clause(ia) of section 2 of the Act except under sub-clauses (c) and (k) of section 2 of the Act.

22. Sub-clause(c) of clause(ia) of Section 2 of the Act provides that an article of food shall be deemed to be adulterated if any inferior or cheaper substance has been substituted wholly or in part for the article so as to affect injuriously the nature, substance or quality thereof. Sub-clause(k) of clause(ia) of Section 2 of the Act provides that an article of food shall be deemed to be adulterated if the article contains any prohibited preservative or permitted preservative in excess of the prescribed limits. The prosecution report does not reveal any of such allegations against the present petitioners.

23. Item No.A.11.02 of Appendix-B of the Rules relates to milk products and it reads:

> "the products obtained form milk such as cream, malai, curd, skimmed milk curd, chhanna, skimmed milk chhanna, cheese, processed cheese, ice-cream, milk ices, condensed milk-sweetened and unsweetened, condensed skimmed milk – sweetened and unsweetened, milk powder, skimmed milk powder, partly skimmed milk powder, khoa, infant milk food, table butter and deshi butter".

Item No.A.18.01 prescribes standard of Atta or resultant Atta and it reads:

> "the coarse product obtained by milling or ginding clean wheat free from rodent hair and excreta. It shall conform to the following standards-
>
> (a) Moisture – Not more than 14.0 per cent(when determined by heating at 130 C-133 C for 2 hours);
>
> (b) Total ash – Not more than 2.0 per cent (on dry weight basis);
>
> (c) Ash insoluble in dilute HCL – Not more than 0.,15 per cent (on dry weight basis);

(d) Gluten (on dry weight basis) - Not less than 6.0 per cent; and

(e) Alcoholic acidity (with 90 per cent alcohol) expressed as HSO (on dry weight basis) - Not more than 0.18 per cent."

Item No. A.07.07 prescribes standard for

Dextrose and it reads:

Dextrose is a white or light cream granular powder, odourless and having a sweet taste. When heated with potassium cupritartarate solution it shall produce a copious precipitate of cuprous oxide. It shall conform to the following standards-
Sulphated ash - Not more than 0.1 per cent on dry basis.

Acidity - 5.0 gm dissolved in 50 ml of freshly boiled and cooled water requires for neutralization not more than 0.20 ml of N/10 sodium hydroxide to phenolphthalein indicator.
Glucose – Not less than 99.0 per cent on dry basis."

24. Admittedly, there is no indication in the prosecution report that any of the articles sent for analysis is milk product or Atta/resultant Atta or Dextrose.

25. In view of the above, it is not at all understood as to how allegations in the case attract provisions under sections 7(i), 5(i), 2(ia),(C)and (K), or items referred under Appendix-BV to the Rules referred to in the prosecution report.

26. It is further observed that in accordance with the prosecution report, by order dated 12.10.2007 learned S.D.J.M., Balangir has taken cognizance of commission of offence punishable under section 16 '(a) (1)(i-a)' of the Act. Upon reference to Section 16 of the Act it is found that there is no such clause as '16(a)(1)(i-a)' under section 16 of the Act. In order to seek clarification, in course of hearing, by order dated 21.10.2009 learned S.D.J.M., Balangir was directed to submit report and C.D.M.O., Balangir was directed to file affidavit regarding the same. C.D.M.O., Balangir filed affidavit stating therein that there is no such provision as section 16(a)(i)(i-a) under the Act and that in the prosecution report said provision was mentioned due to typographical error. According to the C.D.M.O., allegations in the case revealed commission of offence punishable under section 16(1)(a)(i) of the Act. Likewise, S.D.J.M., Balangir submitted a detailed report and concluded

> "On the basis of such P.R. the then S.D.J.M., Bolangir on 12.10.2007 took cognizance of offence U/s 16(a)(i)(i-a) of Prevention of Food Adulteration Act which is never there in the Act. The prosecution section under which the cognizance should have been taken for selling and distributing adulterated food are Sec.16(1)(a)(i) and Sec.16(1 A) of the Prevention of Food Adulteration Act."

27. Thus, it is obvious that there was no application of mind in submission of the prosecution report as well as taking up cognizance of offence. Prosecution report was submitted to proceed against the accused persons for commission of offence and cognizance was taken for commission of offence punishable under a nonexistent statutory provision. Therefore, order of taking cognizance is not sustainable in law and the criminal proceeding is liable to be dropped.

28. In view of the above discussion, both the CRLMC and CRLREV are allowed. Order dated 12.10.2007 passed by the learned S.D.J.M., Bolangir in 2(c) C.C.No.42 of 2007 taking cognizance of offence is set aside.

Application allowed.

2013 (I) ILR - CUT-1067

B. K. NAYAK, J.

CRLREV NO. 687 OF 2012 (Dt.18.12.2012)

BALABHADRA NAYAK ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.457

The words "Police Officer" in Section 457 Cr.P.C. must include an Excise Officer reporting seizure of vehicle/property to a Criminal Court.

In this case motor cycle of the petitioner was seized by Excise officials for alleged commission of offence under the NDPS Act – His

application U/s.457 Cr.P.C. for release of vehicle was rejected by the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur on the ground that the Motor cycle was seized by Excise officials and not by Police and as such Section 457 Cr.P.C. has no application – Held, the impugned order is set aside – Direction issued to the trial Court to release the vehicle in question in favour of the petitioner subject to conditions imposed by this Court.

Case law Referred to:-

2001 Crl. L.J. 3290 : (Abdul Rashid-V- State of Bihar)

For Petitioner - Debasis Sarangi
For Opp.Parties - Addl. Standing Counsel.

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

In this revision, the petitioner challenges the order dated 30.08.2012 passed by the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur in 2(a) C.C. No.21 of 2012 (N) rejecting the petitioner's application for interim release of the vehicle (motorcycle) bearing Registration No.OR-07-W-1879 which was involved in alleged commission of offence under Section 20(b)(ii) (B) of the N.D.P.S. Act.

The motorcycle of the present petitioner was seized by the Inspector-in-charge of Excise E.I. & E.B., Berhampur along with 9.5 kg. of ganja from the possession of the accused, Gopal Krushna Sahu, while he was transporting the same. On the basis of the prosecution report, 2(a) C.C. Case No.21 of 2012 has been initiated. Petitioner's application for interim release of the motor cycle has been rejected by the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur on the ground that the motor cycle was seized by the Excise officials and not by the Police and therefore Section 457 Cr.P.C. has no application and that Section 60(3) of he NDPS Act, provides for confiscation of the vehicle unless the owner proves that it was used without his knowledge or connivance or that of his agent.

Leaned counsel for the petitioner submits that though the present petitioner is the owner of the vehicle he has not been implicated as an accused in the aforesaid 2 (a) C.C. No.21 of 2012 (N) and that even if the motorcycle was seized by the Excise officials, the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur can not be said to have no jurisdiction to give release of the said vehicle in exercise of power under

Section 457 of the Cr. P.C. Learned Additional Standing Counsel submits that Section 457 Cr. P.C. will have no application when the vehicle in question has not been seized by a Police Officer.

The word “Police Officer” occurring in sub-Section (1) of Section 457 Cr. P.C. cannot have a restricted meaning since the only provision that gives power to criminal court to pass order with regard to interim release or custody of the property seizure whereof has been reported to it. It must include any officer authorized under any law to investigate case, to effect seizure and to launch prosecution before the criminal court. In the case of Abdul Rashid-v-State of Bihar 2001 Cri.L.J. 3290, the apex court has held that a confessional statement made by an accused under NDPS Act to an Excise officer, appointed under the Bihar and Orissa Excise Act is inadmissible being hit by Section 25 of the Evidence Act, since such Excise Officer is treated to be a Police Officer.

There is no other provisions in the Cr.P.C. except Section 457 Cr. P.C. for passing order for interim release of the vehicle by the criminal court. In case the words “Police Officer” occurring in Section 457(1) Cr. P.C. is given a restricted meaning so as to exclude officers of other departments like Excise etc. who are invested with power to investigate into the offence, effect seizure and launch prosecution and to report such seizure to the criminal court, it would cause injustice to the persons claiming to be entitled to custody of the property. Therefore, the words “Police Officer” in Section 457 Cr.P.C. must include an Excise Officer reporting such seizure to a criminal court in connection with the enquiry or trial of any criminal case.

Section 60(3) of the NDPS Act is no bar for interim release of the vehicle as the said provision is only substantive in nature and speaks of the liability of the vehicle to be confiscated where the owner fails to prove that it was used without his knowledge or connivance or the knowledge and connivance of his agent in charge of the vehicle.

In the light of the discussions made above. I allow the revision and set aside the impugned order and direct the learned Sessions Judge-cum-Special Judge, Ganjam, Berhampur to release the vehicle in question in favour of the petitioner after being satisfied about the petitioner’s ownership over the vehicle in question subject to the following conditions:-

i) that the petitioner shall furnish cash security of Rs.15,000/- (rupees fifteen thousand) and property security to the tune of Rs.30,000/- (rupees thirty thousand) with two sureties each for the like amount to the satisfaction of the leaned court below with the condition that

the offending motorcycle shall be produced before the trial court as and when the Court directs to do so;

ii) the petitioner shall not transfer or dispose of the offending motorcycle to anyone else and shall not make any change in its body, colour or Engine. It is needless to say that make, colour, chassis number and Engine number of the offending motorcycle shall be furnished by the petitioner before the trial Court with an undertaking that no damage shall be caused or no part of the motorcycle be substituted. He shall keep the motorcycle insured at all times and produce the Insurance Certificate before the trial court as and when called upon;

iii) the petitioner shall also file an undertaking before the trial court that the offending motorcycle shall not be used for commission of any offence; and

iv) before giving interim custody of the offending motorcycle to the petitioner, three coloured photographs of cabinet size from different angles clearly indicating registration number and other particulars of the vehicle shall be kept on file. The expenses for the photographs shall be borne by the petitioner. The CRLREV is accordingly disposed of.

Revision disposed of.

2013 (I) ILR - CUT- 1070

B. K. NAYAK, J.

JCRLA NO. 38 OF 1997 (Dt.16.01.2013)

DHADIA @ GOPAL CHANDRA MISHRA ……..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.465

Appellant charged for the offences U/ss 302, 201, 34 I.P.C. during trial – Trial Court added charges U/ss 498-A, 304-B I.P.C. and

Section 4 of D.P. Act on the date of delivery of judgment and convicted the appellant only on newly added charges – No de-novo trial for the above charge – No opportunity for the appellant to explain any incriminating evidence or circumstance in relation to such charges – Held, a failure of justice has occasioned as envisaged U/s.365 Cr. P.C. – Conviction of the appellant U/s. 498-A, 304-B I.P.C. and Section 4 D.P. Act is liable to be set aside. (Para 9)

For Appellant - Mr. D.P. Dhal.
For Respondent - Addl. Standing Counsel.

B.K.NAYAK, J. This appeal from the jail has been preferred by the appellant-Dhadia @ Gopal Chandra Mishra challenging the judgment dated 18.12.1996 passed by the 1st Additional Sessions Judge, Puri in S.T. Case No.39/324 of 1994 convicting the appellant and the co-accused under Sections 498-A/304-B/34 of the I.P.C. and Section 4 of the D.P. Act and sentencing him to undergo R.I. for seven years under Section 304-B of the I.P.C. and R.I. for one year under Section 498-A of the I.P.C. and S.I. for three months for the offence under Section 4 of the D.P. Act, while acquitting the accused persons of the charges under Sections 302/201/34 of the I.P.C.

2. The prosecution case as revealed from the F.I.R. lodged by one Golekha Ch. Praharaj is that on 30.11.1993 he came to the house of his sister, Kalpana, the wife of appellant to see her and her young son in village-Parajapada, but he found his sister, nephew and the appellant absent in the house. The appellant's father, who was available in the house on being asked, could not say their whereabouts. Thereafter, he learnt from some co-villagers of the appellant that the appellant along with some of his family members and the co-accused, Rajendra Mishra have killed the informant's sister and nephew and concealed the dead bodies. It was further alleged that four years before the informant's sister was given her marriage to the present appellant and that the appellant and the co-accused, who happens to be the husband of the sister of the appellant, were demanding dowry and torturing the deceased lady on that ground. It is alleged that during course of investigation the appellant confessed to have killed his wife and child and concealed the dead bodies before the police and gave recovery of the said bodies. On the basis of the F.I.R. the police registered the case under Sections 498-A/304-B/201/34 of the I.P.C. read with Section 4 of the D.P. Act. On completion of investigation, the police however did not find a case under Sections 498-A/304-B of the I.P.C. and instead filed charge-sheet against the appellant and the co-accused under Sections 302/201/34 of the

I.P.C. for which charges were framed and trial proceeded against the accused persons.

3. The defence plea was a complete denial of the complicity of the accused persons. The further plea of the present appellant was that his wife, Kalpana had some education and she was older to the appellant and that the appellant himself was completely illiterate and deaf and therefore she could not pull on well with him and they were in quarrelling terms. The deceased used to leave the house of the accused very often, even during night and that on one such occasion the body of the deceased lady and the child were found in different places and he was in no way connected with their death.

4. Altogether, eleven witnesses were examined on behalf of the prosecution to prove the charges and the defence examined none.

On consideration of evidence, the trial court found the accused persons not guilty of the charges under Sections 302/201/34 of the I.P.C. But the judgment reveals that the trial court being satisfied that offences under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act were established, added those charges. The order sheet of the date of the judgment, i.e., 18.12.1996 in the Sessions case record however reveals that the trial court first found both the accused persons including the appellant guilty under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act and thereafter framed charges for those offences and read over and explained the charges to them, who pleaded not guilty and thereafter sentenced them.

5. It is submitted by the learned counsel appearing for the appellant that P.Ws.1,7 and 10 are the material witnesses on whose evidence the trial court has relied upon and recorded the judgment of conviction and that their evidence does not in any manner prove the charges under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act against the appellant. It is his further submission that the co-convict –Rajendra Mishra had filed Criminal Appeal No.15 of 1997 before this Court against the very same judgment, which was allowed and his conviction and sentence were set aside vide judgment dated 11.12.2008 with the finding that there was no sufficient material to prove the charges and therefore, applying the same standard of appreciation of evidence, it can be said that the charges against the appellant also do not stand substantiated by such evidence. It is his further submission that the offence under Sections 498-A/304-B of the I.P.C. are not cognate offences with the offence of murder punishable under Section 302 of the I.P.C. and that the ingredients of the offences are

completely different than the ingredients of offence of murder and that in case the trial court came to the conclusion that there are materials with regard to commission of offences under Sections 498-A/304-B of the I.P.C. and section 4 of the D.P. Act, instead of convicting outright the appellant for those offences by adding new charges on the date of the judgment without giving any opportunity to the appellant to enter upon his defence to such charges, it should have directed a de novo trial. It is his submission that the trial court has committed an illegality by finding the accused persons guilty of the offence under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act in the judgment and thereafter adding those charges in exercise of power under Section 216 of the Cr.P.C.

The learned State Counsel, on the other hand, submits that the judgment passed in favour of the co-convict in Criminal Appeal No.15 of 1997 shall not be binding on this Court as the present appellant being the husband of the deceased lady, stands on a different footing.

6. Admittedly, the charges under Sections 498-A/304-B of the I.P.C and Section 4 of the D.P. Act have been added on the date of delivery of the judgment and such fact even forms part of the judgment itself. The order sheet of the date of the judgment of the Sessions case reveals that before addition of such charges the accused persons have already been found guilty of those charges and subsequently such additional charges were framed and readover and explained to the accused persons.

7. Section 216 of the Cr.P.C. which empowers the court to alter or add to any charge provides as under :

"**216. Court may alter charge**.-

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

8. Section 217, Cr.P.C. which has direct nexus with Section 216 of the Cr.P.C. and is relevant for our purpose provides as under :

"**217. Recall of witnesses when charge altered**.- Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material."

9. Offences punishable under Sections 498-A/304-B of the I.P.C. and section 4 of the D.P. Act and under Section 302 of the I.P.C. are not cognate offences as because though murder of a woman which amounts to causing unnatural death may constitute one of the ingredients of the offence of causing dowry death under Section 304-B of the I.P.C., the latter offence however have other ingredients which are not common to the ingredients of the offence of murder. The appellant was charge-sheeted by the police and also charged by the court during trial for the offences under Sections 302/201/34 of the I.P.C. He did not have the notice that he has also to face the charges under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act and therefore his defence was not directed against such charges which were added by the trial court in the impugned judgment itself. Evidently, the appellant's examination under Sections, 313, Cr.P.C. has not been directed in that light and, therefore, the appellant had no opportunity to explain any incriminating evidence/circumstances in relation to such new charges. The appellant, therefore, must be said to have been prejudiced due

to such addition of charges at the time of delivery of judgment, particularly when the trial court did not proceed to conduct a de novo trial for the newly added charges and this has definitely occasioned a failure of justice as envisaged under Section 465 of the Cr.P.C. On this ground alone the conviction of the appellant is liable to be set aside.

10. With regard to the merits of the case, it is necessary to assess the evidence of P.Ws.1, 7 and 10 on which reliance has been placed by the trial court. P.W.1 is the informant, who is the brother of the deceased lady. P.W.7 is the elder sister and P.W.10 is the mother of the deceased. Their evidence reveal that at the time of negotiation of marriage of the appellant with the deceased there was demand of dowry of Rs.10,000/- but the evidence of P.W.1 clearly reveals that the demand was made by the co-accused and not by the present appellant. P.W.7 in her testimony states that she does not have the direct knowledge about the demand of dowry and the ill-treatment of the deceased for non-fulfilment of the demand. With regard to demand and torture to the victim evidence of P.W.1 further reveals that it was the co-accused, who whenever came to the house of the deceased was demanding the balance dowry amount of Rs.5,000/- and at his behest she was being tortured. Although P.W.10 stated in her evidence in an omnibus manner that for non-payment of balance amount of dowry the in-laws tortured the victim, it is apparent that she stated before the Investigating Officer that she gave the victim in marriage with the appellant without any talk of dowry. The evidence of the I.O., P.W.11 clearly reveals that his investigation did not disclose commission of offences under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act for which he did not submit charge-sheet. There is also absolutely no evidence on record that soon before her death the deceased was subjected to cruelty on the ground of demand of dowry. In the judgment passed by this court in connected Criminal Appeal No.15 of 1997 filed by the co-convict it is found that there is no evidence whatsoever with regard to torture of the deceased on the ground of demand of dowry just before her unnatural death. I am also fully in agreement with the findings of this Court given in the said appeal and come to hold that there is absolutely no acceptable evidence against the appellant for commission of offences under Sections 498-A/304-B of the I.P.C. and Section 4 of the D.P. Act. Accordingly, the conviction and sentence of the appellant for the said offences cannot be sustained.

11. The Jail Criminal Appeal is therefore allowed and the impugned judgment is set aside and the accused-appellant is acquitted of the charges under Sections-498-A/304-B of the I.P.C. and Section 4 of the D.P. Act. It appears from the record that during this appeal the appellant has not been

released on bail. He has already suffered the sentence imposed by the trial court and it is not known whether he is released or not. In case he is still in jail, he shall be released forthwith, unless his custody is required in any other case.

Appeal allowed.

2013 (I) ILR - CUT-1076

B. K. NAYAK, J.

CRLMC. NO.1774 OF 2009 (Dt.08.01.2013)

KISHORE KALET ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.319.

The Court must have reasonable satisfaction from the evidence already collected during trial or in the inquiry that some other person, who is not arraigned as an accused in that case has committed an offence and for such offence that other person could as well be tried along with the already arraigned accused – However, entertaining some doubt about the involvement of another person in the offence is not enough for the Court to exercise such discretionary power.

In this case though the informant in the F.I.R. and in the Examination-in-Chief stated that he learnt that O.P.3 & 4 called the victim girl and took her to the bus stand where the accused was waiting, the victim girl having not stated about the involvement of O.P.3 & 4 in the occurrence before the I.O. or before the C.J.M. Port Blair where she was first produced or before the S.D.J.M., Rourkela there is no reasonable prospect of the case against O.P.3 & 4 ending in conviction – Held, there is no infirmity in the impugned order passed by the trial Court for interference by this Court. (Para 5)

Case laws Referred to:-

1.(2000) 3 SCC 262 : (Michael Machado & Anr.-V-Central Bureau of Investigation & Anr.).
2.(2009) 42 OCR 645 : (Ramakanta Behera @ Sahu & Ors.-V- State of Orissa)
3.(2012) 52 OCR-1 : (Asish Kumar Nayak & Anr.-V- State of Orissa).
4.(2012) 52 OCR 814 : (Bhagirathi Jena & Ors.-V- State of Orissa).

For Petitioner - B.Panigrahi
For Opp.Parties - R.N.Behera

Heard learned counsel for the parties.

2. Petition filed by the informant-petitioner through the learned A.P.P. under Section 319 of the Cr.P.C. to issue warrant of arrest and proceed against the present opposite party nos.3 and 4 in S.T. Case No.102/30 of 2008 having been rejected by the learned ACJM-cum-ASJ, Rourkela, the petitioner has come up before this Court in the present revision.

3. On the basis of F.I.R. lodged by the present petitioner, Tangarpali P.S. Case No.51 dated 09.04.2008 was registered against the present opposite party no.2 under Section 363 of the I.P.C. and ultimately charge-sheet was submitted under Section 366 of the I.P.C. and the case being committed it is now pending before the ACJM-cum-ASJ, Rourkela in S.T. Case No.102/30 of 2008. It is stated that a protest petition was filed for taking cognizance against the present opposite party nos.3 and 4 which had been rejected on the ground that the petitioner could invoke the discretion of the court under Section 319 of the Cr.P.C. Accordingly, in the sessions trial petition under Section 319 of the Cr.P.C. was filed by the petitioner for issuance of process to opposite party nos.3 and 4, which has been rejected by the impugned order on the ground that the victim girl has neither stated before police nor before the C.J.M., Port Blair, where she was produced, nor before the learned S.D.J.M., Rourkela about any assistance rendered by opposite party nos.3 and 4 to opposite party no.2 for kidnapping her (victim girl) and that another witness, namely P.W.8 also pleaded his ignorance about the involvement of the said opposite parties and that the I.O. also stated that he had not found during investigation the involvement of the said opposite parties and as such no prima facie case is made out against opposite party nos.3 and 4 for issuance of process against them.

4. Learned counsel for opposite party no.3 and 4 submits that the evidence collected is not sufficient for the court to arrive at a conclusion that if un-rebutted such evidence would lead to conviction of opposite party nos.3 and 4 in the case.

5. In the case of ***Michael Machado and another v. Central Bureau*** of ***Investigation and another***, reported in (2000) 3 SCC 262 the apex Court explaining the scope and ambit of Section 319, Cr. P.C. has observed as follows:

> "The Court must have reasonable satisfaction from the evidence already collected during trial or in the inquiry regarding two aspects; First, that some other person, who is not arraigned as an accused in that case has committed an offence. Second, that for such offence that other person could as well be tried along with the already arraigned accused. It is not enough that the Court entertain some doubt, from the evidence, about the involvement of another person in the offence. But even then, what is conferred on the Court is only a discretion as could be discerned from the words "the Court may proceed against such person". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the Court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the Court had spent for collecting such evidence. It must be remembered that there is no compelling duty on the Court to proceed against such other person.
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> Xxx xxx xxx
>
> Unless the Court is hopeful that there is a reasonable prospect of the case as against the newly-brought accused ending in being convicted of the offence concerned, the court should refrain from adopting such a course of action."

The above decision was relied upon by this Court in the cases of ***Ramakanta Behera @ Sahu & others v. State of Orissa*** reported (2009) 42 OCR 645, ***Asish Kumar Nayak and another v. State of Orissa,*** reported in (2012) 52 OCR-1 and ***Bhagirathi Jena & others v. State of Orissa*** reported in (2012) 52 OCR 814.

6. In the instant case, it is apparent that though in the F.I.R. and in examination-in-chief the informant stated that he learnt that opposite party nos.3 and 4 called the victim girl and took her to the bus stand, where the accused was waiting, and boarded them in the bus, admittedly, he does not have any direct knowledge of the same, which is instead in the nature of

hearsay. The only evidence being that of the victim girl (P.W.3), she having not stated about involvement of opposite party nos.3 and 4 in the occurrence before the I.O. or before the C.J.M., Port Blair, where she was first produced or before the S.D.J.M., Rourkela, there is no reasonable prospect of the case as against opposite party nos.3 and 4 ending in conviction. Therefore, the discretionary power of the learned court below has been rightly exercised in rejecting the petition. The impugned order does not suffer from any infirmity and the CRLREV is accordingly dismissed.

Revision dismissed.

2013 (I) ILR - CUT-1079

B. K. NAYAK, J.

CRLA NO. 519 OF 2OO9 (Dt.09.01.2013)

HARIHAR KHARASUDHA PATNAIK …….Appellant

.*Vrs.*

STATE OF ORISSA ……Respondent

CRIMINAL PROCEDURE CODE, 1973 – S.389 (1)

Power of the Appellate Court – Appellate Court in an exceptional case, may stay conviction and sentence but such power must be exercised with great circumspection and caution where the appellant with all fairness satisfies the Court that failure to stay the conviction would lead to injustice and irreversible consequences.

In this case provisional pension sanctioned in favour of the appellant has been withdrawn as per Rule 7 of the OCS (Pension) Rules 1992 in view of his conviction – Withdrawal of pension does not amount to an irreversible consequence since in the event the conviction is set aside in appeal the petitioner would be entitled to all arrears of pension – Held, the appellant-petitioner is not entitled to any relief sought for. (Para 11)

Case laws Referred to:-

1.2010(Supp-I) OLR-87 : (Harihar Mishra-V- Republic of India (CB.I.Bhubaneswar)
2.(1995)2 SCC 513 : (Rama Narang-V- Ramesh Narang & Ors.)
3.(2001)21 OCR(SC)325 : (K.C.Sareen-V-C.B.I., Chandigarh)
4.(2007)1 SCC 673 : (Ravikant S.Patil-V- Savabhouma S. Bagali)
5.(2012)53 OCR(SC) 1233 : (State of Maharashtra Through CBI, Anti Corruption Branch, Mumbari-V- Balakrishna Dattatrya Kumbhar).

For Appellant - Mr. J.R. Dash
For Respondent - Mr. S. Mohanty, Standing Counsel (Vigilance).

Heard Mr.J.R. Dash, learned counsel for the appellant-petitioner and Mr. S. Mohanty, learned Standing Counsel (Vigilance).

2. This is an application under Section 389 (1) of the Cr.P.C. filed by the appellant-petitioner for staying the conviction of the petitioner as recorded by the learned Special Judge (Vigilance), Jeypore in G.R. Case No.28/95 (V)/(T.R.No.81 of 2007).

3. The petitioner and three others were tried in the aforesaid G.R.Case No. 28/95 (V)/(T.R.No.81 of 2007) by the learned Special Judge (Vigilance), Jeypore for charges under Section 13(2) read with Section 13(1) (d) of the Prevention of Corruption Act and Sections 467/477-A/34 of the I.P.C. for committing criminal misconduct as public servants by abusing their official position in manipulating result sheets of M.E. students with the intention of forging the said result sheets and thereby declared some failed students as passed in furtherance of their common intention during 04.07.1994 and onwards. The petitioner was the Headmaster of the M.E. School at the relevant time.

4. The trial court convicted all the accused persons including the petitioner for the charges framed against them and sentenced each of them to undergo R.I. for two years and to pay a fine of Rs.2,000/-, in default to undergo R.I. for six months for the offence under Section 467 of the I.P.C. and R.I. for one year and to pay a fine of Rs.1,000/- with default sentence on each count for the offence under Section 13(1) (d) of the Prevention of Corruption Act and Section 477-A of the I.P.C. The petitioner has filed Criminal Appeal challenging the said order and the appeal has been admitted.

5. It is stated in the present petition that the petitioner is a retired person and in the meantime and after his conviction, the Inspector of Schools, Jeypore Circle, Jeypore vide order dated 18.01.2010 intimated to the petitioner that the provisional pension sanctioned in his favour has been withdrawn as per Rule 7 of the O.C.S. (Pension) Rules,1992 in view of his conviction in the aforesaid case. The said order has been annexed as Annexure-1 to the petition. The order further reveals that it was passed as per the direction of the Government of Orissa, General Administration (Vigilance) Department vide their letter no.7036/V. Cr(N) dated 24.11.2009 communicated vide Memo No.IVSME/E(II) 252/09 229/SME dated 05.01.2010 of the Government of Orissa, School and Mass Education Department. The said order reveals that the petitioner had been sanctioned with provisional pension by order of the Inspector of Schools dated 07.07.2008.

6. It is the submission of the learned counsel for the petitioner that since the petitioner is a retired Headmaster, he solely depends on his pension for maintaining his family and has no other source of income and that unless the conviction is stayed, he would continue to suffer till the appeal is disposed of. He also submits that he has a good case on merits in the appeal. He relies upon the decision of this Court reported in ***2010 (Supp.-I) OLR-87***: ***Harihar Mihsra v. Republic of India (C.B.I., Bhubaneswar)*** and also the judgment of the apex Court reported in ***(1995) 2 Supreme Court Cases 513***: ***Rama Narang v. Ramesh Narang and others***.

7. The learned Standing Counsel for the Vigilance Department, on the other hand, submits that the petitioner, a public servant, having been convicted for misconduct as such public servant under the provisions of Prevention of Corruption Act, allowing his conviction to be stayed would enure to his benefit for avoiding the consequences of withdrawal of pension as provided under Rule 7 of the O.C.S. (Pension) Rules which would impair the morale of other public servants similarly situated and erode the confidence of the people in public institutions and have demoralizing effect on the honest public servants**.** He relies on the decisions of the apex Court reported in ***(2001) 21 OCR (SC) 325: K.C. Sareen v. C.B.I., Chandigarh, (2007) 1 SCC 673: Ravikant S. Patil v. Savabhouma S. Bagali*** and (***2012) 53 OCR (SC) 1233***: ***State of Maharashtra Through CBI, Anti Corruption Branch, Mumbai v. Balakrishna Dattatrya Kumbhar***.

8. The Supreme Court in the case of ***Balakrishna Dattatrya Kumbhar*** (supra) have taken into consideration all previous decisions of the apex

Court including the decision in the case of ***Rama Narang*** (supra) and ***Ravikant S. Patil*** (supra) and observed as follows in paragraphs-6 and 10 :

> "**6.** In **Rama Narang v. Ramesh Narang & Ors.,** (1995) 2 SCC 513, this Court dealt with the said issue elaborately and held that if, in a befitting case, the High Court feels satisfied that the order of conviction needs to be suspended, or stayed, so that the convicted person does not have to suffer from a certain disqualification, provided for by some other statute, it may exercise its power in this regard because otherwise, the damage done cannot be undone. However, while granting such stay of conviction, the court must examine all the pros and cons and then, only if it feels satisfied that a case has infact been made out for grant of such an order, it may proceed to do so and even while doing so, it may, if it so consider it appropriate, impose such conditions as are deemed appropriate, to protect the interests of the other parties. Further, it is the duty of the applicant to specifically invite the attention of the appellate court as regards the consequences, which are likely to follow, upon grant of such stay, so as to enable it to apply its mind fully to the issue, since under Section 389 (1), Cr.P.C., the court is under an obligation to support its order in a manner provided therein, the same being, "for the reasons to be recorded by it in writing.
>
> **10**. In **Ravikant S. Patil v. Savabhouma S. Bagali,** (2007) 1 SCC 673, this Court held as under:-
>
> "It deserves to be clarified that an order granting stay of conviction is not the rule but is an exception to be resorted to in rare cases depending upon the facts of a case. Where the execution of the sentence is stayed, the conviction continues to operate. But where conviction itself is stayed, the effect is that the conviction will not be operative from the date of stay. An order of stay, of course, does not render the conviction non-existent, but only non operative…… All these decisions, while recognizing the power to stay conviction, have cautioned and clarified that *such power should be exercised only in exceptional circumstances where failure to stay the conviction, would lead to injustice and irreversible consequences."*

9. In summing up the apex Court in paragraph-12 of the judgment in the case of ***Balakrishna Dattatrya Kumbhar*** (supra) observed as follows :

"**12.** Thus, in view of the aforesaid discussion, a clear picture emerges to the effect that, the Appellate Court in an exceptional case, may put the conviction in abeyance along with the sentence, but such power must be exercised with great circumspection and caution, for the purpose of which, the applicant must satisfy the Court as regards the evil that is likely to befall him, if the said conviction is not suspended. The Court has to consider all the facts as are pleaded by the applicant, in a judicious manner and examined whether the facts and circumstances involved in the case are such, that they warrant such a course of action by it. The Court additionally, must record in writing, its reasons for granting such relief. Relief of staying the order of conviction cannot be granted only on the ground that an employee may lose his job, if the same is not done."

10. This Court in the case of ***Harihar Mihsra*** (supra) after taking note of several decisions summed up the scope of power under Section 389 (1) of the Cr.P.C. in paragraph-10 of the order as follows :

"**10.** From the discussion as aforesaid, five broad principles emerge, which, in my considered view, is a guide so far as exercise of discretion under Section 389 (1), Cr.P.C. in relation to stay/suspension of conviction is concerned. They may be called the 'Panchasheel' for exercise of discretion under Section 389 (1), Cr.P.C. for suspension of an order of conviction. They are-

(i) The appellant, who seeks interference of the appellate Court under Section 389(1), Cr.P.C. so far as the order of conviction is concerned, must come with clean hands, and with due frankness and fairness specifically draw attention of the appellate Court to the specific consequences he is going to suffer, if discretion by the Court is not exercised in his favour.

(ii) Such discretion by the appellate Court may be exercised in favour of the appellant only in rare and exceptional cases depending upon the special facts of the case and not as a matter of course.

(iii) Such discretion may be exercised only where failure to stay the conviction would lead to injustice and irreversible consequences. The Court has to examine carefully on the basis of materials supplied and materials available on record as to whether the consequences sought to visit the appellant at present or on a future date is/are real.

(iv) While exercising the discretion, the appellate Court has a duty to look at all the aspects including ramification of keeping the conviction in abeyance, and it is under further obligation to support its order for reasons to be recorded by it in writing.

(v) In case of public servants convicted of corruption charges, the discretion should not be exercised."

11. Rule 7 of the Orissa Civil Services (Pension) Rules,1992 reserves the right with the Government to withhold or withdraw pension in full or in part, whether permanently or for a specified period, if in any departmental proceeding or judicial proceeding, the pensioner is found guilty of grave misconduct or negligence in duty during the period of his service.

Apparently the power under Rule 7 of O.C.S. (Pension) Rules has been exercised by the State Government, directing withdrawal of the provisional pension sanctioned in favour of the petitioner. As has been seen from the decisions of the apex Court that the power to stay conviction in terms of Section 389(1), Cr.P.C. should be exercised only in exceptional circumstances where failure to stay the conviction would lead *to injustice and irreversible consequences*. Withdrawal of pension does not amount to an irreversible consequence, inasmuch as in the event the conviction is set aside in appeal, the petitioner would be entitled to all arrears of pension. Though the learned counsel for the petitioner has relied upon the case of ***Harihar Mishra*** (supra), which was not a case under the P.C. Act, even going by 5th principle of 'Panchasheel' summed up in paragraph-10 of the said judgment, the petitioner is not entitled to relief of stay of conviction as he has been convicted for corruption charges under the provisions of the Prevention of Corruption Act.

In the aforesaid scenario, I find no merit in the petition, which is accordingly dismissed.

Appeal dismissed.

2013 (I) ILR - CUT-1084

B. K. MISRA, J.

W.P.(C) NO. 5379 OF 2011 (Dt.16.01.2013)

JAYANTA KUMAR SAHU .....Petitioner

.*Vrs.*

LAXMIDHAR SAHU ……..Opp.Party

CIVIL PROCEDURE CODE, 1908 – O-6, R-17

Amendment of plaint can be filed at any stage of the proceeding and delay is not always a factor to refuse amendment – Primary duty of the Court to shorten litigation and it is not required to go in to the correctness or falsity of the case while considering the amendment petition - Since the proposed amendment are only elucidation of some facts which are already on record and no new facts are introduced the learned Court below should not have disallowed the prayer for amendment – Held, impugned order rejecting the application for amendment is set aside.

(Para 10)

Case laws Referred to:-

1.2009 (II) OLR (SC) 815 : (Revajeetu Builders & Developers-V- Narayanaswamy & Sons & Ors.)
2.AIR 1983 SC 462 : (Panchdeo Narain Srivastava-V- Km. Jyoti Sahay & Anr.)
3.AIR 1974 Orissa 36 : (Gobinda Sahoo-V- Ram Chandra Nanda & Anr.)
4.AIR 1989 SC 2206 : (Owners & Parties interested in M.V. "Vali Pero"-V- Fernandeo Lopez and Ors.)
5.2006(II) OLR (SC) 561 : (Rajesh Kumar Aggarwal & Ors.-V- K.K.Modi & Ors.)
6.2001(1) OLR (SC) 475 : (Ragu Thilak D. John-V- S. Rayappan & Ors.).

For Petitioner - Mr. S.P.Mishra, S.Nanda, S.K.Mohanty, A.K.Dash, B.S.Panigrahi.
For Opp.Party - Mr. Trilochan Rath.

B.K.MISRA, J The present petitioner being the plaintiff instituted a suit i.e. Civil Suit No.5 of the year, 2010 for injunction simplicitor in the court of learned Civil Judge (Jr. Divn.), Keonjhar. The defendant in the said suit who is the father of the present petitioner is the opposite party in this writ petition. In the said suit the present opposite party entered appearance and filed his written statement-cum-counter claim praying therein for restraining the present petitioner permanently from entering into the suit schedule land except the old house standing over 3370 Sq.ft. of land where the present opposite party claims to be residing. It is also prayed in the counter claim to restrain the present petitioner from making any new construction over the suit schedule land. The present petitioner filed his written statement to the

counter claim of the defendant in the said suit. It is the present petitioner who as plaintiff in the court below filed a petition under Order 6, Rule 17 of the Civil Procedure Code (hereinafter referred to as "C.P.C.") for incorporating certain amendments to the plaint. Objection was filed from the side of the defendant with regard to the amendment as has been prayed for by the plaintiff-petitioner.The prayer for amendment of the plaint was disallowed by the Civil Judge (Jr.Divn.), Keonjhar by his impugned order dated 28.2.2011 i.e. Annexure-6. The plaintiff being aggrieved with the said order of rejection of his prayer for amending the plaint has approached this Court for quashing the impugned order at Annexure-6.

2. I have heard the learned counsel appearing for the petitioner as well as the opposite party. I have gone through the pleadings of the respective parties as well as the impugned order as at Annexure-6. The admitted fact which emerges is that it is the opposite party the father of the petitioner, is the owner of the suit property. Though the plaintiff-petitioner claims that the said suit was acquired by the opposite party-defendant from out of the joint family fund, it is also an admitted fact that in the mutation proceeding the suit land has been recorded in the name of the present opposite party. It is also admitted by the plaintiff-petitioner that the opposite party-defendant remains in one of the room of the suit house.

3. Without entering into the merits of the cases of the respective parties, suffice is to say that when an application is filed under Order 6, Rule 17 of the C.P.C. the Court has to bear in mind the following aspects:-

(i) Whether the amendment sought is imperative for proper and effective adjudication of the case ?

(ii) Whether the application for amendment is bona fide or mala fide ?

(iii) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(iv) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(vi) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case? and

(vii) (vi) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

Above is the trite law as envisaged by the Apex Court in the case of **Revajeetu Builders and Developers V. Narayanaswamy and Sons and others, 2009 (II) OLR (S.C) 815.**

4. Admittedly**,** the parties have not yet adduced evidence in the suit in question. In the written statement-cum-counter claim the present opposite party-defendant has asserted that he constructed the house over the suit land and is residing there since 1990 which is his self acquired property and is never the joint family property nor the property of the plaintiff. But he has also admitted in his counter claim in Para-7 that the plaintiff-petitioner wanted to live separately from him and other family members and therefore he forced the opposite party for partition. In his written statement to the counter claim of the defendant, the present petitioner as plaintiff though admitted that the suit property was acquired by the defendant-opposite party, but when the family expanded and because of old age the defendant-opposite party was unable to bear the educational expenses of his sons and other house-hold expenses, he took over the management of the house and started his career as helper and became a driver later on and acquired trucks and his wife also acquired some vehicles. But the defendant-opposite party on the ill-advice of some inimical person of him started creating problems for which an agreement in the year 2009 was entered into in between the parties.

5. I have perused the petition filed under Order 6, Rule 17 of the C.P.C., seeking to incorporate certain amendments to the plaint and the objection filed thereto.

6. The learned counsel for the petitioner strenuously contended that no new facts are being introduced in the guise of amendment of the plaint but those are elucidations of the points which have already been averred to by the present petitioner in the plaint as well as in the written statement filed to the counter claim of the opposite party and it cannot be said that the nature and character of the suit would be changed if the proposed amendments are to be allowed and the defendant cannot be said to be taken by surprise by such amendment of the plaint.

7. After carefully examining the materials on record and after going through the application for amendment of the plaint, it appears that the apprehension of the opposite party that the nature and character of the suit would be changed if the proposed amendments are allowed is without any substance. The suit would remain as a suit for injunction simplicitor and whatever harassment that would be caused to the adversary can be

compensated by imposition of cost or otherwise. As I find in the instant case, the amendment which has been sought for and by addition of sub-para as para 4(a) before Para-5 of the plaint are elucidation of facts which are there in the original plaint as well as in the written statement filed by the present petitioner to the counter claim-cum-written statement filed by the opposite party in Civil Suit No.5 of 2010. There is no controversy with regard to the position of law as envisaged in Order 6, Rule, 2 of the C.P.C. that the materials facts are to be pleaded and not material particulars. If materials facts are there on record, those can be supplemented during evidence by keeping in mind the aforesaid position of law.

8. The contention of the learned counsel appearing for the opposite party that by the proposed amendment since the plaintiff-petitioner wants to withdraw the admission of facts, the same is impermissible. But I am unable to accept this contention of the learned counsel for the opposite party as it is the settled position of law that the admission made by the parties may be withdrawn or may be explained away and therefore it cannot be said that by amendment an admission fact cannot be withdrawn. **(*AIR 1983 S.C. 462, Panchdeo Narain Srivastava –v- Km. Jyoti Sahay and another)***. Similarly, on this point we can refer to a decision of this Court in the case of ***Gobinda Sahoo –v- Ram Chandra Nanda and another reported in AIR 1974 Orissa, 36***. The most salient factor in this case is that the parties have known the case which they are contesting and they would not be taken by surprise about the elucidation of facts which are already there in the plaint, by the proposed amendment in Para-4(a). Since in the instant case the amendment of the plaint is sought before the commencement of the hearing of the suit, the proviso to Order 6, Rule 17 is not at all applicable. It is the settled position of law that an amendment petition can be filed at any stage of the proceeding and delay is not always a factor to refuse the prayer for amendment. The primary duty of the Court is to shorten the litigation and the Court is not required to go into the correctness or falsity of the case in the amendment. It is also the trite law that the Court while deciding a prayer for amendment of the pleadings under Order 6, Rule 17 of the C.P.C. it should not adopt a hyper-technical approach but should take a liberal view taking into consideration the fact that the other side can be compensated with the costs. Technicalities of law should not be permitted to hinder the Courts in the administration of justice between the parties. The Rules of procedure are intended to be a handmade to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, in advertence or even infractions of the Rules of Procedure. **(*AIR 1989 S.C. 2206, Owners and Parties interested in M.V. "Vali Pero". –v- Fernandeo Lopez and others, 2006 (II) OLR (S.C.) 561, Rajesh***

Kumar Aggarwal and others –v- K.K.Modi and others, 2001 (1) OLR (S.C.) 475, Ragu Thilak D. John –v- S.Rayappan and others).

9. For the reasons aforesaid, I have not been able to persuade myself

to accept the findings of the learned Civil Judge (Jr.Divn.), Keonjhar that the proposed amendments would change the stand of the plaintiff and would change the nature and character of the plaint completely.

10. When no new facts are going to be introduced by incorporating the amendments to the plaint and when the proposed amendment are only elucidation of some facts which are already there on record and when the opposite party-defendant would not be taken by surprise in view of the written statement already filed by the plaintiff to his counter claim, the learned court below should not have disallowed the prayer for amendment of the plaint. Accordingly, the impugned order at Annexure-6 is set aside. The application for amendment of the plaint as filed by the petitioner stands allowed subject to payment of cost of Rs.2,000/- (Rupees two thousand) to the opposite party which shall be deposited by the petitioner within two weeks from the date of supply of certified copy of this order. In default of such payment of cost, the application for amendment of the plaint shall stand rejected. The learned Court below shall afford opportunity to the opposite party in filing additional written statement is he so desires, if the amendments are carried out.

11. Since the dispute is between the father and son, the learned trial court is directed to resort to the provisions of Section 89 of the C.P.C. and may refer the matter to the Permanent and Continuous Lok Adalat for brining out an amicable settlement to the dispute through mediation and conciliation and resolve the dispute as early as possible. The parties are directed to co-operate with the court to see that their dispute is resolved through the alternate dispute resolution mechanism.

12. In the aforesaid premises, the impugned order dated 20.09.2011 at Annexure-6 passed by the learned Civil Judge (Jr.Divn.), Keonjhar is set aside and the writ petition stands allowed.

Writ petition allowed.

2013 (I) ILR - CUT-1090

RAGHUBIR DASH, J.

BLAPL NO. 2768 OF 2013 (Dt.02.05.2013)

SIBA PRASAD KANHAR ……Petitioner

.Vrs.

STATE OF ODISHA …….Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S. 439
r/w Section 37 (1) (b) NDPS Act, 1985.

BAIL – Offence U/ss.8, 20 (b) (ii) (c) of the N.D.P.S. Act, 1985 – There must be reasonable ground for the Court to believe that the petitioner is not guilty of such offence and he is not likely to commit any offence while on bail - Held, prayer of the petitioner to be released on bail on the ground of parity as the Co-accused is released on bail, has no substance – Prayer for bail is rejected.

Case law Relied on:-

AIR 2000 S.C. 3661 : (Superintendent, Narcotics Central Bureau, Chennai-V- R. Paulsamy)

Case laws Referred to:-

1.1993 Cri.L.J. 260 : (Bidydhar Dolai-V- The State)
2.1993 Cri.L.J. 1785 (Allahabad High Court) : (Dadan Singh-V- State of U.P.).

For Petitioner - N.N. Mahapatra.
For Opp.Party - Addl.Standing Counsel.

Heard learned counsel for the petitioner and learned counsel for the State on the petition under Section 439 Cr.P.C.

The petitioner is alleged to have committed offences under Sections 8 and 20(b)(ii)(c) of the N.D.P.S. Act in 2(a)C.C. No.10 of 2011(N) arising out of P.R. No.15/2011-12 pending in the court of the learned Sessions Judge-cum-Special Judge, Berhampur.

On behalf of the petitioner, it is submitted that since one of the co-accused has already been released on bail under order passed in BLAPL No.29544 of 2012, the petitioner, who stands on the same footing, should

also be released on bail. As commercial quantity of 'Ganja' is involved in this case, it is submitted by the learned counsel for the petitioner that Section 37 of the N.D.P.S. Act will not be a bar to the case in hand inasmuch as there is clear violation of Section 50 of the N.D.P.S. Act.

On behalf of the State, it is submitted that since commercial quantity of 'Ganja' has been seized from the possession of the petitioner, Section 37 of the N.D.P.S. Act is applicable, with further submission that the petitioner's earlier two bail petitions having been dismissed as being withdrawn/not pressed, the present petition, without there being any change of circumstances, ought to be rejected.

It is true that co-accused Dillip Sahu is directed to be released on bail vide order dated 14.12.2012 passed by this Court in BLAPL No.29544 of 2012. But merely on the ground of parity, the present petitioner cannot be released on bail unless and until this Court is satisfied that the restrictions placed by Sub-clause (b) of Sub-section (1) of Section 37 of the N.D.P.S. Act are not applicable as against the present petitioner. Before granting the prayer for bail, this Court is to record its satisfaction that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. As per the prosecution, the petitioner and other co-accused persons were the occupants of an auto rickshaw loaded with five numbers of plastic bags found to have contained 161 Kgs. of 'Ganja'. Therefore, at this stage, it cannot be said that there are no reasonable grounds for believing the petitioner to be innocent or not guilty of the alleged offence.

As regards the submission that there is non-compliance of the mandatory provisions contained in Section 50 of the N.D.P.S. Act, in the facts and circumstances as narrated above, the provision of Section 50 of the Act is not applicable inasmuch as the recovery was not made from the person of the petitioner. Therefore, the decisions cited by the learned counsel for the petitioner in the case of ***Bidyadhar Dolai v. The State***, reported in ***1993 Cri. L.J. 260 (Orissa High Court)*** and in the case of ***Dadan Singh v. State of U.P.,*** reported in ***1993 Cri. L.J. 1785 (Allahabad High Court)*** are not applicable to the present case. However, it is relevant to mention the following observations made by the Hon'ble Supreme Court in the case of ***Superintendent, Narcotics Central Bureau, Chennai v. R. Paulsamy***, reported in ***AIR 2000 Supreme Court 3661:***

> "In the light of Sec. 37 of the Act no accused can be released on bail when the application is opposed by the public prosecutor

unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. It is unfortunate that matters which could be established only in offence regarding compliance with Secs.52 and 57 have been pre-judged by the learned single Judge at the stage of consideration for bail. The minimum which learned single Judge should have taken into account was the factual presumption in law position that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the learned single Judge during bail stage regarding the compliance of the formalities mentioned in those two sections."

In the facts and circumstances, the petitioner's prayer for bail is rejected. The BLAPL is accordingly dismissed.

Application dismissed.