I.M.QUDDUSI,ACJ & B.K.NAYAK,J.

SK.IBRAHIM -V- STATE OF ORISSA & ORS.*

JANUARY 22,2010.

ORISSA FOREST ACT, 1972 (ACT NO.14 OF 1972) – SEC.56(2-C)

Confiscation of vehicle – Vehicle carrying Kendu leaves without any authority

In this case petitioner had given the vehicle to his driver- Use of fake number plate at the time of seizure – Even if the petitioner instructed the driver not to use the vehicle for illegal purposes and he had no knowledge about the use of his vehicle illegally, the driver being the agent in charge of the vehicle knowingly used the same for Commission of forest offence. – Held, the vehicle cannot escape confiscation. (Para 11)

Case laws Referred to:

1.71(1991) C.L.T.157 : (State of Orissa represented through the Range Officer,Khurda,Forest Range -V- Kiran Sankar Panda & Ors.).

2. 94(2002) CLT.290 : (Malatilata Samal & Ors. -V- State of Orissa & Ors.)

3. AIR 2000 SC 2729 : (State of Karnataka -V- K.Krishnan).

For Petitioner – M/s. S.K.Mohapatra, C.K.Pradhan & B.B.Baisakh.

For Opp.Parties – Government Advocate.

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*W.P.(C) NO.15573 OF 2006. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.K.NAYAK, J. In this writ application the petitioner prays to quash the order of confiscation of his vehicle under Annexure-1 passed by the Authorised Officer-cum-A.C.F., Angul Forest Division, Angul in C.P. Case No.5 of 2005-06 and also the appellate order under Annexure-2 passed by the learned District Judge, Dhenkanal in FAO No.7 of 2006 confirming such confiscation order.

2. The facts of the case are that on 08.05.2005, the Forester, Panchamahala Forest Check Gate and his staff detected a Tata Sumo vehicle bearing registration number plate OR-02-J/9891 at 12.30 A.M. that was carrying 93 bundles of kendu leaves unauthorisedly. The three occupants of the said vehicle including the driver having failed to produce any document of authority regarding such transportation, the vehicle along with kendu leaves were seized and brought to the forest rest house, Angul. Further enquiry revealed that the kendu leaves were being transported from Kishorenagar area of Angul to Balijhari in the district of Cuttack. The Forest Range Officer, Purunagarh Range, Angul reported the matter on the basis of which confiscation proceeding no.5 of 2005-06 was initiated before the Authorised Officer-cum-ACF, Angul Forest Division, Angul.

3. Nearly three months after the seizure of the vehicle, the present petitioner claiming to be the owner of the said vehicle filed petitioner and a

show cause in the confiscation proceeding stating that the vehicle in question belonged to him and its actual registration number was OR-02H-3501 and that he had engaged one Sk.Salim Mohammad of Tusura, district-Kendrapara as driver and the driver had been specifically instructed not to carry contraband goods or forest produce. It was further stated that on 28.03.2005 the driver took the said vehicle with the permission of the petitioner for use in the marriage ceremony of a relation with a promise to return the vehicle after two days. The driver having not returned the vehicle till 31.03.2005, as promised, the petitioner went to his house on 10.4.2005, but failed to get any information about the vehicle and whereabouts of the driver from his family members. The petitioner thereafter lodged a report at Balichandrapur Police Station about the missing of the vehicle. The O.I.C., Balichandrapur P.S. having not taken any action, the petitioner approached the Superintendent of Police of Jajpur on 17.5.2005 whereafter the O.I.C., Balichandrapur P.S. registered P.S.Case No.56 dated 22.05.2005 under Section 407 of the I.P.C. against the driver and took up investigation. The driver remained absconding till 28.7.2005 when he was found by the petitioner's son driving a bus at Cuttack. The driver was then produced in Malgodown Police Station and during interrogation he disclosed that the vehicle (Tata Sumo) was seized by the Forest Staff, Angul Division on 08.05.2005. The I.O. along with the driver and the petitioner came to Angul on 29.7.2005 and on enquiry at the Forest Division office it was found that one Tata Sumo bearing Registration No.OR-02J-9891 was seized. At that time, the driver disclosed that he had displayed the fake number plate, as aforesaid, on the Tata Sumo belonging to the petitioner for illegal transportation of kendu leaves. On verification of the Engine and Chasis numbers of the seized Tata Sumo, it was found that it belonged to the petitioner and its real registration number was OR-02H-3501. The petitioner , therefore, contended before the Authorised Officer that despite his specific instruction not to use the vehicle for any illegal purposes, his driver transported kendu leaves unauthorisedly without the knowledge, consent or connivance of the petitioner and, therefore, the vehicle was not liable to be confiscated.

4. On consideration of the show cause of the petitioner and the materials/evidence on record the Authorised Officer arrived at the conclusion that the Tata Sumo was used for commission of forest offence and that the petitioner (owner) must be imputed with the knowledge of the commission of the offence by his agent, the driver, and, therefore passed the order of confiscation of the said vehicle.

5. The petitioner challenged the order of confiscation before the District Judge, Dhenkanal by filing an appeal under Section 56 (2-e) of the Orissa Forest Act which was registered as FAO No.7 of 2006. After hearing both

sides, the learned District Judge, Dhenkanal dismissed the appeal with the finding that since the petitioner's driver- Sk.Salim Mohammad had knowledge about the illegal transportation of forest produce, the petitioner cannot escape liability even though he had no personal knowledge of use of his vehicle for such illegal transportation.

6. In assailing the impugned orders, the learned counsel for the petitioner contended that the petitioner had instructed his driver Sk.Salim Mohammad not to use the vehicle for illegal purposes and that the petitioner having no knowledge or connivance about the use of his vehicle for transportation of kendu leaves by the driver, his vehicle was not liable to be confiscated and, therefore, the orders under Annexure-1 and 2 are bad and illegal.

7. The learned Government Advocate on the other hand contended that in view of the specific provision contained in Section 56(2-c) of the Orissa Forest Act, which provides that the owner of the vehicle can escape liability only by proving that the vehicle was used not only without his knowledge or connivance but also without the knowledge or connivance of his agent in charge of the vehicle, and that the petitioner's driver having admittedly the knowledge of illegal transportation of forest produce, the vehicle was liable to be confiscated and as such there is no infirmity in the orders under Annexure-1 and 2.

8. The contention raised on behalf of the petitioner has the reference to sub-section (2-c) of Section 56 of the Orissa Forest Act,1972 (hereinafter referred to as 'the Act'). Sub-section (2-c) runs as follows :

> "Without prejudice to the provisions of Sub-section (2-b), no order of confiscation under Sub-section (2-a) of any tool, rope, chain, boat, vehicle or cattle shall be made if the owner thereof proves to the satisfaction of the authorised officer that it was used without his knowledge or connivance or the knowledge or connivance of his agent, if any, or the person in charge of the tool rope, chain, boat vehicle or cattle, in committing the offence and that each of them had taken all reasonable and necessary precautions against such use."

9. The scope of Section 56 (2-c) directly came up for consideration before this Court in the case of **State of Orissa represented through the Range Officer, Khurda, Forest Range v. Kiran Sankar Panda & others;** 71 (1991) C.L.T. 157. In paragraph-3 of the aforesaid judgment this Court held as follows :

> " …..so far as confiscation of any tool, rope, chain, boat, vehicle or cattle is concerned, section 56 (2-c) has excluded the conception of mens rea by necessary implication, as already noted. We have said so because this section states that in case of confiscation of such articles, it is the owner who has to prove that the same had been used without his knowledge or connivance or the knowledge or

> connivance of his agent, if any, or the person in charge of the article in question. This would show that knowledge or connivance is assumed unless contrary is proved. The knowledge or connivance about which section 56 (2-c) has spoken is not confined to the owner but takes within its fold the knowledge or connivance of the agent, if any, or of the person in charge of the article in question. Not only this, this section further states that to escape the order of confiscation, it must be further proved that each of the concerned persons had taken all reasonable and necessary precaution against the use of the article in question in respect of the commission of the forest offence."

10. The aforesaid decision has also been subsequently followed in the case of **Malatilata Samal and others v. State of Orissa and others: 94 (2002) CLT 290**. This Court also took note of the views of the Hon'ble Apex Court in the case of **State of Karnataka v. K.Krishnan: AIR 2000 SC 2729**, where it was held that liberal approach in the matter with respect to the property seized which is liable to confiscation is uncalled for as the same is likely to frustrate the provisions of the Act.

11. In the instant case, the petitioner had given the vehicle to his driver, who admittedly himself knowingly used the vehicle for commission of forest offence. Even assuming for the sake of argument that the petitioner instructed the driver not to use the vehicle for illegal purposes and that he had no knowledge of the illegal user of the vehicle by his driver, he cannot escape the liability of confiscation as his driver, who was the agent in-charge of the vehicle, knowingly used the same for commission of forest offence.

12. In the context of the aforesaid established facts and in the light of the settled position of law as seen above, we do not find any merit in this writ petition, which is accordingly dismissed.

There shall, however, be no order as to costs.

Writ petition dismissed.

2010 (I) ILR-CUT- 275

I.M.QUDDUSI,ACJ & SANJU PANDA, J.

MIRZA SIDDIK -V- STATE OF ORISSA & ORS.*

JANUARY 14,2010.

ORISSA GOVERNMENT LAND SETTLEMENT ACT, 1962 (ACT 33 NO. OF1962) – SEC.7-A (3)

Land sanctioned infavour of the father of the petitioner as a concession for his serving in Army – He was declared eligible by the State Government – Resumption of land after the death of the father of the petitioner – Order challenged – In this case land settled in favour of an ex-army personnel under special lease principles of the Government but not under the provisions of the Act.

Held, Suo motu proceeding U/s.7-A(3) of the Act is without jurisdiction which is liable to be quashed.

For Petitioner –B.Mohanty

For Opp.Parties –State

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*W.P.(C) NO.12457 OF 2009. In the matter of an application under article 226 & 227 of the Constitution of India.

Heard learned counsel for the petitioner and the learned Government Advocate for the State-opposite parties.

By means of this writ petition, the petitioner has prayed for quashing of the impugned order dated 30.4.1998 passed by the Tahasildar, Bhubaneswar resuming the land settled in favour of the father of the petitioner and to restore the said land to the petitioner.

Facts of the case are that Mirza Bhikan, the father of the petitioner who was in Military service was declared by the Home Department of the State Government eligible for concession of land as per the Home Department Resolution No.20827/Poll. Dated 7.7.1969. Thereafter he filed a petition for allotment of Govt. land as admissible to Jawans out of Plot No.329 under khata no.274 of mouza Alakar. As after enquiry the aforesaid land was found to be of Chotajungle kisam and cannot be considered for settlement, the petitioner was asked to select another piece of land pursuant to which the petitioner prayed for allotment of land out of plot no.53 under khata no.201 in mouza Gothapatna. Considering the application of the petitioner and after due enquiry, the Tahasildar, Bhubaneswar by order dated 25.1.1990 passed in W.L.Case No.945 of 1987 settled Ac.5.000 acres of land appertaining to plot no.53 under khata no.201 in mouza Gothapatna in favour of the father of the petitioner. Thereafter the aforesaid land was mutated in the name of the father of the petitioner and he continued to possess the land by paying rent. Case of the petitioner is that his father after prolonged illness died on 1.3.2001 and the petitioner who was staying

outside went to pay the rent, the same was not accepted on the ground that the land has been restored to the Government.

Contention of the learned counsel for the petitioner is that the land having been allotted to his father under the Government Grants Act could not have been resumed by applying the provision of Section 3-B of O.G.L.S. His further contention is that no notice having been issued to his father or after his death to the petitioner before cancellation of the allotment, there was violation of the principles of natural justice.

It appears from the order of allotment that the land allotted to the father of the petitioner was reserved for settlement among the Jawans. It futher appears from the order of allotment that settlement of land with Jawans is governed by the provisions of Govt. Grants Act, 1895 as a measure of reward and not by the provisions of O.G.L.S.Act, 1962. From the impugned order it appears that the case was taken up on receipt of letter dated 15.12.1997 from the A.D.M., Khurda directing the Tahasildar, Bhubaneswar for resumption of the land in question on the ground that Sri R.C.Mishra, I.A.S. who was entrusted with the enquiry into the lease cases sanctioned in Bhubaneswar Tahasil also pointed out irregularities in regard to sanction of lease by the Tahasildar under the Govt. Grants Act and therefore it was necessary to resume the land. By the impugned order, the Tahasildar resumed the land, cancelled the patta issued in favour of the father of the petitioner and restored the land to Govt. holding.

A similar matter came up for consideration before this Court in Rajkishore Das V. State of Orissa and others, 1994(II) OLR 149 wherein an ex army personnel challenged the order of the Additional District Magistrate, Bhubaneswar canceling the land settled with him as war lease. In that case this Court held that the settlement of five acres of land in favour of ex-army personnel was not made in accordance with the provisions of the Orissa Government Land Settlement Act but the same was made under the lease principles read with Government notifications which made special provision for special categories of persons who could not be treated on the same footing as private individuals. Therefore, suo motu proceeding under Section 7-A(3) of the Act could not be resorted to for examining the correctness or otherwise of the settlement made in favour of a Jawan.

In the instant case the land was sanctioned in favour of the father of the petitioner as a concession for his serving in Army during the year 1962-1964 who was declared eligible by the State Government for such concession. The said land was resumed by the Tahasildar on the basis of the letter issued by the Additional District Magistrate, Khurda. This case is therefore covered by the decision of this Court in Rajakishore (supra).

In view of the above, we hold that the proceeding initiated for cancellation of the grant in favour of the father of the petitioner was without

jurisdiction and the order passed there under can not be maintained. We, therefore, allow this writ petition and quash the impugned order.

Writ petition allowed.

2010 (I) ILR-CUT- 278

B.P.DAS,J.

DILIP KUMAR RAY -V- STATE OF ORISSA & ORS.*

FEBRUARY 17,2010.

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

Quashing of F.I.R. – Petitioner was not arrayed as an accused in the F.I.R. – No material to implicate the petitioner – Even after taking the petitioner's case as in the F.I.R. and the charge sheet on its face value, if the allegations made are accepted and nothing is added there to or substracted there from, no offence is made out against the petitioner.

Held, continuance of Criminal Proceeding against the petitioner will amount to miscarriage of justice and abuse of the process of Court. (Para 9,10,11)

Case laws Referred to:-

1.AIR 1992 SC 604 : 1992 Supp.(1) SCC 335 : (State of Haryana -V-Bhajan Lal).

2.2002 Crl. LJ 132 : (Atique Ahmed -V- State of U.P).

For Petitioner - Shri Sanjit Mohanty, Sr.Advocate, with Shri S.P.Panda.

For Opp.Parties – Shri S.K.Mund & Shri D.K.Mohapatra, Standing Counsel (Vigilance).

*CRIMINAL MISC.CASE NO. 1895 OF 2002. In the matter of an application under Section 482 of the Code of Criminal Procedure, 1973.

B. P. DAS, J. This application under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.' in short) has been filed with a prayer to quash the First Information Report dated 23.5.2000, Annexure-1, lodged by Shri Binod Bihari Patel, Inspector of Vigilance, Sambalpur, so far as it relates to the petitioner, under Section 13 (2) read with Section 13 (1) (d) of the Prevention of Corruption Act, 1988 (hereinafter 'P.C.Act'), which has been registered by the Superintendent of Police, Vigilance, Sambalpur, as Sambalpur Vigilance P.S. Case No.30 of 2000. It may be noted here that during pendency of this application, charge-sheet against the petitioner has been filed.

2. The case of the petitioner in brief is that on 23.5.2000 the Inspector, Vigilance, Sambalpur, lodged the FIR, Annexure-1, alleging the therein that one Anil Kumar Chatterjee while posted as Forest Range Officer, Kuanrmunda Forest Range in Sundergarh district, abusing his official position during 1992-93 had issued number of false Timber Transit Permits

in favour of different persons without any supporting materials thereby putting the Govt. to heavy loss. An enquiry being conducted against said Chatterjee, it was found that he had issued T.T. Permits 53465/65/529/535/3121 dated 6.12.1992 in favour of one D. K. Ray of Puri showing transportation of Sal sizes 103 pieces, teak sizes 153 pieces, teak door 250 pieces, pannel shutters 16 pieces and window shutters 34 pieces stated to have been purchased as per cash memos. of Orissa Forest Development Corporation, Kalunga Saw Mill bearing no.9214/222 dated 23.10.1992. On enquiry, the record of OFDC, Kalunga Saw Mill, however, disclosed that no such cash memo. against which the Range Officer had issued the T.T. Permits had been issued. Similarly the said Range Officer had also issued T.T. Permit No.902/31/546/562 dated 17.3.1993 for 488 pieces of Sal sizes of 230.45 cft. in favour of one B.K.Das from Rourkela to Bhubaneswar against cash memo. of OFDC Kalunga Saw Mill No.926/92515 dated 6.3.1993 and 925/92454 dated 12.3.1993 for a total quantity of 13.419 cft. and 10.159 cft respectively.

It is alleged that on the basis of the aforesaid FIR, Annexure-1, the petitioner had been interrogated by the Inspector of Vigilance in the month of January/February, 2007 and his statements were recorded with regard to the allegations made in the FIR. The petitioner had clarified that as Director of the company (Mayfair Groups of Hotel) he had not purchased any timber in his personal capacity or authorized any person as Director to purchase the same or apply for any T.T. Permits and receive the same.

The petitioner has alleged that though the aforesaid prosecution has been launched against A. K. Chatterjee, Forest Range Officer, Kuanrmunda Forest Range, he has been entangled in that case with a motive to malign his reputation and harass him on account of political rivalry.

The petitioner was a Member of the Orissa Legislative Assembly having been elected from Rourkela Assembly Constituency and in March, 1990 he had been inducted into the State Cabinet as a Minister of State for Industry and he continued as such till March, 1995. In April, 1996 the petitioner had been elected as a Member of the Rajya Sabha and on 28.6.1996 had been inducted into the Union Cabinet headed by Shri H. D. Devegowda, the then Prime Minister of India.

It may be stated here that the petitioner has also filed an application under section 482, Cr.P.C. registered as Criminal Misc. Case No.771 of 2002 praying to quash the FIR dated 28.6.1996 filed against him by the Inspector of Vigilance, Cuttack, under section 13 (2) read with section 13 (1) (e) of the P.C. Act as well as the Cuttack Vigilance P.S.Case No.53 of 1996 registered by the Superintendent of Police, Vigilance, Cuttack.

While the aforesaid Criminal Misc. Case No.771 of 2002 was pending in this Court, the present FIR dated 23.5.2000 against A.K.Chatterjee was

pursued and the petitioner was interrogated. The petitioner has stated that the allegations made in the FIR even if accepted at their face value do not disclose commission of any offence and/or make out a case against him under the P. C. Act. The documents basing upon which the investigation was conducted and the criminal proceeding initiated for the T.T. Permits prepared by A.K. Chatterjee, who is an accused, do not indicate anything that the timbers had ever been purchased or supplied to the petitioner nor did the petitioner ever apply for any transit permit under the Orissa Timber and Other Forest Produce Transit Rules, 1980 ('T.T. Rules' in short) for transporting timber, as alleged in the FIR. The allegations made in the FIR were so absurd and inherently improbable that on that basis no prudent person could ever reach a just conclusion that there was sufficient ground for proceeding against the petitioner. Since the FIR did not disclose commission of any cognizable offence nor did make out a case against the petitioner under the P.C. Act, the petitioner has prayed to quash the investigation made on the basis of the information alleged or received.

3. Learned counsel for the petitioner placed reliance on a decision of the apex Court in the case of the ***State of Haryana v. Bhajan Lal, AIR 1992 SC 604 : 1992 Supp. (1) SCC 335***, and submitted that taking the last guideline indicated in the aforesaid decision into consideration, the FIR lodged, the case registered and the charge-sheet filed were attended with blatant and glaring mala fides and ulterior motive of wreaking vengeance on the petitioner due to the private and personal grudges of the powers that be. It would be worthwhile to quote hereunder the last guideline, i.e., guideline no.(7), as indicated in Bhajan Lal's case (supra) :

> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

4. Against the aforesaid prayer of the petitioner, the prosecution advanced its arguments and also filed written notes of submission. The prosecution in the written notes of submission has admitted that the petitioner had not been arrayed as an accused in the FIR but it only arrayed A. K. Chatterjee, Forest Range Officer, Kuarmunda, as an accused and a case had been registered only against said Chatterjee. Since the petitioner is not an accused in the FIR, this application filed under section 482, Cr.P.C. challenging the FIR is not maintainable.

5. Though the prosecution has taken the aforesaid stand, fact remains, during pendency of this application charge-sheet has been filed arraying the petitioner as an accused. Therefore, the ground taken by the prosecution that this application under section 482, Cr.P.C. challenging the FIR is not maintainable since the petitioner has not been arrayed as an accused in the FIR absolutely does not hold good. As the charge-sheet was filed on 15.5.2007, the aforesaid point was not available to be urged in the written notes of submission filed, after the charge-sheet was filed, on 10.7.2007. Even though charge-sheet was submitted by then, this aspect was overlooked by the learned counsel for the prosecution.

6. Learned counsel for the petitioner drew my attention to the charge-sheet wherein it is stated thus :-

> "During investigation, a case U/s 13(2) r/w 13(1)(d), P.C. Act, 1988/120-B IPC and Section 21 of Orissa Timber and Other Forest Produce Transit Rules, 1980 has been well established against the accused persons, Sri Anil Kumar Chatterjee, Forest Range Officer, Kuarmunda Range, Sri Dillip Kumar Ray, Ex-Hon'ble Minister of State, Industries, Sri Bishi Keshan Dash and Sri Ramsaya Pandey. Since Sri Chatterjee has retired from Govt. service, no sanction of prosecution is required for his trial. Sri Bishi Keshan Dash and Sri Ramsey Pandey being private persons, no sanction is also required for their trial. His Excellency Governor of Orissa has been requested to accord sanction as required U/s 19(2) of P.C. Act-1988 for prosecution of Sri Dillip Ray, the Ex-Hon'ble Minister of State, Orissa, Bhubaneswar. However, awaiting sanction of prosecution against Sri Dillip Ray, the present Hon'ble M.P. Rajya Sabha, I submit C.S. No.15 dt.11.5.2007 U/s 13(2) r/w 13(1)(d), P.C. Act, 1988/120-B IPC/21 Orissa Timber and Other Forest Produce Transit Rules, 1980 against all the accused persons noted above to stand their trial in the court of law."

7. Learned counsel for the petitioner further drew my attention to the statement of one A.C. Dinakar, IFS, D.F.O., Sundargarh, recorded during the investigation under section 161, Cr.P.C. wherein he has stated that A. K. Chatterjee was not authorized to issue the T.T. Permits and further that said Chatterjee had also not submitted or enclosed any application in Form No.II or bill or challan or cash memo. along with the duplicate copies of the T.T. Permits. Basing upon the aforesaid statements of Shri Dinakar, learned counsel for the petitioner submitted that it is an admitted fact that the petitioner had never made any application for T.T. Permit and/or removal of

forest produce and, therefore, he could never be held responsible for the same. He also drew my attention to Rules 4 and 7 of the T.T. Rules, which provide that a person desiring to remove forest produce under Rule 4 shall apply for transit permit to the Forest Officer having jurisdiction in Form II or Form III, as the case may be, together with a declaration and undertaking as required and only then his application would be entertained for consideration or refusal. According to the petitioner, the statement of Shri Dinakar shows that no application was filed by the present petitioner and if at all anything had been done by A.K.Chatterjee, by no stretch of imagination the petitioner is not to blame for that.

8. The aforesaid contention of the learned counsel for the petitioner cannot be brushed aside. Before going into the merit of the case, it is pertinent to mention here the order of this Court dated 26.2.2002, which is quoted below :-

> No coercive action or precipitative action against the petitioner shall be taken without the leave of this Court in regard to F.I.R. dated 23.5.2000/Sambalpur Vigilance P.S. Case No.30/2000……."
>
> On 11.3.2002 this Court passed the following order :
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> XXX XXX XXX
>
> Be that as it may, the order dated 26.2.2002 is very clear and unambiguous, and it leaves no scope for interpretation that there is stay of investigation. The Investigating Agency has only been directed not to take any coercive or precipitative action against the present petitioner without the leave of this Court because if such an action is taken during the pendency of the application, the entire application will become infructuous. Therefore, no clarification of the order dated 26.2.2002 is at all required."
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> XXX XXX XXX

Thereafter, when the matter was listed, adjournments were sought mostly by the counsel for the Vigilance Department on the ground that sanction of competent authority was awaited. On 10.4.2007 this Court in Misc. Case No.7/2002 while clarifying that sanction was not the issue in the present proceedings and the case could be heard on merit without awaiting sanction, fixed the case for final hearing on April 18, 2007. On April 18, 2007, on a joint request of the parties,

the case was adjourned to May 16, 2007. On May 16, 2007 charge-sheet was filed during pendency of this case.

9. In paragraph-6 of this judgment, the relevant portion of the charge-sheet has already been quoted. It was indicated by the learned counsel for the petitioner that the petitioner was not arrayed as an accused in the F.I.R. It is also pertinent to mention here that when the petitioner was challenging Vigilance P.S. Case No.53 of 1996 before this Court in Crl.Misc. Case No. 771 of 2002, the F.I.R. against Sri Anil Kumar Chatterjee, Forest Range Officer, Kuarmunda Range, was pursued which ultimately resulted in filling of the charge-sheet. The said Crl. Misc. Case has also been disposed of by this Court on 15.12.2008. In the present case, as contented by the learned counsel for the petitioner, perusal of the F.I.R. and charge-sheet, indicate that there is no material to implicate the petitioner, save and except the statement made in paragraph-4 charge-sheet that on 18.2.1992 Sri A.K.Chatterjee issued TT Permit in favour of Sri D.K.Ray, Director, M/s.Hotel Mayfair Beach Resort, Puri, authorizing transportation of 20.46 cft. Sal from Rourkela to Puri. Save and except saying that some TT Permits were issued in favour of Sri B.K.Das, C/o.D.K.Ray, Rourkela, and Sri D.K.Ray, Director, M/s.Hotel Mayfair Beach Resort, Puri, and Sri D.K.Ray, Director, M/s.Hotel Bishram Pvt. Ltd., there is nothing in the charge-sheet to show that any application was made by the Company or by D.K.Ray for issuance of TT Permit for transportation of the timbers, which is required under the T.T. Rules. Learned counsel for the prosecution also emphasized on the fact that Sri A.K.Chatterjee, Range Officer Kuarmunda, during his incumbency as Forest Range Officer during the year 1990-94 had shown undue official favour to Sri D.K.Ray, the then Hon'ble Minister of State and his employees, Bisikesan Das and Ramsaya Pandey by abusing his official position in issuing TT Permits, allowing transport of excess quantity of timbers and sized logs over and above the quantity actually purchased by the applicants. It is further indicated in the charge-sheet that Sri Dillip Kumar Ray, who was the then Minister of State, recommended the transfer of Sri Anil Kumar Chatterjee from Baliisankara K.L.Range to Kuarmunda Forest Range, This cannot be said to be material to connect the petitioner as an accused. As an elected representative of the people, there was no bar for him to recommend the transfer or stop the transfer of any employee. In this case, as it appears, the petitioner recommended the transfer of Sri Anil Kumar Chatterjee on the ground of illness of his wife, who was a cardiac patient. This cannot be a ground to make out a case against the petitioner. Even after taking the petitioner's case as in the F.I.R. and the charge-sheet on its face value, if the allegations made are accepted and nothing is added

thereto or subtracted therefrom, no offence is made out against the petitioner.

10. Learned counsel for the petitioner prayed for quashing of the charge-sheet but the same has not been challenged in this case and only the F.I.R. has been sought to be quashed. Learned counsel for the petitioner relied upon the decision in the case of **Atique Ahmed Vs. State of UP** reported in 2002 Crl.LJ 132, wherein a Division Bench of the Allahabad High Court observed that a constitutional court can take into account the subsequent events in order to do complete justice between the parties and to avoid multiplicity of litigations. Basing upon the said decision, learned counsel for the petitioner prayed to quash the charge-sheet.

11. After considering the submissions of the learned counsel for the parties, in my considered opinion, continuance of the criminal proceeding against the petitioner for the offence under the provisions of Section 13(2) read with Section 13(1)(d) of the P.C. Act, 1988/120-B IPC and Section 21 of Orissa Timber and Other Forest Produce Transit Rules, 1980 will amount to miscarriage of justice and abuse of process of court. As the petitioner has challenged only the F.I.R. and not the charge-sheet, I dispose of this Crl. Misc. Case with a direction that in the event sanction is received and the petitioner files an application before the trial court at the time of framing of charge to discharge him, the said application shall be allowed by the trial court.

Application allowed.

2010 (I) ILR-CUT- 285

B.P.DAS,J & S.C.PARIJA,J.

NITYANANDA BEHERA -V- STATE OF ORISSA & ANR.*

FEBRUARY 5,2010.

NOTARY ACT, 1952 (ACT NO.52 OF 1952) – SEC.5(2) r/w RULE 13(12)(b)

Notarial Certificate of practice – Renewal of – A Notary once registered is entitled to renewal as a matter of course – State Government has no discretion to refuse renewal.

In the present case there was allegations of misconduct against the petitioner – State Government after considering the misconduct exercised power under Rule 13(12)(b) (iii) of the Notaries Rules, letting off the petitioner with warning – Held, the self same misconduct can not be a ground for refusing renewal of his Notarial Certificate of Practice – Direction issued to Opp.Parties to grant renewal to the petitioner within four weeks. (Para 8,11 & 12)

Case law Referred to:-

AIR 1992 Kerala 152 : (State of Kerala & Ors.-V- K.U.Narayana Poduval & Ors.).

For Petitioner – M/s. Sujata Dash, R.P.Das & R.Choudhury.

For Opp.Parties – Addl.Government Advocate.

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*W.P.(C) NO.8647 OF 2006. In the matter of an application under articles 226 & 227 of the Constitution of India.

S.C.PARIJA, J. The decision of the State Government in the Law Department not to renew the Notarial Certificate of Practice of the petitioner, with effect from 16.7.1998, is under challenge in the present writ petition.

2. The case of the petitioner, as detailed in the writ petition, is that he enrolled as an advocate under the State Bar Council in the year 1972 and started practice at Baripada. On completing more than ten years of active practice as an advocate, the petitioner made an application in the prescribed form accompanied by requisite fees, for being appointed as a Notary. The State Government appointed the petitioner as a Notary, for a period of three years, with effect from 16.7.1983, as per the Notarial Certificate of Practice dated 16.7.1983 (Annexure-1). The said Notarial Certificate of Practice was renewed from time to time, authorising the petitioner to practice as a Notary.

3. In the year 1998, the petitioner applied for renewal of his Notarial Certificate of Practice and accordingly submitted application with requisite fees. While the renewal was pending, the petitioner was served with a show cause notice from the State Government in the Law Department dated 08.01.1998, on various false allegations of misconduct, which were on the basis of anonymous letters purported to have been received from some persons. The petitioner filed his reply to the said show cause notice. The

State Government thereafter initiated suo motu enquiry and after completion of such enquiry, the State Government in the Law Department, considering the nature and gravity of the misconduct, vide its letter dated 22.6.2004 (Annexure-5), warned the petitioner to be careful in future for his misconduct, as per Section 13(12)(b)(iii) of the Notaries Rules, 1956, (hereinafter referred to as the 'Rules').

4. After conclusion of the enquiry proceeding and award of the punishment of warning, the petitioner submitted representation to the State Government in the Law Department, requesting for renewal of his Notarial Certificate of Practice, which had been pending consideration since 1998. Instead of granting renewal, the petitioner was served with a letter dated 1.5.2006 (Annexure-8), intimating him that the State Government has been pleased not to renew his Notarial Certificate of Practice with effect from 16.7.1998, since he has been severely warned vide order dated 22.6.2004.

5. The grievance of the petitioner is that the enquiry proceeding initiated for alleged misconduct having been concluded by the State Government as provided under Rule 13 of the Rules and the petitioner having been severely warned to be careful in future, as provided under Rule 13 (12)(b)(iii) of the said Rules, it was not open for the State Government to decline renewal of his Notarial Certificate of Practice. In this regard, it is submitted that as renewal is automatic, as provided under Section 5(2) of the Notaries Act (hereinafter referred to as the 'Act'), the State Government had no discretion in the matter and the petitioner was entitled to renewal of his Notarial Certificate of Practice, as a matter of course, merely on making an application and payment of prescribed fees.

6. Learned counsel for the opposite parties 1 and 2, with reference to the counter affidavit filed, submitted that the proposal for renewal of Notarial Certificate of Practice of the petitioner for further period of three years, with effect from 16.7.1998, was kept pending till finalisation of enquiry initiated against him. In the said enquiry, prima facie case of misconduct as a Notary was proved for which the petitioner was severely warned to be careful in future with regard to his conduct, as provided under Rule 13(12)(b)(iii) of the Rules. In view of the above misconduct of the petitioner, the State Government in the Law Department decided not to renew his Notarial Certificate of Practice, which has been communicated to the petitioner vide letter dated 1.5.2006 as per Annexure-8 to the writ petition. Accordingly, it is submitted that the said decision of the State Government cannot be faulted.

7. Section 5 of the Act provides for the entry of names in the Register and issue or renewal of certificates of practice, which reads as under:

> "(1) Every notary who intends to practise as such, may, on payment to the Government appointing him of the prescribed fee, if any, be entitled.
>
> (a) to have his name entered in the Register maintained by that Government under section 4; and
>
> (b) to a certificate authorizing him to practise for a period of five years from the date on which the certificate is issued to him.
>
> (2) The Government appointing the notary, may, on receipt of an application and the prescribed fee, renew the certificate of practice of any notary for a period of five years at a time. "

8. On a reading of the aforesaid statutory provisions, it is seen that the use of the word "may" and the words 'be entitled' in Section 5 (2) makes it abundantly clear that there is no residuary discretion vested in the State Government at the time of renewal of an application filed by a Notary. A Notary, once registered as such, is entitled to renewal as a matter of course, merely on making an application and payment of requisite fees, as prescribed in the Rules. Hence, Section 5(2) of the Act is mandatory and the right of renewal is automatic and there is no discretion vested in the State Government to refuse such renewal. (See-***State of Kerala and others – vrs.- K.U. Narayana Poduval and others,*** AIR 1992 Kerala 152.)

9. In the present case, admittedly the State Government had initiated a suo motu enquiry against the petitioner on the basis of certain allegations and after conclusion of enquiry, the petitioner having been found to be guilty of certain misconduct, he had been let off with a warning, keeping in view the nature and gravity of misconduct proved against the petitioner, as provided under Section 13(12)(b)(iii) of the Rules.

10. Section 13(12) (b) of the Rules reads as under:

> "(b) If after considering the report of the competent authority, the appropriate Government is of the opinion that action should be taken against the notary the appropriate Government may make an order-
>
> (i) canceling the certificate of practice and perpetually debarring the notary from practice; or

(ii) suspending him from practice for a specified period; or

(iii) letting him off with a warning, according to the nature and gravity of the misconduct of the notary proved."

11. In view of the fact that the State Government had already exercised its power under Section 13(12) (b) (iii) of the Rules, letting off the petitioner with a warning, considering the nature and gravity of the misconduct proved against him, the same could not have been the basis for refusing renewal of his Notarial Certificate of Practice, inasmuch as, the petitioner could not have been punished twice for the same offence. Moreover, the said provision contained in Section 13 of the Rules does not provide for refusal of renewal of a Notarial Certificate of Practice on the ground of misconduct, by way of punishment.

12. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that the impugned decision of the State Government as communicated to the petitioner vide letter dated 1.5.2006 (Annexure-8), refusing to renew his Notarial Certificate of Practice is not proper and justified and the same is accordingly quashed. The opposite parties are directed to grant necessary renewal to the petitioner, as per the provision of the Rules, within four weeks hence.

Writ Petition is accordingly allowed.

2010 (I) ILR-CUT- 289

B.P.DAS,J & S.C.PARIJA,J.

ANUPAMA BEHERA & ORS. -V-D.M.,L.I.C. OF INDIA,CUTTACK & ANR.*

JANUARY 29,2010.

INSURANCE ACT, 1938 (ACT NO.4 OF 1938) – SEC.45.

Repudiation of claim – Test to determine – If the facts not disclosed in the proposal form has any bearing on the risk undertaken by the insurer then the same can be construed as a material fact for repudiation.

In the present case the insured died on 18.06.2004 due to heart failure – No material that the insured suffered from any serious disease affecting his life expectancy prior to his taking the policies – The medical book maintained by the employer of the insured disclosed that he had complained of lower back pain in the year 1999 – Merely because the insured had not disclosed in the proposal form some minor ailments which had no material bearing on the risk undertaken by the L.I.C., the same can not be construed as fraudulent suppression of material facts so as to authorise the L.I.C. to repudiate its liability under the contract of Insurance.

Held, repudiation of Insurance Policies and rejection of claim by the L.I.C. not justified.

(Para 15,16,17)

Case laws Referred to:-

1.AIR 1962 SC 814 : (Mithoolal Nayak -V- Life Insurance Corporation of India).

2.AIR 1960 Calcutta 696 : (Rohini Nandan Goswami -V-Ocean Accident & Guarantee Corporation Ltd.).

3.AIR 1961 Punjab 253 : (Lakshmi Insurance Co.Ltd.-V-Bibi Padma Wati).

4.AIR 1968 Madras 324 : (Life Insurance Corporation of India -V-Janaki Ammal).

5.AIR 2001 SC 549 : (Life Insurance Corporation of India & Ors.-V-Smt.Asha Goel & Anr

6.AIR 2008 SC 424 : (P.J.Chacko & Anr.-V-Chairman, Life Insurance Corporation of India & Ors.)

For Petitioners- M/s.J.M.Mohanty,K.C.Mishra,T.R.Mohanty, P.C.Mohaparana.

For Opp.Parties – M/s.A.R.Dash, R.N.Behera & S.N.Nanda-1.

*W.P.(C) NO.6994 OF 2005. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S.C. PARIJA, J. The action of the Life Insurance Corporation of India (for short 'L.I.C.') in repudiating all its liabilities under Policy Nos.583852302, 583851466 and 583707315, on the ground that the deceased insured had

withheld material information regarding his health at the time of effecting the insurance policies with L.I.C., is under challenge by the legal heirs of the insured in the present writ petition.

2. The brief facts of the case as narrated in the writ petition is that the insured Pramod Kumar Behera was working in Deulabera Colliery under Mahanadi Coalfields Ltd. and during his service period, he had taken six insurance policies bearing nos.581483762, 581487043, 581488222, 583707315, 583851466 and 583852302. The insured Pramod Kumar Behera died on 18.6.2004 due to heart failure. After the death of the insured, the wife (petitioner no.1) made claims in respect of the aforesaid policies. The LIC, while settling the claim and releasing the assured amount in respect of the first three insurance policies, rejected the claim in respect of Policy Nos. 583707315, 583851466 and 583852302, on the ground that the insured had withheld material information regarding his health at the time of effecting the insurance policies with the LIC. In the letter of repudiation dated 30.3.2005 (Annexure-7), the LIC intimated the wife of the insured that they have proof to show that the insured had been suffering from certain diseases on several dates before his death, as per the medical book maintained by the employer, which fact had been suppressed by the insured at the time of completing the proposal. Accordingly, the LIC repudiated the claims of the petitioners in respect of the said three policies on the ground that the insured had made deliberate mis-statement and withheld material information regarding his health at the time of effecting the assurance with the LIC.

3. Learned counsel for the petitioners submits that as the insured died on 18.6.2004 due to heart failure, which had no nexus with the minor ailments of casual nature like back pain, which the insured had complained of in the year 1999, much prior to his taking of the said three insurance policies, as has been reflected in his medical book maintained by the employer, the non-disclosure of such fact cannot be a ground for rejecting the claims. It is further submitted that basing on the medical book and the leave records of the insured, maintained by the employer Deulabera Colliery, the LIC could not have repudiated the claims of the petitioners, when there is no material on record to establish that the insured had wilfully suppressed material facts having a bearing on his health, which was directly or indirectly the cause of his ultimate death.

4. Learned counsel appearing for the LIC, with reference to the counter affidavit filed, submits that the Policy No.583707315 was for a sum assured of Rs.1,00,000/-, in which deceased Pramod Kumar Behera was the proposer of the life assured of Saurav Behera (petitioner no.2). Policy Nos.583851466 and 583852302 were for sums assured of Rs.50,000/- and Rs.1,00,000/- respectively, for the life assured of deceased Pramod Kumar Behera. All the three insurance policies were under the monthly salary

saving scheme, which have been repudiated on account of the insured withholding material information regarding his health, while submitting the proposal form at the time of effecting the assurance with the LIC. In this regard, it is submitted that the insured had given false statements to the questionnaire contained in the proposal form, which was with regard to the personal medical history of the proposed insured. To the questions in sl. no.11(a) to 11(h) of the proposal form, the insured had answered in the negative as 'No' and in sl. no.11(i), the insured had answered as 'Good'. It is submitted that after the death of the insured on 18.6.2004, as the claim was an early death claim, an enquiry was conducted by the LIC for settlement of the claims made by the petitioners. On enquiry, it came to the knowledge of the LIC that the insured had suffered illness on various occasions, as per the medical book maintained by the employer and as such the insured was not in a good health condition, at the time of effecting the insurance policies.

5. Accordingly, learned counsel for the LIC submitted that as the medical book maintained by the employer revealed that the insured had suffered from ailments on various occasions and had availed sick leave, as per the certificate given by the employer (Annexure-A series), the same amounted to deliberate mis-statement and withholding of material information from the LIC regarding his health, at the time of effecting the insurance policies. Therefore, in terms of the policy contract and the declarations contained in the proposal for assurance, the LIC repudiated the claims of the petitioners, as provided under Section 45 of the Insurance Act.

6. On a perusal of the impugned letter of repudiation dated 30.3.2005 (Annexure-7), it is seen that the LIC has repudiated the claims of the petitioners in respect of the Policy Nos.58385230, 583851466 and 583707315 on the ground that the insured had withheld material information regarding his health at the time of effecting the assurance with the LIC. The relevant portion of the said letter of repudiation is extracted below :

> "We may, however, state that all these answers were false as we hold indisputable proof to show that before he proposed for the above policy he suffered from diseases as per the medical book on several dates before his death. Such suffering was suppressed at the time of completing the proposal.
>
> It is therefore evident that she had made deliberate mis-statement and with-held material information from us regarding her health at the time of effecting the assurance and hence in terms of the Policy Contract and the Declarations contained in the forms of Proposal for Assurance, we hereby repudiate the claim and accordingly we are not liable for any payment under the above policy

and all moneys that have been paid in consequence thereof cannot be paid."

7. Section 45 of the Insurance Act reads as under:

> "Policy not to be called in question on ground of mis-statement after two years. No policy of life insurance effected before the commencement of this Act shall, after the expiry of two years from the date of commencement of this Act and no policy of life insurance effected after the coming into force of this Act shall, after the expiry of two years from the date on which it was effected, be called in question by an insurer on the ground that a statement made in the proposal for insurance or in any report of a medical officer, or referee, or friend of the insured, or in any other document leading to the issue of the policy, was inaccurate or false, unless the insurer shows that such statement was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made by the policy-holder and that the policy-holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose."

xxx xxx xxx xxx

8. Section 45 postulates repudiation of such policy within a period of two years. By reason of the aforementioned provision, a period of limitation of two years had, thus, been specified and on the expiry thereof the policy was not capable of being called in question, inter alia on the ground that certain facts have been suppressed which were material to disclose or that it was fraudulently been made by the policy holder or that the policy holder knew at the time of making it that the statement was false. Statute, therefore, itself provides for the limitation for valid repudiation of an insurance policy. It takes into account the social security aspect of the matter.

The Supreme Court in the case of ***Mithoolal Nayak –vrs.- Life Insurance Corporation of India,*** AIR 1962 SC 814, while interpreting the ambit and scope of Section 45 held that there are three conditions for application of the second part of Section 45 of the Insurance Act, which are:–

> "a. the statement must be on a material matter or must suppress facts which it was material to disclose;

b. the suppression must be fraudulently made by the policy-holder; and

c. the policy-holder must have known at the time of making the statement that it was false or that it suppressed facts which it was material to disclose."

9. In the case of ***Rohini Nandan Goswami –vrs.- Ocean Accident and Guarantee Corporation Ltd.,*** AIR 1960 Calcutta 696, while considering the duty of a insured to disclose material facts and the right of the insurer to avoid the insurance policy in case of such non- disclosure, the Hon'ble Court observed that where to a claim under the policy of insurance, concealment of material fact is alleged by the insurer as entitling him to avoid the policy, the Court has to consider what is a material fact. Whether a particular fact is material depends upon the circumstances of a particular case. Evidence of materiality is not always necessary. Materiality of a particular fact may be obvious from its very nature. The test to determine materiality is whether the fact has any bearing on the risk undertaken by the insurer. If the fact has any bearing on the risk, it is a material fact, if not, it is immaterial.

10. While interpreting a contract of life insurance, a Division Bench of Punjab High Court in the case of ***Lakshmi Insurance Co. Ltd. -vrs.- Bibi Padma Wati***, AIR 1961 Punjab 253, observed as under:

"The contract of life insurance being one of utmost good faith and the probable expectancy or duration of the life of policy-holder being an important element in it, the controlling factor in the construction of terms "sickness, ailment or injury" in the application by insured for revival of his lapsed insurance policy must necessarily be the intent of the parties without attaching to any one of these terms any technical or theoretical meaning. Whatever the term 'ailment', or 'sickness' may mean in the medical sense, or in accordance with their dictionary meaning, they cannot embrace merely transitory and temporary illness in its accepted sense, as they are not material to the risk insured. These terms refer to disorders of substantially serious nature affecting general health and do not include passing indispositions which do not affect the applicant's general health. No embargo, therefore, can be placed on the insured, in not declaring occasional physical disturbances of a trivial character. These terms are to be restricted to such illnesses which impair the constitution

of the insured or interrupt the performance of vital functions. xxx xxx xxx."

11. Considering the effect of Section 45 of the Insurance Act and whether the policy holder had made an inaccurate or false statement on a material matter or suppressed facts which it was material to disclose and it was fraudulently made by the policy holder and the policy holder knew at the time of making it that the statement was false or that it suppressed facts which it was material to disclose, the Division Bench of Madras High Court in the case of ***Life Insurance Corporation of India -vrs.- Janaki Ammal,*** AIR 1968 Madras 324, proceeded to observe as under:

> "Thus, there is ample authority for the proposition that, an insurer could avoid a contract of insurance after the expiry of period of two years mentioned in the first part of S.45 of the Insurance Act only on the ground of suppression of illness, which affects the expectation of life of the insured and not mere temporary or trivial illness and that unless the disease he was suffering from is clearly established and it is also established that disease would have a material bearing on the insurability of the policy holder, the policy cannot be invalidated. We are, therefore, clear that in the circumstances of this case, the mere fact that the deceased had been taking medicines and injections without proof of anything more would not be sufficient to invalidate the policy."

12. In the case of ***Life Insurance Corporation of India and others -vrs-. Smt. Asha Goel and another***, AIR 2001 SC 549, the Supreme Court observed as follows:

> "In course of time the Corporation has grown in size and at present it is one of the largest public sector financial undertakings. The public in general and crores of policy-holders in particulars look forward to prompt and efficient service from the Corporation. Therefore the authorities in-charge of Management of the affairs of the Corporation should bear in mind that its credibility and reputation depend on its prompt and efficient service. Therefore, the approach of the Corporation in the matter of repudiation of a policy admittedly issued by it should be one of extreme care and caution. It should not be dealt with any mechanical and routine manner."

13. In the case of ***P. J. Chacko and Anr. -vrs.- Chairman, Life Insurance Corporation of India & Ors.***, AIR 2008 S.C. 424, the Supreme Court has

held that a deliberate wrong answer in the proposal form which has a great bearing on the contract of insurance, if discovered, may lead to the policy being vitiated in law and therefore the proposal can be repudiated if a fraudulent act has been discovered. In the said case, the deceased insured while submitting the proposal form had not disclosed that he had undergone an operation for Adenoma Thyroid. Subsequently, the deceased insured died of Polyneuritis. The Hon'ble Court, in the facts of the case, came to hold that since the insured had undergone an operation for Adenoma Thyroid, which was a major operation, which fact he did not disclose prior to obtaining the insurance policy and died within six months from the date of taking the policy, the LIC is entitled to repudiate all liability under the policy.

14. A Division Bench of this Court in ***Kuni Lata Sahoo –vrs.- Senior Divisional Manager, LIC and another*** (WP(C) No.3552 of 2003), decided on 6.8.2009, while dealing with a similar question regarding repudiation of claim by the LIC for alleged non-disclosure of material facts, held in the facts of the case, that as the deceased insured was suffering from minor ailments like Gastritis with superficial Stomach Ulcer, which is not a serious disease having any bearing on the risk undertaken by the L.I.C., the non-disclosure of the same cannot be said to be material, especially when the same did not affect the life expectancy of the deceased insured. Moreover as the cause of death of the insured was admitted due to Viral Encephalitis coupled with Cardio Respiratory arrest, which had no nexus with the previous ailments of the deceased insured, the repudiation of the policy and rejection of the claim by the L.I.C. was not proper and justified.

15. The legal position which emerges from the aforementioned judicial pronouncements is that the test to determine materiality is whether the fact not disclosed has any bearing on the risk undertaken by the insurer. If the fact has any bearing on the risk, it is a material fact. If the insured failed to disclose in the proposal form trivial ailments suffered by him temporarily on some occasions, the same cannot be construed as fraudulent suppression of material facts, so as to repudiate the contract of insurance.

16. The Insurance policy, apart from its special feature, is a contract between a person seeking to be insured and the insurer. In interpreting the terms of contract of insurance, they should receive fair, reasonable and sensible construction in consonance with the purpose of the contract as intended by the parties. Emphasis in such cases is laid more upon a practical and reasonable, rather than, on a literal and strained construction. In interpreting the contract of insurance neither the coverage under a policy should be unnecessarily broadened, nor should the policy be rendered

ineffective in consequence of unnatural or unreasonable construction. An attempt should be to construe a contract in liberal manner so as to accomplish the purpose or the object for which it is made. In the absence of ambiguity, neither party can be favoured but where the construction is doubtful, the Courts lean strongly against the party who prepared the contract. Where there is a susceptibility of two interpretations, the one favourable to the insured is to be preferred.

17. In the present case, the insured admittedly died on 18.6.2004 due to heart failure and there is no material on record or any medical evidence to show that the insured had suffered from any serious disease, affecting his life expectancy in any manner, prior to his taking the said three policies. The medical book maintained by the employer of the insured disclosed that he had complained of lower back pain in the year 1999, which was non-specific and no neurological disorder or deficiency was noticed and the insured did not suffer from any serious disease or illness during his service period. Merely because the insured had not disclosed in the proposal form some minor ailments of trivial nature suffered by him temporarily on some occasions, as has been reflected in the medical book of the insured, which had no material bearing on the risk undertaken by the LIC or even any remote nexus with the ultimate cause of his death, the same cannot be construed as fraudulent suppression of material facts, so as to authorise the LIC to repudiate its liabilities under the contract of insurance. Accordingly repudiation of the insurance polices and rejection of the claim by the LIC was not proper and justified.

18. In view of the foregoing reasons, the impugned letter of repudiation dated 30.3.2005 (Annexure-7) is quashed and the LIC, opposite party nos.1 and 2 are directed to pay the sum assured under the Policy Nos. 583852302 and 583851466, and to continue the Policy No.583707315 and pay the sum assured on its maturity, as per the terms of the said policy.

Writ Petition is accordingly allowed.

2010 (I) ILR-CUT- 297

L.MOHAPATRA,J & I.MAHANTY,J.

KISHORE CHANDRA MOHANTY -V- UNION OF INDIA & ORS.*

JANUARY 29,2010.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5OF1908) – ORDER 47, RULE 1.

Review – Jurisdiction - Power of review could only be exercised for correction of a mistake or an error which is apparent on the face of the record – Even an illegal or erroneous finding whether on fact or law can not be a ground for review and the only remedy available to the party to challenge such decision in appeal.

In the present case the review petitioner calls upon the Court to reconsider the issue afresh on a point which was never argued earlier – Held, review petition is liable to be dismissed.

(Para 6,7)

Case laws Referred to :-

1.AIR 1963 S.C. 1909 : (Shivdeo Singh & Ors.-V- State of Punjab & Ors.).
2.AIR 1964 S.C. 1372 : (M/s.Thungabhadra Industries Ltd.-V-The Government of Andhra Pradesh).
3.AIR 1980 S.C. 674 : (M/s. Northern India Caterers (India) Ltd. -V- Lt. Governor of Delhi.)
4.AIR 1995 S.C. 455 : (Smt. Meera Bhanja -V- Smt.Nirmala Kumari Choudhury).
5.(1997)8 S.C.Cases 715 : (Parsion Devi & Ors.-V-Sumitri Devi & Ors.).
6.AIR 1979 SC 1047 : (Aribam Tuleshwar Sharma -V- Aribam Pishak Sharma).
7.AIR 2006 SC 1634 : (Haridas Das -V- Smt. Usha Rani Barik & Ors.)

For Petitiuoner – M/s.B.S.Mishra (2), R,N.Mishra, D.K.Mohanty, Ganeswar Rath & S.Rath.

For Opp.Parties – M/s. S.D,Das.
Asst.Solicitor General of India.

RVWPET NO.210 OF 2008. In the matter of an application under Section 114 read with Order 47 of the Code of Civil Procedure.

L.MOHAPATRA, J. The review petitioner, who was opposite party No.1 in W.P.(C) No.224 of 2003 assails the judgment of this Court delivered in the said case as well as W.P.(C) No.4493 of 2002.

2. The review petitioner had approached the Central Administrative Tribunal in an application under Section 19 of the Administrative Tribunals Act vide O.A.No.542 of 1995 alleging therein that he had served for more than three years as Inspector of Income Tax and appeared in the Departmental Examination held during June/July 1995, but results were published on 12.2.1996. He was allowed two annual increments with retrospective effect, i.e., from 3.7.1995. During the period from June/July

1995 and publication of result on 12.2.1996, five posts of Income Tax Officer (Group-B) were sanctioned for Orissa Region and in order to fill up the said posts, a Departmental Promotion Committee meeting was convened on 13.10.1995. His case was not considered because the result of the Departmental Examination had not been declared by then. His grievance before the Tribunal was that he having already appeared in the Departmental Examination and the Departmental Promotion Committee having convened the meeting before declaration of the results, his case should have been considered for promotion and kept in sealed cover till publication of the Departmental Examination results. In the alternative, a review DPC meeting should have been convened to consider the cases of those Inspectors of Income Tax who cleared the Departmental Examination and promotions on the basis of recommendation of the review DPC should have been given.

The Tribunal allowed the Original Application and directed the Department to hold the review DPC within a specified time and grant retrospective promotion to the review petitioner by extending notional financial benefit for the intervening period. The said judgment of the Tribunal was challenged before this Court in two writ applications vide W.P.(C) No.224 of 2003 and W.P.(C) No.4493 of 2002. W.P.(C) No.224 of 2003 was filed by the Department whereas W.P.(C) No.4493 of 2002 was filed by one Sovesh Chandra Mohanty challenging the said judgment. Both the writ applications were heard together and were disposed of by a common judgment dated 31.10.2008. The order of the Tribunal directing for a review DPC was set aside and all consequential orders passed in pursuance of the order of the Tribunal were directed to be recalled. Challenging the said judgment passed in the aforesaid writ applications, this review has been filed.

3. Before entering into the merits of the review petition, we would like to refer to some judgments of the Hon'ble Supreme Court defining the scope of review. A Constitution Bench of the Hon'ble Supreme Court in the case of ***Shivdeo Singh and others v. State of Pubjab and others, reported in AIR 1963 Supreme Court 1909*** held that there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. This question again came up for consideration before the Hon'ble Supreme Court in the case of ***M/s. Thungabhadra Industries Ltd. v. The Government of Andhra Pradesh, reported in AIR 1964 Supreme Court 1372***. In paragraph-11 of the judgment, the apex Court defined the scope of review. The said paragraph is quoted below:

"What, however, we are now concerned with is whether the statement in the order of September 1959 that the case did not involve any substantial question of law is and 'error apparent on the face of the record'. The fact that on the earlier occasion the court held on an identical state of facts that a substantial question of law arose would not per se conclusive, for the earlier order itself might be erroneous. Similarly, even if the statement was wrong, it would not follow that it was an 'error apparent on the face of the record', for there is distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which starts one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. No question of fact were involved in the decision of the High Court in T.R.Cs.75 to 77 of 1956. The entire controversy turned on the proper interpretation of R.18(1) of the Turnover and Assessment Rules and the other pieces of legislation which are referred to by the High Court in its order of February 1956; nor could it be doubted or disputed that these were substantial questions of law. In the circumstances therefore, the submission of the appellant that the order of September 1959 was vitiated by 'error apparent' of the kind envisaged by O. XLVII, R. I, Civil Procedure Code when it stated that 'no substantial question of law arose' appears to us to be clearly well founded. Indeed, learned Counsel for the respondent did not seek to argue that the earlier order of September 1959 was not vitiated by such error."

In the case of ***M/s. Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, reported in AIR 1980 Supreme Court 674***. The Hon'ble Supreme Court observed that a party is not entitled to seek a review of a judgment delivered by the Supreme Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary. The Court further observed that it is beyond dispute that a review proceeding cannot be equated with the original hearing

of the case, and the finality of the judgment delivered by the Court will not be reconsidered except 'where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility'.

In the case of ***Smt. Meera Bhanja v. Smt. Nirmala Kumari Choudhury, reported in AIR 1995 Supreme Court 455***, interpreting the Order 47, Rule 1 of the Code of Civil Procedure and the term "error apparent on face of record", the Hon'ble Supreme Court observed that "error apparent on face of record" means an error which strikes one on mere looking at record and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. The meaning of the term "error apparent on face of record" again came up for consideration before the Hon'ble Supreme Court in the case of ***Parsion Devi and others v. Sumitri Devi and others, reported in (1997) 8 Supreme Court Cases 715***. The Hon'ble Supreme Court in the said case observed that under Order 47, Rule 1, CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47, Rule 1 CPC. In exercise of jurisdiction under Order 47, Rule 1, CPC it is not permissible for an erroneous decision to be "reheard and corrected". There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction. A review petition has a limited purpose and cannot be allowed to be "an appeal in disguise". A similar view was also expressed earlier by the Hon'ble Supreme Court in the case of ***Aribam Tuleshwar Sharma v. Aribam Pishak Sharma, reported in AIR 1979 SC 1047***. In the case of ***Haridas Das v. Smt. Usha Rani Barik & others, reported in AIR 2006 SC 1634***, the scope of review was again reiterated. In paragraph-15 of the judgment, the Court held as follows:

> "A perusal of the Order XLVII, Rule 1 show that review of a judgment or an order could be sought : (a) from the discovery of new and important matters or evidence which after the exercise of due diligence was not within the knowledge of the applicant; (b) such important matter or evidence could not be produced by the applicant at the time when the decree was passed or order made; and (c) on account of some mistake or error apparent on the face of record or any other sufficient reason."

While coming to such a finding, the Hon'ble Supreme Court also referred to some of the cases referred in this judgment earlier.

4. On analysis of all these decisions, one would find that power of review is available to a court only when there is a mistake or an error apparent on the face of the record and the power of review cannot be exercised to correct an erroneous decision. The reasons for the Hon'ble Supreme Court to lay down this law is that an erroneous decision is to be challenged in appeal and the review power under Order 47, Rule 1, CPC can only be exercised for correction of a mistake or an error which is apparent on the face of the record. An illegal and erroneous finding whether on fact or law cannot also be a ground for review. The power of review cannot be exercised for rehearing on fact and law to correct an erroneous decision. If there has been an erroneous decision, the only remedy available to the party is to assail such decision in appeal. The scope of review is only to correct a mistake which has crept in to the judgment and apparent on the face of the record or in cases where some materials though available on record, escaped the notice of the Court for some reason or other affecting in merits of the case. In the light of the scope of review as stated above, we now proceed to examine the grounds taken in the review petition and find out as to whether the impugned judgment can be reviewed.

5. The review petitioner after serving as Inspector of Income Tax for more than three years appeared in the Departmental Examination held during June/July 1995 but the results were published on 12.2.1996. During the period from June/July 1995 and 12.6.1996 that is the date of publication of result, five posts of Income Tax Officer (Group-B) were sanctioned for Orissa Region and a DPC was convened on 13.10.1995 to select Officers for promotion to the above five posts. The Departmental Examination result having not been published, the case of the review petitioner was not considered. It is the case of the review petitioner that he having already appeared in the Departmental Examination by the time the DPC was convened, his case should have been considered by the DPC and kept in sealed cover till publication of results of the Departmental Examination. It is also the case of the review petitioner that on earlier occasions also whenever any DPC had been convened in between the last date of examination and publication of results thereof, the Department used to convene review DPC to consider the cases of those Inspectors of Income Tax who clear the examination and allow them promotion on recommendation of DPC with retrospective effect, i.e., from the date on which the last examination was held. However, such practice was not adopted by the Department even after publication of results on 12.2.1996. For the above reason, the review petitioner had approached the Tribunal claiming promotion to the post of Inspector, Group-B with effect from the date on which the last examination was held.

The opposite parties contested the proceeding before the Tribunal and relied upon two earlier decisions of the Tribunal by taking a ground that the date on which DPC is convened only those Inspectors of Income Tax who were eligible for consideration could be considered and the petitioner who had not cleared the Departmental Examination by then could not have been considered by the DPC.

The Tribunal referring to a decision of this Court in the case of Ajaya Kumar Das v. Union of India and others, disposed of on 28.3.2001 in O.J.C. No.1594 of 1999 decided the case and directed the Department to conduct a review Departmental Promotion Committee meeting within a specified time, consider the case of the review petitioner and grant him retrospective promotion by giving notional financial benefit for the intervening period till his actual promotion.

During pendency of the Original Application before the Tribunal, one Sovesh Chandra Mohanty intervened in the Original Application and contested. Against the judgment of the Tribunal, the Department filed W.P.(C) No.224 of 2003 and the said Sovesh Chandra Mohanty filed W.P.(C) No.4493 of 2002 before this Court. Both the writ applications were hard together and were also disposed of in a common judgment which is the subject matter of review. This Court while disposing of both the writ applications allowed the same on a finding that on the date the DPC was convened only eligible Officers could considered and a person who acquires the prescribed qualification subsequent to that cannot be considered by the DPC and therefore, the DPC convened on 13.10.1995 rightly did not consider the case of the review petitioner.

6. In this review petition, all the grounds taken relate to merits of the case. Reliance is again placed on the decision of this Court in the case Ajaya Kumar Das v. Union of India and others where the Court held that the qualification of the petitioner therein shall relate back to the date of examination and such finding of this Court was up set by the Hon'ble Supreme Court in Civil Appeal No.6295 of 2001 and the Hon'ble Supreme Court made the following observation while setting aside the aforesaid judgment:

> " The High Court held that the results which were declared in March 1990 will relate back to the date of the examination in 1989. This, in our opinion is an incorrect preposition of law. There can be no question of relating back. The condition of eligibility was very clear. It had to be five years' service after qualifying as on 1st

> January, 1995 and in this view we are supported by a decision of this Court in Ashok Kumar Sharma and others vrs. Chander Shekhar and Another 1997(4) SCC 18."

Therefore, the ground taken in this regard is only reiteration of what had been argued before the Bench when the writ applications were heard and such point has been elaborately dealt with in the impugned judgment. The other ground taken in course of argument is that the review petitioner having been granted two annual increments with retrospective effect, i.e., from 3.7.1995, his case could not have been ignored by the DPC even though the results were published after the DPC was convened. This question was never argued before the Court when the writ applications were being heard and therefore, there was no scope for the Court to examine this question. By raising such a question, the review petitioner now calls upon the Court to reconsider the issue afresh on a point which was never argued earlier. We are afraid, in a review petition the Court cannot permit a new ground to be taken for reconsideration of the entire issue specially when the same was available to be argued when the writ applications were heard. The decisions referred to earlier with regard to scope of review clearly lay down that the power of review under Order 47, Rule 1, CPC could only be exercised for correction of a mistake or an error which is apparent on the face of the record. Even an illegal or erroneous finding whether on fact or law cannot also be a ground for review. The power of review cannot be exercised for a rehearing on fact and law to correct an erroneous decision. If there has been an erroneous decision, the only remedy available to the party is to assail such decision in appeal.

We are, therefore, of the view that the new ground taken by the learned counsel for the petitioner in this review petition cannot be considered for deciding the case afresh on merit.

7. For the reasons stated above, we find no merit in the review petition and accordingly dismiss the same.

Review petition dismissed.

2010 (I) ILR-CUT- 304

L.MOHAPATRA,J & B.P.RAY,J.

PREMANJAN PARIDA -V- STATE OF ORISSA & ANR.*

JANUARY 25,2010.

CONSTITUTION OF INDIA, 1950 – ART.311.

Departmental Proceeding – Unexplained delay in initiation of the Proceeding – Proceeding vitiated.

In this case departmental proceeding was initiated in 2001 – Opp.Parties did not choose to frame charges– No explanation to frame charges within seven years of the alleged incident – Held, departmental proceeding is vitiated

(Para 8)

Case laws Referred to:-

1.(2009) 7 SCC 305 : (Secretary, Forest Department & Ors.-V- Abdur Rasul Chowdhury)

2.AIR 2006 SC 207: (P.V.Mahadevan -V- M.D.,Tamil Nadu Housing Board).

For Petitioner – M/s.R.K.Rath & N.R.Rout.

For Opp.Parties – Addl.Government Advocate.

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*W.P.(C) NO.5488 OF 2006. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. This writ application is directed against the order of Orissa Administrative Tribunal, Bhubaneswar dated 27.2.2006 passed in O.A.No.1229 of 2004.

2. The petitioner, who was applicant before the Tribunal, entered into Government service as Sub-Inspector of Police having been directly recruited to the post in the year 1975, subsequently he was promoted to the post of Inspector of Police in the year 1992. While working as such, a departmental proceeding was initiated against him and ultimately he was exonerated of the charges by order dated 13.5.2004. When the matter was pending before the disciplinary authority, promotion of officers to the rank of Deputy Superintendent of Police was considered and the petitioner's case was also considered and the opinion of Promotion Committee had been kept in sealed cover. After the petitioner was exonerated of the charges, the sealed cover should have been opened and on the basis of recommendation of Selection Board, he should have been given promotion to the post of Deputy Superintendent of Police. No action in this regard having been taken, the petitioner approached the Tribunal in O.A.No.1214 of 2004. The said O.A. was disposed of on 11.10.2004 directing the Government to consider the matter and in pursuance of the direction of the Tribunal, the Government by order dated 12.4.2005 gave promotion to the petitioner to the rank of

Deputy Superintendent of Police. The petitioner having been exonerated of the charges, he should have been given promotion from the date others were given promotion in pursuance of the recommendation of D.P.C. in the year 2002 but such benefit was not extended to him and he was given promotion from 2005 only. The petitioner therefore made a representation to give him promotion retrospectively from the date others were promoted on the basis of recommendation of D.P.C. but no action was taken. In order to prevent the petitioner from getting any further promotion and the aforesaid benefits, a fresh proceeding was initiated and charges were communicated to the petitioner on 29.9.2004. The petitioner therefore approached the Tribunal challenging initiation of the proceeding in respect of the charges which relate to an incident of 1997 and sought for quashing the departmental proceeding.

3. It was contended before the Tribunal that the departmental proceeding having been initiated after laps of seven years from the alleged date of occurrence, which constitute the subject matter of charges, initiation of such proceeding is unsustainable under law. Reliance was placed on some decisions by the petitioner before the Tribunal. However, the Tribunal on analysis of the decisions relied upon by the petitioner found that the said decisions relate to delay in disposal of the departmental proceeding and do not relate to delay in initiation of the departmental proceeding. Accordingly the Tribunal dismissed the Original Application.

4. Shri R.K.Rath, the learned Senior Counsel appearing for the petitioner assailed the impugned order on the ground that the decisions relied upon by the petitioner before the Tribunal not only relate to delay in disposal of departmental proceedings but also delay in initiation of departmental proceeding. The Tribunal without looking into the judgments cited by the petitioner held the same to be inapplicable in the facts of the case and dismissed the Original Application. It was also contended by the learned Senior Counsel that the charges leveled in the departmental proceeding relates to some incidents in the year 1997 and after laps of seven years, the petitioner could not have been proceeded with in respect of those charges. For the above reasons, according to the learned counsel for the petitioner, the Tribunal should have allowed the Original Application and quashed the proceeding.

The learned counsel for the State submitted that though there is delay of initiation of departmental proceeding, there is no bar for initiation of such proceeding after laps of seven years. According to the learned counsel for the State, the charges are serious in nature and, therefore the departmental proceeding has been rightly allowed to be continued by the Tribunal.

5. In order to appreciate the rival contention of the learned counsel appearing for both parties, it is necessary to look into the charges leveled against the petitioner in the departmental proceeding initiated in the year 2004.

Following are the charges leveled against the petitioner:-

"Shri Premanjan Parida, Ex-IIC of Nayapalli Police Station now in P.T.C. is charged with gross negligence and dereliction of duty in that:-

That Sri Premanjan Parida while functioning as I.I.C. of Nayapalli P.S., Bhubaneswar under Khurda district during the period from May'97 to August'97 committed grave misconduct for his failure to maintain the Station Diary of the P.S. properly in contravention to P.M.R.-116.

That during 1st week of June'97 though Sri Jagannath Prasad, Sri Ranjit Jena and Sri Ajaya Samal were brought to Nayapalli Police Station, Sri Parida enquired regarding the business transaction with a Calcutta party and noted their names and addresses on a piece of paper but did not enter the facts of the enquiry and other related factors in the General Diary/Station Diary of Police Station though required to make such entry in the General Diary/Station Diary as per P.M.R.-116.

That on 24.7.97 Sri Pramanjan Parida while functioning as Inspector-in-Charge of Nayapalli P.S. did not register the cognizable case pertaining to Car bearing No.ADH-1575 which dashed against the light post on N.H.-5 in front of CRPF Gate No.2, carcass of a Bull was found lying on the spot, though the matter was reported to the Police Station immediately.

That on the same day on 24.7.97 one Sri K.Madhav Swamy was detained at Nayapalli P.S. lock-up without any corresponding Station Diary entry nor any registration of the case, rather there was demand of illegal gratification and acceptance of the gratification to release Sri K.Madhav Swamy from the lock-up.

The copy of the Station Diary dt.24.7.97 was received at D.P.O., Khurda, Bhubaneswar on 6.8.97 after undue delay.

That even if the officers and men were not present at P.S., they were shown present at Police Station and their arrival and departure were not noted timely in Station Diary in violation of P.M.R.-116."

6. Admittedly, a departmental proceeding had been initiated against the petitioner in the year 2001 on some charges and these charges were also available to be framed at the time of initiation of the first departmental proceeding. The opposite parties did not choose to frame the charges in the first departmental proceeding and the petitioner had been exonerated of the charges in the first proceeding. Apart from above, there was no reason for the Department to frame the above charges seven years after the alleged incidents took place. In this connection, reference may be made to a decision of the Apex Court in the case of ***Secretary, Forest Department and Others Vrs. Abdur Rasul Chowdhury*** reported in (2009) 7 SCC 305. In the said reported case, there was delay in conclusion of a departmental proceeding and the incumbent had retired from service. The proceeding was sought to be dropped on the ground of delay and the Apex Court held that delay is not always fatal to the inquiry. It depends on facts and circumstances of each case and unexplained protracted delay may be one of the circumstances in not permitting the employer to continue with the enquiry proceedings. However, if the delay is explained satisfactorily, the proceedings should be permitted to continue. Though this case relates to delay in disposal of a departmental proceeding, the principles laid down therein can also be made applicable to the delay in initiation of a proceeding. Here is a case where admittedly there is delay of seven years in initiating a proceeding in respect of the aforesaid charges and there is no explanation whatsoever in the counter affidavit indicating the reasons therefor. Therefore the Department has not explained the reasons for delay of seven years in initiating the departmental proceeding. Reference in this connection may be made to another decision of the Apex Court in the case of ***P.V.Mahadevan Vrs. M.D.,Tamil Nadu Housing Board*** reported in AIR 2006 SC 207. In the said reported case, there was delay of ten years in issuance of charge memo and the Apex Court held that there being inordinate delay in initiation of the departmental proceeding, the same is vitiated.

7. In the present case, there being admittedly delay of seven years in initiation of the proceeding and no reason having been assigned by the Department explaining such delay in initiation of the departmental proceeding, we are of the view that the same is vitiated.

8. For the reasons stated above, we allow the writ application, set aside the impugned order of the Tribunal and also quash the departmental proceeding initiated against the petitioner.

Writ petition allowed.

2010 (I) ILR-CUT- 308

L.MOHAPATRA,J & B.P.RAY,J.

MANUA GOUDA -V- STATE OF ORISSA.*

NOVEMBER 10,2009.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.106.

Death of wife – Homicidal in nature – If husband and wife remained within the four walls of a house burden is on the husband to explain the circumstances in which the wife died.

In the present case there is no evidence that in the night of occurrence both the appellant and the deceased wife were present in the house – So although deceased died a homicidal death possibility of some body else being responsible can not be ruled out – Held, prosecution failed to establish the charge against the appellant.

(Para6)

Case law Relied on :-

(2009)43 OCR(SC)-591 : (Subramaniam -V- State of Tamil Nadu & Anr.).

For Appellant – Mr.Debasis Sarangi.

For Respondent – Addl.Govt.Advocate.

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*CRIMINAL APPEAL NO.214 OF 2001. From the judgment and order dated 30.6.2001 passed by Shri S.N.Sahoo, Addl.Sessions Judge, Bhanjanagar, Aska, Bhanjanagar in Sessions Case No.23 of 1999/(10/99 ADJ-I).

L.MOHAPATRA, J. The appellant having been convicted for commission of offence under Section 302 of the Indian Penal Code and sentenced to imprisonment for life by the learned Addl. Sessions Judge, Bhanjanagar, Aska, Bhanjanagar in Sessions Case No.23 of 1999/(10/99 ADJ-I), has preferred this appeal against the order of conviction and sentence.

2. The deceased is wife of the appellant. P.W.3, Santosh Kumar Gouda, lodged the F.I.R. before the Officer-in-Charge of Buguda Police Station on 7.5.1998 alleging therein that his sister, Sajani Gouda (deceased) wife of the appellant died about 1.00 A.M. in the night of 6.5.1998 in her husband's house. He was informed about such death by the appellant and when he saw the dead body, entertained a doubt and, accordingly, lodged the F.I.R.. Initially an U.D. Case was registered and inquiry was undertaken. In course of inquiry, it was found that the deceased died a homicidal death and, accordingly, investigation was taken up and charge-sheet was filed for commission of offence under Section 302 of the Indian Penal Code.

3. The prosecution in order to prove the charge, examined thirteen witnesses whereas one witness was examined on behalf of the appellant. The appellant took a plea that in the night of occurrence, he along with P.W.10 had gone to attend a feast and on his return found the dead body of the deceased. Out of thirteen witnesses examined by the prosecution, P.W.1 is the informant and brother of the deceased. P.W.9 is another brother

of the deceased. P.W.2 is stepmother of the appellant and P.W.4 is mother of the deceased. P.Ws.5 and 7 are two sisters of the deceased and P.Ws.6 and 8 are the paternal uncles of the deceased. P.W.1 is a witness to the inquest and P.W.10 speaks about the death of the deceased having heard from others. P.W.11 is the doctor, who conducted postmortem examination and P.Ws.12 and 13 are the Police Officers involved in the inquiry and investigation of the case.

4. Admittedly, there is no eye witness to the occurrence and the case is based on circumstantial evidence. The trial court on analysis of the evidence found that the appellant along with his deceased wife was living separately without having any connection with the parents before death of the deceased and that he has failed to prove the plea of alibi taken as defence. The trial court also found the information given by the appellant to the relatives of the deceased regarding the reasons for death was found to be false and he being the only person present in the house in the night of occurrence, the burden of proof was on him to explain the circumstances under which the deceased died. On these findings, the appellant was found guilty of the charge and was convicted thereunder.

5. Shri Sarangi, learned counsel appearing for the appellant assailed the impugned judgment on the ground that even accepting the postmortem report and the opinion of the doctor, P.W.11 that the deceased died a homicidal death, there being no eyewitness to the occurrence, it was the duty of the prosecution to prove the chain of circumstances to establish that it is the appellant and appellant alone, who could have committed the alleged offence. According to the learned counsel, the only material placed by the prosecution before the trial court is that the appellant informed the relatives of the deceased that the deceased was suffering from loose motion and vomiting whereas the death of the deceased was found to be homicidal by strangulation**.** There being no other evidence to connect the appellant with the commission of alleged offence, it was contended on behalf of the appellant that there is no evidence available against him and, accordingly, he should have been acquitted of the charge.

Learned counsel for the State submitted that evidence on record clearly establish that the appellant and the deceased were staying together in a separate house and there was none else in the said house when the dead body of the deceased was found. Therefore, it was for the appellant to explain the circumstances under which the deceased met a homicidal death. According to the learned counsel for the State, the appellant having not discharged his onus, the order of conviction is justified.

5. We have carefully perused the F.I.R. and the evidence of witnesses examined in course of trial. Admittedly, there is no eyewitness to the occurrence. P.W.1 is a witness to the inquest and turned hostile. P.W.2 is

step-mother of the appellant and she has stated in her deposition that four to five days before the date of occurrence, all of them had gone to Puri to perform the Sradha ceremony of the natural mother of the appellant and in the morning of the night of occurrence, she was told about the death of the deceased. She has further stated that they had no connection with the appellant or deceased after their marriage. P.W.3 is sister of the deceased and she in her deposition has stated that the appellant and the deceased had no child and for not being able to beget a child, the deceased was being tortured by the appellant and the appellant one day came to their house and informed about the illness of the deceased. When her family members went to the house of the appellant, they found the deceased lying on the floor of a room with ligature mark on the neck. Suspecting foul play and on failure of the appellant to explain as to how ligature mark was there on the neck of the deceased, the matter was informed to the police. Similar is the evidence of P.W.4, who is the father of the deceased. The other sister of the deceased, P.W.5 has supported the evidence of P.Ws.3 and 4. P.W.6 is the Uncle of the deceased, who has stated that in the morning they were informed about the death of the deceased and he had been to the house of the appellant to see the deceased. P.W.7 is another sister of the deceased, who has corroborated the evidence of P.Ws.3 and 4. Similarly, P.W.8, another uncle of the deceased has corroborated the evidence of P.W.6. P.W.9, another sister of the deceased has corroborated the evidence of P.Ws.3 and 4. P.W.10 was declared hostile and P.W.11 is the doctor, who conducted postmortem examination. He was of the opinion that the cause of death was due to asphyxia by strangulation and it was homicidal in nature. P.Ws.12 and 13 are the Police Officers involved in the inquiry and investigation of the case.

6. On analysis of the entire evidence, it is established that the appellant and the deceased were staying separately from their parents. In the morning of night of occurrence, the appellant went to the house of father of the deceased and informed regarding illness of the deceased. He stated before them that the deceased was suffering from loose motion and vomiting. After getting this information from the appellant, sisters, two uncles and father of the deceased came to the house of the appellant and found the deceased lying dead with ligature mark on her neck. Suspecting foul play, they informed the police. In course of postmortem examination, the doctor, P.W.11, who conducted postmortem examination, was of the opinion that the death of the deceased was homicidal due to strangulation. Even accepting the evidence of P.W.11 that the deceased died a homicidal death, the only circumstance available against the appellant is that he had given wrong information to the family members of the deceased by stating that the deceased was suffering from loose motion and vomiting. There is no

material whatsoever on record to show that in the night of occurrence the appellant and the deceased were together in the house of the appellant. In absence of any material to the above effect, we are of the view that the trial court was not justified in coming to a finding that under Section 106 of the Evidence Act, the burden was on the appellant to explain the circumstances under which the deceased died. In this connection, reference may be made to a decision of the Apex Court in the case of ***Subramaniam Vrs. State of Tamil Nadu and another*** reported in (2009) 43 OCR(SC)-591. The Apex Court in the said case observed that when the husband and wife remained within the four walls of a house and death by homicidal takes place, it will be for the husband to explain the circumstances in which she might have died. The Court further held although the same may be considered to be a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive. Under such circumstances, it may be difficult to arrive at a conclusion that the husband and the husband alone was responsible for the offence.

So far as present case is concerned, as stated, there is no iota of evidence to establish that in the night of occurrence both the appellant was present in the house. Therefore, even accepting that the deceased died a homicidal death, the possibility of somebody else being responsible can not be ruled out.

7. For the reasons stated above, we are of the view that the prosecution has not been able to establish the charge against the appellant. Accordingly, we allow the appeal and set aside the impugned judgment.

Appeal allowed.

2010 (I) ILR-CUT- 312

A.S.NAIDU,J & B.N.MAHAPATRA,J.

JADUMANI ROUT -V- M.D, ORISSA STATE SEEDS CORPORATION LTD. & ANR*

FEBRUARY 16,2010.

ORISSA STATE SEEDS CORPORATION SERVICE RULES 1988 – RULE 7(iii).

Employee of the Corporation – Age of superannuation 60 years – He can be asked to retire at the age of 58 if the authority found efficiency of the employee have been impaired.

Non-service of three months prior notice – Notice does not disclose that the petitioner made to retire compulsorily as his efficiency was found to have been impaired – A fresh reason can not be assigned by way of affidavit to validate the earlier order – Performance of the petitioner was quite satisfactory and there was no adverse remark with regard to the efficiency of the petitioner during his incumbency.

Held, impugned order set aside – Petitioner is deemed to have retired from service on superannuation at the age of 60 – Direction issued to the Opp.Parties to pay salary/differential salary to the petitioner along with normal annual increments along with other consequential service benefits within two months.

(Para 16,17,18)

Case laws Referred to:-

1.AIR 1978 SC 851 : (Mohinder Singh Gill & Anr.-V-The Chief Election Commissioner, New Delhi & Ors.)
2.AIR 2004 SC 4655 : (State of Punjab & Ors.-V-Balbir Singh)
3.38(1972)CLT 49 : (Shyam Charan Mohanty -V-State of Orissa & Ors.).
4.AIR 1978 SC 897 : (Polestar Electronic (P) Ltd.-V-Addl. Commissioner, Sales Tax &Anr)
5.AIR 1990 SC 1984 : (S.N.Mukherjee-V- Union of India).
6.(1971)1 All ER 1148 : (Breen -V- Amalgamated Engg.Union.)
7.(1974) ICR 120(NIRC) : (Alexander Machinery (Dudley) Ltd.-V-Crabtree).
8.AIR 1971 SC 40 : (Union of India -V-Col. J.N.Sinha & Anr.).
9.ILR 1973 Ctc.387 : (Benudhar Das -V-Union of India & Anr.).
10.AIR 2009 Orissa 35 : (Krushna Chandra Sahoo -V-Bank of India & Ors.).
11.40(1974) CLT.977 : (Sahadeb Patnaik -V- State of Orissa).
12.AIR 1954 SC 369 : (Shyamlal -V-State of Uttar Pradesh & Anr.).

For Petitioner - M/s.B.Routray, A.K.Baral, B.N.Satpathy, A.Panda, D.Mohapatra & B.Singh.

For Opp.Parties – Mr.J.Pattnaik, Sr.Advocate
M/s.S.N.Sahu, U.C.Behura, J.Patnaik, A.A.Das, B.Mohanty & T.K.Patnaik.

*ORIGINAL JURISDICTION CASE NO.14002 OF 2001. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.N.MAHAPATRA, J The writ petitioner calls in question the legality and propriety of the notice dated 15.09.2001 (Annexure-10) issued by Opp. Party No.2, Company Secretary, Orissa State Seeds Corporation Ltd., Bhubaneswar (for short 'the Corporation') calling upon him to retire from service on superannuation with effect from 30.11.2001 at the age of 58 and further prays to fix his scale of pay at Rs.1600-2660/- with four advance increments and to grant him all consequential service benefits in terms of his order of appointment as well as the Rules of the Corporation treating his age of superannuation to be 60 years.

2. Bereft of unnecessary details the facts and circumstances giving rise to the present writ petition are that the petitioner while continuing as Senior Operator on deputation basis in the Corporation, the Board of Directors (for short, 'the Board') of the Corporation on 18.7.1995 in the greater interest of the Corporation decided to absorb him on permanent basis in the scale of pay of Rs.1600-2660/- with four advance increments as per Annexure-6. Pursuant to said decision of the Board, and order dated 16.2.1996 of the Director of Horticulture, the petitioner was absorbed permanently in the Corporation with the condition as per Annexure-7 that his services will be governed by the Rules of the Corporation. On 15.9.2001, the Company Secretary issued a letter (Annexure-10) to the petitioner stating therein that as per the O.S.S.C. Service Rules, 1988 approved by the Board of Directors in their 43rd meeting held on 25.6.1988 the petitioner was due to retire from the service on superannuation with effect from 30.11.2001 A.N. at the age of 58, his date of birth being 03.11.1943. Hence, the writ petition.

3. Mr.B.Routray, learned counsel appearing on behalf of the petitioner vehemently argued that the impugned notice under Annexure-10 asking the petitioner to retire from service on superannuation at the age of 58 is not sustainable as the same has been issued contrary to the Service Rules of the Corporation in vogue at the relevant time. According to Rule 7(iii) of the Orissa State Seeds Corporation Service Rules, 1988 (for short 'the Rules'), an employee has to retire from service on superannuation at the age of 60 with an exception that in case the efficiency of an employee is found by the Board to have been impaired then he would be asked to retire on completion of 58 years after giving three months' prior notice. The notice of retirement under Annexure-10 does not reveal that the petitioner was asked to retire on completion of 58 years on the ground that the Board had found efficiency of the petitioner to have been impaired. It is clarified in the order dated 08.10.1996 (Annexure-7) that the services of the petitioner would be governed by OSSC Rules, 1988 in all respects. The performance of the petitioner was quite satisfactory throughout his incumbency having no adverse entry in the CCR. It

is argued that the Board has not taken a decision to retire the petitioner at the age of 58. There is no such provision under the statute empowering the Board of Directors to delegate the powers of the Board to the Managing Director with regard to the premature retirement. The authorization given to the Managing Director by the Board of Directors under Annexure-A/1 to take a decision in the matter of retirement does not speak about the premature retirement. More so, after enactment of the OSSC Service Rules, 1988 the executive instructions contained in Annexure-A/1 are invalid in the eye of law. Non-service of three months' prior notice, as required under Rule 7(iii) of the Rules, to the petitioner vitiates the impugned notice of retirement. No opinion as required under the Rules was formed before issuance of such notice of premature retirement to the petitioner. Hence, the plea of the opp. parties that a decision was taken by the Managing Director before asking the petitioner to go on compulsory retirement is an arbitrary and capricious decision, which warrants interference by this Court.

Relying on the decision of the apex Court, in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851,*** it was argued that when a statutory functionary passes an order based on certain grounds its validity must be judged by reasons so mentioned, and cannot be supplemented by fresh reasons by way of affidavit or otherwise. Therefore, the impugned notice asking the petitioner to retire from service with effect from 30.11.2001 at the age of 58 instead of 60 is bad in law and is liable to be set aside. The petitioner should be deemed to be in continuous service till the date he attained the age of superannuation, i.e., 60 years.

It was further argued that the petitioner had not been paid his scale of pay of Rs.1600-2600/- with four advance increments in terms of the minutes of the 65th Meeting of the Board held on 18.07.1995 (Annexure-6) pursuant to which order under Annexure-7 was passed.

4. Mr.J.Pattnaik, learned Senior Advocate appearing on behalf of the opposite parties submitted that the Managing Director of the Corporation before taking a decision not to allow the petitioner to continue beyond 58 years made assessment of the performance of the petitioner in the light of the Resolution dated 06.06.1998 of the Government of Orissa. A comparative statement showing performances of the petitioner was also prepared and placed before the Managing Director for consideration. On consideration of the same, the Managing Director found the efficiency of the petitioner to have been impaired. Thereafter, the notice of retirement dated 15.09.2001 was issued to the petitioner asking him to retire from service with effect from 30.11.2001. Subsequently, on 22.09.2001, the Board of Directors in their 87th meeting considered the matter and approved the decision of the Managing Director. Therefore, there was no violation of Rule

7(iii) of the Rules, in retiring the petitioner on superannuation with effect from 30.11.2001 at the age of 58. Under the Regulations of the Corporation, the Managing Director is the competent authority in the matter of retirement of its employees. This power was conferred on the Managing Director by virtue of delegation of powers in the 39th Meeting of the Board of Directors held on 20.06.1987. It was contended that compulsory retirement given to the petitioner was in accordance with the settled principles of law, and no infirmity can be attributed to the same.

In support of his contention, Mr. Pattnaik relied upon several decisions of the apex Court as well as this Court in *Shyamlal-v-State of Uttar Pradesh and another, AIR 1954 S.C.369; Allahabad Bank Officers Association and another-v-Allahabad Bank and others AIR 1996 SC 2030; High Court of Punjab and Haryana -v- Ishwar Chand Jain and another etc, AIR 1999 SC 1677; Registrar (Administration), High Court of Orissa, Cuttack V. Sisir Kanta Satapathy (dead) by L.Rs. & Anr.*, *AIR 1999 SC 3265; State of Gujarat-v-Umedbhai M.Patel*, *AIR 2001 SC 1109; State of U.P. and others-v-Vijay Kumar Jain, AIR 2002 SC 1345; State of Punjab and others-v-Balbir Singh, AIR 2004 SC 4655;* and *Sahadeb Patnaik Vs. State of Orissa, 40(1974) CLT 977.*

Mr. Pattnaik, further submitted that law is well settled that if adequate notice is not given to the concerned employee then at best he would be entitled to pay for the said period, but the same cannot invalidate the notice of retirement. In support of his contention, Mr. Pattnaik relied upon the decision of this Court in ***Shyam Charan Mohanty Vs. State of Orissa & Ors., 38(1972) CLT 49***. It was also submitted that fixation of pay of the petitioner is pending with the Corporation awaiting clearance of the Government for implementation of the revised scale of pay in respect of employees of the Corporation.

5. To resolve the controversies involved, it is felt necessary to examine the order of permanent absorption of the petitioner under Annexure-6, the notice of retirement dated 15.09.2001 under Annexure-10 as well as the provisions of Rule 7(iii) of OSSCS Rules, which are as follows:-

Annexure-6 "EXTRACT OF THE MINUTES OF THE 65TH MEETING OF THE BOARD OF DIRECTORS OF OSSC LTD. HELD ON 18.07.1995

XX XX XX

Item No.12

PERMANENT ABSORPTION OF SHRI JADUMANI ROUT, SENIOR OPERATOR IN THE O.S.S.C. LIMITED:

The Board considered the proposal for absorption of Shri Jadumani Rout, Senior Operator on permanent basis and decided to absorb him as Supervisor in the scale of pay of Rs.1600--2660/- with

four advance increments over and above the pay being drawn by him in greater interest of the Corporation.

XX XX XX"

(Emphasis supplied)

Annexure-10 "To

Sri Jadumani Rout,
Supervisor,
D.R.Seed Store,
Chandaka, BBSR.

Sub:- Issue of retirement notice.

Sir,

As per OSSC Service Rules, 1988 approved by the Board of Directors in their 43rd meeting held on 25.6.88, you are due to retire from the service of the Corporation on 30.11.2001 AN on attaining the age of superannuation of 58 years being your date of birth is 3.11.1943 as recorded in your Service Book. So you are desired to clear all the Corporation dues if any outstanding with you and the pensionary documents may please be submitted at the earliest for taking further action in the matter and you keep yourself ready to handover the charges.

Yours faithfully
Sd/-
Company Secretary"

Rule-7(III) of Orissa State Seed Corporation Service Rules, 1988

"After an employee has reached an age of 58 years he may be retired after giving him three months notice in writing in case his efficiency is found by the Board to have been impaired. Subject to this an employee shall retire in completion of 60 (Sixty) years."
(*Emphasis supplied)*

6. In ***Polestar Electronic (P) Ltd. V. Addl. Commissioner, Sales Tax & Anr., AIR 1978 SC 897***, the apex Court held that the well settled principle of law of interpretation is that a statutory enactment must ordinarily be construed according to the plain natural meaning of its language and that no words should be added, altered or modified unless it is necessary to do so in order to prevent a provision from being unintelligible, absurd, unreasonable, unworkable or totally irreconcilable with the rest of the statue.

A plain reading of Rule 7(iii) makes it amply clear that in normal course an employee has to retire on superannuation at the age of 60 years. However, in case efficiency of an employee is found by the Board to have

been impaired, he can be retired on superannuation at the age of 58 years with three months' prior notice in writing. The impugned notice of retirement reveals that as per the OSSC Rules, 1988 approved by Board of Directors on 25.06.1988, the petitioner was made to retire on attaining the age of superannuation from the Corporation service with effect from 30.11.2001 AN at the age of 58, his date of birth being 03.11.1943. The said notice does not indicate any reason as to why the petitioner was asked to retire at the age of 58 instead of 60.

7. The order dated 08.10.1996 (Annexure-7) reveals that the petitioner was absorbed permanently in the Corporation and his service has to be governed by the Rules of the Corporation. So far as the retirement of the petitioner is concerned, Rule 7(iii) of the Rules contains the provision for retirement which were in force at the time of permanent absorption of the petitioner and also at the time when the impugned notice of retirement was issued.

8. The main thrust of contention of the opp. parties is that on review of performance of the petitioner it was found by the Managing Director that efficiency of the petitioner had been impaired for which he was asked to retire on superannuation on completion of 58 years.

9. Needless to say that if an employee is appointed permanently to a post, right accrues in his favour in terms of the order of his appointment and the Rules prevailed at the relevant date. For any reason, if the employer decides to take away such right(s) of the employee, the reason should be intimated to the employee. The reason should not rest in the minds of the employer. The same should be translated into words so as to enable the employee to know the reason for which any right accrues in his favour, in terms of order of his appointment and the prevalent Rule is taken away.

Law is well settled that the requirement to record reason can be regarded as one of the principles of natural justice and should govern exercise of powers by administrative authorities. The apex Court in ***S.N.Mukherjee-v-Union of India, AIR 1990 SC 1984,*** held that the recording of reasons by an administrative authority serves a salutary purpose namely; it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. The need for recording of reasons is greater in a case where the order is passed at the original stage.

Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [S***ee Raj Kishore Jha V. State of Bihar (2003) 11 SCC 519]***.

Even in respect of administrative orders Lord Denning, M.R. in ***Breen V. Amalgamated Engg. Union (1971) 1 All ER 1148***, observed: "The giving of reasons is one of the fundamentals o f good administration." In ***Alexander***

Machinery (Dudley) Ltd. V. Crabtree (1974) ICR 120 (NIRC) it was observed: "Failure to give reasons amounts to denial of justice".

In ***Vasant D. Bhavsar V. Bar Council of India (1999) 1 SCC 45***, the apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based.

In the instant case, the impugned order does not say anything about the reason as to why the petitioner was made to retire from service at the age of 58, though the normal age of retirement on superannuation is 60 years.

10. Law is also well settled that validity of an order is to be judged by the reasons mentioned therein and it cannot be developed either by oral submission or by filing affidavit.

The apex Court, in ***Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors., AIR 1978 SC 851***, held as follows:-

> "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p. 18):
>
> Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> Orders are not like old wine becoming better as they grow older."

Admittedly, the notice of retirement does not say that the petitioner was made to retire compulsorily as his efficiency was found by the Board to have been impaired. A fresh reason cannot be assigned by way of affidavit to validate the earlier order.

11. This Court in ***Sahadeb Pattnaik (supra),*** while dealing with a case of compulsory retirement placed reliance on ***T.G.Shivvacharana Singh Vs. State of Mysore***, ***AIR 1965 SC 280; Union of India Vs. Col. J.N.Sinha & Anr., AIR 1971 SC 40;*** and ***Benudhar Das Vs. Union of India & Anr., ILR 1973 Ctc. 387*** and held that the criteria and procedure indicated in the administrative instructions are to be followed rigidly and only in case of doubtful integrity and lack of physical and mental efficiency, the proviso is to be applied. A high-power committee is to be constituted to review the case of

each individual officer. It is for the State Government to determine whether the petitioner's retirement was in public interest. If the authority with bona fide intension forms an opinion, its correctness cannot be challenged before courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or that the decision is based on collateral grounds or that it is an arbitrary or capricious decision. When such a dispute is raised by an employee, it is open to the Government to place relevant material before the Court to establish that the impugned action was not arbitrary or based on collateral grounds. If there are some materials germane to the issue in supporting the action taken by the Government, then the High Court cannot sit in appeal and declare that the action is invalid as being based on insufficient materials or on the ground that it could come to a different conclusion on the same materials. The High Court can, however, interfere if the decision of the government is based on no materials or on materials on which a reasonable person cannot come to that conclusion.

12. Challenging that the impugned order is arbitrary and capricious one, Mr. Routray referred to paragraph 15 of the writ petition, and submitted that the performance of the petitioner was quite satisfactory and there was no adverse remark as regards efficiency of the petitioner during his incumbency. In reply to the said averment, the opp. parties, in paragraph 10 of the counter affidavit stated that the Corporation was in great financial crisis and the Government of Orissa vide Resolution dated 06.06.1998 decided and directed all Public Sector Undertakings to reduce their staff strength and also to prepare a Scheme for voluntary retirement of the employees. In such circumstance, comparative assessment of CCRs/ performances of the petitioner was made. On such assessment, when the M.D. found the performance of the petitioner unsatisfactory, he decided to issue the impugned notice of retirement to the petitioner.

13. Merely saying that the CCR of an employee is not satisfactory is not enough. Nothing has been brought by the opp. party to the notice of the Court to substantiate the stand of un-satisfactory performance of the petitioner till 15.09.2001 when the impugned notice of retirement was issued. On the other hand, the entries made in CCR of the petitioner give a different picture. On being asked, learned counsel for opp. parties produced the original CCR of the petitioner, relevant portions of which are extracted below.

"**2000-2001**

Sl. No.	HEADING	REMARKS
1.	REPORT ON HEALTH QUALITIES AND ABILITIES	: Good health. Possesses administrative and technical ability. Have zeal to work. Can take responsibility. Takes good decision. Noting & drafting good. Very popular among the staff for his amiable nature.
2.	REPORT ON KNOWLEDGE AND PERFORMANCE	: Aware of rules, regulations and procedure. Capable of acquiring knowledge and apply the same. Capable of dealing and disposing the case smoothly. A good Supervisor to look after the work. Technically sound.
3.	DEFECTS, IF ANY NOTICED, POINTED OUT AND RESULTS THEREOF	: Not noticed
4.	INTEGRITY	: Beyond doubt
5.	GRADING	: Very Good

1999-2000, 1998-1999 & 1997-1998

1.	a) State of health	: Sound
	b) Attendance & discipline	: Punctual and quite disciplined
	c) Clearance of routine	: Very good
	d) Noting	: Does not arise
	e) Drafting	: Does not arise
	f) Disposal	: Quick
	g) Knowledge of rules and regulations	: Very much sound
	h) Ability to deal with cases	: Dealing with technical cases is outstanding
	i) Integrity	: Beyond doubt
2.	Steps taken to point out defects if any with result	: No defects noticed

3.	General remarks (Officer) conduct, fitness for promotion or other assignment over all rating etc.	**:** Being a sincere, responsible and experienced person, adequately equipped with technical knowledge, worked with determination and shouldered responsibility. Capable of providing effective results being a competent technical personnel. In view of his good performance in all respects during the period under report, I ranked him outstanding. Deserves promotion to higher post."

Almost similar remarks have been given in the preceding years. Remarks in the Character Roll for the year 2000-01 were given by the M.D., O.S.S.C. and for the years 1999-2000, 1998-99, 1997-98 and 1996-97 by the Manager, Cold Storage and was confirmed by the Chief Processing Manager of the Corporation.

Comparison of the remarks entered in the CCR of the petitioner for the above years does not at all indicate that the petitioner's efficiency was found to have been impaired in any way. There was no adverse entry in the character roll nor the integrity was doubted at any point of time. On the other hand, entries in the character roll reveal that the petitioner possessed administrative and technical ability having zeal to work; could take responsibility and good decision; noting and drafting was good; he was aware of rules, regulations and procedure; capable of dealing and disposing of the cases smoothly; he was a good supervisor to look after the work; technically sound and no defect was noticed in his work. Even outstanding rank has been given to him.

Moreover, it appears from the original record produced before the Court that the name of the petitioner was recommended for continuance in service beyond the age of 58 years to meet the shortage of staff strength and to utilize the long service experience of the petitioner for benefit of the Corporation. Even the office note dated 14.09.2001 speaks of such recommendation. But all of a sudden on 15.09.2001, the decision was taken by the Managing Director to serve the notice of retirement on the petitioner.

The stand that a comparative chart showing performance of the petitioner had been prepared keeping in view the Government Resolution dated 06.06.1998 for the purpose of taking a decision in the matter of compulsory retirement of the petitioner is not relevant as Rule 7(iii) does not provide for such consideration. Executive instruction cannot supersede the statutory provision. Therefore, action of the opp. parties taking the same into consideration vitiates the decision making process.

Law is well settled that when the statute provides for a particular procedure to be followed to do a certain thing, the same should be done in that manner or not at all and other modes of performance are necessarily forbidden. (See: *Sukhdev Singh & Ors. Vs. Bhagatram Sardar Singh Raghuvansh i & Anr., AIR 1975 SC 1331; Hukam Chand Shyam Lal Vs.*

Union of India & Ors., AIR 1976 SC 789; *Sangeeta Singh Vs. Union of India & Ors., AIR 2005 SC 4459; Hira Cement Workers Union Vs. State of Orissa & Ors., 92 (2001) CLT 184; Krushna Chandra Sahoo Vs. Bank of India & Ors., AIR 2009 Orissa 35 and Rabindranath Das v. State of Orissa & others in O.J.C. No.8913 of 1997 decided on 10.12.2009)*

Further, nothing was noticed from the office notes made prior to 15.09.2001 including 14.09.2001 that a comparative statement showing performance of the petitioner was prepared for consideration by the M.D.

14. Extracts of the minutes of the 87th Meeting of the Board of Directors of OSSC Ltd. held on 22.09.2001, furnished by opp. parties, reveals that after due deliberation, the notice on Sri Jadumani Rout, Supervisor for retirement from Corporation service on attaining the age of superannuation at 58 years with effect from 30.11.2001 A.N. was approved by the Board. The minutes do not say that on review of the performance of the petitioner, the Managing Director found the efficiency of the petitioner has been impaired.

Further, it appears that two lines have been inserted into the note sheet entry on 15.9.2001. The relevant note sheet entry dated 15.9.2001 runs as follows:-

"Discussed with M.D. with reference to orders at page 180/c to 180E/C

The notice to be served for retirement immediately on Sri Rout."

(*emphasis supplied*)

As it appears, originally the entry was only the subsequent two lines, i.e., "the notice be served for retirement immediately on Shri Rout." The previous two lines, i.e., "Discussed with M.D. with reference to orders at page 180/C to 180E/C" appears to be subsequent insertion. Such conclusion of us gets fortified from the following noting made on the same day prior to the above notings.

"**15/9**

A draft three month notice to Sri Jadumani Rout, Supervisor is put up below for approval since he is due to retire from Corporation service w.e.f. 30.11.01.

Sd/-
15.9.01

S.O.(ESTT)

Notes above.

As desired draft retire notice of Shri Jadumani Rout, Supervisor is put up below for kind approval.

DFa
Sd/-
15.9.2001"

These two notings clearly show that three-month's retirement notice was drafted and put up for approval on 15.09.2001. Thereafter, there was no need to discuss the matter with M.D. further for the purpose of taking a decision with regard to compulsory retirement of Shri Rout on giving reference to order at page 180/C to 180E/C.

The matter can also be considered from another angle. If the three different notings of 15.09.2001 excluding the noting "Discussed with M.D. with reference to order at page 180/C to 180E/C" are read together, the sequence is maintained. When the above two lines are inserted the sequence breaks.

Our impression is further strengthened from the following facts:-

(i) The stand of the opposite party is that the Managing Director before taking a decision not to allow the petitioner to continue beyond 58 years made assessment of the performance of the petitioner. Keeping in view the resolution dated 6.6.1998 of the Government of Orissa a comparative assessment of performance of the petitioner was made and was placed before the Managing Director for consideration. On consideration of the same, the Managing Director found the efficiency of the petitioner to have been impaired. Thereafter the notice of retirement dated 15.9.2001 was issued to the petitioner. Subsequently, on 22.9.2001 the Board of Directors in its 87th meeting considered the matter and approved the decision of the managing Director. But the said proceeding of the 87th Meeting of the Board of Directors dated 22.09.2001 does not support this contention of the opposite parties. At this juncture for better appreciation, the proceeding of the said meeting contained in pages 224-225 of the original record are extracted below.

Page- 224 "ORISSA STATE SEEDS CORPORATION LIMITED

(87th Board meeting)

Item No.8.

CONTINUANCE OF SHRI JADUMANI ROUT, SUPERVISOR BEYOND ATTAINING THE AGE OF SUPERANNUATION OF 58 YEARS.

Shri jaduani Rout was initially working in this corporation as Senior Operator since 27.08.84 on deputation basis from the Directorate of Horticulture, Orissa, Bhubaneswar. Later on, in pursuance of the decision taken by the board in their 65th Meeting held on 18.07.95 and in pursuance of Order No.ID NG(I+3)I/85-3/1179/Hort.Dt.16.02.96 of the Director of Horticulture, Sri Roiut has been permanently absorbed in the services of the Orissa State Seeds Corporation Ltd. with effect from 08.10.96 vide Order No.7846 dt 08.10.96 as Supervisor in the scale of pay of Rs.1600-50-2300-EB-60-2660/-. Now being the date of birth of Sri Rout is 03.11.1943, he is due to be retired from the services of the OSSC Ltd. on 30.11.2001 on attaining the age of superannuation of 58 years.

As per the Service Rules, 1998 approved by the board of Directors in their 43rd Meeting held on 25.06.88 "an employee may be retired from the services of the Corporation after reaching an age of 58 years in giving him 3(three) months notice in writing in case his efficiency is found by the board to have been impaired subject to this an employee shall retire on completion of 60 years.

The Notice for retirement has already been served on Shri Jadumani Rout.

Page- 225 "EXTRACT OF THE MINUTES OF THE 87TH MEETING OF THE BOARD OF DIRECTORS OF O.S.S.C. LIMITED HELD ON 22.09.2001

xx xx xx

Item No.8.

CONTINUANCE OF SRI JADUMANI ROUT, SUPERVISOR BEYOND ATTAINING THE AGE OF SUPERANNUATION

After due deliberation, the notice served on Sri Jadumani Rout, Supervisor for retirement from Corporation service on attaining the age of superannuation of 58 years on 30.11.2001(A.N.) was approved by the Board.

xx xx xx xx xx

Sd/- Alka Panda,IAS
CHAIRPERSON"

In the above extracted two pages neither any reference is made with regard to Managing Director's consideration of the performance of the petitioner nor consideration of the comparative CCR/performance of the petitioner prepared keeping in view the Resolution dated 6.6.1998 issued by the Government of Orissa, even though such a consideration of the Managing Director has been claimed to have been made on 15.9.2001. This clearly indicates that when the matter relating to retirement of Sri Rout was placed before the Board on 22.09.2001 for approval, no decision was taken by the M.D. on the basis of study of the performance of the petitioner with reference to page 180C to 180E/C, as claimed. Had there been any such decision of the M.D. and existence of page 180/C to 180E/C containing the comparative analysis of petitioner's performance, the same must have been placed before the Board on 22.09.2001 and reflected in the resolution.

Further, the entry in the petitioner's character roll for the year 2000-2001 reflects the grading of the petitioner as 'very good' on 04.05.2001. Thereafter, in the month of August 2001, recommendation has been made in office note for continuance of the petitioner in service beyond 58 years and this continued till 14.09.2001 to meet the shortage of staff strength and to utilize the long service experience of the petitioner for the benefit of the Corporation. During these periods, the Company Secretary all along remained silent, but all of a sudden on 15.09.2001, he woke up and

prepared a comparative chart showing performance of the petitioner and placed the same before the M.D. for his consideration for the purpose of compulsory retirement. That too, after a draft retirement notice was prepared and put up for approval. This creates clouds of suspicion in the conduct of opp. parties.

It may be relevant to note that the present writ petition has been filed on 15.10.2001 challenging the impugned order of retirement on the ground that the petitioner was asked to retire from service on attaining the age of 58 years instead of 60 years without indicating any reason in the notice of retirement and in contravention of Rule 7(iii) of the Rules.

Perusal of the records reveals that initially it was decided to give retirement to the petitioner at the age of 58 years without any rhyme and reason and accordingly notings were made. As it appears, subsequently, when the same was challenged in the Court, two more lines, i.e., "Discussed with M.D. with reference to orders at page 180/C to 180E/C" have been inserted to justify the action of authorities to be in consonance with Rule-7 (iii). This action of opp. parties gives an impression that the original records have been manipulated to give a colour of legitimacy to the apparently illegal action.

15. In view of the above, we have no hesitation to hold that the requirement of Rule 7(iii) has not been satisfied while asking the petitioner to take premature retirement in terms of the said Rule at the age of 58.

16. Placing strong reliance on the decision of this Court in the case of ***Sahadeb Patnaik-v-State of Orissa***, ***40(1974) C.L.T.977*** and the decision of the apex court in the case of ***Shyamlal-v-State of Uttar Pradesh and another, AIR 1954 S.C.369***, Mr.Pattnaik contended that compulsory retirement does not amount to dismissal or removal even though misconduct in the shape of inefficiency is a factor taken into account while ordering compulsory retirement. In such case they merely furnish the background and not the basis. The decisions in the above two cases are of no help to the opposite parties since the petitioner's case is that the criteria and procedure indicated in Rule 7(iii) of the Corporation Rules have to be strictly followed. The decision of the Managing Director which has been subsequently approved by the Board it appears is an arbitrary and capricious decision contrary to Rule 7(iii). The case of ***Sahadeb Pattnaik (supra)*** on the other hand supports the case of the petitioner.

The decisions of the apex Court in ***Allahabad Bank Officers Association & Anr. -v- Allahabad Bank & Ors. AIR 1996 SC 2030*** and, ***High Court of Punjab and Haryana -v- Ishwar Chand Jain & Anr. etc, AIR 1999 SC 1677,*** have no application to the case of the petitioner in which the issue was whether the compulsory retirement can be treated as an order of punishment.

The apex Court in ***Registrar (Administration), High Court of Orissa, Cuttack V. Sisir Kanta Satapathy (dead) by L.Rs. & Anr.***, ***AIR 1999 SC 3265***, held that the High Court itself cannot pass an order compulsorily retiring a judicial officer without getting formal approval from the Governor on the recommendations made by the High Court in that regard. This decision is no way relevant for the present case and, therefore, is of no help to the opposite parties. The decision of the apex court in ***State of Gujarat-v-Umedbhai M.Patel***, **(*2001) 3 SCC 314*** is also of no help to the opposite parties as in the said case the apex Court held that when the service of a public servant is no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest, and ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution. Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order. Compulsory retirement shall not be imposed as a punitive measure. On the other hand, this decision of the apex court will help the case of the petitioner wherein it is held that for better administration, it is necessary to chop off dead-wood, but the order of compulsory retirement can be passed after having due regard to the entire

service record of the officer. In the present case, the service record of the petitioner does not contain any adverse remark against the petitioner. The facts in the case of ***State of U.P. & Ors. -v-Vijay Kumar Jain, AIR 2002 SC 1345*** is completely different from the case at hand and the principles decided in that case have no application to the case of the petitioner.

17. So far as payment of scale of pay is concerned, admittedly, the petitioner was permanently absorbed in the Corporation in the scale of pay of Rs.1600-2660/- with four advance increments as per Annexures-6 & 7. Annexure-8 is a clearance by the Director of Horticulture to absorb the petitioner in the Corporation in the scale of pay of Rs.1600-2660/- The grievance of the petitioner is that his case was not considered for payment of scale of Rs.1600-2660/- with effect from the date of joining in the Corporation with four increments, which is violative of the terms and conditions of the appointment. Annexure-11 is a representation dated 06.04.2001 made by the petitioner bringing to the notice of the opposite parties about the revised scale of pay in terms of 65th resolution of the meeting of the Board as well as in terms of the order of appointment, but till date no such financial benefit has been provided to the petitioner. In paragraph-14 of the counter affidavit it is stated that the matter regarding fixation of pay is pending with the Corporation awaiting Government clearance for implementation of the revised scale of pay in respect of Corporation employees and that after 08.10.1996 the petitioner is ceased to be an employee of the Government of Orissa by exercising necessary option to be absorbed in the Corporation. The

reply of the opposite parties is really unfortunate. When an employee is given appointment on particular terms and conditions indicating the salary structure, the employer is duty bound to pay such salary and should not avoid on some plea or other. In the instant case, the petitioner was permanently absorbed in service with effect from 18.7.1995 in the scale of pay of Rs.1600-2660/- with four advance increments. Though notice of retirement was issued on 15.1.2001 his salary in terms of the order of appointment has not been paid by the opposite parties.

18. In the above circumstances and in the ends of justice, we have no hesitation in reaching the conclusion that the petitioner is deemed to have retired from service on superannuation at the age of 60. We, accordingly, set aside impugned order dated 15.09.2001 under Annexure-10 and direct the opp. parties to pay the salary/differential salary to the petitioner along with normal annual increments, and other consequential service and financial benefits expeditiously, preferably within a period of two months from the date of receipt of this judgment.

The writ petition is allowed.

2010 (I) ILR-CUT- 328

A.S.NAIDU,J & B.N.MAHAPATRA,J.

ARTATRANA SWAIN -V- STATE OF ORISSA & ORS.*

OCTOBER 27,2009.

ORISSA CIVIL SERVICES (REHABILITATION ASSISTANCE) RULES 1990 – RULE 5.

Employment on compassionate ground – Not a vested right – Object is to enable the family to get over the financial crisis – Court is to consider penurious conditions of the deceased's family.

In this case father of the petitioner got premature retirement on 14.12.1998 – So cause of action for the petitioner to apply for appointment under the scheme arose after 14.12.1998 – The petitioner made an application in the year 1999 after the emended Rules came into force – Employment on compassionate ground should be provided strictly in accordance with the Rules and the Court can not take a liberal view contrary to the Rules – Held, Tribunal has not committed only error in rejecting the application of the petitioner.

(Para 14)

Case laws Referred to:-

1.(1998) 9 SCC 87 : (Kochin Dock Labour Board - V- Leemamma Samuel & Ors.).
2.(1997) 8 SCC 85 : (Haryana State Electricity Board & Anr.-V-Hakim Singh).
3.(1994) 4 SCC 138 : (Umesh Kumar Nagpal -V- State of Haryana & Ors.)
4.(2004) 2 SCC 130 : (Teri Oat Estates (P) Ltd.-V- U.T.Chandigarh).

For Petitioner – M/s.Krushna Ram Mohapatra & Associates.

For Opp.Parties- Addl.Govt.Advocate.

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*W.P.(C) NO.12094 OF 2009. An application under Articles 226 & 227 of the Constitution of India.

A.S.NAIDU, J. The order dated 5th February, 2009 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1344 of 2000 is assailed in this Writ Petition.

2. Bereft of all unnecessary details the short facts of the case are as follows:-

The father of the petitioner was serving as a Peon in the establishment of Tahasildar, Binika in the district of Sonepur. In course of his service he suffered from serious ailments and permanently became incapacitated. He was directed to appear before the C.D.M.O., Sonepur for medical examination by the Board. After examination, a Medical Certificate was issued declaring him completely and permanently incapacitated for further service of any kind in the department. Thereafter, on 5th May, 1998 the father of the petitioner filed a representation before opposite party No.3, inter alia,

praying to allow him to retire from service on health ground with a further prayer to give employment to his son on compassionate ground. To the said representation an application of the petitioner seeking his appointment on compassionate ground was also enclosed. The application filed by the father of the petitioner was allowed by order dated 14.12.1998 (Annexure-3) and he was permitted to retire from Government service on the ground of invalidation w.e.f. the date of his expiry of leave, i.e. 11.9.1998. Thereafter, it appears, the petitioner filed application for appointment under Rehabilitation Assistance Scheme in the year 1999. The said application was forwarded by the Tahasildar, Binika to Collector, Sonepur on 19.2.1999 vide Annexure-4. In the meanwhile the petitioner filed an application to issue distress certificate. After due consideration the Collector was pleased to rejected the said application. Being aggrieved by the fact that no action was taken on the application filed by the petitioner for appointment under Rehabilitation Assistance Scheme, the petitioner approached the Orissa Administrative Tribunal, Bhubaneswar in O.A.No.1344/2000.

3. Before the Tribunal it was submitted that the father of the petitioner having retired prematurely on 11.9.1998, on the ground of permanent incapacitation, in consonance with the provisions of the Orissa Civil Services (Rehabilitation Assistance) Rules, 1990 (for short "Rehabilitation Assistance Rules") he was entitled to an appointment.

4. The aforesaid contentions were resisted by the State Government mainly on the ground that in view of the amendment of the Rehabilitation Assistance Rules which came into force w.e.f. 08.10.1998, the petitioner was not eligible to get the benefit under the Scheme.

5. Learned Tribunal after hearing the parties arrived at a conclusion that by the time the petitioner filed the application for appointment under Rehabilitation Assistance Scheme, amended rules had already come into force and as such the authorities had not committed any illegality in rejecting the petition. The said order as stated earlier is assailed in this Writ Petition.

6.According to learned counsel, the father of the petitioner admittedly retired prematurely on 11.9.1998 on the ground of incapacitation. He had submitted an application on 5.5.1998 for allowing him to retire. Along with the said application the petitioner had also submitted an application seeking appointment. Rehabilitation Assistance Rules were admittedly amended w.e.f. 8.10.1998. Thus, there was no reason as to why the application filed by the petitioner was not considered.

7. The aforesaid submissions are strongly repudiated by learned counsel appearing for the State. It is submitted that in fact the petitioner had filed an application in the year 1999 and by the said date the amended rules had already come into force and as such the authorities have rightly rejected the application.

8. Heard learned counsel for the parties at length and perused the pleadings meticulously. There is no dispute with regard to the factual aspects. The father of the petitioner in fact filed an application on 5.5.1998 seeking premature retirement. The said application was allowed by order dated 14.12.1998. Thus he was permitted to retire w.e.f. 11.9.1998, i.e. the date on which his leave expired. The cause of action for filing an application for appointment under Rehabilitation Assistance Scheme arose only after 14.12.1998 or at best on 11.9.1998.

9. In view of the aforesaid fact the application said to have been filed by the petitioner on 5.5.1998 was a premature one. Admittedly, the petitioner filed another application in the year 1999 by then the amended Rules had already come into force. Thus, the authorities did not commit any irregularity in rejecting the said application.

10. Law is well settled that an employment on compassionate ground should be provided strictly in accordance with the Rules and the Court can not take a liberal view contrary to the Rules (see **Kochin Dock Labour Board Vs. Leemamma Samuel & Ors., (1998) 9 SCC 87.**

11. That apart, the object of providing compassionate employment is only to relieve the family from the financial hardship. Therefore, an "ameliorating relief" should not be taken as opening an alternative mode of recruitment to public employment. (**see Haryana State Electricity Board & Anr. Vs. Hakim Singh, (1997) 8 SCC 85.**

12. In the case of **Umesh Kumar Nagpal Vs. State of Haryana & Ors., (1994) 4 SCC 138** the Supreme Court has elaborately dealt with the nature of right, which a dependant can claim while seeking employment on compassionate ground. The Court observed that the only ground which can justify compassionate employment is the penurious conditions of the decease's family……. The consideration of such employment is not a vested right ……. The object being to enable the family to get over the financial crisis.

13. In the case of **Teri Oat Estates (P) Ltd. V. U.T.Chandigarh, (2004) 2 SCC 130.** The Supreme Court held as follows:

> "We have no doubt in our mind that sympathy or sentiment by itself can not be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. It is further trite that despite an extraordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, the Court ordinarily would not pass an order which would be in contravention of a statutory provision."

14. In view of the aforesaid, among many other authoritative pronouncements as the Rehabilitation Assistance Rules, governing compassionate appointment, have been amended, we are of the considered

view that the Tribunal has not committed any error, consequently we are not inclined to interfere with the same.

The Writ Petition is accordingly dismissed.

2010 (I) ILR-CUT- 332

PRADIP MOHANTY,J.

MD.NOORULLAH SHAREEF -V- SENIOR POST MASTER,GPO,BUXIBAZAR,CTC-1*

OCTOBER 29,2009.

LIMITATION ACT, 1963 (ACT NO. 36 0F 1963)-SEC.5

Law is well settled that while considering the application of condonation of delay the Court should not take a pedantic approach but should take a pragmatic view and it is not necessary for the party seeking condonation of delay to explain each day of delay.

In the present case, due to official process and for tracing out the file, the delay had occasioned – Held, the appellate Court has not committed any illegality or material irregularity in allowing the application – However the cost imposed by the appellate Court is modified from Rs.5000/- to Rs.20,000/-. (Para 5)

Case laws Referred to:-

1. 2003(I) OLR (SC) 673 : (Shiv Shakti Coop.Housing Society, Nagpur -V- M/s. Swaraj Developers & Ors.)
2. 2008(I) OLR 235 : (Golam Mohammad & Anr.-V- Sk.Fakir & Ors.).
3. 2003(II) OLR 409 : (Sitaram @ Mahendra Ghosh -V-Sri Antaryami Mohapatra &18 Ors. etc.)
4. (2006)7 SCC.452 : (Vidyodaya Trust & Ors.-V-mohan Prasadr & Ors.).
5. 2003 (Supp.)OLR 703 : (Narayan Dash -V- Gouranga Charan Dash & Ors, etc.).

For Petitioner – M/s. P.K.Rath (I), S.Barik, S.M.Ali, D.Jena, M.Tola, R.Mahapatra & D.Maharana.

For Opp.Party – Mr.S.K.Das, Central Government Counsel.

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*CRP NO.4 OF 2005. From the judgment dated 17.12.2004 passed by Sri C.R.Dash, Ad hoc Addl.District Judge (FTC-I), Cuttack in Misc. Appeal No.119 of 2002 reversing the order dated 02.09.2002 passed by Sri G.Pati, Civil Judge (Jr.Division), Ist Court, Cuttack in Misc.Case No.152 of 2000.

PRADIP MOHANTY,J. In this Civil Revision, the petitioner challenges the judgment dated 17.12.2004 of the Ad hoc Addl. District Judge (FTC-I), Cuttack in Misc. Appeal No. 119 of 2002 reversing the order dated 02.09.2002 passed by the Civil Judge (Jr. Division), Ist Court, Cuttack rejecting an application filed under Order 9, Rule-13 C.P.C. registered as Misc. Case No.152 of 2000.

2. The brief fact of the case is that one Ashrafun Nisha Begum and her husband Md. Abdullah Sharif on 17.12.1984 had purchased jointly 16 numbers of National Savings Certificates amounting to Rs.80,000/- from the opposite party. They had made their sons, namely, Md. Nurullah Shariff and Md. Rahimtullah Shariff as nominees. After the death of Md. Abdullah

Sharif on 06.01.1988, Rahimtullah Shariff tried to encash the NSCs without the consent of Ashrafun Nisha Begum in collusion with the opposite party. As such, Ashrafun Nisha Begum filed T.S. No. 364 of 1989 before the learned Civil Judge (Junior Division) Ist Court, Cuttack with a prayer to restrain the opposite party from making any payment either towards interest or cost of the NSCs to Md. Rahimtullah Shariff or to anybody else excepting her and for depositing the same in Savings Bank Account No.268450, which jointly belonged to the petitioner and Ashrafun Nisha Begum. The said title suit was decreed on 26.08.1991 directing the opposite party to deposit the amount in S.B. Account No.268450. Despite such direction the opposite party did not deposit the amount in the joint savings bank account. Ashrafun Nisha Begum made a representation but the opposite party did not take any steps. Finding no other way, she filed Execution Case No.9 of 1992 to execute the decree passed in T.S. NO.364 of 1989. During pendency of said execution case, Ashrafun Nisha Begum died on 18.06.1992. The petitioner being the sole nominee of his mother Ashrafun Nisha Begum contested the execution case. By order dated 23.07.1992 the learned Civil Judge directed the opposite party to deposit the matured amount of the NSCs in the aforesaid S.B. Account. The opposite party on 14.10.1997 deposited a sum of Rs.94,430.50 and the petitioner withdrew the same being the sole account holder. As interest was paid till the date of maturity and not till the date of payment, i.e., 14.10.1997, the petitioner filed T.S. No. 184 of 1998 for payment of interest and other dues. The opposite party entered appearance through his advocate and on 14.05.1999 filed written statement. When the suit was posted for hearing, the opposite party remained absent. Despite several opportunities, the opposite party took no steps to contest the suit. The petitioner also personally tried to procure the attendance of the opposite party and issued notice to him to participate in the hearing, but the opposite party did not turn up. Ultimately, on 31.01.2000 the suit was decreed ex parte directing the opposite party to pay interest on maturity value of the NSCs at the government rate of interest from the date of maturity till the actual date of deposit made in the S.B. account. The opposite party, to set aside the ex parte decree, filed a petition on 19.06.2000 under Order 9 Rule 13 CPC which was registered as Misc. Case No.152 of 2000. Together with the said misc. case, the opposite party also filed a petition under section 5 of the Limitation Act. The learned Civil Judge (Junior Division), Ist Court, Cuttack on considering of the evidence and upon hearing the parties rejected petition under Section 5 of the Limitation Act and dismissed the misc. case for setting aside ex parte decree by order dated 02.09.2002. Against that order, the opposite party preferred Misc. Appeal No.119 of 2002 before the learned Ad hoc Additional District Judge, FTC No. I, Cuttack. After hearing the parties, the learned Ad

hoc Additional District Judge by judgment dated 17.12.2004 set aside the order dated 02.09.2002 passed in Misc. Case No. 152 of 2000 as well as the ex parte judgment and decree passed in T.S. No.184 of 1998 subject to payment of cost of Rs.5,000/- to the petitioner and directed the trial court to dispose of the suit within three months from the date of payment of the cost after giving opportunity to the parties to adduce evidence, if any. Against the said order, this civil revision is filed by the petitioner.

3. Learned counsel for the petitioner submits that during the course of trial of the suit, the opposite party remained absent willfully. Even after coming to know about the ex parte decree, he also did not take steps for setting aside the same and restoration of the suit to file within the period of limitation. The evidence of the witnesses as well as the documents shows that the opposite party had no prima facie case to invoke the relief and set aside the order of the trial court in the suit. He further submits that the opposite party was set ex parte on 04.01.2000 and ex parte judgment was passed on 31.01.2000. No sufficient cause or reason was ascribed for non-appearance of the opposite party on the date fixed in spite of knowledge of the same. The evidence of the witnesses examined on behalf of the opposite party is totally inconsistent. The plea of super cyclone is nothing but an afterthought. Moreover, super cyclone was held on 29.10.1999. The time petition was filed on 19.11.1999, i.e. after the super cyclone. Admittedly, the petitioner gave notice on 13.12.1999. He further submits that the original suit is of the year 1989. Petitioner is the legal heir of the original plaintiff Ashrafun Nisha Begum. During her life time she could not get the maturity value of the NSCs. The same was paid to the petitioner after the death of the original plaintiff pursuant to the direction in the execution case filed by her. For realization of interest the petitioner filed another suit in the year 1998. Without considering these aspects, the appellate court illegally condoned the delay, set aside the order of the trial court and restored the suit to file. He further submits that this civil revision is maintainable. In support of his contention, he relies upon the decisions in ***Shiv Shakti Coop. Housing Society, Nagpur v. M/s. Swaraj Developers & ors***, 2003(I) OLR (SC) 673; ***Golam Mohammad and another v. Sk. Fakir and others,*** 2008 (I) OLR 235; ***Sitaram alias Mahendra Ghosh v. Sri Antaryami Mohapatra and 18 others***, ***etc.*** 2003(II) OLR 409; ***Vidyodaya Trust and others v. Mohan Prasadr and others***, (2006) 7 S.C.C. 452 and ***Narayan Dash v. Gouranga Charan Dash and others***, ***etc.*** 2003 (Supp.) OLR 703.

4. Mr. Dash, learned counsel for the opposite party strenuously opposes the above submission of the petitioner and contends that the opposite party was never negligent. In fact, on receipt of notice he had appeared through advocate and filed written statement in the original suit. But for the laches

on the part of the conducting lawyer, the opposite party was prevented from appearing on the date fixed for hearing of the suit. The conducting lawyer, who has been cited as a witness (P.W.3) in Misc. Case No. 152 of 2000, has admitted that in spite of knowledge of the date of hearing, he could not attend the court due to his personal difficulties. He further submits that soon after the ex parte decree came to the notice of the opposite party, he moved for further action by maintaining the official formalities and in the process there was delay of five months in filing the petition under Order 9 Rule 13 CPC. He also submits that this civil revision is not maintainable in view of amendment to section 115 C.P.C. and is liable to be dismissed on that ground alone. He lastly submits that the petitioner having received the cost of Rs.5,000/- has waived his right to challenge the impugned order.

5. Perused the records and the judgments cited by the parties. So far as maintainability of the revision is concerned, a plain reading of section 115 CPC, as it stands, makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to the suit or other proceeding. If the answer is 'yes' then the revision is maintainable. On the contrary, if the answer is 'no', then the revision is not maintainable. This civil revision is filed by the plaintiff against the order allowing the petition under Order 9 Rule 13 C.P.C. filed for setting aside the ex parte decree passed against the defendant-opposite party. If the impugned order had been passed in favour of the petitioner it would have given finality to the suit. Therefore, this revision is maintainable.

Coming to the merits of the case, an ex parte decree passed against a defendant can be set aside upon satisfaction of the Court that either the summons were not duly served on the defendant or he was prevented by sufficient cause from appearing when the suit was called for hearing. In the instant case, the stand of the opposite party before the court below was that, in spite of the steps being taken by him, he was prevented from appearance as the conducting lawyer who was entrusted with the case, neither took step nor intimated the opposite party regarding his difficulties in attending the court. In support of his case, the opposite party examined three witnesses and exhibited three documents. The conducting counsel, who was examined by the opposite party, has specifically stated that due to some personal difficulties, he could not attend the court. Law is well settled that sufficiency of cause for being prevented from appearing before a court must be liberally construed to enable the court to do complete justice. It is also the settled principle of law that while considering the application filed for condonation of delay, the court should not take a pedantic approach but should take a pragmatic approach and it is not necessary for the party seeking condonation of delay to explain each day of delay. In the instant case, as it appears, due to official process and for tracing out the file, the

delay had occasioned. In such circumstances, it cannot be said that the appellate court has committed any illegality or material irregularity in allowing the prayer of the opposite party. This Court opines that the impugned order has been passed to do complete justice and the same does not warrant interference of this Court. However, the cost of Rs.5000/-, as imposed by the appellate court, appears to be inadequate. Therefore, this Court modifies the impugned judgment to the extent that the opposite party shall pay cost of Rs.20,000/- (twenty thousand) instead of Rs.5,000/- to the petitioner. Since petitioner has already received Rs.5,000/- before filing of the civil revision, this Court directs the opposite party to pay the balance amount of Rs.15,000/-(fifteen thousand) to the petitioner in the shape of a bank draft on or before 21st December, 2009. This Court further directs the trial court to complete the trial of the suit by the end of April, 2010, since the matter is lingering from the year 1989. Both the parties undertake to cooperate with the trial.

The CRP is disposed of with the modification of the impugned order to the extent indicated.

Petition disposed of.

2010 (I) ILR-CUT- 337

M.M.DAS, J.

SAROJ KUMAR PANDA -V- STATE OF ORISSA.*

JANUARY 11,2010.

PREVENTION OF CORRUPTION ACT,1988(ACT NO.49 OF1988) – SEC.13(1)(c) (d) & (2) r/w SEC.120-B IPC.

Petitioner is the proprietor of a private firm – He can not be implicated for an offence under the P.C.Act.

No material to show the commission of offence of conspiracy – No statement showing meeting of mind between the two accused persons – Prosecution failed to make out a case U/s.120-B IPC. – Held, order of cognizance passed by the learned Special Judge (Vigilance), Bhubaneswar against the petitioner is quashed. (Para 4 & 5)

For Petitioner – M/s.P.R.Dash, J.K.Sahoo, K.Raj, S.K.Mohapatra & D.P.Mishra.

For Opp.Party – Addl.Standing Counsel.

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*CRLMC. NO. 2536 OF 2003. In the matter of an application under section 482 of the Code of Criminal Procedure.

This application under section 482 Cr.P.C. has been filed by the petitioner, who is the Proprietor of J.K. Printers, for quashing the order of cognizance dated 26.7.2002 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R. Case No. 54 of 2002, against him.

2. The prosecution case in brief is that the accused no.1 – Hrusikesh Mallick is the Ex-Secretary of Children's Literature Committee, Bhubaneswar and is a public servant. He showed undue favour to the accused no. 2 (petitioner herein) by entrusting him to publish 24 nos. of manuscripts of selected writings of eminent writers of the State to be supplied to 12760 numbers of primary schools of the State. The accused no.1 entered into an agreement with the accused no.2 (petitioner) on 28.11.1992 for printing the above books. The petitioner was supplied with papers worth Rs. 8,09,424/- and required amount towards printing charges and other expenses totaling to Rs. 20,80, 151/- (including cost of paper). The petitioner supplied 69, 120 numbers of books worth Rs.5,52,960/- and did not supply the remaining books worth Rs.18,96.960/-. After completion of investigation, charge sheet no. 478 dated 27.12.2000 was submitted for alleged commission of offence under section 120-B I.P.C. read with sections 13 (2) and 13 (1)(c)(d) of the Prevention of Corruption Act, 1988.

3. Mr. P.R. Dash, learned counsel for the petitioner submitted that there is no material available on record to even prima facie show commission of the aforesaid offence by the petitioner, more specifically, offence under section 120-B IPC . None of the ingredients of section 120-B IPC are revealed from the materials collected during the investigation. Mr. Dash

contended that offence under the Prevention of Corruption Act cannot be alleged against a private person. According to him, even accepting the entire materials produced by the prosecution, no case is made out against the petitioner for alleged commission of offence under the aforesaid sections.

4. The case diary was called for. On scrutiny of the same, it is found that in the statements recorded under section 161 Cr.P.C., a Senior Assistant of the office of the Children's Literature Committee has stated that the petitioner did not supply the remaining books in spite of the reminders. The auditor, who audited the accounts, recommended for recovery of Rs.18,96,960/- from the petitioner. The Secretary of the Children's Literature Committee, who has given his statements under section 161 Cr.P.C., has stated that the accused –petitioner did not supply the remaining books in spite of the reminders. Other witnesses have made similar statements against the petitioner. There is absolutely no material to show, prima facie, that there was a conspiracy between the petitioner and the accused no.1. The petitioner, being the Proprietor of a private firm, cannot be implicated for an offence under the Prevention of Corruption Act, 1988.

5. Since, there is absolutely no material to show the offence of conspiracy to have been committed, as there is no statement showing that there was meeting of mind between the two accused persons and accepting the entire materials collected by the prosecution during investigation does not make out a case under section 120-B I.P.C. against the petitioner, no fruitful purpose will be served in maintaining the order of cognizance impugned in this petition against the petitioner. Accordingly, the order of cognizance dated 26.7.2002 passed in T.R. No. 54 of 2002 by the learned Special Judge (Vigilance), Bhubaneswar against the petitioner is quashed. The case, however, shall continue as against the other accused person.

The CRLMC is accordingly allowed.

2010 (I) ILR-CUT- 339

M.M.DAS,J.

DR.IPSITA MISHRA & ORS. -V- STATE & ORS., DR.SUSHANTA KU.SAHOO & ORS. -V- STATE & ORS, & DR.LEEZA MOHANTY & ORS. -V- STATE OF ORISSA & ORS.*

NOVEMBER 6,2009.

Admission – ***Petitioners completed MBBS Course – Selected to take admission in P.G. Medical Course as direct Candidates – Clause 20 of the prospectus for the year 2007 & 2008 prescribed for grant of P.G. Degree pass certificate to render two years post P.G. mandatory service as a condition for grant of P.G. Degree pass certificate – Object is to produce specialist doctors – Condition imposed under Clause 20 is under challenge.***

Distinction between Candidates admitted to P.G. (Medical) course under the State Quota and All India Quota – Candidates under All India Quota immediately obtain certificates to prosecute post P.G. speciality courses but Candidate admitted under State Quota have to wait for two years till they complete the post P.G. Mandatory service which amounts to treating equals as unequals – Held, action on the part of the State is arbitrary, unfair and violative of Article 14 of the Constitution which is liable to be quashed.

(para 9& 10)

Case laws Referred to :-

1.AIR 1974 SC 555 : (E.P.Royappa -V- State of Tamil Nadu).
2.AIR 1994 SC 2263 : (Ghaziabad Development Authority -V-Delhi Auto & General Finance Pvt. Ltd. & Ors.).
3.AIR 1967 SC 1427 : (S.G.Jaisinghani -V-Union of India & Ors.).

For Petitioners - M/s.Ramakanta Mohanty, D.Mohanty, A.P.Bose, M.R.Dash, S.K.Mohanty, S.Mohanty, P.Jena, D.Pattanaik, S.N.Biswal & D.Vardhan.
For Opp.Parties - Addl.Govt. Advocate. (For Opp.Parties 1 & 2)
For Petitioners - M/s.G.A.R.Dora, Mrs. G.Rani Dora & J.K.Lenka.
For Opp.Parties - Addl.Government Advocate (For Opp.Parties 1 & 2) Mr.R.C.Mohanty, (For O.P.No.3)
For Petitioner - M/s.D.K.Dwibedi, G.M.Rath, S.S.Padhy & B.Guin.
For Opp.Parties – M/s. Addl.Govt. Advocate (For O.Ps.1 & 2).

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*W.P.(C) NOS.8464 & 18001 OF 2008 & W.P.(C) NO.4965 OF 2009. In the matter of applications under Articles 226 & 227 of the Constitution of India.

M.M. DAS, J. In all the aforesaid three writ petitions, the petitioners have sought for a direction for quashing Clause-20 of the prospectus published for

selection of candidates for Post Graduate (Medical) Course in the three Government Medical Colleges of the State for the year 2007.

In W.P. (C) No. 18001 of 2008, along with the prospectus for the year 2007, Clause-20 of the prospectus for the year 2008 is also sought to be quashed.

The petitioners in all the writ petitions after successfully completing their M.B.B.S. Course being selected to take admission as direct candidates to the P.G. (Medical) Course, are continuing in the said course as direct candidates and have already completed more than one and half years in the said course. They have challenged Clause - 20 of the prospectus, as stated above, for the years 2007 as well as 2008 on the ground that the conditions imposed therein with regard to grant of P.G. Degree pass certificate is arbitrary, unreasonable and discriminatory being violative of Article 14 of the Constitution. Clause – 20 of the prospectus of the years 2007 and 2008, which are identical, is quoted hereunder: -

"20. POST P.G.MANDATORY POSTING OF CANDIDATES:

20.1. After successful completion of three year course and passing the examination in the concern subject the in-service candidates shall have to work for a period of two years in KBK/Tribal areas. Candidates who are not in the service (Direct candidate) will be posted on contractual basis depending on the vacancy available for a period of two years in KBK/Tribal areas. In case the required numbers of vacancies are not available in KBK/Tribal district, in-service candidates will be posted to KBK/Tribal areas on priority. The remaining candidates, i.e. surplus in-service as well as direct candidates if any will be posted to the rural areas of Non-KBK/Tribal districts. (Vide Resolution No. ME-II-IXM-155/2005-869 dated 12.1.2006). This will be considered as Post PG Mandatory Service or PPMS.

20.2. They will be allotted their place of posting with the concerned C.D.M.Os in accordance of the principles laid down by authorities. The candidates are to report to the concerned C.D.M.Os within 10 days after the publication of their result.

20.3. The candidates admitted to the non-clinical (Anatomy, Physiology and Biochemistry) and Para-clinical (Pharmacology) and FMT) disciplines must work for two year in the concerned disciplines in the Medical Colleges with consolidated salaries/regular pay at par with other clinical disciplines and the period will be treated equivalent to the two year post PG mandatory peripheral service or as decided by the Govt. from time to time.

20.4. The Direct candidates not in service will be appointed on contractual basis for two years and will be paid consolidated pay as will be decided by the Government. The period of their service shall not in any way count towards seniority and other service benefits later. For Direct Candidates already in Government service as well as in-service candidates, the two-year mandatory service in identified areas will be counted as part of their regular service.

20.5. The candidate who has not joined the Two-years PPMS or discontinued before completion of two years PPMS shall not be eligible for getting PG Degree pass certificate either Provisional or Original or CLC/Conduct Certificates from the concern College or University. In addition to that the direct candidate who has not joined or discontinued after joining PPMS is liable to refund the entire pay/consolidated pay received by him/her during the PG course.

20.6 Provision of Post PG mandatory service will not apply to the candidates who are admitted under the All India quota.

20.7. On completion of two-years PPMS, the candidates will obtain certificate from the C.D.M.Os/Head of Department of Medical Colleges indicating that they have rendered uninterrupted service for the period indicating that they have not availed any kind of leave other than CL (15 days at the maximum) and Earned Leave (30 days at the maximum). In case the period of earned leave exceed 60 days during two years of PPMS, the term of mandatory service shall be extended co-terminus with the leave availed for the period beyond 60 days.

20.8. The Principals of Medical Colleges will not issue CLC , conduct Certificate and will also write to the concerned University to withhold his/her result until candidates complete the two year PPMS".

2. Mr. Dora, learned counsel appearing for the petitioners in W.P. (C) No. 18001 of 2008 as well as Mr. R.K. Mohanty, learned counsel appearing for the petitioners in W.P. (C) No. 8464 of 2008 contended that the conditions imposed in the prospectus with regard to rendering of two years Post P.G. Mandatory Service as a condition precedent for grant of P.G. Degree Pass Certificate suffers from the vice of discrimination and arbitrariness for violating of the constitutional mandate enshrined in Article 14 of the Constitution, inasmuch as , the said action of the State Government is a surrogate method of imposing forced labour which is otherwise not permissible in a democratic constitutional set up. It was further contended on behalf of the petitioners that the stipulations with regard to Post P.G. Mandatory Service have no nexus with the aims and objectives sought to be

achieved and if such a rider is imposed by the State Government in ensuring two years Post P.G. Mandatory service in either backward districts or rural areas in return of imparting P.G. Education, such restriction will act as a deterrent to the object sought to be achieved , i.e., to produce Specialists doctor in the State by imparting P.G. (Medical) Course, as the candidates may avoid to take admission to P.G. (Medical) Course on that ground. It was further contended that a condition cannot be imposed in a prospectus laying down the principles to be adopted for giving admission to a particular course that if an act is not performed by the successful candidates, who are given admission to such course after completion of such course, their degree will be withheld.

3. Mr. Dora, learned counsel further contended that since degrees are awarded by the University, any candidate successfully completing any course cannot be deprived from getting such degree from the University at the behest of the State.

4. Though no counter affidavit has been filed by the State, to the writ petitions, traversing the grounds set forth by the petitioners, nevertheless, learned counsel for the State, during hearing, contended that since there are dearth of Specialists Doctors, whose services are necessary in the "backward districts of the State and the rural areas", such a condition has been imposed for ensuring that Special medical services are made available to the residents/inhabitants of such backward districts and rural areas. Therefore, learned counsel for the State submits that the objective being to provide such medical service to the people of the State, who are being deprived from the service of Specialists Doctor, no fault can be found with the condition imposed in Clause -20 of the prospectus for the years 2007 and 2008. According to him, no discrimination whatsoever can be attributed to the action of the State for imposing the condition as has been done in Clause – 20 of the prospectus.

5. It would be appropriate to quote the eligibility criteria fixed in the prospectus for the All India Entrance Test to take admission to P.G. (Medical) Course and such criteria given in the impugned prospectus meant for the State candidates. It would be further appropriate to state here that 50% of the seats for the P.G. (Medical) Course in the three Government Medical Colleges of the State are meant for State quota candidates and the rest 50% of the seats are meant for All India Quota. The relevant clause – 4 of the eligibility criteria in the prospectus for All India Entrance Examination for MD/M.S/PG Diploma and MDS Courses, 2007 is as follows:-

"4. ELIGIBILITY CRITERIA.

(a) The candidate must be an Indian National.

(b) A candidate, who holds M.B.B.S. degree from a recognized medical college (Appendix-III)or a foreign medical degree included in the

Schedules to the Indian Medical Council Act, 1956 and who has obtained full registration either from the Medical Council of India or any of the State Medical Councils after completing compulsory rotating internship shall be eligible to take this examination.

(c) The candidates who have obtained their MBBS degree from the Medical Colleges which are not recognized by Medical Council of India shall not be eligible.

(d) However, a candidate who, after passing the final qualifying examination (MBBS or the foreign medical degree recognized by MCI) , is undergoing 12-month compulsory rotating internship/practical training and is likely to complete the same by 31st March, 2007 can take up this examination, but he/she shall not be eligible for admission unless he/she has completed the compulsory rotating internship and obtained full registration on or before 31st March, 2007 or the candidate produces a certificate from the head of Institution that he/she will be completing internship by 31st March, 2007.

(e) **No condonation** of Compulsory Rotating Internship shall be accepted unless approved by the Medical Council of India along with necessary proof of the approval of the Medical Council of India. The condonation of compulsory rotating internship shall be restricted to the period up to 31st March, 2007 and not beyond that date.

(f) Those candidates who are undergoing 12-month Compulsory Rotating Internship and whose Internship is likely to be completed on or before 31st March, 2007, shall have to submit a certificate from the Principal/Dean of the college regarding the **likely date of completion of internship** in the proforma provided in the Non-Scannable Application Form, failing which their applications will be summarily rejected.

(g) The cut off dates for the recognition of the Medical Colleges and Dental Colleges, for the year 2007 will be 31st October, 2006.The colleges recognized after this date will not be considered.

(h) Registration with M.C.I./D.C.I./State Medical Council/State Dental Council is necessary and its documentary proof should be furnished at the time of counseling.

(i) Some of the Universities are having regulations that candidates who are already pursuing the PG Course in their University or in another University are not eligible for admission till they complete the course. The candidates who are already pursuing PG Courses either through all India Quota or State Quota and are applying for a seat under All India Quota may confirm the eligibility conditions of that University in this regard. DGHS shall not be responsible if such candidates are

refused admission. Such candidates may opt for the subject and the college at their own risk and cost.

Similarly, the relevant clause prescribing the eligibility criteria for State quota candidates is given at Clause – 5 of the prospectus for selection of candidates for Post Graduate (Medical) Courses in the Government Medical Colleges of the State for the year 2007, which is as follows:-

"5. ELIGIBILITY CRITERIA OF CANDIDATES:

The candidate must be:

5.1. A permanent resident of Orissa

Or

5.2. Is the Son/Daughter/Spouse of any one of the following category:

5.2.1. Employees of Government of Orissa.

5.2.2. All India Services belonging to Orissa Cadre serving within or outside Orissa.

5.2.3. Public Sector undertaking of either State of Orissa or Government of India located in Orissa.

5.2.4: Defence Services personnel stationed in Orissa.

5.2.5. Employees of Government of India serving in Orissa at the time of application provided the candidate has passed the qualifying examination from any one of the three Government Medical College of Orissa

Or

5.3. Who is permanent resident of Orissa but graduated from any recognized medical College outside the State. He/She is required to furnish a certificate of permanent residence of Orissa from a Revenue Officer not below the rank of Tehsildar of the area concerned (in Form No. III, in Appendix III-B).

OR

5.4. Belonging to other State who has completed their M.B.B.S. studies in any one of the three Government Medical Colleges of the State of Orissa;

5.5. At the time of application, the candidate :

5.5.1 Must have passed M.B. B. S. Degree Examination from an institution recognized by Medical council of India.

5.5.2 Must have completed one year of compulsory rotating internship/houseman ship by 31st December, 2006.

5.5.3 Must have permanently registered himself/herself with State/Central Council of Medical Registration.

5.6. Candidates who have completed P.G.(Medical) Course or undergoing P.G. (Medical) course in a particular subject in any of the Medical College/Institution of Orissa shall not be eligible to apply for the P.G. (Medical) Course in subsequent years.

5.7. Applicants who have taken admission in P.G. Medical Course in any of the three Medical Colleges of Orissa but have not joined or have discontinued after joining, shall not be eligible to apply for P.G. (Medical) Course in subsequent three years".

6. From the above, it is seen that there is no material distinction between the eligibility criteria for the All India quota and the State quota. Upon being found suitable and selected in either of the tests, such selected candidates are given admission to the seats for P.G. (Medical) Course in the three Government Medical Colleges of the State. Thus, after being admitted to such seats on similar eligibility criteria, there cannot be any distinction between the students holding a State seat and the students holding All India Quota seats. Imposing the condition for candidates admitted under the State quota with regard to Post P.G. (Medical) Service in Clause-20 of the prospectus, more specifically, with regard to non-grant of P.G. Degree Certificates to such candidates, unless they complete the Post P.G. Mandatory Service is a restriction imposed by the State on the candidates who took admission under the State Quota. The question, therefore, arises as to whether such restriction amounts to an arbitrary and unfair action on the part of the State and violates the mandate of Article 14 of the Constitution of India.

7. In a series of decisions, the Supreme Court has repeatedly dealt with the question as to whether the action of the State amounts to discrimination and violates Article 14 of the Constitution on various set of facts.

8. It is trite law that every action of the State must be informed by reasons and should be free from arbitrariness which is the very essence of rule of law and its bare minimum requirement. Any decision taken in an arbitrary manner contradicts the principle of legitimate expectation relating to procedural fairness in decision making. Such action also amounts to denial of administrative fairness, which is the constitutional anathema (See ***E.P. Royappa v. State of Tamil Nadu***, AIR 1974 SC 555 and ***Ghaziabad Development Authority v. Delhi Auto & General Finance Pvt. Ltd. and others***, AIR 1994 SC 2263)

Every action of the State or its instrumentalities should not only be fair, legitimate and above-board, but should be without any affection or aversion, impression of bias and favourtism. In ***S.G. Jaisinghani v. Union of India and others*** , AIR 1967 SC 1427, a Constitution Bench of the Supreme Court observed as follows:-

> " In the context, it is important to emphasize that absence of arbitrary power is the first essence of the rule of law, upon which our whole Constitutional System is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within the clearly defined limits. Rule of law, from this point of view, means that the decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law.".

9. Applying the law as stated above to the facts of the present case, it would be found that by drawing a distinction between the candidates admitted to P.G. (Medical) Course under the State Quota and the candidates who were admitted to the said course in the All India Quota, though after admission, they constituted a homogenous class of students prosecuting their studies in the P.G. Medical Course and withholding issuance of certificates of P.G. Degree Certificates in case of the candidates who are admitted under the State Quota , whereas awarding such certificates to the candidates, who are admitted under the All India Quota amounts to treating equals as unequals. It definitely results in a situation where the candidates under the All India Quota after obtaining such certificate get the opportunity to prosecute Post P.G. Speciality Courses, immediately, but the candidates admitted under the State Quota have to wait for two years more for obtaining such certificates and prosecuting higher studies till they complete the Post P.G., Mandatory service as contemplated under Clause-20 of the prospectus.

10. It is, therefore, clear that such action on the part of the State is arbitrary and unfair and does not stand the test of administrative fairness. Such action is clearly violative of Article 14 of the Constitution of India, which calls to be quashed. Coupled with the above, it is also found in the instant case that such a procedure was not adopted prior to the year 2007 by the State Government, where only in respect of in-service candidates Pre-P.G. service in KBK/Tribal Districts were insisted upon. Action of the State Government does not also disclose any reason for adopting Clause-20, as it stands in the prospectus of the yeas 2007 and 2008 which clause has been challenged by the petitioners. The discrimination is further evident on a conjoint reading of Clauses - 20.1 and 20.3, which results in a situation where candidates prosecuting P.G.(Medical) Classes in non-clinical subjects are not required to render their service in KBK/Tribal areas. The said clause-20 of the prospectus of P.G. (Medical) Selection, 2007 as well as 2008 is accordingly quashed.

11. The writ petitions are allowed, but, in the circumstances, without any cost.

Writ petition allowed.

2010 (I) ILR-CUT- 348

M.M.DAS,J.

STATE OF ORISSA, REP. THROUGH THE COLLECTOR, PURI -V- SANTI KUMAR MITRA & ANR.*

NOVEMBER 13,2009.

Khasmahal lease ***– Lessee not applying for renewal within time as stipulated in the lease deed – Held, it does not ipso facto take away the right of the lessee for renewal of the lease.***

(Para 6)

Khasmahal lease ***– Application by lessee for renewal – Resumption Proceeding by the lesser – No ground that the lessee failed to perform all the conditions of the lease or the state requires the land for public purpose – Held, during pendency of the renewal application the lessor can not start unilateral resumption proceeding without taking recourse of law for evicting the lessee.*** (Para 6)

Khasmahal lease ***– Property in a Khasmahal lease shall be treated to be akin to a private land of the lessee, which is both heritable and transferable.*** (Para 6)

Case laws Referred to :-

1.(1997) C.L.T. 762 : (Pabitra Kumar Swain -V- State of Orissa & Ors.).
2.ILR 1976 (Cuttack) :1392 : (Republic of India -V- Prafulla Kumar Samal.)
3.1993 (I) OLR. 187 : (Shankarlal Verma & Ors.-V-Smt.Uma Sahu & Ors.).
4.28 (1962) CLT 209 : (Janab Jahada Begum Sahib -V- State of Orissa).
5.2004 (II) OLR 332 : (Sourindra Narayan Bhanja Deo -V-Member, Board of Revenue, Orissa & Ors.).

For Appellant – Addl.Government Advocate.

M/s. Prasant Mohanty, P.K.Mohapatra, A.K. Rath, P.K.Rath, D.R.Ray, S.P.Choudhury, D.N.Mohapatra, R.K.Mohanty, D.Mohapatra, A.P.Bose, B.P.Routray, B.Naiak & G.Mishra.
(For respondents 1 & 2)

M/s. G.K.Mohanty, G.P.Samal, C.Panigrahi, D.K.Nanda, B.Ghadei & N.M.Mishra.
(For Intervenor).

SECOND APPEAL NO.98 OF 1993. From the judgment dated 23.12.1992 and decree dated 6.1.1993 passed by Shri B.K.Mishra, Sub-Judge, Puri in T.A.No.2/100 of 1992-91 reversing the judgment dated 30.9.1991 passed by Shri P.K.Das,Munsif, Puri in O.S. No.161/402 of 1990/1986.

M.M. DAS, J. This appeal has been filed by the State of Orissa against a reversing judgment passed in T.S. No.161/402 of 1990/1986 by the learned Subordinate Judge, Puri in T.A. No. 2/100 of 1992/1991. The suit property was leased out on 26.09.1905 in favour of one Shailendranath Mitra for 30 years under a registered sale-deed. The same was a Khasmahal lease.

During the subsistence of the lease, Shailendranath Mitra expired and the property was succeeded by his legal heirs Nalininath Mitra, Jatindranath Mitra and Khagendra Mitra. In Mutation Case No.410 of 1935-36 the property was mutated in favour of the above named legal heirs of late Shailendranath Mitra. On 22.01.1944, the lease was renewed and a fresh registered lease deed was executed by the Governor of Orissa represented through the Collector, Puri in favour of the said legal heirs as well as Gouribala Mitra, widow of one of the legal heirs. In 1965, there are being family dissentions, a partition suit bearing no.1377 of 1967 was filed by Khagendra Mitra in the Calcutta High Court under its original jurisdiction in respect of the joint family properties including the present suit properties. A receiver was appointed to remain in-charge of the management and custody of the entire suit property. The receiver upon coming to know about the expiry of the lease applied to the Khasmahal Authority (Collector, Puri) for renewal of the lease. However, no intimation was received by him and no action was taken thereon. Several correspondences were made between the respondents and the Collector, Puri. The partition suit pending in the Calcutta High Court was disposed of and the present suit properties were exclusively allotted to the share of the plaintiffs-respondents. Upon disposal of the said suit, the plaintiffs approached the Khasmahal Authority for renewal of the lease and filed number of petitions requesting for renewal. As nothing was done, on inquiry in the year 1983, they came to learn that a suo motu proceeding was initiated by the Collector for resumption of the lease, which was registered as Resumption Case No. 6 of 1975, even though the renewal application filed earlier was numbered as Lease Renewal Case No.11 of 1972. The plaintiffs finding no other alternative filed the present suit, i.e., T.S. No.402 of 1986 against the State of Orissa before the Munsif, Puri (now Civil Judge) which was renumbered as O.S. No.161 of 1990. The learned trial court upon hearing the suit after framing six issues dismissed the suit on contest on the ground that the plaintiffs have not applied for renewal of the lease three months prior to expiry of the term and have violated the conditions of the lease. He further found that the plaintiffs did not maintain the building. Being aggrieved, the plaintiffs preferred an appeal before the learned District Judge, Puri numbered as T.A. No.100 of 1991. The appeal was heard by the learned Subordinate Judge, Puri being renumbered as T.A. No.2/100 of 1992-91. The learned appellate court after hearing the appeal set aside the judgment and decree passed by the learned trial court by reversing the said finding and decreed the suit of the plaintiffs. The State of Orissa being aggrieved by the said judgment of reversal has preferred the present second appeal.

2. The substantial question of law on which the appeal has been admitted is:

"Whether the period of lease having expired long since and not been renewed the impugned judgment of the lower appellate court is at all sustainable in law and whether the lower appellate court is justified in holding that the Government cannot take possession of the land even though it has held earlier that the State can resume possession in accordance with law."

3. Before addressing the above question as framed to be determined in this second appeal, this Court feels it appropriate to refer to the lease deed, in question, which was exhibited before the learned trial court as Ext.4. The lease is a Khasmahal lease nomenclatured as "Lease for Balukhand Khasmahal, Puri". The relevant Clauses-9 and 15 of the lease, which are necessary to be referred, read as follows:

"9.That the LESSEES shall make such sanitary improvement as may be ordered by the Collector.

15. That on breach or non-observance of any of the aforesaid terms or conditions, the Collector may declare that the lease has determined and become void, that an order of the Collector declaring that there has been such breach or non-observance shall be final and conclusive proof of such breach or non-observance as between the parties hereto and that on the expiry of one month from the date of such order the Collector or any Officer or person appointed in that behalf by the Collector shall be entitled to take possession of the land leased and the buildings erected thereon.

PROVIDED that the Collector shall at the time of such declaration, either offer to pay reasonable compensation for the structures and other improvements made with the consent of the Collector or direct the LESSEES to remove the structures or other improvement within a specified time and, if the LESSEES fail to remove them accordingly, the Collector shall cause such removal to be effected and recover the cost from the LESSEES. Where compensation is offered, the amount of such compensation shall be fixed by the Collector whose decision shall be final, conclusive and binding on the LESSEES, subject to revision by the Revenue Commissioner. "

4. It is the case of the appellant that the lease was resumed on account of non-observance of the Clasue-9 of the lease-deed. Learned counsel for the appellant-State relying upon the decision in the case of ***Pabitra Kumar Swain –v- State of Orissa and others*****,** 84 (1997) C.L.T. 762 submits that this Court in the said case has laid down that cancellation of a lease does not amount to any breach of Fundamental Right and does not amount to any illegality or irregularity on the part of the State. The facts of the said case are distinguishable from the facts of the present case. In the said case,

this Court was in seisin of a writ petition, where the petitioner sought for a writ of certiorari quashing the order cancelling the petitioner's lease of the Sand Source of Barimund Ghat in River Kuakhai. The Collector, Khurda approved the sanction of lease of the said Sand Source in favour of the petitioner therein subject to limitation of lifting of sand not exceeding 20,000 cubic meters for a period of two years on the basis of the report of the concerned Tahasildar and recommendation of the Sub-Collector. The petitioner was intimated about the approval of the lease by the Collector and conditions of the said lease and was directed to deposit Rs.1,00,000/- towards royalty and further amounts towards rent and security. Thereafter, the petitioner executed the agreement and got the same registered. When the petitioner intended to deposit the remaining amount towards royalty to obtain the work order, he was served with a notice of cancellation of lease, which was challenged in the said writ petition. This Court finding that the Collector on perusal of the case record and the report of the Sub-Collector cancelled the lease of the Sand Source/Ghat in view of danger to the river embankment at Patia did not interfere with such cancellation.

5. In the present case, however, the lease is a Khasmahal lease. Mr. G.K. Mohanty, learned counsel for the intervenor/respondent submits that it has been repeatedly held by this Court that a lease-hold estate in a Khasmahal land is heritable and transferable with a right of renewal. In the case of ***Republic of India -v- Prafulla Kumar Samal,*** ILR 1976 (Cuttack) 1392, this Court held that lease-hold estate in the Khasmahal land is heritable and transferable with a right of renewal. The right of lease in respect of such land is in no way different from that which one has in his own private land. The lessee's right in Khasmahal land being heritable and transferable, the lessee can create a permanent right of tenancy in his holding.

6. In the case of ***Shankarlal Verma and others -v- Smt. Uma Sahu and others*****,** 1993 (I) OLR 187, this Court had the occasion to deal with a Khasmahal lease property. Relying upon the decision in the case of Republic of India *(Supra)* and the case of ***Janab Jahada Begum Sahib -v- State of Orissa*****,** 28 (1962) CLT 209, it was observed that law is well settled that interest of a lessee in a Khasmahal land is both heritable and transferable and his right is similar to those on a private land. His interest is regulated by the terms of lease between him and the Khasmahal authorities and the parties to the lease are governed by the provisions of the Transfer of Property Act. In the instant case, the lease was cancelled on the allegation that Clauses-9 of the lease deed was violated by the lessee. However, nothing was brought before this Court that there were materials before the Collector to come to the conclusion that the said clause has been violated. It is an admitted position that the Lease Renewal Case No.11 of 1972 was initiated for renewal of the lease during pendency of which the

Resumption Proceeding No.6 of 1975 was suo motu registered by the Collector and no notice of the said resumption case was served on the respondent before passing the final order, which action was questioned in the suit. The Khasmahal lease was a registered lease. Applying the ratio of the aforementioned case laws, there can be no dispute that the provisions of the Transfer of Property Act are applicable to a Khasmahal lease and the property in a Khasmahal lease shall be treated to be akin to a private land of the lessee, which is both heritable and transferable. Though Clause-15 of the lease deed, as quoted above, provides the modalities for determination of lease by the Collector, the State, as defendant, has brought no materials before the trial court to show that such determination of lease made by the Collector was in accordance with Clause-15 of the lease deed. In the case of ***Sourindra Narayan Bhanja Deo –v- Member, Board of Revenue, Orissa and others*****,** 2004 (II) OLR 332, this Court was considering the legality of determination of a Khasmahal lease in a resumption proceeding. The facts of the said case are similar to the present case. Referring Sub-Rule (5) of Rule -28 of Bihar and Orissa Government Estates Manual, 1919 and the earlier decisions of this Court, it was held that Clause-18 of the lease deed provides that on expiry of lease the lesser shall, if the lessee has duly observed and performed all the conditions of the lease, be bound at the option of the lessee to renew the lease for a further period of 30 years. In other words, the option of renewal has been left with the lessee and not with the Khasmahal authorities. Since material has been brought before the Court that such a renewal application was pending, the said application could not have been rejected otherwise than finding that the lessee has not duly observed and performed all the conditions of the lease. The State has not brought any material to show that there was any specific public purpose for which the aforesaid land was required as provided in Rule 28 of the Bihar and Orissa Government Estate Manual, 1919. The power of presumption provided to the Khasmahal authority is under the said Rule 28, which can only be exercised if the land is required for public purpose. Such a case has not been made out by the appellant-defendant. It is, therefore, clear from the facts of the case and the materials produced before the learned trial court that the unilateral resumption of the lease which was granted in favour of the plaintiffs/their predecessors, cannot be sustained when the lessor has not approached the common law forum for determination of the lease by declaring the lease to be void or for eviction of the lessees on the ground of violation of any of the terms of the lease. Even where there is violation of the conditions of the lease, which entails resumption of the lease and re-entry by the lessor, such action cannot be unilaterally taken by the lessor without taking recourse of law for evicting the lessee.

7. Learned lower appellate court, therefore, has rightly reversed the judgment and decree of the learned trial court and decreed the suit of the plaintiffs. The question of law framed in this appeal should, therefore, be answered in the affirmative.

8. In the result, the Second Appeal fails and the judgment and decree of the lower appellate court is confirmed. Parties shall bear their respective costs of this Second Appeal.

Appeal dismissed.

2010 (I) ILR-CUT- 354

R.N.BISWAL,J

PRESIDENCY EXPORTS & INDUSTRIES LTD.-V-E.SHIPPING PVT.LTD.& ORS.*

DECEMBER 22,2009.

ARBITRATION ACT, 1996 (ACT NO.26 OF 1996) – SEC.9.

Whether District Judge in charge is competent to deal with the case under the Act, in absence of the District Judge – Held, no.

Since the 1996 Act is a special enactment, the District Judge has exclusive jurisdiction to deal with the case under the Act and Addl.District Judge-in-charge of the District Judge can not exercise power under the said Act – Impugned order set aside.

(Para 11)

Case laws Referred to:-

1. AIR 2006 SC 450 : (M/S. s.B.P. & Co.-V- Patel Engineering Ltd. & Anr.).
2. 2006(4) Vol.64 ARBLR 90 SC : (Sandeep Kumar & Ors.-V-Master Ritesh & Ors.).
3. AIR 2008 SC 1016 : (Atul Singh & Ors.-V-Sunil Kumar Singh & Ors.).
4. (2007) 7 SCC 120 : (Aurohill Global Commodities Ltd.-V-Maharastra STC Ltd.).

For Appellant – M/s.N.R.Rout, Pami Rath, S.Pradhan & S.K.Pradhan.

For Respondents – M/s.D.N.Mohapatra, M.Mohapatra, G.R.Mohapatra & S.P.Nath,
(for Respondent No.2)
M/s. S.M.Pattnaik, D.Mohanty, R.R.Sahoo, S.Mohanty & S.K.Nanda
(for Respondent No.1)

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*ARBA NO.25 OF 2009. In the matter of an appeal under Section 37 of the Artbitration & Conciliation Act, 1996.

R.N.BISWAL,J. In this appeal, the appellant challenged the order dated 11.11.2009 passed by the District Judge-in-Charge, Cuttack in ARBP No.207 of 2009, wherein he ordered that status quo in respect of the cargo as on the date of the order, be maintained by both the parties till appearance of the opp. parties.

2. Opp. party No.1 herein was the petitioner, appellant was the opp. party No.2, respondent No.2 was the opp. party No.1 and respondent No.3 was the opp. party No.3 in the court below. The petitioner is a private limited company registered in Singapore and is engaged in the business in shipping, ship chartering and ship brokering. It filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 1996 Act) giving rise to the aforesaid case before the District Judge, Cuttack with prayer to injuct the opposite parties from removing Rs.17,532/- M.T. of

iron ore fines stored at site "site for N/S.I.O.C.L. Outlet" a specified location at Paradip Port in order to secure its dues and claims against opp. party No.1.

3. As per the case of the petitioner in November, 2007, through its parent company, M/s. Acemark Ventures INC, it Chartered, a 1984 built bulk carrier, later renamed as MV SAHAR from its owners, Bridge Navigation Limited, Republic of Malta and was engaged in shipping of prescribed bulk cargo to different parts of the world as a despondent owner of the vessel. On 28.7.2009, vide a Fixture Note signed between the petitioner and opp. party No.1, i.e., Voyage Charterer, the petitioner sub-chartered the bulk carrier to perform a single Voyage. According to Fixture Note, MV SAHAR was to load bulk iron ore from Haldia and Visakpatnam or Paradip and was to discharge the said cargo at any of the designated ports in China. According to the stowage plan of the vessel, she was to load 17532 of M.T. of iron ore fines at Haldia Port by contracted shipper, opp. party No.2 and was to top up the vessel with additional cargo at Paradip Port by different shippers to take the total load up to 40,000 M.T. iron ore fines. The vessel, reached at Haldia Port on 11th August, 2009 and the loading of 17532 M.T. of iron ore fines on it was completed on 10.9.2009. Thereafter, the Master of the vessel was given a certificate of analysis of cargo loaded on behalf of Charterer and shipper, the 1st and 2nd opp. parties. The certificate was issued by the Cargo Superintendents and Surveyors of opp. party Nos. 1 and 2, M/s. Therpeutics Chemical Research Corporation (TCRC), Haldia and represented that the moisture content of the cargo loaded was on average 7.04%. On 10.9.2009 itself, the vessel MV SAHAR sailed from Haldia and arrived at Paradip Anchorage on the next date. It was berthed at Paradip Port on 16.9.2009. Then, loading of additional cargo for another shipper commenced. In course of loading, the Chief of M.V. SAHAR observed puddles of free water on the Haldia cargo and as such sought the assistance of J.B.Boda Surveyors. On observing water on the top of the cargo and its liquefied state, further loading was stopped. Unfortunately, by the time the condition of the cargo was known, about 700 M.T. of cargo of another shipper, M/S. Orecast India Private Limited had already been loaded on top of the Haldia cargo. On analysis it was found that Haldia cargo had moisture content in excess of the flow of the moisture point of the cargo, which was unfit for shipment. The dangerous condition of the cargo loaded at Haldia was reported by the Master of the ship to the petitioner, Voyage Charterer and shipper. On request opp. party No.3 vide its letter dated 9.10.2009 directed the Additional Traffic Manager to allot 2000 square meters of storage land to opp. party No.2 for temporary storage of the Haldia cargo. Accordingly, on allotment being made, the cargo was stored there. It is the case of the petitioner that due to the mishandling, negligence

and malicious act of opp. party Nos. 1 and 2 in loading the dangerous iron ore fines on the vessel at Haldia Port, it was held up at Paradip Port for nearly two months causing huge losses to the petitioner.

4. As per Clause-22 of the Fixture Note, the present claim is to be covered in the arbitration proceeding to be instituted at Singapore International Arbitration Center as per English laws, but the jurisdiction of the courts of India having neither been expressly or impliedly excluded the provision of Part-1 of 1996 Act shall apply to such International Commercial Arbitration.

5. Apprehending that opp. party Nos. 1 and 2 would remove the Haldia Cargo weighing 17532 M.T. of iron ore fines without paying its dues the petitioner filed the proceeding under Section 9 of 1996 Act with the following prayers:-

> "(i) Injunct the opp. parities from removing/re-shipping the subjected cargo of 17532 MT of Iron ore fines, presently stored at Paradip port at "Site for N/S.I.O.C.L. Outlet"; and/or
>
> (ii) Direct re-storage of the aforesaid cargo at a safe and convenient location at Paradip Port, if necessary, at the cost of the petitioner; and/or
>
> (iii) Pass any further appropriate order/directions as this Hon'ble Court thinks fit and proper for the ends of justice;

6. After hearing learned counsel for the parties and considering the urgency of the matter, in absence of the District Judge, the District Judge-in-Charge before issuing notice to the opp. parties therein passed the order of status quo as stated above. Being aggrieved with the said order, opp. party No.1 in the court below preferred the present appeal.

7. Mr.Rath, learned Senior counsel appearing for the appellant submitted that the District Judge-in-Charge, Cuttack was not competent to entertain the application under Section 9 of 1996 Act. It is only the principal court of the District, who can entertain such a petition. He further submitted that there was no contract/ arbitration agreement between the appellant and respondents as defined under Section 7 of 1996 Act. In absence of an arbitration agreement between the parties, application under Section 9 of 1996 Act was not maintainable. In support of his last submission he relied on several decisions including the decisions in the case of ***M/s. S.B.P. & Co. v. Patel Engineering Ltd., and another*** AIR 2006 Supreme Court 450 ***Sandeep Kumar and others v. Master Ritesh and others*** 2006 (4) Vol.64 ARBLR 90 Supreme Court and ***Atul Singh & others v. Sunil Kumar Singh and others*** AIR 2008 Supreme Court 1016. He further submitted that since the parties to the agreement were foreign companies and as per the agreement Arbitration proceedings were to be held at Singapore, that too in accordance with English laws, the jurisdiction of the Indian courts was ousted. In support of his submission, he relied on the decision in the case of

Aurohill Global commodities Ltd v. **Maharastra STC Ltd** (2007) 7 SCC 120. At last learned counsel for the appellant submitted that on the request made by the appellant, the Traffic Department of respondent No.3 permitted it to discharge the cargo at Paradip for further transshipment and allowed a plot of 2000 square meters for temporary storage. Respondent No.3 instructed the appellant through M/s. Roy and Chatterjee (P) Ltd. to take immediate step for deposit of Port charges such as Wharfage, Port rent etc. Accordingly, the appellant deposited the port dues to the tune of Rs.13,92,435/-.If the appellant is not allowed to remove the cargo, he would be saddled with Wharfage, Port charge etc. for an unlimited period. On all those grounds learned counsel for the appellant prayed to allow the appeal.

8. At the out set Mr.Bijan Ray, learned senior counsel appearing for respondent No.1 submitted that the impugned order being an ad interim one, appeal could not lie against it. According to him as per Section 37 of 1996 Act, appeal can lie only against the final order passed under the said Act. At this stage it would be prudent to quote Section 37 (1) of 1996 Act, which reads as follows:-

> "37. Appealable order-(1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:-
>
> (a) granting or refusing to grant any measure under section 9;
>
> (b) setting aside or refusing to set aside an arbitral award under section 34.
>
> (2)An appeal shall also lie to a Court from an order of the arbitral tribunal-
>
> (a) accepting the plea referred to in sub-section(2)or sub-section(3)of section 16;or
>
> (b) granting or refusing to grant an interim measure under section 17.
>
> (3)No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

This Section stipulates that appeal can lie against granting or refusing to grant any measure under Section-9.It would be profitable to quote Section 9 of the 1996 Act which reads as follows:

> **9.Interim measures, etc.,by Court**.-A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36,apply to a Court:-
>
> (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:-

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the Court to be just and convenient,

And the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

In the present case, the prayer of the petitioner in the court below was to injunct the opposite parties from removing/re-shipping the cargo in question stored at Paradip Port. In the impugned order an ad-interim order of status quo in respect of the said cargo was passed. The provisions quoted above do not envisage that appeal can lie only against the final order passed under Section 9 of the Act. Accordingly, it is held that the appeal is maintainable.

9. Mr. Bijan Roy, learned senior counsel for respondent No.1, next contended that Section 7 of the Orissa Civil Courts Act, 1994 enjoined that an Addl. District Judge can be kept in charge of the District Judge under the circumstances mentioned in that section. Sub- section 2 of Section 7 lays down that while in charge of the office of District Judge, the Addl. District Judge may subject to any Rules, which the High Court may make in that behalf, exercise any of the powers of the District Judge. So,it cannot be said that the Addl. District Judge in charge of District Judge, Cuttack had no power to pass the order under challenge. He next contended that as found from the documents like Bill of Lading, Mate Receipt etc. the appellant volunteered to be bound by the arbitration clause. So, it cannot be said that it was not a party to the arbitration agreement. According to him respondent No.1 being the disponent owner of the cargo can claim lien over the cargo till it gets its dues. At last, learned counsel for the respondent submitted that sub-section 2 of Section 2 of 1996 Act did not restrict application of the said statute to the International Commercial Arbitration. Hence he prayed to dismiss the appeal.

10. As per Section 9 of 1996 act, a party can apply for interim relief to any court. As defined under section (2) (e) of the said Act, 'Court' means the principal Civil Court of original jurisdiction in a District. Again as per section 2(2) the Orissa Civil Courts Act, the court of the District Judge is the principal court of the original civil jurisdiction of the District. As per the explanation "District Judge" shall include Additional District Judge. Section 7 of Orissa Civil Courts Act,1984 reads as follows :-

> "7. **Temporary charge of District Courts**-
>
> (1) In the event of the death, resignation, removal or transfer of a District Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held and unless any other arrangement has been made by the High Court, the Addl. District Judge or if an Additional District Judge is not present at that place, the senior most judicial officer exercising civil power present and available thereat, shall, without relinquishing his ordinary duties, assume charge of the office of the District Judge and shall continue in charge thereof until the office is resumed by the District Judge, or assumed by an officer appointed thereto.
>
> (2) While in charge of the office of the District Judge, the Additional District Judge or the senior most judicial officer exercising civil powers, as the case may be, may, subject to any rules which the High Court may make in this behalf, exercise any of the powers of the District Judge.

So, as per this provision, an Additional District Judge in charge of District Judge can exercise any of the powers of the District Judge subject to any Rules made by the High Court may make in this behalf,. In this context, it would be prudent to quote Rule 553 of G.R. & C.O. (Civil) Volume-1, which reads as follows:-

> "553. **Passing interim judicial orders in urgent matters by the Officer in-charge of District Judge**- Whenever an Additional District Judge or a Senior most Judicial Officer exercising civil powers assumes charge of the office of the District Judge under Sub-section (2) of Section 7 of the Orissa Civil Courts Act, 1984 (Act of 1984) he may while in-charge of such office, pass interim judicial orders in any urgent civil matter arising out of or relating to the case on the file of the District Judge:
>
> Provided that such powers shall not be exercised in matters relating to the exclusive jurisdiction of District Judge under special enactments:
>
> Provided further that while passing such order, the Additional District Judge or the Senior most judicial officer exercising civil

powers as the case may be, shall direct that the same shall be put up for final order before the District Judge, immediately on the letter's resuming or assuming charge of the office and the District Judge may thereupon pass such orders as he may consider necessary."

11. The 1996 Act is a special enactment. The District Judge has exclusive jurisdiction to deal with the case under that Act. So, the Addl. District Judge, even though he was in-charge of the District Judge, Cuttack can not exercise power in respect of 1996 Act. Accordingly, the impugned order passed by learned Additional District Judge, as District Judge in charge of Cuttack cannot stand. It would not be wise to give findings on the other points raised by learned counsel for the parties, lest the same may influence the District Judge, Cuttack if a similar petition is filed before it or the Arbitrator to be appointed or already appointed.

Accordingly, the appeal is allowed and the impugned order is set aside. No costs.

Appeal allowed.

2010 (I) ILR-CUT- 361

INDRAJIT MAHANTY, J.

PRAMOD KUMAR BASTIA -V- STATE OF ORISSA.

JANUARY 28,2010.

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

Quashing of Proceeding U/s.376 IPC – Not compoundable in terms of Section 320 Cr.P.C. – Petitioner being a teacher had kept sexual relationship with the victim who was a student – Petitioner managed to subvert the course of justice as he continued as a Govt. teacher for the last 17 years although N.B.W issued by the trial Court for his apprehension – Anguish of the victim about the clear failure of the judicial system compelled her to file affidavit supporting the prayer of the petitioner for quashing of the proceeding.

Held, plight of the victim can not be allowed to be used as a ground in the hands of the accused petitioner for seeking quashing of a Criminal Proceeding – Direction issued for immediate apprehension of the petitioner and for initiation of appropriate disciplinary action.

Case laws Referred to:- (para8,9)

1.2007(II) OLR 444 : (Sri Ajaya Dalua -V-State of Orissa & Anr.)

2.(2007) II SCC 191 : (Rama Paswan & Ors.-V-State of Jharkhand).

For Petitioner - M/S.Biswajit Mohanty-3, K.K.Goya & P.K.Behera.

For Opp.Party : Addl.Govt.Advocate.

For the Victim : Mr.M.K.Mohanty-2.

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*CRIMINAL MISCELLANEOUS CASE NO.1428 OF 2008. In the matter of an application under section 482 of the Code of Criminal Procedure.

I. MAHANTY, J. In this application under section 482 Cr.P.C., the petitioner has sought for quashing of the criminal proceeding in G.R. Case No.819 of 1992, arising out of Jagatsinghpur P.S. Case No.381 of 1992 pending before the learned S.D.J.M., Jagatsinghpur for the offence under section 376 I.P.C..

2. Learned counsel appearing for the petitioner submits that while the alleged offence took place in the year 1992, in the meantime, the informant-Krushna Chandra Nayak has expired for which reason the prosecution would measurably fail to prove the allegations against the petitioner and further, in the meantime also the victim-Sarala Nayak has got married to some other person and does not want to proceed with the case in view of the compromise reached between the parties and therefore, the criminal proceeding pending against the petitioner may be quashed.

In support of his contention, learned counsel for the petitioner placed reliance on a decision of this Court in the case of **Sri Ajaya Dalua Vrs. State of Orissa and another,** 2007(II) OLR 444 whereby the learned Single Judge by his order dated 17.8.2007 quashed the criminal proceeding initiated for the offence under section 376 IPC, relying on an affidavit sworn to by the

alleged victim and concluding that since the victim would be adversely affected in her family life and has expressed her desire not to depose in the case, therefore, no fruitful purpose would be served by keeping the criminal proceeding pending.

3. Mr.Biplab Das, on behalf of Mr.M.K.Mohanty (2), learned counsel for the victim, supports the prayer made by the petitioner and has filed an affidavit sworn to by the victim stating therein that during the course of investigation her father Krushna Chandra Nayak has expired on 5.8.2007 and even after completion of investigation since long, the trial has yet to commence and the matter is pending for about 18 years. Further since she, in the meantime, has got married and blessed with three children, she supports the prayer of the petitioner for quashing of the criminal proceeding.

4. In the light of the facts narrated herein above, the essential question that arises in the present case for consideration is as to whether a criminal proceeding for an offence under section 376 IPC, (which is not compoundable), ought to be quashed in exercise of power under section 482 Cr.P.C, for the reasons as has been noted herein above.

5. In the present case at hand, it appears that late Krushna Chandra Nayak, the father of the victim had lodged an F.I.R. before the I.I.C., Jagatsinghpur Police station alleging that the accused-petitioner had kept sexual relationship with his daughter Sarala Nayak who was a student of Class-IX in Pranakrushna Memorial Vidyapitha where the accused-petitioner was a school teacher and as a consequence of which his daughter became pregnant. It is further alleged that keeping in view the future of the victim, she under went medical termination of the pregnancy and even though the informant reported the matter to the President of the Managing Committee of the School and the school authorities had assured the informant to take action against the teacher who had committed the crime, while no action was taken, he was compelled to file an F.I.R. against the petitioner.

6. In the petition, the stand of the petitioner is that he is a Government employee and presently working as an Assistant Teacher of Ballipata High School and is regularly attending the classes in the school. It is further averred in the petition that “the investigating agency never informed the petitioner about institution of the case and behind his back, charge sheet has been filed showing the petitioner as an absconder and the trial court took cognizance of the offence and directed issue of N.B.W. against him.

7. In the light of the facts as narrated herein above, it clearly shocks my judicial conscious that a person who is alleged to have raped a minor and that too a student, he was teaching in the school, has managed to subvert the course of justice and has continued as a teacher in a Government School for the last 17 years that too, after having been shown as absconder and after an NBW has been issued by the trial court for his apprehension. It is

necessary to note the courts' clear disapproval of the manner in which the investigating agency as well as the disciplinary authority have remained inactive for nearly two decades. No disciplinary action has yet been initiated against the petitioner and the petitioner has not yet been apprehended either during the investigation or after filing of charge sheet even though he continues as a teacher in a Government School.

8. I am conscious of the grounds raised by the victim in her affidavit and the clear failure of the judicial system which compelled the victim to file such an affidavit before this Court supporting the prayer of the petitioner for quashing the proceeding. The anguish of the victim and that too of a minor and the obvious delay in apprehension/trial of the accused cannot at all be countenanced. No doubt, the victim has got married in the meantime and has been blessed with three children and is leading a happy conjugal life. But in my considered view, while these may be adequate grounds for the victim to pray for examination 'in camera' and also to seek restraint in publication of her name in any newspaper/electronic media yet the plight of a victim cannot be allowed to be used as a ground in the hands of an accused for seeking quashing of a criminal proceeding.

9. No doubt, the faith of people in the criminal justice system is at stake. In my considered opinion, this is a fit case where the prayer of the accused-petitioner ought to be rejected outright and in the interest of justice, direction should be issued for immediate apprehension of the petitioner (accused). Since the petitioner is working as a teacher in a Government school for the entire period from the date of occurrence. Further direction is issued to the Inspector of Schools, Jagatsinghpur to take immediate action against the accused-petitioner by initiating appropriate disciplinary action/suspension. It must never be forgotten that where the 'Rule of law' ends, anarchy begins.

10. In my considered view, the decision cited by the learned counsel for the petitioner in the case of **Ajaya Dalua** (supra) no provision of any law has been cited therein for the purpose of reaching at the conclusion. On the other hand, in the case of **Rama Paswan and Others Vrs. State of Jharkhand,** (2007) II SCC 191, the Hon'ble Supreme Court (although in a different context) in paragraph-5 of the judgment came to hold as follows :

> "…… The High Court was of the view that the compromise petition which was annexed to the petition under Section 482 of the Code referred to purported compromise between the parties. The High Court noted that Section 376 IPC is not compoundable and when the victim was examined and cross-examined during trial, the prayer to recall the victim is not acceptable. Accordingly, the petition was rejected."

11. Placing reliance on the judgment of the Apex Court and the facts noted herein above, I am of the view that since an offence under section 376

IPC is non-compoundable and the petitioner-accused is alleged to have committed the offence against a minor student, in a school where he was a teacher, granting the prayer for quashing the proceeding would not sub-serve the ends of justice.

12. Accordingly, the CRLMC stands dismissed with the observations and directions given herein above.

Application dismissed.

2010 (I) ILR-CUT- 365

SANJU PANDA, J.

M/S.VIK ASSOCIATES & CHITS PVT. LTD.-V- M/S.ASHOK AUTOMOBILES MECHANICAL & ELECTRICAL ENGINEER, BERHAMPUR.*

DECEMBER 11,2009.

COMPANIES ACT, 1956 (ACT NO.1 OF 1956) – SEC.635.

Decree passed by Company Court – In view of Sec.635 Companies Act decree need not be transferred to another Court for execution – Decree can be filed before the Court within whose jurisdiction the judgment Debtor is residing – Section 39 C.P.C. has no application to this case – Held, learned Sub-Judge failed to exercise his jurisdiction in not executing the decree in question.

For petitioner – M/s. S.D.Das, S.K.Samantaray, B.K.Kar & B.N.Udgata.

For Opp.Party – None.

CIVIL REVISION NO.149 OF 1990. From an order dated 24.11.1988 passed by the learned Subordinate Judge,Berhampur in E.P.No.61 of 1988.

S. PANDA, J. In this civil revision, challenge has been made to the order dated 24.11.1988 passed by the learned Subordinate Judge, Berhampur in E.P. No.61 of 1988.

2. The facts as narrated in the civil revision are as follows:

The petitioner-decree holder filed Application No.101/1982 under Section 446(2)(b) of the Companies Act, 1956 in Company Petition No.27 of 1977 before the High Court of Karnatak at Banglore. On 2.6.1982, the Hon'ble Company Judge held that the case for Official Liquidator was accepted and ordered ex parte that the respondent would pay the sum of Rs.14,331.00 together with interest at the rate of 6% per annum on the principal sum of Rs.9,990.00 from the date of application till the date of realization. Accordingly, the said application was decreed. Further, on 3.3.1978 the Hon'ble Company Judge in Company Petition No.27 of 1977 ordered the petitioner-company to be wound up. After the aforesaid decrees were passed, those were forwarded to one Sri B. Debadan, Advocate, Berhampur for filing of execution petition in the court of the Sub-Judge, Berhampur. He filed the execution petition which was registered as E.P. No.61 of 1988. The said application was rejected on 24.11.1988 by the learned Subordinate Judge on the ground that the decree holder had simply filed a certified copy of the decree to execute the same. In absence of any order for transfer of the decree in question to the court, as required under Section 39(2) of the Civil Procedure Code, the execution proceeding was not maintainable.

3. Learned counsel for the petitioner submitted that the executing court erred in law in holding that the procedure laid down in Section 39 of the Civil Procedure Code is to be complied with by the court which has passed the order to enforce the decree. The impugned order is otherwise illegal and if

allowed to stand, it will cause irreparable loss and injury to the petitioner-decree holder. Hence, the same is liable to be set aside.

4. Earlier, notice was issued to the opposite party-judgment debtor by registered post. Thereafter, on 11.10.2007 it was published in the local Oriya daily "The Samaj". In spite of that, the opposite party did not appear in this case.

5. It is the admitted fact that the petitioner-decree holder filed an application under Section 446 (2) (b) of the Companies Act and obtained a decree from the company court which is not a usual civil court decree. Therefore, the procedure prescribed under Section 39 of the Civil Procedure Code is that the decree is to be transferred by the court, which passed the same, to be executed out of its jurisdiction to another court in whose jurisdiction the judgment-debtor is residing.

6. Here, admittedly the judgment debtor, as per the address furnished in the company case, was staying at Berhampur. So, the learned Subordinate Judge, Berhampur had the jurisdiction to execute the decree. In view of the provisions contained in Section 635 of the Companies Act, it is not necessary to transfer the decree passed by the court to another court for its execution as the decree can be filed before the court within whose jurisdiction the judgment-debtor is residing.

7. For better appreciation, Section 635 of the Companies Act is quoted hereunder:

> "**S.635. Enforcement of orders of one Court by other Courts**. – (1) Where any order made by one Court is required to be enforced by another Court, a certified copy of the order shall be produced to the proper Officer of the Court required to enforce the order.
>
> (2) the production of such certified copy shall be sufficient evidence of the order.
>
> (3) Upon the production of such certified copy, the Court shall take the requisite steps for enforcing the order, in the same manner as if it has been made by itself.
>
> (4) Where any order made by the Company Law Board under Section 17, Section 18, Section 19, Section 79 or section 186 is required to be enforced by a Court, a certified copy of the order shall be produced to the proper officer of the Court required to enforce the order and the provisions of sub-sections (2) and (3) shall, as far as may be, apply to every such order in the same manner and to the same extent as they apply to an order made by a Court."

8. Since, the learned Subordinate Judge failed to exercise his jurisdiction in executing the decree in question, this Court sets aside the

impugned order and remands the matter to the executing court with a direction to proceed with the execution proceeding in accordance with law and conclude the same as early as possible, preferably within a period of six months from the date of receipt of a copy of this order.

The Civil Revision is accordingly disposed of. No costs.

2010 (I) ILR-CUT- 368

SANJU PANDA, J.

SOUBHAGYA MOHANTY -V- HAREKRUSHNA MOHANTY & ORS.*

JANUARY 14, 2010.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 18, RULE 17.

Recall of witness for further Cross-examination – Discretion of the Court to allow at any time before delivery of judgment – Discretion must be exercised judicially and on well accepted judicial principles and not arbitrarily or capriciously – The Court should exercise the discretion with an aim for giving full opportunity to the parties to present their case and not to fill up their lacuna or drag the proceeding.

In the present case P.W.1 was earlier examined and Cross-examined – He was also further cross-examined as per the direction of this Court– Successive applications filed on the same plea was dismissed by the trial Court – Held, there is no error apparent on the face of the impugned order for interference by this Court.

(Para 8 & 9)

Case laws Referred to:-

1. AIR 1981 Punjab & Haryana 157 : (Om Prakash -V-Sarupa & Ors.).
2. AIR 1984 Delhi 439 : (Suresh Kumar -V-Baldev Raj).
3. 2005 (Supp) OLR 791 : (Sk.Mustafa & Anr.-V-Additional District Judge,Jajpur & Ors).

For Petitioner – M/s.A.R.Dash, R.N.Behera, P.K.Behera, K.S.Sahu & S.N.Sahoo.

For Opp.Parties – M/s.B.Bhuyan, B.N.Mishra & C.R.Swain.

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*W.P.(C) NO.17609 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S. PANDA, J. In this writ application, challenge has been made to the order dated 11.11.2009 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Civil Suit No.595 of 2005 rejecting an application to recall the plaintiffs' witness for further cross-examination.

2. The facts as narrated in the writ application are as follows:

The plaintiffs who are opposite party nos.1 and 2 filed the suit for cancellation of a sale deed, declaration of title, confirmation of possession and permanent injunction with other reliefs. The present petitioner is defendant no.1 and the proforma opposite party no.3 is defendant no.2. However, the present petitioner who is only contesting the suit filed his written statement. In course of hearing of the suit, the evidence of both sides was closed and the suit was posted for argument. At that stage, defendant no.1 engaged a new counsel. After going through he pleadings and the

evidence adduced by the parties, the newly engaged counsel felt it essential that P.W.1 who was plaintiff no.1 be recalled for further cross-examination as questions on several material aspects had not been put to him during his cross-examination. The conducting counsel appearing for defendant no.1 filed an application under Order 18, Rule 17 read with Section 151 of the Civil Procedure Code giving the particular material aspects and the possible questions to be put to P.W.1 for further cross-examination which could not be put to him earlier due to omission of the previous conducting counsel on the date to which the suit was posted for argument. The plaintiffs filed their objections to the said application stating therein that defendant no.1 was trying to fill up his lacuna as P.W.1 was earlier examined and cross-examined and also re-examined on recall.

3. After considering the plea of the petitioner and the objection filed by the plaintiffs, the trial court rejected the said application on the ground that the suit is in its fag end of hearing and P.W.1 has been exhaustively cross-examined by the previously engaged Advocate. The newly engaged Advocate filed the application with sixteen material points to be asked in the further cross-examination as to possession, partition, state of health, suspension, construction of house respectively. If the defendant is allowed to recall P.W.1 and ask those questions, it will amount to patching up and covering the lacuna left out after strenuous cross-examination by the previously engaged Advocate. It will cause prejudice to the plaintiffs. Again de novo trial will begin, as the plaintiffs will also attempt to counter the adverse materials that may likely arise in the evidence.

4. Learned counsel for the petitioner submitted that the trial court should have considered the merit of the application without being influenced by the stage of the suit. Since Order 18, Rule 17, CPC stipulates that at any stage a witness can be recalled and if the same is necessary, the court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit. In support of his contention, he cited the decisions reported in **AIR 1981 Punjab & Haryana 157** (**Om Prakash** v. **Sarupa and others)**, **AIR 1984 Delhi 439** (**Surersh Kumar** v. **Baldev Raj**), **2005 (Supp) OLR 791** (**Sk. Mustafa and another** v. **Additional District Judge, Jajpur and others**) where it has been held that the stage of the case alone should not weigh with Court to such an extent as to overshadow other aspects of the matter and the vital questions not put to the witness due to lapse of counsel. In such a situation the witness can be recalled and cross-examined.

5. Learned counsel for the opposite parties submitted that P.W.1 was earlier recalled and cross-examined on the ground that the conducting counsel had not cross-examined the said witness and they had approached this Court by filing W.P.(C) No.4721 of 2009 which was disposed of on

8.4.2009. As per the direction of this Court, the said witness was re-examined. After he was re-examined, again defendant no.1 changed the counsel and filed another application and successive application for the self-same purpose is not maintainable.

6. Considering the above rival contentions of the parties, this Court is to determine whether further cross-examination of P.W.1 is necessary in such a situation for just decision of the case. The provision of Order 18, Rule 17 CPC does not enable a party to claim the privilege of recalling the witnesses examined in chief by his opponent for the purpose of cross examination. The discretion vests in the Court to recall a witness who has been examined at any time before the delivery of judgment. Cross-examination of a witness who has been examined by the adverse party, if necessary for ends of justice, can be permitted by recalling the witness and such discretion must be exercised judicially and on well accepted judicial principles and not arbitrarily or capriciously. Recalling a witness depends upon the facts and circumstances of each case. The Court should exercise the discretion with an aim for giving full opportunity to the parties to present their case and not to fill up their lacuna or drag the proceeding.

8. In the present case, it is the admitted fact that the witness P.W.1 was earlier examined and cross-examined. He was also further cross examined as per the direction of this Court in W.P.(C) No.4721 of 2009 on recall. In spite of the said opportunity, defendant no.1 did not cross-examine the said witness fully nor did he reserve any right as provided under Order 18, Rule 3, CPC to further cross-examine the said witness and the questionnaire formulated to cross examine the said witness on recall is not so relevant for just decision of the case as the said witness was already cross-examined on recalled. Plaintiff no.1 is none other than the father of defendant no.1 (eldest son) and defendant no.2 is the daughter in law (wife of younger son) and the parties are Hindus and governed under Mitakshara School of Hindu Law.

9. The decisions cited by the learned counsel appearing for the petitioner are not applicable in the present facts and circumstances of the case and hence the same are not necessary to be taken into consideration. In the present case, the witness whom the petitioner wants to recall for re-cross examination was earlier after closure of his examination-in-chief and cross-examination recalled as per direction of this Court in W.P.(C) No.4721 of 2009 and on such recall the said witness was cross-examined at length on the ground of lapse and change of counsel. If successive applications are filed by a party on the same plea, the trial court has to deal with the same being in a position to infer the intension of the party appearing before it. It is well settled that a little difference in the facts or additional facts may make a lot of difference in precedential value of a decision. Judicial utterances are

made in setting up of the facts of a particular case. Therefore, the above decisions are not applicable to the facts of the present case.

10. In view of the aforesaid discussions, there is no error apparent on the face of the impugned order passed by the trial court. Hence, in exercise of the jurisdiction under Article 227 of the Constitution of India, this Court is not inclined to interfere with the same. Accordingly, the writ application is dismissed.

Writ petition dismissed.

2010 (I) ILR-CUT- 372

SANJU PANDA,J.

M/S.D.T.M. CONSTRUCTION (INDIA) LTD. -V- CAPT. P.K.SRIVASTAVA & ANR.*

FEBRUARY 11,2010.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – SEC.9,37.

Application U/s. 9 of the Act before the District Judge, Puri seeking interim relief – Clause 19.3 of the agreement provides venue of the arbitration shall be at Mumbai –Learned District Judge returned the application for presentation in proper Court at Mumbai – No order allowing or refusing the prayer – Not appellable U/s. 37 (1) of the Act – Writ petition is maintainable.

However since the word "only" or "ouster" has not been used in the said Clause of the agreement the jurisdiction of the Court at Puri is not ousted – Held, there is error in the impugned order which is set aside – Matter remanded to the learned District Judge, Puri to consider the application on merit. (Para 11 & 12)

Case law Relied on:

2006 (1) OLR 40 : (Mr.Bhaskar Bhatt & Ors.-V-M/s.Crescent Art Times Pvt.Ltd.)

Case laws Referred to:

1.AIR 2002 SC 1432 : (Bhatia International -V-Bulk Trading S.A. & Anr.).
2.AIR 2000 SC 1886 : (P.Anand Gajapathi Raju & Ors.-V- P.V.G.Raju (died) & Ors.).
3.AIR 1989 SC 1239 : (A.B.C.Laminart Pvt. Ltd. & Anr.-V- A.P.Agencies,Salem).
4.AIR 1971 SC 740 : (Hakam Singh -V- Gammon (India) Ltd.).
5.2010 (1) Civil L.J.79 : (Balaji Coke Industry Pvt. -V- M/s.Maa Bhagwati Coke (Guj)Pvt. Ltd.).
6.AIR 2006 SC 3426 : (Percept D' Mark (India) Pvt. -V-Zaheer Khan & Anr.)

For Petitioner – M/s.S.K.Dash, A.K.Otta, S.Dash, B.P.Dhal & Mrs.A.Dalasamanta.

For Opp.Parties – M/s.R.N.Sahoo, S.Sahoo, S.N.Sahoo, A.R.Dash, S.K.Nanda-1, K.S.Sahu & B.Mohapatra.

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*W.P.(C) NO.1486 OF 2010. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S. PANDA, J. In this writ application, the petitioner has challenged the order dated 13.1.2010 passed by the learned District Judge, Puri in ARBP Case No.56 of 2010 returning the petition filed by the petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to present the same in a proper court at Mumbai.

2. The facts of the case are as follows :

The petitioner is a construction Company which deals in projects relating to construction and dredging. Opposite party no.1 is a proprietor concern which deals in hiring of dredger and its accessories by procuring margin. Opposite party no.2 is a Company which used to let out dredgers. The Irrigation Department of the Government of Orissa issued a work-order in favour of the petitioner for dredging and distillation in the rivers connected with Chilika Lagoon in the district of Puri to protect the same. Hence, the petitioner-D.T.M. Construction (India) Ltd. approached opposite party no.1 for hiring of dredger and opposite party no.1 accepted the said proposal of the petitioner. He intimated that though the dredger belongs to opposite party no.2 from whom he (opposite party no.1) obtained the said dredger on hire basis, he can sub-let the same. The petitioner brought the dredger from Mumabi to river Makara. However, several defects were found in the dredger which were rectified by opposite party nos.1 and 2. But the situation did not improve. The petitioner entered into an agreement with opposite party no.1 on 1.9.2008 regarding hiring of the dredger on good faith and with the belief that opposite party no.1 had correctly revealed the condition of the dredger. Opposite party no.2 gave a letter autorising opposite party no.1 to sub-let the dredger. As per the said agreement, the petitioner paid Rs.30,00,000/- (Rupees thirty lakhs) to opposite party no.1 and also paid another sum of Rs.10,00,000/- (Rupees ten lakhs) in the month of July 2009. Regarding hiring charges, opposite party no.1 demanded more amount from the month of April, 2009 to June, 2009. To solve the dispute, a joint meeting was held with opposite party nos.1 and 2 and opposite party no.1 also recommended to reduce the hiring charges to opposite party no.2, but no fruitful purpose was served. Despite the fact that the dredger did not function at all for some months, opposite party no.2 informed opposite party no.1 by e-mail that the petitioner should pay minimum charges for the period from 14th February to 15th April, 2009. However, the petitioner paid sum of Rs.40,000/- (Rupees forty thousand) out of the total dues of Rs.45,000/- irrespective of the fact that the dredger due to defects, did not work and also the petitioner spent Rs. 71,74,451/- for repair of the said dredger. The petitioner had to arrange two more dredgers to complete the job in time as the dredger obtained from opposite party no.1 did not work. Since dispute arose between the parties and the opposite parties tried to take away the dredger without settling the dues, finding no other way, the petitioner filed an application under Section 9 of the Act before the learned District Judge, Puri which was registered as ARBP Case No.56 of 2010 claiming interim relief to restrain the opposite parties from taking away the dredger on the ground that if the dredger will be taken away, the petitioner will sustain further loss and injury and the balance of convenience is in favour of the petitioner. The learned District Judge

issued notice to the opposite parties and also passed an interim order protecting the petitioner. After appearance of the opposite parties, the learned District Judge heard the matter on the question of maintainability of the application and by the impugned order, he held that the court has no jurisdiction to decide the said application and directed to take back the petition to present before a proper court at Mumbai and also vacated the interim order.

3. Learned counsel for the petitioner submitted that the learned District Judge should not have returned the application of the petitioner taking into consideration Clause 19.3 of the agreement with regard to the venue of the arbitration. He further submitted that since the dredger in question was available and its utilization was within the jurisdiction of the court, the petitioner rightly moved the application under Section 9 of the Act for interim protection as provided. The court had issued notice to the opposite parties. Therefore, instead of returning the said application filed under Section 9 of the Act by the petitioner, the learned District Judge should have decided the application on merit as Section 9 of the Act provides that the application is to be presented before the court for interim relief.

4. In the present case, the opposite parties appeared by filing a Caveat Petition. Learned counsel for the opposite parties submitted that the writ application is not maintainable as the impugned order is subject to appeal under Section 37 of the Act. Therefore, the impugned order is appealable and this Court need not interfere with the same in a writ application.

5. Learned counsel for the petitioner further submitted that Section 37 of the Act provides that if the court has allowed or refused the application, the appeal will be maintainable but not in other circumstances. In the present case, since the learned District Judge returned the application to present it before a proper court, the petitioner has challenged the said order by invoking the jurisdiction of this Court under Article 227 of the Constitution of India as the order was not revisable, as provided under Section 115 of the Civil Procedure Code.

6. From the above rival submissions made by the parties, it appears that by the impugned order, the learned District Judge returned the application to present it before a proper court at Mumbai taking into consideration Clause 19.3 of the Agreement. For better appreciation Clause 19.3 is extracted hereunder:

> "19.3 The venue of the arbitration shall be at Mumbai. The arbitration will be governed as per Indian Laws."

From the above clause of the agreement, it appears that the venue of the arbitration shall be at Mumbai and the arbitration shall be governed by Indian Laws.

7. The impugned order is not coming within the purview of Section 37 of the Act which provides that the order granting or refusing to grant measures under Section 9 of the Act is appealable. In the present case, by the impugned order since the court has returned the application, the said order was not appealable under Order 7 Rule 10, CPC which provides for return of a plaint to present it before a proper court. The said order was appealable under Order 43, Rule 1, CPC and the procedure prescribed in the Civil Procedure Code is specific regarding the remedy available to a party when the court has returned the plaint. However, in the Arbitration Act, no procedure has been prescribed for return of the application nor is the CPC applicable in a strict sense to the arbitration proceeding. Therefore, this Court is of the view that the writ application is maintainable against the impugned order.

8. On merits, the learned counsel for the petitioner submitted that the petitioner had moved an application under Section 9 of the Act and jurisdiction of the court was not ousted by the agreement between the parties. Therefore, the learned District Judge should have heard the matter on merits. Clause 19.3 of the Agreement provides for the venue of the arbitration and the dispute was not referred to the arbitration. He cited the decisions of the apex Court reported in **AIR 2002 SC 1432** (**Bhatia International** v. **Bulk Trading S.A. and another**) and **AIR 2000 SC 1886** (**P. Anand Gajapathi Raju and others** v. **P.V.G. Raju (died) and others**) where it has been held that if the word "only" or "ouster" has been used in the agreement, the jurisdiction of other courts is ousted by the said agreement and the parties of the agreement can only seek their remedies before the court as agreed in the agreement. The other courts have no jurisdiction to entertain the application. However, in the present case since the word "only" or "ouster" has not been used in the said clause of the agreement, the jurisdiction of the court at Puri is not ousted by the agreement. Hence, the court at Puri has jurisdiction to hear the same. In support of his contention, he further cited the decisions of the apex Court reported in **AIR 1989 SC 1239** (**A.B.C. Laminart Pvt. Ltd. and another** v. **A.P. Agencies, Salem**) and **AIR 1971 SC 740** (**Hakam Singh** v. **Gammon (India) Ltd.)**.

9. Learned counsel for the opposite parties submitted that opposite party no.2 is not a party to the agreement. Therefore, the application is not maintainable against him. The agreement is only between the petitioner and opposite party no.1. Since both the parties agreed that the arbitration will be held at Mumbai, the petitioner should have moved the court at Mumbai, not the court at Puri. In support of his contention he cited a decision reported in **2010 (1) Civil LJ 79** (**Balaji Coke Industry Pvt. Ltd.** v. **M/s. Maa Bhagwati Coke (Guj) Pvt. Ltd.** wherein the apex Court has held that since the parties

had knowingly and voluntarily agreed that the contract arising out of the High Seas, Sale Agreement would be subject to Kolkata jurisdiction and even if the courts in Gujarat also had jurisdiction to entertain any action arising out of the agreement, it has to be held that the agreement to have the disputes decided at Kolkata by an Arbitrator in Kolkata, West Bengal. He further submitted that since the petitioner did not file any application to refer the dispute to the arbitrator, he lacked bona fide and in support of the said contention, he cited the decision of the apex Court reported in **AIR 2006 SC 3426** (**Percept D' Mark (India) Pvt.** v. **Zaheer Khan & another**).

10. The petitioner filed an application under Section 9 of the Act before the learned District Judge, Puri seeking interim relief. On a plain reading of Section 9 of the Act, it appears that the said provision can be invoked by a party, before, or during arbitral proceedings or at any time after the making of the arbitral award and only restriction imposed in the said section is that the provision can be invoked before the award is enforced in accordance with Section 36 of the Act. The provision is made for an interim measure of protection in respect of any of the matters regarding preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement, interim injunction, receiver, etc. The provision has been enacted in accordance with the principles underlying Rule 1 of Order 38 of the Civil Procedure Code. Therefore, before exercising the powers conferred by the said provision, a court should be satisfied on two points. The first is that the plaintiff's cause of action is prima facie an unimpeachable one subject to his proving his allegations made in the plaint. The second one is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the Court. The Court is specifically empowered by this section to pass interim orders that may be deemed necessary. The Court is vested with powers to pass interim order to safeguard and protect the interests of the parties. However, there is nothing in the said section to warrant the assumption that the well-established principles governing the grant of temporary injunction like prima facie case, balance of convenience and irreparable injury are not applicable to the exercise of power under the said section. The scope of the said section is only deals with the interim measure by the Court. Obviously it is not within the scope of the said section to enquire into the claim and the counter-claim made by both the parties in regard to the custody of the articles and for protection of it pending dispute between the parties in regard to them. The word "Court" mentioned in Section 9 as defined in Section 2(1)(e) of the Act, means the principal civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had

been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal civil Court, or any Court of Small Causes. In the present case there is no doubt that the dredger is the subject matter and the dispute between the parties is the said dredger and its consequential matters as per the agreement. Therefore, the petitioner rightly invoked the jurisdiction of the court of the learned District Judge, Puri for interim relief before the dispute is referred to arbitration as per the agreement. In view of the above, the decision of the apex Court in the case of Percept D' Mark (India) Pvt. (supra) cited by the learned counsel for the opposite parties is not applicable to the facts and circumstances of the present case.

11. From the decision of the apex Court in the case of Balaji Coke Industry Pvt. Ltd. v. M/s. Maa Bhagawati Coke (Guj) Pvt. Ltd. (supra), it appears that in the said case an application was filed under Section 25 of the CPC for transfer of Arbitrator Application No.1 of 2008 pending before the court of the Principal Civil Judge (Senior Division), Bhavnagar (Gujarat) which was transferred to the Calcutta High Court taking into consideration the arbitration clause, i.e., Clause-11 of the agreement between the parties of the said case which reads as under:

> "In case of any dispute or difference arising between the parties hereto or any claim or thing herein contained or the construction thereof or as to any matter in any way connected with or arising out of these presents or the operation thereof or the rights, duties or liabilities of either party thereof, then and in every such case the matter, differences in disputes shall be referred to an Arbitrator in Kolkata, West bengal, India in accordance with and subject to the provisions of the Arbitration and Conciliation Act, 1996, or any other enactment or statutory modifications thereof for the time being in force. The place of arbitration shall Kolkata."

In that case, the apex Court held that the decisions in A.B.C. Laminart (P) Ltd's case and Hakam Singh's case (supra) are very clear on the point. Therefore, in view of Clause 19.3 of the agreement of the present case already quoted and the aforesaid two decisions of the apex Court as well as the decision of this Court reported in **2006 (1) OLR 40 (Mr. Bhaskar Bhatt and others** v. **M/s. Crescent Art Times Pvt. Ltd.),** since the word "only" or "ouster" was not included in the arbitration clause of the Agreement, the jurisdiction of other courts was not ousted totally.

12. In view of the discussion made in the foregoing paragraphs, the impugned order dated 13.1.2010 passed by the learned District Judge, Puri in ARBP Case No.56 of 2010 is an error apparent on the face of record as he has only considered Clause 19.3 of the agreement wherein it was only mentioned that the venue of the arbitration shall be at Mumbai. But the said

agreement does not oust the jurisdiction of the court at Puri where the subject matter of the dispute was available and required to be protected. Hence, in exercise of the jurisdiction under Article 227 of the Constitution of India, this Court remands the matter to the learned District Judge, Puri to consider the application filed by the petitioner under Section 9 of the Act on merits and the interim order vacated by the said court is restored back for the interest of justice.

With the above observations, the writ application is disposed of. No costs.

Writ petition disposed of .

2010 (I) ILR-CUT- 379

B.N.MAHAPATRA, J.

ORIENTAL INSURANCE CO.LTD.-V-MOCHIRAM SAHOO & ORS.*

FEBRUARY 10,2010.

MOTOR VEHICLES ACT, 1988 (ACT NO. OF 1988) – SEC.147.

Accident causing death – Vehicle involved is a private vehicle – Vehicle covered by a comprehensive policy – Insurance Company is liable to pay the compensation to the claimants.

(Para 6)

Case law Relied on:-

(2009) 2 CLR 579 : (Divisional Manager, Oriental Insurance Co.Ltd. -V- Arati Mishra & Anr.)

For the Appellant – M/s. Mohitosh Sinha, P.R.Sinha, P.K.Mahali & J.Jena.

For the Respondents – M/s.A.K.Mohanty, m.C.Nayak, & D.C.Dey (For R-7)
M/s. P.K.Mishra, P.Mishra, P.K.Nanda &
P.K.Mishra.(For R-1 to 4)

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*M.A.C.A. NO.100 OF 2009. From a judgment dated 04.09.2007 passed by the 3rd Motor Accident Claims Tribunal, Bhubaneswar in Misc.Case No.413 of 1997.

B.N.MAHAPATRA, J. This is an appeal against the judgment dated 04.09.2007 passed by learned 3rd Motor Accident Claims Tribunal, Bhubaneswar (for short "the Tribunal") in Misc. Case No. 416 of 1997

2. The case of the claimants before the Tribunal is that on 15.09.1997 while the deceased along with her family members and other co-passengers was returning to her village by a Tata Sumo bearing registration No.OR-02-F-0222, the said vehicle dashed against a truck bearing registration No.WMO-98 which was coming from opposite direction. In the said accident, the deceased sustained severe injuries. After the accident, the deceased was shifted to Tangi Hospital for treatment. From Tangi Hospital while she was taken to S.C.B., Medical College and Hospital, Cuttack for better treatment, she succumbed to the said injuries. The police registered an accident case against the driver of the offending truck. The further case of the claimants is that the accident took place due to rash and negligent driving by drivers of both the vehicles. The deceased was aged about 17 years and a student of Class-X. In her leisure time, the deceased along with her sister was doing stitching of the dress materials of villagers and was earning Rs.300/- per month. Out of this profit, the deceased was contributing towards maintenance of the family. The deceased was a goods student and in the year of accident she was to appear at the Board examination. Her future was to be a Nurse. With the above averments, the claim petition was filed claiming compensation of Rs.2,00,000/-

3. Both the owners of the vehicles involved in the accident did not contest the case. They were set ex parte. Both the insurers of the offending vehicles

contested the case by filing separate written statements denying almost all the material facts alleged in the claim petition. They have denied their knowledge about the validity of the Insurance Policies and driving licences of drivers of respective vehicle and prayed for dismissal of the claim petition.

The learned Tribunal framed as many as three issues. After taking into consideration the materials on record, the Tribunal held that due to rash and negligent driving of drivers of both the vehicles the accident took place. All the four claimants before the Tribunal are entitled to compensation. The Tribunal further held that both the vehicles were duly insured by the Insurance Company, i.e., the opposite party Nos. 3 and 4 and they are liable to pay the compensation at the ratio of 50:50. With the above findings, the Tribunal determined the amount of compensation at Rs.1,60,000/-.

Being aggrieved with the said judgment of the learned 3rd M.A.C.T., Bhubaneswar, the appellant–Insurance Company has filed the present appeal.

4. Mr. M. Sinha, learned counsel appearing on behalf of the appellant-Oriental Insurance Co. Ltd. contends that since the deceased was traveling in private Tata Sumo bearing registration No.OR-02-F-0222, she is not entitled to get any compensation as it violates the policy conditions. It is further contended that the deceased being a student she had no personal income.

5. Mr. P.K. Mishra, learned counsel appearing on behalf of the claimants submits that since it is a comprehensive policy, the passenger traveling in a private vehicle are automatically covered by the said policy and are entitled to get compensation. In support of his submission, he cited and relied upon a decision in ***Divisional Manager, Oriental Insurance Co. Ltd. vs. Arati Mishra & Anr., (2009) 2 CLR 579.*** It is further submitted that the Tribunal has adopted annual notional income of Rs.15,000/- as per Schedule-2 of the Motor Vehicles Act considering the fact that the deceased had no income at the relevant time. In the said accident, two daughters of the claimant-respondents died. In other Misc. Case No. 416 of 1997, in respect of another sister of the deceased, the appellant-Insurance Company has paid its share of 50% of the awarded amount as directed by the learned Tribunal and the claimant-respondents have already received the compensation. In the present case, 50% as awarded has already been paid by the other Insurance Company, namely, United India Insurance Company.

6. The argument of Mr. Mishra, learned counsel that Tata Sumo was covered by a comprehensive insurance policy has not been disputed by Mr. Sinha, learned counsel appearing on behalf of Insurance Company. Hence, in view of the principles decided by this Court in Arati Mishra (supra), the claimants are entitled to get compensation. So far as income is concerned, since the notional income as provided under Schedule-2 has been taken into consideration by learned Tribunal, there is no infirmity in the order of the learned Tribunal to

determine the compensation at Rs.1,60,000/- even if the deceased has no income which appears to be just and proper.

7. In view of the above, the appellant is directed to deposit 50% of the amount of compensation, i.e., Rs.80,000/- along with interest @ 7% from the date of filing of the appeal till the date of deposit before the learned Tribunal within a period of two months from the date of receipt of this order. After such deposit is made, the same shall be disbursed to the claimants in the same manner as was directed by the learned Tribunal. On production of the receipt showing payment of awarded amount along with interest as indicated above, the Registrar (Judicial) of this Court shall refund the statutory deposit of Rs.25,000/- along with interest accrued thereon to the appellant Insurance Company.

In the result, the appeal fails and dismissed.

Appeal dismissed.

2010 (I) ILR-CUT- 382

B.P.RAY,J.

M/S.MAHAVIR AUTO DIAGNOSTIC PVT.LTD.-V- MANOJ AIYER.*

DECEMBER 19,2009.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.420.

Allegations in complaint petition – Failure on the part of the petitioners to comply with certain promises made to the complainant while purchasing the car in question – Held, mere failure to keep somebody's promise would not make himself liable for being prosecuted U/s.420 IPC. – Impugned order as well as the proceeding in the complaint case are quashed. (Para 4)

Case law Relied on:-

AIR 2008 SC 251 : (Inder Mohan Goswami & Anr.-V- State of Uttaranchal & Ors.).

For Petitioner - Mr.S.K.Gajendra, Sr.Counsel & Associates.

For Opp.Party – Mr.T.Roy & Associates.

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*CRLMC NO.1277 OF 2007. In the matter of an application U/s.482 of the Cr.P.C. to quash the order of cognizance dated 02.02.2007 passed in I.C.C.Case No.206of 2007 by Shri D.Nayak, learned S.D.J.M.,Bhubaneswar.

B.P. RAY, J. The petitioners have assailed the order of cognizance taken by the learned S.D.J.M., Bhubaneswar in ICC Case No. 206 of 2007 on the basis of a complaint filed by the opp.party. Learned Magistrate by the impugned order dated 2.2.2007 has taken cognizance of the offence under Section 420/34,IPC and has issued summons to the accused persons for which the petitioners have filed this application u/s. 482, Cr. P.C.

2. The complaint petition filed by the opp.party has been enclosed as Annexure-6 to this petition. From the averments made in the complaint petition it would appear that the complainant had purchased a Skoda car from the petitioners from their Bhubaneswar Show Room on 28.10.2006. It was alleged that while purchasing the said car the petitioners had made certain inducements/promises to the complainant for which the complainant agreed to purchase the car in question. According to the complainant, the petitioners had promised to give a cash discount of Rs.30,000/- on the prevailing quoted sale price, which the complainant was yet to receive and further the petitioners had promised to give the complainant a Multi CD changer Music system having remote control of a branded Company which was not provided at the time of delivery and instead, a music system of cheaper quality without any remote control facility was given. The accessories as promised by the petitioners were not provided to the complainant. According to the complainant, the petitioners had not given the invoice of sale of the car in the name of the complainant, on the date of delivery but was given at a later point of time for which the complainant had

to incur an additional cost for registration of the car. According to the complainant, the accused persons had promised to exchange the car with future model of the said company for which written documents though promised were not provided. The complainant also alleged that the petitioners had also refused to honour their commitment of taking Opel car of the complainant at an exchange offer of pre-designated price of Rs.2.5 lakhs, but offered at a lower price of about Rs.1.5 lakhs as maximum and thereby they committed criminal breach of trust. According to the complainant, the entire transaction of selling new Skoda Car by the petitioners to the complainant was based on promise of the petitioners to exchange the Opel Corsa Car of the petitioner along with the differential value with that of the New Skoda Car. According to the complainant, though he had purchased the car in question from the petitioners, yet the petitioners refused to keep their compromise and thereby cheated the complainant. On the basis of these averments the complainant having been filed, the initial statement of the complainant was recorded on 18.1.2007. After recording of the initial statement of the complainant, the complainant filed a petition for time for which the learned Magistrate granted time till 22.1.2007 for further enquiry. It appears that the case was taken up on 2.2.2007 and no enquiry was undertaken inasmuch as no witness was examined on behalf of the complainant. On that date learned Magistrate on perusal of the complaint petition, initial statement of the complainant took cognizance of the offence u/s.420/34, IPC by the impugned order. The said order is impugned in this application u/s. 482, Cr. P.C.

3. I have heard Mr. Gajendra, learned Senior Counsel for the petitioners and Sri Roy, learned counsel appearing for the opp.party. In the instant case learned Magistrate has taken cognizance of the offence u/s. 420, IPC. Cheating is defined in Section 415, IPC and is punishable u/s.420, IPC. Section 415,I.P.C. is set out below for reference:

> " 415. Cheating.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'."

Section 415 IPC thus requires –

1. deception of any person.
2. (a) fraudulently7 or dishonestly inducing that person –

(i) to deliver any property to any person; or

(ii) to consent that any person shall retain any property; or

(b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

The Hon'ble Supreme Court in the case of **Inder MohanGoswami & Anr. v. State of Uttaranchal & Ors.,** AIR 2008 SC 251 while considering the scope and ambit of Section 420, IPC held in paragraph 41 as follows :-

"41. On a reading of the aforesaid section, it is manifest that in the definition there are two separate classes of acts which the person deceived may be induced to do. In the first class of acts he may be induced fraudulently or dishonestly to deliver property to any person. The second class of acts is the doing or omitting to do anything which the person deceived would don't do or omit to do if h weren't so deceived. In the first class of cases, the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but need not be fraudulent or dishonest. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had a fraudulent or dishonest intention at the time of making the promise. From his mere failure to subsequently keep a promise, one cannot presume that he all along had a culpable intention to break the promise from the beginning."

4. Keeping in view the ratio of Inder Mohan Goswami (supra) I am of the considered opinion that the allegation as set out in the complainant is merely a failure on the part of the petitioners to keep their promise. Mere failure to keep somebody's promise would not make himself liable for being prosecuted u/s. 420, IPC. Therefore, the allegation as set out in the complaint petition even if taken at its face value and accepted in its entirety do not constitute the offence alleged of.

5. Apart from the above, I also find that the learned Magistrate after recording the initial statement of the complainant on 18.1.2007 adjourned the case for further enquiry. It would obviously mean enquiry as visualized u/s. 202 of the Code. Since the learned Magistrate has postponed the issue of process it was incumbent on the learned Magistrate to cause an enquiry as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. It was also open to the learned Magistrate to take evidence of witnesses on oath as provided under sub-section (2) of Section 202 of the Code. It appears, the learned Magistrate without taking recourse to these methods, took the impugned cognizance by order dated 2.2.2007. This procedure, taken recourse to by learned Magistrate, in my considered

opinion, is impermissible. True it is the learned Magistrate, can at once take cognizance on filing of a complaint and recording initial statement of the complainant u/s. 200 of the Code. This was not adopted and on the contrary, the learned Magistrate decided to hold an enquiry and without holding any enquiry, passed the impugned order of cognizance which is not in consonance with the procedure prescribed in the Code.

6. For the reasons stated above, the impugned order taking cognizance and proceeding in ICC Case No. 206 of 2007 in the file of learned S.D.J.M., Bhubaneswar are quashed.

Criminal Misc. Case is accordingly allowed.

Application allowed.

2010 (I) ILR-CUT- 386

B.P.RAY, J.

DALU @ SAILENDRA PRADHAN -V- STATE OF ORISSA.*

DECEMBER 19,2009.

PENAL CODE,1860 (ACT NO.45 OF 1860) – SEC.376.

Rape – Victim was 16 years old when she was subjected to sexual intercourse – Sexual intercourse continued for more than three years by the time information lodged and victim was conceived through the appellant which was aborted later – No convincing evidence on record that the accused had extended any threat on her or forced her to have sexual inter course with him – Victim has not made any whisper before any one complaining such conduct of the appellant – Held, the victim is a consenting party and the appellant can not be held guilty of the charge U/s.376 IPC. (Para 6)

Case law Referred to :-

AIR 1983 SC 753 : (Bharwada Bhoginbhai Hirijibhai -V-State of Gujarat).

For Appellant – Mr.D.P.Dhal.

For Respondent – Addl.Govt. Advocate.

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*CRIMINAL APPEAL NO.216 OF 1995. From the judgment and order dated 29.7.1995 passed by Shri S.K.Mohanty, Asst.Sessions Judge, Khurda in S.T.Case No.7/467 of 1995/94.

B.P. RAY, J. Challenge in this appeal is to a judgment and order of conviction and sentence passed by the Asst. Sessions Judge, Khurda in S.T. Case No. 7/467 of 1995/94 in its file. Learned Asst. Sessions Judge vide the impugned judgment of conviction and sentence held the appellant guilty of charge U/s. 376 I.P.C and sentenced him to undergo R.I. for 8 years and to pay a fine of Rs.2,000/- in default to undergo R.I. for two months more.

2. The case of the prosecution against the appellant is that the appellant had brought the victim (P.W.9) along with her brother, when she was a child of 8 years old, from their native place and kept them in his house and engaged both of them as his domestic servants. Some years thereafter, the appellant assaulted and drove out the brother of the victim from his house keeping the victim in his home. Subsequent to the same, when the victim attended her puberty and was aged about 16 years, the appellant kept physical relationship with her. On the pretext of searching the brother of the victim, the appellant took her along with him from place to place and continued to keep physical relationship with her in such places against her will and without her consent. Such relationship of the victim with the appellant when came to the knowledge of the wife of the appellant, the relationship between the appellant and his wife became strain and as such the appellant kept the victim in another place and there from he took her to Nayagarh and wrongfully confined her there, engaging “goondas”. It is the

further case of the prosecution that the victim conceived out of the physical relationship with the appellant, but the same was aborted in a clinic at Bhubaneswar. The appellant was also extending threat to the victim not to report the matter to the police, but on 1.5.1994 the victim could escape from the clutches of the appellant and reported the matter to the I.I.C, Khurda on 8.5.1994, pursuant to which the present case in question was registered against the appellant. After completion of investigation, charge sheet was submitted against the appellant alleging offence U/s. 347/376 I.P.C. The appellant in the trial court faced his trial being charged for the aforesaid offences. The trial court in the conclusion of the trial while acquitting the appellant of the charge u/s. 347 I.P.C., held him guilty for the charge U/s. 376 I.P.C. and sentenced him as stated earlier.

3. Assailing the impugned judgment and order of conviction and sentence passed, it is submitted by learned counsel for the appellant that the same are unsustainable in the eye of law inasmuch as there is no credible evidence worth on record to hold the appellant guilty of charge U/s. 376 I.P.C. Elaborating the submissions, it is submitted that no doubt an order of conviction can be recorded on the sole testimony of victim in a case U/s. 376 I.P.C., but such testimony of the victim must be clear, cogent, confidence inspiring. Here in this case, according to him, since the evidence of the victim is full of material contradictions and there is no other corroborating evidence on record, the judgment of conviction recorded on such evidence can not be sustained. Hence, it is submitted by learned counsel for the appellant, the impugned judgment of conviction and sentence in such premises recorded by the trial court is liable to be set aside and the appellant needs to be acquitted of the charge U/s. 376 I.P.C.

4. In response, learned counsel appearing for the State submits that the evidence of the victim in this case that she was subjected to sexual intercourse against her will and without her consent by the appellant being clear, cogent and confidence inspiring and it being well settled that the sole testimony of the victim in a case of this nature is sufficient to hold the appellant guilty of charge without any corroboration, no fault can be found with the impugned judgment of conviction and sentence recorded, which also appears to be commensurate to the facts and circumstances of the case.

4. On perusal of the materials on record it appears that in this case the trial court placing reliance on the evidence of the victim (P.W.9) recorded the judgment of conviction and sentence. Before adverting the merit of the contention raised, this court is well aware of the position of law that corroboration is not the sine qua non to the testimony of victim for a conviction in a case of sexual assault. Hon'ble apex Court in the case of

Bharwada Bhoginbhai Hirijibhai V. State of Gujarat, A.I.R. 1983 S.C. 753 has held that:-

"…….In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society.

A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society including by her own family members, relatives, friends, and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. In view of these and similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated.

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration in the form of eye-witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Courts in the Western World. If the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities-factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification : Corroboration may be insisted upon when a woman

> having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self-preservation. Or when the 'probabilities-factor' is found to be out of tune."

Keeping in mind the aforesaid settled position of law, the testimony of a victim in a case of sexual assault has to be addressed.

6. Needless to say that in a case of rape, the prosecution in order to sustain a charge must establish cogently that victim who has attained the age of discretion i.e. 16 years on the date of commission of offence was subjected to sexual intercourse by the perpetrator of the crime and that was against her will and without her consent. Coming to the evidence on record, it is seen from the evidence of P.W.3-Dr. Ashok Kumar Pani, who had examined the victim on police requisition in this case on 10.5.1994 that the age of the victim was 18-20 years. The victim in her evidence also deposed that when she was of 16 years of old, she was subjected to sexual intercourse by the appellant. From the same, it is clear that by the time the accused was having sexual intercourse with the appellant, the appellant had already attained the age of discretion to consent for sexual intercourse. In view of such evidence on record, prosecution must prove to the hilt that the victim was subjected to sexual intercourse against her will or without her consent to establish the charge. It appears from the evidence on record that the victim was brought when he was a child of 8 years old and the accused kept her as his domestic servant and on her attaining the majority when she was 16 years, the appellant committed sexual intercourse on her. Such sexual intercourse appears to have been committed for more than three years and the victim also deposed to have conceived through the appellant which was aborted later. The victim's evidence goes to show that the accused took her from place to place and cohabitated with her on different occasions. The victim deposes that such sexual intercourse was without her consent and against her will and on account of such sexual intercourse, the relationship of the appellant with her wife became strained and thereafter the appellant kept her in another place and continued to cohabitated with her. There is no convincing evidence on record to show that the accused had extended any threat on her or forced her to have sexual intercourse with him, when she cohabitated with him. There is also nothing on record to show that the victim was kept in a such condition that such sexual intercourse of the appellant with her which she deposes against her will and without her consent could not be disclosed by her to anyone during the said period. It appears that for these three years till she conceived the accused committed sexual intercourse with her, aborted her pregnancy and also thereafter continued to have sexual intercourse with her. The victim has made no whisper before anyone complaining such conduct of the appellant during

such period. There is absolutely no evidence on record to show that the appellant had exercised any threat or coercion on the victim or had put the victim or any person on whom she is interested in fear of death or hurt compelling the victim to submit for such sexual intercourse with him. The victim in this case may be hesitating or reluctant to consent for such sexual intercourse, but when she consciously permitted the same and also continued to have sexual intercourse with the appellant and subsequently became pregnant through such relationship and had no grievance for he same at any point of time before any one even though she was in a position to do so, it can be said that she is a consenting party to such sexual intercourse. The same is further fortified from the unexplained delay in lodging the report. The delay in lodging the report to the police in a case of this nature though no fatal, but in the facts and circumstance, the same cast a cloud in the case of the prosecution and fortified the version of the defence that when the appellant denies to keep the victim as his wife, the victim made the allegation of sexual assault. The sexual intercourse as deposed by the victim with the appellant in this case though acceptable to be trust-worthy, but the same is a consensual intercourse. A sexual intercourse with a lady, who has attained the age of discretion on consent it goes without saying that does not attract the ingredients of evidence of sexual assault, as defined u/s. 375,IPC which has been made punishable u/s. 376, IPC. In such premises , here the evidence of the victim with regard to the sexual intercourse without consent on the face of the evidenced on record being not confidence inspiring in spite of the fact that she has deposed that the same was without her consent and against her will, the trial court appears to have erred in accepting the evidence of the victim that the sexual intercourse on her by the appellant was without her will against her consent and as such the appellant was guilty of charge u/s.376, IPC.

7. Hence on reappraisal of the evidence on record in the opinion of this Court, there was no clear, cogent and convincing evidence to hold the appellant guilty of charge u/s. 376, IPC and the judgment of conviction and sentence returned by the trial court in this case appear to be indefensible. Hence, the appeal stands allowed. The impugned judgment of conviction and sentence returned by the trial court are set aside and the appellant is acquitted of the charge.

The appellant stands discharged of his bail bond.

Application allowed.

2010 (I) ILR-CUT- 391

S.C.PARIJA,J.

PRINCIPAL SECY.TO GOVT. OF ORISSA, S & M.E.DEPTT.& ORS. -V-
MANAGING COMMITTEE OF SRI JATINDRANATH HIGH SCHOOL,KAITHA KHOLA,BHADRAK.*

OCTOBER 27,2009.

LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – SEC.5.

Condonation of delay – Law is well settled that time barred cases should not be entertained by Courts as the rights which have accrued to others by reason of delay in approaching the Court can not be allowed to be disturbed unless there is a reasonable explanation for the delay – The vested rights of the parties should not be disrupted at the instance of a person who is guilty of culpable negligence.

In the present case the State functionaries filed appeal against the judgment of the State Education Tribunal after a delay of 376 days and the same having been dismissed for non-compliance of peremptory order, the present restoration application has been filed after a delay of 282 days.

Held, this Court finds no sufficient and bona fide cause to condone the inordinate delay in filing the restoration application.

Case laws Relied on:-

1.AIR 1974 SC 259 : (R.S.Deodhar -V-State of Maharashtra).
2.AIR 1986 SC 2O86 : (K.R.Mudgal -V- R.P.Singh).

Case laws Referred to:-

1.AIR 1987 SC1353 : (Collector, Land Acquisition, Anantnag & Anr.-V- Mist.Katij & Ors.).
2.AIR 1988 SC 897 : (G.Ramegowda Major etc.-V- Special Land Acquisition Officer,Bangalore).
3.AIR 1996 SC 1984 : (State of Madhya Pradesh -V- s.S.Akolkar).
4.AIR 2005 SC 2191 : (State of Nagaland -V- Lipok AO & Ors.).
5.2008 (II) OLR 942 : (State of Orissa & 4 Ors.-V-Kantilata Sarangi).
6.AIR 1998 SC 2276 : (P.K.Ramachandran -V-State of Kerala & Anr.).

For Petitioner – Sr.Standing Council (Govt.of Orissa).
For Opp.Party – M/s.B.Routray, B.Singh, D.K.Mohapatra, B.B.Routray, P.K.Sahoo, S.Jena.

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*CAMPAL NO.320 OF 2009. In the matter of an application for restoration of the FAO having been dismissed on 18.3.09 of non-compliance of the order dated 21.1.09 & read with order 41 Rule 19 C.P.C.

MISC.CASE NO.90 OF 2009.

This is an application under Section 5 of the Limitation Act, for condonation of delay of 282 days in filing the application for restoration of the

FAO No.146 of 2006, which was dismissed for non-compliance of the peremptory order dated 21.01.2009.

The brief facts giving rise to the present application is that the respondent-opposite party filed an application under Section 24-B of the Orissa Education Act before the State Education Tribunal, Orissa, Bhubaneswar, which was registered as GIA Case No.65 of 2004, claiming grant-in-aid with effect from 01.01.2004 in addition to other reliefs. The said application of the respondent-opposite party was disposed of by the State Education Tribunal vide judgment dated 24.12.2004, holding that the present respondent-opposite party is eligible to receive grant-in-aid, as per the Orissa Education (Payment of Grant-in-aid to the High Schools and Upper Primary Schools etc.) Order,2004, and therefore is entitled to receive such grant-in-aid from the month of January 2004.

The said judgment of the State Education Tribunal dated 24.12.2004 passed in GIA Case No.65 of 2004 was challenged by the present appellants-petitioners in appeal before this Court in FAO No.146 of 2006, which was filed on 04.04.2006. Along with the memo of appeal, the appellants-petitioners filed an application under Section 5 of the Limitation Act for condonation of delay of 376 days in filing the appeal, which was registered as Misc.Case No.221 of 2006. After notice on the question of limitation, the respondent-opposite party appeared and filed objection to the application for condonation of delay. This Court, vide order dated 28.11.2008, considering the grounds taken in the application and the submissions made by the learned counsel for the parties and taking a lenient view of the matter, condoned the delay of 376 days in filing the appeal, subject to payment of Rs.5000/- as cost, to be paid to the learned counsel appearing for the respondent-opposite party.

The appellants-petitioners did not pay the cost of Rs.5000/- within the stipulated period of four weeks and prayed for further time to pay the said cost. Accordingly, by order dated 21.01.2009, this Court granted further two weeks time to the appellants-petitioners to pay the cost of Rs.5000/-, as directed vide order dated 28.11.2008, failing which the appeal shall stand dismissed without further reference to the Bench.

In spite of the peremptory order of this Court dated 21.01.2009, as the appellants-petitioners did not pay the cost within the prescribed time, the appeal, i.e. FAO No.146 of 2006 stood dismissed on 18.03.2009, for non-compliance of the peremptory order.

The present respondent-opposite party filed a writ application before this Court for implementation of the judgment of the State Education Tribunal dated 24.12.2004 in GIA Case no.65 of 2004, which was registered as WP(C) No.3465 of 2009. The said writ application was taken up for consideration and the Division Bench of this Court while taking note of the

fact that the appeal filed by the appellants-petitioners i.e. FAO No.146 of 2006, has been dismissed for non-compliance of peremptory order dated 21.01.2009, disposed of the writ application directing the present appellants-petitioners to comply with the order of the State Education Tribunal passed in GIA Case no.65 of 2004 within a period of four months from the date of the said order, if no other application is pending against the order of this Court dated 21.01.2009, dismissing FAO No.146 of 2006.

The appellants-petitioners filed an application for restoration of FAO No.146 of 2006 on 11.09.2009, which was registered as CMAPL No.320 of 2009. Along with the said application for restoration, the appellants-petitioners filed the present application under Section 5 of the Limitation Act, for condonation of delay of 282 days in filing the restoration application.

In the meantime, as the order of this Court dated 17.04.2009 passed in WP (C) No.3465 of 2009 was not implemented, the respondent-opposite party filed an application for implementation of the said order, which was registered as Misc.Case No.11305 of 2009. The said application for implementation of order dated 17.04.2009 was disposed of by this Court vide order dated 14.09.2009 directing the appellants-petitioners to comply with the said order dated 17.04.2009 by the end of November, 2009. This Court further observed that if the said order is not complied with by the end of November, 2009, contempt proceeding shall be initiated against the present appellants-petitioners, who were opposite parties in the said writ application.

The respondent-opposite party filed its objection to the present application for condonation of delay. The main objection of the respondent-opposite party is that no ground has been taken in the present application, explaining the inordinate delay in filing the restoration application and that the said application has been filed at a belated stage to get the appeal restored, only to avoid the order/direction of this Court dated 14.09.2009, passed in W.P.(C) No.3465 of 2009.

Learned Sr.Standing Counsel appearing for the appellants-petitioners relying upon the decisions of the Apex Court in the case of **Collector, Land Acquisition, Anantnag & Anr. V. Mst.Katiji & Ors.,** AIR 1987 SC 1353; **G.Ramegowda Major etc. V. Special Land Acquisition Officer, Bangalore,** AIR 1988 SC 897; **State of Madhya Pradesh V. S.S.Akolkar**, AIR 1996 SC 1984 ; **State of Nagaland V. Lipok AO & Ors.,** AIR 2005 SC 2191 and a division Bench decision of this Court in the case of **State of Orissa & 4 others V. Kantilata Sarangi,** 2008 (II) OLR 942, submitted that the question relating to condonation of delay should be liberally considered, particularly when the State is the appellant. In this regard, it is submitted that as the State Government is an impersonal machinery, they can not be treated on the same footing as that of a private party and implicit in the very

nature of the Governmental functioning is procedural delay incidental to the decision making process. Accordingly, it is submitted that as the State represents the larger public interest, some latitude must be given to the State, when it files an application for condonation of delay.

Shri B.Routray, learned counsel for the respondent-opposite party has referred to a decision of the Apex Court in the case of **P.K.Ramachandran V. State of Kerala and another,** AIR 1998 SC 2276, in support of his contention that the law of limitation may harshly affect a particular party but it has to be applied with all its rigour when the statute so prescribe and the Courts have no power to extend the period of limitation on equitable grounds. Accordingly, it is submitted that no special privilege can be bestowed on the State, especially when no grounds have been taken in the present application, explainining the inordinate delay in filing the restoration application.

In the instant case, on a perusal of the present application filed for condonation of delay, it is seen that the only ground regarding delay has been stated in paragraphs 3 and 4 of the application, which are extracted below:-

"3. That it is submitted that there is no intentional delay or negligence to deposit the cost as ordered by the Hon'ble Court. For non-compliance of the order for which FAO is dismissed.

4.That the letter having been sent from the Govt. to the Inspector of Schools, Bhadrak. The letter being in receipt by Appellant. No.3,Inspector of Schools rushed to the Cells Office for preferring this Misc.Case and as such appella nt No.3 is authorized to prefer this Misc.Case CMAPL."

There is no doubt that the question of condonation of delay should be liberally considered by the Courts for the cause of substantial justice and certain amount of latitude is permissible where State and its functionaries are litigants before the Court, but that does not mean that when no sufficient cause has been shown and no plausible explanation has been given for the inordinate delay in approaching the Court, the so-called liberal attitude should be taken in all cases, where the State Government is the appellant. The casual and careless approach of the State and its functionaries is evident from the fact that the appeal (FAO No.146 of 2006) against the judgment of the State Education Tribunal was filed after a delay of 376 days and the same having been dismissed for non-compliance of peremptory order, the present restoration application has been filed after a delay of 282 days.

It is settled law that time-barred cases should not be entertained by Courts as the rights which have accrued to others by reason of delay in approaching the Court, cannot be allowed to be disturbed unless there is a

reasonable explanation for the delay. The vested rights of the parties should not be disrupted at the instance of a person who is guilty of culpable egligence. – (See **R.S.Deodhar V. State of Maharashtra,** AIR 1974 SC 259; and **K.R.Mudgal V. R.P.Singh,** AIR 1986 SC 2086).

Applying the principles of law, as discussed above, to the facts of the present case and considering the grounds taken in the present application, I find no sufficient and bona fide cause to condone the inordinate delay in filing the restoration application.

This application for condonation of delay is rejected.

Misc.Case is accordingly dismissed.

CMAPL NO.320 OF 2009.

In view of the rejection of the application for condonation of delay, this CMAPL is dismissed on the ground of limitation.

2010 (I) ILR-CUT- 396

B.K.PATEL,J.

SMT. TULASI SAHUKAR -V- NEW INDIAN ASSURANCE COMPANY LTD.& ORS.*

FEBRUARY 2, 2010.

MOTOR VEHICLES ACT, 1988 (ACT NO. 59 OF 1988) – SEC.157.

Insurance Policy – While in force owner expired and the offending vehicle met with an accident – Policy not cancelled – Ownership of the vehicle transferred in the name of the appellant during subsistence of the said policy – Policy issued infavour of the previous owner is deemed to have been transferred infavour of the present owner – Impugned award directing owner to pay compensation is set aside – Held no scope for the Insurance Company to avoid the statutory liability towards third party claims but to pay compensation with interest and cost to the claimants. (Para 21,22

Case laws Referred to :

1.1972 ACJ 13 : (Hindustan General Ins. Society Ltd.-V-Kausalya Rani Das & Anr.)
2.1998 (1) TAC. 615 (SC) : (Oriental Insurance Co.Ltd.-V-Inderjit Kaur & Ors.).
3.1976 CLT 1283 : (Cuttack Municipality -V-Shyamsundar Behera)
4.2002 (3) TAC 663 (Mad.) : (New India Assurance Co.Ltd. -V-Kaliathal & Ors.).
5.1999(3) TAC 831 (Guj.) : (United India Insurance Co.Ltd.-V- Mohanlal Nandiram & Ors.)
6.2003(2) TAC.22 (SC) : (Rikhi Ram & Anr.-V- Sukhrania & Ors.).
7.1985 CRI.L.J. 951 : (V.Parakashan -V-Pankajakshan & Anr.).
8.1992 CRI.L.R. 2476 : (Virendrakumar J.Handa -V-Dilawarkhan Alij Khan & Ors.).

For Appellant – M/s.J.Pal, Md.G.Madani, M.K.Sarangi & B.P.Prusty.

For Respondents – M/s. S.S.Rao & B.K.Mohanty
(for respondent no.1)
M/s. R.N.Mohanty, P.K.Panigrahi, R.C.Ojha & A.K.Jena.
(for respondents 2,3 & 4)

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*MACA NO. 452 OF 2004. From the award dated 16.2.2004 passed by Sri R.Dash, Additional District Judge-cum-3rd M.A.C.T. Gajapati,Parlakhemundi in M.A.C. No.3/2001/125/99 (GDC).

B.K. PATEL, J. This appeal, at the instance of owner-appellant, is directed against the judgment dated 16.2.2004 passed by the learned Additional District Judge-Cum-Third Motor Accident Claims Tribunal, Gajapati, Parlakhemundi in MAC No.3/2001/125/99 (GDC) directing the owner of the offending vehicle, a bus bearing registration No.OR-07-C-0099, to pay to the claimants-respondent Nos. 2 to 4 compensation amount of

Rs.1,15,000/- (Rupees one lakh fifteen thousand) with interest at the rate of 8 per cent from 1.10.2002, i.e., the date of appearance of the appellant with cost of Rs.500/- (Rupees five hundred) on account of death of deceased Sakuda Mandal in an accident involving the offending vehicle. On consent, the matter was taken up for final disposal at the stage of admission.

2. The accident took place on 28.6.1997. Initially the claimants filed claim application against appellant's husband Krushna Chandra Sahukar as the owner of the offending vehicle. It was pleaded that appellant's husband was insured in respect of the offending vehicle for the period from 7.1.1997 to 28.2.1998 by respondent no.1-New India Assurance Company. Subsequently, appellant's husband having died on 18.3.1997, the appellant was arrayed in the claim proceeding as the owner of the offending vehicle. Appellant filed written statement pleading, inter alia, that the Insurance Company is liable to pay compensation arising out of use of the offending vehicle. Insurance Company filed written statement denying its liability. In order to substantiate the claim, appellant examined two witnesses and relied upon documents marked Exts.1 to 5. No oral evidence was adduced either by the owner of the offending vehicle or by the Insurance Company. However, documents marked Ext. 'A' series were admitted to on behalf of the owner and Ext. 'B' series were admitted to on behalf of the Insurance Company. Upon consideration of materials on record learned Tribunal held that the owner is liable to pay compensation.

3. In assailing the impugned judgment it was submitted by the learned counsel for the appellant that as per Section 50(2)(a) of the Motor Vehicles Act, 1988 (for short the 'M.V. Act') the appellant got the ownership of the offending vehicle transferred in her favour by the registering authority on 4.12.1997. The vehicle was insured during the period of accident. On the basis of such factual submissions it was contended that in view of Section 157 of the M.V. Act, insurance policy issued in favour of appellant's husband has to be deemed to have been transferred in favour of the appellant. It was further argued that the policy issued to appellant's deceased-husband covered the period of accident and the insurance policy was never cancelled by the Insurance Company. Therefore, third party benefits contemplated under the M.V. Act cannot be defeated due to delay, if any, in transfer of the ownership of the offending vehicle in the name of the appellant as the liability of the Insurance Company towards the third party is not contractual but is statutory. In support of his contentions learned counsel for the appellant relied upon decisions of our High Court in ***Hindustan General Ins. Society Ltd. –vrs.-Kausalya Rani Das and another***, 1972 A.C.J 13 and of the Hon'ble Supreme Court in ***Oriental Insurance Co. Ltd. –vrs.- Inderjit Kaur and others***, 1998 (1) T.A.C. 615 (SC).

4. In reply, learned counsel for the Insurance Company contended that as the person in whose favour insurance policy was issued died more than three months before the accident and no step was ever taken by the appellant to get the insurance policy transferred in her favour, the learned Tribunal rightly held that Insurance Company is not liable to pay compensation on account of accident involving the offending vehicle. It was argued that contract of indemnity between the Insurance Company and insurer-owner came to an end with his death on 18.3.1997. It was further contended that as the claim application was initially filed against a dead person and the case stood abated against the deceased-owner, no award can be passed against the Insurance Company on the strength of policy which had been issued to the appellant's husband. In support of his contentions learned counsel for the Insurance Company relied upon the decisions of our High Court in ***Cuttack Municipality –vrs.- Shyamsundar Behera***, 1976 CLT 1283, of the High Court of Madras in ***New India Assurance Co. Ltd. -vrs.- Kaliathal and others***, 2002 (3) T.A.C. 663 (Mad.) and of the High Court of Gujarat in ***United India Insurance Co. Ltd. –vrs.- Mohanlal Nandiram and others***, 1999(3) T.A.C. 831 (Guj.).

5. Learned counsel for the claimants respondent nos.2 to 4 also argued that in view of provisions under Section 50 (2) (a) and Section 157 of the M.V. Act the insurance policy which was never cancelled automatically got transferred in favour of the appellant. There might have been some delay in getting the vehicle transferred in the name of the appellant. However, delay is of no consequence so far as liability of the Insurance Company towards third party is concerned. Learned counsel for the claimants placed reliance on decision in ***Rikhi Ram and another –vrs.- Sukhrania and others***, 2003 (2) T.A.C. 22 (S.C).

6. Having perused the materials on record and considered the contentions raised on behalf of the parties, it is found that certain facts are not at all disputed. Insurance policy was issued by the Insurance Company in favour of the appellant's deceased husband in respect of the offending vehicle prior to the accident covering the period from 7.1.1997 to 28.2.1998 vide Ext.A series. Appellant's husband died on 18.3.1997 and accident took place on 28.6.1997. Ownership of the offending vehicle was transferred by the registering authority in the name of the appellant on 4.12.1997 as is revealed from the copy of the registration certificate filed on behalf of the appellant. Claim application was filed on 19.3.1999 impleading appellant's deceased-husband as the owner. Having learnt regarding death of the appellant's husband claimants impleaded the appellant as the owner of the vehicle when the claim application was pending. Accordingly, claim application was amended before hearing commenced. It is not disputed that insurance

policy issued in favour of the offending vehicle was never cancelled or rescinded by the Insurance Company.

7. In view of such admitted facts, there is no scope for the Insurance Company to assail impletion of the appellant in the claim proceeding as the owner. No objection was raised before the learned Tribunal against impletion of the appellant. Scheme of the Motor Vehicles Act also does not provide any scope to the Insurance Company to object to appellant's impletion on the ground of bar of limitation. Decision in ***Cuttack Municipality –vrs.- Shyamsundar Behera*** (supra) relied upon by the learned counsel for the Insurance Company to canvass his objection to the impletion of appellant as the owner of the vehicle lays down that no substitution can be permitted in a case where there was a sole defendant, but where there are more defendants than one and one of them was dead when the suit was filed, the legal representatives of the deceased defendant can be brought on record subject to the question of limitation that may be available to be raised. In the present case, admittedly, deceased-owner was not the only opposite party against whom claim application was filed. Therefore, the objection is not sustainable.

8. The crucial issue to be decided in the appeal is as to whether third party liability of the Insurance Company subsisted in respect of the cause of action arising of use of the offending vehicle after the death of the appellant's husband but during the period for which the policy had been issued. Stand of the Insurance Company is that the liability towards third party ceased due to inaction on the part of the appellant to get ownership of the offending vehicle and insurance policy transferred in her favour after death of appellant's husband and before the accident.

9. Clause (a) of sub-section (2) of section 50 of the M.V. Act provides for the contingency regarding transfer of ownership of a vehicle in case of death of the registered owner. It reads:

> " Where –
>
> (a) the person in whose name a motor vehicle stands registered dies, xx
>
> (b) xxx xxx
>
> the person succeeding to the possession of the vehicle or, as the case may be, who has purchased or acquired the motor vehicle, shall make an application for the purpose of transferring the ownership of the vehicle in his name, to the registering authority in whose jurisdiction he has the residence or place of business where the vehicle is normally kept, as he case may be, in such manner,

accompanied with such fee, and within such period as may be prescribed by the Central Government."

Thus the provision makes it clear that so far as transfer of ownership of the registered vehicle by the registering authority is concerned, the person succeeding to the possession of the vehicle is to make an application for the purpose. It is not disputed that the appellant succeeded to the possession of the vehicle. Therefore, transfer of ownership of the vehicle which the transferee acquired upon death of deceased owner was required to be registered on an application made by the successor of the deceased-owner.

10. Legal consequence of not making an application within the period prescribed under sub-section (2) of Section 50 of the M.V. Act and the duties of the registering authority on receipt of the application have been provided under sub-section (3) to (7) of Section 50 of the M.V. Act, which read:-

"(3) If the transferor or the transferee fails to report to the registering authority the fact of transfer within the period specified in clause (a) or clause (b) of sub-section (1), as the case may be, or if the person who is required to make an application under sub-section (2) (hereafter in this section referred to as the other person) fails to make such application within the period prescribed, the registering authority may, having regard to the circumstances of the case, require the transferor or the transferee, or the other person, as the case may be, to pay, in lieu of any action that may be taken against him under section 177 such amount not exceeding one hundred rupees as may be prescribed under sub-section (5):

Provided that action under section 177 shall be taken against the transferor or the transferee or the other person, as the case may be, where he fails to pay the said amount.

(4) Where a person has paid the amount under sub-section (3), no action shall be taken against him under section 177.

(5) For the purposes of sub-section (3), a State Government may prescribe different amounts having regard to the period of delay on the part of the transferor or the transferee in reporting the fact of transfer of ownership of the motor vehicle or of the other person in making the application under sub-section (2).

> (6) On receipt of a report under sub-section (1), or an application under sub-section (2), the registering authority may cause the transfer of ownership to be entered in the certificate of registration.
>
> (7) A registering authority making any such entry shall communicate the transfer of ownership to the transferor and to the original registering authority, if it is not the original registering authority."

Thus, it is evident that what is required to be done by filing an application under sub-section (2) of Section 50 of the M.V. Act is simply to intimate to the registering authority "the fact of transfer" of the ownership of the vehicle in case of death of the owner by the person succeeding to the possession of the vehicle by filing an application within the prescribed period. In the event of failure to do so, instead of taking action under Section 177 of the M.V. Act, "transferee" may be required to pay such amount not exceeding one hundred rupees as may be prescribed under sub-section (5) of Section 50 of the M.V. Act. Only when the "transferee" fails to pay the amount, action under Section 177 of the M.V. Act has to be taken against the "transferee". It has been categorically provided that where a person has paid the amount under sub-section (3) of Section 50 of the M.V. Act, no action shall be taken against him under Section 177 of the M.V. Act.

11. Provisions under Section 50 of the M.V. Act extracted above make it clear that the registering authority is bound to record the transfer of the vehicle once an application is made. Entry in the certificate of registration does not cause the transfer of ownership. The transfer of ownership takes place from the date of sale when the transferee purchases the vehicle, and from the date of death of owner when the successor-in-interest succeeds to the possession of the vehicle. Registration certificate does not confer title. Change of entry in the registration certificate does not convey the ownership. Transfer of ownership of motor vehicle is governed by the provisions of Sale of Goods Act or law of succession as the case may be. In this connection, decisions of Kerala High Court in ***V. Parakashan –vrs.- Pankajakshan and another***: 1985 CRI.L.J. 951 and of Bombay High Court in ***Virendrakumar J. Handa –vrs.-Dilawarkhan Alij Khan and others*** : 1992 CRI.L.J.2476 may be referred to.

12. Section 157 of the M.V. Act lays down provisions relating to transfer of certificate of insurance in the event of transfer of ownership of a motor vehicle. It reads:

" 157. Transfer of Certifificate of Insurance :-

(1) Where a person in whose favour the certificate of insurance has been issued in accordance with the provisions of this Chapter transfers to another person the ownership of the motor vehicle in respect of which such insurance was taken together with the policy of insurance relating thereto, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of its transfer.

(2) The transferee shall apply within fourteen days from the date of transfer in the prescribed form to the insurer for making necessary changes in regard to the fact of transfer in the certificate of insurance and the policy described in the certificate in his favour and the insurer shall make the necessary changes in the certificate and the policy of insurance in regard to the transfer of insurance."

The language of sub-section (1) of Section 157 of the M.V. Act is unambiguous in stating that certificate of insurance as well as the policy described in the certificate shall be deemed to have been transferred in favour of the transferee with effect from the date of its transfer. Transfer of insurance policy is automatic. Therefore, in case of death of the insured, transferee in possession has to be deemed to have been covered by the policy.

13. At this stage it is also essential to refer to the provisions relating to duties and liabilities of the insurer and insured under the M.V. Act.

14. Sub-section (5) of Section 147 of the M.V. Act reads:-

"147. **Requirements of policies and limits of liability**.-

xx xx xx

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

15. Sub-section (1) of Section 149 of the M.V. Act reads:-

"**149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks**. – (1) If, after a certificate of insurance has been issued under sub-section (3) of section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of section 147 (being a liability covered by the terms of the policy) [or under the provisions of section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

16. Section 156 of the M.V. Act reads:-

"156. **Effect of certificate of insurance**.- When an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then-

(a)if and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and

(b)if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as state in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate."

17. Sub-section (5) of Section 147 of the M.V. Act is substantially in *pari materia* with sub-section (5) of Section 95 of the Motor Vehicles Act, 1939 (for short the '1939 Act').

18. In ***Rikhi Ram and another –vrs.- Sukhrania and others*** (supra) the Hon'ble Apex Court had the occasion to analyse the effect and implication of Section 95 (5) of the 1939 Act. It was held:

> "3. This Court in *G. Govindan v. New India Assurance Co. Ltd. and others*, 1999 (3) S.C.C. 754, has settled the controversy as regards liability of insurer to pay compensation to third party in the absence of any intimation of transfer of the vehicle to the transferee. It was held therein that since insurance against third party is compulsory, and once the Insurance Company had undertaken liability to third party incurred by the persons specified in the policy, the third party's right to recover any amount is not affected by virtue of the provisions of the Act or by any condition in the policy. We are of the view that said decision concludes the controversy in the present appeal. However, we would like to give further reasons that the liability of an insurer does not come to an end even if the owner of the vehicle does not give any intimation of transfer to the Insurance Company. Chapter VIII of the Act has been enacted following several English statutes. In England, prior to 1930, there was no law of compulsory insurance in respect of third party rights. Whenever an accident took place the victim or the injured used to take legal proceedings against an erring motorist for recovery of damages. But many a times it was found that the owner of an offending vehicle was not always in a position to pay compensation or damages to the injured or to the dependants of the deceased and in that event the claimants could not get the damages. To meet such a situation, various legislations were enacted in England. For the first time, Third Parties (Rights Against Insurers) Act, 1930 was enacted, the provisions of which find place in Section 97 of the Act which gave to third party right to sue directly against the insurer. Subsequently, the Road Traffic Act, 1930 was enacted which provided for compulsory insurance of motor vehicles. The provisions of the said Act was engrafted in Section 95 of the Act. Under Section 38 of English Act, 1930, certain conditions of insurance policy were made ineffective so far as the third parties were concerned. The object behind the aforesaid legislations was that third party right should not suffer on account of failure of comply with those terms of the insurance policy. Section 94 of the Act gives protection to third party in respect of death or bodily injury or damage to the property while using the vehicle in public place and, therefore, the insurance of vehicle had been made compulsory under Section 94 read with Section 95 of the Act.

4. A perusal of Sections 94 and 95 would further show that the said provisions do not make compulsory insurance to the vehicle or to the owners. Thus, it is manifest that compulsory insurance is for the benefit of third parties. The scheme of the Act shows that an insurance policy can cover three kinds of risks, *i.e.*, owner of the vehicle; property (vehicle) and third party. The liability of the owner to have compulsory insurance is only in regard to the third party and not to the property. Section 95 (5) of the Act runs as follows:

"Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract ; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Sections 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we held that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not cease so far as the third party/ victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. Similarly, our High Court in ***Hindustan General Ins. Society Ltd. – vrs.-Kausalya Rani Das and another*** (supra) has held:

> "11. xx xx xx xx xx Chapter 8 of the Act, as its heading indicates, makes provision for insurance of motor vehicles against third party risks. In other words, the object of the provisions contained in this Chapter is to ensure that third parties who suffer on account of user of motor vehicles would be able to get damages for the injuries
>
> sustained by them and their ability to get damages will not be dependent on the financial condition of the owner or driver of the vehicle. Under section 94 of the Act, a person is prohibited from using, causing or allowing any other person to use a motor vehicle in a public place except as a passenger unless there exists a policy of insurance respecting user of that vehicle and the same complies with the requirements of Chapter 8. The policy, therefore, must provide insurance against any liability to third party incurred by the person when using that vehicle. Under section 95, the requirements to be complied with are ; firstly, the policy must specify the person or classes of persons who are insured with respect to their liability to third parties; secondly, the policy must specify the extent of liability which must extend to the extent specified in sub-section (2) thereunder and thirdly, the liability which be incurred by the specified person or classes of persons in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle insured. Sub-section (4) thereof provides for issue of a certificate of insurance to the person who effects the policy and sub-section (5) is as follows:
>
> > "95 (5) "Notwithstanding anything elsewhere contained in any law, a person issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

Thus, if the policy covers the insured for his liability to third parties, the insurer is bound to indemnify the person or classes of persons specified in the policy. The same is the effect of sub-section (1) of section 96 which provides that the insurer is bound to pay to the person entitled to the benefit of a decree he obtains in respect of any liability covered by the terms of the policy against any person insured by the policy irrespective of the fact whether the insurer was entitled to avoid or cancel or might have avoided

or cancelled the policy. Thus, the liability of the insurer to third parties who suffer injury or damage due to the use of the motor vehicle is statutory and not contractual."

20. In ***Oriental Insurance Co. Ltd. –vrs.- Inderjit Kaur and others*** (supra) while dealing with provisions under Section 147 (5) and 149 (1) of the M.V. Act, the Hon'ble Apex Court held:

> "6. Chapter 11 of the Motor Vehicles Act, 1988, provides for the insurance of motor vehicles against third parry risks. Section 146 thereunder states that no person shall use or cause or allow any other person to use a motor vehicle in a public place unless there is in force in relation to the use of the vehicle a policy of insurance that complies with the requirements of the Chapter. Section 147 sets out the requirements of policies and the limits of liability. A policy of insurance, by reason of this provision, must be a policy which is issued by a person who is an authorized insurer. Sub-section 5 reads thus :
>
> > "(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."
>
> Section 149 refers to the duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks. Sub-section (1) thereof reads :
>
> > "(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under Clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in

> respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

7. We have, therefore, this position. Despite the bar created by Section 64-VB of the Insurance Act, the appellant, an authorized insurer, issued a policy of insurance to cover the bus without receiving the premium therefore. By reason of the provisions of Sections 147 (5) and 149 (1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereof had not been honoured.

8. The policy of insurance that the appellant issued was a representation upon which the authorities and third parties were entitled to act. The appellant was not absolved of its obligations to third parties under the policy because it did not receive the premium. It remedies in this behalf lay against the insured.

9. We may note in this connection the following passage in the case of *Montreal Street Railway Company v. Normandin*, AIR 1917 Privy Council 142 :

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done.""

21. Such being the legal dispensation under the M.V. Act, there is absolutely no scope for the Insurance Company to avoid the statutory liability towards third-party claimants. I am in respectful disagreement with any other interpretation of the statutory provisions and their implications which learned counsel for the Insurance Company seeks to assign by placing reliance on the decisions in ***New India Assurance Co. Ltd. –vrs.- Kaliathal***

and others (supra) ***and*** in ***United India Insurance Co. Ltd. –vrs.- Mohanlal Nandiram and others*** (supra).

22. In view of the above, the impugned award directing the owner to pay the compensation amount is not sustainable in law. Therefore, the impugned award is set aside and it is held that the Insurance Company is liable to pay the compensation amount with interest and cost as awarded to the claimants.

23. Accordingly, the appeal is allowed. The Insurance Company is directed to deposit with the Tribunal the award amount with interest and cost within two months. On such deposit the learned Tribunal shall deposit and disburse the amount among the claimants in the same proportion as directed in the impugned award.

Parties shall bear their own cost.

Appeal allowed.

2010 (I) ILR-CUT- 410

B.K.NAYAK, J.

NIRANJAN SAHOO -V- STATE OF ORISSA.*

JANUARY 19,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.438.

Anticipatory bail – Earlier application rejected by a Bench of Co-ordinate jurisdiction – Petitioner moved second application – Maintainability of the application when principle of resjudicata is not applicable to bail applications.

This Court consciously rejected the earlier application and granted liberty to the petitioner to surrender before the Court below and move for regular bail and without complying with the direction of this Court, petitioner filed the present application – No substantial change of circumstances or events – Held, Second application for anticipatory bail is not maintainable and accordingly it stands rejected.

(Para 5 & 6)

Case laws Referred to:-

1.(2007) 37 OCR 688 : (Bimal Lochan Das.-V- State of Orissa).

2.AIR 1960 SC936 : (Mahadolal Kanodia -V- Administrator General).

The Petitioner –S.Das

The Opp.Parties –State

*BLAPL NO. 17303 OF 2009. In the matter of G.R.Case No.393 of 2009 arising out of Nayagarh Sadar P.S.Case No.32 of 2009 now pending in the Court of the learned S.D.J.M.,Nayagarh.

This is the second journey of the petitioner to this Court seeking anticipatory bail under Section 438, Cr.P.C. in connection with Nayagarh Sadar P.S. Case No.32 of 2009 corresponding to G.R. Case No.393 of 2009 pending on the file of learned S.D.J.M., Nayagarh for alleged commission of offences under Sections 341/294/323/324/325/307/379/34 of the Indian Penal Code.

2. Earlier the petitioner and another co-accused, namely, Sanjaya Sahoo filed application in this Court for anticipatory bail in BLAPL No.12849 of 2009 in connection with the very same Nayagarh Sadar P.S.Case No.32 of 2009. In the said bail application, the present petitioner figured as petitioner no.1. Upon hearing, a co-ordinate Bench of this Court passed order in that bail application on 28.08.2009 granting anticipatory bail to co-accused-Sanjaya Sahoo, but rejected the prayer for anticipatory bail of the present petitioner. The relevant portion of the said order in so far as it relates to the present petitioner is quoted hereunder:

> "So far as petitioner no.1-Niranjan Sahoo is concerned, considering the gravity of the offence alleged to have been committed by him, I am not inclined to grant him anticipatory bail and reject the prayer.

However, I grant liberty to petitioner no.1 to surrender before the court below and move for regular bail, in which event the said court will dispose of the bail application of the petitioner on the same day it is filed. If thereafter the petitioner files bail petition before the Sessions court, on being called for the records shall be transmitted to that court at the cost of the petitioner and the latter will do well to dispose of the bail petition expeditiously"

3. In view of the rejection of the earlier anticipatory bail application of this petitioner, as above, the learned Additional Government Advocate raised objection about the maintainability of this second anticipatory bail application. Learned counsel for the petitioner, on the other hand, contended, relying upon the decision of this Court in the case of **Bimal Lochan Das v. State of Orissa; (2007) 37 OCR 688** that the principle of res judicata is not applicable to bail application and, therefore, there is no bar for filing successive anticipatory bail applications.

4. In the case of **Bimal Lochan Das** (supra), this Court allowed the second anticipatory bail application holding that in the earlier bail application, the anticipatory bail had been granted only for two months and that in the meantime, there was a change of circumstance and, therefore, the second application was maintainable. Repelling the contention of the State Counsel in that case this Court observed as follows :

"….. The decision in the case of State of T.N. (supra) on which, Mr. D.K. Mohapatra, places reliance, was a case concerning repeated filing of bail applications under Section 439 Cr.P.C. without any change of circumstances. This Court is of the considered view that the ratio of the said decision cannot be made applicable to a second petition filed under Section 438 Cr.P.C. As a matter of fact, in the said decision, even in the case of application under Section 439 Cr.P.C., the Supreme Court observed that the principle of res judicata are not applicable to bail applications but repeated filing of bail applications without any change of circumstance could lead to a bad precedent.

Form the fact of the present case, it is revealed that the petitioner approached this Court previously in an application under Section 438, Cr.P.C. and, as stated earlier, this Court favoured the petitioner with an order under the said Section, but for a period of two months from the date of passing of the said order. There is a change circumstance as found from the records that now the Vigilance has sought for sanction for lodging the prosecution. It can, therefore, be safely held that the Investigating Agency having sought for sanction to lodge the prosecution, the same definitely creates sufficient apprehension in the mind of the petitioner, of his arrest.

> More so, when the period for which the order of anticipatory bail was previously granted has passed long since. This Court is therefore of the view that the present petition is maintainable."

5. In the present case, there is neither any change of circumstance nor is it of the nature where the petitioner had been granted anticipatory bail for a brief period and there was a subsequent change of circumstance. On the other hand, it is a case where upon consideration of the materials on record and hearing the submissions of the counsel for parties, this Court consciously rejected the prayer for anticipatory bail of the petitioner and granted liberty to the petitioner to surrender before the court below and to move for regular bail with a direction to the court below to dispose of the same on the same day, and in the event the occasion arose to move the sessions court against rejection by the lower court, the said application was to be disposed of expeditiously. Instead of complying with the subsequent direction of this Court, the petitioner has filed this fresh anticipatory bail application, averments where of are verbatim re-production of the averments made in the earlier bail application. There is nothing on record nor any argument has been advanced on behalf of the petitioner to show that there has been any substantial change of circumstances after rejection of the earlier anticipatory bail application, which would necessitate reconsideration of the prayer afresh.

6. If appreciated in the perspective of the claim, I am of the view that the Court should be too slow to thrive the second application of a party for anticipatory bail where the earlier one has been rejected on merits and there is no substantial change of circumstance or events. Further, repetition of prayer for anticipatory bail after rejection by a Bench of coordinate jurisdiction after invoking the power of review of the decision of the earlier Bench may lead to a judicial anarchy about which caution has been sounded by the apex Court in the case of **Mahadolal Kanodia v. Administrator General; AIR 1960 S.C. 936 :**

> "Judicial decorum no less than legal propriety forms the basis of judicial procedure" and "if one thing is more necessary in law than any other thing it is the quality or certainty" and that " that quality would totally disappear if judges of coordinate jurisdiction in the High Court start overruling one another's decisions". It was observed further that the result would be utter confusion if a "Judge sitting singly in the High Court is of opinion that the previous decisions of another single judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger bench" as "in such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an

embarrassing position of having to choose between dissentient judgment of their own High Court.".

For the foregoing reasons, it is held that this second application for anticipatory bail is not maintainable and accordingly it stands rejected.

Application rejected.

2010 (I) ILR-CUT- 414

S.K.MISHRA,J.

KELU CHARAN BEHERA -V- STATE OF ORISSA.*

FEBRUARY 2,2010.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – SEC.354.

Out raging the modesty of woman – Test to determine – Action of the offender is important where from it could be perceived as to how it is capable of shocking the sence of decency of a woman.

In the present case the informant does not complain that the petitioner aimed the blow to her breast – Rather she has very categorically stated that the petitioner pressed the lathi (Katha) on her neck and stood on it – Then the petitioner's wife dragged him – It appears that the injury to her breast caused accidentally – There is no suggestive overtuous regarding sex – Held, offence U/s.354 is not made out and the conviction of the petitioner U/s.354 IPC. is not sustainable. (Para 6,7)

Case laws Referred to:-

1.1995 SCC.(Crl.) 1059 :(Rupan Deol Bajaj (Mrs.) & Anr.-V-Kanwar Pal SinghGill& Anr.).

2.AIR 1967 SC 63 : (State of Punjab -V-Major Singh).

For Petitioner – M/s.B.Panda, S.R.Mohapatra & A.Das.

For Opp.Parties – Addl.Standing Counsel.

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*CRIMINAL REVISION NO.248 OF 1996. From the judgment 07.06.1996 passed by the Addl.Sessions Judge-cum-Special Judge, Bhubaneswar in Criminal Appeal No.52 of 1993 dismissing the appeal and confirming the judgment dated 23.08.1993 passed by learned Judicial Magistrate First Class, Bhubaneswar in G.R.Case No.2514 of 1998 (Trial No,84 of 1990).

S.K.MISHRA,J. The petitioner assails the confirming judgment passed by the learned Additional Sessions Judge-cum-Special Judge, Bhubaneswar in Criminal Appeal No.52 of 1993, where in he confirmed the conviction recorded by the learned J.M.F.C., Bhubaneswar in G.R.Case No.2514 of 1998 convicting the present petitioner for the offence under Sections 354 and 323 of the Indian Penal Code, 1860 (hereinafter referred to as the "I.P.C." for brevity).

2. The case of the prosecution was that on 01.10.1988 at about 9.00 A.M., the present petitioner Kelu Charan Behera along with other co-accused persons, who have since been acquitted by the learned J.M.F.C., assaulted the informant with the intention to outrage her modesty and due to such assault, she sustained injuries on her nipple, neck and other parts of her body. That night she went to the house of Sapani Mallik, the Grama Rakhi and narrated about the incident. She took shelter in his house for that night. On the next day, she lodged a report before the Inspector in charge of

Bhubaneswar Police Station on the basis of which Bhubaneswar P.S.Case No.23 of 1988 was registered and the S.I. of Police took up investigation of the case and submitted charge-sheet against the present petitioner and three others.

In course of trial, prosecution examined six witnesses and defence examined none. Learned trial court having considered the evidence adduced on behalf of the prosecution came to the conclusion that the prosecution has been able to prove its case for commission of offence under Section 323 and 354 of the I.P.C. against the present petitioner Kelu Charan Behera and accordingly, he convicted him for both the offences and sentenced him to undergo rigorous imprisonment for six months on each count and to pay fine of Rs.500/- on each count, in default, to undergo rigorous imprisonment for one month on each count.

3. The present petitioner challenged his conviction before the Additional Sessions Judge-cum-Special Judge, Bhubaneswar. The Addl.Sessions Judge as per his judgment dated 07.06.1996 in Criminal Appeal No.52 of 1993 upheld the findings recorded by the learned trial court and dismissed the appeal with a modification of sentence. Learned Addl.,Sessions Judge reduced the substantive imprisonment for the offence under section 354 I.P.C. to undergo rigorous imprisonment for three months but did not disturb the imposition of fine of Rs.500/-, in default to undergo simple imprisonment for one month more. So far as the offence under section 323, I.P.C. is concerned, learned Addl.Sessions Judge modified the sentence and directed the petitioner to pay a fine of Rs.500/- only thereby setting aside the sentence of imprisonment for the offence under section 323, I.P.C. Such confirming judgment with modification of sentence is challenged in this Revision.

4. In course of hearing, learned counsel for the petitioner assailed the finding of the appellate court by raising the following points:-

(j) The prosecution case can not be believed as there are material infirmities in it and there are contradictions in the evidence of P.W.4;

(ii) The prosecution has failed to prove that the petitioner assaulted the informant with intention to outrage her modesty or with the knowledge that her modesty would be outraged; and

(iii) That the sentence imposed is excessive.

5. The learned trial court accepted the version of P.W.4 i.e. the injured as her evidence was corroborated by the testimony of P.W.1 and medical evidence on record. Such finding of fact has been accepted by the learned appellate court. So there is no cogent reason to disturb the findings of fact recorded by the courts below, wherein they have come to the concurrent findings that on 01.10.1988 at about 9 P.M., the petitioner assaulted the

informant. But the contention of the learned counsel for the petitioner is that even if such finding of fact is accepted an offence under section 354 is not made out, in as much as, the prosecution has failed to prove that the accused petitioner had the intention of outraging the modesty of the injured. In this connection, it is apposite to refer to the evidence of P.W.4, P.W.4 has stated in her examination-in-chief:-

> "xxx accused Bimbadhar is my husband. Accused Dhruba is the younger brother of my husband. Accused Laxmidhar is my father-in-law, accused Kelu Charan is the uncle of my husband (Malasura). About two years back in the night at about 9 P.M. in our house, the incident took place. There was quarrel between my husband and myself. Accused Kelu came and told other accused persons to assault me by means of "Katha" (i.e.Lathi). Accused Kelu put that Katha on my neck and stood on that Katha. I was on the ground. The wife of Kelu dragged away Kelu. I sustained bleeding injury on my left nipple due to action of the accused persons. I lodged the F.I.R. xxx"

6. Coming to examine the contention that the above accepted fact does not constitute an offence under section 354 of the I.P.C., it is apposite to refer to the said section, which reads as under :-

> "354. ***Assault or criminal force to woman with intent to outrage her modesty*** – *Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with find, or with both."*

The word, 'modesty' has not been defined in the Indian Penal Code. Hon'ble Apex Court in the case ***of Rupan Deol Bajaj (Mrs.) and another V. Kanwar Pal Singh Gill and another,*** 1995 S.C.C. (Crl.) 1059 has relied upon the dictionary meaning of the word 'modesty'. The Apex Court further relied upon the case ***of State of Punjab V. Major Singh***, AIR 1967 SC 63, wherein the apex Court has held that when any act done, in the presence of a woman, is clearly suggestive of sex according to the common notions of mankind, it must fall within the mischief of section 354, I.P.C. The Apex Court further held that it was needless to say, the "common notions of mankind" referred to by the learned Judge have to be gauged by contemporary societal standards. It was observed that the essence of a woman's modesty is her sex and from her very birth she possesses the modesty which is the attribute to her sex. Thus, relying on earlier case, the Apex Court in ***Rupan Deol Bajaj's*** (*supra*) case held that the ultimate test for ascertaining whether modesty has been outraged is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman. Applying the above test to the reported case,

the Apex Court held that it must be held that the alleged act of the respondent in slapping the complainant on her posterior amounted to "outraging of her modesty" for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady – "sexual overtones" or not, notwithstanding.

7. Applying the aforesaid principle of appreciation to this case, it is seen that the informant does not complain that the present petitioner aimed the blow to her breast. Rather, she has very categorically stated that the petitioner pressed the Lathi (Katha) on her neck and stood on it. Then the petitioner's wife dragged him. The injury was caused to her breast for the action of the accused persons. It thus, appears that the injury to her breast was caused accidentally. The injury, which was sustained by the injured on her breast has not been attributed particularly to the present petitioner in the sense that she has not stated that due to his assault she sustained the injury. Rather she has stated that due to the assault of the accused persons, she sustained the injury. In this case, this Court comes to the conclusion that applying to the standard laid down by the Apex Court in Rupan Deol Bajaj's case (supra), it can not be held to be an affront to the normal sense of feminine decency. It is further noted that in this case there is no suggestive overtuous regarding sex. Therefore, the offence under section 354 is not made out. The conviction of the petitioner section 354, I.P.C. is not sustainable. As far as offence under section 323 is concerned, learned trial court as well as the learned appellate court has come to a concurrent finding of fact which requires no interference. Since the petitioner is sentenced to pay fine of Rs.500/- for the offence under section 323, I.P.C., it is not necessary to disturb the same as the learned appellate court has already taken a sufficiently lenient view.

8. In the result, the revision is allowed in part. The conviction and sentence for the offence under section 354 of the I.P.C. are hereby set aside. However, the conviction and sentence for the offence under section 323 of the I.P.C. are left undisturbed.

Revision allowed in part.

2010 (I) ILR-CUT- 418

S.K.MISHRA,J.

NILAKANTHA PRADHAN -V- STATE OF ORISSA & ORS.*

FEBRUARY 5,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974) – SEC.401.

Informants revision against an order of acquittal -Evidence of the witnesses have not been properly discussed in the impugned judgment consisting of proper reasoning – Propriety has been entirely ignored – Approach of the trial Court has resulted in manifest illegality and gross miscarriage of justice – Held, order of acquittal recorded by the trial Court can not be sustained which requires interference of the revisional Court. (Para 10 & 11)

Case laws Referred to : -

1.AIR 1962 SC 1788 : (1963) 3 SCR 412 :(K.Chinnaswamy reddy -V-State of Andhdra Pradesh & Ors.).

2.(1951) SCR 676 : (Logendranath Jha & Ors.-V-Shri Polailal Biswas).

3.(2002) 23 OCR SC 476 : (Bindeswari Prasad Singh @ B.P.Singh & Ors. -V- State Of Bihar & Ors.).

For Petitioner – M/s. S.Nayak, A.K.Parida, T.K.Sahoo.

For Opp.Parties – Addl.Standing Counsel. (for Opp.Party No.1)
M/s.B.S.Tripathy, M.K.Rath, J.Pati. (for Opp.Parties 2 to 11).

CRL.REV.NO.107 OF 2006. From the judgment dated 24.10.2005 passed by the Ad hoc Addl.Sessions Judge, F.T.C. No.1, Puri in Sessions Trial No.96/261 of 2003/2002.

S.K. MISHRA, J. On consent of the learned counsels for both the parties, the criminal Revision is disposed of at the stage of admission.

2. In this Criminal Revision, the petitioner assails the Judgment of acquittal dated 24.10.2005 passed by the learned Adhoc Additional Sessions Judge, F.T.C. No. I, Puri in Sessions Trial No. 96/261 of 2003/2002 whereby he acquitted the accused-Opp. Parties of the offences under Sections 447, 294, 506, 324, 325, 307, 337/34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC" for brevity).

3. Short facts of the case are that on 4.12.1999 the informant Nilakantha Pradhan went to his land for cutting paddy along with his brother, it is alleged that during their absence, the accused persons being armed with deadly weapons came to the Bari side door of his house and started abusing his father Laxman. When Laxman opened the door, all of them attacked him. When he fell down on the ground, accused Rabindra, Dusa, Surendra and Suka assaulted him by dealing blows with swords. The other accused persons also assaulted him by means of Thengas causing severe

bleeding injuries on his person. Accused Hina and Phula started pelting stones. On being informed, Nilakantha came running to the spot but the accused persons threatened to kill him. Satrughna Panda, Sahadev Panda, Shyama Panda and Pabana Panda arrived there. Seeing them, the accused persons left the place. On the same day at about 11.45 A.M., the informant lodged a report regarding the occurrence in the Satyabadi Police Station. The Officer Incharge, Satyabadi Police Station took up the investigation. In course of investigation, the injured was examined by the doctor. After completion of investigation, the Investigating Officer submitted the charge-sheet.

4. The accused took the plea of complete denial of the prosecution case.

5. In order to establish the charges against the accused persons, prosecution examined seven witnesses, out of whom P.W.3 Nilakantha Pradhan is the informant and father of P.W.2 Sabita Pradhan. P.W. 5 Laxman Pradhan is the injured and was examined by P.W.6 Dr. Haribandhu Mishra on police requisition. P.W.1 Satrughna Pradhan and P.W.4 Shyama Pahanda were examined as independent eye witnesses to the occurrence. P.W. 7 D. K. Tripathy is the Investigating Officer of the case. None were examined on behalf of the defence.

6. The learned trial court, after discussing the evidence on record, held that the prosecution has failed to prove its case and hence acquitted the accused persons of the offences invoking Section 235(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “the Code” for brevity) due to want of sufficient evidence.

7. In course of hearing of the revision, the learned counsel for the petitioner pointed out several infirmities in the judgment and argued to set aside the order of acquittal. The learned counsel for Opp. Parties No.2 to 11, on the other hand, supported the findings recorded by the learned trial Court and further urged that the revisional court should not lightly interfere with the order of acquittal of the lower court. Way back in 1962, the apex Court in **K.Chinnaswamy Reddy V. State of Andhra Pradesh and another**, reported in *A.I.R. 1962 SC 1788 : (1963) 3 SCR 412* has laid down that it is open to a High Court in revision to set aside an order of acquittal even at the instance of the private parties, though the State may not have thought it fit to appeal. However the apex Court cautioned that the jurisdiction should be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-Section (4) of Section 439 of the Code of Criminal Procedure, 1908 forbids the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of

conviction. The apex Court has further ruled that only in exceptional cases such power should be exercised. But it is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. However, the apex Court has pointed out that where the trial Court has no jurisdiction to try the case but has still acquitted the accused or where the trial Court has wrongly shut-out evidence or where the appeal court has wrongly held evidence which was admitted by trial Court to be inadmissible, or where material evidence has been overlooked either by the trial Court or by the appeal Court, or where the acquittal is based on a compounding of the offence which are not compoundable, are instances in which revisional power can be exercised for setting aside of the order of acquittal. In **Logendranath Jha & others V Shri Polailal Biswas,** *(1951) SCR 676;* the Apex Court has cautioned against a discussion of the evidence and expressing opinion in the judgment in a Criminal Revision against acquittal on the ground that there can be little doubt that by doing so he shall load the dice against the appellants, and it might prove difficult for any subordinate judicial officer dealing with the case to put aside altogether the strong views expressed in the judgment as to the credibility of the prosecution witnesses and the circumstances of the case in general.

8. Applying the principle to the case in hand, it is the duty of the Court not to discuss the evidence but to see that if the order passed by the learned Adhoc Additional Sessions Judge requires interference of this Court. In this case, the statement of P.W.5 Laxman Pradhan, the injured himself, who has sustained six injuries out of which three are grievous in nature, has been brushed aside by the learned trial court rather perfunctorily. It is seen that the learned trial court has taken into consideration the non-mentioning of the name of P.W.4 Shyam Pahanda in the FIR and has held that the presence of the said witness at the spot is ruled out. At the same time, he has taken into consideration the evidence of P.W.4 Shyam Pahanda to discredit the evidence of the injured P.W.5 Laxman Pradhan. The evidence of the witnesses has not been discussed and appreciated in their proper perspective against the accepted canons of appreciation of evidence and the testimony of most of the witnesses have not been properly discussed in the judgment consisting of proper reasoning and lack of judicial approach. The propriety has been entirely ignored and as pointed out earlier at one stage, the lower court looking into the evidence held that the presence of P.W.4 has not been proved because the name was not mentioned in the FIR, such finding is against the settled principle of law that F.I.R is not an encyclopedia. The lower court also committed gross illegality by taking into his evidence to find out fault in the evidence of the injured.

9. The apex Court in **Bindeswari Prasad Singh @ B. P. Singh and others** Vrs. **State of Bihar and Others,** *(2002)23 OCR SC 476* has held

that an order of acquittal cannot be interfered by the High Court in revision but in exceptional cases, where the interest of public justice requires interference for the correction of a manifest illegality or the prevention of gross miscarriage of justice. The apex Court has further ruled that the High Court will not be justified in interfering with an order of acquittal merely because the trial court has taken a wrong view of the law or has erred in appreciation of evidence.

10. In this case, however, the machinations shown by the trial court in appreciation of evidence cannot be held to be a simple error in appreciation of evidence. In fact, the whole approach of the trial court has resulted in manifest illegality and gross miscarriage of justice.

11. Keeping in view the aforesaid considerations, this Court holds that the order of acquittal recorded by the trial court cannot be sustained and requires interference of the revisional court.

12. In the result, the Criminal Revision succeeds, the judgment of acquittal dated 24.10.2005 passed by the learned Adhoc Additional Sessions Judge, FTC No.1., Puri is hereby set aside and the case is remitted to the trial Court for re-hearing of the argument and to decide the case afresh.

The Opposite parties 2 to 11 are directed to appear before the learned Adhoc Addl. Sessions Judge, (F.T.C-I), Puri on 8.2.2010 without fail. On that date, the learned trial court shall release them of furnishing fresh bail bond on the same conditions they were released during trial. Send back the LCR immediately.

Revision allowed.

2010 (I) ILR-CUT- 422

S.K.MISHRA,J.

LINGARAJ REAL ESTATES & DEVELOPERS (P) LTD.-V- STATE OF ORISSA & ANR.*

JANUARY 6,2010.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.313.

Summons Case – Court may dispense with recording of accused statement where his attendance was dispensed with U/s. 205 Cr.P.C. – However the accused has to make an application supported by his/her own affidavit indicating his/her real difficulties vis-à-vis an undertaking that he/she will not raise the question of prejudice at any stage of the case including appeal and revision. (Para 6)

Case laws Referred to:-

1.AIR 1988 SC 2163 : (Chandu Lal Chandraker -V- Puran Mal & Anr.).
2.1989 C.L.J.2210 : (Pritish Nandy & Anr.-V- State of Orissa).
3.2000 Crl.L.J. 4604 : (Basavaraj R.Patil & Ors.-V- State of Karnataka & Ors.).

For Petitioner - M/s.R.N.Parija, A.K.Rout & S.Pattanaik.
For Opp.Parties – M/s.A.N.Das, S.Das, Y.S.P.Babu, M.Verma, Y.Mohanty, S.K.Mishra S.N.Das, B.B.Panda, S.K.Das.

*CRIMINAL REVISION NO.112 OF 2008. From order dated 14.01.2008 passed by Sri A.Rath, Judicial Magistrate First Class, Bhubaneswar in I.C.C.No.2504 of 2005.

S.K. MISHRA, J. Accused in I C.C. No. 2504 of 2005 assails the order passed by the learned J.M.F.C., Bhubaneswar on 14.01.2008. In that case, his petition for dispensing with recording of statement under Section 313 of the Criminal Procedure Code, 1973 (hereinafter referred to as "the Code") has been rejected. The opposite party has initiated a complaint case against the present petitioner for the alleged offence under section 138 of the Negotiable Instruments Act, 1881. The accused was summoned. He filed application under Section 205 of the Code, which was allowed. The petitioner's attendance was dispensed with and he was allowed to be represented through a counsel. Then, after closure of the prosecution evidence, the case was posted for accused statement. On 30.10.2007, learned counsel for the accused filed an application to dispense with the recording of accused statement under section 313 of the Code, by resorting to the proviso to sub-section (1). The learned J.M.F.C. rejected the petition on the ground that no document has been filed by the accused indicating that he is suffering from aggravated cardiac problem, for which he is receiving treatment outside the State. Considering the fact that the present case was lingering for more than four months for accused statement, the

learned lower court rejected the petition. Such order is challenged in the revision.

2. Learned counsel for the petitioner in course of hearing of the revision application drew notice of the Court to Annexure-3 i.e. copy of the petition filed by the accused to dispense with the recording of accused statement. It is evident from the said petition that at that time, the accused was suffering from viral fever and also he was a patient of cardiac ailment. On *28.10.2007* all on a sudden, because of the aggravated cardiac problem, the accused had to go outside of the State for treatment and for that reason, the accused was not in a position to appear before the trial court. Hence, it was prayed that the recording of the statement of the accused be dispensed with. The accused has also pleaded that no prejudice will be caused to him, if such petition is allowed. Learned counsel for the petitioner however is not in a position to indicate, whether the petitioner is still receiving treatment outside the State or whether he is residing at present at Bhubaneswar. Learned counsel for the opposite party however objected to the prayer made by the petitioner.

3. It is undisputed at this stage that the petition of the accused-petitioner was allowed under Section 205 of the Code, in which his attendance in court was dispensed with. The proviso to sub-section (1) of Section 313 of the Code lays down that in a summons case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b) of the said sub-section. The Supreme Court in ***Chandu Lal Chandraker v. Puran Mal and another,*** AIR 1988 S.C. 2163 had allowed the motion to dispense with the examination of the accused with the condition that he will not raise the question of prejudice, if any, caused to him on account of his non-examination at subsequent stage of trial, in appeal or revision.

4. This question also came up for consideration before this Court in ***Pritish Nandy and another v. State of Orissa,*** 1989 Criminal Law Journal 2210, wherein this Court has held that examination of the accused under section 313 of the Code can be dispensed with when personal attendance of the accused is dispensed with under Section 205 of the Code, but in such a case, examination of representing counsel in lieu of the accused is not permissible. This Court held that the substantive provision of Section 313 of the Code has a mandatory requirement that the examination of the accused must be a personal one and cannot be delegated to a counsel representing him. Section 313 of the Code consists of two parts; one, an enabling power for the court that it may question, as it thinks necessary, the accused without previously warning him at any stage of the trial and the other, a compulsory direction to the court to question the accused generally on the case after the prosecution evidence is closed and before the accused is called upon to

enter his defence. Proviso to sub-section (1) is an exception to the compulsory provision of clause (b) and applies only when the case is a summons case and the court has dispensed with the personal attendance of the accused. In a warrant case, the Court would have no power to dispense with the examination under Clause (b). It is further ruled by this Court in that case that it is not in all summons cases, where attendance of the accused has been dispensed with, his examination should also be dispensed with. In ultimate analysis, the statement made by the accused under Section 313 of the Code is grounded upon the principles of natural justice by furnishing the views of the accused to the court for its consideration by affording opportunity to him to explain the circumstances appearing against him. It is well settled that an inadequate examination or omission under Section 313 of the Code would not ipso facto render the trial void unless prejudice is shown to have been caused to the accused. The discretion to dispense with the examination of the accused under section 313 of the Code squarely lies on the Court and it is for the court to decide whether in given facts, such discretion should be exercised or not.

5. The Supreme Court in ***Basavaraj R.Patil and others v. State of Karnataka and others***, 2000 Crl. Law Journal 4604, has also held that the Court can exempt examination of the accused under Section 313 of the Code, if the conditions specified in the proviso are fulfilled. However, the Hon'ble apex Court has further indicated that the accused should make an application to that effect supported by an affidavit narrating the facts to satisfy the Court of his real difficulties to be physically present in Court for giving such answers, he shall not be prejudiced by such dispensation of his examination and with an undertaking that he would not raise a grievance on that score at any stage of the case.

6. Keeping in view the aforesaid proviso, this Court holds that the Magistrate has jurisdiction to dispense with the examination of the accused under section 313 of the Code, if the following conditions are satisfied:

(i) The case is a summons case;

(ii) The attendance of the accused has been dispensed with by the court under section 205 of the Code.

But such provision does not mean that in every summons case where personal attendance of the accused has been dispensed with, the Magistrate should dispense with examination of the accused under section 313 of the Code. The Magistrate should only dispense with the examination of the accused when it is shown that the accused is under any kind of disability or the accused cannot appear before the court without incurring considerable expenditure and by travelling from a far off place or that he is suffering from such ailment that it is not possible for him to appear in the

court or that the accused is a Paradanasini lady, who is not appearing in public places; then the Magistrate may exercise the jurisdiction in allowing the application for dispensing with the examination of the accused under Section 313, Cr.P.C. (instances cited are only illustrative and not exhaustive) provided that the accused makes an application supported by his own affidavit indicating, (i) narration of facts to satisfy the court of his real difficulties to be physically present in the court for giving answers to the questions put by the court , (ii) his assurance that no prejudice would be caused to him in any manner by dispensing with his personal presence for such examination and (iii) an undertaking that he would not raise any grievance on that score at any stage of the case including appeal and revision. It appears to this Court that the learned trial court has not examined the question in its proper perspective. Therefore, it is felt necessary that the question should be examined by the trial court.

7. In the result, it is directed that the accused-petitioner shall make a fresh prayer before the learned lower court and supported by an affidavit as indicated in the preceding paragraphs. On such event, the learned trial court shall dispose of the application on merit in the light of the observations made by this Court in this order. The parties are directed to appear before the learned Magistrate on 30th January, 2010. Petitioner shall file a fresh application within seven days thereof. The Magistrate shall do well to dispose of the case as expeditiously as possible.

The Criminal Revision is accordingly disposed of.