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

W.P. (C) NO.14886 OF 2009 (Decided on 01.10.2010)

M/S. KALINGA INSTITUTE OF INDUSTRIAL TECHNOLOGY …….. Petitioner.

.Vrs.

COMMISSIONER OF INCOME TAX, ORISSA,BBSR & ANR. …….. Opp.Parties.

INCOME TAX ACT, 1961 (ACT NO.43 OF 1961) – SEC.12-AA (3)

Registration of Institution – Commissioner Income Tax issued notice U/s.12 AA (3) for cancellation of registration – Income Tax Appellate Tribunal quashed the earlier order of cancellation holding that the power is required to be exercised cautiously and consciously – Held, power U/s.12 AA (3) I.T. Act may be exercisable by the Commissioner only on recording his satisfaction of the circumstances that may warrant the exercise of such power and to record in the notice the basis for initiation of such proceeding – Impugned notice Dt.24.09.2009 U/s. 12 AA (3) I.T. Act is quashed.

(Para 5,6)

For Petitioner - M/s. R.K.Rath (Sr.Advocate)
S.Ray & S.Dey.
For Opp.Parties 1 & 2 – Mr. A.K.Mohapatra
(ASC, Income Tax Deptt.)

V.GOPALA GOWDA, C.J. In this writ petition the petitioner has sought for quashing of purported notice issued under Section 12AA(3) of the Income Tax Act, 1960, annexed as Annexure-1 to the writ application, which is extracted herein below:

"GOVERNMENT OF INDIA
OFFICE OF THE COMMISSIONER OF INCOME TAX,
AAYAKAR BHAWAN, 2ND FLOOR,
RAJASWA VIHAR, BHUBANESWAR-751 007.

No.Tech./12A-81/95-96/2009-10/4015
Dated, Bhubaneswar the 24th September, 2009.

To

The Secretary,

Kalinga Institute of Industrial Technology (KIIT),
Patia, Bhubaneswar.

Madam/Sir,

Sub: Proceedings U/s.12AA(3) of the I.T.Act-Matter regarding.

In consequence to the order of the Ld. ITAT, Cuttack Bench, Cuttack your case is fixed for hearing before the Commissioner of Income Tax, Bhubaneswar U/s.12AA(3) of the I.T. Act on 22.10.2009 at 11.00 AM.

You are requested to appear on that date before the Commissioner for hearing.

Yours faithfully,
Sd/-
(M.R.Rath)
Income Tax Officer (Tech.)
Bhubaneswar."

2. Mr. R.K.Rath, learned senior counsel appearing for the petitioner submits that, the impugned notice is wholly without jurisdiction, inasmuch as, there is no direction in any order of the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack, authorizing the issue of the impugned notice. The only relevant judgment of the Income Tax Appellate Tribunal, in ITA No.86/CTK 2007 has been appended as Annexure-6, in which the Tribunal while allowing the petitioner's appeal held as follows:

> "13. In our considered opinion both the cancellation as well as continuance of registration will have an effect and a bearing on the assessment proceeding. It does not mean that the assessment proceeding being a quashi judicial proceeding should be interfered like the present one. Rather in all fairness the CIT should have taken precaution to complete the assessment expeditiously and then should have arrived at the conclusion of proposed cancellation of registration. The present act of the CIT amounts to interruption in the assessment proceeding. The power u/s.12AA(3) has been enunciated under the Act is an unbridled power in the hands of CIT to safeguard the interest of revenue as and when he is satisfied to do so. It does not mean that this unbridled power given by the act after much deliberation in the Parliament should be utilized without clear cut satisfaction. As per strict judicial discipline we consider that power of punishment is a unbridled power like the present power of cancellation envisaged u/s.12AA(3) But such unbridled power should

be utilized quite cautiously and consciously. With the aforesaid findings we are of the considered opinion that the order of the CIT is a premature one which has been utilized at a prematured stage in haste. Accordingly the assessee succeeds in its appeal regarding continuance of registration. Before parting with our order it will not be out of place to mention here that our order has nothing to do with the search and seizure assessment proceedings. The concluding finding in the search and seizure assessment proceeding may be utilized by the revenue or by the assessee in their respective favour accordingly. Again we reiterate that this order is given considering the present facts and circumstances of the case in cancellation of registration only and it has got no bearing to any other activity arising out of said proceedings."

(Emphasis supplied)

2.1. Learned counsel for the petitioner asserts that there is no direction given by the Income Tax Appellate Tribunal which can form the foundation for issue of notice dated 24th September, 2009, impugned under Annexure-1 to the present writ application. He further submits that the petitioner's application for grant of registration under Section 12(a) of the Income Tax Act, 1961 was allowed by the Commissioner of Income Tax, Orissa vide his order dated 7th/9th February, 1996, granting registration to the petitioner-institution w.e.f. 1.4.1995 and the same remains valid and subsisting as on date. From Annexure-5, it appears that an earlier attempt made by the Commissioner of Income Tax, Bhubaneswar vide its order dated 15.12.2006 passed under Section 12AA(3) of the Income Tax Act, 1961 which was challenged by the petitioner before the Income Tax Appellate Tribunal in ITA No.86 CTK 2007. The said appeal came to be allowed by the Full Bench of the Tribunal, vide order dated 5.10.2007 and the conclusion of which has been quoted hereinabove. Therefore, it is submitted that the Tribunal has not only quashed the earlier attempt at cancelling the registration of the petitioner-institute under Section 12(a) of the Income Tax, 1960, yet, the self-same order appears to be relied upon and/or referred to in the impugned notice under Annexure-1. It is further submitted that the Income Tax Department has also sought to challenge this order of the Tribunal before the High Court but is yet to press the said application, for which reason the same remains pending, as on date.

3. Mr. Mohapatra, learned Addl. Standing Counsel appearing for the Income Tax Department, on the other hand, sought to try and justify the impugned notice by stating that, the Commissioner of Income Tax was not denuded of his authority under Section 12 AA(3) of the I.T.Act even though

the Tribunal had quashed an earlier order dated 15.12.2006 passed by the Commissioner cancelling the petitioner-institute.

3.1. Learned counsel for the Department further submits that a search and seizure had been conducted against the petitioner-institute on 9.8.2005 and based on documents seized and information re-covered in course of such search and seizure without awaiting for the conclusion of the congenital assessment proceeding, the earlier order dated 15.12.2006 had been passed by the Commissioner of Income Tax under Section 12 AA(3) of the Income Tax Act, 1961 directing cancellation of the registration of the petitioner-institution. This order had came to be quashed by the Income Tax Appellate Tribunal vide judgment dated 5th October, 2007 in ITA No.86/CTK/2007 on the ground that such notice was premature. Accordingly, he submits that the power under Section 12 AA(3) of the I.T.Act continuous to be vested in the Commissioner of Income Tax and merely because an earlier order under Section 12 AA of the I.T.Act had been quashed by the Income Tax Appellate Tribunal, it did not mean that the Income Tax Commissioner was denuded of his authority, to initiate another proceeding under Section 12 AA(3) of the Income Tax Act.

4. In response to the contention made by the learned counsel for the Department, learned counsel for the petitioner-institute submits that, while there had been a search and seizure operation carried out against the petitioner-institute on 9.8.2005, an assessment proceeding followed the same and was completed and no adverse finding had been recorded against the petitioner-institution to form any fresh ground for issue of notice.

4.1. Learned counsel for the petitioner further asserts that in the impugned notice, there is no reference to any subsequent fact, event, information or order to form the foundation of the notice under Section 12 AA (3) of the Income Tax Act and impugned as Annexure-1 herein. The only basis referred in the impugned notice was, "**in consequence to the order of the learned ITAT, Cuttack Bench, Cuttack**". This reason was wholly without any foundation and, therefore, the impugned notice ought to be quashed.

4.2. Learned counsel for the petitioner also asserts that although the impugned notice claims to be a notice under Section 12 AA of the Income Tax Act, the same has been issued by the Income Tax Officer (Tech), Bhubaneswar and the counter affidavit in the present case has also been filed by the self-same Income Tax Officer (Tech.). In other words, neither the impugned notice nor the counter affidavit has in fact been issued by the Commissioner of Income Tax.

4.3. Learned counsel for the petitioner, therefore, prays for quashing of Annexure-1 since the same has not been issued by the Commissioner of

Income Tax as well as for rejection of the counter affidavit, since the power and authority under Section 12AA of the Act is only vested with the Commissioner of Income Tax Act and not with any Income Tax Officer (Tech.), who had issued such notice.

5. On a consideration of the submissions of the learned counsel for the parties as noted hereinabove and on perusal of the impugned notice under Annexure-1 as well as the order of the Income Tax Appellate Tribunal under Annexure-6, it is clear there from that the Tribunal has held that though power has been vested under Section 12 AA(3) of the Income Tax Act in the Commissioner of Income Tax to safeguard the interest of the revenue, but such power vested in him can only to be exercised by him on a clear-cut satisfaction of the circumstances for exercise of such power. Although, the Tribunal's order quashed an earlier order of Commissioner dated 15th December, 2006 under Section 12 AA(3) of the Act, the same order also clarified that such power "should be utilized quite cautiously and consciously". Therefore, we have no hesitation to direct quashing of the impugned notice dated 24th September, 2009 issued under Section 12 AA(3) of the Income Tax Act vide Annexure-1 to the writ petition and we order accordingly.

6. We make it clear that the power under Section 12 AA(3) of the Income Tax Act may be exercisable by the Commissioner only on recording his satisfaction of the circumstances that may warrant the exercise of such power and to record in the notice and the basis, if at all for the initiation of such proceeding.

7. Accordingly, the writ application is allowed in terms of the directions as noted hereinabove.

Writ petition allowed.

2011 (I) ILR -CUT- 295

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

W.P.(C) NO.12408 OF 2009 (Decided on 24.12.2010)

PITABASA MISHRA & ORS. .....Petitioner.

.Vrs.

ODISHA INDUSTRIAL INFRASTRUCTURE DEVELOPMENT CORPORATION LTD & ORS. ..... Opp. Party

CONSTITUTION OF INDIA, 1950 – ART.226.

No government property can be conferred upon an individual without issuing public notice and inviting application from eligible persons and without following the procedure for conducting public auction.

In this case public property owned by O.P.1, a statutory corporation – Regularization of public property by the Corporation in favour of O.P.2 on the ground of unauthorized occupation without issuing public notice is opposed to public interest and contrary to the law laid down by the Apex Court – Held, decision of the corporation to regularize unauthorized occupation of the land in favour of O.P.2 without framing regulation for the purpose is illegal and the same is liable to be quashed being contrary to Sec.32, 33 (a)& (b) of OHDCA Act.

Since it is alleged in the Counter filed by OP 2 that some of the petitioners have also got allotted the plots of IDCO in similar manner this Court issued direction to IDCO to examine the matter and if allotment is for inadequate consideration, the same may be examined and necessary action may be taken as provided under the provisions of the Act. (Para 7)

Case law Referred to:-

AIR 1979 SC 1628 : (Ramana Dayaram Shetty-V-International Air Port Authority of India).

For Petitioner - M/s. Damodar Pati, S.K.Mishra & S.N.Sharma.
For Opp.Partoes- M/s. Jagannath Patnaik, B.Mohanty, S.Pattnaik, R.P.Ray, a.Patnaik (for O.P.1)
Mr. A.P.Bose (for O.P.2)
M/s. A.C.Mohanty, G.N.Rout, S.Bhagat & A.Mohanty (for O.P.4)

V. GOPALA GOWDA, C.J. The petitioners in this case question the correctness of the letter No.HO/ID/A/2658/01-96 (Annexure-1) allotting industrial plot measuring 0.145 decimals (Revenue Plot No. 72(P), Khata No.11 of revenue village Raghunathpalli, Rourkela) in favour of the opposite party no.2 M/s.Sai Sansar Associates which is a proprietary concern and pray to quash the same urging various facts and legal contentions.

2. It is the case of the petitioners that opposite party no.1 hereinafter called as IDCO, which is a statutory Corporation has allotted the aforesaid plot for a paltry sum of Rs.7,89,350.00 though its market value would be about two crores. The petitioners who are the allottees of Shop-cum-residence located in the commercial estate, Rourkela carrying on with business in their allotted premises. It is their case that opposite party no.1 being a statutory corporation owns a commercial estate in Rourkela. There are 10 nos of A type shop-cum-residential buildings and 11 nos. of B type shop-cum-residence are available at the Commercial Estate. The main object of the opposite party no.1-Corporation is to form industrial estates by acquiring lands and forming industrial buildings and allot the same in favour of eligible applicants with a view to see that industries are developed in an orderly manner. The Corporation without issuing any public notice inviting applications from the eligible persons has allotted the land in question referred to supra in favour of opposite party no.2 for outright sale for establishment of Saree Polishing and Dyeing of Garments and Fabric Unit. It is stated that the Corporation under section 15 of the Act is empowered to allot plots, factory sheds or building or part of building including residential tenements to suitable persons in the industrial estate established and developed by the Corporation. The Corporation can dispose of its property as per the requirement laid down as per Section 33 of the Act. Without adhering to the statutory provision as provided in section 33, the Corporation has allotted the same for a paltry sum in favour of opposite party no.2.

3. It is their further case that there is statutory obligation on the part of the Corporation under section 34 of the Act to allot unutilized area of plots capable of sub-division to any person. But before that it shall issue notice to the plot holders in the industrial area calling upon them to furnish relevant information in the prescribed form. Sub-section (4) of Section 34 provides for giving reasonable opportunity of being heard to the plot holders and other persons interested in the plot regarding the allotment of unutilized plots. The land has been allotted in favour of opposite party no.2 on leasehold basis up to 2.1.2076. Allotment of the land situated in a prime locality for a paltry sum for such long period on lease conferring right of enjoyment without following the procedure as provided under the provisions of the Act and the law in this

regard is arbitrary and unreasonable. It is detrimental to the interest of the Corporation. Therefore, public interest will suffer.

4. It is their further case that the allotment of such industrial plot in favour of opposite party no.2 is not conducive to the nearby allottees and plot-holders who are also residing in the plots because the manufacturing activity that will be undertaken by opposite party no.2 will involve polishing and dyeing of garments and the activities will create pollution in the environment thereby the neighbouring allottees would suffer. For this reason also they have prayed for quashing of the allotment. It is further stated by them that the allotment has been made on the recommendation of opposite party no.3. Opposite party no.3 is obliged to consider the application of opposite party no.2 along with other applicants before recommending to the Corporation for allotment in favour of opposite party no.2.

The said petition is opposed by opposite party no. 1 by filing statement of counter. It is contended by the Corporation that the writ petition filed by the petitioners is not maintainable in law. The allotment of the said plot was made in favour of opposite party no.2 pursuant to the orders passed by this Court on 13.5.2008 in W.P.(C) No.6969 of 2008 filed by opposite party no.2 wherein this Court disposed of the said writ petition without examining the merits of the case with a direction to the Corporation to consider and dispose of the representation of opposite party no.2 as expeditiously as possible preferably within three months from the date of production of certified copy of the order. Pursuant to the said order, the representation of opposite party no.2 was placed before the 74th Board Meeting of the Corporation held on 20.9.2008. The Board has approved the proposal for regularization of the case of encroachment of 6300 sqfts of land by opposite party no.2 at the auction price for a similarly placed plot of Rs.54.44 lakhs per acre as against the prevailing concessional industrial rate of Rs.18.21 lakh per acre. In the Board resolution, the Board has stipulated that the case of regularization of land in favour of opposite party no.2 would not be cited as a precedent in future and further it had resolved that the Corporation should take all steps to remove existing encroachments. Thus it is stated at para 4 that the allegation that the allotment was made for a paltry amount of Rs.7,89,350.00 is not correct and not acceptable to the petitioners. With regard to the other legal contentions, it is submitted that provision of section 33 of the Act is not attracted to the plot in question as it speaks about the disposal of land by the Corporation relating to any land acquired by the State Government and transferred to IDCO with or without development. Section 34 of the Act which speaks about acquisition of unutilized surplus lands in the industrial area is not applicable to the plot in question. It is further stated that section 15 of the Act empowers the

Corporation to allot plots in favour of the eligible applicants. They sought to justify the allotment of the plot in question in favour of opposite party no.2 placing reliance upon the aforesaid Board meeting at the auction price of similarly placed plot of Rs.54.44 lakh per acre. The allotment made for a paltry amount of Rs.7, 89,350.00 is incorrect and is not acceptable to the Corporation.

5. Opposite party no.2 has also filed counter statement seeking to justify the allotment of plot in its favour traversing the various petition averments contending that the petitioner no.6 was also an encroacher over the plot and road and on the basis of his application the matter was regularized and the plot was allotted to him and on the basis of application of opposite party no.2 for allotment of the plot in question, the matter was regularized and the plot was allotted in his favour in the same line of the allotment as in the case of petitioner no.6 at lower price. Petitioner nos. 1 to 5 are the allottees of other block, i.e. Block 'A' and petitioner no.5 who is the proprietor of M/s.Kusum Chemical Works was also an encroacher and runs a chemical factory in the claimed residential area. In this regard, the information obtained under the RTI Act is produced as Annexure-F/2. The petitioners are all encroachers of public road and area. Petitioner no.2 was also an encroacher of Plot No.A/3. IDCO authorities have also issued notice to him as per Annexure-G/2 which was subsequently regularized in the year 2006 at a concessional rate by IDCO.Therefore; the petitioners have not come with clean hands as they are encroachers and had got the lands from the Corporation at concessional rate. Having got benefit of allotment of land at lower price they have filed this writ petition questioning the correctness of the allotment by way of regularization made in favour of opposite party no.2 which cannot be entertained by this Court as there is no public interest involved in this case but they are trying to pursue their private interest.

6. With reference to the above said rival legal contentions, the following points would arise for consideration: (a) in absence of regulations famed under section 59 of the OIIDC Act, whether the allotment of the plot in question in favour of opposite party no.2 by the Board of Directors of the Corporation without inviting applications or conducting public auction is legal and valid? (b) whether the cost of property of Rs.7,89,350.00 is the market price of the plot in question and (c) what order ?

7. The plot in question was acquired by the State Government in exercise of the powers conferred under section 31 of the Act following the procedure under the Land Acquisition Act, 1894 on behalf of IDCO to form industrial estates in the industrial area. The same has been transferred in favour of IDCO by the State Government as provided under section 32 of the Act. It is the property of IDCO. Section 33 (2)(a) confers power upon the

Corporation for disposal of its land for the purpose of establishment of industries in favour of eligible persons subject to such requirements as to its development and use on such terms the Corporations may think fit with due regard to the price at which any such land has been acquired from them. Section 59(1)(d) provides for the Corporation to make regulations with previous approval of the State Government consistent with the provisions of the Act and the rules regarding the terms under which the Corporation may dispose of its land, building and amenities. Undisputedly, there is no regulation framed for this purpose by the Corporation. As could be seen from Annexure-1 which is sought to be quashed by the petitioners, the allotment of plot in favour of opposite party no.2 was made in consideration of his letter dated 14.1.2008 and pursuant to the order passed by this Court in W.P.(C) No. 6969 of 2008 dated 13.5.2008 the Board of Directors in its meeting held on 20.9.2008 has provisionally allotted the plot in question in favour of opposite party no.2 on terms and conditions stipulated in the impugned allotment letter. The land is allotted on leasehold basis for a period up to 2.1.2076 for establishment of a Saree Polishing & Dyeing of Garments & Fabrics Unit. It is necessary to extract the order of this Court in W.P.(C) No.6969 of 2008 which reads as under:

> " Heard the learned counsel for the petitioner.
>
> By means of this writ petition, the petitioner has prayed for a direction to the opposite parties to regularize the land occupied by him since last 12 years in the Commercial Estate, Rourkela pursuant to the letter dated 17.7.2004 issued by IDCO for disposal of land in Saturated Industrial Estate/Industrial Area for industrial purpose and to direct opp.party no.2 to consider and dispose of the representation of the petitioner as contained in Annexure-11 which is pending before him.
>
> Considering the facts and circumstances and without going into the merits of the case one way or the other, we dispose of this writ petition with a direction to opposite party no.2 to consider and dispose of the representation of the petitioner as contained in Annexure-11 as expeditiously as possible preferably within a period of three months from the date of production o f a certified copy of this order along with the copy of the representation."

As could be seen from the aforesaid order, the writ petition of opposite party no.2 was disposed of with a direction to consider his representation. The consideration of the representation of opposite party no.2 was to be done only in accordance with the provisions of section 33 (2)(a) read with the regulations, if any framed under section 59. In the counter affidavit filed on behalf of opposite party no.1 at para 4 it is specifically stated that in the 74th meeting of the IDCO held on 20.9.2008, the Board approved the proposal to

regularize the case of encroachment of 6300 sqfts. of land by opposite party no.2 at Commercial Estate, Rourkela at the auction price for a similarly placed plot of Rs.54.44 lakhs per acre as against the prevailing concessional industrial rate of Rs.18.21 lakh per acre. The Board also stipulated that the case of regularization in favour of opposite party no.2 would not be cited as a precedent in future and further IDCO should take all steps to remove existing encroachments. The regularization of unauthorized occupation by encroacher, namely, opposite party no.2 is not permissible under the provisions of the Act for the reason that section 33(2)(a) provides that where the Corporation proposes to dispose of by sale any such land which is surplus to its requirement, it shall in first instance offer the land to the persons from whom it was acquired if they desire to purchase it subject to such requirements as to its development and use as the Corporation may think fit to impose. Clause (b) also states that persons who are residing or carrying on business or other activities on any such land shall, if they desire to obtain accommodation on land belonging to the Corporation and are willing to comply with any requirements of the Corporation as to its development and use have an opportunity to obtain thereon accommodation suitable to their reasonable requirements on terms settled with due regard to the price at which any such land has been acquired from them. Sub-section (3) of Section 33 states that nothing in the Act shall be construed as enabling the Corporation to dispose of land by way of gift or by creation of any easement, right or privilege or otherwise. IDCO being a statutory Corporation constituted under section 4 of the Act, whenever any land is required by the Corporation for any purpose in furtherance of the objects of the Act to form industrial estate to allot plots, factory sheds or buildings or part of buildings for any industry or class of industry but the Corporation is unable to acquire it by agreement, upon the application of the Corporation in that behalf, the State Government may order proceedings to be taken under the Land Acquisition Act, 1894 for acquiring the same on behalf of the Corporation as if such lands were needed for a public purpose within the meaning of that Act and after such acquisition by the State Government of the lands for the purpose of industrial area or industrial estate notified under sections 2(h) and 2 (i) of the Act, the same will be transferred and placed at the disposal of the Corporation upon such conditions as may be agreed upon between the Government and the Corporation. After such transfer, the land will be developed by or under the control and supervision of the Corporation and it shall be dealt with by the Corporation in accordance with the regulations made under this Act and the directions given by the State Government in that behalf as per sub-section (2) of Section 32. Section 33 (a) & (b) provides for disposal of land by the Corporation. Therefore, the property acquired by the Corporation is public property. If it is a public

property in the absence of regulations framed as provided under section 59 (d), the Corporation cannot regularize or grant lease in favour of an encroacher. That would affect public interest. If the industrial plot formed out of the acquired land is surplus after utilization by the Corporation to build factory and other buildings for any industry or class of industry, then the same has to be disposed of by conducting public auction is the law declared by the Supreme Court in the case of Ramana Dayaram Shetty v. International Air Port Authority of India, AIR 1979 SC 1628 wherein the apex Court after interpretation of Article 14 of the Constitution has held that no government largess can be conferred upon an individual without following the procedure required to be followed . The said principle is equally applicable to the case on hand for the reason that the property is a public property owned by opposite party no.1 which is a statutory Corporation. Therefore, regularization of the unauthorized occupation in favour of opposite party no.2 without following the procedure of conducting public auction at the auction price for a similarly placed plot of Rs.54.44 lakhs per acre as against the prevailing concessional industrial rate of Rs.18.21 lakh per acre as admitted by opposite party no.1 in its counter statement is opposed to public interest and contrary to the law laid down by the apex Court in Ramana Dayaram (supra). Therefore, we have to answer both the points against opposite party no.2. Allotment of plot by way of regularization pursuant to the orders of this Court referred to supra to consider the representation must be in accordance with law as laid down in Ramana Dayaram (supra). Therefore, the decision of the Board to regularize the unauthorized occupation of land in favour of opposite party no.2 is illegal as the same is contrary to Sections 32 and 33 (a) & (b) and the law laid down by the Supreme Court. Undisputedly, the plot which is allotted by way of regularization was done without conducting public auction is patently illegal. Though against the petitioners some allegations are made by the opposite party no.2 stating that they are encroachers similar to him in respect of the plots of the Corporation and further it is alleged that it is alleged that it is a private interest litigation and, therefore, they are not entitled for the relief, we have considered the above facts and exercised our extra ordinary and discretionary power to protect the public property owned by the Corporation in the public interest.

8. Therefore, the impugned letter Annexure-1 is liable to be quashed and accordingly the same is quashed. It is open for the IDCO to take necessary action to conduct public auction and allot the same in favour of the eligible person after initiating necessary proceedings. For the reasons stated supra, we allow the writ petition and issue rule.

9. In the counter filed by opposite party no.2 it is pointed out that some of the petitioners have also got allotted the plots of the IDCO in similar

manner as has been done in case of opposite party no.2 industrial plots formed by the Corporation. If that is so, direction is given to the IDCO to examine this aspect of the matter and if the allotment is for inadequate considerations, the same may be examined and necessary action may be taken as provided under the provisions of the Act. It is needless to make observation that to implement the provisions of the OIIDC Act to achieve the laudable object and intendment and also to protect the public interest, the Corporation is required to frame the Regulations for disposal of the industrial plots formed in the industrial area out of the acquired lands and Govt. land.

Writ petition allowed.

2011 (I) ILR -CUT- 303

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

SUO MOTU.W.P.(C) NO.8228 OF 2010 (Decided on 20.12.2010).

REGISTRAR (JUDL.)
ORISSA HIGH COURT,CUTTACK ……. Petitioner.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

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

Suo-motu PIL basing on a news item – Cataract operation – Loss of vision complained – Report shows one doctor has carried out 43 operations per day over a period of 7 days – Operation carried in a hasty manner – Lack of pre-operative assessment – Although free spectacles were provided the patients were allowed to chose their non-spectacles available on a table which clearly indicates that there was no real assessment done by the doctors as per the requisite specifications needed by each individual patient.

Held, direction issued for grant of compensation of Rs.25,000/- each in favour of 3 persons for their pain and suffering – Government hospitals to ensure proper pre-operative assessment of all the patients prior to recommending surgery – Attempt for achieving huge targets or records should be discouraged – Journalists/press reporters must ensure proper verification of facts prior to sending the same for publication.

(Para 4 & 5)

For Petitioner - Government Advocate.
For Opp.Party - Addl. Govt. Advocate.

I.MAHANTY,J. This Public Interest Litigation was registered, suo-motu on the basis of a news item published in "The Times of India" dated 1.5.2010 under the head line "Over 100 villagers lose vision after cataract operation" in an eye surgery camp held at Gunupur hospital organized by a private organization 'Trilochan Netralaya' from Sambalpur with the aid and assistance of the district administration.

2. A counter affidavit was filed by the Under Secretary to Government of Orissa, Health & Family Welfare Department indicating that, after receiving the complaints from some of the media personnel regarding loss of vision of some patients in Ukumba village of Ramanaguda block, Dr. M.

Suresh Kumar, Senior Ophthalmic Surgeon-cum-District Programme Manager of District Blindness Control Society, Rayagada was sent to the concerned village to examine the patients and to ascertain the facts. It is stated that Dr. M.Suresh Kumar in his report informed that 3 persons out of 13 persons of the village have not been able to see properly after operation, due to pre-existing eye disease like Glucoma, Diabetic Retinopathy and Macular star. Apart from the above, it is stated that an order was passed by the State Government on 29.04.2010, for a joint examination of all operated cases and accordingly, a total number of 164 cases were jointly examined by a team of surgeons till 6.05.2010. After proper examination, the surgeons reported that only 6 cases complained of poor vision after conduct of cataract surgery due to pre-existing eye diseases and rest of the cases were found as free from any complaints.

3. Pursuant to the aforesaid counter affidavit filed by the State Government, the Secretary, District Legal Services Authority, Koraput-Jeypore was directed to record statements of some of the patients whose names have been listed in Annexure–B to the counter affidavit of the State and to find out the correctness of the report published in the news paper. Accordingly, the Secretary, District Legal Services Authority submitted his report to this Court vide letters dated 25.06.2010 & 27.09.2010. On perusal of the said reports it appears that, the Secretary, District Legal Services Authority recorded statements of 26 persons. From among the 26 persons, it was found that, 20 persons have stated that they have benefited from cataract operation and their vision power in the operated eye had improved and they are able to see properly at present. From out of the reset 6 persons, 2 persons namely, Sahadeva Bebarta and Smt. Kadingi Manika did not complain of any loss of vision, rather they stated of improvement in their eye sight after the cataract operation. From the balance 4 persons, only 2 i.e. Nagali Amiamma aged about 70 years of village Ukkumba and Smt. S.Gunamma complained about low vision in their eyes after the operation but none of these patients stated that they had any pre-existing eye diseases except formation of cataract prior to operation.

3. Another patient, namely, Mrutyunjaya Panda, on whose allegation the news article was published in “The Times of India”, stated that his vision power in his left eye had become very low after the operation held on 1.2.2010 at S.D. Hospital, Gunupur. On 2.2.2010 though he visited the eye camp, the operating doctor was not available for consultation. Thereafter he consulted with the eye specialist at Gunupur, who informed that this blindness which had developed after the operation could not be cured during his life time. It is alleged that he also visited Ramanguda PHC after a

week where he consulted with Dr. Shiba Pr. Sahu, Managing Director of Trilochan Netralaya, where the operating doctor Dr. Susant Kumar Jagadal was present and when he described his problem of low vision to them, they simply did nothing except providing some medicines.

The Secretary, District Legal Services Authority also interviewed the Press Reporter, namely, Mr. Satyanarayan Pattnaik of Jeypore, on whose report the article had been published by "The Times of India". In the enquiry report it was stated that from the statement of Mr. Satyanarayan Pattnaik, Journalist of "The Times of India" it can be concluded that the said news item regarding the alleged loss of vision by the aforesaid patients as quoted and published in "The Times of India" on 1.5.2010, was purely based on verbal complaints of the patient before him and not upon any physical examination of the patient or any direct knowledge about the alleged matter.

The report further indicates that 'Trilochan Netralaya' had carried out an eye camp for cataract patients at Gunupur Hospital in collaboration with Gunupur Hospital Authority and Dr. Susanta Kumar Jagdal of Trilochan Netralaya, Sambalpur single handedly conducted all the operations on 301 patients in seven days i.e., from 27.01.2010 to 2.2.2010 at S.D.Hospital, Gunupur. On an average, Dr. Susanta Kumar Jagdal carried out operation of 43 patients per day. From the above, the Enquiry Officer has reported that, evidently the operation was carried out in a hasty manner having least regard to the vital sensitive organ of a human being like eyes. Apart from the above the report also discloses the apparent lack of pre-operative assessment. Although it was claimed by the Medical Authorities that, the patients had been selected for surgery on the basis of prior examination and evaluation, yet, the volume of patients on whom the operation was carried out, i.e. 301 patients over a span of seven days, at an average of 43 patients per day negatives the assertion made on behalf of the Medical Authorities that adequate pre-operative evaluation had been done, to exclude those patients from operation those patients who had pre-existing health condition for which no cataract surgery ought to have been carried out. The report of the Secretary, District Legal Services Authority also indicates that though adequate medicines as well as post operation care was afforded to the patients and free spectacles were given to the patients, yet the patients were allowed to choose their non spectacles available on a table, which clearly indicates that there was no real assessment done by the doctors of the requisite specifications needed by each individual patient.

5. In the light of the circumstances as recorded hereinabove and based on the enquiry conducted by the Secretary, District Legal Services Authority, Koraput-Jeypore, we dispose of the sou-motu writ petition with the following directions:-

(i) The Government of Orissa in Health and Family Welfare Department is directed to grant compensation a sum of Rs.25,000/-(Rupees twenty five thousand) each in favour of Smt. Nagali Amiamma, Smt. S.Gunnamma and Sri Mrutyunjaya Panda for their pain and suffering.

(ii) All the Government hospitals of the State should ensure proper pre-operative assessment of all patients prior to recommending surgery, especially when "Health Camps" are organized to ensure proper evaluation of patients.

(iii) Whenever a health camp is conducted, the doctors of such Government Hospital should ensure that adequate medical personnel are available to conduct such surgery, so that each individual patient is given adequate care. Attempt for achieving huge targets or records should be discouraged and the authorities must ensure that such number of surgeries take place, as is practically possible and permissible. In the present case we find that only one surgeon has carried out on an average 43 cataract operations per day over a period of seven days. Obviously, adequate care could not have been given to each patient as is required and each patient deserves.

(iv) The Journalists/Press Reporters must ensure proper verification of facts, prior to sending the same for publication to their respective news papers/magazines. In the present case, it is found that Mr. Satyanarayan Pattnaik, Press Reporter of the Times of India had sent his report merely based on oral statements made by a few patients, without in any manner attempting to cross check or verify such facts. Further, resorting to headlines, as used in the present case should be avoided and the same be duly toned down keeping in view the public duty it owes to its readers and not to create panic in circumstances which are not warranted.

6. With the aforesaid directions, the suo-motu writ petition is disposed of. Registrar (Judicial) is directed to send copy of this judgment to the Secretary, Government of Orissa Health & Family Welfare Department for circulation to all concerned as well as to the Editor, the Times of India for information and necessary action.

Writ petition disposed of.

2011 (I) ILR -CUT- 307

V.GOPALA GOWDA, CJ & S.C.PARIJA, J.

RVWPET NOS.249 & 254 OF 2009 (Decided on 11.01.2011).

GOVERNING BODY OF ISPAT COLLEGE, ROURKELA. …….. Petitioner.

.Vrs.

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

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

Review – Power of review lies only when there is a mistake or an error apparent on the face of the record and that fallibility is by the oversight of the Court but not for correcting an erroneous decision – If a counsel argued a case to his satisfaction and for any reason he had not raised the particular point, it can not be a ground for review.

In the present case the petitioner has not specified as to what is the glaring omission or error apparent on the face of the record which requires reconsideration by way of review – The only plea taken by the petitioner in the review petitions is that the order sought to be reviewed is un-executable and can not be implemented due to want of post in the Department of physics – This plea having not been taken either in the averments made in the original writ petition or at the time of hearing of the same, it can not be permitted to be raised now as a ground for review of the original order – Held, the review petitions are not maintainable hence dismissed.

Case laws Referred to:-

1.AIR 1997 SC 1005 : (Tamil Nadu Electricity Board –V-N.Raju Reddiar & anr).
2.AIR 2005 ALL 308 : (Mohan Lal Bagla-V-Board of Revenue, U.P. Lucknow & ors.)
3.AIR 1977 All 163 : (Bhagwati Singh-V-Deputy Director of Consolidation & Anr.)
4.AIR 1964 SC 1372 : (M/s.Thungabhadra Industries Ltd.-V-The Government of A.P. represented by the Deputy Commissioner of Commercial Taxes Anantapur).
5.AIR 1980 SC 674 : (Northern India Caterers(India) Ltd.-V-Lt.Governor of Delhi).
6.AIR 1995 SC 455 : (Smt.Meera Bhanja-V-Smt.Nirmala Kumari Choudary)
7.1997 (8) SCC 715 : (Parsion Devi-V-Sumiri Devi).

8.AIR 2006 SC 1634 : (Haridas Das -V-Smt. Usha Rani Barik & Ors.).

For Petitioner - M/s. H.S.Mishra, A.K.Mishra, A.S.Behera & T.K.Sahoo.
For Opp.Parties - Addl. Govt. Advocate.

S.C. PARIJA, J. The writ petitioner in W.P.(C) No.9601 of 2006 has filed these two review petitions seeking review of the common order dated 1.7.2009, passed in W.P.(C) Nos.9601 of 2006 and 11663 of 2008, with the following prayer :

> "The petitioner above named, therefore, prays that in the fact and circumstances of the case stated above, this Hon'ble Court may please to admit this application and after hearing the parties, the impugned order under Annexure-1 may kindly be suitably reviewed and the said order is un-executable and un-implementable due to want of post either permanent or temporary lecturer in the Department of Physics."

2. The factual background of the case in brief is that the present opposite party no.3, Sri Rameswar Prasad Mishra, filed a representation before the Director, Higher Education, Orissa, opposite party no.2, questioning his removal from service as a Lecturer in Physics in the petitioner's college. The Director, opposite party no.2, after hearing the parties and considering the documents on record, came to the conclusion that Sri Rameswar Prasad Mishra was in fact denied natural justice, inasmuch as, though he was in a better footing than others, his case was ignored. The Director disposed of the representation by order dated 16.6.2006, observing as follows:

> "Therefore without prejudice to the claim or claims of others, the Principal-cum-Secretary, Ispat College, Rourkela, opposite party no.4, is directed to reinstate Sri Rameswar Prasad Mishra, as Lecturer in Physics within one month from issuance of this order."

The said order of the Director dated 16.6.2006 was assailed by the petitioner in W.P.(C) No.9601 of 2006. Sri Rameswar Prasad Mishra, present opposite party no.3, filed W.P.(C) No.11663 of 2008, for implementation of the order passed by the Director.

After hearing learned counsel appearing for the parties and considering the materials available on record, this Court by common order

dated 1.7.2009, disposed of both the writ petitions with the findings that the impugned order of the Director does not suffer from any legal infirmity or irregularity and therefore needs no interference in exercise of the writ jurisdiction. Accordingly, the authorities were directed to implement the order passed by the Director, as expeditiously as possible. It is this common order dated 1.7.2009, passed in W.P.(C) No.9601 of 2006 and W.P.(C) No.11663 of 2008, which is now sought to be reviewed in these two review petitions.

3. In the review petitions, the petitioner has not taken any ground for seeking review, except that the order sought to be reviewed is un-executable and cannot be implemented due to want of post of lecturer in the Department of Physics in the petitioner's college. On a perusal of the averments made in the original writ petition filed by the present petitioner, i.e. W.P.(C) No.9601 of 2006, it is seen that no such ground regarding non-availability of post of lecturer in the Department of Physics has been taken. Moreover, no plea to that effect had been raised at the time of hearing of the said writ petition and therefore no finding in that regard has been recorded in the order. Sri H.S. Mishra, learned counsel appearing for the review petitioner was not the counsel appearing for the petitioner in W.P. (C) No.9601 of 2006 and therefore he is not in a position to say as to what was argued before the Court and whether any such plea regarding non-availability of post had been taken at the time of hearing of the original writ petition.

4. The propriety of filing review petitions and arguments on it by a new counsel, who was not the counsel appearing in the original proceedings, came up for consideration before the apex Court in the case of ***Tamil Nadu Electricity Board –Vrs.– N. Raju Reddiar and another***, AIR 1997 SC 1005, wherein the Hon'ble Court while deprecating such practice, observed as follows :

> "xx xx xx. When an appeal/special leave petition is dismissed, except in rare cases where error of law or fact is apparent on the record, no review can be filed; that too by the advocate on record who neither appeared nor was party in the main case. It is salutary to note that Court spends valuable time in deciding a case. Review petition is not, and should not be, an attempt for hearing the matter again on merits. Unfortunately, it has become, in recent time, a practice to file such review petitions as a routine; that too, with change of counsel, without obtaining consent of the advocate on record at earlier stage. This is not conducive to healthy practice of the Bar which has the responsibility to maintain the salutary practice of profession."

5. A similar question came up for consideration before the Allahabad High Court in the case of ***Mohan Lal Bagla –Vrs.– Board of Revenue, U.P., Lucknow and others***, AIR 2005 All 308, wherein the Hon'ble Court while referring to the observations of the apex Court in Tamil Nadu Electricity Board (supra), proceeded to hold as under:

> "xx xx xx. The review petition appears to have been filed by new counsel mainly on the ground that some letters written by Mohan Lal Bagla to the Deputy Collector, Sales Tax and to the Commissioner have not been taken note and bid sheet has not been considered by this Court in respect to which suffice it to say that it cannot be said by Sri Singh, who is new counsel for the purpose of arguing review petition that whether the aforesaid letters were referred in the argument and they were relied by the then counsel and whether any effort was made by learned advocate to lay emphasis on those documents as they have any relevance in the matter in issue and thus the question touching with the proceedings of the Court and discussion during course of argument by a new counsel who was neither arguing counsel nor assisting counsel at the initial stage, cannot be permitted. To argue some details as a question of fact in second inning of the matter cannot be permitted. xx xx xx"

6. Coming to the question as to whether a plea which has not been taken or raised at the time of hearing of the original writ petition can be allowed to be raised while seeking review of the order passed in the said writ petition, it is now fairly well settled that if a counsel has not raised a point or taken a plea in the original proceeding, review is not maintainable, for the simple reason that such a mistake would not be apparent on the face of the record. Moreover, the expression "discovery of new and important matter of evidence" contained in the provisions of Order XLVII Rule 1 CPC means, discovery of an evidence or any material, which could not be produced at the initial stage, in spite of due diligence. The said expression cannot be expanded to take within its ambit an argument which could have been advanced by the counsel, at the time of hearing of the original proceeding.

7. In ***Bhagwati Singh –Vrs.– Deputy Director of Consolidation & Anr.,*** AIR 1977 All. 163, the Allahabad High Court rejected the review application filed on a ground which had not been argued earlier because the counsel, at initial stage, had committed mistake in not relying on and arguing those points, observing as under :-

> "It is not possible to review a judgment only to give the petitioner a fresh inning. It is not for the litigant to judge of counsel's wisdom after the case has been decided. It is for the counsel to argue the case in the manner he thinks it should be argued. Once the case has been finally argued on merit and decided on merit, no application for review lies on the ground that the case should have been differently argued."

8. Coming to the question regarding maintainability of the review petition, it is now well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1 CPC. A perusal of the said provisions of 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.

9. The scope of review came up for consideration before the apex Court in the case of ***M/s. Thungabhadra Industries Ltd. –Vrs.– The Government of Andhra Pradesh, represented by the Deputy Commissioner of Commercial Taxes, Anantapur,*** AIR 1964 SC 1372, wherein the Supreme Court held as follows :

> "There is a 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. Where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it, a clear case or error apparent on the face of the record would be made out."

10. In ***Aribam Tuleshwar Sharma –Vrs.– Aribam Pishak Sharma,*** AIR 1979 SC 1047, the Supreme Court held as under :

> "It is true as observed by this Court in Shivdeo Singh v. State of Punjab (AIR 1963 SC 1908) 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. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

11. In the case of ***Northern India Caterers (India) Ltd. –Vrs.– Lt. Governor of Delhi,*** AIR 1980 SC 674, it has been held that a party is not entitled to seek a review of a judgment delivered by the 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 to do so. Whatever may be the nature of the proceeding, 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 a patent mistake or a grave error has crept in earlier by judicial fallibility.

12. The decision in Aribam's case (supra) has been followed by the Supreme Court in the case of ***Smt. Meera Bhanja –Vrs.– Smt. Nirmala Kumari Choudary,*** AIR 1995 SC 455, wherein the Hon'ble Court has reiterated that an error apparent on the face of the record for acquiring jurisdiction to review must be such an error which may strike one on a mere looking at the record and would not require any long drawn process of reasoning.

13. In a later decision in the case of ***Parsion Devi –Vrs.– Sumiri Devi,*** 1997 (8) SCC 715, the Supreme Court relying upon the decisions in the cases of Aribam's (supra) and Smt. Meera Bhanja (supra) observed as under :

> "Under Order XLVII, 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 XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

14. The ambit and scope of a review, as has been held in the aforementioned cases, has been considered, affirmed and reiterated in a subsequent decision of the apex Court in the case of ***Haridas Das –Vrs.– Smt. Usha Rani Barik & Others,*** AIR 2006 SC 1634, wherein the Hon'ble Court observed as under :

> "In order to appreciate the scope of a review, Section 114 of the CPC has to be read, but this section does not even adumbrate the ambit of interference expected of the Court since it merely states that it "may make such order thereon as it thinks fit." The parameters are prescribed in Order XLVII of the CPC and for the purposes of this lies, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason." The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection."

15. On an analysis of the aforesaid decisions, it is seen that the law is well settled that the power of review is available only when there is a mistake

or an error apparent on the face of the record and not for correcting an erroneous decision. Hence the plea that the decision is erroneous on merit due to wrong interpretation of law or because of illegal and erroneous finding, whether on fact or in law, cannot be a ground for review. The said power of review cannot be exercised for rehearing and correcting an erroneous decision. The only remedy available to the aggrieved party, is to assail such erroneous decision in appeal. The power to review is a restricted power which authorizes the Court, which passed the judgment sought to be reviewed, to look over through the judgment not in order to substitute a fresh or a second judgment but in order to correct it or improve it, because some material which it ought to have considered had escaped its consideration or failed to be placed before it for any other reason.

16. In view of the above discussion, the law of review can be summarized that it lies only on the grounds mentioned in Order XLVII, Rule 1 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other "sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in Order XLVII, Rule 1 CPC. Under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged inning for making submissions, nor review lies merely on the ground that it may be possible for the Court to take a view contrary to what had been taken earlier. Review lies only when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court. If a counsel has argued a case to his satisfaction and he had not raised the particular point for any reason whatsoever, it cannot be a ground of review for the reason that he was the master of his case and might not have considered it proper to press the same or could have thought that arguing that point would not serve any purpose. If a case has been decided after full consideration of arguments made by a counsel, he cannot be permitted, even under the garb of doing justice or substantial justice, to engage the Court again to decide the controversy already decided. If a party is aggrieved of a judgment or order, it must approach the higher Court by way of appeal or revision, as the case may be, but entertaining a review to reconsider the case would amount to exceeding its jurisdiction, conferred for the very limited purpose of review. Justice connotes different meaning to different persons in different contexts and therefore, Courts cannot be persuaded to entertain a review application to do justice unless it lies only on the grounds permitted in law, as has been discussed above.

17. In the present case, the petitioner has not specified as to what is the glaring omission or error apparent on the face of the record which requires reconsideration by way of review. The only plea taken by the petitioner in the review petitions is that the order sought to be reviewed is un-executable and cannot be implemented due to want of post in the Department of Physics. This plea having not been taken either in the averments made in the original writ petition or at the time of hearing of the same, it cannot be permitted to be raised now as a ground for review of the original order.

18. Applying the principles of law as discussed above to the facts of the present case, the conclusion is irresistible that both the review petitions as laid are not maintainable and the same are accordingly dismissed.

Review petitions dismissed.

2011 (I) ILR -CUT- 316

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

W.P.(C) NO.18496 OF 2009 (Decided on 20.12.2010)

UTKAL PHARMACEUTICALS MANUFACTURERS ASSOCIATION & ANR. **…….** Petitioners.

.Vrs.

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

Tender – Clause 2.1 of the Tender call notice fixing Rs.10 Crores or more as annual turnover of the Principal manufacturing Units/ the tendering firms for pharmaceutical products in each year for the last three financial years to participate in the tender is under challenge.

Larger public interest and Liberalization of trade – Supply of quality products and consistency in supply can not be ensured by enhancement of the minimum annual turnover to Rs.10 Crores – No answer to this by the O.P. 2 & 6 in their counter – Enhancement of such annual turnover despite the request of the Industries Department to O.P.2 to relax the minimum annual turnover from Rs. 10 Crores to Rs. 10 Lakhs for the S.S.I Unit/MSMES is unreasonable which satisfies the test of wednesbury's unreasonableness and the aforesaid pre condition is intended to snatch away the incentives given under the IPR, 2007 as well as the MSME Policy, 2009 – Held, the impugned eligibility condition as per Clause 2.1 is quashed – The State Government is directed to accept the recommendations made by the Industries Department to relax the minimum annual turn over to Rs.10 lakhs for the SSI Units and MSMEs.

(Para 13,14)

Case laws Referred to:-

1.(2003)5 SCC 437 : (Union of India & Anr.-V-International Trading Co & Anr.)
2.AIR 1999 SC 303 : (State of Bihar -V- M/s.Suprabhat Steel Ltd.)
3.(2007)8 SCC 1 : (Reliance Energy Ltd.&Anr.-V-Maharashtra State Road Development Corporation Ltd. & Ors.)

For Petitioner - Mr. Sanjit Mohanty, Sr.Advocate
M/s.S.P.Panda, S.Nanda, A.Mohapatra, A.Meher & A.Mohanty.

For Opp.Parties –Govt. Advocate & M/s. Yuvraj Parekh, B.B.Jaysingh, S.Mukherjee,

S.K.Behera & K.Ghadei.

B. P. DAS, J. This writ petition has been filed by Utkal Pharmaceuticals Manufacturers Association, petitioner no.1, which is an association of twenty small scale pharmaceutical industries and registered under the Societies Registration Act, 1860, and its Joint Secretary (Executive), petitioner no.2, assailing Clause 2.1 of the Tender Conditions in respect of Tender Call Notice No.SDMU/2009-2010-DMC-11-009 issued by O. P. No.2-the Director of Health Services, State Drug Management Unit, Orissa, vide letter no.11128 dated 29.10.2009 under Annexure-9, fixing Rs.10 crores or more as the annual turnover of the principal manufacturing units/the tendering firms for pharmaceutical products of each year of last three financial years, as being illegal, arbitrary, discriminatory and contrary to the Industrial Policy Resolution, 2007 (IPR, 2007) as well as the Orissa Micro, Small and Medium Enterprise Development Policy, 2009 (shortly called 'the MSME Policy 2009'), which has been declared under the notification dated 17.2.2009 published in the Orissa Gazette on 9.3.2009, vide Annexure-6. The petitioners have prayed to relax/reduce/modify the minimum annual turnover fixed in Clause 2.1 of the Tender Conditions to Rs.10 lakhs with a direction to the opposite parties to allow the local SSI units/MSME units to participate in the tender pursuant to the Tender Call Notice, Annexure-9.

2. O.P. no.2-the Director of Health Services, State Drug Management Unit, (DHS in short), by the aforesaid Tender Call Notice, Annexure-9, invited tenders in sealed cover from reputed manufacturing firms having valid manufacturing licence and GMP (Good Manufacturing Practice) as per a revised schedule, i.e. Schedule-M, for supply of drugs and medical consumables for a period of one year from the date of approval of tender on rate contract basis.

According to the petitioners, the State Govt. in order to ensure that store items for Government Departments and agencies under its control are procured from industries located within the State and further those local units get price preference for the aforesaid purpose and simultaneously to ensure that local products are cost-effective meeting overall quality requirement for competitiveness, efforts are to be made to distribute purchase orders equitably among the participating industries.

It is stated that to prevent monopoly, the rate contract system in Orissa was introduced at the behest of the erstwhile Health Department of the Govt. of Orissa. The rate contract system for drugs of Small Scale Pharmaceutical Industries has been in force since last twenty years. The

rate contract system is now within the domain of the Directorate of Export Promotion and Marketing (DEPM). Keeping in view the above objectives, certain items of drugs and medical consumables are earmarked by the State Govt. for purchase from approved local Small Scale Industrial Units (S.S.I. Units) and those products to be purchased only from the DEPM approved SSI Units taking their past performance and capacity of production into consideration.

For this, the local SSI units were to have (a) valid drug manufacturing licence and (b) valid Export Promotion and Marketing (EPM) rate contract.

The basic features of rate contract system for drugs and medicines formulated by the State Govt. are : (i) The prices of the drugs and medicines under the rate contract are to be finalized by the Drugs Committee of EPM in which the Health Secretary shall be the Chairman on cost plus basis and the rates so finalized by the DEPM Drugs Committee shall be subject to audit by the Comptroller and Auditor General (CAG); (ii) The rate contract system is a unique system which shall provide market support to MSMEs (Mirco, Small and Medium Enterprises) as per the provisions of the Industrial Policy Resolution (IPR) and (iii) The rate contract in respect of specific store items not in the exclusive list and manufactured by the local small scale industrial units is to be finalized by the DEPM. This was done on the basis of competitive offers received from local units, cost structure obtained from these offers, market price of similar items valid DGS & D rate, if any, and other relevant consideration.

The objective of adopting the aforesaid policy was that the Departments and Agencies under the control of the State Govt. may purchase rate contract items from the rate contract holder/small scale industries at the price fixed, without inviting tenders. DEPM vide Circular nos.2106(200) and 2113(200) dated 8.3.1999 issued fresh rate contracts in respect of drugs and medicines with SSI units in the State for supply of store items. Phase-I of the said rate contract included 31 items and Phase-II contained 44 items.

When the matter stood thus, the State Govt. in Industries Department vide circular No.XIV-HI-9/04-3042/I dated 17.2.2004 framed the Purchase Policy as envisaged under the IPR, 2001. Clause 3 of the said Purchase Policy provides :

> "3) Rate Contract :-
>
> i. Rate contract in respect of specific store items not in the exclusive list and manufactured by the local small scale industrial units will be

finalized by the Director of Export Promotion & Marketing. This will be done on the basis of competitive offers received from local units, cost structure obtained from these offers, market price of similar items valid DGS&D rate (if any) and other considerations relevant to fixing the price of the product. Besides, in respect of bulk items a representative of the purchasing Department would be actively associated at the time of rate contract finalization.

ii. State Government Departments and Agencies under the control of the State Government will purchase rate contract items from the rate contract holder/Small Scale industry at the price fixed, without inviting tenders."

According to the petitioners, periodic extensions were granted by the DEPM as to validity of rate contract with MSMEs. In 2003 the State Govt. with the financial assistance of the Central Govt. under the schemes like Small Industry Cluster Development Programme (SICDP) formulated a special package for self-employment with the prime objective to promote small scale industries through development of industrial clusters, ancillary and downstream industries, all eligible new SSI units and existing SSI units taking up expansion/modernization/diversification located in industrially backward areas which started commercial production between 1.4.2003 and 31.3.2007 to be eligible for sales tax reimbursement for a period of 5 years limited to 100% Fixed Capital Investment. The Director of Industries, O.P. no.3, taking into account the views of the Director, SISI and other concerned organizations by order dated 7.7.2005 identified various clusters for different kinds of product/process SSI units including pharmaceuticals. In a meeting held on 2.9.2006 under the chairmanship of the Commissioner-cum-Secretary, Industries Department, regarding Cluster Development, after discussing various action points, it was resolved under paragraph 2 that Utkal Pharmaceuticals Manufacturers' Association (UPMA) should register the SPV for implementation of the cluster development programme. The representative of UPMA was asked to furnish proposal under SICDP at the earliest. Under paragraph 3, it was further resolved that UPMA should prepare a report on quantum of generic drug purchase of the State Government and submit proposal to the Industries Department for improving the share of local industries in the government purchases. The proposal was to be submitted quickly under SICDP. While the matter stood thus, IPR 2007 came into force with effect from 2.3.2007, inter alia, laying down marketing support to Micro and Small Scale Enterprise in Government Procurement. The relevant clauses of the IPR 2007, i.e., Clauses 13.3, 13.6 and 30, on which the petitioners have placed reliance, are extracted hereunder :

"13. MARKETING SUPPORT TO MICRO AND SMALL SCALE ENTERPRISEIN GOVERNMENT PROCUREMENT

xxx xxx xxx

13.3 The State Government Departments and agencies will have to purchase their requirements of theseitems only from local industries with ISO/ ISI/EPM certification for the items, by involving competitive quotations from such industries. Efforts will be made to distribute the purchase order equitably among the participating industries, prepared to accept the lowest negotiated rate keeping in view their production capacity.

xxx xxx xxx

13.6 For facilitating government purchase of MSE products, an 'MSE Exclusive List' shall be prepared by Director of Industries, taking the items generally manufactured by the MSE units of the State. The items so listed shall be reserved for the MSE units of the State for Government procurement through limited tender system.

xxx xxx xxx

30. MISCELLANEOUS

(a) The policy shall remain in force until substituted by another policy. The State Government may at any time amend any provision of this policy.

(b) A special package of incentives over and above what has been enumerated in this Policy document may be considered for new industrial projects on case to case basis taking into account the benefits to the State. The Cabinet on the recommendations of the SLSWCA and the HLCA and concurrence of Finance Department may consider such proposal.

xxx xxx xxx"

The State Govt. in Industries Department accordingly issued notification dated 21.6.2007 under Clause 13.1 of the IPR 2007 constituting a Committee under the chairmanship of the Commissioner-cum-Secretary, Industries Department, to make a comprehensive review of the rate contract, purchase list, exclusive purchase list and open tender purchase list with a view to extend marketing support to SSI units in alignment with the newly enacted Micro, Small and Medium Enterprises Development Act, 2006 and the corresponding Rules framed thereunder and the same was

published in the extra-ordinary issue of the Orissa Gazette on 28.9.2007, Annexure-16 to the rejoinder filed by the petitioners.

The State Govt. in Industries Department by notification dated 17.2.2009 formulated the Orissa MSME Development Policy, 2009 in conjunction with IPR 2007 and in consonance with section 11 of the MSME Act, 2006 for promoting the MSMEs in the State and published the same in the extraordinary issue of the Orissa Gazette dated 9.3.2009, vide Annexure-6. Thereafter the DHS, State Drug Management Unit, by letter dated 22.6.2009 in Annexure-7 intimated all the MSME units, which were formerly known as SSI units, to continue to supply drugs at the previous contract rate having valid GMP and manufacturing licence since the Govt. by letter dated 18.6.2009 had allowed procurement of drugs covered under the EPM rate contract from the local MSME units having valid GMP and manufacturing licence. One such letter addressed to a local SSI unit is annexed as Annexure-7.

According to the petitioners, the local SSI units like petitioner no.1 having valid manufacturing licence, certificates of GMP and ISO certifications as required under the Drugs and Cosmetics Act, 1940 have been catering to the need of the State Govt. for last more than twenty years. The DHS, State Drug Management Unit, floated the tender as per Tender Call Notice dated 29.10.2009, vide Annexure-9, for supply of 259 items of drug and medical consumable for a period of one year on rate contract basis. Four rate contract items and 93 items of drug in respect of which the local SSI units/MSMEs have manufacturing licence, as per the lists, Annexure-11 and 13 respectively to the rejoinder, have been put to tender in the Tender Call Notice, Annexure-9.

The petitioners have challenged the legality and validity of the eligibility criteria in Clause 2.1 of the Tender Conditions stipulating that the minimum annual turnovers of pharmaceutical products of the principal manufacturing unit/the tendering firm of each year of last three financial years shall be Rs.10 crores for being eligible to participate in the tender as arbitrary and unreasonable because the said minimum annual turnover has been introduced with a view to help large manufacturers belonging to other States to participate in the tender while denying the opportunity to the SSI units and the MSMEs of the State to participate in the tender because they can never meet the annual turnover of Rs.10 crores as fixed in the eligibility clause. According to the petitioners, this is an attempt to keep the SSI units and the MSMEs of the State out of the tender process, which will ultimately lead to denying the SSI units and the MSMEs to participate in the tender.

That apart, the local SSI units/MSMEs have been meeting the Govt. requirements for more than twenty years without fail and, therefore, the allegation that small manufacturing units are not able to supply in time due to less manufacturing capacity and are not able to maintain the stringent quality control is incorrect.

In this regard the petitioners made a representation to the Minister of Health and Family Welfare Department of the Govt. of Orissa, vide Annexure-15 to the rejoinder, with a request to reduce the quantum of annual turnover pursuant to which a meeting was convened by the Industries Department on 17.6.2009 wherein decision was taken, vide Annexure-8, to reduce the turnover of the MSMEs from Rs.10 crores to Rs.10 lakhs and this decision was taken keeping in view the provisions of the MSME Act, 2006 and in consonance with the IPR 2007 and the Orissa MSME Policy, 2009. Paragraphs II and III of the minutes of the meeting relevant for the purpose are extracted hereunder :

> "II. The turnover condition of Rs.10.00 crore may continue for purchase of drugs through open tender but for local MSMEs the turnover condition may be relaxed to 10.00 lakhs.
>
> III. The inspection of units who have gone for GMP takes lot of time due to shortage of staff in Drugs Controller's Office. The units who have applied for inspection should not be denied orders pending inspection by office of Drugs Controller."

According to the petitioners, O.P. no.2-DHS and O.P. no.6-the Commissioner-cum-Secretary, Health and Family Welfare Department, being the functionaries of the State Govt. and bound by the decision taken as per Annexure-8, can neither resile from such decision nor can act contrary to the same. Opposite party nos.2 and 6 having acted contrary to the aforesaid decision in inviting the tender as per Annexure-9, the tender process was illegal, arbitrary, discriminatory and that contravenes the MSME Act, 2006 and violates the IPR 2007 and the MSME Policy, 2009.

3. Opposite party nos.2 and 6 have jointly filed a counter affidavit through the Joint Director of Health Services (State Drug Management Unit), Orissa, taking several stands, inter alia, that the eligibility criteria stipulating the annual turnover of Rs.10 crores or more is neither illegal nor arbitrary for those pharmaceutical units, which have already manufactured and supplied drugs for the last three years with their annual turnover of Rs.10 crores or more as they can maintain the standards laid down and have the financial

strength to supply huge quantity of essential medicines at the time of emergency and by this way the State can get better quality products with minimum chance of "Not of Standard Quality" (NSQ) drugs and thereby most of the non-serious players can be restricted. The opposite parties in this regard have annexed a chart showing position of part-supply and non-supply of drugs by local SSI units for more than 60 days from the date of purchase order during the year 2009-10, vide Annexure-F/2. In support of their stand, the said opposite parties have annexed copies of tender call notices issued by the Health Departments of various other States/Union Territories/important Governmental organizationsfor supply of drugs and medical consumables by pharmaceutical manufacturing units, vide Annexure-A/2, wherein turnover had been fixed at Rs.10 crores or more with a view to ensure timely as well as supply of better quality of drugs with less chance of NSQ drugs. The opposite parties have further contended that the Technical Committee/Sub-Committee consisting of DHS, DMET, D.C., Joint Director, SDMU, M.O., SDMU and SMO Central Drug Stores, and others in the meeting held on 7.4.2009 recommended, as per the minutes in Annexure-M/2 that fixing the turnover at Rs.10 crores or more would ensure that pharmaceutical units, which were financially sound with better technology, would participate in the tender and patients would get better quality of medicines at the right time and at the time of epidemic, natural calamities, flood and that many lives can be saved if essential medicines are supplied in time. Price preference and exemptions have been given to local SSI units/MSMEs as per the IPR 2007 and MSME 2009, vide Annexure-C/2.

Learned counsel for the State contended that the action taken by the authorities in fixing the annual turnover at Rs.10 crores and more as the eligibility criteria is not at all arbitrary and the same has been included in the tender conditions to ensure better quality products.

4. Question that arises for consideration is whether a conscientious decision taken in the meeting held on 17.6.2009 under the chairmanship of the Commissioner-cum-Secretary, Industries Department, vide Annexure-8, has binding effect on the State Govt. in any manner and whether Annexure-9, the Tender Call Notice, is in any manner contrary to the Public Policy declared by the State Govt. to ensure that the SSI units/MSMEs survived in the State.

5. At the outset, we may make it clear that there is no allegation in the counter affidavit against the SSI units/MSMEs of the petitioner association that it has ever supplied drugs and medicines not of standard or at any point of time caused any delay in supply of drugs. It is also a fact that by fixing the

minimum annual turnover at Rs.10 crores, the petitioner-association was kept outside the purview of the tender process.

6. We have also heard Mr.Yuvraj Parekh, learned counsel appearing for the intervenor-O.P. no.7, who submitted that O.P. no.7-firm is an intending bidder and has no objection if the minimum annual turnover of Rs.10 crores is reduced to Rs.10 lakhs so far as MSMEs are concerned. Apart from the items under the EPM rate contract, other items of drug included in the tender notice are to be taken as valid.

7. On the aforesaid background, and the points raised, we may refer to the minutes of the meeting held on 23.7.2010 under the chairmanship of the Chief Secretary, Orissa, with reference to the present writ petition and another writ petition being W.P. (C) No.18494 of 2009 filed by the present petitioners. The aforesaid minutes has been filed by the learned counsel for the State along with the memo. dated 29.7.2010. In the aforesaid minutes under the heading "Benefits being given to SSI Units of the State", it has been stated that in both the tenders the following preferences/exemptions have been extended to the local MSEs in the terms and conditions and subsequent pre-bid meetings as per IPR, 2007 and MSME, 2009 :

> (1) The local MSEs registered with respective DICs, Khadi, Village, Cottage & Handicraft Industries, SIC and NSIC shall be exempted from payment of earnest money and shall pay 25% of the prescribed security deposit while participating in tenders of Govt.
>
> (2) Local Micro & Small Enterprises and Khadi and Village Industrial Units including Coir, Handloom andHandicrafts, competing in the open tender shall be entitled to price preference of 10% vis-à-vis local, medium and large industries as well as outside industries. Local MSEs having ISO or ISI certification for their product shall get an additional price preference of 3% as per provisions of IPR, 2007.
>
> (3) While preparing comparative price statement for evaluation of tender papers, the VAT payable in Orissa shall be excluded and price comparison shall be made only on the basic price. However, any tax payable outside Orissa shall be added to the basic price for such price comparison."

8. In our considered opinion, the petitioners' contention is that the aforesaid benefits can only be extended to the local SSI units/MSMEs of Orissa if they come within the zone of consideration, i.e., only when they are entitled to participate in the tender process. If the local SSI units/MSMEs

cannot satisfy the turnover criteria, the question of their getting the benefits as indicated above will not arise. So, the aforesaid benefits will not be made available to the local SSI units/MSMEs and the declaration made by the State Govt. to that effect will be frustrated because of the stipulation in the eligibility clause that the minimum annual turnover of the bidder shall be Rs.10 crores in each of last three financial years. The tender so floated by the opposite parties as per Annexure-9 is definitely against the interest of the local SSI units and the MSMEs for development of which the MSME Act has been enacted by the Central Govt. with the following objects and reasons :

> "…… The world over, the emphasis has now been shifted from 'industries' to 'enterprises'. Added to this, a growing need is being felt to extend policy support for the small enterprises so that they are enabled to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity to remain competitive in a fast globalization area. ….."

9. A bare analysis of the statement of objects and reasons makes it clear that emphasis has been given to enterprises, a growing need being felt to extend policy support for the small enterprises to enable them to grow into medium ones, adopt better and higher levels of technology and achieve higher productivity in the fast global competition. With this aim and object, the MSME Policy so also IPR 2007 have been formulated. Now by an executive fiat and in an indirect manner, the benefits intended to be given by policies of the Govt. like the MSME Act, IPR 2007 and MSME Policy, as indicated above, are going to be snatched away from the petitioner-association.

10. The members of the petitioner-Association and the local SSI units and MSMEs have been kept out of the tender process despite the fact that a conscientious decision has been taken in a meeting held on 17.6.2009 under the chairmanship of the Commissioner-cum-Secretary, Industries Department, to reduce/relax the turnover condition from Rs.10 crores to Rs.10 lakhs for the local MSMEs and the resolution adopted in such meeting was forwarded to the Health Department, the Director of Export Promotion & Marketing, and others including the petitioner-Association, vide letter dated 23.6.2009, Annexure-8 and the tenders as per the tender call notice, Annexure-9, was floated on 29.10.2009. No decision has also been taken on the recommendation of the Industries Department.

11. As to the allegation that small manufacturing units are not able to maintain the stringent quality control, the plea taken by O.P. nos.2 and 6 that by enhancing the minimum annual turnover to Rs.10 crores, there will be no chance of supply of drugs of "Not of Standard Quality" (NSQ) is not acceptable as there is no allegation against the units of the petitioner-Association regarding supply of drugs of NSQ.

12. Law is fairly well settled that while the discretion to change a policy in exercise of the executive power, when not trammelled by any statute or rule, is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. (See ***Union of India and another v. International Trading Co. and another, (2003) 5 SCC 437***).

At the cost of repetition, we may say that the benefits given to the SSI units and MSMEs by the State Govt. in the Industries Department under the MSME Act, 2006 and the IPR 2007 and Orissa MSME Policy, 2009 in one hand have been snatched away by another Department of the State Govt. In ***State of Bihar v. M/s.Suprabhat Steel Ltd., AIR 1999 SC 303***, the Supreme Court held that the incentives given under the Industrial Incentive Policy by the State Govt. on the basis of the resolutions of the State Cabinet cannot be denied. In the case at hand also, the action of O.P. no.2 in floating the tender and keeping the SSI units/MSMEs out of the reach of the aforesaid tender process is an act which can safely be construed to have been done with an intention to keep away the units of the petitioner-Association from availing the benefits of the IPR 2007.

We may now refer to a decision of the apex Court in the case of ***Reliance Energy Ltd. and another v. Maharashtra State Road Development Corporation Ltd. and others, reported in (2007) 8 SCC 1.*** The apex Court in paragraph 36 of the aforesaid decision held as follows :

> "36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of 'non-discrimination'. However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to 'right to life'. It includes 'opportunity'. In our view, as held in the latest

> judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N., (2007) 2 SCC 1, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. 'Level playing field' is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of 'level playing field'. We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of 'level playing field' is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. 'Globalisation', in essence, is liberalization of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of 'globalisation'. Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of 'level playing field' embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of 'equality' should not be read as a stand alone item but it should be read in conjunction with article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of 'level playing field'. According to Lord Goldsmith, commitment to the 'rule of law' is the heart of parliamentary democracy. One of the important elements of the 'rule of law' is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of 'reasonableness', then such an act or decision would be unconstitutional."

Referring to the aforesaid decision, learned counsel for the petitioners submitted that the petitioners have not been given the scope to compete with the equally placed competitors because of the restriction imposed by eligibility clause 2.1 of the tender conditions by enhancing the minimum annual turnover to Rs.10 crores.

13. After hearing learned counsel for the petitioners, learned counsel for the State and learned counsel for the intervenor-O.P. no.7 and going through the records and the decisions cited above, our conclusion would be that there can be no compromise with the quality of the drugs to be purchased or consistency in supply. But as we have said in the foregoing

paragraphs that there is no allegation regarding any inconsistency in the supply of drugs and in not meeting the quality or supply of any non-qualitative drugs by the units of the petitioner-Association. We fail to understand how the aforesaid two criteria, i.e., consistency in supply and supply of quality products will be ensured by enhancement of the minimum annual turnover to Rs.10 crores. There is absolutely no answer to the same in the counter affidavit filed by O.P. nos.2 and 6. As to ensuring consistency in supply, penal provision can be made in the event of failure on the part of the supplier. The same can only be ensured through rigorous quality control and periodical test of the drugs supplied. These exercises have to be performed by the State against those who supply the products. So, there cannot be no co-relation of ensuring consistent supply and supply of quality drugs with the enhancement of the annual turnover to Rs.10 crores by changing the eligibility clause. So, while framing the pre-qualification criteria, the purpose of doing so should have been kept in view. Apart from those, our conclusion is that enhancement of the minimum annual turnover in the eligibility clause to Rs.10 crores despite the decision of the Industries Department and the request of the Industries Department to O.P. No.2 to relax the minimum annual turnover from Rs.10 crores to Rs.10 lakhs for the SSI units/MSMEs is unreasonable, which satisfies the test of Wednesbury's unreasonableness and the aforesaid pre-condition is intended to snatch away the incentives given under the IPR 2007 as well as the MSME Policy, 2009. For the reasons aforestated, it is a fit case where the Court must interfere.

14. Accordingly we allow this writ petition and quash the impugned eligibility condition as per Clause 2.1 of the Tender Conditions of the Tender Notice, Annexure-9, i.e., requiring the principal manufacturing units/the tendering firms whose annual turnover is Rs.10 crores or more for pharmaceutical products in each year of last three financial years to participate in the tender, so far as it relates to the local SSI units and MSMEs of the State. The State Govt. is directed to accept the recommendations made by the Commissioner-cum-Secretary,IndustriesDepartment, vide Annexure-8, wherein decision has been taken to relax the minimum annual turnover to Rs.10 lakhs for the SSI units and MSMEs and act in terms of said Annexure-8.

There shall be no order as to cost.

Writ petition allowed.

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

W.P.(C). NOS.6781,7359/08,17375/09 &1638/2010 (Decided on 24.12.2010)

LAGNAJIT RAY & ORS. ……. Petitioners.

.Vrs.

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

(A) CONSTITUTION OF INDIA, 1950 – ARTS.16 & 16 (11-A). r/w Rule 10(2) of the OAS (1) Recruitment Rules 1977.

Promotion – Resolution of the Govt. in its G.A. Department granting benefit of accelerated promotion with consequential seniority to SC & ST promotees and the provisional Gradation list of the OAS Class-1 (Junior Branch) challenged – Held, the provisional Gradation list of OAS-I (JB) has not been prepared in accordance with Rule 10 (2) of the OAS (1) Recruitment Rules 1977. (Para 11)

(B) CONSTITUTION OF INDIA, 1950 – ART.16 (4-A).

Promotion – Resolution of the Govt. granting benefit of accelerated promotion and consequential seniority to SC & ST promotees can neither be termed as law made in exercise of enabling power of the State Under Article 16 (4-A) of the Constitution nor does it satisfy the parameters laid down for enacting the law by the state in exercise of the enabling power under the said provision – Held, the resolution has no legal basis and it can not be sustained – Moreover preparation of provisional gradation list by abandoning the "catch up rule" and changing the previous gradation list is legally impermissible. (Para 19,20)

(C) CONSTITUTION OF INDIA, 1950 – ART.16 & 16 (4-A).

Tribunal rejected Original Applications as premature since objections filed by the petitioners against the provisional gradation list was pending with the authority – State admitted that objections of the petitioners were rejected and provisional Gradation list was finalized without any change – None of the grounds of rejection is legally sustainable – Neither the provisional gradation list nor the final Gradation list can be acted upon unless and until the State makes law after ascertaining quantifiable data with regard to backwardness of the SCs and STs and the inadequacy of their representation in the

particular service – Held, orders of the Tribunal Dt.17.04.2008, Goverment resolution Dt.20.3.2002 and Gradation list Dt.3.3.2008 are quashed. (Para 21,22)

Case laws Referred to:-

1.AIR 1996 SC 448 : (Union of India & Ors.-V-Virpal Singh Chauhan & Ors.)
2.AIR 1999 SC 3471 : (Ajit Singh & Ors.-V-The State of Punjab & Ors.).
3.(2006)8 SCC 212 : (M.Nagaraj & Ors.-V-Union of India & Ors.).
4.AIR 1996 SC 1189 : (Ajit Singh Januja & Ors.-V-State of Punjab & Ors.)
5.1992 Supp.(3)SCC 217 : (Indra Sawhney -V-Union of India).
6.(2009)9 SCC 454 : (Anil Chandra & Ors.-V-Radha Krishna Gaur & Ors.)

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B. P. DAS, J. The petitioners in this batch of writ petitions challenge the orders passed by the Orissa Administrative Tribunal dated 17.4.2008 in O.A. No.904 (C) of 2008, dated 1.12.2009 in O.A. No.3006 (C) of 2009, dated 21.4.2008 in O.A. No.979(C) of 2008 and dated 9.5.2008 in O.A. No.1097 (C) of 2008, vide Annexure-12, and also the resolution of the General Administration Department of the State Government dated 20.3.2002, vide Annexure-5, and the gradation list of the Orissa Administrative Services, Class-I (Junior Branch) (in short "OAS-I (JB)") dated 3.3.2008, vide Annexure-7. Since common questions of fact and law are involved in the writ petitions, they were heard together and are being disposed of by this common judgment.

2. The petitioners were appointed to O.A.S-II posts being selected by the Orissa Public Service Commission. Some of them were recruited in 1983 and some others in 1984 and 1987. They were assigned different ranks in the merit lists prepared for their respective batches by the OPSC. In the respective merit list, persons belonging to S.C. & S.T. category, who were appointed as against reserved vacancies, were placed much below in the list than the petitioners. Thus, in terms of the merit list/panel, the petitioners were senior to the appointees belonging to S.C. & S.T. category recruited in the same recruitment year. After rendering service in the post of OAS-II, the

petitioners having been found suitable by the D.P.C. were promoted and appointed to the next higher rank, i.e., O.A.S-I (JB) vide Government Notification dated 26.8.2000 (Annexure-2). The petitioners joined the promotional posts and have been continuing as such since then. However, many junior OAS Officers belonging to the SC & ST category recruited along with the petitioners or even in subsequent batches in different recruitment years were also given promotion to the rank of O.A.S.-I (JB) against reserved vacancies in between 1995 and 2000 as per the Orissa Reservation of Vacancies in Posts and Services (for Scheduled Castes and Scheduled Tribes) Act and the Rules, 1975 and 1976 (in short, "O.R.V. Act & Rules"). It is stated by the petitioners that the promotions made both in favour of reserved categories and unreserved categories including the petitioners have not yet been concurred by the OPSC since the principles determining seniority inter se and the gradation list prepared from time to time of the officers in the rank of O.A.S.-II and O.A.S.-I (JB) became the subject-matter of several protracted litigations. However, the roster point promotees belonging to the SC & ST category were given promotion to the rank of O.A.S.-I (JB) against reserved vacancies earlier irrespective of their original seniority below the general category recruits like the petitioners. But the original seniority position in the cadre of O.A.S.-II prepared by the OPSC was retained in the O.A.S.-I (JB) without any changes on the basis of the law laid down by the Hon'ble Apex Court in the case of ***Union of India & others v. Virpal Singh Chauhan & others***; AIR 1996 S.C. 448. Hence, irrespective of getting promotion in subsequent years, the inter se seniority of the petitioners vis-à-vis the S.C. & S.T. roster point promotees in the rank of O.A.S.-I (JB) was maintained in the seniority/disposition list prepared for the rank of O.A.S-I (JB) in the year 2002 and also in the year 2004 as per the panel position prepared by the OPSC for the cadre of O.A.S.-II. The copy of the seniority list dated 16.5.2001-of officers of O.A.S-I (JB) cadre has been filed as Annexure-3. Such seniority list was maintained in view of the 'Catch Up Rule' evolved by the Hon'ble Apex Court in the case of ***Virpal Singh Chauhan*** (supra), which was also set at rest by the Apex Court in the case of ***Ajit Singh & others v. The State of Punjab & others,*** AIR 1999 S. C. 3471 (herein after "Ajit Singh Januja-II"). It is stated that Article 16(4A) was incorporated in the Constitution by way of 77th and 85th Amendment of the Constitution enabling the State to grant accelerated promotion along with consequential seniority to SC & ST reserved category employees. While the validity of such constitutional amendments was pending adjudication before the Hon'ble Apex Court in several writ petitions, the Government of India in the Department of Personnel, Public Grievances and Pension (D.O.P&T) by its Memorandum dated 21.1.2002 under Annexure-4 decided to grant benefit of accelerated promotion along with consequential seniority in favour of

roster point promotees belonging to the S.C. & S.T. category employees under the Central Government in accordance with the constitutional amendment. It is alleged that the Government of Orissa without appreciating the justification for grant of additional benefit of accelerated seniority to S.C. & S.T. category promotees working in different cadres of civil services/posts, decided to grant such benefit by mechanically accepting or adopting the D.O.P.T Office Memorandum under Annexure-4 and issued the G.A. Department resolution dated 20.3.2002 granting such benefit of accelerated promotion with consequential seniority to S.C. & S.T. promotees under Annexure-5.

3. It is further stated by the petitioners that the aforesaid G.A. Department resolution dated 20.3.2002 under Annexure-5 was challenged before the Hon'ble Apex Court in W.P.(C) No.453 of 2002 by present petitioner no.5-Srimanta Mishra and some others wherein by order dated 2.9.2002 the Hon'ble Apex Court while directing the writ petition to be heard analogously with W.P.(C) No.61 of 2002 (M.Nagraj & others v. Union of India & others), as an interim measure further directed the State-respondents not to affect the standing seniority of the petitioners during the pendency of the said writ petition. It is not disputed that subsequent to disposal of the writ petition in the case of M. Nagraj and others, W.P.(C) No.453 of 2002 was disposed of by the Hon'ble Supreme Court on 11.3.2010 giving liberty to the petitioners to move the High Court and while the matter stood thus, the State Government in the Revenue Department prepared a provisional gradation list of officers of O.A.S.-I (JB) by taking the very Government Resolution dated 20.3.2002 (Annexure-5) as its basis. By virtue of grant of consequential seniority to the S.C. & S.T. reserved promotees, the provisional gradation list has been recast and placed for circulation on 3.3.2008 changing/unsettling the original seniority position in the cadre to the detriment of the petitioners. The provisional gradation list dated 3.3.2008 has been filed as Annexure-7. The petitioners filed objections to the provisional gradation list challenging the very basis of its preparation and citing the principles decided by the Hon'ble Apex Court in the case of ***M. Nagaraj & others v. Union of India & others*****;** (2006) 8 SCC 212. While during the pendency of the representations the petitioners apprehended that their objections would be mechanically rejected and promotion to the next higher cadre would be considered by the D.P.C. at short notice, they filed Original Application No.904(C) of 2008 before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack, inter alia for quashing the Government Resolution dated 20.3.2002 under Annexure-5 and the provisional gradation list dated 3.3.2008 under Annexure-7. Vide order under Anneuxre-12, the Tribunal disposed of the Original Application

holding the same as premature and directed the State-respondent to dispose of the petitioners' objections.

4. It is submitted by the learned counsel for the petitioners that the petitioners were placed higher in the merit position in the select list above all the S.C. & S.T. candidates in their respective batches at the time of recruitment to O.A.S.-II and, therefore, they were senior to such S.C. & S.T. category Officers. Though such junior S.C. and S.T. Officers were promoted to O.A.S.-I(JB) in respect of S.C & S.T. reserved vacancies as per the O.R.V. Act and Rules earlier than the petitioners, who were originally senior to them, by virtue of the 'Catch up principle' laid down in the case of ***Virpal Singh Chauhan & others*** *(supra),* as affirmed in the case of ***Ajit Singh Januja-II*** (supra), which was accepted by the State Government in the resolution dated 2.11.2000, the petitioners' seniority after their promotion to O.A.S.-I (JB) was restored and accordingly gradation list under Annexure-3 has been prepared and that it being the settled principle, as has been held by the Hon'ble Apex Court in the case of ***M. Nagaraj*** (supra) that the Constitution 77th and 85th Amendment of Article 16(4A) merely enables the State to enforce such constitutional provision by making law after satisfying the parameters, such as, the backwardness of S.C. & S.T. employees, inadequacy of their representation in the promotional cadre, to be determined on the basis of quantifiable data and maintenance of administrative efficiency in the service, the State Government without making any law could not have issued the provisional gradation list by recasting the seniority position by giving consequential seniority to the S.C. & S.T. promotees from the date of their promotion. It is submitted that without legislating any law after determining the aforesaid parameters, it is not open to the State to implement the provision of Article 16(4A) merely on the basis of Government Resolution under Annexure-5 which cannot be said to be a law. It is contended on behalf of the petitioners that since the Government Resolution under Annexure-5 on the basis of which the provisional list was issued was challenged before the Tribunal, the Tribunal has gone wrong in disposing of the Original Application holding it to be premature.

5. On behalf of opposite party no.2 representing the State Government a counter affidavit has been filed stating that, as rightly observed by the Administrative Tribunal, the writ petition is premature inasmuch as it was filed challenging the provisional gradation list under Annexure-7 before it reached finality. While admitting that the original seniority of general category candidates was restored in the gradation list of O.A.S.-I (JB) dated 16.5.2001 (Annexure-3) on the basis of the 'Catch up principle' laid down by the Hon'ble Apex Court in the case of ***Virpal Singh Chauhan & others*** *(supra)* and ***Ajit Singh Januja-II*** (supra) and G.A. Department Resolution

No.21260 dated 16.6.2000, it is stated in the counter that after the 85th Constitutional Amendment introducing accelerated promotion along with consequential seniority in favour of S.C. & S.T. employees, the Government Resolution dated 20.3.2002 (Annexure-5) was issued superseding the earlier resolution dated 16.6.2000 and that subsequently the validity of the said Constitutional Amendment having been upheld by the Apex Court in the case of ***M. Nagaraj*** (supra), the Government Resolution under Annexure-5 cannot be faulted. It is stated that there is no necessity of bringing out any law with regard to grant of accelerated seniority and determination of inter se seniority of general caste promotees vis-à-vis S.C. & S.T. roster point promotees inasmuch as the parameters or compelling reasons, as laid down in ***M. Nagaraj*** (supra), are necessary to be satisfied for future cases of promotion and it has no retrospective effect. It is stated that the principle of inter se seniority of the Officers of O.A.S.-I (JB) is available in the O.A.S.-I (JB) Recruitment and Appointment by Promotion Rules, 1977 and the provisional gradation list has been prepared in accordance with Rule 10 (2) of the said Rules, as the State Government has not embarked upon any policy for S.C. & S.T category employees. It is also stated that the persons whose names find place in the provisional gradation list are necessary parties to the writ petition and they having not been arrayed as parties, the writ petition suffers from the defect of non-joinder of necessary parties.

6. Opposite party nos. 4 and 5 have filed a counter affidavit contending that the provisional gradation list has been prepared in accordance with Rules 10 & 11 of the O.A.S.-I (JB) Recruitment and Appointment by Promotion Rules,1977 and the O.R.V. Act, 1975 which are State enactments. It is also stated that there is nothing wrong on the part of the Government in issuing resolution dated 20.3.2002 (Annexure-5), as it set the matter right by withdrawing the earlier faulty resolution dated 16.6.2000 issued by the Government. It is stated that the provisional gradation list is prepared on the basis of the aforesaid Rules and not on the basis of the G.A. Department Resolution under Annexure-5 or the Constitution 85th Amendment of Article 16 (4A).

7. While issuing notice to the opposite parties on 13.5.2008 this Court passed the following interim order :

> "Till next listing, no action shall be taken on the basis of the provisional gradation list against which objections have already been invited, without leave of this Court. However, this will not debar the opposite parties to dispose of the objections. But the same shall be subject to further orders of this Court.
>
> If the gradation list is finalized, the same shall be produced before this Court prior to it is given effect to."

During the course of hearing it was submitted by the learned State counsel that in view of the interim order, as noted above, the provisional gradation list has been finalized without any change and objections filed by the petitioners and others to the provisional gradation list have been rejected. As per direction of the Court dated 4.10.2010 the learned State counsel has produced the concerned records which show that the objections filed by the petitioners have been rejected and order has been passed to finalize the provisional gradation list dated 3.3.2008 without any change therein.

8. It may be noted that the reason for which the impugned provisional gradation list (Annexure-7) has been prepared is borne out from the note-sheet of the Government in Revenue and Disaster Management Department File No.Con.R-6/08, copy whereof obtained by the petitioners under the R.T.I. Act has been filed as Annexure-10. It is revealed from Annexure-10 that note was put up to prepare a gradation list of Officers of OAS-I (JB), as on 1.1.2008, for the purpose of conducting D.P.C. for promotion of such officers to the next higher cadre of O.A.S.-I(SB) as the earlier gradation list of Officers of O.A.S.-I (JB) dated 16.5.2001 (Annexure-3) is stated to have been locked up in litigation. Accordingly, the provisional gradation list (Annexure-7) was prepared and placed for the approval of the Commissioner-cum-Secretary, Revenue Department. It appears further that on 20.2.2008, the Commissioner-cum-Secretary, i.e., opposite party no.2, stated in the note-sheet to the following effect :

> "The promote SC/ST officers within Class-I are to be arranged in the seniority in compliance to Apex Court Nagraj Judgment i.e., based on 85th Constitutional Amendment, without 'sliding down'. Please confirm whether it has been done accordingly."

Thereafter, the query was answered by the Additional Secretary on 29.2.2008 stating that the provisional gradation list has been prepared without adhering to 'catch up principle' restoring the original position of general category officers after their promotion to O.A.S.-I(JB) and that the S.C. and S.T. Officers are arranged as per their position at the time of promotion without any change. Accordingly, the file was put up before opposite party no.2 for approval of the draft gradation list. Opposite party no.2, thereafter, approved the draft provisional gradation list which was issued by office order dated 3.3.2008 vide Annexure-7.

9. It is apparent that the aforesaid provisional gradation list has been prepared giving a go-bye to the 'catch up principle' laid down by the Hon'ble Apex Court and following the Constitution 85th Amendment of Article 16 (4A) giving consequential seniority to the S.C. & S.T. O.A.S. Officers, who were, though initially junior to the general caste officers, promoted earlier than them to the next higher cadre of OAS-I(JB) against roster vacancies. So,

there is no manner of doubt nor any denial that the seniority position of the petitioners and other general caste officers, which had been restored in the gradation list dated 16.5.2001 of O.A.S.-I(JB) by applying the 'catch up principle', has been given a go-bye and their seniority position has been changed in the impugned provisional gradation list.

10. Keeping in view the averments made by the parties in their pleadings and the contentions raised by them, the following issues arise for determination;

(i) whether the 'catch up principle' evolved by the Hon'ble Apex Court still governs the field after the constitution 85th Amendment and whether the judgment of the Apex Court in the case of ***M. Nagaraj*** (supra) that upheld the validity of the constitutional amendment has given a go bye to the 'catch up rule' ?

(ii) Whether in absence of any law made by the State in exercise of enabling power conferred under Article 16(4) and 16 (4A) after satisfying the necessary parameters laid down in ***M. Nagaraj*** (supra), it is open to the State Government to abandon the 'catch up principle' by issuing the resolution dated 20.3.2002 (Annexure-5) ?

(iii) Whether the impugned provisional gradation list that abandoned the earlier gradation list dated 16.5.2001 has been prepared in pursuance of the provisions of the ORV Act 1975 and/or Rule 10(2) of the O.A.S.(I) Recruitment Rules,1977 ?

(iv) Whether the provisional gradation list is legally valid and justified ?

(v) Whether the finding arrived at by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack that the Original Application was premature and not maintainable is justified and legally sustainable and whether the writ petition in the present form is maintainable or not ?

Issue No.(iii) :

11. It is apposite to consider issue no.(iii) at first. It is seen earlier that the State Government in its counter affidavit admitted that the original seniority of general category officers was restored in the gradation list of O.A.S.-I (JB) dated 16.5.2001 on the basis of the 'chatch up rule' laid down by the Hon'ble Apex Court in the case of ***Virpal Singh*** and ***Ajit Singh Januja-II*** (supra) and G. A. Department Resolution No.21260 dated 16.6.2000. It is also admitted in the counter that in view of the Constitution 85th Amendment introducing accelerated promotion along with consequential seniority in favour of S.C. & S.T. employees, the validity of which was upheld in the case of M. Nagraj (supra), the Government Resolution dated 23.3.2002 (Annexure-5) was issued superseding the earlier resolution dated 16.6.2000. There is no dispute that the impugned provisional gradation list under Annexure-7 has

been prepared giving consequential seniority to the S.C. and S.T. roster point promotees by recasting the gradation list dated 16.5.2001 which had been prepared following the 'catch up rule'. The basis of preparation of such provisional gradation list is said to be the provision in Rule 10(2) of the O.A.S.-I (JB) Recruitment and Appointment by promotion Rule 1977 (in short "1977 Rules"). Similarly, private opposite party nos. 4 and 5 have stated in their counter affidavit that the provisional gradation list has been prepared in accordance with Rules 10 and 11 of the 1977 Rules and the provisions of the O.R.V. Act and Rules, 1975 and 1976. Rule 11 of the 1977 Rules provides that notwithstanding anything contained in the Rules, vacancies shall be reserved for promotion in favour of candidates belonging to Scheduled Caste and Scheduled Tribe in accordance with the existing laws in force. In other words, the law that governs reservation of vacancies in posts and services in favour of S.Cs. & S.Ts, i.e., the O.R.V. Act and Rules,1975 and 1976 shall apply in the matter of promotion to O.A.S.-I (JB). Rule 11 of 1977 Rules, however, does not make any provision for inter se seniority in the cadre of O.A.S.-I(JB). Reservation in promotional post under the State Services is available only in respect of Class-I post at the lowest rung as per clause-(c) of the second proviso to sub-section (2) of Section 4 of the O.R.V. Act,1975 and not to any higher Class-I post in the service. With reference to the Orissa Administrative Service, therefore, vacancies are reserved in O.A.S.-I(JB), which is the lowest rung of the Class-I posts, to the extent provided under the O.R.V. Act and Rules. The O.R.V. Act and Rules, however, do not make any provision for determining seniority or inter se seniority of reserved candidates and general candidates in the promotional cadre. Rule 10(1) of the 1977 Rules provides that appointment to the service shall be made in the order in which the names of members of the O.A.S. Class-II appear in the 'select list'. Rule 10(2) provides that the inter se seniority of officers appointed to the service shall be determined by the order indicated in the select list. Preparation of select list by the Selection Board for the purpose of appointment by promotion to O.A.S.-I(JB) has been provided for in Rule-5 of 1977 Rules which is quoted hereunder :

"5. Conditions of eligibility for promotion-

(1) The Selection Board shall ordinarily meet at intervals of not less than six months and not more than one year and prepare a list of such members of Orissa Administrative Service, Class-II as are held by them to be suitable for appointment to the service. The number of members of the Orissa Administrative Service, Class-II, included in the list shall not be more than twice the number of vacancies anticipated in the course of a period of twelve months commencing from the date of preparation of the list or ten per cent of the posts available in the cadre, whichever is greater.

The Selection Board shall consider for inclusion in the said list the cases of the members of the Orissa Administrative Service, Class-II, in order of seniority, up to a number not more than thrice the number referred to in sub-rule(1) :

Provided that the Selection Board shall not consider the case of a member of the Orissa Administrative Service, Class-II unless on the first day of January of the year when it meets, he is substantive in the Orissa Administrative Service, Class-II and has completed not less than six years of service (whether officiating or substantive) in a post of Orissa Administrative Service, Class-II:

Provided further that a member of Orissa Administrative Service, Class-II who has already been appointed as "probationer" in the Orissa Administrative Service, Class-I (Junior) or appointed to officiate in the Orissa Administrative Service, Class-I shall not be considered by the Selection Board for their appointment to the Orissa Administrative Service, Class-I (Junior Branch).

(2) The Selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority.

(3) The names of the officers included in the list shall be arranged in order of seniority in the Orissa Administrative Service, Class-II: provided that any junior officer who in the opinion of the Selection Board, is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him.

(4) The list shall be reviewed and revised every year.

(5) If in the process of selection, review or revision it is proposed to supersede any member of the Orissa Administrative Service, Class-II, the Selection Board shall record its reason for the proposed supersession."

The select list prepared by the Selection Board is to be sent to the Orissa Public Service Commission for their consideration and recommendation in terms of Rules 6 and 7. In accordance with Rule 8, the select list reaches finality on approval by Government with modifications or otherwise after consideration of the recommendations of the Public Service Commission.

It is clear from the provisions of Rule-5 of 1977 Rules as seen above, that though selection for inclusion in the list shall be based on merit and suitability in all respects with due regard to seniority, the names of officers included in the list shall be arranged in order of seniority in O.A.S.-II subject to the only rider that any junior officer, who, in the opinion of the Selection Board, is of exceptional merit and suitability may be assigned a place in the list higher than that of officers senior to him. It is clear that the inter se

seniority of officers appointed to O.A.S.-I (JB), as provided in Rule 10(2) of the Rules, shall be as per the final 'select list' in respect of all those officers, who have been considered and placed in the select list in any given meeting of the Selection Board as finally approved by the Government. The Rule has, however, no reference to inter se seniority of general candidates considered and placed in the select list in any given Selection Board meeting vis-à-vis the S.C. and S.T. candidates, who were considered and placed in the select list in the same meeting or a different meeting for their accelerated promotion on the basis of reservation against roster point vacancies. It, therefore, cannot be said that the provisional gradation list of O.A.S.-I (JB) under Annexure-7 has been prepared in accordance with Rule 10(2) of the 1977 Rules, as contended by the opposite parties.

On the contrary, as has been noted in the Government file (Annexure-10), particularly the query made by the Commissioner-cum-Secretary which was answered by the Additional Secretary on 29.2.2008, it is apparent that the provisional gradation list has been prepared on the basis of 85th Constitutional amendment by giving consequential seniority to the S.C. & S.T. Officers, those who were junior to the general caste officers in the feeder cadre and were promoted earlier to them against reserved roster point vacancies, by giving a go bye to the 'catch of rule' and thereby abandoning the extant gradation list dated 16.5.2001. Issue no.(iii) stands answered accordingly.

Issue No.(i), (ii) and (iv) :

12. In order to decide whether the preparation of provisional gradation list by abandoning the 'catch of rule' and thereby recasting the gradation list dated 16.5.2001 is legally justified or not, it is appropriate to find out what the 'catch up rule' is as evolved by the Hon'ble Apex Court and whether it still governs the field. The 'catch up rule' was evolved in ***Virpal Singh Chauhan*** (supra) where the question inter alia was about determination of seniority between general candidates and candidates belonging to reserved classes in the promoted category of railway guards. The Hon'ble Apex Court said in paragraph-24 as follows :

> "……. Hence, the seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position. We have discussed hereinbefore the meaning of the expression "panel" and held that in case of non-selection posts, no "panel" is prepared or is necessary to be prepared. If so, the question arises, what did the circular/letter dated August 31,1982 mean when it spoke of seniority being governed by the panel position? In our opinion, it should mean the panel prepared by the selecting authority at the time of selection for Grade 'C'. It is the seniority in this panel which must be reflected in

each of the higher grades. This means that while the rule of reservation gives accelerated promotion, it does not give the accelerated-or what may be called, the consequential-seniority……"

It was further held in the concluding paragraph-28 as follows :

"…… In other words, even if a Scheduled Caste/Scheduled Tribe candidate is promoted earlier by virtue of rule of reservation/roster than his senior general candidate and the senior general candidate is promoted later to the said higher grade, the general candidate regains his seniority over such earlier promoted Scheduled Caste/Scheduled Tribe candidate. The earlier promotion of the Scheduled Caste/Scheduled Tribe candidate in such a situation does not confer upon him seniority over the general candidate even though the general candidate is promoted later to that category….."

13. In the case of ***Ajit Singh Januja & others v. State of Punjab & others***; AIR 1996 SC 1189 (herein after referred to as "Ajit Singh Janjua-I") being confronted with the question of determination of inter se seniority of reserved candidates and general candidates, the Hon'ble Apex Court observed that the question cannot be examined "only" on the basis of any circular, order or Rule issued/framed by any State Government or the Union of India and the same has to be tested on the basis of the constitutional scheme of equal opportunity enshrined in Articles 14 and 16 of the Constitution. The Court also relied on the decision in ***Indra Sawhney v. Union of India,*** **1992 Supp. (3) SCC 217,** and observed that though Article 16 (4) enables the State to make provision for reservation in appointment or posts in favour of any backward class of citizens but at the same time Article 335 of the Constitution which enjoins to take into consideration maintenance of efficiency in administration cannot be lost sight of. Approving the "catch up rule', the Hon'ble Apex Court in Ajit Singh Januja-I concurred with the view in ***Virpal Singh Chauhan*** (supra) and held as under :

" 16. We respectfully concur with the view in Union of India v. Virpal Singh Chauhan JT (1995) 7 SC 231, (supra) that seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position i.e., with reference to their inter se seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated 'consequential seniority'. If a Scheduled Caste/Scheduled Tribe candidate is promoted earlier because of the rule of reservation/roster and his senior belonging to the general category candidate is promoted later to that higher grade the general category candidate shall regain his seniority over

such earlier promoted scheduled caste/tribe candidate. As already pointed out above that when a scheduled caste/tribe candidate is promoted earlier by applying the rule of reservation/roster against a post reserved for such scheduled caste/tribe candidate, in this process he does not supersede his seniors belonging to the general category. In this process there was no occasion to examine the merit of such scheduled caste/tribe candidate vis-à-vis his seniors belonging to the general category. As such it will be only rational, just and proper to hold that when the general category candidate is promoted later from the lower grade to the higher grade, he will be considered senior to a candidate belonging to the scheduled caste/tribe who had been given accelerated promotion against the post reserved for him. Whenever a question arises for filling up a post reserved for scheduled caste/tribe candidate in still higher grade then such candidate belonging to scheduled caste/tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority cum merit or merit cum seniority. If this rule and procedure is not applied then result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered in service on basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution."

14. In ***Ajit Singh Januja-II*** (supra), the Hon'ble Apex Court, stating that ***Virpal Singh Chauhan*** and ***Ajit Singh Januja-I*** have been correctly decided, held as under :

"76. We, therefore, hold that the roster point promotees (reserved category) cannot count their seniority in the promoted category from the date of their continuous officiation in the promoted post,-vis-à-vis the general candidates who were senior to them in the lower category and who were later promoted. On the other hand, the senior general candidate at the lower level, if he reaches the promotional level later but before the further promotion of the reserved candidate-he will have to be treated as senior, at the promotional level, to the reserved candidate even if the reserved candidate was earlier promoted to that level….."

15. In ***Indra Sawhney*** (supra), it was held that reservation in appointment or posts under Article 16(4) is confined to initial appointment and cannot be extended to reservation in the matter of promotion. Feeling that the said judgment adversely affects the interest of S.Cs. & S.Ts. in service, the Government felt it necessary to continue the policy of providing reservation in promotion to S.Cs and S.Ts and, therefore, brought in the 77th Amendment in 1995 by introducing Clause(4-A) in Article 16 of the Constitution. Similarly, the Government felt that the decisions in ***Virpal Singh Chauhan*** and ***Ajit Singh Januja-II*** (supra) which evolved the concept of 'catch up rule' adversely affect the interests of the S.Cs and S.Ts in the matter of seniority on promotion in the next higher grade. The Legislature, therefore, once again amended Clause (4-A) of Article 16 by the Constitution 85th Amendment Act 2001 by conferring the benefit of consequential seniority on S.C. & S.T. roster point promotees in the promotional grade. The constitutional validity inter alia of the Constitution 77th Amendment and 85th Amendment was challenged before the Apex Court in ***M. Nagaraj*** mainly on the ground that such amendments violate the basic structure of the Constitution. Elucidating the question of application of the principle of basic structure, the Hon'ble Apex Court observed as follows :

> " 102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the "width test" and the test of "identity". As stated hereinabove, the concept of the "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism, etc. Obliteration of these concepts or insertion of these concepts does not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of Backward Classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that Backward Class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, "backwardness" and "inadequacy of representation". As stated above, equity, justice and efficiency are variable factors. These

> factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4) are retained. Clause (4-A) is derived from clause (4) of Article 16. Clause (4-A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is whether the impugned amendments discard the original Constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicates that the impugned amendments have been promulgated by Parliament to overrule the decisions of this Court. We do not find any merit in this argument. *Under Article 141 of the Constitution the pronouncement of this Court is the law of the land. The judgments of this Court in Virpal Singh[1], Ajit Singh (I)[2], Ajit Singh (II)[3] and Indra Sawhney[5] were judgments delivered by this Court which enunciated the law of the land".* ***(Emphasis supplied)***

It is apparent from the observation of the Apex Court in the above quoted paragraph (italicised) that the 'catch up rule' still governs the field being law of the land unless and until the appropriate Government enacts law providing for reservation keeping in mind the parameters in Article 16(4) and (4-A). Therefore, though ***M. Nagaraj*** (supra) upheld the validity of the constitutional amendment, it has not overruled or given a go-bye to the 'catch up rule'. The Constitution 85th Amendment does not by itself confer the additional benefit of consequential seniority on the S.C. and S.T. candidates in the promotional post for their accelerated promotion against reserved posts/roster points since clause (4-A) of Article 16 is merely enabling in nature. This is amply made clear in the observation of the Apex Court in ***M. Nagaraj,*** as seen above. It has further been held therein as follows :

> " …… In our view, the field of exercise of the amending power is retained by the impugned amendments, as the impugned amendments have introduced merely enabling provisions because, as stated above, merit, efficiency, backwardness and inadequacy cannot be identified and measured in vacuum. Moreover, Article

16(4-A) and Article 16 (4-B) fall in the pattern of Article 16(4) and as long as the parameters mentioned in those articles are complied with by the States, the provision of reservation cannot be faulted. Articles 16(4-A) and 16(4-B) are classifications within the principle of equality under Article 16(4)……..."

16. In exercise of enabling power under Article 16(4-A), the State has to identify and recognize the compelling reasons in making law providing for accelerated promotion and consequential seniority in favour of S.C. & S.T. candidates. Therefore, in ***M. Nagarj*** (supra), the Hon'ble Apex Court said:

"107. It is important to bear in mind the nature of constitutional amendments. They are curative by nature. Article 16(4) provides for reservation for Backward Classes in cases of inadequate representation in public employment. Article 16(4) is enacted as a remedy for the past historical discriminations against a social class. The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognize the compelling interests. If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured. That exercise depends on availability of data. That exercise depends on numerous factors. It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. How best one should optimize these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment. This is amply demonstrated by the various decisions of this Court discussed hereinabove. Therefore, there is a basic difference between "equality in law" and "equality in fact" (See Affirmative Action by William Darity). If Articles 16(4-A) and 16(4-B) flow from Article 16(4) and if Article 16(4) is an enabling provision then Articles 16(4-A) and 16(4-B) are also enabling provisions. As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, when the State fails to identify and implement the controlling factors then excessiveness comes in, which is to be

> decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of "guided power". We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred."

Lastly, while ultimately holding the Constitutional Amendments valid, the Apex Court held as under :

> " ….. In this regard the State concerned will have to show in each case the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation. As stated above, the impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, the State has to collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335. It is made clear that even if the State has compelling reasons, as stated above, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling limit of 50% or obliterate the creamy layer or extend the reservation indefinitely……"

17. The principles regarding the ambit of power of the State under Article 16(4-A) of the Constitution, as decided in the case of ***M. Nagaraj*** (supra), has also been followed by the Hon'ble Supreme Court in the recent decision in ***Anil Chandra & others v. Radha Krishna Gaur & others:*** (2009) 9 SCC 454. In that case, subsequent to the judgment of the Apex Court in ***M. Nagaraj*** (supra), the U.P. Government framed the U.P. Government Servants Seniority (Third Amendment) Rules, 2007 providing for consequential seniority to promotees belonging to S.Cs and STs as per roster/rule of reservation from the date of their promotion and further issued a letter directing to effect necessary amendment in the seniority list as per the amended rule. The U.P. Jal Nigam, which was following the State Government Servants Seniority Rules, adopted the said amended rules and issued tentative joint seniority list of Engineers at higher levels. The validity of the aforesaid amended Seniority Rules was challenged by the Engineers of the Irrigation Department by filing writ petition before the High Court, Allahabad, Lucknow Bench, wherein the division Bench of the High Court passed an interim order directing not to change or disturb the seniority of Engineers that was existing prior to the enforcement of the Government

Servants Seniority (Third Amendment) Rules, 2007. The aforesaid interim order was challenged before the Apex Court in appeal. Hon'ble Supreme Court taking note of the principles laid down in ***M. Nagaraj*** (supra) upheld the interim order passed by the Allahabad High Court holding as follows :

> " In the present case and in the facts and circumstances stated herein earlier, we are of the view that it was the constitutional obligation of the State, at the time of providing reservation in the matter of promotion to identify the class or classes of posts in the service for which reservation is required, however, neither any effort has been made to identify the class or classes of posts for which reservation is to be provided in promotion nor any exercise has been done to quantify the extent of reservation. Adequate reservation does not mean proportional representation. Rule 8-A has been inserted mechanically without taking into consideration the prerequisites for making such a provision as required under Article 16(4-A) of the Constitution of India. The ceiling limit of 50%, the concept of creamy layer and the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency are all constitutional requirements without which the structure of equality of opportunity in Article 16 would collapse. However, in this case, as stated, the main issue concerns the "extent of reservation" and in this regard, the State should have shown the existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency before making provision for reservation."

18. It is admitted by the State in this case that the gradation list dated 16.5.2001 of O.A.S.-I(JB) was prepared by following the 'catch up rule' and the petitioners and other general O.A.S.-Class-II Officers, who were admittedly senior to the S.C. and S.T. Officers, but were promoted later, were assigned their seniority in the list as per the panel. The said gradation list must be held to have been correctly prepared in view of the stand taken by the State. Unless and until the State Government makes a law for conferring the benefit of consequential seniority on the S.C. & S.T. officers, who were though admittedly junior to the general caste and other category of officers but got promoted to O.A.S.-I(JB) earlier against reserved roster point vacancies and which law must also satisfy the parameters as laid down in ***M. Nagaraj*** (supra), such as existence of compelling reasons, namely, backwardness of the S.C. and S.T. category, inadequacy of their representation in the particular service and maintenance of overall administrative efficiency, the gradation list dated 16.5.2001 is not liable to

change. The backwardness and inadequacy of representation must be based on quantifiable data justifying the necessity of conferring the benefit.

In a latest decision of the apex Court in the case of ***Suraj Bhan Meena & anr. V. State of Rajasthan & ors., SLP (C) Nos.7716, 7717, 7826 & 7838 of 2010***, computer generated copy of which was furnished to us, the Court in paragraph 46 stated the position after the decision in ***M. Nagaraj*** (supra) that reservation of posts in promotion is dependent on the inadequacy of representation of members of the Scheduled Castes and Scheduled Tribes and Backward Classes and subject to the condition of ascertaining as to whether such reservation was at all required and held thus :

> "……. The view of the High Court is based on the decision in M. Nagaraj's case (supra) as no exercise was undertaken in terms of Article 16(4-A) to acquire quantifiable data regarding the inadequacy of representation of the Scheduled Castes and Scheduled Tribes communities in public services. The Rajasthan High Court has rightly quashed the notifications dated 28.12.2002 and 25.4.2008 issued by the State of Rajasthan providing for consequential seniority and promotion to the members of the Scheduled Castes and Scheduled Tribes communities and the same does not call for any interference. Accordingly, the claim of Petitioners Suraj Bhan Meena and Sriram Choradia in Special Leave Petition (Civil) No.6385 of 2010 will be subject to the conditions laid down in M. Nagaraj's case (supra) and is disposed of accordingly. Consequently, Special Leave Petition (C) Nos.7716, 7717, 7826 and 7838 of 2010, filed by the State of Rajasthan, are also dismissed."

The stand taken by the State Government in its counter affidavit that there is no necessity for bringing out any law with regard to grant of accelerated seniority cannot be countenanced in view of the law laid down in ***M. Nagaraj*** (supra).

19. The Government have issued resolution dated 20.3.2002 (Annexure-5) for fixation of inter se seniority of general caste government servants vis-à-vis S.C. & S.T. government servants in promotional posts by conferring the benefit of accelerated/ consequential seniority on the S.C. & S.T. roster point promotees. The resolution has been issued pursuant to the instruction contained in Government of India DOPT Office Memorandum dated 21.1.2002 and evidently based on the amendment of Article 16(4-A) of the Constitution. The resolution can neither be termed as law made in exercise of enabling power of the State under Article 16(4-A) nor does it satisfy the parameters laid down for enacting the lawby the State in exercise of

enabling power under the said provision. The Resolution has no legal basis and, therefore, cannot be sustained.

20. In view of our conclusion that the gradation list dated 16.5.2001 of O.A.S.-I (JB) under Annexure-3 was prepared correctly by following the 'catch up rule' and that admittedly the State Government having not made any law for conferring the additional benefit of consequential seniority on the S.C. and S.T. roster point promotees in the cadre of O.A.S.-I(JB) in exercise of its enabling power under Article 16(4-A) of the Constitution after complying with the necessary parameters as noted above, the preparation of the provisional gradation list under Annexure-7 by abandoning the 'catch up rule' and changing the gradation list under Annexure-3 is legally impermissible and as such invalid.

Issue No.(v) :

21. The Orissa Administrative Tribunal did not entertain the Original Applications of the petitioners and disposed of the same as premature, as because representations/objections of the petitioners and others against the provisional gradation list were pending before the State Government. Order was, therefore, passed by the Tribunal directing the State Government to dispose of the representations. As has been seen earlier, in W.P.(C) No.6781 of 2008 this Court has passed interim order with direction not to take any action on the basis of provisional gradation list but at the same time given liberty to the State to dispose of the objections filed against the provisional gradation list which shall be subject to the order of the Court. It was further ordered that the gradation list if finalized shall be produced before the Court prior to it is given effect to.

It is admitted on behalf of the State at the time of hearing that the objections raised by the petitioners and others have been rejected and the provisional gradation list has been finalized without any change. The Government file, CON-R-22/08, which has been produced, reveals that by Government order dated 2.12.2009 the provisional gradation list (Annexure-7) has been finalized and the objections raised by the petitioners and others have been rejected. In particular, the points raised on behalf of the petitioners in this writ petition, which were also raised before the Tribunal were raised in their objections. The objections have been rejected by the State on the grounds that the concept of 'catch up rule' earlier decided by the Hon'ble Supreme Court has no effect after the 85th Constitutional Amendment and the judgment passed in ***M. Nagaraj*** (supra), and that the principle adopted in the gradation list of 2001 was not supported by any rule and it has no validity after the Constitutional amendment, and that the provision of any new reservation policy to be formulated in future may not have retrospective effect, and that the provisional gradation list is based on

the provision of Rule 10(2) of the 1977 Rules. In view of the conclusions reached by us, we have no hesitation to hold that none of the grounds of rejection of the objections is legally sustainable. It is clear that the legally wrong premise on which the provisional gradation list was prepared also continues in finalizing the provisional gradation list and, therefore, neither the provisional gradation list under Annexure-7 nor the final gradation list can be acted upon unless and until the State makes a law after ascertaining quantifiable data with regard to backwardness of the S.Cs. & S.Ts. and the inadequacy of their representation in the particular service, further by keeping in view the efficiency in the administration. Driving the petitioners to file fresh Original Applications before the Administrative Tribunal against final gradation list on the self-same grounds on which the provisional gradation list had been challenged would not only cause hardship to the petitioners but also amount to multiplicity of proceeding. In the circumstances, we are of the view that the writ petitions are maintainable in their present form.

22. In the light of the discussions made above, the writ petitions are allowed and the orders of the Tribunal under Annexure-12, the Government Resolution dated 20.3.2002 (Annexure-5) and the Gradation List dated 3.3.2008 (Annexure-7) as finalised are quashed.

All pending misc. cases are dismissed. Parties are directed to bear their own costs.

Writ petition allowed.

2011 (I) ILR -CUT- 350

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

W.P.(C) NO.13783 OF 2010 (3.12.2010)

SUNITA AGARWAL ……. Petitioner.

.Vrs.

CENTRAL ELECTRICITY SUPPLY UTILITY, BBSR & ORS. …… Opp.Parties.

Tender – Notice inviting tender from manufacturers/authorized representatives of the manufacturers for supply of service connection Kits – Petitioner, OP.3 and 3 other bidders submitted tender papers – Tender awarded in favour of O.P.3 although he quoted higher price than the petitioner – Hence the writ petition.

This Court called for the records from O.P. 1 & 2 and found the authorities have not treated the tenderers equally and have not maintained transparency in awarding the contract – Since the action of the authorities are not free from doubt this Court in exercise of the power of judicial review sets aside the order awarding contract in favour of O.P.3 and directs O.P.1 & 2 to take fresh step – However if the materials supplied by O.P.3, already utilized the same may not be disturbed. (Para 14)

Case laws Referred to:-

1.(1993) 1 SCC 71 : (Food Corporation of India-V- M/s.Kamdhenu Cattle Feed Industries).
2.AIR 1996 SC 11 : (Tata Cellular -V- Union of India).
3.AIR 2005 SC 2653: (Global Energy Ltd. & Anr.-V-M/s.Adani Exports Ltd.& Ors.)
4.AIR 2000 SC 801 : (Air India Ltd. -V- Cochin International Airport Ltd.& Ors.)
5.AIR 2001 SC 682 : (West Bengal Electricity Board-V-Patel Engineering Co. Ltd&Ors)

For Petitioner - M/s.K.N.Jena, B.P.Bal, D.K.Mohapatra, A.K.Sahu.
For Opp.Parties- M/s.N.C.Panigrahi (Sr.Advocate)
S.R.Panigrahi, N.K.Tripathy & D.Dhal(for O.P.1 & 2)
M/s.P.K.Rath, P.K.Satpathy, R.N.Parija, A.K.Rout & K.C.Kar. (for O.P.3)

SANJU PANDA, J. In this writ application, the petitioner has challenged the action of opposite party nos.1 and 2 in respect of tender notice for supply of Service Connection Kits and awarding of such contract.

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

Opposite party no.2 issued a notice inviting tender from manufacturers/authorised representatives of the manufacturers for Supply of Service Connection Kits on behalf of opposite party no.1 as it transpires from Annexure-1. The last date for submission of tender was fixed to 14.5.2010. In pursuance of the said notice, the petitioner along opposite party no.3 and three other bidders participated and submitted their tender papers. The tender papers were opened in presence of the representatives of the tenderers on the date fixed. The petitioner was declared as L-1. She quoted the price at Rs.595.92 per kit. Opposite party no.3 quoted its price at Rs.627.74 per kit. The grievance of the petitioner is that though she was declared as L-1, opposite party nos.1 and 2 going out of the way have awarded the contract in favour of opposite party no.3 who quoted higher price in comparison with her.

3. Opposite party nos.1 and 2 filed their counter-affidavit contending that the petitioner was never declared as L-1. As per the terms and conditions of the tender call notice, the entire tender is single part tender for supply of service connection kits. A bidder participating in the tender is required to satisfy the terms in the tender condition including Clasues-1 and 9 which run as follows:

> "Clause-1: The officer should contain all the technical details with Brouchers, Past supply/experience, valid LTCC, PAN No., STCC, VATCC, EMD and documentary evidence of financial capacity to execute the order. The list of purchase orders executed and performance reports are also to be submitted and if required copies are to be submitted. The offer is to be valid for 90 days from the date of opening of Bid.
>
> xxx xxx xxx
>
> Clause-9: the Bids which meet out technical and commercial terms of the tender shall only be considered for price comparison cost comparison shall be on the basis of landing cost of CESU Store, Bhubaneswar/Choudwar."

4. It is further averred in their counter affidavit that the petitioner submitted the tender without satisfying the qualifying clause. The petitioner submitted tender papers without giving the experience certificate and without any list of purchase orders executed and performance report as required under the tender call notice. The petitioner's tender form from its inception was an incomplete tender paper. However, in the interest of the company, a letter dated 23.6.2010 was issued to the petitioner as well as opposite party no.3 calling upon them to produce the documents to show past experience, valid authorisation certificate with regard to dealership, distributorship. In reply to the said letter, the petitioner failed to submit her experience

certificate, copy of the purchase order and other requirements as required under the said letter. Therefore, the only alternative for them was to consider the tender of opposite party no.3 which was the only eligible bidder in the process. The difference between the price quoted by the petitioner and opposite party no.3 is Rs.25.54 paise per kit.

5. Opposite party no.3 has also filed its counter-affidavit supporting the contentions of opposite party nos.1 and 2. However, in its counter, it has been further stated that opposite party nos.1 and 2 issued a letter on 9.6.2010 to opposite party no.3 for reducing the price but it did not agree to reduce the price as quality is to be maintained in pursuance of the letter dated 23.6.2010. It supplied all the documents including past experience service regarding supply of similar materials. Considering all the documents, the contract was awarded in its favour vide order dated 14.8.2010. It in terms of such order, out of total 15000 service connection kits, has already supplied 7500 number of kits and invested huge amount for supply of the rest of the materials. The materials covered by the tender call notice relates to supply of service connection kits which are to be installed in the consumer premises at the time of initial supply/connection of electricity from the main supply line. Quality of such materials in the public interest being paramount consideration in absence of anything to show that the petitioner matches opposite party no.3 with regard to quality and other similar requirements, the entire process of tender in favour of opposite party no.3 do not suffer from any kind of unfairness in the decision making process nor there exists any illegality. As there is no unreasonableness or mala fide in the decision making process or any kind of violation of the terms and conditions of the tender paper, the order awarding contract need not be interfered with.

6. Considering the rival submissions of the parties, this Court had directed the opposite parties to produce the record of tenders which are produced before us. After perusal of the record, it appears that opposite party no.3 was the only supplier who submitted P.O. for supply of service connection kits 26000 number of kits and also supplied 10000 numbers of Service Connection Kits on CESU vide P.O. No.5904 dated 15.2.2010 at the rate of Rs.563.83 (inclusive of all taxes and duties).

7. On verification of the price bid, it is found that M/s.Kishan Enterprises-opposite party no.3 quoted the L-2 price of Rs.627.63 (inclusive of all taxes and duties). M/s. Radhamadhav Engineers and Traders (present petitioner) quoted L-1 price of Rs.595.92 (inclusive of all taxes). The lowest bidder, the petitioner, does not have experience for Supply of Service Connection Kits as per the document furnished by the firm. Hence, it was opined that the firm having supply experience of Service Connection Kits may be considered.

8. However, the matter did not end there. The authorities again issued a letter dated 23.6.2010 to the petitioner as well as opposite party no.3 to furnish certain documents. However, the record further shows that the offer of opposite party no.3 on 11.6.2010 which was made by it in pursuance of the letter dated 9.6.2010 reducing price from Rs.627.63 to Rs.621.46 was accepted by the authorities on the same date as it was written on the back of the said letter in a pencil. Therefore, it is not clear how the opposite party nos.1 and 2 have issued further letter on 23.6.2010 calling the petitioner as well as the opposite party no.3 to submit their further documents when they had already decided to accept the offer of opposite party no.2. If both the bidders have not supplied all the required documents as per the terms of the tender, how could they accept the offer of opposite party no.3 and proceed with the selection of tender. It seems that the authorities had pre-determined regarding the award of the contract before taking the final decision and waiting for the parties to supply further documents. The letter dated 23.6.2010 issued by them is only an eye-wash and the process of so- called negotiation with the petitioner and opposite party no.3 is only to give a colour of legality to their illegal act. The action of the authorities reveals their pre-determination to award the contract on 11.6.2010 in favour of opposite party no.3.

9. Learned counsel for the petitioner submitted that the process of acceptance of rate of Rs.621.45 per kit by opposite party no.3 has been done unreasonably and unequal basis by negotiation with only one bidder. The reason advanced by the opposite party nos.1 and 2 that the petitioner could not produce the experience certificate and detail information was not proved in accordance with law does not hold good as the record discloses contrary, i.e., the pre-determination of the authorities to award the contract to opposite party no.3. He cited the decision reported in **(1993) 1 SCC 71** (**Food Corporation of India** v. **M/s.Kamdhenu Cattle Feed Industries**) where the apex Court has held that a bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny and submitted that in view of the said decision, action of the present opposite party nos.1 and 2 is unfair, unreasonable, illegal and meant to show undue favour to opposite party no.3, which is against the public interest. Therefore, the same is liable to be set aside.

10. Learned counsel for opposite party nos.1 and 2 submitted that the case of the petitioner was rejected by the Purchase Committee. Hence, there was no bar to negotiate with opposite party no.3 who was duly qualified and as the petitioner failed to produce the documents in support of technical and commercial details, the decision of the Purchase Committee for issuing purchase order in favour of opposite party no.3 cannot be called

to be illegal and interfered with. In support of his contention, he cited the decision reported in **AIR 1996 SC 11** (**Tata Cellular** v. **Union of India**) and **AIR 2005 SC 2653** (**Global Energy Ltd. and another** v. **M/s. Adani Exports Ltd. and others**).

11. Learned counsel for opposite party no.3 cited the decision reported in **AIR 2000 SC 801** (**Air India Ltd.** v. **Cochin International Airport Ltd. and others**) and **AIR 2001 SC 682** (**West Bengal Electricity Board** v. **Patel Engineering Co. Ltd. and others**).

12. The position of law is not in dispute as settled by the apex Court where the apex Court held in West Bengal Electricity Board's case (supra) that instructions given to bidders are to be complied with scrupulously. The principle of awarding contract to the lowest tenderer applies when all things are equal. In Global Energy Ltd.'s case (supra) the apex Court held that price is not always material to be considered.

13. Be that as it may, law is well settled that though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders. Yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good as decided in Food Corporation of India's case (supra).

14. In view of the above, in the present case since the authorities have not treated the tenderers equally though the petitioner has no right to claim

for acceptance of her bid as she had not satisfied the terms and conditions of the tender notice. However, the authorities should have maintained greater transparency in awarding the contract as the facts narrated above. Since the action of the authorities are not free from doubt, this Court in exercise of the power of judicial review sets aside the order of awarding contract in favour of opposite party no.3 and directs opposite party nos.1 and 2 to take fresh step. The materials supplied by opposite party no.3, if already utilised, may not be disturbed.

The writ application is accordingly disposed of.

Writ petition disposed of.

2011 (I) ILR -CUT- 356

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

W.P.(C) NO.10824 OF 2006 (Decided on 09.11.2010)

NIRMAL KUMAR DAS ……. Petitioner.

.Vrs.

ORISSA POWER TRANSMISSION CORPORATION LTD.& ORS. ……. Opp.Parties.

Departmental Proceeding – Petitioner remained on leave on medical ground – Medical Board found him fit to resume duty – Charge framed against the petitioner for availing leave on false plea – Order of punishment passed dismissing the petitioner from service – Hence the writ petition.

Medical Board formed an opinion on the basis of the documents produced by the petitioner without examining the petitioner physically – None of the doctors in the Medical Board was urologist and no test had been conducted on the petitioner – Report of the Medical Board which formed the basis of the charge not produced before the Enquiring Officer – Evidence of Dr.B.C.Satpathy shows that the petitioner was having some problem relating to his kidney - Finding of the Enquiring Officer that the petitioner submitted leave application on false grounds is unsustainable – Held, findings of the Enquiring Officer and consequently the order of punishment is set aside.

(Para 6)

For Petitioner - M/s. Biswajit Mohanty-1, S.Patra, P.K.Majhee & A.Panda.
For Opp.Parties - M/s. B.K.Pattnaik, P.Sinha, R.K.Nayak & P.K.Sahoo.

L.MOHAPATRA, J. The petitioner having been dismissed from service in pursuance of a departmental proceeding by order dated 30.8.2005 in Annexure-26 has filed this writ petition challenging the said order of punishment.

2. The petitioner initially joined as a Junior Engineer under the State Government in 1979 and in the year 1981 he was recruited as an Assistant Engineer by way of promotion. In the same year he was sent on deputation to Orissa State Electricity Board (OSEB) from the Energy Department of the

Government of Orissa. Later OSEB was abolished and GRID Corporation came into existence. The services of the petitioner were placed under GRIDCO and he was permanently absorbed in GRIDCO. While working under GRIDCO, in March 2001 the petitioner got himself examined by Dr. B.C. Satpathy, Medical Officer, GRIDCO Dispensary for his ailment in Kidney. As per advice of the doctor, Ultrasound test was conducted and it revealed that both the kidneys had developed mild degree of hydronephrotic changes and both the ureters were abnormally dilated in proximal area. Since there was malfunctioning of the kidneys, Dr. Satpathy advised him to contact Prof. L.K. Sahu of Urology, S.C.B. Medical College & Hospital, Cuttack. The petitioner thereafter got himself examined several times in between April 2001 to July 2006 and remained under treatment of Dr. Sahu. While the petitioner was under treatment, he was transferred on 13.6.2001 to Talcher Thermal Power Station and as per the orders of the authorities, he relinquished the charges on 9.7.2001. Because of his ailment, the petitioner applied for leave from 10.7.2001 to 30.7.2001 and also submitted a representation to recall the order of transfer on the ground of illness. The first representation for recalling the order of transfer having not been attended to, some more representations were made on subsequent dates. On 7.8.2003 the petitioner was directed to appear before a Medical Board of GRIDCO on 12.8.2003 as he had availed leave on medical ground from 10.7.2001. The petitioner appeared before the Medical Board but he was found fit to resume duty. Accordingly, on 20.8.2003 the petitioner was directed to resume duties at Talcher Thermal within seven days. Even though the petitioner joined at Talcher on 27.8.2003, a departmental proceeding was drawn up against him for remaining on leave from 10.7.2001 to 26.8.2003 without submitting any Medical Certificate along with the leave application and also on the ground that the Medical Board having found him fit to resume duty, he should not have availed leave on medical ground. On such allegations, the charge memo was served on the petitioner and he was called upon to submit a reply. The petitioner submitted his reply explaining the reasons for his absence in details. But the same was not accepted and an enquiry was conducted. The petitioner participated in the enquiry and after conclusion of the enquiry, a report was submitted by the Enquiring Officer finding the petitioner guilty of the charge. The disciplinary authority thereafter called upon the petitioner to submit his reply to the report of the Enquiring Officer and after receipt of the reply, the order of punishment was passed dismissing the petitioner from service. Challenging the said order of dismissal from service, this writ application has been filed.

3. A counter affidavit has been filed by the opposite parties and a preliminary objection was raised by the learned counsel appearing for the

opposite parties to the effect that the order of punishment is appellable and without exhausting the alternative remedy, the petitioner should not have approached this Court by filing a writ petition. Though the learned counsel appearing for the opposite parties has some justification in raising such preliminary objection, we are not entertaining the said objection considering the fact that the writ application is pending here for more than four years by now and directing the petitioner to prefer an appeal against the order of punishment at this stage will result in undue hardship to the petitioner.

4. Shri Biswajit Mohanty-1, the learned counsel appearing for the petitioner assailed the enquiry report as well as the order of punishment on the ground that the basis for framing the charge is the report of the Medical Board constituted by GRIDCO. But the report of the Medical Board was never placed before the Enquiring Officer and therefore, the document on the basis of which charge was framed having not been produced before the Enquiring Officer, the petitioner could not have been found guilty of the charge. Apart from the above, the learned counsel also drew attention of the Court to the evidence of the three doctors examined in course of the enquiry to substantiate his submission that the leave applications filed by the petitioner were not without any basis and because of his ailment and the treatment he was undergoing under Dr. Sahu, he was forced to take leave and at no point of time he was physically fit to resume duty. The learned counsel for the opposite parties supporting the enquiry report submitted that the three doctors constituting the Medical Board having been examined in course of the enquiry, there was no necessity to produce their report before the Enquiring Officer and the evidence of these three doctors clearly establish that even though the petitioner was fit physically to resume duties, he went on submitting leave applications without supporting medical certificates.

5. Law is well settled that this Court in exercise of writ jurisdiction cannot sit in appeal and reassess the evidence adduced before the Enquiring Officer and come to a different conclusion. Only if the findings of the Enquiring Officer are based on no evidence, the Court may interfere and set aside such report.

The charge framed against the petitioner in Annexure-9 relates to disobedience of orders of superior authority, misleading the authority by providing false information and gross mis-conduct. The allegation is that the petitioner was transferred from PMU (Trans), GRIDCO and was posted as SDO, LD & TC Sub-Division, T.T.P.S. vide Office order dated 13.6.2001 and was accordingly relieved with effect from 10.7.2001. Instead of joining the

new assignment at Talcher, he remained at Bhubaneswar and represented on 16.7.2002 for modification of the transfer order on health ground. From the date of relieve, he remained on leave continuously on the ground of medical observation of problem related to kidney and submitted thirteen applications for extension of leave on very same ground. He did not submit any Medical Certificate along with the leave applications in support of medical observation. He was asked to appear before a Medical Board on 12.8.2003 and the Medical Board did not find any abnormality in his physical and mental ability and declared him fit for resuming duty. Therefore, his stay on leave for such a long period on medical ground is proved to be false. From the aforesaid conduct, it is clear that he has intentionally not joined the new assignment at Talcher and tried to avoid joining duty on health ground.

6. The petitioner in response to the said charge memo submitted his reply indicating the reasons for taking leave and also prayed for supply of certain documents as indicated in Annexure-10. Though it is alleged that the said documents were not supplied, it may not be material for the purpose of the case considering the stand taken by the petitioner in his reply to the charge sheet. The authorities not being satisfied with the explanation given, appointed an Enquiring Officer and the petitioner also participated in the enquiry. In course of enquiry witnesses were examined and documents were produced by both the parties and the Enquiring Officer submitted his report in April, 2005 finding the petitioner guilty of the charges. The learned counsel for the petitioner submitted that the report of the Medical Board was never placed before the Enquiring Officer and the said fact is borne out from the proceeding of the enquiry dated 28.8.2004. The Enquiring Officer has recorded in the proceeding dated 28.8.2004 that in course of enquiry it was felt and pointed out that the Confidential Letter No.23 dated 14.8.2003 of Dr. P.K. Nayak, Medical Officer, GRIDCO Dispensary is simply a forwarding letter but the detailed findings of the medical examination report is supported with the letter. This recording in the proceeding itself shows that the findings of the Medical Board constituted by GRIDCO had not been produced before the Enquiring Officer and only the forwarding letter of Dr. P.K. Nayak had been produced. The charge framed against the petitioner is based on the report of the Medical Board that the petitioner was fit physically and mentally to resume duty, but he availed leave on a false plea that he was suffering from kidney problem. Therefore, the first submission of the learned counsel for the petitioner is substantiated from the above recording. We find that in course of enquiry Dr. B.C. Satpathy, Medical Officer, GRIDCO Dispensary, Dr. P.K. Nayak, Ex-Medical Officer, GRIDCO Dispensary and Dr. Biswa Kalyani Das, Lady Medical Officer, GRIDCO Dispensary were examined. Dr. B.C. Satpathy, who had first examined the

petitioner has stated in course of enquiry that he had not seen the contents of report and it was not shown to him by Dr. P.K. Nayak. He also stated that he had seen the prescriptions and connected papers submitted by the petitioner at the time of medical examination by the GRIDCO Medical Board. He also stated that the petitioner was advised some investigations and there was some abnormality with him for which he had been referred to Dr. Sahu, Urologist of S.C.B. Medical College and Hospital, Cuttack. He has also stated that the petitioner was being treated by Dr. Sahu. This witness has also stated that there was no test conducted on the petitioner and the opinion of the Medical Board was formed only on the basis of the documents submitted by the petitioner. Dr. P.K. Nayak has also stated in his evidence that none of the doctors in the Medical Board was Urologist and no test had been conducted on the petitioner as Laboratory facilities were not available in the GRIDCO Hospital so far as Urological diseases are concerned. The Board only verified the available medical records and formed its opinion. Dr. Biswa Kalyani Das also stated that no physical test was conducted in the GRIDCO Dispensary at the time of medical examination and all the three doctors of the Board only examined the records produced by the petitioner relating to his disease. It is, therefore, clear from the evidence of these three doctors that in course of examination by the Medical Board, only documents produced by the petitioner in relation to his ailment were considered by the Board and the petitioner was not put to physical examination even though the petitioner alleged that he was suffering from ailment relating to kidney. The Board did not have an Urologist in the panel to examine the said documents. No facilities were available in the GRIDCO Hospital for any kind of pathological test relating to Urology. All the three doctors admitted that their opinion is based on the documents produced by the petitioner in relation to his ailment. As is evident from the evidence of Dr. B.C. Satpathy, the petitioner had some problem relating to his kidney and he had advised him to contact Dr. Sahu, who was then working as Professor of Urology in the S.C.B. Medical College and Hospital, Cuttack. Therefore, it was the duty of the Medical Board to examine the petitioner physically to find out as to whether he had any ailment relating to his kidney or not. Though an opinion can be formed on the basis of the reports submitted by the petitioner, since the dispute was as to whether the petitioner was having any problem relating to his kidney or not, it would have been better on the part of the Medical Board to put the petitioner to physical medical test to find out the truth or otherwise of the claim made by the petitioner. Prima facie from the evidence of Dr. B.C. Satpathy, we are satisfied that the petitioner was having some problem in relation to his kidney for which he had been directed to contact Dr. Sahu, an Urologist for treatment. Therefore, all the leave applications submitted by

the petitioner indicating that he was under treatment of Dr. Sahu cannot be said to be false as held by the Enquiring Officer. The report of the Medical Board which formed the basis of the charge having not been produced before the Enquiring Officer and the evidence of the three doctors being that no test was conducted and an opinion was formed only on the basis of the documents produced by the petitioner, we are of the view that the findings of the Enquiring Officer that the petitioner submitted leave applications on false ground is unsustainable and without any basis specially in view of the evidence of Dr. B.C. Satpathy. Accordingly, we set aside the findings of the Enquiring Officer and consequently the order of punishment in Annexure-26 is also set aside.

The writ petition is accordingly allowed.

Writ petition allowed.

2011 (I) ILR -CUT- 362

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

JCRLA. NO.54 OF 2001 (Decided on 24.11.2010)

DUKHIA @ DUKHABANDHU SINGH ……. Appellant.

.Vrs.

STATE OF ORISSA ……..Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.302.

Murder – Prosecution relied on the circumstantial evidence that the deceased was last seen with the appellant some time before his death – Information regarding the death of the deceased was given to P.W.1 at 5 P.M. – P.W's 3 & 6 stated to have seen the deceased with the appellant at 1.30 P.M. – There is nothing on record to show that the deceased and the appellant were seen immediately before the occurrence – Apart from the above prosecution case is that the axe seized had contained blood but the chemical examination report is silent as to whether the blood found on the axe is that of the deceased or not – Law is well settled that when a case is based on circumstantial evidence the chain of circumstances proved by the prosecution must point at the guilty of the appellant leaving no scope to entertain a doubt – In this case even if the evidence of P.Ws 3 & 6 is accepted to the extent that they had seen the appellant and deceased at 1.30 P.M., there is no other evidence to connect the appellant with the alleged crime – Held, prosecution miserably failed to prove the charge against the appellant – Impugned judgment is set aside

(Para 5)

For Appellant - Mrs. Pramila Mohanty.
For Respondent - Addl. Govt. Advocate.

This appeal is directed against the judgment and order dated 9.7.2001 passed by the learned Sessions Judge, Dhenkanal-Angul, Dhenkanal in S.T.Case No.100D of 1998 convicting the appellant for commission of offence under Section 302 of the Indian Penal Code (in short 'IPC') and sentencing him to imprisonment for life.

2. The deceased is a resident of village Tipei Jharan. On the date of occurrence, he had gone to Bali Jharan to purchase Mahua Flowers. At about 5 P.M., his son, P.W.1, received information that the deceased bad been murdered by some one. Thereafter, he went to the village Sundarmundi and found the dead body of the deceased lying on the ridge of

a paddy field. There was bleeding from the head of the deceased. Thereafter, P.W.1 and others guarded the dead body till morning and on the next day, P.W.1 went to Mahabir Road Out-post and presented the written report. On the basis of the said report, a station diary entry was made and F.I.R. was sent to Parjanga Police Station for registration. Investigation was taken up and on completion of investigation, charge sheet was submitted against the appellant for commission of offence under Section 302 of IPC.

3. Prosecution examined nine witnesses whereas none was examined on behalf of defence. The plea of defence is complete denial of the prosecution case. Out of nine witnesses examined by the prosecution, P.W.1 is the informant and is also son of the deceased. P.W.2 claims that the appellant had made an extra judicial confession before him admitting to have committed murder of the deceased. P.Ws.3 and 6 are the witnesses, who have stated that they had seen the appellant with the deceased on the date of occurrence. P.W.4 is a Constable, who accompanied the dead body for post-mortem examination and P.W.5 is the Doctor, who conducted post-mortem examination. P.W.7 is a seizure witness. P.W.8 is the A.S.I. of Mahabir Out-post, who received the written report and conducted initial investigation. P.W.9 is the I.O.

The trial Court accepting the evidence of P.Ws.3 and 6 came to a conclusion that the deceased was last seen with the appellant and also relying on the evidence of P.Ws.2 and 5 came to a conclusion that it is the appellant, who committed murder of the deceased.

4. Mrs. Mohanty, learned counsel appearing for the appellant assails the impugned judgment on the ground that out of two circumstances claimed to have been proved by the prosecution, the so-called extra judicial confession made before P.W.2 is unacceptable under law. The only other evidence against the appellant is the evidence of P.Ws.3 and 6, who claim to have seen the deceased along with the appellant some time before the occurrence. According to the learned counsel, on the basis of evidence of P.Ws.3 and 6, no conviction can lie as the case of the prosecution is totally dependant on circumstantial evidence and the prosecution has failed to prove the chain of circumstances pointing at the guilt of the appellant.

Learned counsel for the State relied on the evidence of P.W.2 so far as it relates to extra judicial confession as well as the evidence of P.Ws.3 and 6 who claim to have been seen the deceased prior to his death along with the appellant.

5. As stated earlier, out of nine witnesses examined on behalf of the prosecution, P.W.1 is the informant and is also son of the deceased – He, in his evidence, has stated that from the morning of the date of occurrence the deceased and gone by his bicycle to village Bali Jharan. On the said date at

about 5 P.M. his father's elder sister's son, namely, Adwait came to his house along with his cousin brother and informed that the deceased has been murdered by somebody. Accordingly, he went to the spot near village Sundaramundi and found the dead body of the deceased lying on the ridge of the land. He also found bleeding injuries on the head apart from other parts of the body of the deceased. Since he arrived near the dead body at about 8 P.M., he along with others guarded the same till morning and, thereafter, he went to Mahabir Road Outpost and submitted a written report. P.W.2 is a witness to the seizure under exhibit-3 and also claims that the appellant made an extra judicial confession before him. He, in his evidence, has stated that on 25.4.1998 the appellant, who was hiding in village Bali Jharan, was brought to the mango tope of his village by Pranabandhu Singh and Narottam Singh and others. He went to the mango tope at about 11.30 A.M. and found the appellant tied up. On his asking, the appellant is alleged to have stated that he committed murder of the deceased for money. Though such statement was made by P.W.2 in his deposition, P.W.9, the I.O., in his cross-examination has stated that during investigation, P.W.2 had not stated before him that on his asking, the appellant admitted to have committed murder of the deceased for money. Apart from above, as stated by P.W.2, at the time he visited the mango tope, the appellant had been tied by some of the youth belonging to the same village. Under these circumstances, even if any statement is made by the appellant, it can not be said to be a voluntary statement and, therefore, the evidence of P.W.2 with regard to extra judicial confession can not be accepted.

The other circumstance on which prosecution placed reliance is that the deceased was seen with the appellant some time before his death. P.Ws.3 and 6 were examined by the prosecution to support the said circumstance. P.W.3, in his evidence, has stated that on the date of occurrence, he was suffering from fever. At about 1.30 P.M. while he and P.W.6 were returning by their bicycles, they found the deceased sitting on a stone keeping his bicycle nearby. The appellant was standing near him with a small axe. Similar is the statement of P.W.6. Even if the evidence of these two witnesses is accepted, the prosecution has been able to prove that the appellant was found with the deceased at about 1.30 P.M. on the date of occurrence. The information regarding death of the deceased was given to P.W.1 at 5 P.M.. There is nothing on record to show that the deceased and the appellant were seen immediately before the occurrence. Apart from above, though it was claimed by the prosecution that the axe seized had contained blood, the chemical examination report is silent as to whether the blood found on the axe is that of the deceased or not. Law is well settled that when a case is based on circumstantial evidence, the chain of circumstances proved by the prosecution must point at the guilt of the

appellant leaving no scope to entertain a doubt. Here is a case where even if the evidence of P.Ws.3 and 6 is accepted to the extent that they had seen the appellant and the deceased at 1.30 P.M., there is no other evidence to connect the appellant with the alleged crime. We are therefore of the view that the prosecution has miserably failed to prove the charge against the appellant.

6. Accordingly, for the reasons stated above, we allow the appeal and set aside the impugned judgment and order dated 9.7.2001 passed by the learned Sessions Judge, Dhenkanal-Angul, Dhenkanal in S.T.Case No.100D of 1998 convicting the appellant-Dukhia @ Dukhabandhu Singh for commission of offence under Section 302 IPC. The appellant, who is in custody, be set at liberty forthwith unless his detention is required in any other case.

Appeal allowed.

2011 (I) ILR -CUT- 366

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

JCRLA NO.36 OF 2001 (Decided on 24.11.2010)

PARSU MUNDA ……. Appellant.

.Vrs.

STATE OF ORISSA ……. Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.34.

In order to attract Section 34 I.P.C. it is not sufficient to prove, that each of the participating culprits had the same intention to commit certain act – The requisite ingredient of Section 34 is that each must share the intention of the other.

Section 34 I.P.C. speaks of conjoint complicity – In the present Case all of a sudden the present appellant gave a slap to the deceased but his brother gave the fatal blow by a knife – There is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit – Moreover the parties are tribal and they act more on passion than reason – Had the appellant nurtured any intention to kill the deceased he would have come to the spot unarmed – Held, conviction of the appellant modified to one U/s.323 I.P.C. and he was sentenced to suffer R.I. for one year.

(Para 7,8 & 9)

For Appellants - M/s. Siladitya Ray, C.R.Nandi, N.R.Tripathy, B.L.Tripathy, Binapani Tripathy & Nandini Tripathy.

For Respondent - Additional Government Advocate

Learned trial court found the appellant and his brother Soma Munda guilty of offence under section 302/34 I.P.C. and sentenced each of them there under to suffer imprisonment for life. The judgment and order of sentence passed by learned Sessions Judge, Sundargarh in S.T. No.13 of 1997 is impugned in this appeal.

2. The occurrence happened at about 11.00 P.M. in the night of 23.9.1996 in the house of deceased Saranga Munda. The prosecution case as revealed from the record is that at the relevant time deceased Saranga Munda and his wife (P.W.7) were sleeping on the verandah of their house. Both the convicts, the present appellant and his brother Soma Munda (who according to the report from the offence has not preferred any appeal) entered inside the house breaking open the door. The present appellant

Parsu Munda gave two to three staps on the cheek of the deceased Saranga Munda and Co-convict Soma Munda gave blow to the chest of the deceased by a knife. It is further alleged that after such assault both the convicts pushed the deceased inside the house and fled away from the spit. On the basis of the report lodged by Birju Munda (P.W.1), who happens to be the son of the deceased, the present case was registered and P.W.11 took up investigation, who on completion of investigation filed charge-sheet implicating the present appellant and his brother Soma Munda in offence under Section 302/34. I.P.C.

3. Prosecution has examined 11 witnesses to prove the charge leveled against the appellant and his co-convict. P.Ws. 1 to 7 are asserted to be the eye witnesses to the occurrence. P.Ws. 8 and 10 are witnesses to some relevant seizures. P.W.9 is the Medical Officer, who conducted post-mortem examination on the dead body of the deceased and P.W.11 is the Investigating Officer.

The defence plea is one of complete denial of the charge but none was examined on behalf of the defence.

4. Learned trial court has returned finding of guilt against the appellant and his brother on the basis of the evidence of P.Ws.6 and 7, who are son and wife respectively of the deceased. On thorough consideration of the evidence of P.Ws. 1 to 5 and cross-reference to the evidence of the Investigating Officer (P.W.11), learned trial Court has rightly disbelieved P.Ws. 1 to 5 as eye witnesses to the occurrence inasmuch as all of them have been contradicted under Section 145 of the Evidence Act, so far as their assertion to have witnessed the occurrence is concerned.

5. Learned counsel for the appellant submits that there being discrepancies in evidence of P.Ws. 6 and 7 and there being no corroboration of their evidence in material particulars, learned trial court has erred in recording conviction against the appellant under Section 302/34, I.P.C. Alternatively, it is contended that even if P.Ws. 6 and 7 are believed, the present appellant should not have been convicted under Section 302, I.P.C. by aid of Section 34 thereof, because it is the consistent prosecution case that the present-appellant gave only two/three slaps to the deceased.

Learned Addl. Government Advocate on the other hand supports the impugned judgment.

6. Admittedly, the occurrence happened inside the house of the deceased. The present appellant is the son-in-law of the deceased, he being the husband of P.W.3, who is one of the daughters of the deceased. It is further admitted that the occurrence happened at about 11.00 P.M. in the night. From the evidence of the witnesses, i.e. P.Ws.1 to 7, it is clear that by the time of occurrence all inmates in the house had already retired to sleep and the deceased at that time was sleeping along with his wife (P.W.7) on

the verandah of the house. The appellant and his brother are alleged to have entered inside the house by breaking open the door. It is the consistent prosecution case that the present appellant only gave two to three slaps on the cheek of the deceased and thereafter his brother Soma Munda assaulted the deceased by the knife he was holding. Learned trial court has convicted the present appellant by aid of Section 34, I.P.C.

7. It is well settled in law that in order to attract Section 34, I.P.C., it is not sufficient to prove that each of the participating culprits had the same intention to commit a certain act. What is the requisite ingredient of Section 34 I.P.C. is that each must share the intention of the other. It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the at of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A criminal court fastening vicarious liability must satisfy itself as to the prior meeting of minds of the principal culprit and his companions, who are sought to be constructively made liable in respect of every act committed by the former. There is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. It is further well settled in law that "common intention" is a question of fact and the existence or otherwise of the same depends upon the facts and circumstances of each case.

8. Coming to the evidence in the present case, we on careful scrutiny of the evidence of P.Ws.1 to 5 and on cross-reference to the evidence of the Investigating Officer (P.W.11), are satisfied that the learned trial court has rightly disbelieved P.Ws. 1 to 5 as eye witnesses to the occurrence. He has based the conviction of the appellant and his co-convict on the basis of the evidence of P.Ws. 6 and 7, P.W.7, who is the wife of the deceased has testified that in the night she and her husband had slept on the verandah of the house; the appellant and his brother entered inside the house by breaking open the door and all of a sudden the present appellant gave a slap to her husband and then accused Soma gave a knife blow on the chest of her husband. She has further testified that out of fear she fled away from the verandah. P.W.6, who is the son of the deceased, has testified that in the night of occurrence his father was sleeping and he heard somebody breaking the door of the verandah; he came out and found Parsu (present appellant) breaking the door of the verandah and with him accused Soma was present. He has further testified that the present appellant gave a slap to his father and accused Soma pierced a knife over the chest of his father.

P.W.6 has further testified that after the assault the appellant and his brother pushed his father inside the house and seeing that he fled from the house apprehending danger. There is no effective cross-examination of the aforesaid two witnesses regarding their presence in the spot house or regarding the scope on their part to see the occurrence in the moonlit night. They are also corroborated by the Medical Officer (P.W.9). From the evidence of the aforesaid two witnesses it is clear that the appellant and his brother came to the spot house, but we are not able to accept their assertion that both of them entered inside the house by breaking open the door because there is nothing on record to show that there was mark of violence on the door of the spot house. The appellant is the son-in-law of the deceased. From the defence suggestion to the prosecution witnesses, it is found that there was some ill-feeling between him and the deceased. The appellant with his brother might have come to the house of the deceased to confront him about the matter. There is also evidence to show that the appellant along with his wife (P.W.3) was staying in the same village. We can not lose sight of the fact that the parties are tribal and they act more on passion than reason. The appellant being guided by some passion might have come to the house of the deceased in odd hours of the night and his brother might have accompanied him. Therefore, we shall accept the evidence of P.Ws.6 and 7 to the extent that in the night of occurrence the appellant and his brother came to the house of the deceased and we do not accept the assertion of the witnesses (P.Ws.6 and 7) that they so came by breaking open the door. From the evidence of P.Ws.6 and 7, it is further clear that the present appellant gave only one slap to the deceased and his brother gave a stab blow to the deceased by the knife he was holding. Learned trial court has convicted the present appellant by aid of Section 34, I.P.C.

Learned Additional Government Advocate submits that as both the appellant and his brother came together and the appellant had knowledge about the fact that his brother was armed with a knife and as they left the spot together, on the basis of their conduct learned trial court has rightly convicted the present appellant by aid of Section 34, I.P.C.

9. In our discussion supra we have discussed the law relating to Section 34, I.P.C. which speaks of conjoint complicity. In the present case, there is no evidence to show that the appellant and his brother left the spot together. P.W.6 is speaking about two spots. He has testified that the appellant and his brother assaulted the deceased on the verandah of the house and then they pushed the deceased inside the house. We are not able to accept the evidence of P.W.6 on this aspect in as much as the Investigating Officer vide Ext.9 has seized the bloodstained earth from one spot and the Investigating Officer had designedly not mentioned in the

seizure list (Ext.9) as to whether he has seized the bloodstained earth from the verandah or from the room where the dead body of the deceased was lying. In view of such fact, it might have so happened that the occurrence might have taken place either on the verandah and thereafter the deceased might have gone inside the room or the occurrence might have happened inside the room and not on the verandah. We therefore, are not able to accept the prosecution case to the extent that after the assault by c-convict Soma Munda with the knife the appellant and said Soma Munda pushed the deceased inside the house. Though the appellant and his brother Soma Munda came together to the spot house, it is clear from the evidence of P.Ws. 6 and 7 that the present appellant only gave a stab blow and his brother Soma Munda assaulted the deceased with the knife which is the fatal blow and cause of death of the deceased. Had the appellant nurtured any intention to kill the deceased, he would have come to the spit armed, but he had come to the spot unarmed. The spot house is inhabited by the deceased and his sons. In view of such fact, the appellant's brother might have brought the knife to defend in the event they are caught while entering into the spot house, or in the event, they are attacked by the inmates of the house. From the facts proved it can not be held that the appellant had any knowledge about the fact that his brother Soma Munda was armed with a knife while accompanying him (appellant).Taking into consideration the entire evidence on record, we are unable to hold the conduct of the appellant to be incriminatory, to fasten the liability on him by aid of Section 34, I.P.C. The appellant is guilty for his individual act and he can not be be held guilty for the offence of murder. As discussed supra, the appellant having given a slap to the deceased he is liable under Section 323, I.P.C.

10. In view of our discussion supra, we modify the conviction of the appellant to one under Section 323, I.P.C. and sentence him to suffer R.I. for one year there under.

11. With the aforesaid modification of the conviction and sentence, the appeal is allowed in part.

It is submitted by the learned counsel for the appellant that though the appellant is now on bail, he has already suffered the sentence awarded to him. If that be so, the appellant Parsu Munda be set at liberty forthwith, if his detention is not required in connection with any other case.

Appeal allowed in part.

2011 (I) ILR -CUT- 371

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

W.P.(C) NOS.9040, 9041 OF 2009 (Decided on 22.12.2010)

M/S. BERHAMPUR COLD STORAGE (P) LTD. & ORS. …… Petitioners.

.Vrs.

ICICI BANK LTD. & ANR. ……. Opp.Parties.

RECOVERY OF DEBTS DUE TO BANKS & FINANCIAL INSTITUTIONS ACT, 1993 (ACT NO.51 OF 1993) – Ss.17, 18, 19 & 39, r/w Section 5 of the Arbitration & Conciliation Act, 1996.

O.P. – Bank filed OA before the Tribunal for recovery of debt – Petitioners-defendants filed petition saying that the DRT lacks jurisdiction in view of the Arbitration Clause in the agreement.

In this case some of the defendants before the DRT are not parties to the arbitration agreement – Moreover when parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to Court to have the disputes settled.

RDB Act is a special statute vesting exclusive jurisdiction to the DRT with regard to claims by Banks or financial institutions in excess of rupees ten lakhs – So the supposed conflict between the non-obstante clause in Section 5 of the Arbitration Act and section 34 of the RDB Act is to be resolved by applying the principle expressed in the maxims *generalia specialiabus non derogant and generalibus specialia derogant* and the Arbitration Act, 1996 shall have to give way to the RDB Act, 1993 for primacy – Held, even if there is a valid arbitration agreement between the parties the DRT, Cuttack would have exclusive jurisdiction over the dispute between the parties.

(Para 28,29,30)

Case laws Referred to:-

1.AIR 1997 Kerala 273 : (The Industrial Credit & Investment Corporation of India Ltd. and etc.-V-Vanjinad Leathers Ltd. & etc.)
2.1(2001) BC 656(SC) : (Solidaire India Ltd.-V-Fair Growth Financial Services Ltd. & Ors.)
3.(2000) 4 SCC 406 : (Allahabad Bank-V-Canara Bank & Anr.)
4.121(2005) D.L.T.241 : (Kohinoor Creations & Ors.-V-Syndicate Bank).
5.(2002) 4 SCC 275 : (Union of India & Anr.-V-Delhi High Court Bar Association & Ors.)
6.AIR 1973 SC 207 : (State of Uttar Pradesh & Anr.-V-Janki Saran

Kailash Chandra & Anr.).
7.(1994) 1 SCC 502 : (Svenska Handelsbanken & Ors.-V-Indian Charge Chrome Ltd. & Ors.)
8.(2003) 5 SCC 531 : (Sukanya Holdings Pvt. Ltd.-V-Jayesh H.Pandya & Anr.).
9.(1993) 2 SCC 144 : (Maharashtra Tubes -V-State Industrial & Investment Corporation of Maharashtra).
10.(1981) 1 SCC 315 : (Life Insurance Corporation of India -V-D.J.Bahadur).
11.(1984) 4 SCC 657 : (Sudarsan Chits India Ltd.-V-O.Sukumaran Pillai).

For Petitioners - M/s. Milan Kanungo, D.Pradhan, Y.Mohanty, S.K.Mishra, S.N.Das, B.P.Pattanaik & B.B.Panda.
For Opp.Parties – M/s. R.K.Mohanty, Rajit Ray, S.K. Singh, R.K.Mohanta, N.Hota, A.Pradhan & B.R.Behera.

C.R.DASH, J. Contents and relief(s) claimed in both the writ petitions being same, they are taken up together for disposal by this common order.

2 Whether the Debt Recovery Tribunal, Cuttack ('D.R.T.'in short) (opp.party no.2 in both the writ petitions) lacks jurisdiction to entertain Original Application No.96 of 2009 (defendants whereof are the petitioners in W.P.(C) No.9040 of 2009) and Original Application No.88 of 2009 (defendants whereof are the petitioners in W.P.(C) No.9041 of 200(0 is the sole question that arises for consideration in the present writ petition.

3 Defendants in O.A. No.96 of 2009 and defendants in O.A. No.88 of 2009 filed different Misc. Applications raising the issue of lack of jurisdiction by the D.R.T., Cuttack to entertain the aforesaid Original Applications filed by the present opposite party no.1 – Bank seeking issuance of Recovery Certificates. They passed for deciding the issue of jurisdiction as a preliminary issue and prayed for stay of the proceedings in both the O.As. direction the parties to seek for settlement of their dispute by arbitration in view of existence of Arbitration Clause in the agreement between opposite party no.1 –Bank and petitioner no.1 to 6 in W.P.(C) No.9040 of 2009 (defendant nos.1 to 6 before the D.R.T.) as well as between the opposite party no.1 – Bank and petitioner nos. 1 to 6 in W.P.(C) No.9041 of 2009 (defendant nos. 1 to 6 before the D.R.T.), issue raised in all the M.As. arising out of the aforesaid O.As. being same, learned D.R.T., Cuttack disposed of the same by common order dated 17.06.2009 passed separately in both the O.As., and rejected the claim of the present petitioners. Said common order dated 17.06.2009 passed in the M.As. arising out of O.A. Nos.96 of 2009 and 88 of 2009 have been impugned in the present writ petitions.

4 Facts relevant in W.P.(C) No.9040 of 2009 are as follows –

Opposite party no.1 – Bank entered into a Management and Collection Agreement (M & C Agreement) vide Annexure-2/A with petitioner nos.1 to 6 (defendant nos. 1 to 6 before the D.R.T., Cuttack) on 07.09.2005 appointing petitioner nos.1 to 6 as its Management & Collection Agent (M & C Agent) as well as Warehousing Management Agent (W.M.A.). As per the agreement vide Annexure-2/A, it was the duty of petitioner nos. 1 to 6 to identify borrowers for Warehouse Receipt Based Financing Scheme (W.R.B.F. Scheme) for extending agricultural loans. Petitioner nos.7 to 13 (defendants no.7 to 13 before the D.R.T., Cuttack) are the persons, to who opposite party no.1 – Bank extended financial assistance as loan for a period of 12 months under the W.R.B.F., Scheme. Loans were advanced to petitioner nos. 7 to 13 keeping their agricultural produces as security, which were pledged on lien basis to opposite party no.1 – Bank in accordance with the W.R.B.F. Scheme. Petitioner nos. 1 to 6 being the M & C Agents had the duty to identify the borrowers, keep the agricultural produces pledged by the borrowers in their godowns / warehouses and purchase the produces as and when required in accordance with the scheme. They (petitioner nos. 1 to 6) were not recipients of any loan from the opposite party no.1 – Bank. Opposite party no.1 – Bank filed O.A. No.96 of 2009 seeking issuance of a Recovery Certificate for a sum of Rs.23,35,01,220/- (twenty-three crores thirty-five lakhs one thousand two hundred twenty) claiming that all the petitioners were jointly and severally liable to repay the aforesaid amount.

Same is the fact in W.P.(C) No.9041 of 2009, where petitioner nos. 1 to 6 (defendants no.1 to 6 before the D.R.T.) are the M & C Agents under the W.R.B.F. Scheme and petitioners nos. 7 to 10 (defendants no.7 to 10 before the D.R.T.) are the individual borrowers under the said scheme.

5. In both the O.As. the defendants (petitioners in both the writ petitions) filed Misc. Applications questioning jurisdiction of the D.R.T., Cuttack on the following grounds –

(I) The basis of the proceeding before the D.R.T., Cuttack by opposite party no.1 – Bank being the M & C Agency Agreement (filed as Annexure-2/A in both the writ petitions), the Tribunal is completely devoid and deprived of any jurisdiction in view of Clause-39 of the said Agreement (Annexure-2/A) providing for settlement of all disputes arising between the parties pertaining to or arising out of the agreement in accordance with the Arbitration and Conciliation Act, 1996, subject to exclusive jurisdiction of Courts at Mumbai.

(II) In the Civil Suit bearing C.S. No.87 of 2008 filed by defendant nos. 7 and 8 in O.A. No.88 of 2009 and in C.S. No.88 of 2008

filed by defendant no.6 in O.A. No.96 of 2009 before the competent Court at Berhampur, the Bank, without filing a written statement, took a stand that the Suits were not maintainable in view of the Arbitration Clause, i.e., Clause-39 in Annexure-2/A.

(III) There have been various correspondence between the parties depicting suggestion and acceptance of names of sole arbitrators prior to filing of the original applications.

6. Opposite party no.1 – Bank objected to the claim of the petitioners before the D.R.T. on the ground that in view of Section 34 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ('R.D.B. Act' in short). Which given overriding effect to the said Act as against other remedies, opposite party no.1 – Bank was within it s competence to move the D.R.T., Cuttack for issue of Recovery Certificate in both the O.As. and the D.R.T. alone has the exclusive jurisdiction to try the claims.

7. Learned D.R.T., Cuttack, on consideration of the contentions raised by learned counsels for the parties, found exclusive jurisdiction with it to try the claim of opposite party no.1 – Bank in view of overriding effect of Section 34 of the R.D.B. Act and dismissed the Misc. Applications filed by the defendants.

8. Mr. Kanungo, learned counsel for the petitioners in both the writ petitions reiterates the same contentions, as were raised before the D.R.T., Cuttack. He lays stress primarily on Clause-39 of the M & C Agreement in Annexure-2/A in both the writ petitions providing for settlement of dispute by arbitration and conduct of the opposite party no.1 – Bank in invoking Clause-39 of Annexure-2/A to get C.S. No.87 of 2008 and C.S. No.88 of 2008 dismissed on the basis of said arbitration clause, i.e. Clause-39 in Annexure-2/A. Referring to order dated 04.01.2008 passed by Hon'ble the Chief Justice of this Court on a petition filed by some of the defendants under Section 11 (6) of the Arbitration and Conciliation Act, 1996, Mr. Kanungo, learned counsel for the petitioners submits that the order dated 04.01.2008 so passed shows that the Hon'ble Chief Justice was of the opinion that the dispute between the parties should be referred to the Arbitration though, of course, by a competent Court. Opposite Party no.1 – Bank having not questioned maintainability of the Arbitration Proceeding before Hon'ble the Chief Justice, subsequent filing of the aforesaid O.As. by it (Bank) before the D.R.T. is barred by the principles of constructive res judicata. It is further submitted by Mr. Millan Kanungo, learned counsel for the petitioners that opposite party no.1 – Bank in a Notice under Section 11 of the Arbitration and Conciliation Act, 1996, which is dated 21.04.2008 addressed to defendant nos. 1 to 6 in O.A. No.88 of 2009, called upon to approve

appointment of any one of three retired judges of this Court as sole arbitrator to resolve the dispute as early as possible in terms of Clause-39 of the M & C Agreement. Lastly, it is submitted by Mr. Kanungo, learned counsel for the petitioners that Arbitration and Conciliation Act, 1996 being a later Special Act, the non-abstante clause in Section 5 thereof giving overriding effect to the provision of the Act shall prevail over the R.D.B. Act, which is a former Special Act. He relies on the case of The Industrial Credit and Investment Corporation of India Limited and etc. v. Vanjinad Leathers Ltd. and etc., AIR 1997 Kerala 273 and Solidaire India Ltd. vs. Fair Growth Financial Services Ltd. and others, 1 (2001) BC 656 (SC) to substantiate such contention.

9. Mr. R.K. Mohanty, learned counsel for opposite party no.1 – Bank on the other hand oppugns the contention raised by Mr. Kanungo, learned counsel for the petitioners on the ground that the D.R.T., Cuttack has got exclusive jurisdiction so far as the present dispute is concerned and no other remedy can be resorted to by the Bank in view of overriding effect of Section 34 of the R.D.B. Act. He relies on the case of Allahabad Bank vs. Canara Bank and another, (2000) 4 SCC 406 to substantiate his contention that the jurisdiction of the D.R.T. to adjudicate the dispute between the parties is exclusive. He further relies on the case of Kohinoor Creations and others vs. Syndicate Bank, 121 (2005) D.L.T. 241 to substantiate his contention that irrespective of existence of Arbitration Clause in the agreement between the concerned opposite parties and the Bank, jurisdiction of the Debt Recovery Tribunal constituted under the R.D.B. Act is not ousted by such Arbitration Clause.

10. Which of the two Acts would prevail ? Whether the provisions of Arbitration and Conciliation Act 1996 ('Arbitration Act' for short) override the R.D.B. Act is the question raised by the parties. Mr. Kanungo, learned counsel for the petitioners takes up through different judicial pronouncements and especially Sections 5 and 8 of the Arbitration Act and Section 34 of the R.D.B. Act to submit that both the statutes being Special Statutes and the Arbitration Act being a later statute, non-abstante clause in Section 5 of the Arbitration Act has to have over-riding effect irrespective of existence of a non-abstante clause in Section 34 of the R.D.B. Act. Mr. R.K.Mohanty, learned counsel for the opposite parties on the other hand takes up through different judicial pronouncements and different provisions of the R.D.B. Act including Section 34 thereof to contend that the D.R.T. has exclusive jurisdiction under the R.D.B. Act to try any dispute involving dues of a Bank or Financial Institution and even existence of arbitration clause in the agreement between the parties can not affect the exclusive jurisdiction of D.R.T. constituted under R.D.B. Act

11. Basis of present dispute between the parties is the existence of the Arbitration Clause, i.e., Clause-39 in the agreement between the parties vide Annexure-2/A. said Clause-39 reads thus –

> " All disputes between the parties here to pertaining to or arising out of this agreement shall be settled by the parties in accordance with the Arbitration and Conciliation Act 1996, as amended from time to time, and shall be subjected to exclusive jurisdiction of Courts at Mumbai."
>
> The aforesaid Agreement vide Annexure-2/A was executed between the parties on 07.09.2005. By that time both the aforesaid statutes were operating in the field. Whether the aforesaid clause in the Agreement vide Annexure-2/A binds the parties is dependent on the questions – (1) whether the D.R.T. constituted under the R.D.B. Act has exclusive jurisdiction to try the dispute in question and (2) whether the agreement providing for arbitration clause, as aforesaid, takes away jurisdiction of the D.R.T.

12. The Supreme Court, considered the provisions of the R.D.B. Act in the case of Allahabad Bank vs. Canara Bank (supra) while dealing with adjudication regarding debts due to Banks or Financial Institutions and the exclusivity of the jurisdiction of the D.R.T. The Hon'ble Supreme Court held thus :

> "21. In our opinion, the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to Banks or Financial Institutions ….. Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226, 227 of the Constitution). This is the effect of Section 17 and 18 of the Act.
>
> 22. We hold that the provisions of Section 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the appellant Bank is concerned."

Hon'ble Supreme Court, in the aforesaid case, further held that process of the Debt Recovery Tribunal was superior, because it intended to provide a speedy and summary remedy for recovery of thousands of crores of rupees which were due to Banks and Financial Institutions. Hon'ble Supreme Court in the case of ***Union of India and another vs. Delhi High Court Bar Association and others, (2002) 4 SCC 275,*** has reiterated the same view in paragraph-4 of the judgment, which reads thus –

"4. ….. According to Section 18 of the Act, no court or other authority is entitled to exercise any jurisdiction, powers or authority in relation to matters in respect of which such jurisdiction, powers and authority are vested with the Tribunal. Section 18, however, provides that the bar on other Courts and authorities to entertain such disputes shall not in any way oust the jurisdiction of this Court or the High Courts in exercise of their jurisdiction under Articles 226 and 227 of the Constitution."

12. The special machinery of the D.R.T. has been constituted as per the preamble of the R.D.B. Act, *"for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto". In paragraph-24 of the judgment in* ***Union of India vs. Delhi High Court Bar Association*** (supra), the Hon'ble Supreme Court has held thus –

"24. The manner in which a dispute is to be adjudicated upon is decided by the procedural laws which are enacted from time to time. It is because of the enactment of the Code of Civil Procedure that normally all disputes between the parties of a civil nature would be adjudicated upon by the civil courts. There is no absolute right in anyone to demand that his dispute is to be adjudicated upon only by a civil court. The decision of the Delhi High Court proceeds on the assumption that there is such a right. As we have already observed, it is by reason of the provisions of the Code of Civil Procedure that the civil courts had the right, prior to the enactment of the Debts Recovery Act, to decide the suits for recovery filed by the banks and financial institutions. This forum, namely, that of a civil court, now stands replaced by a Banking Tribunal in respect of the debts due to the bank……"

In view of the provisions contained in Sections 17, 18 and 19 of the R.D.B. Act and the aforesaid judicial pronouncement it is to be held that the Debt Recovery Tribunal has got exclusive jurisdiction in respect of debts which are in excess of rupees ten lakhs and for such a claim the D.R.T. becomes the original and obvious forum by a Bank or Financial Institution instead of a Civil Court.

14. Section 34 of the R.D.B. Act, which gives over-riding effect to the provisions of the Act as against any other law or instrument having effect by virtue of any law other than the R.D.B. Act, reads as follows :-

"34. Act to have over-riding effect. – (1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any

other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).

A cursory reading of the aforesaid provisions makes it clear that the provisions of R.D.B. Act shall have over-riding effect not only against other law for the time being in force (except those statute saved by Sub-section 2) but also against any instrument having effect by virtue of any law other than the R.D.B. Act. The agreement between the parties vide Annexure-2/A providing for the Arbitration Clause in Clause-39 is to be held as covered under 'any instrument' having effect by virtue of any law. We feel persuaded to take such a view in as much as Clause-39 being a part of a valid agreement vide Annexure-2/A can be said to have effect by virtue of the Contract Act and the Arbitration Clause vide Clause-39 in Annexure-2/A has the potentiality to bring the lis under the purview of the Arbitration Act. Section 34 as aforesaid sweeps the field and the R.D.B. Act shall have overriding effect not only against any other law for the time being in force but also against any agreement between the parties made in derogation of exclusivity of jurisdiction of the Tribunal constituted under the Act. Therefore, any agreement made in derogation of the R.D.B. Act shall not survive the sweep of Section 34 of the Act.

It is, however, contended that in view of Clause-39 in Annexure-2/A, provisions of the Arbitration Act becomes applicable to the disputes between the parties and the Arbitration Act being a later special statute shall have to override the provisions of the R.D.B. Act. We keep this question alive for discussion at the appropriate stage.

15. Hon'ble Supreme Court, as back as in 1973 in the case of ***State of Uttar Pradesh and another vs. Janki Saran Kailash Chandra and another, A.I.R. 1973 SC 207,*** had held that mere existence of an arbitration clause in an agreement does not by itself create an obligation on the Court to stay the suit or to give any opportunity to the defendant to consider the question of enforcing the Arbitration Clause. The right to institute a suit in some Court is conferred on a person having a grievance of civil nature,

under the General Law. The Arbitration Agreement does not by itself operate as a bar to the suit in the Court.

In the case of ***Svenska Handelsbanken and others vs. Indian Charge Chrome Ltd. and others,*** (1994) 1 SCC 502, Hon'ble Supreme Court held thus –

> "51. When parties agree to have their disputes settled by arbitration it does not mean that both have bound themselves not to go to court to have the disputes settled. At page 163 of Russel on Arbitration, Twentieth Edn. It is stated that "a party to a contract to refer disputes to arbitration has a perfect right to bring an action in respect of those disputes, and the court has jurisdiction to try such disputes. Any provision to the contrary would be an ouster of the jurisdiction of the Courts.
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> 52. Lord Macmillan in the House of Lords decision in Heyman v. Darwins Ltd. pointed out as under :
>
> I venture to think that not enough attention has been directed to the true nature and function of an arbitration Clause in a contract. It is quite distinct from the other clauses. The other Clauses set out the obligations which the parties undertake towards each other hinc inde. But the arbitration Clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution.
>
> 53. It may be that even after entering into an arbitration Clause any party may institute legal proceedings. It is for the other party to seek stay of the suit by showing the arbitration Clause and satisfying the terms of the provisions of law empowering the court to stay the suit …"

Though the aforesaid judgment was rendered by Hon'ble Supreme Court in the context of Arbitration Act, 1940, the principles laid down therein would hold good even for the purpose of consideration of the question under the Arbitration Act, 1996. The Hon'ble Supreme Court, by the aforesaid judgment, we feel, has set down applicable legal principles, so far as effect of arbitration clause in an agreement and liberty of a party to such agreement to move the Court for settlement of dispute is concerned.

16. Reliance is placed by Mr. Millan Kanungo, learned counsel for the petitioners on Sections 5 and 8 of the Arbitration and Conciliation Act, 1996, which are extracted below for ready reference:-

> **"5. Extent of judicial intervention**:

Notwithstanding anything contained in any other law for the time being in force, in matters governed by this part, no judicial authority shall intervene except where so provided in this Part.

8. Power to refer parties to arbitration where there is an arbitration agreement:

(1) A judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.

(2.) The application referred to in sub-section (1) shall not be entertained unless it is accompanies by the original arbitration agreement or a duly certified copy thereof.

(3.) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

It is the established principle that while examining a particular provision of a statute to find out whether the jurisdiction of a Court is ousted or not, the principle of universal application is that ordinarily the jurisdiction may not be held to be ousted unless the very statutory provision explicitly indicates or even by inferential conclusion the Court arrives at the same when such a conclusion is the only conclusion.

The Arbitration and Conciliation Act, 1996 does not contain any provision explicitly ousting jurisdiction of a Court except what is provided in Section 5, and Section 8 thereof does not restrict right of a party to maintain a suit in express term, rather it confers primacy on the Court to determine the question with regard to existence of an arbitration agreement.

17. Hon'ble Supreme Court in their landmark pronouncements in Sukanya Holdings Pvt. Ltd. vs. Jayesh H. Pandya and another, (2003) 5 SCC 531, has clearly ruled that the Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the arbitration agreement do not take the steps stipulated under Section 8 of the Act. Considering the statutory provisions, the Hon'ble Supreme Court held thus :-

"12. For interpretation of Section 8, Section 5 would have no bearing because it only contemplates that in the matter governed by Part-I of the Act, judicial authority shall not intervene except where so provided in the Act. Except Section 8, there is no other provision in the Act that in a pending suit, the dispute is required to be referred to the arbitrator. Further, the matter is not required to be referred to the arbitral tribunal, if – (1) the parties to the arbitration agreement have

not filed any such application for referring the dispute to the arbitrator; (2) in a pending suit, such application is not filed before submitting first statement on the substance of the dispute; or (3) such application is not accompanied by the original arbitration agreement or duly certified copy thereof. This would, therefore, mean that Arbitration Act does not oust the jurisdiction of the Civil Court to decide the dispute in a case where parties to the Arbitration Agreement do not take appropriate steps as contemplated under Sub-sections (1) & (2) of Section 8 of the Act.

13. Secondly there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

14. Thirdly, there is no provision – as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against his, under Section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties who have not joined in such application.

15. The relevant language used in Section 8 is –"in a matter which is the subject matter of an arbitration agreement". Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of Section 8. The word 'a matter' indicates entire subject matter of the suit should be subject to arbitration agreement.

16. The next question which requires consideration is – even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act ? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not

contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

Admittedly, in the present case some of the defendants of both the O.As. pending before the D.R.T. are not parties to the arbitration agreement. According to opposite party no.1 Bank all the defendants are jointly and severally liable. Learned counsels for the parties however, did not choose to address us on the aspect of applicability of Section-8 of the Arbitration Act and as to whether learned D.R.T. should have referred the parties to Arbitration by invoking Section-8. They have confined their submission as to which provision between Section-5 of the Arbitration Act and Section-34 of the R.D.B. Act has got primacy. We, therefore, refrain ourselves from commenting on merit regarding applicability of Section-8 of the Arbitration Act to the facts of the present case.

18 In view of the above we are inclined to hold that, the D.R.T. having replaced Civil Court so far as the dispute in question is concerned, and it is having original jurisdiction to try the present lis, it's jurisdiction is not ousted or taken away by virtue of Clause-39 in Annexure-2/A. Opposite party no.1 Bank, can not therefore, be faulted for approaching the D.R.T. as from our discussion it is clear by now that existence of an arbitration agreement itself does not prevent a party from moving the competent court.

19. It is clear from out discussion by now that the non obtstante Clause in Section 5 of the Arbitration Act shall come into play after a dispute is brought before an arbitrator for settlement in accordance with Part-1 of the Act. Unless a matter is brought for arbitral proceeding in accordance with the provisions of the Act, the non obstante clause in Section 5 of the Act can not have overriding effect against any provision of any other Act. We have already held that existence or Arbitration Clause in an agreement does not ipso facto oust the jurisdiction of a competent court or the jurisdiction of the D.R.T. after coming into force of the R.D.B. Act. Unless the competent court exercises its jurisdiction under Section 8 of the Arbitration Act in favour of the party seeking settlement of dispute through arbitration, such court continues to have jurisdiction over the matter and the non obstante clause in Section 5 of the Act does not come into play in such situation to have overriding effect against the statute which governs the field so far as the proceeding in a court is concerned. In the present case, the D.R.T. still being in seisin over the matter and we having not been addressed on merit of the case regarding applicability of Section 8 of the Arbitration Act to the facts of the present case, the contention simplicitor regarding overriding effect of Section 5 of the

Arbitration Act on the basis of Clause-39 in Annexure-2/A is totally misconceived. We feel persuaded to rule here at the cost of repetition that existence of an arbitration clause in an agreement between the parties as in the present case per se does not attract operation of Section 5 of the Arbitration Act; and if a competent court/forum does not exercise it's jurisdiction under Section 8 of the Act in favour of the parties seeking such exercise of jurisdiction and continue to proceed with the matter, Section 5 of the Arbitration Act in such a case is also not attracted to have overriding effect on the statute governing the proceeding before the court/forum. Viewed from his perspective, we are constrained to hold that the question of primacy of the provisions contained in Section 5 of the Arbitration Act vis-à-vis Section 34 of the R.D.B. Act as raised by learned counsels for the parties in the facts of the present case is more illusory than real.

20. In view of our findings as aforesaid the question raised by learned counsels for the parties on facts of the present case becomes mere academic but still we propose to address the questions to find out in the even of a supposed conflict which of the provision would have primacy.

21. Now the question that arises, as to which statute has got primacy in the matter. Whether the Arbitration Act should give way to the R.D.B. Act or the R.D.B. Act should give way to the Arbitration Act. There is no dispute at the Bar so far as the settled law on the point is concerned and it is agreed that when there is conflict between two Special Statutes, it is the later statute which must prevail. (See Solidaire India Ltd. vs. Fair Growth Financial Services Ltd. supra). Viewed from such perspective, the Arbitration Act being the later statute has to prevail, if we take a simple common sense approach without going into the niceties of both the statutes.

22. The Hon'ble Supreme Court was faced with a similar question in Maharashtra Tubes vs. State Industrial and Investment Corporation of Maharashtra, (1993) 2 SCC 144, in which the Hon'ble Apex Court carved out a fine exception and held that the non-abstante clause of the later Act would prevail, but if it is found that the later Act was a general statute as against the special earlier Act, then the later Act would give way to the earlier one. Hon'ble Supreme Court held thus:-

> "Both the statutes have competing non-abstante provisions. Section 46-B of the 1951 Act provides that the provision of that statute and of any rule or order made there under shall have effect notwithstanding anything inconsistent there with contained in any other law for the time being in force whereas Section 32 (1) of the 1985 Act also provides that the provisions of the said Act and of any rules or schemes made there under shall have effect notwithstanding anything inconsistent therewith contained in any other law. Section

22(1) also carries a non obstante clause and say that the said provision shall apply notwithstanding anything contained in Companies Act, 1956 o r any other law. The 1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause found in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim generalia specialibus non derogant would apply."

In the case of ***Solidaire India Ltd.*** (supra), the Hon'ble Supreme Court poised with the same question embarked upon harmonious interpretation of the Special Court Act, 1992 and the Sick Industrial Companies (Special Provisions) Act, 1985 and held that the Special Court Act, 1992 would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985 Hon'ble Supreme Court said:-

"It is settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted. If an interpretation is given that the Sick Industrial Companies (Special Provisions) Act, 1985 is to prevail then there would be a clear conflict. However, there would be no conflict if it is held that the 1992 Act is to prevail. On such an interpretation the objects of both would be fulfilled and there would be no conflict. It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick company was in a position to first pay back the public money, there would be no difficulty in reconstruction."

In the case of ***Life Insurance Corporation of India vs. D.J. Bahadur,*** (1981) 1 SCC 315, an objection was raised before the Tribunal constituted under the L.I.C. Act, that leave of the Company Court under Section 446 of the Companies Act was required as a condition precedent for filing a claim before the Tribunal to recover amounts. Hon'ble Supreme Court rejected the objection holding that for certain cases an Act may be general and certain other purposes it may be special and the Court can not blur a distinction when dealing with the finer points of law. It was further held that in view of Section 41 of the L.I.C. Act, the Company Court has no jurisdiction to entertain and adjudicate upon any matter, which the Tribunal is empowered to decide or determine under the L.I.C. Act.

23. The proposition that a Special Act could also be treated as General Act in certain circumstances, was further reiterated by the Hon'ble Apex Court in the case of Allahabad Bank (supra). It is noteworthy that Hon'ble

Supreme Court held that the principle of purposive interpretation, which was applied by it is favour of the jurisdiction and powers of the Company Court in the earlier judgment in the case of ***Sudarsan Chits India Ltd. vs. O.Sukumaran Pillai***. (1984) 4 SCC 657 and other cases, cannot be invoked in the present case against the D.R.T. In view of superior purposes of the R.D.B. Act and the special provisions contained therein. A view was taken upon applying this principle that the process of the Debt Recovery Tribunal was superior, because it intended to provide a speedy and summary remedy for recovery of thousands of crores of rupees, which were due to Banks and Financial Institutions.

24. In resolving the conflict between provisions of two different Acts, a familiar approach in such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific. The principle is expressed in the maxims Generalia specialibus non derogant, and generalibus specialia derogant. If a special provision is made on a certain matter, that matter is to be excluded from the general provision. Hon'ble Supreme Court has applied the rule in resolving conflict between different provisions in so many cases and we do not want to burden our judgment by referring to those pronouncements.

25. The Division Bench of Delhi High Court in ***Kohinoor Creations and Others vs. Syndicate Bank*** supra on consideration of different judicial pronouncements and provisions of both the Arbitration Act and R.D.B. Act held thus:-

> "25. The legal position that emerges from all this is:
>
> 1) That the Debt Recovery Tribunal established under the RDB Act enjoys the exclusive jurisdiction to adjudicate upon and execute the recovery claims of the Banks and other Financial Institutions and the jurisdiction of all Courts and authorities which otherwise enjoyed this jurisdiction is ousted barring that of the Supreme Court and the High Court.
>
> 2) That the RDB Act is the special statute catering to the recovery of debts by the Banks and other Financial Institutions and that it was enacted to provide for summary and speedy recovery of crores and crores of rupees of public money.
>
> 3) That in case of consistent and conflicting provisions in the two special statutes, the latter statute would prevail over the earlier one provided one of the two statutes is not treated as a general statute qua the other in which case the one surviving as special statute would override, no matter whether it was enacted earlier in point of time.

26. Given regard to all this, we find no difficulty in taking the view that the RDB Act would prevail over the Arbitration Act even though it was the later Act. This is so for variety of reasons. Firstly because if the RDB Act conferred exclusive jurisdiction on the Tribunals established by it to adjudicate upon and execute the recovery claims of the Bank and other financial institutions to the exclusion of all other Courts and authorities except the Supreme Court and the High court, which position is laid down and affirmed by the Supreme Court, then the Arbitrator Assuming this jurisdiction under Section 8 of the Arbitration Act could not be countenanced despite the mandatory nature of its provisions. Otherwise the established exclusiveness of the DRT's justification under the RDB Act would be eroded and compromised which would be contrary to the legislative intent behind the DRB Act because on a simple logic. If the DRT enjoys the exclusive jurisdiction to try the recovery claims of the Banks & Financial Institutions, it so enjoys against all forums established by various statutes which would include the Arbitrator under the Arbitration Act also, the only exception made in this regard being the Supreme Court and the High Court.

27. The exclusiveness of the DRT's jurisdiction is all the more fortified by the provisions of Section 34 of the RDB Act. This Section gives all pervasive overriding effect to the provisions of the RDB Act as against any inconsistent provision in any law for the time being in force. It was amended in 2000 to exempt several enactments from the purview of the RDB Act. The Arbitration Act of 1996 which was in force at the time of amendment does not figure in this list of statutes which leave no scope for doubt that it was not intended to be so exempted and its inconsequential provisions were intended to be overridden by the provisions of the RDB Act.

28. We are unable to accept the submission that the amendment of 2000 made in Section 34 of RDB Act was inconsequential and that the exclusion of the Arbitration Act, 1996 in the list of exempted statutes through this amendment made no difference. On the contrary this amendment provides a vital clue to the legislative intent that the RDB Act was to prevail upon inconsistent provisions of all laws in force on that date except the statutes enlisted therein.

29. The next question that arises for consideration is whether Arbitration & Conciliation, 1996 which is a later special statute and which consolidates law relating to domestic arbitration, international, commercial arbitration, could be regarded as a general statute vis-à-vis the RDB Act, an earlier statute. We have no doubt that it

possesses all the trappings of a general statute vis-à-vis the RDB Act. For one thing it deals with a whole lot of subjects ranging from domestic arbitration to the conciliation. Even under domestic arbitration, it brings within its ambit all sorts of matters exposing its general nature in the process. As against this, the RDB Act is a very special statute conferring exclusive jurisdiction on the Tribunal to adjudicate upon recovery claims of banks and other financial institutions running into crores of rupees and provides its own mechanism for execution of the recovery certificates passed by the DRT. It deals with only one subject and is a self contained code to achieve the object and purpose of huge amount of public money. That being so, it falls within the fine exception carved out by the Supreme Court in its several judgments laying down a same statute could be treated as a special statute vis-à-vis one legislation and a general legislation vis-à-vis another legislation. Though the arbitration is a special statute for matters relating to domestic and international, commercial arbitration and law relating to conciliation on the basis of UNCITRAL model, but it is a general statute vis-à-vis RDB Act, which act empowers adjudication of the recovery claims of banks and financial Institutions by the Tribunals set by it expressly. The RDB Act would, therefore, override the provisions of the Arbitration Act, 1996 even though this act is a later statute.

30. We also do not see any conflict between the non-obstante clause of Section 5 of the Arbitration Act and that of Section 34 of the RDB Act because the range of the former is limited to matters governed by Part-1 of the Arbitration Act. Section 5 of the Arbitration Act provides for minimizing the judicial intervention only in matters falling under Part-1 of the Act. This part comprises of 10 chapters dealing with matters related to domestic arbitration. Even in this, it permits judicial intervention in some situation. In any case provisions of this Section providing for the extent of judicial intervention can't be interpreted to give any overriding effect to the provisions of the first part of the Act over anything inconsistent contained in the RDB Act. Section 34 of the RDB Act on the other hand, gives an overriding effect to the provisions of the RDB Act. It says that provisions of this Act would have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any law under this Act. Its sub Section(2) saves some statutes from the purview of this Act which include the Industrial Finance Corporation Act, the State Financial Corporation Act, the Unit Trust of India, the Industrial Reconstruction Bank of India Ltd. the SICA and the small Industries

Development Bank of India Act. But it significantly leaves out the Arbitration Act, 1996 which was in force at the time of amendment in 2009."

26. Learned D.R.T. has relied on the decision of the Delhi High Court in Kohinoor Creations supra in dismissing the claim of the petitioners. In view of our discussion in this judgment, we do not find any justification to take a different view. Learned counsel for the petitioner sought to distinguish the judgment of Delhi High Court in Kohinoor Creations supra on the ground that in the case of Kohinoor Creations unlike the present case, some of the defendants had not approached the Hon'ble Chief Justice of the said Court under Section 11 of the Arbitration Act and Hon'ble the Chief Justice had not expressed any opinion whatsoever on such a petition. In the present case however, some of the defendants had moved Hon'ble the Chief Justice in ARBP No.62 of 2007. No objection by the opposite party Bank regarding lack of jurisdiction by the Arbitrator was raised before Hon'ble the Chief Justice and Hon'ble the Chief Justice passed the following order:-

"4.1.2008 – It is clear from the perusal of the clause that petitioner has agreed that all arbitration proceeding shall be subjected to the exclusive jurisdiction of the courts at Mumbai. Since the petitioner has agreed to the same and it is body's case that Mumbai courts will have no jurisdiction in the matter, this Court can not appoint an arbitrator to decide the dispute between the parties having regard to the forum selection clause which is a part of the Arbitration Clause.

The petition is therefore returned to the petitioner for taking proper step, if so advised."

Taking clue from the afore-quoted order it is submitted by Mr.Milan Kanungo, learned counsel for the petitioner that the opposite party No.1 Bank having not raised any objection before Hon'ble the Chief Justice regarding the lack of jurisdiction on the part of an arbitrator under the Arbitration Act, can not now take the same plea on the basis of Section 34 of the R.D.B. Act.

In order to verify the veracity of the contention so raised, we called for record in ARBP No.62 of 2007 and on perusal of the said record we found that the said petition under Section 11 of the Arbitration Act was filed by Tara Charan Padhy (Petitioner No.2 in W.P.(C) No.9040 of 2009) and the aforesaid order was passed by Hon'ble the Chief Justice at the admission stage without issuing notice to the opposite party No.1 Bank. In view of such fact, submission of learned counsel for the petitioner is out and out

misconceived inasmuch as opposite party No.1 could not have raised any plea in the aforesaid ARBP No.62 of 2007 as it had not been noticed to appear. The other plea of learned counsel for the petitioner on this score to the effect that the present proceeding before the D.R.T. is hit by the principle of constructive res judicata inasmuch as the opposite party No.1 Bank had not taken the aforesaid plea before the Hon'ble the Chief Justice is also misconceived for the aforesaid reasons, and for the reason that order passed by Hon'ble the Chief Justice under Section 11 of the Arbitration Act is mere administrative in nature.

27. Learned counsel for the petitioner then draws our attention to the conduct of opposite party No.1 Bank in getting C.S. Nos. 87 and 88 of the 2008 pending in the Court of Civil Judge (Senior Division), Berhampur dismissed in the guise of the Arbitration Clause, i.e., Clause 39 in Annexure-2/A and further conduct of the opposite party No.1 Bank in calling upon some of the defendants to furnish names of sole arbitrator and on the basis of such conduct of the opposite party No.1 Bank it is submitted that the Bank is estopped from instituting the present proceeding before the D.R.T. after having taken the benefit of Clause-39 of Annexure-2/A before the Civil Court.

28. We have already held that the D.R.T. constituted under the R.D.B. Act has got exclusive jurisdiction so far as claim of a Bank or financial institution in excess of rupees ten lakhs is concerned. We have also held that existence of Arbitration Clause vide Clause-39 in Annexure-2/A does not ipso facto take away the jurisdiction of the D.R.T. and for the claim of the present nature the D.R.T. is the obvious and original forum for a Bank or financial institution. It is well settled in law that as against statute, there is no estoppel. The doctrine of estoppel can not be invoked to render invalid a proceeding before a competent forum, which the legislature has, on grounds of public policy vested with such jurisdiction. In view of such settled law the last contention raised by Mr. Milan Kanungo, learned counsel for the petitioners merits no consideration.

29. Taking into consideration the aforesaid discussion and the fact that pronouncement of the Delhi High Court in Kohinoor Creations' case supra cannot be distinguished in the fact of the present case and in view of our agreement with what has been held by Delhi High Court in the case of Kohinoor Creations supra we do not have any doubt in our mind that the Arbitration and Conciliation Act, 1996 is a general Act so far as recovery of debts due to Bank and financial institution is concerned, but the R.D.B. Act is a special statute enacted specifically for the specific object by vesting exclusive jurisdiction to the D.R.T. with regard to claims by Banks or financial institutions in excess of rupees ten lakhs. In view of such position, the supposed conflict between the non-obstante clause in Section 5 of the

Arbitration Act and Section 34 of the R.D.B. Act is to be resolved by applying the principle expressed in the maxims generalia specialiabus non derogant and generalibus specialia derogant and the Arbitration Act 1996 shall have to give way to the R.D.B. Act, 1993 for primacy.

30. In view of the above, we hold that even if there is a valid arbitration agreement between the parties, the D.R.T., Cuttack would have exclusive jurisdiction over the dispute between the parties irrespective of such agreement in the facts and circumstances of the case presented before us.

Accordingly, both the writ petitions are dismissed.

Writ petition dismissed.

2011 (I) ILR -CUT- 391

PRADIP MOHANTY, J.

CRLREV. NO.11 OF 2010 (Decided on 24.12.2010)

NARENDRA AICHA @ BABALI & ORS. …….. Petitioners.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.210.

Clubbing up Cases U/s.210 Cr.P.C. can be allowed where there is a complaint Case and police investigation in respect of same offence.

In the present Case there are two S.T.Cases – Both the incidents occurred simultaneously with a time gap of ten minutes in registering the Cases – Two F.I.Rs were lodged, separate investigation was conducted and two charge sheets have been filed – Magistrate took cognizance in both the Cases and committed them to the Court of session – Application filed U/s.210 Cr.P.C. for clubbing up the S.T.Cases – Application rejected – Hence this revision.

Held, this Court is not inclined to interfere with the impugned order. (Para 6)

For Petitioners - M/s. B.Pujari, B.K.Nayak, N.Moharana & M.R.Nayak.

For Opp.Party - Miss. Samapika Mishra Addl. Standing Counsel & Mr.B.N.Mohapatra (for informant)

PRADIP MOHANTY, J. This criminal revision is directed against the order dated 29.07.2009 passed by the learned Assistant Sessions Judge, Anandapur in S.T.Case No.17/57 of 2009 declining to club it up with S.T. Case No.16/55 of 2009.

2. Before delving into the legality and propriety of the impugned order, it is necessary to give a brief resume of events of both the sessions cases, clubbing up of which has been sought for.

S.T. Case No.16/55 of 2009 arises out of G.R.Case No.165 of 2008 and Nandipada P.S. Case No.28 of 2008 registered on the basis of FIR lodged by Smt. Manjarika Panda. The allegation in this case is that on 30.03.2008 at about 9.30 a.m. while the informant was busy in her household work, the petitioners along with others being armed with weapons

like bhujali, khanda, bomb, thenga, gun, etc., came to her house, abused her in obscene language, uprooted the fence and threatened to kill her. Since her husband was absent, she rushed inside the house. But, petitioner no.1 Narendra and petitioner no.2 Babuli caught hold of her, dragged her out and tried to disrobe her. It is also alleged that one Anil Pattnaik (not charge-sheeted) tried to hit her head by a Nepali Katta but she warded off and became unconscious. After regaining sense, she found that the accused persons have taken away cash of Rs.40,300/- in cash, gold ornaments and radio. When the Grama Rakhi protested, he was also assaulted. In this case, charge-sheet has been filed against the petitioners under Sections 452/341/294/427/354/307/323/34 I.P.C.

So far as S.T. Case No.17/57 of 2009 is concerned, it arises out of G.R.Case No.166 of 2008 and Nandipada P.S.Case No.29 of 2008 registered on the bais of FIR lodged by Anusaya Barik. Her allegation is that on 30.03.2008 her husband Narahari was posted at the house of Umakanta Panda of village Badarampas as Gramarakhi as per direction of the O.I.C. Nandipada Police Station. On that day, at about 9.30 a.m. the petitioners and others including one Anil Pattnaik (not charge-sheeted) came near the house of Umakanta Panda, hurled obsence language and declaring to finish him forcibly entered into his house. When Narahari protested, he was assaulted. They also assaulted Manjarika and stole away gold ornaments, cash and other items from the house. In this case charge-sheet has been filed against the petitioners under Sections 447/341/294/323/325/307/353/34, IPC.

3. Mr. Pujari, learned counsel for the petitioners submitted that in both the cases time and place of occurrence are same, accused persons are same and the charge-sheeted witnesses are also same. Both the cases arise out of one occurrence but in order to harass the accused-petitioners two FIRs have been lodged. If the accused-petitioners are made to face separate trials, it will amount to double jeopardy. Therefore, in the interest of justice and fair play both the cases may be clubbed up and tried together.

4. Mr. B.N. Mohapatra, learned counsel for the informant submitted that both the cases arise out of two separate incidents. The first incident took place in the house of Umakanta Panda and the second one occurred outside his house in course of which the accused-petitioners attacked the Grama Rakhi, who was posted there as per direction of the O.I.C. Nandipada P.S. to maintain law and order. So, both the occurrences can not be said to be one and same. Therefore, the trial court has committed no illegality in rejecting the application.

5. Miss Mishra, learned Additional Standing Counsel relying upon the comparative charge vehemently contended that the first F.I.R. was lodged at 10.30 a.m. by Manjarika Panda, wife of Umakanta Panda, whereas the second F.I.R. was lodged at 10.40 a.m. by Anusaya Barik, wife of Narahari Barik, the Grama Rakhi. The accused persons first entered into the house of Manjarika Panda and committed the crime. While coming out of her house, they assaulted the Grama Rakhi who was guarding outside the house of Umakanta Panda. In both the cases, the witnesses are not same but some common witnesses are there including the doctor and the I.O. The Code of Criminal Procedure does not prescribe clubbing up the two police cases. Section 210 Cr.P.C. only prescribes for clubbing up of a G.R.Case with a complaint case.

6. Perused the records including the C.Ds. of both the S.T. Cases. There was a time gap of ten minutes in registering the cases. Both the incidents occurred simultaneously, first one occurred inside the house of Umakanta Panda and the second outside the house while the accused persons were coming back. Two FIRs were lodged, separate investigation was conducted and two chare-sheets have been filed. The doctor, the investigating officer and two independent witnesses are common. The Magistrate gook cognizance in both the cases and committed them to the Court of Session. There is no provision in the Criminal Procedure Code for clubbing up of cases except under Section 210, Cr.P.C., which provides for clubbing up where there is a complaint case and police investigation in respect of same offence. Therefore, this Court is not inclined to interfere with the impugned order. However, this Court directs the trial court to conduct the trial of the aforesaid Sessions cases one after the other, hear the arguments on one day and also deliver the judgments on the same day.

7. The Criminal Revision is accordingly disposed of.

Revision disposed of.

2011 (I) ILR -CUT- 394

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

JCRLA. NO.71 OF 2000 (Decided on 12.01.2011)

SANIA SISA ……. Appellant.

.Vrs.

STATE OF ORISSA ……. Respondent.

Criminal Trial – Appreciation of evidence – The occurrence took place at 8 P.M. in the month of January 1996 – P.W.2 saw the occurrence by standing at a distance of 80 cubits from the spot – In Cross-examination he admitted that he had not seen who shot the arrow – Again on recall by the prosecution he stated that the accused-appellant shot the arrow on the chest of the deceased who is his son-in-law – P.W.2 is not a trust worthy witness – It is not possible to witness the occurrence from a distance of 80 cubits in the dark night – He also admitted that he had not seen the accused – P.W.2 is not a believable witness and it is not safe to convict the present appellant basing upon his evidence – Held, this Court sets aside the impugned judgment of conviction and sentence and acquits the appellant of the charge.

(Para 9)

For Appellant - M/s. B.S.Tripathy, M.K.Rath, R.K.Singh & Miss. P.D.Choudhury.

For Respondent - Mr. Soubhagya Ketan Nayak (Addl. Govt. Advocate.)

PRADIP MOHANTY, J. This Jail Criminal Appeal is directed against the judgment and order of conviction dated 08.10.1999 passed by the learned Additional Sessions Judge, Malkangiri in S.C. Case No.13 of 1999 (Sessions Case No.113/96 of Sessions Judge, Jeypore) convicting the appellant under Sections 302 I.P.C. and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that on 10.1.1996 at about 11:00 AM, the informant (P.W.1) came to Mudulipada Police Station and reported orally that on 9.1.96 at about 8:00 PM, Hadi Kirsani, Hadi Sisa and Mangala Sisa quarrelled with each other. Hadi Sisa and Mangala Sisa chased Hadi Kirsani to kill by holding bow and arrow. Hearing hullah, the deceased came out of his house and at that time Hadi Sisa shot an arrow aiming at him which pierced his chest. Hearing hullah of the deceased 'BHAI MARIGALI, MARIGALI', the informant came immediately and found the arrow pierced

on the chest of his brother and both Hadi Sisa and Mangala Sisa fleeing away. The informant removed the arrow from the chest of the deceased and gave water to him but, immediately the deceased succumbed to the injury. Since the occurrence took place in the night, the informant could not come to PS and on the next day at about 11 AM, he came and reported the matter at P.S. The Officer-in-Charge of Mudulipada P.S. reduced the oral report of the informant to writing, drew up formal FIR, registered the case and took up investigation. After completion of investigation, he submitted charge-sheet against the accused u/s 302 IPC.

3. The plea of the appellant is of complete denial of the allegations.

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

5. Learned Additional Sessions Judge, who tried the case, convicted and sentenced the appellant, as already stated hereinbefore, basing upon the evidence of P.W.2 and the doctor (P.W.6)

6. Mr. Pati appearing on behalf of Mr.B.S.Tripathy, learned counsel for the appellant challenged the order of conviction mainly on the following grounds:

(i) No iota of evidence is there against the present appellant implicating him with the crime;

(ii) P.W.2, who is said to be the sole eye witness, is not a trustworthy witness;

(iii) The charge-sheet has been filed against the present appellant, but in the FIR the informant has specifically stated that Hadi Sisa, son of late Sama Sisa shot an arrow to the deceased.

7. Mr.Nayak, learned Additional Government Advocate contended that the FIR is very clear and cogent. P.W.1, who is the brother-in-law of the accused, has lodged the FIR on the next day of the occurrence. The evidence of P.W.2, who is the eye witness, is clear and cogent and is corroborated by the medical evidence. The seizure of arrow has been made from the accused in presence of the independent witnesses.

8. Perused the LCR. In the instant case, P.W.1, is the informant who has stated that hearing hullah, he came to the spot and found one arrow fixed on the chest of the deceased. He removed the arrow and the

deceased died in the mid-night. But in his cross-examination, he admitted that he has not seen who shot the arrow on the chest of the deceased.

P.W.2 is an eye witness to the occurrence. He specifically stated that the appellant shot an arrow pierced on the chest of the deceased and he was near the spot. Seeing the incident, he went to his house and the deceased died in the night. In his cross-examination, he admitted that except him, no one was present at the spot. He was at a distance of 80 cuibits from the spot. He has also admitted that the deceased was his son-in-law and he was not talking with the accused. On recall by the defence, he admitted that the day of occurrence was a dark night and prior to occurrence, Hadi Sisa and Hadi Badanaik quarrelled with each other and by the time the deceased came for urination the arrow was shot on him. He has also admitted that he had not seen who shot the arrow. This witness was recalled by the prosecution and on recall he stated that he saw the accused shooting arrow on the chest of the deceased and that he was present near the spot and that he did not understand what the defence counsel asked.

P.W.3 is a witness to the seizure of bow and sample earth. He proved Exts.1 and 2. P.W.4 is also a witness to the seizure of arrow and he proved Ext.2. P.W.5 is the police constable who guarded the dead body. He is also a witness to the seizure of wearing apparels of the deceased vide Ext.5.

P.W.6 is the doctor, who conducted the post-mortem examination over the dead body of the deceased and found the following injuries:

"**External Injury**

(i) One injury on the right side of the chest size 4 cm X 2 cm X 5 cm bleeding in nature. The injury is situated in between 7th and 8th intercostals space, caused by an arrow

Internal Injury

(ii) Injury on the right side liver about 2" in length and there is fracture of 8th rib."

He opined that all the injuries were ante-mortem in nature and the cause of death was due to severe bleeding injury of intra abdominal as a result of direct stroke by an arrow on the liver. On examination of the arrow produced by the I.O., he opined that injury caused on the person of the deceased was possible by the arrow.

P.W.7 is the OIC, who registered the case, took up investigation, sent the wearing apparels for chemical examination and ultimately after completion of the I nvestigation, filed charge-sheet against the present

appellant. No effective question has been put to him in the cross-examination, besides a formal suggestion.

9. On scrutiny of the entire evidence, it appears that the conviction of the appellant has been recorded basing on the sole testimony of P.W.2 corroborated by the medical evidence. The occurrence took place during night at 8 PM in the month of January, 1996. P.W.2 saw the occurrence by standing at a distance of 80 cubits from the spot. In cross-examination, he admitted that he had not seen who shot the arrow. Again on recall by the prosecution, he stated that the accused-appellant shot the arrow on the chest of the deceased who is his son-in-law. Considering the nature of the evidence, he cannot be considered as a trustworthy witness. It is not possible to witness the occurrence from a distance of 80 cubits in the dark night. He also admitted that he had not seen the accused. Therefore, he is not a believable witness. If P.W.2 had seen the occurrence, he should have disclosed the name of the accused to the informant, who came to the spot immediately. But in the FIR, P.W.1 mentioned the name of Hadi Sisa, son of Sama Sisa as the accused

In view of the above, it is not safe to convict the present appellant basing upon the evidence of untrustworthy witness. Therefore, this Court sets aside the impugned judgment and order of conviction dated 08.10.1999 passed by the learned Additional Sessions Judge, Malkangiri in S.C. Case No.13 of 1999 (Sessions Case No.113/96 of Sessions Judge, Jeypore) and acquits the appellant of the charge. The appellant Sania Sisa be set at liberty forthwith, unless his detention is required otherwise.

10. The Jail Criminal Appeal is allowed.

Appeal allowed.

2011 (I) ILR -CUT- 398

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

W.P.(C) NO.6224 OF 2006 (Decided on 25.01.2011)

CHANDRAMA BHUSAN SARANGI …….. Petitioner.

.Vrs.

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

(A) SERVICE LAW – Departmental proceeding – Charge is unauthorized absence from duty for 441 days – Petitioner explained the reasons for his absence – Punishment of removal from service – Although the petitioner was awarded a minor punishment of "Censure" and a petty punishment in the past, such past conduct has not been taken into account as a ground for imposition of the present punishment – Such past conduct was also not an additional charge over and above the charge of unauthorized absence from duty – Employer to take into consideration the magnitude and degree of misconduct before imposing such major punishment – Held, punishment is unduly harsh and excessive which is accordingly set aside – Direction issued to reinstate the petitioner in service but he will not be entitled to any back wages from the date of his removal till re-instatement in service. (Para 17,18,19)

(B) **CONSTITUTION OF INDIA, 1950 – ART.226.**
Writ Court – Territorial Jurisdiction – Petitioner appointed as a Constable in CISF and he was always posted outside his home state – In a disciplinary proceeding he was awarded punishment of removal from service – He preferred appeal which was dismissed – He filed revision but in vain – The appellate and revisional orders were served on the petitioner at his address at Rourkela in the State of Orissa – Held, part of the cause of action for this writ petition arose within the jurisdiction of this Court and therefore, the writ petition is entertainable (Para 13)

Case laws Referred to:-

1.(1994) 4 SCC 711 : (Oil & Natural Gas Commission-V-Utpal Kumar Basu & Ors.).
2.(2004)9 SCC 786 : (National Textile Corporation Ltd & Ors.-V-Haribox Swalram & Ors.).
3.(1999) 4 SCC 656 : (C.B.I., Anti-corruption Branch,Mumbai-V-Narayan Diwakar).
4.(2004)6 SCC 254 : (Kusum Ingots & Alloys Ltd.-V-Union of India & Anr.).

5.(2000)7 SCC 640 : (Navinchandra N.Majithia-V-State of Maharashtra &Ors)
6.94(2002) CLT.413 : (Tapan Kumar Dalai-V-Union of India & Ors.).
7.2000 (II) OLR.126 : ((Sri)Janardan Mohanty-V-Union of India & 3 Ors.).
8.(2009)15 SCC 620 : (Chairman-cum-Managing Director, Coal India Ltd. & Anr.-V-Mukul Kumar Choudhury & Ors.)

For Petitioner - Mr.Bibekananda Nayak.
For Opp.Parties - Mr. S.D.Das.
Asst. Solicitor General.

B.K.NAYAK, J. In this writ petition the petitioner challenges the order of punishment of removal from service and the confirming appellate and revisional orders under Annexure-8, 10 & 12 respectively.

2. Briefly stated, the case of the petitioner is that initially in the year 1992 he was appointed as a Constable in the C.I.S.F. Unit, IPCL, Baroda in the State of Gujarat. In 1997 he was transferred to the CISF Unit, BPCL, Mumbai. On 15.5.1999 he was transferred from Mumbai to CISF Unit, KhSTPP, Kahalgaon, Bihar and was relieved on that day with direction to join at C.I.S.F. Unit, Kahalgaon on 28.5.1999 after availing joining time. The petitioner having not joined at his new place of posting, the Dy. Commandant, C.I.S.F., KhSTPP, Kahalgaon vide its letters dated 19.7.1999 and 30.08.1999 reported about non-joining of the petitioner. Thereafter three call up notices dated 2.8.1999, 7.9.1999 and 08.09.1999 were sent to the petitioner by registered post to his residential address with direction to report to duty at Kahalgaon failing which disciplinary action would be taken against him. The first two call up notices were returned to the office undelivered by the postal authorities with remarks “long absent”. The petitioner neither reported for duty nor sent any communication regarding his whereabouts nor responded to the call up notice dated 08.09.1999. Therefore, a departmental proceeding was initiated against him under Rule 34 of the C.I.S.F. Rules,1969 (now amended Rule 36 of C.I.S.F. Rules,2001) and Memorandum of charges dated 16.10.1999 as per Annexure-1 was served on him. The petitioner submitted his reply (Annexure-2) to the charge stating that due to his illness and hospitalization he could not report at his new place of posting. The Inquiry Officer enquired into the charge and found the petitioner guilty of the same and submitted his report dated 10.7.2001 (Annexure-4) to the disciplinary authority. Before the disciplinary authority, the petitioner submitted a further show cause stating that due to self illness and for Super Cyclone in which his paternal house was washed away he could not report for duty. On consideration of the enquiry report, the materials on record along with the show cause filed by the petitioner, the disciplinary authority (opposite party no.4) passed order on 3.10.2001 vide

Annexure-8 imposing the punishment of removal of the petitioner from service. The petitioner, thereafter filed appeal before opposite party no.3 challenging the order of punishment, but the said appeal was dismissed by order 1.5.2002 vide Annexure-10. Being aggrieved, the petitioner filed a revision before opposite party no.2 which also met with the same fate. The order of dismissal of revision dated 02.06.2003 has been filed as Annexure-12.

It is also pleaded and contended that the Inquiry Officer as well as the disciplinary authority acted whimsically without properly considering the evidence on record and without following the procedure and formality. It is also stated that the punishment of removal from service is quite harsh and shockingly disproportionate to the misconduct for which the petitioner was charged.

3. The opposite parties have filed a counter affidavit challenging the territorial jurisdiction of this Court to entertain and dispose of the writ petition. It is also stated that the petitioner instead of joining at his new place of posting, i.e., C.I.S.F Unit KhSTPP, Kahalgaon, Bihar remained unauthorisedly absent for 441 days and thereafter reported at the new place of posting on 10.08.2000 afternoon. It is stated that all procedural formalities were duly followed and adequate and reasonable opportunities were given to the petitioner to defend his case. The plea of the petitioner was that he suffered from illness and was under treatment and that in the Super Cyclone of 1999 his house in his native village was washed away. But the medical certificate filed by him shows that initially he was treated by one Dr. A.A. Mathe at Mumbai, who issued a medical certificate in favour of the petitioner on 15.7.1999 stating that the petitioner was under his treatment from 20.5.1999 to 15.7.1999 for jaundice and was declared fit to resume duty with effect from 16.7.1999, but the petitioner thereafter did not report to duty and instead obtained medical certificate from another doctor, namely, Dr. V.V. Krishnan of Mumbai who advised him rest from 16.7.1999 to 31.7.1999 and from 1.8.1999 to 15.8.1999 in two spells and declared him fit to resume duty with effect from 16.8.1999. But the petitioner did not join after 16.8.1999. It is also surprising that Dr. V.V. Krishnan declared the petitioner fit with effect from 16.8.1999 when he issued the certificate on 2.8.1999. But the petitioner again obtained certificate of his treatment as an outdoor patient at Rourkela Government Hospital and rest for one month from 17.8.1999 to 18.09.1999. He also again purportedly took treatment on 10.01.2000 and was from time to time advised rest, but there is no evidence about any illness or treatment of the petitioner from 17.10.1999 to 9.1.2000 (89 days). It is stated that the plea of illness and medical treatment has been concocted by the petitioner and he managed to obtain the certificates merely for the purpose of his defence. With regard to the washing away of the house of the petitioner at

his native village, it is stated that charge memo having been sent to the CISF Unit PPT, Paradeep (Orissa), the same was sought to be served on the petitioner at his native village, but the petitioner was not available there and it was ascertained from his mother and brother that the petitioner never visited the village since March,1998 to 1.7.2000. It is further stated that the certificate of the Tahasildar vide Annexure-6 reveals that it is the house of the petitioner's elder brother, Subhransu Sarangi which had been damaged, but not washed away fully, for which a compensation of two thousand rupees only was sanctioned in his favour. It is also stated that on two earlier occasions the petitioner had been punished while he was serving at Baroda and Bombay for unauthorized absence from his duty and from duty post respectively. It is also lastly stated that in the facts and circumstances and under the Rules the petitioner is not fit to be retained in a disciplinary force like the CISF and therefore, the penalty of removal from service is quite proportionate and commensurate to the gravity of the charge. The disciplinary authority, the appellate authority and the revisional authority have passed orders keeping in view and having considered all material aspects, which warrant no interference.

4. It is strenuously contended on behalf of the learned Asst. Solicitor General that this Court has no territorial jurisdiction to entertain the writ application inasmuch as no part of the cause of action for the writ application arose within the jurisdiction of this Court. It is further submitted by him that there is no averment in the writ application which would go to show that the cause of action or any part of the cause of action for the writ application arose within the jurisdiction of this Court. He relies upon the decisions reported in ***Oil and Natural Gas Commission v. Utpal Kumar Basu and others;*** (1994) 4 SCC 711, ***National Textile Corporation Ltd and others v. Haribox Swalram and others;*** (2004) 9 SCC 786, ***C.B.I., Anti-corruption Branch, Mumbai v. Narayan Diwakar***, (1999) 4 SCC 656, ***Kusum Ingots & Alloys Ltd v. Union of India and another;*** (2004) 6 SCC 254 and ***Navinchandra N. Majithia v. State of Maharashtra and others;*** (2000) 7 SCC 640.

5. It is settled law that the High Court can exercise power to issue writ, direction or order for enforcement of any of the fundamental rights conferred by Part-III of the Constitution or for any other purpose, if the cause of action wholly or in part has arisen within the territorial jurisdiction of the High Court. Referring to the ambit of High Court's jurisdiction under Article 226 of the Constitution of India, the Apex Court in the case of ***Oil and Natural Gas Commission v. Utpal Kumar Basu and others;*** (1994) 4 SCC 711 held as follows :

> "5. Clause (1) of Article 226 begins with a non obstante clause-notwithstanding anything in Article 32- and provides that

every High Court shall have power "throughout the territories in relation to which it exercises jurisdiction", to issue to any person or authority, including in appropriate cases, any Government, "within those territories" directions, orders or writs, for the enforcement of any of the rights conferred by Part-III or for any other purpose. Under Clause (2) of Article 226 the High Court may exercise its power conferred by clause (1) if the cause of action, wholly or in part, had arisen within the territory over which it exercises jurisdiction, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. On a plain reading of the aforesaid two clauses of Article 226 of the Constitution it becomes clear that a High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories. In order to confer jurisdiction on the High Court of Calcutta, NICCO must show that at least a part of the cause of action had arisen within the territorial jurisdiction of that Court."

6. Explaining the meaning of the expression "cause of action" and the mode of determination whether cause of action arose within the territorial jurisdiction of the particular High Court, the Apex Court in the case of ***Oil and Natural Gas Commission*** *(supra)* further held as follows:

"6. It is well settled that the expression "cause of action" means that bundle of facts which the petitioner must prove, if traversed, to entitle him to a judgment in his favour by the Court. In Chand Kour v. Partab Singh Lord Watson said :

"… the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the ground set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour."

Therefore, in determining the objection of lack of territorial jurisdiction the court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the

averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition."

7. As to what facts give rise to cause of action for the purpose of determining jurisdiction, it has been explained in the case of ***National Textile Corporation Ltd and others v. Haribox Swalram and others;*** (2004) 9 SCC 786 as follows :

" 10. Under clause (2) of Article 226 of the Constitution, the High Court is empowered to issue writs, orders or directions to any Government, authority or person exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories. Cause of action as understood in the civil proceedings means every fact which, if traversed, would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. To put it in a different way, it is the bundle of facts which taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. In Union of India v. Adani Exports Ltd. in the context of clause (2) of Article 226 of the Constitution, it has been explained that each and every fact pleaded in the writ petition does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the lis that is involved in the case. Facts which have no bearing with the lis or dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the court concerned. …."

Taking note of the views expressed in ***Oil and Natural Gas Commission*** (supra), the Apex Court further held as follows :

"11. The question of jurisdiction was considered in considerable detail in Oil and Natural Gas Commission v. Utpal Kumar Basu and it was held that merely because the writ petitioner submitted the tender and made representations from Calcutta in response to an advertisement inviting tenders which were to be considered at New Delhi and the work was to be performed in Hazira (Gujarat) and also received replies to the fax messages at Calcutta, could not constitute facts forming an integral part of cause of action. It was further held that the High Court could not assume jurisdiction on the ground that the writ petitioner resides in or carries on business from a registered office in the State of West Bengal."

8. In ***C.B.I., Anti-corruption Branch, Mumbai v. Narayan Diwakar***, (1999) 4 SCC 656, where the petitioner, who had been posted in Arunachal Pradesh, received a wireless message through Chief Secretary of the State asking him to appear before the C.B.I. Inspector in Bombay, moved the High Court of Guwahati for quashing the F.I.R. filed against him by the C.B.I., on objection being raised by the department, the Apex Court held that Guwahati High Court had no territorial jurisdiction to entertain the writ petition.

9. The decisions in ***Oil and Natural Gas Commission and National Textile Corporation Ltd and others*** (supra) were followed in the case of ***Kusum Ingots & Alloys Ltd v. Union of India and another;*** (2004) 6 SCC 254 and it was held as follows :

> "12. This Court in Oil & Natural Gas Commission v. Utpal Kumar Basu held that the question as to whether the Court has a territorial jurisdiction to entertain a writ petition, must be arrived at on the basis of averments made in the petition, the truth or otherwise thereof being immaterial."

10. In the case of ***Navinchandra N. Majithia v. State of Maharashtra and others;*** (2000) 7 SCC 640, it has been held that the place of residence of the person moving a High Court is not the criterion to determine the contours of the cause of action in that particular writ petition. The High Court before which the writ petition is filed must ascertain whether any part of the cause of action has arisen within the territorial limits of its jurisdiction. It depends upon the facts in each case.

11. Coming to the facts of the present case, the averments with regard to territorial jurisdiction of this Court for entertaining the writ petition have been made in paragraphs-2 and 19 of the writ petition, which are quoted hereunder :

> "2. That the petitioner is a citizen of India and a permanent residence of Orissa within the territorial jurisdiction of this Hon'ble Court. The cause of action arises within this Hon'ble Court and the opposite parties are amenable to this writ application.
>
> 19. That the petitioner has received the order of appellate authority as well as the Revisional Authority at rourkela which is fully evident from the said orders. Being a resident of the State of Orissa and as per the decision reported in 2000 (ii) OLR-126 Janardhan v. Union of India the case is maintainable before this Hn'ble Court."

12. Learned counsel for the petitioner has placed reliance on the decisions reported in 94 (2002) C.L.T. 413; ***Tapan Kumar Dalai v. Union of India and others*** and 2000 (II) O.L.R. 126; ***(Sri) Janardan Mohanty v. Union of India and 3 others***. In the first case where the petitioner, who was working in the C.R.P.F. in the State of Assam was visited with punishment in

a disciplinary proceeding and the order of punishment was served on him at his home address in the State of Orissa and the Memorandum of charges were also sent to him at his home address in Orissa, this Court held that the part of cause of action for the writ petition arose within the territorial jurisdiction of this court and, therefore, entertained the writ petition.

In the second case of ***(Sri) Janardan Mohanty,*** which is exactly similar to the case in hand, where the writ petitioner was working as Assistant Sub-Inspector in the C.I.S.F. Unit, Ranchi, where disciplinary proceeding was initiated against him and ultimately punishment of removal from service was imposed and the petitioner challenged the punishment order in appeal and the appellate order confirming the punishment was served on him at his home address in the State of Orissa, this Court held that the High Court of Orissa has jurisdiction to entertain the writ petition. It was observed as follows :

> "3. xxx xxx xxx xx
> ……..The service of the appellate order on the petitioner at his permanent residence in the State of Orissa will give rise to a cause of action within the territory of this State if service of the said order was an integral part of the cause of action. The communication of an order affecting the service of an individual is necessary and the order takes effect against the individual employee after it is communicated. In the present case also the cause of action arose only when the appellate order was communicated to and/or served on the petitioner. Admittedly the order was communicated at the petitioner's permanent residence within the State of Orissa. In our view, in the facts and circumstances of the present case part of the cause of action has arisen within the State of Orissa."

In both the aforesaid decisions, this Court took note of the principle laid down by the Apex Court, in the case of ***Oil and Natural Gas Commission*** (supra) cited by the opposite parties.

13. None of the decisions cited on behalf of the opposite parties deal with the question whether in the matter of challenge to orders passed by the disciplinary authority as well as the appellate and revisional authorities, service of such orders at a particular place on the delinquent officer would form part of cause of action or not. Keeping in view the general principle laid down by the Apex Court in the decisions, as seen above, and following the decisions of this Court in the case of ***Tapan Kumar Dalai*** and ***(Sri) Janardan Mohanty*** (supra) we hold that since admittedly the appellate and revisional orders vide Annexures-10 and 12 were served on the petitioner at his address at Rourkela in the State of Orissa, part of the cause of action for

this writ petition arises within the jurisdiction of this Court and, therefore, the writ petition is entertainable.

14. Coming to the merits of the case, it is necessary to see the scope of judicial review in the matter of departmental inquiry. In the case of ***Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others;*** (2009) 15 SCC 620 while deprecating the practice of assessment of evidence by the High Court recorded in the departmental proceeding in order to come to its own conclusion, the Hon'ble Supreme Court held as follows :

> "13. It has been time and again said that it is not open to the High Court to examine the findings recorded by the inquiry officer as a court of appeal and reach its own conclusions and that power of judicial review is not directed against the decision but is confined to the decision-making process. In a case such as the present one where the delinquent admitted the charges, no scope is left to differ with the conclusions arrived at by the inquiry officer about the proof of charges. In the absence of any procedural illegality or irregularity in conduct of the departmental enquiry, it has to be held that the charges against the delinquent stood proved and warranted no interference."

15. In the instant case, it is only pleaded and contended on behalf of the petitioner that the enquiry officer as well as disciplinary authority acted whimsically without properly considering the evidence on record and without following the procedural formality. But nothing has been shown as to what procedural formality has been deviated from by the authorities in the conduct of the inquiry and disciplinary proceeding and in the matter of disposal of the appeal and revision. Similarly, there is no allegation of either non-consideration of any material evidence or reliance by the authorities of any material, which is wholly irrelevant or extraneous. The writ court is not an appellate court and propriety or otherwise of the fact findings cannot be interfered with in exercise of its power of judicial review. We have carefully gone through the impugned orders and the materials on record and find that the petitioner was given adequate opportunity and he filed his show cause to the charges and led evidence in support of his defence. His defence of illness and treatment, and the evidence in support thereof has been considered by the authorities in their proper perspective. The authorities have rightly found the petitioner guilty of the charge. Therefore, there is no scope to interfere with the finding of guilt of the petitioner.

16. It is contended on behalf of the petitioner that the punishment of removal from service of the petitioner is grossly disproportionate to the charge of unauthorised absence and shockingly harsh and excessive which should be quashed. The learned Assistant Solicitor General vehemently

urged that the petitioner remained unauthorisedly absent for 441 days and therefore he should not be allowed to continue in a disciplined force like the C.I.S.F., particularly when the petitioner had on two earlier occasions been imposed with punishment of censure for his absence from shift duty at Baroda and petty punishment of four days extra duty of one hour each for his absence from duty post at Mumbai.

17. With regard to proportionality of punishment for misconduct, the Apex Court in the case of ***Chairman-cum-Managing Director, Coal India Limited*** (supra) has held as follows :

> "19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.
>
> 20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances ? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment."

In the aforesaid case where the misconduct of delinquent was unauthorised absence from duty for six months and he while admitting his guilt explained the reasons for his absence, the Apex Court set aside the punishment holding the same as unduly harsh and grossly in excess to the allegations and directed for reinstatement without back wages from the date of his removal till reinstatement.

18. In the instant case, though undisputedly the petitioner had in the past been awarded a minor punishment of 'censure' and a petty punishment, such past conduct has not been taken into account as a ground for imposition of the present punishment of removal from service. Such past conduct was also not an additional charge over and above the charge of unauthorised absence from duty. The petitioner has not denied the charge of unauthorised absence but explained it on the ground of his illness though the authorities on consideration found the evidence to be not credible. For such misconduct of unauthorised absence from duty, we are of the opinion that the major punishment of removal from service appears to be unduly harsh and excessive.

19. Accordingly, we set aside the punishment order passed by the disciplinary authority under Annexure-8 and the appellate and revisional orders under Annexures-10 and 12 respectively and direct that the petitioner be reinstated in service within a period of two months from the date of communication of this order, but he will not be entitled to any back wages from the date of his removal till the reinstatement in service. On reinstatement, the disciplinary authority shall consider the imposition of any adequate minor punishment on the petitioner.

The writ petition is accordingly disposed of. No costs.

Writ petition disposed of.

2011 (I) ILR -CUT- 409

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

W.P.(C) NO.9140 OF 2008 (Decided on 16.11.2010)

SARAT KUMAR PARIDA ……. Petitioner.

.Vrs.

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

CENTRAL CIVIL SERVICES & CIVIL POSTS (UPPER AGE LIMIT FOR DIRECT RECRUITMENT) RULES, 1998 – RULE 3 & 6.

Petitioner while working as Technical Officer in the Regional Medical Research Centre Bhubaneswar there was a notification for recruitment to the post of Senior Research Officer (Entomology) – Petitioner applied for the post – His application was rejected on the ground of over age – Petitioner approached Tribunal for a direction to extend the age relaxation for two years by resorting to Rule 3 but it was in vain – Hence the writ petition.

The relevant rules provide for a concession of two years incases of direct open competition examination conducted by the statutory body like UPSC and S.S.C. where as the relaxation of five years as envisaged to Rule 6 is not applicable to any recruitment made by the commission unless it is specifically provided by the scheme.

In the present case the advertisement has been made by the department and there has already been a relaxation of five years for all departmental Candidates – So the relaxation of age as envisaged in Rule 3 shall not be applicable to the case over and above the five years relaxation of age as provided under Rule 6 – Held, the claim of the petitioner that he is entitled to a relaxation of two years in addition to the five years relaxation is not tenable, hence the impugned judgment passed by the learned Tribunal does not require an interference.

(Para 5)

For Petitioner - M/s. Prabhat Kumar Praharaj, D.K.Parida, S.Tripathy, & J.K.Mohanty.
For Opp.Party No. 1 - Mr. S.Das (A.S.G.)
For Opp.Party No.2,3 - M/s. M.Mishra, P.K.Das, & D.K.Patnaik.
For Opp.Party No.4 - Susanta Das, S.Behera & S.Das.
For Opp.Party No.5 - Mr. Janmejaya Katikia.

S.K.MISHRA, J. Petitioner assails the judgment dated 22.5.2008 passed by the Central Administrative Tribunal, Cuttack Bench, Cuttack, in

O.A.No.608 of 2004 wherein the prayer of the petitioner to further relax the age for two years in pursuant to Rule 3 of the Central Civil Services and Civil Posts (Upper Age Limit for Direct Recruitment) Rules,1998 (hereinafter referred to as the "relevant rules" for brevity) was denied.

2. The undisputed facts in this case are that pursuant to the Notification dated 10th March, 2004 while working as Technical Officer in the Regional Medical Research Centre, Bhubaneswar, the petitioner applied through proper channel to the post of Senior Research Officer (Entomology). However, he did not get any call letter while others were called to face the test. He made various representations, but without any result. It is the further case of the petitioner that he came to know his candidature has been rejected due to his over age without giving age relaxation as provided under Rule 3 of the relevant rules. According to the petitioner without considering his candidature in proper perspective by giving age relaxation applicable to Government employees, opposite party No.2 has conducted the selection for the post of Senior Research Officer (Entomology) on 27.8.2004. It is further pleaded by the petitioner that the candidature of opposite party No.4 (Dr. R.K.Hazra) was taken into consideration in relaxation of his age and he was selected and has joined in the post of Senior Research Officer (Entomology) on 03.10.2004. Therefore, he approached the learned Tribunal for a direction to extend age relaxation for two years by resorting to Rule 3.

3. The opposite parties have filed counter affidavit before the learned Tribunal, inter alia, pleading that the application of the petitioner cannot be entertained as the petitioner was over age on the cut off date stipulated in the advertisement. Further, the petitioner being a departmental candidate, is entitled for relaxation of up to five years, in other words, if the petitioner is within the age of 50(45+5), the candidature of the petitioner ought to have been considered, but as the date of birth of the petitioner is 08.1.1953, the petitioner was over aged on the cut off date. They further pleaded that Dr. R.K.Hazra has not been given any differential treatment and therefore prayed to dismiss the writ petition.

4. The pivotal question which requires determination in this case is whether the petitioner is entitled to the benefit of Rule 3, i.e. relaxation of two years over and above the relaxation of five years as provided in Rule 6 of the relevant rules. In order to adjudicate this issue, it is appropriate to take note of the relevant provisions as well as the stipulations made in the advertisement. The advertisement in question has clearly made stipulations regarding the age of the petitioner which reads as under:

"AGE: Below 50 years for the post of Dy. Director and below 45 years for the posts of Ads and SROs. SC/ST/OBC and departmental candidates are allowed relaxation in accordance with the Central Government Rules, in force."

The contention of the learned counsel for the petitioner is that in addition to this relaxation of five years, the petitioner is entitled to a relaxation of two years as per Rule 3. It is appropriate to quote Rule 3 for proper appreciation.

"3.*Increase in the upper age limit*:-

The upper age limit for recruitment by the method of Direct Open Competitive Examination to the Central Civil Services and Civil Posts specified in the relevant Service/Recruitment Rules on the date of commencement of the Central Civil Services and Civil Posts (Upper age limit for Direct Recruitment) Rules, 198, shall be increased by two years.

There is Note to such Rules which reads as follows:

"NOTE – Direct Open Competitive Examination for the purpose of these rules shall mean direct recruitment by Open Competitive Examination conducted by the Union Public Service Commission or the Staff Selection Commission or any other authority under the Central Government and it shall not include recruitment through limited Departmental Examination or through short listing or by interview or by contract or by absorption or transfer or deputation."

Thus, relaxation envisaged in Rule 3 is applicable to any direct open competitive examination conducted by the Union Public Service Commission (for short "U.P.S.C") or the Staff Selection Commission (for short "S.S.C") or any other authority under the Central Government. Thus, such relaxation is not applicable to any open competition examination conducted by the department. On the contrary, Rule 6 is applicable to all recruitment to Groups 'A' and 'B' posts. Rule 6 reads as follows:-

"6. The upper age relaxation admissible to Government employees for direct recruitment to Groups 'A' and 'B' posts- 1. The following decisions have been taken in consultation with the Union Public Service Commission :-

(i) Government servants may not be allowed any relaxation of age for recruitment to Group 'A' or Group 'B' posts on the basis of competitive examinations held by the Commission, except in cases where it has been specifically provided for in the scheme of the examinations approved in consultation with the Commission.

(ii) Government servants may be allowed, on a uniform basis, relaxation of a maximum of five years in the upper age limit for recruitment to other Group 'A' or Group 'B' posts by advertisements through the Commission. The age relaxation will be admissible to such of the Government servants as are working in posts which are in the same line or allied cadres and where a relationship could be established that the service already rendered in a particular post will be useful for the efficient discharge of the duties of the post(s) recruitment to which has been advertised. Decision in this regard will rest with the Commission".

Sub-rule 2 of Rule 6 further clarify that the instructions that this concession is available to departmental candidates for recruitment to Groups 'A' and 'B' posts which are exempted from the purview of the U.P.S.C. and, therefore, recruitment to which is made by the organizations themselves.

5. From the above scheme, it is clear that the relevant rules provide for a concession of two years incases of direct open competition examination which is conducted by the statutory body like the U.P.S.C. and S.S.C whereas the relaxation of five years as envisaged to Rule 6 is not applicable to any recruitment made by the Commission unless it is specifically provided by the scheme. On the other hand, such recruitment may have a maximum of five years of upper age limit of relaxation to Groups 'A' and 'B' posts if the recruitment is conducted by the organization themselves. The rules in essence exclude any probabilities of double benefit. In other words, by necessary application the rule provide that where two years relaxation as per Rule 3 is applicable the five years relaxation as per Rule 6 shall not be applicable and *vice versa.* Applying this principle to the present case, it is seen that the advertisement has been made by the department and there has already been a relaxation of five years for all departmental candidates. That being so, the relaxation age envisaged in Rule 3 to the relevant rules shall not be applicable to the case over and above the five years relaxation age as envisaged under Rule 6 of the relevant rules. Thus, the claim of the petitioner that he is entitled to a relaxation of two years in addition to the five years relaxation is not tenable

and the judgment passed by the learned Tribunal does not suffer from any infirmity or illegality requiring an interference of this Court. The writ petition is accordingly dismissed. No costs.

Writ petition dismissed.

2011 (I) ILR -CUT- 414

M.M.DAS, J.

W.P.(C) NO.10770 OF 2010 (Decided on 03.11.2010)

SABITRI BAGH ……. Petitioner.

.Vrs.

BHAJI BAGH ……. Opp.Party.

(A) ORISSA PANCHAYAT SAMITI ACT, 1959 (ACT NO. 7 OF 1960) – SEC.44-C.

Section 44-C of the Act clearly states as to who are to be added as parties in an election dispute – So the Court trying the election dispute as well as the appellate Court can not exercise jurisdiction like a Civil Court by directing addition of Parties under Order 1 Rule 10 C.P.C. in an election petition.

(Para 16)

(B) ORISSA PANCHAYAT SAMITI ACT, 1959 (ACT NO.7 OF 1960) – SEC.44-Q,44-H.

Learned Civil Judge (Sr.Divn.) is empowered U/s.44 (H) to exercise jurisdiction vested in a Court under C.P.C. while trying a suit in respect of the matters mentioned in the said Section – Held, the learned subordinate Judge, who is to try an election dispute under the Act as well as the appellate authority i.e. District Judge can not be held to be persona designata– Held, the contention that the learned Addl. District Judge has no power to decide the appeal can not be accepted.

(Para10 11)

(C) ORISSA PANCHAYAT SAMITI ACT,1959 (ACT NO. 7 OF 1960) – SEC.44-Q.

Election dispute – If the appellate Court felt that the evidence of the Election Officer was very much essential for just adjudication of the dispute, should have summoned the Election Officer and recorded his evidence himself and should not have remitted the matter back to the Court below for the said purpose – Held, when the Act does not vest the jurisdiction on the said Courts to exercise all the powers of the Civil Court as per the code of Civil Procedure, it can not be construed that the appellate Court has jurisdiction Under Order 41 Rule 28 C.P.C. to remit the matter back to the Court below to take additional evidence.

(Para 17)

Case laws Referred to:-

1.AIR 2008 SC 2454 : (State of M.P. & Arn. -V- Anshuman Shukla)

2.ILR(4) Cal(15)483(F.B) : (The Empress-V-Ashootosh Chuckerbutty & Ors.).

For Petitioner - M/s. Dr. A.K.Rath & A.K.Nath.
For Opp.Parties- M/s. J.R.Dash & K.L.Dash

M.M. DAS J. The petitioner was elected as Member of the Panchayat Samiti from Deul Padar Grama Panchayat under Tarbha Panchayat Samiti. His election as Member of the Panchayat Samiti was challenged by the opp. party before the learned Civil Judge, (Sr. Division), Sonepur in Election Dispute Case No. 7 of 2007. The learned Civil Judge by judgment dated 22.5.2008 dismissed the election petition on contest against the opp. party. Against the said order of dismissal, the opp. party preferred F.A.O. No. 18/22 of 2008, which has been decided by the learned Additional District Judge, Sonepur by judgment dated 4.5.2010 which is impugned in the present writ petition by the petitioner.

2. The learned Additional District Judge in the impugned judgment remanded the election dispute to the court of the learned Civil Judge (Sr. Division), Sonepur by passing the following order:-

> "The suit is remanded to the learned lower court as per Rule – 28, Order – 41 of C.P.C. with a direction that such Court shall take necessary steps at the expenses of the petitioner-appellant to produce the attendance of the concerned B.D.O.-cum-Election Officer, Tarbha for adduction of his evidence which would be confined to specific points as indicated in para-13 of this order and that the adduction of such evidence includes both oral and documentary as would be deemed appropriate to the learned lower court. The petitioner – appellant is directed to appear before the learned lower court on 15.5.2010 positively and to take steps accordingly for adduction of the evidence of the concerned B.D.O.-cum-Election Officer, Tarbha limited to the points referred above including production of documentary evidence as necessary. The O.P. is directed to participate in such hearing and to cross-examine, if necessary to such witness. All the expenses in this regard in procuring the attendance of the B.D.O.-cum-Election Officer and for other steps ancillary thereto shall be borne by the petitioner-appellant. The learned lower court is further directed to complete all the above ancillary proceedings and to send the record to this court by 15.7.10 positively."

3. Substantially, Dr. A.K. Rath, learned counsel for the petitioner has raised two issues in the writ petition, namely, (i) the learned Additional

District Judge had no jurisdiction to decide the appeal under section 44-Q of the Orissa Panchayat Samiti Act, 1959 (hereinafter referred to as 'the Act'), and (ii) in an election dispute under the Act, the appellate court has no power to direct addition of party as well as to remand the case to the learned Civil Judge (Sr. Division), for fresh adjudication.

4. With regard to the first question raised, Dr. Rath submits that section 44-Q of the Act provides that any person aggrieved by an order passed by the learned Civil Judge (Sr. Division, under sub-section (1) or sub-section (2) of section 44-J of the Act can prefer an appeal before the learned District Judge having jurisdiction and, therefore, the learned District Judge acts as persona designata and not as the District Judge, as defined in the Orissa Civil Courts Act. Hence, the learned Additional Distinct Judge could not have exercised the appellate power and decide the appeal.

5. Mr. J.R. Dash, learned counsel for the opp. party, on the other hand, contends that a bare reading of section 44-Q of the Act would amply show that the appeal is to be preferred before the learned District Judge having jurisdiction meaning thereby the Distinct Judge should have jurisdiction over the area in which the Grama Panchayat is situated and the learned Civil Judge (Sr. Division), who tried the election dispute should be under his jurisdiction. He further submits that the appeal, in fact, was filed before the learned District Judge, Bolangir and was subsequently transferred to the learned Additional District Judge, Sonepur and unlike others Acts specifically mentioning that the court trying an election disputes acts as persona designata, the Panchayat Samiti Act does not specifically mention in either section 44-J or section 44-Q that the learned Civil Judge (Sr. Division) or the learned District Judge acts as persona designata and not as a court.

6. Originally, the Orissa Zilla Parishad Act, 1959 (Orissa Act 7 of 1960) was enacted and there was no Panchayat Samiti Act. By the Orissa Zilla Parishad (Amendment) Act, 1961, the Act was renamed as Orissa Panchayat Samiti Act. A new Chapter – VIA was inserted and in section 44-B, the procedure to file an election petition was prescribed. As per section 44-B (2) (b) it was prescribed that in the case of an election in respect of Samiti, the Munsif having jurisdiction over the place at which the office of such Samiti is situated will have jurisdiction to try the election petition. Even in sub-section (3) of the said section, it was provided that an election petition may, either suo motu or on an application, be transferred by the District Judge, if presented before him, to any Additional District Judge or Subordinate Judge, who is subordinate to him in respect of a Parishad and if such election petition is in respect of a Samiti and presented before a Munsif, the same can be transferred as above by the District Judge to any

other Munsif subordinate to him. Further amendments have been brought in 1965 and thereafter, ultimately culminating in the present form of the Act. A reading of the gradual development of the legislation which culminated in the present form of Orissa Panchayat Samiti At, 1959, would clearly go to show that the legislature never intended that the Subordinate Judge (at present Civil Judge (Sr. Division)) before whom the election petition is to be presented or the District Judge, who is the appellate authority should act as a persona designate.

7. Even otherwise, examining the question from another angle, it would be seen that section 44-B of the Act dealing with presentation of petition prescribes that the election petition shall be presented on one or more of the grounds specified in section 44-L before Subordinate Judge (now Civil Judge (Sr. Division)) having jurisdiction over the place at which the office of the Samiti is situated together with a deposit of Rs. 200/- as security within 15 days after the day on which the result of the election was announced. The proviso prescribes that the Subordinate Judge, if the court is closed on the last day of the period of limitation, the petition may be presented on the next day of which such office is opened and provided further that if the petitioner satisfies the Subordinate Judge that sufficient cause exists for failure to present the petition within the period aforesaid, the Subordinate Judge may in his discretion condone such failure. (**emphasis supplied)**

8. The Supreme Court in the case of ***State of M.P. and another v. Anshuman Shukla,*** AIR 2008 SC 2454, while examining the question of applicability of section 5 of the Limitation Act in respect of a revision before the High Court arising out of a reference under the M.P. Madhyastham Adhikaran Adhiniyam, 1983 (29 of 1983), examined the question as to which is a court under the Indian Evidence Act. While examining the said question, referring to various earlier judgments of the apex Court, it was laid down that there exists a distinction between a court and the Tribunal. The very fact that the authorities under the Act are empowered to examine witnesses after administering oath to them clearly shows that they are "Court" within the meaning of the Evidence Act. The "Court" is defined in section 3 of the Indian Evidence Act, which reads thus:-

> "Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence**.**

9. Finding that the Tribunal under the said M.P. Act has been conferred various powers, the Supreme Court observed that there cannot be any doubt whatsoever that the authorities under the said Act are also "Court" within the meaning of the provisions of the Indian Evidence Act. It was observed that the definition of "Court" under the Indian Evidence Act is not exhaustive (See ***The Empress v. Ashootosh Chuckerbutty and***

others, ILR (4) Cal. (15) 483 (F.B.)). The Supreme Court, therefore, laid down that though the said definition of "Court" is for the purpose of the Indian Evidence Act alone, all authorities must be held to be Courts within the meaning of the said provision who are legally authorized to take evidence. The word "Court" has come up for consideration at different times under different statutes.The Supreme Court, thereafter, having analyzed various decisions held that the Tribunal under the M.P. Act for all intent and purport is a Court which has to determine a lis.

10. Applying the ratio of the said decision to the Orissa Panchayat Samiti Act, it would also be seen that the Subordinate Judge (Civil Judge (Sr. Division)) is empowered under section 44 (H) to exercise the jurisdiction vested in a court under the Code of Civil Procedure while trying a suit in respect of the matters mentioned in the said section which includes examining witnesses on oath. Hence, it is conclusively found that the Subordinate Judge, who is to try an election dispute under the Act as well as the appellate authority, i.e., District Judge cannot be held to be persona designata and they come under the definition of the "Court" as defined in the Indian Evidence Act.

11. Thus, the contention raised by Dr. A.K. Rath that the learned Additional District Judge has no power to decide the appeal cannot be accepted.

12. With regard to the question as to whether the appellate court under section 44-B of the Act can exercise the power directing either addition of a party to the proceeding and/or remand of the case to the learned Civil Judge (Senior Division) to examine the Election Officer as a witness by way of additional evidence in accordance with Order 41, Rule 27 (b) C.P.C., it is seen that section 44-H of the Act specifically provides that the learned Civil Judge (Sr. Division) shall have the powers of a civil court which he has, while trying a suit, but in respect of the matters specifically mentioned in the said section. For better appreciation, section 44-H of the Act is quoted herein below:-

> "44-H. **Powers of (Subordinate Judge)-** The Subordinate Judge shall have the powers which are vested in a Court under the Code of Civil Procedure, 1908 (5 of 1908) when trying a suit in respect of the following matters, namely:
>
> (a) discovery and inspection;
> (b) enforcing the attendance of witnesses and requiring the deposit of their expenses;
> (c) compelling the production of documents.
> (d) examining witnesses on oath;
> (e) granting adjournments;
> (f) reception of evidence taken on affidavit; and

(g) issuing commissions for the examination of witnesses,

and may summon and examine *suo motu* any person whose evidence appears to it to be material; and shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (5 of 1898)".

Section 44-C of the Act specifically provides as to who are the parties to be impleaded as parties in an election petition, which is as follows:-

"44-C. Parties to the petition- (1) An election petition may be presented by any candidate as such election.

(2) A person whose election is questioned and where the petition is to the effect that any other candidate is to be declared elected in place of such person, every unsuccessful candidate who has polled more votes than such candidate shall be made opposite party to the petition".

13. It is, therefore, clear from the above provision of the Act that the learned Civil Judge (Sr. Division) in an election dispute under the Act has no jurisdiction to direct addition or deletion of parties from the proceeding. The appellate court in a statutory appeal always has the powers which are exercisable by the trial court. But, however, the jurisdiction to remand a matter to the trial court is a special jurisdiction of the appellate court under the C.P.C. The appellate court under the Act, nevertheless, cannot exercise, the powers vested in an appellate court under Order 41 C.P.C. as the election dispute is to be decided strictly in accordance with the Act, there is no provision in the Act empowering the appellate court to remand an election dispute to the learned Civil Judge (Sr. Division).

14. It is submitted by Mr. J.R. Dash, learned counsel for the opp. party that no where, the appellate court in its judgment has directed impletion of the B.D.O.-cum-Election Officer as a party to the proceeding and, therefore, the question of jurisdiction of the appellate court to direct addition of party has no relevance to this case.

15. A reading of the judgment of the appellate court shows that in the body of the judgment, an observation was made that no issue has been framed as to whether the suit was bad for non-joinder of necessary/proper party nor it was raised by the opp. party-respondent in her pleadings. But as per Order 1, Rule 10 C.P.C., the court has got jurisdiction to direct any of the parties to the suit for addition of necessary or proper party for proper adjudication of the lis if it is felt necessary. It has been also observed that the learned trial court should have exercised its power under Order 1, Rule

10 C.P.C. by giving a direction to the election petitioner to add the Election Officer concerned as a party to arrive at a just decision on issue nos. 4, 6 and 7. Observing thus, the appellate court came to the conclusion that the election case being of the year 2007 and three years being lapsed out of the total term of five years, it is not felt necessary that it would be proper to frame such an issue for answering. But it would be appropriate for the interest of justice to direct the learned trial court to examine the Election Officer as a witness instead of adding him as one of the opposite parties to the suit.

(emphasis supplied)

16. At the out-set, it may be mentioned that the learned appellate court has mis-directed himself by treating the election dispute as a suit. When section 44-C of the Act clearly states as to who are to be added as parties in an election dispute, the Court trying the election dispute or the appellate court, cannot exercise jurisdiction like a civil court by directing addition of parties in accordance with Order 1, Rule 10 C.P.C. in an election petition. The observations made by the learned appellate court, therefore, were mis-directed.

17. I have been taken through the materials which were brought before the court during trial of the election dispute. Considering such materials, I am of the considered view that the learned appellate court if felt that the evidence of the Election Officer was very much essential for just adjudication of the dispute should have summoned the Election Officer and recorded his evidence himself and should not have remitted the matter back to the court below for recording of the said evidence. Considering the scheme of the Act , it is clear that both the Civil Judge (Sr. Division) as well as the appellate court are to follow the procedures strictly in accordance with the Act and when the Act does not vest the jurisdiction on the said courts to exercise all the powers of the civil court as per the Code of Civil Procedure, it cannot be construed that the appellate court has jurisdiction under Order 41, Rule 28 C.P.C. to remit the matter back to the court below to take additional evidence.

18. In view of the above discussions, while setting aside the impugned order passed by the appellate court, the matter is remitted back to the learned Additional District Judge, Sonepur to summon the Election Officer and record his evidence himself giving opportunity to the petitioner to cross-examine him and upon recording such evidence shall consider the same along with other materials available on record and dispose of the election appeal afresh by the end of March, 2011.

19. With the aforesaid direction, the writ petition is allowed, but in the circumstances without cost.

Writ petition allowed.

2011 (I) ILR -CUT- 421

R.N.BISWAL, J.

ARBA NOS.12 & 13 OF 2007 (Decided on 16.09.2010)

M/S. HINDUSTAN COPPER LTD. …….. Appellant.

.Vrs.

M/S. SATYANARAYAN IRON WORKS (PVT.) LTD. & ANR. ……. Respondents.

ARBITRATION & CONCILIATION ACT, 1996 (ACT NO.26 OF 1996) – S.34.

Award passed by the Industries Facilitation Council (IFC) U/s. 6 of the Interest on Delayed payments to small scale and Ancillary Industrial Undertakings Act, 1993 and the appellant ought to have filed appeals U/s.7 of the said Act by depositing 75% of the awarded amount.

The appellants challenged the awards passed by the IFC U/s. 34 of the Arbitration and Conciliation Act, 1996 for setting aside the arbitral award before the learned District Judge – Even if the above award is challenged before the learned District Judge U/s. 34 of the 1996 Act, the appellant is required to deposit 75% of the awarded amount before the learned District Judge – Held, in the present case the appellant having not deposited 75% of the awarded amount the appeals stand dismissed.

(Para 4 & 5)

Case law Referred to:-

2010 (3) SCC 34 : (Snehadeep Structure Pvt.Ltd.-V-Maharashtra Small Scale Industries Corporation Ltd.)

For Appellant - M/s. G. Mukherji, P.Mukherji, M.R.Barik & S.Patra.

For Respondent- M/s. D.Pati, S.K.Mishra, P.Panigrahi, (For Respondent no.1)

R.N. BISWAL,J. The facts and law involved in the both appeals being similar and the appellant being same, they were heard together and the following common order is passed thereon.

2. The appellant is a Govt. of India Enterprise, which runs business in mining activities having its unit at Kolkata. It requires chilled cast iron grinding media balls (in short cast iron balls) for its mining activities. The respondents in both the appeals are Small Scale Industrial Units. They are

manufactures of cast iron balls. They showed interest to supply the cast iron balls to the appellant, as such, the appellant issued purchase order to both the respondents for supply of the same. On the ground that the appellant did not pay the consideration amount in due time, both the respondents filed claims before Industries Facilitation Council Orissa, Cuttack (herein after referred as IFC) giving rise to IFA case Nos.1/2004 and 6/2002. After hearing, the IFC made the awards in favour of both the respondents. Being dissatisfied, the appellant challenged both the awards passed in IFC case Nos.1/2004 and 6/ 2002 under Section 34 of the Arbitration and Conciliation Act, 1996 (herein after referred to as 1996 Act) before the District Judges, Cuttack giving rise to ARBA Nos. 167/2005 and 168/2005 respectively. It also filed a petition in each of the ARBPs for of stay execution of the awards. The District Judge rejected the same. So the appellant filed W.P.© Nos 16686/2006 and 16685/2006 separately challenging the rejection of stay petitions, before this Court, wherein the District Judge was directed to hear the parties on the question of maintainability of the petitions under Section 34 of the 1996 Act first. So the District Judge heard about the maintainability of the both the cases before it and also on merit. As it appears from the impugned orders, the District Judge held the petitions under Section 34 of the 1996 Act were not maintainable since the awards were passed under Section 1993 Act that admission of the said petitions would be in direct contravention of the mandatory provision contained under Section 7 of the 1993 Act and that the appellant did not deposit 75% of the awarded amount in either of the cases.

3. Learned counsel appearing for the appellant argued on the maintainability of the petitions filed before the IFC. As it appears from the impugned orders, the appellant filed a writ petition bearing No.5144 of 2004 in the High Court of judicature, Jabalpur, M.P. challenging the jurisdiction of the IFC in entertaining IFC Case No. 1 of 2004. It also filed W.P.© No. 1988 of 2003 in the same High Court, challenging the jurisdiction of IFC in entertaining IFC Case No. 6 of 2002. As it appears, both the writ petitions are pending. So, to avoid conflicting decision, I am not touching the point whether the IFC has jurisdiction to entertain both the petitions under the 1993 Act.

4. Learned counsel for the appellant submitted that the finding of the learned District Judge that admission of the applications under Section 34 of the 1996 Act would be in direct contravention of the mandatory provision contained under Section 7 of the 1993 Act, is a serious error of law, inasmuch as the scope and ambit of Section 34 of the 1996 Act cannot be equated with the scope and ambit of Section 7 of the 1993 Act.

5. Appeal lies against the order of IFC, as provided under Section 7

of the 1993 Act. Since the awards passed by the IFC were under Section 6 of the 1993 Act, the appellant ought to have filed appeals under Section 7 of the said Act by depositing 75% of the awarded amount. It has been held by the apex Court in the case of **Snehadeep Structure Pvt. Limited vs. Maharastra Small Scale Industries Corporation Ltd.** 2010 (3) S.C.C. 34 that even if an arbitration award is challenged before the District Judge under section 34 of the 1996 Act, the petitioner is required to deposit 75% of the awarded amount before the District Judge. In the present cases admittedly the appellant has not done so.

So, both the appeals stand dismissed. No cost

Appeals dismissed.

2011 (I) ILR -CUT- 424

INDRAJIT MAHANTY, J.

CRLMC. NO.3177 OF 2010 (Decided on 14.12.2010)

MANDAKINI JENA & ANR. ……. Petitioners.

.Vrs.

STATE OF ORISSA …….. Opp.Party.

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

Anticipatory bail – Grant of – Limitation of time – Personal liberty of the petitioner – Liberal consideration of the application in the light of Article 21 of the Constitution.

In the present case anticipatory bail granted to the petitioners does not contain any stipulation regarding any time limit for the period for which the said order has been passed, so the same has to be considered to be one which continues without any limitation of time i.e. till the end of the trial unless it is cancelled by the Court on finding fresh material or on the ground of abuse of the indulgence by the accused. (Para 6)

Case laws Referred to:-

1.Crl Appeal.No.2271 of 2010 : (Siddharam Satlingappa Mhetre-V-State of Maharashtra & Ors.).

2.(1980)2 SCC 565 : (Gurbaksh Singh Sibbia & Ors.-V-State of Punjab).

For Petitioners - M/s. Yeeshan Mohanty (Sr.Adv.) P.C.Biswal, S.N.Mishra, S.K.Behera, B.P.Das, B.C.Nayak & S.Mohapatra.

For Opp.Party - Mr. A.K.Mishra, (Addl.Govt. Advocate)

I.MAHANTY, J. In the present application under Section 482 of the Code of Criminal Procedure, a prayer has been made seeking to quash the order of cognizance dated 9.3.2010 passed by the learned J.M.F.C., Chandikhol in G.R. Case No.309 of 2009.

2. Mr. Mohanty, learned Senior Counsel appearing for the petitioner fairly submits that the present application is filed essentially due to the apprehension in the mind of the petitioners that although they have been granted anticipatory bail by this Court in BLAPL Nos. 5870 of 2009 and 6113 of 2009 vide order dated 27.4.2009 and 13.5.2009 respectively and

thereafter, have been released on bail by the police. As a consequence of the impugned order of cognizance and the charge-sheet have been submitted and summons have been issued by the learned J.M.F.C. for appearance of the petitioners, the petitioners apprehend arrest and/or being remanded to judicial custody especially, since the offences complained of are triable by the Court of Sessions.

3. In course of argument, reliance was placed by the learned Senior Counsel for the petitioner on a latest judgment of the Hon'ble Supreme Court in the case of ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others*** passed in Criminal Appeal No.2271 of 2010 vide order dated 2.12.2010 (copy of which has been downloaded by the NIC) and produced before this Court for perusal. The Hon'ble Supreme Court in a Bench presided by Hon'ble Mr. Justice Dalveer Bhandari, considering the scope and ambit of Section 438 Cr.P.C., 1973 placed reliance on an earlier Constitution Bench judgment rendered by the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia and others v. State of Punjab***, (1980) 2 SCC 565 and came to hold as follows:

(Paragraph-101)

> " xxx xxx The bail granted by the court should ordinarily be continued till the trial of the case."

4. In Paragraphs-111 & 112 of the aforesaid judgment, the Hon'ble Supreme Court came to hold that the grant of bail for a limited period is contrary to the legislative intention and law which has been declared by a Constitution Bench as well as the direction issued in certain judgments of the Apex Court of lesser forum. An accused released on anticipatory bail must surrender himself to custody and only thereafter can apply for regular bail, was held to be contrary to the basic intention and spirit of Section 438 Cr.P.C. It is also contrary to Article 21 of the Constitution of India. Their Lordships further concluded that directing the accused to surrender to custody after the limited period amounts to deprivation of his personal liberty.

5. In Paragraph-117, Their Lordships after reviewing the earlier judgments of the Hon'ble Supreme Court considered the view that "once the anticipatory bail is granted then the protection should ordinarily be available till the end of the trial unless the interim protection by way of the grant of anticipatory bail is curtailed when the anticipatory bail granted by the court is cancelled by the court on finding fresh material or circumstances or on the ground of abuse of the indulgence by the accused.

Apart from the above, the Hon'ble Supreme Court in the aforesaid case came to conclude in Paragraph-134 that declaration of law laid down by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Gurbaksh Singh Sibbia*** (supra), it would not be proper to limit the life of

anticipatory bail and in view of the clear declaration of the law by the Constitutional Bench the life under section 438 Cr.P.C. granting bail cannot be curtailed.

6. In the present case, anticipatory bail granted to the petitioner in the aforementioned orders dated 27.4.2009 and 13.5.2009 does not contain any stipulation regarding any time limit for the period for which the said order has been passed, therefore, the same has to be considered to be one which continues without any limitation of time, subject to of course to the circumstances as taken note of by the Hon'ble Supreme Court in the aforesaid judgment.

7. In view of the aforesaid facts, I am of the considered view that the apprehension expressed by Sri Mohanty, learned Senior Counsel appearing for the petitioners that there is likelihood of being arrest after their appearance before the learned J.M.F.C. has no basis since the judgment of the Hon'ble Supreme Court referred hereinabove is clear in the aforesaid regards.

8. Therefore, while I am not inclined to entertain the challenge made in the present application to the order of cognizance, the CRLMC is disposed of in terms of the observations made hereinabove. Misc. Case Nos.2239 & 2335 of 2010 are also disposed of accordingly.

Application disposed of.

2011 (I) ILR -CUT- 427

INDRAJIT MAHANTY, J.

CRLMC. NO.769 OF 2010 (Decided on 17.12.2010)

STATE OF ORISSA …….. Petitioner.

.Vrs.

DURJO @ DURYODHANA SANAMAJHI & ORS. ……. Opp.Parties.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.311 (2).

Application to recall and re-examine witnesses – Witnesses are the eyes and ears of justice – Section 311 (2) which is mandatory in nature casts an obligation on the trial Court to allow such application if fresh evidence is essential for the just and proper decision of the Case.

In the present Case P.Ws. 17 & 18 filed petition that they failed to depose truth due to threatening calls from the supporters of the accused persons which was preceded by the death of two other witnesses in a connected Case and they requested that if police protection will be provided they will depose the truth – Application rejected by the trial Court – Hence this application – Held, direction issued to the trial Court to issue summons for production of P.Ws.17 & 18 for re-examination in course of trial. (Para 15 & 16)

Case laws Referred to:-

1.1991 Supp.(1) SCC 271 : (Mohanlal Shamji Soni-V-Union of India & Anr.)
2.(1999) 6 SCC 110 : (Rajendra Prasad-V-Narcotic Cell).
3.AIR 2007 SC. 3029 : (Iddar & Ors.-V- Aabida & Anr.).
4.(2008) 3 SCC 602 : (Himanshu Singh Sabharwal-V-State of M.P. & Ors.)
5.26 Crl L.J. 1935 : (Rameshwar Dayal-V-State of U.P.)
6.(2008)41 OCR (SC) 792 : (Hanuman Ram-V-The State of Rajasthan & Ors.).
7.(2006) 33 OCR(SC) 499 : (Nisar Khan @ Guddu & Ors.-V-State of Uttaranchal).
8.(2005) 10 SCC 701 : (Mishralal & Ors.-V-State of M.P. & Ors.)

For Petitioner - Mr. V.Narasingh
(Addl. Govt. Advocate)
For Opp.Parties - Mr. P.C.Chhinchani.

I.MAHANTY, J. The State of Orissa has filed the present application under Section 482 Cr.P.C. seeking to challenge the order dated 20.2.2010 passed by the learned Adhoc Addl. Sessions Judge, FTC-II, Phulbani in Sessions Trial No.18 of 2009 (ST 3/09-FTC-II) with a prayer to allow P.Ws.17 and 18 to be recalled for further examination in course of the trial.

2. The brief facts leading to the present case is that on 23.8.2008, an F.I.R. was filed by one Brahmachari Madhab Chaitanya regarding the murder of Swami Laxmanananda Saraswati. Investigation was taken up by the police and Final Form was filed against the opposite parties. The police placed reliance on the evidence recorded under Section 161 Cr.P.C. of a number of witnesses including Mahasing Kanhar (P.W.17) and Birendra Kanhar (P.W.18), both are residents of the district of Kandhamal and were cited to be examined as prosecution witnesses, since the investigation revealed that they had narrated crucial evidence leading to the homicidal death of Swami Laxmanananda as well as regarding the post-occurrence events pointing out to the involvement of the accused persons in the commission of the crime.

3. The investigation of the case had been handed over to the Superintendent of Police, CID-CB, Orissa, Cuttack vide P.S. Case No.37 of 2008 was registered. On 13.11.2008, the statements of Mahasingh Kanhar (P.W.17) and Birendra Kanhar (P.W.18) were recorded under Section 161 Cr.P.C. by the Investigating Officer. On 30.1.2009, charge-sheet was filed against the accused-opposite parties, while keeping the investigation open under Section 173(8) Cr.P.C. On 17.3.2009, the Investigating Officer in a related case recorded the statement of one Prabhat Panigrahi under Section 161 Cr.P.C. and on 18/19.3.2009, the said Prabhat Panigrahi was killed. On 23.4.2009, the Investigating Officer recorded the statement of one Gopinath Lima under Section 161 Cr.P.C. in a related case and on 4.8.2009 the said Gopinath Lima was killed. On 5.9.2009 both Mahasing Kanhar and Birendra Kanhar were examined as P.Ws.17 and 18 respectively and resiled from their statements recorded under Section 161 Cr.P.C.

4. The prosecution alleged that on 10.1.2010 Mahasingh Kanhar (P.W.17) addressed a petition to the Superintendent of Police, Kandhamal and a similar petition was also addressed to the Superintendent of Police, Kandhamal by Birendra Kanhar (P.W.18) on 12.1.2010.

The extract of the petitions (translated from Oriya) are noted hereinbelow:

"To

The Superintendent of Police, Kandhamal

Sir,

I Sri Mahasingh Kanhar, S/o. Tasban Kanhar, Vill.-Kelani Sahi, P.S.-Kotagarh beg to inform you that I am one of the witnesses of Swami Laxmanananda Saraswati's Murder case. During investigation of this case I have truthfully narrated the facts seen by me and known to me before the Investigating Officer. Before my deposition in the Fast Track Court, the supporters of the accused persons of this case threatened me not to depose the facts narrated by me to the I.O. and kept watch on me near the Trial Court. I was mortally afraid just before my deposition, so I could not narrate the facts known to me in my deposition. I denied to the public prosecutor in this respect. Since then I constantly regret for concealing the truth. Now also there is imminent danger to me and my family so I secretly came to you and inform this matter.

So I request you if proper protection is provided to me by police and opportunity be given by the court I shall depose the truth.

Yours faithfully,

Read over to me an I found to correctly recorded and signed.

Sd/-
Mahasingh Kanhar

10.1.2010"

"To

The Superintendent of Police, Kandhamal

Sir,

I Sri Birendra Kanhar, S/o. Jandura, vill.-Haripur, P.S.-Timudibandh beg to inform you that I have given my deposition as a witness in the murder case of Swami Laxmananda in the Fast Track Court, Before my deposition some people came to me and threatened not to depose the facts which I have narrated before police during investigation. On the day of my deposition in the trying court I found those persons keeping watch on me just out side court premises. As I found my life is at stake, I could not disclose the fact before the trying court. I also know that two witnesses of these cases have been murdered.

So I request you to kindly provide police protection to me. I also request you if police protection will again be given to me in the court, I would disclose the fact within my knowledge. I request you to take proper action in this regard. The contents of this petition were read over to me after and I found it to be correctly recorded, I put my signature on it.

Yours faithfully,

Sd/-
Birendra Kanhar
12.1.2010"

5. On 2.2.2010 a petition was filed by the prosecution, before the court of learned Adhoc Additional Sessions Judge, Fast Track Court No.2, Phulbani, under Section 311 Cr.P.C. (Annexure-2) with a prayer to recall P.Ws.17 and 18 in view of their petitions submitted by the witnesses, namely, Mahasingh Kanhar (P.W.17) and Birendra Kanhar (P.W.18). This petition was heard by the learned Adhoc Additional Sessions Judge and came to be rejected by him vide order dated 20.2.2010 (Annexure-3) which is the subject matter of challenge herein.

6. Mr.V.Narsingh, learned Additional Government Advocate on behalf of the State submitted that the court below had failed to appreciate the scope and ambit of the second part of Section 311 Cr.P.C. which has been held by the Hon'ble Supreme Court to consist of two parts:

> First Part **:** Giving a "discretion" to the Court to examine the witnesses at any stage.
> Second Part **:** The "mandatory" provision which enjoins upon the court a duty to examine a witness if the evidence sought to be adduced appears essential to the just decision of the case.

Learned counsel for the State submitted that the case of the prosecution in its application under Section 311 Cr.P.C. would come under the second part of the Section 311 Cr.P.C. and submitted that the court below, lost sight of the second part of Section 311 Cr.P.C. He further submitted that both the P.Ws. 17 and 18 as contended in their petition before the Superintendent of Police, were under serious threat to their lives for which reason, they were constrained to resile from their statements recorded under Section 161 Cr.P.C. out of fear, on account of what had transpired prior to their evidence being led in court. It is asserted by the State that two other witnesses whose statements had been recorded under Section 161 Cr.P.C. by the Investigating Officer, in connected cases, namely, Pravat Panigrahi and Gopinath Lima were killed soon after the recording of their 161 statements. Further as would be revealed from their petitions, the persons who threatened the said witnesses had kept a watch on the said witnesses and were near the trial court even on the date of their evidence being recorded and being mortally afraid could not narrate the actual truth known to them as had been recorded in their deposition under Section 161 Cr.P.C.

Learned counsel for the State submitted that P.Ws. 17 and 18 were vital witnesses for the prosecution and on receipt of the petitions from the

said witnesses, the Superintendent of Police, Kandhamal, immediately directed the I.I.C., Kotagarh P.S. and the O.I.C., Timudibandh P.S. to take follow-up action and to remain alert and to intensify the police patrolling near the house of the said witnesses by providing security to them and the said directions have also been implemented for the safety of the said witnesses from the date of receipt of the said petitions. Based on the said petitions, the matter was reported to the Public Prosecutor, Kandhamal on whose advise, the State filed a petition under Section 311 Cr.P.C. for recall and re-examination of P.Ws. 17 and 18, namely, Mahasingh Kanhar and Birendra Kanhar respectively.

7. Learned counsel for the State placed reliance on the following judgments of the Hon'ble Supreme Court in support of his contentions:

(i) **Mohanlal Shamji Soni v. Union of India and another,** 1991 Supp(1) Supreme Court Cases 271.

(ii) **Rajendra Prasad v. Narcotic Cell,** (1999) 6 Supreme Court Cases 110.

(iii) **Iddar and others v. Aabida and another,** AIR 2007 Supreme Court 3029.

(iv) **Himanshu Singh Sabharwal v. State of Madhya Pradesh and others,** (2008) 3 Supreme Court Cases 602.

The Hon'ble Supreme Court in the case of ***Mohanlal Shamji Soni*** (supra) has dealt with the scope and ambit of Section 311 Cr.P.C. para materia with Section 540 of the old Code of 1898 and came to uphold the judgment of the Hon'ble Gujrat High Court allowing recall and re-examination of certain witnesses while rejecting the contention of the accused persons therein that, permitting the prosecution to recall the witness who had already been examined was violative of the principles underlined Section 540 (now Section 311 Cr.P.C.). The Hon'ble Supreme Court reiterated the views expressed in the earlier case of **Rameshwar Dayal v. State of U.P.**, 26 Crl.L.J. 1035 and concluded that, whenever any additional evidence is recorded or fresh evidence is admitted against the accused, then it was absolutely necessary, in the interest of justice that, the accused should be afforded a clear and reasonable opportunity to rebut the evidence of that part of record against him.

In the case of ***Rajendra Prasad*** (supra), Hon'ble Supreme Court in a Division Bench presided over by Hon'ble Justice K.T.Thomas in Paragraph-12 has noted the following:

> "12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the

prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at."

(emphasis supplied)

In the case of ***Iddar and others*** (supra), the Hon'ble Supreme Court presided over by a Bench consisting of Hon'ble Dr. Justice Arijit Pasayat, reiterated the principle laid down by the Hon'ble Supreme Court in the earlier decision and came to conclude in Paragraph-12 which is as follows:

"12. As indicated above, the Section is wholly discretionary. The second part of it imposes upon the Magistrate an obligation: it is, that the Court shall summon and examine all persons whose evidence appears to be essential to the just decision of the case. It is a cardinal rule in the law of evidence that the best available evidence should be brought before the Court. Sections 60, 64 and 91 of the Indian Evidence Act, 1872 (in short, 'Evidence Act') are based on this rule. The Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their side. This must be left to the parties. But in weighing the evidence, the Court can take note of the fact that the best available evidence has not been given, and can draw an adverse inference. The Court will often have to depend on intercepted allegations made by the parties, or on inconclusive inference from facts elicited in the evidence. In such cases, the Court has to act under the second part of the section. Sometimes the examination of witnesses as directed by the Court may result in what is thought to be "filling of loopholes". That is purely a subsidiary factor and cannot be taken into account. Whether the new evidence is essential or not, must of course depend on the facts of each case, and has to be determined by the Presiding Judge."

(emphasis supplied)

In the case of ***Himanshu Singh Sabharwal*** (supra), while dealing with the scope of Section 311 Cr.P.C. the Hon'ble Supreme Court in its judgment rendered by the Division Bench presided over by Hon'ble Justice Dr. Arijit Pasayat, came to hold that, during examination of several witnesses who were stated to be eyewitnesses, such witnesses resiled from the statements made during investigation and even three police witnesses also

resiled from their earlier statements. They are Dhara Singh (P.W.32, Sukhnandan (P.W.33) and Dillip Tripathi (P.W.34). In the said case which has been filed with a prayer seeking to transfer the case from Sessions Court in M.P. to some other place, in the larger interest of justice and transparency, the learned counsel for the State submitted that, they had no objection about the transfer of the said case to any other state. Learned counsel appearing for the respondent-accused in order to show their bona fides, also stated that, even the police officials, P.Ws.32, 33 and 34 may be recalled for cross-examination even without any application in terms of Section 311 of the Code of Criminal Procedure, 1973 being filed. In this case, Hon'ble Supreme Court came to hold as follows:

> "The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice-often referred to as the duty to vindicate and uphold the majesty of the law."
>
> "If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."
>
> "If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."
>
> "A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as to a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to

mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial, and not by an isolated scrutiny."

" 'Witnesses', as Bentham said: are the eyes and ears of justice, Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties."

(emphasis supplied)

In the said judgment while allowing the petition seeking transfer of trial from Madhya Pradesh to Nagpur in the State of Moharashtra, the Hon'ble Supreme Court further directed that it is open for the Public Prosecutor to seek recall of any witness already examined in terms of Section 311 of the Code and, this direction was in addition to its earlier direction to recall and re-examination of P.Ws.32, 33 and 34.

8. Mr. P.C.Chhinchani, learned counsel for the accused-opposite parties, on the other hand, vehemently argued that allowing the prayer of the prosecution would seriously prejudice the interest of the accused persons since P.Ws.17 and 18 had already been examined by the prosecution and thereafter, also cross-examined by the prosecution after declaring them hostile. Considering such a request on the part of the prosecution at the fag end of the trial, when only the Investigating Officer remains to be examined, would in effect permit a de novo trial which is impermissible in law.

In this respect, reliance was placed by the learned counsel for the accused-opposite parties on the following judgments of the Hon'ble Supreme Court in support of his contentions:

(i) **Hanuman Ram v. The State of Rajasthan and others,** (2008) 41 OCR (SC) – 792

(ii) **Nisar Khan @ Guddu & others v. State of Uttaranchal**, (2006) 33 OCR (SC) – 499

(iii) **Mohanlal Shamji Soni v. Union of India and another,** 1991 Supp (1) Supreme Court Cases 271

9. In the light of the submissions advanced by the learned counsel for the parties as noted hereinabove, it is now become necessary to deal with the findings reached by the trial court in the impugned order dated 20.2.2010 under Annexure-3 to the present application, which is quoted hereinbelow:

> "In the instant case admittedly both the witnesses i.e. P.Ws. 17 and 18 without any fear or apprehension in their mind appeared in the court on being summoned and entered the witness box. They did not reveal any such apprehension in their mind during their evidence in court. From the tenor of evidence it also appears that they remained farm not to support the prosecution case, which the fact revealed when the effort taken by the prosecution by putting the witnesses to cross-examination under section 154 of the Evidence Act could not fetch any result and went futile. Had there any threat been extended to them and the witnesses really had the intention to help the court in reaching a just and proper conclusion in deciding the case they could have appraised such fact to the S.P., Kandhamal soon after they received summon from the court and could have abstained from deposing in the court until protection was sought for by them. Having attended the court without revealing their apprehension in any manner it is really difficult to accept the concern shown by the witnesses as transformed by the prosecution through their petition. It is also hard to believe that the witnesses had any obstacle in giving proper evidence before the court while they were in a protected zone being inside the premises of the Court. In the given facts and circumstances, having regard to the principle enunciated in the decision referred to by the defence in the matter of Hanuman Ram v. the State of Rajasthan and others reported in (2008) 41 OCR (SC) 792 I am dragged to the conclusion that it would be a travesty of justice if this court recall the witnesses who having appeared in the Court on their own examined once and declared hostile by the prosecution and discharged without any iota of apprehension in their mind. With the above considered view I am not inclined to allow the prayer of the prosecution and both the petitions recalling witnesses accordingly stands rejected."

Insofar as the scope and ambit of Section 311 Cr.P.C. is concerned, the same has been well settled by the Hon'ble Supreme Court in a catena of judgments. While dealing with the case of ***Mohanlal Shamji Soni*** (supra), Hon'ble Mr. Justice S.Ratnavel Pandian dealt with earlier decisions of the Hon'ble Supreme Court, on the scope of Section 540 of the old Code of 1898 corresponding to Section 311 of the new Code of 1973 and found that Section 311 is almost a verbatim reproduction of Section 540 of the old Code except for the insertion of the words 'to be' before the word 'essential' occurring in the old section. Accordingly, it was held that the said section was manifestly in two parts. Whereas the word used in the first part is 'may' the word used in the second part is 'shall'. As a consequence thereto, the first part which can be stated to be 'permissive' gives purely discretionary authority to the Criminal Court and enables it "at any stage of enquiry, trial or other proceedings" under the Code to act in one of the three ways, namely:

(1) to summon any person as a witness, or

(2) to examine any person in attendance, though not summoned as a witness, or

(3) to recall and re-examine any person already examined.

The second part which is 'mandatory' imposes an obligation on the court:

(1) to summon and examine, or

(2) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case.

Thereafter, in the said judgment, Hon'ble Supreme Court came to conclude at Paragraph-27 thereof which is as follows:

"27. The principle of law that emerges from the views expressed by this Court in the above decisions is that the criminal court has ample power to summon any person as a witness or recall and re-examine any such person even if the evidence on both sides is closed and the jurisdiction of the court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

(emphasis supplied)

10. Now it becomes important to consider the judgments relied upon by the learned counsel for the opposite parties.

In the case of ***Hanuman Ram*** (supra), the Hon'ble Supreme Court presided over by Hon'ble Justice Arijit Pasayat came to conclude in Paragraph-11 which is as follows:

> "11. The factual scenario in *Mishri Lal's* case (supra) has great similarity with the facts of the present case. The High Court's view for accepting the prayer in terms of Section 311 of the Code does not have any legal foundation. In the facts of the case, the High Court ought not to have accepted the prayer made by the accused persons in terms of Section 311 of the Code. Above being the position, we set aside the impugned order of the High Court."
>
> (emphasis supplied)

Hon'ble Supreme Court in the aforesaid case reached its conclusion by placing reliance on an earlier judgment of the Hon'ble Supreme Court in the case of ***Mishralal and others v. State of M.P. and others****,* (2005) 10 SCC 701. In the said case, Hon'ble Mr. Justice K.G.Balakrishnan came to conclude that, once a witness was examined in-chief and cross-examined fully, such witness should not have been recalled and re-examined to deny the evidence he had already given before the Court, even though, that witness had given an inconsistent statement before any other Court or forum "subsequently".

In the said case, P.W.2-Mokam Singh has been examined in course of the trial before the Sessions Judge and also cross-examined by the defence on the same day. Some of the accused persons who were allegedly involved in this incident being minors, their case was tried by the Juvenile Court. The same witness-Mokam Singh was also examined as a witness before the Juvenile Court and in the Juvenile Court, he gave evidence to the effect that, he was not aware of the persons who had attacked him and hearing the voice of the assailants, he assumed that they were some *Banjaras*.

The accused persons filed application for recall of P.W.-2, Mokam Singh and in their prayer, the said witness was recalled and then confronted with the evidence given by him before the Juvenile Court. On the basis of such evidence the accused persons were acquitted of the charge under Section 307 I.P.C. for having made an attempt on the life of this witness.

It is in these circumstances, where the order of recall was passed to confront the witness with "subsequent evidence", which was held by the Hon'ble Supreme Court to be erroneous and without any sound judicial basis. The Hon'ble Supreme Court further came to conclude that a witness could only be confronted with any "previous statement" made by him. The Hon'ble Supreme Court further concluded that the said witness must have given some other version before the Juvenile Court for extraneous reasons

and the defence should not have been given any opportunity at a later stage, to completely efface the evidence already given by him under oath.

11. In the fact situation of the present case, the principles laid down by the Hon'ble Supreme Court in the case of **Hanuman Ram** (supra), wherein Their Lordships relied on an earlier judgment of the Hon'ble Supreme Court in the case of ***Mishralal and others*** (supra) have no application since the fact situation of the present case and are clearly distinguishable for the reasons noted hereinbelow.

12. The facts of the case as noted hereinabove, are clearly distinguishable and do not apply to the facts of the present case. The principle that evolves from the judgments cited by the learned counsel for the parties, is clear. Section 311 Cr.P.C. contains two parts. The first part is purely "discretionary" and the second part is "mandatory". The case of the prosecution is that their petition under Section 311 Cr.P.C. was covered by the second part of Section 311 Cr.P.C., since the object of the prosecution behind the petition was an attempt to bring essential evidence to the notice of the trial court in course of the trial in order to enable it to reach a just decision in the trial.

As noted hereinbefore, in the case of **Himanshu Singh Sabharwal** (supra), the oft-quoted the passage of Bentham on the relevance of the witnesses is that the "witnesses are the eyes and ears of justice" but such witness when incapacitated from acting as eyes and ears of justice, a trial can no longer be said to constitute a fair trial. The incapacitation of a witness to act as eyes and ears of justice, may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. The Hon'ble Supreme Court while referring to the oft-quoted passage of Bentham, had highlighted the trial court's duty to protect such witness. The Hon'ble Supreme Court has warned that it is time had become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualty.

13. Insofar as the judgment of the Hon'ble Supreme Court in the case of **Nisar Khan @ Guddu & others** (supra) is concerned, a Division Bench presided over by Hon'ble Justice K.Sema, observed that one of the witnesses, i.e. P.W.4-Naeem Babu had filed an application before the trial Magistrate that he has been threatened and intimidated by the accused not

to depose against them. So also P.Ws.1 and 2 who were eye-witnesses and supported the prosecution case consistently turned hostile. P.Ws.1 and 2, direct eye-witnesses of the occurrence were examined and discharged and thereafter, at the behest of the defence recalled on 7.1.2002 re-examined by the defence, where all of them turned hostile and resiled from the previous statement. From the said case, the Hon'ble Supreme Court came to conclude that it is clear that the prosecution witnesses were won over either by money, muscle power or by threats or intimidation, since they were recalled and re-examined at the behest of the defence after more than one year of their original examination and cross-examination.

14. It is the responsibility and obligation of the trial court to act as a protector of all citizens and to ensure that during a trial in court, a witness could safely depose the truth without any fear of being threatened/haunted by those against whom he is likely to depose. The Hon'ble Supreme Court repeatedly has called upon all trial courts to take a "participatory role" in a trial and are no longer expected to act as mute tape recorders and merely record whatever is being stated by the witnesses. Section 311 of the Code and Section 165 of the Evidence Act confer vast and wide powers on presiding officers of a court to elicit all necessary materials by playing an "active role in the evidence-collecting process". The trial court cannot afford to be wishfully or pretend to be blissfully ignorant or oblivious to such serious pitfalls or dereliction of duty on the part of the prosecuting agency. The power of the court under Section 165 of the Evidence Act is in a way complementary to its power under Section 311 of the Code and the second part of Section 311 does not allow any discretion and instead casts an obligation on the trial court and binds the trial court to take necessary steps if the fresh evidence is essential to the just decision of the case is forthcoming. The object of Section 311 Cr.P.C. is to enable the court to arrive at the truth, irrespective of the fact that the prosecution or the defence have failed to produce some evidence but which is necessary or essential for a just and proper decision of the case and, therefore, such power must be utilized to sub-serve the cause of justice and protect public interest.

15. The death of Swami Laxmanananda Saraswati, while being a dastardly act, resulted in a great amount of public outcry and also a most unfortunate consequence for the State of Orissa and for its people. The trial court is duty bound in law to bring the perpetrators of such a heinous crime to justice. The trial court also owes of an obligation to the citizens of the country. In the facts of the present case and from the nature and manner in which the trial court has dealt with the application filed by the prosecution under Section 311 Cr.P.C. to recall P.Ws.17 and 18 (Mahasing Kanhar and Birendra Kanhar), clearly indicates that the court has proceeded on an

assumption that the petition under Section 311 Cr.P.C. was filed under the first part of the said Section and, therefore, it proceeded on the footing that the court had a discretion in the matter.

I am afraid the facts of the present case clearly mandates that the petition was filed under the second part of Section 311 Cr.P.C. which is mandatory in nature. In such cases where both the witnesses have filed a petition stating therein the basis of their fear, which was preceded by death of two other witnesses in connected cases, the threat to life and property meted out to the witnesses alongwith the allegation that the persons threatening the witnesses were within visible sight of the court room while the witnesses were giving their evidence in court. In my earnest view justifies the necessity to allow the petition filed by the prosecution under Section 311 Cr.P.C..

16. Accordingly, I direct the trial court to re-examine the P.Ws.17 and 18, namely, Mahasing Kanhar and Birendra Kanhar respectively. The majesty of law mandates a fair trial and the search for truth are noblest object to a criminal trial and such application in the present facts and circumstances of the case ought to have been considered favourably. Therefore, while placing reliance on the judgments of the Hon'ble Supreme Court as referred hereinabove, I have no hesitation whatsoever in directing the set aside of the order dated 20.2.2010 passed by the learned Adhoc Addl. Sessions Judge, FTC-II, Phulbani in Sessions Trial No.18 of 2009 (ST 3/09-FTC-II) and I order accordingly. The trial court is directed to issue summons for production of P.Ws.17 and 18, namely, Mahasing Kanhar and Birendra Kanhar respectively for re-examination in course of such trial and give adequate opportunity to the defence for cross-examination in course of such proceeding and also be afforded a fair and reasonable opportunity to rebut any evidence that may be brought on record by the prosecution in course of the recall/re-examination of P.Ws.17 and 18.

17. With the aforesaid direction, the CRLMC is allowed. Interim order dated 19.5.2010 stands vacated. The Lower Court Record may be remitted back to the trial court urgently.

Application allowed.

2011 (I) ILR -CUT- 441

H.S.BHALLA, J.

CRLA. NO.55 OF 1992 (Decided on 01.11.2010).

JAGABANDHU SWAIN & ORS. …… Appellants.

.Vrs.

STATE OF ORISSA …… Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SECS.307/149.

Appeal against conviction –The appellants have been facing mental stress and agony of the trial for the last 23 years i.e. since the date of registration of the case, and a sword of conviction has been persistently hanging over their head – Ends of justice would be amply met if a lenient view in the matter of sentence is taken against the appellants – Held, conviction recorded against the appellants shall be maintained but the period of sentence awarded to them by the Court below is reduced to the period, which they have already undergone – However, the appellants are directed to pay Rs.30,000/- as compensation which is to be shared by all the injured persons failing which the order passed by the trial Court shall become operative.

(Para 4)

For Appellants - M/s. D.P.Dhal, & A.K.Acharya.
For Respondent - Addl. Govt. Advocate
M/s. Debasis Panda & Manas Chand
(for informant no.1)

H.S.BHALLA, J. This criminal appeal is directed against the judgment of conviction and order of sentence dated 5.2.1992 passed by learned Additional Sessions Judge, Jajpur vide which the appellants were convicted and sentenced them to undergo as under,

SL No.	Name of the appellant(s)	Under Sections	Sentence
01.	Jagabandhu Swain and others	307/149, I.P.C.	All the accused persons were sentenced to undergo R.I.for five years and to pay a fine of Rs.500/- each. In default thereof, they were further sentenced to undergo R.I for two months

2. The learned counsel appearing for the appellants, at the very outset, has contended that he does not challenge the conviction of the appellants on merits and confines his arguments only on the point of quantum of sentence. He further submits that a case under the said sections was registered against the appellants in the year 1987 and the appellants have been facing mental agony of the trial and a sword of conviction has been persistently hanging over their head since then. He, therefore, prays that a lenient view be taken against the appellants. He has further submitted that keeping in view the facts and mitigating circumstances of the appellants, as also the fact that they are poor persons, some leniency be shown against the appellants in the matter of sentence.

3. Since the prayer made by the learned counsel for the appellants has been restricted only on the quantum of sentence, therefore, in order to avoid repetition of fact in the judgment herein, I do not consider it necessary to recapitulate the same again, since they have been narrated in the judgment of the court below in details.

4. I have considered the submissions raised by the learned counsel for the appellants. It is not doubt true that since the date of registration of the case, the appellants have been facing mental stress and agony for the last 23 years and in such like circumstances, I am of the view that ends of justice would be amply met if a lenient view in the matter of sentence is taken against the appellants. Accordingly, taking a lenient view against the appellants, I direct that conviction recorded against the appellants shall be maintained, but the period of sentenced already awarded to them by the court below is reduced to the period, which they have already undergone. However, the appellants are directed to pay Rs.30,000/- (Rupees Thirty Thousand) as compensation to be shared by all the injured persons. The said compensation amount shall be deposited with the trial court within a period of 45 days from the date a certified copy of this order is received. It is made clear that in case the appellants fail to deposit the compensation amount within stipulated period, the order passed by the trial court shall become operative.

With this modification in the matter of sentence, the appeal filed by the appellants stand dismissed.

Appeal dismissed.

2011 (I) ILR -CUT- 443

H.S.BHALLA, J.

MACA NO.275 OF 2009 (Decided on 02.12.2010)

ORIENTAL INSURANCE CO.LTD. …….. Appellant.

.Vrs.

KARUNAKAR PRADHAN & ORS. …… Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – SECS.147, 149.

Driver of the offending vehicle had no licence – Breach of the policy conditions – Onus is always on the Insurance Company to prove that the driver had no valid driving licence at the time of accident to escape the liability – Even the Insurance Company can not contend that since the driver failed to produce licence when asked to do so in Cross-examination, adverse inference should be drawn against him.

In this case no efforts were made by the Insurance Company to prove on record that the driver was not holding a valid driving licence at the time of accident in order to prove that the driver was disqualified from holding a valid licence at the time of accident – Held, appeal filed by the appellant being without merit the same is dismissed.

(Para 6,7,8)

Case law Relied on:-

1985 ACJ 397 (SC) : (Narchinya Kamat -V- Alfredo Antonio Deo Martins).

For Appellant - M/s. P.Mishra & Associates.
For Respondents – None

H.S.BHALLA, J. This appeal is directed against award dated 7.1.2009 passed by 1st M.A.C.T., Keonjhar (hereinafter referred to an "the Tribunal") in M.A.C. No.130 of 2004 by virtue of which the claim petition filed by the legal representatives of the deceased Karunakar Pradhan, who died in a motor vehicular accident, was allowed, the relevant portion of which reads as under:-

> " The M.A.C. Case is allowed on contest against O.P.No.2 and ex parte against O.P. no.1, with a cost of Rs.300/- to be paid by O.P. no.2 to petitioners. O.p.no.2 is directed to pay compensation of Rs.1,78,000/- (rupees one lakh seventy eight thousand eight hundred) only with cost to petitioners within two months of this order along with interest at the rate of 9% per annum from the date of

application till the date of payment 90% of this amount including interest shall be kept in fixed deposit in the name of the petitioners in any Nationalized Bank for a period of five years, monthly interest being payable to petitioners regularly. The balance amount with interest be paid to the petitioners. The bank shall not allow any loan to be raised treating this deposit as security nor it shall allow any prematured payment of the same. Separate cheques be issued accordingly. O.P. No.2 shall furnish along with the cheques the detailed calculations of the amount covered by these cheques."

2. Since the liability of the appellant to pay the amount of compensation was fastened by the Tribunal, the appellant challenged the findings of the Tribunal by filing the present appeal before this Court.

3. The detailed facts have already been recapitulated in the award of the Tribunal and in order to avoid repetition, the same are not being reproduced herein.

4. Learned counsel appearing for the appellant vehemently argues that the driver of the offending vehicle was not holding a valid driving licence at the time of accident and since he was not holding a valid driving licence, the appellant is liable to be exonerated.

5. I have considered the contention of the learned counsel for the appellant in this regard and for the reasons to be recorded by me hereinafter, I find that the same is liable to be noticed only for the sake of rejection.

6. In the instance case, the appellant has categorically pleaded in its written statement that the driver was not holding a valid driving licence, but in order to escape the liability, the instance company is not only required to prove that the driver was not holding a valid driving licence at the time of accident but also to prove that the driver was disqualified from holding or obtaining a licence or that he never had any licence at all. It is conceded by learned counsel for the appellant that onus of proving that the driver was not holding a valid driving licence or disqualified from holding the licence is on the Insurance Company. It is for the Insurance Company to prove that the driver was not holding a valid driving licence on the date of accident by bringing the relevant documents, i.e., extracts from the Road Transport Authority or District Transport Officer or certificate to the effect that the person driving the vehicle at the time of accident was not issued with a licence at all. The apex Court in the case Narchinya Kamat v. Alfredo Antonio Deo Martins, 1985 ACJ 397 (SC) has held that whenever the Insurance Company pleads a breach of the condition of policy by pleading that the driver had no driving licence at the time of the accident, the onus is on the Insurance Company to prove that fact. The onus is always on the Insurance Company to prove that the driver had no driving licence to escape

the liability. To my mind, the Insurance Company even can not contend that only because the driver failed to produce licence when asked to do so in cross examination, adverse inference should be drawn against the driver. In the instant case, on the strength of evidence finding has been recorded by the learned Tribunal that the driver was holding a valid driving licence at the time of accident.

7. In view of the settled law that onus to prove that the driver had no licence is on the Insurance Company, the contention of the learned counsel for the appellant has no force when he argues that the driver was not holding a valid driving licence at the time of accident, particularly when no evidence was led by the Insurance Company. No efforts were made by the Insurance Company to prove on record that the driver was not holding a valid driving licence at the time of accident in order to prove that he was disqualified or holding valid licence at the time of accident.

8. In the light of what has been observed above, the appeal filed by the appellant, being without any merit, fails and is hereby dismissed. The appellant-Insurance Company is directed to deposit the awarded amount along with interest before the Tribunal within two months after deducting the amount already paid to the claimant under Section 140 of the M.V. Act, if any. On deposit of the awarded amount, the statutory deposit kept in deposit in this Court shall be refunded to the Insurance Company.

Appeal dismissed.

2011 (I) ILR -CUT- 446

ARUNA SURESH, J.

CRLA NO.2 OF 1990 (Decided on16.12.2010)

LAKHI @ LAKHIDHAR BAG ……. Appellant

.Vrs.

STATE OF ORISSA ……. Respondent

(A) EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.32.

Victim of rape could not be examined in Court as she expired- Though her statement can't be considered as a dying declaration, her statement to eye witnesses and to her husband, soon after she was rescued, without any lapse of time becomes highly credible being relevant u/s 32 of the Act.

(Para 15)

(B) **PENAL CODE, 1860 (ACT NO.45 OF 1860) – S.376.**

P.W. 6 &8 deposed that when they entered inside the room they found the appellant in compromising position and sitting on the victim lady - All the witnesses had also caught-hold of the appellant at the spot- Victim was a married woman- The incident took place on 13.04.1989 - F.I.R. lodged on 14.04.1989 and the victim was examined on that day at about 1-30 PM.

Serological report indicates that semen of human origin was found on the shaya but it could not be related with the sample semen because of deterioration - It is also not necessary that when a woman is raped, the vaginal fluid must contain spermotza living or dead - To constitute an offence of rape penetration is enough - Held, there is no merit in the appeal which is dismissed.

(Para 12,17,18)

For Appellant : M/s P.K. Nanda & P.C. Das
For Respondent : Miss Samapika Mishra
Addl. Standing Counsel

Impugned in this appeal is the judgment of the Sessions Judge, Kalahandi, Bhawanipatna dated 2.12.1989 whereby he convicted the appellant for an offence under Section 376 I.P.C and sentenced him to undergo rigorous imprisonment for three years.

2. On 13th April, 1989 at about 5 P.M, victim Champa Dei , wife of informer Bhadra Thakur, P.W.3 had gone to the house of her sister Mangelin Dei for getting fire. Appellant Lakhi Bag taking advantage of the absence of Mangelin Dei, forced her servant Bisekh Harijan, P.W.5 to leave the place and, thereafter, ravished Champa Dei. When Champa Dei resisted, appellant gagged her mouth with cloth. However, accidentally, the cloth came out of her mouth and she screamed. Hearing her screams, neighbors came there and broke opon the door and rescued the victim. At the time of the incident, the informer was not in the village as he had gone out. He was informed about the incident by his wife, the victim on his return back in the evening. Thereafter, he lodged his complaint, Ext.3 scribed by Dibakar Thakur, P.W.4, at the Jaypatna Police Station. Resultantly, F.I.R No.37 dated 14.4.89 under Section 376 I.P.C. was registered. After completion of the investigation, charge-sheet was filed.

3. On the basis of evidence available on the record, the trial court was pleased to frame charge under Section 376 I.P.C against the appellant to which he pleaded not guilty and claimed trial.

4. Prosecution has examined nine witnesses in support of its case. Relevant witnesses are Bhadra Thakur (P.W.3), Dibakar Thakur (P.W.4), Bisekh Harijan (P.W.5), Chintamani Thakur (P.W.6), Manu Thakur (P.W.8). Dr. Bishnu Charan Panda (P.W.7) had medically examined the victim as well as the appellant. Constable Promod Kumar Mishra (P.W.1), O.I.C, Ramanath Nayak (P.W.2) and D.I.C, Debi Prasad Das (P.W.9) are all official witnesses. The victim could not be examined by the prosecution, as she had expired after about two or three months of the incident i.e., before the commencement of the trial.

5. Informer Bhadra Thakur as P.W.3 in categorical terms has deposed that the victim had narrated the entire incidents to him when he came back to his house in the evening. He explained the entire incident to Dibakar Thakur, P.W.4 who wrote the complaint, Ext.3 on his instructions, he identified his signature on the complaint. He submitted the report at Jaypatna Police Station on the basis of which F.I.R, Ext.3 was registered and was signed by him. In his cross-examination, he has disclosed that appellant is his cousin (Father's Sister's son). He denied the suggestion that victim had illicit relationship with the appellant before he married her.

P.W.4, Dibakar Thakur has corroborated the statement of Bhadra Thakur. Besides, he is also a witness to the seizure of saree, blouse and Shaya which belonged to the deceased and was seized by the Investigating Officer vide seizure memo, Ext.4.

6. Bisekh Harijan, P.W.5 who happen to be the servant of Mangelin Dei, was present in the house and was cooking his food at the time of the incident. He, in categorical terms has deposed that Mangelin Dei was absent as she had gone somewhere. He was preparing his food in her house when victim came and asked for fire. Appellant Lakhi also came there and dragged the victim inside the house of Mangelin Dei, after pushing him out of the house. He has testified that he ran towards the village Basti and told the incident to Malla Thakur and Manu Thakur that victim had been dragged forcibly by the appellant inside the house of Mangelin Dei. Those two persons came at the spot, opened the door and found the victim weeping inside the house and the appellant had concealed himself in a corner of the room.

He has stood the test of cross-examination. When questioned by the defence counsel, he gave graphical description of the place of occurrence as well as details of the incidents. In the cross-examination, he did admit that Jayanti and her daughter Nura had also come there for husking paddy. However, he has explained that it was after Jayanti and his daughter left, victim was dragged by the appellant inside the room.

8. Learned counsel for the appellant has argued that there is contradiction in the statement of the witnesses regarding the place of occurrence. According to P.W.9, the I.O, place of occurrence was the varendah which was enclosed from all sides by wooden planks. According to P.W.5, Bisekh Harijan, the occurrence had taken place in a room. The trial Court has dealt with this submission of the counsel for the appellant in para 9 of the judgment in the following manner:

"Such position has been refuted by P.W.9, the I.O in this case who stated that the place of occurrence is on the varendah with its enclosure from all side by wooden planks. This witness might has understood that the varendah to be a room as it was enclosed from all sides having a door. In this case, the spot map prepared by P.W.9 lends a great significance which snows that the place of occurrence was on the varendah……"

9. I find myself in consensus with the observations of the trial court as regards place of offence. Varendah was also enclosed by all sides by wooden planks having door for entrance. It is individual perspective how a person describes a place which is covered from all sides having an entrance door. Bisekh Harijan has explained the place of occurrence as "room" whereas the Investigating Officer has described it a "covered varendah". The fact remains, all the witnesses for the prosecution who reached the spot after the occurrence have in categorical terms stated that the enclosure where the incident took place was covered with wooden planks from all

sides having one entrance door. Therefore, the contradiction as highlighted by the counsel for the appellant is of no consequence.

10. The Investigating Officer had prepared the site plan, Ext.7 after visiting the spot. Correctness of the spot map is not indispute. Testimony of Bisekh Harijan is of much importance, as he is the first witness of the incident who has clearly proved the manner in which appellant handled the victim and forcibly took her inside the house.

11. Chintamani Thakur, P.W.6 is a chance witness. He was passing in front of the house of Mangelin Dei, when he heard some noise inside her house. He also saw P.W.5, Manu Thakur coming towards the house of Mangelin Dei followed by Malla Thakur. He met them in front of the house of Mangelin Dei. He removed the wooden plank of the varendah and unchained the door. He deposed that he went inside and found the victim was made to lie on the floor and the appellant was sitting on her. It was when he raised alarm along with Malla Thakur and Manu Thakur, the appellant got up and they rescued the victim. In his cross-examination he has deposed that he had gone inside the house at the instance of Manu Thakur as they had heard some sound coming from inside and also because Manu had told him that appellant had dragged the victim inside the house.

12. Manu Thakur, P.W.8 has also corroborated the testimony of Chintamani Thakur. He, in categorical terms has deposed that when they entered inside the room, they found the appellant in compromising position and sitting on the victim lady. It was when they raised alarm, appellant came out and hid himself in the corner of the room.

13. All public witnesses are in consonance with each other, when they said that victim after her rescue, had told them that she was forcibly taken inside the room and raped by the appellant against her will. All these witnesses had also caught-hold of the appellant at the spot.

14. Defence has failed to demolish the testimony of any of the witnesses in their cross-examination. The trial court, therefore, rightly assessed the testimony of these witnesses to conclude that guilt of the appellant has been proved without any dent.

15. True, that the victim of crime could not be examined because she had died. Under these circumstances, trial Court has rightly given weightage to the statement made by the victim to her husband and other witnesses, being relevant under Section 32 of the Evidence Act. Though her statement cannot be considered as a dying declaration, the fact

remains, her statement or narration of incident to the eye-witnesses, soon after she was rescued by them and to her husband without any lapse of time becomes highly credible and could not have been ignored by the trial Court.

16. Learned counsel for the appellant has submitted that as per the medical report(Ext.5), Dr. Bishnu Charan Panda, P.W.7 found few external injury on the person of the victim but did not find any injury on her genetalia, nor there was any sticking of pubic hair by formatic or vaginal fluid. He also did not find any living or dead spermotza in her vaginal fluid. He emphasized that in view of this report, it cannot be said that the appellant had ravished the victim forcibly.

17. I do not find much force in the submissions made by the learned counsel for the appellant. Victim was a married woman. The incident took place on 13.4.1989. The F.I.R was lodged on 14.4.1989 and she was examined by the doctor at about 1.30 P.M on 14.4.1989.

18. Serological report (Ext.9/1) indicates that semen of humane origin was found on the Shaya but, it could not be related with the sample semen because of deterioration. This clearly suggests that the victim was ravished/raped by the appellant. It is not necessary that when a woman is raped, the vaginal fluid must contain spermotza living or dead. To constitute an offence of rape penetration is enough. Under these circumstances, the report of the Medical Officer in no manner has weakened the case of the prosecution.

19. Considering the testimony of the eye-witnesses and other evidence which stands fully corroborated and proved on record, I find no merits in this appeal. Hence, the same is accordingly dismissed.

20. As regards sentence, the trial court inflicted sentence of 3 years to meet the end of justice, keeping in mind the age of the appellant, who was a young man at the time of the incident and also keeping in mind the submissions made by the learned counsel for the appellant that he had committed the offence at the spur of moment out of sudden impulse. The sentence imposed by the trial Court is reasonable and cannot be considered as harsh. Therefore, I found no reason to interfere in the same.

Appellant shall surrender himself before the trial Court within a week from today to suffer the sentence imposed on him, failing which the trial Court shall ensure his presence in accordance with law.

Attested copy of this order be sent to the trial Court through special messenger forthwith for compliance. Trial Court record be returned back.

Appeal dismissed.

2011 (I) ILR -CUT- 451

B.N.MAHAPATRA, J.

MACA NOS.464 & 895 OF 2006 (Decided on 14.09.2010)

CHANCHALA SAHU & ORS. ……. Appellants.

.Vrs.

D.M., M/S. NEW INDIA ASSURANCE COMPANY & ANR. …….. Respondents.

MOTOR VEHICLE ACT, 1988 (ACT NO. 59 OF 1988) – SEC.171.

Interest – No reason assigned by the Tribunal for awarding interest at the rate of 6% per annum from the date of appearance of the Insurance Company till the date of payment – Held, taking into consideration the provisions of Section 171 of the M.V. Act, this Court feels, the interest should have been allowed from the date of filing of the claim petition till the date of deposit and the appropriate rate of interest should be 9% per annum instead of 6%.

(Para 16)

Case laws Referred to:-

1.2001 (2) TAC. 250 (SC) : (Rathi Menon-V-Union of India).
2.2007(2)TAC 8 (SC) : (New India Assurance Co.Ltd.-V-Vedwati & Ors.)
3.2002(3) TAC 378 (SC) : (Supe Dei & Ors.-V-National Insurnce Co.Ltd. & Anr.).
4.2008(3) TAC 789 (SC) : (Dharampal & Ors.-V-U.P.State Road Transport Corpn.)

For Appellants - M/s.Dillip Kumar Mohapatra &A.K.Kar.
For Respondents - Mr. N.N.Mishra
For Appellant - Mr. N.N.Mishra
For Respondent - M/s.D.K.Mohapatra, A.K.Kar, L.Kabi (R-1 to 3)
M/s. G..K.Mishra, G.K.Mishra, G.N.Mishra & S.C.Sahoo. (R-4)

B.N.MAHAPATRA, J. These two appeals are directed against the judgment dated 30.3.2006 passed by the Second Addl. District Judge-cum-MACT, Cuttack in M.V. Misc.Case No.1241 of 2000. MACA No.464 of 2006 has been filed by the claimants for enhancement of compensation amount whereas MACA No.895 of 2006 has been filed by the Insurance Company challenging correctness of the findings of the learned Tribunal that the

deceased was an employee under the owner of the offending truck and not a gratuitous passenger.

2. The case of the claimants before the Tribunal was that on 29.9.2000 at about 9.30 A.M. a truck bearing Registration No.OR04-6511 carrying instruments and belongings of a Jatra Party met with a road accident due to rash and negligent driving of its driver and capsized. In the said accident, the deceased sustained severe injury and died being squeezed under the materials and instruments carried in the truck. It was further stated that though signal was given by the Highways personnel for stoppage of the offending truck for checking of documents, the driver of the offending vehicle suddenly swerved to the extreme left side of the road as a result of which one of the wheels of the vehicle slipped into the telephone cable hole following which the vehicle was over turned resulting death of the deceased, some other labourers and Jatra Party members. The further claim of the claimants was that the income of the deceased was their only source of maintenance. The deceased was earning Rs.3000/- per month as a permanent labourer in the offending vehicle and was contributing Rs.2500/- towards maintenance of the family. On the death of the deceased, the members of the family are deprived of love and affection besides financial support. With these averments the claimants filed the claim petition claiming a compensation of Rs.4.20 lakh from the owner of the offending vehicle and the insurer of the vehicle holding them liable jointly and severally for the act of the offending driver.

3. The owner of the offending vehicle filed written statement admitting the fact of accident and engagement of the deceased in his vehicle as labourer on a monthly salary of Rs.3000/-. According to him, at the relevant time of accident, the vehicle was insured with the Insurance Company and the deriver of the offending vehicle had valid driving license for which the Insurance Company is required to indemnify.

4. The Divisional Manager, M/s. New India Assurance Co. Ltd., (in short "Insurance Company) respondent in MACA No.464 of 2006 and appellant in MACA No.895 of 2006 by filing a separate written statement resisted *inter alia* that the claimants and the owner have colluded for compensation; but admitted coverage of the vehicle with it and taken a stand that the offending truck being registered as goods carrying vehicle was restricted to carry passengers along with goods. Since the offending vehicle was carrying members of a Jatra Party along with their belongings, it violated the term and conditions of the Insurance Policy. Hence, the Insurance Company is not liable to pay any compensation. The Insurance Company also raised dispute with regard to age, profession and income of the deceased.

5. On the aforesaid pleadings of the parties learned Tribunal framed the following issues:

"(i) Whether due to rash and negligent driving of the vehicle bearing Regn. No.OR-04-6511 (Truck), the accident took place and in the accident one Brundaban Sahoo succumbed to the injuries?
(ii) Whether all the opp.parties or any of the opp.party is/are liable to pay the compensation?
(iii) Whether the petitioners are entitled to get compensation?"

6. The claimants examined two witnesses whereas the owner of the offending vehicle and Insurance Company examined one witness each. The claimants exhibited five documents marked as Exts. 1 to 5 in support of their claim. The Insurance Company exhibited 11 documents marked as Exts. A to A/8 and Exts. B, C and D.

7. Taking into consideration both oral and documentary evidence learned Tribunal came to the conclusion that the vehicular accident resulted due to rash and negligent driving by the driver of the offending vehicle and as such the owner of the offending vehicle is vicariously liable for such accidental death of the deceased. The deceased was not moving as a gratuitous passenger in the offending truck at the time of the alleged accident. The deceased died in the accident being engaged as a labourer in the truck. The vehicle in question being covered by the Insurance Policy the Insurance Company cannot be exonerated from the liability to pay compensation even if there was breach of policy conditions. The accused driver had a valid driving licence, but the tenure of licence had expired at the time of accident. There is no material to indicate that at the time of accident the driver had incurred any disqualification as contemplated under the M.V. Act. Therefore, the insurer is liable to pay compensation to the legal representatives of the deceased, but it has the right to recover the same from the insured if there was any breach of terms and conditions of the Insurance Policy. The Tribunal taking into consideration the minimum wages of an unskilled labourer assessed the monthly income of the deceased at Rs.1500/- and deducting 1/3rd towards his personal expenses determined Rs.1,000/- towards monthly contribution to his family. The age of the deceased was taken as 33 years and multiplier 15 was applied by the Tribunal. The dependency was calculated at Rs.1.80 lakh. Rs. 15000/- was also awarded towards funeral expenses, loss of estate and transportation of the dead body of the deceased from the place of accident to the village. Accordingly, compensation of Rs.1.95 lakh was awarded to the claimants. The Tribunal further held that the claimants are entitled to get 6% interest per annum on the compensation amount from the date of appearance of the insurance company, i.e., 20.07.2001.

Out of the total compensation, an amount of Rs.1.0 lakh was directed to be deposited in the name of the wife of the deceased Smt. Chanchala Sahoo in an unencumberable Fixed Deposit in a nationalized bank for five years with quarterly interest payable. A sum of Rs.40,000/- was directed to be deposited in the name of Rashmita Sahoo and Rajkishore Sahoo each (the daughter and son of the deceased) in an unencumberable Fixed Deposit in a nationalized bank till they attain their majority and the rest of the amount of Rs.15,000/- with interest on the total compensation amount and a cost of Rs.500/- were directed to be released in favour of the widow wife in cash.

8. Mr. D.K. Mohapatra, learned counsel for the claimants submitted that in view of the statement in the written statement filed by the owner of the vehicle and the statement of the Supervisor of the owner confirming that the deceased was working under them as labourer at a monthly salary of Rs.3000/- and in absence of any contrary evidence adduced on behalf of the Insurance Company, learned Tribunal is not justified to determine the monthly income of the deceased at Rs.1500/-. It was argued that the Tribunal is wrong in applying the multiplier 15 having held that at the relevant time of accident the deceased was 33 years old and the appropriate multiplier should be 17. In support of his contention, he relied upon Second Schedule of the M.V. Act, 1988. The Tribunal has committed wrong in allowing interest from the date of appearance of the Insurance Company instead of the date on which the claim petition was filed before the Tribunal. Interest at the rate of 6% as allowed by the Tribunal is also extremely low. According to the learned counsel, the proper rate of interest should be 9% per annum in the year 2000. Placing reliance on the judgment of the apex Court in ***Rathi Menon vs. Union of India, 2001 (2) T.A.C. 250 (S.C.),*** Mr. Mohapatra contended that the scheme of compensation under the M.V. Act, 1988 and the W.C. Act, 1923 for determination of compensation are different and that the claims Tribunal must consider what the Rules prescribe at the time of making order for payment of compensation.

9. Mr. Mishra, learned counsel for the Insurance Company submitted that the petitioner was a gratuitous passenger in the offending truck. In its written statement, the Insurance Company has specifically taken the stand that the deceased was not working as a labourer under the owner of the offending vehicle. The Investigator of the Insurance Company has categorically stated that the deceased was a member of the Jatra Party travelling in the offending vehicle. Therefore, the Insurance Company is not liable to pay any compensation. In support of his contention, Mr. Mishra placed reliance upon the decision of the apex Court in ***New India Assurance Co. Ltd. Vs. Vedwati and others, 2007 (2) T.A.C. 8 (S.C.).*** He

submitted that if this Court comes to a conclusion that the deceased was a labourer working under the owner of the offending truck, the amount of compensation awarded by the Tribunal being just and reasonable, the same should not be enhanced. He further submitted that barring the oral evidence no documentary evidence was adduced by the claimants before the Tribunal in support of the claim that the deceased was getting Rs.3,000/- per month. Therefore, the Tribunal is right in taking into consideration the minimum wage of an unskilled labourer during the relevant time of accident and that the deceased was not getting work throughout the month so as to determine his monthly salary at Rs.1,500/-.

10. Now the questions that fall for consideration by this Court are as follows:-

1. Whether the deceased who was traveling in the offending truck and died in the vehicular accident was working as a labourer under the owner of the vehicle or was a member of the Jatra Party and moving as a gratuitous passenger in the offending truck?

2. Whether the Tribunal is justified in not accepting the claim of the claimants that the deceased was getting monthly salary of Rs.3,000/- during the time of accident?

3. Whether the Tribunal is justified to apply multiplier 15 having held that at the time of accident the age of the deceased was 33 years?

4. Whether the Tribunal is justified to allow interest at the rate of 6% from the date of appearance of the Insurance Company till the date of payment?

11. So far as question No.1 is concerned, the stand of the Insurance Company is that it had stated in the written statement that the deceased was a member of the Jatra Party moving in the truck and he was not an employee under the owner of the vehicle. To substantiate its stand it relied upon the statement of the investigator. On the other hand, the claimants as well as the owner of the vehicle claimed that the deceased was a labourer under the owner of the offending truck and at the time of accident he was moving in the truck as a labourer for the purpose of loading and unloading goods. Learned Tribunal has dealt with the issue as follows:-

> "To put forth their claim, the claimants as well as Opp. party no.1 has placed reliance on the oral testimony. P.W.1, the wife of the deceased has claimed in her oral testimony that the deceased was working as a permanent labourer in the offending vehicle for more than two years prior to the alleged accident. The witness O.P.W.1, examined on behalf of the owne r of the vehicle, has also testified

that the deceased was working as labourer in the vehicle and according to him, he being the supervisor of Opp. party no.1, looks after the affairs of the truck. On the date of accident, the truck was hired by Niyati Gananatya for transportation of stage materials and the deceased and some others were moving in the truck as labourers to load and unload the goods. Although these two witnesses have been cross-examined to a substantial length, Opp. party no.2 seems to have failed to bring any substantial from their cross-examination to raise slighted suspicion that the deceased was moving in the vehicle in the capacity of a member of opera troop, but not a labourer of the vehicle. Undisputedly, the insurer has examined its investigator and filed some statements of various persons to demolish such stand of the claimants, the evidence adduced by the investigator is apparently based on the version of others and those statements have no evidential value. Effort is also made on behalf of the insurer by filing some news reports to prove its stand. But the reports in the news papers cannot also be accepted in evidence without the examination of the makers of those news items. Thus, there is nothing on the record as legal evidence to lead a conclusion that the deceased was moving as a gratuitous passenger in the offending vehicle at the relevant time of accident for which the insurer cannot be fastened with the liability to make payment of compensation."

12. In view of the above, this Court has no hesitation to hold that at the time of accident the deceased was moving in the truck as a labourer being engaged by the owner of the truck for the purpose of loading and unloading of goods in the offending truck and he was not moving as a gratuitous passenger as claimed by the Insurance Company.

For the reasons stated hereinbefore, the decision of the apex Court in ***Vedwati & Ors. (supra)*** relied upon by the Insurance Company in support of its contention that it has no liability to pay compensation is of no help to the Insurance Company.

13. As regards monthly income of the deceased, the Tribunal has not accepted the claim of the claimants on the ground that except the oral evidence no document or register was produced before it to show that the deceased was getting Rs.3,000/- per month as a labourer from the owner of the offending truck. Taking into consideration the minimum wage of an unskilled labourer, the Tribunal determined the monthly income of the deceased at Rs.1,500/-. The owner of the vehicle in his written statement admitted that he was paying Rs.3,000/- per month to the deceased. The Supervisor of the owner of the offending truck in his evidence stated that the

deceased was getting Rs.3,000/- salary per month. Nothing contrary has been elucidated by way of cross-examination from the mouth of these witnesses. In fact, no documentary evidence or register was produced before the Tribunal in support of such claim. It is not uncommon in our society that many labourers are engaged by the owners of trucks on monthly salary basis without issuing any letter of appointment and no attendance register and payment register are systematically maintained by such owners of the vehicles.

It is also very much common that a person, who carries on any type of trade/business keeps some sorts of account, may be in a rough manner, to record the receipts and expenditure in connection with his business. This is particularly true, when a person carries on some business engages a Supervisor to supervise his business. In the instant case, the owner of the vehicle engaged a supervisor. It is therefore hard to believe that no account is maintained to record the salary paid to the employees engaged in truck plying business. Except the statement made in the written statement and the oral evidence of the Supervisor, there is no other corroborating evidence to support the claim that the deceased was getting salary of Rs.3,000/- per month. The owner of the vehicle was also not examined.

14. In view of the above, I do not find any infirmity in the order of the Tribunal in taking the monthly income of the deceased at Rs.1,500/- on the basis of minimum wages of an unskilled labourer during the relevant time and his contribution towards his family at Rs.1,000/- after deducting 1/3rd for personal expenses.

The facts of the case in ***Rathi Menon*** *(supra)* relied upon by Mr. Mohapatra are completely different from the case at hand. Hence, the decision of the apex Court in that case is of no help to the appellant.

15. Question No.3 relates to appropriate multiplier. The apex Court in ***Supe Dei & Others vs. National Insurance Co. Ltd. & Another, 2002 (3) T.A.C. 378 (SC),*** held as follows:

> "While considering the question of just compensation payable in a case all relevant factors including the appropriate multiplier are to be kept in mind. The position is well settled that the Second Schedule under Section 163-A to the Act which gives the amount of compensation to be determined for the purpose of claim under the Section can be taken as a guideline while determining the compensation under Section 166 of the Act. In that view of the matter, there is no reason why multiplier of 17 should not be taken as the appropriate multiplier in this Case."
>
> Since the Tribunal has determined the age of the deceased on the date of the of accident to be 33 years, as per Second

Schedule to the M.V. Act, the appropriate multiplier should be 17 instead of 15.

16. So far as question No.4 is concerned, no reason has been assigned by the Tribunal for awarding interest from the date of appearance of the Insurance Company till the date of payment at the rate of 6% per annum. Taking into consideration the provisions of Section 171 of the M.V. Act, this Court feels, the interest should have been allowed from the date of filing of the claim petition till the date of deposit.

The apex Court ***in Dharampal & Ors., Vs. U.P. State Road Transport Corpn., 2008(3) T.A.C. 789 (SC)***, held as follows:-

> "Interest is compensation for forbearance or detention of money, which ought to have been paid to the claimant. No rate of interest is fixed under Section 171 of the Act and the duty has been bestowed upon the Court to determine such rate of interest. In order to determine such rate we may refer to the observations made by this Court over the years. In the year 2001 in the case of ***Kaushnuma Begaum (Smt.) and Others Vs. New India Assurance Co. Ltd. and others, (2001) 2 S.C.C. 9 : 2001 (1) T.A.C. 649***, on the question of rate of interest to be awarded it was held that earlier, 12% was found to be the reasonable rate of simple interest but with a change in economy and the policy of Reserve Bank of India the interest rate has been lowered and the nationalized banks are granting interest @9% on fixed deposits for one year. Accordingly, interest @ 9% was awarded in the said case."
>
> *[*Also see *Supe Dei & Others (supra)]*

In the circumstances, the appropriate rate of interest should be 9% per annum instead of 6%.

17. Taking into consideration the monthly income of the deceased at Rs.1,500/- and deducting 1/3rd towards personal expenses and applying multiplier 17, the amount of compensation comes to Rs.2,04,000/-. Apart from the above, the claimants are also entitled to get Rs.15,000/- towards funeral expenses, loss of love and affection, estate etc. as awarded by the Tribunal. Thus, the claimants are entitled to get total compensation of Rs.2,19,000/.

18. In view of the above, the Insurance Company is directed to deposit the compensation amount of Rs.2,19,000/- along with interest at the rate of 9% from the date of filing of the claim petition till the date of deposit and a cost of Rs.500/- before the Tribunal within eight weeks from today. Liberty is given to the Insurance Company to recover the same from the owner of the vehicle in accordance with law. On such deposit being made by the Insurance Company, learned Tribunal shall disburse the above revised

compensation amount to the claimants in the same manner as it has directed in its judgment.

19. On production of evidence in support of payment of award amount along with interest and cost before the Tribunal as indicated above, the Registrar (Judicial) of the Court shall refund the statutory deposit of Rs.25,000/- along with interest accrued thereon to the Insurance Company.

20. In the result, MACA No.464 of 2006 filed by the Claimants is allowed in part and MACA No.895 of 2006 filed by the Insurance Company is dismissed.

Claimants appeal allowed in part.
Insurance Company appeal dismissed.

2011 (I) ILR -CUT- 460

S.C.PARIJA, J.

F.A.O. NO.393 OF 2010 (01.02.2011)

D. M., NEW INDIA ASSURANCE CO. LTD. ..... Appellant.

.Vrs.

PUSPAKANTI PRAHARAJ & ANR. ..... Respondents.

WORKMEN'S COMPENSATION ACT, 1923 (ACT NO.8 OF 1923) – S.30 r/w Sec.163-A M.V.Act.

Permanent disability – Loss of future earning capacity – Treating doctor assessed physical disability of the injured / claimant at 45% - Commissioner assessed the loss of earning capacity at 100% which is challenged by the Insurance Company.

Percentage of loss of earning capacity is not the same as the percentage of permanent disability – The doctor who treated an injured / claimant can give evidence only with regard to the extent of permanent disability and the loss of earning capacity is to be assessed by the Tribunal with reference to the evidence in entirety.

In the present case the claimant-driver had renewed his licence on 19.07.2001 i.e. one year and three months after the date of accident so he can not be said to be completely disabled and the commissioner is erred in assessing the loss of earning capacity of the claimant at 100% - Held, the impugned award is set aside and the matter is remitted back for disposal afresh.

Case law Relied on :-
(2011) 1 SCC 343 : (Raj Kumar -V- Ajay Kumar & another).
Case laws Referred to:-
(1)2002 (1) TAC-P-772(A.P) : (Raypati Venkteswar Rao-V-Mantai Sambasiva Rao &Anr.).
(2)2002(3) TAC (Kant.) G.V.Venketesh Babu & Anr.-V-Krishna Kumar)

For Appellant - P.K.Panda
For Respondents – H.K.Mohapatra

This appeal by the appellant-Insurance Company is directed against the judgment/award dated 18.6.2010, passed by the Commissioner for Workmen's Compensation, Orissa, Bhubaneswar, in W.C. Case No.18 of

2001, awarding an amount of Rs.4,89,240/- as compensation, to be deposited within one month, failing which penalty and interest will be imposed as per the provisions of the W.C.Act,1923.

The main contention of the learned counsel for the appellant is that the Commissioner has assessed the loss of earning capacity of the claimant at 100% in a mechanical manner and without application of mind, especially when the treating physician (OPW 1) had stated in his evidence that there exists osteomylities and intermittently the claimant may face difficulty with pain. It is further submitted that as the claimant had only suffered fracture injuries and had been operated upon and the Medical Board as well as the treating Doctor had assessed the physical disability at 45%, the Commissioner erred in assessing the loss of earning capacity of the claimant at 100% and calculating the compensation amount on that basis.

Learned counsel for the appellant further submits that as the Driving Licence bearing No.4472/86, issued by the Licensing Authority, Bhubaneswar, had been renewed on 19.7.2001, about one year and three months after the date of the accident, the injured claimant was not completely disabled and therefore the Commissioner erred in assessing the loss of earning capacity of the claimant at 100%. In this regard, it is submitted that as the claimant as the driver of a heavy goods vehicle (truck) was required to furnish medical certificate in proof of his ability to drive such a vehicle, at the time of renewal of the driving licence, the same goes to show that the claimant did not suffer 100% loss of earning capacity. It is further submitted that the assessment of the loss of earning capacity by the Commissioner has been mechanically arrived at without any basis and without considering the nature and extent of the disability suffered by the claimant due to the accident.

Learned counsel for the claimant-respondent no.2 vehemently submits that as the claimant was a driver of a heavy goods vehicle (truck) and suffered fracture of right ankle and another fracture in the thigh bone and had to undergo repeated operations and there was shortening of his leg and restriction in the movement, the Commissioner has rightly assessed the loss of earning capacity of the injured claimant at 100%. As regard the renewal of the driving licence obtained by the injured claimant, learned counsel submits that the same has been obtained by the owner of the vehicle for availing claim from the insurer and that the injured claimant is not in a physical position to drive a heavy vehicle.

On a perusal of the impugned award, it is seen that after the accident, the injured claimant was taken to Dhenkanal District Headquarters Hospital and thereafter he was shifted to SCB Medical College and Hospital, Cuttack, where he was admitted to the Orthopedic Department as an indoor

patient on 21.4.2000 and his lower right leg was operated. Subsequently, on 28.4.2000 his right thigh was operated and rod was placed in the right leg and that he remained under treatment for about one and half months. The claimant had examined his doctor (OPW 1), who in his evidence had stated that there was a fracture in the right leg near ankle and another fracture in the thigh bone. OPW 1 had further opined that the claimant had all the injuries which were fractures and grievous in nature and he had not treated the claimant entirely, but only the ankle part of the injury. OPW 1 further deposed that there was stiffness of knee joint and shortening of leg and that the claimant was suffering from ulcer of bone because of open fracture injuries. OPW 1 also stated in his cross-examination that since there exists osteomylities, the claimant may intermittently face difficulty with pain. He accordingly agreed with the Medical Board that the claimant suffered physical disability of 45%.

The Commissioner on the basis of such evidence on record has come to hold that the injured claimant, due to the injuries, has suffered permanent disablement resulting in 100% loss of earning capacity. The relevant findings of the Commissioner is extracted below :-

> "xxx xxx The applicant is a driver of goods vehicle and in my view it is quite impossible on his part to drive the heavy vehicle in such condition of his right leg. It is a clear case of 100% professional disability although the Medical Board has given 45% physical disability. The applicant cannot work as a driver as he has become almost invalid and is suffering from pain and suffering due to the injuries sustained and is walking with help of crutch. Some judicial decisions have been relied upon by the applicant viz. (1) 2002 (1) TAC, page-772 (A.P) reported in Raypati Venkteswar Rao –Versus- Mantai Sambasiva Rao and another, where the injured cleaner sustained compound fracture of his right leg, steel rod inserted during operation, doctors evidence that he sustained 20% to 25% physical disability and used a stick to walk, commissioner holding the loss of earning capacity at 70% turned to 100% by the Hon'ble High Court, because the workman was incapacitated and unable to perform his duties. Another decision i.e. 2002(3) TAC (Kant.) G.V.Venketesh Babu and another –Versus- Krishna Kumar, where the workman a loader in lorry sustained grievous injuries, Doctor assessed loss of earning capacity at 55%, commissioner concluded that the workman sustained total, permanent disablement of 100%, which has been confirmed by the Hon'ble High Court and in the decision in Amarnath Singh –Vrs- Continental Constructions Limited, in TAC 446 (S.C) has been discussed and the Hon'ble Apex Court have clearly enunciated that permanent

total disablement is to be judged from the point of view of the job which the workman was doing and if the disablement renders him unfit to do the job, the disablement is total and not partial. In view of this I hold that this is a case of permanent total disablement amounting to 100% loss of earning capacity."

In a recent decision, the apex Court in the case of **Raj Kumar Vs. Ajay Kumar and another, (2011) 1 SCC 343**, while dealing with the question as to what would constitute a permanent disability and its effect on the earning capacity of an injured person, has observed as under:-

"9.The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood."

The apex Court accordingly summarised the principles for determining the disability and loss of earning capacity of an injured-claimant as under:-

"19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.
(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).
(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.
(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

As regard the injured claimant obtaining renewal of Driving Licence bearing No.4472/86, which has been renewed on 19.7.2001 up to 18.7.2004, it is seen that Section 15 of the M.V.Act, 1988, requires that where renewal of a driving licence to drive a transport vehicle has been applied, the same shall be accompanied by a medical certificate to show that the applicant does not suffer from any disability, which is likely to affect his driving. In the present case, the injured claimant having availed renewal of his driving licence on 19.7.2001, which is about one year and three months after the date of the accident, which took place on 13.4.2000, it cannot be said that the injured claimant had suffered 100% loss of earning capacity. The plea of the learned counsel for the claimant that the owner has got the driving licence renewed for the purpose of availing claim from the insurer cannot be accepted. In any case, the said fact has not been taken into consideration by the Commissioner while assessing the loss of earning capacity suffered by the claimant.

In view of the above, the impugned award is set aside and the matter is remitted back to the Commissioner for Workmen's Compensation, Bhubaneswar, to dispose of the same afresh, after giving opportunity of hearing to the parties. It is open for the parties to adduce further evidence in support of their respective cases and take all such pleas as are available to them in law, which shall be considered by the Commissioner on its own merit and in accordance with law, keeping in view the aforesaid principles laid down by the apex Court in Raj Kumar case (supra). If necessary, the Commissioner may direct the claimant to appear before the Medical Board for ascertaining the exact nature and extent of his disability and to what extent the same would affect his earning capacity.

As the claim is of the year 2001, the Commissioner shall do well to dispose of the matter as expeditiously as possible, preferably within a period of three months from the date of receipt of copy of this order.

FAO is accordingly disposed of.

Appeal disposed of.

2011 (I) ILR -CUT- 466

B.K.PATEL, J.

W.P.(C) NO.13841 OF 2009 (Decided on 14.1.2011)

SATYABADI PATRA …….. Petitioner.

.Vrs.

REGIONAL PROVIDENT FUND COMMISSIONER,BHABISHYANIDHI BHAWAN JANPATH & ANR. ……... Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Petitioner while working as Security Personnel with O.P.2 became permanently disable – He applied for pension under the scheme prepared by the Central Government in exercise of the power U/s.6-A of the Employees Provident Funds and Miscellaneous Provisions Act,1952 - O.P.1 failed to disburse pension – Hence the writ petition.

As per paragraph 15(3) of the scheme petitioner was examined by the Medical Board who certified in no uncertain terms that the petitioner has sustained permanent disablement which has totally incapacitated him for further employment – In such circumstances petitioner has incurred "Permanent total disablement" within the meaning of the scheme and is entitled to pension.

Held, direction issued to O.P.1 to disburse pension to the petitioner from the date following the date of disablement in accordance with paragraph 15 of the scheme within a period of thirty days from today failing which the arrear pension shall carry interest at the rate of 18% per annum till the date of payment.

For Petitioner - M/s. Satyabrata Mohanty-1 & T.K.Kamila
For Opp.Partoes - M/s. Hemanta Ku. Jena (Sr.Adv.)
& T.Mishra (O.P.1)

B.K.PATEL, J. In this writ petition under Articles 226 and 227 of the Constitution of India prayer has been made for issuance of writ of mandamus directing opposite party no.1 Regional Provident Fund Commissioner, Bhubaneswar to disburse current and arrear monthly pension of the petitioner w.e.f. 19.5.2001 since when he became invalidated alongwith 18 per cent interest incurred with Employees' Pension Scheme, 1995 (for short 'the Scheme'.

2. Admittedly, petitioner was working as Security Personnel with opposite party no.2 –Winner Security Services (Orissa) Pvt. Ltd., B.J.B. Nagar, Tankapani Road, Bhubaneswar and was holding EPF account no.04/4025/2156 from 1.4.1995 to 19.5.2001. It is not disputed that petitioner was admitted into S.C.B. Medical College & Hospital, Cuttack for treatment of CVA Rt. Hemoplegia (Infarction) on 19.5.2001 and was discharged on 22..5.2001.

3. Petitioner's case is that while discharging duties he met with an accident on 19.5.2001 sustaining severe bodily injury which led him to COMA. In spite of treatment in S.C.B. Medical College & Hospital, Cuttak till 22.5.2001, he became permanently disable. While discharging the petitioner from the hospital on 22.5.2001 under discharge certificate at Annexure-1, he was advised for physiotherapy and nursing care. As the petitioner's entire right side body was paralysed, he applied for pension under the Scheme before opposite party no.1. On receipt of application opposite party no.1 sent the petitioner to the Medical Board for examination with regard to his disability. Upon examination by the Medical Board certificate at Annexure-2 was issued indicating that petitioner has become permanently incapacitated for further employment. However, despite representations including representation dated 27.9.2008 at Annexure-3, opposite party no.1 has failed to disburse pension under the Scheme to the petitioner.

Opposite party no.1 has filed a counter taking the stand that petitioner is not entitled to pension under paragraph-15 of the Scheme which entitles an employee to pension if he has become permanently and totally disabled. It has been averred that in the certificate of the medical board under Annexure-3 it has been indicated that the petitioner was found to have incurred only 50 per cent disability of permanent nature.

4. It was contended by the learned counsel for the petitioner that discharge certificate of S.C.B. Medical College and Hospital, Cuttack goes to establish that petitioner was under treatment for CVA Rt. Hemoplegia (Infarction) which means that the entire right side body was paralysed. In the certificate at Annexure-2 it has been pointed out that petitioner has become permanently incapacitated for further employment. Medical Board is the competent authority to certify regarding nature of disability. In the certificate under Annexure-2 there is an indication that C.D.M.O., Jagatsinghpur had issued a certificate to the effect that petitioner had sustained 50 per cent disability of permanent nature. However, the Medical Board found that petitioner was permanently incapacitated for the further employment. In such circumstances, the stand of the opposite party no.1 to the effect that Medical Board found the petitioner to have incurred 50 per cent disability is not correct. Paragraph-15 of the Scheme provides that an employee, who is permanently and totally disabled during employment shall be entitled to

pension under the Scheme. Under the Scheme the term "permanent total disablement" has been defined to mean such disablement of permanent nature as incapacitates an employee for all work which he/she was capable of performing at the time of disablement. Opposite party no.1 is, therefore, obliged to pay pension under the Scheme to the petitioner.

5. Learned counsel for the opposite party in course of his argument reiterated the stand taken in the counter affidavit. He would argue that Annexure-2 does not indicate that petitioner incurred total and permanent disability.

6. The Scheme has been framed by the Central Government in exercise of power conferred under Section 6-A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short "the Act') which a price of social welfare legislation for the benefits of persons employed in factories and others establishments. Authorities under the Act must keep the object of the Act while performing their function. The Scheme is a means to ensure social justice to the employees. Therefore, instead of being shacked and guided by an attitude of bureaucratic rigidity, authorities like opposite party no.1 are required to be liberal and compassionate. However, it is evident from the materials on record that the petitioner's claim for pension has been dealt with in a callous manner mechanically in utter disregard to the provisions under the Scheme itself.

7. It has not been denied that medical examination by the Medical Board was conducted at the instance of opposite party no.1. Column nos.9 and 10 of the certificate of the Board read:

"9.	Whether the Member is permanently and totally unfit for employment	50% of disability is permanent nature as per Handicapped Certificate issued by C.D.M.O., :Jagatsinghpur.
10.	Whether permanent/total disablement incapacitated the Member employee for all work which he/she was capable of performing at the time of disablement	: Incapacitated for further employment."

8. Thus, there is no scope for opposite party no.1 to urge that it was the Board which had certified the petitioner to have incurred 50 per cent disability of permanent nature. On the other hand, Medical Board has

certified in no uncertain terms that petitioner has sustained permanent disablement which has totally incapacitated him for further employment.

9. Paragraph 15 of the Scheme reads:

"15. **Benefits on permanent and total disablement during the service**:-

)1) A member, who is permanently and totally disabled during employment shall be entitled to pension as admissible under sub-paragraphs (2) to (5) of paragraph 12, as the case may be, subject to a minimum of Rs.250 per month notwithstanding the fact that he/she has not rendered the pensionable service entitling him/her to pension under paragraph 12 provided that he/she has made at least one month's contribution to the Pension Fund.

(2) The monthly members pension in such case shall be payable from the date following the date of permanent total disablement and shall be tenable for the life time of the member.

(3) A member applying for benefits under this paragraph shall be required to undergo such medical examination as may be prescribed by the Central Board to determine whether or not he or she is permanently and totally unfit for the employment which he or she was doing at the time of such disablement."

The term "permanent total disablement" under the Scheme has been defined at paragraph 2 (xvi). It reads:

> :2.(xvi). "Permanent total disablement" means such disablement of permanent nature as incapacitates as employee for all work which he/she was capable of performing at the time of disablement, regardless whether such disablement is sustained in the course of employment or otherwise."

10. Upon receipt of petitioner's application for benefit of pension he was required to undergo medical examination under paragraph 15 (3) of the Scheme by opposite party no.1.The Board has certified that the petitioner has become permanent incapacitated for any further employment. In such circumstances, petitioner has incurred "permanent total disablement" within the meaning of Scheme and is entitled to pension in view of provision under paragraph 15 of the Scheme.

11. Therefore, opposite party no.1 is directed to disburse pension to the petitioner from the date following the date of disablement in accordance with paragraph 15 of the Scheme within a period of thirty days from today failing which arrear pension amount shall carry interest at the rate of 18 per cent per annum till the date of payment.

Accordingly, the writ petition is disposed of.

Writ petition disposed of.