2012 (I) ILR- CUT- 404

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

W.P.(C) NO.20623 OF 2011 (Decided on 04.11.2011)

RAJESWAR THAKUR ……….Petitioner.

.*Vrs.*

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

TENDER – Excavation and construction of Diaton Branch Canal - Project to be completed by the end of March 2012 - Due to such important aspect tender notice issued under double cover system including technical and financial bids – Three tenderers submitted their bids – All of them became successful in the technical bid – In the financial bid although the petitioner offered a lowest bid instead of issuing work order in his favour the tender call notice was cancelled to go for fresh tender with the same estimated cost – Action challenged.

Project financed by the Central Government as a national importance which is to be completed by the end of March, 2012 otherwise the State Government will have to bear the expenses of the project – Cancellation of tender by the Government on the ground that land acquisition proceedings will take another six to eight months to complete is not proper as Government could have invoked the power U/s. 17 of the Land Acquisition Act and take possession of the land under the urgency provision – Moreover the petitioner has given under taking not to claim extra labour charges for the machineries due to the delay in land acquisition – Held, direction issued to the Opp.Parties to award the contract in favour of the petitioner by executing the agreement and issuing work order.

(Para 15,16,17)

For Petitioner - Mr. S.K.Padhi, Sr.Advocate
Mr. Sibananda Mohanty.
For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate.

V.GOPALA GOWDA, C.J. This writ petition is filed by the petitioner-contractor seeking for issuance of a writ of certiorari to quash the decision of the State Government for proclamation for fresh tender as per Annexures 9 and 10 and to direct the opposite parties to execute the agreement with him to allow him to proceed with the work, urging various facts and legal grounds.

2. The brief facts are stated for the purpose of examining as to whether the petitioner is entitled for the relief as prayed in this petition.

The petitioner has submitted his bid pursuant to the tender call notice bearing No. 2 of 2010-11 issued by the Chief Engineer, L.I. & L.S. Project, Khariar (Opposite Party N.2). The said tender call notice had double cover system, i.e., technical and financial bids in respect of eight numbers of works including “Excavation and construction of Diaton Branch Canal from R.D. 0.00 Km. to 6.50 Kms. Including all structures off taking at RD 49.38 Km. of LMC (Left Main Canal) of LIIP (Lower Indra Irrigation Project)” at sl.no.4 of the said tender call notice. The cost of the work for which tender was called for, was fixed at ` 1302.99 lakhs, the cost of the tender paper was fixed at ` 10,400/- and the Earnest Money Deposit @ 1% of the tender value, comes to ` 13,03,000/- as published in the daily vernacular “The Samaj” and English newspaper “Times of India” on 30th September, 2010 and through website of the State Government. The last date for submission of the tender was 16th September, 2010 and the date of opening of the technical bid was 21st September, 2010.

3. In respect of the above tender call notice, three contractors including the petitioner submitted their bids “On line” along with required documents and scanned copy of EMD. The original receipt of EMD and the paper cost were submitted before the last date, i.e., the date of opening of the technical bid 21.10.2010. After opening of the technical bid , i.e., the same was evaluated by the Executive Engineer, Opposite Party No.3 and was placed before the Project Level Tender Committee on 1.2.2011. The said Committee after scrutiny of the documents submitted by all the three participants found all of them eligible to participate in the tender process. Accordingly the Chief Engineer in his letter dated 7.2.2011, submitted the proceedings of the Project Level Tender Committee along with documents to the tender Committee of water Resources Department.

4. The State Level Tender Committee in their meeting held on 4.3.2011 considered the report of the Project Level Tender Committee referred by the Chief Engineer, evaluated the technical bid of all the three participants and found all the participants technically qualified and responsive for opening of their financial bid. While evaluating the technical bid of the tenderers, the Committee of the State Government also considered the check list submitted by the Chief Engineer. On verification of the check list, it was found that administrative approval and technical sanction have been obtained from the Administrative Department i.e. Water Resources Department of the State Government and the Chief Engineer, L.I. and L.S.

The Component Design has been completed and the land acquisition proceeding in respect of private land is at the stage of section 6(1) of the Land Acquisition Act, 1894. The estimate has been prepared as per S/R – 2008. The above said aspects had been considered by the Project Level Tender Committee as well as the State Level Tender Committee while evaluating the technical bid of the tenderers and the Committees were unanimously satisfied to proceed further to open the financial bid so that the execution of the work can commence to complete the project by end of March, 2012. The main reason is that the funds have been allotted under AIBP Scheme of the Central Government and if the work will not be completed before the said period, the cost of the project has to be borne by the State Government and the Central Government will not be responsible thereafter as per the MoU signed by the State Government with the Central Government. In the letter dated 7.2.2011 the Chief engineer had observed as hereunder :

> "This work is a part of the Distribution System and funded by AIBP, Government of India. The Administrative approval for the project has been accorded by DoWR, Orissa, Bhubaneswar vide letter No. 30171 dated 3.12.2010 for ` 1182.23 Cr. There is budget provision of ` 150 Cr. under A.I.B.P. during the Financial Year 2010-11 for Lower Indra Irrigation Project. The work under discussion is chargeable to the budget head Unit-II "C&B". The budget provision under the head "C&B" is ` 46.01 Cr. for 2010-11. Further the Chief Engineer, L.I. and L.S. Project stated that the Left Main Canal from RD 00 to 49.38 Km (Tail) is under progress through different agencies and 75% work has been completed. This canal directly off-takes from LMC at RD. 49.38 Km. in view of stipulation by DoWR for completion of project by March 2012, the construction of this canal is badly necessary."

5. Total length of Left Main Canal is about 49.38 Km. and the present construction work is at the tail end of the main canal. Length of branch canal from the left main canal is about 16 Kms. Unless this canal is constructed the entire project will be an unused one and the beneficiaries i.e. the farmers can not get water for their irrigation purpose. Undivided Kalahandi district being a backward district, the project has been taken up by the Central Government as a National importance. Keeping all the facts in view, the State Government in their letter No. 9540 dated 4.4.2011 instructed the Chief Engineer to open the financial bids of the technically qualified bidders and to submit the report along with the financial bid proposal within seven days for approval of the Government.

6. On 13.4.2011 the financial bid was opened and the petitioner was found to be the lowest tenderer and his bid amount was ` 12,69,11,228.00 (-2.60% below estimated cost) and the 2nd lowest tenderer was Ratna Infrastructures Projects (P) Ltd. and its bid was ` 12,76,93,022.00 (-2.00% below estimated cost).

7. The financial bid was submitted to the State Government for its approval along with recommendation of the Chief Engineer vide his letter No. 1356 dated 7.5.2011. It was placed before the Tender Committee of the State Government on 27.5.2011 and the Tender Committee considering the report of the Chief Engineer, wanted to know the detail position of the land acquisition proceeding of private lands. In the meeting, the Chief Engineer made a statement that the land acquisition work is at section 4(1) notification stage and the final land acquisition will take more than six to eight months time. The tenders have been invited basing on tentative drawing and designs and lands where available. The Chief Engineer further stated that estimate of the work has been prepared basing on SR 2009 with enhanced labour rate. If the work is retained the estimate cost will remain the same. On consideration of the statement of the Chief Engineer, the Tender Committee of the State Government recommended to cancel the tender and go for fresh tender for the work with the same estimated cost. The relevant portion of the same is extracted below :

> "Tender Committee examined the financial bid proposal, comparative statement and recommendation of the Chief Engineer. During discussion, the Committee desired to know from the Chief Engineer as regard to the status of the private land acquisition, drawing and designs. The Chief Engineer has stated that the position of the land acquisition proceeding of private land required for the work is under 4(1) notification stage. The final land acquisition will take more than six to eight months. The tenders have been invited basing on tentative drawings and designs and lands where available. For the time being the work will be taken up on the tentative drawings and designs. After received of final designs the scheduled quantities may vary less/excess. Even if the tender is awarded in favour of the lowest bidder, the work will commence only after the month of November of this year. The Chief Engineer further stated that estimate of the work has been prepared basing on SR 2009 with enhanced labour rate. If the work is retained the estimate cost will remain the same."

8. The decision of the State Level Tender Committee communicated through the F.A.-cum-Addl. Secretary to Government to the Chief Engineer to cancel the tender and to go for fresh tender for the work in the same estimated cost, is arbitrary and unreasonable. The impugned proceedings and the decision of the State Government in cancelling the tender and go for fresh tender when once the technical and financial bids of the tenderers were considered and found that the petitioner offered a lowest bid compared to other two bidders, instead of awarding the contract by executing agreement and issuing work order, on flimsy grounds cancelling the tender call notice and directing the Chief Engineer to go for fresh tender, would affect public interest since the project work was required to be completed by the end of March, 2012 as per the MoU entered into between the State and the Central Governments failing which the State Government has to bear the expenses of the project work. The tender call notice was published quoting the S/R rate estimation cost after taking all relevant aspects into consideration that acquisition proceedings have been started and it is at the stage of 4(1) notification and also keeping in view that the present construction of the project work is at the tail end of the Main Canal and the length of Branch Canal from the Left Main Canal is about 16 Kms. Unless the said Canal is constructed, the entire project will be an unutilised one and the beneficiaries i.e. the farmers can not get water for their irrigation purpose. Therefore, the proceedings of the State Level Tender Committee on the basis of the statement of the Chief Engineer on the basis of which the State Government recommend to cancel the tender and go for fresh tender vide letter dated 10.6.2011 (Annexure-10), is arbitrary, unreasonable and colourable exercise of power, on flimsy grounds that acquisition proceedings are not concluded. Those aspect of the matter was taken into consideration at the time of taking a decision by the State Level Tender Committee while publishing the tender notice inviting tenders. Therefore, the impugned cancellation, is colourable exercise of power which is liable to be quashed.

9. The State Government has filed counter-affidavit sworn to by Sri Hrusikesh Padhi, working as Executive Engineer, Lower Indra Canal Division No.II, Bangomunda, district Kalahandi traversing the petition averments. He has sought to justify the proceedings of the Tender Committee and the impugned decision communicated by the F.A.-cum-Addl. Secretary to Government, Finance Department contending that though the petitioner's tender offer was lowest, the contract cannot be awarded and the agreement cannot be executed in his favour in view of the statement made by the Chief Engineer that the acquisition proceedings of private land are not concluded. The final acquisition of the land will take six to eight months considering the present status such as usual time required for different

stages like 6(1) notification, declaration, passing of awards and payment of compensation. The estimate was prepared basing on S/R 2009 with enhanced labour rate and tentative drawing. There is no increase in labour rate and material rate after sanction of estimates for the work. So the Chief Engineer has stated that the estimated cost will remain same if it is re-tendered. Further it is stated that the statement of the Chief Engineer in the State Level Tender Committee proceedings is not at all contrary to the check list submitted by him. There is no increase in labour rate and cost of material rate after technical sanction of estimates for the work. The increase in price index has no relation with the estimate. So the cost of work will not be changed for re-tender.

10. It is contended that the Tender Committee consists of six responsible Members from different Government Departments such as Law, Finance and Water Resources. The Committee has properly scrutinized the L.A. status and the slow progress of land acquisition process due to shortage I n required number of officers/staff in L.A. office. There was not a single piece of land available to start with the work. The award of work without any scope to start has no meaning. On the other hand it may create legal problems like claim for compensation, idle charges of machineries and labour etc. by the executants. In view of the above, the Committee has unanimously recommended to cancel the tender and go for fresh tender. Therefore, the allegations made by the petitioner against the opposite parties are all self-made and unfounded.

11. Further placing reliance upon clause 18 of the Bid Identification No. CELI&LSP 02/10-11 Dated 24.09.2010 the authority reserves the right to reject any or all the tender without assigning any reason thereof. So the Government has cancelled the tender for the interest of State which is justified and is not liable to be quashed. Therefore, Mr. Mohapatra, learned Government Advocate prayed for dismissal of the writ petition.

12. With reference to the abovesaid rival legal contentions, following points would arise for consideration :

(i) whether the cancellation of the tender notice and not accepting the lowest LI bid offered by the petitioner for the project work in question and not awarding contract by executing the agreement and issuing the work order and ordering for re-tender at the same estimated cost, is legal and valid ?

(ii) whether the action of the State Government in canceling the tender and directing to go for fresh tender at the same estimated cost on the basis of the statement of the Chief Engineer that acquisition proceedings in respect of private lands to execute the project work would take six to eight months, is legal and valid ?

(iii) what order ?

13. All the points are answered in favour of the petitioner for the following reasons.

14. On the basis of the relevant aspects, viz. the project work is financed by the Central Government according to the MoU entered into between the Central Government and the State Government to execute the project work, the tender call notice was published inviting bids in that respect. This is a time bound project and the same should be completed by the end of March, 2012. Taking this important aspect into consideration the Chief Engineer (O.P. no.2) floated tender notice under double cover system including technical and financial bids in respect of eight numbers of works after fixing the cost of tender and other conditions of the tender. Pursuant to the said tender call notice, three tenderers including the petitioner submitted their bids which were opened and evaluated by the Executive Engineer and was placed before the Project Level Tender Committee. The petitioner and other two tenderers became successful in the technical bid as they submitted all the technical documents and satisfied the conditions stipulated in the tender call notice. Thereafter the Chief Engineer submitted the proceedings of the Project Level Tender Committee before the Tender Committee of the Water Resources Department, wherein it was indicated that "This canal directly off-takes from LMC at RD. 49.38 Km. In view of stipulation by DoWR for completion of project by the end of March, 2012, the construction of this canal is badly necessary." On 4th March, 2011, the State Level Tender Committee evaluated the technical bid of all the three participants and found all the participants to be technically qualified and responsive for opening of their financial bid. The proceedings further stated that "The component designs for the work were completed. With regard to the acquisition of private land/forest land required for this work, the Chief Engineer has stated that 4(1) notification has been made and L/A cases are with Spl. LAO, LIIP, and under 6(1) stage. The period of completion of the work has been fixed to 15 calendar months." The Committee of the State while evaluating the tenders has also considered the check list submitted by the Chief Engineer. On 4th April, 2011, the State Government in its letter No. 9540 instructed the Chief Engineer to open the financial bids of all the

bidders who were successful in technical bids and to submit the report along with financial bid proposal within seven days for approval of the Government. On 13th April, 2011 the financial bids were opened and petitioner's bid amount of ` 12,69,11,228 (Rupees twelve crores, sixty nine lakhs, eleven thousand, two hundred and twenty eight) was found to be the lowest followed by the bid of Ratna Infrastructures. On 21st April, 2011 the Executive Engineer in his letter No. 722 requested the petitioner to extend the bid validity period as it will take some time to finalise the financial bid. The petitioner accordingly extended his validity period till 30th June, 2011. On 7th May, 2011, the Chief Engineer submitted the opened financial bid along with his recommendations vide letter No. 1366 to the State Government. The said report was placed before the Tender Committee of the State Government wherein the Chief Engineer recommended to accept the financial bid of the 1st lowest bidder-petitioner amounting to ` 12,69,11,228/- which is 2.60% less than the estimated amount put to tender. On being asked about the private land acquisition, drawing and designs, the Chief Engineer stated that the status of private land acquisition is under 4(1) notification stage and the final land acquisition will take about six to eight months. He further categorically stated that the tender was invited basing upon the tentative drawings and designs and the work will only commence after the month of November. He also stated that the estimate has been prepared basing on S/R-2009 with enhanced labour rate. On the basis of the report of the Chief Engineer, the Committee felt that since the land acquisition has not yet been fully completed and it wlll take further time of about six to eight months, the monsoon is approaching very shortly and the work cannot be commenced during the rainy season, it would not be proper for the State Government to award the work at this stage to the lowest tenderer. The said order of the Government to cancel the tender and to go for fresh tender for the project work with the same estimated cost, was intimated to the Chief Engineer through the F.A.-cum-Addl. Secretary to Government, which is not legal and valid.

15. The State Government after having taken a decision to invite tender keeping in view the fact that the amount was financed by the Central Government for the project which is to be completed by the end of March, 2012 as per the MoU entered into between the Central & the State Governments, otherwise the State Government will have to bear the expenses of the project. Total length of Left Main Canal is about 49.38 Km. and the present construction work is at the tail end of the main canal. Length of branch canal from the left main canal is about 16 Kms and unless this canal is constructed the entire project will be an unused one and the beneficiaries i.e. the farmers can not get water for the purpose of irrigation

of their land and that since the undivided Kalahandi district is a backward district, the project has been taken up by the Central Government as a National importance, therefore, the decision of the State Government accepting the report of the State Level Tender Committee as communicated by the F.A.-cum-Addl. Secretary to Government to cancel the tender on the report of the Chief Engineer that the acquisition proceedings will take another six to eight months to complete, is not proper. The reason assigned that acquisition cannot be completed, the petitioner may ask for escalation of the rates for execution of work and enhancement of cost of material rate and labour rate. The award of work without any scope to start has no meaning and it may create legal problem. In this regard the petitioner has filed an additional affidavit on 12.9.2011. Review Petition No. 176 of 2011 arising out of the present writ petition, has also been filed. In paragraph-12 thereof it is stated that the specific assurance that the petitioner is ready and willing to execute the work at the same rate without claiming any escalation for delay in Land acquisition was not considered and no reply was submitted by the State Counsel.

16. In view of the abovesaid undertaking, the decision of the State Government for cancellation of the tender and asking for retender at the same rate, is wholly untenable in law. The reason assigned that the acquisition proceedings may take six to eight months, is also not tenable for the reason that the State Government can invoke the power under section 17 of the Land Acquisition Act and acquire the land and take possession under the urgency provision. The work is awarded to the petitioner as he is the lowest tenderer. Therefore, the reason assigned on the basis of the statement that the acquisition proceeding is at section 6(1) stage, cannot be a ground for the State Government for not accepting the lowest bid offered by the petitioner for execution of the work. The State Government can issue section 6 notification, pass award and take possession expeditiously keeping in view the fact that the execution of the project work is a time bound one and the Central Government is financing the project. If the project work is not finished by March, 2012, the Sate Government has to bear the cost of the project in view of the MoU with the Central Government by the State Government. Further the petitioner has categorically stated in the affidavit that he will not claim any extra labour charges or idle charges for the machineries for the delay in Land acquisition; but the Department did not hand over the land for execution of the work. In view of the abovesaid undertaking, the apprehension of the opposite parties is misconceived. Not awarding the contract to lowest bidder to execute the work keeping in view the fact that if the project is not completed by the end of March, 2012, the expenses have to be borne by the State Government, would affect the

public interest. That apart, if the project is not started and completed, the beneficiaries i.e. the farmers cannot get water for irrigation of their land and therefore, they will be affected. Hence cancelling the tender and directing the Chief Engineer to retender, will not be in the interest of the either State or the farmers. Therefore, the action of the State Government in canceling the tender on flimsy reason without application of mind and exercise of its power under section 17 of the Land Acquisition Act for the purpose of taking possession of the private land under urgency clause as the same is required for execution of the project work of the Branch Canal to the Main Canal for utilization of the water for irrigation by the farmers of the area in question, after the financial bids were opened and it was noticed that the petitioner's bid was the lowest, is untenable in law. Apart from that, as could be seen from the additional affidavit filed by the petitioner on 12.9.2011 wherein at paragraph-5 it is indicated that a similar situation, in the Pre-Bid Conference held in the conference Hall of the Chief Engineer, Upper Indravati Irrigation Project at Khatiguda on 23.8.2011, i.e. during pendency of this writ petition, a question arose in question no.3 as to whether the tender will be cancelled or not due to Land Acquisition Problem in future ? The compliance of the Department was 'No'.

17. In this view of the matter, the State Government cannot take a different stand in respect of the project work in question. Hence the reason assigned by the State Government on the basis of the proceedings of the State Level Tender Committee issued to the Chief Engineer, is wholly untenable in law as the same is colourable exercise of power, arbitrary and unreasonable and calls for interference of this Court. Hence the proceedings and the order of the State Government are liable to be quashed. Accordingly the same are quashed. The writ petition is allowed. Issue Rule. Further issue a writ of mandamus directing the opposite parties to award the contract in favour of the petitioner by executing the agreement and issuing work order. It is open for the opposite parties to take possession of the private land by invoking power under section 17 of the L.A. Act.

Writ petition allowed.

2012 (I) ILR- CUT- 414

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

W.P.(C) NO.8140 OF 2011 (Dt.01.11.2011)

SK. SAMSUR & ORS. ……..Petitioners.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

WAKF ACT, 1995 (ACT NO. 43 OF 1995) – S.99.

Appointment of Administrator – It must be for a specific period of six months unless the same is extended by the State Government U/s.99 (3) (a) of the Act after expiry of the initial period of six months.

There is no provision that the members of the Board which was constituted for a term of five years shall continue till the election is held and new Board is reconstituted – So the State Government has power to appoint an Administrator to the Wakf Board U/s. 99 (1) & (2) of the Act to see that the administration and functioning of the Board is carried on till the Board is reconstituted U/s. 13 & 14 of the Act.

In the present case the appointment of Administrator is beyond the period of six months and there is no order of extension after expiry of six months from the date of appointment – Held, impugned notification appointing O.P.2 as Administrator is liable to be quashed.
(Para 14)

Case law Referred to:-

AIR 1965 SC 491 : (University of Mysore-V- C.D. Govind Rao)

For Petitioners - M/s. Adam Ali Khan & S.K.Mohanty.
For Opp.Parties - Mr. R.K.Mohpatra, Govt. Advocate,
M/s. Irshat. Kd. Fayaz & R.R.Behera, (for O.P.No.2)

V.GOPALA GOWDA C.J. The petitioners are the citizens of India belonging to Muslim community who are appointed as Members of Orissa Board of Wakf vide notification dated 21.11.2005 (Annexure-1) and, therefore, interested in the Wakf institutions within the definition and scope of section 3(i) of the Wakf Act, 1995 (for short 'the Act') have filed this writ petition praying for I ssue of a writ of certiorari to quash the notice under

Annexure-6 and direct to allow the Board as formed vide notification dated 22.11.2005 (Annexure-1), to function till a new Board is constituted as per sections 13 and 14 of the Act and for such further order/direction as deemed fit and proper in the circumstances of the case.

2. The brief facts and rival contentions urged in this writ petition are stated in this judgment for the purpose of appreciating the same and answering the contentious issue that would arise for our consideration.

3. The Orissa Board of Wakf (for short 'the Board') was constituted vide Law Department notification published in the Orissa Gazette on 22.11.2005 vide Annexure-1. Eleven persons were appointed by the State Government under different categories under section 14 of the Act. As per provision under section 14 of the Act, Haji Md. Ayub Khan, M.L.A. was elected as the Chairman of the Board. The election of said Haji Md. Ayub Khan, Chairman of the Board was challenged before the Hon'ble Lokpal, Orissa, Bhubaneswar on the ground that Mr. Haji Md. Ayub Khan and Mr. Md. Rafique, M.L.As. were nominated not in accordance with the Wakf Act and the Rules. It is further stated that as per law the State Government should have requested the Assembly Secretary to hold election among the Muslim members of the legislative Assembly (M.L.As.) to elect from those Muslim members at least one and not more than two to the Orissa Board of Wakfs. But the election of the Chairman was challenged because the State Government directly nominated two M.L.As.to the Board illegally. After about one year of the election of the Chairman, the Hon'ble Lokpal observed and directed that the State Government has to choose directly one or two M.L.As. from among the Muslim M.L.As. to the Board and declared the nomination/selection of two M.L.As. to the Board by the State Government, as illegal. Further the State Government was directed to request the Assembly Secretariat to conduct election among the Muslim M.L.As. as one or two M.L.As. must represent the Board by adopting due procedure of election. Therefore, Mr. Khan, the Chairman of the Board was removed.

4. It is further contended that in the meantime Sk. Salimuddin Mohammad, a member of the Board has passed away in the month of March, 2009. The post of Chairman including the post of Member held by late Sk. Salimuddin Mohammad remained vacant. The Chief Executive Officer suggested the name of Haji Sidique Ali of Balasore district for nomination as Member of the Board in place of Sk. Salimuddin. It is alleged that Mr. S. Osatullah (P. No.2) who was appointed as Chairman of the Board has been working for the interest of his personal gain. The other members of the Board have expressed their dissatisfaction over his malfunctioning. Even

O.P. No.2 is trying to create trouble in the smooth management of different wakf properties for his personal gain. He has even influenced to change the decisions taken in the Board meeting and manipulated the record and the proceedings, which was never decided in the meeting. The Members of Board have written to the Chairman and Chief Executive Officer mentioning therein how the proceedings of the meeting were tampered by second opposite party and not recorded on the basis of decision taken in the meeting. It is stated that O.P. No.2 is holding the office which is a public office and that it was held by a usurper without legal authority for the reason that the statute provided certain qualification for the post and the O.P. No.2 is not qualified as per the statute. Therefore, sought for a remedy. He has challenged the appointment of O.P. No.2 seeking to issue a writ of Quo Warranto placing reliance upon a leading decision in the case of ***University of Mysore v. C.D. Govind Rao***, and another, AIR 1965 SC 491.

5. Challenging the appointment of O.P.No.2, W.P.(C) No. 3533 of 2010 was filed before this Court which is pending after issuance of notice. While the matter stood thus, to accommodate O.P. No.2, O.P. No.1 issued another notification bearing No. 1397 dt.21.12.2010 in exercise of its power under clause (b) of sub-section (2) of section 99 of the Act. According to the petitioner, the said notification is non-est in the eye of law as during the existence of the Board no individual can be appointed as an Administrator by substituting the entire body of the Board. The said provision under section 99(2)(b) of the Act was applied by opposite party no.1 without application of mind and no allegation was there against the Board Members. No enquiry was made against them. Simply the impugned notification was issued and substituted by one person whose initial appointment is also under challenge before this Court in the above referred writ petition. The State Government has not taken any step to constitute a new Board, either before expiry of the tenure of the Board or immediately after the term of the Board expired, though recommendations from different organization/institutions were made to the opposite party no.1. The O.P. No.2 took forcible charge of the office of the Board as 'Administrator' not allowing the other members of the Board to function. He is having close connection with the Government officials and he has again started his malicious activities by taking illegal actions against the persons and institution who did not succumb to his illegal demands. Certain illegal actions referred to in the writ petition, have not been referred herein as the same are not required for the purpose of considering the prayers sought for in this writ petition.

6. The ground of attack of the impugned notification is the appointment of O.P. No.2 as an 'Administrator'. When his appointment as a Chairperson of the Board was challenged, he is not competent to be appointed and when the writ petition is filed for issuing a writ of Quo-warranto is pending before this Court, the State Government has exercised its power without appointing Returning Officer to conduct election as required under section 14 of the Act to constitute the Board immediately after its expiry. Therefore, the appointment of O.P. No.2 is illegal and his appointment beyond the period of six months as provided under sub-section (1) of section 99 of the Act without there being extension of that period, as provided under sub-section (3) of section 99 of the Act, being per se illegal, the same is liable to be quashed.

7. Counter-affidavit has been filed by O.P.No.1 justifying notification for the reason that the Board which was constituted vide notification dated 22.11.2005 was for a period of five years. O.P. No.2 in the year 2009 was nominated as Member of the Board consequent upon death of a Member and he was elected as Chairman by the Board and continued till expiry of the term of that Board. O.P. No.2 is senior IAS officer and has worked in different administrative capacities under the Government of Orissa. The term of the Board expired in November, 2010. Pending constitution of the Board, the State Government appointed O.P.No.2 as the person to perform all the functions of the Board. Therefore, there is absolutely no illegality in issuing the notification vide Annexure-6 as alleged by the petitioners. It is further stated that there is no provision under the Act to allow the Board to function even after expiry of the term of office. Therefore, the second prayer made by the petitioners to allow the Board to function till a new Board is constituted by the State Government, is not permissible in law and the said relief cannot be granted by this Court in exercise of its writ jurisdiction that would be contrary to law. It is further stated that allegations made by the petitioners against O.P. No.2 have no basis and the same are denied. It is further stated that O.P. No.1 has already appointed Election Officer as per office order No. 6487 dated 11.7.2011 (Annexure-A/1 of the counter-affidavit of the State) for conducting election of the Members of the Board and since the said Election Officer has already started the election process and taken steps to constitute the Board, and the appointment of O.P. No.2 being in consonance with the provision of the Act, the same need not be interfered with by this Court at this stage.

8. O.P. No.2 has filed the statement of counter today by way of affidavit along with Annexurers A & B. He has contended that sub-section (1) of section 99 is not attracted to the facts of the case as the Board was not

superseded before completion of the term of five years. Therefore, the appointment of an Administrator for a period of six months stipulated under the aforesaid provision, is not applicable to the facts situation of the present case. Further it is contended that as per Annexure-4, the allegation by O.P. No.4 that Chairman tampered, erased and caused omission in resolution in item nos.1 & 22, are all false. All the resolution are placed, heard, discussed and finally decision taken thereon, were reduced to writing in presence of Chairman and Members of the Board and after the same were read over to them, Members have signed the same. None of the Members of the Board have made allegations regarding tampering, erasing and omissions as alleged against O.P.No.2 by the petitioners. It is further stated that a reply has been given to O.P. No.4 vide Annexure-A, on the allegation of tampering etc. made in the resolution. Therefore, he had prayed for dismissal of the writ petition. It is urged by the learned counsel for O.P. No.2 that the petitioners have no locus standi to challenge the impugned notification.

9. With reference to the abovesaid rival legal contentions, the following points would arise for consideration :

(i) whether the petitioners have locus standi to file this writ petition ?

(ii) whether the impugned notification issued under sub-section (2) of section 99 of the Wakf Act by the State Government appointing the opposite party no.2 as an administrator, beyond the period of six months, is permissible in law without there being extension of the period as provided under section 99(3)(a) of the Act ?

(iii) whether the petitioners are entitled to continue as the Members of the Board of Wakf beyond the term fixed in the impugned notification dated 22.11.2005 ?

(iv) what order ?

10. The aforesaid points are required to be answered in the following manner for the following reasons.

11. The first point is answered in favour of the petitioners for the following reasons.

12. It is an undisputed fact that the petitioners are the Membes of the Muslim community. They were appointed as Members of the Board vide notification dated 22.11.2005 (Annexure-1) and, therefore, they are

interested in the affairs of the institution of Wakf within the definition and scope of section 3(i) of the Act. In this view of the matter, the contention raised on behalf of O.P. No.2 is wholly untenable in law. The same is liable to be rejected and is accordingly rejected. We hold that the petitioners have locus standi as they were the Members of the earstwhile Board and they belong to the Muslim community and they have got interest in the better functioning of the institution of the Wakf in the larger interest of the persons of the Muslim community in the State.

Answer to point nos. (ii) and (iii) :

13. The undisputed fact is that the term of office of the Members of the Board constituted by O.P. No.1 in exercise of power under section 13 read with section 14 of the Act is for five years. Before expiry of the term or immediately after expiry of the term of the Members of the Board, the election was not held by the State Government by appointing Election Officcer. There is no provision that the Members of the Board which was constituted for a term of five years shall continue till the election is held and new Board is reconstituted. Therefore, the State Government has got the power under sub-sections (1) and (2) of section 99 to appoint an Administrator to the Wakf Board to see that the administration and functioning of the Board is carried on till the Board is reconstituted as per sections 13 & 14 of the Act. In the instant case, the contention urged on behalf of the O.P. No.2 is that the stipulated period of six months under sub-section (1) of section 99 of the Act is not attracted since the State Government has exercised its power under section 99(2) of the Act. Therefore, interpretation of six months as stipulated under sub-section (1) of section 99 of the Act is not applicable in respect of the person, who is appointed as an Administrator under sub-section (2) of section 99 of the Act. As could be seen from section 99(3)(a), the period of six months can be extended by the State Government if, within that period, election is not held to reconstitute the Board. Therefore, a cumulative reading of the provisions of sections 99(1) and 99(3)(a) makes it very clear that the period of appointment of an Administrator shall supersede the Board or expiry of the term of the Board which was constituted under the provisions of the Act. Therefore, the term of office of Administrator shall not continue for more than six months unless the same is extended by the State Government in exercise of its power under section 99(3)(a) of the Act after the initial period of six months expires.

14. In the impugned notification, the notified period of appointment of O.P. No.2 as an Administrator, is until further orders, which is not

permissible in law. The period of appointment of an Administrator must be for a specific period of six months. Therefore, the impugned notification appointing O.P. No.2 as Administrator of the Board until further orders is wholly unsustainable in law as the same is without authority of law on the part of O.P. No.1. Therefore, the same is liable to be quashed for the reason that the appointment of Administrator vide notification dated 21.12.2010 which is beyond six months and there is no order of extension after expiry of six months period from the date of appointment of O.P. No.2. In this view of the matter, the impugned notification (Annexure-6) is liable to be quashed and is accordingly quashed. Accordingly answered the point no. (ii) in favour of the petitioners. Since we have quashed the notification, the earlier Board Members constituted as per Annexure-1 who are proforma opposite parties impleaded as O.P. Nos.3 to 9, cannot be permitted to function as the Board Members after expiry of five years period. Therefore, the third point is answered against the petitioners and the petition in this regard, is rejected.

Answer to point no. (iv) :

15. Mr. Mohapatra, learned Government Advocate placing reliance on Annexure-A/1 of the counter-affidavit, submitted that the State Government has nominated Sri Rama Krushna Nanda, Secretary L.R.C.-cum-Additional Secretary to Government of Orissa, Law Department under clause (e) of sub-rule (1) of rule-2 of the Orissa State Wakf Board (Conduct of Election) Rules, 1997, as Election Officer to do any act and to perform any function in connection with the conduct of election under the said rules for the category specified under sub-clause (ii) and (iv) of clause (b) of sub-section (1) of section 14 of the Act. The Election Officer shall see that the election is completed as expeditiously as possible but not later than four weeks from today. During this period, it is open for the O.P. No.1 to appoint such officer as an Administrator to manage the affairs of the Board while exercising his power, if the case of O.P. No.2 is to be considered, O.P. No.1 shall take into consideration all the allegations made against him in the writ petition.

With the aforesaid observations and directions, the writ petition is partly allowed in the above terms and direction to the opposite party no.1.

Writ petition partly allowed.

2012 (I) ILR- CUT- 421

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

W.P.(C) NO.27427 OF 2011 (Decided on. 02.12.2011)

M/S. BHUSHAN POWER & STEEL LTD. … …..Petitioner.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

A. ORISSA VAT ACT, 2004 (ACT NO. 4 OF 2005) – S.42.

Audit assessment – Rule 12 (3) of the C.S.T. (O) Rules 1957 – Audit assessment has to be completed on the basis of the materials available in the audit visit report – The assessing authority can not travel beyond the materials available in the audit report – Utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment. (Para 10)

B. ORISSA VAT ACT, 2004 (ACT NO.4 OF 2005) –Ss. 42,43.

Audit assessment under Rule 12 (3) of C.S.T. (O) Rules read with Section 42 of OVAT Act and escaped assessment under Rule 12 (4) of the C.S.T. (O) Rules read with Section 43 of OVAT Act are separate and distinct – In the Case of audit assessment the maximum period of limitation is one year but in the Case of assessment of turn over escaping assessment the period of limitation is 5 years – Held, the period of 5 years as provided under the statute for completing assessment of escaped turn over can not be restricted to one year as provided in Case of audit assessment. (Para 11,12)

C. Principles of natural justice – Copy of the report – The assessee/dealer has a right to receive a copy of the report submitted against him – He has also a right to avail a fair opportunity to meet, explain and controvert such allegation before he is condemned.
(Para 15)

D. CENTRAL SALES TAX ACT, 1956 (ACT NO. 74 OF1956) – S.6 (2).
While examining the transaction of stock transfer, the Assessing authority is required to examine each and every transaction to find out the genuineness of the claim. (Para 17)

Case laws Referred to:-
1.(1970) 26 STC 354 : (Tata Engineering & Locomotive Co.Ltd.-V-Asst.

Commissioner of Commercial Taxes, Jamshedpur & Ors.)
2.(1876) 1 Ch.D.426 : (Taylor -V- Taylor)
3.AIR 1936 pc 253 : (Nazir Ahmed -V- King Emperor)
4.AIR 2004 SC 2615 : (Rak Phal Kundu-V-Kamal Sharma & Indian Bank's Association-V- Devkala Consultancy Service)

For Petitioner - Mr. Venkat Raman, Sr. Advocate,
M/s. Satyajit Mohanty, R.R.Swain & S.Pattnaik.
For Opp.Parties - Mr. R.P.Kar, Standing Counsel (Revenue).

B.N. MAHAPATRA, J. In this writ petition, challenge has been made to the Audit Assessment Order dated 22.9.2011 passed by opposite party No.3-Deputy Commissioner of Sales Tax (LTU), Sambalpur Range, Sambalpur (for short, "Assessing Authority") under Rule 12(3) of Central Sales Tax (O) Rules, 1957 [for short, "CST (O) Rules"] for the period 06.07.2006 to 31.03.2009 on the ground that such order of assessment is illegal, arbitrary, violative of principle of natural justice and Article 14 of the Constitution of India.

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

Petitioner is a Public Limited Company incorporated under the provisions of the Companies Act, 1956 and a registered dealer under the Orissa Value Added Tax Act, 2004 (for short, "OVAT Act") as well as Central Sales Tax Act, 1956 (for short, "CST Act") having TIN No.21241702847. The Audit Assessment proceedings commenced on 05.10.2010 basing on tax audit visit report dated 30.9.2010. This report covers the period from 06.07.2006 to 31.03.2009 suggesting for assessment and demand of tax to the tune of Rs.2.98 crores. According to the provisions of Rule 12(3)(h) of the CST(O) Rules, the assessment proceeding on the basis of tax audit report has to be completed within a period of six months from the date of receipt of the audit visit report provided if for any reason the assessment is not completed within six months the Commissioner may on the merit of each case allow such further time not exceeding six months for completion of the assessment proceedings. The petitioner believed that the assessment order would be passed by the opposite party no.3 before 06.04.2011, i.e., within the period of limitation of six months as provided under Rule 12(3) of the CST(O) Rules. However, the Assessing Authority did not pass any assessment order by that date. While the matter stood thus, the petitioner was served with a notice on 25.06.2011, for the first time, informing that the opposite party no.3 would also be relying on another report dated 02.5.2011 to complete the assessment proceedings. Pursuant to the said letter, the

petitioner appeared on 14.7.2011 and sought for copies of the aforementioned report and reiterated its request again on 22.7.2011. Since the copy of the said report dated 2.5.2011 was not supplied to the petitioner, it approached this Court in W.P.(c) No.21697 of 2011 which was disposed of on 29.8.2011 with the direction that the Assessing Authority shall specify the required documents needed for completion of the proceedings in terms of Annexure-18 and the petitioner shall furnish the same within one week. Thereafter, the petitioner would be entitled to obtain certified copies of the tax evasion report along with its Annexures on deposit of requisite cost and the Assessing Authority shall give reasonable opportunity of hearing to the petitioner. On 12.9.2011, as directed by the Assessing Authority, the petitioner appeared before him and the Assessing Authority directed the petitioner to deposit a sum of Rs.24,540/- for obtaining a copy of the tax evasion report along with the Annexures. After deposit of required fees the certified copy of the fraud case report dated 2.5.2011 in 20 volumes comprising of more than 4000 pages were supplied to the petitioner-Company on 14/15.09.2011. The assessment proceeding was adjourned to 21.9.2011. On 21.9.2011, the petitioner appeared before the Assessing Authority and prayed for time. Since the petitioner did not produce its books of account/documents on 21.09.2011, the learned Assessing Authority passed the impugned order of assessment on 22.9.2011 assessing tax to the tune of Rs.26,95,22,434.69 and penalty amounting to Rs.52,65,09,727.38 and issued demand notice for a total amount of Rs.78,97,64,591.00. Hence, the present writ petition.

3. Mr. V. Raman, learned counsel appearing on behalf of the petitioner submits that the assessment order passed under Rule 12(3) of the CST(O) Rules is illegal, arbitrary and violative of principle of natural justice and Article 14 of the Constitution of India. The Assessing Authority has not supplied to the petitioner the list of specific documents as mentioned in Annexure-18 pursuant to the order of this Court dated 29.8.2011 passed in W.P.(C) No.21697 of 2011. The Assessing Authority on 12.9.2011 had sought for freight payments details and weighment slips which were already produced before opposite party no.3. No reasonable opportunity of hearing was afforded to the petitioner as directed by this Court in the earlier writ petition. It is settled law that if any person is likely to be affected by the use of any material against him that is to be brought to his notice for rebuttal. This is the requirement of natural justice. The impugned order of assessment has been passed in gross violation of principles of natural justice as the learned Assessing Authority supplied the report dated 02.5.2011 on 14.09.2011 in 20 volumes containing 4000 pages and completed the assessment within 8 days, i.e., on 22.9.2011. The impugned

assessment order has not been passed on the basis of the audit visit report dated 30.09.2010 but on the basis of the Vigilance report dated 02.05.2011 and thus the assessment order is one falling under Rule 12(4) of the CST(O) Rules read with Section 43 of the OVAT Act. In that event, the period of limitation is 5 years and it is not six months or one year as applicable to audit assessment. The order of assessment passed under Rule 12(3) of the CST(O) Rules is *ab initio* void as the same has not been passed exclusively on the basis of the Audit Visit Report dated 02.05.2011. The assessment order suffers from the vice of arbitrariness inasmuch as the same has been made by generalizing the entire claim of stock transfer on the strength of some transactions in complete disregard to the law laid down by the Supreme Court in *Tata Engineering and Locomotive Co. Ltd. vs. Asst. Commisioner of Commercial Taxes, Jamshedpur and others, (1970) 26 STC 354,* wherein it has been held that each and every transaction ought to be examined and it is not permissible to generalize the entire claim of branch transfer in respect of all the transactions on the basis of some transactions. This conduct of the Assessing Authority shows *mala fide* intention to harass the petitioner-Company by saddling with exorbitant tax and penalty. Since there is no allegation of concealment or misrepresentation or *mens rea* by the petitioner-Company, imposition of penalty of two times of the tax assessed is illegal, arbitrary and contrary to law and hence the same is liable to be quashed. Rule 12(3) and Rule 12(4) of the CST(O) Rules provide for a very harsh procedure of fixing tax liability which is violative of Article 14 of the Constitution of India for which the said Rules are liable to be quashed. The mandatory provision under Rule 12(3) of the CST (O) Rules for levy of penalty at the rate of twice the tax assessed is the most arbitrary and unguided power conferred upon the Assessing Officer and it violates the fundamental right guaranteed under Article 14 of the Constitution of India. Every transaction of the petitioner-Company is duly reflected and documented in the books of account. The alleged investigation reports have attempted to state that the transactions of stock transfer are not actually stock transfer, but interstate sales which is not correct.

4. It is further argued that law is well settled that once it is a stock transfer, the petitioner is under an obligation to reverse the entire input tax credit. In the present proceedings, the petitioner has reversed an input tax credit of Rs.7.55 crores for the relevant transactions. The petitioner has effected stock transfer and collected the declaration Form “F” and duly filed with the Department. Instead of effecting stock transfer, had the petitioner effected interstate sales against declaration Form “C”, the total tax for the disputed transaction would have been Rs.13.08 crores, and in that case, the petitioner would have utilized entire amount of CST by utilizing input tax

credit. Thus, there is no revenue loss to the State of Orissa. In addition to the reversal of ITC in the State of Orissa, the petitioner had paid local VAT in all States across the country and there is no loss to the government exchequers in any manner. On the contrary, there is surplus contribution of revenue by the petitioner-Company.

5. M. R.P. Kar, learned counsel appearing for the Revenue supporting the order of assessment passed by the Assessing Authority vehemently argued that there is no infirmity or illegality in the impugned assessment order. The assessment having been completed under Rule 12(3) of the CST(O) Rules read with Section 42 of the OVAT Act, the Assessing Authority has no option but to complete the assessment during the period of limitation provided in Rule 12(3) of the CST(O) Rules. The Assessing Authority has not committed any illegality in utilizing the fraud reports submitted by the Vigilance wing in the audit assessment proceedings. With the above submissions, Mr. Kar vehemently urges for dismissal of the writ petition.

6. In the alternative, Mr. Kar makes a prayer that in case the Court comes to the conclusion that reasonable opportunity of hearing has not been afforded to the petitioner-Company and/or that the Assessing Authority has no power/authority to utilize the report submitted by the Vigilance Department in making audit assessment, the matter may be remanded to the Assessing Authority to make the assessment afresh and in that event the petitioner-Company should give an undertaking that it will not take any technical points with regard to the limitation or validity of the re-assessment proceedings. Pursuant to the said submission of Mr. Kar, the petitioner files an affidavit *inter alia* stating that it agrees to file a statutory appeal in terms of Section 77 of OVAT Act against that part of the impugned order levying tax on the strength of audit visit report dated 30.9.2010. The petitioner further undertakes to appear before opposite party no.3 to complete the adjudication proceeding as this Court may be pleased to set aside that portion of the assessment order passed on the strength of vigilance report dated 2.5.2011. The petitioner also undertakes by way of affidavit that at no point of time the bar of limitation of one year fixed in terms of Rule 12(3)(h) of the CST (O) Rules shall be raised or agitated in the adjudication proceedings after the impugned assessment order dated 22.9.2011 is set aside.

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

(i) Whether the Assessing Authority is empowered to utilize any adverse report other than the audit visit report against a dealer while making audit assessment under Rule 12 (3) of the CST(O) Rules read with Section 42 of the OVAT Act?

(ii) If the answer to question No.(i) is in affirmative, whether the period of limitation as provided in Rule 12(3) of the CST (O) Rules read with Sec. 42 of the OVAT Act for making audit assessment is applicable to such assessment?

(iii) Whether the Assessing Authority is justified in utilizing the fraud report dated 2.5.2011 submitted by the Vigilance Department while making audit assessment on the basis of the audit visit report dated 30.9.2011 ?

(iv) Whether the impugned assessment order has been passed in gross violation of principles of natural justice and disobedience to the order passed by this Court on 29.8.2011 in W.P.(C) No. 21697 of 2011 ?

(v) Whether the Assessing Authority is justified to pass the impugned assessment order by generalizing the entire claim of stock transfer on the strength of findings arrived at on scrutinizing some transactions of stock transfer?

8. Question nos.(i) to (iii) being interlinked, they are dealt with together. The scheme of VAT Act provides various types of assessment for the purpose of determination of tax liability under the OVAT Act. Such assessments are self assessment (Section 39), provisional assessment (Section 40), audit assessment (Section 42), escaped assessment (Section 43), assessment of dealer who being liable to pay tax fails to register (Section 44), assessment of casual dealer (Section 45). Similarly, in Rule 12 of the CST (O) Rules provides various types of assessment including audit assessment and assessment of escaped turnover. In the present case, we are concerned with the audit assessment and assessment of escaped turnover.

9. Section 2(6) of the OVAT Act defines “Audit Assessment” which means an audit assessment made under Section 42. Under the CST (O) Rules, Audit Assessment is provided in Rule 12(3) of the CST (O) Rules. According to Rule 12(3)(a), where the tax audit conducted under Rule 10 results in detection of suppression of purchases or sales or both, erroneous

claims of exemption or deductions under the Act and the rules made thereunder, evasion of tax or contravention of any provisions of the Act affecting the tax liability of the dealer, the assessing authority may, notwithstanding the fact that the dealer may have been assessed under sub-rule (1) or (2), serve on such dealer a notice in Form IV along with a copy of the "Audit Visit Report", directing him to appear in person or through his authorized representative on such date, time and place, as specified in the said notice for compliance of the requirement of clause (b) of Rule 12(3) of CST(O) Rules.

10. An audit assessment is required to be completed within a period of six months from the date of receipt of the audit visit report. If, for any reason, the assessment is not completed within the time specified, the Commissioner may, on the merit of each such case, allow such further time not exceeding six months from completion of the assessment proceeding. However, no order of assessment shall be passed after expiry of one year from the date of receipt of the audit visit report. Thus, the maximum period to complete the audit assessment provided under Rule 12(3)(h) read with Section 42 (7) of the OVAT Act is one year from the date of receipt of the audit visit report. Perusal of the Rule 12(3) and Sec. 42 makes it clear that audit assessment has to be completed on the basis of the materials available in the audit visit report. Therefore, no other material can be utilized while making audit assessment. Thus, there was no scope for the Assessing Authority to utilize any materials other than the materials available in the audit report while making the audit assessment under Rule 12(3) of the CST (O) Rules read with Section 42 of the OVAT Act. Since in the present case the impugned assessment order has been passed under Rule 12(3) of the CST(O) Rules, the assessment is certainly an audit assessment and the Assessing Authority is obliged under the statute to make the audit assessment on the basis of materials available in audit report. The Assessing Authority cannot travel beyond the materials available in the audit report. Utilization of any other materials from any other sources in audit assessment is completely foreign to audit assessment and the same is not permissible.

11. Apart from the above, under the scheme of assessment, audit assessment under Rule 12(3) of CST(O) Rules read with Section 42 of OVAT Act and escaped assessment under Rule 12(4) of the CST(O) Rules read with Section 43 of OVAT Act are separate and distinct.

So far as assessment of escaped turnover is concerned, it is only where, after a dealer is assessed under sub-rules (1), (2) or (3) of Rule 12

for any tax period, the Assessing Authority, on the basis of any information in his possession is of the opinion that the whole or any part of the turnover of the dealer in respect of any period or periods has escaped assessment or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable or that the dealer has been allowed wrongly any deduction from his turnover or exemption under the Act or has been wrongly allowed to set off of input tax audit in excess of the amount admissible in clause (c) of the sub-rule (3) of Rule 7 of these Rules, he shall serve a notice in Form IV(a) on the dealer for the purpose of making assessment on escaped turnover. Sub-rule (e) of Rule 12(4) of the CST(O) Rules provides that no order of assessment shall be made under Rule 12(4) after expiry of 5 years from the end of the tax period in respect of which the tax is assessable.

12. Thus, the audit assessment and assessment of escaped turnover cover separate and distinct field for the purpose of assessment. While in the case of audit assessment, the maximum period of limitation is one year, in the case of assessment of turn over escaping assessment, the period of limitation is 5 years. Both the assessments have to be completed within the respective period of limitation as provided under the statute. As stated above, while making audit assessment as provided under Rule 12 (3), the Assessing Authority has no power/authority to utilize any material against the dealer other than the materials available in the audit report. Therefore, the period of 5 years provided under the statute for completing assessment of escaped turnover cannot be restricted to one year as provided in case of audit assessment.

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

14. In view of the above, the Assessing Authority is not justified in utilizing the fraud report dated 2.5.2011 against the petitioner-dealer while making audit assessment on the basis of audit visit report dated 30.9.2010.

15. Question no.(iv) is as to whether the impugned assessment order has been passed in gross violation of principles of natural justice and disobedience to the order passed by this Court on 29.8.2011 in W.P.(C) 21697 of 2011. Undisputedly, the petitioner was supplied with a copy of the report dated 2.5.2011 on 14.9.2011 and the assessment was completed on 22.9.2011, i.e., within 8 days from the date of supply of copy of the report.

It is stated by the learned Senior Advocate for the petitioner that the said report comprises of 20 volumes covering more than 4000 pages. There is no denial by the Revenue to such statement. From the assessment order we also find that one of the reasons given by the Assessing Authority to complete the assessment hurriedly is that since the extended period of assessment allowed under Rule 12(3)(h) of the CST(O) Rules by the C.C.T.(O), Cuttack vide Memo No. 4940 dated 23.3.2011 was going to be expired on 30.9.2011, he did not find any alternative but to complete the assessment ex parte to the best of his judgment. This being the position, it is difficult to accept that reasonable opportunity was afforded to the petitioner to rebut the charges raised against him in the report dated 2.5.2011. Further, this Court vide order dated 29.8.2011 passed in W.P.(C) No. 21697 of 2011 has categorically observed that the Assessing Authority shall provide reasonable opportunity of hearing to the petitioner and if he does not participate, the Assessing Authority shall proceed in the matter in accordance with law.

Reply to a fraud report is a vital piece of material to be considered for making assessment. Giving opportunity to the dealer to file his reply to the fraud report is not an empty formality. The causal approach to such requirement is not at all permissible. The dealer has a right to receive the report submitted by any person/agency against him, if the same is intended to be utilized against him. He has also right to avail a fair opportunity to meet, explain and controvert such allegation before he is condemned. Both dictate providing of reasonable opportunity as well as to follow principles of natural justice, which requires that before the Assessing Officer comes to his own conclusion, the dealer should have an opportunity to reply the report submitted against him.

16. In the instant case, giving 8 days time to explain the allegations raised against the dealer-petitioner in the report dated 02.05.2011 which is in 20 volumes covering more than 4000 pages cannot be said that reasonable opportunity of being heard has been afforded to the petitioner before passing the impugned order of assessment.

17. Question No.(v) is as to whether the Assessing Authority is justified in passing impugned assessment order by generalizing the entire claim of stock transfer on the strength of findings arrived at on scrutinizing some transactions of stock transfer. Needless to mention that while examining the transaction of stock transfer, the Assessing Authority is required to examine each and every transaction to find out the genuineness of the claim. Law is well settled that the onus of proving always lies upon the taxing authority to show that a particular sale or sales is/are exigible to tax under the Act. Therefore, while examining the genuineness of the stock transfer, each individual transaction has to be examined. The Hon'ble Supreme Court in ***Tata Engineering and Locomotive Co. Ltd***. (supra), held as follows:

> "Another serious infirmity in the order of the Assistant Commissioner was (a matter which even the Advocate-General quite fairly had to concede) that instead of looking into each transaction in order to find out whether a completed contract of sale had taken place which could be brought to tax only if the movement of vehicles from Jamshedpur had been occasioned under a covenant or incident of that contract the Assistant Commissioner based his order on mere generalities. It has been suggested that all the transactions were of similar nature and the appellant's representative had himself submitted that a specimen transaction alone need be examined. In our judgment this was a wholly wrong procedure to follow and the Assistant Commissioner, on whom the duty law of assessing the tax in accordance with law, was bound to examine each individual transaction and then decide whether it constituted an inter-State sale exigible to tax under the provisions of the Act."

18. In view of the above legal position and our observations made hereinabove supra, we set aside the impugned order of assessment dated 22.9.2011 passed for the period from 6.7.2006 to 31.03.2009 with a direction to the Assessing Authority to pass the Audit Assessment order afresh exclusively on the basis of Audit visit report within a period of four weeks from the date of appearance of the petitioner-dealer before him for this purpose which is fixed to 20.12.2011. If the petitioner-dealer is aggrieved of the audit assessment order it may prefer statutory appeal. On the date of appearance of the petitioner on 20.12.2011, the Assessing Authority shall serve notice on the petitioner-dealer in the prescribed form for the purpose of making assessment under Rule 12(4) of CST(O) Rules. Needless to mention that the Assessing Authority shall complete the assessment under Rule 12(4) of CST(O) Rules after affording reasonable

opportunity of hearing to the petitioner-dealer and shall examine petitioner's claim of branch transfer keeping in mind the judgment of the Hon'ble Supreme Court in *Tata Engineering Locomotive (P) Ltd*. (supra).

19. With the above observations/directions the writ petition is disposed of.

Writ petition is disposed of.

2012 (I) ILR- CUT- 432

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

W.P.(C) NO.1065 OF 2009 (Decided on 06.12.2011)

JUGAL KISHORE NAYAK ……Petitioner.

.Vrs.

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

Service – Regularization – Petitioner was working as N.M.R. Store Assistnt – His prayer for regularization was rejected although services of his juniors have been regularized – Petitioner fulfills all the criteria and conditions for the purpose – Although the petitioner was discharging the duty of a Store Assistant it can not be said that he ceases to be an NMR – Plea of the state that it had already prepared a scheme for absorption for daily wagers, NMRs and work-charge employees – The scheme covers the NMR employees including the present petitioner – Held, impugned order passed by the Tribunal is set aside – Direction issued to the State Govt. to regularize the service of the petitioner placing him above his juniors. (Para 6)

For Petitioner - M/s. J.K.Rath, D.N.Rath,
S.N.Rath, P.K.Rout.
For Opp.Parties - Mr. J.P.Pattnaik, Addl. Govt. Advocate

B.P.DAS, J. The petitioner, who was working as N.M.R. Store Assistant in the Office of the Liaison Officer, Rengali Irrigation Project, has come up before this Court against the order dated 25.9.2008 passed by the Orissa Administrative Tribunal, Cuttack Bench, in O.A. No.215(C) of 2002 rejecting his prayer for regularisation of service (Annexure-5). The contention of the petitioner is that the services of his juniors have been regularized but his case has not been considered on the ground that as the relief is confined to such persons, who approached the Orissa Administrative Tribunal, here the petitioner cannot claim equal benefit like that of the applicants of the Original Applications before the Tribunal.

2. The brief facts as narrated in this writ petition tend to reveal that the petitioner was initially engaged as Mazdoor under the N.M.R. Scheme on 31st May, 1979 and placed in different grades and ultimately retrenched in the year 2002. Some of the retrenched employees of the Rengali Irrigation

Project, in which the petitioner was working, filed six Original Applications before the Orissa Administrative Tribunal through the Samal Barrage Employees Union, wherein the Tribunal allowed the prayer made in the said Applications directing the O.Ps. to bring the applicants to the work charged establishment with effect from the date of filing of the O.A. in 1993, i.e., 2.9.1993. But the regularisation of service was not allowed on the ground that as the issue was pending consideration of the Government and at that time it was premature to consider the prayer of the applicants. The State Government challenged the aforesaid judgment before the Hon'ble apex Court in six Special Leave Petitions being S.L.P.(C) Nos.5526 to 5531 of 1996. The orders of the apex Court has been annexed as Annexures-1 series and 2 and the same are quoted below :-

> " 20.3.1998- Within four weeks from today the petitioners shall file an affidavit a statement indicating what has been done pursuant to the resolution dated 15th May, 1997, Annexure-P-1, to the affidavit into rejoinder. The respondents shall have two weeks thereafter to respond. Adjourned for seven weeks.
>
> 26.2.1999- We are giving a last opportunity to the State of Orissa to satisfy as that the Scheme that it has formulated has been put into operation for this purpose, it must place an affidavit within four weeks, how many persons in the categories of daily wagers, NMRs and work charge employees are intended to be covered by the Scheme and how many out of them have actually been absorbed pursuant thereto. The affidavit shall indicate when all the persons who were affected shall be absorbed under the Scheme.
>
> Adjourned for four weeks. No further adjournment shall be granted."

3. Thereafter, the Government of Orissa in Finance Department passed a resolution on 15th May, 1997 in Annexure-3, in which it has been resolved inter alia that the Government have been pleased to formulate certain norms and conditions for the NMR/DLR/Job Contract Workers. Few of them are as follows :-

A) Separate gradation/seniority list shall be prepared by the appointing authority for each category of workers determining the length of engagement of a particular person.

B) The workers should have worked under the administrative control of the Department concerned directly for a minimum period of ten years

and the engagement of 240 days in a year shall be construed as a complete year of engagement for this purpose.

C) The date of regularisation was decided to be reckoned as the first appointment to the service for pension and other service benefits.

After this resolution was passed, the petitioner approached the authority-Chief Engineer & Basin Manager, Brahmani Left Basin, Samal and the Chief Engineer by his letter dated 26.4.2002 on the representation of the petitioner informed the Additional Secretary to Government in Water Resources Department that 33 nos. of N.M.R. employees, who were juniors to the petitioner, have been appointed under work-charged establishment with effect from 2.9.1993 pursuant to the common judgment passed by the Orissa Administrative Tribunal. The Chief Engineer also requested to consider the representation of the petitioner and take further action on the order of the Government. As nothing could happen, the petitioner filed O.A. No.215(C) of 2002 before the Orissa Administrative Tribunal and the same was dismissed by order dated 25.9.2008 on the grounds, such as (i) there was no post of Store Assistant lying vacant against which the petitioner could have been regularized. (ii) The petitioner was engaged prior to 12.4.1993 and was retrenched in the year 2002 and he having been sown in the common seniority list in a category in which no vacant post was available in the regular establishment. (iii) The judgment of the Tribunal cannot be held to be a judgment in rem to be automatically applicable to all other similarly circumstanced persons. In the present writ petition also the petitioner challenges the dismissal order of the Tribunal.

4. Counter affidavit has been filed by O.P.5-Executive Engineer indicating therein that the petitioner was a Store Assistant and no such post was vacant, for which the claim of the petitioner for regularisation could not be accepted.

But the fact remains, the petitioner is one of such N.M.R. employees, who have got the benefit of the order passed in six Original Applications filed by them and challenging the same the State Government filed an S.L.P. before the apex Court but the same was dismissed. It is also a fact that the petitioner was in the category of N.M.R. and he fulfills all the criteria and conditions laid in the resolution in Annexure-3. So the only barrier before him is the order of the Tribunal, which termed as judgment in personem.

5. First of all, we may clarify the misnomer that as the petitioner was discharging the duty of a Store Assistant and due to non-availability of any

vacancy in the said post, his case of regularisation could not be considered finally. The case before the Tribunal in earlier Original Applications as well as the Original Application filed by the petitioner was regarding regularisation of service of the N.M.Rs. Admittedly, the petitioner is within the class of N.M.R. and discharging the duty of a Store Assistant. Just because the petitioner was discharging the duty of a Store Assistant, it cannot be said that he ceases to be an N.M.R. The apex Court has dealt with the question of regularisation of the services of the N.M.Rs. and bring them to the status of work charge. The N.M.Rs. are to be regularized. The posts they are holding and the work they are performing are inconsequential.

6. The case of the State before the Tribunal was that it had already prepared a Scheme for absorption for daily wagers, N.M.Rs. and work-charge employees. The preparation of the Scheme and the Resolution in Annexure-3 is not for the purpose of regularizing the services of the persons, who were applicants in the Original Applications before the Tribunal. This is a policy decision taken by the Government to extend the benefit of regularisation of service of those employees, who have worked for a quite long period in the establishment and satisfy the pre-requisite laid down in the Resolution in Annexure-3. The petitioner cannot be deprived of the benefit of the scheme under Annexure-3 just because he did not approach the Tribunal along with the applicants in batch of Original Applications. Hence, there is no force in the argument of the learned State Counsel after the State submitted before the Hon'ble apex Court that a scheme has been prepared for the N.M.R. employees, basing upon which the Hon'ble apex Court passed the order dated 26.2.1999. In our considered opinion, the scheme covers the N.M.R. employees including the present petitioner.

We, therefore, set aside the order dated 25.9.2008 passed by the Orissa Administrative Tribunal, Cuttack Bench, in O.A. No.215(C) of 2002 and direct the State Government to regularize the service of the petitioner placing him above his juniors. The entire exercise shall be completed within a period of three months from the date of communication of this order. The writ petition is allowed accordingly.

Writ petition allowed.

2012 (I) ILR- CUT- 436

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

W.P.(C) NO.9245 OF 2008 (Dt.06.01.2012)

MIHIR KUMAR BAL .. …….Petitioner.

.Vrs.

RESERVE BANK OF INDIA & ORS. ………Opp.Parties.

SERVICE – Compassionate appointment – Petitioner's father expired while working in R.B.I. – He applied for compassionate appointment as his mother predeceased his father – One Mukti Rani Bahal applied for such appointment claiming to be the wife of the deceased employee – R.B.I. took a decision on 31.3.2008 declining to give appointment to the petitioner – Hence this writ petition.

Nothing on record to show that Mukti Rani Bahal is the wife of the deceased employee – She filed suit for a declaration that she is the wife of the deceased employee has not served any fruitful purpose and the R.B.I. has rejected her claim – In the other hand the R.B.I. has extended similar benefits to certain dependants like the present petitioner by following 1985 circular – Petitioner has also filed succession certificate issued by a competent Court to show that he is the successor of his father – Held, direction issued to the Opp.Parties to take steps for compassionate appointment of the petitioner in a post suitable to his qualification. (Para 6,7 8)

<u>Case law Referred to:-</u>

2007(2) SCC 487 : (National Institute of Terchnology & Ors.-V-Niraj Ku.Singh)

For Petitioner - M/s. B.Mohanty, S.Patra, P.Mohanty & A.Panda.
For Opp.Parties - Mr. K.Pattnaik.

B.P.DAS, J. The grievance of the petitioner is against the order dated 31.3.2008 passed by the Deputy General Manager, R.B.I. (Annexure-20) refusing to extend him the benefit of compassionate appointment being the dependant son of Krushna Chandra Bal, who while serving in the Reserve Bank of India (R.B.I.) died.

2. The brief facts leading to this writ petition tend to reveal that the father of the petitioner, namely, Krushna Chandra Bal, while working as a Daftary in the Kolkata Office of R.B.I. died on 4.1.1987. After the death of said Krushna Chandra Bal, the Currency Officer of R.B.I., Kolkata, issued a letter on 28.1.1987 in the name of the mother of the petitioner requesting her to forward them the death certificate of her husband for necessary action. It is not disputed that the mother of the petitioner died much prior to the death of his father, i.e., on 11.4.1983. After receiving the aforesaid letter, the petitioner forwarded the death certificate of his father to the Chief Manager, R.B.I., O.P.2, and on 16.2.1987 he made a representation to O.P.3-Manager, R.B.I., to give him an appointment on compassionate ground commensurate with his qualification, i.e., Matriculation pass. O.P.3, Manager, R.B.I., by letter dated 20.5.1987 (Annexure-3) directed the petitioner to furnish a copy of the document to the effect that he is the legal heir of late Krushna Chandra Bal. In response thereto, the petitioner furnished the legal heir certificate to O.P.3. Thereafter, the petitioner requested the opposite parties by making several communications to extend him the benefit of compassionate appointment but nothing was done. Ultimately, when the petitioner went to the Kolkata Office of R.B.I. to enquire about the fate of his representation, he was told by the Bank officials that the matter was held up as one Mukti Rani Bahal claiming to be the wife of late Krushna Chandra Bal had represented for appointment on compassionate ground. The petitioner raised objection to the aforesaid claim of said Mukti Rani Bahal.

In the meantime, said Mukti Rani Bahal filed T.S.No.161/1989 in the Court of 2nd Munsif, Howrah, for a declaration that she was the legally married wife of late Krushna Chandra Bal, father of the petitioner. The said suit was decreed vide judgment dated 24.7.1992, against which the petitioner preferred an appeal being Title Appeal No.178/1992 before the District Judge, Howrah. The appeal was ultimately allowed on contest by judgment dated 24.6.1993 by setting aside the judgment and decree passed by the 2nd Munsif, Howrah and the suit was remanded for trial afresh. Thereafter, the Title Suit was dismissed for default on 20.7.1994. Long thereafter, said Mukti Rani Bahal filed a misc. case for restoration of the Title Suit but the same was dismissed on 18.1.2003 on the ground of delay. According to the petitioner, the said order of dismissal having not been challenged had attained finality.

It is further submitted that the petitioner was issued with a Succession Certificate by the Civil Judge (Sr.Divn.), Cuttack in Succession Misc. Case No.7/1993, vide Annexure-15, in respect of the estate of his

father, which according to the petitioner, establishes that he is the successor of his father, late Krushna Chandra Bal. When no action was taken in respect of the claim of the petitioner for compassionate appointment, he filed O.J.C. No.3443/1995 before this Court enclosing all the documents including his annual income praying for a direction to the R.B.I. for compassionate appointment, which was disposed of on 6.2.2008. The relevant portion of the said order is quoted herein below :-

> "………According to the learned counsel for the petitioner, O.P.No.4 is not the wife of the deceased and the wife of the deceased died in the year 1983, i.e., prior to the death of the father of the petitioner and the petitioner is the son through the deceased wife. Now both the petitioner as well as O.P.No.4, according to the learned counsel for the Reserve Bank of India, has claimed appointment under the Rehabilitation Assistance Scheme. The Reserve Bank of India is having a Scheme for the same. We dispose of this writ application with a direction to the O.Ps.-Reserve Bank of India to consider the case of both the petitioner as well as O.P.No.4 in accordance with the Scheme and take a decision within a period of two months from today."

In pursuance of the aforesaid order, the Deputy General Manager, R.B.I. took a decision on 31.3.2008 declining to accede to the request of the petitioner for compassionate appointment, vide Anenxure-20, which is quoted herein below :-

> "Please refer to your letter dated February 26, 2008 on the above subject forwarding therewith a copy of the order No.16 dated February 06, 2008 passed by the High Court of Orissa, Cuttack in the captioned case. In this connection, we advise that your request for appointment on compassionate ground has been carefully examined but it has not been found possible to accede to the same under the Bank's Scheme."

Challenging the aforesaid decision dated 31.3.2008 in Annexure-20, the petitioner has filed this writ petition under Articles 226 & 227 of the Constitution of India, inter alia, on the ground that the impugned order is an outcome of non-application of mind and it was purported to have been passed in terms of the circular dated 28.10.1994 in Annexure-17, which is not applicable to the case of the petitioner, as the same came into force long after the death of the petitioner's father, i.e., in the year 1994. According to him, his case is governed by the executive instruction issued by the R.B.I.,

vide circular dated 1.11.1985, basing upon which the benefit of compassionate appointment was extended to Dharani Rout, Santak Ranjan Mishra and G.Seshagiri.

3. A counter affidavit has been filed by the opposite parties through the Assistant General Manager (Personnel), R.B.I., Calcutta Office. In paragraph-4(e) of the said counter affidavit, the O.Ps. have taken a stand that there is neither any statutory obligation on the part of the Bank to provide compassionate appointment to the petitioner nor is there any circular or rule giving right to the family members of any deceased employee to get appointment in the Bank. It is also indicated in the counter affidavit and also argued by Mr.K.Pattnaik, learned counsel for the R.B.I. that compassionate appointment to a family member of the deceased employee was given by the Bank on sympathetic consideration and the same cannot be claimed as a matter of right. As per the policy of the Bank, the widow of the employee is given employment and son/daughter's appointment was considered only on the recommendation of the widow due to her physical inability to work. The aforesaid practice has now been codified in the executive instruction issued by the Bank with some changes, vide circular dated 1.11.1985 in Annexure-B/1. It is further stated that on the request made for such compassionate appointment, a few cases were considered purely on humanitarian ground in extreme cases based on merit of each individual case taking into consideration various factors, namely, financial position of the applicant, liability of the family and superannuation and other benefits paid to the family.

4. In the executive instruction issued by the Deputy Manager, R.B.I. in the circular dated 1st November, 1985, vide Annexure-B/1, it is provided as follows :-

> "It has been observed that offices/departments while referring applications to Central Office for consideration for appointment on compassionate grounds, do not forward details of the late employee and his family such as composition of the dependent family, earning members, therein, if any, and their income, terminal benefits accrued to the family etc. resulting in avoidable correspondence and thus delay in disposing of the cases by Central Office.
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> 2. In view of the above, we advise that in future while referring such cases the offices/departments may note to include the following details/documents invariably in the relevant applications :

i) service file of the late employee with up-to-date reports;

ii) cause of death of the employee and a copy of his death certificate;

iii) particulars of other family members with regard to their income, if any, whether any of the family members is already in the Bank's service ;

iv) details of terminal benefits paid/to be paid and name of the beneficiary thereto ;

v) certified true copies in support of applicant's age, educational qualification; and

vi) vacancy position in the cadre for which the applicant is being considered.

3. Offices may appreciate that it will be conducive to speedy disposal of applications at Central Office if on obtention of the relevant details/documents as desired above, they note to add a line by way of specific recommendation based on a preliminary scrutiny of the relevant application justifying the need for compassion particularly in the case of families that are apparently not in hard financial straits."

Another document enclosed as Annexure-B/1 is the circular dated 21st July, 1988 issued by the R.B.I. requiring all its Managers & Departmental Heads to furnish to the central office all relevant particulars in the enclosed proforma while forwarding the request of the mother of the deceased employee for appointment on compassionate ground.

Annexure-C/1, the Scheme introduced in the circular dated 28th October, 1994, makes a provision for compassionate package for dependants of the deceased employee dying in harness. The said Scheme provides for payment of lump sum exgratia to the members of bereaved family or appointment of spouse of the deceased employee in the Bank.

The main objection raised by the opposite parties is that the petitioner's case cannot be considered in absence of any Scheme. In this regard Mr.K.Pattnaik, learned counsel for the R.B.I., refers to a decision of the apex Court in the case of **National Institute of Technology & Others vrs. Niraj Kumar Singh,** 2007(2) SCC 487, paragraph-14 of which reads as follows :-

> "14. Appointment on compassionate ground would be illegal in absence of any scheme providing therefor. Such scheme must be commensurate with the constitutional scheme of equality."

5. In the case at hand, though there was no specific scheme floated by the RBI for providing employment on compassionate ground, the RBI was following an in-house guidelines incorporated in the 1985 circular in Annexure-B/1. That apart, the case of the petitioner cannot be thrown away or rejected on the ground that there was no scheme formulated by the RBI to provide appointment on compassionate ground in view of the stand taken by the RBI in its own communications. After the death of the petitioner's father, the RBI by letter dated 28.1.1987 (Annexure-2) advised his mother-Manorama Bal to forward the death certificate of her husband for necessary action. Thereafter the RBI with reference to the petitioner's application for compassionate appointment issued a memo dated 20.5.1987 (Annexure-4) to the petitioner advising him to furnish copy of the document showing that he is the legal heir of late Krishna Chandra Bal. In the communication dated 18.5.1990 (Annexure-8), the RBI intimated the petitioner that his request as well as the request of Smt.Mukti Rani Bahal for appointment on compassionate ground was under its active consideration. The Govt. of India, Ministry of Finance, Department of Economic Affairs (Banking Division), in the communication dated 25.7.1990 (Annexure-9) intimated the Prime Minister's Office that the RBI has reported that because of the counter claim of the petitioner's step mother, it has asked the widow of the deceased to prove her claim and for that reason the petitioner's request for compassionate appointment could not be considered by the RBI. In the copy of the aforesaid communication sent to the petitioner, the petitioner was advised to submit legal proof of his claim to the exclusion of Smt.Mukti Rani Bahal to enable the RBI to consider his request. By letter dated 25.6.1991 (Annexure-10), the RBI intimated the petitioner that his claim vis-à-vis the claim of Smt.Mukti Rani Bahal for appointment on compassionate ground was under examination and he would be suitably advised when final decision would be taken in the matter. In view of the stand taken by the RBI in the aforesaid communications, it cannot be said that the petitioner is not entitled to compassionate appointment for want of any scheme to that effect.

As we have already indicated, and it is also not disputed that following the 1985 circular, the R.B.I. has extended the benefit of compassionate appointment to certain dependants of the deceased-employees similarly situated like the present petitioner. So the impugned order dated 31.3.2008 passed by the R.B.I. in Annexure-20 rejecting the application of the petitioner for compassionate appointment on the ground

that the case of the petitioner does not come within the scheme of the R.B.I. is absolutely unsustainable. The documents filed with the counter affidavit by the O.Ps. refer to the 1985 circular, which makes it evident that some guidelines were consciously followed by the R.B.I. in giving appointment on compassionate ground. So even though there was no specific scheme to the effect, the guidelines so adopted then for the purpose of giving appointment on compassionate ground are no less than a scheme and the benefit of the same can be extended to the petitioner. Hence, the decision of the apex Court in the case of **National Institute of Technology & Others vrs. Niraj Kumar Singh,** 2007(2) SCC 487, in which some benefits were granted, is not applicable to the facts and circumstances of the present case.

The plea of the O.Ps. that the cases, in which benefits were granted to certain other persons, are exceptional and they cannot be equated with the petitioner, for which no reason has been given in the counter affidavit, does not deserve acceptance.

6. As to the objection of the O.Ps. that there is delay and laches on the part of the petitioner as in the meantime 25 years have lapsed, we find that the petitioner had approached the Bank authorities for compassionate appointment immediately after the death of his father but the matter was locked up in litigation and delayed in passing the impugned order by the R.B.I. We find no laches on the part of the petitioner to approach the authorities for the benefit as claimed by him.

During the course of hearing, a contention was raised that the practice prevailing then was that only the spouse of the deceased employee was entitled to get appointment and in case of the disability of the spouse and on his/her authorization, another member of the family would get the said benefit. The case in hand is a peculiar case because the wife of the deceased employee, the father of the petitioner is pre-deceased him. So the question of recommendation by the spouse in this case absolutely does not arise. An impracticable proposition was made by the learned counsel for the R.B.I. that as per the principles prevailing then after the death of the employee, if his spouse is pre-deceased, nobody from his family will get the benefit of compassionate appointment even if the other family members are in distress, which does not impress us and we reject the same.

7. Mr.K.Pattnaik, learned counsel for the R.B.I., further submits that the father of the petitioner had furnished a declaration stating Mukti Rani Bahal to be his second wife. As to this, it may be made clear that there is nothing before us to show that Mukti Rani Bahal is the wife of the deceased

employee. That apart, as the R.B.I. itself has rejected the claim of said Mukti Rani Bahal, now it cannot resist the claim of the petitioner on the ground of said Bahal's claim.

8. Considering the facts and circumstances of the case, we allow this writ petition and set aside the order dated 31.3.2008 passed by the Deputy General Manager, R.B.I. (Annexure-20) and direct the opposite parties to take steps for compassionate appointment of the petitioner in a post suitable to his qualification within a period of three months from the date of communication of this order. No cost.

Writ petition allowed.

2012 (I) ILR- CUT- 444

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

JCRA. NO.47 0F 2002 (Decided on .07.12.2011)

RAJU @ RAJENDRA KUMAR SAHU ....Appellant.

.Vrs.

STATE OF ORISSA ....Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.302, 304-I.

Evidence of P.W.4 shows that there was a quarrel between the appellant and the deceased in the morning, in the afternoon and again at 9 P.M. and the deceased abused the appellant at random – Thereafter the appellant ran towards the deceased with a knife and stabbed her – Provocation started from the side of the deceased for which the appellant lost the power of self control and stabbed the deceased.

Held, this is a fit case where Exception-1 of Section 300 I.P.C. should apply and the appellant should have been convicted for commission of offence U/s. 304 Part-I I.P.C. instead of the offence U/s.302 I.P.C. (Para 8,9)

For Appellant - M/s. Gopal Krishna Nayak & S.Patra.

For Respondent - Sangram Das,
Addl. Standing Counsel.

L.MOHAPATRA, J. This appeal is directed against the judgment and order of the learned Addl. Sessions Judge, Bhanjanagar-Aska, Bhanjanagar dated 12.8.2002 in S.C No.12/2001 (38/2001 GDC) convicting the appellant for commission of offence under Section 302 of I.P.C and sentencing him to imprisonment for life.

2. P.W.1, Gopal Krushna Mohanty lodged an F.I.R alleging therein that on 16.8.2000 at about 9.00 P.M the appellant stabbed the deceased in front of Santosh Bhawan Hotel and the incident was witnessed by several persons. On the basis of such information given by P.W.1, the F.I.R was registered for commission of offence under Section 302 of I.P.C. and on completion of investigation, charge sheet was submitted for commission of the said offence against the appellant.

3. The prosecution in order to prove the charge examined seven witnesses. Out of whom P.W.1 is the brother of the deceased and is a post occurrence witness. He is also the informant. P.W.2 is a post occurrence witness and came out of the Hotel immediately after the occurrence and heard the deceased shouting that the appellant had stabbed him. P.W.3 only heard about the incident and P.W.4 is the sole eyewitness to the occurrence. P.W.5 is the wife of the deceased, who came to the spot after the occurrence and P.W.6 is the Doctor, who conducted the postmortem examination. P.W.7 is the Investigating Officer.

The plea of the defence was complete denial of the prosecution case and accordingly no witness was examined on behalf of the defence.

4. The trial court accepted the evidence of sole eyewitness-P.W.4, which was corroborated by P.W.6, the Doctor who conducted the postmortem examination. The trial court also relied on recovery of the knife at the instance of the appellant and the chemical examination report to record a finding of conviction and sentence.

5. Mr. Nayak, learned counsel appearing for the appellant did not seriously challenge the findings of the trial court holding that the appellant had killed the deceased by means of knife. It was contended by learned counsel for the appellant that the evidence of P.W.4 shows that there was a provocation from the side of the deceased, as a result of which the appellant stabbed the deceased by means of a knife. Therefore, the appellant may be liable for commission of offence under Section 304, Part-I of I.P.C and he could not have been convicted under Section 302 of I.P.C.

6. Sri Das, learned Addl. Standing Counsel appearing for the State submitted that the manner in which the deceased was stabbed by the appellant, as is evident from the evidence of P.Ws.4 and 6, the only conclusion that can be drawn is that the appellant committed offence under Section 302 of I.P.C.

7. Seven witnesses were examined on behalf of the prosecution to prove the charge. The most material witness for the purpose of the prosecution is P.W.4. P.W.4 in his deposition stated that on 16.8.2000 the appellant and the deceased were quarreling with each other as the appellant insisted that the deceased should remove his cabin, which had been placed in front of the cabin of the appellant. The deceased declined to remove the cabin saying that N.A.C was the proper authority to remove the same. Both the appellant and the deceased were physically engaged in the

morning and also in the afternoon in relation to the above issue and this witness had interfered on both the occasions. At about 5.00 P.M when the appellant and the deceased again started quarreling over the same issue, this witness advised the deceased to go home. It is alleged by this witness that the appellant was saying that he would kill the deceased and bring out guts from his abdomen. Again at about 9.00 P.M this witness saw the deceased proceeding towards Belaguntha Chhak from the Bus Stand side abusing at random the appellant, who was standing near the Tiffin Hotel of Khadal Polei. The appellant ran towards the deceased holding a knife in his hand and stabbed him on the abdomen. When the deceased turned, the appellant again stabbed on his back twice. He also stabbed on the right thigh of the deceased. The incident was immediately informed to the family members of the deceased, who came to the spot and shifted the deceased to the Hospital but the deceased was declared dead by the time he reached the Hospital. The evidence of this witness gets corroboration from the evidence of P.W.6, who conducted the postmortem examination.

7.1. P.W.6 in course of postmortem examination found four ante mortem injuries. One is a penetrating stab injury on almost right postero auxiliary line from the tip of the right shoulder joint, another injury one inch above upper left border of scapula on midline, penetrating stab wound on left side of the abdomen and a punctured wound on the right back of the thigh. P.W.6 was of the opinion that the death was homicidal and the injuries can cause death in ordinary course of nature. He also opined that the injuries could be caused by knife. Therefore, from the evidence of P.Ws.4 and 6, it is clear that the deceased died a homicidal death and it is the appellant who stabbed the deceased in the night of occurrence. The evidence of P.W.4 also gets corroboration from other circumstances.

7.2. P.W.2 is the owner of the Hotel called Santosh Bhawan. He in his deposition stated that he heard the deceased shouting that he had been stabbed by the appellant and was seeking for help. When he came out of the Hotel, he found the deceased lying on the road with his abdomen ripped and he was also crying stating that “Raju has stabbed him”. The other two witnesses are P.Ws.1 and 5, who are the brother and mother of the deceased respectively. They had come to the spot immediately after getting information about the incident and had found the deceased lying with stab injuries. They shifted the deceased to the Hospital but by the time the deceased reached the Hospital, the deceased had succumbed to the injuries.

8. On analysis of the evidence of all these witnesses, we agree with the trial court that it is the appellant, who stabbed the deceased causing his death. Coming to the submission of learned counsel for the appellant as to whether the offence should be under Section 302 of I.P.C or 304, Part-I of the said Code reference is required to be made to the evidence of P.W.4. P.W.4 stated that there was a quarrel between the appellant and the deceased in the morning and again in the afternoon at about 5.00 P.M. Though it was stated by P.W.4 that the appellant had declared to kill the deceased the said part of the statement of P.W.4 has been contradicted by the Investigating Officer-P.W.7. From the evidence of P.W.4, it further appears that after having two rounds of quarrel, one in the morning and one about 5.00 P.M., again at 9.00 P.M the deceased while proceeding towards Belaguntha from the Bus Stand started abusing at random. The appellant was standing near a Hotel. Immediately thereafter the appellant ran towards the deceased with a knife and stabbed him. It is evident from the above evidence of P.W.4 that the provocation was from the side of the deceased, who at about 9.00 P.M came to the place of occurrence and started abusing at random for which the appellant lost the power of self control and stabbed the deceased.

9. We are therefore, of the view that this is a case where Exception-1 of Section 300 of I.P.C should apply and the appellant should have been convicted for commission of offence under Section 304, Part-I of I.P.C. For the reasons stated above, we allow the appeal in part and set aside the impugned judgment and order of conviction dated 12.8.2002 passed by the learned Addl. Sessions Judge, Bhanjanagar-Aska, Bhanjanagar in S.C No.12/2001 (38/2001 GDC) convicting the appellant – Raju @ Rajendra Kumar Sahu for commission of offence under Section 302 of I.P.C. and find the appellant guilty for commission of offence under Section 304, Part-I of I.P.C and sentence him to undergo imprisonment for a period of ten years.

10. It is stated by learned counsel for the appellant that the appellant is in custody till date and has served more than 11 years of imprisonment. If that be so, the appellant be set at liberty forthwith, unless his detention is required in any other case.

Appeal allowed in part.

2012 (I) ILR- CUT- 448

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

JCRA. NO.99 OF 2001 (Decided on. 15.11.2011)

KANDA @ AJEN MURMU ……..Appellant**.**

.Vrs.

STATE OF ORISSA …….Respondent.

PENAL CODE, 1860 (ACT NO.45 of 1860) – S.304, PART-II.

Appellant shot two arrows from a distance in complete darkness – Eyewitnesses deposed that the occurrence took place in a dark night – It can not be said that the appellant intended to cause injury on any vital part of the body of the deceased though he had knowledge that the injuries that may be caused by arrow may result in death – Held, conviction of the appellant U/s. 302 IPC is converted to Section 304 Part-II IPC. (Para 6,7)

<u>Case law Referred to:-</u>
1997 (2) Crimes 78 : (Narasingh Challan-V- State)

For Appellan- M/s. P.R.Dash, B.P.Routray, K.Rai, S.Mohapatra.
For Respondent - Addl. Government Advocate.

L.MOHAPATRA, J. This appeal is directed against the judgment and order dated 11.10.2001 passed by the learned Sessions Judge, Mayurbhanj,Baripada in Sessions Trial Case No.111 of 2000 convicting the appellant under section 302 of the I.P.C. and sentencing him to undergo imprisonment for life

2. Deceased is the uncle of the appellant. Deceased had two wives, P.W.1 and P.W.6 who is the informant. On 13.5.1099 at about 8.30 P.M. when the deceased was standing in front of his house, the appellant standing on the verandah of his house declared that he would kill the deceased. When the deceased challenged the appellant, appellant shot an arrow standing on the verandah of his house at the deceased. Having been struck by an arrow deceased started shouting in pain and walked a little distance when the appellant shot second arrow which struck the deceased on his chest. Thereafter deceased fell down. One arrow could be removed but the other arrow was broken from the middle. Sometime thereafter the

deceased died because of injuries sustained by him. P.W.6 lodged F.I.R. and investigation was taken up. Charge-sheet was filed under section 302 of the I.P.C. and appellant faced trial for commission of the said offence.

3. In course of hearing, prosecution examined seven witnesses to prove the charge but none was examined on behalf of the appellant. Appellant took a plea of alibi and stated that he was not present in his house at the time of occurrence.

Out of seven witnesses examined on behalf of the prosecution, P.Ws. 1 and 6 are the two wives of the deceased and are eyewitnesses to the occurrence. P.W.2 is the brother of the deceased but is a post-occurrence witness. P.W.3 conducted post-mortem examination and P.W.4 is the police officer who received the F.I.R. at the Police Station and registered the case. P.W.5 is the Investigating Officer and P.W.7 is the doctor who examined the appellant. Trial court relying on the evidence of two eyewitnesses coupled with the evidence of P.W.3 found the appellant guilty of the charge and convicted him thereunder.

4. Shri Dash, learned counsel for the appellant assailed the impugned judgment on the ground that the occurrence took place in a dark night when nothing was visible. It was further contended by the learned counsel for the appellant that when the eyewitnesses admitted that it was a dark night and nothing was visible, it would be unsafe to rely on the evidence of such witnesses who claimed to have seen the appellant shooting two arrows. Learned counsel further alternately submitted that since it was a dark night and the appellant shot two arrows, one of which unfortunately struck on vital part of the body of the deceased and caused death, no intention to commit murder can be inferred. Therefore, even if the evidence of P.Ws. 1 and 6 is accepted, appellant could only be convicted for commission of offence under section 304 Part-II of the I.P.C.

Learned counsel for the State relying on the evidence of P.Ws. 1 and 6 submitted that it is the appellant who declared to kill the deceased and when the deceased protested he shot two arrows aiming at the deceased. Injuries sustained by the deceased caused his death and therefore the offence squarely comes within section 302 of the I.P.C.

5. On careful scrutiny of the evidence of the witnesses examined on behalf of the prosecution, we find that both P.W.1 and P.W.6, the two eyewitnesses to the occurrence, are consistent in their statements that on the date of occurrence at about 7 P.M. when the deceased was washing his

hands and legs in his house, appellant standing on the verandah of his house shouted to kill the deceased. The deceased thereafter came out from the house and asked the appellant as to why he wanted to kill him as he has not committed any fault. Immediately, thereafter the appellant shot an arrow which struck the deceased. Deceased thereafter started shouting out of pain and appellant shot the second arrow which pierced the chest of the deceased. First arrow had also pierced into the chest of the deceased. Deceased thereafter fell down near the Tati gate of their house. One arrow was removed from the body of the deceased but the other arrow could not be removed. Deceased after sometime succumbed to the injuries. So far as this part of the case of the prosecution is concerned, nothing has been brought out in cross-examination to discard statements of both the witnesses. However, in cross-examination both the witnesses have stated that it was a dark night and P.W.6 has specifically stated that nothing was visible. If this part of the statement of both the witnesses is taken into consideration with reference to the sketch map, it is found that the distance between verandah of the appellant and the place where the deceased was standing is such that in complete darkness one cannot shoot an arrow aiming at a particular place. Therefore, we find substance in contentions of learned counsel for the appellant that both the shots were random shots which struck the deceased on his chest. Reference in this regard may be made in the case of ***Narasingh Challan –vs- State***, reported in 1997(2) Crimes 78. In the said reported case, accused had also shot two arrows which struck the deceased and caused his death. In the said case, arrows were shot from a fairly long distance. With the above background, the court held that it cannot be said that, that part of the injury which proved fatal was intended and therefore offence under section 302 of the I.P.C. is not made out. Appellant in the said case was convicted and sentenced for offence under section 304, Part-II of the I.P.C. We find facts of the reported case are more or less similar to that of the present one. The appellant having shot two arrows from a distance in complete darkness, it cannot be said that he intended to cause injury on any vital part of the body of the deceased though he had knowledge that the injuries that may be caused by arrow may result in death. We are, therefore, of the view that the appellant is liable for conviction under section 304 Part-II of the I.P.C.

7. We, accordingly, allow the appeal in part, set aside the impugned judgment convicting the appellant for commission of offence under section 302 of the I.P.C. and convict the appellant for commission of offence under section 304 Part-II of the I.P.C. and sentence him to undergo imprisonment for seven years.

It is stated that the appellant is in custody for more than 11 years. If that be so, the appellant Kanda @ Ajen Murmu be set at forthwith if his detention is not required in any other case.

Appeal allowed in part.

2012 (I) ILR- CUT- 452

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

JCRLA NO.52 OF 2002 (Decided on 02.11.2011)

BIRANCHI DEHURY ……..Appellant.

.Vrs.

STATE OF ORISSA ………Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – S.84.

Plea of insanity –Although such plea was not taken as a defence at the time of trial nor any evidence led to substantiate such plea but relying on the evidence of the prosecution witnesses such plea can be developed and proved.

P.W.3 stated in Cross-examination that for the last two years the appellant was behaving like a mad person and he was being treated at Cuttack – He used to roam here and there – P.W.4 stated that while they were working in the field the appellant came running towards Mamata and his sister without any weapon in naked condition and while attempting to molest Mamata he was protested by the deceased for which the appellant suddenly picked up the "Kanka" left by P.W.7 and assaulted the deceased who died on the spot and the appellant also remained at the spot till witnesses arrived.

Held, such conduct of the appellant prior to, at the time of and after the occurrence, satisfied the requirement that the appellant suffered from unsoundness of mind and the impugned judgment of conviction and sentence can not be sustained.

(Para 5,6,7)

Case law Referred to:-

2008 (I) OLR 118 : (State of Orissa-V- Duleswar Barik)

For Appellant - Mr. S.S.Mohanty
For Respondent - Addl. Govt. Advocate.

L.MOHAPATRA, J. This appeal is directed against the judgment and order dated 2.7.2002 passed by the learned Additional Sessions Judge, Angul in Sessions Trial No.113-A of 2000 (30 of 2000) convicting the appellant for commission of offence under section 302 of the Indian Penal

Code (for short, the I.P.C.) and sentencing him to undergo rigorous imprisonment for life.

2. Prosecution allegation is that on 2.7.2000 deceased along with family members had been to their groundnut field. Appellant came there in a naked condition. The family members working in the field seeing the appellant in naked condition ran away from the place. When the deceased protested, appellant suddenly picked up a 'kanka' and assaulted the deceased causing his death at the spot. Matter was reported to the police by Sarat Chandra Sahu(P.W.1) and investigation was taken up. Charge-sheet was filed against the appellant for commission of offence under section 302 of the I.P.C.

3. In order to prove the charge, 11 witnesses were examined on behalf of the prosecution. P.W.1 is a post-occurrence witness and is the brother of the deceased. He lodged the F.I.R. P.W.2 is also a post-occurrence witness and had seen the appellant at the place of occurrence with the weapon of offence. P.W.3 is a witness to the inquest as well as seizure under seizure list Ext.3. P.W.4 is an eyewitness to the occurrence and much importance has been given by the trial court to evidence of this witness. P.W.5 is also a post-occurrence witness who had seen the appellant standing near the deceased immediately after the occurrence with the weapon of offence and he is also nephew of the deceased. Similar is the evidence of P.W.6 who came to the spot after the occurrence and saw the appellant standing with the weapon of offence. P.W.7 happens to be the daughter of the deceased. She had seen the appellant coming in a naked condition and seeing the appellant she along with his mother and sister left the place leaving the 'kanka' at the spot. P.W.8 is the doctor who conducted post-mortem examination and P.W.9 is the constable who accompanied dead body of the deceased for post-mortem examination. P.W.10 is a witness to seizure and P.W.11 is the Investigating Officer.

Plea of defence is complete denial of the prosecution case.

Trial court relying on the evidence of eyewitness P.W.4 and also evidence of post-occurrence witnesses coupled with evidence of P.W.8 found the appellant guilty of the charge and convicted him thereunder.

4. Shri Mohanty, learned counsel for the appellant drew attention of the Court to the evidence of P.Ws.3,4,5 and 6 and contended that conduct of the appellant immediately prior to the occurrence, at the time of commission of offence and after the occurrence clearly indicate that he was of unsound

mind. Learned counsel for the appellant contended that P.W.4 could not have seen the occurrence as claimed by him as he came to the spot only after arrival of P.Ws. 5 and 6. Though plea of insanity was not taken by the defence at the time of trial and no evidence had been adduced on behalf of the appellant to substantiate such plea, relying on the evidence of prosecution witnesses such plea has been developed by the learned counsel for the appellant at the time of argument.

Learned counsel for the State relying on the evidence of P.W.4 the sole eyewitness to the occurrence submitted that there is no reason to discard evidence of said witnesses. It is further submitted by the learned counsel for the State that neither plea of insanity had been taken as a defence at the time of trial nor any evidence had been adduced to substantiate such plea. Conduct of the appellant is also not such that inference could be drawn that he was of unsound mind.

5. On scrutiny of the entire evidence adduced by the prosecution we find that P.W.4 is the most relevant witness for the purpose of prosecution. This witness is the nephew of the deceased. He in his evidence stated that on the date of occurrence he along with the deceased, P.W.7, one Kasturi and labourer Mamata had been to Sagadia Chaka where they had raised groundnuts. While they were working in the field, appellant came running towards Mamata and his sister completely naked and attempted to molest Mamata. Deceased who was present in the filed raised protest. Sister of this witness and Mamata ran away out of shame leaving the 'kanka' at the spot. Appellant suddenly picked up the 'kanka' and dealt blow on the head of the deceased as a result of which he fell down in the field. Appellant thereafter dealt two other blows as a result of which deceased died at the spot. When he raised hullah P.Ws.5 and 6 came there. When the appellant saw P.Ws. 5 and 6 he threw away the 'kanka' and went towards the Nala. P.W.5 is also another nephew of the deceased and in his evidence he stated that on the date of occurrence deceased, P.W.7 and others had gone to the groundnut field. Hearing hullah of his brother P.W.5 went to the spot and saw the deceased lying dead and the appellant was standing with a 'kanka'. He, in cross-examination, stated that before his arrival others had reached there. He further stated that Tuna Sahu P.W.4 reached after arrival of witnesses and made hullah. Relying on this part of statement of P.W.5 it was contended by the learned counsel for the appellant that P.W.4 having arrived at the spot after the witnesses arrived, could not have seen the occurrence as claimed by him. Similarly, referring to the evidence of P.W.6 it was also contended by the learned counsel for the appellant that this witness in cross-examination further stated that P.W.4 came to the spot after his

arrival and according to him P.W.4 could not have seen the alleged assault. However, evidence of P.W.7 clearly shows that she had seen the appellant coming in naked condition towards Jora and seeing him lady members left the place leaving the 'kanka' there. Thereafter, they were informed that the deceased had been killed by the appellant. From the evidence of P.Ws. 5 and 6 as discussed above, claim of P.W.4 that he had seen the occurrence assaulting the deceased by means of 'kanka' is doubtful.

6. So far plea of insanity is concerned, P.W.3 stated in cross-examination that for last two years the appellant was behaving like a mad person and he was being treated at Cuttack. He used to roam here and there. Basing on this statement of P.W.3 in cross-examination and the conduct of the appellant in coming to the place of occurrence in a completely naked condition without being armed and also not leaving the place of occurrence immediately after the incident took place, plea of insanity was advanced by the learned counsel for the appellant. This Court in ***State of Orissa –vs- Duleswar Barik,*** reported in 2008(I) OLR 118, held that where it is proved that the accused has committed multiple murders while suffering from mental derangement of some sort and it is found that there is absence of any motive, secrecy, and prearrangement, and want of accomplices, it would be reasonable to hold that the circumstances are sufficient to support the inference that the accused suffered from unsoundness of mind. In the present case, as per version of P.W.3 the appellant was of unsound and was being treated at Cuttack and he used to move here and here. From the evidence of witnesses it also appears that the appellant came to the place of occurrence in complete naked condition. He was not armed. Only when deceased protested, he picked up a 'kanka' left by P.W.7 and assaulted the deceased. Immediately after assaulting the deceased he remained at the spot till witnesses arrived. Such conduct of the appellant prior to, at the time of and after the occurrence, satisfies the requirement as indicated in the judgment to hold that the appellant suffered from unsoundness of mind.

7. Having held that the appellant suffered from unsoundness of mind at the time of occurrence, judgment and order of the trial court convicting the appellant for commission of offence under section 302 of the I.P.C. cannot be sustained.

8. We, accordingly, allow the appeal and set aside the impugned judgment convicting the appellant under section 302 of the I.P.C. and sentencing to imprisonment for life. The appellant is acquitted of the charge.

It is stated by the learned counsel for the appellant that the appellant is still in custody. If that be so, the appellant, Biranchi Dehury, be set at

liberty forthwith, unless his detention is required in connection with any other case.

Before his release the Jail Authority is directed to get the appellant-Biranchi Dehury examined in a Government Hospital with regard to his mental condition/unsoundness of mind and if certified, he may be allowed to move free. If the appellant is found to be of unsound mind, he shall be referred to a Mental Asylum for treatment.

Appeal allowed.

2012 (I) ILR- CUT- 457

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

CRA. NO. 223 OF 1998 (Decided on 04.11.2011)

RANGADHAR BEHERA & ORS. ……. Appellants.

.Vrs.

STATE OF ORISSA ……..Respondent.

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

Appellants contend that there was no evidence to support the charge U/s.34 I.P.C. in the absence of prior meeting of mind to assault the deceased or the appellants had decided to cause death of the deceased at the spur of the moment.

In this case there is cogent evidence adduced by the prosecution through the mouths of P.Ws.1 & 2 being supported by the evidence of the Doctor P.W. 6, who conducted Post Mortem examination – Held, the appellants had the common intention of assaulting and causing death of the deceased.

For Appellant - M/s. Arun Kumar Acharya.
For Respondent - Addl. Standing Counsel.

L.MOHAPATRA, J. All the four appellants have been convicted for committing murder of one Ghasinath Behera on 29.7.1996 forenoon and each one of them has been sentenced to imprisonment for life by the learned Sessions Judge, Keonjhar in S.T Case No.11 of 1997. In this appeal they challenge the said order of conviction and sentence recorded by the learned Session Judge.

2. From the allegations made in the F.I.R and depositions of witnesses examined in course of trial, it appears that all the appellants are agnates of deceased Ghasinath Behera and they had a dispute in respect of a piece of paddy field. On 29.7.1996 forenoon the deceased planted paddy in the disputed land in spite of protest raised by the appellants. In the afternoon, the deceased had gone to Janghira Weekly Market and returned home at about 3.00 P.M with Sadasiba Amanta in a cycle. The deceased was the pillion rider. As soon as they reached the crossing of the road near their village locally known as "Manipur Chhak", the appellants came in front of the shop of one Jugal Sahu and stopped the cycle. Appellant-Sanatan @

Sunakar Behera dragged the deceased to the side of the road and stabbed him by means of a knife on his chest. Appellant-Rangadhar Behera assaulted the deceased with a lathi and appellant-Sarat Chandra Behera dealt blows on the head of the deceased by means of a 'Bhujali'. Other appellant-Damodar Behra dealt blows on the neck of the deceased by means of a 'Bala'. Accused-Ramachandra Sahoo also assaulted the deceased. At that point of time the son and daughter-in-law of the deceased came to the spot and gave water to the deceased. Appellants-Rangadhar and Damodar thinking that the deceased might be living again came back to the spot and started assaulting him with lathi and left the place. When the deceased was being taken to Hospital he succumbed to the injuries on the way. The son of the deceased, P.W.1, lodged the F.I.R., on the basis of which investigation was taken up and on completion of investigation charge sheet was submitted against all the appellants and accused-Ramachandra Sahoo for commission of offence under Sections 147 / 148 / 302 / 114 / 149 of I.P.C.

3. The prosecution in order to establish the charges examined eight witnesses. P.W.1 is the son of the deceased and P.W.2 is a witness to the occurrence. P.W.3 is a post occurrence witness and is also a witness to the seizure of incriminating articles in respect of seizure lists Exts.3 and 4. P.W.4 is a witness to the seizure in respect of Exts.5, 6 and 7. P.W.5 is the Doctor, who made the blood grouping of the appellants and submitted his report in Ext.9 and P.W.6, the Doctor, who conducted the postmortem examination. Both P.Ws.7 and 8 are the Investigating Officers.

The plea of defence was complete denial of the prosecution allegation and in course of trial it was contended by the appellants that the deceased might have sustained fatal injuries due to some other reason and they have been falsely implicated because of a land dispute. In support of their plea they also examined one witness namely Abhimanyu Penthei.

4. Learned Sessions Judge held that P.W.1 is not an eyewitness to the entire occurrence and had only seen the second part of the occurrence. The evidence of P.W.2 was accepted in its entirety by the learned Sessions Judge and on the basis of evidence of these two eyewitnesses coupled with medical evidence the learned Sessions Judge found the four appellants guilty of charges under Sections 302 / 34 of I.P.C.

5. Sri Acharya, learned counsel appearing for the appellants challenged the impugned judgment on the ground that there is no evidence whatsoever to support the charge under Section 34 of I.P.C and in absence

of any evidence all the four appellants have been convicted for commission of offence under Section 302 of I.P.C with aid of Section 34 of the said Code. According to Sri Acharya, learned counsel for the appellants there is no evidence to show that there was any prior meeting of mind to assault the deceased or that at the spur of the moment the appellants had decided to cause death of the deceased. In absence of any material to support the charge under Section 34 of I.P.C., the individual conduct of each of the appellants should have been examined by the learned Sessions Judge. It was further contended by learned counsel appearing for the appellants that if individual conduct of each of the appellants is considered, none of them can be convicted for commission of offence under Section 302 of I.P.C.

6. Learned counsel for the State submitted that there need not be any evidence with regard to prior meeting of mind and common intention can arise at the spur of the moment. The manner in which the deceased was assaulted by the four appellants clearly show that they had the common intention of causing death of the deceased and therefore, even though they were charged for commission of offences under Sections 302 / 149 of I.P.C they were rightly convicted for commission of offences under Sections 302 / 34 of I.P.C.

7. On careful examination of the evidence of the witnesses examined in course of trial, we find that P.W.2 is an independent witness, who had seen the entire occurrence and P.W.1 who is the son of the deceased and is also the informant claimed to have seen the entire occurrence. P.W.1 in his evidence stated that on 29.7.1996 he and his deceased father planted paddy in the disputed land where after the deceased had gone to Janghira Weekly Market. When he was returning at about 3.00 P.M, appellants-Sanatan, Rangadhar and Sarat were standing in front of the shop of Jugal Sahu. The deceased was coming with one Sadasib Amanta. Appellant-Sanatan caught hold of the cycle and thereafter he caught hold the hair of the deceased and dealt blow on his face. He pulled the deceased and stabbed on his ribs with a knife. Appellant-Rangadhar assaulted the deceased with a lathi and caused fracture of his hands and legs. Appellant-Sarat dealt a 'Bhujali' blow on the head of the deceased and appellant-Damodar dealt a blow by means of a 'Bala' on the neck of the deceased. All the appellants thereafter left for their respective houses. He and his wife went to attend their injured father and administered water. Again appellants-Rangadhar and Damodar came back to the spot and started assaulting the deceased by means of lathi. Thereafter the deceased was taken to Hospital but on the way he succumbed to the injuries. In cross-examination P.W.1 clearly admitted to have seen the assault on his father on the second

occasion. Therefore, the learned Sessions Judge did not believe P.W.1 so far as the first part of the occurrence is concerned and accepted his evidence in respect of the second part of the occurrence.

P.W.2 in his deposition stated that the deceased and one Sadasiba Amanta were coming on a cycle and he was following them in another cycle from Janghira Weekly Market on the date of occurrence. When the deceased reached at 'Manipur Chhak' appellant-Sanatan dragged him from the cycle and dealt a blow on his face. He thereafter stabbed on the left side chest of the deceased by means of a spring knife and dragged him further up to the road. Thereafter appellant-Rangadhar assaulted the deceased with a lathi and appellant-Sarat dealt three blows with a 'Bhujali' on the head of the deceased. Appellant-Damodar also dealt blows with one 'Bala'. Though he requested the appellants not to assault the deceased they did not listen to him. The deceased was lying on the spot in dying condition. At that point of time P.W.1 and his wife brought water from the house of one Abhimanyu Penthei and gave to the deceased. The deceased thereafter died when he was being shifted to Hospital. This witness has not been cross-examined on material particulars. Therefore, his entire evidence has been rightly accepted by the learned Sessions Judge.

P.W.3 is a witness to the seizure under Exts.3 and 4 and P.W.4 is a witness to the seizure under Exts.5, 6 and 7. P.W.5 is the Doctor who examined the blood group of appellants-Damodar and Subal and P.W.6 is the Doctor who conducted the postmortem examination. From the evidence of P.W.6, it appears that the deceased had sustained as many as eight incised wounds all over the body including right side of the neck, back of the neck, abdomen, occipital region, chest and left partinum. P.W.6 was of the opinion that the death was due to injuries to the vital organs like brain and could be caused by sharp cutting weapons. All the injuries were ante mortem in nature and the weapons like axe, sword and bamboo lathi produced by the Investigating Officer could cause such type of injuries. P.Ws.7 and 8 were the two Investigating Officers.

8. The sole argument advanced by learned counsel for the appellants was that there is no material to support the charge under Section 34 of I.P.C and therefore, individual conduct of each of the appellant is required to be seen to find out as to what offence each one has committed. It is a fact that none of the witnesses examined on behalf of prosecution has stated to have seen the four appellants taking a decision to cause death of the deceased. It is not necessary for the prosecution to prove in every case that there was prior meeting of mind in order to establish the charge under Section 34 of

I.P.C. The common intention can be gathered from the conduct of the appellants at the time of occurrence. This is a case where the common intention of all the four appellants is clear from the evidence of P.Ws.1 and 2. From the evidence of P.Ws.1 and 2, it is proved that in the forenoon of the date of occurrence the deceased had planted paddy over a piece of land in respect of which there was dispute between the deceased and the appellants. At the time of planting paddy the appellants had also protested. On the very same day, at about 3.00 P.M when the deceased was coming back home from Janghira Weekly Market along with one Sadasib Amanta, all the appellants, who had gathered at 'Manipur Chhak' with deadly weapons dragged the deceased and assaulted him by means of different weapons. As is evident from the evidence of P.W.2, appellant-Sanatan dragged the deceased from the cycle and gave a blow on his face and thereafter stabbed on the left side of his chest by means of a knife. Thereafter, appellant-Rangadhar assaulted by means of lathi. Appellant-Sarat dealt blows with a 'Bhujali' and appellant-Damodar dealt blows with a 'Bala'. The evidence of P.W.2 stands corroborated by the evidence of P.W.6, the Doctor, who conducted postmortem examination and P.W.6 in his evidence has specifically stated that the injuries sustained by the deceased could be caused by weapons of offence like axe, sword and bamboo lathi seized in course of investigation. From the conduct of the appellants in being armed with deadly weapons waiting for the deceased near 'Manipur Chhak' and assaulting the deceased one after another immediately after the deceased reached the spot clearly show that they shared the common intention of not only assaulting the deceased but also causing his death. If evidence of P.W.1 in respect of the second phase of the occurrence is accepted, that itself further shows that the appellants had the common intention of causing death of the deceased and therefore, even after assaulting the deceased in the first phase, thinking that the deceased might be living, two of the appellants again came back to the spot and assaulted the deceased by means of bamboo lathi.

9. We are therefore, unable to accept the contention of learned counsel for the appellants that the ingredients of Section 34 of I.P.C are lacking in this case. In view of cogent evidence adduced by the prosecution through the mouths of P.Ws.1 and 2 and the evidence of P.W.6, the Doctor, who conducted postmortem examination no doubt is left in the mind of the Court to hold that the appellants had the common intention of assaulting and causing death of the deceased and on the date of occurrence, each one of them assaulted the deceased by means of different weapons of offence and caused his death.

10. We therefore, find no merit in the appeal and accordingly dismiss the same. Since the appellants are on bail, the trial court is directed to take immediate steps for apprehending them to serve the rest of the sentence.

Appeal dismissed.

2012 (I) ILR- CUT- 463

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

JCRA. NO.70 OF 2000 (Decided on 25.10.2011).

PRASKA LAKU ……Appellant

.Vrs.

STATE OF ORISSA ……Respondent

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

Appellant not only made extrajudicial confession before P.Ws. 1 & 2 but also led to recover the weapon of offence while in police custody – Held, prosecution has proved the allegation made against the appellant through direct evidence of P.W.6 and circumstantial evidence of recovery of weapons of offence at the instance of the appellant while in police custody.

For Appellant : Mr. S.K. Nayak-3
For Respondent : Addl. Standing Counsel

L. MOHAPATRA, J. This appeal is directed against the judgment and order dated 27.11.1999 passed by learned Additional Sessions Judge, Rayagada in Sessions Case No.30 of 1997 convicting the appellant for commission of offence under Section 302 of the Indian Penal Code (for short 'the I.P.C.') and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that about 15 to 16 years prior to the date of occurrence the appellant had been convicted for commission of murder of one Dhanapati Takri and had been sentenced to undergo imprisonment for life. After serving sentence for about 15 years he was released and started staying with the deceased, who is his elder brother. It is alleged in the F.I.R. that the appellant was frequently quarrelling with the deceased on petty matters and on 8.2.1996 at about 8.00 P.M. the wife of the deceased P.W.6 served rice and mutton curry to the deceased first. Taking exception to such conduct of P.W.6, the appellant started quarrelling and assaulted the deceased by means of an axe. Due to such assault the deceased fell down whereafter the appellant cut the throat of the deceased by means of a knife causing instantaneous death of the deceased. Immediately after the occurrence wife of the deceased P.W.6 informed the village Barika P.W.1 and the village Nayak P.W.2. Thereafter, P.Ws.1 and 2

called other villagers and went to the house of the deceased and found the deceased lying dead with profuse bleeding injuries and also saw the appellant coming out of the house of the deceased and washing the knife which was stained with blood by water. When the villagers asked the appellant as to why he committed murder of his brother, he stated that since P.W.6 served mutton and rice first to her husband and she delayed in serving food to him, he shouted and when the deceased picked up quarrel, he got annoyed and assaulted him. Thereafter P.W.2 the headman of the village being accompanied by some villagers went to the Muniguda Police Station and orally reported about the occurrence at about 7.30 A.M. on 9.2.1996. The said oral report was reduced into writing by P.W.9, O.I.C., Muniguda P.S., a formal F.I.R. was drawn up and investigation was taken up. On completion of investigation, charge sheet was submitted for commission of offence under Section 302 of the I.P.C.

3. The prosecution in order to bring home the charge, examined nine witnesses, but none was examined on behalf of the appellant. The plea of the appellant is complete denial to the allegation of the prosecution.

The trial court relying on the evidence of eye witness P.W.6 who happens to be the wife of the deceased and sister-in-law of the appellant coupled with the evidence with regard to extra-judicial confession and leading to recovery of weapons of offence found the appellant guilty of the charge and convicted him thereunder.

4. Sri Nayak, learned counsel for the appellant referring to the evidence of P.W.6 submits that the sole eyewitness to the occurrence has stated in her evidence that the appellant assaulted the deceased by means of a tangia on his neck as a result of which the deceased sustained profuse bleeding injuries. Thereafter, the appellant cut the throat of the deceased by means of a kati as a result of which the deceased died at the spot. According to the learned counsel for the appellant statement of P.W.6 does not corroborate the evidence of P.W.4 the doctor who conducted post-mortem examination. It is also contended by the learned counsel for the appellant that extra-judicial confession not being voluntary, the same cannot be used against the appellant.

5. Learned counsel for the State placed reliance on the evidence of P.W.6 as well as P.W.4 and submits that there is no contradiction in the evidence of these two witnesses. It is also contended by the learned counsel for the State that the appellant not only made extra-judicial confession before

P.Ws.1 and 2 but also led to recovery of weapons of offence while in police custody.

6. We have carefully examined the evidence of all the nine witnesses examined on behalf of the prosecution. P.W.4 is the doctor who conducted post-mortem examination. He found incised looking laceration over front of neck 1-1/2" deep cutting across the wind pipe just above the thyroid cartilage. He also found another incised wound extending from left side neck starting from the above injury till middle of upper part of sternum over chest. P.W.4 was of the opinion that possible cause of death would be neurogenic shock and central failure and the injuries were *ante mortem* in nature. He also opined that the injuries could be caused by both weapons of offence, i.e., M.Os. I and II. It is, therefore, clear from the evidence of P.W.4 that the deceased met with homicidal death.

The prosecution relied on direct evidence of P.W.6 as well as circumstantial evidence such as, extra-judicial confession and leading to recovery of weapons of offence at the instance of the appellant while in police custody. P.W.6 is the wife of the deceased. She in her deposition stated that on the date of occurrence at the relevant time she served rice and mutton curry to her husband. By that time the appellant told her as to why she served the meal to her husband first, and so saying the appellant assaulted the deceased by means of a tangia on his neck as a result of which the deceased sustaining profuse bleeding injuries fell down inside her house. Thereafter, the appellant by means of a kati cut the throat of the deceased as a result of which the deceased died at the spot. In cross-examination nothing has been brought out to disbelieve the testimony of this witness. An attempt was made by the defence to prove that another person to whom P.W.6 got married after death of the deceased was the culprit. However, the defence has miserably failed to prove such plea. Learned counsel for the appellant submitted that there are some contradictions in the evidence of P.Ws.4 and 6. With regard to evidence of P.W.4 it is contended by the learned counsel for the appellant that the injuries on the neck could be caused by repeated blows and there is no evidence from the side of P.W.6 that the appellant had dealt several blows on the neck so as to cause the said injuries. We are unable to accept such contention for the reason that P.W.4 found two incised wounds nearby the neck and one of the injuries had extended to upper part of sternum over chest. Both the injuries were inflicted by two different weapons and, therefore, more than one blow had been inflicted for causing the said injuries.

Apart from the above evidence of P.W.6 we find from the evidence of P.W.1 that the appellant confessed before him saying that he had killed the

deceased, as the wife of the deceased P.W.6 without serving him rice and meat first, gave the same to her husband. P.W.2 also speaks about the said extra-judicial confession. P.W.3 has stated that when the appellant was brought to the middle of the street and was asked by villagers he confessed to have killed the deceased. Similar is the evidence of P.W.5 also. Thus, from the evidence of P.Ws.3 and 5 it appears that the statement made before the villagers may not be a voluntary statement. From the evidence of P.Ws.1 and 2 also it appears that the appellant was brought from his house to the middle of the street and was asked by the villagers as to how the deceased died and thereafter the appellant confessed to have killed the deceased. Therefore, we are in agreement with the learned counsel for the appellant that the said statement made by the appellant before the villagers cannot be treated as a voluntary statement.

Though the prosecution has not been able to establish the circumstance of extra-judicial confession alleged to have been made by the appellant, it has successfully proved the recovery of the weapons of offence at the instance of the appellant while in police custody through the evidence of P.W.1 and disclosure statement (Ext.4) of the appellant.

7. In view of the discussion made above, the prosecution has been able to prove the allegation made against the appellant through direct evidence of P.W.6 and circumstance of recovery of weapons of offence at the instance of the appellant while in police custody. From the chemical examination report also we find that the wearing apparels of the appellant had contained human blood but no explanation has been offered by the appellant as to how wearing apparels were stained with human blood. Taking all the circumstances into consideration coupled with direct evidence of P.W.6, we find no infirmity in the judgment and order of conviction passed by the trial court convicting the appellant for commission of offence under Section 302 of the I.P.C. Accordingly, we find no merit in the appeal and dismiss the same.

Appeal dismissed.

2012 (I) ILR- CUT- 467

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

JCRLA NO.15 OF 2002 (Decided on 05.09.2011)

DIPU @ DEEPAK KU. SAHU ……Appellant.

.Vrs.

STATE OF ORISSA ……Respondent.

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

Dying declaration –P.W.5 the Executive Magistrate recorded dying declaration on 16.02.1999– Evidence of P.W.5 shows that he had kept the Dying declaration in his office after recording it and on getting oral direction of the Sub-Collector he sent the dying declaration to the I.I.C. concerned on 10.6.1999 – He has also explained that he could not send the dying declaration to the concerned I.I.C. earlier as he was busy in election revision work – Held, delay in sending the dying declaration has been explained. (Para 5)

For Appellant - M/s. Bisweswar Mishra, Rajendra Mishra, Sidhartha Mishra, D.Sahoo, P.K.Sahoo, B.K.Mishra & B.S.Mishra.
For Respondent - Addl. Govt. Advocate.

L.MOHAPATRA, J. The appellant has preferred this appeal against the order of conviction recorded by the learned Sessions Judge, Khurda at Bhubaneswar in S.T.Case No.88 of 2000 convicting him for commission of offence under Sections 302, 436 & 449 of the Indian Penal Code (in short 'IPC') and sentencing him to undergo imprisonment for life for his conviction under Section 302 IPC, imprisonment for five years and fine of Rs.200/- for conviction under Section 436 IPC, imprisonment for three years and fine of Rs.200/- for conviction under Section 449 IPC. All the sentences have been directed to run concurrently.

2. Case of the prosecution is that Binod Pradhan is father of the deceased and he was a rickshaw puller by profession. He was living in an one roomed hut in Gouri Nagar area along with his wife Sabitri-P.W.2, the deceased-P.W.18, minor son Dipu- P.W.1 and minor daughter, namely, Gouri. The appellant was running a cycle repairing shop in the same area where the deceased and his family members were residing. Since the

appellant and the deceased developed love affairs, the deceased was given marriage to one Muna Naik, a rickshaw puller by profession and after marriage, the said Muna Naik was living with the deceased in the house of the deceased. The appellant having failed to marry the deceased, drove away the husband of the deceased from Gouri Nagar area, for which there was quarrel between Binod, Sabitri-P.W.2 and the appellant. Binod started pulling rickshaw in Puri Town for a living and left his wife- P.W.2-Sabitri and other two children in the Gouri Nagar hut. In the evening of 15.2.1999, when P.W.2 was absent at home, the appellant went to the house of Binod and asked the deceased to accompany him. When the deceased refused to go with the appellant, it is alleged that the appellant drenched the deceased with kerosene kept in the hut and set her ablaze by lightening a match stick. The deceased along with her younger brother-P.W.1 and sister Gouri ran out of the hut but in the process, the hut caught fire. The deceased went to a nearby tap and rolled on the sand and water in an attempt to extinguish fire. The appellant after setting her ablaze left the place. The Asst. Fire Officer, Bhubaneswar after receiving a telephone call from a unknown person rushed to the spot and extinguished the fire. Thereafter, the deceased was shifted to the capital hospital. P.W.2 came to the house only after the deceased was shifted to hospital and learnt about the occurrence from P.W.1. Thereafter, she immediately went to the hospital and found the deceased lying on the bed in a semiconscious state. The S.I. of police of Lingraj Police Station also arrived at the hospital and P.W.2 orally reported the incident to him. The said information was treated as an F.I.R. and a case was registered for commission of offence under Sections 436 and 307 IPC. The deceased succumbed to the burn injuries on 20.3.1999 while under treatment. Accordingly, the case registered for commission of offence under Sections 449, 302 and 436 IPC and after completion of investigation, charge sheet was also submitted for commission of the aforesaid offence.

The plea of defence is complete denial of the prosecution case.

3. The prosecution in order to prove the charges examined eight witnesses. P.W.1 is brother of the deceased and witness to the occurrence. P.W.2 is the informant and mother of the deceased, P.W.3 is a Surgical Specialist, who had admitted the deceased on 15.2.1999. P.W.4 is the doctor, who conducted the postmortem examination and P.W.5 is the Executive Magistrate, who had recorded the dying declaration of the deceased. P.W.6 is the Assistant Fire Officer and P.W.7 is the Constable, who accompanied the dead body of the deceased for postmortem examination. P.W.8 is the I.O.

Learned Sessions Judge relying on the evidence of P.W.1 and the dying declaration recorded by P.W.5 found the appellant guilty of the charges and convicted him thereunder.

4. Learned counsel appearing for the appellant assailed the impugned judgment on the ground that P.W.1 is only nine years of age. Much reliance on his evidence should not have been placed by the learned Sessions Judge without corroboration from independent sources. It was also contended by the learned counsel for the appellant that the dying declaration was recorded by the Executive Magistrate on 16.2.1999 but it was sent to the Police Station on 10.6.1999 and, therefore, the dying declaration alleged to have been recorded by P.W.5 could not have been relied upon.

Learned counsel for the State supported the findings of the learned Sessions Judge with reference to the evidence of P.Ws 1 and 5.

5. We have carefully examined the evidence of all the eight witnesses examined on behalf of prosecution. Though P.W.1 is a child witness, he has vividly described the entire incident in his deposition. He has specifically stated that in the evening of occurrence, he along with his deceased sister-Kuni and younger sister-Gouri were in the house. The appellant came to their house and asked the deceased to accompany him. The deceased refused and the appellant again forced her to accompany him. When the deceased again refused, the appellant scolded her and brought kerosene kept in their house and thereafter the appellant doused the deceased with kerosene and set her ablaze by lighting a match stick. The deceased ran out of the house to a nearby water tap and he along with his younger sister also came out of the house. Their house caught fire from the deceased and got completely gutted. The local people shifted the deceased to the hospital and also informed the fire brigade which later on arrived at the spot and extinguished the fire. P.W.2 arrived after the deceased was shifted to hospital and on her arrival, this witness explained the entire incident to her. Though this witness has been cross-examined at length, nothing has been brought out in the cross-examination to disbelieve his testimony.

P.W.2 is mother of the deceased. She, in her deposition, has stated that at the time of occurrence, she had been to weekly market to purchase ration and after coming to hut, she heard about the incident from P.W.1 and also found the house completely burnt. Thereafter, she went to the hospital and found the deceased lying in a semi conscious state. P.W.3 is the doctor, who admitted the deceased in the hospital and P.W.4 is the Doctor, who conducted the postmortem examination. P.W.4, in his deposition, has stated

that he found extensive burn covering 80% of the body surface all over the body excepting part of the iliac region. He was also of the opinion that the burn injuries were ante mortem in nature and the death was caused due to 80% burn injury of the surface with anemia. Therefore, the evidence of P.W.4 also gets support from the evidence of P.W.1 to the extent that the deceased died of burn injuries. P.W.5 is the Executive Magistrate, who recorded the dying declaration. He, in his deposition, has stated that on 16.2.1999 he arrived at the bed of the deceased at about 12.30 p.m. and found the deceased in a conscious state. She was fit in state of mind to give declaration in presence of the attending staff-nurse and doctors. He recorded her statement. On being questioned, the deceased stated that "he has burnt me". When the learned Magistrate enquired as to who he was, the deceased stated that "Dipu set her on fire". On being questioned further, she stated that "Dipu has a cycle repairing shop". She also stated that "Dipu asked her to accompany him and on her refusal, set on her fire". Though the learned counsel for the appellant pointed that the dying declaration was recorded by P.W. 5 on 16.2.1999, but it was sent to the police station on 10.6.1999, we find from the evidence of P.W.5 that he had kept the dying declaration in his office after recording it and after getting telephone message from the I.I.C. and under oral direction of the Sub-Collector, he sent the dying declaration to the I.I.C. concerned on 10.6.1999. He has also explained in his evidence that he could not send the dying declaration to the concerned I.I.C. earlier as he was busy in electoral revision work. Therefore, delay in sending the dying declaration recorded by P.W.5 to the I.I.C. Lingaraj Police Station has been explained. The evidence of P.Ws.6 and 7 may not be relevant for the purpose of this case and the evidence of I.O., P.W.8 clearly corroborate the evidence of P.Ws.1,2,4 and 5.

6. On analysis of the entire evidence, we find that the learned Sessions has rightly relied on the evidence of P.W.1 as well as the dying declaration (Ext.6) for recording the findings for conviction in respect of all the three offences against the appellant. There is no reason for us, in view of the above evidence, to differ with the finding of the learned Sessions Judge.

We accordingly do not find any merit in the appeal and dismiss the same.

Appeal dismissed.

2012 (I) ILR- CUT- 471

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

JCRA NO.70 & 71 OF 2001 (Decided on 15.11.2011)

BUDHUNI DEHURY & ANR. ……..Appellants.

.Vrs.

STATE OF ORISSA ………Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.8.

Motive – Prosecution adduced direct evidence against the appellants for murder of the deceased – Such evidence corroborated not only by unimpeachable medical evidence but also by the circumstance of extra-judicial confession made by the appellants – Held, in this case absence of proof of motive is of little relevance.

For Appellant - Mrs. Minakumari Das.
For Respondent - Mr. S.Das, Addl. Standing Counsel.

B.K. PATEL, J. Both the appeals from jail are directed against the judgment dated 1.8.2001 passed by learned Additional Sessions Judge, Rairangapur in S.T. Case No.42/172 of 2000 convicting both the appellants under Section 302 read with Section 34 of the Indian Penal Code (for short 'the I.P.C.') and sentencing each of them to undergo imprisonment for life for commission of murder of deceased Khairi Dehury.

2. Appellant Budhuni is appellant Dhunda's wife and deceased's only daughter. After death of her husband deceased was residing in the house of appellants. P.W.2 is appellant Dunda's brother's wife. Informant P.W.3 is deceased's husband's brother's son. P.W.4 is the Dakua of the occurrence village Dahupani. P.W.5 is deceased's husband's brother. Occurrence took place on 22.5.2000 at about 4.30 P.M.

Prosecution case, as it appears from the F.I.R. and evidence on record, is that on the date of occurrence at about 5.00 P.M. appellant Dhunda went to the house of P.W.4, told him that his mother-in-law, the deceased died. Thereafter, he told informant P.W.3 that the deceased died and asked him to come to his house. P.W.3 went to the house of the appellants and found the deceased lying dead with injuries on her. On being asked both the appellants told that the deceased having quarreled with them they killed her by assaulting with lathi and throatling her neck. On being

questioned regarding the reason for quarrel, appellant Dhunda told that in the morning they alongwith the deceased had been to village Baruni. While returning, the deceased could not walk for which they left her on the way. At about 4.30 P.M. the deceased returned to the house and found that the appellants were sleeping. She woke up appellant Budhuni and abused her for having slept without cooking. There was verbal altercation and quarrel upon which appellant Budhuni assaulted the deceased with lathi. When the deceased snatched away the lathi, appellant Dhunda dealt kick blows on her and laid her flat on the courtyard. Appellant Budhuni sat on deceased's chest and throttled her to death. Having heard regarding the occurrence, informant P.W.3 called a village meeting in which being asked by the villagers, both the appellants confessed to have killed the deceased.

On the basis of oral narration of the occurrence made by P.W.3 at Gorumahisani Police Station, P.W.9, the O.I.C. prepared the F.I.R. Ext.6 and took up investigation. On completion of investigation, charge sheet under Section 302 read with Section 34 of the I.P.C. was submitted against the appellants.

3. Appellants took the plea of complete denial.

4. In order to substantiate the charge, prosecution examined nine witnesses. P.Ws.2 to 5 and 9 have already been introduced. P.Ws. 1 and 6 deposed regarding extra-judicial confession made by the appellants. P.W.7 is the police constable who assisted P.W.9 in the investigation. P.W. 8 is the doctor who conducted post-mortem examination over the dead body of the deceased. Prosecution also relied upon documents marked Exts.1 to 10 and material objects M.Os. I and II. No defence evidence was adduced.

5. Placing reliance on the evidence of eye witness P.W.2 coupled with medical evidence and circumstance of extra-judicial confession made by the appellants, the trial court held the prosecution to have established the charge against the appellants.

6. In assailing the impugned judgment, it is contended by the learned counsel for the appellants that there is no evidence with regard to the motive for commission of murder of the deceased by the appellants. There is nothing to indicate that their relationship with the deceased was strained. Deceased was residing with the appellants. It is argued that in the absence of evidence adduced by the prosecution regarding the motive of offence, the trial court should not have relied upon the evidence of P.W.2. It is further argued that so far as extra-judicial confession made by the appellants is

concerned, it appears that the appellants are stated to have made extra-judicial confession before a number of villagers. In the absence of positive evidence to the effect that confession made by the appellants was voluntary, it would not be safe to accept such confession.

7. Placing reliance on evidence of eye witness P.W.2 coupled with medical evidence it is contended by the learned counsel for the State that prosecution has established beyond reasonable doubt that it was the appellants who, in furtherance of their common intention, committed murder of the deceased by assaulting her and throttling her neck.

8. P.W.2 who happens to be appellant Dhunda's brother's wife is an eye witness to the occurrence. She testified that at first appellant Budhuni assaulted the deceased by means of a lathi and thereafter appellant Dhunda assaulted the deceased. When deceased fell down, appellant Budhuni sat on the chest of the deceased and pressed her neck. Appellants also assaulted on the head and other parts of the body of the deceased. Nothing has been elicited in course of cross-examination of P.W.2 by the defence to discredit her evidence.

P.W.8 noticed multiple bruises over both sides of deceased's neck and lower part of face over mandibular region. There was fracture of both angles of mandible and dislocation of left tempor mandible joint apart from other injuries. One abrasion was noticed below right knee joint also. Injuries were *ante mortem* in nature and cause of death was asphyxia caused by throttling. Thus, evidence of eye witness P.W.2 finds corroboration from medical evidence.

P.W.3 testified that it was the appellant Dhunda who informed the village Dakua P.W.4 that he and appellant Budhuni had killed the deceased. The villagers assembled and went to the house of the appellants. They found blood in the outside courtyard and the deceased was lying dead. On their question, both the appellants confessed that they killed the deceased and appellant Dhunda requested the villagers to forgive him by taking one goat from him. Testimony of P.W.3 is materially corroborated by the contents of the F.I.R. Ext.6. P.W.1 also deposed that both the appellants confessed before the villagers that they killed the deceased.

P.W.4, the village Dakua testified that appellant Dhunda went to him and told that he and appellant Budhuni assaulted the deceased by means of lathi as a result of which she fell down and died and appellant Dhunda also told that appellant Budhuni sat on the chest of the deceased. P.W.4 called

the villagers and went to the house of the appellants. They found blood in the courtyard and the deceased was lying with bleeding injuries on her neck and other parts of the body. On their question, both the appellants made extra-judicial confession before P.Ws.4 and 6 that they had killed the deceased. Appellant Dhunda requested to settle the matter but the villagers informed regarding the occurrence to the police. Both P.Ws.5 and 6 also testified that on being asked by the villagers, appellant Dhunda made extra-judicial confession in presence of appellant Budhuni to the effect that he and appellant Budhuni killed the deceased. Thus, evidence of P.W.2 is supported by evidence of witnesses before whom the appellants had made extra-judicial confession.

9. Prosecution having adduced direct evidence in support of allegation made against the appellants to have committed murder of the deceased and such evidence having been found to be corroborated not only by unimpeachable medical evidence but also by the circumstance of extra-judicial confession made by the appellants, absence of proof of motive is of little relevance. Upon scrutiny of the evidence on record, there appears no infirmity in the impugned judgment holding that the prosecution has established the charge against the appellants beyond reasonable doubt. There is no merit in both the appeals.

10. In the result, both the appeals are dismissed.

Appeals dismissed.

2012 (I) ILR- CUT- 475

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

JCRLA. NO. 103 OF 2004 (Decided on 19.12.2011)

BAINSI MOHAKUD …….. Appellant.

.*Vrs.*

STATE OF ORISSA ……..Respondents.

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

Appellant alleged to have caused murder of two persons by means of a crowbar – None of the witnesses deposed that the Crowbar (M.O.I) was discovered at the in-stance of the appellant – P.W.7 stated that having seen the police he went to the house of the appellant and found the dead bodies lying in the house with bleeding injuries and a blood stained crowbar – P.Ws.4 & 5 stated that the crowbar (M.O.I) was affixed to the roof of the house of the appellant – So the alleged weapon of offence (M.O.I.) was not discovered at the instance of the appellant – Held, the crowbar (M.O.I) having not been proved to have been discovered in consequence of information received from the appellant while in police custody, prosecution is not entitled to avail any benefit U/s.27 of the Evidence Act and in that view of the matter there is no legal evidence on record to sustain the conviction of the appellant and as such the impugned judgment is liable to be set aside.

(Para 10,11)

For Appellant - Mr. Subhasis Sen.
For Respondents - Mr. Sangram Das, Addl. Standing Counsel.

B.K. PATEL, J. This appeal from jail is directed against the judgment dated 30.6.2003 passed by learned Ad hoc Additional Sessions Judge, (Fast Track Court), Baripada in S.T. Case No.29/75 of 2003 convicting the appellant and sentencing him to undergo imprisonment for life under Section 302 of the Indian Penal Code (for short 'the I.P.C.') for having committed murder of deceased persons Dulumu Deogam and Menja Deogam.

2. Deceased Menja was deceased Dulumu's wife. P.W.6 is their daughter. Appellant is P.W.6's husband. Informant P.W.4 and P.W.5 are deceased Dulumu's brothers. Occurrence took place in the night of 11/12.10.2002.

3. Prosecution case is that in the night of occurrence itself P.W.6 came to the house of informant P.W.4 and disclosed that her husband, the

appellant killed both the deceased persons by assaulting them with a crowbar and the dead bodies were lying in front of their house. She also disclosed that the appellant assaulted and caused injuries on P.W.4's niece. On being asked, P.W.6 further disclosed that as there was quarrel between her and the appellant regarding cooking and throwing of chicken curry and protest raised by the deceased persons, the appellant got enraged, brought a crowbar from inside the house and assaulted the deceased persons causing their death. P.Ws.4 and 5 went to the house of the appellant and found both the deceased persons lying dead having injuries on them. Accused was absent. One Rama Mohakud and Malli Mohakud on being asked told that at about 12 in the mid night the appellant came and told them to look after his children. On being further asked, the appellant told them that he had killed his parents-in-law by assaulting with crowbar, and thereafter the appellant left.

On the basis of written report Ext.7 submitted by P.W.4 at Sarat Police Station, the O.I.C. P.W.9 registered the case and took up investigation. On completion of investigation, charge-sheet under Sections 302 and 323 of the I.P.C. was submitted against the appellant.

4. The appellant took the plea of denial and false implication.

5. In order to substantiate the charge, prosecution examined nine witnesses. P.Ws.4, 5, 6 and 9 have already been introduced. Of them P.W.6 was declared to be hostile witness. P.W.1 is a witness to seizure of articles from the spot. P.Ws.2, 3 and 8 are doctors. P.W.2 medically examined the injured persons including P.W.6 whereas P.Ws.3 and 8 conducted post-mortem examination over the dead bodies of the deceased persons Menja Deogam and Dulumu Deogam respectively. P.W.7 is a post-occurrence witness. Prosecution also relied upon documents marked Exts.1 to 20 and material object M.O.I, the iron bar (Sabala). No defence evidence was adduced.

Placing reliance on the evidence of P.Ws.4 and 5; medical evidence of P.Ws.3 and 8; and evidence of investigating officer P.W.9 the trial court held the appellant guilty of commission of offence under Section 302 of the I.P.C. However, appellant was acquitted of the charge under Section 323 of the I.P.C.

6. In assailing the impugned judgment it is contended by the learned counsel for the appellant that the only alleged eye-witness to the occurrence P.W.6 did not support the prosecution. In such circumstance, the trial court was not justified in recording the conviction on the basis of hearsay evidence

of P.Ws.4 and 5. It is argued that medical evidence of P.Ws.3 and 8 does not indicate complicity of appellant with the alleged offence. It is further contended that seizure of iron bar/crowbar M.O.I. from the house of the appellant does not incriminate the appellant.

7. Learned counsel for the State placing reliance on the evidence of P.Ws.4, 5, 7 and 9 supports the impugned judgment.

8. We have scrutinized the evidence of all the nine witnesses. It is not disputed that death of both the deceased persons was homicidal in nature. In course of post-mortem examination P.Ws. 3 and 8 found multiple lacerations and contusions on them. There was a also stab injury on deceased Menja Deogam. Internally the deceased persons had sustained multiple fractures. All the injuries were *ante mortem* in nature. P.Ws. 3 and 8 opined that cause of death of deceased persons was intracranial haemorrhage with sub-dural haematoma due to laceration of brain and fracture of skull caused by blunt, heavy and elongated weapon.

9. Informant P.W.4 as well as P.W.5 are post-occurrence witnesses. P.W.4 deposed that it was P.W.6, who happens to be his niece, came to his house at night and disclosed before him that the appellant had killed her parents by means of crowbar. On his query, P.W.6 disclosed that as there was quarrel between the appellant and P.W.6 regarding cooking of chiken and on protest by P.W.6's parents, the appellant got enraged and assaulted them by means of crowbar causing their instaneous death. On the following morning he went to the house of the appellant. They found both the deceased persons lying dead having bleeding injuries. Their wearing apparels were stained with blood. P.W.4 also testified that they found the crowbar stained with blood affixed to the roof of the house. P.W.4 stated to have lodged F.I.R. Ext.7 at the police station.

P.W.5 stated in his evidence that P.W.4 came to him in the morning and told that both the deceased persons had been killed. On his query, P.W.4 told that P.W.6 came and told him regarding the occurrence. P.W.5 stated to have accompanied P.W.4 to the house of the appellant and found both the deceased persons lying dead having bleeding injuries on them and a crowbar stained with blood was kept on the thatched roof of the house.

Thus, P.W.4 stated to have heard regarding the occurrence from P.W.6 and P.W.5 testified to have heard regarding the occurrence from P.W.4. However, P.W.6, the appellant's wife testified that she did not know about the occurrence. She was declared to be hostile witness. Though she was cross-examined by the prosecution, nothing has been elicited from her

to implicate the appellant with the commission of murder of deceased persons. Therefore, evidence of P.Ws.4 and 5 is of no assistance to the prosecution in establishing the charge of commission of offence under Section 302 of the I.P.C. against the appellant.

10. None of the witnesses deposed that crowbar M.O.I was discovered at the instance of the appellant. P.W.7 stated that having seen the police personnel, he went to the house of the appellant and found the dead bodies of both the deceased persons lying near the door of the house of the appellant with bleeding injuries and also a blood stained crowbar. It also appears from the evidence of P.Ws.4 and 5 that crowbar M.O.I was affixed to the roof of the house. Therefore, it is obvious that alleged weapon of offence M.O.I was not discovered at the instance of the appellant. Crowbar M.O.I having not been proved to have been discovered in consequence of information received from the appellant while in police custody, prosecution is not entitled to avail any benefit under Section 27 of the Evidence Act.

11. In view of the above, there is no legal evidence on record to sustain the conviction of the appellant. Therefore, the impugned judgment is liable to be set aside.

12. Accordingly, the appeal is allowed. The order of conviction and sentence dated 30.6.2004 passed by the learned Ad hoc Additional Sessions Judge (Fast Track Court), Baripada in S.T. Case No.29/75 of 2003 convicting the appellant under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life is set aside, and he is acquitted of the charge.

It is stated that the appellant is in custody. If that be so, the appellant, Bainsi Mohakud, be set at liberty forthwith, unless his detention is required in any other case.

Appeal allowed.

2012 (I) ILR- CUT- 479

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

JCRLA NO.29 OF 2002 (Decided on 10.01.2012)

KAPILESWAR SAHU … …Appellant.

.Vrs.

STATE OF ORISSA …….Respondent.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.118.

Child witness – If the witness understands the questions and able to give rational answers and the Court assessed him to be reliable, such witness can be regarded as a competent witness for the prosecution to maintain a conviction.

Question of forgetting the incident due to the gap of one year and three months between the date of incident and recording of evidence in Court – Even a child of tender age who has witnessed the grue some murder of his parents is not likely to forget the incident for his whole life.

In this case P.W.2 is the child witness aged about 12 years – He is the son of the appellant and the deceased – Since the incident occurred inside the house, it is quite natural that the inmates of the house are the best persons to see the incident as no outside people are expected there – Held, there is nothing wrong in the impugned judgment convicting the appellant basing on the solitary evidence of P.W.2.

(Para 13 to 16)

Case laws Referred to:-

1.(1997)5 SCC 341 : (Dattu Ramrao Sakhare-V- State of Maharashtra)
2.(2009)43 OCR (SC) 374 : (State of Karnataka-V-Shantappa Madivalappa Galapuji & Ors.)
3.(2010)47 OCR (SC)263 : (State of Utter Pradesh-V-Krishna Master & Ors.)
4.2008(12) SCC 565 : (Nivrutti Pandurang Kokate & Ors.-V-State of Maharashtra)
5.2008(4) SCALE 569 : (Golla Yelugu Govindu-V-State of Andhra Pradesh).
6.(2008)40 OCR 529 : (State of Orissa-V-Purna Chandra Kusal)

For Appellant - Mr. Ashok Das, Advocate
For Respondent - Mr. Sangram Dash, Addl. Standing Counsel

B.K.MISRA, J. The present appellant was convicted by the learned Addl. Sessions Judge, Boudh in S.T. Case No. 9-46 of the year 2001. The learned Addl. Sessions Judge while convicting the present appellant under Section 302 of the Indian Penal Code (in short, 'IPC') directed him to undergo Rigorous Imprisonment for life.

2. The case of the prosecution is that the appellant was in the habit of assaulting the deceased Soudamini Sahu, who is his wife and their relationship was strained since two years prior to the occurrence. It is alleged that on 29.6.2000 around 6 P.M., the informant Bhagabat Sahu (P.W.1), who is the brother of the deceased on returning to his house received information from one Rajendra Sahu that the appellant had murdered the deceased Soudamani and the appellant, the deceased as well as their children to have been closeted in their house from the morning and the doors of the said house to have been bolted from inside. On getting this information, P.W.1 proceeded to the village of the appellant and found the house of the appellant to have been closed from both the sides and many persons to have assembled there. It is alleged that P.W.1 from the terrace of a neighbouring house of the appellant namely, Siba Sahu with the light of a torch found the deceased lying with bleeding injuries on the verandah of the back side courtyard. Information regarding the occurrence was lodged by P.W.1 at Kantamal Police Station vide Ext.1. Police on receipt of the said information registered a case and took up investigation. On completion of investigation, charge sheet was placed against the appellant to stand his trial.

3. The plea of the appellant was that of a complete denial of the occurrence. It is his further plea that he does not pull on well with the villagers and the informant (P.W.1) only to grab his properties has foisted this case.

4. The prosecution in order to bring home the guilt of the appellant examined ten witnesses in all and of them, P.W.1 is the informant. P.W.2 is an eye witness to the occurrence. P.Ws. 3 to 5 are the three independent witnesses for the prosecution. P.W.6 is the doctor who held post mortem over the dead body of the deceased. P.W.7 is the seizure witness and P.W.8 is the Police Constable who had accompanied the dead body of the deceased to hospital for post mortem examination. P.Ws. 9 and 10 are the two I.Os.

The appellant examined one witness in his defence.

The learned Addl. Sessions Judge, Boudh formulated three points for determination namely :-

(i) That the death of a human being has actually taken place.

(ii) That such death has been caused by or in consequence of the act of the accused.

(iii) That such act was done with the intention of causing death.

After discussing the evidence on record, the learned Addl. Sessions Judge believed the evidence of P.W.2, who is the son of the appellant and is an eye witness to the occurrence and basing upon his solitary statement convicted the appellant and passed the impugned sentence.

5. The learned counsel appearing for the appellant in course of his argument assailed the order of conviction and sentence on the ground that the learned Addl. Sessions Judge should not have placed reliance on the solitary testimony of P.W.2., who is a child witness and the learned Addl. Sessions Judge did not follow the mandate of law as to how to appreciate the evidence of a child witness and thus, there has been miscarriage of justice which needs to be interfered with by this Court.

6. The learned Addl. Standing counsel Sri S.Dash appearing for the State very forcefully submitted that the learned Addl. Sessions Judge committed no illegality or impropriety in believing the evidence of the solitary eye witness and therefore, the order of conviction needs no interference at all.

7. P.W.6 is the doctor who conducted post mortem over the dead body of the deceased which was identified to him by Constables Magusira Majhi and D.D.Konhar and he found seven external injuries namely:-

(i) Bruise of 7 x 7 cm. over left temporal region and in the middle there was a lacerated cut size 1”x 1”x 1” each.

(ii) Lacerated cut 2” x ½” x 1” left mandibular area near angle of mouth.

(iii) Bruise 4” x 4” over right parieto occipital area and in the middle there was lacerated cut 2” x ½” x 1”.

(iv) Lacerated cut 2” x ½” x 1” over front of right forearm.

(v) Lacerated cut 1” x ½” x 1” back of right arm.

(vi) Contusion 4” x 4” over the dorsam of right arm with under lying fracture of 3rd and 4th metacarpal bones.

(vii) Contusion front of chest 6” x 6”.

On internal examination, P.W.6 found fracture of left temporal bone, laceration of left side dura with underlying haematoma. P.W.6 also found the left facial artery, right occipital artery and arteries of forearm to have been completely cut. In the opinion of P.W.6 the death of the deceased was because of head injuries which might have been inflicted by semi sharp cutting weapon like “Tangia” i.e. M.O.I. He has proved the Post Mortem report prepared by him as Ext.3 and also he has proved his opinion report Ext.4 after examining the weapon of offence M.O.I. In view of such medical evidence and the post mortem report Ext.3 it is clearly established by the prosecution that the death of the deceased was a homicidal one because of the injuries which were found on the person of the deceased. Ext.3 also shows that the injuries which were found on the person of the deceased to be ante mortem in nature.

8. In view of such medical evidence now let us proceed to examine the evidence on record to determine as to how far the prosecution has been able to establish its case against the appellant as the perpetrator of the crime.

9. Admittedly, in this case P.W.1 is the informant. He has no direct knowledge about the occurrence and the evidence of P.W.1 shows that he heard from one Rajendra Sahu that the accused had killed the deceased. P.W.1 deposed that when on getting the information from Rajendra Sahu of village Rundimahul, he proceeded to that village found the front and back door of the house of the accused locked and accordingly, presented the F.I.R. Ext.1. P.W.1 deposed that prior to the occurrence there was quarrel between the accused and the deceased as the accused was selling away the lands without any necessity to which the deceased was objecting. P.Ws. 3, 4 and 5 all of them belong to village Rundimahul i.e. the village of the appellant. P.Ws. 4 and 5 have categorically deposed on oath before the court that the accused was assaulting his wife frequently. P.W.3 who is another witness for the prosecution deposed that on hearing a rumour that the accused had killed his wife, he proceeded to the house of the accused and found some villagers to have gathered outside that house and when he along with Police Officers entered inside the house of the accused, the

accused got annoyed and chased to assault with the tangia. It is also the evidence of P.W.3 that the accused dealt a tangia blow on his left side forehead for which he fell down senseless. Thus, the evidence of P.W.3 shows that he is a post occurrence witness but at the same time his evidence has relevancy to this case as he deposed that he has seen the accused in his house with an axe.

10. The most vital witness and the star witness for the prosecution is P.W.2, who is the son of the appellant as well as the deceased. It is the evidence of P.W.2 that after giving him food around 9 A.M. about a year and three months back prior to his deposing in court on 3rd October, 2001, his mother proceeded to the bed room (Dhaba Ghara) and his father followed her and after sometime his mother came out with bleeding from her head and his father also came out of the said "Dhaba Ghara" with an tangia (axe) in his hand. It is the further evidence of P.W.2 that his father gave blows on the blunt side of the tangia on the head of his mother for which his mother fell down crying and when he immediately rushed to his mother found her dead. P.W.2 also deposed that he was advised by his father not to cry as his mother has died and at that time his elder brother namely, Ashok and Jayakumar were not there in the house. P.W.2 has been cross-examined at length from the side of the appellant but his evidence that when after giving him food his mother proceeded inside the bed room she was followed by the present appellant to that room and some times thereafter his mother came out of the room with bleeding from her head and his father (the present appellant) also came out of that room with a tangia in his hand and also the present appellant dealt blows with that tangia to the head of his mother for which his mother fell down crying, has remained totally unshaken.

11. How to appreciate the evidence of a child witness, law is very clear on the point. In the words of the Apex Court in ***Dattu Ramrao Sakhare V. State of Maharashtra (1997) 5 SCC 341***:-

> "A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be

a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored".

The aforesaid decision of the Apex Court has been followed in another decision of the Apex Court as reported in ***(2009) 43 OCR (SC) 374*** i.e in the case of ***State of Karnataka V. Shantappa Madivalappa Galapuji and Others.*** The position of law relating to the evidence of a child witness has been dealt with also by the Apex Court in a judgment as reported in ***(2010) 47 OCR (SC) 263 in the case of State of Utter Pradesh V. Krishna Master and Others*** and also in ***Nivrutti Pandurang Kokate and others V. State of Maharashtra, (2008 (12) SCC 565) and Golla Yelugu Govindu V. State of Andhra Pradesh (2008 (4) SCALE 569).***

12. Similarly the position of law about appreciation of the evidence of a child witness and the duty of the trial court in relying on the evidence of such witness has been succinctly stated by this Court in a decision as reported in ***(2008) 40 OCR 529 in the case of State of Orissa V. Purna Chandra Kusal.***

13. Section 118 of the Indian Evidence Act, 1872 speaks that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, because of tender years, extreme old age, disease whether of mind or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. The Evidence Act does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. Thus, it is the trite law that evidence of a child witness is not required to be rejected per se but the Court as a rule of prudence considers such evidence with close scrutiny and on being convinced about the quality thereof and reliability can record conviction. The Hon'ble Apex Court also has gone a step ahead in the case of ***State of U.P. V. Krishna Master & Others*** (supra) in observing that a child of tender age who has witnessed the gruesome murder of his parents is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time notwithstanding the gap of about ten years between the incident and recording his evidence. In the words of their Lordships of the Apex Court a child of tender age is always receptive to abnormal event which takes place in its life and would never forget those events for the rest of the life. In the aforesaid touchstone and golden principles with regard to appreciation of the evidence of a child witness, now coming to the evidence of P.W.2, it is seen that the learned

Addl. Sessions Judge has put questions to P.W.2 who was then twelve years old to test his power of understanding and intelligence and on being satisfied that he was capable of understanding questions and give rational answers proceeded to record his evidence. As I have already discussed above there is hardly anything in the evidence of P.W.2 and on record to disbelieve his evidence when he has depicted before the court what happened in his presence and how his mother was killed by his father in his presence.

14. The learned defence counsel tried to demolish the evidence of P.W.2 by drawing our attention to the evidence of P.W.2 in his cross-examination in Para-3, where he has stated that he was examined by police three days after the occurrence and they were in the Police Station for those three days. The Apex Court have very categorically deprecated the practice of rejecting the evidence of a witness where there appear minor discrepancies here and there and adopt a hyper technical approach. In the words of the Apex Court, it is the duty of the Court to find out whether there is a ring of truth in the evidence of the witness when read as a whole. Similarly, in the words of the Apex Court for the defective investigation and for the lapses on the part of the Investigating Officer the evidence of a witness and for that matter the entire case of the prosecution should not be thrown out. The Court is not helpless in such matter and the Court shall not sit in despair and no premium should be allowed to be given to the defence for the defective investigation. Learned Addl. Sessions Judge has assigned reasons when he accepted the evidence of P.W.2 and we do not find any illegality to have been committed by the said court in accepting the evidence of P.W.2. Thus, the contention of the learned counsel for the defence for ignoring the evidence of P.W.2 who is a child witness cannot be sustained. Even if on the point of occurrence the evidence of P.W.2 cannot be thrown out because of non-availability of independent witnesses. It is to be remembered that when an incident takes place inside the house, it is not expected that the people would be there to see that and it is but natural that the inmates of the house and the near relations would be the best persons to speak of the same.

15. The evidence of P.Ws. 7 and 8 is of no relevance on the point of occurrence as P.W.7 is a seizure witness i.e. with regard to the seizure of the blood stained earth and sample earth from the spot by the police and also about the seizure of the broken handle of the tangia. P.W.8 is the Police Constable who deposed that he escorted the dead body of the deceased to Boudh hospital for post mortem and he proved the Command Certificate issued to him as Ext.7. P.Ws.9 and 10 are the two I.Os. and admittedly they are post occurrence witnesses. The evidence of the defence witness

namely, D.Ws.1 i.e. the evidence of the appellant who got himself examined that his wife fell down by wrong stepping inside the house and sustained injury on her head and that he was absent at that time cannot at all be believed as no such suggestion has been given to the witnesses namely, P.Ws. 1 to 5. The appellant also did not resort to such pleas also in his examination under Section 313 Cr.P.C. On the other hand he has taken a specific plea in his under Section 313 of the Cr.P.C. examination that only to grab his property the case has been foisted by P.W.1.

There is nothing on record as to why P.W.2, the son of the appellant would be deposing falsehood especially when D.W.1 deposed that his sons were obedient to him.

16. Thus, in view of the aforesaid discussion of the evidence and position of law, we do not find anything wrong in the judgment of the learned trial court.

In the circumstances, while upholding the order of conviction and sentence awarded by the learned Addl. Sessions Judge, Boudh to the appellant, the present appeal having no merit and stands dismissed.

Appeal dismissed.

2012 (I) ILR- CUT- 487

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

JCRLA NO.233 OF 2000 (Decided on 17.10.2011)

SIBA BAGH & ANR. ………Appellants

.Vrs.

STATE OF ORISSA ……….Respondent

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

Leading to discovery – P.W.3 in his examination-in-Chief stated that both the appellants while in custody made discloser about the incident, led him as well as the other witnesses and the I.O. to the spot and gave recovery of the stone stained with blood – Evidence of P.W.3 corroborates the evidence of the I.O. (P.W.10) with regard to recording of the disclosure statement of the appellants and seizure of the weapon of offence at their instance – Held, prosecution is able to establish the leading to discovery made U/s.27 of the Act. (Para 9)

B. **EVIDCENCE ACT, 1872 (ACT NO.1 OF 1872) – S.134.**

Evidence has to be weighed and not counted – P.W.1 is the sole eyewitness to the occurrence – His evidence appears to be clear, cogent and trust worthy and there is nothing on record to the contrary – Held, prosecution is able to establish beyond all reasonable doubt that both the appellants in furtherance of their common intention have committed murder of the deceased. (Para 9)

For Appellant - Mrs. Sujata Jena.
For Respondent - Mr. B.P.Pradhan . Addl. Govt. Advocate

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment dated 14.07.2000 passed by the Additional Sessions Judge, Jeypore in Sessions Case No.46 of 1998 convicting both the appellants under Section 302/34 I.P.C. and sentencing them to undergo imprisonment for life.

2. The case of the prosecution as unfolded during trial is that on 11.4.1997 at about 8:30 PM, the O.I.C. of Laxmipur Police Station (P.W.10) got information that an unidentified dead body of a male person was lying in

the middle of the road near village Minapali. He entered the said information in the Station Diary and directed the police constable (P.W.8) and the Grama Rakhi to guard the dead body in the night hour. On the next morning at about 7:00 AM, son of the deceased (P.W.4) presented a written report (Ext.6) before P.W.10 at the spot to the effect that the dead body belonged to his father. P.W.10 made endorsement on Ext.6, sent the same to the police station for registration of the case and took up investigation. During the course of investigation on 17.04.1997, P.W.10 examined one Bhagirathi Khosla (P.W.1), who claimed to be a witness to the occurrence. On the basis of the disclosure made by P.W.1, the I.O. arrested the appellants on 18.04.1997. While in custody the appellants confessed their guilt and made disclosure statement, which was recorded under Section 27 of the Indian Evidence Act. They also led the police to the place of concealment and gave recovery of the weapon of offence, i.e., a stone, which was seized in presence of the witnesses. On 10.06.1997, P.W.10 handed over the charge of investigation to P.W.9, who on completion of the investigation filed charge sheet against the appellants under Sections 302/201/34, IPC.

3. During trial, the appellants took the plea of denial and false implication due to prior enmity.

4. In order to prove its case, the prosecution examined as many as eleven witnesses and exhibited twenty-two documents. The defence examined none.

5. Learned Additional Sessions Judge, who tried the case, convicted both the appellants under Section 302/34 IPC mainly basing upon the evidence of the solitary eye witness (P.W.1) and leading to discovery. He, however, acquitted both the appellants of the charge under Sections 201/34 IPC.

6. Mrs.Sujata Jena, learned counsel for the appellants submits that the evidence of P.W.1, who is said to be the sole witness to the occurrence, is shrouded in deep mystery and as such cannot be believed because instead of disclosing the incident before the police immediately he disclosed the same after 4 to 5 days of the occurrence. Leading to discovery of the weapon of offence by the appellants has not been proved by the prosecution. In absence of any corroboration, the conviction of the appellants cannot be sustained on the basis of the evidence of the solitary eye witness (P.W.1), particularly when he has not stated anything in his evidence about the manner of assault by the appellants to the deceased.

7. Mr. Pradhan, learned Additional Government Advocate strongly contends that the evidence of the eye witness (P.W.1) is very clear, cogent and trustworthy. He vividly described about the assault made by the appellants. As he was frightened due to the threat given to him by the appellants, he disclosed the incident after five days of the occurrence. The independent witness (P.W.3) has clearly deposed that both the appellants led the police and the witnesses to the place of concealment and gave recovery of the weapon of offence, i.e., stone (M.O.I) which was stained with blood. The chemical examination report reveals that the wearing apparels of the appellants contained human blood and thereto no explanation has been given by the appellants. Therefore, the impugned judgment does not call for interference by this Court.

8. Keeping the rival submissions in view, this Court minutely examined the oral and documentary evidence available in the LCR. P.W.1 in his examination-in-chief stated that on the date of occurrence at about evening he was returning village after selling baskets at Kutinga. He saw both the appellants assaulting the deceased on the bridge over Jhola. When he asked the appellants as to why they were assaulting the deceased, appellant-Siba threatened him not to take side or else he would be killed. Then, appellant-Siba chased him, for which he ran away from the spot. On the next evening, appellant-Siba came to his house and threatened him saying that if he became a witness in this case, he would be killed. He further stated that because of the threat, he became frightened and kept quite without disclosing about the occurrence to anybody. On the following Thursday, when police came he gathered courage to narrate the incident before him. In cross-examination, he admitted that he saw both the appellants assaulting the deceased on the bridge from a short distance by means of fist and kick blows. Five to six days after the occurrence, he went to the police and narrated about the incident. He also admitted that there were 10 to 12 houses in between his house and the house of the appellant-Siba. On the following day of incident, he heard that Prahallad Bhaina (deceased) died. Nothing substantial has been brought out to demolish the evidence of this witness.

P.W.2 stated that on the date of occurrence in the evening he had seen appellant-Siba wearing a lungi and a white banian had wrapped a Chadar on his body. When he learnt that the deceased had been murdered, he went to the spot where the deceased was lying. The police, who was present there, showed him one Chadar lying near the dead body and he (P.W.2) identified the said Chadar was of appellant-Siba. In cross-

examination, he admitted that in the evening when he saw appellant-Siba at that time he was going at a distance of 20 cubits from him.

P.W.3 stated that after six days of the occurrence, he went to Laxmipur Police Station along with one Ramesh Ch. Turuk and found that the police arrested both the appellants. In their presence, police asked both the appellants about the incident. Both the appellants stated that they would lead the I.O. and point out the stone used by them in the offence. The I.O. recorded the statements of both the appellants. Ext.1 is the statement of appellant-Muku Mandinga and Ext.2 is the statement of appellant-Siba. Then, all of them went near the bridge, i.e., the place of occurrence and after reaching there both the appellants showed the stone, which was used to commit murder of the deceased. The I.O. seized the same under Ext.3. After returning police station, the I.O. seized the wearing apparels of both the appellants under Exts.4 and 5 in his presence. In cross-examination, he admitted that the stone (M.O.I) was not recovered from water of the Jhola and the same was lying on sand.

P.W.4 is the son of the deceased and informant of the case. He deposed that on the day of occurrence he and his wife went to his father in-law's house. On that night, they heard that somebody had been murdered and could not be identified. On the next morning, while they were returning village they saw a dead body lying near the Nala of village Minapai. There was bleeding injury on the dead body and its face was disfigured. But from the wearing apparels he could identify the same to be his father. His father's Tiffin carrier and Shawl were lying near the dead body. Suspecting foul play, they went to one Prakash Chandra Bhainsa and requested him to scribe a report. The said Prakash Ch. Bhainsa scribed the report and read over and explained to him. Finding the same to be correct, he (P.W.4) put his signature and lodged the said report at Laxmipur Police Station which has been marked Ext.6.

P.W.5. is a police constable and a witness to the seizure of wearing apparels of the deceased under Ext.8. P.W.6 is a witness to the seizure of two Shawls, one Dhala and one Tiffin carrier under Ext.9. He is also a witness to the seizure of a black stone, some sample earth, some bloodstained earth and some clothes under Ext.10 and a red colour towel under Ext.11. P.W.7 is a witness to the inquest and proved the inquest report (Ext.7). P.W.8 is the police constable who guarded the dead body. P.W.9 is the Circle Inspector of Police, Koraput, who took charge of the investigation from P.W.10 and on being satisfied about the existence of a prima facie case

submitted charge sheet against both the appellants under Sections 302/201/34 IPC.

P.W.10 is the Officer in-Charge of Laxmipur Police Station and I.O. of the case. He stated that after getting information that an un-identified dead body of a male person was lying on the middle of the road near Village Minapali, he made an entry in the station diary and directed P.W.8 and the Grama Rakhi to guard the dead body in the night. On the next morning, P.W.4 appeared before him at the spot and presented a written report (Ext.6). On receipt of Ext.6 he sent the same to the police station for registration of a case and as it revealed a cognizable case he took up investigation. During investigation, he examined the complainant and other witnesses and recorded their statement. He also held inquest over the dead body, prepared the inquest report and sent the same for post mortem examination. On 13.04.1997, he seized the wearing apparels of the deceased, on 17.04.1997 he examined the eye witness (P.W.1) and on 18.04.1997 he arrested the appellants and recorded their confessional statements. He further stated that both the appellants led him and the witnesses to the spot and pointed out the stone used by them in the commission of the murder of the deceased. He seized the said stone under Ext.3. On 26.04.1997 he received the post mortem report and on 10.06.1997 he handed over the charge of the investigation to P.W.9.

P.W.11 is the doctor who conducted autopsy over the dead body of the deceased and found as many as four external injuries. On further dissection, he found one litre of liquid blood present in thoracic cavity with congestion of lungs. He also found corresponding injury in the brain at places where external injuries were noticed on the head. The cause of death was due to intracranial and intra-thoracic haemorrhage due to the above injuries. All the injuries were ante mortem in nature and sufficient to cause death in ordinary course of nature. He proved the post mortem report (Ext.22).

9. On threadbare analysis of the oral and documentary evidence available on record, this Court finds that P.W.1 is the sole eyewitness to the occurrence. His evidence is that at the time of occurrence he was returning village from Kutinga after selling baskets. He saw both the appellants assaulting the deceased on the bridge over the Jhola. He asked them as to why they were assaulting the deceased. At this, appellant-Siba got annoyed and threatened him not to take the side of the deceased or else he would be killed. His further evidence is that on the next evening of the occurrence, appellant-Siba came to his (P.W.1's) house and again threatened him by

saying that if he became a witness against him, he would also be murdered. It is his further evidence that because of the threat, he became frightened and kept quite without disclosing about the occurrence to anybody and on the following Thursday when police came he gathered courage to narrate the incident before him. In the face of such explanation offered by P.W.1, his evidence cannot be thrown out of consideration on the ground of his delayed disclosure about the incident. Despite thorough cross-examination by the appellants, his evidence has remained unshaken. In cross-examination, he rather admitted that from a short distance he saw both the appellants assaulting the deceased on the bridge by fist and kick blows. Under these circumstances, the evidence of P.W.1 appears to be clear, cogent and trustworthy. P.W.3 in his examination-in-chief stated that both the appellants while in custody made disclosure about the incident, led him as well as the other witnesses and the I.O. to the spot and gave recovery of the stone stained with blood. This evidence of P.W.3 lends corroboration to the evidence of the I.O. (P.W.10) with regard to recording of the disclosure statement of the appellants and seizure of the weapon of offence at their instance. If the evidence of the I.O. (P.W.10) and that of the independent witness (P.W.3) is read together, it cannot be said that the prosecution has not been able to establish the leading to discovery made under Section 27 of the Indian Evidence Act. On perusal of the report of the Chemical Examiner it reveals that human blood of group 'B' was found in the weapon of offence, i.e., the stone marked as "P" and the wearing apparels, i.e., the lungi and the shirt of the deceased. From this it is evident that the stone (M.O.I) was used in the commission of the murder of the deceased. The doctor (P.W.11) opined that all the injuries found on the body of the deceased were ante mortem in nature and sufficient to cause death in ordinary course of nature. It is settled principle of law that basing upon the evidence of a solitary witness, the conviction can be sustained, provided his evidence passes the test of reliability. The general rule of law as enshrined in Section 134 of the Indian Evidence Act is that evidence has to be weighed and not counted. As already observed, the evidence of P.W.1 appears to be clear, cogent and trustworthy and there is nothing on record to the contrary. For all these reasons, this Court holds that the prosecution has been able to establish beyond all reasonable doubt that both the appellants in furtherance of their common intention have committed murder of the deceased.

10. In the result, the Jail Criminal Appeal is dismissed being bereft of merits by upholding the judgment dated 14.07.2000 passed by the learned Additional Sessions Judge, Jeypore in Sessions Case No.46 of 1998 convicting both the appellants under Section 302/34, IPC and sentencing them to undergo imprisonment for life.

Appeal dismissed.

2012 (I) ILR- CUT- 493

M.M.DAS, J.

CRLMC. NO.3673 OF 2011 (Decided on 31.10.2011)

SIMANCHAL BEHERA @
KUNA @ ROWDY ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp.Party

A. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 (ACT NO.56 OF2000) – S.2(l).

"Juvenile in conflict with law" – A person who has not completed 18 years of age as on the date of commission of the alleged offence, will be considered to be a juvenile in conflict with law.

(Para 8)

B. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) ACT, 2000 (ACT NO. 56 OF2000) – S.7-A.

Claim of juvenility – Proviso to Section 7-A stipulates that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case and such claim shall be determined in terms of the provisions contained in the Act and the Rules made there under, even if the juvenile has ceased to be so on or before the date of commencement of the Act.

(Para 8)

C. JUVENILE JUSTICE (CARE & PROTECTION OF CHILDREN) RULES 2007 - RULE -12.

Rule 12 (3) stipulates the procedure to conduct the enquiry by the Court or the Board – Sub-rule (3) (a) of Rule 12 further prescribes the nature of documents which can be taken as evidence for determination of the date of birth – Sub-rule (3) (b) provides that in the absence of such evidence, the medical opinion will be sought for from a duly constituted medical board which will declare the age of the juvenile or child – In case the exact assessment of the age can not be done, the Court for the reasons to be recorded by it may, if considered

necessary, give benefit to the child or juvenile by considering his/her age on lower aside within the margin of one year.

In this case the nature of evidence adduced by the petitioner does not come under Sub-rule (3) (a) of Rule 12 – Held, it was incumbent upon the learned SDJM to send the petitioner for medical opinion of a duly constituted medical board. (Para 8,9)

Case law Referred to:-

AIR 1965 SC 282 : (Brij Mohan Singh-V- Priyabrat Narain Sinha)

For Petitioner - M/s. S.R.Mulia, R.C.Mohapara, M.Mulia, R.R.Nayak & H.K.Singh.
For Opp.Party - Mr. R.P.Mohaptra, Addl.Govt. Advocate.

M.M. DAS, J. The petitioner in this application under section 482 of the Code of Criminal Procedure, 1973 has called in question the order dated 22.9.2011 passed in G.R. Case No. 457 of 2011 by the learned S.D.J.M., Bhubaneswar.

2. The facts reveal that the petitioner was forwarded to the court of the learned S.D.J.M. in connection with the aforesaid G.R. Case as accused for commission of offence under sections 147/148/341/376/323/302 IPC read with sections 25/27 of the Arms Act by the I.I.C., Kharavelanagar Police Station, mentioning the age of the petitioner as 19 years. A petition was filed on behalf of the petitioner under section 7-A of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short, 'the Act') to declare him as a juvenile and to send him to the Juvenile Justice Board for his trial. After filing of the aforesaid petition, the learned S.D.J.M. made an enquiry and examined three witnesses, who are the Principal of Biju Patnaik Science and Technology, a teacher of the High School and the Principal of Venkateswar English Medium School, Bhubaneswar.

3. After hearing the parties, the learned S.D.J.M. disbelieving the evidence of the P.Ws and taking note of the discrepancies with regard to the date of birth of the petitioner, rejected the application with regard to the claim of the petitioner that he was a juvenile.

4. In the impugned order, the learned S.D.J.M. vividly discussing the evidence adduced by the P.Ws 1 to 3 and the entries made in the school admission register and taking note of the contentions raised before him as well as the decision in the case of ***Brij Mohan Singh v. Priyabrat Narain***

Sinha, AIR 1965 SC 282 rejected the plea of the petitioner. In the case of Brij Mohan Singh (supra), the Supreme Court made an observation that in actual life, it often happens that persons give false age of the boy at the time of his admission to a school so that later in life he could have an advantage when seeking public service for which a minimum age for eligibility is often prescribed.

5. Mr. Mulia, learned counsel for the petitioner drawing the attention of this Court to the definition of "Juvenile in Conflict with Law", provisions under section 7-A of the Act as well as Rule 12 of the Rules framed under the said Act submits that the learned S.D.J.M. has not proceeded in accordance with law while determining the age of the petitioner. He further submits that if the learned S.D.J.M. did not accept the date of birth of the petitioner as claimed, the only alternative on his part was to send the petitioner for medical opinion with regard to his age.

6. Mr. Mohapatra, learned counsel for the State, on the contrary, submits that the petitioner is not a juvenile and had it been such, the Investigating Officer would have mentioned the same in the charge sheet and the matter could have been proceeded under the Act. According to him, since the petitioner is not a juvenile, he has been rightly produced before the court and the learned S.D.J.M. also minutely scrutinizing the materials produced before him rightly came to the conclusion that the claim of the petitioner should be rejected.

7. To determine the question as to whether the learned S.D.J.M. has followed the procedure as required under law, it is necessary to quote the definition of "Juvenile in Conflict with law" as given in clause (l) of section 2 of the Act, section 7-A of the Act and Rule -12 of the Rules framed under the Act, which are as under:-

"2. **Definitions:** In this Act, unless the context otherwise requires,-

(a) to (k) xx xx xx

(l) "Juvenile in conflict with law" means a juvenile who is alleged to have committed an offence and has not completed eighteen year of age as on the date of commission of such offence."

"7-A. **Procedure to be followed when claim of juvenility is raised before any Court.-** (1) Whenever a claim of juvenility is

raised before any Court or a Court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the Court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any Court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the Court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence, if any, passed by a Court shall be deemed to have no effect.]"

"**12. Procedure to be followed in determination of age.**-(1) In every case concerning a child or a juvenile in conflict with law, the Court or the Board, as the case may be, the Committee referred to in rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The Court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, *prima facie* on the basis of physical appearances or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –

(a) (i) the matriculation or equivalent certificates, if available ; and in the absence whereof ;

(ii) the date of birth certificate from the school (other than a play school) first attended ; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat ;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict wit law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the Court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of section 7-A, section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule(3) of this rule.

(6) The provisions contained in this rule shall apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

8. The definition clause clearly shows that a person, if has not completed 18 years of age as on the date of commission of such offence, will be considered to be a juvenile in conflict with law. Section 7-A of the Act empowers the court to make an enquiry wherever a claim is made that the accused is a juvenile and take such evidence as may be necessary. The proviso to section 7-A also clearly stipulates that a claim of juvenility may be raised before any court and it shall be recognized at any stage, even after final disposal of the case and such claim shall be determined in terms of the provisions contained in the Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of the Act. ***(emphasis supplied)***

Rule 12 (3) clearly stipulates the procedure to conduct the enquiry by the court or the Board, as the case may be. Sub-rule (3) (a) of Rule -12 further prescribes the nature of documents which can be taken as evidence for determination of the date of birth. Sub-rule (3) (b) provides that in the absence of such evidence, the medical opinion will be sought for from a duly constituted medical board which will declare the age of the juvenile or child. Even it provides that in case the exact assessment of the age cannot be done, the court for the reasons to be recorded by it may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year. The court is also required to record a finding in respect of the age after taking into consideration the medical opinion where evidence of the nature prescribed in sub-rule (3) (a) is not available and the medical report shall be the conclusive proof of the age as regards such child or juvenile in conflict with law.

9. The nature of evidence adduced in this case by the petitioner does not come under sub-rule (3) (a) of Rule -12 as the evidence is not any of the type as mentioned in clauses - (i), (ii) and (iii) of sub-rule (3)(a) . It was, therefore, incumbent upon the learned S.D.J.M. to send the petitioner for medical opinion of a duly constituted medical board.

10. It may be noted that the age of the petitioner is required to be considered as on the date of commission of the alleged offence as per the definition clause.

11. In view of the above, the impugned order dated 22.9.2011 is set aside having been passed not following the procedure of law and the matter is remitted back to the learned S.D.J.M., who is directed to refer the petitioner for medical opinion by a duly constituted medical board as per rule 12 (3) (b) and after obtaining such report to consider the same as conclusive

proof of age of the petitioner and pass a fresh order supported by reasons by considering his age on the lower side within the margin of one year and then arriving at a finding with regard to his age as on the date of occurrence. Till the learned S.D.J.M. decides the question of juvenility of the petitioner, he shall not proceed with G.R. Case No. 457 of 2011.

12. The CRLMC is accordingly allowed.

Application allowed.

2012 (I) ILR- CUT- 500

M.M.DAS, J.

F.A.O. NO.184 OF 2011 (Decided on 12.12.2011)

AMIT TOPPO ……...Appellant.

.Vrs.

NONE ……….Respondent.

NATIONAL TRUST FOR WELFARE OF PERSONS WITH AUTISM, CEREBRAL PALSY, MENTAL RETARDATION & MULTIPLE DISABILITIES ACT, 1999 (ACT NO.44 OF 1999) – S.14.

A parent of a person with disability or his relative may make an application u/s.14 of the 1999 Act for appointment of any person of his choice to act as a guardian of the person with disability.

In the present Case one Deepak Toppo is a mentally ill person – Both of his parents expired – He is maintained under the Care and Custody of the appellant – The appellant filed an application u/ss 52 & 53 of the Mental Heath Act, 1987 for being appointed as guardian of the person and property of the said Deepak Toppo – The said application was dismissed by the learned Civil Judge (Sr.Divn.) Rourkala – Hence this appeal.

Held, learned Civil Judge (Sr.Divn.) has rightly dismissed the application filed under the Mental Health Act, 1987 – Liberty granted by this Court to the appellant to file appropriate application u/s.14 of the 1999 Act.

For Appellant - Mr. B.B. Routray
For Respondent - None

M. M. DAS, J. The appellant as petitioner filed an application before the learned Civil Judge (Sr. Division), Rourkela under sections 52 and 53 of the Mental Health Act, 1987 praying to be appointed as guardian of the person and property of one Deepak Toppo. By order dated 18.1.2011, the learned Civil Judge dismissed the said application, which was registered as Guardian Misc. Case No. 59 of 2007.

2. The appellant's case before the learned court below was that said Deepak Toppo is a mentally ill person being a Christian male aged

about 29 years who was born on 7.3.1982. His father and mother are both dead and since the death of his parents, the said Deepak Toppo is being maintained under the care and custody of the appellant, who is the son of Deepak's maternal aunt, i.e., mother's sister. He has no other suitable person other than the appellant to look after him for which the appellant prayed to be appointed as guardian in respect of his property both moveable and immovable as well as his person. A proclamation was made by the learned Civil Judge inviting objections, if any, in the said Guardian Misc. Case No. 59 of 2007. The said Misc. Case was once dismissed on 30.6.2008 against which the appellant approached this Court in FAO No. 539 of 2008. This Court by order dated 8.7.2010 passed in the said FAO, considering the submissions made by the learned counsel for the appellant and without expressing any opinion on the merits of the case, set aside the impugned order and remitted the matter back to the trial court for fresh disposal after giving opportunity of hearing to the parties. This Court further observed that it is open for the appellant to adduce further evidence in support of his claim, which shall be considered by the trial court on its own merit and in accordance with law.

3. After remand, the learned Civil Judge again heard the matter by affording an opportunity of hearing to the appellant. The learned trial court in the impugned order on analyzing the facts of the case came to the conclusion that provision of section 7 of the Guardian and Wards Act, 1890 which speaks of appointment of guardian for the welfare of the minor cannot be made applicable to the facts of the case as the said Deepak Toppo is a major. Thereafter, the learned Civil Judge referred to sections 52 and 53 of the Mental Health Act, 1987 and more specifically referring to the definition of a "mentally ill" person as defined in section 2 (1) of the said Act, came to the following conclusion:-

> "………………It is clearly mentioned in section 2 (1) of Mental Health Act that a mental ill person means a person who is in need of treatment by reason of any mental disorder other than mental retardation. So, the provision laid down u/s 52 and 53 of Mental Health Act, 1987 is not applicable in case of mentally retarded person. With the aforesaid reasons I am of the view that Dipak Toppo being a major is not covered u/s 7 of the Guardians and Wards Act, 1890 and so also in view of the above discussion the provision laid down u/s 52 and 53 of Mental Health Act, 1987 is not applicable to him. So the petition filed by the petitioner is not maintainable and for which I am not inclined to issue a guardian certificate in favour of the petitioner in respect of the person and

property of Dipak Toppo".

4. The learned court below, as a matter of fact, has found that said Deepak Toppo as per the medical certificate marked as Ext. 11 is a mentally retarded person and the retardation is of permanent nature.

5. Learned counsel for the appellant strenuously urged that the learned court below are wrong in holding that the Mental Health Act, 1987 is not applicable to the facts of this case. Learned counsel, however, does not dispute that said Deepak Toppo is a mentally retarded person and such retardation is of permanent nature.

6. Under the Mental Health Act, 1987, a mentally ill person has been defined as a person who is in need of treatment by reason of any mental disorder other than mental retardation. By section 98 of the Mental Health Act, 1987, the Indian Lunacy Act, 1912 was repelled. In the said Indian Lunacy Act, a "Lunatic" was defined as a person who is an idiot or a person of unsound mind as per section 3 (5) thereof. Hence, the Indian Lunacy Act, 1912 included a person suffering from unsound mind and person with an unsound mind would in common parlance include a person suffering from mental retardation. However, in the repealing Act, i.e., Mental Health Act, though person with mental disorder was covered within the definition of mentally ill person, but person with mental retardation has been specifically excluded from the said definition. ***(emphasis supplied)***

7. As a matter of fact, in case of a person with mental retardation, the provisions of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (hereinafter referred to as 'the Act, 1999') will govern. In the said Act, section 2 (g) defines "mental retardation" to mean a condition of arrested or incomplete development of mind of person, which is specially characterized by sub-normality of intelligence. Further, under Chapter -_II of the said Act, a body is constituted by the Central Government by notification, known as "National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability" having perpetual succession and a common seal, with the objects as mentioned in Chapter-III of the said Act. The Board of Trustees are to exercise powers and duties as envisaged in Chapter-IV thereof. The Local Level Committees are constituted by the Board for such area as may be specified by it from time to time, as provided in Chapter-VI of the said Act, which also provides for a parent of a person with disability or his relative to make application to the said Local Level Committee for appointment of any person of his choice to act as guardian of

the person with disability. Procedure for disposal of such application is also provided in the said Chapter-VI.

8. In view of the aforesaid Act, since, it is clear that the learned Civil Judge (Sr. Division) was right in holding that the appellant could not have approached under the Mental Health Act, 1987 or the Guardian and Wards Act, 1890 for being appointed as Guardian of the said Deepak Toppo, while dismissing this appeal, this Court grants liberty to the appellant to file appropriate application under the aforesaid Act, 1999.

9. The FAO is accordingly dismissed.

Appeal dismissed.

2012 (I) ILR- CUT- 504

R.N.BISWAL, J.

CRLREV NO. 18 OF 2010 (Decided on 07.12.2011)

PASHUPATI ACHARYA ..……..Petitioner.

.Vrs.

DIPALI ACHARYA ……….Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.125 (2).

Maintenance allowance is payable from the date of the order – However in Special Cases Order can be passed to pay the same from the date of filing of the petition which must be supported by reasons.

In the present case no reason has been assigned for payment of maintenance from the date of application – Held, impugned order directing the petitioner to pay maintenance from the date of application is quashed. (Para 9)

Case law Referred to:-
2005 (31) OLR 79 : (Govinda Sahoo-V- Pratima Muduli)

For Petitioner - M/s. S.K.Mishra, K.R.Mohanty, J.Pradhan, P.Prusty.
For Opp.Party - M/s. D.Nayak, N.K.Mohanty

R.N.BISWAL,J. The petitioner assails the judgment dated 29.10.2009 passed by the learned J.M.F.C. Soro in Misc. case No.109 of 2007 awarding monthly allowance of Rs.2000/- towards maintenance of the opp.party from the date of filing of the petition under section 125 of Cr.P.C. i.e., 8.10.2007.

2. The case of the opp.party, as per her petition filed under section 125 of Cr.P.C. before the court below in nub, is that she married the petitioner on 3.7.1993 as per their caste custom and Hindu rites. At the time of her marriage a sum of Rs.5000/- and gold and silver ornaments as per demand of the petitioner and his family members were given to the petitioner towards dowry. The couple led a happy conjugal life for a short period and thereafter skirmishes errupted between them as the demand of petitioner and his family members for further sum of Rs.10,000/- and a colour T.V. towards dowry could not be complied with. The petitioner tortured the opp.party in

many a way. The opp.party bore all the tortures with the hope that good sense would prevail upon the petitioner by passage of time. In the meantime, opp. party gave birth to two female children, but still then the torture continued unabated. In one occasion, the petitioner poured kerosene over opp.party to kill her, but some how she could be escaped. She was not provided with food and medicine for which she was compelled to work in bakery for sustenance of her life and the life of her two children. But still then the lust of the petitioner for money and colour T.V was not quenched, and he removed her from his house and since then she has been residing in her parental house.

3. It is the further case of the opp.party that petitioner works in Rourkela Steel Plant and earns Rs.6000/- per month besides having 10 acres of home stead and agricultural land in village Bishnupur, where from he earns Rs.50,000/- per annum, whereas she is unable to maintain herself. So the opp.party in her petition under section 125 of Cr.P.C. claimed Rs.2000/- per month as allowance towards her maintenance from the petitioner**.**

4. The petitioner admitted the fact of marriage between himself and the opp.party, but denied the allegation of demand of dowry and torture on the opp.party. As per his case, opp.party voluntarily deserted him due to his poverty. Furthermore, it was alleged that she had extramarital relationship with one Sudadrsan Jena. According to the petitioner, he is not working in Rourkela Steel Plant. So the question of earning Rs.6000/- per month is a myth. He has also no any agricultural land. In fact, he is coaching some students and out of it he earns only Rs.1800/- as tuition fees per month. So, he is not liable to pay any allowance towards maintenance of the petitioner.

5. To establish her case, opp.party examined four witnesses including herself as P.W.1 before the trial court. On a petition of opp.party for interim maintenance, a sum of Rs.300/- per month was awarded to be paid by petitioner from 5.11.2008. Since he did not pay the same, his defence was struck out by the trial court relying on the decision of this Court in the case of **Govinda Sahoo** vs. **Pratima Muduli** 2005 (31) OLR-79.

6. After assessing the evidence on record, the trial court held that opp. party could not prove that the petitioner used to work at Rourkela Steel Plant and earn Rs.6000/- per month. She also failed to establish that petitioner owns 10 acres of homestead and cultivable land. But it held that he is an able bodied man and accordingly awarded a sum of Rs.1000/- per month as maintenance allowance in favour of the opp. party to be paid by the petitioner vide judgment and order dated 29.10.2009. Being aggrieved with

the said judgment and order, the petitioner has preferred the present revision**.**

7. Learned counsel for the petitioner submits that the court below erred in not allowing the petitioner to adduce evidence, particularly on 10.9.2009 when he was ready to pay a sum of Rs.500/- towards arrear interim maintenance. A sum of Rs.3000/- was allowed as interim maintenance vide order dated 5.11.2008. The petitioner did not pay that amount. As it appears from the order sheet dated 10.9.2009 he was ready to pay a sum of Rs.500/- only towards arrear interim maintenance, but by that time it had already mounted to more than Rs.2700/-. So, striking out the defence of the petitioner by the trial court and not allowing him to adduce evidence is not illegal in view of the aforesaid decision of this Court.

8. Learned counsel for the petitioner further submits that in fact petitioner has no avocation. He has two daughters, besides the parents who are not able to maintain themselves. So he has to maintain them also. Under such circumstances, trial court ought not to have awarded a sum of Rs.1000/- as monthly allowance towards maintenance. Even if the petitioner is unemployed it is his legal and moral duty to maintain the opp.party-his legally married wife, besides maintaining his minor children. As it appears opp. party tried her best not to leave the matrimonial home. She even worked in a bakery to maintain herself and her children. But, still then, the petitioner tortured her both physically and mentally for non-fulfillment of his demand of Rs.10000/- and a colour T.V. When she could not bear the torture any further, she left the matrimonial home. So, it cannot be said that she left the matrimonial home without sufficient reason. Now in the present day market when the price of essential commodities has become very costly, an award of Rs.1000/- per month towards maintenance allowance cannot be said to be exorbitant*.*

9. Learned counsel for the petitioner further submits that as per sub-section (2)of Section 125 of Cr.P.C. the maintenance allowance is payable from the date of order, but in the present case, it has been ordered to be paid from the date of filing of the petition under Section 125 of Cr.P.C. i.e., 8.10.2007 which is wrong. In normal course the monthly maintenance award is payable from the date of order. In special cases order can be passed to pay it from the date of filing of the petition under section 125 of Cr.P.C. In the present case, no reason has been assigned as to why the award would be payable from the date of application. So the order directing the petitioner to pay the maintenance allowance from the date of filing of the

petition under section 125 of Cr.P.C. i.e. 8.10.2007 instead of the date of order deserves to be set aside.

10. Accordingly the revision is allowed in part. In stead of paying the maintenance allowance of Rs.1000/- from 8.10.2007, the petitioner shall pay it from the date of order i.e.29.10.2009. The order of the court below is set aside to this extent only while the remaining part of it remains unaltered.

Revision allowed.

2012 (I) ILR- CUT- 508

ARUNA SURESH, J.

W.P.(C) NO.8334/2011 & 11403/2011 (Dt.31.01.2012)

SMITARANI SAHOO & ANR. … ….Petitioners.

.Vrs.

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

SERVICE – Appointment of Sikshya Sahayak – Preparation of select list - Department considered the marks obtained by the petitioners in the Vocational Course while preparing provisional list – No adverse stipulation in the resolution Dt.10.01.2011 or in the advertisement – Held, marks secured by the petitioners in +2 Vocational Course under Arts stream be treated as equivalent to +2 Arts for the purpose of their engagement as Sikshya Sahayaks while preparing the select list and if necessary revise the final select list already published. (Para 14,17,20 & 21)

Case law Referred to:-

Vol.110(2010) CLT 545 : (Tarun Kanti Sethi -V- State of Orissa)

For Petitioners - Mr. S.Das.
For Opp.Party - Mr. P.Mohanty,
Sr. Standing Counsel for School & Mass
Education Department.

ARUNA SURESH, J. Since both the petitions involve common question of law, they were heard together.

2. Petitioners have challenged the selection procedure followed by the respondents in preparing merit list of eligible candidates who were found suitable for appointment as Sikshya Sahayaks.

3. In brief, case of the petitioners is that respondents published guidelines vide Resolution no.587 dated 10.1.2011 for issuance of an advertisement for appointment of Sikshya Sahayaks, their minimum qualifications, criteria and the procedure for selection to be followed while selecting eligible candidates. Another letter was issued by the Department on 17.1.2011 thereby revising the calendar of selection process. This

revised calendar required advertisement to be issued by 24.1.2011. Accordingly, advertisement was issued. Petitioners submitted their applications for consideration as they possessed requisite eligibility. Name of the petitioners appeared in the provisional list published by the Department. Name of the petitioners also appeared in the merit list but they were not engaged. However, petitioners noticed that their names were not included in the SEBC +2 Arts (C.T) final select list. Petitioners came to know that total marks secured by them in the vocational course had not been taken into consideration at the time of final selection, rather the marks secured in the basic foundation course had been deducted from the grand total and only marks of some of the subjects had been considered for calculation of percentage of marks for selection of Sikshya Sahayaks. Therefore, the total percentage of marks of the petitioners with +2 vocational certificates was reduced drastically and their name did not find place in the final select list.

4. Grievance of the petitioners is that they have been discriminated vis-à-vis the candidates having vocational course in other districts where their vocational course have been considered for selection. However, a deviation was made by the respondents while selecting eligible candidates for appointment in Cuttack and Bhadrak district respectively while preparing the select list in utter violation of Resolution dated 10.1.2011. Challenging the selection list so prepared by the respondents and seeking consideration of their marks secured in vocational course as eligible criteria for selection, petitioners have filed these petitions.

5. Respondents have contested the claim of the petitioners. It is alleged in the counter affidavit filed by Bijoy Kumar Rath, District Project Coordinator that guidelines, eligibility criteria and procedure as laid down in the Resolution dated 10.1.2011 was followed at the time of preparation of the final select list. The Government had been issuing instructions from time to time which were also followed. It is further averred that letter dated 15.1.2011 was issued by School & Mass Education Department to all the Collectors-cum-CEO, Zilla Parishad enclosed with letter no.5 dated 14.2.2011 of the Secretary, Council of Higher Secondary Education, Orissa clarifying that as per the proceedings of the Academic Committee of the Council held on 11.1.2010 and duly approved by the General Body of the Council in its meeting held on 13.1.2010; High School Vocational Examination having History, Pol. Science and Economics as basic Foundation Course is to be considered as equivalent to Higher Secondary Examination in Arts stream.

6. It is alleged that case of the petitioner was considered in accordance with the said letter dated 14.2.2011 and entire marks of +2 vocational course as reflected in the marksheet submitted by the petitioners while applying as SEBC candidates, were taken into consideration and accordingly, provisional list was prepared, but subsequently, as per the guidelines and instructions issued from the Government, their basic foundation course in +2 vocational course was taken into consideration while preparing the final merit list and in the final list, the petitioners have secured much lesser marks and were placed in the merit list amongst SEBC category candidates. Candidates up to serial no.25 in the merit list, who had secured higher marks, have been engaged and since all the posts in the said category have been exhausted, there is no vacant post against which petitioners can be considered for appointment. It is urged that the petitions therefore deserve to be dismissed.

7. Mr. S. Das, advocate appearing for the petitioners has submitted that neither in the guidelines dated 10.1.2011, nor in the advertisement, there was any stipulation that the marks secured in the vocational course would not be taken into consideration at the final selection and also that the marks secured in the basis foundation course would be deducted from the grand total and only the marks obtained in some subjects would be taken into consideration for calculation of percentage of marks for selection of Sikshya Sahayks. Therefore, Department in not considering the marks obtained by the petitioners in the vocational course acted against the resolution of the Government and in violation of principles of equity and natural justice. He has referred to Tarun Kanti Sethi Vs. State of Orissa Vol. 110 (2010) CLT 544 to support his case.

8. Mr. P. Mohanty, Senior Standing Counsel for the Government has refuted the submissions made by counsel for the petitioners. He has argued that letter dated 14.2.2011 has laid down the criteria to be considered for deciding equivalence to different streams of HS vocational examination and as per this letter, HS vocational examination having History, Pol. Science and Economic as basic foundation course can only be considered as equivalent to Higher Secondary Examination in Arts stream. Petitioners were not having subjects of History, Pol. Science and Economics for consideration of their marks as equivalent to Higher Secondary Examination in the Arts stream and, therefore, their marks were not taken into consideration while calculating the percentage of marks for preparation of select list of the candidates. He has urged that since all the vacancies meant for SEBC candidates have been filled in and no vacancy of the

concerned year is left, the claim of the petitioner is without merits and must be rejected.

9. Para 4 of the Resolution dated 10.1.2011 lays down the procedure and minimum qualification to be considered by the Department for engagement of a Sikshya Sahayak. As per para 4.2, vacant post as well as newly created posts in the elementary schools on account of opening of new Primary/Upper Primary Classes or due to Up-gradation of existing Primary Schools to Upper Primary Schools or opening of Class-VIII by way of up-gradation of existing Upper Primary Schools are to be filled up by the candidates having the qualification of +2 Science, Arts/Commerce(or its equivalent examination declared by appropriate authority and C.T Training or +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and 2 year Diploma in Education (Special Education) a course recognized by Rehabilitation Council of India (RCI) and B.A., B.Sc. (or its equivalent Examination declared by appropriate authority) and B.Ed. or B.A., B.Sc. (or its equivalent examination declared by appropriate authority) and one year B.Ed. (Special Education) course recognized by Rehabilitation Council of India (RCI) as per the requirement under each category.

10. As per sub-para 4.3, selection has to be made only on merit on the basis of percentage of mark secured in +2 (or its equivalent examination declared by the appropriate authority) and C.T. for C.T. candidates and B.A., B.Sc. (or its equivalent examination declared by the appropriate authority) with B.Ed. for B.Ed. candidates.

11. Para 6 of the Resolution lays down the eligibility criteria to be fulfilled by a candidate while applying for the post of Sikshya Sahayak. As per this paragraph, the candidate must have passed +2 Science, Arts/Commerce (or its equivalent examination declared by appropriate authority) and C.T. Training from a recognized Board/University or +2 Science, Arts/Commerce (or its equivalent examination declared y appropriate authority) and 2 year Diploma in Education (Special Education) a course recognized by Rehabilitation Council of India (RCI) or B.A., B.Sc. (or its equivalent examination declared by appropriate authority) and B.Ed. from a recognized University or B.A., B.Sc. and one year B.Ed. (Special Education) course recognized by Rehabilitation Council of India(RCI). The +2 candidates must have odia as a subject up to class-Vii Nd B.Ed. candidates must have Odia as a subject up to class-X.

12. This Resolution, therefore, is silent if qualification of vocational course of a candidate is to be considered or not while calculating the percentage of marks secured by a candidate at the time of making of the merit list. Similarly, the advertisement issued in pursuance of the Resolution dated 10.1.2011 does not contain any stipulation that the vocational course of a candidate shall not be taken into consideration for selection. The petitioners in view of the past guidelines and procedure which was being followed by the Department filed their candidatures for consideration with the presumption that their marks obtained by them in the vocational course would also be considered by the Department while preparing the selection list. Letter dated 15.2.2011 enclosed with copy of letter dated 14.2.2011 of the Secretary, Council of Higher Secondary Education was circulated by the Additional Secretary to Government after the Resolution was published and advertisement was issued. True that, in the revised calendar circulated vide letter dated 17.1.2011 by the Commissioner-cum-Secretary to Government to all the Collectors-cum-CEO, Zilla Parishads, it was stated that marks secured in Extra Optional, Foundation Course and Ancillary course would be excluded from computation of aggregate of marks. However, this stipulation was not contained in the advertisement issued on 21.1.2011. Besides, it is silent as to how the marks obtained in Vocational Course are to be considered or excluded for computation of aggregate of marks.

13. Under the circumstances, there was no reason for the petitioners to believe that their vocational course qualification would not be considered at the time of selection.

14. It is pertinent that the Department did consider the marks obtained by the petitioners in the vocational course at the time of preparation of provisional list. Since petitioners found their name in the provisional list, there was no reason for them to apprehend that their vocational course marks would not be considered by the Department while preparing the final select list. Before preparation of the final list, Department did not inform the petitioners that in view of the letter dated 14.2.2011, their marks obtained in the vocational course would not be taken into consideration while preparing the select list. Undisputedly, this letter was issued after the applications were submitted by the candidates including the petitioners as the last date of receipt of the application was 10.2.2011. Preliminary scrutiny and compilation of the applications were to be completed by 15.2.2011. Obviously at the time when provisional list was prepared, the Collector was not aware of the letter dated 14.2.2011. Surprisingly, though the Academic Committee of the Council had taken a decision on 11.1.2010 which was duly approved by the General Body of the Council in its meeting held on

13.1.2010 laying down the criteria to be followed for deciding equivalence to different streams of Higher Secondary Examinations, it was not communicated to the Special Secretary to Government, Department of Higher Education, Orissa, Bhubaneswar and furthr Collector-cum-CEO, Zilla Parishad for compliance till after the preliminary scrutiny and compilation of applications Education District Unit wise were completed.

15. Petitioners were called upon to bring their original certificates for verification on 1.3.2011. Their documents were accordingly verified. It is noted that at the time of verification of the documents, petitioners were not intimated of issuance of the letter dated 14.2.2011 by the Secretary, Council of Higher Secondary Education and also that in view of the said letter, their marks obtained in the basic foundation course in Higher Secondary Vocational examination would not be considered while calculating the percentage of marks obtained by them. Experience of the petitioners that they would be finally selected, considering their merit in the provisional list and also on verification of the documents as Sikshya Sahayak was therefore natural.

16. Similar question arose in **Tarun Kanti Sethi Vs. State of Orissa and others 110 (2010) CLT 545**. In the said case petitioner was disengaged from the post of Swechhasevi Sikshya Sahayak by Collector, Bhadrak on the plea that her average percentage of marks had come down below the minimum requirement after verification as the Extra optional marks obtained by her were not to be calculated to prepare the merit list panel in pursuance of G.O letter dated 4.11.2000 and, therefore, she had to be disengaged. While allowing the petition, this Court directed the Department to re-engage the petitioner in the said petition with the observations that advertisement did not reflect that while calculating the total marks, the marks obtained in Extra Optional should be excluded.

17. As discussed above, there was no stipulation in the Resolution dated 10.1.2011 and the advertisement issued in pursuance of the resolution that marks obtained in the vocational course would not be considered for calculation of average percentage of marks for preparing the select list. Letter dated 15.2.2011 makes it very clear that +2 vocational course has to be treated as equivalent to Higher Secondary Examination under Arts and Science stream as minimum qualification for the purpose of engagement of Sikshaya Sahyaks. Therefore, the concerned officials of the Department should have considered +2 vocational course of the petitioners under Arts stream for the purpose of engagement as Sikshya Sahayaks while preparing the select list.

18. Vide letter dated 14.8.2006, Council of Higher Secondary Education had informed all concerned that +2 vocational examination conducted by Council of Higher Secondary Education, Orissa, Bhubaneswar is equivalent to the Higher Secondary Examination conducted by the Council of Higher Secondary Education for Arts, Science and Commerce Stream. Similar letter dated 17.1.2008 was circulated to all the concerned Departments. In accordance with these letters, various Departments of the Government have been considering +2 Vocational Examination conducted by the Higher Secondary Education as equivalent to +2 Arts stream examination conducted by the Council of Higher Secondary Education.

19. **In W.P (C) No.4265 of 2011(Goutam Behera & others Vs. State & others),** a similar question arose for consideration. In this petition, learned Single Judge of this Court observed as below.

> In this view of the matter all the pending Misc. Cases as well as the writ petition is disposed of directing that the cases of the petitioners/candidates, who have completed +2 Vocational course with CT training shall be considered by the Collectors-cum-CEOs, Zilla Parishad as per the instruction given by the Department of School and Mass Education Department and the provisional list of selected candidates already published shall be revised accordingly after considering the cases of the petitioners and other candidates situated similarly. Fresh provisional merit lists of selected candidates shall be published. Since there are many similar matters pending and all the Collectors-cum-CEOs have been directed to revise such provisional list of selected candidates, this order shall apply to the entire process of selection in the State. The interim order passed earlier stands vacated.

20. Facts & circumstances of this case are clearly covered by the aforesaid order of this Court. The concerned officials of the Department ought to have considered +2 vocational course of the petitioners under Arts stream as equivalent to +2 Arts for the purpose of their engagement as Sikshya Sahayak while preparing the final select list.

21. Hence, the petitions are disposed of with the direction to the concerned Collectors-cum-CEOs, Zilla Parishad to consider the claim of the petitioners afresh as per the directives issued by the Council of Higher Education Department from time to time in the light of observations as above and after reconsideration of the claim of the respective petitioners, if need be, revise the final select list already published, preferably within a period of two months from the date of the order. The concerned Collector

shall afford fair opportunity of being heard to the petitioner and other affected candidates, if any, and shall grant liberty to the petitioners to produce relevant documents in support of their relevant cases, if so desired.

Writ petitions disposed of.

2012 (I) ILR- CUT- 516

B.N.MAHAPATRA, J.

MACA NO.247 OF 2010 (Decided on 16.12.2011)

PRATIMA KUMARI DAS & ORS. ………Appellants.

.Vrs.

LAXMI KANTA SABAT & ANR. ………Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – S.168.

Compensation – Husband of the appellant expired at the age of 57 years while working as progressive Assistant in the office of the B.D.O. Chikiti - Tribunal determined compensation by applying 9 multiplier and deducted 50% of the compensation on the ground that his wife is getting family pension and his sons are earning by doing business – Held, deduction of compensation by 50% by the Tribunal is not legally sustainable – Appellants are entitled to get full compensation. (Para 11,12)

Case law Referred to:-

AIR 2009 SC 3104 : (Smt. Sarala Verma & Ors.-V- Delhi Transport Corporation & Anr.)

For Appellants - M/s. P.K.Mishra & P.P.Mishra.
For Respondent - M/s. M.Sinha, P.R.Sinha & P.K.Mahali (For Res.No.2)

B.N. MAHAPATRA, J. This appeal has been filed at the instance of the claimant-appellants against the judgment dated 03.12.2009 passed by the learned District Judge-cum-1st M.A.C.T., Berhampur in M.A.C. No.296 of 2007 for enhancement of compensation.

2. The case of the claimant-appellants in a nutshell is as follows:

On 31.07.2007, the deceased-Tarini Prasad Das while coming to Berhampur from his office at Chikiti in his motorcycle bearing Registration No.OR-07P-2062 on the extreme left side of the road and obeying all the traffic Rules and Regulations, near Golanthara Bridge on N.H. 5, the offending Mohindra Mini Bus bearing Registration No.OR-07D-1131 being driven by its driver in a most rash and negligent manner came in high speed and while overtaking another vehicle dashed against the motorcycle of the deceased. As a result of such accident, the deceased fell down on the spot

and received severe injuries on his person. The deceased was removed to M.K.C.G. Medical College & Hospital, Berhampur by police with the assistance of local people and while undergoing treatment, the deceased succumbed to the injuries. During the relevant time, the deceased was working as a Progressive Assistant in the Office of the B.D.O., Chikiti with the monthly income of Rs.19,239/- and he had two years to retire from service. Further case of the claimant-appellants is that the deceased had a valid driving licence and the offending vehicle was insured with opposite party No.2-Oriental Insurance Company Ltd. Before the Tribunal, the claimants filed a claim petition claiming compensation of Rs.10,00,000/- on account of death of the deceased.

3. Opposite Party No.1, the owner of the offending vehicle contested the case by filing written statement denying the accident to have been caused due to rash and negligent driving by the driver of the offending vehicle. The offending vehicle was validly insured with the opposite party No.2-Insurance Company and the insurance policy was valid from 18.10.2006 to 17.10.2007 covering the date of accident and the driver of the vehicle had also effective valid driving licence at the time of accident. Further case of Opposite Party No.1 is that the offending vehicle had also a valid route permit and therefore, it is the Insurance Company, who is liable to pay the compensation if any, and not Opposite Party No.1.

4. Opposite Party No.2-Insurance Company in its written statement has all together denied the alleged accident, which took place on 31.07.2007 causing death of the deceased. It has also denied the monthly income of the deceased stated that the deceased was more than 60 years of age when he died. Further case of the Opposite Party No.2 is that the driver of the offending vehicle had also no valid driving licence and that the deceased died because of his own fault and wrong act. Therefore, the claimants had no *locus standi* to claim compensation.

5. On the basis of the pleadings of the parties, the learned Tribunal has framed the following issues:

(1) Whether the deceased Tarini Prasad Das died in the accident on account of rash and negligent driving of the vehicle bearing Registration No.OR-07D-1131 (Mohindra and Mohindra Mini Bus) on 31.07.2007 at about 12 Noon?

(2) Whether the claimants are entitled to compensation. If so, from whom and to what extent?

(3) To what other relief the claimants are otherwise entitled?

6. Before the Tribunal, the claimant examined three witnesses and produced as many as nine documents which are marked as Exts. 1 to 9. On the other hand, neither Opposite Party No.1 nor Opposite Party No.2 had examined any witness nor produced any documents in support of their stand.

7. Learned Tribunal taking into consideration both oral and documentary evidence came to the conclusion that the deceased died on 31.07.2007 in the accident on account of rash and negligent driving by the driver of the offending vehicle. The offending vehicle had valid insurance policy and had also valid route permit so also the driver had the valid driving licence at the time of accident. Therefore, the Insurance Company was made liable to pay the compensation to the claimants for death of the deceased. The Tribunal also held that the deceased had a valid driving licence for driving a motorcycle with gear when the accident took place. The gross salary of the deceased was taken at Rs.19,239/- on the basis of the evidence produced and by deducting 1/3rd therefrom towards personal expenses, the net contribution towards his family was determined at Rs.12,826/- per month and Rs. 1,53,912/- per year. On the basis of the entries made in the service book, the Tribunal held that when the deceased died on 31.07.2007 he was 57 years old and if the deceased would have lived till the age of superannuation, i.e., 58 years, he would have retired on 31.07.2008. So he would have contributed a sum of Rs.1,53,912/- for another one year. Thereafter, taking into consideration the amount of pension at Rs.9,000/- per month and deducting 1/3rd towards personal expenses of the deceased and applying multiplier 9 his contribution towards family was worked out at Rs.6,48,000/- Thus, in total, the amount of compensation was worked out to be Rs.8,01,912/-, i.e., [Rs.6,48,000/- + Rs.1,53,912/-]. Thereafter, the learned Tribunal took 50% of the amount of compensation computed by him, i.e., Rs.4,00,956/- as the amount of compensation payable to the claimants on the ground that the wife of the deceased was getting family pension and his sons were earning by doing business in computer and CDs. The Tribunal further held that the claimants were entitled to Rs.5,000/- towards loss of consortium, Rs.5,000/- towards funeral expenses and Rs.2,000/- towards loss of estate. Hence, the Tribunal determined the total compensation at Rs.4,12,956/- and directed the Insurance Company to pay the said amount along with interest at the rate of 6% per annum from the date of filing the claim petition till the date of actual payment. The Tribunal also directed to keep a portion of the compensation amount in fixed deposit in the name of petitioner No.1 with certain conditions.

8. Mr. Pradeep Kumar Mishra, learned counsel appearing for claimant-appellants submitted that at the time of accident, the deceased was aged about 57 years and earning Rs.19,239/- per month by working as a Progressive Assistant in the Office of the B.D.O., Chikiti. The learned Tribunal committed an error by calculating the loss of dependency by taking monthly salary at Rs.19,239/- for one year only and thereafter by taking the pension amount of Rs.9,000/- as monthly income and deducting 1/3rd towards personal expenses and applying multiplier 9 for the purpose of determining the amount of compensation. It was vehemently argued that the learned Tribunal has committed an error by deducting further sum of Rs.4,00,956/-, i.e., 50% of the calculated amount of Rs.8,01,912/- to determine the amount of compensation payable to claimants. The learned Tribunal has taken 6% as the rate of interest, which should have been 9% per annum. Mr. Mishra, further submitted that the learned Tribunal should have determined the amount of compensation taking monthly income at Rs.19,239/- and deducting 1/3rd towards personal expenses and applying 9 multiplier.

9. Per contra, Mr. M. Sinha, learned counsel appearing for respondent No.2-Insurance Company submitted that since after the death of the deceased the legal heirs are getting pension, they are only entitled to get the compensation for one year as the deceased was due to retire after one year of the accident.

10. On the rival contentions advanced by the parties, the only question that falls for consideration by this Court is as to whether the amount of compensation computed by the Tribunal is just and proper.

11. The undisputed facts are that at the time of accident the petitioner was of 57 years. He was working as Progressive Assistant in the Office of the B.D.O., Chikiti and was getting monthly salary of Rs.19,239/-. Relying on the judgment of the Hon'ble Supreme Court in the case of ***Smt. Sarala Verma & Ors. vs. Delhi Transport Corporation & Anr.,*** AIR 2009 SC 3104, the Tribunal applied 9 multiplier. Usually, the amount of compensation is determined taking into consideration the income of the appellant at the time of death and deducting 1/3rd towards personal expenses and applying appropriate multiplier. In the instant case, the learned Tribunal has adopted a different method for determining the amount of compensation. Taking into account the date of birth as entered in the service book (Ext.9), the learned Tribunal held that at the time of accident the deceased was 57 years old. It further held that if the deceased would have lived till attaining the age of superannuation, i.e., 58 years, he would have retired on 31.07.2008. So, the

deceased would have contributed to his family for another one year from his salary income, which was calculated at Rs.1,53,927/- [Rs.19,239/- (—) 1/3rd towards personal expenses x 12 months]. Thereafter, the Tribunal held that if an employee completes 25 years of qualifying service, he would be entitled to full pension, i.e., half of the salary last drawn. Therefore, after retirement, the deceased would have got pension around Rs.9,000/- per month. After deducting 1/3rd from the said amount of compensation towards personal expenses, the contribution towards his family was worked out at Rs.6,000/- per month and accordingly Rs.72,000/- per year. Applying multiplier 9, the learned Tribunal determined the loss of dependency at Rs.6,48,000/-, i.e., [Rs.72,000/- x 9] and adding the first year contribution of Rs.1,53,927/-, it determined the amount of compensation at Rs.8,01,912/-. Thereafter, the learned Tribunal deducted 50% of the amount of compensation from Rs.08,01,912/- and determined the same at Rs.4,00,956/- on the ground that his wife is getting family pension and his sons are earning by doing business of computer and CDs. This further deduction of 50% from the total amount of compensation to determine the amount of compensation payable to claimants is not at all correct and the reason given by the learned Tribunal to do so is not legally sustainable. Once the amount of compensation is determined on the basis of the amount of pension and adopting multiplier method, further deduction of 50% does not stand to any reason/logic. Therefore, once the multiplier method is applied to the income of the deceased and after deducting 1/3rd therefrom towards personal expenses, any further deduction is not permissible. It is not uncommon that now-a-days a retired employee is engaged at a higher salary. It is obvious that a retired employee, who gets pension after retirement always, tries to earn more to match with his salary to maintain his standard of living. In the present case, the learned Tribunal has closed its eyes to this income aspect of a retired employee. On the other hand, for no valid reason, it has deducted 50% of the amount of compensation calculated on the basis of the pension and deducting 1/3rd of pension notionally towards personal expenses of the deceased and applying multiplier 9. However, in the fact situation, this Court accepts the method adopted by the learned Tribunal in computation of the amount of compensation except 50% further deduction made from the total amount of compensation.

12. For the reasons stated above, the appellants are entitled to get compensation of Rs.8,01,912/- besides Rs.12,000/- towards loss of consortium, funeral expenses and loss of estate as awarded by the learned Tribunal. Thus, respondent No.2-Oriental Insurance Company Ltd. is liable to pay the amount of compensation, i.e., of Rs.8,13,912/- (Rs.8,01,912/ + Rs.12,000/-) to the claimant-appellants. So far as interest part is concerned,

considering the date of accident, 6% interest as allowed by the Tribunal appears to be low and the same is fixed at 7.5% per annum.

13. For the reasons stated above, the stand taken by Mr. Sinha is not sustainable in law, hence, not accepted.

14. In view of the above, respondent No.2-Oriental Insurance Company Ltd is directed to deposit the total amount of compensation of Rs.8,13,912/- (Rupees eight lakhs thirteen thousand nine hundred and twelve) only along with interest at the rate of 7.5% per annum from the date of filing of claim petition till the date of actual payment before the Tribunal within a period of eight weeks from today.

15. On deposit of the amount of compensation along with interest as awarded by this Court, the Tribunal shall disburse the same to the claimant-appellants in the manner it has directed in its judgment.

16. With the aforesaid observations and directions, the appeal is disposed of.

Appeal disposed of.

2012 (I) ILR- CUT- 522

B.K.NAYAK, J.

W.P.(C) NO.5029 OF 2011 (Dt.30.08.2011)

CHAKRADHAR PAITAL (DEAD)
AFTER HIM, HIS L.Rs. & ORS. ……..Petitioners.

.Vrs.

GELHI BEWA (DEAD) AFTER
HIM, HIS L.Rs.& ORS. ………Opp.Parties.

A. CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 21, RULE 32(5).

Execution of decree – Whether decree for permanent injunction can be executed byway of recovery of possession of the suit land – Held, since the present Execution Case filed after the explanation to Sub-Rule (5) of Rule 32 of order 21 C.P.C. came into force with effect from 01.07.2002 the decree of prohibitory injunction can be enforced by way of recovery of possession – So the contention of the Counsel for the petitioners that Sub-Rule (5) with its Explanation has no application to a decree for prohibitory injunction fails. (Para 9)

B. LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – S.136.

Decree for perpetual (Prohibitory) injunction is sought to be executed in the manner as provided under Sub-Rule (5) of Rule 32 of order 21 C.P.C – Recovery of possession in this case would be an act which is required to be done so that the parties would be put in the position which they occupied at the time of passing of the decree that continued till the decree was disobeyed by way of encroachment – Such manner of execution does not convert the decree to be one of mandatory injunction – The decree of prohibitory injunction in this case does not lose its character – As per proviso to Article 126 of the Limitation Act, there is no limitation for execution of a decree of perpetual (Prohibitory) injunction – Held, the execution case in question cannot be said to be barred by limitation. (Para 10)

<u>**Case laws Referred to:-**</u>

1.ILR 1879 (I) Cuttack 474 : (Fakira Pradhan-V-Urdhaba Pradhan)
2.2007(I) OLR (SC) 406 : (State Bank of Hyderabad-V-Town Municipal Council)

3.(2006) 13 SCC 295 : (Kamla Devi-V-Kushal Kanwar & Anr.)
4.(2006)(II) CLR 368 : (Sabitri Khuntia & Ors.-V-Fam Avatar Modi)
5.AIR 2009 PUNJAB & HARYANA 188 : (Kapoor Singh-V-Om Prakash)

For Petitioner - M/s. Manas R. Panda, S.K.Swain, S.Samal, S.K.Baral, M.R.Dash, R.Jena.
For Opp.Parties - M/s. Gadadhar Rayatsingh, L.N.Rayatsingh.

B.K.NAYAK, J. Judgment-debtors in Execution Case No.4 of 2009 of the court of the learned Civil Judge (Junior Division) Second Court, Cuttack have filed this writ application challenging the order dated 27.12.2010 passed by the Executing Court rejecting their objection to execution.

2. The decree holder-opposite parties filed T.S. No.6 of 1987 against the judgment-debtors and some of their predecessors-in-interest for permanent injunction. The suit was decreed on 24.06.1995 injuncting permanently the defendants-Judgment-debtors from interfering with the peaceful possession of the decree holders over the suit land. The decree holders filed Execution Case No.4 of 2009 for executing the decree by way of recovery of possession on the assertion that on 06.03.2009, the judgment-debtors interfered with their peaceful possession and forcibly encroached the suit land by dispossessing them. The judgment-debtors filed their objection to the execution petition contending that the decree being one for permanent injunction, it could not be executed by way of recovery of possession of the suit land and that the execution proceeding was barred by limitation. The judgement-debtors also further prayed for stay of execution case on the ground that they had filed Title Appeal No.79 of 1995 challenging the decree in question and that the appeal having been dismissed for default they filed an application under Section 151, C.P.C. for restoration which was pending. The Executing Court rejected all the contentions raised by the Judgment-debtors and refused to stay the execution case by the impugned order.

3. In assailing the impugned order, Mr. M.R. Panda, learned counsel for the petitioners has raised the following contentions :

(i) a decree for perpetual (prohibitory) injunction can be executed only in accordance with the provisions of Order 21, Rule 32 (1) of the C.P.C. and not by way of recovery of possession. Other modes of execution provided in sub-rule (5) of Rule 32 of Order 21 is confined only to mandatory injunction and not to prohibitory injunction and that the Explanation appended to sub-rule (5) by virtue of amendment of

C.P.C. in 2002, has no application to the present case as the decree is of the year 1995;

(ii) the execution case was barred by limitation under Article 135 of the Limitation Act since the execution was in the form of executing a decree of mandatory injunction.

4. Learned counsel for the opposite parties, on the other hand, submits that a decree for perpetual (prohibitory) injunction can be enforced by way of recovery of possession, if it is found that after passing of the decree, the decree holders have been dispossessed by the judgment-debtors, in which event the decree holders can not be forced to file a separate suit. It is also his submission that by virtue of insertion of the Explanation to sub-rule (5) of Rule 32 of Order 21, C.P.C. in 2002, the execution of a decree of prohibitory injunction is no more confined to the modes envisaged in sub-rule (1) of Rule 32 above but can also be executed by other modes as per provision of sub-rule (5), as for instance, where a decree for perpetual injunction has not been obeyed by the judgment-debtors, the executing court can direct for recovery of possession if the same is required for enforcement of the decree. He also contends that execution of a decree of perpetual prohibitory injunction is not subject to any period of limitation as per the proviso to Article 136 of the Limitation Act and that Article 135 of the Limitation Act has no application to such a case.

5. Sub-rule (1) and Sub-rule (5) with its explanation of Rule 32 of Order 21, C.P.C., which are relevant for the purpose are extracted hereunder :

"***32. Decree for specific performance for restitution of conjugal rights, or for an injunction***.-(1) where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to b e done may be done so far as practicable by the

decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

[*Explanation.-For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.]"*

6. It is evident from Sub-rule (1) of Rule 32, as quoted above, that a decree of injunction, be it a mandatory injunction or a prohibitory injunction, may be enforced by detention of the judgment-debtor in the civil prison or by attachment of his property, or by both. No other specific mode of execution of an injunction decree has been provided for in the procedure. However, Sub-rule(5) of Rule 32 of Order 21, C.P.C. provides for enforcement of an injunction decree, which has not been obeyed by the Judgment-debtor, directing the decree-holder or any other person to do the required act that will have effect of enforcement of such decree, at the cost of the Judgment-debtor. This mode of enforcement can be directed by the Court in lieu or in addition to the other modes of enforcement prescribed under sub-rule(1) of Rule 32.

7. Relying on the decision of this Court reported in ***ILR 1979 (I), Cuttack 474; Fakira Pradhan v. Urdhaba Pradhan***, the learned counsel for the petitioners submits that the manner of enforcement of an injunction decree in accordance with Sub-rule(5) of Rule 32 is limited only to a decree for a mandatory injunction and not prohibitory injunction. No doubt, the aforesaid decision supports the contention of the learned counsel for the petitioners. Placing reliance on the decisions of several other High Courts, this Court in the aforesaid case held as under :

"…. Sub-rule (1) of Rule 32 of Order 21, Civil Procedure Code applies both to mandatory as well as prohibitory injunctions. Sub-rule (5) of Rule 32 on the language used applies to mandatory injunctions only. The word 'injunction' under Sub-rule (5) has been qualified by the words 'has not obeyed' and the rule says that in the event of disobedience of the injunction, the Court may, direct that the act required to be done may be done so far as practicable by the decree-holder. This could only be a mandatory direction. A prohibitory direction would be not to do an act. A prohibitory injunction is a negative one restraining the defendant from doing a

particular act. The difference between the two is obvious and Rule 32(5) can only be construed as applying to mandatory injunctions and not to prohibitory injunctions. …..”

8. The aforesaid interpretation of Sub-rule (5) of Rule 32 would not, however, hold good after the incorporation of the Explanation thereto by the Amendment Act of 2002. The Explanation has explicitly made it clear that the expression, ‘the act required to be done’ in Sub-rule(5) covers both prohibitory as well as mandatory injunction. In case, it is held that sub-rule (5) with the Explanation will have application to the present case then the decision in ***Fakira Pradhan*** (supra) will have no application. Learned counsel for the petitioners has submitted that the C.P.C. Amendment Act of 2002 will not apply to the present execution case in which the decree passed in the year 1995 is being sought to be executed. In this context, he has relied upon the decisions of the apex Court, reported in **2007 (I) OLR (SC) 406**; ***State Bank of Hyderabad v. Town Municipal Council*** and ***(2006) 13 SCC 295; Kamla Devi v. Kushal Kanwar and another***. The first decision cited by the learned counsel for the petitioners relates to amendment of pleadings in a suit filed in the year 1998 where the applicability of the proviso appended to Order 6, Rule 17, C.P.C., by the C.P.C. Amendment Act,2002 which debars amendment of pleadings after commencement of trial of the suit unless the party is able to satisfy the Court that in spite of due diligence he could not have pleaded the new facts prior to the commencement of trial. It was held therein that the proviso will have no application to pleadings filed prior to the proviso came into force as Section 16(2) (b) of the 2002 Amendment Act so provides by way of repeal and saving. In the case of ***Kamla Devi*** (supra) it was held that a letters patent appeal which was filed prior to coming into force of the C.P.C. Amendment Act of 2002 that inserted Section 100-A prohibiting such appeal would be maintainable as Section 100-A has no retrospective application.

9. This execution case had been filed in 2009 when the judgment-debtors disobeyed the decree of permanent injunction by encroaching upon the suit land and dispossessing the decree holders. Explanation to Sub-rule (5) of Rule 32 of Order 21, C.P.C. came into force with effect from 01.07.2002 and this execution case having been filed after the Explanation came into force, sub-rule (5) will have application and the decree of prohibitory injunction in question can be enforced by way of recovery of possession where the judgment-debtors have disobeyed the said decree. This Court also in the decision reported in ***(2006) (II) CLR-368; Sabitri Khuntia and others v. Ram Avatar Modi*** has held that a decree for prohibitory injunction can be executed taking recourse to sub-rule(5) of Rule

32 by removing a cowshed raised by the judgment-debtors in violation of the decree. It is also held in the decision reported in ***AIR 2009 PUNJAB AND HARYANA 188; Kapoor Singh v. Om Prakash*** that in the event of violation of a decree for prohibitory injunction by way of dispossession of the decree holder by the judgment-debtors, the executing court has jurisdiction to restore possession in favour of the decree holder, who cannot be compelled to file another suit. The contention of the learned counsel for the petitioners that sub-rule (5) with its Explanation has no application to a decree for prohibitory injunction therefore fails.

10. The other contention raised by the learned counsel for the petitioner is that the execution case must be held to be barred by limitation under Article 135 of the Limitation Act inasmuch as the decree is sought to be executed in a mandatory way by means of recovery of possession. This contention, to my mind, is wholly fallacious. The decree that is being sought to be executed is a decree for perpetual (prohibitory) injunction. It is being sought to be executed in a manner which sub-rule (5) of Rule 32 of Order 21, C.P.C. permits. Recovery of possession in the instant case would be an act which is required to be done so that the parties would be put in the position which they occupied at the time of passing of the decree that continued till the decree was disobeyed by way of encroachment. Such manner of execution does not convert the decree to be one of mandatory injunction. Irrespective of the manner or mode of execution, the decree of prohibitory injunction does not lose its character as such. As per proviso to Article 136 of the Limitation Act, there is no limitation for execution of a decree of perpetual (prohibitory) injunction. Therefore, the execution case in question cannot be said to be barred by limitation.

11. In the light of the aforesaid discussions, I find no infirmity in the impugned order. The writ petition is devoid of merit and is accordingly dismissed. No costs.

Writ petition disposed of.

2012 (I) ILR- CUT- 528

S.K. MISHRA, J.

W.P.(C) NO.31039 OF 2011 (Dt.11.01.2012)

DHRUBA CHARAN PANDA ……...Petitioner.

.Vrs.

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

REPRESENTATION OF THE PEOPLE ACT, 1950 (ACT NO.43 OF 1951) – S.17,18,19, r/w Rule 4 & 6 of O.G.P. Election Rules 1965.

Preparation of electoral rolls – Main condition is that a person can be registered as a voter in any place where he is ordinarily residing but not in a place he owns property or for any other reason.

In this case O.P.6 & 7 applied to include their name in ward No.15 of village Kendupalli basing on a residential certificate issued by the Tahasisldar although they are not residing in that village – Villagers objected by producing electoral rolls of the last election that O.P. 6 & 7 were registered as voters of constituencies other than the village applied for – O.P.3 passed order to include the name of O.P.6 & 7 in the electoral rolls as per the residential certificate issued by the Tahasildar – Order of O.P.3 challenged in this writ petition.

The electoral roll prepared in the last election shall continue to remain unless it is revised on change of facts and it can not put in cold storage – The entire process of preparing electoral roll stands at a much higher footing than preparation of a residential certificate which is prepared under the Miscellaneous Certificate Rules and do not have the constitutional sanction behind it – Held, inclusion of names of O.P.6 & 7 in ward No.15 of village Kendupalli is illegal and their names be deleted from the Electoral Roll in question. (Para 11 to 14)

ORISSA GRAMA PANCHAYATS ELECTION RULES, 1965 – RULE 4 , 6,7, & 8. r/w Section 17, 18 & 19 of the Representation of the People Act, 1950.

An inquiry under the statutory rule shall prevail over the inquiry under the Miscellaneous Certificate Rules.

In the present case name of O.P. 6 & 7 included in the electoral roll in ward No.15 of village Kendupalli basing on a residential certificate issued by the Tahasildar which was prepared under the Miscellaneous Certificate Rules although in fact they were not residing in that village – There was no inquiry as provided under Rule 6 & 7 of the O.G.P. Election Rules 1965 – Held, names of O.P.6 & 7 be deleted from the Electoral Roll in question. (Para 14)

Case laws Referred to: -

1.2006 (3) KLT 496 : (Muhammad Ali -V- State Election Commission)
2.AIR 1985 SC 1233 : (Lakshmi Charan Sen & Ors.-V-A.K.M..Sassan Uzzaman & Ors.)

For Petitioner - M/s. Bibudhendra Dash, P.K.Mohanty & S.Dash.
For Opp.Parties.2 - M/s. Pitamber Acharya & Associates.
For Opp.Parties 6,7 - M/s. S.Pattnaik, L.Mishra, T.Mishra.

S.K.MISHRA,J. The petitioner in this case prays to quash the order passed by the Electoral Registering Officer-Cum-Block Development Officer, Bhapur, District-Nayagarh, opposite party no.4, including the names of Rabindra Kumar Sahoo, opposite party no.6, and Saudamini Sahoo, opposite party no.7, in the voter list of Ward No.15 in respect of village Kendupalli which comes within the area of Salapada Grama Panchayat.

2. Opposite party no.2, i.e. the State Election Commission issued notification on 12.8.2011 which was latter on modified on 13.9.2011 for preparation of ward wise Electoral Rolls of all the Grama Panchayats for the purpose of conducting General Elections to the three tier Panchayati Raj Institutions (hereinafter referred to as "PRI" for brevity). On receipt of notification the Collector, Nayagarh, opposite party no.3, appointed opposite party no.4 to prepare the Electoral Rolls for the Block in question, for General Election, 2012.

During the preparation of ward wise Electoral Rolls, opposite party nos.6 and 7 applied for inclusion of their names in Ward No.15 of Salapada Grama Panchayat in the prescribed Form No.16 of the Orissa Grama Panchayat Election Rules, 1965 (hereinafter referred to as the "Election Rules" for brevity). Opposite party no.6 had attached a residential certificate issued by the Tahasildar to his application in Form No.16, but opposite party

no.7 had attached the copy of the Board Certificate, copy of R.O.R. with respect to Khata No.367/54 of Mouza Kendupalli, rent receipts and a residential certificate to her application. Opposite party no.4 after enquiry rejected their applications and prepared an additional list of newly added voters including the names of some other applicants, whose applications were allowed.

3. Being aggrieved by the said order opposite party nos.6 and 7 filed an application before opposite party no.4 for inclusion of their names in the voter list of Salapada Grama Panchayat. At that stage the petitioner and other villagers made a representation to opposite party no.4 on 11.11.2011 attaching the voter list of village Gohiriapada under Khandapara Block, 2011 and Siariapur of Pipili constituency not to include the names of opposite party nos.6 and 7 in the voter list of Ward No.15 of village Kendupalli of Salapada Grama Panchayat on the ground that neither of the opposite parties were residing in village Kendupalli of Salapada Grama Panchayat, whereas the voter list of Gohiriapada shows that Saudamini is residing at Gohiriapada and her name has found place in the voter lists of Gohiriapada and Siariapur of Pipili. Similarly the name of Rabindra found place in the Electoral Rolls of Gohiriapada under Khandapara Block in 2011 voter list.

4. After receiving such representations of the villagers, opposite party no.4 referred the matter to opposite party no.3 for clarification. Opposite party no.4 also wrote a letter to the Tahasildar, Bhapur for clarification. Opposite party no.3 thereafter directed that the Electoral Rolls should be prepared as per the resident certificate issued by the Tahasildar. Aggrieved by such an order, the petitioner, therefore, come up with this writ petition.

5. Opposite party nos.6 and 7 have filed their counter affidavit. They denied that they are registered voters of Gohiriapada, Ramichheli Grama Panchayat under Khandapada Block. It is specifically stated that they have applied for deletion of their names from the voter list of village Gohiriapada and their applications have been duly acknowledged by the competent authority on 17.10.2011 and their names have been deleted from the voter list of village Gohiriapada coming under Khandapada Block. As far as the inclusion of the names of opposite party nos.6 and 7 appear also in the voter list of Pipili Assembly Constituency, it is submitted that they are no more the voters of the aforesaid Constituency, which is clear from the document, i.e. Form No.17 dated 7.10.2011 duly filed and acknowledged by the competent authority.

6. The undisputed facts of the case are as follows:-

(a) Opposite party nos.6 and 7 were originally registered as voters of village Gohiriapada, Ramichheli Grama Panchayat under Khandapada Block and were also registered as voters of Pipili Assembly Constituency though, in the mean time during the process of the present exercise, they have applied for deletion of their names from those two constituencies.

(b) Opposite party nos.6 and 7 have been issued with certificates showing they are residents of village Kendupalli under Salapada Grama Panchayat.

(c) At the first instance opposite party no.4 having considered the objection raised by the villagers and as well as on the facts found by him, rejected the application filed by the opposite party nos.6 and 7.

(d) Opposite party nos.6 and 7 were included in Electoral Rolls of Kendupalli in spite of certain facts found by opposite party no.4. He found that opposite party nos.6 and 7 are not resident of village Kendupalli, but by virtue of the order passed by opposite party no.3 to prepare the Electoral Rolls as per the resident certificate issued by the Tahasildar, name of those opposite parties were included in the voter list of Kendupalli.

(e) In the Electoral Rolls prepared for Kendupalli, no house number has been allotted to the entries of the names of opposite party nos.6 and 7.

7. In course of hearing learned counsel for the opposite party nos.6 and 7 very emphatically submitted that the writ jurisdiction should not be invoked for interfering with the preparation of Electoral Rolls and in this connection he relies upon the case of ***Muhammad Ali v. State Election Commission***; 2006(3) KLT 496 wherein a Bench of Kerala High refused to interfere with the preparation of Electoral Rolls on the ground that the petitioner has never raised any objection to the draft voter list and the right to be included in an Electoral Roll and to challenge the exclusion are, entirely, rights of the individual and if the individual has not initiated the prescribed statutory procedures, no right will lie in any one else to challenge the same. The observations made by the Kerala High Court are definitely on a different set of facts where no objection, as required, was raised and, therefore, the writ petition was not entertained. In the said case reference has been made to ***Lakshmi Charan Sen and others v. A.K.M. Hassan Uzzaman and others***; AIR 1985 SUPREME COURT 1233, wherein the Hon'ble Supreme

Court has held that; the fact that the revision of Electoral Rolls, either intensive or summary, is undertaken by the Election Commission does not have the effect of putting the electoral roll last published in cold storage. The revision of electoral rolls is a continuous process which has to go on, elections or no elections. The Hon'ble Supreme Court further held that if an electoral roll is not revised, its validity and continued operation remain unaffected, at least in a class of cases. Holding thus, the Hon'ble Supreme Court held that the election should not be vitiated on the ground that some persons have not been included in an electoral roll. The observation of the Hon'ble Supreme Court in that case is not applicable to the present case except to the extent that even when the revision of Electoral Roll is undertaken, it does not have the effect of putting the electoral roll last published in cold storage.

8. Electoral Rolls for the PRI elections are prepared by the State Election Commission as mandated under Article 243K of Constitution of India. The said Article provides that the superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commissioner consisting of a State Election Commissioner to be appointed by the Governor. Thus, the authority to prepare the Electoral rolls for the PRI election flows from the Constitution of India.

9. Rule 6 of the Election Rules provides for the qualification etc. of a voter. Sub-rule (1) of Rule 6 provides that no person shall be eligible to be registered in the electoral roll for more than one ward in any Grama. Sub-rule (2) of Rule 6 provides that any person who is qualified under the provisions of the Representation of the People act, 1950 or the Orissa Grama Panchayats Act, 1964 to be registered as a voter in any Grama, shall be eligible to be registered in the electoral roll of a ward and the name of a person who is disqualified under the provisions of the said Acts shall be liable for removal from the electoral roll of the said ward. Sub-rule (3) provides for the right to claim for inclusion of and to object for inclusion of any person etc., which is not relevant for this case.

Chapter-II of the Orissa Grama Panchayat Act, 1965(hereinafter referred as the "G.P.Act" for brevity) provides for Grama, Grama Sasan, Grama Sabha, etc. Section 4 provides for Constitution and incorporation of Grama Sasan. Sub-section (1) of Section 4 provides that for every Grama there shall be a Grama Sasan which shall be composed of all persons registered by virtue of the Representation of the People Act, 1950 in so much of the electoral roll for any Assembly Constituency for the time being in

force as it relates to the Grama and unless the Election Commission directs otherwise of the roll shall be deemed to be the electoral roll in respect of the Grama. Section 17 of the Representation of People Act, 1950(hereinafter referred to as the "R.P.Act" for brevity) provides that no person shall be entitled to be registered in the electoral roll for more than one constituency. Section 18 of the R.P.Act provides that no person shall be entitled to be registered in the electoral roll for any constituency more than once. Section 19 of the R.P. Act provides for the conditions to be fulfilled for being registered as a voter. The first condition is that the person should not be less than eighteen years of age on the qualifying date. Secondly, he must be an ordinarily resident in a constituency. Only when these two conditions are fulfilled a person is registered as a voter in any constituency.

10. From the foregoing paragraphs, it appears that the opposite party nos.6 and 7 were registered as voters of constituencies other than the village Kendupalli. The revision of the Electoral Rolls for the ensuing PRI election does not put the electoral roll last published in cold storage. In other words, the probative valued of the last electoral roll remains and only when there is a change in the fact situation, the name of a person can be deleted from one electoral roll and can be included in another electoral roll of a different constituency.

11. Learned counsel for the opposite party nos.6 and 7 has very emphatically submitted that under Article 19(1)(d) of the Constitution of India a citizen is free to move throughout the territory of India and, therefore, they can be registered as voters in any place. The contention raised by learned counsel for opposite party nos.6 and 7 is correct, but a person can be registered as a voter in any place where he is ordinarily residing, but not in a place he owns property or for any other reason.

12. Thus, in this view of the matter, it is to be seen whether the opposite party nos.6 and 7 are actually the resident of village Kendupalli. As has been observed by the Supreme Court in the aforesaid case of ***Lakshmi Charan Sen and others*** (supra) the electoral roll prepared earlier is not put in cold storage. It means that the electoral roll was prepared in the last election shall continue to remain unless it is revised on change of facts. It is also seen sub-section (1) of Section 4 of the G.P. Act provides that in so much of the electoral roll for any Assembly Constituency for the time being in force as relates to a Grama, shall be deemed to be the electoral roll in respect of the Grama. Thus, the presumption is that the voters registered in the electoral roll prepared for the Assembly shall be registered as voters of the said Ward corresponding to that portion of the assembly constituency

unless there are changes in the circumstances. For example there may be an additional member, who has attained the age of 18 years may be included in Panchayat voter list. Similarly, in case of a bonafide migration also the electoral roll can be revised, but the same has to be bona fide migration and the applicant should be an "ordinarily resident" of the area in question. In this case, there is singular lack of evidence that the opposite party nos.6 and 7 have actually started residing in village Kendupalli. It is borne out from the observations made by opposite party no.4 in Annexure-13 that there is no trace of Sri Rabindra Kumar Sahoo and his wife staying in village Kendupalli though they started constructing a building for the purpose of Dal and Oil Mill. But it is seen that on the basis of residential certificate issued by the Tahasildar, opposite party no.3 directed inclusion of the names of opposite party nos.6 and 7 in the Electoral Rolls. The Electoral Rolls have been prepared including these two names, but no house number has been given thereto.

13. In such view of the matter, this Court comes to the conclusion that there is no positive evidence to the effect that actually opposite party nos.6 and 7 have migrated to Kendupalli from other constituency.

14. In view of the presumption attached to the electoral roll prepared previously, the onus lies on the opposite party nos.6 and 7 to prove that they are not ordinarily resident of village Gohiriapada, Ramichheli Grama Panchayat under Khandapada Block and they are not the voters of Pipili Assembly Constituency. The only evidence that is coming forward is the resident certificate issued in their favour. The resident certificate issued in their favour has been so issued by taking into consideration the properties recorded in their names. There is no enquiry to the effect that they are actually residents of village Kendupalli. More over, in a case of conflict between two documents like in electoral roll and a resident certificate, the electoral roll shall prevail in the sense that the authority to prepare the same flows from the Constitution of India and the Electoral Rolls are prepared by the enumerator, who move from house to house in the village and prepare the list by interviewing members of each house. Thereafter provisional list is published and objections are invited, then only a final list is prepared. So the entire process of preparing electoral stands at a much higher footing than preparation of a residence certificate, which is prepared under the Miscellaneous Certificate Rules and do not have the constitutional sanction behind it.

In view of the aforesaid discussion, this Court comes to the conclusion that inclusion of names of the opposite party nos.6 and 7 in Ward

No.15 of village Kendupalli is illegal and, therefore, is liable to be set aside and Annexurs-13 and 14 are herby quashed. The name of opposite party nos.6 and 7 be deleted from the Electoral Roll in question. Accordingly, the writ petition is allowed. No costs.

Writ petition allowed.

2012 (I) ILR- CUT- 536

S.K.MISHRA, J.

GCRLA NO. 2 OF 2010 (Decided on 29.07.2011)

STATE OF ORISSA ……Appellant.

.Vrs.

DR. BISWANTH HOTA ……...Respondent.

PREVENTION OF CORRUPTION ACT, 1988 (ACT NO. 49 OF 1988) – S.13 (1) (d).

Mere recovery of tainted money in the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe, conviction can not be sustained – No substantial and compelling reasons to come to the conclusion that the findings arrived at by the learned Special Judge were in any manner perverse or distorted – No need to interfere with the findings recorded by the trail Court. (Para 12)

Case laws Relied on:-

1.AIR 1934 PC 227 : (Sheo Swarup & Ors.-V- King Emperor)
2.(2007) 4 SCC 415 : (Chandrappa & Ors.-V-State of Karnataka).

Case laws Referred to:-

1.AIR 1980 SC 873 : (Hazari lal-V- The State (Delhi Admn.)).
2.(2011) 49 OCR 601 : (State of Kerala & Anr.-V-C.P.Rao)
3.2009 (3) SCC 779 : (C.M. Girish Bahu-V- CBI, Cochin, High Court of Kerala)
4.1979(4) SCC 725 : (Suraj Mal-V- State (Delhi Admn.)).

For Appellant - Mr. Subrat Das, Standing Counsel (Vig.)
For Respondent - M/s. Basudev Pujari, S.K.Pradhan(1) & B.Jali.

S.K.MISHRA, J. This is an appeal against the judgment of acquittal dated 28.11.2000 rendered by the learned Special Judge (Vigilance), Berhampur in G.R. Case No.2 of 1994 (V), whereby the respondent was acquitted of the charges under Sections 13(1)(d) and 7 of the Prevention of Corruption Act, 1988 (hereinafter referred as the “Act” for brevity).

2. Case of the prosecution, in brief, is that on 04.01.1994, complainant Rabi Moharana went to the City Hospital, Berhampur with his wife Sujata for medical check up as she was feeling pain in her stomach. On instruction of the doctor at the outdoor, the complainant took his wife to the Gynaecology Department of the hospital. Upon examination it is alleged that the respondent, who was then Gynaecology Specialist of that hospital, informed the complainant that the baby inside the womb was already dead. He advised to wash the uterus and demanded a sum of Rs.300/- as bribe. In spite of repeated request, the accused did not listen. Thereafter, on the next day i.e. on 05.01.1994, the complainant met the respondent at his residential office. Then the doctor asked the complainant to come on 06.01.1994 with the cash of Rs.300/- and his wife to the hospital for the purpose of washing. On such allegation, the complainant lodged a written report before the Superintendent of Police (Vigilance). He directed the Inspector of Vigilance, Berhampur to take up investigation and detect the case by laying a trap. Thereafter, the Inspector of Vigilance completed all formalities for a trap and on 06.01.1994, in presence of official witnesses a trap was laid and during such trap, the tainted G.C. notes, smeared with phenolphthalein powder were recovered from the possession of the accused. Thereafter, after further investigation, charge-sheet was submitted against the accused.

3. The accused denied the charges leveled against him. He specifically took the plea that while he was in hospital, someone came and kept some money forcibly in his pocket and while he was protesting to such action of that man, two Vigilance Officers came and recovered money from his possession, though in fact he had never taken up any medical check up of the wife of the complainant nor demanded any bribe from him.

4. In order to establish its case, prosecution examined ten witnesses. P.W. 5-Rabi Maharana is the complainant and P.W. 4-Sujata Kumari Behera is his wife. P.W.6-Debendra Kumar Satpathy, a Junior Clerk and P.W. 7-Prafulla Kumar Behera, a Peon of Settlement Office, Berhampur and P.W. 8-Gopinath Deo, then Asst. Settlement Officer, Berhampur are witnesses in whose presence the trap was laid. P.W. 1-Niranjan Padhy and P.W. 2-Pramoda Kumar Padhy happen to be two employees of the City Hospital, who have been examined as formal witnesses to the seizure of O.P.D. Register of female wing, City Hospital. P.W. 3 is a witness, whose hand-wash was taken prior to and after counting the tainted notes. P.W. 9 is the Scientific Officer, who examined the chemical solution. P.W. 10 is the trap laying officer as well as Investigating Officer of the case.

The defence has not examined any witness on its behalf.

5. After taking into consideration the materials available on record, the trial court found that neither the complainant nor his wife has stated that the respondent has examined P.W. 4 or demanded Rs.300/- towards bribe to wash the uterus of P.W. 4. Rather, they have categorically stated that the accused had never demanded money from them. The learned trial judge further took into consideration the fact that P.W. 7 has stated that the complainant went to the Doctor and talked with him and in spite of denial of that doctor, the complainant kept the tainted G.C. notes in the pocket of that doctor. Thus, the learned trial judge came to the conclusion that mere recovery of the tainted G.C. notes from the possession of the respondent and the change in colour in Sodium Carbonate solution to pink will not enhance the case of the prosecution and hence he acquitted the respondent of the charges leveled against him.

6. In assailing the order of acquittal, Mr. Subrat Das, learned Addl. Standing Counsel for the Vigilance Department argued that mere fact that on recovery of the tainted notes from the possession of the respondent shall establish the case of the prosecution. He further argued that when the evidence of the police officer, who laid the trap, was found to be trustworthy, there is no need to seek any corroboration and merely on that score, the judgment impugned is liable to be set aside. In this connection, he relied on the reported case of **Hazari Lal v. The State (Delhi Admn.)**, AIR 1980 SC 873.

7. Learned counsel for the respondent, on the other hand, submitted that mere recovery of the tainted notes from the possession of the respondent in the absence of any evidence regarding demand of bribe is not sufficient to convict the accused. It is further argued that unless there are good and sufficiently cogent reasons, the appellate court in appeal against acquittal should not disturb the findings recorded by the learned trial Judge. In this case, it is submitted that there are no substantial and compelling ground or good and sufficiently cogent reason for disturbing the finding of facts. Hence, it is submitted by the learned counsel for the respondent that the appeal should be dismissed.

8. It is urged at the Bar that P.W. 5 i.e. the complainant, his wife P.W. 4 and over-hearing witness P.W. 7 have not supported the prosecution case. They have been cross-examined by the prosecution after taking leave of the court under section 154 of the Indian Evidence Act, 1872, hence the court considers it necessary to refer to certain portion of evidence of theses witnesses for coming to a just and proper conclusion.

9. P.W. 5 Rabi Maharana, the complainant himself, has stated in his examination-in-chief that when he first complained regarding the demand of bribe, he did not know the name of the respondent and, therefore, he came and enquired from a Peon, who told that the respondent was on duty during day time. After ascertaining the name of the doctor, he went to the Vigilance Office. Then the Vigilance staff took his signature on a plain paper and asked him to leave. This witness was cross-examined by the prosecution and the contents of the F.I.R. lodged by him as well as the statement recorded under section 161 of the Criminal Procedure Code, 1973 were confronted to him. It is no doubt clear that the prosecution has brought out in such cross-examination that this witness has in fact lodged an F.I.R. and has been examined by the Investigating Officer and has implicated the present respondent to have demanded and received bribe of Rs.300/-, but such evidence is not substantial evidence and on the basis of such evidence, conviction cannot be recorded. Furthermore, it is found from the cross-examination of this witness that he has categorically stated that the respondent was not present among the three doctors, who were present in that room when he took his wife to the City Hospital for the first time. He again states that the accused has never demanded any money from him to wash stomach of his wife. He has further stated on oath that he was insisted by the Vigilance Inspector to put the tainted currency notes inside the chest pocket of the doctor, who demanded money. He further adds that after his arrival at City Hospital, the doctor who demanded the money from him was not found. Thereafter, one of the members of the Vigilance staff asked him to keep the tainted currency notes inside the chest pocket of the accused, when he informed the Vigilance staff that this accused had not demanded money, still then the vigilance Inspector insisted to put the tainted currency notes in the chest pocket of the accused and accordingly he did so.

10. P.W. 7 the over-hearing witness has stated that after their arrival at the City Hospital, the doctor was not found in his seat. After sometime, the doctor was found coming from the operation theatre. At that time, the complainant went to the doctor, talked with him and in spite of denial of the doctor, the complainant kept money (G.C. notes) inside the chest pocket of the doctor. Thus, complainant and the most important witnesses, namely the over-hearing witness have not stated regarding the demand of bribe by the respondent, which is a vital ingredient in a case under section 7 of the Act. In a recent decision, the Supreme Court in **State of Kerala and another v. C. P. Rao,** (2011) 49 OCR 601 has quoted the observation made by the Hon'ble Supreme Court in the case of **C.M. Girish Babu v. CBI, Cochin, High Court of Kerala** reported in 2009(3) SCC 779 and **Suraj Mal v. State (Delhi Admn.)** reported in 1979 (4) SCC 725 and held that mere recovery of

tainted money, divorced from the circumstances under which it is paid, is not sufficient to convict the accused, when the substantive evidence in the case is not reliable. The mere recovery by itself cannot prove the charge of the prosecution against the accused. In the absence of any evidence to prove payment of bribe or to show that the accused voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained. The observation made by the Supreme Court in the aforesaid cases is squarely applicable to the case at hand and, therefore, there appears to be no plausible reason for disturbing the findings recorded by the learned Special Judge, Vigilance in this case.

11. Before parting with the case, it is apt to take note of the principles guiding the appeal against acquittal. As back as in 1934, in **Sheo Swarup and others v. King Emperor,** AIR 1934 PC 227, the Privy Council has laid down the principle guiding the appeal against acquittal. It has been laid down in very clear terms that the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial court as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court to disturb a finding of fact arrived at by a Judge who had advantage of seeing the witnesses. This view appears to be still holding force as in **Chandrappa and others v. State of Karnataka**, (2007) 4 SCC 415, the Hon'ble Supreme Court has laid down the following principles:

"(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly,* the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.

12. Thus, on the basis of the aforesaid discussion, this Court comes to the conclusion that there are no substantial and compelling reasons to come to the conclusion that the findings arrived at by the learned Special Judge were in any manner perverse or distorted On the contrary, this Court comes to the conclusion that the trial Judge seems to have an perspicacious view of the matter and has come to a just and proper conclusion. Therefore, there is no need to interfere with the findings recorded by the trial court. Accordingly, it is held that the appeal is without merit and the same is dismissed.

Appeal dismissed.

2012 (I) ILR- CUT- 542

C.R.DASH, J.

CRL.M.C. NO.4294 OF 2011 (Dt.02.02.2012)

BIPIN BIHARI PANDA & ANR. ……..Petitioners

.Vrs.

STATE OF ORISSA ……..Opp.Party.

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

Inherent power U/s. 482 Cr. P.C. – How to exercise – It can be exercised

(i) to give effect to any order under the code of Criminal Procedure, or

(ii) to prevent abuse of the process of any Court , or

(iii) to otherwise secure the ends of justice.

Moreover when the power is plenary, there is requirement of caution and circumspection as discipline is the hallmark of exercise of power by judicial authorities.

In this case petitioners seek to quash the proceeding initiated before the Authorized officer for confiscation of properties – Held, the Authorized officer being not a Court and the proceeding before him being governed by a special statute like the Special Courts Act, 2006 and the Authorized officer being empowered to deal with confiscation of property only and not the offence, power U/s. 482 Cr.P.C. can not be invoked in this case. (Para 17)

Case Laws Referred to:-

1.AIR 1953 SC 325 : (Maqbool Hussain -V- State of Bombay)
2.AIR 1986 SC 328 : (Divisional Forest Officer -V- G.V.Sudhakar Rao)
3.AIR 1981 SC 1068 : (Khatri & Ors.etc.-V- State of Bihar & Ors.)
4.AIR 1984 SC 718 : (A.R. Antulay -V- Ramdas Sriniwas Nayak & Anr.)

For Petitioners - M/s. Bijan Ray, C.Choudhury, B.Mohanty, D.Chhotray, D.R.Das & S.Mohanty.
For Opp.Party - Addl. Standing Counsel (Vigilance).

1. The petitioners are husband and wife. Confiscation proceeding vide C.C. No.1 of 2010 has been initiated against them before the Authorised Officer, Special Court, Bhubaneswar for confiscation of properties alleged to have been procured by them illegally by means of the offence they are alleged to have committed. They have moved this Court under Section 482, Cr.P.C. for issuance of a direction obliging the State and the Authorised Officer to do the things as the Orissa Special Courts Act, 2006 (for short 'the Act') and the Rules made thereunder provides and not to do anything otherwise.

2. Facts relevant for disposal of this petition are as follows :

Sub-Section (1) of Section 13 of the Act provides thus :-

> "**13. Application for confiscation –** (1) Where the State Government, on the basis of *prima-facie* evidence, have reasons to believe that any person, who held high public or political office has committed the offence, the State Government may, whether or not the Special Court has taken cognizance of the offence, authorize the Public Prosecutor for making an application to the authorised officer for confiscation under this Act of the money and other property, which the State Government believe the said person to have procured by means of the offence.
>
> (emphasis supplied)

Sub-Rule (3) of Rule 13 of the Orissa Special Courts Rules, 2007 (for short 'the Rules') provides that the application filed before the Authorised Officer shall be in Form No. III.

3. In the present case, the State Government in Home Department, vide authorization dated 12.01.2009, has authorised the Public Prosecutor concerned for making an application under Section 13(1) of the Act to the Authorised Officer, Bhubaneswar for confiscation of properties / pecuniary resources, as mentioned in the authorization. It is alleged that in derogation of the provisions in Section 13(1) of the Act, Rule 13(3) of the Rules and the aforesaid authorization dated 12.01.2009 issued by the Government in Home Department, the application for confiscation has been made by the I.O. of the case, whom the Public Prosecutor has only identified. Further it is alleged that the application is not in Form No. III, as provided in Sub-Rule (3) of Rule 13 of the Rules.

4. It is strenuously contended by Mr. Bijan Ray, learned Senior Counsel appearing for the petitioners that the action of the Authorised Officer in

accepting the application for confiscation made in contravention of the provisions contained in Section 13(1) of the Act and Rule 13(3) of the Rules amount to abuse of the process of the Court, and the Authorised Officer through direction by this Court should be obliged to follow the mandates of the Act and Rules so far as acceptance of the application for confiscation is concerned. It is further contended that requirement of the Authorised Officer being moved by the Public Prosecutor by making the application himself being a safeguard in favour of the petitioners, it was not proper for the Authorised Officer to overlook such a statutory safeguard.

5. Learned Additional Standing Counsel appearing for the Vigilance Department, with all the vehemence at his command, submits as follows :-

(i) The proceeding before this Court, in the present form, is hit by Sections 17 and 22 of the Act in view of specific bar for any other proceeding there in those Sections.

(ii) The Public Prosecutor having identified the I.O., who has made the application for confiscation under Section 13 of the Act, there is no violation or contravention of Section 13(1) of the Act or Rule 13(3) of the Rules.

(iii) The Public Prosecutor having presented the application before the Authorised Officer, such act of presenting the application is wholesome compliance of Section 13(1) of the Act and Rule 13(3) of the Rules.

(iv) The proceeding of confiscation being a quasi civil proceeding and the Authorised Officer being not a Court, inherent power of this Court under Section 482, Cr.P.C. cannot be exercised in respect of any proceeding before the Authorised Officer.

6. Mr. Bijan Ray, learned Senior Counsel oppugns the contentions raised by learned Addl. Standing Counsel (Vigilance) on the grounds that the bar provided in Section 22 of the Act does not affect the inherent power of the High Court, as this Court has plenary power under Section 482, Cr.P.C. to exercise for the three purposes provided there in the Section. To substantiate his contention, he relied on a catena of decisions of Hon'ble the Supreme Court. He further submits that when the Act has provided to do a certain thing in a certain way, it is the duty of the authority concerned to implement the same as has been provided in the Act and not otherwise.

It is further contended by Mr. Bijan Ray, learned Senior Counsel that from the provisions of the Act and Rules, there is no escape from the conclusion that the Proceeding before the Authorised Officer is a criminal proceeding though the consequence thereof may be civil or quasi civil in nature till the judgment by the Special Court is pronounced.

Elaborating his contention, Mr. Ray, learned Senior Counsel submits that the Authorised Officer competent to take up the confiscation proceeding is a person belonging to the cadre of Orissa Superior Judicial Service (Senior Branch), as provided in Section 2(a) of the Act and Rule 9 of the Rules; the proceeding before the Authorised Officer, according to Rule 10 of the rules, is to be deemed as a judicial proceeding; rule 11 of the Rules provides for application of the provisions of the Code of Criminal Procedure to the proceedings before the Authorised Officer in so far as they are not inconsistent with the provisions of the Act; rule 12 of the Rules provides for application of the provisions of the G.R. & C.O. (Criminal) and (Civil) to the conduct of business so far as the proceeding before the Authorised Officer is concerned. Mr. Ray, learned Senior Counsel taking me through the aforesaid provisions submits that the aforesaid provisions, if read together, would lead to definite conclusion that the proceeding before the Authorised Officer is a judicial proceeding on criminal side and this Court, under Section 482, Cr.P.C., has necessary power to interfere and issue direction.

7. Coming to the question of bar to any suit or other legal proceeding in any Court as raised by learned Additional Standing Counsel, Vigilance Department, the provisions in the Act are, Sub-section (6) of Section 15 and Section 22.

Sub-section (6) of Section 15 provides thus :-

xxx xxx xxx xxx

> "The order of confiscation passed under the Section shall, subject to the order passed in appeal, if any, under Section 17, be final and shall not be called in question in any Court of law."

Section 22 of the Act provides thus :-

> "**22. Bar to other proceedings** – Save as provided in Sections 9 and 17 and notwithstanding anything contained in any other law, no suit or other legal proceedings shall be maintainable in any Court in respect of any money or property or both ordered to be confiscated under Section 15."

8. The aforesaid provisions read in conjunction with Sections 9 and 17 of the Act (which are provisions for appeal against the order of Special Court and the Authorised Officer respectively) would make it clear in unambiguous term that there is bar to suit or any other legal proceeding so far as final order passed in the confiscation proceeding is concerned. It needs further examination and insight whether any proceeding under Section 482, Cr.P.C. to prevent or augment the three purposes provided therein is also barred or there is any kind of fetter so far as exercise of inherent jurisdiction under Section 482, Cr.P.C. by this Court in respect of the proceeding before the Authorised Officer is concerned.

9. Before addressing the questions raised by learned counsels for the parties and the question that has arisen in the preceding paragraph, I feel persuaded to understand the nature of confiscation proceeding and how has this proceeding been viewed so far by the Apex Court. It is not disputed that confiscation is aimed against the goods / properties, which are tangible; it consists in condemnation of the goods / properties, whereas the trial by the Special Court is aimed against the person alleged to have procured the goods / properties by way of corruption. I may refer to a Constitution Bench decision of the Hon'ble Supreme Court in **Maqbool Hussain *vrs.* State of Bombay,** A.I.R. 1953 S.C. 325, in which confiscation aspect of the matter was examined in the context of Article 20 (2) of the Constitution of India. That case dealt with the power of confiscation given to Sea Customs Authorities, and Hon'ble Apex Court opined in paragraph-16 of the judgment that though the Sea Customs Authorities can impose confiscation as one of the penalties, that is more in the nature of proceedings in rem than proceedings in personam, the object being to confiscate the offending goods, which were dealt with contrary to the provisions of the law in respect of which also an option has been given to the owner of the goods to pay in lieu of confiscation, such fine, as the officer thinks fit. (It is worthwhile to mention here that proviso to Sub-section (3) of Section 15 of the Orissa Special Courts Act, 2006 also contains a similar provision). It is further observed in that paragraph (para-16 of the judgment) that Sea Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorised to administer oath to anybody. It was then observed in paragraph-17 of the judgment that such authorities competent to pass order of confiscation are not judicial tribunals. Because of this and similar other provisions, it may be said that Sea Customs Authorities are merely constituted as administrative machineries for the purpose of adjudging confiscation.

10. In **Divisional Forest Officer *vrs.* G.V. Sudhakar Rao,** A.I.R. 1986 S.C. 328, Hon'ble Apex Court was dealing with the power of the Authorised Officer given by the Andhra Pradesh Forest Act to confiscate goods in relation to which a forest offence had been committed. In paragraph-12 of the judgment it was stated that the confiscation proceeding is distinct from trial before Court and the power of the confiscation conferred on Authorised Officer was not dependent upon whether a criminal prosecution for commission of the forest offence has been launched against the offender or not. The Special Court Act in the present case also authorizes the State Government to file application for confiscation before the Authorised Officer, whether or not the Special Court has taken cognizance of the offence.

11. Some other statutes like Customs Act, 1962, Essential Commodities Act, 1955, Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and, of course, Orissa Forest Act, 1972 are central enactments barring the last one. In all the aforesaid enactments, power of confiscation is conferred on administrative officers like Customs Authorities, District Collectors, competent officers appointed by the Central Government or competent forest officials. The scheme of the aforesaid enactments and the judicial decisions referred to supra make it clear that confiscation proceeding is independent of criminal prosecution against the offender; it aims at confiscation of goods only; the proceeding is chaired mostly by administrative officials of the concerned departments or any other official having supervisory powers over the subject matter of the statute like the District Collectors under the scheme of the Essential Commodities Act; and the confiscating authorities are constituted as administrative machineries for the purpose of adjudging confiscation.

12. With the aforesaid in mind, let me now examine the questions raised by learned counsels for the parties so far as status and position of Authorised Officer under the Act is concerned.

Section 2(a) of the Act provides thus :-

"authorised officer" means any serving officer belonging to Orissa Superior Judicial Service (Senior Branch) and who is or has been an Additional Sessions Judge, nominated by the State Government with the concurrence of the High Court for the purpose of section 13.

No doubt, in view of Section 2(a) of the Act, the post of Authorised Officer is to be filled up by a judicial officer belonging to Orissa Superior Judicial Service (Senior Branch), who is or has been an Additional Sessions

Judge. The aforesaid provision alone cannot be held to have clothed the Authorised Officer to be a Court or the proceeding before him to be a judicial proceeding, because the word "Officer" in the Section has been used qua the person holding the office of the Authorised Officer. Further, any office held by a judicial officer cannot be held to be a Court or the proceeding before him to be judicial proceeding on that ground alone, because there are many posts which are filled up by judicial officers who perform purely administrative functions or man quasi judicial tribunals.

13. Proceeding further, it is found from Sections 13, 14 and 15 of the Act that the function of the Authorised Officer is to order confiscation of property in certain cases, as provided in Section 15 of the Act. Provision of Section 13 deals with application for confiscation, as to who has to make the application, as to what should accompany the application for confiscation and as to what such application for confiscation should contain. Section 14 of the Act deals with notice for confiscation and Section 15 provides for certain procedures for confiscation and final order of confiscation. If Sections 13, 14 and 15 are taken into consideration together, there is no room for doubt that all the aforesaid Sections under Chapter – III of the Act provides for procedures and safeguards so far as confiscation proceeding is concerned and, above all, a Senior Judicial Officer being the Authorised Officer, there should be presumption of necessary safeguard against arbitrariness. Further it is made clear by the aforesaid provisions that the proceeding before the Authorised Officer aims at confiscation of goods / properties and there are exhaustive procedures in Chapter-III itself as to the mode of making the application, notice, and the method for reaching at the decisions. Provisions of Section 15 of the Act further makes it clear that the Authorised Officer has to record a finding only on the point as to whether all or any other money or properties in question have been acquired illegally. Such a finding is not final and according to provisions of Section 19 of the Act, in case of acquittal of the accused by the Special Court money or properties or both are to be refunded to the accused in accordance with procedures there in Section 19. Besides the act of reaching the findings for confiscation, the Authorised Officer by virtue of Section 18 of the Act has the administrative power of taking possession of the properties confiscated.

14. My attention is drawn by Mr. Ray to some of the provisions in the Rules to substantiate his contention that the proceeding before the Authorised Officer is a judicial proceeding on the criminal side and the authorized officer acts as a Court. The provisions are Rule 10, 11 and 12 of the Rules made under the Act, which are as follows :-

"**10. Authorized Officer to be public servant -** The authorized officer shall be a public servant within the meaning of Section 21 of the Indian Penal Code and any proveeding before him be deemed to be judicial proceeding for the purpose of Section 228 of the Code.

11. Application of Code of Criminal Procedure - The provisions of the Code of Criminal Procedure, 1973 shall, in so far as they are not inconsistent with the provisions of the Act apply to the proceedings before the authorized officer.

12. Application of provisions of G.R. & C.O. – The provision of G.R. & C.O. (Criminal) and (Civil) shall mutatis mutandis be applicable to the conduct of business of the Court and the authorized officer in respect of the proceedings before them."

According to Rule 10 of the Rules, the Authorised Officer shall be a public servant within the meaning of Section 21 of the Indian Penal Code, and any proceeding before him be deemed to be a judicial proceeding for the purpose of section 228 of the Code. In view of the definition of 'Code', as given in Section 2 (b) of the Act, some confusion arises though the same can be obliterated by conscious reading of Rule 10. If the word 'that' would have been used before the word 'code' or the word 'thereof' would have been used in place of the words "of the code", there would have been no room for any confusion. If the legislature would have intended the Authorized Officer to be a Court, they would not have enacted Rule 10 to bring the Authorised Officer within the meaning of "public servant" under Section 21 of the I.P.C. and they would not have provided for the proceeding before him to be deemed to be a judicial proceeding for the purpose of Section 228 of the I.P.C. Provision of Rule 10, therefore, cannot be read for the benefit of the petitioners, as contended by Mr. Ray, learned Senior Counsel, to hold the Authorised Officer to be a Court and further to hold the proceeding before him to be a judicial proceeding.

Rule 11 of the Rules provides for application of the Code of Criminal Procedure so far as they are not inconsistent with the provision of the Act to the proceedings before the Authorised Officer. Such a provision in the Rules, which may be resorted to by the Authorised Officer for the purpose of the proceeding, though there is little scope for the same does not make the Authorised Officer a Criminal Court, especially when there are self-contained procedures as to making of application, materials to be accompanied with the application, notice and procedure for confiscation in Sections 13, 14 and 15 under Chapter-III of the Act.

Rule 12 of the Rules provides for application of the provisions of the G.R. & C.O. (Civil) and (Criminal) for conduct of business or the proceeding before the Authorised Officer. Such a provision in the Rules makes it obligatory on the part of the Authorised Officer to maintain necessary Registers and conduct business before him in a judicial fashion. But application of the G.R. & C.O. (Civil) and (Criminal) also does not make the Authorised Officer a Court.

15. Rule 14 of the Rules provides that the Indian Evidence Act shall mutatis mutandis be applicable to the proceedings before the Court and the Authorised Officer in recording the evidence. Taking clue from the aforesaid provisions in Rule 14 of the Rules, Mr. Bijan Ray, learned Senior Counsel appearing for the petitioners draws my attention to Section 2 (i) of the Code of Criminal Procedure, which runs as under :-

> "Judicial Proceeding" includes any proceeding in course of which evidence is or may be legally taken on oath.

The aforesaid definition of the "judicial proceeding" as given in the Code of Criminal Procedure is the touchstone to decide the nature of different proceedings occurring in course of investigation, enquiry and trial under the provisions of the Code and runs contrary to the legislative intent as reflected in the Act, which is a Special Statute. As has been discussed supra, had the proceeding before the Authorised Officer been a judicial proceeding and had the Authorised Officer been a Court, no provision under Rule 10 would have been made to deem the proceeding before the Authorised Officer to be a judicial proceeding for the purpose of Section 228 of the Indian Penal Code and it was also not necessary to declare the Authorised Officer as a "public servant" within the meaning of Section 21 of the Indian Penal Code. Provision of Rule 14 is to be read in conjunction with the provisions contained in Sections 13, 14 and 15 of the Act, and it is to be understood that Rule 14 of the Rules provides for an additional safeguard against arbitrariness so far as confiscation proceeding is concerned. It is established law that when any authority, not being a court, is required to give findings affecting rights of the parties, not arbitrarily or in his discretion alone or on his subjective satisfaction but according to the facts and circumstances of the case, as determined upon an enquiry after giving opportunity to the parties to be affected of being heard, and whenever necessary allowing production of evidence in support of their contentions, such authority is held to be acting quasi judicially. In the light of the above principles if the provisions of Chapter-III of the Act coupled with the aforesaid provisions are taken into consideration, there is no escape from the conclusion that the Authorised Officer discharges a quasi judicial function so far as confiscation

of goods / properties is concerned and the proceeding before him is not purely a judicial proceeding and the Authorised Officer is not a Court.

16. When the Authorised Officer is not a court and the proceeding before him is a quasi judicial proceeding, it is to be seen whether power under Section 482, Cr.P.C. can be exercised to issue the direction as sought for.

Inherent power under Section 482, Cr.P.C. can be exercised –

(i) to give effect to any order under the Code of Criminal Procedure, or

(ii) to prevent abuse of the process of any Court, or

(iii) to otherwise secure the ends of justice.

The words “any order under this Code” occurring in Section 482, Cr.P.C. are unambiguous and there is no confusion in my mind to hold that Section 482, Cr.P.C. can be invoked to give effect to any order under the Cr.P.C. or in other words to give effect to any order passed under any provision of the Cr.P.C. By necessary implication, it is to be understood that any order passed under any Special Statute cannot be brought under the mischief of Section 482, if those orders have not been passed in exercise of powers derived from any provisions of the Code. For illustration, we may refer to the order passed by the Authorised Officer under Section 56 of the Orissa Forest Act or the appellate order passed by the District Judge under Section 56 (2-a) thereof.

The words “any court” as occurring in item no.(ii) supra must be read in conjunction with Sections 4 and 6 of the Cr.P.C. Section 4 deals with application of the provisions of the Code for investigation, enquiry and trial of cases involving offence under Indian Penal Code and other laws and Section 6 deals with classes of Criminal Courts under the Code. For the purpose of our discussion, Section 4 of the Cr.P.C. may be extracted for ready reference.

Trial of offence under the Indian Penal Code and other laws –

4. (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, enquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, enquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force

regulating the manner or place of investigating, enquiring into, trying or otherwise dealing with such offences.

It is thus apparent from Section 4 that the provisions of the Code of Criminal Procedure are applicable when an offence under the Indian Penal Code or under any other law is being investigated, enquired into, tried or otherwise dealt with. In the absence of a specific provision made in a Special Statute indicating that offences will have to be investigated, enquired into, tried, and otherwise dealt with according to that Statute, the same will have to be investigated, enquired into, tried, and otherwise dealt with according to the Code of Criminal Procedure. In other words, the Code is the parent statute, which provides for investigation, enquiring into and trial of cases by Criminal Courts of various designations. *(see* **Khatri and others etc. *v.* State of Bihar and others,** *A.I.R. 1981 S.C. 1068* and **A.R. Antulay *v.* Ramdas Sriniwas Nayak and another,** *A.I.R. 1984 S.C. 718).*

It is, therefore, clear that reference to "any court" in Section 482, Cr.P.C. refers to the Court, which enquires into, tries or otherwise deals with the offence under the Indian Penal Code or under any other law in accordance with the provisions and procedures of the Code of Criminal Procedure. The third purpose of "otherwise to secure the ends of justice" cannot be held to be all pervasive to embrace any "order" beyond the code or to embrace any action pending or contemplated before any authority which cannot be brought under the meaning of "any court" as understood supra. Provision of Section 482, Cr.P.C. cannot therefore be invoked in respect of any judicial or quasi judicial proceeding, if those proceedings are beyond the purposes, as understood supra.

17. In the present case, as discussed supra, the confiscation proceeding has nothing to do with the offence. It deals with the confiscation of goods / properties in accordance with the procedures prescribed in Sections 13, 14 and 15 of the Act. I have already held that the proceeding before the Authorised Officer is not a judicial proceeding and the Authorised Officer does not act as a Court. Discipline is the hallmark of exercise of power by judicial authorities. When the power is plenary, there is requirement of caution and circumspection. Such caution and circumspection can be met by any judicial authority in exercise of its power or discretion if attempt is made to fix the location of the jurisdiction invoked to be exercised and the extent of power that can be exercised. In other words, the Court exercising such plenary power is to be careful to find its jurisdiction first and then to set the limit as to how far is too far. If such a test is applied before exercise of jurisdiction or power, there may not be any chance of arbitrariness or abuse. If the aforesaid test is applied in the background of my discussion supra, I

am constrained to hold that the Authorised Officer being not a Court and the proceeding before him being governed by a Special Statute like the Special Courts Act, 2006, and the Authorised Officer being empowered to deal with confiscation of property only and not the offence, power under Section 482, Cr.P.C. cannot be invoked for any purpose specified therein.

18. In view of the above, the CRLMC is dismissed.

Application dismissed.