V. GOPALA GOWDA, CJ & S.K.MISHRA, J.

W.P.(C) NO. 23308 OF 2011 (Dt.24.09.2012)

M/S. MAA VAISHNAVI SPONGE L.T.D. & ANR. …….. Petitioners

.Vrs.

ORISSA MINING CORPORATION & ORS. …….. Opp.Parties

CONTRACT ACT, 1872 – S.74.

Breach of contract - O.P.2 issued letter to petitioner for forfeiture of EMD – Writ Petition to quash the letter and for a direction to refund EMD – Opp.Party not pleaded any loss caused to it for the breach of the contract – Action of the Opp.Party is hit by Articles 14, 19 (i) (g) of the Constitution – Held, impugned letter is quashed – Opp. Party is directed to refund EMD to the petitioner within four weeks, failing which the same shall carry 9% interest from the date of forfeiture till payment. (Para 10)

Case laws Referred to:-

1.AIR 1973 SC 1098 : (Union of India-V- Rampur Distillery & Chemical Co.Ltd.)
2.AIR 1970 SC 1955 : (Maula Bux-V- Union of India)
3.AIR 2001 MAD 271 : (A. Murali & Co.-V- State Trading Corporation of India Ltd.)
4.AIR 1963 SC 1405 : (Fateh Chand-V- Balkishan Dass)
5.AIR 2004 Karnataka 155 : (H. Sowbhagya –V- N.G.E.F. Ltd. & Anr.)

For Petitioners - M/s. Saurjya Kanta Padhi, Anand Das, B.Panigrahi, S.B.Dash.

For Opp.Parties - Mr. Ashok Mohanty, A.K.Panigrahi.

V. GOPALA GOWDA, C.J. The Petitioner has filed this writ petition for issuance of a writ of certiorari quashing the letter dated 23.7.2011 (Annexure-7) issued by O.P. No.2-Manager (S & M) Orissa Mining Corporation Limited (for short 'Corporation') informing the petitioner that the EMD amount of Rs. 35,47,500/- deposited by it with the Corporation has been forfeited for non-compliance of the terms and conditions of the contract and for a direction to the opposite parties to refund the EMD to the

petitioner-company along with interest within a stipulated period, urging various facts and legal contentions.

2. The brief facts are stated for the purpose of appreciating the rival legal contentions urged in this writ petition with a view to find out as to whether the petitioner is entitled for the relief sought for to quash the impugned letter dated 23.7.2011 (Annexure-7).

Petitioner no.1 is a company registered under the provisions of Companies Act, 1956. Opposite Party No.1 is a wholly owned Government of Orissa Undertaking. Opposite Partis 2 & 3 are its officers. The Corporation is an authority under Article 12 of the Constitution of India. Hence it is amenable to the writ jurisdiction of this Court.

3. The petitioner-company is engaged in the business of Mining of Iron Ore Fine in Khandadhar Iron Ore Mines in the district of Sundargarh. It entered into a contract with O.P. No.1 vide Contract No. 150004675 dated 1.4.2011 (Annexure-1) for lifting of 30,000 MT of 'Minus 10mm iron ore fines 60-62% 1MINUS10FE620' at the rate of 2121/- per MT. The period of contract was from 1.4.2011 to 30.6.2011. It is the case of the petitioner that they have complied with all requirements and also deposited the Earnest Money of Rs.35,47,500/- with the opposite party-authorities for the quarter April to June, 2011. Clause-9 of the said agreement refers to Earnest Money Deposit. Clause-11 refers to the Lifting Schedule. According to the said clause, the petitioner has to lift the entire allotted cargo by 30.6.2011. In the event of failure of lifting as per the above schedule, Earnest Money deposited by the buyer will be forfeited.

4. The petitioner-company has been regularly lifting the Iron Ore Fines on day to day basis and its purpose has been reflected in the performance sheet. As it could not lift the materials for several days, it intimated O.P. NO.3-Regional Manager of the Corporation regarding the difficulties faced by it vide letter dated 29.4.2011 (Annexure-2). In the said letter, it was indicated that one weigh bridge is not functioning for the last 15 days and due to naxlite strike the dispatch was suspended for 2 days. Thereafter vide letter dated 25.5.2011 (Annexure-3), the petitioner-company intimated to O.P. NO.3 that lifting work has been further disrupted for 4-5 days due to over continuation dispatch and labour strike. Similarly vide letter dated 10.6.2011 (Annexure-4) the petitioner intimated O.P. No.3 that due to Kanta Labour Strike the dispatch was suspended for 3-4 days and due to non-availability of security guard the dispatch was suspended for 3-4 days. It is further stated that since the quarter April to June coming to an end and the

petitioner could not lift the entire contract quantity, vide letter dated 20.6.2011 (Annexure-5 series), it requested O.P. No.3 for extension of time for lifting of the residual quantity or reduction of quantity indicating the reasons that due to non-functioning of one weigh bridge, naxlite & labour strikes, road closure, over continuation, Raja festival and non-availability of security guard for several days dispatch was suspended. It was further stated that the petitioner vide letter (Annexure-6) indicated that it achieved 87.5% lifting of the entire quantity. The rest quantity as agreed could not be lifted due to Force-Majeure Causes and accordingly it requested for refund of the EMD. In spite of representations given to the O.P.-Corporation, as referred to above indicating difficulties and reasons for non-lifting of the materials, the Corporation forfeited the EMD amount vide impugned letter on the ground of non-compliance of the terms and conditions of the contract. It is further stated that total contract period was 90 days. There were only 59 working days out of which only 15 days were full capacity running days. The petitioner-company has further given to understand that one M/s. Jaiswal Co. Ltd. (JNIL) has lifted only 87% of the entire contract quantity but his EMD has not been forfeited whereas though the petitioner-company has lifted 87.5% of the entire contract quantity, the Corporation has forfeited its EMD amount which is arbitrary and violative of Article 14 of the Constitution of India. It is further stated that there has been no deliberate laches in carrying out the work as per the contract within the schedule time and the reasons for non-performance was beyond the control of the petitioner-company. It is further contended that there has been no breach of contract on its part. It is further contended that forfeiture of the huge EMD amount is against the principle of natural justice. Therefore, it is contended by Mr. Padhi, learned senior counsel placing reliance upon the decision of the apex Court in *Union of India v. Rampur Distillery and Chemical Co. Ltd*., AIR 1973 SC 1098 wherein a three Judges Bench decision in *Maula Bux v. Union of India*, AIR 1970 SC 1955 at paragraphs-4 & 7 has been referred in support of the principle that forfeiture of earnest money under a contract for sale of property does not fall within section 73 of the Contract Act. Reliance is also placed upon another decision of Madras High Court in *A. Murali and Co. v. State Trading Corporation of India Ltd.,* AIR 2001 MAD 271 wherein the High Court referring to the decision of the apex court in Fateh Chand v. Balkishan Dass, AIR 1963 SC 1405 has held that since no loss was either pleaded or proved the EMD was held not liable to be forfeited. Reliance is also placed upon the decision of *Karnataka High Court in H. Sowbhagya v. N.G.E.F. Ltd*. and another, AIR 2004 Karnataka 155 at paragraph-9 wherein after referring to Article 12 of the Constitution of India, section 73 of the Indian Contract Act and Article 14 of the Constitution of India, it has been held that action of the first respondent to forfeit the entire amount of EMD is

not sustainable in law. Therefore, Mr.Pahi, learned senior counsel contended that forfeiture of the huge amount of Rs.35,47,500/- vide Annexure-7 is not only arbitrary but the same is contrary to the decisions of the apex Court and the High Courts (supra) and violative of section 73 of the Indian Contract Act. It is contended that the O.P.-Corporation has neither pleaded nor proved the loss sustained by it and in view of the decision in the case of Maula Bux (supra) and under section 73 of the Indian Contract Act, forfeiture of earnest money deposit is per se illegal.

5. The petition is opposed by the Corporation by filing a detailed counter-affidavit by its Manager (Legal) traversing the various petition averments justifying the impugned order placing reliance upon clauses 9 & 11 of the contract which read as under :

> "9. Earnest Money Deposit.
>
> EMD against the above supply shall be refunded after completion of lifting of entire quantity ore in the stipulated time of lifting time indicated vide clause-11. In the event of failure of lifting as per Lifting Schedule within the stipulated period, the Earnest Money deposited by the buyer shall be forfeited.
>
> 11. Lifting Schedule.
>
> The buyer has to lift the entire allotted cargo by 30.6.2011. In the event of failure of lifting as per the above schedule, Earnest Money deposited by the buyer will be forfeited."

6. Referring to the letter dated 20.6.2011 of the petitioner seeking for extension of time or reduction of quantity, it is contended that the same was not considered as there was no such condition or provision in the contract. It is further stated that the weigh bridge was out of order only for three days, transportation was disrupted for some days due to labour strike, road blockade, Maoist bandh and Raja festival, as contended by the petitioner, are all false and incorrect. It is further contended that the contention of the petitioner that out of 90 calendar days, lifting of ore took place as many as on 59 days is considered to be very good considering the post trend. In reply to the petition averments at paragraph-9, it is contended that the same are not correct. The petitioner has given false information to this Court. It is stated that the petitioner was allotted 30,000 MT $\pm$ 10% 62-60% times of Koira origin vide Contract No. 150004675 dated 1.4.2011 to be lifted by 30.6.2011 whereas the petitioner-company deposited cost of materials for 26,250 MT i.e. 87.5% of the allotted quantity. The quantity of 30,000 MT $\pm$

10%, which is 68.35% of tender quantity. With regard to the averments made at paragraph-10 by the petitioner-company, it is contended that it is clearly specified at sl.no.3 as at Annexure-A to the counter that in the event the highest bidder fails to lift the allotted quantity against the above tender participation within the stipulated time in conformation with the tender norms, the EMD deposited with the Corporation by the buyer will be forfeited. It is contended that the petition is not maintainable. That apart the facts and legal contentions urged by the petitioner are wholly untenable in law and, therefore, has prayed for rejection of the writ petition on that ground.

7. Rejoinder-affidavit has been filed by the petitioner traversing the certain averments regarding the percentage of the quantity lifted by it.

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

(i) Whether forfeiture of the EMD amount pursuant to clauses 9 & 11 of the contract, is legal and valid ?

(ii) What order ?

9. Both the points are answered in favour of the petitioner for the following reasons.

It is an undisputed fact that the petitioner has entered into the contract with the Corporation on 1.4.2011 with certain terms and conditions for lifting of iron ore fines of 30,000 MT $\pm$ 10% 62-60% by 30.6.2011. It is also an undisputed fact that as per clause 9 of the contract, the petitioner deposited EMD of Rs.35,47,500/-. It is alleged that due to non-functioning of one weighbridge, naxalite and labour strikes, road closure, Raja festival and non-availability of security guards etc. for several days, dispatch was suspended and the petitioner could not lift the entire quantity within the stipulated time of 90 days. Therefore, the petitioner-company sought for reduction in the lifting quantity or extension of time period for lifting of the residual quantity which were adverted to in the letters under Annexure-5 series. Despite the said letters, the case of the petitioner was not considered by the Corporation and instead the impugned letter indicating forfeiture of huge EMD amount of Rs.35,47,500/-. Even if the petitioner has lifted 87.5% of the agreed quantity, action of the Corporation issuing the impugned letter intimating forfeiture of huge EMD amount of Rs.35,47,500/- is certainly arbitrary and violative of Article 19(1)(g) of the Constitution of India. Mr. Padhi, learned senior counsel placed reliance on the decision of the apex

Court in Maula Bux (supra). Relevant portions of paragraphs-4 & 7 of the said decision is extracted herein below :

> "4. xx xx the amounts claimed as security for guaranteeing due performance of the contracts xx xx cannot be regarded as earnest money."
>
> "7. xx xx Forfeiture of earnest money under a contract for sale of property – movable or immovable – if the amount is reasonable, does not fall within section 74. xx xx for forfeiture of a reasonable amount paid as earnest money does not amount to the imposition of a penalty. But, if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

10. In view of the clear pronouncement of law by the apex court, forfeiture of huge EMD amount for the alleged violation of clauses 9 & 11 of the contract, is opposed to section 70 of the Indian Contract Act as the petitioner is a buyer and he has purchased the property. Therefore, the forfeiture does not fall within section 70 of the Indian Contract Act. Apart from the said reason, the judgments of the apex court in the cases of Maula Bux and Fateh Chand, Madras High Court in the case of A. Murali & Co. v. State Trading Corporation of India Ltd. and Karnataka High Court in the case of H. Sowbhagya (supra), with all force, are applicable to the fact situation of the case of the petitioner. The opposite party neither pleaded nor urged that any loss was caused to the Corporation due to non-lifting of the agreed quantity of iron ore in terms of the contract. Therefore, the action of the opposite parties in forfeiting the earnest money deposit as per Annexure-7 of the writ petition is hit by Articles 14, 19(1)(g) of the Constitution and also contrary to the decision of the apex court (supra). Therefore, the impugned letter dated 23.7.2011 (Annexure-7) is liable to be quashed. Accordingly the same is quashed. The writ petition is allowed. Rule issued. Direction is given to the Corporation to see that earnest money deposit is refunded to the petitioner within four weeks, failing which the same shall carry interest @ 9% from the date of forfeiture till payment.

Writ petition allowed.

2013 (I) ILR - CUT- 370

V. GOPALA GOWDA, CJ & B.K. MISRA, J.

W.P.(C) NO. 10233 OF 2012 (Dt.03.10.2012)

SWAPAN KUMAR GUPTA .....Petitioner

.Vrs.

DISTRICT & SESSIONS JUDGE, MAYURBHANJ & ORS. ……..Opp.Parties

A. SERVICE LAW - Acceptance of resignation without there being a request for immediate acceptance, dispensing with the notice period, i.e. three months salary period is bad in law hence liable to be quashed.

In this case the petitioner was appointed as a Jr. Typist and joined the post on 7.5.2012 but resigned on 14.5.2012 – He received relieve order on 16.5.2012 and requested the authority on the same day for withdrawal of his resignation before the same is accepted – He also made written applications on 21.5.2012 and 23.5.2012 for withdrawal of his resignation – Request not accepted – Hence this writ petition.

Letter of "resignation" or "voluntary retirement" from service being one and the same Rule 42 of the Orissa Pension Rules 1992 applies to this Case – Held, acceptance of resignation without there being a request for acceptance immediately, dispensing with the notice period, i.e. three moths salary period is bad in law – Acceptance of resignation as well as the relieve order Dt.16.5.2012 are quashed – Direction issued to O.P.1 to reinstate the petitioner in his original post – However petitioner is not entitled to any salary from 16.5.2012 till the date of reinstatement. (Para 15)

B. SERVICE LAW – On resignation of the petitioner O.P.3 appointed in his post as her position was at Sl.No.3 of the select list which is in operation for a period of one year – There is one vacancy in the Cadre of Jr. Typist in the office of O.P.1 – Held, direction issued to O.P.1 to consider the case of O.P.3 as she was duly appointed and working against the post of Jr. Typist and she will be attaining overage after two months.

Case law Relied on:-

AIR 1987 SC 2354 : (Balram Gupta-V- Union of India & Anr.)

Case laws Referred to:-

1.AIR 1978 SC 694 : (Union of India etc.,-V- Gopal Chandra Misra & Ors.)
2.AIR 1989 SC 1083 : (Punjab National Bank-V- P.K.Mittal)
3.AIR 1990 SC 1808 : (M/s. J.K. Cotton Spg. & Wvg. Mills Co. Ltd. Kanpur-V- State of U.P. & Ors.)

For Petitioner - M/s. Niranjan Lenka
For Opp.Parties - M/s. Addl.Govt. Adv.

Misc.Case No.17386/2012

This petition is filed in Court today with prayer for intervention of one Puspanjali Sahu as Opp. Party no.3 to the writ petition. Let this petition be registered as Misc. Case.

2. Considering the submission of the learned counsel for the petitioner and the averments made in the petition, prayer for intervention is allowed. Let necessary amendment be made to the cause title of the brief.

Misc. Case stands dispose of.

W.P.(C) NO.10233 OF 2012

Heard learned counsel for the petitioner, the learned Addl Govt. Advocate for Opp.Party Nos.1 and 2 and learned counsel appearing for intervenor-opp. party no.3.

2. The petitioner who was an employee in the Office of the District & Sessions Judge, Mayurbhanj-Baripada at Jr. Typist as he was selected and recruited for the said post by the selection committee by order dated 27.04.2012 after fulfilling the eligibility criteria. Though he joined the said post on 7.5.2012, he tendered his resignation on 14.5.2012 on the ground of family problem. On 15.5.2012, the Accounts Officer called the petitioner and took an undertaking from him to the effect that he will not claim GIS and salary for the period he rendered services.

3. It is stated that although the petitioner submitted the resignation on 14.5.2012, he was allowed to discharge his duties on 15th and 16th of May, 2012. On 16.5.2012, the petitioner met opp.party No.2 and wanted to withdraw his resignation on the ground that due to his mental imbalance owing to severe suffering from malaria he had tendered his resignation without realizing the consequence. But opp. party no.2 instead of allowing the petitioner to withdraw his resignation on the same day i.e. on 16.5.2012 served upon the relieve order to the effect that he is relieved of his duties in

he afternoon of 16.5.2012 with the direction that he has to hand over charge of his seat and clear all dues of the office before he was relieved.

4. Further, it is sated that on 21.5.2012 the petitioner submitted an application before opp. party no.1 for withdrawal of his resignation specifically mentioning that due to suffering from malaria he had lost his mental stability and under that situation submitted the resignation. Along with the said application, he also produced the medical documents in support of his illness. But, the same was not accepted by opp. party no.1. Again on 23.5.2012, the petitioner submitted another application before opp. party no.1 reiterating his prayer for withdrawal of his resignation. Despite all this, his application for withdrawal of resignation. Despite all this, his application for withdrawal of resignation having not been considered, the petitioner is before this Court seeking for issuance of a writ of mandamus directing the opp. party no.1 to allow the application for withdrawal of his resignation and to quash the relieve order under Annexure-2.

5 Learned Counsel appearing for the petitioner placed reliance upon the judgment of the Supreme Court in the case of **Balram Gupta v. Union of India and another**, AIR 1987 SC 2354.

6. A counter affidavit has been filed on behalf of the opp.parties 1 and 2 Rejoinder affidavit is also filed on behalf of the petitioner.

7. Learned Addl. Government Advocate sought to justify the acceptance of the resignation application and issuance of the relieve order. Further, Opp.Party No.3-Puspanjali Sahu is also before this Court for seeking relief as she has been appointed in place of the petitioner herein after the vacancy caused after resignation submitted by the petitioner.

8. Learned counsel Mr. Asim Amitav Dash appearing on behalf of intervenor-opp. party no.3 submits that in case the writ application is allowed, opp.party no.3 who is aged 38 years and has got employment against the vacancy caused due to resignation of the petitioner will suffer irreparably.

9. Further, learned counsel submits that opp.party no.3 stands at Sl.No.3 of the select list and one post is lying vacant. Therefore, appropriate direction may be given to the appointing authority to appoint her against that post as the select list is operative for one year. Since she has been duly appointed and working satisfactorily in the post she held in the vacancy caused on account of resignation of the petitioner, in case she is dislodged

there may be no scope for her future employment as she has already attained the overage.

10. With reference to the above factual and rival legal contentions, we have carefully perused the resignation application which is dated 14.5.2012 under Annexure-D to the counter affidavit. The reason assigned by the petitioner for resignation is due to unavoidable circumstances of the family matters, as the petitioner was required to devote more time towards his family affairs and to look after his ailing sister because at his early age he has lost his parents and there is none to look after his family. Therefore, under such compelling circumstances the petitioner submitted his resignation and requested the authority to consider and accept the resignation and allow him to retire from the service i.e. from the post of Jr. Typist in the District Judge Copying Department.

11. The Constitution Bench of the apex Court, at paragraph 51 of its judgment in the case of **Union of India etc., vrs. Gopal Chandra Misra and anothers,** AIR 1978 SC 694, dealt with the case of a resignation by a Sitting Judge of Allahabad High Court to become effective from a future date and the majority view reads as under.

> "51. It will be repetition that the general principle regarding resignation is that in the absence of a legal, contractual or constitutional bar, a 'prospective' resignation cam be withdrawn at any time before it becomes effective, and it becomes effective when it operates to terminate the employment or the office-tenure of the resignor. This general rule is equally applicable to Government servants and constitutional functionaries. In the case of a Government servant/or functionary who cannot under the conditions of his service/or office, by his own unilateral act of tendering resignation, give up his service/or office-tenure terminated, when it is accepted by the competent authority. ……."

12. Taking into account the Constitution Bench decision referred to supra, the Supreme Court in its subsequent decision in the case of **Punjab National Bank v. P.K. Mittal.** AIR 1989 SC 1083, held as follows:

> "7. ……. It is common knowledge that a person proposing to resign often wavers in his decision and even in a case where he has taken a firm decision to resign, he may not be ready to go out immediately. In most cases he would need a period of adjustment and hence like to defer the actual date of relief from duties for a few

months for various personal reasons. Equally an employer may like to have time to make some alternative arrangement before relieving the resigning employee …… It gives the employee a period of adjustment and rethinking. It also enables the bank to have some time to arrange its affairs, with the liberty; in an appropriate case, to accept the resignation of an employee even without the requisite notice if he so desires it. The proviso in our opinion should not be interpreted as enabling a bank to thrust a resignation on an employee with effect from a date different from the one on which he can make his resignation effective under the terms of the regulation. ……..

8. The result of the above interpretation is that the employee continued to be in service till the 21st April, 1986 or 30th June, 1986, on which date his services would have come normally to an end in terms of his letter dated 21st. January, 1986. But by that time he had exercised his right to withdraw the resignation. Since the withdrawal letter was written before the resignation became effective, the resignation stands withdrawn, with the result that the respondent continues to be in the service of the Bank. It is true that there is no specific provision in the regulations permitting the employee to withdraw the resignation. It is, however, not necessary that there should be any such specific rule. Until the resignation becomes effective on the terms of the letter read with Regulation 20, it is open to the employee, on general principles to withdraw his letter of resignation……"

13. Further, in a case under the Uttar Pradesh Industrial Disputes Act, while examining the meaning of the terms 'Resign' and 'Retire', the Supreme Court in the case of ***M/s. J.K. Cotton Spg. & Wvg. Mills Company Ltd., Kanpur v. State of U.P. and others,*** AIR 1990 SC 1808, has observed that when an employee voluntarily tenders his resignation it is an act by which he voluntarily gives up his job. Such a situation would be covered by the expression 'voluntary retirement' within the meaning of Section 2(s) of the State Act.

14. In the case at hand, the petitioner is a State Government employee and Rule 42 of the Orissa Pension Rules, 1992 deals with the voluntary retirement on completion of 20 years' qualifying service. For better appreciation, Rule 42 (1) of the said Rules which is relevant for our purpose is extracted-hereunder :

"42. ***Voluntary retirement on completion of 20 years' qualifying service*** – (1) At any time after a Government servant has completed twenty years qualifying service, he may, be giving notice

> of not less than three months in writing to the appointing authority, retire from service."

Sub-rule (2) of Rule 42 provides that the notice of voluntary retirement given under sub-rule (1) shall require acceptance by the appointing authority. This rule shall be applied to submission of resignation letter as 'resignation' or 'voluntary retirement' from service is one and the same, both bring about termination of service of an officer or employee.

15. It appears from the resignation application of the petitioner that there is no request to accept the same forthwith or immediately before expiry of the three months notice period. Termination of employment rules is applicable with three moths notice or payment of three months' salary in lieu of notice. The reliance placed upon the judgment of the Supreme Court referred to supra is also applicable to the fact situation of the present case. Hence, the same has to be accepted. Apart from the resignation application under Annexure-D to the counter affidavit, as could be seen from the narration of facts, as stated above, it is much very clear that under what circumstances petitioner had to submit his resignation application, and immediately after receiving the relieve order, i.e. 16.05.2012 the petitioner requested the authority for withdrawal of his resignation before the same was accepted by the District Judge. The oral request and subsequent applications of the petitioner submitted on 21.5.2012 and 23.5.2012 respectively were not examined. Therefore, applying the principle laid down by the Apex Court in Balram Gupta's case referred to supra we are of the view that acceptance of resignation without there being a request for acceptance immediately dispensing with the notice period, i.e., three moths salary period is bad in law. Hence, the acceptance of resignation is held to be bad in law and is liable to be quashed. Accordingly the relieve order under Annexure-2 dated 16.5.2012 is quashed. We, therefore, direct opp.party no.1 to reinstate the petitioner in his original post within a week from the date of receipt of a certified copy of this order. However, the petitioner is not entitled to any salary for the period from 16.5.2012 till the date of reinstatement.

16. On account of resignation of the petitioner opp.party no.3 has been appointed and working. It is stated at the Bar that she is aged about 38 years. Undisputedly, she is at Sl. No.3 of the select list. It is also stated that there is one vacancy in the cadre of Junior. Typist in the Judgeship of Mayurbhanj-Baripada. Having regard to the fact situation of the case, justice can be done to opp.party no.3 by appointing her against the vacant post as no injustice will be caused to the other candidates as she is at Sl. No.3 in the

select list, which is in operation for a period of one year. Therefore, we further direct opp.party no.1 to consider the case of opp.party no.3 keeping in view the fact that she was duly appointed against the post of Jr. Typist as per the select list and has been working as such and she will be attaining the overage after two moths.

With the aforesaid observation and direction, the writ petition is allowed.

Writ petition allowed.

2013 (I) ILR - CUT- 377

V. GOPALA GOWDA, CJ.

M.A. NO.1225 OF 1999 (Dt.17.08.2012)

BHAGABAN MALLIK ……..Appellant

.Vrs.

KRISHNA KUMAR SHARMA & ANR. ……Respondents

MOTOR VEHICLES ACT, 1988 – S.168.

Just compensation – Claimant a rickshaw-puller – He sustained total loss of vision of the right eye and diminition of the vision of the left eye up to 80% - Tribunal awarded Rs.60,000/- as compensation – While challenging the award the claimant claimed just compensation.

In view of serial No.4, Part-I of Schedule-I of W.C. Act, 1923 disablement of the claimant would be 100% - There being no proof of monthly income his salary must be taken as Rs.3000/- P.M. in view of Second Schedule to Section 163-A of the M.V. Act 1988 which comes to Rs.36,000 P.A. - The claimant being 42 years old at the time of accident, as per the P.M. report, 15 multiplier is applied and compensation comes to Rs.5,40,000/- - He is also entitled Rs.50,000/- towards pain and suffering, Rs.50,000/- for loss of enjoyment of life and happiness on account of loss of eye sights, Rs.15,000/- towards loss of ribs, fracture of clavicle, nourishment, transport & attendant charges, Rs.25,000/- for assistance throughout his life and in toto he is entitled to receive Rs.6,80,000/- as compensation. (Para 7 & 8)

Case laws Referred to:-

1.2011 (4) TAC 28 (SC) : (Kumaresh-V- Divisional Manager, National Insurance Co. Ltd. & Anr.)
2.2011 (3) TAC 374(SC) : (Rudra-V- National Insurance Co. Ltd. & Anr.)
3.2011 (3) TAC 1 (SC) : (Urviben Chiraghbhai Sheth-V- Vijaybhai Shambhubhai Joranputra & Ors.)
4.2011 (3) TAC 7 (SC) : (B. Kothandapani-V-Tamil Nadu State Transport Corpn.Ltd.)
5.2012 (1) TAC 1 (SC) : (Govind Yadav-V- New India Insurance Company Ltd.)
6.2012 (1) TAC 78 (SC) : (C. Mohanraju-V- Divisional Manager, United India Insurance Co. Ltd. & Anr.)
7.AIR 2009 SC 3104 : (Smt. Sarla Verma & Ors.-V- Delhi Transport Corpn.&Anr.)

For Appellant - M/s. A.Das & P.K.Mishra.
For Respondents- M/s. Sidheswar Mallik & P.C.Das,
(for Res.No.2).

V. GOPALA GOWDA, C.J. This appeal has been filed by the claimant against judgment dated 22.9.1999 passed by the Second Motor Accident Claims Tribunal, Cuttack in Misc.Case No.380 of 1989 awarding compensation of Rs.60,000/- with interest @ 9% per annum on the aforesaid sum from the date of filing of the claim petition i.e., 20.4.1989 till payment as the appellant is aggrieved for non-award of just and reasonable compensation, urging various facts and legal contentions.

2. It is not necessary to advert to the facts of the case for the reason that the awarded amount has been satisfied by the insurance company. Therefore, the legal contention urged by the appellant, is required to be examined in this appeal. Hence, the grounds urged in this appeal, are adverted to in this judgment.

3. The first ground urged is that the award has to be made under different heads which has not been done in this case. It is further contended that the compensation awarded is too meager in view of the total loss of vision of the right eye and partial loss of vision of the left eye up to 80% of the appellant. That apart, the other grievous injuries, namely, fracture of two ribs and fracture of right clavicle were not taken into consideration and proper assessment of percentage of disability in terms of Schedule I of the Workmen's Compensation Act, 1923 by the doctor with regard to the injury sustained in a motor accident by the appellant, was not made. Therefore, compensation is required to be enhanced. It is further contended that the Tribunal has not awarded compensation under the heads of pain and suffering loss of amenities, medical expenses, transport allowance, attendant & nutritious food charges and assistance service required to be taken by him throughout his life. Therefore, the claimants have approached this Court with a request to award just and reasonable compensation.

4. Learned counsel for the appellant has placed reliance upon the decisions in Kumaresh v. Divisional Manager, National Insurance Co. Ltd. and another, 2011 (4) TAC 28 (SC); Rudra v. National Insurance Co. Ltd. and another, 2011 (3) TAC 374 (SC); Urviben Chiraghbhai Sheth v. Vijaybhai Shambhubhai Joranputra and others, 2011 (3) TAC 1 (SC); B. Kothandapani v. Tamil Nadu State Transport Corporation Ltd., 2011 (3) TAC 7 (SC); Govind Yadav v. New India Insurance Company Limited, 2012 (1) TAC 1 (SC); and C. Mohanraju v Divisional Manager, United India

Insurance Co. Ltd. and another, 2012 (1) TAC 78 (SC). In the aforesaid decisions taking into consideration the permanent disablement of the claimant having sustained grievous injuries in road traffic accident, the claimants have been awarded substantial compensation. He has referred to Schedule I of the Workmen's Compensation Act, 1923, list of injuries deemed to result in permanent and total disablement, Sl. No.4 thereof states that loss of sight to such an extent as to render the claimant unable to perform any work for which eye sight is essential, can be treated as permanent total disablement which will cause 100% loss of earning capacity. The said entry is applicable to the facts on hand for the reason that the claimant is a rickshaw puller and for his job, eye sight is most important. The deceased has lost total vision of right eye and 80% vision of left eye due to which he is unable to carry out his work. Therefore, the future loss of earning capacity must be taken as 100% and his salary must be taken as Rs.3,000/- in the minimum placing reliance upon the second schedule under section 163-A of the Act, inserted by way of amendment with effect from 14.11.1994. It is further contended that the multiplier should be 15 having regard to the age of the claimant as 42 years.

5. The aforesaid legal contentions urged on behalf of the appellant is serious contested by the learned counsel on behalf of the insurance company contending that the claimant is not entitled for compensation considering his disablement at 100%. The Tribunal has assessed the percentage of disablement of the claimant on the basis of the evidence of the doctor who has stated that the claimant/appellant has total loss of vision of the right eye and diminition of the vision of left eye upto 80%. Further two ribs have been fractured and right clavicle was also fractured. The compensation determined has already been paid. Therefore, his submission is that no case is made out for interference with the impugned judgment and award. Hence prayed for dismissal of the appeal.

6. With reference to the above said rival contentions, following points would arise for consideration.

(i) whether the compensation awarded at Rs.60,000/- consolidated amountwould be just and reasonable having regard to the grievous injuries sustained like loss of vision in right eye and diminition of vision of left eye upto 80% along with other injuries.

(ii) If the petitioner is entitled for compensation, what could be the just and reasonable compensation ?

(iii) What award ?

7. As could be seen from the judgment, the Tribunal has recorded a finding on issue nos. 1 & 2, particularly, issue no.2 that the accident occurred due to rash and negligent driving of the driver of the offending vehicle. Issue nos. 3 & 4, are also answered in favour of the claimant but the appellant is aggrieved of the inadequate compensation awarded in answer to issue nos.3 & 4. Therefore, he has rightly approached this Court by filing the present appeal. Having regard to the undisputed fact that the loss of vision of right eye completely and diminition of the vision of left eye upto 80% certainly makes the claimant permanent total disablement to 100%. Therefore, learned counsel in absence of evaluation of total percentage of disablement by the doctor, has rightly placed reliance upon item-4 of the Schedule I of the W.C. Act and submitted that having regard to the nature of injuries sustained by him, the disablement would be 100%. In addition to compensation on the basis of the loss of total disablement suffered by him, compensation has to be awarded on the following heads; pain and suffering; loss of income during treatment, medial expenses for whole life, loss of future earnings, loss of amenities, enjoyment of life, conveyance charges and food & nourishment charges. Reliance placed by learned counsel for the appellant upon aforesaid decision, with all force, are applicable to the fact situation. Therefore, it could be just and proper for this Court to award compensation in the following terms.

8. Having regard to the nature of work which the deceased had been doing, i.e. as a rickshaw puller and keeping in view the provision specified in the second schedule to section 163-A of the Act, Rs.3,000/- is to be taken as monthly income of the claimant, which would be Rs.36,000/- per year. Applying 15 multiplier as per the decision in the case of Smt. Sarla Verma and others v. Delhi Transport Corporation and another, AIR 2009 SC 3104, the total amount would be not less than Rs.5,40,000/- to which the amount under the heads; Plain and suffering Rs.50,000/-, loss of enjoyment of life and happiness on account of loss of eye sights Rs.50,000/-, loss of ribs fracture of clavicle, nourishment, transport & attendentant charges Rs.15,000/-, assistance throughout his life Rs.25,000/- are to be added. Therefore, in total the compensation would be Rs.6,80,000/-. The aforesaid amount is awarded by way of enhancement, relying on the judgments of the apex Court (supra) and catena of other decisions which, I feel is very nominal taking into consideration the fact that the accident had taken place in the year 1989. The Insurance Company is directed either to deposit or to pay the enhanced compensation to the claimants.

9. Deducting Rs.60,000/- already awarded, the remaining amount of Rs.6,20,000/- would carry interest at the rate of 6% from the date of claim petition till the date of payment/deposit. Out of the aforesaid amount

awarded, 70% with proportionate interest shall be deposited in the name of the appellant in any one of the nationalized bank of the choice of his choice for a period of three years. The balance amount with proportionate interest shall be paid to him. The entire exercise shall be completed within four weeks from the date of receipt of this judgment. The interest that may be earned on the Fixed Deposits, as directed above, shall be permitted to be withdrawn by the claimant for being utilized for his family expenses. If the claimant requires the amount ordered to be kept in fixed deposit or any portion thereof for the family necessity or any other developmental purpose of the family, he is at liberty to file application before the Tribunal which shall be considered and disposed of as expeditiously as possible. The appeal is accordingly allowed on the aforesaid terms.

Appeal allowed.

2013 (I) ILR - CUT- 382

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

W.P.(C) NO.3127 OF 2012 (Dt.12.03.2012)

M/S. INDUSIND BANK LTD. …….Petitioner

.Vrs.

PRINCIPAL SECY. TO GOVT.
FINANCE DEPARTMENT GOVT.
OF ODISHA & ORS. . …… Opp.Parties

ORISSA VALUE ADDED TAX ACT, 2004 – S.2 (12).

Bank makes auction sale of vehicles etc. and realizes sale proceeds from the loan defaulters – The transaction between the Bank as a "seller" and the auction purchaser as the "buyer" comes under the definition of "dealer" U/s.2 (12) of the Act – Held, Bank selling hypothecated vehicles etc. comes under the definition of "dealer" and is liable to pay value added tax. (Para 6)

Editors note – SLP No.10125/2012 preferred against the order Dt.12.03.2012 before the Apex Court is withdrawn vide Order Dt.29.03.2012.

For Petitioner - M/s. Sidheswar Mohanty
For Opp.Parties - None

Heard Mr. Manas Mohapatra, learned Sr. Counsel for the petitioner-Bank and Mr. R.P. Kar, learned Standing Counsel for the Revenue.

2. This writ petition has been filed by the petitioner-M/s. IndusInd Bank Ltd. challenging the order of assessment dated 11.01.2012 passed by the Deputy Commissioner of Sales Tax-O.P. No.3 under Section 44 of the Orissa VAT Act,2004.

3. The case of the petitioner is that O.P. No.3 issued a letter dated 15.11.2011 asking the petitioner-Bank to furnish information regarding the receipt of sale proceeds on account of disposal of repossessed property like old vehicle, machinery and equipments. Petitioner-Bank furnished the statements in respect to the disposal of such goods. Thereafter, O.P.No.3 issued notice U/s.44(1) of the OVAT Act, 2004 commanding to assess the petitioner-bank as unregistered dealer and also directed to produce the

documents in support of disposal of old commercial vehicles, construction equipments, two wheelers. On receipt of the said notice petitioner submitted an objection disputing the validity of notice issued U/s.44 (1) of the Act stating that the petitioner being a banker is no way liable to be dealer under the VAT Act nor the transactions conducted by the bank can be termed as "Sate". However, the O.P.No.3 proceeded against the petitioner and raised the demand of VAT along with penalty vide impugned demand dated 11.01.2012 (Annexure-4).

4. Learned Sr. Counsel for the petitioner placing reliance upon the definition of "Sale" under Section 2(45) of the OVAT Act, urged that transfer of property in goods by way of mortgage, hypothecation, charge or pledge, by one person to another in course of trade or business cannot be treated as "sale" and therefore, the petitioner is not liable to pay the VAT for the said purpose.

5. The aforesaid contention on behalf of the petitioner cannot be accepted in view of the clear definition clauses under Section 2(12), 2(31), & 2(35) of the Act, which reads thus :

> "2 (12), "DEALER" means any person who carries on the business of buying selling supplying or distributing goods, executing works contract, delivering any goods on hire-purchase or any system of payment by instalments, transferring the right to use any goods or supplying by way of or as part of any service, any goods directly or otherwise, whether for cash or for deferred payment, or for commission, remuneration or other valuable consideration as includes"……
>
> 2(31) "PERSON" means any individual or association or body of individuals and includes a Hindu undivided Family a firm, a company whether incorporated or not a society including a co-operative society, a trust, a club, an institution, an agency a corporation, other artificial or legal person, local authority, a department of Government, a Government enterprise and a financial institution or Bank:
>
> 2(33) "PRESCRIBED" means prescribed by rules;'
>
> 2(35) " PROPERTY" means any property, whether real or personal, movable or immovable, tangible or intangible, corporal or in corporal, and includes a right or interest of any kind, but does not include money."

6. In the case on hand the petitioner-Bank is engaged in usual Banking transactions as well as extending loan facility to different customers for financing purchase of commercial vehicles, construction equipments & two wheelers. For recovering the outstanding loan dues the Bank effects auction sale of vehicles/construction equipment/two wheelers/machineries and finally the bank realizes the sale proceeds arising out of auction sale on account of the loan defaulters wherein the transactions between the Bank as a "seller" and the auction purchaser as the "buyer" is coming under the definition of "dealer". Further, from the conjoint reading of the aforesaid definition clauses and entire definition clause of "SALE" under Section 2 (45), it is clear that the petitioner-Bank is coming within the purview of dealer as Bank is included in the definition of person under Section 2(31) of the Act. Therefore, the contention urged on behalf of the petitioner, that the provision of the OVAT Act is not attracted, cannot be accepted. Further the reliance placed by the learned counsel for the petitioner upon the case of Federal Bank Ltd. & Ors. Vs. State of Kerala & Ors. (Appeal Civil No.6459 of 2003) decided on 21.3.2007 has no application to the fact situation of the present case.

7. Considering the entire fact situation of the case the writ petition is dismissed. Petitioner is at liberty to avail the alternative remedy by filing an appeal before the appellate authority.

Writ petition dismissed.

2013 (I) ILR - CUT- 385

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

W.P.(C) NO. 7693 OF 2011 (Dt.12.12.2012)

ALL INDIA NETWORKS WELFARE TRUST & ORS. .....Petitioners

.Vrs.

SUPERINTENDENT OF POLICE & ORS. .....Opp.Parties

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

Writ petition – Maintainability – Large number of gullible investors deposited their hard-earned money with O.P.7-company since the company invited deposits of Rs.10,000/- and its multiple up to Rs.2.5 lakhs – O.P.7-Company failed to send any benefit to the depositors and did not comply with its promises – Investors belong to lower section of the society – No indivisual can be able to sue the mighty company in case of any injury caused to him – High Court in its writ jurisdiction can exercise power to meet unprecedented extra ordinary situation – Held, writ petition is maintainable.

(Para 41,42)

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

Writ petition – prayer made to handover investigation to C.B.I – Thousands of public deposited their life savings with O.P.7-company through O.P.2 to 6-Banks – Depositors tempted for investment due to assurance of high return – O.P.7 promoted money circulation scheme under the guise of sale of its products – O.P.7 did not comply with its promises and failed to provide any benefit to the depositors – Depositors filed F.I.R. and police defreezed the deposits made with the Banks U/s.102 Cr.P.C. – Scam involving lakhs of depositors all over the country – Status report submitted by the Crime Branch shows that O.P.7- company is indulging money circulation – Violation of legal/fundamental right – Investigation by Odisha Crime Branch will not be effective all over the country – This Court cannot close its eyes to the injustice alleged to have been perpetrated – Held, direction issued that the investigation be handed over to the C.B.I. and the Odisha Crime Branch shall assist the C.B.I. in the investigation.

(Para 48,50)

Case laws Referred to:-

1.AIR 1982 SC 149 : (S.P. Gupta-V- Union of India)
2.(2010)6 SCC 33 : (B.P. Singhal-V- Union of India)
3.AIR 1976 SC 1455 : (Mumbai Kamgar Sabha-V- Abdulbhai Faizullabhai)
4.AIR 1987 SC 1023 : (Reserve Bank of India-V- Peerless General Finance & Investment Co. Ltd.)
5.(2004)3 SCC 553 : (ABL International Ltd. & Anr.-V- Export Credit Guarantee Corporation of India & Ors.)
6.2011 SCW 1799 : (K.K.Baskaran-V-State of Tamilnadu)
7.(2003)7 SCC 546 : (Guruvayoor Devasom Managing Committee & Anr.- V- K.C.Rajan & Ors.).
8.AIR 1983 SC 75 : (National Textile Workers' Union –V- P.R.Ramakrishnan & Ors.)
9.AIR 1976 SC 1152 :(Nawabganj Sugar Mills Co.Ltd. & Ors.-V-Union of India &Ors.)
10.(2011)5 SCC 697 : (Union of India-V-Tantia Construction Pvt. Ltd.)
11.(2009)1 SCC 441 : (Nirmal Singh Kahlon-V- State of Punjab & Ors.)
12.AIR 1996 Cal. 181 : (State of West Bengal-V- Union of India)
13.(2008)12 SCC 500 : (Kisan Sakhari Chini Mills-V- Vardan Linkers)
14.(2008)8 SCC 172 : (Pimpri Chinchwad Municipal Corpn. & Ors.-V- Gayatri Construction Company & Anr.)
15.(2006)7 SCC 654 : (FCI-V- Harnesh Chand)
16.AIR 2003 SC 3032 : (T,.K. Tangarajan-V- Govt. of Tamil Nadu & Ors.).
17.AIR 1987 SC 294 : (Shivajirao Nilangekar Patil-V-Dr. Mahesh Gosavi & Ors.).

For Petitioners - Mr. Bijan Ray, Sr.Advocate,
M/s. B.P.Nayak, B.Mohanty,S.Mohanty, B.Moharana (for Petitioner Nos.1 & 2)
M/s. Sidharth Prasad Mishra, B.K.Nayak, D.P.Patra, R.Rath, D.Mishra & D.Behera.
M/s. A.K.Behera, S.K.Mahanta,K.P.Mishra, S.Mohapatra, T.P.Tripathy,
M/s. K.M.Mishra, R.K.Nanda, S.Chakrabarty & T.Sinha, (for intervenor-petitioners)

For Opp.Parties - Mr. Debasis Panda, Addl. Govt. Advocate (for O.P.No.1)
M/s. N.K.Dash, S.K.Barik (for O.P.No.2).

B.N. MAHAPATRA, J. This Writ Petition has been filed with a prayer to protect the deposits, investments made by members of the Petitioner-Trust and similarly situated other investors and to issue a writ of mandamus and/or any other appropriate writ/order/direction to opposite parties 2 to 7-Banks to give refund and recovery of the investments/deposits made by the public investors on due production of their receipts.

2. Petitioners' case in a nutshell is that petitioner No.1 in the writ petition is a registered Trust of duped and gullible thousands and thousands of investors of Karnataka, Tamil Nadu and Andhra Pradesh, who have invested their money with M/s Fine Indisales Pvt. Ltd. through opposite party-Banks, i.e., ICICI Bank, Axis Bank, HDFC Bank, YES Bank and IDBI Bank (opposite parties 2 to 6). Petitioner No.2 is the President of petitioner No.1-Trust. Members of the Trust, who are the investors, are poor people of the society working as rickshaw pullers, taxi drivers, shopkeepers, Class-IV employees of private companies, hotels and other establishments, tea-shop owners, cabin holders etc., who invested their life savings with a hope of getting effective and speedy return from the Company. The deposits made by these umpteen number of investors with opposite party Nos. 2 to 6-Banks were defreezed by the statutory orders under Section 102 of the Code of Criminal Procedure by the Crimes Department of the State of Odisha and presently the investments/deposits of these investors are in the lawful custody of learned S.D.J.M., Balasore. Opposite party No.7-M/s Fine Indisales Pvt. Ltd. (for short 'the Company'), a Company registered under the Companies Act, promoted a multi-level marketing business and floated the Scheme/Project on the Website without obtaining any permission from the Reserve Bank of India. The said Company is a non-banking financial Company. The Company represented on the Website that its registered office is in Uttar Pradesh and Corporate office in Mumbai. Members of the Trust being enamored by the brochures and prospectus published on the website applied for distributorship/ membership of the said Company and each one deposited/subscribed Rs.10,000/- to Rs.2,50,000/- for purchase of the purported product as published on the website in opposite parties 2 to 6-Banks in the name of opposite party No.7-Company. The deposits were multiples of Rs.10,000/-, Rs.20,000/-, Rs.40,000/-, Rs.50,000/-, Rs.80,000/- and Rs.1,70,000/-. Opposite party No.7-Company failed to comply with the terms of the Scheme and contract till the date of filing of writ petition while accepting such deposit. The Company also failed to send any product or benefits to its members and other similarly situated investors/depositors. The Company also entered into an agreement of distributorship with the members/distributors/investors. The amount deposited and/or invested by the Trust and its members is more than Rs.100.00 crores and the petitioners understand which they verily believe to be true that all over India such deposits are more than thousands of crores. Agreement of the said Company amounts to a scam involving lakhs of gullible depositors all over India. The Reserve Bank of India on or about 01.08.2009 issued Circular to all scheduled Commercial Banks that opposite party No.7 Company and six other Companies are not non-Banking financial organization as defined under Section 45 of the Reserve Bank of India Act and none of these

Companies had been issued with a certificate to conduct non-banking financial activity.

3. One Niranjan Sahoo of Balasore district of the State of Odisha being aggrieved by the malicious and fraudulent conduct of the said Company lodged an F.I.R. on 17.07.2009 in Sahadev Khunta Police Station in the district of Balasore, which has been registered as P.S. Case No.118 dated 17.07.2009 under Sections 406/420/468/471/34, IPC and Sections 4, 5, and 6 of Prize Chits and Money Circulation Scheme (Banning) Act, 1978 (for short 'the Act, 1978'), which has been turned to CBPS Case No.17 of 2009. The matter was investigated by the Crime Branch of the State, Criminal Investigation Department, which unearthed a magnitude of total loss and money squandered away by the said Company. The Criminal Investigation Department freezed the accounts of opposite party No.7-Company. So far investments/deposits by the investors, all the concerned Banks hold such deposits as trustees, with the investors as beneficiaries. Insofar as such fiduciary relationship is concerned, the said Trustee-Bank remains liable to refund the money on appropriate direction by this Court. Despite execution of the agreement and fabulous deposits by thousands and thousands of investors, the said opposite party No.7-Company wilfully failed to comply with the requirements of the assurances and stipulations of the contract within last 2 ½ years. Under such strange circumstances, there was panic among the investors and they expressed and demanded refund of their life savings from the said Company. As the Company purported to act online through its website, the investors demanded refund of their money as per the agreement of the contract on the website of the said Company. In contravention of all assurances, representations and stipulations contained in the agreement, the Company on its website published that refund option has been suspended awaiting results from the appropriate Company Court and the matter pending before this Court and kept watching this website for latest updates. Hence, the Writ Petition.

4. Mr.Bijan Ray, learned Senior Advocate appearing for the petitioners submitted that the refund policy as incorporated in the agreement stipulates 100% refund of money and when the refund has been suspended the petitioners and the investors in their anxiety to obtain refund of their savings approached this Court for getting refund of their money. The petitioners came to understand that one Writ Petition bearing W.P.(Crl.) No.267 of 2010 has been filed by opposite party No.7 Company for quashing of F.I.R. lodged against the said opposite party No.7. Therefore, on advice of the Counsel the petitioners filed Misc. Case No.29 of 2011 to be impleaded as parties to the said Writ Petition and also filed an application for protection of their

deposits. This Court by order dated 04.02.2011, while holding that such applications are in no manner connected with the issue relating to quashing of F.I.R. directed the petitioners to initiate appropriate legal action before the appropriate Court if they so advised. Being advised, petitioners filed application under Section 457 of the Code of Criminal Procedure before the learned S.D.J.M., Balasore and further invoked the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India for appropriate order as advised/instructed/directed by this Court in order dated 04.02.2011 passed in Misc. Case Nos.29 and 30 of 2011 arising out of W.P.(Crl.) No.267 of 2010.

5. Mr. Ray submitted that Section 58-A of the Companies Act, 1956 prescribes that only the Central Government in consultation with the Reserve Bank of India, may prescribe the limits up to which, under what conditions and subject to which, deposits may be invited or accepted by a Company from the public or from its member. From the Circular of Reserve Bank of India, it is evident that neither the Central Government nor the Reserve Bank of India has prescribed any limit in the case relating to the advertisement and invitation on website by opposite party No.7-Company inviting such deposits. Thus, the invitation by opposite party No.7-Company and acceptance of investments from the gullible public are not only illegal or irregular but also violative of the statutory provisions contained under section 58-A of the Companies Act. Opposite Party No.7-Company violates mandatory provisions of the Act, 1978. The State Crimes Department has lodged an F.I.R. and has been investigating into the offences committed by opposite party No. 7-Company. Thousands of investors are deprived of their hard-earned money by the fraudulent representations of opposite party No.7-Company.

6. It is submitted that the company has fraudulently transferred money deposited by the gullible investors to the business organization owned by the Directors and relations. No affidavit has been filed by any of the opposite party-Companies, the bankers and the Prosecution disclosing the amounts deposited, amounts withdrawn/transferred and the remaining amount that was freezed.

Placing reliance upon the judgment of the Hon'ble Supreme Court in the cases of *S.P. Gupta vs. Union of India,* AIR 1982 SC 149 *and B.P.Singhal vs. Union of India,* (2010) 6 SCC 33, Mr. Ray submitted that where there is public injury the Court can exercise its jurisdiction to dispense justice. Specific class or group of investors having sufficient interest can certainly maintain an action challenging the legality of the scheme. Placing

reliance upon the decision of the Hon'ble Supreme Court in the case of *Mumbai Kamgar Sabha vs. Abdulbhai Faizullabhai,* AIR 1976 SC 1455, Mr. Ray submitted that the writ petition is maintainable. Further referring to *State v. Union of India,* AIR 1996 Calcutta 181; *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.,* AIR 1987 SC 1023*;* and *Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India*, AIR 1992 SC 1033, it was submitted that this Court should save small investors. It is submitted that this Court should pass necessary order directing disbursement of Rs.194 crores seized and freezed by the local police in exercise of power under Section 102, Cr.P.C. The depositors have right to get refund of the entire amount invested. Opposite party No.7 has admitted such right and declared on the website as late as on 30.01.2011 that refund has been deferred due to pendency of litigation. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *ABL International Ltd. & Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors.,* (2004) 3 SCC 553*,* Mr. Ray submitted that disputed facts are not absolute bar. Merely one party disputing a fact, don't make it disputed question.

7. Mr. Ray submitted that issue in the writ petition is for issuance of a direction for refund of the amounts invested by the investors and no Court has passed any order relating to the same. W.P.(C) No.1443 of 2009 was filed on 27.07.2009 before the High Court at Mumbai assailing the F.I.R. and freezing of Bank accounts dated 17.07.2009. None of the investors was party. The said writ petition was withdrawn. Criminal Misc. Writ Petition No.16901 of 2009 filed by opposite party No.7 before the Allahabad High Court has been rejected vide order dated 19.08.2009. Thereafter, opposite party No.7 initiated a fraudulent Company Application No.16 of 2009 on 29.10.2009. The petition under Sections 391 and 494 was filed for getting approval of Scheme impleading four shareholders and thirteen unsecured creditors. None of the investors is shown as unsecured creditor. On 26.03.2010 judgment was passed in Company Petition No.3 of 2010 approving the scheme. It is submitted that said judgment has been fraudulently obtained. The said judgment is neither binding on the petitioners nor on any one of 2,15,000 investors; thus the matters in issue in this writ petition and determination thereof will not conflict to any decision of any Court. Referring to the Auditor's report and income tax assessment orders and enquiry and investigation by the Reserve Bank of India, it was submitted that the company is fraud. Referring to the report of the Crime Branch, Mr. Ray submitted that the company had furnished false address. The Investigating Agency stated that there is reliable indication that major part of the money has been used for funding questionable purposes. Further placing reliance upon the judgment of the Hon'ble Supreme Court in the

case of *K.K. Baskaran vs. State of Tamilnadu,* 2011 SCW 1799*,* Mr. Ray submitted that the small investors cannot approach conventional legal proceedings incurring huge expenses of court fees, advocate's fees etc.

8. It was submitted that Section 457 Cr.P.C. and/or revisional forum don't create any impediment for this Court to exercise its jurisdiction under Article 226 of the Constitution in giving relief to these specified class or injured public, who have been defrauded of their life earnings. The Company and subsequent act of Investigating Agency deprived the investors from enjoying their property, which amounts to deprivation of the property under Article 300-A of the Constitution. Even temporary and/or non-final deprivation of property amounts to deprivation within the meaning of Article 300-A of the Constitution. Public Authorities cannot arbitrarily and on technical ground withhold payment due to petitioners.

9. Mr.Ray, learned Senior Advocate placing reliance on the decision of the Hon'ble Supreme Court in Civil Appeal No.2341 of 2011 disposed of on 04.03.2011 submitted that a conspiracy was effected by certain fraudulent financial establishments which not only committed fraud on the depositor, but also siphoned off or diverted the depositor's funds mala fide. Therefore, it was prayed that this Court being the custodian of the welfare of the citizens may delve into the fraudulent conduct of opposite party No.7, who are nothing but cheats and charlatans and having no social responsibility but only a lust for easy money by making false promise of attractive returns for the gullible investors.

10. Mr. Ray submitted that the amount invested, amount withdrawn, amount transferred and amount that remained with the petitioners are within the knowledge of opposite party No.7 and the bankers. The petitioners being gullible investors had no access to bank account of opposite party No.7 and could not furnish the account. No affidavit has been filed by any of the opposite parties disclosing the details about the amount deposited, amount withdrawn and amount transferred. Opposite parties willfully violated the Hon'ble Courts' order. The flimsy plea of opposite party No.7 that all their documents have been seized is a mischievous one as they have at relevant time submitted their income tax returns and the audited accounts have been filed before this Court. As per the statement of learned counsel appearing for opposite party No.7, Dibakar Sinha is missing from the date of F.I.R. Dibakar Sinha transferred 1000 shares from opposite party No.7 to one Sushila during the year 2009-10. All those who are personally injured have moved this Court for relief through their Trust as individually it was not possible for them to approach the Court or bear the huge expenses.

11. Placing reliance upon the judgment of this Court in the case of *Nishakar Khatua & Five others vs. State of Orissa and four others*, 2012 (I) ILR – CUT -19, Mr. Ray submitted that this Court must entertain the writ petition as the decision of the Hon'ble Supreme Court in the case of *Guruvayoor Devasom Managing Committee and another vs. C.K. Rajan and others,* (2003) 7 SCC 546 has no application to the present case.

12. Placing reliance upon the judgments of the Hon'ble Supreme Court in the case of *National Textile Workers' Union vs. P.R. Ramakrishnan and others,* AIR 1983 SC 75 *and Nawabganj Sugar Mills Co. Ltd. and others vs. Union of India and others,* AIR 1976 SC 1152*,* Mr. Ray submitted to issue direction for refund of money seized by the Investigating Agency.

13. Mr.K.P.Mishra, learned counsel appearing for intervenor-petitioners supporting the case of the petitioners and adopting their stand further submitted that opposite party No.7-Company has raised Rs.578,22,17,252/- from public and the total number of depositors is 2,43,356. The Company has launched a Multi Level Marketing Scheme from 2008. As per the status report of the Investigating Agency, the registered office of the Company is running in a rented house which is registered as tannery under the Municipality of Kanpur, U.P. The address furnished by the Company as its registered office in W.P.(C) No.1443 of 2009 before the Bombay High Court and W.P.(Crl.) No.267 of 2010 before this Court found to be wrong. A.C.P., Mumbai Police confirmed that no such address exists in Mumbai. The Company is not carrying on sale and trading business of clothes. No sales tax and VAT has been paid by the Company. Referring to the status report of the Investigating Agency, Crime Branch (O.P. No.1), Mr.Mishra submitted that opposite party No.7-Company is a fraud Company. Deputy Commissioner of Income Tax, Kanpur, UP has disallowed Company's tax return with observation that it is a case of siphoning of funds of assessee Company by the members of group for their own benefit of the group. The Auditor's report reveals that the Company does not maintain proper record and there is no transaction of purchase of goods and materials and sale of goods. R.B.I. on due investigation issued Circular about seven number of Companies including opposite party No.7 observing that the Company is actually mobilizing large amount of deposits from the public with promises of high return. Another Director of the Company Mr.Mahesh Bahadur Singh Chandal filed a writ petition before the Allahabad High Court for quashing of the F.I.R. in PS Case No.118 of 2009, Sahadev Khunta Police Station, Balasore, which was rejected by the Allahabad High Court. The order passed in the application under Sections 391 and 394 of the Companies Act by the Allahabad High Court is not applicable to the depositors. Arrangement

has been made between four shareholders with thirteen creditors of the Company without hearing the affected persons. The Company has paid a sum of Rs.74,30,000/- towards legal fees from 1st April, 2009 to March, 2011. Mr. Mishra submitted that the Company specifically targeted and lured the lower section of the society, house-wife, retired person and unemployed youth. The Company invited deposits of Rs.10,000/- only because for such amount no individual can dare to sue the Company in future. The Company has raised depositors not particularly from any single town/district/State but from entire country.

14. Placing reliance on the case of *T.K.Rangarajan Vs. Government of Tamil Nadu & others,* AIR 2003 SC 3032 and *Nawabganj Sugar Mills Co. Ltd. Vs. Union of India,* AIR 1976 SC 1152, Mr.Mishra submitted that the writ petition is maintainable. Further placing reliance on the judgment of Hon'ble Supreme Court in the case of *Union of India Vs. Tantia Construction Pvt. Ltd.,* (2011) 5 SCC 697 it was submitted that alternative remedy is not a bar to maintain the writ petition. Relying upon the judgment of the Hon'ble Supreme Court in *Nirmal Singh Kahlon Vs. State of Punjab and others,* (2009) 1 SCC 441, it was submitted that Article 21 right to fair trial is equally applicable to accused and the victim. Relying on a judgment of the Calcutta High Court in the case of *Radcliff and Asplay Pvt. Ltd. Vs. Union of India,* (1997) 5 Comp LJ 237 (Cal), it was submitted that no person can be deprived of his property save by authority of law. Right to sum of money is such property. Referring to the judgment of the Hon'ble Supreme Court in the case of *National Textile Workers Union Vs. P.R.Ramkrishnan & others,* AIR 1983 SC 75 it was submitted that social scientists and thinkers regard a Company as a living, vital and dynamic, social organism with firm and deep rooted affiliations with the rest of the community to which it functions. Further, placing reliance on the judgment of High Court of *Gujarat in Arvind-Bhai V. Patel Vrs. State of Gujarat and another*, (1995) 4 Comp. LJ 410 (Guj) the High Court of Gujarat did not want to continue ad-interim relief on the ground that the poor and unfortunate person like the complainant is the victim in that case.

15. Further placing reliance on the judgment of the Hon'ble High Court of Calcutta in *State of West Bengal Vrs. Union of India*, AIR 1996 Cal 181, it was submitted that the present writ petition is in the nature of a PIL seeking remedy of prompt relief for the poor depositors.

16. Mr.D.Panda, learned Additional Government Advocate appearing for opposite party No.1-Superintendent of Police, CID, CB, Odisha, Cuttack submitted that the C.I.D., C.B., Odisha has taken up investigation into a

multi-crore scam floated in the guise of MLM activities by opposite party No.7-Company on the basis of the F.I.R. initially lodged by one Niranjan Sahoo at Sahadev Khunta P.S., Balasore district and is investigating into the channeling of moneys of several gullible investors of Odisha especially in the districts of Balasore, Bhadrak, Sundargarh and Sambalpur. In the course of investigation, opposite party No.1 thought it fit for protection of the interest of these investors and others to freeze the various bank accounts of opposite party No.7-Company maintained with opposite parties 2, 3, 4, 5 and 6 in their branches situated all over India. Primary investigation has disclosed that the account-holders being ex-Directors as well as Directors of opposite party No.7-Company and were attempting to siphon moneys of these small investors deposited in opposite party No.7-Company's account to their own personal accounts maintained in various branches including opposite parties 2 to 6 banks. The investigation into the F.I.R. is on at present and has been held up due to non-cooperation of the accused Directors and Ex-Directors of opposite party No.7-Company. As the investigation is on, it is not possible to quantify the exact amount deposited by the investors from Odisha or to separate the same from the amounts deposited by the investors of Karnataka, Tamil Nadu and Andhra Pradesh, who are members of the petitioners' Trust. Therefore, the prayer for refund of the amounts to the investors at the present stage is misconceived. Moreover, in view of the facts presented in this writ petition the ambit of investigation has become widen and refund if any can only be possible at the end of trial, if any, which may be initiated on completion of investigation currently going on.

17. Accounts of opposite party No.7 Company have been seized in the course of investigation and the seizure has been reported to the Court of S.D.J.M., Balasore. An application under Section 457, Cr.P.C. seeking interim release was filed on behalf of the writ petitioners before the said Court which has rejected the same by order dated 09.05.2011 and in that event the petitioners have remedy of moving either the Court of Session or this Court in Criminal Revision by assailing the order of rejection. Since recourse is available to the petitioners under the ordinary laws of the land to redress their grievances, the present writ petition is not maintainable. Opposite party No.1 is not aware of any demand for refund made by the investors to opposite party No.7-Company. Insofar as the refund policy uploaded in the Company's website is concerned, it is an internal matter, which is of no concern to opposite party No.1. The Bank accounts of the Company with opposite parties 2 to 6 Banks having been suspended the investors are already protected. Since petitioners have not produced any record before this Court with exactitude of amounts deposited by them into the accounts of opposite party No.7-Company and also have not filed any

scrap of paper showing deposits to have been made by the petitioner No.1-Trust on behalf of its members and also not filed any certified documents indicating the names of its members, the amounts received by the Trust from them as well as interest received from the Company allowing the petition for release and directing release of Rs.100 crores in favour of the petitioners would neither be just nor reasonable nor it would be in the interest of other depositors. The writ petition is otherwise improper, unjustified and as such is liable to be dismissed.

18. Mr. Tulsi, learned Senior Advocate appearing for opposite party No.7-Company submitted that the writ petition is not maintainable either in fact or in law and the same is liable to be dismissed. There is no privity of contract between the petitioners and opposite party No.7-Company and as such no cause of action had arisen in favour of the petitioners to file the writ petition. The entire relief sought for in the present writ petition is against opposite party No.7 and/or in respect of the amounts lying deposited in opposite parties 2 to 6-Banks. Neither opposite party No.7 nor opposite party Nos. 2 to 6-Banks can be said to be a State under the provisions of Constitution of India and therefore the present writ petition filed by the petitioners is not maintainable and no relief can be granted while exercising writ jurisdiction by this Court. The present writ petition involves disputed question of facts as to whether any such person is entitled to claim refund of the amounts as against opposite party No.7. Therefore, such recovery proceeding between the private parties deserves to be dismissed.

19. The writ petition has been filed suppressing the material facts from this Court and attempts are made to play fraud upon this Court. The petitioners have approached the learned SDJM, Balasore by filing an application under Section 457, Cr.P.C. vide Misc. Case No.29 of 2011 which was rejected by passing a speaking order dated 09.05.2011. This fact has been suppressed before this Court. Opposite Party No.7-Company had been in the business of selling necessary consumer products which were being sold by them by utilizing electronic media facilities, i.e., internet. Internet facility has been used to avoid the expenses and investment on the premises necessary for commencing any such retail outlet. As per the policy of the Company, all the terms and conditions have been displayed by the Company on their website, which are copies of the terms and conditions for purchase of the products published in the website of opposite party No.7-Company. A person who intends to purchase the product manufactured and/or sold by opposite party No.7-Company is required to purchase the said product subject to compliance of the terms and conditions appearing in the website. As per the policy, the Company has been selling the Suit length

to the people at large for which, a purchaser is required to deposit necessary value of the suit length in the Bank account maintained by the Company with ICICI Bank by Cheque and/or by pay order. Subject to deposit of the amounts, opposite party No.7-Company has been issuing necessary purchase voucher on the basis of which, the Company had been delivering the product to the concerned purchaser. As per the policy of the Company, if a customer does not intend to take delivery of the product immediately, he is entitled to enter into a regular agreement with the Company draft of which is also published on the website and upon such agreement being signed, it was provided that if the said customer brings other customers for the Company, he is being made entitled to get necessary commission on the amounts paid by the other customers. The Company has been dealing in sales of cloth, there was huge margin in the sale price and the cost of the Company and accordingly as per the Policy of the Company, it had also been sharing the profit generated by the Company with their respective customers, which were paid on monthly basis subject to Company making profits and no such deposit had ever been taken from any of the customers nor any fixed income had been promised. The said facility had been available only for a period of one year and within the said period, the concerned customer was duty bound to take delivery of the cloth material. Within a period of one year, if the customer so chooses is being made entitled to claim refund of the amounts paid by him which were refunded by the Company on the terms and conditions already published on their website. Although the Company has been functioning regularly without committing any default and has been making the profits which were shared with their respective customers, the Bank account of the Company maintained with ICICI Bank Ltd. having a huge balance, came to be frozen from 3rd July, 2009 by the Bank Authority without any notice of whatsoever nature. Against such action of opposite party No.2-ICICI Bank, one of the Director, Diwakar Sinha of opposite party No.7-Company immediately filed Writ Petition bearing W.P.(C). No.1443 of 2009 before the High Court, Mumbai. While the matter stood thus, the Police authorities at Balasore registered a complaint against the opposite party No.7-Company, which came to be registered vide Sahadev Khunta P.S. Case No.118 of 2009 under the provisions of Sections 406/420/468/471 of I.P.C. and Section 4, 5 and 6 of the Act, 1978, corresponding to C.T. Case No.1339 of 2009 in the file of S.D.J.M., Balasore and the said case was subsequently transferred to the present Investigating Agency on the very day of registration of the same by Balasore Police Station. Though the said F.I.R. only pertained to Rs.10,000/-, the Police Authorities directed the Bank Authorities to freeze the Bank account of the Company and in such manner, the illegal act on the part

of the Bank authorities was sought to be regularized by the Police authorities.

20. It is further submitted that the complainant had no grievance against the Company and despite the same, he had been forced by the Police Authorities to lodge such complaint and in view thereof, the complainant of his own conscious, filed W.P.(Crl.) No.503 of 2009 before this Court for quashing of the complaint. Opposite Party No.7-Company had also preferred to file a writ petition before this Court for quashing of the said complaint which was registered as W.P.(Crl.) No.267 of 2010 and both the petitions have been heard finally by this Court and the matter is reserved for judgment. The present petitioners made an attempt to intervene in the said proceedings and their intervention application was rejected by this Court.

21. Mr. Tulsi submitted that the Company having realized that their entire functioning has come to stand still because of freezing of the accounts and in the absence of operation of the account, they are unable to refund the amounts and since they are not generating any profit, they are not in a position to share the profit, the Company approached the Company Judge, Allahbad High Court by presenting a Scheme through an application. Pursuant to such application, the Company Judge, Allahbad High Court has been pleased to appoint the Chairman and Vice-Chairman for holding a meeting of all the creditors and necessary notices were published in the newspaper and accordingly, a meeting of the creditors had taken place on 26th December, 2009. In the said meeting, a Resolution came to be passed in presence of the Chairman appointed by the Allahabad High Court to the effect that henceforth, the Company shall not refund any amounts to any of the customers/depositors and all the customers are liable to take delivery in respect of the product manufactured/sold by the Company. On the basis of the said resolution, a further application had been presented before the Company Judge, Allahabad High Court and by order dated 26.03.2009, after hearing the Advocate including the Advocate for the Company Registrar, the Allahabad High Court has been pleased to approve the said Scheme. It was further submitted that in view of the order of the Allahabad High Court, the Company had not been made liable to refund any of the amounts to any of their customers and they are entitled to take delivery in respect of the products manufactured by the Company; more particularly, the Suit length. The orders passed by the Allahabad High Court were also published on the website of the Company and the Company had received request from many customers and accordingly, the Company had dispatched the Suit length to all those customers. If any identical request is made by any other customers of the Company, the Company is ready and willing to deliver the material

and/or they are at liberty to take delivery of the product from the registered office of the Company by presenting their documents. Therefore, in view of the order of the Allahabad High Court the claim of other customers seeking refund of any such amount from the Company does not arise.

22. It is further submitted that in view of the orders passed by the Allahabad High Court, this Court cannot exercise any appellate jurisdictional power in respect of the said orders. Therefore, this writ petition is not maintainable even on facts and law and deserves to be dismissed. The allegation made in the writ petition that the Company has accepted deposits is false on the face of it. At no point of time, Company has accepted any such deposits and in view thereof, all the contentions, citations and the quotations made in the said petition are not applicable to the facts of the present case. The writ petitioners are running a parallel institute as a recovery agency for and on behalf of the poor uneducated people to grab the benefits to be received by such poor people including the receipt of the cloth material and the petitioner No.1-Trust has been formed only to blackmail the genuine Companies like that of opposite party No.7. A careful perusal of the deed of trust does not show and/or form any legal documents by virtue of which, the petitioners get any such cause of action against opposite party No.7-Company in any manner whatsoever. The agreement referred to and relied upon by the petitioners categorically shows that the entire Agreement is in respect of commercial transaction for sale and purchase of the material between the respective customers of opposite party No.7-Company. Clause 29 of the said Agreement contemplates that in case of dispute, the matter shall be referred for arbitration and by filing the present petition, the petitioners can never be permitted to give overriding effect to the provisions of Arbitration and Conciliation Act in any manner whatsoever. Receipt relied upon by the petitioner at page 58, clearly mentions that the payment has been received against the sales of the product. Concluding his argument, Mr.Tulsi submitted for dismissal of the writ petition.

23. Mr. Tulsi, learned Senior Advocate appearing on behalf of opposite party No.7 further submitted that the present writ petition cannot be treated as a public interest litigation petition as it is an application for refund of money by the alleged purchasers of opposite party No.7. A private dispute cannot be permitted to take shape of public interest litigation. Personal disputes are termed as “private interest litigation”. The present writ petition is completely beyond the scope of PIL. In support of his contention, Mr. Tusli relying upon the decision of the Hon’ble Supreme Court in the case of *Guruvayoor Devasom Managing Committee and another vs. C.K. Rajan and others,* (2003) 7 SCC 546*,* submitted that the dispute between two warring

groups are in the realm of private law and would not be allowed to be agitated as PIL. "PIL is not a pill or panacea for all wrongs".

24. Placing reliance upon the decisions of the Hon'ble Supreme Court in the case of *Ashok Kumar Pandey vs. State of West Bengal, (2004) 3 SCC 349 and R & M Trust vs. Koramangla Residents Vig. Group, (2005) 3 SCC 91,* Mr. Tulsi submitted that the only prayer in the present writ petition is to direct the opposite parties to give refund and recovery of the investment deposits. All the members of petitioner No.1-Trust claiming to be investors sought to file a writ petition for a declaration protecting the rights of the member investors for refund of the amount they have invested with opposite party No.7. Therefore, this being a private interest litigation, it ought not to be entertained as PIL. It is further submitted that the decision of the Hon'ble Supreme Court in the case of *National Textiles Workers' Union and others vs. P.R. Ramakrishnan and others, AIR 1983 SC 75* has no application to the present case as the said demand was in the context of workers' compensation under a statute and not a civil dispute like the present case. It was also submitted that the decision of the Hon'ble Supreme Court in the case of *Nawabganj Sugar Mills Co. Ltd. and others vs. Union of India and others,* AIR 1976 SC 1152 has also no application to the present case.

25. It was argued that the present writ petition is not maintainable as the same relates to hundreds of disputed questions of facts. The substance of the dispute falls in the realm of the alleged breach of contract and/or for enforcement of the same for which the writ petition is not maintainable. Referring to paragraph-5 of the writ petition, it was submitted that the petitioners claim that the amount deposited or invested by the trust members is more than Rs.100 crores, yet when they are directed to give details, the statement filed by them is only able to provide details of Rs.9.48 crores of investment made by 4427 members. In this statement, it is found that 772 names are duplicate entries. The allegation of the petitioners' investment of Rs.100 crores is ridiculous. Mr. Tulsi further submitted that the writ petition merely deals with the allegation of breach of contract for which the only remedy available is in Civil Court, as the Criminal Courts are already ceased of petitions for quashing and/or refund of investments.

26. Placing reliance upon the judgments of the Hon'ble Supreme Court in the case of *Kisan Sahkari Chini Mills vs. Vardan Linkers,* (2008) 12 SCC 500 *and Pimpri Chinchwad Municipal Corporation & Ors. Vs. Gayatri Construction Company & Anr.,* (2008) 8 SCC 172 *and FCI vs. Harmesh Chand,* (2006) 7 SCC 654*,* Mr. Tulsi further submitted that the writ petition is not maintainable in contractual matters. Filing of the present writ petition is

nothing but abuse of process of this Court. The petitioners having met their waterloo at various forums have taken resort to the present writ petition. One of the creditors, namely, Ashok, who is a member of petitioner No.1-Trust had sought for a stay against the initiation of the scheme from a Court in Mumbai which was denied; he challenged the stay in Bombay High Court which refused to intervene. Special Leave Petition (SLP) against the said order was also dismissed by the Hon'ble Supreme Court on 11.02.2010. Therefore, contention of learned counsel for the petitioners that sanction of Scheme is fraud on the Court is not correct. The petitioners then filed an application for refund of their investment which application was rejected by the learned S.D.J.M., Balasore on 09.05.2011. The said order was challenged by the petitioners by filing Criminal Revision No.533 of 2011, which is pending, the same relief of refund of money has been sought for therein.

27. The Deputy Commissioner of Income Tax, Kanpur by his order dated 31.12.2010 held that opposite party No.7 was not a NBFC and was only trading in consumer goods (FMCG) in the form of multi-level marketing. No sales tax is payable on textile material or unstitched clothes. Since the writ petition was styled as a Civil Writ Petition, the petitioners misled this Court by seeking directions which were directly violative of Article 20(3) of the Constitution. Even though a dispute may be pursued simultaneously in Civil and Criminal Courts, yet so long as a party is an accused in a criminal proceeding, he is entitled to the protection under Article 20 even before a Civil Court.

28. Further placing reliance upon the decisions of the Hon'ble Supreme Court in the cases of *Selvi vs. State of Karnataka, (2010) 7 SCC 263; Ayyub vs. State of U.P., (2002) 3 SCC 510; Sukhvinder Singh vs. State of Punjab, (1994) 5 SCC 152; State of Gujrat vs. S.M. Choksi, AIR 1965 SC 1251 and State of Bombay vs. Kathi Kalu Oghad, AIR 1961 SC 1808,* Mr. Tulsi submitted that a person accused in a criminal case cannot be compelled to make a statement on oath nor can a person who is accused can be compelled to produce documents. These principles have been held to be the most precious values of the Constitution and can never be allowed to be diluted. All proceedings and directions which are found to be violative of Article 20(3) of the Constitution are liable to be treated as void.

29. Mr. Tulsi, further submitted that the petitioners are not correct to say that there is no disputed question of fact. On the one hand, in the writ petition, it is claimed that members of the petitioner No.1-Trust invested more than Rs.100 crores and yet, when they asked to give details, they gave

details of only Rs.9.48 crores. Even the State has termed their claim of Rs.100 Crores as ridiculous. The State has further claimed that petitioners have not even filed a scrap of paper in respect of their claims. Submission of the petitioners that FIR is against the Company is factually incorrect. The FIR is against the officials of the Company and Directors are obviously officials, who are entitled to protection under Article 20(3) of the Constitution. The judgment of this Court in *Nisakar Khatua (supra)* can have no application to a case where the case property pending investigation is sought to be delivered to a person from whom the same is not seized. Each time the petitioners mention different amount and number of depositors/members. In their submissions, the petitioners have sought to inflate the amount of Rs.5.87 crores and 2,45,000 depositors, whereas in paragraph 5 of the writ petition it was Rs.100 crores, and when the details were sought it was reduced to Rs.9.48 crores and 4427 members, out of whom 772 were duplicate entries. Concluding his argument, Mr. Tulsi submitted for dismissal of the writ petition.

30. On the rival factual and legal contentions advanced by the parties, the following questions fall for consideration by this Court:

(i) Whether the writ petition is maintainable?

(ii) If answer to question No.(i) is in affirmative, whether the prayer made in the writ petition can be granted?

(iii) What order?

31. Question No.(i) is with regard to maintainability of the writ petition. It is not in dispute that a large number of gullible investors have invested their money in the scheme floated by opposite party No.7-Company. The scheme provided deposits to the tune of Rs.10,000/- and its multiple up to Rs.2.5 lakhs. Under the Scheme, the Company promises to give not less than 10% monthly commission to investors. The investors are from Karnataka, Andhra Pradesh, Tamil Nadu and Kerala. The petitioners' allegation is that opposite party no.7 promoted money circulation scheme under the guise of sale of its products. Investments were against the product of Company on issuance of Payment Verification Code (PVC). Auditors' report reveals that there is no transaction of purchase of goods and material or sale of goods or materials. As per the policy of the Company, the entire (100%) purchase amount is refundable, if the product vouchers has not been redeemed and the investor has not violated any clause mentioned in the agreement. On 17.07.2009 FIR was lodged against opposite party No.7-Company at Sahadev Khunta Police Station vide P.S. Case No.118 of 2009 in the district of Balasore. Investigation against opposite party No.7 was initiated under Sections 406,

420, 468, 471 and 34 of I.P.C. read with Sections 4, 5 and 6 of the Act, 1978. The Investigating Officer in exercise of his powers under Section 102, Cr.P.C. freezed the bank accounts of opposite party No.7-Company. On 20.07.2009, the Investigating Officer freezed the Company's accounts in three banks, namely, HDFC Bank, IDBI Bank and AXIS Bank.

32. Immediately after freezing of accounts under Section 102, Cr.P.C. opposite party No.7 moved High Court of Mumbai challenging the police action by filing Writ Petition No.1443 of 2009 on 27.07.2009 assailing the F.I.R. and freezing dated 17.07.2009. None of the investors was made party and the said writ petition was withdrawn. Opposite Party No.7 filed Criminal Misc. Writ Petition No.16901 of 2009 before the Allahabad High Court and the Hon'ble Court vide judgment dated 19.08.2009 refused the prayer for quashing of the impugned F.I.R. with the following observation:

> "From the perusal of the F.I.R., it appears that on the basis of the allegations made therein prima facie cognizable offence is made out. There is no ground for interfering in the F.I.R. Therefore, the prayer for quashing the impugned F.I.R. is refused."

On dismissal of the writ petition, opposite party No.7-Company filed Company Application No.16 of 2009 on 29.10.2009 under Sections 391 to 394 of the Companies Act, 1956 for approval of a Scheme impleading four shareholders and thirteen unsecured creditors. None of the investors is shown as unsecured creditor. On 26.03.2010, order was passed in Company Petition No.3 of 2010 approving the said Scheme.

33. Reserve Bank of India on due investigation issued circular in respect of 7 numbers of Company including opp. party No.7-Company and has observed that opp. party No.7-Company posing itself as Multi Level Marketing agency for consumer goods and services have been actually mobilizing large amount of deposit from the public with promises of high return. Opposite party No.7 filed W.P.(Crl) No.267 of 2010 before this Court for quashing of the F.I.R. which still remains pending disposal. When the investors learnt about freezing of accounts, they demanded 100% refund pursuant to policy of the Company as uploaded on the website and stipulated in the agreement as well, but on the website Company refused to make payment indicating that refund option has been suspended awaiting results from the appropriate Company Court and pendency of the matter before this Court. The Investors at Karnataka, Andhra Pradesh and Tamil Nadu being harassed, prejudiced and defrauded of their life savings registered a deed of trust for taking steps for refund of the amount deposited

by them. On 04.02.2011 in W.P.(Crl.) No.207 of 2010 this Court directed the petitioners to initiate appropriate legal action before jurisdictional court. On 25.03.2011, the Trust filed a writ petition seeking refund of the deposited amount. On 15.04.2011, this Court issued notice directing that there shall not be any disbursement without leave of the Court. On 02.01.2012, this Court directed to keep the amount in fixed deposit. On 08.02.2012, this Court further directed opposite party No.7 to disclose as to what happened to the balance amount deposited. On 09.05.2011, the learned S.D.J.M., Balasore rejected the application under Section 457 of Cr.P.C. On 11.07.2011, CRLREV No.533 of 2011 was filed before this Court.

34. The Auditors specifically found that the Company has not maintained proper records. This fact is evident from the Audit report of the Company. No transaction of purchase and sale of goods and materials and service was made in pursuance of the contract. Sections 58-A and 98-AA of the Companies Act, 1956 have been violated and the Company has no internal audit system.

35. Status report submitted by the Crime Branch reveals as follows:

(1) Neither the memorandum nor the articles of association of the Company reflects that the Company is engaged in the business of multilevel marketing. (Para-5).

(2) Company has cited A-101A, Sterling Centre, Andheri West, Mumbai as its administrative Office in the writ application filed before Hon'ble Bombay High Court. After due verification by Mumbai Police it was found that no such location is available in Mumbai. (Para-6)

(3) Company had filed these applications:

a) Before the Hon'ble Mumbai High Court, W.P.(C) No.1443 of 2009 for defreezing of its account with regard to ICICI Bank only. The application has been dismissed as withdrawn.(Para-6)

b) Before Hon'ble Allahabad High Court vide Criminal Misc. Writ Petition No.16901 of 2009, the same has been disposed of with observation that F.I.R. reveals a prima-facie case and did not quash the FI.R. (Para-7)

(4) On perusal and verification of I.O. and reply from the Kanpur Municipality, it is found that the address furnished in the website by the Company is a tannery. (Para-11)

(5) As per the letter of Asst. Commissioner Commercial Tax, Kanpur the Company has not submitted returns from 2007-08 to 2009-10 (from 2007 to 2010) about their selling and trading of cloth. (Para-14)

(6) Around 2,43,356 depositors have deposited their money and enrolled in the scheme of the Company. (Para-29)

(7) Company has raised Rs.578,22,17,252/- (Rs.578.23 Crores) from the depositors. And has paid Rs.67,32,54,190/- towards the commission to the depositors.(Para-29)

(8) The Investigating Agency state that there are reliable indication that major part of the money has been used for funding questionable purposes.(Para-33)

(9) Warning letter by Home Department bearing No.44555 dtd.08.10.2009 named the Company indulging in money circulations. (Para-34)

36. On the above backdrop, it is felt necessary to refer to the following decision of Hon'ble Supreme Court.

In the case of ***T.K. Rangarajan vs. Govt. of Tamil Nadu and others,*** AIR 2003 SC 3032, the Hon'ble Supreme Court held as under:-

> "5. At the outset, it is to be reiterated that under Article 226 of the Constitution, the High Court is empowered to exercise its extraordinary jurisdiction to meet unprecedented extraordinary situation having no parallel. It is equally true that extraordinary powers are required to be sparingly used. The facts of the present case reveal that this was most extraordinary case, which called for interference by the High Court, as the State Government had dismissed about two lakh employees for going on strike."

In the instant case, huge number of depositors have invested their hard-earned money/life savings with opposite party No.7-Company and it is practically impossible for those small investors to move individually before the procedural Court for redressal of their grievances.

37. In the case of ***Nawabganj Sugar Mills Co. Ltd. vs. Union of India,*** AIR 1976 SC 1152, the Hon'ble Supreme Court observed as follows:-

> "…Who is to start ? Against whom ? How is he to meet the huge litigative costs and how long (O, Lord, how long !) he to wait with long-drawn-out trial procedures, appeal, second appeal, special

> appeal, and Supreme Court appeal ? For, on the other side is the similar with the millions to be coughed up !"
>
> AND
>
> "…The difficulty we face here cannot force us to abandon the inherent powers of the Court to do. The inherent power has its roots in necessity and its breadth is coextensive with the necessity. Xxx
>
> …If there is to be relief, we must construct it here by simple legal engineering."

The petitioners and intervenors belong to the lower section of the society and it is not practicable for them to fight against the mighty opp. party No.7-Company in a long legal battle.

38. In the case of ***Union of India vs. Tantia Construction Pvt. Ltd.,*** (2011) 5 SCC 697, the Hon'ble Supreme Court held as under:

> "…the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities. In justice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution."

39. In the case of ***S.P. Gupta Vs. Union of India*** reported in AIR 1982 SC 149, the Hon'ble Supreme Court held as under:

> " It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Art. 226 and in case of breach of any fundamental right of such person or determinate class of persons, in this Court under Art. 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."

40. In the case of ***Mumbai Kamgar Sabha Vs. Abdulbhai Faizullabhai*** reported in AIR 1976 SC 1455 at page 1458 Justice Krishna Iyer emphasized:

> "Article 226 viewed in wider perspective may be amenable to ventilation of collective of common grievances xx xx xx Public interest is promoted by a spacious construction of locus standi in our socio economic circumstances."

41. The investors belong to lower strata of the society. They are house-wives, rickshaw pullers, taxi drivers, small shopkeepers, Class-IV employees of Private Companies, hotels and other establishments, tea shop owners, cabin holders, retired persons and unemployed youth etc, who have invested their life savings with opposite party No.7-Company. Since the company invited deposits of Rs.10,000/- and its multiple up to Rs.2.5 lakhs, no individual can be able to sue the Company in case of any injury caused to him. The gullible investors were tempted to make investments in the Company because of high return not less than 10% per month and 100% of refund of their deposited amount was assured to them. Accordingly, the investors were spread over throughout the country.

42. In view of the above facts and case laws cited above, we are of the view that the writ petition is maintainable.

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

Undisputedly, the criminal investigation is pending against opposite party No.7-Company. The exact number of investors and exact amount invested by each small depositor are yet to be ascertained although the Crime Branch Department in their status report stated as follows:

a)Total Amount Deposited		:Rs.578,22,12,252
Company paid commission		:Rs. 67,32,54,190

Balance with O.P. No.7	:	Rs.510,89,58,062
		==========
		Say Rs.511 Crores

b) <u>Payments and Transfers by Opposite Party No.7-Company:</u>

Rupees in Crores)

i)	Transferred to Eve Industries, paid to wife of Director, Kamraj Khurshid (and Rs.64.00 Crores eventually to Md. Naseer and Shamshed Alam	:	Rs.133.39

ii)	Transferred to Great Entertainment of Md. Naseer	:	Rs. 82.72
iii)	Transferred to Shamshed Alam	:	Rs. 0.72
iv)	Transferred to Sayeed Ahmed	:	Rs. 4.02
v)	Transferred to Fine Consultancy	:	Rs. 29.60
vi)	Transferred to Bhupinder Chaturvedi	:	Rs. 29.92
vii)	Transferred to Aman Enterprises	:	Rs. 0.83
viii)	Transferred to B.T. Industries	:	Rs. 17.98
ix)	Transferred to Fine Industrial	:	Rs. 1.75
x)	Transferred to Key Stone	:	Rs. 9.00
xi)	Transferred to Lemon T.V. and Luxury Car	:	Rs. 1.00
xii)	Transferred to Ferox Shah	:	Rs. 0.50
	Total transfers	:	Rs.311.43

C) <u>Available with Banks on day accounts freezed :</u>

	Rs.510.90 Crores
(-)	Rs.311.43 Crores
	Rs.199.47 Crores
Income Tax paid (-)	Rs. 5.36 Crores
With Bank	Rs.194.11 Crores

44. Mr. Tulsi, learned Senior Advocate submitted that since the Directors of opposite party No.7-Company are already accused in the criminal case pending investigation, they are entitled to be protected by this Court of their constitutional rights guaranteed under Article 20(3) of the Constitution. It is further submitted that a person accused in a criminal case can neither be compelled to make a statement on oath nor he can be compelled to produce documents. These principles, which have been held to be of most precious values of the Constitution, can never be allowed to be diluted in any proceedings, and directions which are found to be violative of Article 20(3) of the Constitution are liable to be treated as void.

45. Some of the aspects of the case which draw attention of this Court as matter of concern are that one investor claiming refund of Rs.10,000/- filed complaint against the Company at Sahadev Khunta Police Station, which was registered as Sahade v Khunta PS Case No.118 of 2009 dated

17.07.2009 under Sections 406/420/468/471/34 of IPC and Sections 4, 5, and 6 of the Act, 1978, corresponding to CT Case No.113/2009 in the file of S.D.J.M., Balasore.

The said case was transferred to the Investigating Agency and the Police Authorities directed the Bank Authorities to freeze the Bank account of the Company.

The Complainant at whose instance Sahadev Khunta PS Case No.118 of 2009 dated 17.07.2009 was instituted, filed W.P.(Crl.) No.503 of 2009 for quashing of the complaint filed by him on the ground that he was forced by Police to file such complaint. Opp. party no.7- Company also filed another writ petition bearing W.P.(Crl.) No.267 of 2010 for quashing of the F.I.R.

46. One more vital aspect of the case is that on 30.10.2009 Company Petition No.16 of 2009 was filed under Sections 391 and 394 of the Companies Act, 1956 impleading 4 share holders and 13 un-secured creditors before the Company Judge, Allahabad High Court proposing a scheme of arrangement with a request for sanction of the same. In that Company case, 4 share holders of the Company had given their consent through affidavit and for 13 un-secured creditors a meeting was convened under the Chairmanship of Mr. S.C. Mishra, Advocate. Thus, the arrangement has been made between 4 share holders and 13 creditors of the Company. During continuation of the aforesaid proceeding, Company Petition No.3 of 2010 was filed for confirming the compromise and arrangement. Allahabad High Court vide its order dated 26.03.2010 in the said Company petition sanctioned the said Scheme, according to which, policy for encashment of purchase vouchers and/or refund of the amount paid by the purchaser stands withdrawn and all the purchasers shall compulsorily take delivery of the materials purchased. Grievance of the petitioners is that the Company case was disposed of on 26.03.2010 by the Allahabad High Court without impleading all the affected parties more particularly the petitioners. None of the investors is shown as unsecured creditor. It is settled principle that no adverse order shall be passed having civil consequence without hearing the affected persons. Only seventeen persons cannot decide the fate of 2.5 lakh depositors. Depositors are the real owner of the funds and without hearing them no adverse order can be passed having civil consequence. It is also not possible on the part of the gullible small investors to spend money and contest the case at Allahabad.

47. We have perused the events including the above that have taken place, but we are refraining ourselves from entering upon the details thereof lest it may prejudice any party.

48 In the instant case, the ground realities cannot be lost sight of in the maze of technicalities. The investigation by the Crime Branch, Odisha will not be effective all over the country. Therefore, investigation by CBI would be more effective to unearth the truth for doing complete justice. The High Court does not lack jurisdiction to modulate the relief to give aid to people who have been wronged. Whenever any wrong is done to a citizen, the Court cannot become a silent spectator to such illegality and it becomes the solemn duty of the Court to see that the affected person must get justice.

49. The Hon'ble Supreme Court in the case of ***Shivajirao Nilangekar Patil Vs. Dr.Mahesh Madhav Gosavi & Ors.,*** AIR 1987 SC 294 held as under:-

> "51.This Court cannot be oblivious that there has been a steady decline of public standards or public morals and public morale. It is necessary to cleanse public life in this country along with or even before cleaning the physical atmospheres. The pollution in our values and standards is an equally grave menace as the pollution of the environment. Where such situations cry out the Courts should not and cannot remain mute and dumb."

50. Needless to say that whenever there is a wrong, there is a remedy. In our view this is a classic case where Court should not close its eyes to the injustice alleged to have been perpetrated. For the reasons indicated above and in the interest of justice, we direct that the investigation be handed over to the CBI and the Crime Branch shall assist the CBI in the investigation. The CBI is directed to submit quarterly status report before this Court.

The prayer for refund of money shall be considered after receipt of periodical status report(s).List this matter after three months

Writ petition disposed of.

2013 (I) ILR - CUT- 410

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

W.P.(C) NO.2444 OF 2011 (Dt.31.07.2012)

ORISSA TRUST OF TECHNICAL EDUCATION& TRAINING. ……Petitioner

.Vrs.

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

A. INCOME TAX ACT, 1961 – S.10 (23-c) (vi)

Exemption U/s. 10 (23-c) (vi) – Ingredients –

(i) There must be an educational institution,
(ii) Such University or other educational institution must exist solely for educational purposes.
(iii) It should not exist for the purpose of profit, and
(iv) Approval by the prescribed authority.

(Para 10)

B. INCOME TAX ACT, 1961 – S.10 (23-c) (vi)

Exemption – Authority to grant such exemption – Chief Commissioner or Director General. (Para 10)

C. INCOME TAX ACT, 1961 – S.10 (23-c)

Fees collected towards "Placement and training" in an educational institution is very much for educational purpose – Held, it cannot be considered as a profit for the institution.

D. INCOME TAX ACT, 1961 – S.10 (23-c)

Scheme of the provision – It is only if the pre-requisite condition of actual existence of the educational institution is fulfilled, the question of compliance with requirements in the proviso's would arise – To make the section with the proviso workable, monitoring conditions in the 3rd proviso could be stipulated as condition by the prescribed authority subject to which approval could be granted – Petitioner-institution must be given opportunity to comply with the monitoring conditions – Approval/grant of exemption can be withdrawn on noticing breach or existence of circumstances mentioned in 13th proviso – Existence of profit element disqualifies institution from availing benefit U/s.10 (23-c)

- If one of the objects enables the educational institution to undertake commercial activities, it will not be entitled for approval U/s.10 (23-c).

Case laws Referred to:-

1.AIR 2003 SC 3724 : (Islamic Academic of Education & Ors.-V-State of Karnataka)
2.AIR 2005 SC 3226 : (Inamdar & Ors.-V-State of Maharashtra)
3.(2008)301 ITR 86 (SC): (American Hotel & Lodging Association Educational Institute –V- CBDT).
4.(2001)247 ITR 658 (SC) : (Oxford University Press-V- CIT)

For Petitioner - M/s. R.P.Kar, A.N. Ray, P.K.Mishra, M.S. Raman & K.K.Sahoo.
For Opp.Parties - Mr. A.K.Mohapatra, Standing Counsel (Income Tax).

B.N.MAHAPATRA,J. This writ petition has been filed with a prayer to quash order dated 30.09.2010 (Annexure-5) passed by opposite party No.1-Chief Commissioner of Income Tax (for short, "Chief Commissioner") by which the application of the petitioner made in Form 56-D for grant of approval for exemption under Section 10(23C)(vi) of the Income Tax Act, 1961 (for short, "Act, 1961") for the financial year 2008-09 has been rejected on the ground that the fees collected by the petitioner under head "Placement and Training" are well within the scope of law as has been prescribed and published through notification in Official Gazette by the Government of Orissa, Industry Department.

2. Petitioner's case in a nutshell is that the petitioner is a Trust registered under the Indian Trust Act and in consonance with one of its objectives, it has established two Educational Institutions i.e. Bhubaneswar Institute of Management and Information Technology and Indian Institute of Science and Information Technology for imparting Higher Education in MBA and MCA courses respectively. The aforesaid two institutions have been established with the sole intention to provide higher education only without having any profit motive. These institutions are running to impart world class environment and training to enable the youth of India belonging to all sections and strata of the society to give a foot hold and place in the international market. Therefore, these institutions come within the scope and ambit of Section 10(23C)(vi) of the Act, 1961. As per the said provision, the petitioner filed an application vide Annexure-2 in Form No.56-D with the Chief Commissioner for grant of exemption under Section 10(23C)(vi) of the

Act, 1961 for the financial year 2008-09. While adjudicating the petitioner's claim, the Chief Commissioner directed opposite party No.2-Commisisoner of Income Tax to make an inquiry and submit a report on the actual activity of the petitioner. Accordingly, an inquiry was conducted by opposite party No.2, records were examined and finally being satisfied a report regarding the two institutions of the petitioner was submitted. After receipt of the report from opposite party No.2, the Chief Commissioner issued notice to the petitioner for hearing and during the course of hearing the petitioner produced various documents as directed by opposite party No.1. Those documents are;

(a) The manner of receipt of fees and heads of receipt from the students and the Books of Accounts,

(b) Copies of the Notification of the Government of Orissa, Industry Department prescribing fees to be charged under different heads,

(c) Copy of the audit report showing details of receipt and expenditure made for educational activities, and

(d) Letter of Approval granted by the AICTE

Before the Commissioner, the petitioner has also explained the details of activities which are in consonance with the law governing the field and which make it eligible to be granted exemption under Section 10(23C)(vi) of the Act, 1961. However, the Chief Commissioner has rejected the application of the petitioner for approval of exemption under Section 10(23C)(vi) of the Act, 1961. Hence, the present writ petition.

3. Mr. R.P. Kar, learned counsel appearing on behalf of the petitioner submitted that the aforesaid two institutions have been duly approved by the All India Council for Technical Education (for short, (AICTE) for conducting MBA and MCA Courses. The Chief Commissioner without appreciating and analyzing the law in its proper perspective and the documents produced before him, rejected the application for approval of exemption under Section 10(23C)(vi) of the Act, 1961. The rejection order passed by the Chief Commissioner is wholly untenable. The petitioner has collected placement and training fees in accordance with the notification of the Government of Orissa, Industries Department. The said notification as would be evident is in pursuance of exercise of power of the State under the provisions of the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 and consequent upon the interim order dated 01.06.2007 passed by the Hon'ble Supreme Court in S.L.P.(Civil) No.10318

of 2007 and in three others and interim order of the Hon'ble Supreme Court dated 18.06.2007 in Civil (Appeal) No.2872 of 2007 envisaging a Fee Structure Committee to be constituted for determination of fee. The Committee so constituted recommended the fees under different heads which would be charged for the Academic Session 2007-08. Under Clause (1), a ceiling limit was fixed for certain costs which could be levied including placement fee by the institutions. The Legislature of the State of Orissa enacted the Orissa Professional Educational Institutions (Regulation of Admission and Fixation of Fee) Act, 2007 (for short, "Act, 2007") to provide for the regulation of admission and fixation of fee, prohibition of capitation fee, reservation in admission and for other measures to ensure equity and excellence in professional educational institutions and for the matters connected therewith or incidental thereto.

4. Mr. Kar, further argued that in *Islamic Academic of Education and others vs. State of Karnataka, AIR 2003 SC 3724,* it was held that two Committees for monitoring the admission procedure and determining fee structure in professional Educational Institutions are permissible as regulating measures. Thereafter, the Hon'ble Supreme Court in *P.A. Inamdar and others vs. State of Maharashtra, AIR 2005 SC 3226,* held that it is for the Central Government or for the State Governments, in absence of a central legislation, to come out with detailed thought out legislation on the subject. Thus, the State of Orissa has enacted the Act, 2007 in line with the observations of the Hon'ble Supreme Court in the cases referred to supra. The Act, 2007 was challenged before this Court in W.P.(C) No.3689 of 2007 and this Court by judgment dated 18.05.2007 declared it unconstitutional. The said judgment of this Court dated 18.05.2007 was challenged by the State before the Hon'ble Supreme Court in S.L.P.(Civil) No.10318 of 2007 and by order dated 01.06.2007, the Hon'ble Supreme Court constituted the policy planning body and so also the "Fee Structure Committee" and directed that other provisions of the Act shall continue to be in force. In the aforesaid background the notifications of the Government of Orissa Industries Department vide Annexure-4 was published for the Academic Session 2007-08. The said notification is holding the field and is the law insofar as the collection of fees under different heads is concerned. The Chief Commissioner has relied on the Government of India Resolution for fee structure, 1997 and the Government of Orissa Industries Department Resolution dated 17.09.1998, to come to a conclusion that fees collected towards placement and training is in excess of what was prescribed by the said resolutions. Thus, the resolution relied upon by the Chief Commissioner no more holds the field in view of the Act, 2007 and the order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide

Annexure-4 issued by the Industries Department. The resolution of 1997 and dated 17.09.1998 relied upon by the Chief Commissioner as aforesaid has become redundant and non-est. The concept and recommendation for charging a "placement and training fee" came with effect from 2007 vide Annexure-4 and is very much for educational purpose and cannot be held otherwise and in the least can ever be considered as a profit earning by the petitioner's institution. Therefore, the said fee collection is for educational purpose only as envisaged under Section 10(23C)(vi) of the Act, 1961.

5. It was argued that the institutions are obliged to see the placements of its students as per the AICTE Guidelines and train them accordingly. The fee for the same has been permitted to be collected which is for educational purpose. The subsequent notification dated 20.09.2010 is also in similar lines with a ceiling on optional cost to be collected from the students and also provided for collecting "placement and training fee". The Notification vide Annexure-4 also provides that Colleges are not allowed to charge any other optional costs in any other name other than prescribed and if any institution has collected any other fee in any name guise, the same will entail in withdrawal of NOC by the AICTE and levy of penalties as per the Act, 2007. The placement and preplacement training is a part of the curriculum and has been recognized by the AICTE. A perusal of the approval letter of the AICTE and Clause (4) of the General Conditions thereof would go to show that other fees shall be charged as prescribed by the competent authority. The placement fee comes within the category of "other fee" collection of which has the approval of the Fee Structure Committee which is the competent authority. Therefore, placement and training is a mandatory condition for grant of approval and collection of the fee for it is a part of the curriculum and an educational activity of the Institution.

6. Mr. Kar further submitted that the case laws relied upon by the Chief Commissioner have been misinterpreted by him. He has held that a legally prescribed mandatory educational activity is not to be prescribed by relying on the resolutions which no more hold the field. Therefore, the case needs reconsideration by the said authority in the interest of justice. The observation of the Chief Commissioner is that the petitioner is engaged in non-educational activity like horticulture and generating income from the same is a misunderstanding of facts. There were standing Coconut and mango trees in the land acquired by the petitioner for establishment of the Educational Institutions. In order to maintain a salubrious and green environment the trees were not cut down but maintained. The petitioner has reflected the receipt in its income and expenditure Account and the amount of Rs.15,000/- received has been utilized in the educational activities of the

Institutions and for infrastructural development and the same cannot be termed as a profit earned to deny the benefits of Section 10(23C)(vi) of the Act, 1961. It is also submitted that the income earned by the Trust has been applied wholly and exclusively for educational activities of the Institution itself and not otherwise. The Chief Commissioner has recorded observations that the petitioner is having one non educational objective i.e. item No.16 at page 13 of the Trust Deed. The petitioner has drawn out different objectives but for the present it is only involved in one of the objectives i.e. establishment of Educational Institutions and running them on a no profit basis. The present activity for which the exemption is sought for is the educational institutions established and for nonelse. Concluding his argument Mr. Kar, submitted that the case of the petitioner requires for reconsideration in its proper perspective.

7. Per contra, Mr. A.K. Mohapatra, learned Standing Counsel appearing for the Income Tax Department vehemently argued that there is no illegality and infirmity in the order of the Chief Commissioner. The order passed by the Chief Commissioner is a reasoned order as per Section 10(23C)(vi) of the Act, 1961. It was submitted that the institutions must exist solely for educational purposes. Since the petitioner has other objectives, which are not connected with education, the Chief Commissioner is justified in not granting approval under Section 10(23C)(vi) of the Act, 1961. The very fact of collection of fees under the head other than educational purpose, disentitles the petitioner to avail exemption under Section 10(23C)(vi) of the Act, 1961.

8. On the rival, factual and legal contentions advanced by the parties, the questions which fall for consideration by this Court are as follows:

(i) Whether the petitioner Trust is existing solely for educational purpose and not for the purpose of profit so that the income received by it shall not be included in computing its total income for the financial year 2008-09 ?

(ii) Whether opposite party No.1-Chief Commissioner is justified in not granting approval under Section 10(23C)(vi) of the Act, 1961 for the financial year 2008-09 ?

9. Since both the aforesaid questions are interlinked, they are dealt with together.

10. To deal with the aforesaid two questions, it is necessary to know what is contemplated in Section 10(23C)(vi) of the I.T. Act. The same is extracted below:

"**10. Incomes not included in total income**

In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included —

xx xx xx

(23C) any income received by any person on behalf of —

xx xx xx

(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iiiab) or sub-clause (iiiad) and which may be approved by the prescribed authority".

xx xx xx

(Underlined for emphasis)

A plain reading of Section 10(23C)(vi) of the I.T. Act makes it amply clear that in order to be eligible for exemption under Section 10(23C)(vi) of the I.T. Act, the following conditions are to be satisfied:

(i) there must be an educational institution,

(ii) such university or other educational institution must exist solely for educational purposes,

(iii) it should not exist for the purposes of profit, and

(iv) approval by the prescribed authority.

The prescribed authority as per Rule 2CA(1) of the Income Tax Rules, under sub-clause (vi) of Section 10(23C) shall be the Chief Commissioner or Director General, to whom application shall be made. 11.

11. At this juncture, it is necessary to know some of the relevant provisos of Section 10(23C)(vi) of the I.T. Act for our present purpose.

The first proviso provides that the other educational institution shall make an application in the prescribed form and manner to the prescribed authority for the purpose of grant of exemption or continuance thereof.

The second proviso provides that the prescribed authority before approving the other educational institution may call for such documents including audited annual account or information from the educational institution as it thinks necessary in order to satisfy itself about genuineness of the activities of other educational institution. The prescribed authority may also make such inquiries as it deems necessary in that behalf.

The third proviso provides that the income of a university or educational institution should be applied or accumulated for application wholly and exclusively to the objects for which it is established. Clause (b) of the third proviso states that the cash must be invested or deposited in one or more of the forms or modes specified in sub-section (5) of Section 11.

The seventh proviso to Section 10(23C) provides that nothing contained in sub-clause (vi) shall apply in relation to any income of the university or educational institution, being profits and gains of business, unless the business is incidental to the attainment of its objectives and separate books of account are maintained by it in respect of such business.

The 12th proviso provides that where the other educational institution does not apply its income during the year of receipt and accumulates it, any payment or credit out of such accumulation to any trust or institution registered under Section 12AA or to any fund or trust or institutions or any university or other educational institution or hospital or other medical institutions shall not be treated as application of income to the objects for which such fund or trust or institution or university or other educational institution or hospital or other medical institutions as the case may be is established.

12. The Hon'ble Supreme Court referring to its earlier decision in the case of *Surat Art Silk, (1980) 2 SCC 31,* considered the provision of Section 10(23C)(vi) in *American Hotel & Lodging Association Educational Institute vs. CBDT*, (2008) 301 ITR 86 (SC) and made the following observations:

> "With the insertion of the first proviso, the prescribed authority is required to vet the application. This vetting process is stipulated by the second proviso. It is important to note that the second proviso also indicates the powers and duties of the prescribed authority. While considering the approval application in the second proviso, the prescribed authority is empowered, before giving approval, to call for such documents including annual accounts or information from the applicant to check the genuineness of the activities of the applicant-institution. Earlier that power was not there with the prescribed authority.
>
> Under the third proviso, the prescribed authority has to ascertain while judging the genuineness of the activities of the applicant-institution, as to whether the applicant applies its income wholly and exclusively to the objects for which it is constituted/established.

> Under the 12th proviso, the prescribed authority is required to examine cases where an applicant does not apply its income during the year of receipt and accumulate it but makes payment there from to any trust or institution registered under section 12AA or to any fund or trust or institution or University or other educational institution and to that extent the proviso states that such payment shall not be treated as application of income to the objects for which such trust or fund or educational institution is established. The idea underlying the 12th proviso is to provide guidelines to the prescribed authority as to the meaning of the words "application of income to the objects for which the institution is established". Therefore, the 12th proviso is the matter of detail. The most relevant proviso for deciding this appeal is 13th proviso. Under that proviso the circumstances are given under which the prescribed authority is empowered to withdraw the approval earlier granted. Under that proviso, if the authority is satisfied that the trust, fund, University or other educational institution etc. had not applied its income in accordance with the 3rd proviso or if it finds that such institution, trust or fund etc. has not invested/deposited its funds in accordance with the 3rd proviso or that the activities of such fund or institution or trust etc. are not genuine or that its activities are not being carried out in accordance with the conditions subject to which approval is granted then the prescribed authority is empowered to withdraw the approval earlier granted after applying with the procedure mentioned therein."

13. In the above case the Hon'ble Supreme Court further held that it is only if the prerequisite condition of actual existence of the educational institution is fulfilled, the question of compliance with requirements in the provisos would arise. To make the section with the proviso workable, monitoring conditions in the third proviso like application/utilization of income, pattern of investments to be made, etc., could be stipulated as conditions by the prescribed authority subject to which approval could be granted. While imposing stipulations subject to which approval is granted, the prescribed authority may insist on certain percentage of accounting income to be utilized/applied for imparting education in India.

However, the prescribed authority must give an opportunity to the petitioner-institution to comply with the monitoring conditions which are stipulated for the first time as mentioned in the third proviso to Section 10(23C) of the I.T.Act. After grant of approval, if it is brought to the notice of the prescribed authority that conditions on which approval was given have been breached or that circumstances mentioned in the thirteenth proviso exist, then the prescribed authority can withdraw the approval earlier given by following the procedure mentioned in that proviso.

The Hon'ble Supreme Court further held that on the issue of deciding whether an institution is existing for profit or not, the mere excess of income over expenditure cannot be decisive. An institution cannot be considered to be existing for profit, if some surplus is generated over expenditure. According to the Hon'ble Supreme Court, it is not possible to carry on educational activity in such a way that the expenditure exactly balances the income and there is no resultant profit.

14. The Hon'ble Supreme Court in the case of *Oxford University Press vs. CIT, (2001) 247 ITR 658 (SC),* has held that non profit qualification in Section 10(23C)(vi) of the I.T. Act has to be tested against Indian activities.

15. In Section 10(23C)(vi) of the I.T. Act, emphasis has been given on the word "solely" for educational purposes. Solely means exclusively. Thus, the expression "solely" appearing in Section 10(23C)(vi) makes it clear that only the income of the institution established solely for educational purposes and not for commercial activities is entitled for exemption. Therefore, the Hon'ble Supreme Court in the case of *American Hotel & Lodging Association Educational Institute (supra),* held that even when one of the objects enables the institution to undertake the commercial activities, it will not be entitled to approval under Section 10(23C)(vi) of the I.T. Act.

16. The Hon'ble Supreme Court in the case of *Aditanar Educational Society (supra),* held that in deciding the character of the recipient of the income, it is necessary to consider the nature of the activities undertaken. If the activity has no co-relation to education, exemption has to be denied. The recipient of the income must have the character of an educational institution to be ascertained from its objects.

17. The Chief Commissioner in his order dated 30.09.2010 under Annexure-5 has quoted the following objective of the petitioner-Trust:

> "One of the non educational objectives (i.e. item no-16 at page-13 of the trust deed) of the assessee trust is:
>
> "the Managing Trustee or with the consent of the Managing Trustee the trustees may manage or supervise the **management of any lands,** hereditaments, and premises of the Trust Estate or any part thereof with power to erect, pull down, rebuild, add to, alter and repair houses and other buildings and to build drains and make roads and fences and otherwise **to improve and develop and to cultivate or cause to be cultivated all or any of the said lands,** hereditaments and premises and to insure houses and buildings against loss or damage by fire and/or other risks or to let, lease, make allowances to any agreements with tenants, agriculturists and

generally to deal with the said lands, hereditaments and premises as they may deem fit in their absolute discretion."

18. The Chief Commissioner further held that the petitioner trust is not existing solely for educational purposes. The trust has been created with other aims and objectives which are clearly in the nature of business. However, from the impugned order under Annexure-5, it does not reveal whether the petitioner trust has carried on any activities enumerated against item No.16 at page 13 of the Trust deed.

19. The Chief Commissioner, in paragraph 5 of his order under Annexure-5, has observed that on verification of the audited income and expenditure statements for financial years 2008-09 and 2007-08 it is seen that the assessee was engaged in non-educational activities like horticulture and generating income from the same. But the said order is totally silent as to what is the nature and magnitude of horticultural activities carried on by the assessee and what is its annual income and how it is utilized by the assessee. With regard to horticultural income, the contention of the assessee is that there were standing coconut and mango trees in the land acquired by the petitioner for establishment of the educational institution. In order to maintain a salubrious and green environment the trees were not cut down but maintained. The petitioner has reflected the receipt in its income and expenditure account. Amount of Rs.15,000/- received has been utilized in the educational activities of the institutions and for infrastructural development. Therefore, it cannot be treated that the profit was earned for non-educational activities. The stand of the petitioner needs examination by opposite parties with regard to quantum of income and utilization of the same.

20. The other reason given by the Chief Commissioner for refusing to grant exemption under Section 10(23C)(vi) of the Act, 1961 is that the petitioner has collected fees under the head "placement and training" from the students which is not in conformity with the fees prescribed. Referring to the judgment of the Hon'ble Supreme Court in the case of ***Islamic Academic of Education*** *(supra)* , learned Chief Commissioner has held that if any amount is charged other than the fee prescribed by the Committee under any head or guise, the same would amount to capitation fee.

21. As it appears from the impugned order under Annexure-5, the Chief Commissioner has relied on the Government of India resolution providing for fee structure, 1997 and the Government of Orissa Industries Department Resolution dated 17.09.1998 to come to a conclusion that the fees collected towards "placement and training" is in excess of what was prescribed by the said resolutions.

Petitioner's case is that the resolution relied upon by the Chief Commissioner no more holds the field in view of the Act, 2007 and the order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4 issued by the Industries Department. The resolution of 1997 and 17.09.1998 relied upon by the Chief Commissioner as aforesaid has become redundant and non-est. The concept and recommendation for charging a "placement and training fee" came with effect from 2007 vide Annexure-4 and is very much for educational purpose and cannot be held otherwise and in the least can ever be considered as a profit earning by the petitioner's institution. Therefore, the said fee collection is for educational purpose only as envisaged under Section 10(23C)(vi) of the Act, 1961. The institutions are obliged to see the placements of their students as per the AICTE Guidelines and train them accordingly. The fee for the same has been permitted to be collected which is for educational purpose.

22. The Chief Commissioner, therefore, is required to see whether the fees collected under head "placement and training" is in consonance with the Act, 2007, order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4 as claimed by the petitioner. If the collection is in consonance with the Act, 2007, order of the Hon'ble Supreme Court dated 01.06.2007 and subsequent notification vide Annexure-4, then it cannot be said that the collection is without any authority of law.

23. The next question that arises and needs to be determined is as to whether the collection of money made under the head "placement and training" is for educational purposes. It is to be further examined by the Chief Commissioner that how the income earned under head "placement and training" is utilized, i.e., whether for educational purpose or non-educational purpose. Recording of findings on the above issues by the Chief Commissioner is very much necessary to decide as to whether the petitioner is entitled to the grant of exemption in terms of Section 10(23C)(vi) of the Act, 1961.

24. In view of the above, the order of the Chief Commissioner under Annexure-5 is set aside and the matter is remitted back to the said authority to re-examine the case of the petitioner in the light of the observations made above and pass appropriate order in accordance with law within a period of six weeks from the date of receipt of a copy of this judgment.

25. With the aforesaid observations and direction, the writ petition is disposed of.

Writ petition disposed of.

2013 (I) ILR - CUT- 422

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

W.P.(C) NO. 4934 OF 2008 (Dt.22.08.2012)

M/S. KALPANA GLASS FIBRE PVT. LTD. ……..Petitioner

.Vrs.

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

A. ODISHA VALUE ADDED TAX ACT, 2004 – S.2 (45).

"Sale" – A particular sale may either be intra-State or inter-State, but cannot be both.

A transaction of sale is a single transaction whereby the property of goods passes through the seller to the buyer and there can never be two transactions of sale in one sale – Held, a single transaction of sale can be assessed either under the State Act or under the Central Sales Tax Act and can never be under both the Acts. (Para 10)

B. REFUND OF TAX – Tax paid under a mistake – Matter can be decided in a regular suit but not in writ petition – The power of the Court is not meant to be exercised for unjustly enriching a person – Held, unjust enrichment is inapplicable to the State Government as it represents the people of the country. (Paras 15,17)

C. ODISHA VALUE ADDED TAX ACT, 2004 – S.2 (45).

Fact – Whether a transaction of sale is inter-State or intra-State cannot be examined by the High Court in its writ jurisdiction. (Para11)

Case laws Referred to:-

1.88 STC 204 (SC) : (Gannon Dunkerley & Co. & Ors.-V-State of Rajasthan & Ors.)
2.(1994)92 STC 17 (Orissa) : (Brajendra Mishra-V- State of Orissa & Ors.)
3.(2000)118 STC 297 (SC) : (Steel Authority of India Ltd.-V- State of Orissa & Ors.)
4.(2001)1 OLR 586(Orissa) : (Ashoka Bidi Works-V- State of Orissa)
5.(2007)7 VST 214 (SC) : (State of Orissa-V- K.B. Shah & Sons Industries Pvt.Ltd.)

6.(2007)6 VST 331(SC) : (Commissioner of Sales Tax-V-Crown Re-Roller Pvt.Ltd.)
7.(1965)16 STC(V.64-VI)-398 : (Suganmal-V- State of Madhya Pradesh & Ors.)
8.(1988)71 STC 253 (Orissa) : (EDL Cast India-V- Sales Tax Officer).
9.(2003)2 SCC 614 : (Shree Digvijay Cement Co.Ltd. & Anr.-V- Union of India & Anr.)

For Petitioner - M/s. Jagabandhu Sahoo, N.K.Rout, P.Mohapatra, Pankaj Vyas & P. Vyas.

For Opp.Parties - Mr. R.P.Kar (for O.Ps. 2 & 3).

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to issue a writ in the nature of mandamus directing opposite parties 2 and 3 to refund Rs.8,10,516/- in favour of the petitioner within a stipulated period on the ground that opp. party no.2-Commissioner of Sales Tax, Orissa and opp. Party 3-Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar realized the aforesaid amount of tax illegally and arbitrarily from the petitioner as per the certificate in Form VAT 605 in respect of sales in course of inter State trade pursuant to contract with opp. Party no.4-Indian Oil Corporation Ltd., 304-Bhoi Nagar, Bhubaneswar.

2. The petitioner's case in a nutshell is that it is a Company registered under the provisions of the Companies Act, 1956 and it is a manufacturer supplier-contractor of canopy, cladding etc. having its factory at Sasewadi, Mumbai-Bangalore Highway, Tal. Bhor, Dist- Pune in the State of Maharashtra. The petitioner-Company was awarded with various work orders by the Indian Oil Corporation Ltd. (for short, "IOCL") for supply, fabrication and installation and Retail Visual Identity (for short, "RVI") elements at various retail outlets against limited tender No. OSO-ENG/2006-07/LT-41. As per the work order placed on the petitioner by IOCL, the petitioner is required to supply fabrication and installation of RVI elements at various retail outlets which will be subject to various terms and conditions, specifications and rate quoted by the petitioner-company and as finalized by IOCL. The work order provides for a time period for completion of work and further provides for compensation for delay. The contract further provides for service tax as per the provisions of law. Pursuant to the aforesaid contract entered into by the petitioner with IOCL, the petitioner- company supplied canopy, sales building fascia, column cladding etc. to IOCL. Against such supply, the petitioner-company has raised running account bills for 70% and 30% as per the completion stage of site invoices on IOCL and has charged Central Sales Tax at the appropriate rate i.e. 12.5% in the

Commercial Invoice as required under Section 8 of the Central Sales Tax Act. IOCL for the purpose of dispatch of goods to its various retail outlets has also duly issued way bill form in the prescribed Form XXXII issued by the Sales Tax Officer which also contains the details of goods dispatched from Pune by the petitioner-company to IOCL. The goods sent by the petitioner is supported by consignment note, way bill, commercial invoice, challan and all other documents. The petitioner-company has dispatched 23 consignments pursuant to the contract relating to various work orders issued by the IOCL. The IOCL while making payment to the petitioner in respect of 23 RVI elements in various retail outlets has deducted service tax @ of 4.04 per cent (12.24 per cent x 33%) income tax @ 2.244 per cent, the works contract tax at the rate of 4% and retention at the rate of 5% while making payment of the balance bill amounts to the petitioner-company. Opp. Party no.4 has in the process deducted a sum of Rs.8,10,516/- from the petitioner even though the same is not realizable u/s. 54 of the Orissa Value Added Tax Act (for short, "OVAT Act"). Hence, the present writ petition.

3. Mr. Jagabandhu Sahoo, learned counsel appearing for the petitioner-company submits that the materials which are required for the purpose of RVI elements are supplied in pursuance of the contract entered with the IOCL by the petitioner-company in course of interstate sales as ontemplated u/s 3 of the CST Act. As per the Explanation of Sec. 54 of the OVAT Act, the tax deducted by opp. Party no.4 is not realizable u/s. 54 of the OVAT Act. Neither the Explanation to Section 54 of the OVAT Act, nor the provisions of sub-section (5) nor any other provisions of Section 54 of the OVAT Act shall be construed as to authorize deduction of any amount of tax on the value of the property in goods transferred in the course of inter-state sales, sales outside the State or sales in the course of import. The petitioner in the present case having not transferred any property in goods in the State of Orissa pursuant to the contract with IOCL and the entire goods which are required for the purpose of RVI elements in various retail outlets having been supplied by the petitioner to IOCL under the CST Act, the petitioner does not incur any liability under the provisions of OVAT Act. The petitioner thus being not liable to pay tax under the OVAT Act does not incur any liability for obtaining registration under Section 24 of the said OVAT Act. The expression "sale" is defined under Section 2 of the OVAT Act and the note annexed to the explanation speaks in no uncertain terms that a sale or purchase shall not be deemed to have taken place inside the State, if the goods are sold in the course of inter-state trade and commerce.

4. Placing reliance on a decision of the Hon'ble Supreme Court in the case of *Gannon Dunkerley & Co. and others v. State of Rajasthan and*

others, 88 STC 204 (SC), Mr. Sahoo submitted that for the purpose of arriving at Taxable Turnover, turnover relating to inter State transactions, export, import under the CST Act are to be excluded. Thus, the provision of State Sales Tax Act is always subject to the provisions of Sections 3 and 5 of the CST Act. Sale or purchase in course of interstate trade or commerce and levy and collection of tax thereon is prohibited by Article 269 of the Constitution of India. Similarly, Article 286(1) of the Constitution prohibits the State from making a law imposing or authorizing the imposition of tax on the sale or purchase of goods where such sale or purchase takes place; (a) outside the State; or (b) in the course of import of goods into or export of goods out of the territory of India. As a result of the said provision, the legislative power conferred under Entry-54 of the State List does not extend to imposition of tax on a sale or purchase of goods which takes place in course of import or export of goods. Therefore, the Hon'ble Supreme Court held that power conferred upon the State Legislature under Entry- 54 of the State List cannot transgress the limitations provided under the Constitution and accordingly, a deemed sale resulting from transfer of goods involved in execution of works contract which take place in course of inter-State trade or commerce or which take place outside the State or in the course of import or export within the meaning of Sections 3, 4 and 5 respectively of the CST Act cannot be lost sight of. The petitioner under the scheme of law therefore, being not at all liable to pay tax under the OVAT Act within the scope of Entry-54 List-II 7th Schedule of the Constitution vis-à-vis the provisions of OVAT Act and rules framed thereunder, the amount realized from the petitioner by opp. party no.4 and deposited with the Sales Tax Department is liable to be refunded to the petitioner.

5. Mr. Sahoo, further submitted that the procedure provided under Section 54 of the OVAT Act and the mechanism provided therein though prescribes grant of no deduction and partial deduction of tax at source upon application by a contractor, but the Explanation to section 54 speaks in unequivocal terms that the said procedure shall not be construed as to authorize deduction of amount towards tax on the value of the properties in goods transferred in course of inter-State sale under the CST Act. Since supply of all the goods made by the petitioner company to IOCL pursuant to the contract executed with the IOCL are sales in course of inter-State trade, therefore, by virtue of Sec. 54 of the OVAT Act deduction of tax at source and so also deposit of such tax with the State Government are grossly unauthorized and the said amount is refundable to the petitioner. It is a trite rule of law much less the mandate of the Constitution which provides that no tax shall be levied without authority of law as per Article 265 of the Constitution of India. Thus, the deduction of tax from the petitioner and

deposit of such tax with the State Government being unauthorized, the same amounts to unjust enrichment on the part of the State and is thus refundable to the petitioner. In support of this contention, Mr. Sahoo relied upon the decision of this Court in the case of *Brajendra Mishra v. State of Orissa & others*, (1994) 92 STC 17 (Orissa). It was submitted that this Court while examining the validity of Section 13AA of the Repealed Act, struck down the necessary provision of said section providing deduction of tax in respect of inter-State sales, export or import vis-à-vis deemed sales contemplated under Article 366, Sub-Article 29A(b) of the Constitution of India. The Hon'ble Supreme Court in the case of *Steel Authority of India Ltd. V. State of Orissa and others, (2000) 118 STC 297 (SC)* has also struck down the amended provision of Section 13AA of the OST Act as sub-section (5) (a) of Section 13AA takes no account of the fact that even if a works contract involves both transfer of property in goods and labour or service, State sales tax may not be payable upon the entire value ascribable to the transfer of property in goods for the reason that it is in the course of inter-State sale, an outside sale or a sale in the course of import or export.

6. Placing reliance on a decision of this Court in the case of *Ashoka Bidi Works v. State of Orissa (2001) 1 OLR 586 (Orissa)* which was confirmed by the Hon'ble Supreme Court in Civil Appeal Nos.4158 to 4186 of 2001 in the case of *State of Orissa v. K.B. Shah and Sons Industries Pvt. Ltd. (2007) 7 VST 214 (SC),* Mr. Sahoo submitted that since supply of materials by the petitioner to IOCL are sales in the course of inter-state trade under Section 3 of the CST Act, direction should be given for refund of the tax realized by IOCL from the petitioner and deposited with the Government. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Commissioner of Sales Tax v. Crown Re-Roller Pvt. Ltd., (2007) 6 VST 331 (SC),* Mr. Sahoo submitted that where an industrial unit availing sales tax exemption was constrained to pay sales tax while effecting purchase of raw materials because of the notification of the State Government notifying the raw materials to be exigible to sales tax at the first point in the State and thereby resulting in payment of sales tax through purchase price, the Hon'ble Supreme Court directed the State to refund the sales tax it has actually collected. It was further submitted that the petitioner only provides service in the State of Orissa so far as execution of contract in question with IOCL is concerned. The same being a service exigible to service tax under the Central Law, IOCL deducts service tax at the rate of 4.04 per cent from the petitioner from its bills while making payment. Concluding his argument, Mr. Sahoo prayed to allow the writ petition granting relief claimed in the writ petition.

7. Per contra, Mr. R.P. Kar, learned Standing Counsel appearing for the Revenue submitted that remedy is available to the petitioner under sub-section(5) of Section 54 of the Act. Petitioner's case is that no tax is either payable or deductible at source under Section 54 of the OVAT Act. In such event, the petitioner should have made an application to the Assessing Officer and if he satisfies that no tax is payable, it could have obtained a 'No Deduction Certificate' from the Assessing Officer. On production of such certificate before the contractee i.e. IOCL, no tax would have been deducted from the payments made to the petitioner by the IOCL. This Court by exercising jurisdiction under Article 226 of the Constitution cannot decide the question whether the transaction in question is inter-State or intra-State in nature. Placing reliance on the judgment of the Hon'ble Supreme Court in the case of *Suganmal vs. State of Madhya Pradesh and others, (1965) 16 STC (V.64-VI)- 398,* Mr. Kar, submitted that the proper course left to the petitioner is to approach the Civil Court for refund of tax alleged to have been illegally collected and not by a petition under Article 226 of the Constitution of India.

8. On the rival contentions of both parties, the only question that falls for consideration by this Court is; whether a writ in the nature of mandamus directing opp. Party no.2-Commissioner of Sales Tax, Orissa and opp. Party no.3- Sales Tax Officer, Bhubaneswar-II Circle, Bhubaneswar can be issued to refund Rs.8,10,516/- alleged to have been illegally collected by IOCL from the petitioner and deposited with the Government ?

9. The undisputed facts are that petitioner entered into a contract with IOCL to execute some works at various retail outlets functioning inside the State of Orissa. In course of execution of the works, the petitioner supplied some materials, labour and service for installation of RVI elements at various outlets. According to the petitioner, it only provides service in the State of Orissa so far execution of contract in question with IOCL is concerned and the same being a service exigible to service tax under the Central Law, the IOCL levies service tax from the petitioner from its bill while making of payment. Petitioner's further case is that so far as supply of materials is concerned, the same being sales in course of inter-state trade, it is not exigible to tax under the OVAT Act and he is neither liable to be registered nor to pay any tax under the OVAT Act, 2004. Therefore, deduction of tax from the payment made to it by IOCL and deposit of the said amount with the State is illegal, contrary to the provision of the statute, mandate of the Constitution and the State should be directed to refund the amount so collected by IOCL and deposited with the State. In support of his contention that the State has no power or authority to levy tax in respect of inter-State sales, Mr. Sahoo relied upon the decision of the Hon'ble Supreme Court in

the case of Gannon Dunkerley & Co. and others (supra) and the provisions of OVAT Act, 2004 so far as 'sale' as defined under Section 2 of the OVAT Act, 2004 is concerned. In view of Entry-54 List VII of the Constitution of India, Articles 269, 286 (1) of the Constitution of India, we do not think it proper to burden the judgment by elaborately dealing with the judgment of the Hon'ble Supreme Court and the constitutional and statutory provisions relied upon by Mr. Sahoo as there is no quarrel over the proposition that for the purpose of arriving at taxable turnover, turnover relating to inter-State transactions, export, import under the CST Act are to be excluded, that the State Act is always subject to the provisions of Sections 3 and 5 of the CST Act; that sale or purchase in course of inter- State trade or commerce and levy and collection of tax thereon by the State is prohibited by Article 269 of the Constitution of India; that Article 286 (1) of the Constitution of India prohibits the State from making a law imposing or authorizing the imposition of tax on the sale or purchase of goods where such sale or purchase takes place (a) outside the State or (b) in the course of import of goods into or export of goods out of the territory of India; that the legislative power conferred under Entry-54 of the State List does not extend to imposing tax on a sale or purchase of goods which takes place in course of import or export of goods, and that the State legislature under Entry-54 of the State List cannot transgress the limitations provided under the Constitution.

10. Law is well settled that a particular sale may either be intra- State or inter-State sale, but cannot be both. A transaction of sale is a single transaction whereby the property of goods passes through the seller to the buyer and there can never be two transactions of sale in one sale. Thus a single transaction of sale can be assessed either under the State Act or under the Central Sales Tax Act and can never be under both the Acts. *(**See EDL Cast India v. Sales Tax Officer (1988) 71 STC 253 (Orissa**).*

11. Whether a particular sale is an inter-State sale or an intra- State sale would depend upon the factual scenario and nature of evidence produced. Without examining the evidence it cannot be definitely said whether the transaction is an intra-State or inter-state transaction. The nature of transaction cannot be decided in the writ petition because the material produced along with the writ petition can be more effectually examined by the Assessing Authority. The stand that the petitioner is not liable to be registered under the OVAT Act, 2004, does not improve the situation because the High Court cannot examine the material as an original forum. For the said purpose the petitioner has to establish that there is no breaking of chain of inter-state movement which has to be factually established.

12. Section 54 of the OVAT Act provides that any person responsible for making payment of any sum to any contractor for carrying out any works contract, which involves transfer of property in goods, in pursuance of a contract between the contractor and the Central Government or any State Government or any local authority or any authority or Corporation stablished by or under a statute, or any company incorporated under the Companies Act including any State or Central Government Undertaking, or any Co-operative Society, or any other association registered under the Societies Registration Act shall at the time of credit of such sum to the account of the contractor or any payment thereof in cash or by issue of a cheque or draft or any other mode, whichever is earlier, deduct subject to the certificate, if any, produced by the contractor in pursuance of sub-Section (5), an amount towards tax equal to 4 per centum of such sum in respect of the works contract, if the value of works contract exceeds Rs.50,000/-.

Sub-Section (5)(a) provides that where on an application being made by the contractor in this behalf, the Assessing Authority is satisfied that any works contract of the nature referred to in sub-section (1) involves both transfer of property in the goods and labour or services or involves only labour or service and accordingly justifies deduction of tax on the part of the same in respect of works contract or as the case may be justifies no deduction of tax he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate in the manner prescribed.

Clause (b) of sub-section (5) of Section 54 of the OVAT Act provides that where such certificate is produced by a contractor before the deducting authority, until such certificate is cancelled by the assessing authority, the deducting authority shall either make no deduction of tax or make the deduction of tax, as the case may be, in accordance with the said certificate. The explanation appended to Section 54 provides that nothing in sub-section (5) or any other provision of the this section shall be construed as to authorized deduction of any amount towards tax on the value of any property in goods transferred in the course of inter-State sales, sales outside the State or sales in the course of the import.

13. In view of the above statutory provision, it was incumbent on the part of the petitioner-contractor to make an application as provided under sub-Section (5) (a) of Section 54 to the Assessing Authority and satisfies him that no tax is deductible from the payments made to the petitioner as the materials supplied by it to IOCL is sale in course of inter-State trade and it is protected by Explanation appended to Section 54. In such event, the Assessing Officer has to examine the case of the petitioner and if is satisfied,

he is obliged under the Statute to issue no deduction of tax certificate to the petitioner and on production of such certificate before the IOCL, IOCL is bound not to deduct any tax from the payments made to the petitioner as provided under Section 54 (5)(b) of the Act, otherwise for contravention of the provision of Section 54 (5)(b) penalty shall be imposed on the IOCL as provided under sub-section (6) of Section 54 of the Act. Thus Section 54 is a complete provision so far as deduction of tax from the payment made to the contractor is concerned. Admittedly, the petitioner has not availed the remedy provided under Section 54(5) of the Act. 14. Now the next question arises as to whether in exercise of power under Articles 226 & 227 of the Constitution, a direction can be issuedto the State to refund the tax alleged to have been collected from the petitioner by IOCL illegally and deposited with the State.

15. At this juncture, it will beneficial to refer to the Constitution Bench decision of the Hon'ble Supreme Court in the case of ***Suganmal V. State of Madhya Pradesh and others*** *(supra)* in which it has been held that a petition under Article 226 of the Constitution of India solely for issue of a writ of mandamus directing the State to refund money alleged to have been illegally collected by the State as tax was not ordinarily maintainable because a claim for such refund is ordinarily made in a suit against the authority which had illegally collected the money as tax. The Hon'ble Supreme Court further held that the question whether the State was bound u/s.72 of the Contract Act to refund the amount on the ground that it was paid under a mistake was a matter for decision in a regular suit and not in a proceeding under Article 226.

16. In view of the Constitution Bench decision of the Hon'ble Supreme Court, the decision relied upon by the petitioner in the case of ***Ashoka Bidi Works (supra) and Crown Re-roller Pvt. Ltd. (supra)*** for issuance of a writ of mandamus directing the State to grant refund to the petitioner is of no help to the petitioner. Moreover, the facts of those cases are distinguishable from that of the present case.

17. Further contention of Mr. Sahoo, learned counsel for the petitioner is that deduction of tax from the petitioner and deposit of such tax with the State Government being unauthorized, the same is unjust enrichment on the part of the State and thus the said tax is refundable to the petitioner. In support of his contention he relied upon the judgment of this Court in ***Brajendra Mishra (supra)***. For the reasons stated herein before it cannot be said that the deduction of tax from the petitioner and deposit of such tax with the Government is unauthorized. Moreover, decision of this Court in *Brajendra Mishra* (supra), is of no help to the petitioner in view of the

decision of the Hon'ble Supreme Court in the case of **Shree *Digvijay Cement Co. Ltd. and another v. Union of India and another, (2003) 2 SCC 614,*** wherein the Hon'ble Supreme Court held that the doctrine of 'unjust enrichment' is a just and salutary doctrine. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is however, inapplicable to the State Government as it represents the people of the country. No one can speak of the people being unjustly enriched.

18. In view of the detailed provision made under Section 54 with regard to the deduction of tax and no deduction of tax and deduction of tax at a lower rate from the payment made to the contractor with reference to nature of the contract and the Explanation to Section 54 of the OVAT Act, there is no need to deal with the case of Steel Authority of India (supra) relied upon by the petitioner.

19. For the reasons stated above, the prayer made in the writ petition by the petitioner for a direction to opposite party Nos.2 and 3 to refund Rs.8,10,516/- cannot be granted.

20. In the result, the writ petition is dismissed. No order as to costs.

Writ petition disposed of.

2013 (I) ILR - CUT- 432

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

W.P.(C) NO. 27345 OF 2011 (Dt.31.08.2012)

M/S. SANTUKA AGENCIES ……Petition

.Vrs.

INCOME TAX OFFICER, WARD-2(2)
CTC. & ORS. . ……..Opp.Parties

INCOME TAX ACT, 1961 – S. 237.

Refund – An assessee is entitled to claim refund of tax, if the tax paid by him or on his behalf for any assessment year exceeds the tax which he is liable to pay for that assessment year and such refund shall be granted if he satisfies the assessing officer that he is entitled to a refund – Though there is no specific provision empowering the assessing officer to investigate such claim, such a power is implicit and inherent in the assessing officer. (Para 10)

Case law Referred to:-

(1991)190-Income Tax Reports 260 : (Babu Ram Chandra Bhan & Anr.-V- Income Tax Officer & Anr.).

For Petitioner - M/s. B. Panda, B.B. Sahu & B. Panda.
For Opp.Parties - Mr. A.K. Mohapatra, Sr. Advocate.

B.N. MAHAPATRA,J. This writ petition has been filed with a prayer to direct opp. party no.1-Income Tax Officer, Ward-2(2) Cuttack and opp. party no.2-Addl. Commissioner of Income Tax, Range-2, Cuttack for issuance of refund voucher in favour of the petitioner at the earliest with interest @12% per annum on the ground that the action of opp. Party nos.1 and 2 are contrary to the provisions of the statute.

2. The petitioner's case in a nutshell is that the petitioner filed its return of income on 01.09.2003 for the assessment year 2003-04 claiming refund of Rs.1,70,691/-. The total tax payable in respect of the income disclosed in the return was Rs.1,14,800/- as against which the tax of Rs.2,15,491/- was deducted at source and advance tax amounting to Rs.70,000/- was paid. Thus against the tax liability of Rs.1,14,800/-, Rs.2,85,491/- was paid for the assessment year 2003-04. Therefore in the return form under Annexure-1 and in the statement of income under Annexure-2, the petitioner claimed

refund of Rs.1,70,691/-. Despite filing several representations, since no refund is granted to the petitioner, the present writ petition is filed claiming the above relief.

3. Mr. B. Panda, learned counsel for the petitioner submitted that the refund due to the petitioner is to be paid along with interest @ 12% as provided under Section 243 of the Income Tax Act. If the refund is not granted within a period of three months from the end of the month in which the total income is determined under the Act or in any other case from the end of the month in which the claim for refund is made under Chapter XIX of the Income Tax Act, the Central Government shall pay the assessee simple interest at the rate of 12% per annum on the amount directed to be refunded. Under the scheme of Income Tax Act, once the return is filed, the same is to be processed under Section 143 (1) of the Income Tax Act. After the return is processed, question of refund arises on the basis of return and then refund is made to the assessee. In the instant case, till date no proceeding either under Section 148 or under the provisions of the Income Tax Act has been initiated in respect of the return filed for the assessment year 2003-04. Therefore, the refund of Rs.1,70,691/- claimed in the return should have been refunded to the petitioner with interest as the said amount has not been granted to the petitioner. The petitioner sent two reminders dated 18.7.2008 and 25.7.2008 requesting opp. party no.2 to expedite the matter and make payment of the refund due to the petitioner. In spite of receipt of the reminders, opp. party nos.1 and 2 had kept mum and maintained silence over the issues and in the process, the matter has been delayed for pretty long period. Thus, the petitioner felt harassed. Since excess amount of tax has been paid through TDS and by way of advance tax than what is due from the petitioner, the petitioner is legally entitled to get refund of the excess amount, but the same has been illegally denied to the petitioner by the opp. parties.

4. Mr. A.K. Mohapatra, learned Senior Standing Counsel appearing on behalf of the opp. parties referring to the counter affidavit filed by opp. party nos.1 to 3 submitted that the claim of the petitioner for refund is barred by time and it is not maintainable. The allegation of the petitioner regarding any apparent inaction and recalcitrant attitude of the Income Tax Authorities relating to no issue of the refunds claimed for the assessment year 2003-04 amounting to Rs.1,70,691/- is totally baseless. From the annexures appended to the writ petition, it is found that on behalf of the petitioner for the first time a letter was addressed to the Addl. CIT, Range-2, Cuttack on 16.07.2008 received in the office on 18.07.2008 claiming that the refund for Rs.1,70,691/- was not received by the assessee till 16.07.2008. Under the

provisions of the Income Tax Statute, a return of income filed for the assessment year 2003-04 has to be processed under Section 143(1) of the Income Tax Act, 1961 by March, 2005. As per the existing administrative regulation, any refund claimed which is found lawfully payable by the Income Tax Department to the tax payers exceeds Rs.1 lakh, it has to be approved by the Range Officer before the refund amount is paid to the assessee. From the registers and records available in the office of the ITO, Ward- 2(2), Cuttack, it transpires that necessary action had been duly taken by the Assessing Officer/Range Officer for processing the return of income and to obtain administrative approval for refund of amount exceeding Rs.1 lakh in the case of M/s. Santuka Agencies for the assessment year 2003-04. From verification of return of income filed by the partnership firm on 01.09.2003 along with copies of TDS certificates, computation of total income statement, tax audit report, P & L Account, balance sheet for the financial year 2002-03, it transpires that as per the TDS certificates the assessee had earned gross interest income of Rs.11,01,577/- on which TDS was made by the payer for Rs.11,567/-. Similarly the assessee had executed contract works for gross amount of Rs.1,57,531/- from which TDS was made by the contractee amounting to Rs.3,310/-.Further the TDS certificates in respect of commission payment revealed that the gross commission amount was Rs.17,31,891/- from which the payer had deducted TDS for Rs.96,514/-. The sum total of TDS amount was Rs.2,15,491/- and the sum total of receipts under the head interest, contract works and commission taken together amounted to Rs.29,90,999/-. The verification of tax audit report and P & L Account enclosed to the return of income filed shows no separate head of receipts in the credit side of the P & L Account in respect of interest income of Rs.11,01,577/- and contractual works receipts of Rs.1,57,531/-. The commission amount credited to the P & L Account shows total commission of Rs.18,35,783/- whereas as per TDS certificate the commission amount was Rs.17,31,891/-.

5. Mr. Mohapatra further submitted that at the relevant time the Assessing Officer and the Range Officer had preliminary belief that the P & L Account having not reflected separately income under the head ‘Interest’ and contractual receipts, there was an escapement of income assessable to tax. Accordingly, the Assessing Officer, ITO, Ward-2(2), Cuttack had written a letter to M/s.Santuka Agencies, Dolamundai, Cuttack vide letter No.ITO/W-2(2)/CTC/2004-05 dated, Cuttack, dated the 1st June, 2004 requesting him to furnish the details of TDS certificate for processing his return for issue of refund. The said letter was received by M/s.Santuka Agencies on 1.07.2004 through Notice Server. In response to the said notice, the petitioner did not furnish any clarifications called for by the Assessing Officer. It is further

submitted that the Assessing Officer had reasons to believe that interest income and contract receipts were not disclosed in the return filed for which a noting was made in the records for issue of notice under Section 148 of the Income Tax Act, 1961. However, there is no evidence available on records regarding actual service of the notice under Section 148 of the Income Tax Act, 1961 on the assessee except the service of letter dated 1.6.2004 on the petitioner on 1.7.2004. It was submitted that since the assessee having not complied with clarifications called for by the Assessing Officer as per letter served on 1.7.2004 prima facie the assessee was not entitled to any credit of TDS on the ground that corresponding income of Rs.11,01,577/- towards interest income and contract receipts of Rs.1,57,531/- had not been isclosed in the P & L Account. In other words, the TDS amount of Rs.1,15,667/- from such interest income and TDS from contract receipts of Rs.3,310/- were not prima facie admissible.

6. Mr. Mohapatra further submitted that the petitioner has an alternative efficacious remedial measure available right now to produce relevant reconciliation of gross receipts from interest income, gross receipt from contract works and gross receipt from commission as per TDS certificate with the figures shown in the P&L Account for the financial year 2002-03. After submission of such clarifications/supporting documents, it can be ascertained as to whether the entire TDS amount is available to the assessee's credit or only a part of the TDS can be allowed corresponding to the gross turnover which has been disclosed in the P&L Account. No action on the petition filed by the petitioner on July, 2008 i.e. after five years from the date of filing of the return would be taken by the Assessing Officer as the return filed on 1.9.2003 could not be readily available.

7. On the rival contentions of the parties, the question that arises for consideration of this Court is to whether the petitioner assessee is entitled to get refund of Rs.1,70,691/- as claimed in its return filed on 01.09.2003 for the assessment year 2003-04 along with interest as provided under the Income Tax Act, 1961 and the Income Tax Authorities are not justified in not granting the refund claimed by the petitioner.

8. The undisputed facts are that the petitioner filed its return for the assessment year 2003-04 claiming refund of Rs.1,70,691/-.

9. The petitioner's case is that the income chargeable on his return income is Rs.1,14,800/- as against which Rs.2,85,491/- waspaid (Rs.2,15,491/- and Rs.70,000/- through TDS and advance tax respectively). Therefore, the petitioner is entitled to get refund of Rs.1,70,691/-. Since no

refund was paid, the petitioner sent reminders to the authorities on 8.7.2008 and 25.7.2008 respectively requesting opp. party no.2 to expedite the matter and make payment of the refund due to the petitioner for the period as stated above. In the writ petition, the petitioner has not explained why he remained silent from the date of filing of return from 1.9.2003 till July, 2008 when he made representation. The petitioner has also not explained why it belatedly approached this Court in October, 2011. On the ground of delay and laches, though this writ petition is liable to be dismissed, we are not doing so in view of the averments made in paragraph 10 of the counter affidavit filed by the Income Tax Department to the effect that the petitioner has an alternative efficacious remedial measure available right now to produce relevant reconciliation of gross receipts from interest income/from contract works/from commission as per TDS certificate with the figure shown in P & L Account for the financial year 2003-04 and after submission of such clarification/supporting documents it can be ascertained about petitioner's entitlement to get the amount of refund on the basis of TDS certificate.

10. Section 237 of the Income Tax Act speaks about refund. The said Section reads thus:-

> "If any person satisfies the [Assessing] Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."

Plain reading of this Section makes it clear that a person is entitled to claim refund of tax, if the tax paid by him or on his behalf for any assessment year exceeds the tax which he is liable to pay for that assessment year.

Section 237 further stipulates that only if any person satisfies the assessing officer that he is entitled to a refund then such refund shall be granted. Therefore where there is a dispute as to the entitlement of assessee to get refund, the assessing officer has to cause necessary enquiry and after giving opportunity to the assessee shall come to a conclusion. Though there is no specific provision empowering the assessing officer to investigate such a claim, such a power is implicit and inherent in the assessing officer as would be evident from a plain reading of Section 237.

11. The Allahabad High Court, in the case of ***Babu Ram Chandra Bhan and another V. Income-Tax Officer and another,*** reported in (1991) 190-

Income Tax Reports-260 while considering the provision of Section 237 held that a person becomes entitled to refund only when he satisfies the Assessing Officer that a certain amount is due to him. This satisfaction necessarily involves an inquiry where there is a dispute as to the entitlement to the amount to be refunded. While there is no specific provision empowering the Income-tax Officer or the Assessing Officer to investigate such a claim, such a power is implicit and inherent in him as would be evident from a reading of section 237 of the Income-tax Act, 1961.

12. In the instant case, specific case of the opp. parties is that on verification of tax audit report and P & L Account it reveals that there is no separate head of receipts in the credit side of the P & L Account in respect of interest income of Rs.11,01,577/- and contract works receipts of Rs.1,57,531/- in relation to which the TDS certificate has been submitted and refund is claimed. The further discrepancy is that the commission amount credited to the P & L Account shows total commission of Rs.18,35,783/- whereas as per TDS certificate the commission amount was Rs.17,31,891/-. Therefore, the assessing officer had written a letter to the petitioner vide letter No.ITO/W-2(2)/CTC/2004-05 dated 01.06.2004 to clarify the discrepancy. For better appreciation, the said letter dated 01.06.2004 is extracted hereunder.

> "To
> M/s. Santuka Agencies
> Dolamundai, Cuttack.
>
> Sir,
>
> Sub:- Claim of refund for the A/Y.2003-2004-Matter regarding.
>
> While processing your return for issue of refund, it is observed that TDS certificates enclosed with the return indicate your receipts under the heads interest, contract and commission. But P & L A/c submitted with the return does not indicate any interest income and contract receipts. In this connection, your Authorized Representative was requested to furnish the details of interest income and contract receipts. But nothing has been heard so far. You are once again requested to furnish the details within three days from the date of receipt of this letter, failing which report as deemed appropriate will be submitted to the Joint Commissioner of Income Tax,
> Range – 2, Cuttack.
>
> Yours faithfully,
> Sd/-

(U.C. Satpathy)
Income Tax Officer,
Ward-2(2), Cuttack."

13. Opp. parties in paragraph 7 of their counter affidavit stated that the said letter was received by M/s.Santuka Agencies, Dolamundai, Cuttack on 1.7.2004. There is no material evidence on record to show that the assessee had produced any reconciliation statement of interest and contractual receipts as per TDS certificate compared to turnover credited in the P & L Account as per the audited statement. No rejoinder was filed by the petitioner denying the facts stated in paragraph 7 of the counter affidavit.

14. In view of the provisions of Section 237 of the Income Tax Act and averments made in paragraphs 6 and 7 of the counter affidavit, it cannot be said that there is any laches on the part of opp. parties-Department in not granting refund to the petitioner as claimed in its return. 15. At this juncture, it is relevant to reproduce the relevant portion of paragraphs 10 and 13 of the counter affidavit.

> "10…….The assessee having not apparently complied with the clarifications called for vide letter dated 01.06.2004 served on the assessee on 01.07.2004, the Income Tax authorities could not give credit to the entire
> TDS claimed in so far as there was no mention in the P & L Account about any interest income or income from execution of contract works and also on account of discrepancy between commission income shown in the P & L Account and gross commission received as per TDS certificates. In this context the petitioner has an alternative efficacious remedial measure available right now to produce relevant reconciliation of gross receipts from interest income/gross receipt from contract works/gross receipt from commission as per TDS certificates with the figures shown in the P & L Account for the financial year 2002-2003. After submission of such clarifications/supporting documents it can be ascertained as to whether the entire TDS amount is available to the assessee's credit or only a part of the TDS claim can be allowed corresponding to the gross turnover which has been disclosed in the P & L Account.
>
> 13……It is reiterated here that the assessee has an option to file the clarifications called for by the Assessing Officer about the reconciliation of interest income as per TDS certificate/contractual receipts as per TDS certificate/commission receipts as per TDS

certificate vis-à-vis amount credited in the P & L Account for the financial year 2002-2003 before the jurisdictional Assessing Officer with supporting books of accounts and documents and necessary action shall be taken by the present Income Tax authorities on the basis of such evidences which may be furnished. The petitioner has an alternative efficacious measure to redress its grievances by producing the clarifications called for by the Assessing Officer in June, 2004 with supporting books of accounts."

16. In view of the above, we direct the petitioner to appear before opp. party no.1-Income Tax Officer, Ward-2(2), Cuttack within a period of four weeks from today. If the petitioner appears before the Assessing Officer and satisfies him with supporting documents about his entitlement to get refund in terms of Section 237 of the Income Tax Act, the Assessing Officer is directed to grant refund immediately along with interest in accordance with law.

17. With the aforesaid observations and directions, the writ petition is disposed of.

Writ petition disposed of

2013 (I) ILR - CUT- 440

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

W.P.(C) NO. 27674 OF 2011 (Dt.02.11.2012)

SUCHANDRA KUMAR NAYAK & ORS. ……..Petitioners

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

SERVICE LAW – Petitioners were called to attend the selection process conducted by the Selection Board and were found qualified for the post of Junior Assistant – Their claim was rejected on the ground that their case is covered by a decision of this Court in OJC No.3694/99 although it has really no application to the case of the petitioners – Held, petitioners are entitled to be absorbed in the post of Junior Assistant – Direction issued for their appointment before the State Government goes for any fresh selection for Junior Assistants in the L.F.S Cadre. (Paras 8,9,10)

For Petitioners - M/s. Jagannath Rath, B.N. Rath, S.K.Jethy, S.K.Mishra & B. Barik.
For Opp.Parties - Mr. Sahoo, Addl. Standing Counsel) (for O.P.Nos.1 & 4)
M/s. K.P. Nanda & D. Panigrahi, (for O.P. Nos. 2, 3 & 5).

B.K. NAYAK, J. Petitioner no.2-Lokanath Sahoo having already withdrawn the writ application, it is now confined to petitioner nos.1 and 3 to 13, who have prayed to set aside the order of the State Government under Annexure-7 and to direct the opposite parties by issuing a writ of mandamus to regularize/appoint them in the post of Junior Assistants from 25.09.1997 as per the direction of this Court dated 25.09.1997 in OJC No.13605 of 1997 (Misc. Case No.1182 of 1997).

2. The case of the petitioners is that they are working as Clerks on NMR basis against the posts of Junior Assistant under the Bhubaneswar Municipal Corporation, previously Bhubaneswar Municipality, since more than two decades. Their request to the authorities to regularize them having produced no result they approached this Court in OJC No.1058 of 1992 for regularization and for payment of equal wages for equal work. In the meanwhile, although some posts of Tax Collectors were lying vacant and the

case of the petitioners for regularization against those posts was not considered, they filed OJC No.3820 of 1994. By virtue of an order in Misc. Case No.7521 of 1994 arising out of OJC No.3820 of 1994 they were absorbed on regular basis as Tax Collectors under Bhubaneswar Municipal Corporation. The petitioners' earlier writ application bearing OJC No.1058 of 1992 along with Misc. Case Nos.8688 and 8689 of 1995 was disposed of by order dated 19.01.1996 with the following direction:

> "Considering the nature of the relief sought and the developments of the case as noted above, we dispose of the writ application as well as the misc. cases with the direction that the case of the petitioners be considered for regularization/ appointment as Junior Assistants according to the vacancies available and in accordance with rules and instructions.
>
> The order be communicated to the opposite parties forthwith. Requisites will be filed by 22.01.1996."

3. In the meantime, the Government of Orissa issued instruction to all the Executive Officers of Urban Local Bodies to sponsor applications of NMR Junior Assistants for considering their case for regularization through a special selection board as the posts of Junior Assistant are in the cadre of Local Fund Service under the Local Fund Service Rules. On 13.11.1997 the Director, Municipal Administration-opposite party no.4 issued letters to the petitioners, one of which is at Annexure-3, asking them to report before the Secretary to the Government on 16.11.1997 with relevant documents for selection to the post of Junior Assistants in the special recruitment. The petitioners appeared and participated in the selection process, but they were ignored though 148 other candidates were shown selected for the posts of Junior Assistant. The petitioners' case having been ignored for Junior Assistant posts, they again approached this Court by filing OJC No.13605 of 1997. In Misc. Case No.11821 of 1997 arising out of the said writ application this Court passed order on 25.09.1997 to the following effect :

> "Issue notice to the writ application as well as the misc. case returnable within three weeks. Requisites shall be filed by 27.09.1997.
>
> In the interim we direct that all the NMR employees shall be regularized in terms of the order dated 19.1.1996 passed in OJC No.1058 of 1992 and Misc. Case Nos.8688 and 8689 of 1995 before calling any outsiders for interview and tests.

An authenticated copy of this order may be granted on payment of court fee worth Rs.50/-."

4. In the selection held on 16.11.1997 by the Selection Board the petitioners appeared in pursuance of the interim order dated 25.09.1997 passed in the aforesaid Misc. Case No.11821 of 1997 and the proceeding of the selection board dated 08.04.1999 (Annexure-5) reveals that the petitioners were found qualified by the selection board but in view of the pendency of the writ application, i.e., OJC No.13605 of 1997, their case for regularization as Junior Assistants could not be considered.

5. OJC No.13605 of 1997 was finally disposed of by this Court on 12.08.2010 taking note of the orders passed in the previous OJC No.1058 of 1992 and the proceeding of the selection board under Annexure-5 by issuing the following directions :

"In view of the above, it is clear that during pendency of the writ application, the question of regularization of the petitioners as Junior Assistants has not been considered.

We, therefore, dispose of the writ application directing the opposite parties to give effect to the earlier order passed by this Court in OJC No.1058 of 1992 as well as the interim order passed by this Court on 25.09.1997 and take a decision regarding regularization of the petitioners as Junior Assistants in terms of the above two orders within a period of three months from the date of communication of this order."

Thereafter, order dated 1.01.2011 under Annexure-7 was passed by the Commissioner-cum-Secretary to Government in Urban Development Department rejecting the case of the petitioners for regularization/ absorption in the posts of Junior Assistant on the ground that their cases are covered by the decision of the High Court of Orissa passed in OJC No.3694 of 1999 which was confirmed by the Hon'ble apex Court by order dated 22.01.2001 in SLP No.5848 of 2000.

6. The learned counsel for the petitioners contends that as it appears from Annexure-7, OJC No.3694 of 1999 was filed by some regular Senior Tax Collectors challenging the action of the Bhubaneswar Municipal Corporation allowing some Junior Tax Collectors to work against some posts of Junior Assistants and that the writ application having been allowed, some Tax Collectors, who were working in the Junior Assistant posts, filed the

aforesaid SLP No.5848 of 2000 which was dismissed by the Hon'ble apex Court, and that such decision has no bearing at all so far as the case of the petitioners for their absorption in the post of Junior Assistants is concerned as because they having been allowed to face the selection process conducted by the selection board under the LFS Rules came out successful but their case was kept pending awaiting the final decision in the writ application (OJC No.13605 of 1997), but they have been illegally denied appointment/absorption by virtue of the order under Annexure-7 even though there is a clear direction in OJC No.1058 of 1992 for their regularization/appointment as Junior Assistants according to the vacancies available and in accordance with the rules.

7. The State Government-opposite party nos.1 and 4 have filed counter affidavit stating that the petitioners were regularised in the posts of Tax Collector and their case for regularisation/absorption as Junior Assistant can not be considered as because they became regular Tax Collectors of Bhubaneswar Municipal Corporation. While not disputing the fact that in the selection held by the Selection Board on 16.11.1997 the petitioners were found qualified for the post of Junior Assistant, it is stated that their names were not included in the select list prepared in the said selection because of the pendency of OJC No.13605 of 1997. It is also stated that the case of the petitioners is covered by the decision of the High Court in OJC No.3694 of 1999 which was confirmed by the Supreme Court in SLP. It is stated that the petitioners having been regularised in the posts of Tax Collectors, their cases can only be considered for promotion to the posts of Junior Assistant from the promotional quota as per the Local Fund Service Rules.

8. There is no denial of the fact that the petitioners were initially engaged on NMR basis to work against the posts of Junior Assistant, though at a later point of time they were regularised in the post of Tax Collectors, which is a non-LFS cadre post. While the petitioners claimed for regularisation as Junior Assistants and filed OJC No.1058 of 1992 seeking such relief, this Court by order dated 19.01.1996 directed the opposite parties to consider the petitioners for regularisation/appointment as Junior Assistants according to vacancy available and in accordance with Rules and instructions. There is also no denial of the fact, rather it is admitted that as per the Selection Board proceedings under Annexure-5 the petitioners along with others were called to attend the selection process conducted by the Selection Board on 16.11.1997 and they were found qualified for the posts of Junior Assistant but they were not appointed/absorbed because of the pendency of OJC No.13605 of 1997. In Misc. Case No.1182 of 1997 arising out of OJC No.13605 of 1997 this Court on 25.09.1997 passed interim order

directing that all NMR employees shall be regularised in terms of the order dated 19.1.1996 passed in OJC No.1058 of 1992 and Misc. Case No.8688 and 8689 of 1995 before calling any outsiders for interview and test. Pursuant to the interim order the petitioners were called to face the selection board, which they faced on 16.11.1997 and were found qualified for the post of Junior Assistants. Taking into consideration the selection board's minutes under Annexure-5 to the effect that the petitioners were found qualified and the previous order dated 19.01.1996 passed by this Court in OJC No.1058 of 1992 this Court disposed of OJC No.13605 of 1997 directing the authorities to consider the case of the petitioners for regularisation/absorption in the posts of Junior Assistant.

9. As it transpires, the State Government, particularly, the Commissioner-cum-Secretary, Housing and Urban Development Department passed order under Annexure-7 and rejected the claim of the petitioners only on the ground that the petitioners' cases are covered by the decision of this Court in OJC No.3694 of 1999, which was confirmed by dismissal of SLP No.5848 of 2000, ignoring the orders passed by this Court in OJC Nos.1058 of 1992 and 13605 of 1997. Nothing has been shown by opposite party nos.1 and 4 in their counter affidavit as to how the case of the petitioners is covered by the decision in OJC No.3694 of 1999. Whatever is available from the description in Anenxure-7 is that OJC No.3694 of 1999 was filed by some regular Senior Tax Collectors challenging the action of the Bhubaneswar Municipal Corporation allowing some Junior Tax Collectors to work against the posts of Junior Assistant. That writ application was allowed on 25.2.2000 by quashing the order of the Bhubaneswar Municipal Corporation whereby some Junior Tax Collectors were allowed to work against posts of Junior Assistant and such order of the High Court was confirmed in the SLP No.5848 of 2000. It is, therefore, clear that the decision in OJC No.3694 of 1999 shall have no bearing or effect on the claim of the petitioners, who were earlier directed to be regularised in accordance with the rules and accordingly they came out successful and qualified in the selection conducted by the Selection Board, much prior to passing of the order by this Court in OJC No.3694 of 1999.

In the aforesaid view of the matter, the petitioners are entitled to be absorbed in the posts of Junior Assistant.

10. We, therefore, allow the writ application and direct the authorities, particularly the State Government to absorb/appoint petitioners in the vacant posts of Junior Assistant or any post that might become available in future, if there is no vacant posts at present, before the State Government goes for

any fresh selection for appointment of Junior Assistants in the LFS cadre. This order, however, shall not affect the right or claim of any other employee for regularisation/absorption in the post of Junior Assistant in the LFS cadre which has already been adjudicated prior to the disposal of this writ application. The writ application is accordingly disposed of. No costs.

Writ petition disposed of.

2013 (I) ILR - CUT- 446

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

MATA NOS. 32 & 33 OF 2008 (Dt. 12.10.2012)

NIRMAL CHANDRA DASH ……. Appellant

.*Vrs.*

JANAKI DASH @ PANDA & ORS. ……..Respondents

HINDU MARRIAGE ACT, 1955 – S. 13(1).

Divorce – Adultery – Difficult to get direct evidence – Held, circumstantial evidence leading to an inference of adultery is sufficient.

In this case the petitioner-husband alleged that despite the protest made by his old mother his wife entertained outsiders till late night and on 01.09.1999 she left the house with one Santosh Kumar Das – P.Ws. 2 & 3 are respectively son and daughter of the petitioner-husband and defendant No1-wife – P.W.2 stated that Santosh is the agnatic brother of his father and he has seen Santosh sleeping on the same bed along with his mother and gossiping and P.W.3 has stated to have suspected bad relationship of her mother and Santosh but they did not say any thing that on 01.09.1999 their mother left with Santosh – Mother of the petitioner-husband being the vital witness has been with held from the witness-box without any cogent reason.

Held, evidence of P.Ws.2 & 3 cannot be believed to draw presumption that defendant No.1 was living in adultery – There being no evidence that defendant No.1 was found in a compromising position with Santosh or they were found living together in a house on 01.09.1999, the petitioner has failed to establish his case for dissolution of marriage on the ground of adultery.

(Para 10,12,13,14)

Case laws Referred to:-

1.AIR 1991 ORISSA 39 : (Sanjukta Padhan-V- Laxminarayan Padhan & Anr.)

2.Vol.67(1989) CLT 392 : (Smt. Pramila Dei @ Kuni-V- Sanatana Jena).

For Appellant - M/s. Dayanidhi Lenka, B.N.Lenka, D.S.Ray, S.Patra & M.R. Lenka.

For Respondent - M/s. G.P.Samal, S.K.Biswal, Mr. P.Panda

Mr. S.K.Mohanty, P.K.Rout, S.Barik,
M. Acharya , D.Bhakta, D. Mishra &
S.Mohanty.

B.K.MISRA, J. Both these appeals are being disposed of by this common judgment as both the appeals arose out of the common judgment delivered by the learned Judge, Family Court, Cuttack in Civil Proceeding No.215 of 2000 and Civil Proceeding No.62 of 2002.

2. The appellant in MATA No.33 of 2008 was the plaintiff in Civil Proceeding No.62 of 2002 which was filed for dissolving his marriage with the respondent wife by passing a decree of divorce in the court of learned Judge, Family Court, Cuttack. The said proceeding was dismissed. Therefore, being aggrieved, the appellant has preferred the appeal before this Court.

3. In C.P. No. 215 of 2000, the plaintiff wife had prayed for maintenance of Rs.2000/- per month from the opposite party who is her husband and the said proceeding was allowed of by the learned Judge, Family Court, Cuttack by the impugned judgment wherein the opposite party husband was directed to pay Rs.800/- per month to the plaintiff wife from the date of institution of the Civil Proceeding i.e. 21.01.2000. The opposite party husband being aggrieved by the said judgment has filed MAT Appeal No. 32 of 2008.

4. Bereft of unnecessary details, the case of the plaintiff in Civil Proceeding No. 215 of 2000 was that she married the opposite party (appellant) according to the Hindu Caste Customs in the month of July, 1983 and thereafter, they led a happy conjugal life and were blessed with one son and two daughters. According to the petitioner-wife at the time of marriage the opposite party and his relatives demanded cash of Rs.10,000/- and a black and white T.V. set. Since the father of the petitioner was very poor, he could only give Rs.5,000/- out of the demanded money of Rs.10,000/-besides other house-hold articles, but could not give the black and white T.V. It is alleged by the petitioner that since the demands were not fulfilled by her father as demanded by the opposite party she was subjected to inhuman torture by the opposite party and her mother. But the petitioner was tolerating the torture meted out to her as a Hindu orthodox Brahmin lady. It is further alleged that the opposite party was a wreckless person and leading an amorous life to which when the petitioner protested she was severely assaulted and ultimately the opposite party drove her out of the house in the month of August, 1999 for which the petitioner came to the village of her father and lived there. It was her further case that when her

relatives tried to sort out the problem they were misbehaved and the opposite party openly declared that he will not keep her (wife-petitioner) for a moment and the opposite party did not allow his children to see their maternal uncle and other relatives. It is the case of the petitioner that the opposite party works as a Peon in Ashutosh College, Calcutta in the State of West Bengal and was drawing Rs.5,000/- per month and from the landed property the opposite party earns Rs.30,000/- per year. It is also the case of the petitioner that her father is a poor man having no landed property and she fully depends on her father and it becomes difficult for her father to maintain her and accordingly she prayed for grant of maintenance of Rs.2,000/- per month from the opposite party.

5. The opposite party contested the Civil Proceeding and has filed the written statement wherein while denying the plaint averments in a general and evasive manner, averred that the petitioner on the night of 1.9.1999 around 11.00 P.M. left his house with cash of Rs.5,500/- with a brief case containing her dress materials and ornaments and on coming to know of the said fact in Calcutta he returned back to the village and lodged an F.I.R. before the Officer-in-Charge, Binjharpur Police Station about the missing of his wife. His further plea is that in course of search it came to light that the petitioner had illicit relationship with one Santosh Kumar Das and was living in adultery with that man, despite the protest of his mother and children. It is the further case of the opposite party that the petitioner frankly denied to live with him and expressed her desire to stay with the said Santosh Kumar Das.

6. In Civil Proceeding No. 62 of 2002 the case of the plaintiff-husband while admitting his marriage with the respondent wife in July, 1983, contended that they are blessed with a son and two daughters. The case of the plaintiff-husband further reveals that he was working at Calcutta in the State of West Bengal but his family members like his mother, wife and three children were residing in his native village Kantipur in the district of Jajpur. He has admitted that he was working as a low paid class-IV employee in Calcutta. His wife defendant No.1 was an arrogant lady having no respect for her mother-in-law and she was a promiscuous lady which was not to the liking of his mother. It is the further case of the plaintiff that the defendant No.1 used to entertain male persons in the house, talks to them till late hours in the night despite the protest of her mother-in-law as well as the children. His further case is that on receipt of telephonic message about his mother's illness when he reached his village learnt from his mother and children that defendant No.1 has left the house on 1.9.1999 with cash of Rs.5,500/- ornaments and other dress materials. The plaintiff searched for his missing wife but when could not get any trace of her lodged an F.I.R. in

Binjharpur Police Station seeking police help to trace his wife. Plaintiff alleges that his wife had illicit relationship with Santosh Kumar Das and on the night of 1.9.1999, his wife had left the house for an unknown destination and thereafter there was no trace of Santosh Kumar Das also. But on getting information that the defendant-wife was staying in her father's house at Kapila some gentlemen proceeded to Kapila for an amicable settlement between him and the defendant, but the defendant openly gave out that she would desire to stay with Santosh Kumar Das and not to live with him. Accordingly, it is the case of the plaintiff (appellant) that when there has been no cohabitation between him and the defendant No.1-wife since 1999 and that the defendant No.1 is living in adultery, it would not be possible on his part to live with his wife and accordingly prayed for dissolution of marriage by a decree of divorce.

7. The defendant No.1-wife contested the Civil Proceeding No. 62 of 2002 by filing her written statement wherein she denied the plaint averments about the allegation that she was an arrogant and promiscuous lady and was misbehaving her mother-in-law and children. On the other hand, she has denied the allegation of her illicit relationship with Santosh Kumar Das and she denied to have left the house in the Comany of Santosh Kumar Das for an unknown destination as alleged. On the other hand, it is her specific case that she was subjected to torture inhumanly for non-fulfillment of the dowry by the petitioner and her mother and when she also protested against the affairs of the petitioner with another lady she was forcibly driven out of the matrimonial house for which she had to take shelter in her father's house where she is leading a life of destitute having no means to maintain her and accordingly she prayed that the petitioner's suit be dismissed with cost.

8. Santosh Kumar Dash the alleged adulterer filed his separate written statement wherein he denied the allegation of having any illicit relationship with defendant No.1, who is the wife of the petitioner and it is his specific case that the plaintiff because of political differences had strained relationship with him and with an intention to take revenge and to defame him has foisted the case against him. It is also his case that he is married having three children and the allegation leveled against him by the plaintiff are bundle of falsehood and therefore the suit of the plaintiff should be dismissed.

9. Civil Proceeding No. 62 of 2002 and Civil Proceeding No. 215 of 2000 were tried analogously and disposed of by a common judgment which is impugned in both the appeals. From the side of the petitioner husband

four witnesses were examined and besides that Ext.1 i.e. copy of the F.I.R. lodged before the Officer-in-Charge, Binjharpur Police Station by the petitioner husband on 2.9.1999 has been admitted into evidence. The respondent wife got herself examined in support of her case as O.P.W.1. The learned Judge, Family Court, Cuttack after examining the cases of the parties and analyzing the evidence on record dismissed the Civil Proceeding No. 62 of 2002 filed by the husband as the plaintiff husband could not substantiate that his wife was living in adultery but however the learned Judge, Family Court, Cuttack allowed the prayer of the wife for maintenance in Civil Proceeding No.215 of 2000. Both the findings of the court below are under challenge in this appeal before us.

10. We have heard learned counsel for the respective parties in detail. Perused the impugned judgment and made a thread bare analysis of the evidence tendered by the respective parties in support of their case. In the instant case, it is admitted that the marriage between the appellant and respondent took place in July, 1983 and after marriage they led a happy conjugal life and blessed with a son and two daughters. It is the further admitted case of the parties that the appellant Nirmala Chandra Dash was working as a Class-IV employee in Calcutta, West Bengal. It is also an admitted fact that the respondent wife is living in his house with her parents in village Kapila under Binjharpur Police Station. When the appellant in Civil Proceeding No. 62 of 2002 had sought for dissolution of his marriage with the defendant No.1 on the ground that his wife was living in adultery with one Santosh Kuamr Dash and the defendant No.1 was having affairs with several persons despite the protest of her mother-in-law and her children, the onus is very heavy on him to establish that his wife was living in-adultery which is a ground for divorce. We are very conscious of the position of law that an act of adultery is a secret act. It is extremely difficult to get direct evidence and if courts insist on direct evidence in proof of adultery, it may well amount to denial of legitimate protection of marital rights. Proof of actual adultery is not necessary and circumstantial evidence which lends to an inference of adultery is sufficient. The degree of proof need not reach certainty but it must carry a high degree of probability.

11. Section 13 (1) (i) of the Hindu Marriage Act, 1955 was amended in the year 1976. After the amendment in 1976, it is sufficient to prove that the wife had voluntary sexual intercourse with any person other than the spouse and a single act is sufficient to prove the ground of divorce. (**AIR 1991 ORISSA 39, Sanjukta Padhan V. Laxminarayan Padhan and another)**.

12. Coming to the evidence as led by the petitioner- husband admittedly the most competent person, who would have been the best person to speak

about the adulterous life of the defendant no.1 is the mother of the petitioner-husband who was present when the defendant no.1 allegedly left the house in the company of Santosh Kumar Das on 1.9.1999 around 11 P.M. For reasons best known to the petitioner though the specific case of the petitioner husband is that when his wife was entertaining persons in the house till late hours in the night without listening to the protest of his mother, such an vital witness has been with-held from dock without any explanation whatsoever in that regard. In our opinion, this casts a serious reflection on the case of the appellant-husband. Admittedly, the husband (appellant) was not present on 1.9.1999 in his village and was at Calcutta as it is evident from the case of the appellant and his evidence that on receipt of information about the illness of his mother when he reached his house on 2.9.1999 found his wife absent and on his query his mother and children informed him that the respondent had left the house accompanied by Santosh on 1.9.1999 night. P.W.1 had lodged one report at Binjharpur police station and the copy of the said report has been proved as Ext.1 by P.W.1 during his evidence. P.W.1 deposed that he could come to know that his wife residing in her father's house and intimated the said fact to police. It is also his evidence in examination in chief that the gentlemen namely, Ranjan Kumar Das, Bhabagrahi Das and Promod Kumar Das tried to settle the differences in between them but his wife told them not to return to the matrimonial house but to stay with Santosh Kumar Das. P.W.1 also deposed that he does not want to keep his wife as she was living in adultery. Ext.1 which was lodged on 2.9.1999 by P.W.1 nowhere discloses that the defendant No.1 (wife) had left the house on the night of 1.9.1999 with Santosh Kumar Das. The evidence of P.W.2 who is the son of the petitioner as well as defendant in para-7 deposed that he had not seen her mother going with Santosh Kumar Das on 1.9.1999 night. Therefore, the evidence of P.W.2 in examination in chief that his mother Janaki Das left the house with Santosh Kumar Das of their village cannot be believed. P.W.3 is the daughter of the petitioner as well as the defendant and she has also deposed that her mother left the house on 1.9.1999 during night hours around 11.00 P.M. but very surprisingly in her evidence she has not breathed a word if her mother left their house in the company of Santosh Kumar Das on the night of 1.9.1999 i.e. around 11.00 P.M. P.W.2 the son of the plaintiff in his evidence deposed that Santosh Kumar Das is his agnatic uncle and his house is adjacent to their house and both of their family observe birth and death ceremonies of each other. P.W.2 simply deposed that her mother had attachment towards Santosh and he had seen Santosh sleeping on the same bed along with his mother and gossiping, which he had informed to his father and grand mother. In his cross-examination this P.W.2 deposed that his mother was never going out along with Santosh and

her mother was going to her maternal uncle's house prior to the incidents and four to five days after the incident her mother was traced in the house of her father'. P.W.3, the daughter of the parties deposed that she had seen her mother gossiping with Santosh Kumar Das who is the agnatic brother of her father and she suspected that her mother and Santosh had bad relationship which she informed to her grand mother and father. P.W.4 is the brother-in-law of P.W.1 who deposed that he came to know that the wife of Nirmal Das had left the house and gone away for which F.I.R. was lodged about the missing of Janaki. P.W.4 deposed that they got information that the wife of Nirmala was in her father's house and subsequently when he along with five other persons wanted to settle the dispute Janaki did not concede and he was informed by Nirmal that Janaki had left with Santosh. Thus, P.W.4 being a vital witness for the petitioner has not supported the evidence of P.W.1 that when they tried to settle the differences, the defendant refused to return to the house of P.W.1 and wanted to stay with Santosh Kumar Das. O.P.W.1 the wife, in her evidence stoutly denied of having any relationship with Santosh Kuamr Das and it is her evidence that at the time of her marriage with the petitioner (P.W.1) there was demand of cash of Rs.10,000/- and a T.V. set, but only Rs.5,000/- was paid. Thus for non payment of balance amount of Rs.5,000/- she was being assaulted by her husband and she was driven out of the house in August, 1999 with a direction to return with a T.V. set and balance cash of Rs.5,000/-. O.P.W.1 deposed that her husband was serving in Ashutosh College, Calcutta West Bengal and drawing salary of Rs.7,000/- besides he has income of Rs.30,000/- per annum from his landed property. It is her further evidence that she does not have any income and depends on her father and therefore she require Rs.2,000/- per month to maintain herself. Since in this case the appellant seeks dissolution of his marriage with the respondent on the ground of adultery, the same requires high standard of proof than mere preponderance of probabilities.

13. In the instant case from the evidence as laid by the petitioner-husband (appellant) there is absolutely no evidence to show that the defendant no.1 wife was found in a comprising position with Santosh Kumar Das in her bed room or people of the locality or the village had seen them moving together on the night of 1.9.1999 and they were found living together in a house. The evidence of P.Ws.2 and 3 cannot be believed to draw presumption that the defendant no.1 was living in adultery. The Court cannot act on surmises or conjectures. Further though the petitioner tried to establish that his wife was found in the house of one Pada Dash in village Singhpur but the evidence on record shows that neither P.W.1 nor P.Ws. 2

to 4 had ever gone to Singhpur to verify if Janaki was staying in the house of Pada Dash. Thus the aforesaid fact also cannot be believed.

14. As we find the learned Judge, Family Court, Cuttack has elaborately discussed the evidence on record and has assigned good reasons for not accepting the case of the petitioner-husband, who had sought for dissolution of his marriage with the respondent by a decree of divorce. We concur with the findings of the learned Judge, Family Court, Cuttack that the petitioner has failed to establish his case for dissolution of marriage on the ground of adultery. The evidence which has been led are not acceptable and therefore cannot be believed.

15. Now coming to the question of payment of maintenance to the wife, it is found that admittedly the respondent-wife is living in the house of her father since 1999. Admittedly, the appellant-husband has brought a serious charge against his wife that she was an uncheste woman and living in adultery which charge he has failed to establish. This Court in the case of ***Smt. Pramila Dei @ Kuni –v- Sanatana Jena*** reported in ***Vol.67 (1989) CLT 392*** has held that when an allegation of unchastity is made against the wife and payment of maintenance is sought to be avoided on the ground of her living in adultery but the plea fails, such plea by itself is sufficient to entitle her to live apart from her husband. Such allegation by the husband against the wife causes mental anguish of the deepest character which makes living together incompatible. P.W.1 has specifically deposed in his evidence that he does not want to keep his wife as she is living in adultery. There is no evidence from the side of the present appellant to show if he had ever gone to the house of his father-in-law to bring back his wife or he had paid anything towards the maintenance of his wife who was unable to maintain her being dependent on her father. O.P.W. 1, namely the respondent-wife's case is that because of non-fulfillment of the demand made by her husband at the time of her marriage she was assaulted and tortured by P.W.1 and ultimately she was driven out of the house in August, 1999. As I have already mentioned above the written statement filed by the present appellant as opposite party in Civil Proceeding No.215 of 2000 regarding the alleged torture meted out to the petitioner-wife on demand of dowry, there is no specific denial and the written statement is evasive in nature. It is admitted by the appellant in his evidence that he was working as a Peon in Ashutosh College, Calcutta in the State of West Bengal and was getting more than Rs.4,000/- per month as salary and he has Ac.0.10 gunths of land. Learned Judge, Family Court, Cuttack by considering each and every aspect of the evidence and cases of the parties while disposing of Civil Proceeding No.215 of 2000 directed the opposite party, namely, the

present appellant to pay Rs.800/- per month to his wife from the date of institution of the Civil Proceeding i.e. 21.01.2000 subject to adjustment of interim maintenance paid, if any, in Civil Proceeding No.62 of 2002. The amount awarded as maintenance does not appear to be high and excessive keeping in view the present market index. Thus, grant of Rs.800/- per month to the wife by the appellant does not call for any interference and accordingly, the same is maintained.

16. Therefore, for the aforestated reasons we see no reason to interfere with the impugned judgment of the Judge, Family Court, Cuttack rendered in Civil Proceeding No.215 of 2000 and Civil Proceeding No.62 of 2002. Accordingly, both the appeals having no merit stand dismissed.

Appeals dismissed.

2013 (I) ILR - CUT- 455

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

W.P.(C) NO. 8989 OF 2011 (Dt.22.08.2012)

SAUMYA RANJAN PARIDA ……...Petitioner

.Vrs.

CHAIRMAN, PARADIP PORT TRUST & ORS. ……..Opp.Parties

SERVICE LAW – Whether a candidate is fit for a particular post or not has to be decided by the duly constituted selection committee – No allegation that the staff selection committee is not a duly constituted body and committed gross illegality in selecting O.P.5.

In this case petitioner alleged that although he passed the main diploma examination in Ist division O.P.5 cleared the same in supplementary – Moreover rule does not provide anything that a candidate who clears the main examination is to be given weightage over the candidate passed such examination in supplementary – It is also not the function of this Court to sit in appeal over the decision of the selection committee and to scrutinize the relative merits of the candidates – Held, this Court is not inclined to grant any relief to the petitioner. (Para 7)

Caw Referred to :-

AIR 1990 SC 434 : (Dalpat Abasaheb Solunke etc.-V- Dr. B.S.Mahajan etc.).

For Petitioner - M/s. S.P.Misra, Sr. Advocate
Mr. P.Mishra, Mr. A.K.Panda,
Mr. S.S.Mishra.

For Opp.Parties - M/s. S..K.Padhi, Sr. Advocate,
Mr. M.Padhi, Mr. A.Das, Mr. S.B.Dash,
Mr. S.S.Mohanty & Mr. B.Panigrahi.

B.K.MISRA, J The petitioner questioning the appointment of opposite party No.5 Bijoy Laxmi Mohapatra as Junior Engineer (Mechanical) in the Electrical and Mechanical Department of Paradip Port Trust had approached this Court twice by filing two writ petitions registered as O.J.C. No. 15479 of 1998 as well as O.J.C. No. 4835 of 1999. While disposing of O.J.C. No. 15479 of 1998 this Court by its order dated 30.11.1998 directed

the opposite party Nos. 1 to 4 to consider the case of the present petitioner for appointment in consonance with the circular dated 23.3.1983 issued by the Government of India which was relied upon by the State Government in its circular dated 27.4.1988. Pursuant to such direction of this Court, the case of the petitioner was reconsidered by the opposite parties 1 to 4 but of no avail. Being disappointed, the petitioner again approached this Court by filing writ petition registered as O.J.C. No. 4835 of 1999 which this Court disposed of by judgment dated 25.6.2010 directing the present opposite party No.1 namely, the Chairman Paradip Port Trust, to call for the entire recruitment file and after perusing the same and the representation of the petitioner pass a reasoned order. Pursuant to such direction, the present petitioner filed a representation vide Annexure-4 before the Chaiman Paradip Port Trust, Paradip but the same was rejected. Thus, being aggrieved with such order of the Chairman Paradip Port Trust, the petitioner has approached this Court again challenging the propriety of the appointment of opposite party No.5 and to declare the same as illegal and also to declare the selection process as bad and illegal. The further prayer of the petitioner is to give direction to the opposite parties 1 to 4 to appoint him as Junior Engineer (Mechanical) with effect from the date the opposite party No.5 got appointment.

2. The undisputed fact reveals that Paradip Port Trust had placed requisition with the Employment Officer, Special Employment Exchange Paradip Port in the year 1998 for sponsoring names of ten eligible candidates having passed the H.S.C. examination in first division as well as diploma level examination or any higher qualification in Mechanical/ Automobile Engineering. The name of the present petitioner along with 13 other qualified candidates were sponsored pursuant to the request of the Paradip Port Trust. The petitioner thereafter was called upon to attend the interview. According to the petitioner he attended the interview and his performance was quite satisfactory but to his utter surprise though he had all the requisite qualification and had undergone the apprentice training under Paradip Port for one year but in an arbitrary manner the opposite party Nos. 1 to 4 appointed opposite party No.5 which is assailed in this writ petition.

3. The opposite parties 1 to 4 have filed their counter affidavit wherein it is their stand that the Staff Selection Committee on the basis of overall performance of the candidates who were called to appear at the interview, selected opposite party No.5 to be appointed for the post of Jr. Engineer (Mechanical). Such selection was made in conformity with the rules and

therefore the selection process and especially the order passed by opposite party No.1 which is a speaking order cannot at all be challenged on the ground of malafide or arbitrariness. Accordingly, the opposite parties 1 to 4 have prayed for dismissal of the writ petition.

4. The petitioner filed a rejoinder affidavit wherein while reiterating his original stand challenging the appointment of opposite party No.5 also questioned the awarding of marks to the candidates by the Staff Selection Committee in derogation of the rules and accordingly the case of the petitioner is that the order passed by the opposite party No.1 is not a reasoned order pursuant to the direction of this Court i.e. in O.J.C. No. 4835 of 1999.

5. We have heard Mr. S.P. Mishra, learned Senior Counsel appearing for the petitioner and Mr. Padhi, learned Senior Counsel appearing for the opposite parties 1 to 4. Mr. Mishra, learned Senior Counsel appearing for the petitioner very strenuously contended that though the petitioner possessed better academic career and had completed his apprentiship under the Paradip Port Trust, was entitled to be given preference, but the same was overlooked by the Staff Selection Committee as well as by opposite party No.1 who was directed by this Court in O.J.C. 4835 of 1999 to examine the file relating to recruitment of Jr. Engineer (Mechanical) in the year 1998 and to pass a reasoned order. Mr. Mishra, learned Senior Counsel also contended that it is something very fallacious that though the opposite party No.5 passed diploma examination in supplementary but she was considered to be a better candidate than the present petitioner, who had passed such main diploma examination in first division, which resulted in discarding a more meritorious candidate than that of Opposite Party No.5 and thus there can be no doubt that the opposite party Nos. 1 to 4 with an oblique motive have shown undue favour to opposite party no.5 and being influenced by some extraneous consideration appointed opposite party No.5, which cannot be sustained in the eye of law.

6. The submission as has been advanced by Mr. Mishra, learned Senior Counsel for the petitioner was seriously countenanced by Mr. S.K. Padhi, learned Senior Counsel appearing for the Paradip Port Trust. According to Mr. Padhi the Staff Selection Committee was constituted in consonance with the Paradip Port Trust rules for selection of candidates by direct recruitment which came into effect from 01.01.1971 as well as 1967 Regulation and therefore such constitution of the committee cannot be faltered and when the Selection Committee determined the modalities for judging the merit of a candidate and when the Selection Committee acted without any bias and malice such selection process cannot be questioned

and this Court cannot interfere with that. In support of such contention reliance was placed on a case decided by the Hon'ble Apex Court reported in ***AIR 1990 SC 434, Dalpat Abasaheb Solunke etc. V. Dr. B.S. Mahajan etc.***

7. Admittedly, pursuant to the directions of this Court in O.J.C. No.4835 of 1999 dated 25.06.2010 (Annexure-3) the petitioner filed a representation (Annexure-4) before the Chairman, Paradip Port Trust (opposite party no.1). The opposite party no.1 by an elaborate order discussing the entire fact scenario rejected the representation of the petitioner praying for an appointment to the post of Jr. Engineer (Mechaninal). We have very carefully gone through the order passed by the opposite party no.1 as at Annexure-5. In Para-6 of Annexure-5 the mark secured by the petitioner as well as opposite party no.5 in the Diploma Examination as well as in the High School Certificate Examination have been reflected in a tabular form which shows that opposite party no.5 had secured more marks than the petitioner both in the Diploma as well as in the High School Certificate Examination. The argument advanced by the learned counsel for the petitioner is that opposite party no.5 passed the Diploma Examination in Supplementary but when the petitioner cleared the Diploma main examination in 1st Division preference should have been given to the case of the petitioner. The said point was also urged before the opposite party no.1 and the same has been dealt with by opposite party no.1 in his order at Annexure-5 in Para-3. In the opinion of the Staff Selection Committee opposite party no.5 was considered more suitable than the petitioner for the job and accordingly, the opposite party no.5 was appointed to the post and she is continuing as such since in the year 1998. With regard to the apprentiship of the petitioner the opposite party no.1 has assigned reasons as to when the same is to be taken into consideration and same has been dealt with in Para-2 and 4 of the order of the opposite party no.1 at Annexure-5. We have perused the 1971 Rules as well as the 1967 Resolution. There is nothing in the said Rules that a candidate who passes one examination in supplementary is a less meritorious student than a student who passes such main examination. No material to that effect could also be produced before us from the side of the petitioner. When the rule does not provide anything that a candidate who clears the main examination is to be given weightage over a candidate who passes such examination in supplementary, we cannot import something to give a different interpretation contrary to the decision of the Staff Selection Committee and that of opposite party No.1. Many disputed questions of fact have been raised in this writ petition and the trite law is that disputed questions of fact are not to be adjudicated under the writ jurisdiction. There are plethora of judicial pronouncements on the point, which needs no mention. Law is also quite

well settled that whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise on the subject. The Court has no such expertise in the given case. The Selection Committee was constituted as per Regulation-15 of Paradip Port Trust Employees (Recruitment, Seniority and Promotions) Regulations, 1967 and out of the four members of the Staff Selection Committee, three were technical persons and the other member was the Secretary of the Board who is a statutory member. There is no dispute that the decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure vitiating the selection, or proved malafides affecting the selection etc. In the instant case, the Staff Selection Committee consisted of experts and selected the candidates after going through all the relevant materials before it. There is nothing on record to show that the Staff Selection Committee in this case was not a duly constituted body and had committed gross illegality in selecting opposite party no.5. We are of the considered view that it is not the function of this Court to sit in appeal over the decision of the Selection Committee and to scrutinize the relative merits of the candidates and in that context, we draw our strength from ***Dalpat Abasahed Solunke' s case*** (supra).

8. In the circumstances, we are not at all inclined to grant any of the reliefs as has been sought for by the petitioner Thus, the writ petition being devoid of merit stands dismissed.

Writ petition dismissed.

2013 (I) ILR - CUT- 460

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

JCRLA NO.113 OF 2003 (Dt.30.08.2012)

SANIA JHIGIDI ……Appellant

Vrs.

STATE OF ORISSA ……Respondent

PENAL CODE, 1860 – S.304-PART-II

Arrow shot hit the belly of the deceased – Deceased immediately pulled the arrow which resulted in heavy bleeding, leading to his death – Only one arrow shot – Prosecution failed to prove the intention of the appellant to kill the deceased although he had knowledge that the injury inflicted may cause death – Held, conviction of the appellant U/s.302 I.P.C. is converted to one U/s.304 Part-II I.P.C.
(Paras 11,12)

For Appellant - Mr. S.K. Jee, Advocate
For Respondent - Mr. Sk. Zafuralla, Addl. Standing Counsel.

PRADIP MOHANTY, J. This jail criminal appeal is directed against the judgment and order dated 22.09.2003 passed by the learned Addl. Sessions Judge, Malkangiri in Sessions Case No.63 of 1999 convicting the appellant under Section 302, IPC sentencing him to undergo imprisonment for life.

2. The prosecution case in brief is that on 23.04.1997 at 4.30 P.M. the informant P.W.1 lodged an F.I.R. alleging therein that on 22.04.1997 at night Hadi Sisa, Soma Sisa and Sania Sisa went to Jhigidi Sahi to dance. But, on being prevented by accused, they returned to their respective houses. On the next morning, i.e., 23.04.1997 at about 7.00 AM being armed with bow and arrow accused came to Sisa Sahi and challenged Buda Sisa (deceased) as to why he in the previous day abused his mother. When the deceased asked him to return home, accused shot an arrow from the bow held by him and fled away. The arrow hit at the abdomen of the deceased. Then, immediately the deceased removed the arrow from his abdomen and went to his house. On receipt of the FIR, initially a case was registered under Sections 324/307, IPC. But, subsequently as the deceased died on 24.04.1997, while undergoing treatment at District Headquarter Hospital, Koraput, the case was turned to one under Section 302, IPC and

investigation taken up. On completion of investigation, police submitted charge-sheet against the appellant under Section 302, IPC.

3. The plea of the appellant was one of complete denial of the prosecution case. His specific plea was that at the time of occurrence he was at school and the witnesses due to village dispute have falsely implicated him in the case.

4. The prosecution, in order to prove the charge, examined as many as 8 witnesses including the I.O. and exhibited 13 documents. Defence examined none.

5. The learned Addl. Sessions Judge on conclusion of trial convicted the appellant under Section 302, IPC and sentenced him to undergo imprisonment for life mainly basing upon the evidence of P.Ws.2 and 3, who are said to be the ocular witnesses, and the postmortem report Ext.12.

6. Mr. Jee, learned counsel for the appellant assails the impugned judgment inter alia on the ground that P.Ws.2 and 3 are in fact post occurrence witnesses and they have projected themselves as eyewitnesses as because they are inimically disposed towards the appellant. He further submits that the appellant had no intention to kill the deceased, for which this is a fit case to convert his conviction under Section 302, IPC to one under Section 304, Part-II, IPC.

7. Mr. Sk. Zafuralla, learned Additional Standing Counsel, on the other hand, supports the impugned judgment and vehemently contends that P.Ws.2 and 3 are actually witnesses to the occurrence and their evidence is quiet believable. The weapon of offence, i.e., the arrow, which was seized from the house of the appellant, found containing human blood, as revealed from the chemical examination report, and in regard to that no explanation has been offered by the appellant. He further submits that no fault having been committed by the trial court in convicting the appellant under Section 302, IPC relying upon the evidence of P.Ws.2 and 3 and other post occurrence witnesses, the impugned judgment of conviction does not warrant interference by this Court.

8. Perused the LCR and gone through the depositions of the witnesses minutely. P.W.1, who is the informant, in his examination-in-chief stated that the deceased was his brother and he died at Jeypore Hospital. He orally reported the matter before the O.I.C., who reduced the same to writing, read over and explained the contents there of and took his L.T.I. P.W.2 claims to be an ocular witness. In her examination-in-chief she stated that on the date

of occurrence, at the early morning, the accused in front of the house of the deceased shot an arrow at the deceased which hit on his belly. Subsequently, the deceased died at Koraput hospital. She also stated that P.W.3 had seen the occurrence. A suggestion was given by the defence that there was enmity between the accused and the deceased prior to the occurrence but she denied the same. In cross-examination she admitted that after hearing hullah she came to the spot and saw the arrow pierced in the belly of the deceased. P.W.3 is a co-villager who specifically stated in his examination-in-chief that accused shot an arrow at the deceased which hit on the belly of the deceased. The deceased removed to Koraput hospital where he died. He further stated that P.W.2 was with him at the time of occurrence. P.W.4 is another brother of the deceased and a post occurrence witness. He stated that he came to the spot after the occurrence and accompanied the deceased to the hospital. He further stated that he heard the incident from P.Ws.2 and 3. P.W.5 is the Constable who on being commanded had guarded the dead body and carried the same to the hospital for postmortem. He had received the wearing apparels of the deceased from the postmortem doctor and produced the same before the I.O., who seized the same under Ext.3. He proved the command certificate (Ext.1), dead body challan (Ext.2) and the seizure list (Ext.3). P.W.6 has not supported the prosecution case in any manner. P.W.7 is the A.S.I. of police, who registered the case and took up investigation during the course of which he examined the witnesses, proceeded to the spot and prepared the spot map, arrested the accused, seized the arrow, i.e., the weapon of offence and sent the same to the Medical Officer for opinion and also sent the material objects for chemical examination. On 27.06.1997 he handed over the charge of investigation to the O.I.C., Mudulipada P.S. P.W.8 is the O.I.C. of Mudulipada P.S., who stated to have received the charge of investigation from P.W.7 and simply on perusal record submitted charge sheet.

9. In the instant case, the postmortem doctor has not been examined. But the postmortem report (Ext.12) and the injury report (Ext.13) have not been challenged by the defence. In other words, they have been marked exhibits on the admission of the defence. The injury report (Ext.13) reveals that the deceased had sustained one grievous oval shaped stab injury of size 1.5 inches penetrating into the abdomen and his omentum was protruding out. According to the post mortem report (Ext.12), the death was due to generalized massive peritonitis resulting from abdominal injury and the time since death was within 24 hours of autopsy. In the opinion report (Ext.7/2), which was also exhibited on admission by the defence, the Medical Officer has opined the injury of the deceased could have been caused due to the arrow produced before him for examination and the injury of the

deceased was ante mortem in nature. Thus, there is no dispute that the death of the deceased was homicidal.

10. Now, it is to be seen whether the appellant is the author of the death of deceased. P.W.2, the sister of the deceased, deposed that at the time of occurrence she was in front of the house of the deceased. The accused shot an arrow at the deceased which hit on his belly. The deceased was shifted to Koraput hospital for treatment but he died there. P.W.3 corroborated the evidence of P.W.2 in material particulars. From the evidence of these two witnesses, it is clear that due to the arrow shot by the accused the deceased got injured and died at the hospital. There is no reason to disbelieve the evidence of these two witnesses. The arrow, which was seized by the I.O. from the house of the accused and sent for chemical examination, found to have contained human blood, and with respect to that no explanation has been offered by the accused. For all these reasons, this Court holds that the present appellant was the author of the crime.

11. Now, the question arises whether, as urged by the learned counsel for the appellant, the act of the appellant would come under the purview of Section 304, Part-II, IPC or Section 302, IPC. In the instant case admittedly the appellant shot an arrow which pierced into the belly of the deceased and though the incident took place on 23.04.1997 around 7.00 AM, the deceased died on the next day (24.04.1996) at 5.00 AM, i.e., after 22 hours of the occurrence. In the FIR it is narrated that after the arrow hit the belly of the deceased, the deceased immediately pulled the arrow and went to his house. The contention of the learned counsel for the appellant is that the pulling of arrow by the deceased might have resulted in heavy bleeding leading to his death. This Court finds some force in the contention of the learned counsel for the appellant and, having regard to the attending circumstances and the fact that only one arrow was shot at the deceased which pierced into his belly, holds the intention of the appellant to kill the deceased has not been proved by the prosecution though the prosecution has been able to prove that the appellant had knowledge that the injury inflicted by him may cause death. Therefore, by applying the ratio decided in ***Naju Mallik*** (supra) this Court holds the appellant guilty of commission of offence punishable under Section 304, Part-II, IPC.

12. In the result, the appeal is allowed in part. The impugned judgment and order dated 22.09.2003 passed by the learned Additional Sessions Judge, Malkangiri in Sessions Case No.63 of 1999 convicting the appellant under Section 302 IPC is set aside. Instead, the appellant is convicted under Section 304, Part-II, IPC and sentenced to undergo rigorous imprisonment for ten years.

It is stated at the Bar that the appellant Sania Jhigidi is in custody from the date of arrest and in the meantime has already undergone more than ten years. If that be so, the appellant Sania Jhigidi be set at liberty forthwith, unless his detention is required otherwise.

Appeal allowed in part.

2013 (I) ILR - CUT- 465

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

O.J.C. NO. 13851 OF 1998 (Dt.12.11.2012)

GOLUK CHANDRA DAS (DEAD)
AFTER HIM HIS LEGAL HEIRS
LAXMIPRIYA DAS & ORS. …….. Petitioners

.Vrs.

THE CHAIRMAN-CUM-M. D.,
MAHANADI COAL
FIELDS LTD. & ORS. ……Opp.Parties

PAYMENT OF GRATUITY ACT, 1972 – S. 4 (6)

Payment of gratuity – Petitioner an employee under O.P.1 – He was terminated from service having faced a Criminal charge – Acquittal by a competent Court – Opp.Parties alleged that at the time of re-instatement he agreed not to claim gratuity and as such he was denied gratuity – Action challenged – Held, it is not the case of the Opp.Parties that the services of the petitioner-employee terminated for his riotous or disorderly conduct or any other act of violence – Hence petitioner cannot be denied payment of gratuity only because a Criminal Case was initiated against him. (Paras 6, 7)

For Petitioner - M/s. J.M. Patnaik, L.K.Nayak, P.K.Rout.
For Opp.Parties - M/s. P.K.Ray & B.K. Mohanty.

S.K.MISHRA, J. In this writ application the petitioner-Gokul Ch.Das, prays to quash Annexure-1, which is the settlement arrived at between the Management and the petitioner, wherein he has allegedly given up his right to claim the gratuity.

2. The petitioner was initially appointed as a Lower Division Clerk at Talcher Colliery and successfully discharged his duties. He was promoted to the post of Senior Cashier w.e.f. 18.3.1971. Basing on the F.I.R. lodged by the Colliery Manager on 23.2.1979 a criminal case, vide G.R. Case No.66 of 1979, was initiated against the petitioner for misappropriation of coal royalty amounting to Rs.64,737/- and the said case was tried by the Judicial Magistrate First Class, Talacher. The petitioner has been acquitted in the said case. It is alleged by the petitioner that during pendency of the said

case, opposite party no.3 has taken statement forcibly at midnight on 23.2.1979 that he has misappropriated coal royalty amounting to Rs.64,737/- which he has received by way of cheque and encashed the same on 29.1.1979 and, accordingly, the case was tried under Section 408 of the Indian Penal Code. Immediately thereafter a Departmental Proceeding was initiated against the petitioner and on the next day i.e. on 24.2.1979 he had suspended from his service. After suspension the petitioner has received subsistence allowance till 14.12.1979 pending Disciplinary Proceeding initiated against him by opposite party no.3. Opposite party no.3 has framed charges on 21.3.1979 and directed the petitioner to submit explanation within seven days and the petitioner has received the said notice after 21.3.1979. Thereafter the Departmental Proceeding proceeded and it is alleged by the petitioner that in gross violation of principles of natural justice he was found guilty, but he was acquitted by the criminal court.

3. It transpires from the counter affidavit filed by the opposite parties that on 8.8.1996 there was a settlement between the parties in terms of Rule 58 of the Industrial Disputes (Central) Rules, 1957(in short "Rules, 1957") in Form H, as appended to the schedule, wherein the petitioner had agreed that he will not be entitled to nor he will claim gratuity for his past service till re-instatement. He will also not be entitled to gratuity from the date of his joining duties till 3.11.1998, i.e. the date of superannuation. On the basis of this statement, it is contended by the opposite parties that the petitioner is not entitled to gratuity as claimed. In this connection, learned counsel for the petitioner relies on the reported case of ***Cooperative Store Ltd. And Ved Prakash Bhambri****;* 1 L.L.J 1990, page-119, wherein the Delhi High Court has held that Rule 58 of the Industrial Disputes (Central) Rules, 1957 and Form H are statutory provisions which have to be given full effect before the settlement could be considered valid. Even though the settlement has not been arrived at during the pendency of the conciliation proceedings, yet the settlement has to be in accordance with the statutory provisions before it can be held to be valid. Settlement between the individual workman and the management must be strictly in compliance with the rules. 'Settlement' has been clearly defined under Section 2(p) of the Industrial Disputes Act and the same has to be in accordance with the statutory provisions. If there is no settlement as contemplated in the statute and the rules made there under, the same will not be binding on the parties under Section 18(1) of the Industrial Disputes Act, 1947.

It is contended that the ratio decided is squarely applicable to the case in hand. Section 2(p) of the Industrial Disputes Act, 1947 reads as follows:-

"2(p) "Settlement" means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between the employer and workmen arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorized in this behalf by the appropriate Government and the conciliation officer."

4. Rule 58 of the Rules, 1957 provides for Memorandum of settlement. For ready reference, the same is quoted below:-

"58. **Memorandum of settlement**. – (1) A settlement arrived at in the course of conciliation proceedings or otherwise, shall be in Form H.

(2) The settlement shall be signed by –

(a) in the case of an employer, by the employer himself, or by his authorized agent, or when the employer is an incorporated company of other body corporate, by the agent, manager or other principal officer of the corporation;

(b) in the case of the workmen, by any officer of a trade union of the workmen or by five representatives of the workmen duly authorized in this behalf at a meeting of the workmen held for the purpose;

(c) in the case of the workman is an industrial dispute under section 2-A of the Act, by the workman concerned.

Explanation – In this rule "officer" means any of the following officers, namely:-

(a) the President;

(b) the Vice- President;

(c) the Secretary (including the General Secretary);

(d) a Joint Secretary;

(e) any other officer of the trade union authorized in this behalf by the President and Secretary of the Union.

(3) Where a settlement is arrived at in the course of conciliation proceeding the Conciliation Officer shall send a report thereof to the Central Government together with a copy of the memorandum of settlement signed by the parties to the dispute.

> (4) Where a settlement is arrived at between an employer and his workmen otherwise than in the course of conciliation proceeding before a Board or a Conciliation Officer, the parties to the settlement shall jointly send a copy thereof to the Central Government, the Chief Labour Commissioner (Central) New Delhi, and the Regional Labour Commissioner (Central) and to the Assistant Labour Commissioner (Central) concerned."

5. In this case, admittedly, the settlement is not arrived at in course of a conciliation proceeding but the question arise whether Annexure-1 is in consonance with Form H read with Rule 58 of the Rules, 1957. It is seen from the record itself that the settlement has been signed by the petitioner, the General Manager and four witnesses. It is further apparent from the record that the copy of the memorandum of settlement has not been sent to the Chief Labour Commissioner (Central) New Delhi, the Regional Labour Commissioner (Central) and the Assistant Labour Commissioner (Central). It is, therefore, not in consonance with Rule 58 of the Rules, 1957 read with Form H of Section 2(p) of the Industrial Disputes Act,1947 and hence the same cannot be given any weightage.

6. It is also seen that the settlement arrived at between the parties is not in accordance with the provisions of Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 (in short "Gratuity Act"). Sub-section (6) of Section 4 of the Gratuity Act provides for the case where the employer can withheld the gratuity of an employee. It reads as follows:

> "Section 4. xx xx xx xx
>
> (6) Notwithstanding anything contained in sub-section (1), -
>
> (a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;
>
> (b) the gratuity payable to an employee may be wholly or partially forfeited-
>
> (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or
>
> (ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

7. In this case, admittedly the petitioner has been acquitted by the criminal charges levelled against him by the court of competent criminal jurisdiction. It is not the case of the opposite parties that the services of the employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part and, accordingly, requirements of Sub-section (6) of the Section 4 of the Gratuity Act are not fulfilled and accordingly it is held that the petitioner cannot be denied for payment of gratuity only because a criminal case was initiated against him.

8. In that view of the matter, we are inclined to allow the writ application and direct the legal heirs of the petitioner, who have been substituted in this writ application, to file a representation before the General Manager, Mahanadi Coal Field Ltd., Talcher Area, Angul, opposite party no.3, for calculation of the gratuity amount of the petitioner-Late Gokul Ch. Das. If such a representation is filed, opposite party no.3 shall calculate the gratuity amount of the petitioner-Late Gokul Ch.Das and disburse the same to his legal heirs within a period of six months from the date of receipt of copy of this judgment, failing which the legal heirs of the petitioner shall be entitled to interest @ 9% per annum from the date of this judgment.

Writ petition allowed.

2013 (I) ILR - CUT- 470

M. M. DAS, J.

W.P.(C) NO. 524 OF 2012 (Dt.12.11.2012)

DILLIP KUMAR PATTANAIK ……Petitioner

.Vrs.

BIMAL KISHORE MOHAPATRA & ANR. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-16, R-10(2)

Issue of proclamation – Court must see reasons to believe that the evidence of the persons against whom proclamation sought to be issued are material witnesses and though summons have been served on them, they have intentionally avoided service.

Held, in the absence of materials as discussed above the learned Court below has rightly rejected the prayer of the petitioner for issuance of proclamation against those witnesses – Held, no reason to interfere with the impugned order. (Paras -11 & 13)

For Petitioner - M/s. S.K. Dey & N. Pattnaik.
For Opp.Parties- M/s. S.S.Das, S.Pattanayak, H.K.Rout & S. Ray (O.P.No.2).

M. M. DAS, J. This writ application has been filed against an order dated 15.11.2011 passed by the learned District Judge, Cuttack in R.C.C. Case No.8 of 2003 rejecting the prayer of the petitioner to issue proclamation against three persons, namely, Priti Mohanty, Dipti Mohanty and Dr. Kasturi Das, to attend the court and gave evidence at a time and place, as the court may feel just and proper, on the ground that in spite of summons being issued to them to attend the court to give evidence, they failed to do so.

2. The matter arises out of an application filed by the opposite party No.2 under Section 276 of the Indian Succession Act for probate of the Will executed by the testator late Birendra Mohan Pattanaik on 27.11.1996 in respect of his estate. In the said application, the opposite party No.2 described the brother of late Birendra Mohan Pattanaik, i.e., Surendra Mohan Pattanaik, Dipti Mohanty and Priti Mohanty, the daughters of late Birendra Mohan Pattanaik and the present petitioner Dillip Kumar Pattanaik one of the sons of late Birendra Mohan Pattanaik as near relations.

3. The matter is being contested only by the present petitioner. The hearing of the case has commenced. The record discloses that one Bijay Kumar Sahu was examined as P.W.1 and the opposite party No.2, who is the petitioner in the probate case, was examined as P.W.2 in the year 2005 and 2007 respectively. Thereafter, the present petitioner, examined himself in the year 2008 and one Gopabandhu Das as OPW-2 on 10.08.2011 and then filed the application for issuance of proclamation to the three persons named above.

4. The learned District Judge, while dealing with the said petition, recorded that a petition was earlier filed by the petitioner for issuance of summons to Priti Mohanty on 18.07.2011, which was rejected being not pressed. Thereafter the petitioner took Dusti summons to be served on the said Priti Mohanty on 25.04.2011 and claimed that he has delivered the same to her. The learned District Judge has found that Dr. Kasturi Das and Bimal Kishore Mohapatra are witnesses to the Will. He further found that the said Priti Mohanty and Dipti Mohanty have not filed any objection to the probate proceeding and, therefore, came to the conclusion that they should not be compelled to give evidence in the case. The court also found that there is no document available on record to show that Priti Mohanty received the summons.

5. With regard to Dr. Kasturi Das, the learned court below came to the conclusion that her evidence in the opinion of the court is material, as she is a witness to the alleged Will and therefore observed that the opposite party (present petitioner) is at liberty to examine the said Dr. Kasturi Das as a witness on his behalf. But, however, question of issuing any proclamation against her does not arise at all, more particularly, when there is nothing to show that any summon was issued to her earlier. Thus concluding, the learned court below rejected the prayer of the petitioner to issue proclamation against the aforesaid three persons compelling their attendance for giving evidence and directed the present petitioner to adduce further evidence from his side, if any, on the date fixed. Only after closure of the evidence of the petitioner, who is the opposite party in the court below, if he fails to examine Dr. Kasturi Das on his behalf, the learned court below directed that in such circumstances, necessary summons shall be issued to her after closure of the evidence of the opposite party (present petitioner) for her examination in the court as a court witness.

6. Mr. Dey, learned counsel for the petitioner urged that since summon, which was taken by the petitioner to be served on Priti Mohanty, was served on her by delivering the same in her office on 20.06.2011 as per her instruction she having failed to appear proclamation should have been

issued against her. It may be mentioned here that the petition filed by the petitioner for issuance of proclamation was neither supported by any affidavit nor verification. The said petition was also not signed by the present petitioner.

7. Mr. S.S. Das, learned counsel for the opposite party No.2, on the contrary, submitted that the provision of Order – 16, Rule 10 (2) CPC being coercive in nature with penal consequences, the Court is expected to be slow. He further submitted that the pre-conditions for issuance of proclamation under Order – 16, Rule 10 (2) CPC having not been fulfilled, the learned District Judge was right in rejecting the said petition filed by the present petitioner.

8. Order – 16 of the Code deals with summons and attendance of witnesses. Rule 10 (1) thereof provides the procedure to be adopted by the court to find out as to whether the summons issued to a witness has been sufficiently served on him or not, who was summoned to give evidence or produce the document in compliance to such summons and fails to do so. In such circumstances, the court, if the certificate of the service officer has not been verified by affidavit or if service of summon has been effected by a party or his agent, or may if the certificate of the serving officer has been so verified, shall examine on oath the serving officer or the party or his agent as the case may be, who has effected service or cause him to be so examined by any court, touching the service or non-service of the summons.

8. Rule 10 (2) of Order 16 CPC provides as follows:-

> Rule 10 – **Procedure where witness fails to comply with summons.-** (1) xxx xxx xxx
>
> (2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides".

10. A bare reading of the aforesaid rule clearly shows that unless the court sees reasons to believe that such evidence or production of document is material and the person has without lawful excuse failed to attend or to produce the document in compliance with such summons or has

intentionally avoided service, then only the court assumes jurisdiction to issue a proclamation as contemplated therein.

11. In the instant case, nothing is shown either before the learned court below or before this Court that the evidence of the persons against whom proclamation was sought to be issued by the petitioner are according to the court material and further summons have been served on them and they have intentionally avoided service of such summons. The petitioner produced no material before the court to show that he has served the summons by hand on Priti Mohanty as claimed by him. He neither examined himself to prove such service of summons nor produced any material in that regard.

12. The learned District Judge also has rightly come to the conclusion that the evidence of the said Priti Mohanty and Dipti Mohanty, who have filed no objection to the application for probate of the Will are in no way material for the case. The learned court, however, has rightly come to the conclusion that the evidence of Dr. Kasturi Das is material, has passed necessary direction in that regard, in the impugned order.

13. Since there is no finding of the learned court below that the evidence of the witnesses against whom proclamation was sought to be issued are material for the purpose of deciding the case and such witnesses have intentionally avoided service of summons, he has rightly rejected the prayer made by the petitioner for issuance of proclamation against them.

14. This Court finds no reason to interfere with the impugned order and the writ application accordingly stands dismissed.

Writ petition dismissed.

2013 (I) ILR - CUT- 474

M. M. DAS, J.

W.P.(C) NOS. 11550 & 11685 OF 2012 (Dt.27.11.2012)

FALCON REAL ESTATE PVT. LTD. & ANR. ……Petitioners

.Vrs.

JANAK KUMARI DEVI & ORS. ……Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-18, R-17

Suit for partition – During pendency of Final Decree Proceeding Defendant Nos.3 & 4 were impleded on the ground that they purchased some property involved in the suit – Thereafter they filed petition to recall witnesses examined at the stage of preliminary decree for Cross-examination – Application rejected – Hence the writ petition.

In a suit for partition, in the event of changed circumstances, necessitating change in shares, there is no impediment for a Court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of the parties – Held, the impugned order is set aside with a direction to the learned trial Court to recall the witnesses for Cross-examination by the Petitioners-Defendant Nos.3 & 4 after recasting the issues and pass a fresh preliminary decree.

(Paras 13, 14)

Case law Relied on :-

AIR 2012 SC 169 :(Ganduri Koteshwaramma & Anr.-V-Chakiri Yanadi & Anr.)

Case laws Referred to:-

1.AIR 1977 SC 292 : (Muthangi Ayyana -V- Muthangi Jaggarao & Ors.)
2.AIR 1929 Calcutta 689 : (Taleb Ali -V- Abdul Aziz)
3.AIR 1940 Patna 204 : (Banwari Lal -V- Shaikh Shukrullaha)
4.AIR 1978 Kerala 152 : (Neelakantha Pillai Ramachandran Nair –V- Ayyappan Pillai Kumara Pillai)
5.AIR 1963 SC 992 : (Venkata Reddi -V- Pethi Reddi)
6.59 (1985) CLT 552 : (Palia Bewa -V- Parbati Kumari Mohapatra & Ors.)
7.45 (1978) CLT 75 : (Alekha Pradhan & Ors.-V- Bhramar Pal & Anr.)

8.AIR 1987 Orissa 212 : (Gouri Bewa -V- Ari Pradhan & Ors.).
9.AIR 1967 SC 1470 : (Phoolchand & Anr.-V- Gopal Lal.).

For Petitioner - M/s.S.P.Mishra, Sr.Advocate,
S. Mishra, S.S. Kashyap,
J.K.Mohapatra, S.K. Samantaray.

For Opp.Parties - M/s. B.H. Mohanty, D.P. Mohanty,
T.K.Mohanty & P.K.Swain.

For Petitioner - M/s. Nirmal Ch. Mohanty & P. Rajan.

For Opp.Parties - M/s. R.K. Nayak.

M. M. DAS, J. These two writ petitions have been filed by the petitioners, who are defendants 4 and 3 respectively in C.S. No. 361 of 1994-I (Final Decree) against a common order dated 19.5.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in the said suit. Both the petitioners filed two separate applications under Order 18, Rule 17 C.P.C. seeking recalling of the P.Ws, who were examined in the suit at the stage of preliminary decree for cross-examination by the said defendants. The learned trial court recorded that the proceeding is one for making the preliminary decree final and in the meantime, the parties to the dispute have also entered into a settlement outside the court and accordingly, a petition for compromise has been filed in the final decree proceeding, concluded that the function of final decree is merely to restate and apply with precision what the preliminary decree has ordered. Thus, the final decree proceeding is only to enforce what has already been declared by the preliminary decree. A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted on the date of final decree. Relying upon the decision in the case of ***Muthangi Ayyana v. Muthangi Jaggarao and others,*** AIR 1977 SC 292, the learned trial court held that as has been held in the said case, the final decree cannot be amended or cannot go behind the preliminary decree on a matter determined by the preliminary decree. The learned trial court further relied upon the decisions in the cases of ***Taleb Ali v. Abdul Aziz,*** AIR 1929 Calcutta 689 and ***Bnwari Lal v. Shaikh Shukrullaha***, AIR 1940 Patna, 204 and recorded that it has been held in the said decisions that final decree is based on and controlled by preliminary decree and cannot travel beyond the preliminary decree. On the above basis, the learned trial court came to the conclusion that recalling of P.Ws may disconcert the findings of preliminary decree. The learned trial court further noted that the claim of the defendants 3 and 4 arose from the sale deeds executed by one Mahendra Narayan Deo, brother of the present plaintiff and the father of the

defendant no.1 being the Power of Attorney Holder of his father Harekrushna Harichandan Mohapatra. Thus concluding, the learned trial court rejected both the applications. The learned trial court, however, did not notice the peculiar and distinct facts of the case which are totally different from the facts involved in the decisions relied upon by him.

2. In order to appreciate the rival contentions raised before this Court, it would be appropriate to state the facts of the case in brief chronologically.

On 27.11.1946, Harekrushna Harichandan Mohapatra executed a registered Power of Attorney in favour of Mahendra Narayan Deo. On 18.2.1972, by a registered sale deed, Mahendra Narayan Deo sold part of the suit land, i.e., khata no. 224/3, plot no. 600/149 measuring Ac. 1.47 decimals, khata No. 224/4, plot no. 800 measuring Ac. 1.580 decimals, khata no. 224/4, plot no. 829 measuring Ac. 3.620 decimals, khata no. 224/4, plot no. 830/1495 measuring Ac. 4.648 decimals and khata no. 83, plot no. 828 measuring Ac. 1.950, in total, Ac. 15.000 in favour of one Hadunnav Venkat Raman Murthy, who filed Mutation Case Nos. 668 , 669 and 670 of 1972. On4.12.1975, the Mutation Cases were allowed. On 7.12.1977, Hadunnav Venkat Raman Murthy by a registered sale deed sold the lands in favour of M/s. Paradeep Marine Pvt. Ltd. which applied for loan to the O.S.F.C. and IPICOL. The properties were mortgaged as security for the loan and the said company established a Prawn Processing Unit. On 3.2.1978, Harekrushna Harichandan Mohapatra filed affidavit before the O.S.F.C. acknowledging the power of attorney executed by him in favour of Mahendra Narayan Deo to sell the property. M/s. Paradeep Marine failed to repay the loan. On 27.1.1984, the O.S.F.C. took steps under section 29 of the S.F.C. Act and the properties under Prawn Processing Unit were put to auction. M/s. Kalinga Marine on becoming the highest bidder purchased the property from the O.S.F.C. and on 14.5.1984 possession was delivered to M/s. Kalinga Marine. On 31.10.1986, the O.S.F.C. executed regular conveyance deed and on 19.10.2005, M/s. Kalinga Marine sold the land by registered sale deed in favour of M/s. Falcon Real Estate.

3. The present petitioners, i.e., Kalinga Marines & Transport Pvt. Ltd. and Falcon Real Estate Pvt. Ltd. were not made as parties in the suit initially, but later on, the petitioners filed petition under Order 1 , Rule 10 C.P.C. praying therein to be impleaded them as parties in the suit in the final decree proceeding. The plaintiff – opp. party no. 1 filed objection to the said petition. However, the learned trial court allowed the petitions and impleaded them as defendants 3 and 4. The petitioners after being impleaded as parties filed their written statement stating therein the fact as

to how they acquired title over the property and the O.S.F.C. handed over possession of the aforesaid land with plant and machineries in favour of Kalinga Marine and, accordingly, OSFC executed registered deed of conveyance on 31.10.1986 in respect of 'A' schedule property in favour of the said company. Thereafter, the Kalinga Marine being the absolute owner of the property sold the land bearing Sabik khata no. 223, sabik plot no. 800 which corresponds to hal khata no. 224/4, hal plot no. 800 area Ac. 1.580 decimals to the petitioner in WPC No. 11550 of 2012, i.e., Falcon Real Estate Private Ltd. Pursuant to the said sale, the said petitioner took over possession of the suit land and mutated the land in its favour. It was mentioned that the defendant no. 1 in the suit filed C.S. No. 998 of 2008 against the Kalinga Marine and Transport Pvt. Ltd. (defendant no. 3) which was subsequently abandoned by him.

4. The aforesaid suit, i.e., C.S. No. 361 of 1994-I was decreed preliminarily by judgment dated 27.11.1999 granting 1/4th share to the parties from their father's share and half share from the mother's share. The said judgment was challenged by defendant nos. 1 and 2 in F.A. No. 76 of 2000 before this Court, which was dismissed modifying the order of the learned trial court. Against the order of dismissal passed in F.A. No. 76 of 2000, the defendant no. 1 preferred SLP No. 31245 of 2008 before the Hon'ble apex Court which also was dismissed. The further averments made in the written statement was that while the matter stood thus, the plaintiff – defendant no. 1 and defendant no. 2 filed a compromise petition before the learned trial court praying therein to partition the property as per the preliminary decree by passing the order as was passed in F.A. No. 76 of 2000, but the compromise was rejected by the learned trial court by order dated 14.5.2009. Thereafter, another compromise petition was filed which is pending. At this juncture, the applications were filed under Order 18, Rule 17 C.P.C. praying therein to recall all the P.Ws for cross – examination by the petitioners as they were not parties when the evidence was recorded before the preliminary decree was passed. Objection was filed to the said petitions stating therein that the petitions are not maintainable either in law or in fact as the proceeding is a final decree proceeding and there is no scope for the court to decide any other issues in the present proceeding.

6. Mr. S.P. Mishra, learned senior counsel appearing for the petitioner in W.P.(C) No. 11550 of 2012 contended that the petitioner in the said writ petition having been added as a party in the suit on the basis of an application under Order 1, Rule 10 (2) C.P.C. which has become final, the newly added party, i.e., the petitioner, derives all the rights to defend its case. He further contended that after being impleaded as party as the

written statement filed by the petitioner was accepted being satisfied that the petitioner is a necessary party, the learned court below should have recast the issues and should have given an opportunity to the petitioner to cross-examine the plaintiff's witness(s). According to Mr. Mishra, when admittedly, the petitioner was not a party in the suit when the preliminary decree was passed and its property has been included in the schedule of property in the decree and on that ground alone, the petitioner was impleaded as party, the learned trial court was required to adjudicate the matter as to whether the property of the petitioner is liable to be excluded from the preliminary decree and the same, in the facts of this case, would not amount to reopening the decree, but will amount to re-adjudication of the case in the interest of justice and the findings which have been arrived at in the preliminary decree contrary to such facts should be treated to be vitiated.

7. Mr. Mohanty, learned counsel appearing for the opp. party no. 1, however, contended that in a final decree proceeding, the court cannot go behind the preliminary decree and is only to work out the final decree and, therefore, the learned trial court was right in rejecting the applications filed by the petitioners. He relied upon the decision in the case of ***Neelakantha Pillai Ramachandran Nair v. Ayyappan Pillai Kumara Pillai***, AIR 1978 Kerala 152, in support of his contention that the Kerala High Court relying upon the decision of the apex Court has held in the said case that in suits for redemption or partition where the passing of a preliminary decree is contemplated, the power conferred under Order 1, Rule 10 C.P.C. is to be regarded as circumscribed by the provisions contained in section 2 (2) and section 97 of the C.P.C. The impleadment of additional parties subsequent to the passing of the preliminary decree is permissible only if none of the questions already settled by the preliminary decree would have to be reopened by the court as a consequence of such impleadment; the addition of parties can be allowed at that stage only on condition that the further proceedings to be taken in the suit will be only on the basis of the preliminary decree already passed, and none of the questions settled by the preliminary decree will be allowed to be re-agitated on the ground that the person newly impleaded was not before the court at the time of the passing of the preliminary decree. As to whether or not the impleadment of a new party should be allowed on the aforesaid condition in the circumstances of a particular case will have to be considered by the court on the merits of each case as and when the said question arises. No party should be impleaded against his will if that would involve his being subjected to the terms of a preliminary decree which was passed without his being on the party array, particularly when there are pleas which the said party could

have put forward in respect of the matters considered and settled by the preliminary decree .

8. It appears that in the said decision, the Kerala High Court on a reference made by a learned Single Judge with regard to the question of law as to whether subsequent to the passing of the preliminary decree for partition or redemption it is legally competent for the court to implead additional parties under Order 1, Rule 10 C.P.C. While deciding the said question, the Kerala High Court relied upon the decision in the case of ***Venkata Reddi v. Pethi Reddi,*** AIR 1963 SC 992 and held that the said decision clearly indicates that in respect of the matters covered by a preliminary decree, the said decree is to be regarded as embodying the final decision of the court passing it. It will not, therefore, be reasonable to understand the provision in Order 1, Rule 10 C.P.C. as empowering the impleadment of additional parties in a suit in circumstances which would necessitate the ripping open of the determination made in the preliminary decree already passed in the suit. However, one can very well conceive of several situations where an impleadment of an additional party may be asked for or may be considered by the court to be necessary for a proper and complete adjudication of the matters in controversy in such a suit and such impleadment would not involve the reopening of the matters already finally settled by the preliminary decree.

9. Mr. Mishra, learned senior counsel, however, relied upon the provisions of Order 1, Rule 10 (5) C.P.C. which provides that subject to the provisions of the Indian Limitation Act, 1877, in section 22 (now the Limitation Act, 1963, section 21), the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons. Relying upon the said provision, he submitted that once the petitioners have been added as defendants under Order 1, Rule 10 (2) C.P.C. and have been permitted to file their written statements, it should be held that the suit for the petitioners should begin from the stage of issuance of summons to them and they should be given full opportunity to contest the suit for which, if required, the court can always reopen the preliminary decree as it is a settled law that in a partition suit, several preliminary decrees can be passed. He further relied upon the decision of this Court in the case of ***Palia Bewa v. Parbati Kumari Mohapatra and others***, 59 (1985) CLT 552, where this Court though was dealing with a suit for permanent injunction, accepted the contention of the defendant no. 12 therein that the said defendant being allowed to be impleaded as a party and such impletion having not been challenged which have become final, under sub-rule (5) of Rule 10 of Order 1 C.P.C., the suit must be deemed to have

begun against the said defendant no. 12 and, therefore, he has all the rights including asking for recalling of the witnesses already examined on behalf of the plaintiff for further cross-examination. Refusing defendant no. 12 to cross-examine the plaintiff would amount to negation of the right and would make the order allowing him to be impleaded as a party wholly infructuous. This Court in the said case held that once an order allowing an application under Order 1, Rule 10 C.P.C. is not challenged, the newly added party has all the rights to defend his case and so far as he is concerned, the case must be taken to have begun afresh. Further, in the said case, the contention of the defendant no. 12 that the order allowing recalling of the plaintiff for cross – examination will not be "any case which has been decided" was also accepted by this Court. This Court relied upon an earlier decision in the case of ***Alekha Pradhan and others v. Bhramar Pal and another***, 45 (1978) CLT 75, wherein, it has been held that by allowing a witness to be examined, no right or obligation of the parties in controversy in the suit is being decided.

10. With regard to partition suits, in the case of ***Gouri Bewa v. Ari Pradhan and others***, AIR 1987 Orissa, 212, a learned Single Judge of this Court held that a preliminary decree can always be corrected under section 152 C.P.C. In the case of ***Ganduri Koteshwaramma and another v. Chakiri Yanadi and another***, AIR 2012 SC 169, the Supreme Court, while considering the right of daughter in coparcenery property categorically laid down as follows:-

> "…….Section 97 provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree but that does not create any hindrance or obstruction in the power of the Court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. As such by passing of preliminary decree in partition suit before stipulated date it cannot be said that the rights of daughter to share in coparcenery property is lost".

11. With regard to the character of a preliminary decree, the Supreme Court in the said case held that a preliminary decree determines the rights and interest of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum, i.e., after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of the parties having regard to the changed situation. ***(Emphasis supplied)***

12. The Supreme Court in the said case relied upon an earlier decision of the said Court in the case of ***Phoolchand and another v. Gopal Lal***, AIR 1967 SC 1470, where it was held as follows:-

> "We are of the opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented……..So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so;……there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility…….for it must not be forgotten that the suit is not over till the final decree is passed and the court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties…… a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree……..."

13.. Keeping the above position in law in view, this Court is of the opinion that in view of the changed circumstances, as narrated above, under which

the property is stated to have come to the hands of the petitioner – Falcon Real Estate Pvt. Ltd. and the petitioners have already been impleaded as parties by allowing their applications under Order 1, Rule 10 (2) C.P.C. and their written statements filed have been accepted, the learned trial court should have construed that the suit is relegated to a position prior to passing the preliminary decree, where the defendants 3 and 4 entered appearance and filed their written statements. Hence, it was incumbent on the part of the learned trial court to recast the issues under the changed circumstances and to recall the witnesses examined by the parties before the preliminary decree was drawn up for being cross-examined by the petitioners. On such cross-examination and on the evidence adduced by the petitioners, both oral and documentary, the learned trial court was required to determine the issues recast to find out as to whether the property said to have been purchased by the defendant no. 3 and, thereafter, by the defendant no. 4 from him, is to be excluded from the preliminary decree.

14. In view of the above findings, the impugned order dated 19.5.2012 passed by the learned Civil Judge (Senior Division), Bhubaneswar in C.S. No. 361 of 1994-I (F.D.) is set aside and the learned trial court is directed to recall the witnesses for cross-examination by the petitioners – defendants 3 and 4, after recasting the issues and pass a fresh preliminary decree as per the directions/observations made above. The suit being of the year 1994, the learned trial court is directed to expedite the hearing of the same so as to conclude it by the end of June, 2013.

15. In the result, both the writ petitions are allowed. There shall be no order as to costs.

Writ petitions allowed.

2013 (I) ILR - CUT- 483

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

W.P.(C) NO. 6913 OF 2008 (With Batch) (Dt.21.12.2012)

MANORAMA MOHANTY & ORS. ……..Petitioners

.Vrs.

AUTHORIZED OFFICER & ORS. ……Opp.Parties

SECURITIZATION & RECONSTRUCTION OF FINANCIAL ASSETS & ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (in short SARFAESI ACT,2002) – S.13.

Whether the Co-operative Banks are entitled to take action under the SARFAESI Act, 2002, against the petitioners to enforce the security interest as created by the petitioners while taking loan when dispute case U/ss. 68 & 70 of the Orissa Co-operative Societies Act, 1962 is pending – Held, pendency of Dispute Case U/ss. 68 & 70 of the OCS Act does not debar the Co-operative Banks from invoking the provisions of the SARFAESI Act to enforce security interest for liquidation of loan not repaid. (Para 15)

Case laws Referred to:-

1.AIR 2007 SC 1584 : (Greater Bombay Co-operative Bank Ltd.-V- M/s.United Yarn Tax. Pvt. Ltd. & Ors.)

2.2009(1)Bank CLR 230(MP)
AIR 2008 m.p. 193 : (Hafiz Zakir Hussain-V- Akola Janta Commercial Co-operative Bank Ltd.)

3.2008(2) Bank CLR 658 (Bom.) : (M/s. Rama Steel Industries & Ors.-V- Union of India & Anr.)

4.2008(2) Bank CLR 587 (Ker.) : (A.P. Varghese & etc. etc.-V- The Kerala Stat Co-operative Bank Ltd. & Ors.).

For Petitioner - M/s. Rakesh Sahu, S.Pattnaik & P.K.Sahoo.
For Opp.Parties- M/s. S.C.Panda, M.K. Majumdar, R. Das Nayak, G.C.Nath, A.K.Swain & D.K.Nayak.
For Petitioner - M/s. B.R.Rout, R.Mishra.
For Opp.Parties - M/s. Sanjit Mohanty, M/s. Sudarsan Nanda & R.R. Swain.
For Petitioner - Mr. S.K.Sanganeria,
For Opp.Parties - Dr. A.K.Rath, A.K.Nath & H. Mohanty)for O.P.1)

For Petitioner - Mr. Manoj Kumar Rajguru.
For Petitioner - M/s. Sidhartha Das, P.R.Singh, S.K.Mishra, D.Rout.
For Opp.Parties- Mr. Sudarsan Nanda (for O.P.2).

C.R. DASH, J. Section 13(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short) authorizes a secured creditor to enforce a security interest, without the intervention of the Court or Tribunal, in accordance with the provisions of the said Act. Whether the Co-operative Bank can invoke provisions of the said SARFAESI Act to enforce a security interest is the common question that is involved in all the above writ applications. In view of such fact, these writ applications are disposed of by this common judgment.

2. **In W.P.(C) No.6913 of 2008,** the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Cuttack has issued Demand Notice under Section 13(2) of the SARFAESI Act demanding from the petitioner Rs.24,78,399/- (twenty-four lakhs seventy-eight thousand three hundred and ninety-nine) along with accrued interest as on 31.10.2008.

In W.P.(C) No.7328 of 2008, the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Cuttack has issued Demand Notice under Section 13(4) of the SARFAESI Act against the petitioner demanding payment of Rs.4,41,312/- (four lakhs forty-one thousand three hundred and twelve).

In W.P.(C) No.10804 of 2012, the Urban Co-operative Bank Ltd., Tinikonia Bagicha, Buxi Bazar, Cuttack has issued Notice dated 12.04.2012 under Section 13(2) of the SARFAESI Act demanding repayment of Rs.59,48,316/- (fifty-nine lakhs forty-eight thousand three hundred and sixteen) towards principal and Rs.27,28,014/- (twenty-seven lakhs twenty-eight thousand and fourteen only) towards accrued interest.

In W.P.(C) No.16174 of 2012, the Urban Co-operative Bank Ltd., Jagatpur Branch, Cuttack has issued Notice dated 15.03.2012 under Section 13(4) of the SARFAESI Act demanding Rs.4,87,036/- (four lakhs eighty-seven thousand and thirty-six only) towards principal and Rs.35,95,811/- (thirty-five lakhs ninety-five thousand eight hundred and eleven) towards accrued interest.

In W.P.(C) No.17269 of 2012, the Urban Co-operative Bank Ltd., Link Road Branch, Arunodaya Market, Cuttack has issued Notice under

Section 13(2) of the SARFAESI Act demanding Rs.11,46,311/- (eleven lakhs forty-six thousand three hundred and eleven) from the petitioner.

The petitioners in all the writ petitions at the time of securing the loan had mortgaged immovable properties and the opposite parties-Bank now has initiated appropriate action under the SARFAESI Act to enforce the security interest as against the petitioners for realization of the loan not repaid by them.

3. The petitioners in all the aforesaid writ petitions have assailed the action of the opposite party – Co-operative Banks on the ground that the Co-operative Banks cannot invoke the provisions of SARFAESI Act to enforce the security interest.

Learned counsels for the petitioners in all the writ petitions relied on the case of **Greater Bombay Co-operative Bank Ltd. *vs.* M/s. United Yarn Tex. Pvt. Ltd. & Ors.,** A.I.R. 2007 SC 1584, to substantiate their contentions.

In W.P.(C) No.10804 of 2012, it is further submitted that arbitration proceeding under Sections 68 and 70 of the Orissa Co-operative Societies Act, 1962 ('OCS Act' for short), vide Dispute Case No.62 of 2009 is pending before the Arbitrator-cum-Assistant Registrar, Co-operative Societies, City Circle, Cuttack, in respect of the demanded sum and when such arbitration proceeding is pending adjudication, no proceeding under the provisions of SARFAESI Act is maintainable in as much as in view of Section 35 of the SARFAESI Act, the said Act cannot over-ride a proceeding for arbitration continuing under Sections 68 and 70 of the OCS Act.

Mr. R.K. Sahu, learned counsel appearing for the petitioner in W.P.(C) No.6913 of 2008 submits that because the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act" for short) have not been made applicable to the Co-operative Banks [see **Greater Bombay Co-operative Bank Ltd.** (supra)], the provisions of the SARFAESI Act also cannot apply, since the same are not complementary or in addition to the provisions contained in the OCS Act.

4. Learned counsels appearing for the opposite parties-Bank on the other hand submit that Co-operative Bank having been included within the definition of 'Bank' occurring in Section 2(1)(c) of the SARFAESI Act as per Central Government's Notification dated 28.01.2003 by the Ministry of Finance and Company Affairs published in the Gazette of India (Extraordinary), the Co-operative Bank can take action under the SARFAESI Act to enforce security interest and to recover the loan. They

relied on the case of **Greater Bombay Co-operative Bank Ltd.** (supra), **Hafiz Zakir Hussain *vs.* Akola Janta Commercial Co-operative Bank Ltd.,** 2009 (1) Bank CLR 230 (MP) and A.I.R. 2008 Madhya Pradesh 193, **M/s. Rama Steel Industries and others *vs.* Union of India and another,** 2008 (2) Bank CLR 658 (Bom), and **A.P. Varghese and etc. etc. *vs.* The Kerala State Co-operative Bank Ltd. and others,** 2008 (2) Bank CLR 587 (Ker) to substantiate their contentions.

5. From the aforesaid rival submissions raised at the Bar, it is clear that the pivotal question that emerges for adjudication is whether the Co-operative Banks here in these writ petitions are entitled to take action under the SARFAESI Act against the petitioners herein to enforce the security interest as created by the petitioners while taking loan.

Submission of Mr. Sanganeria, Mr. R.K. Sahoo and other counsels appearing for the petitioners in the writ petitions is that, if the principles laid down in **Greater Bombay Co-operative Bank Ltd.** (supra) are properly understood and appreciated, there cannot be any doubt that Co-operative Bank being not a "**Banking Company**" cannot take recourse to the provisions enacted in the SARFAESI Act.

Learned counsel for the petitioners relies heavily on paragraphs- 88 and 89 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra).

6. Paragraphs- 88 and 89 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra) is quoted below for ready reference.

> **"88**. For the reasons stated above and adopting pervasive and meaningful interpretation of the provisions of the relevant Statutes and Entries 43, 44 and 45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution, we answer the Reference as under:-
>
> "Co-operative banks" established under the Maharashtra Co-operative Societies Act, 1960 [MCS Act, 1960]; the Andhra Pradesh Co-operative Societies Act, 1964 [APCS Act, 1964]; and the Multi-State Co-operative Societies Act, 2002 [MSCS Act, 2002] transacting the business of banking, do not fall within the meaning of "**banking company**" as defined in Section 5 (c) of the Banking Regulation Act, 1949 [BR Act]. Therefore, the provision of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993

> [RDB Act] by invoking the Doctrine of Incorporation are not applicable to the recovery of dues by the co-operatives from their members.
>
> **89**. The field of co-operative societies cannot be said to have been covered by the Central Legislation by reference to Entry 45, List I of the Seventh Schedule of the Constitution. Co-operative Banks constituted under the Co-operative Societies Acts enacted by the respective States would be covered by co-operative societies by Entry 32 of List II of Seventh Schedule of the Constitution of India.**"**

7. From the aforesaid decision in **Greater Bombay Co-operative Bank Ltd.** (supra), it is clear beyond doubt that the Co-operative Bank being not a "Banking Company", it cannot recover its debts or dues by taking recourse to the RDB Act. It is also clear from the decision that Co-operative Societies is not a "Banking Company" within the definition clause and the scheme of RDB Act. The basis of the matter is therefore, whether the aforesaid decision in **Greater Bombay Co-operative Bank Ltd.** (supra) can be taken aid of by the learned counsel for the petitioners in the writ petitions to build an edifice for the conclusion that the SARFAESI Act is also not applicable. Dr. A.K. Rath and other counsels appearing for the Co-operative Banks in different writ petitions invited our attention to paragraphs- 30 and 31 of the decision rendered in **Greater Bombay Co-operative Bank Ltd.** (supra) in which Their Lordships were dealing with the SARFAESI Act. For proper appreciation, we feel persuaded to reproduce the said paragraphs for better appreciation.

> **"30**. The Parliament had enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ['the Securitisation Act'] which shall be deemed to have come into force on 21st day of June, 2002. In Section 2(d) of the Securitisation Act same meaning is given to the words 'banking company' as is assigned to it in clause (e) of Section 5 of the BR Act. Again the definition of 'banking company' was lifted from the BR Act but while defining 'bank', Parliament gave five meaning to it under Section 2(c) and one of which is 'banking company'. The Central Government is authorized by Section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28.01.2003, has specified "co-operative bank" as defined in Section 5 (cci) of the BR Act as a "bank" by lifting the definition of 'co-operative bank' and 'primary co-operative bank' respectively from Section 56, Clauses 5 (cci) and (ccv) of Part V. The Parliament has thus consistently made the

meaning of 'banking company' clear beyond doubt to mean 'a company engaged in banking, and not a co-operative society engaged in banking' and in Act No.23 of 1965, while amending the BR Act, it did not change the definition in Section 5 (c) or even in 5(d) to include co-operative banks; on the other hand, it added a separate definition of 'co-operative bank' in Section 5 (cci) and 'primary co-operative bank' in Section 5 (ccv) of Section 56 of Part V of the BR Act. Parliament while enacting the Securitization Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify 'co-operative banks' by Notification dated 28.01.2003. The context of the interpretation clause plainly excludes the effect of a reference to banking company being construed as reference to a co-operative bank for three reasons: firstly, Section 5 is an interpretation clause; secondly, substitution of 'co-operative bank' for 'banking company' in the definition in Section 5 (c) would result in an absurdity because then Section 5 (c) would read thus: "co-operative bank" means any company, which transacts the business of banking in India; thirdly, Section 56 (c) does define "co-operative bank" separately by expressly deleting/inserting clause (cci) in Section 5. The Parliament in its wisdom had not altered or modified the definition of 'banking company' in Section 5 (c) of the BR Act by Act No.23 of 1965.

"31. As noticed above, "Co-operative bank" was separately defined by the newly inserted clause (cci) and "primary co-operative bank" was similarly separately defined by clause (ccv). The meaning of 'banking company' must, therefore, necessarily be strictly confined to the words used in Section 5(c) of the BR Act. If the intention of the Parliament was to define the 'co-operative bank' as 'banking company', it would have been the easiest way for the Parliament to say that 'banking company' shall mean 'banking company' as defined in Section 5(c) and shall include 'co-operative bank' and 'primary co-operative bank' as inserted in clauses (cci) and (ccv) in Section 5 of the Act 23 of 1965.**"**

8. Submission of Dr. A.K. Rath and other counsels appearing for the opposite parties-Co-operative Bank is that both the aforesaid paragraphs in fact support the contention of the opposite parties-Bank. From the decision of Hon'ble Supreme Court in **Greater Bombay Co-operative Bank Ltd.** (supra) vis-à-vis the submissions advanced by learned counsel for the petitioners it is clear that learned counsel for the petitioners are confused on the following points :

(i) They are missing the point that the decision in **Greater Bombay Co-operative Bank Ltd.** (supra) is about the availability of remedy under the RDB Act to the Co-operative Banks covered under the State Co-operative Societies Act. In other words Hon'ble Apex Court in the aforesaid case was dealing with the question whether debts due to the co-operative banks constituted under the Co-operative Societies Act of the Maharashtra and Andhra Pradesh could be covered under the provisions of the RDB Act.

(ii) They are confused about the terms "Bank" and "Banking Company" as defined separately in Clause (c) and (d) of Section 2(1) of the SARFAESI Act and Clause (d) and (e) of Section 2 of the RDB Act.

9. The definitions of "Bank" and "Banking Company" separately in Clauses (c) and (d) of Section 2(1) of the SARFAESI Act and Clauses (d) and (e) of Section 2 of the RDB Act show that the law does not require that every bank has to be a banking company though every banking company may be a bank.

10. The definitions of "Bank" and "Banking Company" in Clauses (c) and (d) of Section 2(1) of the SARFAESI Act as reproduced below for ready reference would bring out the clear distinction between the meaning of the terms "Bank" and "Banking Company".

"(*c*) "bank" means –

(i) a Banking Company; or
(ii) corresponding new Bank; or
(iii) the State Bank of India; or
(iv) a subsidiary Bank; or
(v) such other Bank which the Central Government may, by notification, specify for the purposes of this Act."

(*d*) "banking company" shall have the meaning assigned to it in Clause (c) of Section 5 of the Banking Regulation Act, 1949 (10 of 1949).**"**

11. Section 5 of the Banking Regulation Act, 1949 ("BR Act" for short) does not define a "Bank". The aforesaid BR Act defines 'banking company' in Clause (c) of Section 5. However, Co-operative Bank has been separately defined in Clause (cci) of Section 5, which has been inserted by enacting Section 56 of the BR Act.

12. Chapter-III of the Securitization Act provides for enforcement of security interest by a secured creditor. The term "secured creditor" is wider

than a "bank" or a "banking company" or a "financial institution". Clause (zd) of Section 2 of the SARFAESI Act defines "secured creditor". This clause refers to a "Bank" but not to a "Banking Company". The contention of the learned counsels for the petitioners regarding the applicability of the decision of Hon'ble Supreme Court in **Greater Bombay Co-operative Bank Ltd.** (supra) which deals with the applicability of RDB Act to Co-operative Bank is based on a misconception relating to scope of expressions "Bank" and "Banking Company" in the SARFAESI Act. Clause (v) of Section 2(1) of SARFAESI Act as found from the provision quoted (supra) empowers the Central Government by notification to specify any other bank for the purpose of the Act. Thus, power has been conferred on the Central Government in the SARFAESI Act for including any other bank within the definition by issuing a notification and the Central Government has issued a notification and included Co-operative Bank for the purpose of the said Act. In paragraph- 31 of the decision in **Greater Bombay Co-operative Bank Ltd.** (supra) the discussion by Hon'ble Apex Court makes it clear that the Parliament has not intended to define Co-operative Bank as Banking Company. Such a view in paragraph- 31 in the aforesaid decision supports the contention of the opposite parties-Bank that Co-operative Banks are not Banking Companies and they having been brought under the purview of the SARFAESI Act by the Central Government's Notification dated 28.1.2003 published by the Ministry of Finance and Company Affairs in the Gazette of India (Extraordinary) in exercise of power conferred under Section 2(1)(v) of the SARFAESI Act, the Co-operative bank can enforce security interest created in favour of the bank by the loanee under Section 13 of the SARFAESI Act. In our view on this aspect we are supported by Madhya Pradesh High Court, Bombay High Court and Kerala High Court in their decisions rendered in the case of Hafiz Zakir Hussain, Rama Steel Industries and A.P. Verghese respectively (supra).

13. The contention raised by Mr. Sanganeria to the effect that in view of pendency of Arbitration Proceeding under Section 68 of the O.C.S. Act, no proceeding under the SERFAESI Act is competent and contention of Mr. R.K. Sahu, learned counsel appearing for the petitioner in W.P.(C) No.6913 of 2008 to the effect that Co-operative Bank cannot invoke the provisions of the SERFAESI Act, as provisions of the R.D.B. Act have not been made applicable for recovery of the debts of the Co-operative Banks may be addressed together, as both the questions are almost similar. The basis of argument by both Mr. Sanganeria and Mr. Sahu is to the effect that as the provisions of the R.D.B. Act have not been made applicable to the Co-operative Bank, the provisions of the SERFAESI Act also cannot be applied, since the same are not complementary or in addition to the provisions

contained in the O.C.S. Act. It is beneficial to observe here that SERFAESI Act is an independent enactment providing remedy to a group of creditors (defined as "secured creditors" in Clause (zd) of Section 2 of the SERFAESI Act. The provisions of the said Act authorize a secured creditor to enforce the security interest, without the intervention of the Court or Tribunal in accordance with the provisions of the said Act. A creditor seeking recovery under the provisions of the R.D.B. Act on the other hand need not necessarily have a secured interest on the basis of which he can claim realization of the debt while under the SERFAESI Act he is competent to claim liquidation of debt on the basis of the secured assets. In view of such fact, the scheme of the SERFAESI Act cannot be narrowed down or limited by taking aid of the R.D.B. Act.

14. There is distinction in the expression used in Section 37 of the SERFAESI Act and Sub-section (2) of Section 34 of the R.D.B. Act. The Sections may be usefully reproduced for ready reference as hereunder :-

> "Section 37 of the SERFAESI Act : Application of other laws not barred. – The provisions of this Act or the rules made thereunder shall be in addition to and not in derogation of the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."
>
> "Sub-section (2) of Section 34 of the RDB Act : The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948, the State Financial Corporations Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Act, 1984 [the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989]."

15. It may be seen from the above provisions that the expression "or any other law for the time being in force" appearing in Section 37 of the SERFAESI Act is missing in Section 34 of the R.D.B. Act. This is crucial, because it would show that the remedy provided is an addition to the remedy under any other law for the time being in force, which includes the remedy available under the Orissa Co-operative Societies Act. We are

therefore of the considered view that pendency of the Dispute Case under Sections 68 and 70 of the O.C.S. Act does not debar the Co-operative Bank from invoking the provisions of the SERFAESI Act to enforce security interest for liquidation of loan not repaid.

16. In view of the above, we do not find any merit in the writ petitions, and all the writ petitions are accordingly dismissed.

Writ petition dismissed.

2013 (I) ILR - CUT- 493

INDRAJIT MAHANTY, J.

CRLMC. NO.802 OF 2011 (Dt.09.07.2012)

PRASANTA KUMAR PAL …….Petitioner

.Vrs.

DEBASIS PATTNAIK & ANR. …….Opp.Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 – S.138.

Territorial jurisdiction of the Court to try offence U/s.138 N.I. Act – How to determine – Held, Complaint Petition has to be read as a whole and mere declaration or mis declaration made at the cause title of the complaint petition cannot form to decide the jurisdiction of a Court.

In this case both the complainant and the accused reside in the district of Keonjhar – Cheque issued and dishonoured in Keonjhar – Notice sent by complainant from Keonjhar – Complaint petition filed at Cuttack and learned SDJM, Sadar, Cuttack took cognizance in the matter – Order challenged on the ground of maintainability – Held, impugned order is quashed as no part of the cause of action arose within the territorial jurisdiction of the learned SDJM, Cuttack – Direction issued for transfer of the case for trial by a competent Magistrate at Keonjhar. (Paras 9, 11)

Case laws Referred to:-

1.AIR 1999 SC 3762 : (K. Bhaskaran-V- Sankaran Vaidhyan Balan & Ors.)
2.(2009)44 OCR (SC)44 : (Rajiv Modi-V- Sanjay Jain & Ors.)
3.(2009)1 SCC 720 : (Harman Electrinics Pvt.Ltd. & Anr.-V- National Panasonic India Pvt. Ltd.).
4.(2011)6 SCC 463 : (Dalmia Cement (Bharat) Ltd. –V- Galaxy Traders & Agencies Ltd.).

For Petitioner - M/s. Ashok K. Mohapatra, A.K. Mohapatra, N.C.Rout, S.K. Padhi, S.K. Mishra, Tej Kumar.
For Opp.Party No.1 - M/s. Chinmaya Mohanty, S.K. Nayak-3, S.Rath, S.P.Mohanty.
For Opp.Party No.2 - Addl. Standing Counsel.

I.MAHANTY, J. In this application under Section 482 Cr.P.C., the petitioner- Prasanta Kumar Pal has sought for quashing the order of cognizance dated 15.11.2010 passed by the learned S.D.J.M., Sadar, Cuttack in I.C.C. Case No.1062 of 2010 taking cognizance against him under section 138 of the N.I.Act on the ground that no part of the cause of action arose within the jurisdiction of the learned S.D.J.M., Sadar, Cuttack and the order of cognizance was passed by a court lacking territorial jurisdiction.

2. Shorn of unnecessary details, as would be evident from the case records, the complainant-Opp. Party No.1 is a permanent resident of the district Keonjhar, but in Column-1 of the complaint petition he has mentioned his present address as Jyotivihar, Bidanasi, Cuttack and in Column-3 he has mentioned the place of occurrence as Cuttack. Basing on these averments made in the complaint petition, the learned S.D.J.M. has proceeded to entertain the matter and exercise his jurisdiction thereunder.

The case of the complainant (Opp. Party No.1) is that he is a permanent resident of Keonjhar and the accused-petitioner who had his business at Joda, had approached the petitioner for a friendly loan of Rupees ten lakhs for the purpose of business. The complaint petition further indicates that on 21.02.2010 an amount of Rs.10,00,000/- was handed over to the accusedpetitioner at Keonjhar and by way of repayment of the loan amount, the accused-petitioner handed over a Cheque dated 24.09.2010 drawn on Bank of India, Keonjhar bearing Cheque No.009105 for an amount of Rs.10,00,000/-.

The complainant thereafter claims to have deposited the said cheque in his bank i.e. the State Bank of India, Keonjhar Branch for its encashment on 25.9.2010 and the said cheque given by the accused was dishonoured by the Bank at Keonjhar on the same day i.e. 25.9.2010. Thereafter, a legal notice was issued to the accused-petitioner on 30.09.2010 under the N.I. Act through an Advocate based at Cuttack and since the accused failed to pay the cheque amount within 15 days stipulated in the notice, the present complaint proceeding came to be filed at Cuttack.

3. The case of the petitioner is that while coming from Keonjhar to Cuttack on 17.9.2010 on the way to Bhubaneswar, he lost his black colour bag containing Bank of India Cheque No.910129150 and another cheque book of Indusind Bank and cash along with personal belongings. The petitioner on learning about the loss of his bag, reported the matter to the I.I.C., Nayapalli P.S. vide S.D.E. No.426 dated 21.9.2010. Accordingly, on

the request of the petitioner, his Bank of India Account at Keonjhar Branch was closed on 12.3.2010. It is further submitted that the petitioner had given his reply to the demand notice on 22.10.2010. The speed post receipt and copy of the reply to the demand notice have been annexed to this application as Annexures-5 and 6 respectively.

4. It is asserted on behalf of the accused-petitioner that no part of the cause of action arose within the territorial jurisdiction of the learned S.D.J.M., Sadar, Cuttack and only since the Advocate for the complainant (Opp. Party No.2) resides at Cuttack, the learned SDJM without perusing the averments made in the complaint petition, as well as, initial statement of the omplainant, as well as, the documents annexed thereto, proceeded to exercise jurisdiction and passed the impugned order of cognizance.

5. Mr.Nayak, learned counsel for Opp. Party No.2, on the other hand contended that it is well settled by the Hon'ble Supreme Court in the case of **K.Bhaskaran Vrs. Sankaran Vaidhyan Balan and another**, AIR 1999 SC 3762 that:

> "The offence under S.138 of the Act can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence : (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It is not necessary that all the five acts should have been perpetrated at the same locality. It is possible that each of those five acts could be done at five different localities. But concatenation of all the above five is a sine qua non for the completion of the offence under S.138 of the Act. Referring S.178(d) of Code it is clear that if the five different acts were done in five different localities any one of the Courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence under S. 138 of the Act. In other words, the complainant can choose any one of those Courts having jurisdiction over any one of the local areas within the territorial limits of which any one of those five acts was done. As the amplitude stands so widened and so expansive it is an idle exercise to raise jurisdictional question regarding the offence under S. 138 of the Act.
>
> Under S. 177 of the Code "every offence shall ordinarily be inquired into and tried in a Court within whose jurisdiction it was committed". The locality where the bank (which dishonoured the

cheque) is situated cannot be regarded as the sole criteria to determine the place of offence. Even otherwise the rule that every offence shall be tried by a Court within whose jurisdiction it was committed is not an unexceptional or unchangeable principle. S. 177 itself has been framed by the legislature thoughtfully by using the precautionary word "ordinarily" to indicate that the rule is not invariable in all cases. S. 178 of the Code suggests that if there is uncertainty as to where, among different localities, the offence would have been committed the trial can be had in a Court having jurisdiction over any of those localities. The provision has further widened the scope by stating that in case where the offence was committed partly in one local area and partly in another local area the Court in either of the localities can exercise jurisdictions to try the case. Further again, S. 179 of the Code stretches its scope to a still wider Horizon. The above provisions in the Code should have been borne in mind when the question regarding territorial jurisdiction of the Courts to try the offence was sought to be determined." Apart from the above, reliance is also placed by the complainant on another decision of the Hon'ble Supreme Court in the case of **Rajiv Modi Vrs. Sanjay Jain and Others**, (2009) 44 OCR (SC) 44 wherein it has been held that to constitute the territorial jurisdiction, the "whole" or a "part" of "cause of action" must have arisen within the territorial jurisdiction of the Court and the same must be decided on the basis of the averments made in the complaint without embarking upon an inquiry as to the correctness or otherwise of the said facts. Placing reliance on the aforesaid decision, learned counsel for the complainant submits that since the complainant has stated in his complaint petition that he is presently residing at Cuttack and since it is averred in Column-3 of the complaint petition that the cause of action for initiating the present case arose at Cuttack, the learned S.D.J.M. possesses the necessary jurisdiction in the matter and no objection to the same ought to be entertained.

6. In the light of the submissions made by the learned counsel for both the parties, in order to constitute the territorial jurisdiction, the whole or a part of cause of action must have arises within the territorial jurisdiction of the court, which would also have to be decided on the basis of the averments made in the complaint petition. This Court is of the considered view that the complaint has to be read as a whole, more particularly, the mere declaration made at the cause title of the complaint, cannot form the basis to decide the jurisdiction of a court. The averments made in the cause title page of the complaint is quoted herein below:"

Name and Address of the Complaint :

Debasis Pattnaik, Nilakrushna Kutir, Mining Road, Keonjhar. At present residing At-Jyotivihar, P.O/P.S-Bidanasi, Dist: Cuttack.

Place and Date of Occurrence : CuttackDtd.

24.09.2010 when the cheque was issued by the accused.

"For better appreciation, it would be appropriate to quote name and address of the complainant mentioned in the demand notice (Annexure-2) issued by the counsel for the complainant, which reads as follows:

"CLIENT

Debasis PattnaikNilakrushna Kutir Mining Road, Keonjhar-758001."

7. Apart from the above, no other pleading is available eitherin the complaint petition or in the initial statement to show that the complainant is a permanent resident of Cuttack. Therefore, I am of the considered view that the fact situation that arose in the case of **Rajiv Modi** (supra) is not similar to the facts of the present case and details of which are dealt with later. The decision of the Hon'ble Supreme Court in **K. Bhaskaran** (supra) has been considered by a later judgment in the case of **Harman Electronics Private Limited & Another Vrs. National Panasonic India Private Limited,** (2009) 1 SCC 720. In paragraphs-9 and 11, the Supreme Court has observed as follows:

"**9.** Reliance has been placed by both the learned Additional Sessions Judge as also the High Court on a decision of this Court in **K. Bhaskaran v. Sankaran Vaidhyan Balan.** This Court opined that the offence under Section 138 of the Act can be completed only with the concatenation of number of acts, namely, (1) drawing of the cheque, (2) presentation of the cheque to the bank, (3) returning the cheque unpaid by the drawee bank, (4) giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) failure of the drawer to make payment within 15 days of the receipt of the notice. It was opined that if five different acts were done in five different localities, any one of the courts exercising jurisdiction in one of the five local areas can become the place of trial for the offence

under Section 138 of the Act and the complainant would be at liberty to file a complaint petition at any of those places. As regards the requirements of giving a notice as also receipt thereof by the accused, it was stated: (SCC pp. 518- 19, para 18)

"18. On the part of the payee he has to make a demand by 'giving a notice' in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of such 'giving', the travails of the prosecution would have been very much lessened. But the legislature says that failure on the part of the drawer to pay the amount should be within 15 days 'of the receipt' of the said notice. It is, therefore, clear that 'giving notice' in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address."

The Court, however, refused to give a strict interpretation to the said provisions despite noticing *Black's Law Dictionary* in regard to the meaning of the terms "giving of notice" and "receiving of the notice" in the following terms" (K. Bhaskaran case, SCC p.519,\ paras 19-20)

"19. In *Black's Law Dictionary* 'giving of notice' is distinguished from 'receiving of the notice' (vide p.621): 'A person notifies or gives notice to another by taking such steps as may be reasonable required to inform the other in the ordinary course, whether or not such other actually comes to know of it'. A person 'receives' a notice when it is duly delivered to him or at the place of his business.

20. If a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure." For the said purpose, a presumption was drawn as regards refusal to accept a notice.

11. Indisputably, the parties had been carrying on business at Chandigarh. The head office of the respondent complainant may be at Delhi but it has a branch office at Chandigarh. It is not in dispute

that the transactions were carried on only from Chandigarh. It is furthermore not in dispute that the cheque was issued and presented at Chandigarh. The complaint petition is totally silent as to whether the said cheque was presented at Delhi. As indicated hereinbefore, the learned counsel appearing on behalf of the respondent complainant contended that in fact the cheque was put in a drop box but as the payment was to be obtained from the Delhi branch, it was sent to Delhi. In support of the said contention, purported certificate issued by Citibank NA has been enclosed with the counter-affidavit which reads as under:

"This is to confirm that M/s National Panasonic India (P) Ltd. (NPI) having registered office at AV-11, Community Centre, Safdarjung Enclave, New Delhi 110 029 are maintaining Current Account No.2431009 with our Bank at Jeevan Bharti Building, 3, Parliament Street, New Delhi 110 001 only and not at any other place in India including Chandigarh.

Further confirmed that Citibank has provided the facility for collection of cheques/demand drafts from branches of NPI located at various places/cities in India. However, all amounts of cheques/demand drafts so collected on behalf of National Panasonic India (P) Ltd. are forwarded and debited/credited to the aforesaid Current Account No.2431009 with our bank at Jeevan Bharti Building, 3, Parliament Street, New Delhi 110 001."

8. In the case of **Dalmia Cement (Bharat) Ltd. Vrs. Galaxy Traders & Agencies Ltd.,** (2001) 6 S.C.C. 463, the Hon'ble Supreme Court has observed that while "issuance of notice" by the holder of a negotiable instrument is necessary, "service thereof" is also imperative. Only on a "service" of such notice and failure on the part of the accused to pay the demanded amount within a period of 15 days thereafter, the commission of an offence completes. Giving of notice, therefore, cannot have any precedent over the service.

Therefore, the fact situation arises for consideration in this case is that the service of notice on the petitioner (accused) was at Keonjhar, therefore, the mere issuance of notice on behalf of the complainant (Opp. Party No.1) by a lawyer situated at Cuttack and as held by the Hon'ble Supreme Court in the case of Harman Electronics (supra) the learned S.D.J.M. at Cuttack does not possess the necessary jurisdiction to entertain the same.

9. In the present case, both the complainant as well as the accused-petitioner reside in the district of Keonjhar. The alleged loan in cash was

given by the complainant to the petitioner accused at Keonjhar. The purported cheque given by the accused-petitioner to the complainant was at Keonjhar. The complainant presented the cheque for encashment at Keonjhar and the bank intimated about the dishonour of cheque at Keonjhar. The advocate notice on behalf of the complainant was issued by the lawyer located at Cuttack.

The learned counsel for the opposite party-complainant orally submitted that the accused-petitioner had "handed over the cheque" to the complainant-opposite party at Cuttack. Learned counsel for the opposite party-complainant was called upon by the Court to point out any averment made either in the complaint petition under Annexure-1, demand notice under Annexure-2 and initial statement recorded under Annexure-3 to support his oral submission as noted hereinabove.

Learned counsel failed to point out any such averment made in either of the Annexures 1, 2 and 3 and, therefore, the averments made by the learned counsel for the opposite party is held to be unsubstantiated. At best, the declaration made in the complaint petition by the opposite party, claiming to have resided temporarily at Cuttack and declaring the cause of action arose at Cuttack have to be held to be mere mis-declaration made solely for the purpose of attempting to bring the matter within the territorial jurisdiction of the learned S.D.J.M., Cuttack.

In the judgment of the Hon'ble Supreme Court in the case of **Rajiv Modi** (supra), it has been held that the issue of territorial jurisdiction of a court must be decided on the basis of the averments made in the complaint. The observation of the Hon'ble Supreme Court has to be understood to mean the complaint petition as a whole and an nsubstantiated mis-declaration cannot clothe the court with the jurisdiction, which it otherwise does not possess. Any declaration made in the body of the complaint petition by itself has to be substantiated by the facts pleaded in the complaint petition as well as the initial statement.

In the case at hand, on a prima facie reading of the complaint petition (Annexure-1), demand notice (Annexure-2) and initial statement (Annexure-3) no averment exists there to justify and/or substantiate the territorial jurisdiction of the court of learned S.D.J.M., Cuttack. Hence, this Court is of the considered view that while no enquiry as to the correctness of the facts may be gone into, yet, the complaint petition, as a whole, has to be considered and not merely the declaration or mis-declaration made in the cause title page of the complaint petition. Further, while there is no averment

in any of the documents under Annexures 1, 2 and 3 regarding the alleged handing over the cheque by the accused-petitioner to the complainant-opposite party at Cuttack, this Court is of the view that the declaration of temporary residence at Cuttack and further declaration that cause of action occurred at Cuttack as contained in the cause title page of the complaint petition are nothing else but misdeclarations not supported by any averments made on behalf of the complainant either in the complaint petition, demand notice or initial statement.

Apart from the above, the only issue left for consideration is as to whether the learned S.D.J.M., Cuttack would have territorial jurisdiction in the facts of the present case, since the counsel for the complainant issued the demand notice to the accused-petitioner is based at Cuttack. This issue is no longer res integra and has been settled by the Hon'ble Supreme Court in the case of **Harman Electronics Private Limited and another** (supra) wherein the Hon'ble Supreme Court has held that the mere "issue of notice" does not satisfy the requirement of Section 138 N.I.Act and such notice has to be "served" all cause of action to arise. Admittedly, notice was "served" on the accused-petitioner at Keonjhar and, therefore, no part of cause of action for initiating the complaint arose at Cuttack. Therefore, when the test as laid down by the Hon'ble Supreme Court in the case of **K.Bhaskaran** (supra) is applied, they are answered as follows:

(i) The cheque was dishonoured at Joda at Keonjhar.

(ii) The cheque was presented by the complainant to his bank located at Keonjhar.

(iii) The complainant-bank at Keonjhar returned the cheque unpaid by drawee bank at Keonjhar.

(iv) 07.11.2012 Notice in writing was given to the drawer of the cheque (petitioner) demanding payment of cheque amount on behalf of the complainant by the counsel located at Cuttack but such notice was Keonjhar.

Therefore, applying the judgment of the Hon'ble Supreme Court as laid down in the case of **K.Bhaskaran** (supra), this Court is of the considered view that no part of cause of action arose within the territorial jurisdiction of the learned S.D.J.M., Cuttack.

10. It is further submitted by the learned counsel for both the parties that the trial in the matter has progressed substantially and in the interest of both

the parties, this Court in exercise of jurisdiction under Section 482 Cr.P.C. may direct transfer of the said case to a court at Keonjhar.

11. Considering the submissions made, the District Judge, Cuttack is directed to transfer ICC Case No.1062 of 2010 from the court of the J.M.F.C., Cuttack to the District Judge, Keonjhar. On receipt of the case record, the District Judge, Keonjhar shall allot the said case to a competent Magistrate, who shall proceed with the matter after issuing fresh notice to both the parties and complete the trial at the earliest. With the aforesaid observations and directions, the CRLMC is allowed and consequently interim orders stand vacated. No costs.

Application allowed.

2013 (I) ILR - CUT- 503

SANJU PANDA ,J.

CRLREV NO.1591 OF 2008 (Dt.09.11.2012)

KANHU CHARAN LENKA ……Petitioner

.Vrs.

UDAYANATH NAYAK ……Opp.Party

A. CRIMINAL PROCEDURE CODE, 1973 – Ss.468, 473.

Complaint petition – Offence U/ss.177, 181 & 182 I.P.C. – Delay of four years – Not explained properly – Cognizance taken by the learned Court below – Order challenged – Held, learned Court below should not have taken cognizance against the petitioner by condoning delay in filing the complaint petition. (Para 6)

B. PENAL CODE, 1860 – Ss. 177, 181 & 182.

Cognizance taken against the petitioner U/ss.177, 181 & 182 I.P.C. for not disclosing assets in his name, his spouse and his joint living family members – Petitioner has filed affidavit disclosing assets in his name and his spouse – Since he is not required under law to disclose properties in the name of his joint living family members, the impugned order taking cognizance under the above sections is set aside. (Para 6)

Case laws Referred to:-

1.2009 (10) SCC 184 : (General Manager, Telecom-V- M. Krishnan & Anr.)
2.1982 CRI. L.J. 210 : (S.K. Bajaj & Ors.-V- D.K. Bhattacharya & Ors.).

For Petitioner - M/s. H.S. Satpathy, D.R. Bhokta, S.Sastri, N.Bisoi, M. Panda, D.Mohanty, A.N. Sahu, M.M. Swain.
For Opp.Party - Addl. Govt. Advocate.

SANJU PANDA,J. In this revision, the petitioner challenges the order dated 25.10.2008 passed by the learned S.D.J.M. (Sadar), Cuttack in 2(C) C.C. No. 129 of 2008 in condoning the delay in filing the complaint petition in respect of the alleged offence under Sections 177,181 and 182, IPC without applying its judicial mind and without explaining

reasonable/sufficient cause to condone the delay in filing the complaint petition.

2. The facts leading to the present case are as follows:

The Complainant as the Additional District Magistrate-cum-Returning Officer in respect of 45-Assembly Constituency, Cuttack filed a complaint petition against the present petitioner on 14.7.2008 alleging inter-alia that the petitioner on 7.4.2004 submitted his nomination paper along with an affidavit of the assets owned by him and his spouse before him. It is averred by the complainant that the petitioner was a contesting candidate for 45 Choudwar Assembly Constituency in the General Assembly Election, 2004. As per the guideline of the Supreme Court of India, he filed an affidavit disclosing the assets owned by him and his spouse along with the nomination paper. One Harihar Prida and others filed an application before the Election Commission of India on the allegation that the affidavit filed by the petitioner was false as the petitioner suppressed some other properties situated in different places belonging to him and his spouse. As the petitioner furnished false information to the Returning Officer, the Chief Electoral Officer instructed the Collector to ascertain the truth on the allegation made by Harihar Parida and others. The Collector, in its turn instructed the Sub-Collector to enquire about the truth of allegations made. Accordingly, the Sub-Collector requested the Tahasildars of Cuttack,Tangi/Choudwar,Bhubaneswar and Puri to furnish report about the landed property and assets owned by the petitioner and his spouse. The Sub-Collector also requested the R.T.Os, Cuttack, Puri, Bhubaneswar, Dhenkanal and Ganjam to submit report about the vehicles owned by the petitioner and his spouse. After receiving reports from the aforesaid Officers, the Sub-Collector submitted its report to the Collector on 5.2.2008. Accordingly, the aforesaid complaint was filed on 14.7.2008. It was further alleged in the complaint petition that the petitioner knowingly and deliberately had suppressed the properties owned by him, his spouse and his joint living family members and therefore, he is guilty of offence under Sections 177,181 and 182, IPC for suppression of truth in filing such false affidavit.

3. Learned counsel appearing for the petitioner submitted that from the above fact it is crystal clear that inquiry was made on the allegation of one Harihar Parida. However, the complaint petition does not reveal as to when such an application was filed by Harihar Parida and when inquiry was made and the complaint petition was filed four years after the election. The complainant also though repeatedly stated in the complaint petition that the petitioner did not disclose the property owned by him and his spouse, but in

the complaint petition the facts narrated reveals that the allegation was with regard to the property belonging to the joint living family members. So, it is not possible on the part of the petitioner to ascertain the property belonging to the joint living family members. As such, the petitioner has not suppressed any facts while furnishing such affidavit, rather he has furnished the property belonging to him and his spouse even though the records were not corrected and his name was not reflected in the record of right. Learned counsel for the petitioner further submits that the Sub-Collector had received all the reports by 17.11.2007. As it appears from the complaint petition the alleged offence is under Section 125-A of the Representation of the People Act, 1950 (hereinafter referred to as "the Act"). Since the said provision is a special provision, the punishment prescribed under the aforesaid section is imprisonment for 6 months or with fine or with both. However, after receiving those reports he did not submit all those facts to the District Magistrate to file a complaint petition. As the complainant did not properly explain the delay caused in filing the complaint petition, the court below should not have condoned the delay and in view of the fact that the alleged facts were within the knowledge of the complainant long since 15.9.2006, the complaint petition is liable to be dismissed in lemine. In support of his contention, learned counsel for the petitioner cited an unreported decision of this Court in Criminal Misc. Case No.57 of 2007, **Narasingha Mishra** v. **Sub-Collector-cum-Returning Officer, 110-Loisingha Assembly Constituency, Bolangir** as well as decision of the apex Court in the case of **General Manager, Telecom** v. **M.Krishnan & Anr,** 2009 (10) SCC 184 and another decision in **S.K.Bajaj and others** v. **D.K.Bhattacharya and others**, 1982 CRl. L.J,210.

4. On the other hand, learned Additional Government Advocate however supporting the impugned order submitted that after the allegation was brought to the notice of the complainant, inquiry was made and after receiving report from different corners the complaint petition was filed and in view of Section 182, IPC the maximum sentence is three years. Therefore, in the interest of justice, the court below has rightly condoned the delay and entertained the complaint petition.

5. There is no doubt that a candidate has to file an affidavit disclosing the property belonging to him and his spouse. Punishment prescribed for such offences is under Section 125-A of the Representation of the People Act, 1950 The said Act being a special statute prevails over the general statute and the punishment prescribed is imprisonment for 6 months or with fine or with both. The plea of the complainant that after enquiring into the matter and on collection of materials the complaint petition was filed after

four years is wholly unsatisfactory since the delay was not properly explained as to when he (complainant) received the allegation from Harihar Parida and when step was taken by him to enquire into the matter after receiving allegation.

6. Further, the complaint petition was also not filed within the statutory period prescribed. Further it also appears from the averment made in the complaint petition that petitioner had not disclosed in the affidavit the property belonging to his joint living family members. In a joint living family, it is open to different members to acquire and possess property in their respective names which were their self acquired property. It is not necessary that all the joint family members should disclose regarding acquisition of the property acquired/owned by themselves utilizing their own acquisition or with their own extortion. Therefore, it cannot be said that the petitioner is required to disclose all those facts regarding the property belonging to the members of the joint family, rather, as per the decision of the apex court reported in 2003 (supra) , a candidate has to disclose the property owned by him and his spouse, which the petitioner has fulfilled. The copy of the record of right furnished by the complainant reveals that the petitioner has furnished all the property owned by him and his spouse and the allegation regarding record of right standing in the names of joint living family members and other brothers are not required to be furnished by a candidate as per the decision of the apex Court in the case of *Peoples Union for Civil Liberties (PUCL) and another* (supra). This Court in case of Narasingha Mishra (supra) in similar circumstances quashed the proceeding as the complaint petition was filed at a belated stage i.e. more than two years and cognizance of the offence was taken. In view of that, the learned court below should not have taken cognizance under Sections 177,181 and 182, IPC against the petitioner by condoning the delay in filing the complaint petition at a belated stage in the interest of justice.

In view of the above the CRLREV is allowed and the order dated 25,10.2008 passed by learned S.D.J.M. (Sadar), Cuttack in 2(C)CC Case No.129 of 2008 is hereby set aside

Revision allowed.

2013 (I) ILR - CUT- 507

SANJU PANDA, J

W.P.(C) NO. 14739 OF 2009 (Dt.19.12.2012)

NIRANJAN MISHRA & ORS. ……..Petitioners.

.Vrs.

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

EDUCATION – **Kendriya Vidyalaya Sangathan – Enhancement of tution fee in the guise of Vidyalaya Vikash Nidhi Contribution which is made compulsory Under Article 119 of the Education Code for Kendriya Vidyalayas – Violative of fundamental rights of the children for free and compulsory education – Held, enhancement of fees is illegal and unconstitutional – Impugned notice directing the parents for payment of enhanced rate of fees is quashed – The Opp.Parties are directed to refund the amount forthwith if collected at the enhanced rate.**

(Para 7)

For Petitioner - M/s. Subash Ch. Puspalaka, K. Satpathy & K. Mohanty.
For Opp.Parties - Mr. Ashok Ku. Mohanty, Sr. Advocate, Hrusikesh Tripathy, P.K.Mohanty, P.K. Sahu.

SANJU PANDA,J. In this writ petition, the petitioners challenge the notice dated 14.9.2009 issued by the Principal, Kendriya Vidyalaya, No.4, Niladri Vihar, Bhubaneswar-opposite party no.4 enhancing its tuition fees and other fees.

2. The facts leading to the present writ petition are that the guardians of the students of Kendriya Vidyalaya, No.4, Niladri Vihar, Bhubaneswar are the petitioners in this writ petition. It is averred in the writ petition that the School was opened in the year 2003 starting from Class-I to Class-VII. The Commissioner, Kendriya Vidyalaya Sangathan provided the teaching and non-teaching staffs of the School, who were recruited through proper recruitment procedure. Class-VIII was opened in the year 2005. Thereafter, Class-IX and Class-X were opened in the year 2006 and 2007 respectively. At present, the total student strength of the School is about 520. No tuition fee is charged from the students of Class-I to Class-VIII and for the Girl students of Class-IX and Class-X also. Prescribed tuition fee of Rs.40/- per month was being collected quarterly from the Boy students of Class-IX and

Class-X so also Rs.20/- towards computer fee starting from the students of Class-III and Rs.160/- towards Vidyalaya Vikash Nidhi (VVN) contribution starting from the students of Class-I are being collected. While the matter stood thus, the impugned notice was issued basing upon revision of fee structure by the Kendriya Vidyalaya, New Delhi with effect from 1.10.2009. As per the new fee structure, computer fee was enhanced from Rs.20/-to Rs.50/-, tuition fee from Rs.40 to Rs.200 and Vidyalaya Vikash Nidhi (in short VVN) contribution was enhanced from Rs.160/- to Rs.240/- with the stipulation that the revised fee will be collected prospectively.

3. Learned counsel for the petitioners submits that the School is an organization under the Ministry of Human Resources Development of the Central Government. The aim and object of the Department is to develop the Human Resources in order to educate the citizen and as such nominal fee was charged from the Boy students of Class-IX and Class-X. It is further submitted that without any rhyme or reason, the tuition fee as well as Vidyalaya Vikash Nidhi (VVN) contribution was enhanced illegally and arbitrarily, even though Central Government is providing all the infrastructure facilities of the School and that major expenditures are being borne by the Central Government. The tuition fee of the kids of the Central Government Employees, who are prosecuting their study, is being reimbursed by the Central Government also. Accordingly, learned counsel for the petitioners submits that since the School is running by the Central Government under the Human Resources Development Department, the impugned notice is liable to be struck down.

4. The Assistant Commissioner, Kendriya Vidyalaya Sangathan, Bhubaneswar-opposite party no.3 filed counter affidavit on behalf of all the opposite parties taking a stand that all the policy decisions are taken by the Board of Governors of the Sangathan headed by the Human Resources Development, Ministry of Government of India and as such the fee structures and its enhancement also decided by the said Board of Governors. The integrated Finance Division of the Human Resources Development headed by the HRD Minister of Government of India observed that Kendriya Vidyalaya Sangathan was enhanced the fee structures in view of the substantial increase in re-imbursement of Tuition fee and Vidyalaya Vikash Nidhi (VVN) contribution under the heading of Child Education Assistance, which increases the revenue of Kendriya Vidyalaya Sangathan and the Human Resources Development Department also share the expenditure of the Kendriya Vidyalaya Sangathan. Accordingly, the Board of Governors approved the revised fee structure in its 84th Meeting, which was held on 29th July, 2009. The Kendriya Vidyalayas are set up in the civil and defence sectors to meet the needs of children to cater to the educational needs of

the children of transferable Central Government employees and there is provision for exemption of fees from physically disabled students, single girl child of parent from Class- VI onwards and for the children of the parent, who are living below poverty line(i.e. whose income from all the sources is less than Rs.3,500/-per month) and since the Board of Governors have taken the decision and revised the aforesaid fees, which are just and proper, there is no merit in the writ petition. In support of his contention, Mr. Ashok Mohanty, learned Senior Advocate submitted that Kendriya Vikash Sangathan is an autonomous body set up by the Ministry of Human Resources Development Department, Government of India to establish, administer and manage the Kendriya Vidyalays, as per Articles 117, 118, 119, 120 and 1201 of the Education Code for Kendriya Vidyalayas and the same are relevant for admission fee, tuition fee, computer fee etc. The Finance Committee of the Education Code for Kendriya Vidyalayas has examined all these matters and as per the satisfaction of the said Committee, the fees have been revised and it is within their domain. Therefore, the impugned notice need not be interfered with.

5. Taking into consideration the rival stands taken by the petitioners as well as the opposite parties and after going through the Education Code for Kendriya Vidyalayas, it appears that Kendriya Vidyalaya Sangathan is working under the Ministry of Human Resource Development, Government of India with its Headquarters at New Delhi, Regional Offices to manage a cluster of Schools and Kendriya Vidyalayas spread all over the country and abroad. Kendriya Vidyalaya Sangathan is functioning through its General Body called the Sangathan, its Board of Governors and three Standing Committees constituted by the Board viz., the Finance Committee, the Academic Advisory Committee and the Works Committee. The Minister of Human Resource Development, in-charge of the Kendriya Vidyalaya Sangathan, is the ex-officio Chairman of the Sangathan. The Minister of State in the Ministry of Human Resource Development shall be the Deputy Chairman and an officer of the Ministry of Human Resource Development notified by the Government of India for this purpose shall be the Vice-Chairman. The Financial Adviser to the Ministry of HRD shall be the Finance Member of the Sangathan. The other members of the General Body of the Sangathan shall be appointed by the Government of India as per Rule 3 of the memorandum of Association and Rules. Joint Commissioner (Admn.) shall be the ex-officio Secretary of the Sangathan.

6. In view of the above, it is crystal clear that the Kendriya Vidyalaya Sangathan is controlled and functioned under the Central Government. The Central Government being the controlling authority should not have collected

money from the students of Class-I to Class-XII for promotion of education/computer under the heading of Bidyalaya Vikash Nidhi. Being a welfare State, it is the duty of the Government to provide education with advance technology to promote its citizen so also the children of the country with international standard and to provide all facilities to the children, who are being educated in Kendriya Vidyalayas with all advance instruments and it should not have collected the money from the children or from the parents of the students. Right of Children to Free and Compulsory Education Act, 2009 was incorporated in the Constitution of India as per (86 Amendment) Act, 2002 which runs as follows:

> "The State shall provide free and compulsory education to all children of the age six to fourteen years in such as a way as the State may, by law, determine."

7. After such amendment was incorporated in the Constitution in 2009, the same was communicated to provide education to all the children and these rights being fundamental rights of the children, the Sangathan should not have collected money in the guise of Vidyalaya Vikash Nidhi contribution from all the students which was being made compulsory under Article 119 of the Education Code for Kendriya Vidyalayas. The said Article is violative of the fundamental rights of the children to free and compulsory education and Article 120 regarding Computer fee which is made compulsory for the students from Class-VI onwards. Kendriya Vidyalaya Sangathan being controlled and functioned under the Central Government, it should not have enhanced the fee under those two articles, rather it should have taken a nominal fee. Accordingly, the notice dated 14.09.2009 issued vide Annexure-2 directing the parents of the students of Kendriya Vidyalaya, No.4, Bhubaneswar to pay Computer fee and Vidyalaya Vikash Nidhi contribution at the enhanced rate from the month of October, 2009 onwards is quashed as the same is illegal and unconstitutional. The opposite parties are directed to refund the amount if collected at the enhanced rate forthwith. Accordingly, the writ petition is allowed, No cost.

Writ petition allowed.

2013 (I) ILR - CUT- 511

B. N. MAHAPATRA, J.

W.P.(C) NO. 11358 OF 2012 (Dt.30.11.2012)

S.PADMA ……..Petitioner

.Vrs.

CENTRAL ELECTRICITY SUPPLY UTILITY(CESU), ODISHA & ORS. ……..Opp.Parties

A. ELECTRICITY ACT, 2003 – Ss. 42(1) & 43(1) r/w Regulations 3,4,5 & 7 of the Code, 2004.

Supply of electricity – Even if a person is not an owner of the premises but in occupation of the same can be supplied with electricity on fulfilment of certain conditions.

Statutory duty of the Distribution Licensee is to supply electricity not only to an owner of the premises but also to a person who is in occupation of the same if the occupier shall execute an indemnity bond indemnifying the licensee against any damage payable on account of any dispute – Held, liberty given to the petitioner to make an application for supply of electricity to her premises fulfilling statutory requirements and the Opp.Party licensee is directed to consider such application as early as possible but not exceeding one month from the date of receipt of her application. (Para 18,19)

B. ELECTRICITY – Basic need of a person – A person in occupation of a premises can be supplied with electricity even without the consent of the owner of such premises. (Para 18)

Case laws Referred to:-

1.(2011)6 Supreme 1 : (Chandu Khamaru-V- Nayan Malik)
2.2003(5) ALD 352 : (M.Varalakshmi-V- The Asst. Divisional Engineer, The Central Power Distribution Company of A.P. Ltd,& Ors.)
3.AIR 1996 SC 1051 : (Chameli Singh & Ors.-V-State of U.P. & Anr.)

For Petitioner - M/s. Biren Sankar Tripathy, M.K.Rath, J.Pati, Mrs. M. Bhagat, Miss S.A.Mishra.

For Opp.Parties - Mr. B. Dash & A.K.Pandey (for O.Ps.2 & 3)

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer for issuance of a writ of mandamus directing opposite party-Licensee to provide a new electric connection to the premises of the petitioner.

2. Petitioner's case in a nutshell is that she has occupied premises of opposite party No.4-Adari Attamulu, who is the owner of the residential house as a tenant on 01.01.2001. Opposite party No.4 being in want of money entered into an agreement with the petitioner for sale of a portion of his premises, i.e., Ac.0.004 decimal consisting of two rooms and a deed of agreement was executed on 01.06.2007. Petitioner has paid Rs.1,50,000/- to opposite party No.4. Since opposite party No.4 violated the terms and conditions of the said agreement, petitioner filed Civil Suit No.408 of 2009 in the Court of Civil Judge (Senior Division), First Court, Cuttack against opposite party No.4, which is pending. On the other hand, opposite party No.4 has also filed a Suit seeking decree of eviction of petitioner from the suit premises, which is still pending in the Court of Civil Judge (Senior Division), First Court, Cuttack in C.S.I. No.647of 2009. While the matter stood thus, power supply to the premises of opposite party No.4 was disconnected by the Electricity Department due to non-payment of electricity dues, which was subsequently restored. But opposite party No.4 disconnected power supply to the premises of the petitioner on grudge due to pendency of the Civil Suits. Finding no other alternative, the petitioner approached opposite party No.3-the Junior Manager (Electrical), Tinkonia Bagicha Section, PO: Buxibazar, Dist: Cuttack to provide new electricity connection to her premises and also deposited a sum of Rs.34/- through treasury challan along with all relevant documents, but opposite party No.3 vide his letter No.174 dated 06.04.2012 rejected the said application and denied to give new electric connection to the premises of the petitioner. Being aggrieved, petitioner had approached this Court in W.P.(C) No.7938 of 2012 seeking issuance of a direction to opposite party-licensee to provide electricity connection to her premises. However, the said writ petition was withdrawn by order dated 20.06.2012 with a liberty to the petitioner to file a better petition. The petitioner also approached opposite parties 2 and 3 to provide temporary electricity connection to her premises but the same was not acceded to. Hence, the present writ petition.

3. Mr. B.S.Tripathy, learned counsel appearing for the petitioner submitted that the petitioner is a poor lady having banana business in the Buxi Bazar and suffering a lot being denied to avail electricity. The action/inaction on the part of the opposite parties in not considering her petition to provide new electricity connection to her premises is arbitrary and illegal. Though the petitioner has approached opposite party Nos.2 and 3 to

provide temporary electricity connection, the same has not been provided to her. In similar matter, this Court in W.P.(C) No.61 of 2003 and W.P.(C) No.11788 of 2008 directed the Licensee to give power supply to the premises of the petitioner on temporary basis. Concluding his argument, Mr.Tripathy requested to allow the prayer made in the writ petition.

4. Mr.B.Dash, learned counsel appearing for opposite party-CESU submitted that the petitioner is not the owner of the house and she is not coming forward with the application for new connection with the permission/consent of the true owner of the house in question. As per Regulation 4(1) of OERC Distribution and Conditions of Supply Code, 2004, if anybody except the owner applies for new connection he/she has to obtain permission of the owner. In the instant case, the petitioner applied for new connection without permission of the owner. Therefore, opposite party-Licensee cannot consider petitioner's application for new connection. Mr.Dash further submitted that the temporary connection is given under the Regulation 80(14) of the said Code, 2004 to meet the temporary needs on special occasions including marriage or other ceremonial functions, fairs, festivals, religious functions or seasonal business or for construction of residential houses, complexes, commercial complexes, industrial premises provided that such power supply does not exceed a period of six months. Since the petitioner has not applied for supply of temporary power supply for any of the purposes enumerated in Regulation 80(14), her application for temporary supply of power cannot be considered. There are also arrear dues outstanding against the premises. Concluding his argument, Mr.Dash submitted for dismissal of the writ petition.

5. On the rival contentions of both parties, the question that arises for consideration is as to whether opp. Party-licensee authorities are justified to deny temporary power supply or new connection to the premises of the petitioner in view of non-compliance of Regulation 4(1) of the Code, 2004.

6. Undisputedly, Civil Suits are pending in the Civil Court between the owner of the premises and the petitioner, who is a tenant under the said owner. The petitioner had been availing power supply from the owner, who is a consumer of electricity under the opposite party-Licensee. Due to civil disputes, the owner disconnected the power supply to the premises of the petitioner.

7. Since it is not the case of the petitioner that she requires power supply for any of the purposes enumerated under Regulation 80(14) of the Code, 2004, the opposite party licensee is justified to deny temporary power supply to the petitioner's premises. The facts of the case in W.P(C) No.61 of 2003 and W.P.(C)

No.11788 of 2008 relied upon by Mr.Tripathy are different from the facts of the case at hand. In those two cases, there was no prayer to provide temporary power supply to the premises of the petitioner and the Court has not directed to give temporary power supply to the premises of the petitioner as provided under Regulation 80(14) of the Code, 2004. Therefore, the orders passed in those cases are of no help to the petitioner.

8. The grounds for not giving new connection to the premises of the petitioner are of two fold.— (i) the petitioner has not obtained the consent of the owner and without the permission of the owner she is not entitled to get new electricity connection; (ii) there is arrear outstanding on the same premises.

9. So far as first ground is concerned, since civil dispute is pending between the petitioner and her owner, petitioner certainly cannot obtain any permission/consent from the owner to get new electricity connection to her premises. So far second ground is concerned, admittedly owner of the premises is a consumer under the opposite party-Licensee and electricity dues and arrear charges if any, are outstanding against the owner, the petitioner is not liable to pay such arrears to the opposite party-licensee. According to the petitioner, despite outstanding arrear dues, the owner is availing the power supply. Be that as it may, fact remains that there was no electricity connection in the name of the petitioner and no arrear dues is outstanding against her. Therefore, that cannot be a ground to deny new electricity connection to the petitioner.

10. Now, the only question arises as to whether without consent/permission of the owner new connection can be given to the petitioner, who is an occupier of the premises owned by opposite party No.4.

11. The Hon'ble Supreme Court in the case of ***Chandu Khamaru v. Nayan Malik*** (2011) 6 Supreme 1 referring to sub-section (1) of Section 42 and sub-Section (1) of Sec. 43 of Electricity Act, 2003 held that the provisions in the Electricity Act, 2003 make it amply clear that a distribution licensee has a statutory duty to supply electricity to an owner or occupier of any premises located in the area of supply of electricity of the distribution licensee, if such owner or occupier of the premises applies for it, and correspondingly every owner or occupier of any premises has a statutory right to apply for and obtain such electricity supply from the distribution licensee.

12. At this juncture, it would also be appropriate to refer here to the decision of a Division Bench of this Court dated 21.09.2004 in W.P.(C)

No.9186 of 2004 as well as the decision of the Andhra Pradesh High Court in the case of ***M.Varalakshmi Vs. The Assistant Divisional Engineer, The Central Power Distribution Company of A.P. Limited and others***, 2003 (5) ALD 352, which more or less deals with the issues involved in the case at hand.

13. The Division Bench of this Court vide its order dated 21.9.2004 passed in W.P.(C) No.9186 of 2004 in an identical matter held as under :

> "Power supply is essential for survival of a person as without electricity a person cannot manage his daily affairs. CESCO has the monopoly for supply of electricity and cannot deny supply of electricity to a person who is agreeable to enter into an agreement for supply of electricity as a consumer. CESCO may insist that a person must sign and enter into an agreement as a consumer for supply of electricity and should comply with all requirements for supply of electricity. But CESCO cannot altogether refuse to supply electricity on the ground that the landlord of the tenant has withheld such consent for supply of electricity, because if such consent is withheld by the landlord on account of a dispute between the landlord and the tenant, the tenant will be left without electricity. This is not what the rule of law contemplates.
>
> For the aforesaid reasons, we direct that the opposite parties will enter into an agreement for supply of electricity with the petitioner as a consumer and if the petitioner complies with all the requirements including execution of agreement for such supply of electricity, CESCO will supply the electricity to the shop rooms of the petitioner under his occupation. The direction will be complied with by the opposite parties within seven days of execution of agreement for supply of electricity by the petitioner."

14. The Andhra Pradesh High Court in the case of ***M.Varalakshmi*** (supra), held as under:

> "The dispute with regard to ownership is still brewing unabated. Steps are, admittedly, to be taken by the unofficial respondents to evict the petitioner from the flat in question. Till such time, the petitioner cannot be deprived of supply of power."

In that case, the Court directed the licensee to restore the power supply to the flat in question upon the undertaking to be given by the petitioner.

15. Needless to say that right to shelter is a fundamental right under Art. 19(1) of the Constitution of India [See ***Chameli Singh others Vs. State of U.P. and another***, AIR 1996 SC 1051] and shelter without electricity makes the life miserable. Electricity is the basic necessity for survival of a person in modern days. Abrupt disconnection of power supply or non-supply of power seriously affects a person's right to have his food, water and decent environment, medical care and education. Disconnection of power supply from the premises of a consumer or non-supply of power to an applicant has a drastic impact on the day-to-day life of the citizens. It affects study of children, enhances the misery of old and sick persons, endangers the safety of the houses more particularly it is unbearable in the present days of global warming.

16. The Hon'ble Supreme Court in ***Chameli Singh and others Vs. State of U.P. and another***, AIR 1996 SC 1051 held as follows:-

> "7. In any organized society, right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions which inhibit his growth. All human rights are designed to achieve this object. Right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society."

17. At this juncture, it is necessary to reproduce the relevant portion of Section 42(1) and Section 43(1) of the Act, 2003 and relevant Regulations of Chapter III of the Code, 2004 which deal with power supply.

Relevant portions of Sections 42(1) and 43(1) of the Act, 2003 are extracted below:

> "**42. (Duties of distribution licensee and open access):---**
> (1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act."
>
> xx xx xx
>
> "**43. (Duty to supply on request) :---**
> (1) [Save as otherwise provided in this Act, every distribution] licensee, shall, on an application by the owner or occupier of any premises give supply of electricity to such premises, within one month after receipt of the application requiring such supply."

xx xx xx

Regulations 3,4,5 and 7 of the Code, 2004 are extracted below:

"3. Application for Supply- Application for initial supply or subsequent additional supply of power shall be made in the format in duplicate as provided in Form Nos. 1 & 2 as the case may be. Copies of the format of the application may be obtained from the local offices of the licensee free of cost. Photocopies of a blank form or form downloaded from the web-site of the licensee may also be used as an application form.

4. (1) The application after filing in shall be signed by the owner or the lawful occupier with the consent of the owner of the premises for which supply is required and shall be submitted at the local office of the engineer along with a non-refundable fee not exceeding the amount as fixed below together with a sketch map of the premises and documentary evidence of his ownership or occupation of the premises in question. Any assistance or information required for filling of the application may be obtained by the applicant from the local office of the engineer.

For loads at single phase	.. Rs.25/-
For Loads at three phase	.. Rs.100/-
For loads at HT	.. Rs.500/-
For loads at EHT	.. Rs.5000/-

(2) The licensee shall acknowledge the application/letter(s) of the applicant/consumer forthwith.

5. Notwithstanding anything contained in Regulation 4, the licensee may grant connection to the premises of any applicant, and the licensee's engineer may dispense with documentary evidence of lawful occupation of the premises at his discretion. In cases where such documentary evidence of lawful occupation of the premises is dispensed with, any documentary evidence regarding electricity connection or payment of bills raised by the licensee for consumption of electricity will not constitute evidence for the purpose of lawful occupation of the premises in any municipal record, revenue record or any Court of law.

6. xx xx xx

> 7. An applicant, who is not the owner of the premises occupied by him, shall execute an indemnity bond, indemnifying the licensee against any damages payable on account of any dispute arising out of supply of power to the premises."

18. Conjoint reading of Sections 42(1) and 43(1) of the Act, 2003 and Regulations 3, 4, 5 & 7 of the Code, 2004 shows that even if a person is not an owner of the premises, but in occupation of a premises can be supplied with electricity power on fulfilment of certain conditions.

Regulation 5 says that notwithstanding anything contained in Regulation 4, the Licensee may grant connection to the premises of any applicant, and the Engineer of Licensee may dispense with documentary evidence of lawful occupation of the premises at his discretion.

Regulation 7 further says that an applicant, who is not an owner of the premises occupied by him shall execute an indemnity bond indemnifying the Licensee against any damage payable on account of any dispute arising out of supply of power to the premises.

19. In view of the above, the writ petition is disposed of with liberty to the petitioner to make an application for supply of electricity to her premises fulfilling the statutory requirements within one week from today along with the certified copy of this order. The opp. Party-Licensee is directed to consider the petitioner's application for supply of electricity to her premises keeping in view the legal position settled by the Hon'ble Supreme Court and the High Courts including this Court and the Regulations of Code, 2004 stated above as early as possible, but not exceeding one month from the date of receipt of the application of the petitioner for supply of electricity to her premises.

Writ petition disposed of.

2013 (I) ILR - CUT- 519

B. N. MAHAPATRA, J.

W.P.(C) NO. 18311 OF 2012 (Dt.14.12.2012)

SANTILATA DEI ……..Petitioner

.Vrs.

SUMITRA MAHAKUDA …….Opp.Party

A. CIVIL PROCEDURE CODE, 1908 – O-11, R-1

Grant of leave to deliver interrogatories – Petition filed by the returned candidate – Duty of the Court to see the relevancy of the interrogatories for a just decision of the Case – Held, since the interrogatories have no relevancy for just decision of the Case the Tribunal is justified in rejecting the application filed by the returned candidate seeking leave of the Court to deliver interrogatories to the election petitioner. (Para 14)

B. CIVIL PROCEDURE CODE, 1908 – O-11, R-1

Discovery by interrogatories – Under Order 11, Rule 1 C.P.C. every party to a suit is entitled to know the nature of its opponent's case so that it may know beforehand what case it has to meet at the time of hearing – But he is not entitled to know the facts which constitute exclusively the evidence of his opponent's case, the reasons being that it would enable an unscrupulous party to tamper with his opponents witnesses and to manufacture evidence in contradiction and to shape his case as to defeat justice. (Para 7)

C. CIVIL PROCEDURE CODE, 1908 – O-11, R-1

Interrogatories - The nature of a plaintiff's case is disclosed in his plaint – The nature of a defendants case is disclosed in its written statement – But a plaint or written statement may not sufficiently disclose the nature of a party's case and to make good the deficiency, either party may administer interrogatories in writing to the other through the Court – Interrogatories may also be administered by a party to his opponent to obtain admissions from him to facilitate the proof of his own case – The party to whom interrogatories are administered must answer them in writing and on oath – This is called discovery by interrogatories.

Administering of interrogatories is to be encouraged as it is a means of getting admissions and tends to shorten litigation – It is a valuable right of which a party should not be lightly deprived of.

(Paras 8,9)

Case laws Referred to:-

1.(1877) 7 C.D. 435 : (Saunders-V- Jones)
2.(1886)17 Q.B.D. 154 : (Marriot-V- Chamberlain)
3.(1880) 16 C.D. 93,95 : (Benbow-V- Low)
4.(1911)2 K.B. 726, 730 : (Knapp-V- Harvey).
5.AIR 1972 SC 1302 : (Raj Narain-V- Indira Nehru Gandi & Ors.).

For Petitioner - M/s. Prafulla Ku. Rath, P.K.Satpathy, R.N.Parija, A.K. Rout, S.K. Pattnaik, D.P. Pattnaik, A.Behera.
For Opp.Party - M/s. D.P. Dhal, S.K. Dash, A.K.Mishra.

B.N.MAHAPATRA, J. This writ petition has been filed with a prayer to set side the order dated 21.09.2012 (Annexure-1) passed by the learned Additional Civil Judge (Junior Division), Dasapalla (for short, "Election Tribunal") in I.A. No.6 of 2012 arising out of Election Dispute Case No.2 of 2012 rejecting the application filed by the present petitioner, who is the returned candidate and opposite party in the election petition for grant of leave to deliver interrogatories.

2. Petitioner's case in a nut-shell is that she along with opposite party who was the election petitioner were contesting in the election for the office of Sarpanch, Rasanga Grama Panchayat. In the said election, the petitioner having polled majority of valid votes was declared elected. The election of the writ petitioner has been challenged by the opposite party on the ground of disqualification with the averments that the writ petitioner has begotten 3rd child after the cut off date. The writ petitioner entered her appearance by filing her show cause. Before commencement of trial of the election dispute, the writ petitioner filed application seeking grant of leave to deliver interrogatories on certain aspects pleaded by opposite party-election petitioner in the election petition. The said application, which was registered as I.A.No.6 of 2012, under Annexure-4, at its foot contains specific questionnaires to be answered by opposite party. However, the Election Tribunal rejected the said petition by passing the impugned order. Hence, the present writ petition.

3. Mr. P.K. Rath, learned counsel appearing for the petitioner submitted that the purpose of making application seeking grant of leave to deliver

interrogatories on certain aspects pleaded by the opposite party in the election petition is to cut the litigation short. Hence, the impugned order is not sustainable in law. It is further submitted that the provisions contained in Order 11, C.P.C. nowhere mandate that a party's seeking leave to deliver interrogatories forms part of the objection/show cause. Particularly, when the law does not require the same, rejection of the application on such ground is highly unjust, illegal and outcome of nonapplication of mind of the Election Tribunal. Finding of the Election Tribunal that the intention of the election petitioner is not clear about the contents of interrogatories is not correct, particularly, when the application for grant of leave to serve interrogatories specifically contains the questionnaires at its foot. Concluding his argument, Mr. Rath submitted to allow the writ petition.

4. Mr. D.P. Dhal, learned counsel appearing for the election petitioner (opposite party herein) submitted that the writ petitioner filed her show cause on 07.05.2012, where she has tried to explain that she is not coming under the mischief of Section 25(v) of the Orissa Grama Panchayat Act for the reasons assigned in the show cause reply with regard to birth of 3rd child. Much after filing of show cause only in the month of September 2012, an application was filed under Order 11, Rule 1 of the Civil Procedure Code for grant of leave to deliver interrogatories. On a plain reading of the petition filed under Annexure-4, i.e., interrogatories vis-à-vis the election petition under Annexure-2 and the show cause reply under Annexure-3, it reveals that the petition filed by the writ petitioner has got no sanctity and has been filed only with an intention to delay the proceeding. It is further submitted that the note appended to the petition filed under Order 11 Rule 1 of CPC clearly shows that the interrogatories have got no relevancy for just decision of the case. Nothing has been averred in the show cause reply with regard to the questions to be put in the interrogatories as the same has got no relevant points to decide the election petition. Placing reliance on the proviso to Rule 1, Order 11, C.P.C., it is submitted that the intention of the writ petitioner is only to delay the proceeding which has been fortified as nothing has been put to the present opposite party when she was examined and cross-examined by the learned Election Tribunal on 22.09.2012. In the Trial Court, not a single question appended in the note under Annexure-3 has been put to her. A bare reading of the impugned order passed by the Election Tribunal would reveal that the tenor of the order though is clear in the line of judicial pronouncement and the statute, yet some observations made by him to reach the finding seem to be improper, or not necessary to reach the conclusion that the interrogatories filed by the present petitioner have got no relevance to reach at the just decision of the case. Concluding his argument, Mr. Dhal prays for dismissal of the wri petition.

5. On the rival factual and legal contentions of the parties, following questions fall for consideration by this Court:

(i) Whether the interrogatories have got any relevance for just decision of this case ?

(ii) Whether the Election Tribunal is justified to reject the application filed by the returned candidate-writ petitioner for grant of leave to deliver interrogatories ?

(iii) Whether the Tribunal is justified to observe that "objection to opposite party about her disqualification raised by the petitioner is impliedly admitted by opposite party which is not the matter of controversy while dealing with the application of the writ petitioner seeking leave for delivery of interrogatories ?

(iv) Whether the Tribunal has made contradictory observations in the impugned order by observing at one place of the order that "petitioner's case is clear that opposite party has three children to which the opp. Party, the present petitioner has denied" and after few lines it is further observed that "opposite party has not specifically denied to the pleadings made by the petitioner about three children of opposite party ?

6. Since question Nos.(i) and (ii) are interlinked with each other, they are dealt with together.

7. To deal with Question Nos.(i) and (ii), it is necessary to know what is contemplated under Order 11, Rule 1, CPC.

Under Order 11, Rule 1, C.P.C., every party to a suit is entitled to know the nature of its opponent's case, so that it may know beforehand what case it has to meet at the time of hearing. But he is not entitled to know the facts which constitute exclusively the evidence of his opponent's case, the reasons being that it would enable an unscrupulous party to tamper with his opponents witnesses, and to manufacture evidence in contradiction, and to shape his case as to defeat justice. (See *Saunders vs. Jones (1877) 7 C.D. 435, Marriot vs. Chamberlain (1886) 17 Q.B.D. 154, and Benbow v. Low (1880) 16 C.D. 93, 95; Re Strachan [1895] 1 Ch. 439, 445, 447 and 448; Knapp v. Harvey (1911) 2 K.B. 726, 730*).

8. The nature of a plaintiff's case is disclosed in his plaint. The nature of a defendant's case is disclosed in its written statement. But a plaint or a written statement may not sufficiently disclose the nature of a party's case, and to make good the deficiency, either

party may administer interrogatories in writing to the other through the Court. Interrogatories may also be administered by a party to his opponent to obtain admissions from him to facilitate the proof of his own case. The party to whom interrogatories are administered must answer them in writing and on oath. This is called discovery by interrogatories; the party to whom the interrogatories are administered discloses by his affidavit in answer to the interrogatories the nature of his case.

9. Administering of interrogatories is to be encouraged, as it is a means of getting admissions and tends to shorten litigation. It is a valuable right of which a party should not lightly be deprived. (See *Ramlal Sao v. Tan Singh, AIR 1952 Nag. 650.* The fact that the party has other means of proving the fact in question is not a ground for refusing interrogatories. (See *Jamaitrai Bishan Sarup v. Motilal Chamaria (1960) A.C. 536.)*

10. The Hon'ble Supreme Court in the case of ***Raj Narain v. Indira Nehru Gandhi and other,*** AIR 1972 SC 1302, held as under:

> "27. Questions that may be relevant during crossexamination are not necessarily relevant as interrogatories. The only questions that are relevant as interrogatories are those relating to "any matters in question" The interrogatories served must have reasonably close connection with "matters in question". Viewed thus, interrogatories 1 to 18 as well as 31 must be held to be irrelevant."

11. Now, it is necessary to know what are the interrogatories the petitioner wants to administer to opposite party. For better appreciation, the interrogatories which the writ petitioner wants to deliver to the election petitioner are extracted below:

> ""NOTE
>
> (A) As to whether the election petitioner has given any objection in writing at the time of submission of nomination before the Election Officer ?
>
> (B) As to whether the particulars with regard to the number of children provided in the election petition under paragraph-4 finds place in the written objection filed by the election petitioner before the Election Officer at the time of nomination ?
>
> (C) If the election petitioner is a voter of Rasanga Gram Panchayat ? If so, what is the Sl.No. and relative ward No. ?

(D) If the election petitioner has any dues with the Gram Panchayat or has any subsisting contract with the Gram Panchayat as well as is a defaulter of any loan from any Cooperative Society ?

(E) If the election petitioner has herself signed the verification as well as the affidavit at the time of filing the election petition ?"

12. In order to find out whether the interrogatories have reasonably close connection with the matter in question, we have to gather from the election petition as to what is the matter in question in the election petition.

Perusal of the election petition reveals that the same has been filed on the ground that the writ petitioner, who is the returned candidate has been blessed with three children. The first son namely, Nihar Ranjan Mohanty was born on 06.07.1987, the second son namely, Tushar Ranjan Mohanty was born on 22.06.1991 and the third one is the daughter namely, Sonali Mohanty, who was born on 30.07.1995. The birth of these three children was entered in the Birth Register maintained at Gania C.H.C. With these pleadings, the election petitioner challenges the election of the returned candidate as Sarpanch on the ground that she is disqualified under Section 25(v) of the Orissa Grama Panchayats Act. The returned candidate in her show cause filed on 07.05.2012 tried to explain about her third child. In paragraph-4 of the show cause, it is contended that opposite party would like to answer the only point whether she has got more than two natural born children. According to the writ petitioner, Section 25(v) of the Orissa Grama Panchayats Act is not applicable for disqualification of her membership as because she gave birth only two children, i.e., one son namely, Tusar Ranjan Mohanty and one daughter namely, Sonali Mohanty, who are her natural born children. She admitted that the husband of the returned candidate namely, Nabaghana Mohanty had married previously to one Anjana Mohanty, D/o. Harihar Mohanty in a village under Kanpur Police Station, Dist: Cuttack and out of their wedlock one son namely, Nihar Ranjan Mohanty was born and after the death of his first wife he again married to opposite party who blessed with two children. Therefore, mischief of Section 25(v) of the Orissa Grama Panchayats Act is not attracted in her case. Therefore, she is not disqualified under Section 25(v) of the G.P. Act.

13. Now, it is to be examined with reference to the case of both the parties whether the interrogatories have reasonably close connection with the matters in question. All the interrogatories (A) to (E) are not relevant to the matters in question. To adjudicate the matters in question, answer to interrogatories (A) and (B) hardly matters. Similarly, whether the election

petitioner is a voter of Rasanga G.P. and if so, what is her SL.No. and Ward No. is nothing to do with the matter in question.Therefore, interrogatory 'C' has no relevance to the matter in question. Similarly whether the election petitioner has any dues with the Grama Panchayat or has any subsisting contract with the Grama Panchayat or is a defaulter of any loan from any Cooperative Society has nothing to do with the matter in question. Thus, interrogatory 'D' is not relevant. So far interrogatory 'E' is concerned, the said interrogatory is not relevant to the matter in question.

14. In view of the above, this Court is of the view that the interrogatories have no relevancy for just decision of this case and the Tribunal is justified to reject the application filed by the returned candidate-writ petitioner seeking leave of the Court to deliver interrogatories to the election petitioner.

15. Since question Nos.(iii) and (iv) are interlinked with each other, they are dealt with together.

To deal with questions No.(iii) and (iv), it is necessary to extract here the relevant portion of the impugned order passed by the Tribunal.

> "….Perused the case and on perusal it is found that, in the Election Misc. Case both the petitioner & O.P. have filed petition & objection respectively. The petitioner has filed this Misc. Case challenging the election of the O.P. on the ground of her disqualification being she is the mother of three children. The O.P. filed her show-cause objecting the plea of the petitioner. In the present position, the O.P. has asked for interrogatories with the question containing to objection made by petitioner regarding disqualification of O.P. whereas the present petitioner has not specifically denied to this effect in her show-cause. Hence, the objection to O.P. about her disqualification raised by the petitioner is impliedly admitted by O.P. which is not matter of controversy. Interrogatories can be asked for by either party if petition or written statement show cause may not sufficiently disclose the nature of party's case. The petitioner case is clear that the O.P. has three children to which O.P. present petitioner has denied. The O.P. has admitted in the show cause that, O.P. has two children. So, in the instant case the petition itself sufficiently discloses the nature of petitioner's case. The O.P. in the present petition the petitioner. The election Misc. Case objected on the ground stated therein that the question are irrelevant and not maintainable by law and contended that interrogatories must relate to matters in question. It is meant matter in controversy and the matter in controversy would mean that,

> which has been alleged by the party and traversed by other party. The O.P. has not specifically denied to the pleadings made by the petitioner about the three children by the O.P., whereas the O.P. has sought questions relating to such objection by the petitioner at the time of submission of nomination paper before the Election Officer. ”
>
> *(Underlined for emphasis)*

16. So far question no.(iii) is concerned the emphasized portion shows that the election tribunal has pre-judged the issue involved in the election petition which is certainly unwarranted while dealing with the petition of the returned candidate seeking leave of the Court to deliver interrogatories to the election petitioner.

17. So far question No.(iv) is concerned, the second and third emphasized portions in the impugned order extracted above clearly show that the observations are contradictory. The Election Tribunal is therefore, not justified to make such contradictory observations. Further such observations are irrelevant for the purpose of adjudicating the issue involved in I.A. No.6 of 2012 arising out Election Dispute No.2 of 2012.

18. In view of the above, the Tribunal is directed not to be influenced by the said observations made in the impugned order while deciding the election dispute in Election Dispute Case No.2 of 2012.

19. In the result, the writ petition is dismissed with the aforesaid observation and direction. No order as to costs.

Writ petition dismissed.

2013 (I) ILR - CUT- 527

B. N. MAHAPATRA, J.

W.P.(C) NO. 11212 OF 2012 (Dt.21.12.2012)

SUKANTI JENA ……..Petitioner

.Vrs.

STATE OF ODISHA & ORS. ……Opp.Parties

ANGANWADI WORKER – Appointment – Advertisement made for one post – Five candidates applied – One Sasmita Behera was selected/appointed having secured highest marks – Petitioner was second in the merit list – As Sasmita was regularly attending C.T. Training petitioner filed appeal challenging her appointment before the A.D.M. – Sasmita was disengaged – Since petitioner was not given appointment in that vacancy she filed the writ petition.

As per guide lines of the Government Dt.2.5.2007 vacancy need be filled up immediately – Since Sasmita has not challenged her disengagement order nor the rest three candidates challenged the select list prepared by the Selection Committee, right accrues in favour of the petitioner for appointment in that vacancy – Held, direction issued to the CDPO (O.P.4) to issue order of engagement to the petitioner as Anganwadi worker. (Paras 11,12)

Case law Referred to:-

2008 (II) CLR 556 : (Renubala Jena-V- State of Orissa & Ors.).

For Petitioner - M/s. S. S. Patra, G. M. Padhi, B.K. Sahoo, S.K.Mishra.
For Opp.Parties - Mr. Somanath Mishra, Addl. Govt. Advocate.

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer for issuance of a direction to opposite party No.3-Sub-Collector, Balasore and opposite party No.4-Child Development Project Officer (CDPO), Baliapal, Dist: Balasore to issue order of engagement as Anganwadi Worker in favour of the petitioner within a stipulated period.

2. Case of the petitioner in a nutshell is that the petitioner along with four others including one Sasmita Behera applied to beengaged as Anganwadi Worker in Pakamundi-II Anganwadi Centre, under Baliapal ICDS

Project in the district of Balasore pursuant to Advertisement dated 21.01.2010. On 25th March, 2010, CDPO, Baliapal published Select List (Annexure-1) of five candidates in which Sasmita Behera was declared selected as Anganwadi Worker in the Anganwadi Centre in question whereas the petitioner secured second highest mark in that selection. Accordingly, letter of engagement dated 27.03.2010 was issued by opposite party No.4 in favour of Sasmita Behera. Pursuant to the said engagement letter, Sasmita Behera joined in the post of Anganwadi Worker and continued as such. In the meantime, petitioner came to know that Sasmita Behera was undergoing CT training in Government Secondary Training School, Langaleswar, in the district of Balasore as regular candidate. She did not take permission from the competent authority at the time of filing her application pursuant to advertisement dated 21.01.2010 to be engaged as Anganwadi Worker. Further, she has attended CT training without any absence. In support of her contention, the petitioner attached a copy of letter No.74 dated 23.07.2010 issued by Government C.T. School, Langeleswar, Balasore to the writ petition as Annexure-2. Petitioner has also obtained copy of the attendance register under the R.T.I. Act. The above fact was communicated to opposite party No.4 by way of filing representation with request to disengage Sasmita Behera and to give engagement to the petitioner as Anganwadi Worker as she has secured second highest mark. Since opposite party Nos. 3 and 4 did not interfere with the matter, the petitioner filed Misc. Appeal No.69 of 2010 before the Additional District Magistrate, Balasore in April, 2010 with a prayer to disengage Sasmita Behera and to engage the petitioner. Since the Appeal was not disposed of till October, 2010, petitioner approached this Court in W.P. (C) No.18363 of 2010, which was disposed of on 08.11.2010 with a direction to opposite party No.2- Additional District Magistrate, Balasore to dispose of the Appeal within a period of two months. Pursuant to said order of this Court, opposite party No.2-ADM disposed of the Appeal on 04.08.2011 after perusing the record maintained by opposite party No.4-CDPO, Baliapal by disengaging Sasmita Behera and remanding the case to Selection Committee for taking further course of action as per Government Guidelines. Since Selection Committee did not take any action as directed by the ADM and did not issue order of engagement in favour of the petitioner despite several approaches, petitioner filed the present Writ Petition.

3. Mr. S. Patra, learned counsel for the petitioner submitted that the petitioner having secured second highest mark in the selection, the Selection Committee should have issued engagement order in favour of the petitioner. The welfare Scheme of the Government is not properly implemented due to inaction of opposite parties without any rhyme or reason. Petitioner is

deprived of her legitimate right. Learned counsel Mr.Patra in support of his case, placed reliance on the judgment of this Court in *Renubala Jena Vs. State of Orissa & 3 Ors.,* 2008 (II) CLR 556.

4. Mr.Somanatha Mishra, learned Additional Government Advocate appearing for State-opposite parties submitted that the Selection Committee in case of disengagement of Anganwadi Worker has to go for fresh selection in which the petitioner may participate.

5. On the rival contentions advanced by the parties, the following questions fall for consideration by this Court:

> (i) Whether in view of disengagement of Smt. Sasmita Behera the petitioner is entitled to be issued with the order of engagement as Anganwadi Worker in Pakamundi-II Anganwadi Centre, under Baliapal ICDS Project in the district of Balasore having secured second highest mark in the selection process?
>
> (ii) Whether pursuant to disengagement of Smt. Sasmita Behera as the Anganwadi Worker, the CDPO, Baliapal shall go for a fresh advertisement inviting applications from the intending candidates to be engaged as Anganwadi Worker in the Anganwadi Centre in question?

6. Since both the questions are interlinked, they are dealt with together.

Undisputed facts are that pursuant to Advertisement dated 21.01.2010 inviting applications from the eligible candidates to be engaged as Anwangwadi Worker in Pakamundi-II Anganwadi Centre, under Baliapal ICDS Project in the district of Balasore, petitioner along with four others, including Sasmita Behera, applied for the same and the Selection Committee prepared the Select list and as per the said list Sasmita Behera secured highest mark and the petitioner Sukanti Jena secured second highest mark. The Additional District Magistrate, Balasore, after hearing the Advocate for the appellant-Sukanti Jena, CDPO, Baliapal and A.G.P. and perusing the documents available on record from which it reveals that the CDPO has issued disengagement letter to respondent No.3-Sasmita Behera, who did not appear before the ADM, Balasore, passed order dated 04.08.2011 in Anganwadi Appeal No. 69 of 2010 by remanding the matter to Selection Committee for taking further action as per the Government Guidelines.

7. For better appreciation, relevant portion of the order of the ADM, Balasore dated 04.08.11 passed in Anganwadi Appeal No.69 of 2010 is extracted hereunder:-

> "Heard Learned Advocate for Appellant, C.D.P.O., Baliapal and A.G.P. Respondent no.3 did not appear court to participate in hearing of the case.
>
> xx xx xx
>
> The C.D.P.O., Baliapal has submitted written statement and stated that the Respondent No.3 been disengaged with effect from 31.3.11.
>
> Perused the record as well as documents available on the record. It is revealed that the C.D.P.O., Baliapal has issued disengagement letter to the Respondent no.3. The Respondent no.3 neither appear in the court not submitted any reply. In view of the above, the case is remanded to the Selection Committee for taking further course action as per Government Guidelines."

8. At this juncture, it is necessary to know what is provided in the revised Government Guidelines dated 02.05.2007 issued by Commissioner-cum-Secretary to Government, Women & Child Development Department, Government of Odisha, with regard to disengagement of Anganwadi Workers. The relevant portion of said Guidelines is reproduced hereunder for ready reference.

"**IV. Disengagement of Anganwadi Workers**:-

- A candidate once selected and engaged to work as Anganwadi worker will ordinarily continue to work till satisfactory discharge of duties;

- An Anganwadi worker can be disengaged by the Sub-Collector if any serious or persistent lapse is noticed in her work. The Anganwadi Worker will be given an opportunity to show cause against the action proposed to be taken against her and personal hearing by the Sub-Collector.

- If any Anganwadi Worker is elected as a representative of any local body, she shall be disengaged immediately and the vacancy shall be filled up forthwith.

▪ Every year Sub-Collector will review the functioning of Anganwadi Workers who are 55 years or more than 55 years of age. Anganwadi Worker who is not able to discharge the duties satisfactorily will be disengaged after being given due opportunity of being heard.

Collector shall be the appellate authority in the hearing of disengagement of Anganwadi Worker."

9. In the instant case, while Sasmita Behera was undergoing C.T. training, she made an application pursuant to Advertisement dated 1.01.2010 to be engaged as Anganwadi Worker in the Anganwadi Centre in question and also attended the C.T. training regularly, for which she has been disengaged. Therefore, on disengagement of Sasmita Behera as per Guidelines the vacancy should be filled up immediately. The order of A.D.M. does not show that any appeal or petition has been filed before any higher Forum by smt. Sasmita Behera challenging her order of disengagement with effect from 31.03.2011. On disengagement of Sasmita Behera right accrues in favour of Sukanti Jena, the petitioner, who has secured second highest mark in the selection, held for giving engagement as Anganwadi Worker in the Anganwadi Centre in question.

10. This Court in the case of Renubala Jena (supra) held as follows:-

"21. In view of the above, in an appropriate case as the other persons were satisfied with the result of the selection process though may be manipulated, and did not approach the Court or any other Forum, the matter could have been restricted between the appellant and Respondent No.4. However, in view of the fact that the entire selection process stood vitiated because of the manipulation, such an order cannot be issued and all the four candidates who were called for the interview should be recalled again and fresh selection may be held from the stage of interview and the same should be completed within a period of six weeks from the date of production of certified copy of this order before the learned District Collector, Bhadrak."

11. In view of the above, there is no question of issuing fresh advertisement inviting applications for giving engagement in the Anganwadi Centre in question. The selection now is confined to remaining four candidates, as engagement of Sasmita Behera has been held invalid and order of disengagement has been issued to her. Among the remaining four candidates, as per the Select List, petitioner-Sukanti Jena has secured the second highest mark and the rest three candidates have not challenged the

Select List prepared by the Selection Committee. Therefore, in the present case, petitioner is entitled to be issued with the order of engagement as Anganwadi Worker in Pakamundi-II Anganwadi Centre, under Baliapal ICDS Project in the district of Balasore.

12. In view of the above, this Court directs opposite party No.4- CDPO to issue the order of engagement to the petitioner as Anganwadi Worker within two weeks from the date of production of certified copy of this judgment.

13. Before parting with the case, this Court observes that for the upliftment and welfare of the children, women and downtrodden section of the society Government both in Centre and State have been taking various welfare measures and have been spending huge amount for the said purpose. If the said welfare Scheme/Project will not be implemented in letter and spirit, the very purpose of achieving the avowed goal shall be frustrated. Therefore, the State Government should take necessary steps to ensure that the beneficial statutes/Schemes should be implemented in its proper perspective.

14. In the result, the Writ Petition is allowed with the aforesaid bservation and direction.

Writ petition allowed.

2013 (I) ILR - CUT- 533

B. K. PATEL, J.

FAO. NO. 260 OF 2006 (Dt.14.12.2012)

GHANASHYAM PATRA & ORS. …….. Appellants

.Vrs.

UNION OF INDIA & ANR. ……..Respondents

RAILWAY CLAIMS TRIBUNAL ACT, 1987 – S.123 (c)

Untoward incident – Deceased belongs to state of Orissa was alone moving in a local train and accident occurred at Thane Railway Station in Mumbai – Not expected to get an eye witness – Documentary evidence shows that the deceased fell down from the running train and sustained injuries – Railway authorities failed to adduce evidence to establish that claimants are not entitled to compensation – Held, order passed by the Chairman and Member (Technical) of the Tribunal is set aside and the order passed by the Member (Judicial) holding that the claimants are entitled for compensation is confirmed.

(Para 12)

Case laws Referred to:-

1.2003 ACJ 1286 : (Union of India -V- B. Koddekar & Ors.)
2.2004 ACJ 529 : (Union of India, South Central Railways-V-Kurukundu Balakrishnaiah & Ors.)
3.1993 ACJ 846 : (Raj Kumari-V- Union of India).

For Appellants - M/s. R.P. Mohapatra, Deepali Mohapatra & Sandip Parida.
M/s. R.K. Patnaik & S.P. Swain.
For Respondent - M/s. A.K. Mishra, H.M. Das & A.K. Sahoo (for Res.No.1).

B.K. PATEL, J. This appeal under Section 23 of the Railway Claims Tribunal Act,1987 (for short, 'the Act') is directed against the order passed by the Railway Claims Tribunal, Bhubaneswar Bench (for short 'the Tribunal') dismissing the Case No.OA/67/2003.

2. Appellants who were applicants before the Tribunal are deceased's parents, wife and minor daughter. Applicants before the Tribunal filed application for compensation on account of death of Padma Charan Patra in

a railway accident. Applicants' case before the Tribunal was that on 20.9.2002 at about 10.30 A.M. deceased boarded local train No.DA-2 Ambernath to Dadar in platform no.6 of Thane Railway Station to return to his mess situated at Kurla road, Mumbai. The compartment was overcrowded. Due to push and pull of the co-passengers deceased fell down from the train in platform no.6 of Thane Railway Station itself and sustained injuries. He was shifted for treatment to Civil Hospital, Thane where he expired on 21.9.2002. A criminal case was registered in connection with the accident. Thus applicants claimed that death of the deceased having occurred as a result of an untoward incident as defined under Section 123 (c) of the Act, respondents-Railway is liable to pay compensation.

3. Respondents-Railway filed written reply resisting the claim. It was pleaded that neither the deceased was *bona fide* passenger in any train nor death of the deceased occurred as a result of untoward incident as defined under the Act. It was pleaded that the deceased did not fall down from any train. On the contrary, death of the deceased occurred due to knocking down by DA-2 local train at Thane Railway Station platform no.6.

4. On the basis of rival pleadings, the Tribunal framed the following issues for adjudication:

"(i) Whether the applicants prove that the deceased accidentally fell down from the local train on 20.9.2002 at Thane and succumbed to the injuries?

(ii) Whether the respondents prove that the alleged incident does not come within the provision of Section 123 as an untoward incident?

(iii) Whether the respondents prove that the deceased was not a bona fide passenger?

(iv) What reliefs?"

5. In order to substantiate their case applicants filed affidavit evidence of two witnesses including applicant no.3 who is wife of the deceased. Other witness happens to be deceased's uncle. Applicants also relied upon documents including police report, inquest report, post mortem report, etc. Respondents who represent the Railway filed affidavit evidence of the Motorman, i.e., the driver and the Guard of the local train which was involved with the incident.

6. It appears that as there was difference of opinion between the Member (Judicial) of the Tribunal on the one hand who held the applicants

to be entitled to compensation and the Member (Technical) of the Tribunal on the other who accepted the defense of the Railway that death of the deceased did not occur due to any untoward incident, the matter was referred for decision to the Chairman of the Tribunal who agreed with the view taken by the Member (Technical). Consequently, application for compensation was dismissed.

7. In assailing the impugned order it was submitted by the learned counsel for the appellants that on the basis of materials on record Member (Judicial) of the Tribunal categorically came to conclusion that death of the deceased occurred due to untoward incident as defined under the Act which view cannot be held to be perverse, or even unreasonable. It was argued that deceased belongs to the State of Orissa and was residing in Mumbai. The untoward incident occurred when he was travelling alone in a local train. In such circumstance, it is not expected that the applicants would be able to adduce evidence regarding exact manner and circumstances under which the incident took place. Nonetheless, materials on record disclosed that deceased died in an accident involving the local train. Evidence of two witnesses on which reliance was placed by the Chairman and Member (Technical) of the Tribunal is inconsistent and discrepant for which no reliance can be placed on the same to conclude that deceased was knocked down at a distance of about 100 meters from platform no.6 of Thane Railway Station. In such circumstances, the Tribunal was not justified in dismissing the claim application. In support of the contentions learned counsel for the appellants placed reliance on the decisions of the Andhra Pradesh High Court in **Union of India –vrs.- B. Koddekar and others** : 2003 ACJ 1286 and **Union of India, South Central Railways –vrs.- Kurukundu Balakrishnaiah and others** : 2004 ACJ 529.

8. In **Union of India –vrs.- B. Koddekar and others** (supra) placing reliance on the decision of the Madhya Pradesh High Court in **Raj Kumari –vrs.- Union of India** : 1993 ACJ 846 it was held that burden does not lie on the dependents of the deceased to prove that the deceased was a *bona fide* passenger and the burden is on the railway administration to prove that the deceased was a ticketless traveler or was not a *bona fide* passenger.

9. In **Union of India, South Central Railways –vrs.- Kurukundu Balakrishnaiah and others** (supra) upon reference to number of judicial pronouncements it was held that burden lies on the Railways to prove the plea that legal representative of the victims of untoward incident are not entitled to compensation on any of the defences available to Railway in the statute so as to disentitle the claimants to claim compensation.

10. In reply it was submitted by the learned counsel for the respondents that appellants failed to adduce any evidence with regard to the manner and circumstance under which the deceased sustained injuries which led to his death. Motorman and Guard of the concerned train having positively stated in their affidavits evidence that the deceased was knocked down by the running train while he was walking between railway tracks of platform no.6, it was rightly held by the Tribunal that death of the deceased did not occur due to any untoward incident.

11. I have heard learned counsel for the parties and also perused materials on record as well as all the three separate judgments passed by the Chairman and the two Members of the Tribunal.

12. In appreciating the case it is to be borne in mind that the deceased who is a resident of State of Orissa was victim of a railway accident in Mumbai. Therefore, it is not expected from the claimants that they would be able to adduce any eyewitness account of the circumstance under which the accident took place. It is not disputed by the respondents that the deceased died of injuries sustained in an accident involving local train no.DA-2 in platform no.6 of Thane Railway Station. Case of the claimants is that the deceased fell down from the crowded compartment due to push by co-passengers. Case of the Railway is that the deceased was not a passenger of the said train and he did not fall down from the train. Rather, the train knocked down the deceased when he was walking between the railway tracks at a distance of 100 meters from platform no.6. On perusal of affidavit evidence of the concerned Motorman on whom much reliance has been placed by the Chairman and Member (Technical) of the Tribunal it is found that it has been averred therein that when the local train was about to enter platform no.6 the Motorman found the deceased walking between the tracks of platform no.6. In spite of blowing horn the deceased did not respond. When the Motorman applied emergency brake to stop the train the deceased tried to escape by jumping. However, he was hit by the side of the train, knocked down and thrown out of the track. According to him, the Station Master who was present at platform no.6 immediately came to him and told to restart the train. During that time the deceased having sustained injuries was lying on the left side of the track of platform no.6 and the station staff of the railway station were rendering first aid to him. In his cross-examination, the Motorman deposed that the incident occurred 100 meters before platform no.6 which fact he has not mentioned in the affidavit. Thus, it has been rightly observed by the Member (Judicial) that affidavit evidence of the Motorman to the effect that the deceased was walking between the tracks of platform no.6 when the local train entered platform no.6 is not consistent with the evidence in course of cross-examination that

the deceased was knocked down by the train at a distance of 100 meters of platform no.6 of Thane Railway Station. It is also in the evidence of Motorman that staff of the railway station immediately attended to the deceased. This circumstance also is not consistent with the assertion that the accident took place at a distance from platform no.6. None of the documentary materials on record is inconsistent with the case of the applicants that the deceased fell down from the running train and sustained injuries. Injuries found on the deceased are in no manner inconsistent with the circumstance that deceased sustained injuries due to fall from the train. In such circumstances, no intrinsic value can be attached to the evidence of the Motorman for rejecting the claim made by the legal representatives of the deceased. Railway administration is found to have failed to discharge burden to lead cogent evidence to establish that claimants are not entitled to compensation as death of the deceased did not occur due to untoward incident. Therefore, the orders passed by the Chairman and Member (Technical) of the Tribunal are liable to be set aside and the order passed by the Member (Judicial) is entitled to acceptance.

13. Accordingly, the appeal is allowed. The impugned orders passed by the Chairman and that of Member (Technical) of the Tribunal are set aside. Respondents- Railways administration is held to be liable to pay compensation of Rs.4,00,000/- (Rupees four lakhs only) along with interest at the rate of 6 per cent to the appellants-claimants from the date of filing of the claim application till payment. Compensation amount along with interest shall be deposited with the Tribunal within a period of two months from today upon which the Tribunal shall apportion the compensation amount among the applicants and also direct deposit of part of amount payable to each of the applicants in fixed deposit on such proportions as deemed proper.

Appeal allowed.

2013 (I) ILR - CUT- 538

B. K. NAYAK, J.

CRLMC. NO. 2755 OF 2008 (Dt.06.11.2012)

JOHN HARIHAR DAS @ HARIHAR DAS …….Petitioner

.Vrs.

ROSALYN SANTIAGO @ ROSALYN DAS & ORS. ……..Opp.Parties

CRIMINAL PROCEDURE CODE, 1973 – S.125 (1) (C).

Maintenance – Children, legitimate or illegitimate attained majority unable to maintain themselves due to physical or mental abnormality or injury are entitled to get maintenance except married daughters.

In this case O.P. 2 & 3 were admittedly major on the date of filing of maintenance application – No averment in the application that they were unable to maintain themselves due to any physical or mental abnormality/injury – Hence they are not entitled to maintenance – Held, order of maintenance in favour of O.P.2 & 3 passed by the learned SDJM, Bhubaneswar and confirmed by the revisional Court is set aside. (Paras 8,9)

Case laws Referred to:-

1.1993 (II) OLR 546 : (Ainul Ali Khan-V- Sagar Begum @ Suka Begum & Ors.)
2.(1995)9 OCR-15 : (Upendra Mohapatra-V- Smt. Kanchanbala Mohapatra)
3.1996 (1) OLR 522 : (Keshaba Patra-V- Jamuna Patra).

For Petitioners - Mr. Tusar Kumar Mishra.
For Opp.Parties - M/s. Bidyadhar Pradhan, B.Pr. Giri, S.P.Rath, O.P.Mohanty, S. Pradhan, D. Mishra & S.Mohapatra.

B.K.NAYAK, J. In this application under Section 482, Cr.P.C., the petitioner challenges the judgment dated 20.03.2008 passed by the learned Ad hoc Additional Sessions Judge, F.T.C. No.3, Bhubaneswar in Criminal Revision No. 3/74 of 2007/2006 confirming the order passed by the learned

S.D.J.M., Bhubaneswar in Criminal Misc. Case No.123 of 2004 granting monthly maintenance of Rs.1,500/- in favour of present opposite party no.1 and monthly maintenance of Rs.1,000/- each in favour of opposite party nos.2 to 5 under section 125, Cr.P.C.

2. Opposite party nos.1 to 5 filed the Criminal Misc. Case No.123 of 2004 in the court of learned S.D.J.M., Bhubaneswar under Section 125, Cr.P.C. on the assertions that opposite party no.1 was the wife of the petitioner their marriage was solemnized on 12.05.1981 in a Church at Khurda Road and from the date of marriage, they resided together and out of their wedlock four daughters, opposite party nos.2 to 5 were born. Since opposite party no.1 could not bear a male child she was ill-treated by the petitioner mentally and physically and in order to have a male child the petitioner threatened to go for a second marriage and accordingly kept one P. Laxmi as his second wife and neglected to maintain the opposite parties, who were having no income of their own. Opposite party no.1 also suffered from paralysis and was unable to move. The petitioner works in the East Cost Railways as a gateman earning a monthly salary of Rs.7,500/-. Besides, he was having agricultural income of Rs.25,000/- per annum from his landed properties.

3. The petitioner filed his objection admitting his marriage with opposite party no.1 and further admitting that opposite party nos.2, 3 and 4 were his daughters born through opposite party no.1. It was his specific plea that opposite party no.1 developed extra marital relationship out of which opposite party no.5 was born. The allegations of neglect and refusal to maintain the opposite parties was denied and it was further stated that since opposite party no.1 deserted him, he filed Original Suit No.4 of 1993 for restitution of conjugal rights which was decreed on 07.08.1995, but opposite party no.1 did not comply with the said decree and continued to stay away and was living in adultery.

4. Evidence was led only on behalf of the claimants-opposite parties. The petitioner did not lead any defence evidence. On consideration of the evidence led by the opposite parties, the learned S.D.J.M. came to the finding that opposite party no.5 was the legitimate daughter of the petitioner through opposite party no.1 and that the petitioner kept another lady in order to get a male child and drove the opposite parties away and having sufficient means to maintain he refused and neglected to maintain the opposite parties, who had no source of income or livelihood and accordingly granted maintenance @ 1,500/- per month in favour of opposite party no.2 and Rs.1,000/- each in favour of opposite party nos.2 to 5. The aforesaid order of the S.D.J.M., Bhubaneswar was challenged by the petitioner in Criminal Revision No. 3/74 of 2007/2006 which was ultimately

dismissed by the learned Ad hoc Additional Sessions Judge F.T.C. No.3, Bhubaneswar by his judgment dated 20.03.2008.

5. During the course of hearing the only contention raised by the learned counsel for the petitioner is that opposite party nos.2, 3 and 4 had already become major at the time of filing of the maintenance application and there being no averment and proof to the effect that they were unable to maintain themselves by reason of any physical or mental abnormality or injury as required under Clause (c) of sub section (1) of Section 125, Cr.P.C., they were not entitled to maintenance. The contention has been raised on the basis of the age of the present opposite party nos.2, 3 and 4 as described in their maintenance application filed before the learned S.D.J.M. However, the orders of the courts below reveal thatno such contention was raised by the present petitioner either before the learned S.D.J.M. or before the learned revisional court and no such objection was raised in the show cause filed by the present petitioner before the learned S.D.J.M.

Learned counsel for the opposite parties, however admits that opposite party nos. 2 and 3 had already attained majority on the date of filing of maintenance application. But so far as opposite party no.4 is concerned, it is submitted, with reference to the date of birth of opposite party no.4 as spoken to by P.W.1, that she had not attained majority by the time of filing of the maintenance application.

6. Admittedly, opposite party nos.2, 3 and 4 are unmarried daughters and it is also admitted by the learned counsel appearing for them that opposite party nos.2 and 3 were already major on the date of filing of maintenance application.

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7. In a similar case a division Bench of this Court, in the decision reported in 1993 (II) OLR 546; ***Ainul Ali Khan v. Sagar Begum alias Suka Begum and three others*** have held as follows :

> "**3**. Sec.125 of the Code deals with maintenance to be granted to wives, children and parents. So far as children are concerned, both legitimate and illegitimate children are covered by Sub-sec. (1) of Sec.125 of the Code. In the case of minor child, an order of maintenance can be passed if it is unable to maintain itself, irrespective of the marital status. But that is not the case in the case of those who have attained majority. Married daughters are excluded from the scope of Sub-sec.(1) of Sec.125 of the Code. No order of

maintenance can be passed in favour of those who have attained majority unless by reason of any physical or mental abnormality or injury the child is unable to maintain itself.

The word 'children' in the section refers to both legitimate and illegitimate children. Provision is made for maintenance of minor child whether married or not, unable to maintain itself. Clause (c) of Sub-sec.(1) however makes special provision for maintenance of major children, not being married daughters, where they are unable to maintain themselves by reason of any physical or mental abnormality, or injury. Under the 1898 Code, Sec.488 did not define 'child' and there were conflicting views as to whether the expression 'child' would include a major child or not. The controversy does not subsist in view of the express language used in Sec. 125 of the Code.

4. In view of the fact that the statement of the appellant has practically gone unchallenged, we find substance in the plea of Mr. Patra so far as respondents 2 to 4 are concerned. In the claim petition itself the respondents 2 and 3 have been shown to be majors. The exceptions enumerated in sec. 125 (1) (c) are not pleaded in their case. So, irrespective of their marital status, they are not entitled to maintenance."

Similar view has also been expressed in (1995) 9 OCR-15 ***Upendra Mohapatra v. Smt. Kanchanbala Mohapatra*** and 1996 (1) OLR 522; ***Keshaba Patra v. Jamuna Patra.***

8. It is admitted during hearing that opposite party nos. 2 and 3 were already major on the date of filing of maintenance application and in the claim application their age has been described as 22 years and 20 years respectively. There is no averment in the claim application that they were unable to maintain themselves because of any physical or mental abnormality, or injury. Therefore they are not entitled to maintenance. Even though this contention was not raised before the courts below it being a legal question based on admitted facts it is entertained in this application under Section 482, Cr.P.C.

So far as opposite party no.4 is concerned it appears from the judgment of the learned S.D.J.M., that P.W.1 who is none other than opposite party no.3 and the elder sister of opposite party no.4, stated in her evidence that opposite party no.4, Helan Cecilia Das was born on

29.01.1987 which means that by the time of filing of the maintenance application in the year 2004, she had not completed the age of 18 years and therefore had not attained majority. Maintenance in her favour has therefore been rightly granted by the learned S.D.J.M.

9. In the light of the discussions made above, the CRLMC is partly allowed and the order of maintenance in favour of opposite party nos.2 and 3, namely, Elizabeth Das and Gladya Annetta Das only passed by the learned S.D.J.M., Bhubaneswar and confirmed by the revisional court is set aside. The CRLMC accordingly stands disposed of.

Application disposed of.

2013 (I) ILR - CUT- 543

C. R. DASH, J.

CRLMC. NO. 2475 OF 2006 (Dt.21.11.2012)

DHRUBA CHARAN BEHERA ……..Petitioner

.Vrs.

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

CRIMINAL PROCEDURE CODE, 1973 – S.202.

Enquiry U/s.202 of the Code – It does not speak of mechanical acceptance of facts and parrot like statements of witnesses as truth – The real scope is restricted only to find out the truth by application of judicial mind – Thereafter the Magistrate has to determine whether to issue process U/s.204 or dismiss the complaint U/s.203 of the Code.

In this case the complaint petition was dismissed on two earlier occasions for delay and non-examination of natural witnesses but on second remand the same Court took cognizance in the case on 8.11.2005 taking in to consideration the above facts and parrot like statements of the witnesses – Held, order taking cognizance Dt.8.11.2005 is quashed. (Para 7)

For Petitioner - M/s. Chandan Samantaray, Sk. F. Ahmed.
For Opp.Party No.1 - Addl. Standing Counsel.
For Opp.Party No.2 - M/s. T.Nanda & S.N.Mishra.

C.R.DASH, J. The petitioner was working as the Headmaster and opposite party No.2 was working as the Hindi Teacher at the relevant time in P.R. High School, Bolangir. The petitioner in the present Criminal Misc. Case has impugned order dated 8.11.2005 passed by the learned S.D.J.M., Bolangir in 1 C.C. No. 65 of 1999 taking cognizance of offence under Sections 323/294, I.P.C. as against the petitioner.

2. A compendium of the case relevant for disposal of the criminal misc. case is as follows.

At the relevant time as indicated supra, the petitioner was working as Headmaster and opposite party No. 2 was working as Hindi Teacher in P.R. High School, Bolangir. It was 5.00 P.M. on 30.9.1999. Both of them were leaving the school. At that time opposite party No.2 Siba Sankar Naik asked the petitioner near the school gate as to why he withheld

his (O.P.No.2's) one day pay. The petitioner Dhruba Charan Behera got enraged and abused him (O.P.No.2) in obscene words. It is further alleged that he caught hold of the shirt collar of the complainant Siba Sankar Naik(Present O.P.No.2) and dealt a slap on his left cheek. Judhistir Naik, elder brother of the complainant, who was present there separated them. The complainant Siba Sankar Naik reported the matter in Bolangir Town Police Station. When no action was taken by the police, complainant Siba Shankar Naik filed 1.C.C. No. 65 of 1999 against the present petitioner alleging offence under Sections 294/506/323, I.P.C. Prayer was made to take cognizance and issue process against the petitioner in the aforesaid complaint case. In course of enquiry under Section 202, Cr.P.C. the complainant examined his elder brother Judhistir Naik and one Jagdish Rout, whose name does not find mention in the list of witnesses of the complaint petition. Learned Magistrate on consideration of the averments made in the complaint petition, initial statement of the complainant and statements of the witnesses dismissed the complaint petition under Section 203, Cr.P.C. vide order dated 27.11.1999.

3. The aforesaid order dated 27.11.1999 was challenged in Criminal Revision No. 56/3 of 1999-2001. Learned Ad hoc Additional Sessions Judge (FTC), Bolangir set aside the aforesaid order dated 27.11.1999 and remitted back the matter to the learned Magistrate. Again enquiry under Section 202, Cr.P.C. was fixed to be held on 14.01.2002 on such remand. On 01.03.2002 the complainant (O.P. No.2) examined himself and filed a memo not to examine any other witnesses. Accordingly, the enquiry was closed, learned Magistrate on consideration of the materials on record obtained afresh was pleased to dismiss the complaint petition under Section 203 Cr. P.C. again vide order dated 8.03.2002.

4. The matter was again carried in revision vide Criminal Revision No. 15 of 2002 before the learned Sessions Judge, Bolangir. Vide order dated 28.4.2002 learned Ad hoc Additional Sessions Judge (FTC), Bolangir again set aside the order dated 8.3.2002 dismissing the complaint under Section 203, Cr.P.C. and remitted back the matter to the learned Magistrate. The matter was again taken up by learned Magistrate on second remand. After several adjournments to produce witness the complainant finally got one Saroj Kumar Sai examined on 4.11.2005. It is pertinent to mention here that the aforesaid Saroj Kumar Sai was not a witness mentioned in the list of witnesses in the complaint petition. Learned Magistrate after such enquiry under Section 202, Cr.P.C. found a prima facie case under Sections 323/506/294 I.P.C. made out against the present petitioner and accordingly took cognizance vide order dated 8.11.2005, which is impugned in the present criminal misc. case.

5. Learned counsel for the petitioner submits that the complaint petition having been dismissed earlier on two earlier occasions by the same court it was not proper on the part of the said court to take cognizance against the petitioner by a cryptic order on the basis of statement of a witness whose name does not find mention in the complaint petition. It is further submitted that learned Magistrate has not tried to reach at the truth and has taken cognizance of offence under Sections 323/506/294, I.P.C. without application of his judicial mind.

Learned counsel for the opposite parties on the other hand submits that the expression "all the witnesses" occurring in Section 202, Cr.P.C. should be construed to mean all the witnesses, whom the complainant chooses to examine irrespective of his name being entioned in the complaint petition or not. It is further submitted by learned counsel for the opposite parties that learned Magistrate after applying his judicial mind to the statement of all witnesses obtained in course of enquiry under Section 202, Cr.P.C. has rightly taken cognizance.

6. The scope of enquiry under Section 202, Cr.P.C. is extremely restricted only to finding out the truth or otherwise of the allegations made in the complaint in order to determine whether process should be issued or not under Section 204 of the Code or whether the complaint should be dismissed by resorting to Section 203 of the Code onthe finding that there is no sufficient ground for proceeding on the basis of the statements of the complainant and of his witnesses, if any. But the enquiry at the stage does not partake the character of a full dress trial which can only take place after process is issued under Section 204 of the Code calling upon the proposed accused to answer the accusation made against him for absoureding the guilt or otherwise of the said accused person. Further the question whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of the enquiry contemplated under Section 202 of the Code. To say in other words, during the course of the enquiry under Section 202 of the Code, the court has to satisfy himself simply on the evidence adduced by the prosecution whether prima facie case has been made out so as to put the proposed accused on a regular trial and that no detailed enquiry is called for during the course of such enquiry.

Section 203, Cr.P.C. consist of two parts, the first part lay down the materials which the Magistrate must consider, and the second part state that if after considering those materials there is no sufficient ground for proceeding, the Magistrate may dismiss the complaint. While exercising such power under Section 203 of the Code, it is incumbent upon the Magistrate to reflect in his order the basis for arriving at the conclusion that there are no sufficient grounds to proceed with the complaint case. In other

words, Section 203 makes it incumbent upon the Magistrate to give reasons for forming an opinion that the complaint petition is liable to be dismissed. The Magistrate must apply his judicial mind to materials on which he has to form a judgment and reflect in the order. However, while arriving at his judgment, the Magistrate is not fettered in any way except by judicial considerations. He is not bound to accept what the inquiring officer says, nor is he precluded from accepting a plea; provided always that there are satisfactory and reliable materials on which he can base his judgment as to whether there is sufficient ground for proceeding on the complaint or not. If the Magistrate has not misdirected himself as to the scope of inquiry under Section 202, Cr.P.C. and has applied his mind judicially to the materials on record, it would be erroneous in law to hold that he should not consider or discuss the materials available and the statements recorded. A Magistrate is empowered to hold an inquiry into a complaint as to commission of certain offence in order to ascertain whether there was sufficient foundation for it to issue process against the person or persons complained against and such order under Section 203, Cr.P.C. should be a speaking one. In other words, when a Magistrate intends to dismiss a complaint petition, he has to give reasons.

7. In the present case, the same court on earlier two occasions took into consideration delay of about ten days in filing the complaint petition, non-examination of natural witnesses, facts mentioned in G.R. Case No.485 of 1999 filed by the present petitioner against the Hindi Teacher (present opposite party No.2) and other materials to come to a conclusion that there is no sufficient ground for proceeding against the petitioner. Admittedly, both the petitioner and opposite party No.2 are employees of the same school and the petitioner being the Headmaster is the administrative head of the institution. The occurrence happened at the School gate at about 5.00 P.M. on 30.9.1999. It militate against commonsense as to how at that time no teacher, student or other natural witnesses were present at the spot and only person present was the elder brother of the complainant. Name of another witness who was examined by the complainant find no mention in the complaint petition. The present petitioner had lodged F.I.R. on 01.10.1999 as present opposite party No.2 had assaulted him in his office chamber alleging withheldingof his one day's pay. Ten days thereafter opposite party No.2 filed complaint petition against the present petitioner without explaining satisfactorily the delay. The court taking into consideration all the aforesaid facts and the parrot like statements of the witnesses did not feel proper to proceed against the petitioner any further in the matter. The revision carried by opposite party No.2 in two occasions ended in remand of the matter to the learned Magistrate and on the third occasion after the second remand,

leaned Magistrate took cognizance being oblivious of the earlier finding by the court. The scope of enquiry under Section 202, Cr.P.C. is to find out the truth by application of judicial mind. It does not speak of mechanical acceptance of fact narrated parrot like by some witnesses as truth.

8. Taking into consideration all the aforesaid facts and my discussion supra, the order of cognizance dated 8.11.2005 passed by leaned S.D.J.M., Bolangir in I.C.C. No.65 of 1999 is quashed and theCriminal Misc. Case is allowed.

Application allowed.