**V.GOPALA GOWDA, CJ & B.P.DAS,J.**

# WELFARE SOCIETY OF ORISSA, MANDAL,JAJPUR -V- UNION OF INDIA, REP.BY ITS SECRETARY. DEPTT. OF COAL, NEW DELHI & 3 ORS.*

**APRIL 7, 2010.**

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

**Public Interest Litigation – The Court should be very cautious while deciding a matter relating to PIL, if there is any public interest affected or any injury or any violation of rule of law is made out, then only the Court has to exercise its judicial review power.**

**In this case 97 million tons of coal block was allotted in favour of O.P.3 during 2008 but petitioner challenged it in 2010 and by that time O.P.3 made huge investments and obtained permission from different authorities for establishment of the plant – Moreover it will not only mitigate the unemployment problem of the state but also mitigate the power generation problem – Allegations of the petitioner that public interest will suffer in this case is not correct – Writ petition dismissed.**

(Para 25, 30)

**Case laws Referred to:-**

1.AIR 1979 SC 1628 : (Ramana Dayaram Shetty -V-International Airport Authority of India)
2.(1980) 4 SCC 1 : (Kasturi Lal Lakshmi Reddy -V- Union of India).
3.(1989)1 SCC 89 : (Fasih Chaudhury -V- Director General,Doordarshan).
4.(1993)1 SCC 445 : (Sterling Computers Ltd.-V-M & N Publications Ltd.).
5.JT 2010(1) SC 329 : (State of Uttaranchal -V-Balwant Singh Chaufal).
6.AIR 1982 SC 149 : (S.P.Gupta -V- Union of India & Anr.).
7.AIR 1993 SC 892 : (Janata Das -V- H.S.Chowdhary & Ors.).
8.AIR 1995 SC 1847 : (Giani Devender Singh Sant Sepoy Sikh -V-Union of India & Anr.
9.AIR 2005 SC 894 : (R & M Trust -V- Koramangala Residents Vigilance Group & Ors.).
10.AIR 2008 SC 913 : (M/s. Holicow Pictures Pvt.Ltd. -V- Prem Chandra Mishra & Ors.).

For Petitioner – M/s. Bhagban Mohanty, B.Moharana, S.Mohanty & D.Chhotray.
For Opp.Parties – M/s. Saktidhar Das, A.S.G (For O.P.No.1)
M/s.Jagannath Patnaik, B.Mohanty, J.K.Patnaik & B.S.Rajgur
(For O.P.No.2)
Mr.Sanjit Mohanty, Sr.Advocate, Ms.Suruchi Agrawal.

M/s.S.S.Das, Soubhagya S.Das, Ramakanta Sahoo & K.C.Mohapatra (For O.P.No.3)
M/s. P.K.Mohapatra, S.K.Nayak, S.K.Sahu (For O.P.No.4).

*W.P.(C) NO.3352 OF 2010. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***V. GOPALA GOWDA, C.J.*** This writ petition in the shape of Public Interest Litigation has been filed by the Welfare Society of Orissa represented by its Secretary seeking following reliefs urging various facts and legal contentions.

> **"**(1) For issuing a Rule Nisi in the nature of writ of mandamus and/or certiorari and/or any other appropriate writ/writs, order/orders, direction/directions calling upon the opposite parties to show cause as to why the allotment of 97 million tons of coal blocks out of total 291 million tons in Mandakini Coal Block of Mahanadi Coal Fields Ltd. made by the opposite party No.1 in favour of the opposite party No.3 as per Annexure-5 shall not be quashed.
>
> (2) if the opposite parties fail to show cause and /or show insufficient and /or false cause, make the said rule nisi absolute by issuing appropriate writ/writs, order/orders, direction/ directions as this Court deems fit and proper.
>
> (3) Pass such other order/orders and direction/directions as this Court deems fit and proper in the facts and circumstances of the case."

2. The brief facts for the purpose of appreciating the rival legal contentions urged on behalf of the parties are that the petitioner is a registered Non-Government Organization (NGO) claims to be dedicated itself for the cause of the public justice and to weeding out corruption and other mal-practices at all levels. It has dedicated itself to achieve the principles enshrined in the Constitution of India, particularly, the Directive Principles of State Policy to establish an egalitarian society to bring social and economic order in the country. It was registered in the year 2009. The aim and objective of the Society is to carry out several awareness campaigns, relief and rehabilitation activity, cultural activities and to spread awareness among the under privileged and deprived sections of the society with a vision to establish a classless and casteless society.

3. The focus and objectives of the Society is for the social and economic upliftment of the poor masses of Orissa State.

4. The Mandakini Coal Block of Talcher Coalfields (Mahanadi Coalfields Ltd.) is situated in Orissa with a geological reserves of 291 million tons of coal block. The Ministry of Coal, New Delhi issued notification in the month of November, 2006 inviting application from interested parties for allocation of 38 coal blocks in various parts of the country for captive mining by Companies engaged in generation of power, production of iron and steel and cement. Out of these 15 coal blocks are earmarked for power generation and 23 coal blocks would be available for other specified end uses. As per the notification, preference will be given to the power sector and steel sector. Out of power sector, priority shall be accorded to projects with more than 500 MW Capacity so also in the steel sector, priority will be given to steel plants with more than 1 million tons per annum capacity. Copy of the notification is produced and marked as Annexure-3. It is the case of the petitioner that pursuant to the said notification many number of companies like Monnet Ispat, Tatas, Sterlite, Lanco, GMR, Reliance, Mittal Steel, Navabharat etc. having many years of experience in the coal industry which have their own power plant transmission line and coal mining business applied for the allotment of the Mandakini Coal Block. It is the case of the petitioner that opposite party no.3, Jindal Photo Ltd. which has no experience in the field of mining and power generation applied for the allotment of the coal block in Mandakini Coal Block of Talcher Coalfields on 9.1.2007.

5. It is the case of the petitioner that Opposite party no.3, Jindal Photo Limited (hereinafter called as 'JPL') has been allotted 97 million tons of coal block from the Mandakini Coal Block overlooking other experienced and reputed Companies. It is the case of the petitioner that opposite party no.2 did not scrutinize the application of opposite party No.3-JPL in accordance with the guidelines for allocation of captive blocks and conditions of allotment through the Screening Committee. The allotment of blocks which was issued in favour of the JPL is produced and marked as Annexure-5. The guidelines for allocation of captive blocks and conditions of allotment through the Screening Committee is produced and annexed as Annexure-6. It is the further case of the petitioner that two portions of the same block have been allotted to Monnet-Ispat and Tatas, who have got wide experience in the filed. The allotment of coal blocks received by other bidders such as Sterlite, Lanco, GMR, Reliance, Mittal Steel, Navabharat etc. as referred to above are comparatively very small. The aforesaid companies are allotted Greenfield blocks where the development cost is much higher than open cast blocks, though the said companies have got sufficient experience in the industries and therefore they are likely to make much better use of the highly efficient coal blocks than the JPL. Most of them had applied for allotment of

the Mandakini coal block several years before the JPL has applied for the same.

6. It is alleged, on the basis of facts stated supra, that JPL having hand in gloves with the opposite parties is going to sell away the high grade coal which has been allotted to it by illegal means. The purpose of allotment of coal block for the existing power projects is to combat the power scarcity prevailing in the State of Orissa. The allotment of high grade coal and that too one-third of the total reserve of Mandakini Block in favour of JPL is illegal, arbitrary and opposed to the public policy. It is further alleged that it has reliably learnt that JPL has obtained the said allotment of coal block by influencing the authorities concerned. It has suppressed the fact about the earlier coal linkage allotment in its favour and obtained the present allotment illegally by undue influence and on extraneous considerations. Therefore, it is illegal and void, which would results in inappropriate and improper utilization of the coal block.

7. Mr. Bhagaban Mohanty, learned counsel appearing on behalf of the petitioner, contends that the opposite party No.1-Union of India was required to verify the expertise and other technical abilities of JPL before allotting such a huge quantity of coal block for captive mining. Allotment of the said coal blocks in favour of JPL, which has not possessed the experience in the power generation plant and other plants, defeats the purpose and objects of allotment of such major mineral in its favour, thereby the public interest is affected so also public injury and it is also in violation of rule of law are the relevant grounds on which the present petition is filed seeking for the aforesaid relief. It is further contended by him that the opposite party No.1, in the matter of entering into contract of allotment of coal block, which is a major mineral, which shall be used for the common good as provided in the Directive Principles of State Policy under Article 39 (b) of the Constitution, has violated in allotting the coal blocks in favour of an illegal person as it does not possess the required experience in the filed of power generation. It is further contended that opposite party No.1 was required to exercise its jurisdiction by following the mandate of Article 14 of the Constitution, which excludes arbitrariness on its part and requires to act fairly and reasonably when the contract concerns the public interest at large. It is urged that as the JPL is not fulfilling the legal requirement having not possessing the experience in the field of power generation for the allotment of coal blocks in its favour and it is in violation of the guidelines and the criteria required to be followed by the opposite party No.1. Therefore, the action on the part of the opposite party No.1 is arbitrary and unreasonable as it will be a loss to the State exchequer. It is further contended that the opposite party No.1 has not discharged its function properly as it has neither scrutinized the applications

in proper perspective nor acted in a fair and reasonable manner in the allotment of coal blocks in favour of JPL.

8. Learned counsel for the petitioner in support of his submission has placed reliance upon the case of Ramana Dayaram Shetty Vrs. International Airport Authority of India, AIR 1979 SC 1628, Kasturi Lal Lakshmi Reddy Vrs. Union of India, (1980) 4 SCC 1, Fasih Chaudhury Vrs. Director General, Doordarshan, (1989) 1 SCC 89 and Sterling Computers Ltd. Vrs. M&N Publications Ltd., (1993) 1 SCC 445. By relying upon the aforesaid decisions of the Apex Court, learned counsel for the petitioner prays to grant the relief as the public interest and public injury is involved in this public interest litigation.

9. Learned Assistant Solicitor General has filed notes of preliminary submission on behalf of the opposite party No.1 by referring to various facts pleaded in the writ petition. It is stated that the Ministry had advertised 38 coal blocks on 6th November, 2006 inviting application for allocation of the said blocks for captive mining for specified end uses, namely, power generation, production of iron & steel and production of cement as per the provisions of Coal Mines (Nationalization) Act, 1973 (hereinafter called "the Act, 1973") as amended from time to time. In response to the said advertisement, more than 1400 applications were received for allocation of said blocks, out of which 744 applications were for power sector blocks. In all, about 207 companies had applied for power sector coal blocks. Notice along with details of blocks, guidelines indicating procedure for submission of application, criteria for allocation etc. were placed on the Ministry's website as well. As per the procedure laid down in the guidelines, allocation of coal/lignite blocks was made through the Screening Committee as the said applications were sent to the Central Ministries of Power, Commerce and Industry (Department of Industrial policy & Promotion) Steel as well as the State Governments concerned, where the blocks were located and where the end use projects were proposed to be located for their comments. The first meeting of the Screening Committee was held from 20.06.2007 to 23.06.2007. All the applicants were invited to make their representations individually outlying the salient features of their respective cases. Altogether, 193 companies came and made presentation before the Committee. Ministry of Coal could not finalise the recommendation since the Ministry of Power informed that they had not been able to examine the applications. Subsequent thereto another meeting of the Screening Committee was convened on 30.07.2007. Ministry of power had furnished their views with the observation that authenticity of data/comments submitted need to be verified separately. Accordingly, the Committee decided that the State Governments may be asked to carry out a quick verification of the data used by the Ministry of power for techno-economic evaluation of end use

projects. The next Committee meeting was convened on 13.9.2007. The verification reports from the State Government as requested were received and placed before the screening committee. Financial strength of applicants was scrutinized independently with the help of financial experts from Coal India Ltd. Taking cognizance of the advice given by the Ministry of Power that in view of the capacity constraints in transmission network, power producers should limit plant capacity to 500 to 1000 MW, the Committee agreed that this should be taken as the guiding principle. Therefore, 1000 MW was taken as the maximum limit for allocation of coal blocks and the shares of geological reserves in the block, in case the capacity indicated in the application is higher than the maximum limit suggested by the Ministry of Power.

10. Based on the recommendation of the Screening Committee as approved by the Government, the Mandakini captive coal- blocks have jointly been allocated to M/s. Monnet Ispat & Energy Ltd., M/s. Jindal Photo Ltd and M/s. Tata Power Company Ltd., for their respective power plant. It is specifically asserted that Ministry of Power and Ministry of Coal have applied uniformly the guidelines before deciding the allocation of coal blocks and consequent equitable proportionate distribution of shares of geological reserves in favour of the allottee. Therefore, the allegation of not following the guidelines, so also the allegation of arbitrariness, unreasonableness and illegality on the part of the opposite party No.1 in allotting the coal blocks in favour of JPL is specifically denied by Mr. Das, learned Assistant Solicitor General.

11. It is further stated that based on the recommendation of the Screening Committee as approved by the Government, an offer letter was issued on 09.01.2008 intimating the option for allocation of Mandakini captive coal block jointly to M/s. Monnet Ispat & Energy Ltd., M/s. Jindal Photo Ltd and M/s. Tata Power Company Ltd. with equal shares of the geological reserves for their power plants of 1000 MW capacity. Further it is contended that the allottees were asked to intimate their option and form a Joint Venture Company by entering into a joint venture agreement within four weeks from the date of the aforesaid offer letter, failing which appropriate action would be taken by the Government. Accordingly, they entered into a joint venture agreement and submitted the required bank guarantee and purchased the geological report from CMPDIL within the prescribed time limit. The mining plan in respect of the coal block was approved by the Ministry under the MC Rules of Mines and Minerals (Regulation and Development) Act, 1957 (hereinafter called “MMRD Act”). Therefore, the contention of the petitioner that the coal block has been allotted illegally and arbitrarily in favour of JPL is not correct.

12. Opposite party No.3 has filed the counter affidavit raising certain preliminary objections regarding maintainability of the writ petition to the effect that the petitioner-Society was registered in the year 2009, but the allotment of coal blocks was made in the year 2008. It is further alleged that the present writ petition has been filed to abuse the process of the Court and so also to sub-serve some private interest and for harassing the opposite party No.3. Therefore, it deserves to be dismissed.

13. Further, with regard to the allegation made for allotment of coal blocks, the petitioner is unable to show anything by furnishing relevant material facts that the opposite party No.3 was allotted the coal block by using influence or on extraneous consideration. The allegation with regard to illegal allotment of coal block in its favour for power generation and so also to sell it outside the State is not supported by any other factual foundation is vague and lacks material particulars.

14. Mr. Sanjit Mohanty, learned Senior Counsel appearing for opposite party No.3, placed strong reliance upon the counter affidavit by referring to the judgment of the Apex Court in the case of State of Uttaranchal Vs. Balwant Singh Chaufal, reported in JT 2010 (1) SC 329, wherein it has been held that frivolous and vexatious petitions in the garb of public interest litigation must be discouraged by the Court in exercise of its Constitutional power. He has placed reliance on the relevant guidelines laid down in the aforesaid case in justification of allotment of coal block in favour of JPL and the Joint Venture Companies (JVC).

15. The relevant guidelines enumerated in the said case are extracted hereunder for better appreciation of rival contentions in this matter:

> "(a) Verification of the credentials of the P.I.L. petitioner.
> (b) Satisfaction of correctness of the contents of the petition,
> (c) Substantial public interest is involved.
> (d) Petition should involve larger public interest, gravity and urgency,
> (e) The PIL is aimed at redressal of genuine public harm or public injury and that there should be no personal gain, private motive or oblique motive behind filing the public interest litigation.
> (f) Petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations."

16. Further it is contended by Mr. Mohanty that no substantial public interest are involved in the present case and it does not amount to redressal of genuine public interest or public injury. Therefore, it is requested that the writ petition should be dismissed with exemplary costs, as the same has been filed with ulterior motive and on extraneous consideration. It is further

alleged that the attempt of the petitioner to challenge the allotment of Mandakini Coal Block of Talcher coal fields in favour of JPL, which has got only 33% shareholding does not involve redressal of any public injury and no public interest is shown to be served by filing the present writ petition as observed by the Hon'ble Supreme Court in Balwant Singh Chaufal (supra) and also in a catena of decisions on PIL matter. Further, as the petitioner has no grievance against M/s. Monnet Ispat & Energy Ltd and M/s. Tata Power Company Ltd. who are the JVC of JPL and as JPL has got only 33% share in the project, it cannot be said that there will be any public injury even if the JPL is having no experience in the filed of power generation. It is contended that this Court having regard to the facts and circumstances of the case, as the petitioner is unable to show to this Court that neither public interest nor any public injury or any violation of rule of law is involved in this case, this Court should decline to exercise its Constitutional power under Article 226 of the Constitution of India. Mr. Mohanty further seeks to justify the allotment in favour of opposite party No.3 and its status contending that opposite party No.3 is a flagship company of the B.C. Jindal Group which is one of the well reputed industrial groups in the country known for its multi-product on multi location manufacturing establishment for the last five decades, such as Jindal Photo Ltd., Jindal Poly Films Ltd., Jindal India Ltd..

However, we do not feel it necessary to elaborate the details about the company in this judgment, which are given in the counter affidavit.

17. It is further submitted that opposite party No.3 is acting in the interest of public and a Memorandum of Understanding (MOU) has been entered into with Govt. of Orissa for establishment of a power project of 1200 MW by using coal as fuel. Several measures involving huge financial investment and stake have been taken for establishment of the Thermal Power Plant in Angul district in the State of Orissa. It is duty bound to act in terms of the undertakings given to the Govt. of Orissa with regard to the establishment of its Thermal Power Plant. The conditions include supply of generated power to the State of Orissa in the proportion as stipulated under the MOU at concessional rate. The opposite party No.3 has to utilize the coal from assured captive coal mines /coal linkages by the Govt. of Orissa for End Use Projects, namely, the power plant alone, to be located in the State of Orissa and to provide employment to local people in terms of the allotment letter as well as MOU. Therefore, the allegation made in the PIL that allotment of coalmines in its favour will hamper the public at large is certainly a wrong understanding of the petitioner with the concept of public interest or injury. Rather it will sub-serve the public interest by generating large number of employment and also supply of power directly to the consumer in the rural parts of the Orissa State as well as in the town and urban areas and will certainly augment the per capita income of the people of the State of Orissa.

Therefore, the allotment of the coal block in its favour is in the public interest and it definitely subserves the interest of the common man of the State. Hence, the petition is wholly untenable in the eye of law and deserves to be rejected.

18. Mr. Mohanty, further referred to the allotment of the coal blocks in favour of the JVC on the basis of the recommendation of the State of Orissa and submits that the coal block allocation is subject to terms and conditions related to performance and the opposite party No.3 is bound by the terms and conditions of utilization of coal block allotted in its favour for the purpose of End Use. If the same is not used for that purpose and is sold in the public market it has to face the consequence of cancellation of the allotment as per the condition enumerated in the MOU. Therefore, the apprehension of the petitioner's society that the JPL will not utilize the material resources of coal block and sale it in the open market is also without any factual foundation and is devoid of any merit.

19. Justifying the stand taken by the learned Assistant Solicitor General with regard to non violation of any guideline for allocation of Coal Blocks in favour of JPL, it is contended that strictly in conformity with the guidelines the allocation has been made. Further, huge investments has already been made by the company for setting up of the power plant, several measures have already been taken and infrastructural facilities have been obtained from the State Government, for acquiring 1055 acres of land (both Government and private) investment to the tune of Rs. 72 crores have been made, water commitment for 40 cusecs of water has been obtained from the State Government and various other approvals, namely, clearance from the Ministry of Environment and Forest, Pollution control Board, Airport Authority etc. have already been obtained and financial closures for 1200 MW for first and second unit has been completed and it is almost ready for manufacturing / production activities by establishing the plant but on account of the status quo order passed by this Court, further steps as required to be taken are stalled.

20. Mr. Mohanty placing reliance upon the guidelines under Annexure-6 sought to justify the allocation of coal blocks in favour of JPL and its JVC and further submitted that the company has fulfilled all the criteria prescribed in the guidelines. In order to fortify his submission, he has relied upon the provisions of Sub-Section (3) to Section 3 of the Act, 1973 which reads thus :

> "(iii) a company engaged in :
> (1) the production of iron and steel,
> (2) generation of power
> (3) washing of coal obtained from a mine, or
> (4) such other end use as the Central Government may by notification specify

xxx xx xxx xxx"

Clause (iii) of Sub-section (3) came by way of amendment to the aforesaid provision of the Act,1973 with effect from 9.6.1993. By careful reading of the aforesaid provisions of the Act and the guidelines, Mr. Mohanty, learned Senior Counsel on behalf of the JPL submits that the exclusively power generation is not the criteria for allotment of coal blocks as contended by the learned counsel for the petitioner. He submits that the Screening Committee has verified the application of the applicants, examined each one of the application on merit, applying its mind after procuring reports from the respective State Governments and keeping in view the public interest of the State, the contract is awarded in favour of opposite party no.3 for a period of 30 years for generating power. Therefore, he submits that there is no public interest involved in this matter. Further, it is contended that after lapse of two years from the date of allocation, when the company has already invested huge amounts of money and obtained all necessary permission from different Authorities as required under the various Statutory enactments, at this stage petitioner has come up before this Court seeking to quash the allocation of coal block in favour of JPL contending that it is bad in law and as there is delay and latches on the part of the petitioner, the petition is devoid of any merit and deserves to be dismissed.

21. Mr. P.K.Mohapatra, learned counsel appearing for opposite party no.4 submits that he has no submission to make for the reason that opposite party no.4 is neither a proper or necessary party to this proceeding as no relief is sought against it. The same is placed on record.

22. With regard to the above rival contentions, the following questions are framed for consideration of this Court.

(i) Whether the JPL, in whose favour award of the contract of coal blocks was made for establishment of power generation plant, is a eligible person to submit the application pursuant to the notification under Annexure-3 ?

(ii) Whether the allotment of coal blocks in favour of opposite party no.3-JPL, for establishment of power plant for generation of power by using the coal blocks which are end uses, is vitiated on account of illegality, arbitrariness and unreasonableness as contended by the petitioner ?

(iii) Whether there is any public interest involved by allotting Mandakini Coal Block of Talcher Coalfields in favour of JPL and its consortium companies or it will affect either any public interest or injury or is in violation of Rule of Law ?

23. To answer the first question, it is necessary for us to refer the guidelines at Annexure-6 and the same are considered in the backdrop of the statutory provisions of Sub-Section (3) to Section 3 of the Act, 1973. On careful reading of the notification and guidelines, it appears that the applications were invited by opposite party No.1 for the purpose of allotment of coal blocks for generating power by establishing the plant. In our considered view, the contention urged by the petitioner's counsel that the JPL is ineligible as it did not have engaged itself in any power generation as on the date of filing the application, cannot be accepted by this Court for the reason that the guidelines are read with the statutory provisions referred to supra, did not provide anywhere that a person must have the experience in the field of power generation at the time of submission of its application. Such type of interpretation of the notification by the learned counsel for the petitioner cannot be accepted. If such an interpretation is given, the same would be contrary to the statutory provisions and the guidelines. As long as the statutory provision and the guidelines are intact, this Court cannot go beyond the same and fix a criteria that if a person not having existing power generation plant cannot submit the application as contended by the petitioner, which would run contrary to the statutory provisions and defeat the purpose for which the applications were invited by the opposite party no.1 for allotment of coal blocks in favour of a successful Tenderer for establishment of power generating plant. Accordingly the first question is answered against the petitioner.

24. To answer the second and third questions, it is necessary to mention that, elaborate procedure has been followed by the Union of India and other Ministries. A Screening Committee headed by the Secretary (Coal) as the Chairman, was constituted to process the applications received pursuant to the notification. It would be seen from the notes of preliminary submission made on behalf of the opposite party No.1 that the Committee has met on several occasions i.e. from 20.06.2007 to 23.06.2007 and on 30.07.2007. The applications were scrutinized, processed, and the reports from the concerned State Governments were received for the purpose of allotment of coal blocks and thereafter the same were considered. During the process of scrutinisation of the applications, Screening Committee thoroughly examined the same on the basis of the detailed data and notes submitted by each one of the applicants and the representations which were filed before the said Committee. The Screening Committee is the fact finding Committee to examine various relevant factors like, financial capacity, technical capacity and various other aspects as required, which have been examined for allotting the coal blocks in favour of the eligible applicants for the purpose of establishment of power generation plant, by using the coal blocks for that purpose. On the basis of relevant criteria and guidelines the Committee has

applied its mind, expressed its opinion and recommended for allotment of the coal blocks in favour of Opposite party No.3-JPL and its consortium companies. Unless cogent and positive materials are produced before this Court regarding the correctness of the decision of the fact finding Committee, it is not possible for this Court to interfere with the same. Therefore, the allegation made by the petitioner that the allotment of coal blocks awarded in favour of opposite party No.3 and its consortium companies is illegal, arbitrary and unreasonable which attracts Article 14 of the Constitution of India is not based on any valid grounds and evidence. We are of the view that petitioner's society has got very limited resources in placing the materials before this Court. In public interest litigation, it is not for this Court to go into the correctness of the allegations made against the granting authority in the absence of material evidence to substantiate the allegations. Opposite party No.1 is the authority which has allotted the coal blocks in favour of JPL and its consortium companies. Further, a Committee constituted by some responsible bureaucrat headed by the Secretary (coal) as its Chairman has carefully scrutinized the applications and being satisfied with the eligibility of opposite party No.3, has awarded the contract in its favour. The said fact is not at all denied by the petitioner as incorrect. In the absence of the same we cannot, on the basis of surmises, record any finding that the action of the Ministry of Coal in allotting the coal blocks in the favour of JPL is bad in law and JPL has influenced the Ministry in getting the allocation of coal blocks in its favour, and the same cannot be accepted by this Court.

25. The Court should be very cautious while deciding a matter relating to PIL, if there is any public interest affected or any injury or any violation of rule of law is made out, then only this Court has to exercise its Judicial Review Power.

26. In S.P. Gupta Vs. Union of India & Anr., AIR 1982 SC 149, a Seven Judge Bench of Hon'ble Supreme Court has clearly defined 'what PIL means and is' and held as follows :

> "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 Article 226 and in

> case of breach of any fundamental right of such person or determinate class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons ……... This Court will readily respond even to a letter addressed by such individual acting pro bono publico. It is true that there are rules made by this Court prescribing the procedure for moving this Court for relief under Article 32 and they require various formalities to be gone through by a person seeking to approach this Court. But it must not be forgotten that procedure is but a handmaiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of public-minded individual as a writ petition and act upon it .... But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activised at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court. We may also point out that as a matter of prudence and not as a rule of law, the court may confine this strategic exercise of jurisdiction to cases where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal-aid organisation which can take care of such cases."

In Janata Dal Vs. H.S. Chowdhary & Ors., AIR 1993 SC 892, the Hon'ble Supreme Court while deciding a PIL matter, referred to the decision in S.P.Gupta (supra) and held that the decision in Gupta's case is a golden master key which has provided access to the Courts for the poor and down trodden.

27. In Giani Devender Singh Sant Sepoy Sikh Vs. Union of Inida & Anr, AIR 1995 SC 1847, the Hon'ble Supreme Court held as under :

> "….If the High Court intends to pass an order on an application presented before it by treating it as a public interest litigation, the High Court must precisely indicate the allegations or the statements contained in such petition relating to public interest litigation and should indicate

how public interest was involved and only after ascertaining the correctness of the allegation, should give specific direction as may deem, just and proper in the facts of the case."

28. The Hon'ble Supreme Court in the case of R&M Trust Vs. Koramangala Residents Vigilance Group & Ors, AIR 2005 SC 894 held as under :

"……Courts should be very slow in entertaining petitions involving public interest: in very rare cases where the public at large stand to suffer…."

29. In M/s. Holicow Pictures Pvt. Ltd. Vs. Prem Chandra Mishra & Ors, AIR 2008 SC 913, the Hon'ble Supreme Court held as under :

"……Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta….."

30. In the instant case, as could be seen from the event that had taken place, only after the allotment of coal blocks is made in favour of JPL, particularly when, private and Government lands to the extent of 1055 acres have been acquired by the State Government and handed over in favour of the JPL is the statement of counter filed by the opposite parties. The aforesaid land which includes both Government and Private lands, were provided to the JPL for establishment of plant by using coal blocks for end uses. Further, this writ petition has been filed in the year 2010 but the offer of allotment was made in the year 2008. Thereafter, the MOU and the supplementary agreement were entered into by opposite party No.1 with JPL and its consortium companies. Apart from the said agreement, necessary permissions from the different departments like Pollution Control Board, Airport Authority and other necessary organizations had already been obtained for establishment of the plant. As stated by the learned Senior Counsel huge investment has already been made for the purpose of procuring the water, for obtaining geological reports from CMPDI and GSI, bank guarantees, approval of mining plans etc. for establishment of the plant. Further, as per the terms and conditions of the agreement, JPL and its consortium companies have entered into an agreement with the State Government to supply the power that would be generated for consumption of the consumers of the State at large. Therefore, this writ petition at the

instance of a public spirited person alleging that the public interest will suffer in the present case is not correct. Rather, in our considered view, if we interfere at this stage and quash the allotment by granting relief sought for by the petitioner, in that event, the public interest will suffer and injury will be caused to the public at large. Therefore, we are of the view that public interest is in favour of the allocation of coal blocks and not against it as alleged in the writ petition, for the reason that awarding of the contract in favour of JPL and its consortium companies for establishment of plant, referred to supra, by using the coal blocks for end uses is in the public interest, which will generate employment for thousands of unemployed youth of the State and will augment the State exchequer. Not only it will mitigate the unemployment problem of the State but also mitigate the power generation problem as per the MOU entered into by the JPL and its consortium companies with the State Government. The State Government under Section 11 of the Electricity Supply Act, 2002 can issue notification to the power generating companies to supply power to the Corporation which will supply the same to the consumers and in that process both the agricultural and industrial development would take place in the State and as a result of which large number of farmers and industrial workers will be benefited and the per capita income of the people of the State will increase and in that process the public interest is protected and safeguarded. In view of the aforesaid reasons, we have answered the question Nos. 2 and 3 in justification of the allocation of the coal blocks in favour of JPL and its consortium companies.

31. As we have answered all the points in justification of the award in allotting the coal blocks in favour of JPL and its consortium companies, the fact situation is not in favour of the petitioner's society, which has filed this public interest litigation for grant of the reliefs. Accordingly the writ petition is dismissed. Since we have dismissed the writ petition the status quo order granted by this Court on 25.2.2010 stands vacated.

Writ petition dismissed.

2010 ( I ) ILR-CUT-608

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

# GAYATRI DATTA NAYAK & ORS. -V- STATE & ORS, ORISSA PUBLIC SERVICE COMMISSION -V- ANANTA GOPAL BEHERA & ORS. , RAMESH CHANDRA DAKUA & ORS. -V- STATE OF ORISSA & ORS.*

**MARCH 23, 2010.**

**ORISSA PUBLIC SERVICE COMMISSION (CONDITION OF SERVICE) REGULATION 1952 – REGULATION 3.**

**O.P.S.C. consists of a Chairman and five members – Presently two members have been appointed by the Govt. and one is nominated to act as Chairman – Tribunal observed that the Commission is not complete to declare the result of Orissa Civil Service (Main) Examination-2006 and stayed the viva-voce test – Hence this writ petition.**

**The word "any" mentioned in Regulation-3 according to 6th Edition of Black's law Dictionary does not necessarily mean only one person but may have reference to more than one or to many – Held, order passed by the Tribunal that in the absence of more than one member business of O.P.S.C. can not be transacted is fallacious and erroneous – Interim order passed by the Tribunal is set aside and OPSC is directed to proceed with the interview.**

(Para 16,17 & 18)

For Petitioners – M/s.Jagannath Patnaik, Sr.Advocate B.Mohanty, T.K.Patnaik, A.Patnaik, B.S.Rayguru, R.P.Ray.

For Opp.Parties – Advocate General. Mr.Sanjit Mohanty, Sr.Advocate, Mr.B.K.Dash. Mr.N.C.Panigrahi Sr.Advocate S.R.Panigrahi, N.C.Nayak N.K.Tripathy,Mr.J.K.Rath, Sr.Advocate.

For Petitioners – Mr.R.K.Rath, Sr.Advocate, N.R.Rout, M.K.Biswa, P.Rath.

For Opp.Parties – Advocate General Mr.Sanjit Mohanty, Sr.Advocate Mr.B.K.Dash.

*W.P.(C) NOS.4635, 4826 & 4886 OF 2010. In the matter of an application under articles 226 & 227 of the Constitution of India.

***B.P. DAS,J.*** The aforesaid three writ applications have been filed challenging the interim order dated 26.2.2010 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A. No. 218 (C) of 2010 and a batch of Original Applications, directing the Orissa Public Service

Commission (OPSC) not to proceed with the viva voce test and the selection of candidates to be appointed in the post of Civil Service pursuant to Orissa Civil Service (Main) Examination, 2006.

2. W.P.(C) No. 4635 of 2010 and 4886 of 2010 have been filed by some of the candidates, who are yet to appear in the viva voce test after being successful in the O.C.S. (Main) Examination. W.P.(C) No. 4826 of 2010 has been filed by the OPSC. Opposite parties 3 to 16 in W.P.(C) No. 4886 of 2010 are the applicants before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack.

3. Since in all the three writ applications, the interim order of the Tribunal was under challenge, the same were heard together and are being disposed of by this common order.

The writ applications were listed for admission on 15.3.2010. Thereafter, the same were posted to 16.3.2010 for admission, on which date, at the stage of admission, the hearing was concluded.

4. The brief facts leading to the writ applications are as follows:-

Opposite parties 3 to 16 in W.P.(C) No. 4886 of 2010, which includes the private opposite parties in the other two writ applications are the applicants before the Orissa Administrate Tribunal, Cuttack Bench, Cuttack in a number of Original Applications. The said Original Applications have been filed challenging the action of the OPSC in declaring the results of the Orissa Civil Service (Main) Examination, 2006 in arbitrary and perfunctory manner, and thereby depriving some of the candidates including the applicants to be issued with call letters for appearing at the viva voce test. The relief sought for and the interim relief prayed for since identical in nature in all the original applications, such reliefs as have been made in one of the Original Applications, i.e. O.A. No. 218(C) of 2010, are quoted as hereunder:-

> "Relief sought for:-
>
> The Respondent No.2 be directed to relax the qualifying marks and to fix one qualifying mark for all the categories of candidates like previous years. The present applicants may be declared to have qualified so as to be considered on merit for the post pursuant to the Advertisement No.8 of 2006-07 under Annexure-1."
>
> Interim Relief, if prayed for:-
>
> The Respondent No.2 be directed not to hold the Personality Test, i.e. Viva Voce from 15.2.2010 and ultimately direct that no further action be taken pursuant to the advertisement No. 8/2007-07 till disposal of the original application."

5. while hearing the interim application of the applicants, the Tribunal by its order dated 26.2.2010 observed thus:-

"Considering the submissions made by the learned counsel for both the parties, we are of the considered view that since only two members have been appointed by the State Government so for as O.P.S.C. is concerned and out of them one Member has been nominated to act as Chairman, the O.P.S.C. is not complete in terms of the statute. The so-called rules, copy of which have been supplied by Mr. B.K. Das, learned counsel appearing for the O.P.S.C. in court today, also indicate that the proceeding of the Commission shall not be invalidated by reasons of any vacancy in the Office of the Chairman or any Member. That clearly indicates that all other Members, i.e. out of total five, minimum four should be there. It cannot be accepted that even in absence of more than one Member, all the business of the Commission can be conducted by a single Member, even if others have not been appointed till date. Rule 3 provides if there are Chairman and other Members and somebody is absent on a particular date, that will not be the reason to say that the quorum for the meeting is not complete. Even though, this is not a rule framed by the State Govt. as stated by Mr. B.K. Dash, since it has been formulated by the Chairman, O.P.S.C. and approved by the State Government, it cannot be accepted as a rule framed under Article 309 of the Constitution of India or in accordance with the statutory provisions.

In view of the above, at this stage, in our considered view, it will be just and proper to direct the O.P.S.C. not to proceed with the viva voce test which is being conducted pursuant to the advertisement as at Annexure-1 any further, till a final decision is taken in the matter. Accordingly, O.P.S.C. is directed not to proceed with the selection of candidates to be appointed pursuant to the advertisement No. 8 of 2006-2007 which was published in Nijukti Khabar dtd. 14.08.2006.

6. The fact, which is uncontroverted, is that the examination in question, i.e. Orissa Civil Service Examination, is of the year 2006 and this was the subject matter of various litigations before the Tribunal as well as before this Court. Ultimately, this Court directed for fresh examination and therefore, the examination was conducted and on the basis of the result of the Preliminary Examination the Main Examination was conducted and the viva voce test was to be conducted.

7. According to Mr. Sanjit Mohanty, learned senior counsel for the OPSC, the opposite parties, who were applicants before the Tribunal, are all unsuccessful candidates and since they were not called to the viva voce test, they approached the Tribunal for relaxation of the qualifying marks so that their papers can be evaluated and after evaluation of the papers, if they will be found qualified, they can be called to the viva voce test, he further

submits that a large number of candidates were called to the viva voce test and after the interim order was passed at the instance of the unsuccessful candidates, the futures of the successful candidates are at stake. He also submits that there is no cause of action for the applicants to file the Original Applications and the interim relief granted by the Tribunal is beyond the scope and ambit of the prayer made in the Original Applications as indicated above. There was also no prayer to declare that the constitution of the Commission was not complete, for which the interview should be declared null and void. This being so, the impugned interim order of stay should not have been passed.

8. Mr. Jagannath Patnaik, learned senior counsel for the petitioners in W.P.(C) No. 4635 of 2010, submits that there is no occasion for the Tribunal to come to a conclusion, as indicated in the foregoing paragraph. His further argument is that the Original Applications before the Tribunal filed by some of the unsuccessful candidates should not have been entertained by the Tribunal and that too the interim order staying to entire process of interview is totally illegal and has been passed by the Tribunal without application of mind. According to him, there is no occasion for framing Rule under Article 309 of the Constitution of India as interpreted by the Tribunal.

9. Mr. N.C. Panigrahi, learned senior counsel for the O.P. 5, in W.P.(C) No. 4635 of 2010, who has entered appearance through caveat, submits that the opposite parties are within their right to approach the Tribunal as their other answer papers have not been evaluated, for which the Tribunal is correct in passing the interim order pending disposal of the Original Applications because in the event the applicants before the Tribunal succeed, ultimately, they will not get any relief.

10. Mr. B. Routray, learned senior counsel appearing for the private opposite parties in W.P.(C) No. 4826 of 2010, submits that the writ application is not maintainable at the behest of the present petitioners as all of them were not parties before the Tribunal. Even though some of the petitioners were parties before the Tribunal, instead of approaching the Tribunal for variation or vacation of the interim order, they have directly rushed to this Court, for which the writ applications should be dismissed. He further draws our attention to the fact that there are defects in the question papers as in one set of question papers, the candidates were directed to write essay in 100 words and in another set of question papers, the candidates were directed to write essay in 1000 words.

11. We have also heard Mr. R.K. Rath, learned senior counsel for the petitioners in W.P.(C) No. 4886 of 2010, Mr. J.K. Rath and Mr. A.K. Mishra, learned senior counsel for the interveners.

12. The undisputed fact is that in the midst of the viva voce test, all the Original Applications were filed before the Tribunal.

13. With regard to the maintainability of the writ application filed by the petitioners, who were not parties before the Tribunal, law is well settled that even if the petitioners were not parties to the proceeding before the court below, if they are actually aggrieved by the order of the court below, they can very well approach the Court under Article 226 of the Constitution of India. However, it is the present private opposite parties, who are the applicants before the Tribunal, have not impleaded the present petitioners as parties before the Tribunal. So it can be said that the applicants before the Tribunal have not come to Court in clean hands by not impleading the candidates in the Original Applications, who have ultimately been aggrieved by the order of the Tribunal.

So the submission to the private opposite parties that the writ applications are not maintainable is not sustainable. Even otherwise, the O.P.S.C's writ petition is also being heard analogously.

14. Now let us go to the question whether the Tribunal is justified in passing the order as indicated above. In the Original Application, annexed as Annexure-2 to W.P.(C) 4635 of 2010, there is no prayer in regard to constitution of the Commission. Nowhere in the body of the Original Application (Annexure-2) also, the constitution of the Commission is under challenge. As it appears, the question of constitution of the Commission is developed by the learned counsel for the applicants before the Tribunal, even though there is no pleading to that effect. However, the Tribunal interpreted Regulatiion-3 of the Orissa Public Service Commission (Conditions of Service) Regulations, 1952 at the conclusive paragraph, which has been quoted above. Further, the observation of the Tribunal that the rules and regulations of the proceeding of the OPSC, as evolved for the purpose of regulating the proceedings, are not the regulations under Article 309 of the Constitution of India. So far as grant of interim order is concerned, we are of the view that the Tribunal while considering the interim application should have kept in mind the time tested principles of prima-facie case, balance of convenience and irreparable loss.

15. Here the applicants before the Tribunal were the unsuccessful candidates, who did not qualify for any reason whatsoever. If their prayer is to relax the qualifying marks and to declare them to be qualified, the far-fetching consequence of that relief should be dealt with while deciding the Original Application and what the applicants would get if they succeed is that their other answer papers are to be evaluated and if they get the pass mark in the papers evaluated, they will be called to the viva voce test. For a very few applicants, who have not succeeded in the examination and with a prayer of this nature, they now succeeded in getting an interim order, which is not only irregular, but the Tribunal while passing the order has not taken into consideration the fate of a large number of candidates whose viva voce

test has been stalled at the midst. The consideration of the Tribunal should have been whether by non-grant of the interim order the ends of justice would be defeated. Here there is no such case. In our considered opinion, the ends of justice would be defeated if the interim order is allowed to continue.

16. Now, with this we would have ended, but from the interim order, we find that the Tribunal has touched the merits of the case while passing the interim order and fallen into a grave error in interpreting the provision of Regulation-3. So we think it proper to give a clear interpretation of Regulation-3, made under the Orissa Public Service Commission (Condition of Service) Regulations, 1952. As we find, at the time of passing the order, only two members were there in the O.P.S.C. and the Tribunal observed that "it cannot be accepted that even in absence of more than one Member, all the business of the Commission can be conducted by a single Member, even if others have not been appointed till date".

Regulation-3 of the 1952 Regulations provides as follows:-

> "3. The Commission shall consist of a Chairman and five other Members:
>
> Provided that the proceedings of the Commission shall not be invalidated by any vacancy in the office of a Member."

The word 'any' mentioned in Regulation-3, according to 6th Edition of Black's Law Dictionary, can be read as:

> "Any" does not necessarily mean only one person, but may have reference to more than one or to many. Doherty v. King Tex, Civ. App., 183 S.W. 2d 1004, 1007."

In this respect, we may refer to Section-13 (2) of the Orissa General Clauses Act, 1937

> "13. **Gender and number-**
>
> "(2) words in the singular shall include the plural and vice versa"

17. This being the position, the finding of the Tribunal in the impugned order that the O.P.S.C. is not complete and in the absence of more than one Member, business cannot be transacted, is fallacious and erroneous. That apart, learned counsel for the O.P.S.C. submitted that the Chairman of the O.P.S.C. has already been appointed and joined. However, we are not inclined to deal with the matter any further as it may touch the merit of the Original Applications, which are pending before the Tribunal.

18. In view of the above, the interim order of the Tribunal dated 26.2.2010 passed in O.A. No. 218 (C) of 2010 and batch of Original Applications is set aside. The O.P.S.C. is directed to proceed with the interview by giving fresh notice to the rest of the successful candidates, who have not been interviewed.

All the writ applications are accordingly disposed of.

**2010 ( I ) ILR-CUT- 614**

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

## JALANDHAR PRADHAN -V- STATE OF ORISSA & ANR.*

**MARCH 15,2010.**

**ORISSA CIVIL SERVICE (CLASSIFICATION ,CONTROL AND APPEAL ) RULES 1962 ,RULE –15**

**Disciplinary Proceeding – De novo enquiry – Not provided under the statute – When permissible ?**

**Disciplinary Authority can direct for a de novo inquiry while disagreeing with the findings of the Inquiring Officer if the inquiry report suffers from material irregularity and when important evidence, either to be relied upon by the department or by the delinquent official, is shut out, as the same would not result in any advancement of justice but on the other hand result in a miscarriage there of –Held, de novo inquiry can not be made only if the report does not appeal to the Disciplinary Authority, but the Disciplinary Authority while giving direction for a de novo inquiry should satisfy itself that there is fundamental procedural error.** (Para.7)

**Case laws Referred to:-**

1.107 (2009) CLT 438 : (Gokha Behera -V- Principal Secretary, Law Department Bhubaneswar & 3 Ors.).

2.AIR 1999 S.C. 449 : (Union of India & Ors.-V- P.Thayagarajan).

For Petitioner – M/s. K.P.Mishra, S.Mohapatra, T.P.Tripathy.

For Opp.Parties – Mr.M.S.Sahoo, Addl. Standing Counsel.

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*W.P.(C) NO.8912 OF 2007. In the matter of an application under Article 227 of the Constitution of India.

***B. P. DAS, J.*** The petitioner in this writ application has challenged the order dated 30.4.2007 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 728 of 2004 under Annexure-8, as being contrary to the statutory provisions of law.

2. The brief fact narrated in the writ application tends to reveal as thus:-

The petitioner, while working as Superintendent of Excise, Cuttack, for a period of eight months, a liquor tragedy occurred in Cuttack city in the year 1992. Thereafter a disciplinary proceeding was initiated against the petitioner under Rule-15 of the Orissa Civil Service (Classification, Control and Appeal) Rules, 1962 ("CCA Rules" in short) on the allegation of the following charges:

(1) Gross negligence in duty,
(2) Lack of supervision,
(3) Gross misconduct,

(4) Criminal conspiracy and showing undue favour to a private person,
(5) Violation of statutory Act and Rules and
(6) Connivance and abatement in committing offences under the law.

The Commissioner for Departmental Inquiries-cum-Addl. Secretary to Govt. in General Administration Department, (hereinafter "C.D.I.") was appointed as Inquiring Officer to inquire into the aforesaid charges. After inquiry, the C.D.I. submitted his inquiry report dated 18.9.2002 recommending to exonerate the petitioner from the charges on the ground that during the period of suspension he had been superannuated from service. The C.D.I. further found that the petitioner was not negligent in his duty.

The Disciplinary Authority, however, by his order dated 9.6.2004, while disagreeing with the findings of the C.D.I. directed for a de novo inquiry. The relevant portion of the order passed by the Disciplinary Authority is quoted herein below:-

> "Whereas, after going through the charges, and findings of the Inquiring Officer, the Disciplinary Authority found that in all the proceedings drawn up against the Supdt. of Excise, Deputy Supdt. of Excise and other filed staff who were posted at Cuttack during the liquor tragedy 1992, the Commissioner for Departmental Inquiries was appointed as Inquiring Officer and recommended punishment in respect of all officers and staff, it has been recommended to exonerate the Delinquent Officer Sri Jaladhar Pradhan, who was the Supdt. of Excise, Cuttack. The Inquiring Officer has recommended to fully exonerate the Delinquent Officer from the charges. It has not been spelt out how the charges of negligence in duty, lack of supervision and connivance on the part of the D.O. has not been established;
>
> And whereas, the Disciplinary Authority did not agree with the recommendation of the Inquiring Officer and decided to remand the case to the Inquiring Officer for fresh enquiry;
>
> Now, therefore, the proceeding No. 733/Ex Dt.16.3.96 is remanded to the Commissioner for Departmental Inquiries to conduct fresh enquiry and the Deputy Commissioner of Excise (CD) Cuttack will continue as Marshalling Officer as before to adduce the evidence and present the case in support of the charges."

The petitioner challenged the aforesaid order of the Disciplinary Authority before the State Administrative Tribunal in O.A. No. 728 of 2004. The Tribunal by its order dated 30.4.2007 (Annexure-8) while

dismissing the Original Application, at paragraph-6 of the said order held thus:-

> "A reading of the enquiry report indeed can lead to a doubt as to how the CDI reached the conclusion without adequate evidence. As a matter of fact the CDI appears to have gone beyond the point on which the enquiry was being made even when no evidence was available. So I do not find anything wrong in the Annexure-4 orders by which a re-enquiry was ordered. This order has been passed "by order of Governor" by the Principal Secretary to Government and be allowed to run its course."

This writ application has been filed against the aforesaid order of the Tribunal.

3. Learned counsel for the petitioner submits that there is no provision under the Statute for a de novo inquiry. The direction for de novo inquiry is erroneous and beyond the scope and purview of the CCA Rules. In this regard, learned counsel for the petitioner draws our attention to a decision of this Court in the case of ***Gokha Behera v. Principal Secretary, Law Department Bhubaneswar & 3 Ors***, 107 (2009) CLT 438 in paragraph-13 of which it has been observed that the law can be summarized that generally de novo or fresh inquiry is permissible only if the Statute so provides. But in case a departmental proceeding suffers from some fundamental procedural error, i.e. evidence has not been properly recorded or material witnesses were not available or they were not in a position to depose or the delinquent or the department had not been permitted to cross-examine any of the witnesses, in such a situation de novo inquiry is permissible.

4. Learned counsel for the State, on the other hand, relies upon a judgment of the apex Court in the case of ***Union of India and others v. P. Thayagarajan***, AIR 1999 Supreme Court, 449, wherein it was held that under Rule 27 (c) (6) of the Central Reserve Police Force Act a fresh or de novo inquiry is permissible in case when important evidence, either to be relied upon by the department or by the delinquent official, is shut out, as the same would not result in any advancement of justice but on the other hand result in a miscarriage thereof.

5. A bare perusal of the aforesaid decision of the apex Court as well as of this Court, the irresistible conclusion is that even if there is no provision under the Statute, i.e. the CCA Rules, the Disciplinary Authority can direct for a de novo inquiry while disagreeing with the findings of the Inquiring Officer, but the same can be done under the circumstances indicated in the

case of Thayagarajan (supra). In the case of Gokha Behera (supra), this Court while deciding the case, referred to several decisions of the apex Court starting from AIR 1971 SC 1447 to AIR 2003 SC 4023.

6. Learned counsel for the State drawing our attention to the counter affidavit filed on behalf of the State through the Under Secretary to Government, Excise Department, Bhubaneswar submits that for deciding the issue, paragraph-4 is relevant, which is extracted herein below:-

> "The averments made in para-3(c) is not correct. It is humbly submitted that the petitioner was working as Superintendent of Excise, Cuttack at the time of Cuttack hooch tragedy. After the unprecedented hooch tragedy which took place on 07.05.1992 in Cuttack town, the petitioner along with other Excise officers were placed under suspension for their negligence in duty, lack of supervision, gross misconduct etc. followed by drawal of disciplinary proceedings as per administrative enquiry report. As per recommendation in the Inquiry Report of Hon'ble Justice B.K. Behera, Commission of Inquiry, fresh disciplinary proceeding was drawn up against the petitioner vide erstwhile Revenue and Excise Department order No.733/Ex., dt.16.3.1996 and the proceeding drawn up earlier vide D.P. No.2318, dt.14.8.1992 was dropped vide order No.999/Ex., dt. 18.4.1998"

The State has also relied upon the letter dated 15.3.1994 issued by the Special Secretary to Government in General Administration Department on the subject "Clarification in respect of de novo enquiry or fresh enquiry under Orissa Civil Services (C.C. & A) Rules, 1962", the relevant portion of which is extracted herein below:-

> "Even if there is no specific provision in the Rules, the Disciplinary Authority can remit/remand the proceedings to the Enquiry Officer if he finds that the enquiry report suffers from some material irregularity. In all such cases, the proceedings have to be remitted back to the very same Enquiry Officer who conducted the enquiry with direction to record further evidence and given findings on each charge. The only exception is that another Enquiry Officer can be appointed where the previous Enquiry Officer is dead or has retired from Government service or is not available.

7. So, when there is material irregularity, the proceeding can be remitted back to the same Inquiring Officer with a direction to record further evidence and give findings on each charge. There is nothing in the counter affidavit to indicate that the report of the Inquiring Officer in any manner suffers from fundamental procedural error. It is well settled that de novo

inquiry cannot be made only if the report does not appeal to the Disciplinary Authority. The Disciplinary Authority while giving direction for a de novo inquiry should satisfy itself that there is fundamental procedural error.

8. In our considered opinion, the aforesaid aspect has not been taken into consideration by the Tribunal while dismissing the Original Application filed by the petitioner challenging the order of the Disciplinary Authority and as such, we set aside the order of the Tribunal dated 30.4.2007 passed in O.A. No. 728 of 2004 vide Anneuxre-8. We also set aside the order of the Disciplinary Authority and remit the matter back to the Disciplinary Authority to re-consider the inquiry report of the C.D.I. and pass appropriate order in terms of the judgment as aforesaid, so far as it relates to the present petitioner. Since the petitioner has already retired from service in 1999, the entire exercise shall be completed by the Disciplinary Authority as directed above, by the end of June, 2010.

The writ petition is accordingly allowed.

writ petition allowed.

2010 ( I ) ILR-CUT-619

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

## DR.ANANGA KUMAR MOHAPATRA -V- STATE OF ORISSA & ANR.*

**FEBRUARY 26,2010.**

**CONSTITUTION OF INDIA, 1950 – ART.311.**

**Disciplinary proceeding – While the petitioner was working as H.O.D. department of commerce B.J.B. Autonomous College, a student of +3 Commerce committed suicide – Her suicide note reveals that two lecturers are indulging in private tuitions and harassing students who did not take their coaching.**

**Petitioner being the H.O.D. was aware of the circular of the Govt. prohibiting private tuitions – Inquiry Authority found the petitioner and two lecturers guilty and imposed punishment –Tribunal did not interfere as the punishment was minor in nature.**

**The charge of deliberate under valuation has not been proved against the petitioner – The finding arrived at by the C.D.I not related to charge No.1 and 3 framed against the petitioner – The decision of the Inquiring Authority is totally perverse, absurd and in defiance of logic– Held, it is a fit case where the Disciplinary proceeding against the petitioner is liable to be quashed and the period of suspension of the petitioner be treated as on duty.**

(Para 9,10 )

**Case laws Referred to:-**

1.(1995) (6) SCC 749 : (B.C.Chaturvedi -V-Union of India & Ors.).
2.1997 (7) SCC 463 : (Union of India & Anr.-V-G.Ganayutham).
3.AIR 2005(1) sc.584 : (Damoh Panna Sagar Rural Regional Bank & Anr.-V-Munna Lal Jain.).

For Petitioner – Dr.A.K.Rath & Shri A.K.panda.
For Opp.parties – Addl.Standing Counsel (for O.P.1)
Shri B.K.Dash (for O.P.2).

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*W.P.(C) NO.13338 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***B. P. DAS, J.*** The petitioner in this writ application challenges the order dated 20.02.2009 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 115 of 2009 under Annexure-14 in which the Tribunal rejected the prayer of the petitioner to interfere with the punishments awarded in a disciplinary proceeding under Annexure-12, being minor in nature.

2. Annexure-12, the order dated 1.11.2008 passed by the State Government reveals that the petitioner has been awarded with

the following punishments:

1. Censure.
2. To withhold one annual increment without cumulative effect.
3. To treat the period of suspension as leave due and admissible.

3. The facts of the case as delineated in the writ application tend to reveal that the petitioner while working as a Reader in Commerce in B.J.B. Autonomous College became the Head of the Department (H.O.D.) of Commerce and during such tenure of the petitioner as H.O.D., on 18.11.2005 one Reecha Mishra, a student of +3 Commerce of the said college committed suicide. In her suicidal note, she had put blame on two lecturers of the college, namely, Dr. Durga Prasanna Patnaik, Reader in Commerce, and Dr. Sahadev Swain, Lecturer in Commerce, accusing them of indulging in private tuitions and harassing the students, who did not take their coaching. Basing on such allegation, the State Government directed the Director, Higher Education to inquire into the allegation made in the suicidal note. Accordingly, the Director of Higher Education conducted the enquiry and submitted his report to the State Government vide Annexure-3. Pursuant to such inquiry report, the State Government by order dated 4.1.2006 (Annexure-4) initiated a common disciplinary proceeding against the petitioner and the two other lecturers, namely Dr. Durga Prasanna Patnaik, Reader in Commerce, and Dr. Sahadev Swain, Lecturer in Commerce. Charge Nos.1 and 3 which relate to the petitioner are as follows:-

**Charge No.1**

"That Dr. Ananga Kumar Mohapatra, Dr. Durga Prasad Patnaik and Dr. Sahadev Swain were well aware about the ban imposed by the Govt. on private tuition from time to time. But Dr. Durga Pr. Patnaik and Dr. Sahadev Swain indulged themselves in private tuition without prior approval of the appropriate authority. This fact has not been reported by Dr. Ananga Kr. Mohapatra, HOD Commerce. As such he has not performed his duties properly as HOD."

Thus Dr. Ananga Kr. Mohapatra, Dr. Durga Pr. Patnaik and Dr. Sahadev Swain for violating Govt. instruction No.21470/HE dated 25.4.97, No.32762/HE dated 21.6.97 and No.40425/HE, dated 8.8.03 and rule 3 & 4 of O.G.S.C. Rules, 1959 as they are jointly responsible."

**Charge No.3**

"That Dr. Ananga Kr. Mohaptra, HOD Commerce, Dr. Durga Pr. Patnaik, Reader in Commerce and Dr. Sahadev Swain, Lecturer

(SS) in Commerce have not properly valuated the answer scripts of Reecha Mishra for which Reecha Mishra was placed in 2nd Division. After revaluation of answer scripts it reveals that she has secured 384 marks instead of 332. Hence due to deliberate under valuation of answer scripts Reecha Mishra committed suicide out of mental agony.

Thus the above three O.E.S. officers have shown negligence and misconduct in their duties in violation of Rule 3 of O.G.S.C. Rules, 1959."

The Commissioner for Departmental Inquiries & Ex-Officio, Special Secretary to Govt. in G.A. Department, who conducted the inquiry in the Departmental Proceeding drawn up against the petitioner and others, submitted the inquiry report on 28.8.2007 vide Anenxure-8.

4. So far as Charge No.1 is concerned, the finding of the Commissioner for Department Inquiries (in short 'C.D.I.') is that since the petitioner was the H.O.D., he was well aware of the circular issued by the Government prohibiting private tuitions. The said circular indicates the role of the Principal along with the H.O.D. in collecting the information and supplying the same to the Govt. The spirit of the Circular is that the H.O.D. is to collect information from various sources to find out if any of his juniors are indulging in private tuition and to supply the same to the Principal. This does not mean that the H.O.D. will wait till someone files a complaint in this regard and then only he has to act. The information must be forthcoming, spontaneously and automatically. Thereafter the C.D.I. observed as follows:-

"The Principal is not an individual but an institution who depends on others to discharge his duties in an effective manner. Here of course, the role of the Principal is not exemplary and his failure to curb the private tuition tells upon his efficiency and his leadership quality. The attitude of D.O. No.1 is clearly negative and non-cooperative. He should have kept close watch over the activities of his juniors and instead of waiting for the complaints to be filed before him, he should have taken steps to collect information confidentially from various sources.

From the above discussion, it is clear that the charge of holding of private tuition by D.O. No.2 & 3 are established. But leaking of question papers before examination is not established. The lack of supervision by D.O. No.1 for his failure to report about the involvement of D.O. No.2 and 3 in private tuition is established."

5. According to learned counsel for the petitioner, there is nothing in the circular to show the manner in which the information will come spontaneously and automatically and the method of collection of information.

We also fail to understand how information regarding the junior colleagues indulging in private tuition will flow spontaneously and automatically and how the H.O.D. shall also collect the information and report it to the Principal and thereafter the Principal to the Government, in absence of any procedure formulated therefor. Rightly, as stated by Dr. Rath, there is no power or authority of the H.O.D. to control other faculty members and no procedure to get information regarding their indulging in private tuition.

In our opinion, the finding of the C.D.I. to the effect that lack of supervision by the petitioner, i.e. D.O. No.1 to report about the involvement of D.O. Nos. 2 and 3 in private tuition is established, is based upon no materials.

6. As to Charge No.3 that the petitioner and other two lecturers, D.O. Nos. 2 and 3 had not properly evaluated the answer script of late Reecha Mishra, for which she was placed in 2nd Division and on revaluation of answer scripts, it was found that the marks awarded to her were increased from 332 to 384, the finding of the C.D.I. is as follows:-

> "…….From the above discussion, it is clear that the charge of deliberate under-valuation is not established against D.O. No.2 and 3. But the marks awarded by D.O. No.1 can be termed as erratic. So the charge is established against the D.O.1"

It is well known that the evaluation of answer scripts of the examinees is done on the basis of the subjective satisfaction of the examiners and, therefore, there is every likelihood of variation in the awarding of marks from examiner to examiner. Learned counsel for the petitioner further draws our attention to the inquiry report, in which the procedure for evaluation has been exhaustively explained by indicating that the answer papers evaluated by the petitioner were in coded form and there was no chance of knowing the answer paper of any particular examinee. On perusal of the report of inquiry as well as the findings arrived at, we find that while on one hand the C.D.I. found that the charge of under valuation was not established against D.O. Nos. 2 and 3, on the other hand, he found that the marks awarded by the petitioner (D.O. No.1) as erratic. Charge No.3 would show that the petitioner and the two other Lecturers had not properly evaluated the answer papers of Late Reecha Mishra and hence, due to deliberate under-valuation of answer papers, Reecha Mishra committed suicide. The charge of deliberate under-valuation has not been proved against the petitioner. It is not known basing upon which material the C.D.I. found that the charge was established against the petitioner as the awarding of marks can be termed as erratic, thereby Charge No.3 is proved. No charge has been framed against the petitioner for alleged erratic marking.

7. In paragraph-20 of the writ petition, it is contended by the petitioner that the answer sheets of Reecha Mishra were evaluated by seven lecturers of different colleges. The papers which were originally evaluated by two other lecturers were also revaluated and on such revaluation, there were considerable enhancement of marks. But for the reason best known to the authorities, those two lecturers were not even charge-sheeted nor any proceeding was initiated against them nor any action was taken against them for erratic marking.

8. We are well aware of the position of law and the scope of interference by this Court with the punishment awarded in a Departmental Proceeding.

In this regard, we may refer to a decision of the apex Court in ***B.C. Chaturvedi vrs. Union of India & others (1995) (6) SCC 749***, wherein it was observed as follows:-

> "A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to re-consider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

In ***Union of India and another v. G. Ganayutham, 1997 (7) SCC 463***, the apex Court held as thus.

> "The current position of proportionality in administrative law in England and India can be summarized as follows:
>
> (1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision maker could, on the material before him and within the framework of the law, have arrived at. The court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bona fide. The

court would also consider whether the decision was absurd or perverse. The court would not, however, go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the court substitute its decision to that of the administrator. This is the Wednesbury (1948 1 KB 223) test."

xxx xxx xxx

Finally, we come to the present case. It is not contended before us that any fundamental freedom is affected. We need not, therefore, go into the question of "proportionality". There is no contention that the punishment imposed is illegal or vitiated by procedural impropriety. As to "irrationality" there is no finding by the Tribunal that the decision is one which no sensible person who weighed the pros and cons could have arrived at nor is there a finding, based on material, that the punishment is in "outrageous" defiance of logic. Neither Wednesbury nor CCSU tests are satisfied. We have still to explain "Ranjit Thakur (1987) (4) SCC 611)."

In the case of ***Damoh Panna Sagar Rural Regional Bank and another. V. Munna Lal Jain,*** AIR 2005 (1) S.C. 584, the apex Court observed as hereunder:-

"Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in the Wednesbury's case the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision to that of the administrator. The scope of judicial review is limited to the deficiency in decision-making process and not decision. To put differently unless the punishment imposed by the Disciplinary Authority or the Appellate Authority shocks the conscience of the Court/Tribunal, there is no scope for interference."

9. Here in the case at hand, if we take the report of the C.D.I. in its entirety, without adding or subtracting anything to it vis-à-vis the charges framed, we find that the C.D.I. has arrived at a finding not related to Charge Nos. 1 and 3 framed against the petitioner. The decision of the Inquiring Authority is totally perverse, absurd and in defiance of logic. The C.D.I. has arrived at a finding which no sensible decision maker would arrive at. The C.D.I. has not considered the relevant materials and swayed away by irrelevant considerations and has tried to impose a finding for which charges were not framed and it was not required to enquire. The findings recorded by the

C.D.I. like “the marks awarded by D.O. No.1 can be termed as erratic” / “lack of supervision by the D.O. No.1” are not the charges, the C.D.I. was directed to inquire. The findings arrived at by the C.D.I. are beyond the scope of reference and beyond the scope of charges framed and therefore, it is a fit case where the prayer of the petitioner is to be allowed.

10. In view of the above, we set aside the order dated 20.2.2009 passed by the Orissa Administrative Tribunal in O.A. No. 115 of 2009 under Annexure-14, the order imposing punishment dated 1.11.2008 passed by O.P.1 under Annexure-12 and the order dated 14.8.2008 passed by the Special Secretary, Orissa Public Service Commission under Annexure-13, so far as it relates to the petitioner. The period of suspension of the petitioner be treated as on duty.

The writ application is accordingly allowed. No cost.

Writ petition allowed.

2010 ( I ) ILR-CUT-626

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

## BISHIKESHAN BAGH & ANR.-V- STATE OF ORISSA.*

**NOVEMBER 10, 2009.**

**CRIMINAL TRIAL – Murder Case – No eye witness to the occurrence – Prosecution not only failed to prove that the dead body is that of the deceased but also failed to bring any material on record to connect the appellants with the Commission of the alleged offences – Held, the impugned judgment convicting the appellants can not sustain.** (Para 5)

For Appellants – M/s. N.C.Pati, A.K.Mohapatra, S.Mishra, S.Tripathy, N.Singh & A.K.Panda.

For Respondent – Additional Government Advocate.

*CRIMINAL APPEAL NO.17 OF 2001. From the judgment and order dated 19.12.2000 passed by Md.Abdul Majid, Additional Sessions Judge, Sonepur in S.C. No.7/16 of 1999.

***L.MOHAPATRA, J.*** This appeal is directed against the judgment and order passed by the learned Additional Sessions Judge, Sonepur in Sessions Case No.7/16 of 1999 convicting both the appellants for commission of offence under Section 302/201/34 of the Indian Penal Code (in short 'I.P.C.') and sentencing each one of them to undergo imprisonment for life for commission of offence under Section 302 of the I.P.C., three years imprisonment for conviction under Section 201 of the I.P.C. and fine of Rs.500/- each, in default, to further undergo R.I. for six months each. However, both the sentences were directed to run concurrently.

2. The case of the prosecution as revealed from the F.I.R. is that on 20.3.1998 at about 10 A.M. the deceased had left for Haradakhol High School where he was working as Headmaster. He had kept his cycle in a shop two kilometers away from Tarava at a place called Bairasar Chhak. When the deceased did not return home on that day, his family members got worried. On the next day, they went in search of the deceased but did not find him. Accordingly, a missing report was submitted not only at Bolangir but also at Tarava and Sonepur. In spite of search made by police, the whereabouts of the deceased could not be known. On 2.4.1998 P.W.1, the wife of the deceased, received an anonymous letter wherein it was mentioned that the deceased had been murdered by both the appellants and one Debarchan Chaulia. It was also written in the said letter that both the appellants had taken the deceased in a scooter to Gurupalli via-Sonepur-Burda Road and killed him. On the basis of the said letter, again search was conducted and on 4.4.1998 P.W.24, the A.S.I. of Tarava Police Station,

seized five numbers of small and big stones stained with blood, some sand mixed with oil and one open match box. Apart from the above, two torn pieces of coffee colour pant which were burnt and three pieces of burnt bones, one plastic jerrican with "Samantaray" written in red on it were seized. On 5.4.1998 some further seizures were made. P.W. 26, who was then C.I. of Police, Sonepur took up investigation and on 8.4.1998 he seized one sky cement colour full shirt with pocket stained with blood, one deep blue colour full pant and Bajaj Super Scooter from the house of the appellant Brundaban Sahu. On the very same day he also seized one deep blue colour full pant along with one blue cement colour full shirt stained with blood from the house of other appellant Bisikesan Bag. On the basis of these materials collected in course of investigation, charge-sheet was submitted for commission of offence under Sections 302/201/34 of the I.P.C. against both the appellants.

3. Prosecution in order to prove the charges, examined as many as 26 witnesses and only one witness examined on behalf of the appellants. The trial court on the basis of the circumstantial evidence available from the evidence of the witnesses found both the appellants guilty of the charges and convicted them thereunder.

4. Shri N.C. Pati, the learned counsel appearing for the appellants assailed the impugned judgment on the ground that there is no material whatsoever to convict the appellants. To substantiate his submission, the learned counsel drew attention of the Court to the evidence of the witnesses examined in course of trial. The learned counsel Sri Pati appearing for the appellants submitted that there is no evidence to show that the deceased was last seen with the appellants or the appellants had any reason to commit murder of the deceased. Even the dead body of the deceased had not been identified and only on the basis of an anonymous letter written by someone, the charge-sheet was submitted and the trial court also in absence of any evidence found the appellants guilty of the charges only on suspicion.

Learned counsel for the State on the other hand, relied upon the evidence of P.Ws.1, 3, 4 and 13 to support the impugned judgment.

5. Undisputedly the case of the prosecution is based on circumstantial evidence. Law is well settled that in a case of such nature, the circumstances leading to the guilt of the accused should be of such nature that it completes a chain leaving no room to entertain doubt with regard to involvement of the accused in commission of offence. In the light of the said settled law, we proceed to examine the evidence adduced before the trial court by the prosecution.

P.W.1 is the wife of the deceased. She in her deposition has stated that on 20.3.1998 on a Friday the deceased after taking lunch at 10 A.M. left for the School where he was working as a Headmaster. He kept his cycle at Bairasar and went to Hardakhol by a bus. Though he was expected to return at 12 noon, he did not come till evening. Thereafter, she sent information to P.W.3, a teacher working in the said School to find out the whereabouts of the deceased. P.W.3 informed her that he had not gone to School on that day since he was on invigilation duty in a College. Next morning P.W.1 sent information to her father at Bolangir. They tried to find out the whereabouts of the deceased till 2.4.1998, when she received an anonymous letter wherein it was written that the deceased was killed by both the appellants and one Debarchan Chaulia. It was also stated in the letter that both the appellants had taken the deceased in a Scooter to Gurupalli via Sonepur-Burda Road where they killed him. The said letter was produced in Bolangir Police Station and further search was conducted. Thereafter as it appears from the evidence of the Police officers examined in course of the trial, some seizures were made from the spot including three pieces of human bone. The said human bones seized from the spot were sent to P.W.15 for examination and he could only opine that the said bones are of a male human being.

P.W.2 is the brother of the deceased and he has only stated in his deposition that he lodged a report at Tarava Police Station regarding missing of his brother but the same was not accepted on the ground of jurisdiction and thereafter the father of P.W.1 reported at Bolangir Police Station regarding missing of the deceased. He has also stated about receipt of letter by P.W.1. Apart from the above, there is nothing more in the evidence of P.W.2. P.Ws.3, 4 and 5 are teachers working in the said school whose evidence do not help the prosecution in any way. P.Ws.6 to 12, P.Ws.14, 18 and 19 turned hostile and did not support the prosecution case. P.W.13 is the father of the deceased, who has only stated that he suspected the appellants to have killed the deceased. P.W.15, the Doctor, who examined the bones concluded that the bones are of a male human being. P.W.16 accompanied the police in search of the dead body and P.W.17 is the brother-in-law of the deceased whose evidence also does not help the prosecution in any way. P.W.20 is the Judicial Magistrate, who recorded the statements of some witnesses under Section 164 Cr.P.C. and rest of the witnesses, i.e., P.Ws. 21 to 26 are the police officers, who participated in the investigation. On analysis of the entire evidence as stated above, we find that an anonymous letter was received by P.W.1 implicating both the appellants in commission of the alleged offences. The other evidence on which much reliance has been placed by the learned counsel for the State as well as by the trial court is enmity between the deceased and the

appellants. P.W.1 in her deposition has stated that a post of Science teacher was lying vacant in the School where the deceased was working as Headmaster. The appellant Brundaban Sahu was interested for posting one of his persons as a Science teacher in the School. The deceased with the consent of the members of the Management of the School appointed one Ganesh Meher against the said post. Such conduct of the deceased enraged the appellant Brundaban and he along with others killed the deceased in order to take revenge. She has further stated that the deceased as Headmaster of the School had also warned the other appellant Bisikesan for his misbehaviour towards girl students. Even if such evidence of P.W.1 is accepted, it only creates a suspicion regarding involvement of the appellants in commission of the alleged offences. Law is well settled that suspicion however strong it may be cannot take the place of proof. Therefore, no conviction can lie only on the basis of such statement made by P.W.1 in absence of any other material to connect the appellants with commission of the alleged offences. The prosecution, therefore, has not only failed to prove that the dead body is that of the deceased but also failed to bring any material on record to connect the appellants with commission of the alleged offences. The other materials relied upon by the prosecution is the statement made by the appellants under Section 27 of the Evidence Act at the time of seizure of some articles from their respective houses. On perusal of the said two documents vide Exts. 32 to 33, we find nothing to connect the appellants with commission of the alleged offences since only the statement leading to discovery is admissible in evidence and not the so called confession. For the reasons stated above, we are unable to sustain the impugned judgment convicting the appellants for commission of the aforesaid offences.

6. The appeal is accordingly allowed and the impugned judgment and order of the trial court is set aside.

Appeal allowed.

2010 ( I ) ILR-CUT-630

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

## UNION OF INDIA & ORS. -V- MEGHANAD NAYAK.*

**MARCH 26, 2010.**

**CENTRAL CIVIL SERVICES (CLASSIFICATION & CONTROL & APPEAL) RULES, 1965 – RULE 19(III).**

**Whether the proviso to Sub-Rule (iii) of Rule 19 of the 1965 Rules is mandatory or directory – Held, it is mandatory but not directory.**

**In this case the Opp.party having not been given an opportunity of representing against the proposed punishment and the mandatory provision contained in Rule 19, having not been complied with, the tribunal was justified in setting aside the order of punishment – No reason to interfere with the impugned judgment.**

(Para 6 & 7)

**Case laws Referred to:-**

1.2004 SCC (L&S) 530 : (Union of India & Ors.-V-P.Chandra Mouli & Ors.).
2.AIR 2001 SC.1092 : (Union of India & Ors. -V- Sunil Kumar Sarkar).

For Petitioners - Central Government Counsel.
For Opp.Party - M/s.Ramakanta Mohanty,
Gouri Mohan Rath, S.K.patnaik, M.K.Mishra &
S.N.Biswal.
M/s.P.K.Padhi, P.K.Panda, D.K.Nayak & S.Nayak.
Mr.Kailash Chandra Kanungo.

*W.P.(C) NO.9846 OF 2007. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***L.MOHAPATRA, J.*** This writ application is directed against the order of the Central Administrative Tribunal, Cuttack Bench, Cuttack dated 17.4.2007 passed in O.A.No.491 of 2006.

2. The opposite party was working as a Senior Accountant in the office of the Principal Accountant General ( A & E) of Orissa at Bhubaneswar. A case under Section 5 of the Prevention of Corruption Act, 1947 was registered against him in the court of the Special Judge, Bhubaneswar on allegation of being in possession of assets disproportionate to his known source of income. Simultaneously a Departmental Proceeding on allegation of acquisition of properties without permission was also initiated. Another Departmental Proceeding was also initiated on the allegation of subletting the Government quarter allotted in his favour to an outsider without permission of the competent authority. When the Departmental Proceeding initiated on the allegation of acquisition of properties without permission reached the final stage, the opposite party approached the Tribunal in O.A.

No.97 of 1990 to stay the said proceeding on the ground that the charges in the criminal proceeding as well as in the said Departmental Proceeding being the same, the further proceeding in the Departmental enquiry should be stayed till conclusion of the criminal case. In the said Original Application the Tribunal also directed the Department not to pass any final order in the Disciplinary Proceeding till disposal of the criminal trial pending in the court of the Special Judge, Bhubaneswar. The criminal case initiated against the opposite party ended in conviction with imposition of sentence of rigorous imprisonment of two years and fine of Rs.1,00,000/-. Challenging the said order of conviction and sentence, the opposite party preferred Criminal Appeal No.302 of 1995 before this Court. By order dated 28.11.1995 in Misc. Case Nos.391 and 392 of 1995, realization of fine and operation of the judgment of conviction was stayed by this Court. In 2001, when the Departmental Authority served a copy of the enquiry report drawn in the Disciplinary Proceeding asking the opposite party to furnish his written statement of defence, he again approached the Tribunal in O.A. No.202 of 2001 on the ground that an appeal having been filed against the order of conviction and sentence, the Departmental Proceeding should not also proceed till disposal of the appeal. The said Original Application was disposed of with an observation that because of the interim order dated 28.11.1995 passed by this Court in the aforesaid Criminal Appeal, the hands of the Department have been bound down till disposal of the appeal or till the interim orders are modified. Thereafter an application was filed before this Court in the aforesaid Criminal Appeal for vacating the interim order dated 28.11.1995. The interim order was vacated on the basis of such petition filed on behalf of the Department. After the interim order was vacated, based on the conviction of the opposite party by the Special Judge, Bhubaneswar in the said criminal case, the Disciplinary Authority imposed the punishment of dismissal from service. Challenging the said order of dismissal, the opposite party preferred an appeal. When the appeal was not disposed of within a period of three and half months, the opposite party again approached the Tribunal in O.A.No.651 of 2004 praying for quashing the order of dismissal on the ground that the said order has been passed in violation of the principles of natural justice and proviso to Rule 19 of the CCS (CCA) Rules, 1965. The said Original Application was disposed of on 8.12.2005 with an observation that since the Departmental Appeal is pending, the Appellate Authority has the inherent power to set right the wrong committed by the Disciplinary Authority and if no opportunity was given to the opposite party to have his say in the matter before the impugned order was passed, the Appellate Authority can redress the said aspect of the matter by giving adequate opportunity to the opposite party at his level or by remitting the matter back to the Disciplinary Authority to follow the principle of natural

justice. After the said Original Application was disposed of with the above direction, the Appellate Authority remitted the matter back to the Disciplinary Authority for passing fresh orders in terms of the observations made by the Tribunal in the aforesaid Original Application. The Disciplinary Authority vide order dated 31.3.2006 imposed the punishment of removal from service and challenging the said order, the present Original Application was filed alleging non-compliance of Rule 19 of the CCS (CCA) Rules, 1965.

3. The Tribunal in the impugned order set aside the order of removal from service passed by the Disciplinary Authority and directed the Disciplinary Authority to pass final orders only after giving the applicant an opportunity to have his say. The Department assailing the said order of the Tribunal has preferred this writ petition.

4. Learned counsel for the petitioners assailed the impugned judgment on the ground that proviso to Rule 19 of the CCS (CCA) Rules, 1965 (hereinafter called 'the Rules') provides for giving an opportunity of making representation on the penalty proposed to be imposed before any order is made under the said provision. But such requirement is not mandatory otherwise the term 'may' would not have been inserted into the provision. According to the learned counsel for the petitioners, the said provision gives a wider discretion to the Disciplinary Authority to consider as to whether an opportunity for making a representation before imposing penalty is necessary or not. The provision not being mandatory, there has been no illegality in passing the order of punishment by the Disciplinary Authority without giving an opportunity to the opposite party to represent against the proposed punishment. Considering the circumstances of the present case, the Disciplinary Authority having taken a decision to impose the punishment, there was no reason for the Tribunal to set aside the order of punishment.

5. Shri Kanungo, the learned counsel appearing for the opposite party submitted that the word, 'may' appearing in the said Rule has to be read as 'shall' and, therefore, this mandatory provision having not been complied with by the Disciplinary Authority before imposition of the penalty, the same was rightly set aside by the Tribunal

6. The sole question for determination before this Court is as to whether the proviso to sub-rule (iii) of Rule 19 of the aforesaid Rules is mandatory or directory. For convenience, the entire Rule is quoted below:

"19. Special procedure in certain cases

Notwithstanding anything contained in Rule 14 to Rule 18-

i. where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, or

ii. where the disciplinary authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules, or

iii. where the President is satisfied that in the interest of the security of the State, it is not expedient to hold any inquiry in the manner provided in these rules,

the disciplinary authority may consider the circumstances of the case and make such orders thereon as it deems fit:

(Provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under clause (i):

Provided further that the Commission shall be consulted, where such consultation is necessary, before any orders are made in any case under this rule)".

On reading of the entire Rule, it appears that where any penalty is imposed on a Government servant on the ground of conduct which has led to his conviction on a criminal charge, the Disciplinary Authority may consider the circumstances of the case and make such orders thereon as he deems fit provided that the Government servant may be given an opportunity of making representation on the penalty proposed to be imposed before any order is made in a case under clause (i). Prima facie it appears that if a Government servant has been convicted on a criminal charge on ground of conduct which led to his conviction, the Disciplinary Authority may consider the circumstances of the case and make such orders thereon as it deems fit. It is, therefore, clear that once a Government servant is convicted on a criminal charge, the Disciplinary Authority may consider the circumstances of the case and take a decision. But the same has to be subject to the proviso contained in the Rule. Reliance was placed on a decision of the Hon'ble Supreme Court in the case of ***Union of India and others v. P. Chandra Mouli and others, reported in 2004 Supreme Court Cases (L&S) 530***. In the said reported case, the respondents therein were convicted and sentenced on a criminal charge. A notice to show cause in terms of proviso to Rule 19 of the aforesaid Rules was issued to them and thereafter the appropriate authority passed orders for compulsory retirement of the respondents. The question raised before the Hon'ble Supreme Court was as to whether the High Court was justified in setting aside the order of compulsory retirement on the ground of non-compliance of the proviso to

Rule 19 of the Rules. The question as to whether the proviso is mandatory or directory was not discussed or decided by the Hon'ble Supreme Court in the said case as notice to represent against the proposed punishment had been given to the delinquent officer therein. In this connection, reference may also be made to a decision of the apex Court in the case of ***Union of India and others v. Sunil Kumar Sarkar, reported in AIR 2001 Supreme Court 1092***. In the said reported case a General Court Martial under the provisions of the Army Act, 1950 was initiated against the respondent therein on certain allegations. The respondent therein was found guilty of some of the charges and was sentenced to undergo R.I. for one year. In the meantime, the Disciplinary Authority acting under Rule 19 of the Central Civil Services (Classification and Control and Appeal) Rules issued a show cause notice calling upon the respondent to submit his representation as to why suitable orders shall not be passed against him and thereafter the respondent in the said appeal was put under suspension. In para-8 of the judgment, the Hon'ble Court observed that the very foundation of imposing punishment under Rule 19 is that there should be a prior conviction on a criminal charge and all that a Disciplinary Authority is expected to do under Rule 19 is to be satisfied that the officer concerned has been convicted of a criminal charge and has been given a show cause notice and reply to such show cause notice, if any, should be properly considered before making any order under this Rule. It is, therefore, clear that the Hon'ble Supreme Court while deciding thus was of the view that the proviso to sub-rule (iii) of Rule 19 is mandatory and not directory.

7. Admittedly, in this case the opposite party having not been given an opportunity of representing against the proposed punishment and the mandatory provision contained in Rule 19 of the aforesaid Rules having not been complied with, the Tribunal was justified in setting aside the order of punishment.

8. We, therefore, do not find any reason to interfere with the impugned judgment and accordingly dismiss the writ application

Writ application dismissed.

2010 ( I ) ILR-CUT-635

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

## SANKAR MOHANTY -V- STATE OF ORISSA & ORS.*

**DECEMBER 5, 2009.**

**NATIONAL SECURITY ACT, 1980 ( ACT NO.65 OF 1980) – SEC.3(2).**

**Order of detention – Detenu involved in Criminal cases which hardly attract the mischief of public order – Order is liable to be quashed.** (Para 5)

**Case law Relied on:-**

2008 AIR SCW 6301 : (K.K.Saravana Babu -V- State of Tamil Nadu & Anr.).

For Petitioner – Mr.R.K.Nanda.
For Opp.Parties – Addl.Govt. Advocate.

*W.P.(CRL) NO.311 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***B.P.RAY, J.*** In this writ application under Articles226 & 227 of the Constitution of India the petitioner challenges the order of detention dated 25.12.2008 under Annexure-1 to the writ petition passed u/s 3(2) of the National Security Act (in short, "the Act") by the District Magistrate , Ganjam.

2. In pursuance of the order under Annexure-1, the petitioner was detained and was served with the grounds of detention dated 26.12.2008 under Annexure-2. In the ground of detention, the detaining authority has relied upon seven criminal cases registered against the petitioner. In ground no.1 refrence has been made to four Station Diary Entries made in Aska Police Station and it was also stated therein that in absence of any cogent clue it was impossible to draw up an FIR against the petitioner. Similarly, in ground no.2 reference has been made to Station Diary Entry No. 188 dated 12.7.2008 of Gangpur Police Station. Similarly, in ground no.3 two Station Diary Entries of Aska P.S. have been pressed into service. However, in ground no.4 reference has been made to Aska P.S. Case No. 203 dated 26.7.2007 registered for the offence under Sections 294, 506,307/34, IPC read with Sections 25 & 27 of the Arms Act and Sections 3 & 4 E.S. Act. In ground no.5 reference has been made to Aska P.S. Case No. 209 dated 30.7.2007 registered u/ss. 4 & 5, E.S. Act and under Section 47 (d) (f) of Bihar & Orissa Excise Act. In ground no. 6 reference has been made to Aska P.S. Case No. 176 dated 10.7.2008 registered for the offence u/s. 302/34,IPC and U/s. 25 & 27 of the Arms Act and this case was registered againt accused Saroj Padhy, MLA, Aska, Basanta Mohanty, Budha @ Ganesh Bisoi, Kutuli Nayak, Bikram Mallick and Lambu Tarini. It was also stated therein that two witnesses proved the occurrence as well as the involvement of the petitioner as a conspirator. In ground no.7 it was stated that because of repeated involvement in criminal activities , a prosecution

report vide Aska P.S. Non-FIR No. 79 dated 16.7.2008 u/s. 107,Cr. P.C. has been submitted against the petitioner. The order of detention appears to have been confirmed by the State Government by order dated 20.2009, which has been annexed as Annexure-3 to the writ petition.

3. A counter affidavit has been filed by the State Government in support of the order of detention. The Detaining Authority, namely, opp.party no.3 has also filed a counter affidavit in support of the detention order.

4. We have heard learned counsel for the petitioner as well as learned counsel appearing for the State. Learned counsel appearing for the petitioner submits that the criminal cases which have been placed into service for passing the order of detention do not make out a case of public order inasmuch as, according to learned counsel, the allegations made squarely come within the ambit of law and order situation and therefore, the order of detention is unsustainable. In support of such submission, learned counsel for the petitioner has placed reliance on the decision, 2008 AIR SCW 6301, (**K.K.Saravana Babu Vrs. State of Tamil Nadu & Another**).

5. On perusal of the materials on record, we find that as a matter of fact, the order of detention is based upon the criminal cases, referred to in the grounds of detention, which are mostly station diary entries, save and except, the criminal cases referred to in ground Nos. 4 and 6. The case referred to in ground No.6 has been registered against the accused persons other than the petitioner for the offence U/ss. 302/34 I.P.C. read with Sections 25 & 27 of Arms Act. It is clearly stated that involvement of the petitioner was as a conspirator. So far as criminal case in ground No.4 is concerned, the same is registered for the offence U/ss. 386,294,506,307/34 I.P.C. read with Sections 25 & 27 of the Arms Act. The criminal cases referred to in ground Nos. 4 and 7 clearly come within the ambit of law and order for which detenu can be dealt with under ordinary criminal law. Similar is the fact with regard to the criminal case referred to in ground No.6. So far as the criminal case referred to in ground No.5 is concerned, the same has been registered for the offence under E.S. Act and Bihar & Orissa Excise Act. Therefore, all the three criminal cases referred to in ground Nos. 4, 5 and 6 hardly attract the mischief of public order. Therefore, keeping in view the pronouncement of the Hon'ble apex Court reported in the case of K.K.Saravana Babu (supra), we are of the considered opinion that the order of detention is unsustainable and is liable to be quashed.

Accordingly, we quash the order of detention under Annexure-1. The petitioner may be set at liberty forthwith, if his detention is not required in any other case.

The writ petition is accordingly allowed.

Writ petition allowed.

2010 ( I ) ILR-CUT-637

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

## BANABIHARI DAS -V- BIJAY KUMAR SAHU & ORS.*

**MARCH 26,2010.**

**ORISSA MUNICIPAL ACT, 1950 (ACT NO. 23 OF 1950 ) – SEC.16(1)(ix) r/w ORDER 3 RULE 4(2) C.P.C.**

**Petitioner was elected as Chairman of the N.A.C. – His election was challenged on the ground that at the time of filing nomination he was an advocate appearing against N.A.C. – Petitioner says he gave up briefs prior to filing of nomination – Learned District Judge disqualified the petitioner U/s. 16(1)(ix) of the Act – Hence this writ petition.**

**An advocate engaged in a case owes duty not only to his client but also to the Court – The advocate by his obligation is bound to discharge his duties to his client with the strictest fidelity and is answerable to the disciplinary jurisdiction of the Court for dereliction of duty – The relation involves the highest personal trust and confidence so much so that it cannot be delegated without consent.**

**Held, his appointment is deemed to continue till the leave is granted by the Court – There is absolutely no scope to read the provision U/s.16(1)(ix) of the Act in isolation – Determination of employment or appointment of an advocate has to satisfy the requirement Under Order 3 Rule 4(2) C.P.C.- No reason to interfere with the impugned judgment.** (Para 17,18 )

**Case laws Referred to : -**

1.AIR 1955 Bombay 159 : (Lomeshprasad Hariprasad Desai -V- State of Bombay).
2.AIR (37) 1950 Nagpur 110 : (All Inida Reporter Ltd.-V-G.D.Moghe & Ors,).
3.2003 (1) CCC 321 (Raj.) : (Smt.Maya Devi & Anr.-V-Hari Singh).
4.AIR 1979 SC 281 : (V.C.Rangadurai -V- D.Gopalan & Ors.).
5.AIR 2003 SC 308 : (Vikash Deshpande -V- Bar Council of India & Ors.).
6.AIR 1968 Kerala 213 (V55 C 56) : (Chengan Souri Nayakam – V-A.N.Menon).

For Petitioner - M/s. S.P.Mishra, S.N. anda, B.Mohanty,A.K.Dash,A.P.Mishra & S.S.Kashyap.
For Opp.Parties – M/s. S.S.Das, Miss K.Behera, B.C.Panda, Mrs.S.Modi, P.K.Ghose & B.B.Mohapatra (Caveator)

*W.P.(C) NO.4435 OF 2010. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***B.K.PATEL, J.*** This writ application is directed against the order dated 27.2.2010 passed by the learned District Judge, Ganjam-Gajapati, Berhampur in Election Petition No. 11 of 2008 holding that the petitioner is disqualified under Section 16(1)(ix) of the Orissa Municipal Act,1950 (for short 'the Act') to be a Councillor of the Notified Area Council, Khallikote (for short 'N.A.C.'). Election Petition No. 11 of 2008 was filed by O.P. No.1, one of the Councillors of the N.A.C. against the petitioner and O.Ps.2 to 5, officials entrusted to the task of conducting elections.

2. Polling for election to the Council of the N.A.C. was held on 19.9.2008. For the purpose, nominations were received from 25.8.2008 to 27.8.2008. Declaration of successful candidates was made on 20.9.2008. O.P. No.1 was declared as a Councillor from Ward No. 5 and the petitioner was declared elected as a Councillor from Ward No. 3. On 30.9.2008 the petitioner was declared to be the Chairman of the N.A.C.. First meeting of the Council was held on 11.11.2008.

3. It was alleged in the election petition that the petitioner was disqualified for election as a Councillor of the N.A.C. as on the date of filing of nomination he was an advocate appearing against the N.A.C. in C.S. No. 17/06 and C.S. No. 3/08 pending in the court of Addl. Civil Judge (Jr. Division), Khallikote. In his counter-affidavit the petitioner took the stand that though he was appearing as an Advocate against the N.A.C. in 2 to 3 cases, he gave up the briefs prior to filing of nomination. The briefs in respect of C.S. No. 17/06 and C.S. No. 3/08 were returned to the clients on 6.8.2008 after which he never took any step in the cases. On the basis of rival pleadings, the learned Tribunal settled the following seven issues for determination :

(1) Is the Election Petition maintainable ?
(2) Is there any cause of action to file the Election Petition ?
(3) Is the Respondent No.1 as a Councillor disqualified within the meaning of Section 16(1)(ix) and Section 17(e) of the Orissa Municipal Act ?
(4) Was the Respondent No.1 appearing in C.S. No. 17 of 2006 and C.S. No. 3 of 2008 by taking steps, when he filed nomination for NAC Election of Khallikote ?
(5) Whether the Respondent No.1 had returned the briefs to the parties in C.S. No.17 of 2006 and C.S. NO. 3 OF 2008 and disengaged him from the said suits on 6.8.2008 ?
(6) Did the Respondent No.1 appearin C.S. No.17 of 2006 and C.S. No. 3 of 2008 by taking steps on 25.8.2008 i.e., on the date of filing of the Nomination ?
(7) Is the petitioner entitled to the relief(s) as prayed for ?

In order to substantiate their respective stands, O.P. No.1 examined three witnesses P.Ws. 1 to 3 and relied upon documents marked Exts.1 to 6 whereas the petitiner examined three witnesses O.P.Ws 1 to 3 and relied upon documents marked as Exts. A to D. Learned Tribunal answered issue No.4 in the negative and issue No.5 in the affirmative in favour of the petitioner. So far as issue No.6 is concerned, it was observed that there was no pleading to the effect that petitioner appeared and took steps in C.S. Nos. 3/2008 and 17/2006 for which the issue was unnecessary. It was further held that certified copies of order-sheets Exts. 5 & 6 reveal that none of the suits was posted on 25.8.2008. In such circumstances, Issue No.6 was also answered in the negative.

4. However, in answering issue No.3 it was held by the learned District Judge that though there is no satisfactory evidence to hold that the O.P. No.1 in fact appeared in C.S. Nos. 3/2008 and 17/2006 after 6.8.2008, in view of provision under Order 3 Rule 4(2) of the Code of Civil Procedure (for short 'the C.P.C.') and the facts and circumstances of the case, it is to be deemed that the petitioner continued till 12.11.2008 to be the Advocate employed by the plaintiff in the C.S. No. 3/2008 instituted against the N.A.C., thereby incurring disqualification under section 16(1)(ix) of the Act. Issue Nos. 1 & 3 were also answered in favour of the O.P. No.1.

5. In assailing the impugned judgment it was vehemently argued by the learned Advocate for the petitioner that the adjudication of issue No.3 by the learned District Judge is not sustainable in law or on facts. It was contended that evidence on record clearly goes to show that the petitioner had disengaged himself from the suits on 6.8.2008 which can be gathered from the Vakalatnamas by virtue of which plaintiffs engaged other counsel. Learned District Judge was not justified in holding that the petitioner continued to be employed by the plaintiffs in the suits filed against the N.A.C. till 12.11.2009 when the Vakalatnamas were filed in Court in order to obtain leave under Order 3 Rule 4(2) of the C.P.C.. Relying upon decision of Bombay High Court in ***Lomeshprasad Hariprasad Desai v. State of Bombay***: AIR 1955 Bombay 159, it was strenuously contended that in interpreting the provision under the Act, learned District Judge should have confined himself to determine the actual period of employment as an Advocate. Learned District Judge should not have fallen upon the provision of C.P.C. to infer disqualification under Section 16(1)(ix) of the Act.

6. In reply, it was argued by the learned counsel for the O.P. No.1 that though an advocate is an agent of his client, relationship between the advocate and client is not merely contractual. Taking into account the peculiar nature of duties and the status of an advocate vis-a-vis his clients and the Courts, special provision has been made under Order 3 Rule 4(2) of the C.P.C. laying down that appointment o a lawyer shall be deemed

to remain in force until determined with the leave of the Court by a writing signed by the client. It is further contended that Bombay decision relied upon by the petitioner does not take note of the peculiar nature of relationship between Advocate and client and the objective behind enactment of provision under Order 3 Rule 4(2) of the C.P.C.. Determination of relationship of an advocate and client in a particular case has to be made in accordance with statutory provision. View taken by Bombay High Court renders the provision under Order 3 Rule 4(2) of the C.P.C. redundant and otiose. The learned District Judge has rightly held that the petitioner's engagement on behalf of the plaintiff in C.S.No. 3/2008 continued till 12.11.2008 when fresh Vakalatnama containing endorsement of no objection was filed by the plaintiff in Court.

7. We have heard learned counsel for the petitioner and O.P. No.1 at length upon reference to impugned judgment and materials produced in course of hearing as well as relevant statutory provisions and reported decisions.

8. It is not disputed that the petitioner was engaged as a lawyer by plaintiff in C.S. Nos. 3/2008 and 17/2006 instituted against the N.A.C. Nominations for the election were filed between 25.8.2008 and 27.8.2008. Of the three witnesses examined on behalf of the petitioner, O.P.W. 2 is the plaintiff in C.S. No. 3/08 and O.P.W. 3 is one of the plaintiffs in C.S. No. 17/06. O.P.W.1 is the petitioner himself. Exts.A & C are certified copies of order-sheets in C.S. Nos. 3/2008 and 17/2006. Exts. D & E are the receipts showing return of briefs by petitioner to his clients in C.S. Nos. 17/2006 and 3/2008 respectively. Exts. 4 & 6 are also certified copies of order-sheets in C.S. Nos. 17/2006 and 3/2008 respectively. On analysis of the evidence on record, the learned District Judge came to a categorical finding that there is no satisfactory evidence to hold that the petitioner himself appeared on behalf of the plaintiffs in the two suits even after filing of nomination. However, it is not disputed that Vakalatnama Ext.2 executed by plaintiff in C.S. No.3/08 in favour of another lawyer was filed in Court on 12.11.2008. In Ext.2 the executant had put the date '6.8.2008'. The petitioner also had made an endorsement of no objection and signed Ext.2 putting the date '6.8.2008' below his signature. However, new counsel appointed by the plaintiff had put his signature accepting the Vakalatnama mentioning the date '12.11.2008' below his signature. Therefore, the 'no objection' endorsement and signature of the petitioner in Ext.2 simply implied that there was no objection on his part for engagement of any other Advocate by the plaintiff. On the face of it Ext.2 indicates that the new lawyer accepted the brief from the plaintiff on 12.11.2008. In such circumstances, learned District Judge was not inclined to accept the dates put by the plaintiff on face value. It is also observed that Exts. A & D, receipts of engagement

showing return of briefs were never presented before the Court in which the suits were pending. Both the documents were produced in course of hearing of the election dispute.

9. Added to the circumstances narrated above rendering petitioner's assertion to have returned the briefs to his clients on 6.8.2008 incapable of being accepted, there is no legal basis to support the stand that the employment of the petitioner as a lawyer on behalf of the plaintiff in C.S. No.3/08 was determined prior to 12.11.2008.

10. Clause (ix) of sub-section (1) of Section 16 of the Act reads :

> "Section 16: xx xx xx No person shall be qualified for election as a Councillor of a Municipality if such person
>
> –xx xx xx xx
>
> (ix) is employed as a paid legal practitioner on behalf of the Municipality or as legal practitioner against the Municipality ; "

11. Rule 4 of Order 3 of the C.P.C. lays down provisions relating to 'appointment of pleader'. Sub-rules (1) & (2) thereunder read :

> "(1) No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment.
>
> (2) Every such appointment shall be filed in Court and shall, for the purposes of sub-rule (1), be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.
>
> xx xx xx "

12. In the impugned judgment itself, learned District Judge has referred to decisions in **All India Reporter Ltd. –vrs- G.D. Moghe and others** : AIR (37) 1950 Nagpur 110 and **Smt. Maya Devi and another –vrs.- Hari Singh** : 2003(I) CCC 321 (Raj.). In the decisions it was held that Or. 3, Rule 4, C.P.C. recognizes power of the court regarding determination of appointment of counsel. It is not open to a counsel to withdraw or to a party to terminate the service of its counsel without leave of the Court. An Advocate cannot on his own take it to be the determination of his appointment on engagement of another advocate with no objectio from him by the client. Where a lawyer desires or wants to relieve himself of his duty as an advocate he should have to take all care and responsibility to act in accordance with the provisions of Sub-Rule (2) of Rule-4 of Order-3, C.P.C.

The advocate can withdraw himself from the suit only with the leave of the court.

13. In the Bombay High Court decision in ***Lomeshprasad Hariprasad Desai v. State of Bombay*** : AIR 1955 Bombay 159 relied upon on behalf of the petitioner**,** a contrary view appears to have been taken. Facts of the case has been narrated in the headnotes as follows :

> "A was engaged by Baroda Borough Municipality as a pleader in a certain suit. A applied to the Municipality on 18.1.1954 for relieving him as its lawyer and the Municipality passed a resolution on the same day accepting his resignation as its lawyer. On 27.1.1954 the Chief Officer of the Municipality intimated to the Court that they had relieved A as their lawyer from 18.1.1954. The nomination papers of A for municipal election were filed on 19.1.1954. The papers were scrutinized on 20.1.1954, when B who was a voter and also a candidate for the election, objected to the nomination of A. The objection was overruled and in the election, A was declared elected to one of the seats in the Municipality. B challenged A's election by an application under Article 226 of the Constitution on the ground that he was disqualified as a Councillor by reason of the fact that he was in the employ of the Municipality. Relying upon O. 3, R. 4, Civil P.C., it was contended that although A had tendered his resignation as a pleader and that resignation was accepted by the Municipality on January 18, the date on which he had ceased to be the Municipality's pleader was not the 18th January but the 27th January, when the letter of the Chief Officer was filed in Court and the Court allowed the pleader to withdraw from the suit."

It was held that in order to decide whether A was in the employ of Municipality or not, the Court must look in at the C.P.C., but to the ordinary law which regulates the contract between master and servant, and judging by that law, there can be no doubt that the employment of A was terminated on 18.1.1954.It was further held that for the purposes of the Municipal Boroughs Act, the Courts were concerned with the actual employment, and if the Pleader was no longer in the actual employment of his client, the mere fact that for the purposes of the C.P.C., his appointment is deemed to continue till the leave is granted by the Court under Order 3, Rule 4, does not bring the case of the pleader within the mischief of S.12.

14. We respectfully disagree with the view equating the relationship between advocate and his client with that of master and servant taken by the Bombay High Court in the above cited decision. In ***V.C. Rangadurai – vrs.- D.Gopalan and others*** : AIR 1979 SC 281, it has been held:

"31. xx xx The relation between a lawyer and his client is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith. It is purely a personal relationship, involving the highest personal trust and confidence which cannot be delegated without consent."

15. In ***Vikas Deshpande v. Bar Council of India and others*** : AIR 2003 SC 308 it has been held :

"Relationship between an Advocate and his client is of trust and, therefore, sacred."

16. As has been pointed out in ***Chengan Souri Nayakam vrs.- A.N. Menon:*** AIR 1968 Kerala 213 (V55 C 56) :

"That counsel is not a mere agent of the client would be made clear if we look at the nature of his duties and relationship with public and the court. Counsel has a tripartite relationship; one with the public, another with the court, and the third with his client. That is a unique feature. Other professions or calling may include one of two of these relationships but no other has the triple duty. Counsel's duty to the public is unique in that he has to accept all work from all clients in courts in which he holds himself out as practicing, however unattractive the case or the client. Lord Denning M.R. observed in Rondel v. Worsely. (167) 1 QB 443 at p. 502

"A barrister cannot pick or chose his clients. He is bound to accept a brief for any man who comes before he courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only tat he is paid a proper fee, or in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can because his duty is not only to his client'". All those who practice at the Bar have from time o time been confronted with cases civil and criminal which they would have liked to refuse, but have accepted them as burdensome duty. This is the service they do to the public. Counsel has the duty and right to speak freely and independently without fear of authority, with out fear of the judges and also without fear of a stab in the back from his own client. To extent, he is a minister of justice."

17. In ***Mahbub Ali Khan, In the matter of*** **:** AIR 1958 Andhra Pradesh 116 (V 45 C 38), it has been held that an advocate engaged in a case owes duty not only do his client but also to the Court. The duties of the advocate

are two fold. The advocate by his obligation is bound to discharge his duties to his client with the strictest fidelity and is answerable to the disciplinary jurisdiction of the Court for dereliction of duty. The relation involves the highest personal trust and confidence so much so that it cannot be delegated without consent. A pleader is more than mere agent or servant of his client. He is also an officer of the Court.

18. Statutory provisions under Section 208 of the Indian Contract Act, 1872 also militates against the premises that relationship beween an Advocate and his client can be determined uniterally by one of them or even biletarally by both of them without leave of the Court. Section 208 of the Indian Contract Act provides that the terminaion of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons, before it becomes known to them. Order 3 Rule 4(2) of the C.P.C. is an extention of this principle so far as it relates to determination of the authority of an Advocate is concerned. There is absolutely no scope to read the provision under Section 16(1)(ix) of the Act in isolation. Determination of employment or appoinment of an Advocate has to satisfy the requirement under Order 3 Rule 4(2) of the C.P.C.

19. For the reason stated above, we are unable to persuade ourselves to interfere with the impugned judgment. Therefore, the writ petition is dismissed.

Writ petition dismissed.

2010 ( I ) ILR-CUT-645

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

## SAROJ KUMAR NAYAK -V- STATE OF ORISSA & ORS.*

**FEBRUARY 22, 2010.**

**ORISSA EDUCATION (RECRUITMENT & CONDITIONS OF TEACHERS & MEMBERS OF THE STAFF OF AIDED EDUCATIONAL INSTITUTIONS) RULES, 1974 – RULE 21(1).**

**Director can invoke the jurisdiction under Rule 21 only if the Governing Body refuses or neglects to take disciplinary action.**

**In this case on receipt of information from the Director, the Governing Body initiated a proceeding, conducted an enquiry and found the petitioner not guilty and did not incline to initiate any disciplinary proceeding – Thus, the requirement of law is not satisfied and it can not be presumed that the Governing Body refused or neglected.**

**Held, suspension of the petitioner two days before he retires on attaining the age of superannuation without following the mandatory requirements of Rule 21(1) of the 1974 Rules can not be sustained.**

(Para 11 & 12)

**Case law Referred to:-**

Vol.67(189) CLT, 377 : (Ananta Charan Tripathy -V- State of Orissa & Ors.)

For Petitioner – M/s.J.K.Rath, M.Senapati, B.K.panda, & M.C.Jena.
For Opp.Parties – Addl.Govt.Advocate (For O.Ps. 1 & 2)
Mr.D.P.Dhal & associates (for O.P.3).

*ORIGINAL JURISDICTION CASE NO.14987 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***A.S.NAIDU, J.*** The petitioner seeks to assail the order dated 28.7.2008 (Annexure-11) passed by the Deputy Director, NGC-II suspending him from service in exercise of the powers conferred upon him under sub-rule (1) of Rule 21 of the Orissa Education (Recruitment and Conditions of Teachers and Members of the Staff of Aided Educational Institutions) Rules, 1974, in short, "1974 Rules" contemplating initiation of a proceeding, mainly on the ground that the said order not only suffers from lack of jurisdiction but also is otherwise unjust, illegal and contrary to law.

2. To understand the inter se disputes, it would be prudent to refer to state the case of the petitioner.

"Brundaban Subudhi College" situated at Daspalla in the district of Nayagarh was established in the year 1977 and was recognized by the prescribed authority as Intermediate Arts College in the year 1978. In the year 1981 the Governing Body of the said college decided to introduce

'Education' as an optional subject. After receiving concurrence, steps were taken to fill up the said post. However, considering the financial position, the Governing Body decided to fill up the post on temporary basis for the time being. At the relevant time petitioner, who possessed M.A.Ed. qualification, was working as Headmaster of Patpurapatana U.G.M.Ed. School. He was requested to join as guest faculty in the college and teach Education. He accepted the offer subject to payment of Rs.200/- per month towards conveyance allowance. Accordingly, he took Education classes in the morning hours i.e. between 7.30 A.M. to 9.30 A.M. After few years, it became difficult for the petitioner to serve as Headmaster in UGME School and also teach Education in the college. Consequently, the petitioner left the job of Headmaster with effect from 18.6.1987, joined the college permanently and received his salary month after month. The petitioner's services were approved by the Director, Higher Education by order dated 6.10.1989 and received 1/3rd grant-in-aid towards salary cost with effect from 1.3.1988. While working as Lecturer in B.S.College, Dasapalla, the petitioner was transferred to Rajsunakhala College and joined there on 20.7.1999 and continued till 30.6.2000. Thereafter he was again transferred to B.S.College, Dasapalla and joined there on 1.7.2000. Being the senior most lecturer, the Director, Higher Education by his order dated 22.2.2006 approved the petitioner as Principal-in-charge-cum-Secretary of B.S.College, Dasapalla vide Annexure-3.

3. In the year 2007 certain allegations were levelled against the petitioner with regard to the irregularities and financial embezzlement. He was called upon to show cause. The Governing Body of the college in its meeting held on 19.10.2007 came to the conclusion that the petitioner had neither committed any irregularities nor had suppressed any fact during his tenure of service and took a resolution to that effect on 19.10.2007 vide Annexure-7. While the matter stood thus, a report was received from the office of the Lokpal calling upon the petitioner to explain certain allegations levelled against the petitioner. After receipt of the notice, petitioner submitted his show cause. It is alleged that without affording any opportunity of hearing and without observing the principles of audi alteram partem, the Lokpal passed certain orders on 28.12.2007. After receipt of the report, it is alleged, the Director by order dated 28.7.2008 (Annexure-11) suspended the petitioner. The said order, as stated earlier, is assailed in this writ petition.

3. Mr.Rath, learned counsel appearing for the petitioner forcefully submited that the Director not being the appointing authority lacked the initial jurisdiction to suspend the petitioner from service and on that ground alone the order of suspension should be quashed.

4. Learned counsel for the State on instruction submited that in consonance with the observations made by the Lokpal in Case No. 873-

LY(A), as the Governing Body did not take any action, the Director invoked the jurisdiction conferred upon him under sub-rule (1) of Rule 21 of the 1974 Rules and passed the order of suspension. According to Mr.Mishra, learned Addl. Governing Advocate, Rule 21(1) of 1974 Rules empowers the Director to suspend a lecturer of aided educational institution, if the Governing Body failed to do so and as such, the order dated 28.7.2008 (Annexure-11) suffers from no infirmity.

5. Chapter VI of 1974 Rules deals with disciplinary action. Rule 20 stipulates different punishments to be imposed on an employee of aided educational institution. Rule 20(e) is the penalty of suspension. Rule 21, on the other hand, deals with authority which may initiate a proceeding and impose punishment. It stipulates that in respect of lower grade employees, the punishment can be imposed by the Headmaster or the Principal, as the case may be, and in respect of any other employee, by the Managing Committee or Governing Body, as the case may be. Rule 21(1) is however is an exception. The said Rule reads as follows:

> "21. **Disciplinary authorities**-(1) The Director may impose any of the penalties specified in Rule 20 on any employee:
> Provided that the Director shall not initiate any disciplinary proceeding unless the Managing Committee or the Governing Body, as the case may be, refuses or neglects to take disciplinary action against any employee.
>
> (2) Without prejudice to Sub-rule (1) but subject to the provisions of Sub-rules (3) and (4) any of the penalties specified in Rule 20 may be imposed-
>
> (a) in respect of a lower grade employee, by the Headmaster or the Principal, as the case may be; and
> (b) in respect of any other employee, by the Managing Committee or the Governing Body, as the case may be;
>
> Provided that in case of suspension of employees failing under Clauses (a) and (b) the prior approval of the Inspector in respect of any employee serving in a School and of the Director in relation to any other employee is obtained:
>
> Provided further that the Managing Committee or the Governing Body, as the case may be, may place an employee under suspension at the initiation of disciplinary proceedings for a period of thirty days, pending approval of Inspector or the Director, as the case may be.

(3) No penalty shall be imposed on any employee by an authority other than the authority mentioned in Sub-rule (1) and (2) hereinafter referred to as the disciplinary authority.

(4) No penalty shall be imposed on a person appointed to any post in an aided institution on deputation from the Government except in accordance with the provisions of Rule 25."

(emphasis supplied)

5. The first proviso to Rule 21 of the 1974 Rules makes it clear that the Director shall have the power to imposes any of the punishments specified under Rule 20 only if the Managing Committee or the Governing Body, as the case may be, refuses or neglects to take disciplinary action against an employee.

6. In the case in hand, as would be evident from Annexure-11, contemplating to initiate a disciplinary proceeding against the petitioner in exercise of the powers conferred under sub-Rule (1) of the 1974 Rules he was placed under suspension. The order dated 28.7.2008 (Annexure-11) does not specify that the Director at any time had called upon the Governing Body of the College to initiate any disciplinary proceeding and that the said Governing Body failed/ refused or neglected to initiate such disciplinary action against the petitioner. In absence of the aforesaid contingency, the Director cannot exercise the power conferred upon him under Rule 21(1) of the 1974 Rules and suspend an employee.

7. In the counter affidavit filed by opposite party no.2, however, a stand has been taken to the effect that the Governing Body was called upon to initiate a proceeding, but as no action was taken against the petitioner, consequently, the Director invoked the power under Rule 21(1) of the Rules, 1974.

8. A rejoinder affidavit has been filed by the petitioner denying the allegations made in the counter affidavit. It is stated that after receiving the communication from the Director, in fact the Governing Body called upon the petitioner to show cause. After perusal of the show cause and after conducting preliminary enquiry, the Governing Body was satisfied that the petitioner has neither suppressed any fact nor has committed any illegality or irregularity and the allegations levelled were baseless. On the basis of such satisfaction, the Governing Body decided not to take any coercive action against the petitioner as he was not found guilty. As stated earlier, the proviso to Rule 21 stipulates that the Director can initiate a disciplinary

proceeding only if the Governing Body refuses or neglects to take disciplinary action against the employee concerned and not otherwise.

9. In the case in hand, as would be evident from the facts and circumstances and the pleadings, the Governing Body has neither refused nor neglected to take any action against the petitioner. On the contrary, the Governing Body after receipt of the communication from the Director, initiated a proceeding, called upon the petitioner to show cause, perused the materials available on record and arrived at a conclusion that the allegations made bear no truth and the petitioner was found to be not guilty of the charges.

10. In the case of **Ananta Charan Tripathy v. State of Orissa and others**, Vol.67(189) CLT, 377, it has been held by this Court that the Director cannot on his own accord or straightway initiate any disciplinary proceeding. Furthermore, only in the event, the Governing Body is found to have neglected or failed to give effect to the direction issued by the Director or failed to discharge the duties imposed under the Education Act, then only the powers available to the Director can be exercised. Law requires that the Director can invoke the jurisdiction under Section 21 only if the Governing Body refuses or neglects to take disciplinary action. It is well settled that the provisions of the Act and Rules are to be complied in letter and spirit and not otherwise. In the case in hand, it clearly appears that on receipt of the information from the Director, the Governing Body initiated a proceeding, conducted an enquiry and found the petitioner not guilty and did not incline to initiate any disciplinary proceeding. Thus, the requirement of law is not satisfied and it cannot be presumed that the Governing Body refused or neglected. That apart, it appears that the petitioner retired from service on attaining the age of superannuation, only two days after, the order of suspension was passed. Thus, contemplating to initiate a proceeding at the fag end of his career that too without following the mandatory requirements of law, cannot be sustained.

11. In view of the aforesaid facts, the order dated 28.7.2008 (Annexure-11) suspending the petitioner two days before he retires on attaining the age of superannuation without following the mandatory requirements of Rule 21(1) of 1974 Rules cannot be sustained and this Court therefore, has no hesitation to set aside the same. Accordingly, the impugned order dated 28.7.2008 (Annexure-11) is set aside and the writ petition is allowed.

Writ petition allowed.

2010 ( I ) ILR-CUT- 650

**A.S.NAIDU, J & S.C.PARIJA,J.**

## RUNU @ GIRISH BUDEK & ORS.-V- STATE OF ORISSA.*

**AUGUST 26, 2009.**

**PENAL CODE, 1860 (ACT NO.XLV OF 1860) – SEC.304- PART-1.**

**All the blows were given on legs and lower portion of the body – Accused had no intention to murder the deceased – It appears that they are not Criminals by profession – Held, Offence is punishable U/s.304 Part-1 I.P.C. but not U/s.302 I.P.C.**

**(**Para15 )

For Appellants – Mr.N.C.Pati.
For Respondent – Mr.J.P.Patnaik
Addl.Standing Counsel.

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*CRIMINAL APPEAL NO.320 OF 2000. From the judgment and order dated 4.12.2000 passed by Sri G.N.Panda, Sessions Judge, Balangir in Sessions Case No.77(B) of 1999.

***A.S.NAIDU,J.*** The judgment and order of conviction dated 4.12.2000 passed by learned Sessions Judge, Bolangir convicting the appellants for the offence under Section 302 read with Section 34, IPC and sentencing each of them to undergo R.I. for life in Sessions Case No.77(B) of 1999, is assailed in this appeal.

2. On the basis of the F.I.R. lodged by Barun @ Barna Bhoi at Larmbha Out-post under Patnagarh Police Station in the district of Bolangir, P.S.Case No. 38 of 1999 was registered on 14.5.1999. The A.S.I. of Larambha Out-post took up preliminary investigation, which was subsequently handed over to O.I.C. Patnagarh Police Station. After completion of investigation and on fulfillment of all paraphernalias, charge-sheet was submitted against the appellants for commission of offence under Section 302, read with Section 34, IPC in the court of learned SDJM, Patnagarh in G.R.Case No. 81 of 1999. Learned SDJM after going through the police records and on being satisfied that a prima facie case was made out, took cognizance of the offences and committed the case to the Court of Session for trial.

3. In the F.I.R. it was alleged that on 14.5.1999 at about 1.00 P.M. Karuna Bhoi was returning after taking his bath in Ranikata of village Tamia. The accused persons Padman Bhoi and Babulal Kalasi all of a sudden caught hold of him on the village street and accused Runu @ Girish Chandra Budek inflicted axe blows on his legs, hands and face as if he was cutting a tree. Karuna lost his sense, fell down on the ground and succumbed to the injuries.

4. The plea of the defence was one of complete denial of the allegations and the charges levelled against them. Each of the accused apart from specifically denying the alleged occurrence pleaded that in view of past enmity, false case has been foisted against them.

5. In order to substantiate their case, the prosecution got examined as many as 11 witnesses. Out of them, P.W.1 is the informant and also an occurrence witness, P.Ws.3, 4, 5 and 6 were also witnesses to the occurrence, P.W.2 is a witness to the inquest and seizure of bloodstained earth and sample earth as well as weapon of offence and other materials, P.W.7 is the Medical Officer, who conducted autopsy on the dead body, P.W.8 is the A.S.I. of Police of Larmbha Out-post, who received the written F.I.R. and also conducted inquest over the dead body and sent the dead body for post mortem, P.W.9 is the O.IC. of Patnagarh Police Statiion and was the Investigating Officer, P.W.10 is another police officer, who arrested the accused Padman and Babulal and forwarded them to custody. He had sent the seized materials for chemical examination. Besides the oral evidence, the prosecution relied on documents, which were marked as Exts.1 to 15 and the material objects which were produced in court.

6. Learned Sessions Judge after discussing the evidence in extenso, came to the conclusion that the prosecution has successfully able to prove the charges beyond all reasonable doubt and convicted the accused persons for commission of offence under Section 302, read with Section 34, IPC.

7. Learned counsel for the appellants has assailed the order of conviction and sentence mainly on the ground that learned Sessions Judge has not properly appreciated the evidence and the conclusions arrived at are based on surmises and conjectures. It is further submitted that the F.I.R., Ext.1 was not the original F.I.R. and the same was subsequently created to entangle the accused persons. According to the learned counsel for the appellants, P.Ws.1, 3 and 4 being relatives and P.Ws.5 and 6 being caste men, the trial court should have discarded their evidence as they were interested witnesses. It is further submitted that number of discrepancies were noticed in the evidence of different eye witnesses and it is a fit case where their evidence should have been ignored. Further, according to learned counsel for the appellants, the ocular evidence is inconsistent with the medical report and the evidence of the doctor, P.W.7 and the said fact throws a cloud of suspicion.

All these submissions are strongly repudiated by learned counsel for the State. Mr.Patnaik, learned Addl. Standing Counsel relying upon the

medical evidence as well as other documents, submitted that learned Sessions Judge has rightly convicted the appellants and the conclusions arrived at being just and proper, calls for no interference.

8. Heard learned counsel for the parties at length. Being a final court of facts, this Court went through all the evidence meticulously. The oral evidence clearly establishes that enmity existed between the appellants and Karuna since long. There were several disputes inter se between them in respect of landed properties. The evidence of P.W.7, the doctor, who conducted autopsy reveals that Karuna sustained the following injuries on his person:

(i) Incised wound over anterior aspect of left leg 8 cm x 3 ½ cm x 7 cm with fracture and separation of both tibia and fibula with complete rupture and laceration of the peroneal muscle tibialis anterior and posterior partly of gastrocenes and soleus muscle, popliteal artery, tibial artery, great papangeous vein and common peroneal nerve 4 cm below the lower end of patella.

(ii) Incised wound of size 5 ½ cm x 2 ¼ cm x 5 ½ cm over lateral aspect of left leg 4 cm below the knee joint.

(iii) Incised wound 6 cm x 3 ½ cm x 6 cm, 2 cm below and parallel to injury no.(ii). Underlying injuries nos.(ii) and (iii) fracture and separation of both tibia and fibula into pieces and complete laceration and fracture of peroneal longus and brevis muscle and part of gastrochenus sonues and lateral peroneal nerve, artery and vein.

(iv) Incised wound 6 ½ cm x 4 cm x 4 ½ cm over anterior aspect of left arm 4 cm above ante cubital fossa with fracture and complete separation of lower end of humeerus with laceration and rupture of biceps brachialia brachiratialis, anterior cubital vein, brachial artery and median and ulnar nerve.

(v) Incised wound 5 ½ cm x 3 cm x 4 ½ cm, 3 ½ cm above the elbow joint over medial aspect of arm with fracture and separation of lower end of humerus with laceration and rupture of biceps, brachialis and anterior civital vein, brachial artery, ulnar and medeal cutanus nerve.

(vi) Penetrating wound 4 ½ cm x 1 ½ cm x 4 cm over left side of the face starting from inner angle of left eye to left side of bridge of

nose and alanise with gaping fracture of underlying maxilla and loosening left 1st and 2nd incisor teeth and fracture of lateral orbetrary bone.

10. The doctor after giving conscious thought opined that all the injuries were sufficient to cause death in ordinary course of nature and that injury nos.(i), (ii) and (vi) were prominent injuries. He has further opined that the death was almost instantaneous because major vessels were cut.

11. After going through the evidence of P.W.7 and the post-mortem report, this Court is satisfied that the death of Karuna was a homicidal one.

12. This is a case where the P.Ws.1, 3, 4, 5 and 6 have seen the occurrence. The consistent case of the aforesaid witnesses is that the accused persons caught hold of Karuna and Runu @ Girish Chandra Budek went on assaulting Karuna with an axe, which is a sharp cutting weapon as if he was cutting a tree. This evidence gets ample corroboration from the medical evidence. The evidence of the eye witnesses further reveal that all the three accused persons have taken active part in the assault.

According to learned counsel for the appellants, the facts narrated in the F.I.R. cannot be believed inasmuch as there is some discrepancy with regard to exactly who filed the F.I.R.

13. After verifying the original records and comparing the same with the F.I.R. printed in the paper book, this Court finds that there is an error in the printing, inasmuch as in place of 'Binu', it has been written as 'Dinu'. Admittedly the F.I.R. was filed by Bana @ Barun Bhoi, which is signed by Bana Bhoi as Binu Bhoi in the original F.I.R. Unfortunately the same has been mentioned as "Dina Bhua" in the paper book and thus, causing the confusion. The signature of the informant appearing in the F.I.R. was marked as Ext.1/1 in course of deposition. The informant has also identified his signature and has clearly stated that the F.I.R. submitted by him has been marked as Ext.1. Thus, the argument advanced by learned counsel for the appellants cannot be accepted.

14. So far as the discrepancies in the evidence is concerned, no doubt certain minor discrepancies appear in the evidence of different witnesses, but then, the same are not very much material to the facts of the case and do not render the prosecution case untrustworthy. Added to the aforesaid facts, the bloodstained axe was recovered from the house of the accused Runu during search. That apart, the accused persons absconded from the

village for quite some time. Though absconding may not be a ground to presume a person to be guilty, but then definitely it is a circumstance, which may be considered coupled with other circumstances.

15. After going through the entire evidence and the arguments advanced, we are satisfied with the reasonings given by the learned Sessions Judge holding the appellants guilty for causing the death of Karuna. But then, it appears that there was inter se land dispute between the parties for quite some time and they were not in good terms. That apart, the accused persons are Scheduled Tribe persons and possess a volatile temperament. Fact remains, on the given date, they had caught hold of Karuna and assaulted them with an axe indiscriminately. The medical report as well as the evidence of the doctor however reveals that all the blows were given on legs and lower portion of the body. Thus, it appears that they had no intention to murder Karuna. The accused persons are in custody for more than 10 years. They are not criminals by profession.

16. The totality of the evidence, in our considered opinion, leads to an irresistible conclusion that the offence that the appellants had committed is one punishable under Section 304, Part-I, IPC, but not under Section 302/34, IPC.

17. In the result, we set aside the conviction of the appellants under Section 302/34, IPC and the sentence of imprisonment for life imposed and instead convict the appellants under Section 304, Part-I read with Section 34, IPC and sentence them to undergo rigorous imprisonment for a period for the period already undergone by them. The appellants shall be set at liberty forthwith, if their detention is otherwise not required in any other case.

The appeal is disposed of subject to the modification of the conviction and sentence as indicated above.

Appeal disposed of .

**2010 ( I ) ILR-CUT- 655**

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

## K.N.SINGH & ANR. -V- G.M.(PERSONNEL), M.M.T.C. LTD. & ORS.*

**MARCH 18, 2010**

**SERVICE – Transfer of Class-IV or low paid employees – Power of transfer should be used sparingly when required under administrative exigencies and not in a routine manner – More so, the power has to be exercised in good faith not arbitrarily and the employer should try to accommodate the low paid employees at near by places as his transfer to a far distant place may cause him and his family great financial hardship and make his survival difficult.** (Para 11 )

**Case laws Referred to:-**

1.AIR 1980 SC 643 : (State of Madhya Pradesh -V- Shanker Lal & Ors.).
2.AIR 1986 SC 1955 : (B.Varadha Rao -V- State of Karnataka & Ors.).

For Petitioner - Mr.Bibhu Prasad Das.
For Opp.Parties – Mr.P.Mohanty & Associates
(for O.Ps. 1 to 3)

*WRIT PETITION (CIVIL) NO.9934 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***A.S.NAIDU,J.*** An interesting point is raised for adjudication in the present writ petition, i.e., as to whether the petitioners, who are Class-IV employees can be transferred outside the State.

2. The petitioners were initially appointed in the establishment of Mica Trading Corporation of India Ltd., in short, 'MITCo', which was a fully owned subsidiary of MMTC Ltd. In the year 1992, MITCo became economically crippled and sick. Thereafter, the matter was referred to the Board for Industrial and Financial Reconstruction, in short, 'BIFR' as per the provisions of the SICA Act, 1985. After prolonged hearing, BIFR came to the conclusion that it was no more possible to rehabilitate MITCo on its own. Therefore, it was decided for amalgamation of MITCo with MMTC Ltd. Consequently, MITCo merged with MMTC Ltd. with effect from 14.4.1994 and the same became a division of MMTC. After merger, the employees working in MITCo were treated as the employees of MMTC under the scheme.

3. After such merger, it is submitted that the petitioners discharged their duties under MMTC Ltd. While matter stood thus, by order dated 24.6.2009, petitioner no.1 was transferred to Cochin and petitioner no.2 was transferred to Chennai. The said transfer order is assailed by the petitioners mainly on

the ground that in consonance with the service regulation of MMTC, Class-IV employees are not akin to transfer and as such, the order under Annexure-1 transferring the petitioners to far off places like Cochin and Chennai is contrary to the service conditions. The petitioners have prayed to quash the order of transfer under Annexure-1.

4. After receiving notice, opposite parties have appeared and filed counter affidavit. The fact that MITCo merged with MMTC is not in dispute. Relying upon the relevant portion of BIFR scheme, the opposite parties submitted that MMTC has a right to exercise option if warranted to transfer such number of workers of the erstwhile MITCo to any other units of MMTC as may be deemed necessary. Accordingly, the opposite parties who were found to be surplus at their present place of posting were transferred. In support of such statement, numbers of documents are annexed to the counter affidavit. In short, according to the opposite parties, they have a right to transfer the petitioners to any other unit in India if no work is available at their place of posting.

5. Admittedly, both the petitioners are at present posted at Paradip under the MMTC. The petitioners have also filed rejoinder repudiating the stand taken in the writ petition. The opposite parties in addition to the counter affidavit have also filed additional counter affidavit enclosing several other documents in support of their stand that the management of MMTC has a right to transfer the petitioners, who were found to be surplus staff at Barsuan Branch to any other place in the State.

6. We have heard learned counsel for the parties diligently. We have also perused the documents attached to the pleadings meticulously. There is no dispute that both the petitioners were the erstwhile employees of MITCo and in consonance with the scheme framed by BIFR, the said organization has merged with MMTC. After merger though they are considered to be the employees of MMTC, but then as per the scheme, they are guided by the service conditions of MITCo so far as the same is not detrimental to their interest. Learned counsel for both parties strenuously placed before this Court different clauses of the agreement in support of their arguments. According to the petitioners, the order of transfer from Paradip to Cochin so far as petitioner no.1 is concerned and to Chennai so far as petitioner no.2 is concerned, is not only meant to harsh them but also is otherwise contrary to the procedure agreed to be followed by the management of MMTC. It is submitted that the petitioners are low paid employees, they are getting a paltry amount of Rs.5,000/- per month towards their salary. In spite of specific provisions, the MMTC authorities are not enhancing their salary and

bringing in par with the salary and other benefits applicable to their counterparts, who are regular employees of MMTC. Consequently, the petitioners are subjected to stringent financial difficulties. It is further submitted that they are not entitled to any house rent allowance and are only paid a lump sum amount towards T.A. and D.A. Consequently, if they are made to transfer from Paradiip to Cochin or Chennai, as the case may be, they will be greatly prejudiced.

7. Perusal of the scheme framed by BIFR, the service conditions of MITCo vis-à-vis the service conditions of MMTC and other documents, gives an impression that the petitioners can be transferred from one place to the other if certain conditions are fulfilled. In fact, after taking over the management of MITCo, petitioner no.1 was transferred to Bhilwara Unit from Giridih Unit in the year 2001 and thereafter from Giridih to Jindal Mine, Barsuan in the year 2004 and from Barsuan to Paradip in the year 2006 and vide Annexure-1 he has been transferred from Paradip to Cochin. Similarly petitioner no.2 in the year 1981 was transferred from Abhraknagar to Gudur and in the year 2004 he was transferred from Gudur to Paradip and thereafter by Annexure-1 he has been transferred from Paradip to Tuticorin situated in Chennai. Being confronted with such position, learned counsel for the petitioners submitted that in consonance with the service conditions only when the unit is closed, the employees are transferred. It is stated that in the past as and when units were closed for some reason or the other, the petitioners were transferred and posted in other units. Such conditions are however not satisfied as the unit at Paradip is still functioning and work is available. Thus, it is stated that the order of transfer being unjustified needs interference.

8. It is no more res integra that transfer and posting of an employee is within the domain of the employer, who is to take a decision when, where and at what point of time the employee is to be transferred from his present posting. Transfer is not only an incident of service but an essential condition of service. The employee does not have the vested right to work at a particular place as the order of transfer does not affect his legal rights. Law is also well settled that the Court should always be slow to interfere with the order of transfer.

9. It may so happen that an order of transfer may cause great hardship as the employee would be forced to have a second establishment at far distant places, the education of his children may be adversely affected, he may not be able to manage his affairs and look after his family. But then, it is not permissible for the court to go into the relative hardship of the employee

unless under exceptional circumstances. In the case of **State of Madhya Pradesh v. Shanker Lal and others**, reported in AIR 1980 SC 643, the issue of transfer of a low paid employee was considered by the Supreme Court. After considering the provisions of the Act and the Rules governing in the field, the Court came to the conclusion that unless statutory rules put an embargo for transfer of Class-IV or low paid employees, there can be no bar to transfer the said employee. However, the Court observed that such a power should be exercised sparingly. The relevant observation of the Supreme Court reads as follows:

> " …… theoretically, therefore, the power does exist in the State Government to transfer them. We must, however, hasten to add that in case of employees getting small emoluments the power seems to be meant to be sparingly exercised under some compelling exigencies of a particular situation and not as a matter of routine. If it were to be liberally exercised, it will create tremendous problems and difficulties in the way of employees getting small salaries……..."

10. In the case of **B.Varadha Rao v. State of Karnataka and others**, AIR 1986 SC 1955, while dealing with the issue of transfer, the apex court considered various aspects and observed as under:

> "One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralization. It therefore follows that the policy of transfer should be reasonable and fair and should apply to everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. We wish to add that the position of Class III and Class IV employees stand on a different footing. We trust that the Government will keep these considerations in view while making an order of transfer."

11. After going through the authoritative pronouncement, this Court feels that in case of Class-IV or low paid employees, the power of transfer should be used sparingly when required under administrative exigencies and not in

a routine manner. More so, the power has to be exercised in good faith, not arbitrarily and the employer should try to accommodate the low paid employee at nearby places as his transfer to a far distant place may cause him and his family great financial hardship and make his survival difficult.

12. In view of the aforesaid discussions, we dispose of this writ petition with a direction that if the petitioners submit a fresh representation before the opposite party-authorities, the said authority shall consider the same in the light of the discussions made above by adopting humanitarian approach. If the representation is filed within a period of two weeks from today, we trust, the authorities shall take a decision in the light of the discussions made and the law enunciated above as expeditiously as possible. Till the decision is taken, status quo as on date shall be maintained.

Writ petition disposed of.

2010 ( I ) ILR-CUT- 660

**PRADIP MOHANTY, J & B.P.RAY, J.**

## ROHITA @ SUMANTA DALAI @ DAS & ANR.-V- STATE OF ORISSA.*

**MARCH 2, 2010.**

**EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.27 & 32.**

**Dying declaration – Recorded by doctor (P.W.9) under Ext.10 – In Cross-examination, P.w.9 admitted that there was no endorsement in Ext.10 that the said declaration was recorded by him – Absence of endorsement would not render the dying declaration not acceptable as P.W.9 was satisfied that the injured was in a free state of mind and was capable to make such declaration.**

**Moreover after appellants were arrested, appellant No.1 led the police and gave recovery of the knife – The knife was identified in Court by the witnesses – Moreover clothing's of appellant No.1 were seized by the police which were stained with blood.**

**Held, prosecution is able to prove that both the appellants with their common intention have committed murder of the deceased.**

(Para 9)

**Case law Referred to :-**

AIR 2002 SC 2973 : (Laxman -V- State of Maharashtra).

For Appellants – Miss Bijayalaxmi Tripathy.
For Respondent – Mr.J.P.Pattnaik,
Additional Govt. Advocate.

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*JAIL CRIMINAL APPEAL NO.307 OF 1998. From the judgment dated 27.08.1998 passed by Shri A.P.Das, Second Additional Sessions Judge, Cuttack in S.T.No.185 of 1997.

***PRADIP MOHANTY, J.*** In this appeal from jail, the appellants challenge the judgment and order dated 27.08.1998 passed by learned Second Addl. Sessions Judge, Cuttack in S.T. No.185 of 1997 convicting them under Section 302/34, IPC and sentencing them to undergo imprisonment for life.

2. Prosecution case in brief is that on 06.10.1996 at about 3.00 PM both the appellants called the deceased from his house. The deceased accompanied them. After half an hour of departure of the deceased, one Bharati, who was otherwise called as Bhaga, came and reported the mother of the deceased (P.W.1) that her son was lying in a pool of blood near the house of Mangal Singh. P.W.1, her husband (P.W.2) and their son-in-law (P.W.8) rushed to the spot and found the deceased was lying in a pool of blood. His intestine had come out and there was also injury on the neck. On

query, the deceased disclosed that Rohit and Kusa (present appellants) had stabbed him. The deceased was shifted to S.C.B. Medical College Hospital. P.W.2, the father of the deceased, orally reported the matter in the hospital itself to the I.I.C., Chauliaganj P.S. which was reduced to writing by an A.S.I. of police. On the basis of the said report, the case was initially registered under Section 307/34, IPC and after the death of the deceased it turned to one under Section 302/34, IPC. Police took up investigation and after its completion submitted charge-sheet against both the appellants.

3. Plea of the appellants is complete denial of their involvement in the commission of the offence.

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

5. Charge was framed against the appellants under Section 302/34, IPC. The learned Addl. Sessions Judge after conclusion of the trial convicted both the appellants under section 302/34, IPC and sentenced them to undergo imprisonment for life basing upon the evidence of P.Ws.1, 2, 6 and 8 as well as leading to discovery and dying declaration.

6. Miss. Tripathy, learned counsel for the appellants assails the judgment on the following grounds:

(i) Non-examination of the material witness, namely, Bhaga, who informed the parents and brother-in-law of the deceased that the deceased was lying in a pool of blood, is fatal to the prosecution.

(ii) The oral dying declaration said to have been made by the deceased before his relations cannot be accepted, since there is no independent corroboration.

(iii) Dying declaration as recorded by the doctor without giving certificate with regard to fitness of mind of the deceased has lost its sanctity and cannot be relied upon.

(iv) The requirements for application of Section 27 of the Evidence Act have not been fulfilled inasmuch as there is no material to show that the accused led the

police to the place of concealment and gave recovery of the weapon of offence (knife).

(v) There is no material to implicate appellant no.2-Kusa @ Sanjay Bhoi under Section 302/34, IPC.

(vi) Motive behind the crime has not been proved by the prosecution.

7. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that the dying declaration recorded by the doctor clearly discloses involvement of both the appellants. There is no material to disbelieve the evidence of P.Ws.1, 2 and 8 which is corroborated by P.W.6, an independent witness. Leading to discovery and seizure of the weapon of offence on production by appellant no.1 has been proved under Ext.8. In the instant case, chain of circumstances is complete leading to the only hypothesis that the appellants alone are the perpetrators of the crime. The trial court has rightly passed an order of conviction and there is no reason for this Court to interfere with the same.

8. Perused the LCR. P.W.2 is the father of the deceased. He is the informant. He deposed that at 4.00 PM when he was present in his house both the appellants came and called his son. After putting on pant and shirt the deceased went with the appellants. After some moments, Soubhagini and Bhaga came and informed that Kusa and Rohita had assaulted the deceased and he was lying injured near the house of Mangal Singh. Getting this information, he along with his wife and son-in-law went to the spot. The deceased was conscious and was lying injured in a pool of blood. His stomach was cut and intestine had come out. The deceased disclosed before him (P.W.2) that Kusa and Rohita had inflicted the injuries by means of knife and fled away. At that time, S.P.'s vehicle was crossing. The people stopped the said vehicle and shifted the injured in it to the hospital. In the hospital, he lodged FIR before the I.I.C., Chauliaganj P.S. vide Ext.1. After some time, the deceased succumbed to the injuries. Nothing substantial has been brought out by way of cross-examination from the mouth of P.W.2 to disbelieve his evidence. The defence, however, confronted him with his statement regarding disclosure of the names of the assailants by Soubhagya and Bhagabati. His evidence gets corroboration from the FIR. P.W.1 is the mother of the deceased and wife of the informant (P.W.2). She corroborated the statement of P.W.2 in material particulars. She specifically stated that the deceased was called by Kusa and Rohita as also about the disclosure of the names of the assailants by

the deceased. Nothing has been elicited by way of cross-examination to disbelieve her evidence. P.W.8 is the brother-in-law of the deceased and son-in-law of P.Ws.1 and 2. He corroborated the evidence of P.W.2. There is no material to discard the evidence of P.W.8. P.W.6 is an independent witness who arrived at the spot and found the parents of the deceased holding the injured. He also admitted presence of P.W.8 and shifting of the deceased to the hospital by a police van. He specifically stated that the deceased was alive at the time of admission in the hospital and died after some time. He further stated that the deceased disclosed the names of Rohita and Kusa in presence of everybody at the spot. He is also a witness to the seizure of the wearing apparels of the deceased and has proved Ext.7. Attempt was made by the defence to damage the evidence of P.W.6 but it was intact with regard to the dying declaration. P.W.3 is a police constable and P.W.4 is the S.I. of police. Both of them are witnesses to the inquest and seizure of wearing apparels of the deceased. P.W.5 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries:

"(1) A cut wound of seize 7 cm x 1 cm x skull bone deep situated on the left side tempero auricular area transversely cutting the middle part of the pina of left ear.

(2) One penetrating wound of size 5 cm x 2.25 cm x abdominal cavity deep situated on the left side epigastric region, close to mid line and 5 cm above the umbilicus and 92 cm above the left heel.

(3) A superficial cut of size 1.25 cm x 0.2 cm x skin deep situated on the right hand thumb.

(4) A superficial cut wound of size 4 cm x 0.25 cm x skin deep situated on the front of left arm and shoulder.

(5) A superficial cut wound of size 8 cm x 0.5 cm x skin deep situated on the front of the neck more towards right 4 cm above the supra sternal notch.

(6) A superficial tangential cut of size 1 cm x 1 cm on the palmer aspect of right hand middle finger."

He opined that the injuries were ante mortem in nature and could have been caused by pointed and sharp cutting weapon. The cause of death was due

to shock and haemorrhage resulting from injury no.2 and its corresponding internal injury which was fatal to cause death in ordinary case. He specifically opined that the injuries found on the deceased are possible by M.O.I. In cross-examination, he admitted that external injury nos.3 to 6 are superficial in nature but could not be caused by fall that too over broken glasses. P.W.7 is a local person and a witness to the leading to discovery. He specifically stated that appellant no.1 Rohita while in police custody disclosed that he stabbed the deceased with a knife along with appellant no.2, led the police to the place where he had thrown the knife and gave recovery of the same. The knife was seized under Ext.8 Nothing has been elicited by way of cross-examination from his mouth to discard his evidence. P.W.9 is the Assistant Professor of Surgery of the S.C.B. Medical College and Hospital who recorded the dying declaration. He specifically stated that the injured was in a very serious condition and at 5.05 PM he recorded his dying declaration. The deceased disclosed before him how he received the injuries and he recorded the same vide Ext.10. He proved Ext.10 and his signature thereon as Ext.10/1. He further stated that the Resident Surgeon on duty Dr. Kalyan Ananda Mohanty was present at that time. He proved the signature of the Resident Surgeon as Ext.10/2. In cross-examination, he admitted that there was no endorsement in Ext.10 that the said declaration was recorded by him and that the injured was in a free state of mind and was capable to make such declaration. This apart, nothing has been elicited from the mouth of P.W.9. P.W.10 is the Investigating Officer. He proved the FIR (Ext.1) and the seizure lists. He stated that after arrest appellant no.1 Rohita while in custody disclosed before him in presence of the witnesses about the concealment of the weapon of offence, led him and other witnesses to the place of concealment and gave recovery of the same. He proved Ext.12, the voluntary disclosure statement of appellant no.1, and also Ext.8, the seizure list prepared in token of seizure of the weapon of offence (M.O.I). He also proved seizure of the wearing apparels of the appellants vide Ext.13. In cross-examination, he admitted that he was not present at the time of recording of dying declaration by the doctor. He also denied that the injured was throughout unconscious. Nothing has been brought out through cross-examination by the defence to demolish the evidence of this witness.

9. In the instant case, there is no eye witness to the occurrence. The case is based upon circumstantial evidence. Evidence of P.Ws.1, 2 and 8 is very clear, cogent and consistent. There is no material to disbelieve the evidence of these witnesses to the effect, that the appellants went to the house of the deceased and called him, that the deceased accompanied them, that on being informed that the deceased was assaulted by the

appellants and was lying injured near the house of one Mangal Singh they rushed to the spot, and that on being asked the deceased disclosed before them that he was assaulted by the appellants. This part of the evidence gets corroboration from the evidence of P.W.6. Before the doctor P.W.9, who recorded the dying declaration, the deceased took the names of the appellants as his assailant. After the appellants were arrested, appellant no.1 led the police and gave recovery of the knife (M.O.I). The knife was identified in court by the witnesses. Added to it, clothings of appellant no.1 were seized by the police vide Ext.3 which were stained with blood. True it is that prosecution has not ascribed any motive, but that by itself cannot be a ground to treat the case with doubt. It has been ruled by the apex Court in ***Laxman v. State of Maharashtra***, AIR 2002 SC 2973 that certification by the doctor in the dying declaration to the effect that the patient was conscious was indeed a hyper technical view. Apart from it, in the case at hand the deceased first disclosed before his parents (P.Ws.1 and 2) and other witnesses (P.Ws.6 and 8) the names of the appellants as his assailants and the same was reiterated by him in the hospital before the doctor, as is evident from the dying declaration. P.Ws.1, 2 and 8 have categorically disclosed that Kusa (appellant no.2) was along with Rohita (appellant no.1). The deceased also disclosed the names of both the appellants. For all these reasons, this Court arrives at the irresistible conclusion that prosecution has been able to prove that both the appellants with their common intention have committed murder of the deceased.

10. In the result, therefore, the Jail Criminal Appeal is dismissed by sustaining the conviction and sentence of the appellants as recorded by the trial court under Section 302/34, IPC by the impugned judgment.

Appeal dismissed.

2010 ( I ) ILR-CUT- 666

**PRADIP MOHANTY, J & B.P.RAY, J.**

## GARBAPU VENKATIRAMANA -V- STATE OF ORISSA.*

**FEBRUARY 16, 2010.**

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

**Leading to discovery – Police arrested the accused on 11.03.1997 at 12 noon – Accused gave disclosure statement in presence of P.W.4 vide Ext.5 – Thereafter accused led the police to the half constructed house of one Babu Rao and brought out the weapon of offence M.O.I from the heap of bricks and the same was seized vide Ext.6 – P.W.4 is a witness to the leading to discovery – He stated to have signed the police paper on the night of occurrence i.e. on 10.03.1997 and the accused led the police and M.O.I was recovered at 2.30 PM.**

**Discrepancy with regard to date of seizure and arrest of the appellant – Held, this Court is not inclined to place reliance upon Ext.5 & 6.** (Para 11

**Case laws Referred to:-**

1.AIR 1959 SC 1012 : (Tahasildar Singh & Anr.-V-State of U.P.).
2.AIR 1973 SC 165 : (Nageshwar Sh.Krishna Ghobe -V-State of Maharastra).
3.2001(1) OLR 352 : (Bhagaban Panda & 6 Ors.-V-State of Orissa).
4.(1994) 7 OCR 243 : (Tusar kanti swain -V- State of Orissa).
5.1998(II) OLR 114 : (Narasingha Gopal -V-State of Orissa).
6.(1997)13 OCR 408 : (Khetramohan Das -V- State of Orissa).
7.AIR 1976 SC 2263 : (Lakshmi Singh & Ors.-V-State of Bihar).
8.(2008)41 OCR 558 : (Premananda sahoo & Ors.-V-State of Orissa).
9.AIR 1956 SC 181 : (Baladin & Ors.-V-State of Uttar Pradesh).

For Appellant – Mr.Subrata Acharya.
For Respondent – Mr.J.P.Pattnaik, Addl. Govt. Advocate.

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*JAIL CRIMINAL APPEAL NO.220 OF 1998. From the judgment dated 11.06.1998 passed by Shri M.K.Mohanty, Additional Sessions Judge,Rayagada in Sessions Case No.51 of 1997 (Original S.c.No.158 of 1997 of the Sessions Judge,koraput, Jeypore).

***PRADIP MOHANTY, J.*** Appellant Garbapu Venkatiramana and two others (Garbapu Prasad and Garbapu Ramulu) were facing trial in the court of learned Additional Sessions Judge, Rayagada in Sessions Case No.51 of 1997 (Original S.C. No. 158 of 1997 of the Sessions Judge, Koraput, Jeypore) being charged under Sections 302/324/34, IPC. By the judgment

and order dated 11.06.1998, the learned trial Judge while acquitting Garbapu Prasad and Garbapu Ramulu of the charge, convicted the appellant under Sections 302/324, IPC and sentenced him to undergo imprisonment for life for the offence under Section 302, IPC, but did not impose any separate sentence for the offence under section 324, IPC.

2. Case of the prosecution is that on 10.3.1997 at about 8.00 P.M. Garabapu Elemma, the daughter of Garabapu Ramulu (co-accused since acquitted) was shaking the supporting wire of the electric pole situated in the locality. In course of shaking, there was sparking in the live wire of the electric line. P.W.2, the informant (wife of P.W.1) told her not to do that as there were chances of causing damage to the houses of the locality. But she continued to repeat the same. At that time, P.W.1 came and protested, but she did not listen and started rebuking P.W.1. When P.W.1 confronted Elemma as to why she was rebuking, the three accused persons appeared and started abusing P.Ws.1 & 2 instead of cautioning Elamma. Then the present appellant went to his house, came with a knife and dealt a knife blow to the left arm of P.W.1. As a result, P.W.1 sustained bleeding injury on his arm. At that juncture, Dharmani Krishna (deceased), younger brother of P.W.1, arrived at the spot. When he challenged the appellant, the appellant on being instigated by the co-accused persons (since acquitted) stabbed to the left side chest of the deceased. As a result of such stabbing, the deceased died at the spot sustaining bleeding injury. The informant with the help of her husband's younger brothers shifted P.W.1 to the hospital and lodged FIR in the Rayagada Police Station, consequent upon which, police registered the case, investigated into the matter and submitted charge sheet under sections 302/324/34, IPC against the three accused persons including the present appellant.

3. The accused persons took the plea of complete denial. Their specific plea was that co-accused Garbapu Ramulu (since acquitted) was admitted in the hospital as he had sustained injury on his left thigh on being assaulted by P.W.1 and others. For that, a counter case was instituted against P.W.1 and others. Their further plea was that one Adinarayan, the brother of P.W.1 used the knife against co-accused Garbapu Ramulu. As the deceased was standing very close behind his brother (P.W.1), while dealing knife blows against co-accused Garbapu Ramulu, the injury was caused by Adinarayan on the left arm of P.W.1. The knife slipped from the left arm and entered into the left side chest of the deceased who sustained injury on the chest and died instantaneously.

4. In order to prove its case, prosecution examined as many as fifteen witnesses and exhibited seventeen documents. Defence examined two witnesses.

5. The trial court after conclusion of the trial acquitted the co-accused persons (Garbapu Prasad and Garbapu Ramulu) of the charge, but convicted and sentenced the appellant as stated hereinbefore.

6. Mr. Acharya, learned counsel for the appellant assails the judgment on the following grounds:

(i) Conviction having been based relying on the tainted testimony of interested and partisan witnesses who have tried to develop the case in Court, cannot be sustained.

(ii) No explanation was given by the prosecution with regard to the injury on the person of the co-accused Garbapu Ramulu and thereby prosecution has suppressed the true state of affairs.

(iii) The investigation was biased, perfunctory and suffers from serious infirmity, as the I.O. suppressing the defence story has recorded the statements of the witnesses.

iv) Leading to discovery has not been proved by the prosecution.

7. Mr. Pattnaik, learned Additional Government Advocate, on the other hand, supports the impugned judgment and vehemently contends that the evidence of the eye witnesses is very clear, cogent and convincing. There is no contradiction with regard to assault on the deceased. The injury sustained by co-accused Garbapu Ramulu is superficial and the counter case has been falsely initiated against the informant group. The evidence of P.W.2, the informant, and other eye witnesses corroborates the F.I.R. The evidence of P.Ws.1, 4, 5, 10, 11 and 13 with regard to seizure of M.O.I is supported by the version of P.W.2. Perfunctory investigation is not a ground to disbelieve the evidence of the eye witnesses. Leading to discovery has been proved by independent witness P.W.4.

8. Learned counsel appearing for both the parties rely upon the decisions in ***Tahasildar Singh & anr. v. State of U.P.***, AIR 1959 SC 1012, ***Nageshwar Sh. Krishna Ghobe v. State of Maharastra***, AIR 1973 SC 165, ***Bhagaban Panda & 6 ors. v. State of Orissa***, 2001 (1) OLR 352, ***Tusar Kanti Swain v. State of Orissa***, (1994) 7 OCR 243, ***Narasingha Gopal v. State of Orissa,*** 1998 (II) OLR 114, ***Khetramohan Das v. State of Orissa,*** (1997) 13 OCR 408, ***Mohan Rai & anr. v. State of Bihar***, AIR 1968 SC 1281, ***Lakshmi Singh & ors. v. State of Bihar***, AIR 1976 SC 2263, ***Premananda Sahoo & Ors. v. State of Orissa,*** (2008) 41 OCR 558 and ***Baladin & Ors. v. State of Uttar Pradesh,*** AIR 1956 SC 181.

9. Perused the LCR and the decisions cited by the parties. P.W.1 is an injured and a witness to the occurrence. P.W.2 is the informant and wife of P.W.1 as well as sister-in-law of the deceased. She specifically stated that Elemma, daughter of co-accused Garbapu Ramulu, was shaking the supporting wire of the electric pole situated in her locality. In course of shaking, there was sparking in the live wire of the electric line. She advised Elamma not to do that, as there were chances of sparking and damages to the houses of the locality. But she continued the same act. At that time, her husband P.W.1 came and protested, but Elamma did not listen. Rather she started rebuking P.W.1 to which he protested. At that time, all the three accused persons appeared at the spot. They did not say anything to Elamma but started abusing them. The appellant went to his house, came with a knife in his hand to the spot and dealt knife blow to the left arm of P.W.1 and thereby P.W.1 sustained bleeding injury on his arm. At that juncture, the deceased, brother of P.W.1, arrived there and when he tried to shift P.W.1 to the hospital, co-accused Ramulu and Prasad came to the spot and instigated the appellant to stab the deceased. The appellant stabbed on the left side chest of the deceased causing profuse bleeding. Then the deceased came up to the electric pole and fell down there. When she tried to give some water to the deceased, he could not take and died at the spot. P.W.1 was shifted to the hospital and admitted there. He lost his sense while he was taken to hospital. Thereafter, P.W.2 went to the police station and orally reported the mater. She identified M.O.I as the weapon of offence. In cross-examination, she admitted that a case was instituted against her husband P.W.1 and his two brothers by the accused persons. She also admitted that she narrated the incident to the police in Telgu language. She further admitted about the admission of Ramulu in the hospital. Nothing has been elicited from her cross-examination to disbelieve her testimony. P.W.1 is the injured and the husband of P.W.2. He corroborated the statement of P.W.2. P.W.1 in cross-examination stated that he regained his sense three days after the occurrence and he had lost his sense after seeing the death of the deceased. P.W.3 is a witness to the seizure of the shirt of P.W.1, the injured. P.W.4 is a witness to the inquest as well as seizure of blood stained cemented plaster. He is also a witness to the leading to discovery of M.O.I. He proved Exts.3, 4, 5 and 6. He also specifically stated that the appellant voluntarily gave the disclosure statement in his presence before the I.O. and led them to the place where he had concealed the weapon. In cross-examination, he admitted that he signed on all the papers in the night of occurrence. P.W.5 is an independent witness. He corroborated the statement of P.W.2 with regard to assault to the injured (P.W.1) and the deceased. Nothing has been elicited from his cross-examination to discredit his evidence. P.W.6 is another independent

witness. He also corroborated the evidence of P.Ws.2 and 5. P.W.10 is also an independent witness who corroborated the evidence of P.Ws.2 and 5. In the examination-in-chief, he specifically stated that when deceased challenged the accused persons why they caused injury to his brother (P.W.1), co-accused Ramulu and Prasad instigated the appellant to deal knife blow to the deceased. Then appellant dealt knife blow to the chest of the deceased. Nothing has been elicited by way of cross-examination from his mouth to belie his testimony. P.W.11 is also an independent eye witness. He corroborated the version of PW.2 with regard to assault on P.W.1. P.W.13 is another eye witness. She corroborated the evidence of P.W.2 and specifically deposed that when Krishna (deceased) arrived at the spot and objected, co-accused Ramulu and Prasad directed the appellant to stab the deceased. Then the appellant dealt knife blow to the left side chest of the deceased, as a result of which he sustained profuse bleeding on his chest. Nothing has been elicited from her cross-examination to disbelieve her testimony. P.W.7 is the doctor, who conducted autopsy over the dead body of the deceased. He opined that the injury was caused to the vital organs like heart and lungs which had given rise to a lot of bleeding leading to shock and death. The injury was ante mortem in nature and sufficient in ordinary course of nature to cause death. He also opined that M.O.I can cause such injury. P.W.8 is the doctor, who examined P.W.1. He opined that the injury sustained by P.W.1 was caused by M.O.I. P.W.9 is a police constable and a witness to the inquest. P.W.14 is the I.O. who investigated into the matter and submitted charge sheet against the appellant and two other co-accused persons under Sections 302/324/34 IPC. But in cross-examination he admitted that on 11.03.1997 at about 2.30 PM the M.O.I was recovered and seizure list was prepared. He also admitted that he recorded the statement of P.W.1 on the next day of the occurrence, i.e., on 11.03.1997. He also admitted that he had issued medical requisition to co-accused Garbapu Ramulu on 11.03.1997. The requisition and the medical certificate were not available on record.

10. From the above analysis of the evidence, there is no dispute that P.Ws.2, 5, 6, 10, 11 and 13 are witness to the occurrence and there is nothing on record to disbelieve their evidence. P.W.1, the injured witness, specifically stated in his evidence that he lost his sense immediately after seeing the assault on his deceased brother and regained his sense after two days and police recorded his statement three days after the occurrence. But the I.O., P.W.14 specifically stated that he recorded the statement of P.W.1 on 11.03.1997, i.e. the next day of the occurrence. In this view of the matter, this Court is not inclined to accept the version of P.W.1. However, the evidence of P.Ws.2, 5, 6, 10, 11 and 13 which gained sufficient

corroboration from the medical evidence is found to be reliable. Therefore, taking into account the oral evidence of these witnesses and the medical evidence, it can be safely deduced that it is the appellant who assaulted the deceased and P.W.1.

11. Let us now examine whether leading to discovery has been proved by the prosecution or not. The apex Court has ruled that for application of Section 27 of the Evidence Act, the following requirements are necessary to be fulfilled by the prosecution:

i) The fact of which evidence sought to be given must be relevant to the issue;

ii) The fact must have been discovered in consequence of same information received from the accused;

iii) The person giving information must be accused of the offence; and

iv) he must be in custody of police.

From the aforesaid, it emanates that discovery of a fact in consequence of information from accused in custody must be proved. Only that portion of the information which relates distinctly to the fact discovered can be proved and rest is inadmissible. In this case, police arrested the accused on 11.03.1997 at about 12 noon. Thereafter, it is alleged, the accused-appellant gave the disclosure statement to the police in presence of P.W.4 vide Ext.5, led them to the half constructed house of one Babu Rao and brought out M.O.I from the heap of bricks and the same was seized vide Ext.6. P.W.4 is said to be the witness to the leading to discovery. But he admitted that he signed the police paper on the night of occurrence, i.e., 10.03.1997 and that the accused disclosed the fact, led the police and M.O.I was recovered at 2.30 P.M. Since there is discrepancy with regard to date of seizure and arrest of the appellant, this Court is not inclined to place reliance upon Exts.5 and 6.

In the instant case, although there are some material omissions, such omissions have not been confronted either to the concerned witnesses or to the investigating officer. Therefore, the accused cannot get any benefit out of that.

As regards the so-called perfunctory investigation, the apex Court in ***Baladin & Ors. v. State of Uttar Pradesh,*** AIR 1956 SC 181 has held that

the record by the investigating officer, shall be considered by the Court only with a view to weighing the evidence actually adduced in Court. If the police record becomes suspect or unreliable, as in the present case, on the ground that it was deliberately perfunctory or dishonest, it loses much of its value. So, the Court while judging the case of a particular accused has to weigh the evidence given against him in Court keeping in view the fact that the earlier statements of witnesses as recorded by the police is tainted record. This ratio has been followed by this Court in ***Premananda Saoo & Ors. v. State of Orissa***, (2008) 41 OCR 558. Conjoint reading of evidence of P.Ws.2, 5, 6, 10, 11 and 13 clearly establishes that the appellant assaulted the deceased and P.W.1. As such, the so-called perfunctory investigation will not affect the prosecution case, particularly when the evidence of the investigating officer is very clear and cogent and nothing has been elicited from his mouth by way of cross-examination and nothing has been confronted to him.

2. Now, it is to be seen whether the act committed by the appellant comes within the ambit of Section 302, IPC or Section 304 Part-I, IPC. It is in the evidence that assault took place due to sudden provocation given by the deceased and apparently a single blow was dealt to the chest of the deceased. Therefore, taking into consideration the attending circumstances, this Court converts the conviction of the appellant from Section 302, IPC to Section 304 Part-I, IPC and sentences him to undergo rigorous imprisonment for ten years. His conviction under Section 324 IPC is confirmed without imposing any separate sentence.

It is stated by Mr. Acharya that appellant Garbapu Venkatiramana by now has remained in custody for more than ten years. If that be so, the appellant be set at liberty forthwith, unless his detention is required otherwise.

The Jail Criminal Appeal is partly allowed.

Appeal allowed in part.

**2010 ( I ) ILR-CUT- 673**

**M.M.DAS, J.**

## GENERAL MANAGER, GRIDCO, NOW OPTCL & ANR.-V- SMT. SHYAMALIKA DAS.*

**FEBRUARY 5, 2010.**

**CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – SEC.89.**

**Suit for permanent injunction from raising High Tension Tower for drawing the transmission line on the disputed land.**

**Court is required to weigh the indivisual interest of the plaintiff vis-à-vis the general public interest for getting electricity supply – Court to find ways and means to see that public inconvenience is avoided while protecting the interest of the plaintiff.**

**Section 89 has been introduced for the first time for settlement of disputes outside the Court with the avowed objection of providing speedy justice.**

**In the present case this Court without referring the matter for a settlement out of Court decided that the appellant shall pay a sum of Rs.1,75,000/- as compensation for raising High Tension Tower over the land of the respondent but shall not acquire any title over the land in question.** (Para 14 )

**Case law Referred to :-**

1998 (2) OLR 136 : ( Smt.Susama Patel -V- Grid Corporation of Orissa Ltd. & Ors.)

For Appellants - M/s.P.K.Mohanty, D.N.Mohpatra, G.S.Satpathy, Smt.J.Mohanty, D.K.Pradhan & P.K.Nayak.

For Respondent - Mr.G.K.Nayak.

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*R.S.A. NO.101 OF 2006. From the judgment dated 23.12.2005 and decree dated 6.1.2006 passed by Shri A.B.S.Naidu, learned Addl. District Judge, Sambalpur in RFA No.32/23 of 2004-2005 confirming the judgment dated 25.2.2004 and decree dated 12.3.2004 passed by Shri T.P.Rath, learned Civil Judge 9Junior Division), Sambalpur in T.S. No.32 of 2002.

***M.M. DAS, J.*** This second appeal has been filed against the confirming judgment passed in a suit filed by the respondent for permanent injunction against the defendant-appellants to injunct them from raising a High Tension Tower for drawing the transmission line of 220 K.V.(D.C.) from Budhipadar to Bolangir over the disputed property which admittedly belongs to the respondent. The appeal has been admitted on the substantial question of law as to whether the learned courts below are competent and having jurisdiction to decide the disputes involved in the case and to grant

permanent injunction in view of the clear bar in this regard under Section 82 of the Electricity (Supply) Act, 1948 and Section 145 of the Electricity Act, 2003.

2. Upon hearing the learned counsel for the parties, it appears that over and above the substantial questions of law framed by this Court during admission of the appeal, another substantial question of law arises for determination, such as:

> "Considering the facts involved in this case, where the dispute relates to the general interest of the public, who are to be supplied with electricity vis-à-vis the individual interest of the plaintiff, whether the learned courts below have gone wrong in holding that a decree of permanent injunction can be passed in favour of the plaintiff and in not taking the aid of Section 89 C.P.C. to arrive at a just decision in this case ?

3. On perusal of the impugned judgment, it appears that the learned lower appellate court while confirming the judgment of the trial court took note of the fact that the plaintiff claimed that the suit land is a homestead land and she has raised construction of a house for which the Tahasildar under Ext. 3 authorized to convert the status of the suit land. The learned lower appellate court also observed that no documentary evidence has been adduced from the side of the defendants (appellants) to prove such fact that the scheme was notified in the gazette and the copy of the notification does not reflect the details of the land over which the proposed transmission line was to be taken. The learned lower appellate court has relied upon the decision in the case of ***Smt. Susama Patel –v- Grid Corporation of Orissa Ltd. and others***, 1998 (2) OLR 136 in support of its finding that the proper notification and publication must indicate the areas over which the transmission line is likely to go and in absence of indication of the area in the publication or notification, it is not a proper notification.

4. Mr. Mohanty, learned counsel for the appellants has filed the gazette notification before this Court to accept the same as additional evidence under Order 41 Rule 27 C.P.C., the xerox copy of which was filed before the trial court.

5. Considering the fact that the said gazette notification, which is a public document, would be necessary for just adjudication of the appeal even though admission of the same was objected to by the respondent, the same is admitted into evidence, waiving its formal proof and is marked as Ext. B. In the case of Smt. Susama Patel (supra), this Court on verifying the notification, which was published under sub-section 3 of Section 28 of the Electricity (Supply) Act, 1948 observed as follows:

> "……..In our opinion, this is not a proper publication of the draft scheme as it did not indicate the areas over which transmission line was likely to go".

6. In that view of the matter, the lower appellate court held that the sanctioned scheme was not published properly. In the gazette notification, which has been marked as Ext. B, it has been specifically mentioned that full details of the scheme and the plan may be seen in the office of the Chief Engineer (Transmission Project), Orissa State Electricity Board, Bidyut Bhawan, Sahidnagar, Bhubaneswar on any working day during office hours. It, therefore, cannot be said that in the detailed plan, the areas were not mentioned and accordingly, the said areas mentioned in the detailed plan formed a part of the scheme, which was notified in the gazette. It is, therefore, inevitable to hold that the learned lower appellate court went wrong in placing reliance on the decision in the case of Smt. Susama Patel (supra). It further appears that 90% of the work with regard to drawing of 220 K.V. line from Godipadar to Bolangir is stated to have been completed and supply of electricity is to be made for the interest of the public at large.

7. In the facts of this case, where the Court is required to weigh the individual interest of the plaintiff vis-à-vis the general public interest for getting electricity supply, the learned court below should have come to the finding that the balance of convenience weigh in favour of the appellant-defendant in drawing the transmission line for supply of electricity from Budhipadar to Bolangir and the loss to be sustained by the plaintiff can be compensated in money value which is the cardinal principle prescribed under section 38 of the Specific Relief Act under which the suit for permanent injunction was filed. For better appreciation, section 38 of the Special Relief Act is quoted hereunder:-

> "38. **Perpetual injunction when granted**.-(1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.
>
> (2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter-II.
>
> (3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of property, the court may grant a perpetual injunction in the following cases, namely:-
>
> (a) where the defendant is trustee of the property for the plaintiff.
>
> (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused by the invasion.
>
> (c) where the invasion is such that compensation in money would not afford adequate relief:

(d) where the injunction is necessary to prevent a multiplicity of judicial proceedings."

8. Keeping the above aspects of the case in view, it would have been apt for the court to find ways and means to see that public inconvenience is avoided while protecting the interest of the plaintiff. For the above, aid may be drawn from section 89 of the Code of Civil Procedure.

9. Section 89 C.P.C. providing for settlement of dispute outside the court was inserted in the Code of Civil Procedure in 1999 and brought into force with effect from 1.7.2002. The 'Notes on Clauses' of the C.P.C. (Amendment) Bill 1999 stated with regard to this provision thus:

"Clause 7 provides for the settlement of disputes outside the court. The provisions of Clause 7 are based on the recommendations made by Law Commission of India and Malimath Committee. It was suggested by Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make an attempt to settle the dispute between the parties amicably. Malimath Committee recommended to make it obligatory for the court to refer the dispute, after issues are framed, for settlement either by way of arbitration, conciliation, mediation, judicial settlement or through Lok Adalat. It is only when the parties fail to get their disputes settled through any of the alternate dispute resolution method that the suit could proceed further. In view of the above, Clause 7 seeks to insert a new section 89 in the Code in order to provide for alternate dispute resolution".

Section 89 has been introduced for the first time for settlement of disputes outside the Court, with the avowed objective of providing speedy justice:

**(1)** It is now made obligatory for the Court to refer the dispute after issues are framed for settlement either by way of –

(a) Arbitration,
(b) Conciliation,
(c) Judicial settlement including settlement through Lok Adalat, or
(d) Mediation.

**(2)** Where the parties fail to get their disputes settled through any of the alternative dispute resolution methods, the suit could proceed further in the Court in which it was filed.

**(3)** The procedure to be followed in matters referred for different modes of settlement is spelt out in sub-section (2).

**(4)** Clause (d) of sub-section (2) of Section 89 empowers the Government and the High Courts to make rules to be followed in mediation proceedings to effect the compromise between the parties.

10. Keeping the legislative intent in view for framing section 89 C.P.C. and introducing the same to the Code of Civil Procedure, all endeavour should be made to inspire the parties to settle their dispute outside the court by utilizing the provisions of the said section. Public confidence in the judiciary is the need of the hour more than ever before. The Judiciary has a special role to play for achieving socio-economic goals enshrined in the Constitution. While maintaining their aloofness and independence, the Judges have to be aware of the social changes in the task of achieving socio-economic justice for the people. Socrates said that four things improve a great Judge:

(a) To hear courteously;
(b) To answer wisely;
(c) To consider soberly; and
(d) To decide impartially.

11. The Judges of the subordinate judiciary, which can be termed as the root of our judicial system, are required to inspire confidence in themselves and do justice to the society. It is rightly said that judicial officers discharge divine functions though they are not divine themselves. A successful judicial system is a hallmark of any developed civilization. The introduction of ADR mechanisms in the Code of Civil Procedure, 1908 is one more radical step taken in recent times by the legislature by enacting Section 89 and Order X Rules 1A, 1B and 1C providing for ADR machinery even in cases pending before the civil courts.

12. Hence, introduction of Section 89 to the Code of Civil Procedure can be termed as a crucial legislative intervention which recognized Court-annexed ADR methods in India. This provision is important since significant portions of pending litigations at the trial level are best resolved through these methods. Civil litigation has an inherently adversarial character and is widely perceived in society as a tool of confrontation and unnecessary harassment. Especially in instances where parties are otherwise well-known to each other, their involvement in lengthy and acrimonious civil suits can do irreparable damage to their mutual relationships. Under such conditions, judges can use their discretion to direct the use of ADR methods under their supervision. If this approach is internalized in our system, it can greatly reduce the case-load before the Courts of law. (*Key note addressed by the C.J.I. at Indo-EU Business Forum, London*)

13. It would be apt to state here that it is by now well settled that no legislative enactment dealing with procedure can provide for all cases that

may possibly arise. The Courts, therefore, have inherent powers apart from express provisions of law, which are necessary for proper discharge of functions and duties imposed upon them by law. The Supreme Court has further held that inherent powers are necessary to do the right and to undo a wrong in course of administration of justice on the principle *"quando lex aliquid alicui concedit, concedere videtur et id sirne quo res ipsae esse non potest*" (when the law gives a person anything it gives him that without which it cannot exist) (See AIR 2006 S.C. 2872). (**Emphasis supplied**)

14. Thus, applying the inherent power under section 151 C.P.C. along with the provisions of section 89 C.P.C. in consideration of the nature of dispute involved in this appeal, without referring the matter for a settlement out of court, this Court takes up the matter to find out a via-media for deciding the case finally and orders that on the appellant paying a sum of Rs. 1,75,000/- (Rupees one lakh seventy five thousand) as compensation for raising High Tension Tower over the land of the respondent, to the respondent, they shall be permitted to draw the transmission line of 220 K.V. over the land of the respondent as per the scheme. However, the appellants shall not acquire any title over the land in question except the right to maintain the tower and over the area which exists just below the tower. Payment of the above amount shall be made to the respondent in shape of a bank draft drawn on any Nationalized Bank situated at Burla. The respondent shall co-operate with the appellant whenever maintenance work of the tower is undertaken and the appellant shall take all care and caution while drawing the High Tension Line over the disputed property and in future also, so as to prevent any danger to the life and property of the respondent. The impugned decree is modified to the above extent.

15. The Second Appeal is accordingly allowed in part. Cost of the appeal shall be borne by the respective parties.

Appeal allowed in part.

2010 ( I ) ILR-CUT- 679

**M.M.DAS, J.**

## SMT.SUBASINI CHOUDHURY -V- SMT.BISAKHA KAR & ORS.*

**JANUARY 13,2010.**

**(A) SUCCESSION ACT, 1925 (ACT NO.39 OF 1925) – SEC.63.**

**Will – Not compulsorily registerable - Court should not draw any inference against the genuineness of the will on the ground of its non-registration.** (Para 5)

**SUCCESSION ACT, 1925 (ACT NO.39 OF 1925) – SEC.63.**

**Execution of will – Deprivation of natural heirs – Whole idea behind execution of will is to interfere with the normal line of succession - So natural heirs would be debarred in every case of will either fully or partially.**

**In the present case there are materials appearing on the face of the will that the testator was neglected by all his Kith and Kin which by implication includes his daughter – Held,no suspicious circumstances can be presumed as the testator had only one daughter who was debarred by execution of the will.** (Para 5)

**SUCCESSION ACT, 1925 (ACT NO.39 OF 1925) – SEC.63.**

**Will – Question of title over the properties bequeathed under the Will – Court in which a Will is sought to be probated has no jurisdiction to examine the question of title to the property under the Will**.

**(**Para 5)

**(D)SUCCESSION ACT, 1925 (ACT NO.39 OF 1925) – SEC.63, 276.**

**Will – Appreciation of evidence of attesting witnesses to a Will – They happened to be chance witnesses – Discrepancies in their evidence bound to appear in view of the long gap between the date of execution of the Will and the date of examination of the witnesses – No ground for disbelieving their evidence.**

**Held, impugned judgment is not sustainable – This Court finds the will is a genuine one – There is no suspicious circumstances concerning the execution of the Will – The testator executed the will while in sound health and mind and the Will is the last Will of the testator – The will be probated and required letter of administration be issued in favour of the appellant.**

(Para 5,6,7)

**Case laws Referred to:-**

1.AIR 1954 SC 280 : (Ishwardeo Narain Singh -V-Sm.Kamta Devi & Ors.)
2.AIR 1995 SC 1684 : ( Rabindra Nath Mukherjee & Anr.-V-Panchanan Banerjee (dead) by L.Rs and Ors.).

3.AIR 1964 SC 529 : (Sashi Kumar Banerjee & Ors.-V-Subodh Kumar Banerjee Since deceased & after him his legal representatives & Ors.)

For Appellant – M/s.S.P.Mishra, S.Mishra, S.Dash, S.Nanda & S.Mishra.
For Respondents – Mr.Ashok Mohanty, Advocate General & Addl.Standing Counsel (For Respondent Nos.2 & 3)
Mr.Chittaranjan Pattnaik (For Respondent No.1).
Mr.Damodar Sahoo, (For intervenor).

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* F.A.O. NO.251 OF 2004. From an order dated 15.5.2004 passed by Shri D.S.Mishra,learned Civil Judge (Sr.Divn.),Bhubaneswar in Probate Misc.Case No.5 of 2003.

***M. M. DAS, J.*** This appeal has been filed challenging the order dated 15.5.2004 passed in Probate Misc. Case No. 5 of 2003 by the learned Civil Judge (Senior Division), Bhubaneswar.

2. The petitioner in the said Probate Misc. Case is the appellant before this Court. She filed the said case for probate of a Will under section 276 of the Indian Succession Act. The case of the petitioner was that the residential house site over plot no. 3 in Unit-III, Bhubaneswar City having an area of Ac.0.500 decimals belongs to late Rama Chandra Kar, S/O. late Banchhanidhi Kar of Dargha Bazar, Cuttack. The said Rama Chandra Kar died on 5.3.1996 at S.C.B. Medical College and Hospital, Cuttack. Before his death, he executed his last Will and testament in favour of the petitioner on 14.11.1995 in presence of the witnesses. Initially, no opp. parties were impleaded in the said Probate Misc. Case. But subsequently, by an order passed by the learned District Judge, Khurda at Bhubaneswar on 5.7.1999, one Smt. Bisakha Kar, the State of Orissa through the Secretary, G.A. Department and the Director of Estates, Government of Orissa, G.A. Department were added as opp. parties in the said Probate Misc. Case. When the matter was pending before the court below, a finding has been recorded in the impugned order that in spite of sufficiency of service of notice, the opp. parties, who were arrayed as parties, did not appear in the said case, except the State of Orissa. The learned court below, while ultimately dismissing the Probate Misc. Case, in the impugned order has made certain observations and arrived at certain findings, as stated herein below:-

(i) The Will is an unregistered Will even though the testator beneficiary and the witnesses went to the Sub-Registrar Office for the execution of the Will on 11.11.1995, no explanation is given as to why the Will was not registered.

(ii) In the initial stage of the case, the application for probate was filed without impleading Bisakha Kar and the State Government as parties.

(iii) That the beneficiary and the attesting witnesses who are examined as P.W.1, P.W.2 and P.W. 3 respectively, could not say the name of the typist who typed the Will and they also could not say who filled up the blank space in page 3 of the Will.

(iv) All the P. Ws admitted that the testator has one daughter, namely, Bisakha Kar as the only legal heir to succeed to the property of the testator, and the consent of Bisakha Kar has not been obtained in the Will.

(v) The intention of the testator is not explained for executing the Will in favour of a complete outsider while there is a legal heir to succeed to the whole property of the testator. Such a situation is highly suspicious.

(vi) No relations or any independent advisor of the testator were present at the time of execution of the Will.

(vii) The witnesses to the Will are not related to the testator and they have no previous acquaintance with the testator. The witnesses are picked up.

(viii) While the P.W. No.2 in the cross-examination by the State stated that he came to the residence of P.W.1 where he found the testator, the P.W. 3 and the Doctor were there and they all came to Okil Khana, the P.W.3 stated in the cross-examination by the State that he came directly to Okil Khana.

(ix) P.W. 2 has stated in the cross-examination by the State that the Doctor – D.C. Panda examined the testator and found him in good health and in sound mind and gave a certificate. The said certificate was not produced in the court nor was the doctor examined.

(x) In the court of the Civil Judge (Sr. Division), Cuttack, a Civil Suit bearing T.S. No. 32 of 1978 involving the suit property is pending.

(xi) Though the witnesses for the plaintiff have stated that the testator was in sound health and sound mind, he died after four months of the execution of the Will.

Each of the above observations and findings have been challenged in the appeal.

3. During the course of hearing of the appeal, learned counsel for the State submits that the property under the Will belongs to the State of Orissa.

However, the State has not raised any objection with regard to the genuinity of the Will which it also could not have objected to.

4. Mr. S.P. Mishra, learned counsel for the appellant submits that the learned court below has acted contrary to law in arriving at the aforesaid findings and dismissing the Probate Misc. Case. Relying upon the decision in the case of ***Ishwardeo Narain Singh v. Sm. Kamta Devi and others,*** AIR 1954 SC 280, he submits that just because the Will is not registered, the court cannot raise a suspicion for not accepting the Will as genuine inasmuch as a Will is not compulsorily registerable . He further submits that non-impletion of Smt. Bisakha Kar and the State of Orissa cannot be taken to be an adverse situation against the petitioner-appellant as the petitioner-appellant was ignorant about Smt. Bisakha Kar and the State of Orissa was not a necessary party to the Probate Misc. Case as in a probate proceeding, the court is only to consider a valid execution of the Will and the Probate Court lacks jurisdiction to decide valid title of the testator/testatrix over the properties bequeathed under the Will by granting a letter of administration. In support of the above contention, he relies upon the decision in the case of *Ishwardeo Narain Singh (supra)* and the decision in the case of ***Rabindra Nath Mukherjee and another v. Panchanan Banerjee (dead) by L.Rs and others***, AIR 1995 SC 1684. With regard to the suspicious ground as mentioned by the court below in the impugned judgment, which is noted in (iii) above, Mr. Mishra submits that the same cannot be accepted as a suspicious ground for not declaring the Will to be genuine. The Will was executed in the year 1995 and the witnesses were examined in the year 2004. Hence, even if, P.W. 3 could not say as to who filled up the blank space at page 3 of the Will, P.W.2 has stated that he filled up the blank space in the Will. Even though in the cross-examination, he could not say as to who filled up the blank space, the blank space in the Will, according to Mr. Mishra, was with regard to the name and address of the witnesses and, as such, the same cannot be a suspicious ground. With regard to the suspicion raised in point no. (iv), Mr. Mishra submits that law is well settled that the property, if self-acquired, can be bequeathed under a Will when the testator has been neglected by his kith and kin which also includes his daughter and son-in-law. Such intention could have been gathered in view of the fact of execution of the Will. With regard to point no. (v), he submits that for gathering the intention of the testator for executing the Will, the court should have looked at the Will, which clearly shows the intention for its execution. When all the P.Ws have categorically stated in their evidence that the testator was in sound health and sound mind, the learned court below should not have drawn an adverse inference for non-filing of the doctor's certificate. The finding of the court below that the witnesses are strangers cannot be accepted as a ground to

disbelieve as it is not legally required that a witness to a Will should be related to the testator, more so, in the instant case, when it is evident from the Will itself that the testator was neglected by all his kith and kin. Further, Mr. Mishra submits that none of the witnesses stated that they had no acquaintance with the testator and nothing was put to them in the cross-examination in this regard. The discrepancies as noted by the learned court below, according to Mr. Mishra, are bound to appear in view of the long gap between the date of execution of the Will and the date of examination of the witnesses inasmuch as the said discrepancies are minor in nature. The finding of the court below with regard to non-examination of the doctor and non filing of his certificate is also not sustainable as no question was put to any of the witnesses, whether the doctor was alive or dead and even, no question was put as to whether a certificate was granted by the doctor and his certificate exists on the Will. Further, a death certificate has been produced before this Court along with an application under Order 41, Rule 27 C.P.C. for accepting the same as additional evidence showing that the said doctor has died on 16.5.2003, i.e., much prior to the hearing of the Probate Misc. Case. The said document is accepted as additional evidence by this Court for just adjudication of the matter and this Court finds that the said doctor being dead by the time, the case was taken up for hearing and no question having been put to the witnesses with regard to this aspect of the case, the finding of the learned court below in that regard is totally based on surmises and conjectures. The civil suit referred to by the learned court below was also dismissed and, therefore, just because a suit was filed in respect of the properties under the Will cannot be a ground to disbelieve the Will. Smt. Bisakha Kar having failed to appear before the court below and the suit which was filed having already been dismissed, the learned court below could not have made a suggestion in the order that the petitioner-appellant be impleaded as a party in the said suit or to file a suit for declaration of title and possession in respect of the property in question. Mr. Mishra further submits that the death of the testator after four months of the execution of the Will cannot be a ground for raising a suspicion when it has been clearly established that at the time of execution of the Will, the testator was in sound health and sound mind.

5. In the case of *Ishwardeo Narain Singh* (supra), while analyzing the facts of the said case, it was observed that there is nothing in law which requires the registration of a Will and Wills are in a majority of cases not registered at all. The Supreme Court held that to draw any inference against the genuineness of the Will on the ground of its non-registration is wholly unwarranted.

In the case of *Rabindra Nath Mukherjee and another* (supra), considering as to whether depriving natural heirs from succeeding to a property by execution of a Will, it was observed by the Supreme Court that this should not raise any suspicion, because the whole idea behind execution of Will is to interfere with the normal line of succession and, so, natural heirs would be debarred in every case of Will; of course, it may be that in some cases they are fully debarred and in other only partially. In the instant case, there are materials appearing on the face of the Will that the testator was neglected by all his kith and kin which by implication includes his daughter also. It is, therefore, more fortified that no suspicious circumstances can be presumed as because, the testator had only one daughter who was debarred by execution of the Will. It is well settled in law that the mode of proving the Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will in section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances, surrounding the execution of the Will, proof of testatamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. (See AIR 1959 SC 443 and AIR 1962 SC 567).

In a Five Judges Bench decision in the case of ***Sashi Kumar Banerjee and others v. Subodh Kumar Banerjee since deceased and after him his legal representatives and others***, AIR 1964 SC 529 with regard to appreciation of evidence of attesting witnesses to a Will, the Supreme Court held that where the evidence of both the witnesses to the Will is that the Will was executed in the after-noon on the date on which it purported to have been executed, a slight discrepancy in the evidence of these witnesses as to the time, when the Will was executed is not so serious as to destroy the value of their evidence especially when the witnesses were giving evidence after 8 or 9 years after the execution of the Will. The said circumstance of that case clearly applies to the facts of the present case, where the evidence has been led similarly after about 8 to 9 years from the date of execution of the Will. The Supreme court in the said decision has further held that the attesting witnesses to a Will happened to be chance witnesses is no ground for disbelieving their evidence and it may be that it is more usual for witnesses to be called when a person is intending to execute a Will; even so, there is nothing impossible in advantage being taken of the accidental presence of witnesses in this connection. In the present case, the learned trial court has also acted without jurisdiction in entering into the question of title over the properties, which have been bequeathed under the Will, as a court in which a “Will” is sought to be probated has no jurisdiction to examine the question of title to the property under the Will.

6. Analyzing the facts of the present case in the touchstone of the ratio of the aforesaid case laws, it would be amply clear that the learned court below has committed an error of law in arriving at the findings as quoted above. The impugned judgment, therefore, is not sustainable and this Court on analyzing the materials available on record finds that the Will is a genuine one; there is no suspicious circumstance concerning the execution of the Will; the testator executed the Will while in sound health and mind and the Will is the last Will of the testator.

7 In the circumstances, therefore, while setting aside the impugned judgment on the findings as above, this Court directs that the Will be probated and required letter of administration be issued in favour of the appellant.

The appeal is accordingly allowed

Appeal allowed.

2010 ( I ) ILR-CUT-686

**R.N.BISWAL, J.**

## SRIDHAR JENA -V- SANTOSH KUMAR JENA & ORS.*

**FEBRUARY 2,2010.**

**ORISSA MUNICIPAL CORPORATION ACT, 2003 (ACT NO.11 OF 2003) – SEC.87.**

**Petitioner elected as Corporator Bhubaneswar Municipal Corporation – His election was challenged on the ground of corrupt practice who suppressed pendency of Criminal Case against him at the time of filing nomination – Petitioner filed petition Under Order 7 Rule 11 C.P.C. to reject the election petition as not maintainable – Application dismissed – Hence the writ petition.**

**Section 89 of the Act lays down the grounds to declare an election void and suppression of pendency of Criminal Case would not amount to corrupt practice as provided U/s.87 ( c) of the Act – Held, impugned order is set aside consequently the election petition stands rejected.** (Para 8 & 10)

For Petitioner - M/s. S.K.Padhi, Mrinalini Padhi, S.C.Panda, A.Das & B.Panigrahi.

For Opp.Parties – M/s.S.Patnaik, S.Mohanty & B.Maharana (for Caveater) Mr. Bijan Ray (for O.P.No.1)

*W.P.(C) NO.15462 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***R.N.BISWAL,J.*** In this writ petition, the petitioner challenged the order dated 23.9.2009 passed by the Election Tribunal-cum-District Judge, Khurda at Bhubaneswar in C.M.A. No.12 of 2009, arising out of Election Petition No.362 of 2008 rejecting the petition filed under Order VII, Rule-11 of C.P.C. by the petitioner.

2. Opposite party No.1, a defeated candidate in the last election of Corporators in Bhubaneswar Municipal Corporation in respect of Ward No.40 filed the aforesaid election petition seeking a declaration that the election of the petitioner as Corporator of that Ward was illegal and void. At the same time, he prayed to declare him as the elected Corporator for the said Ward No.40 of the Bhubaneswar Municipal Corporation. In that election, the petitioner had secured 2575 votes, whereas opposite party No.1 secured 2232 votes. After receiving notice in the election petition, petitioner appeared before the Election Tribunal-cum-District Judge, Khurda at Bhubaneswar and filed an application under Order-VII, Rule-11 read with section 151 of C.P.C. giving rise to C.M.A. No. 12 of 2009 for rejection of the election petition on the ground that the election petition was not maintainable since it

did not disclose the provision of law under which it was filed, that the allegation of corrupt practice made against the present petitioner in the election petition was not clear and specific and that the election petition was not signed and verified in the manner as required by law. It is the further case of the petitioner that non-disclosure of criminal antecedent by the present petitioner in the format of affidavit enclosed to the nomination paper as alleged by the election petitioner in the election petition is not a ground for filing election petition alleging corrupt practice. As per the writ petition, without considering the grounds taken in the petition under Order-VII, Rule-11 read with section 151 of C.P.C., properly the learned Election Tribunal-cum-District Judge, Khurda at Bhubaneswar rejected the petition. Hence, the writ petition.

3. Learned counsel appearing for the petitioner submitted that opposite party No.1 filed the election petition alleging that in the affidavit filed by the petitioner at the time of filing his nomination papers for the election did not disclose the fact of pendency of a criminal case i.e., G.R. Case No.1096/97 for the offence under sections 341/323/379/506/34 of I.P.C. before the court of learned S.D.J.M., Bhadrak, and, as such, the petitioner indulged himself in corrupt practice, which is a ground for declaring the election void. Mainly on that ground, opposite party No.1 prayed to declare the election of the petitioner as null and void and to declare him as elected. Learned counsel for the petitioner further submitted that even if the entire allegation made in the election petition was accepted as true, still then, it would not make out a case of corrupt practice. Hence, the Election Tribunal-cum-District Judge, Khurda at Bhubaneswar ought to have allowed the petition under Order-VII, Rule-11 read with section 151 of C.P.C.

4. Learned counsel for opposite party No.1 contended that G.R. Case No.1096 of 1997 for the offence under sections 341/323/379/506/34 of I.P.C. was pending against the petitioner, while he filed an affidavit at the time of filing his nomination papers, but he suppressed this fact in the affidavit. So, this act of opposite party No.1 would fall under Clause-C of section-87 of the Act. The said Section reads as follows:-

> The following shall be deemed to be corrupt practice for the purpose of this Act:-
>
> "(a) xxx xxx xxx xxx
>
> (b) xxx xxx xxx xxx
>
> (c) the publication by a candidate or his agent for by any other person of any statement of fact which is false and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate or in relation to candidature or withdrawal for contest of any candidate being a

statement reasonably calculated to prejudice the prospects of that candidate's election (emphasis supplied).

This, inter alia, relates to publication by a candidate or his agent of any statement of fact which is false in relation to the personal character or conduct of any candidate calculate to prejudice the prospect of that candidate. This does not apply to publication or suppression of fact by a candidate in his favour. So, even if the petitioner did not disclose about the pendency of a criminal case against him in the affidavit filed along with nomination papers, it would not come under corrupt practice.

5 Learned counsel for opp. party No.1 further submitted that as per clause-1 of the order dated 1st January 2004 issued by the State Election Commission, Orissa, every candidate seeking election to the Office of Corporator of Municipal Corporation in the State shall furnish information relating to his criminal antecedent, assets and liabilities and educational qualifications in the form of affidavit in the format prescribed by the Commission to the concerned Election Officer/Returning Officer at the time of filing of nomination papers. Clause-3 of the said order further envisages that non-furnishing of affidavit by the candidate shall be considered to be a violation of the Order and the nomination paper of the candidate concerned shall be liable to rejection at the time of scrutiny by the Election Officer/Returning Officer. So, according to learned Senior Counsel Mr. Bijan Ray since the petitioner did not disclose about pendency of criminal case against him in the affidavit, it amounts to corrupt practice within the meaning of Section 87 (g) of the Act, which reads as follows:-

**87. Corrupt practices:-** The following shall be deemed to be corrupt practices for the purpose of this Act-

"(a) xxx xxx xxx xxx
(b) xxx xxx xxx xxx
(c) xxx xxx xxx xxx
(d) xxx xxx xxx xxx
(e) xxx xxx xxx xxx
(f) xxx xxx xxx xxx
(g) any other practice which the Government may, by rules, specify to be a corrupt practices."

6. Per contra, learned Senior Counsel, Mr. S.K. Mishra appearing for the petitioner submitted that as per clause-6 of the said order, the Election Officer/Returning Officer shall neither undertake verification of the correctness or otherwise of the information furnished in the above mentioned affidavit, nor reject the nomination paper on the ground of furnishing wrong information or suppressing material information in the affidavit. So, non-

furnishing of criminal antecedent in the affidavit would not amount to corrupt practice.

7. Admittedly, the petitioner has furnished affidavit as required under law, but according to opposite parity No.1, he has suppressed about the pendency of criminal case against him. As per Clause-6 of the order suppressing of this fact cannot be a ground for rejecting the nomination paper. The petitioner may be criminally liable for that. But, it would not amount to corrupt practice. His election cannot also be declared void on that ground. The decisions cited on behalf of opp. party No.1 would not be applicable to the present case.

8. Learned counsel for the petitioner further submitted that section 89 of the Orissa Municipal Corporation Act 2003 lays down the grounds for which an election can be void. The averments made in the election petition filed by opposite party No.1 read as a whole does not disclose any ground for declaring the election of the petitioner to be void. So, the election petition deserves to be rejected.

It would be useful to quote section 89 of the Orissa Municipal Corporation Act 2003, which reads as follows:-

> 89. **"Grounds for declaring elections to be void:-** (1) Subject to the provision of sub-section (2) if the District Judge is of the opinion-
> (a) that on the date of the election, a returned candidate was not qualified or was disqualified to be chosen as a Corporator under the provisions of this Act; or
> (b) that any corrupt practice has been committed by a return candidate or his agent or by any other person with the consent of a returned candidate or his agent; or
> (c) that any nomination paper has been improperly rejected; or
> (d) that the result of the election in so far as it concerns a return candidate has been materially affected-
> (i) by the improper acceptance of any nomination, or
> (ii) by any corrupt practice committed in the interests of the returned candidate by a person other than that candidate or his agent, or a person acting with the consent of such candidate or his agent, or
> (iii) by the imporoper acceptance, refusal of any vote or rejection of any vote which is void, or
> (iv) by the non-compliance with the provisions of this Act or any rules or orders made thereunder,
> he shall declare the election of the returned candidate void
> (2) If the District Judge is satisfied-
> (a) that no such corrupt practice was committed at the election by the candidate, and every such corrupt practice was committed contrary to the orders and without the consent of the candidate;

(b) that the candidate took all measurable means for preventing the commission of corrupt practice at the election; and
(c) that in all other respect, the election was free from any corrupt practice on the part of the candidate or any of his agents;
he may decide that the election of the return candidate is not void."

As held earlier, suppression of pendency of criminal case would not amount to corrupt practice. There is no any ground in the election petition to declare the election of the petitioner as void.

9. At last, Mr. Bijan Ray, learned counsel appearing for opp. party No.1 contended that the petitioner ought to have filed a revision instead of a writ petition against the impugned order passed under Order 7, Rule 11 of C.P.C. Since he has not filed a revision, the writ petition could not stand. The writ petition was filed on 16.10.2009. In the meantime, more than three months have already been elapsed. As discussed earlier, there is no ground to entertain the election petition. So, only because instead of filing a revision, a writ petition has been filed, I am not inclined to reject the writ petition on that ground alone.

10. Under all these grounds the writ petition is allowed, the impugned order passed by the learned Election Tribunal-cum-District Judge, Khurda at Bhubaneswar is set aside and consequentially the Election Petition No.362 of 2008 stands rejected. No cost.

Writ petition allowed.

2010 ( I ) ILR-CUT- 691

**INDRAJIT MAHANTY, J.**

# SMT.LAXMIDEVI RAM -V- TIRUPATI ELECTRO MARKETING PVT.LTD.*

**MARCH 25, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF1974 ) – SEC.482.**

**Offence U/s.141 N.I. Act – A penal provision creating vicarious liability – Every person connected with the company shall not fall within the ambit of the provision – Only those persons who were in charge of and responsible for the conduct of the business of the company at the time of Commission of an offence will be liable for Criminal action.**

**In the present case the complaint case discloses that there was no necessary averments to implicate a Director i.e the petitioner for having connived or neglected in committing the offence and admittedly the Managing Director Sri Rajendra Prasad Ram impleded as accused No.2 in the complaint petition had issued the cheque in question.**

**Held, no scope to prosecute the present petitioner and the order of cognizance passed against her is quashed.**

(Para.8 )

**Case laws Referred to:-**

1.2008 Cri.LJ 4316 : (Malwa Cotton & Spinning Mills Ltd.-V-Virsa Singh Sindhu & Ors.).

2.2007 Cri.LJ. 2448 : (N.Rangachari -V-Bharat Sanchar Nigam Ltd.).

For Petitioner - M/s.G.Madaris,S.K.Pradhan, M.Dalai, B.K.Mishra & J.Pal.

For Opp.Party – Mr.D.Das.

*CRLMC. NO.2189 OF 2009. In the matter of an application under Section 482 of the Code of Criminal Procedure.

***I.MAHANTY, J.*** In this application under Section 482 Cr.P.C. the petitioner-Smt. Laxmidevi Ram has prayed for quashing of the order of cognizance dated 17.3.2008 passed in I.C.C. No. 847 of 2008 by the learned SDJM, Bhubaneswar in respect of the present petitioner.

2. Mr.Pal, learned counsel for the petitioner states that the petitioner who was a Director of M/s L.P.Electronics (Orissa) Private Limited, has been implicated as an accused in a proceeding under Section 138 of the N.I. Act, inter alia, only for the reason of her having been named as Director of such company. He asserts that other similarly placed Directors had also filed application under Section 482 Cr.P.C. for quashing of order of cognizance, namely, Sri Om Prakash Ram and Sri Deepak Kumar Ram in CRLMC Nos. 1051 and 1900 of 2008 which were disposed of on 19.5.2009, whereby Hon'ble Mr. Justice B.K.Patel came to a conclusion that here were no

express averments made in the complaint petition that any of the petitioners therein was either in-charge or and/or was responsible to the accused company for the conduct of the business of the company. Therefore relying on Section 141 of the N.I.Act, the learned Single Judge came to hold that the learned counsel for the opposite party was constrained to admit that the complaint petition does not contain such averments as required under Section141of the N.I. Act for implicating the Directors who are petitioners therein. Accordingly, the CRLMCs were allowed and order of cognizance in so far as it concerned other Directors was directed to be quashed.

3. Mr. Pal further contends that the present petitioner is similarly circumstanced as the Director, who had moved the CRLMC mentioned herein above and against whom order of cognizance has been quashed.

4. Mr. Das, learned counsel for the complainant-opposite party relied upon the judgment of the Hon'ble Supreme Court in the case of **Malwa Cotton and Spinning Mills Ltd. Vrs. Virsa Singh Sindhu and Ors**., reported in 2008 CriLJ 4316 in which their Lordships came to a conclusion that the claim of the petitioner therein that he has resigned from the Directorship of the defaulting Company prior to the date on which the cheque had been issued was a matter which should be proved in course of trial and therefore, came to a conclusion that the High Court was not justified in quashing the proceeding in the said case. He further placed reliance on a reference made therein to an earlier judgment in the case of **N.Rangachari Vrs. Bharat Sanchar Nigam Ltd.**, reported in 2007 CriLJ 2448 in which it is observed that in the commercial world having a transaction with a company is entitled to presume that the Directors of the company are in charge of the affairs of the company. If any restrictions on their powers are placed by the memorandum of articles of the company, it is for the Directors to establish it at the trial.

5. Sri Pal, learned counsel for the petitioner on the other hand placed reliance upon the recent judgment of the Hon'ble Supreme Court in the case of **National Small Industries Corporation Limited Vs. Harmeet Singh Paintal and Another**, reported in MANU/SC/0112/2010 which was disposed of on 15.2.2010. In the said judgment, the Hon'ble Supreme Court has referred to its earlier judgment in the case of **N.Rangachari** (supra), the relevant portion of which in paragraphs 9, 10 and 11 thereof are as follows:-

> "Section 138 of the Act refers about penalty in case of dishonour of cheque for insufficiency of funds in the account. We are more concerned about Section 141 dealing with offences by Companies which reads as under.
>
> 141. Offences by companies-(1) If the person committing an offence under Section 138 is a company, every persons who, at the time the offence was committed was in charge of, and was

responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

Provided that nothing contained in this Sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, of that he had exercised all due diligence to prevent the commission of such offence.

Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

(2) Notwithstanding anything contained in Sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, and secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation- For the purposes of this section,-

(a) 'company' means any body corporate and includes a firm or other association of individuals; and

(b) 'director' in relation to a firm, means a partner in the firm.

It is very clear from the above provision that what is required is that the persons who are sought to be made vicariously liable for a criminal offence under Section 141 should be, at the time the offence was committed, was in-charge of, and was responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. Only those persons who were in-charge of and responsible for the conduct of the business of the company at the time of commission of an offence will be liable for criminal action. It follows from the fact that if a Director of a Company who was not in-charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable for a criminal offence under the provisions. The liability arises from being in-charge of an responsible for the conduct of the business of the company at the relevant time

when the offence was committed and not on the basis of merely holding a designation or office in a company.

10. Sections 141 is a penal provision creating vicarious liability, and which, as per settled law, must be strictly construed. It is therefore, not sufficient to make a bald cursory statement in a complaint that the Director (arrayed as an accused) is in charge of and responsible to the company for the conduct of the business of the company without anything more as to the role of the Director. But the complaint should spell out as to how and in what manner Respondent No.1 was in-charge of or was responsible to the accused company for the conduct of its business. This is in consonance with strict interpretation of penal statutes, especially, where such statutes create vicarious liability. A company may have a number of Directors and to make any or all the directors as accused in a complaint merely on the basis of a statement that they are in-charge of and responsible for the conduct of the business of the company without anything more is not a sufficient or adequate fulfillment of the requirements under Section 141.

11. In a catena of decisions, this Court has held that for making Directors liable for the offences committed by the company under Section 141 of the Act, there must be specific averments against the Directors, showing as to how and in what manner the Directors were responsible for the conduct of the business of the company."

6. In consideration of the above, in paragraph-10 of the judgment referred to by the Hon'ble Supreme Court in the case of Malwa Cotton (supra), the Hon'ble Supreme Court has laid down three categories of persons covered by Section 141 which are as follows:-

(1) The company who committed the offence.
(2) Everyone who was in charge of and was responsible for the business of the company.
(3) Any other person who is a director or a manager or a secretary or officer of the company with whose connivance or due to whose neglect the company has committed the offence.

7. In the present case the complaint petition it-self has been annexed as Annexure-1 and in paragraph-7(i) the complainant has made the following complaint, which reads as follows:-

"7(i) Since Mr. Rajendra Prasad Ram is Managing Director of the compan y and Mrs. Lakshmi Devi Ram, Mr. Ashok Kumar Ram, Mr. Niranjan Prasad Ram and Mr. Deepak Kumar Ram are the Directors of the

> company and are committed and looking after the day to day business of the company in their respective individual capacity and jointly as Directors of the company, for which all of them are responsible in one way and other for the conduct of the business of the company as well as company and the accused company has issued the cheque in consultation with all Directors in order to liquidate their liability but subsequently with a view to defraud the claim of complainant knowing fully well their liability purposefully have defaulted to pay to the complainant. The complainant company officials have time to time contacted all the Directors of the accused company before and after issue of cheque but to defraud the claim of complainant has stopped payment of the cheque when they did not have sufficient balance to cover the cheque amount..."

8. On a reading of Section 141 of the N.I. Act vis-a-vis the complaint made in this application it would be clear that necessary averments to implicate a Director such as the present petitioner for having connived or neglected in committing the offence, has not been clearly made. Admittedly the Managing Director Sri Rajendra Prasad Ram had been impleded as accused No.2 in the complaint petition and it is the said Managing Director who had issued the cheque in question and the dishonour of such cheque is the subject matter of the complaint. Further I find that in CRLMC Nos. 1051 & 1900 of 2008 Hon'ble Mr. Justice B.K.Patel of this Court had also come to a conclusion that Section 141 of the Act was required to be strictly complied with and by making ambiguous statement regarding involvement of other Directors other than the Managing Director, the requirement of Section 141 of the N.I. Act was not complied with and therefore, in the absence of any such statement as required under Section 141 of N.I. Act vis-à-vis the present petitioner, there is no scope for her prosecution and therefore, the cognizance order passed against the present petitioner is quashed.

The learned counsel for the O.P. states that the case has remained pending before the learned SDJM, Bhubaneswar since 2008 and thus, more than two years have lapsed in the meantime prays for a direction for early disposal. Therefore, the learned SDJM is directed to take up the matter and dispose of the same expeditiously in accordance with law preferably within a period of four months from the date of communication of this order.

Interim orders, if any, stand vacated.

Application allowed.

2010 ( I ) ILR-CUT-696

**INDRAJIT MAHANTY, J.**

## HARISCHANDRA PATEL -V- STATE OF ORISSA. *

**MARCH 25, 2010.**

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

**Accusation of petitioner with the aid of Section 34 IPC – On a plain reading of the case records as well as the charge sheet, it appears that nothing has been made out by the prosecution to establish either directly or circumstantially that there was any plan or meeting of minds of all the accused persons to commit an offence nor even it was prima facie established that there was any pre-arrangement or meeting of minds on the spur of the moment before commission of the crime.**

**Held, requirement of Section 34 IPC in the present case has not at all been satisfied for the purpose of implicating the present petitioner as a co-accused – Order Dt.5.12.2008 taking cognizance against the petitioner is quashed.** (Para 9 )

**Case laws Referred to :-**

1.AIR 1977 SC 109 : (Ashok Kumar -V- State of Punjab).
2.AIR 1993 SC 1899 : (Ch.Pulla Reddy & Ors. -V-State of Andhra Pradesh).
3.(2009) 6 SCC 450 : (Javed Alam -V- State of Chhattisgarh & Anr.).
4.AIR 2009 SC 2792 : (Sarabjit Singh & Anr.-V- State of Punjab & Anr.).

For Petitioner - M/s.M.K.Mohpatra & S.P.Mishra.
For Opp.Party - Addl.Govt. Advocate.

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*CRIMINAL MISCELLANEOUS CASE NO.3038 OF 2009. In the matter of an application under Section 482 Cr.P.C.

***I.MAHANTY, J.*** In this application under Section 482 Cr.P.C., the petitioner- Harischandra Patel has sought for quashing the order of cognizance dated 15.12.2008 passed by the learned S.D.J.M., Bolangir in G.R.Case No.535 of 2008 taking cognizance against the petitioner and another under sections 452, 332,427,506/34 I.P.C..

2. Shorn of unnecessary details, as would be evident from the case records, an F.I.R. was lodged by the informant-William Bilung, who was then working as the Special Land Acquisition Officer, Lower Suktel Irrigation Project, Bolangir alleging that on 12.8.2008 at about 5.30 PM while the informant was in his office, the petitioner along with one Banamali Khuas (co-accused) entered into his office and demanded advance payment for the fruit bearing trees situated over the land which was acquired from the petitioner and others under the Land Acquisition Act. It appears that when the informant denied to fulfill their demand, a group of 10 to 12 persons who were in his office and started arguing with him. It Is further alleged that in

course of such argument, the co-accused Banamali Khuas, assaulted the informant and threatened to kill him which resulted in filing of the F.I.R..

The medical examination of the informant was conducted on the same day which reveals that there was one bruise of 1" x 1" on the left side of the face which according to the doctor, was caused by hard and blunt object. From the 161 statement of the informant, it appears that a group of persons had entered into the office of the informant and demanded advance payment for fruit bearing trees on the ground that, his predecessor in office had paid advance payment in respect of fruit bearing trees. On their demand, the informant stated that he was not bound by the precedent, the co-accused Banamali Khuas got annoyed and assaulted the informant and threatened to kill him .

3. Learned counsel for the petitioner, inter alia, submitted that on reading of the F.I.R. as well as the statements recorded under section 161 Cr.P.C., no offence whatsoever is made out against the petitioner. He contended that the office of the Land Acquisition Officer is a "public place" and the petitioner has every right to go to that office and make request for release of advance compensation towards fruit bearing trees. Since the alleged assault and threat was made by Banamali Khuas, the petitioner should not be dragged to such a case by aid of Section 34 IPC.

4. Learned State counsel, on the other hand, submitted that the demand for payment of advance compensation on account of fruit bearing trees not being permissible in law and the petitioner was part of the group of persons who were present in the office of the informant and made unlawful demand, he cannot escape from the offence committed by the co-accused Banamali and was liable under Section 34 I.P.C.

5. In the light of the aforesaid contentions advanced and on perusal of the F.I.R., case diary and 161 statements, it is clear that for the purpose of implicating the present petitioner in the present case, aid of Section 34 has been taken by the Investigating Officer. The scope of Section 34 has been settled by the Hon'ble Supreme Court in the case of **Ashok Kumar V. State of Punjab,** AIR 1977 SC 109 and **Ch. Pulla Reddy and Others V. State of Andhra Pradesh,** AIR 1993 SC 1899 which have been reaffirmed in a judgment of the Supreme Court in the case of **Javed Alam V. State of Chhattisgarh and another,** (2009) 6 SCC 450.

**6.** In terms of the law laid down by the Supreme Court, it is clear that Section 34 has been enacted on the "principle of joint liability" in the commission of a criminal act. While the section is only a rule of evidence, the same does not create a substantive offence. It is laid down in the aforesaid judgments that the distinctive feature of the Section 34 is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several

persons arises within Section 34, if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime. Direct proof of such common intention is seldom available and, therefore, such intention can only be "inferred from the circumstances" appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of "common intention", the prosecution has to establish by evidence, whether direct or circumstantial, that there was a plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it pre-arranged or on the spur of the moment; but it must necessarily be before the commission of the crime.

**7.** Apart from the aforesaid judgment of the Supreme Court, it is also relevant to take note of the another judgment of the Hon'ble Supreme Court in the case of **Sarabjit Singh & another V. State of Punjab & another, AIR** 2009 SC 2792 and in particular paragraph-18 of the said judgment which reads as follows :

> "18. xx xx Different standards are required to be applied at different stages. Whereas the test of prima facie case may be sufficient for taking cognizance of an offence at the stage of framing of charge, the court must be satisfied that there exists a strong suspicion. While framing charge in terms of Section 227 of the Code, the court must consider the entire materials on record to form an opinion that the evidence if unrebutted would lead to a judgment of conviction xx xx".

**8.** In the light of the aforesaid decisions of the Hon'ble Supreme Court, what is to be decided in the present case is whether a "prima facie" case is made out by the prosecution for the purpose of taking cognizance against the petitioner. In the F.I.R. as well as in the statement of the informant recorded under section 161 Cr.P.C., the presence of the petitioner at the site where the occurrence took place is not denied. Yet, on a plain reading of the F.I.R. and the 161 statement it is clear that the petitioner and others had gone to the office of the informant and made a demand for release of advance compensation for the fruit bearing trees in respect of the acquired lands and from the same it appears that the intention of the petitioner and the group which entered into the office of the informant was met to commit any crime. Therefore, from the same an allegation of criminal act cannot be made against the petitioner and others entering into the office of the informant, because their common intention appears to be only to demand for advance compensation. Secondly, it is an admitted fact that the office of the informant is a "public office" and the allegation of the informant both, in the F.I.R. as well as in 161 statement, is that the assault was committed by one of the co-accused, namely, Banamali Khuas, but he has not whispered

a single word about participation of the petitioner or any other person in the said assault, in any manner whatsoever.

9. In the light of the circumstances narrated herein above and keeping in view the judgments of the Supreme Court, I am of the considered view that the requirement of Section 34 Cr.P.C. in the present case has not at all been satisfied for the purpose of implicating the present petitioner as a co-accused in the present case. On a plain reading of the case records as well as the charge sheet, it appears that nothing has been made out by the prosecution to establish either directly or circumstantially that there was any plan or meeting of minds of all the accused persons to commit an offence, for which they have been charged with aid of Section 34 nor even prima facie it was established that there was any pre-arrangement or meeting of minds on the spur of he moment before commission of the crime.

10. In the light of the discussions made herein above, the CRLMC is allowed and the order dated 15.12.2008 taking cognizance against the petitioner is quashed.

Application allowed.

2010 ( I ) ILR-CUT-700

**INDRAJIT MAHANTY, J.**

## SIDDHARTHA SEN & ANR. -V- THE REGISTRAR OF COMPANIES, ORISSA.*

**MARCH 27, 2009.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.468(2) (b) r/w SEC.159, 162 & 220 OF THE COMPANIES ACT.**

**A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.**

**In the present case prosecution started due to non-filing of annual return within time and under the Companies Act Penalty of Rs.50/- has to be imposed for every day during which the default continues – In a similar situation the Hon'ble Supreme Court while dealing with levy of penalty for failure to file return under the wealth Tax Act, categorically came to conclude that failure to file return under the Wealth Tax before the due date gives rise to a single default and to a single penalty – So the penalty leviable under the wealth Tax Act is merely a multiplier to be adopted in determining the quantum of penalty and does not have the effect of making the default in question a continuing one.**

**Held, offence alleged in complaint against the petitioner is not continuous wrong and there is bar U/s.468(2) Cr.P.C. to take cognizance of such an offence after more than 11 years – Order taking cognizance and issuing summons in the said case are set aside.**

**(**Para 13,14)

**Case law Relied on:-**

(1981) 129 ITR 328 : (Commissioner of Wealth Tax -V- Suresh Seth).

**Case laws Referred to:-**

1.96(2003) CLT 592 : ( M/s.NALCO & Ors.-V- Registrar of Companies).
2.(2001) 106 Company Cases 554 : (Pravin Jha -V- State of U.P. & Anr.).
3.(2001) 105 Company Cases 203 : (Ashok Muthanna -V- Wipro Finance Ltd.).
4.AIR 1973 SC 908 : (State of Bihar -V- Deokaran Nenshi).

For Petitioners - M/s. Bijay Kumar Mahanty, Bibek Mohanty, S.K.Mishra, S.K.Jena, N.R.Mohanty, M.S.Rao, A.R.Mohanty & P.K.Rout.

For Opp.Party – Mr.P.K.Parhi
(Addl.Central Government S.C.)

*CRIMINALMISC.CASE NOS.2510,2897,2894,2895,2896,2898,2829,2883,2884,2885,2886,2887,2911,2912,2913,2901,2902,2903,2904,&2910 OF 2003. In the matter of an application under Section 482 Cr.P.C.

***I. MAHANTY,J.*** The above noted batch of twenty Criminal Misc. Cases have been filed by the petitioners seeking to challenge the registration of 2(C)CC Case Nos. 366 to 385 of 2001 before the Court of the learned A.C.J.M. (Spl.), Cuttack under Sections 159 and 220(3) of the Companies Act, 1956 and also seeks to challenge the consequential summons issued to the petitioners apart from seeking to challenge the order dated 25.9.2001 taking cognizance in the aforesaid cases.

2. Mr. Bijay Ku. Mahanti, learned Sr. Advocate appearing for the petitioners contended that filing of the aforesaid complaint cases and the order dated 25.9.2001 taking cognizance against the petitioners is hopelessly barred by limitation. In the present case, complaints have been lodged for infraction of Sections 159, 162 and 220 of the Companies Act, 1956. Whereas Section 159 mandates filing of annual return within 60 days from the day on which Annual General Body Meeting was held, Section 162 stipulates penalty for non-compliance of the requirement of Section 159 with fine which may extend to fifty rupees for every day during which the default continues. Section 220 requires filing of balance sheet as well as profit and loss account within thirty days from the date on which the balance-sheet and the profit and the loss account were held before the Annual General Body Meeting and in default, prescribed for a penalty as contemplated under Section 162 of the Companies Act, i.e., fine at the rate of Rs. 50/- per each day of default. It is further submitted that since the offences complained of contemplated levy of fine only, under Section 468(2) Cr.P.C. the period of limitation/bar to take cognizance stipulates that after lapse of the period of limitation stipulated therein is six months since the offences are punishable with fine only. According to the petitioners, the complaints having been lodged much after the period of limitation, the learned A.C.J.M. could not have taken cognizance of the offences alleged. In this respect, reliance was placed on a judgment of this Court in the case of **M/s. NALCO & others v. Registrar of Companies,** 96 (2003) CLT 592.

Further, on the prosecution of failure to file return under Section 159 is a non-continuous offence and the cognizance thereof should have been taken within six months from the date of commission of offence. In this respect, reliance was placed on a decision reported in the case of **Pravin Jha v. State of U.P. & another,** (2001) 106 Company Cases 554. Relying on the above, it was stated that the complaint was filed by the Registrar of Companies after more than 11 years whereas the statutory period was within

six months. Therefore, the complaint by the opposite party-Registrar against the present petitioner is hopelessly barred by limitation.

3. Reliance was placed by the petitioners on a judgment of the Apex Court in the case of **Commissioner of Wealth Tax v. Suresh Seth,** (1981) 129 ITR 328 wherein the failure to file a return on the due date was held to be "non-continuing wrong". Non-filing of return under the Wealth Tax Act was held to be an Act of non-continuous wrong giving rise to a "single default" and to a single penalty and the default, if any, is committed on the last date allowed to file the return. Such default cannot be held to be one committed every month thereafter. The provision for computing penalty on the basis of delay in every month indicate "only the multiplier" to be adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one.

4. Learned counsel for the petitioners has submitted a chart showing the date on which the annual return/balance sheet were filed before the Registrar of the Companies as well as the date on which the period of limitation expires and the date when the complaint was filed in different cases as well as the date when the cognizance was taken. The said chart is quoted below for convenience:

| Balance sheet, profit & loss A/c and Annual Return Year | Date for filing Return before the Registrar of Companies | 6 months limitation for initiation proceeding, offence punishable with fine only | Complaint petition filed | Dateof cogniz ance |
|---|---|---|---|---|
| 1989-90 | 30-10-90 (U/s. 220)<br>30-11-90 (U/s. 159/162) | 31-03-91 | 25-09-2001 | 25-09-2001 |
| 1990-91 | 30-10-91 (U/s. 220)<br>30-11-91 (U/s. 159/162) | 31-03-92 | 25-09-2001 | 25-09-2001 |
| 1991-92 | 30-10-92 (U/s. 220)<br>30-11-90 (U/s. 159/162) | 31-03-93 | 25-09-2001 | 25-09-2001 |
| 1992-93 | 30-10-93 (U/s. 220)<br>30-11-93 (U/s. 159/162) | 31-03-94 | 25-09-2001 | 25-09-2001 |
| 1993-94 | 30-10-94 (U/s. 220)<br>30-11-94 (U/s. 159/162) | 31-03-95 | 25-09-2001 | 25-09-2001 |
| 1994-95 | 30-10-95 (U/s. 220)<br>30-11-95 (U/s. 159/162) | 31-03-96 | 25-09-2001 | 25-09-2001 |
| 1995-96 | 30-10-96 (U/s. 220)<br>30-11-96 (U/s. 159/162) | 31-03-97 | 25-09-2001 | 25-09-2001 |

| | | | | |
|---|---|---|---|---|
| 1996-97 | 30-10-97 (U/s. 220)<br>30-11-97 (U/s. 159/162) | 31-03-98 | 25-09-2001 | 25-09-2001 |
| 1997-98 | 30-10-98 (U/s. 220)<br>30-11-98 (U/s. 159/162) | 31-03-99 | 25-09-2001 | 25-09-2001 |
| 1998-99 | 30-10-99 (U/s. 220)<br>30-11-99 (U/s. 159/162) | 31-03-2000<br>30-05-2000 | 25-09-2001 | 25-09-2001 |

5. In this respect, it is further contended that petitioner no.2-Company was registered on 15.1.1986 with an object of establishing an insulation project and had submitted its balance-sheet, statement of accounts and annual returns for the financial years ending on 31st March, 1987, 1988 and 1989 under the signature of one P.C. Das as the Managing Director and Sri S.K. Bhose as the Director. Accordingly, he submitted that since the signature of petitioner no.1 – Siddhartha Sen does not appear in any document, the said Sri Sen should not be termed as "an officer-in-default" nor as "a person in accordance with whose direction or instructions the company was accustomed to act".

In this regard, reliance is placed on Section 5 of the Companies Act, 1956 and for convenience, the same is quoted hereinbelow:

> **"[S. 5. Meaning of "officer who is in default". –** For the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any punishment or penalty, whether by way of imprisonment, fine or otherwise, the expression "officer who is in default" means all the following officers of the company, namely:-
>
> (a) the managing director or managing directors;
> (b) the whole-time director or whose-time directors;
> (c) the manager;
> (d) the secretary;
> (e) any person in accordance with whose directions or instructions the Board of directors of the company is accustomed to act;
> (f) any person charged by the Board with the responsibility of complying with that provision;
>
> Provided that the person so charged has given his consent in this behalf to the Board;
>
> (g) where any company does not have any of the officers specified in clauses (a) to (c), any director or directors who may be specified by the Board in this behalf or where no director is so specified, all the directors:
>
> Provided that where the Board exercises any power under clause (f) or clause (g), it shall, within thirty days of the exercise

of such powers, file with the Registrar a return in the prescribed form.]"

6. Mr. Mahanty, learned counsel appearing for the petitioners submitted that the annual returns and balance-sheet filed for three financial years, i.e. 1986-87, 1987-88 and 1988-89 it would be clearly noticed that the Company could not proceed with the construction of the project and there was no activities carried out by the company, therefore, it was unanimously decided to dissolve the company and request was made to the Registrar of the Companies, Orissa to strike out the name from the register and declare it as a defunct company. It is further submitted that an application was filed by petitioner no.2-Company on 30.12.2003 for striking out the name of the company under Section 560 of the Companies Act under **simplified exit scheme** and in terms of the said application the name of the company has, in fact, been struck off from the registrar of companies and the evidence of the same has been enclosed as Enclosure-D to the memorandum filed by the petitioner on 16.3.2009. Accordingly, Mr. Mahanti submitted that no real purpose would be served in continuing with the prosecution of petitioner No.1 since the Company no longer subsists and has been struck off from the register of the Companies and the Company, in fact, has never carried out any business activities.

7. Mr. Mahanti, further submitted that since Shri P.C. Das has filed the annual returns indicating his own status as Managing Director and therefore, at best, he alone could have been prosecuted as the 'Officer-in-default' as contemplated under section 5 of the Companies Act, 1956 and all other Directors including petitioner No.1-Siddhartha Sen should not have been proceeded against, since, admittedly he was merely a Director, and had no role to play in the administration of the Company. He further submitted that Shri P.C. Das, Managing Director was also proceeded against by the Registrar of the Companies by way of filing a complaint case and the said proceeding was compounded by him depositing necessary fees/penalty. In this respect, Mr. Mohanty submitted that in other words, the Registrar of the Companies having accepted the compounding fees from said P.C. Das, Managing Director tantamounts to the Registrar of the Companies accepting the fact that said P.C. Das was the "Officer-in-default" and having accepted the compounding fees from him, no further proceeding against any other Director, far less, the present petitioner No.1 can be continued in law.

8. A further contention has been raised on behalf of petitioner no.1 to the effect that petitioner no.1's resignation from the Board of Directors was accepted on 30.9.1989 and even though Form-32 was filed by the Company under Annexure-4 on 26.11.2001, the resignation should have been given effect from, the date of acceptance of resignation by the Board, i.e. on 30.9.1989 and not the date of filing of Form-32. In this respect, reliance was

placed on the judgment of the Hon'ble Madras High Court in the case of **Ashok Muthanna v. Wipro Finance Ltd.,** (2001) 105 Company Cases 203 for the proposition that a Director who has resigned, would be deemed to have been resigned from the date of his resignation.

9. Mr. P.K. Parhi, learned counsel appearing for the opposite party-Registrar of Companies, on the other hand, submitted that the defaulting company, namely, M/s. Eastern Insulation Company Pvt. Ltd. was registered on 15.1.1986 as a Private Ltd. Company under Companies Act, 1956 and as the Company and its "officers-in-default" had not filed the statutory return for the years 1990 to 1999, necessary prosecution under Section 159/162(1) and Section 220(3) of the Companies Act have been launched in the court of the learned A.C.J.M.(Spl.) Cuttack on 25.9.2001. He further submitted that in terms of Section 5 of the Companies Act, 1956, the expression "officer-in-default" is defined to mean "officers of the company" and placing reliance on Section 5(g) he claims to be applicable to the present case, since only the names of the Directors had been indicated, and further since, the company had not filed Form – 32. The Board's Resolution for appointing the Managing Director as provided under Section 192(1) of the Company Act and Clause-(C) of Sub-Section (4) of Section 192 which provides, inter alia, "any resolution of the Board of Directors of the Company or agreement executed by a company, relating to the appointment, re-appointment or renewal of the appointment, or variation of the terms of the appointment, of a Managing Director", is required to be filed in Form-32. Mr. Parhi further contended that the offences alleged against the officers of the Company are "continuing offences" under Section 472 Cr.P.C. and the bar of limitation does not apply to the instant case. In this respect, reliance was placed on a decision of the Supreme Court in the case of **State of Bihar v. Deokaran Nenshi,** AIR 1973 SC 908 to the following effect.

> "Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves penalty the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such dis-obedience or non-compliance occurs and recurs there is the offence continuing. The distinction between the two kinds of offences is between an act or omission which constitute an offence once and for all and an act or omission which continues and therefore constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence there is thus the ingredient of continuance of the offences which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

10. In so far as the alleged resignation of petitioner no. 1 is concerned, it is submitted that no Form No. 32 was filed in the office of the Registrar of the Companies before institution of the instant case on 25.9.2001 and, therefore, cognizance of the letter of declaration of filing of Form No. 32 is of no consequence.

11. In so far as reliance placed by the petitioner on the judgment of this Court in the case of **NALCO and others** (supra), it is asserted that prosecution in that case had been lodged under Section 211 of the Companies Act and not under Section 159, 162(1) and 220(3) of the Companies Act as has been made in the present case. It is asserted that the test led down in the case of **State of Bihar v. Deokaran Nenshi** (supra) should be applied to the facts of the present case and non-filing of the annual return must be held to be "continuous offence" as contemplated under Section 472 Cr.P.C.. Accordingly, Shri Parhi submitted that the present Criminal Misc. Case should be dismissed being without any merit.

12. On consideration of the submissions made and as have been narrated hereinabove, I am of the considered view that the present case can be decided by adjudicating essentially the most important issue, as to whether an offence under the Companies Act of the nature alleged in the present case is a "continuous offence" or not?

In the case of **State of Bihar v. Deokaran Nenshi,** Hon'ble Supreme Court held that a "continuous offence" is one which is susceptible of continuous and is distinguishable from the one which is committed once and for all. In the said case the Hon'ble Supreme Court was dealing with an offence under the Mines Act, 1952. Section 66 of the Mines Act, 1952 provides that any person omitting inter alia, to furnish any return notice etc. in the prescribed form or manner or act or within the prescribed time required by or under the Act to be made or furnished shall be punishable with fine which may extend to Rs. 1000/-. Section 79 however, lays down that no court shall take cognizance of any offence under this Act unless a complaint thereof has been made within six months from the date on which the offence is alleged to have been committed or within six months from the date on which the alleged commission of the offence came to the knowledge of the Inspector, whichever is latter. In the facts of the said case, the respondent, who was the owner of the stone quarry had failed to furnish to the Chief Inspector the annual returns for the year 1959 by the 21$^{st}$ of January, 1960. Although the Chief Inspector under the letter dated 28.3.1960 drew the attention of the respondent to the said failure in filing necessary return, and had even threatened with initiation of proceeding unless return is filed by 11.4.1960, the complaint was lodged on 12.4.1961. In the facts of the aforesaid case, a question arose whether complaint was barred of limitation on having been filed one year after the default.

Considering this issue, the Hon'ble Supreme Court also noted that failure to furnish the annual return either in the prescribed forms or within the time prescribed for it, i.e. 21.1.1960 in the succeeding year is undoubtedly an offence punishable under Section 66 of the Mines Act, a complaint in respect of such offence has to be filed within six months from the date of such default under Section 79, in the aforesaid case, within six months from 21.1.1960. It was held that if the offence is only under Section 79 and not under the Explanation thereto, the complaint was clearly time barred. The Explanation to Section 79 was held only to operate in "continuing offences". There Lordships ultimately come to conclude that in paragraph-10 of the judgment that the High Court was right in holding that the complaint was time barred as the offence in question fell within the substantive part of Section 79 of the Act and not under the Explanation attached thereto. Therefore, I am of the considered view that the aforesaid judgment does not support the contention raised by Mr. Parhi appearing for the Registrar of the Companies and on the contrary, supports the contention of the petitioner in this case.

13. The aforesaid view also gets further support from the law laid down by the Supreme Court in the case of **Commissioner of Wealth Tax Vrs. Suresh Seth** (supra). In the said case the Hon'ble Supreme Court while dealing with levy of penalty for failure to file return under the Wealth Tax Act, categorically came to conclude that failure to file return under the Wealth Tax before the due date gives rise to a single default and to a single penalty. Admittedly, non-filing of return amounts to an act of non-performance and the measure of levy of such penalty is to be computed from the time lag between the last date on which the return has to be filed and the date on which it is filed. But the default, if any, is committed on the last date allowed to file the return and such default cannot be held to be committed every month thereafter. No doubt under the Companies Act, penalty of Rs. 50/- has to be imposed for every day during which the default continues. But similar to the Wealth Tax Act, the penalty that is leviable under the said stipulation is merely a "multiplier" to be adopted in determining the quantum of penalty and does not have the effect of making the default in question a continuing one.

Their Lordships of the Supreme Court came to hold that the distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty. A wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.

14. In the light of the aforesaid discussions, I have no hesitation to hold that the offence alleged in complaint against the petitioner is not a "continuous wrong" and therefore, the bar to take cognizance as

contemplated under section 468(2)(b) Cr.P.C. applies to the complaint lodged in the present case and therefore, taking cognizance of such an offence after more than 11 years is clearly beyond the period of limitation prescribed and is clearly barred in law. Consequently, it is no longer necessary to deal with the other contentions raised on behalf of the petitioner and, therefore, without entering into the other issues raised in course of argument, the criminal misc. cases are allowed. The order of cognizance dated 25.9.2001 and the summons issued in the aforesaid cases are set aside, but in the circumstances without costs.

Criminal Miscellaneous cases are allowed.

2010 ( I ) ILR-CUT-709

**SANJU PANDA, J.**

## DEBENDRA SWAIN & ORS. -V- STATE OF ORISSA & ORS.*

**MARCH 18,2020**

**CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 1, RULE 10**

**Impletion of Parties - A person who has "direct interest" in the subject matter of litigation can be impleaded as party – Whether a person will be impleaded as a party in the suit or not does not depend merely on the wish of the plaintiff – The policy of law is to avoid multiplicity of litigation.**

**In the present case O.P.2 to 6 filed application in a representative capacity representing the villagers as they have a right over the said property which is used as a grazing field – Held, O.P. 2 to 6 have direct interest in the property and the trial Court rightly impleaded them as parties to the suit.** (Para 7,8 & 9)

**Case laws Referred to :-**

1.(1992) 2 SCC 524 : (Ramesh Hirachand Kundanmal -V-Municipal Corporation Greater Bombay & Ors.).
2.1959 SCR 1111 : (Razia Begum -V- Anwar Begun).

For Petitioners - M/s.Samir Kumar Mishra & M.R.Das.
For Opp.Parties – Addl. Standing Counsel (for O.P.No.1)
M/s. Aditya Kumar Mohapatra & Manoranjan Mishra (for O.Ps 2 to 6)

*W.P. (C) NO.2424 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***S. PANDA, J.*** Challenge has been made in this writ petition to the order dated 30.10.2008 passed by the learned Civil Judge (Junior Division), Nimapara in C.S. No.157 of 2007 allowing the application filed by the present opposite parties 2 to 6 under Order 1 Rule 10 of the Civil Procedure Code to implead them as defendants in the suit.

**2.** Before proceeding with the contentions raised by the parties which are pleaded in the record, the following facts of the case are to be stated:

The petitioners as plaintiffs filed the aforesaid suit for declaration of their occupancy right over the suit land, alternatively declaration of title by way of adverse possession, permanent injunction along with other reliefs. They further pleaded that the disputed land was the ex-intermediary estate of late Raybahadur Lokanath Mishra of Markendeswar Sahi, Puri. The suit land was fallow and non-productive land and its status was Anabadi. One Shayam Swain who was a settled rayati of village Bamera approached the

ex-landlord to grant him lease in respect of the suit land under Sabik Khata No.105. The ex-landlord granted him lease in respect of Ac.1.20 decs. in Sabik Plot No.423 and Ac.1.50 decs. in Sabik Plot No.54 under Sabik Khata No.105 of Mouza-Bamera for agricultural purposes. Accordingly, on receipt of due Salami lease was granted in respect of the said land on 15.8.1943. The said Shayam Swain is the predecessor-in-interest of the plaintiffs and he converted the Anabadi land to agricultural land and continued his possession and cultivated the same till his death. After his death, his successors-in-interest including the plaintiffs cultivated the land openly to the knowledge of all and acquired occupancy right over the same. During Hal Settlement Operation, the land was illegally recorded in the name of the State with a note of possession of the plaintiffs and others in respect of Hal Plot No.844/1120, Plot No.203/200 and Plot No.844/1201. The Kissam of the land was described as Gramya Jungle. Though major part of the suit land is agricultural land, some trees planted by the plaintiffs are standing on a portion of the land. The local R.I. threatened to evict the plaintiffs due to note of possession of the defendants. Therefore, they filed lease cases before the Tahasildar, Kakatpur and also filed the suit before the trial court for the aforesaid relief. During pendency of the suit, opposite parties 2 to 6 filed an application under Order 1 Rule 10 of the Civil Procedure Code to implead them as proper parties to the suit as the lands are communal lands and being used by the villagers as grazing field. They also raised their objections in the lease cases before the Tahasildar to protect their right. To their application under Order 1 Rule 10 of the Civil Procedure Code, the plaintiffs filed objections stating therein that the allegations made by the villagers were false. The nature of the land in question was neither communal nor Gochar. It was recorded as Abadjogya Anabadi. Hence, the applicants were not necessary parties to the suit and their application was liable to be rejected.

**3.** Considering the contentions of the parties, the learned Civil Judge (Junior Division), Nimapara allowed the petition filed by opposite parties 2 to 6 holding that the land in respect of Khata No.175 is recorded as Rakhit and Plot No.203/1200 is recorded as Gramya Jungle so also Plot No.844/1201. Since the villagers have direct interest in the suit schedule land and they claimed to be the representative of the village, they are to be impleaded as defendants.

**4.** Learned counsel appearing for the plaintiff-petitioners submitted that from the ROR it appears that the land was recorded as Abadajogya Anabadi and it was not at all communal in nature. Therefore, opposite parties 2 to 6 should not be impleaded as defendants to the suit. He further submitted that since the plaintiffs claimed the relief of occupancy status in respect of the suit land, the presence of opposite parties 2 to 6 was not at all necessary for

effective and complete adjudication of the case. Therefore, impugned order is liable to be set aside.

**5.** Learned counsel appearing for opposite parties 2 to 6 submitted that the land was recorded as Anabadi and described as Puratan Patita in the Sabik settlement ROR of the year 1927-28. After abolition of the estate and vesting of the same with the State Govenment, the said land was recorded as Abada Jogya Anabadi and Rakhita Anabadi and the Kissam of the land was Gramya Jungle. He submitted that neither the ex-intermediary had furnished any Jamabandi in favour of Shyama Swain nor had the land been settled under Sectiosn 6,7 and 8 of the Orissa Estates Abolition Act. Therefore, the Tahasildar, Kakatpur initiated encroachment cases against the petitioners for their eviction from the disputed land in the year 2004 and also in the year 2008 in respect of some of the disputed lands. He further submitted that the Government also issued a notification vide letter No.38369/R dated 27.6.1989 wherein it was decided to delete the notes of unauthorized possession of Government lands from the Government Anabadi Khata. Since the lands are being used by the villagers as grazing field and the Kissam of the land is Gramya Jungle, the note of illegal possession in the ROR needs to be ignored. The nature of the land is communal and the villagers have a right over the disputed land. Therefore, their application for being impleaded as defendants in the suit has been rightly allowed by the court below. Hence, this Court should not interfere with the impugned order.

**6.** From the rival submissions of the parties, it appears that opposite parties 2 to 6 filed an application under Order 1 Rule 10 of the Civil Procedure Code in a representative capacity representing the villagers of village Bamera as provided under Order 1 Rule 8 of the Civil Procedure Code. The plaintiffs have filed the aforesaid suit for declaration of their occupancy right over the disputed land impleading the State Government as parties. From the record it further appears that in the Hal Settlement, the land was described as Gramya Jungle Rakhita Anabadi.

**7.** Order 1 Rule 10 of the Civil Procedure Code makes a provision regarding necessary and proper parties to the suit. A person who has “direct interest” in the subject-matter of litigation can be impleaded as party. “Direct interest” means direct in the issues between the plaintiff and the defendant. A person is legally interested in the question involved in the suit only if he can show that it may lead to a result that may affect him legally, that is curtailing his legal rights. Interest must be one which law recognizes. Power vested under the rule is discretionary and it is wide. Whether a person will be impleaded as a party in the suit or not, does not depend merely on the wish of the plaintiff. The policy of law is to avoid multiplicity of litigation. The true test is not so much in an analysis of what were the constituents of their rights

but rather in what would be the result, on the subject-matter of the action if their rights could be established. The rule empowers the Court to implead a person even if his presence is necessary for considering the case of the defendant or to adjudicate a dispute between the defendant and the person proposed to be impleaded as a party. The doctrine of dominos litis is subject to the power of the Court under Order 1 Rule 10 of the Civil Procedure Code.

**8.** The apex Court in the case of **Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and others** reported in **(1992)2 SCC 524** referring to its earlier decision in the case of **Razia Begun v. Anwar Begun** reported in **1959 SCR 1111**, has observed that the Courts in India have not treated the matter of addition of parties as raising any question of the initial jurisdiction of the Court and that a person to be added as a party to a suit, he should have a direct interest in the subject-matter of the litigation whether it be the questions relating to movable or immovable property. In the said case, the apex Court has held that it is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. Therefore, the question of addition of a party whom plaintiff did not choose to add, would depend upon facts and circumstances of each case depending upon the assertions in the pleadings. Where status of a person is the dispute direct interest of the party may not be insisted upon since such status would have far reaching further effect. Where property is in dispute, direct interest has to be found out to add him as a party.

**9.** In the present case, the property is in dispute. Opposite parties 2 to 6 filed the application in a representative capacity representing the villagers as they have a right over the said property which is being used as a grazing field and the same is also described as Gramya Jungle. While granting relief to the plaintiffs, it has to be considered whether the disputed property is communal in nature and Gramya Jungle and opposite parties 2 to 6 can be said to have direct interest in the property to that effect as it was used by the villagers and if the plaintiffs' prayer for permanent injunction will be allowed, it would directly affect the interest of the villagers. Therefore, considering the same the learned Civil Judge (Junior Division), Nimapara has passed the impugned order impleading opposite parties 2 to 6 as parties to the suit.

**10.** Since there is no error apparent on the face of the impugned order, this Court, in exercise of the jurisdiction under Article 227 of the Constitution of India, is not inclined to interfere with the impugned order dated 30.10.2008 passed by the learned Civil Judge (Junior Division), Nimapara in C.S. No.157 of 2007. Accordingly, the writ petition is dismissed. No costs.

Writ petition dismissed.

2010 ( I ) ILR-CUT-713

**SANJU PANDA, J.**

## XAVIER INSTITUTE OF MANAGEMENT, BBSR. -V-SWAPNA HARRISON.*

**FEBRUARY 4, 2010.**

**CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF 1908 ) – ORDER 39, RULE 1 & 2.**

**Suit filed by Opp.Party challenging her termination from service along with an application under Order 39 Rule 1 & 2 – By the interim order she was re-instated in service – Order confirmed in appeal – Hence the writ.**

**In the present case the main prayer and the interim prayer of the plaintiff is same – So she should not have been reinstated in service before passing of the decree in the suit – Moreover once the plaintiff was not in service the Court had no jurisdiction to issue an injunction prohibiting the defendant from removing her from service or directing the authority to continue the plaintiff in service.**

**Held, Courts should not grant interim relief at the initial stage which amounts to final relief while considering the interim application.**

(Para 7,9 & 10)

**Case laws Referred to:-**

1.AIR 1990 SC 867 : (Dorab Cawasji Warden -V- Coomi Sorab Warden & Ors.).
2.(1993)3 SCC 595 : (St.John's Teachers Training Institute(for Women), Madurai & Ors.-V-State of Tamil Nadu & Ors.).
3.AIR 1995 SC 1368 : (Bank of Maharashtra -V- Race Shopping & Transport Co.Pvt. Ltd. & Anr.)
4.40 (1974) CLT 336 : (Orissa State Commercial Transport Corporation Ltd. Represented by its Secretary Sri C.B.S. Ramchandra Rao -V- Sri Satyanarayan Singh & Anr.).

For Petitioner - M/s.Budhadev Routray & B.K.Mohanty.
For Opp.party - M/s.Pitambar Acharya, P.K.Ray, B.Bhadra, Sanjay Rath & B.K.Jena.

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*W.P.(C) NO.8701 OF 2009. In the matter of an application under Article 227 of the Constitution of India.

***S. PANDA, J***. In this writ petition, the petitioner has challenged the order dated 7.5.2009 passed by the learned Ad hoc Addl. District Judge, FTC-2, Bhubaneswar in FAO No.17/129 of 2008-2004 confirming the order dated 4.9.2004 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Interim Application No.381 of 2004 arising out of Civil Suit No.431 of 2004.

**2.** The facts, as narrated in the writ petition, are as follows:

Petitioner is the defendant. Opposite party as plaintiff filed Civil Suit No.431 of 2004 before the learned Civil Judge (Senior Division), Bhubaneswar with a prayer to declare the order passed by the defendant as illegal, void ab initio, non est in the eye of law and for a decree of permanent injunction. In the said suit, she filed an application under Order 39 Rules 1 and 2 read with Section 151 of the Civil Procedure Code for injunction. The said application was registered as Interim Application No.381 of 2004. The prayer made in the said interim application was to direct the defendant to maintain status quo prior to the passing of the termination order dated 24.7.2004. On hearing both the parties, the learned Civil Judge on 4.9.2004 directed to maintain status quo as was prevailing between the parties on 20.7.2004 till disposal of the suit and also observed that the order could not be used as a shield or sword against the authorities for all times to come till disposal of the suit because the plaintiff was subjected to the Service Rules of 1993 and in the event of any misconduct, service deficiency or for illegal act, the authority would be at liberty to take appropriate action against the petitioner. Challenging the said order, defendant filed an appeal before the learned Ad hoc Addl. District Judge, FTC-2, Bhubaneswar. The learned Ad hoc Addl. District Judge dismissed the appeal filed by the defendant confirming the order of the trial court. Being aggrieved by the said order dated 7.5.2009, defendant petitioner has filed this writ petition.

**3.** Learned counsel appearing for the defendant petitioner submitted that both the courts below failed to appreciate that by virtue of the interim relief it had granted the main relief prayed for in the suit without adjudicating the claim raised by the parties. Therefore, interference by this Court in exercise of the jurisdiction under Article 227 of the Constitution of India is warranted and the order passed by the courts below is liable to be set aside.

**4.** Learned counsel appearing for the plaintiff opposite party submitted that on 3.5.1988 the plaintiff was appointed as a Stenographer in the defendant-institution. After serving for sometime, she left the job. Thereafter she again joined the institution and was continuing as a regular employee of the opposite party institution since 6$^{th}$ September, 1994. The recruitment and condition of service of the management of the defendant institution was framed and known as Xavier Institute of Management Staff Recruitment and Condition of Service Rules, 1993. The plaintiff was abruptly thrown away from the service with effect from 24.7.2004 by the defendant without any cogent and convincing reasons. He further submitted that such action of the defendant was per se illegal, arbitrary and violative of natural justice. Therefore, challenging the said termination order, the plaintiff has filed the suit.

**5.** It may be noted here that in the year 1967 the plaintiff was born in Romania out of the wedlock of Indian father and Romanian mother. She

came to India in the year 1981 having a valid passport. The residential permit was granted by the Registration Officer-cum-Superintendent of Police, Bhubaneswar from time to time. Her application for residential permit was under process in the Ministry of Home, Government of Orissa as well as the Central Government and the said permit was granted as a matter of course. While her application was pending before the authorities, defendant issued a letter to her on 29.6.2004 regarding valid residential permit. She replied to the said letter on 5.7.2004 that she was still a Romanian citizen and her residential permit had already expired and the same was pending before the authorities for renewal. Thereafter on 9.7.2004 again the authorities requested her to furnish all the necessary documents regarding valid residential permit. However, time was allowed till 27.4.2004 but she failed to produce the necessary residential permit. Therefore, her service was terminated on 24.7.2004. During pendency of the interim application before the court below, the authorities revalidated her residential permit till 14.1.2005. Considering the said facts, the learned Civil Judge held that the defendant had not followed the procedure prescribed in the Service Rules, 1993. Therefore, the plaintiff had a prima facie case and the termination of her service would cause irreparable loss and injury to her. Plaintiff opposite party being the sole earning member of the family, balance of convenience was also in her favour. On these grounds, the learned Civil Judge allowed the interim application. Since the order passed by the learned Civil Judge had been confirmed by the lower appellate court, the impugned order should not be interfered.

**6.** From the above rival submissions of the parties, it is clear that the plaintiff-opposite party's service had been terminated on 24.7.2004. Thereafter, the suit was filed. The plaintiff filed an interim application to get back the position which was prior to filing of the suit. To pass such an order, the Court has to satisfy itself higher than the prima facie case, balance of convenience and irreparable loss and injury sustained by the applicant. The apex Court in the case of **Dorab Cawasji Warden v. Coomi Sorab Warden and others** reported in **AIR 1990 SC 867** held as follows:

> "On the facts before the court there should be a strong probability of the plaintiff getting the relief prayed for by him in the suit. The plaintiff's case should be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> Xxx xxx
>
> It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money….."

**7.** It is a settled principle that the Court should not grant a relief which can be granted at the final stage or which amounts to final relief unless there are special circumstances. Only in extraordinary circumstances the Court

may be justified in granting a relief at the time of considering the interlocutory application, but for that the reasons must be recorded by the Court. The apex Court has consistently and persistently deprecated the action of courts in granting interim relief which amounts to final relief at the initial stage while considering the interim application. Reference in this regard may be made to the decision of the apex Court in the case of **St. John's Teachers Training Institute (for Women), Madurai & others v. State of Tamil Nadu & others** reported in **(1993) 3 SCC 595**, **Bank of Maharashtra v. Race Shopping & Transport Co. Pvt. Ltd. & another** reported in **AIR 1995 SC 1368**.

**8.** The logic behind this remains that the ill-conceived sympathy emasculates as interlocutory judgment exposing judicial discretion to criticism to degenerating private benevolence and the Court should not be guided by misplaced sympathy, rather it should pass interim orders making accurate assessment of even the prima facie legal position. The Court should not embrace the authorities under the State by taking over the functions to be performed by the Statutory Authorities.

**9.** In the present case, the main prayer and the interim prayer of the plaintiff is the same. While granting the interim order, the Court should have considered that it is granting main relief to the plaintiff and before filing of the suit her service had already been terminated. Therefore, she should not be reinstated in service before passing of the decree in the suit. The learned counsel for the petitioner defendant also cited the decision of this Court in the case of **Orissa State Commercial Transport Corporation Ltd. represented by its Secretary Sri C.B.S. Ramchandra Rao v. Sri Satyanarayn Singh and another** reported in **40 (1974) CLT 336** wherein this Court has held that irreparable injury cannot be adequately remedied by damages.

**10.** However, if an applicant is reinstated with full back wages, it cannot be said that any irreparable loss would be caused to him. Once the plaintiff was not in service, the Court had no jurisdiction to issue an injunction prohibiting the defendant from removing her from service or directing the authority to continue the plaintiff in service. Therefore, the said order is without jurisdiction.

**11.** Since the order passed by the courts below is an error apparent on the face of the record, this Court sets aside the impugned order dated 7.5.2009 passed by the learned Ad hoc Addl. District Judge, FTC-2, Bhubaneswar in FAO No.17/129 of 2008-2004 as well as the order dated 4.9.2004 passed by the learned Civil Judge (Senior Division), Bhubaneswar in Interim Application No.381 of 2004 arising out of Civil Suit No.431 of 2004. As the suit is of the year 2004, this Court directs the learned Civil Judge (Senior Division), Bhubaneswar to dispose of the same as early as possible, preferably within a period of six months from the date of receipt of this order.

**12.** The writ petition is accordingly allowed. No costs.

Writ petition allowed.

**2010 ( I ) ILR-CUT-718**

**B.N.MAHAPATRA, J.**

## DIVISIONAL MANAGER, UNITED INDIA INSURANCE CO.LTD. CTC -V- NAGENDRA SETHI & ORS.* (WITH BATCH)

**MARCH 5, 2010.**

**(A) MOTOR VEHICLE ACT, 1988 (ACT NO.59 OF 1988 ) – SEC.140.**

**Accident Dt.16.06.1992 – Deceased died – Under the un amended provision of Section 140 quantum of compensation was fixed at Rs.25,000/- in case of death – The said provision amended w.e.f. 14.11.1994 making Rs.25,000/- as Rs.50,000/- - Tribunal directed for payment of Rs.50,000/- as the payment was made after amendment Act came in to force.**

**Held, the amendment made w.e.f. 14.11.1994 does not have any retrospective application – Liability of the insurer can be stretched within the law that was prevailing on the date of accident**

(Para 9)

**(B) MOTOR VEHICLE ACT, 1988 (ACT NO. 59 OF 1988) – SEC.140.**

**Whether interest is payable on the amount of no fault liability awarded U/s.140 of the Act.**

**Held, in respect of no fault liability, the question of awarding interest does not arise as interest may be awarded at the time of final award.** **(**Para 13 )

**Case laws Referred to:-**

1.1991 ACJ II 878 : (National Insurance Co.Ltd.-V- Ram Kishore Sani & Ors.).
2.AIR 2001 SC 1333 : (Rathi Menon -V- Union of India ).
3.1987(II) ACJ 561 : (Gujarat state Road Transport Corporation, Ahmedabad -V- Ramnanbhai Prabhatbhai & Anr.).
4.1998(2) TAC 330 (Ker)) : (United India Insurance Co.Ltd.-V-Alavi ).
5.(1990) 1 SCC 356 : (R.L.Gupta -V- Jupitor General Insurance Co.).
6.(2009) 4 SCC 32 : (Pepsu Road Transport Corporation, Patiala -V- Kulwant Kaur & Ors.).
7.1997(2) ACJ 200 (Orissa) : (D.M.,New India Assurance Co.Ltd.-V-Nandara
8. AIR 1982 SC 836 : (Padma Srinivasan -V- Premier Insurance Co.Ltd.).
9.(2000) 7 SCC 137 : (National Insurance Co.Ltd.-V-Beharilal & Ors.).
10.AIR 2001 SC 1333 : (Rathi Menon -V- Union of India).
11.1997 (2) TAC 96 Orissa : (New India Assurance Co.represented through D.M.,Khurda Division-V-Radha Bewa & Ors.).

For Appellant – M/s.A.K.Mohanty & m.C.Nayak.
For Respondent – M/s.D.Shit & B.P.B.Bahali (for R-1 & 2)
M/s.M.Ghose, P.K.Tripathy, N.Ghose & R.Mohanty

(For R-5).
For Appellant – Mr. S.S.Rao.
For Respondents – M/s.D.Shit & B.P.B.Bahali
(for R-1 to 3)
M/s.A.K.Mohanty, M.C.Nayak & D.C.Dey
(for R-6).

*M.A. NOS.454,455,456,457,458,465,466,467,468,469 of 1996.From orders 30.04.1996 passed by the Addl.District Judge-cum-Motor Accident Claims Tribunal(III), Balasore in Misc.Case Nos.47/88(C )94/92,37/86(C )94/92, 35/85(C) 94/92, 62/84(C )94/92 and 38/87(C )94/92.

***B.N.MAHAPATRA,J.*** These ten appeals are directed against orders dated 30.04.1996 passed in Misc. Case Nos. 47/88 (C) 94/92, 37/86(C) 94/92, 35/85(C) 94/92, 62/84(C)94/92 and 38/87(C) 94/92 by the 3rd MACT-cum-Additional District Judge, Balasore (for short "the Tribunal").

2. Since all these appeals involve common question of law, with consent of the learned counsel for the parties, they were heard analogously and are disposed of by this common judgment.

3. The facts and circumstances giving rise to these appeals are that in the above five misc. cases the legal heirs of the deceased persons, who died in a vehicular accident on 14.06.1992 because of head on collision between a trekker and a truck, filed claim petitions before the Tribunal for compensation under the Motor Vehicle Act, 1988 (for short "the Act 1988"). Thereafter, the legal heirs of the deceased filed applications under section 140 of the Act 1988 for interim relief of Rs.50,000/- (rupees fifty thousand) under "no fault liability". The Tribunal in each of these five misc. cases awarded a sum of Rs.50,000/- (rupees fifty thousand) to the legal heirs of the deceased persons under Section 140 of the Act 1988 and directed the insurers of both the vehicles to pay the said compensation amount of Rs.50,000/- to the claimants proportionately within one month from the date of the interim award with a condition that in the event of failure to pay the award amount within the stipulated time of one month, the award amount would carry interest @ 12% per annum from the date of filing of the petitions under Section 140 of the Act 1988 till realization. Learned Tribunal relying on a decision of the Madhya Pradesh High Court in the case of ***National Insurance Company Ltd. vs. Ram Kishore Sani & Ors***, ***1991 ACJ II 878***, held that the complainants- petitioners are entitled to get Rs.50,000/- instead of Rs.25,000/- as the Amendment Act 54 of 1994 has retrospective application. Hence, the present appeals.

4. Learned counsel appearing on behalf of the appellants-Insurance Companies argued that under the un-amended provisions of section 140 of the Act 1988, the quantum of compensation was fixed at Rs.25,000/- (rupees

twenty-five thousand) in case of death. After the Amendment Act 54 of 1994 came into force with effect from 14.11.1994, the said amount of compensation has been enhanced to Rs.50,000/-. The Tribunal is not justified to hold that the Amendment Act 54 of 1994 has retrospective application and the claimants are entitled to get compensation of Rs.50,000/-. The provisions of the M.V. Act are substantive in nature. The liability of the insurer cannot be stretched beyond the law prevalent on the date of accident. It is further argued that since the compensation awarded under Section 140 of the Act 1988 is an interim one, the learned Tribunal is not justified in awarding interest on the same. The learned counsel cited some decisions in support of his contention.

Learned counsel appearing on behalf of the claimants-respondents strenuously urged that the Motor Vehicles Act being a benevolent legislation, the interim compensation of Rs.50,000/- as provided in the Amendment Act 54 of 1994 has retrospective application. Therefore, the legal heirs of the deceased persons who died due to the accident on 14.06.1992, i.e., prior to the date the Amendment Act came into force, are entitled to get compensation of Rs.50,000/- under Section 140 of the Act 1988. In support of his contention he relied on the decision of the apex Court in ***Rathi Menon vs. Union of India, AIR 2001 SC 1333.*** It is contended that Section 171 of the Act 1988 provides for award of interest on the amount of compensation directed to be paid to the claimants. The said provision does not make any distinction among the compensations paid under Section 140 of the Act 1988, Section 163-A and compensation awarded under Section 168 of the Act 1988. Therefore, no illegality has been committed by the Tribunal by awarding interest on the amount of compensation as prescribed under Section 171 of the Act 1988.

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

(i) Whether the Amendment Act 54 of 1994 that came into force with effect from 14.11.1994 has retrospective application and is applicable to the instant cases, where the alleged accident took place on 14.06.1992, i.e., much prior to the date the Amendment Act came into force, entitling the claimants to compensation of Rs.50,000/- as envisaged under Section 140 of the Act, 1988.

(ii) Whether the claimants are entitled to interest on the amount of compensation awarded under Section 140 of the Act, 1988 from the date of filing of the application under the said Act till the date of payment?

6. For better appreciation, it is necessary to reproduce here the relevant provisions of Section 140 of the Act, 1988 prior to the Amendment Act 54 of 1994 came into force on 14.11.1994.

> "140. **Liability to pay compensation in certain cases on the principle of no fault** – (1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or Motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this Section.
>
> (2) The amount of compensation which shall be payable under Sub-section (1) in respect of the death of any person shall be a fixed sum of twenty-five thousand rupees and the amount of compensation payable under that Sub-section in respect of the permanent disablement of any person shall be a fixed sum of twelve thousand rupees.
>
> xx xx xx
>
> Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this Section or under Section 163-A."

The amounts of 'twenty-five thousand rupees' and 'twelve thousand rupees' appearing in Sub-section (2) above have been raised to 'fifty thousand rupees' and 'twenty-five thousand rupees' respectively in the Amendment Act 54 of 1994.

7. A plain reading of Section 140 of the Act, 1988 reveals that the amount of compensation on the principle of 'no fault liability in case of death was Rs.25,000/- prior to 14.11.1994 when the Amendment Act 54 of 1994 came into force and subsequently it has been enhanced to Rs.50,000/- by introduction of the Amendment Act. The claimants shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default on the part of the owner or owners of the vehicle or vehicles involved in the accident or any other person.

8. It is not in dispute that the accident took place on 14.06.1992 i.e. prior to the Amendment Act came into force. The question remains whether the appellants are entitled to compensation to the tune of Rs.25,000/- under Section 140 of the Act, 1988 as it stood on the date of the alleged accident or they are entitled to get Rs.50,000/- under the provisions of Section 140 of the Amendment Act 54 of 1994 which were prevailing on the date the impugned award was passed.

9. The Apex Court in ***Gujarat State Road Transport Corporation, Ahmedabad vs. Ramnanbhai Prabhatbhai & Anr., 1987 (II) ACJ 561*** held that the provisions of the Motor Vehicles Act, are not merely procedural provisions. They substantially affect the rights of the parties.

Law is well settled that unless legislature by expression or necessary implication indicates retrospective application of any Act, the application shall only be prospective. Right to pay compensation has been created by the statute itself [see ***United India Insurance Co. Ltd. Vs. Alavi, 1998 (2) TAC 330 (Ker)]***.

The apex Court in ***R.L. Gupta vs. Jupitor General Insurance Co., (1990) 1 SCC 356,*** held that the quantum of liability is provided by the statute prospectively.

The apex Court in ***Pepsu Road Transport Corporation, Patiala vs. Kulwant Kaur and Others, (2009) 4 SCC 32,*** held that the amount of compensation payable as "no fault liability" under Section 140 of the Act 1988 was as per the law prevailing on the date of accident.

This Court in ***Divisional Manager, New India Assurance Co. Ltd. Vs. Nandara Bawa & Ors., reported in 1997(2) ACJ 200 (Orissa),*** held that the provisions of Section 140 of the Motor Vehicles Act are not retrospective. The golden rules of all the statutes are prospective unless statutes prescribe otherwise. The amending Act 54 of 1994 which came into force w.e.f. 14.11.1994 does not prescribe for its retrospective application. Thus the amendment, which came into force w.e.f. 14.11.1994 providing for compensation of Rs.50,000/-, has no retrospective operation.

It is also well settled that the liability of the insurer can be stretched within the law that was prevailing on the date of accident. (see ***Padma Srinivasan Vs. Premier Insurance Co. Ltd., AIR 1982 SC 836***)

10. The matter can also be considered from another angle. For example, two persons died in an accident which took place prior to the date the Amendment Act 1994 came into force. Accordingly, two claim cases were filed. In one case, if compensation of Rs.25,000/- is awarded under Section 140 to be paid prior to the Amendment Act 54 of 1994 came into force and, in other case, Rs.50,000/- is awarded to be paid after the Amendment Act 54 of 1994 came into force, then it will amount to discrimination.

The apex Court in ***National Insurance Co. Ltd. Vs. Beharilal & Ors., (2000) 7 SCC 137,*** held that the object of fixing liability at a fixed amount for some period is to maintain uniformity, the compensation cannot be different to the persons who suffered accident only because of the fact that some cases were not disposed of earlier.

11. The decision cited by learned counsel for the claimant-respondent in ***Rathi Menon Vs. Union of India, AIR 2001 SC 1333*** has no application to the case of the claimant. The said judgment was rendered in connection with one claim case under the Indian Railways Act. The Act does not provide for any fixed amount of compensation; the same is left with the Central Government to fix the amount of compensation from time to time. Section 140 of the M.V. Act. Act itself provides for the amount of compensation.

Moreover, this decision of the apex Court had no occasion to refer to the *Padma Srinivasan (supra)*.

12. For the reasons stated above, this Court is of the considered view that since the accident in question took place on 14.06.1992 i.e. prior to the Amendment Act 54 of 1994 came into force, the legal heirs of the deceased persons are entitled to get compensation of Rs.25,000/- under Section 140 of the Act 1988, i.e., as per the law prevailing on the date of accident. The Tribunal is, therefore, not justified directing payment of Rs.50,000/- merely because the said payment was directed to be made after the Amendment Act 54 of 1994 came into force.

13. The next question relates to payment of interest on the amount of compensation awarded under Section 140 of the Act, 1988.

This Court in ***New India Assurance Company represented through Divisional Manager, Khurda Division Vs. Radha Bewa & Ors., 1997 (2) T.A.C. 96 Orissa,*** held that in respect of no fault liability, the question of awarding interest does not arise as interest may be awarded at the time of final award.

In view of the above decision of this Court, no interest is payable on the amount of compensation awarded under Section 140 of the M.V. Act., at this juncture.

The appeals are allowed accordingly.

Appeals are allowed.

2010 ( I ) ILR-CUT-724

**B.P.RAY, J.**

## INDIAN RARE EARTHS LTD. - V- M.D.,SOUTHERN ELECTRICITY SUPPLY CO. OF ORISSA LTD.(SOUTCO),GANJAM & ANR.*

**MARCH 3, 2010.**

**ORISSA ELECTRICITY REGULATORY COMMISSION DISTRIBUTION (CONDITIONS OF SUPPLY) CODE, 1998 – REGULATION 85 (3).**

**Disruption of power supply due to Super Cyclone – Demand of Energy bills against the petitioner during that period is under challenge – Opp.Party says that this being an act of God the aforesaid provision will not be applicable to the petitioner's case.**
**Held, during the period in dispute there being no contractual obligation on either of the Parties levy of demand on the petitioner as made by the Opp.party Company can not be sustained.** (Para 7 )

**Case law Referred to:-**
AIR 1954 SC 44 : (Satyabrata Ghose -V-Mugneeram Bangur & Co. & Anr.).

For Petitioner – Mr.J.K.Tripathy (Sr. Counsel) & Associates.
For Opp.Parties – Mr.B.K.Pattnaik.

*O.J.C. NO.2774 OF 2000. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***B.P. RAY, J.*** The petitioner in this writ petition challenges the demand charges under Annexure-1 series and as well as the disconnection notice under Annexure-9 as illegal, arbitrary and against the principles laid down in the Orissa Electricity Regulatory Commission Distribution (Condition of Supply) Code, 1998.

2. The main contention raised by the petitioner in this writ petition is that the action of the opp. parties in raising the demand charges for the month of October and November, 1999 in their energy bills dated 3.11.1999 and 2.12.1999 and the subsequent disconnection notice dated 16.3.2000 are illegal, arbitrary and contrary to the provisions of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998.

3. The fact of the case is that on 17th October, 1999, due to Super Cyclone, three numbers of 132 KV Electric distribution Towers of Chhatrapur Sub-station supplying power to the petitioner's factory were uprooted causing complete disruption of power supply to the petitioner's factory for 36 days. The power was restored to the premises of the petitioner's unit on 27th November, 1999. Therefore, the contention of the petitioner is that in absence of supply of power to the petitioner's premises, the opp. parties cannot levy any demand against the petitioner for the said period.

The demand charges as defined in Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 1998 is quoted as hereunder.

> "85.(1) Monthly demand charges shall be payable by the consumer on the basis of maximum demand and contract demand as determined in the tariff notification. In case maximum demand meter is not provided or the meter has become defective, the monthly demand charges shall be payable on the basis of contract demand as determined in the tariff notification.
>
> (2) Such monthly demand charges shall be payable during the continuance of the agreement under Regulation 15 even if no electricity is consumed for any reason whatsoever or supply has been disconnected due to default of the consumer.
>
> (3) During statutory power cuts and power restrictions imposed by the licensee, if the restriction on demand is imposed for a period exceeding sixty hours in a month, the monthly demand charges shall be prorated in accordance with the period and quantum of demand restrictions imposed. In all other cases the consumer shall be liable to pay the full demand charges."

4. Mr. Tripathy, learned Senior Counsel for the petitioner states that in view of the provision laid down in Regulation 85(3), the demand against the petitioner is illegal and arbitrary inasmuch as there was no supply of electricity.

Regulation 2(o)-"demand charge" refers to a charge on the consumer based on the capacity reserved for him by the licensee, whether the consumer utilizes such reserved capacity in full or not.

Mr. Tripathy, learned Senior Counsel for the petitioner argues that since no power was reserved for the petitioner, there is no question of liability for demand charges. Therefore, the impugned demand cannot be sustained.

5. Mr. Pattnaik, learned counsel for the opp. parties vehemently argues that the provision of Section 85 Sub-Section (3) can be utilized only when there is a statutory power cut and power restriction, which is not the act of God. This being an act of God, the aforesaid provision will not be applicable to the petitioner's case.

6. Aforesaid provisions go to show that the demand charge relates to a charge on the consumer for keeping reserve the energy to supply him to the extent of contractual demand of energy. A consumer is liable to pay the same if the energy is supplied to the consumer by the licensee whether he draws or utilizes the same or not. The aforesaid relationship of the consumer with the supply company arises out of a contract entered into between them, having mutual obligations. Here in this case, it is seen that by the act of the

God, it became impossible for the supply company to supply the power to the consumer. The supervening circumstances in which neither of the parties had any control, made the contract for the same impossible of being performed and as such during the said period, it can be said that the contract was hit by the "doctrine of frustration". In such a situation the supply company has no obligation to supply power and if any claim would have been made by the consumer for non-supply of energy, it goes without saying that the company could have escaped from the liability thereof taking the resort to the aforesaid doctrine of frustration. When the company could have escaped from the liability by availing of the doctrine of frustration, in such premises, it is fallacious to say that it could have pressed the consumer to pay the tariff charge even though, it has not supplied the power to the petitioner. In this regard Section 56 of the Indian Contract Act, 1872 envisages as follows:-

> "**56. Agreement to do impossible act**- An agreement to do an act impossible in itself is void.
>
> **Contract to do act afterwards becoming impossible or unlawful**.- A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.
>
> **Compensation for loss through non-performance of act known to be impossible or unlawful**.- Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promise did not know to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such promise sustains through the non-performance of the promise."

In the case of **Satyabrata Ghose V. Mugneeram Bangur and Co. and another** reported in A.I.R. 1954 S.C. 44, the Hon'ble apex Court in this regard has held as follows:-

"The essential idea upon which the doctrine of frustration is based is that of impossibility of performance of the contract; in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility. The doctrine of frustration is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of S.56. To the extent that the Contract Act deals with a particular subject, it is exhaustive upon the same and it is not

permissible to import the principles of English law 'dehors' these statutory provisions. The decisions of the English Courts possess only a persuasive value and may be helpful in showing how the Courts in England have decided cases under circumstances similar to those which have come before Indian Courts. In deciding cases in India the only doctrine that we have to go by is that of supervening impossibility or illegality as laid down in S.56, taking the word 'impossible' in its practical and not literal sense. Section 56 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. In cases, where the Court gathers as a matter of construction that the contract itself contained impliedly or expressly a term, according to which it would stand discharged on the happening of certain circumstances, the dissolution of the contract would take place under the terms of the contract itself and such cases would be outside the purview of S.56 altogether. They would be dealt with under S.32 which deals with contingent contracts or similar other provisions contained in the Act. In the large majority of cases, however, the doctrine of frustration is applied not on the ground that the parties themselves agreed to an implied term which operated to release them from the performance of the contract. The relief is given by the Court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. When such an event or change of circumstance occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the Court which can pronounce the contract to be frustrated and at an end. The Court undoubtedly has to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the Court has to form its own conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object. This is really a rule of positive law and as such comes within the purview of S.56 of the Contract Act." (quoted from the placitum of the judgment)

7. In view of the aforesaid authoritative pronouncement, in this case, as during the period in dispute there being no contractual obligation on either of the parties, levy of demand on the petitioner as made by the opposite party-Company cannot be sustained.

8. In the above circumstances, the writ application stands allowed, consequentially, the demand raised by the opp. party-Company from the petitioner for the period in question stands quashed. There will be no order as to cost.

Writ petition allowed.

2010 ( I ) ILR-CUT-729

**B.K.NAYAK, J.**

## KELU CHARANA JENA & ORS. -V- STATE OF ORISSA.*

**MARCH 5, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF1974) – SEC.319.**

**Petitioners were named in the F.I.R. as accused persons – Not charge-sheeted by the investigating agency – However the informant and his son have in their evidence in Court specifically implicated the present petitioners ascribing different roles played by each of them during occurrence – Learned Court below has exercised his discretionary power properly and judiciously – Held, impugned order suffers from no infirmity.** ( Para 5,8 & 9)

**Case laws Referred to:-**

1.2001 (II) OLR (SC)-333 : (Rakesh & Anr.-V- State of Haryana).
2.1994(II) OLR-106 : ( Radharani Panda -V- Arnapurna Padhi @ Panda & Anr.)
3.AIR 2009 SC 1723 : (Ram Pal Singh & Ors.-V- State of U.P. & Anr.).

For Petitioners – Mr.C.R.Lenka.
For Opp.Party - Mr.Goutam Mishra
Additional Standing Counsel.

*CRLREV NO.533 OF 2006. From an order dated 30.06.2006 passed by Shri S.N.Dash, C.J.M.,Jagatsinghpur in G.R.Case No.374 of 2001.

***B.K.NAYAK, J.*** Order dated 30.06.2006 passed by the learned C.J.M., Jagatsinghpur in G.R.Case No.374 of 2001 exercising power under Section 319, Cr.P.C. and issuing summons to the present petitioners to stand their trial is the subject matter of challenge in this revision.

2. In G.R.Case No.374 of 2001 before the C.J.M., Jagatsinghpur one Rabindra Nath Jena was facing trial for alleged commission of offences under Sections 341/323/294/506 of the I.P.C. During course of trial, the A.P.P. filed a petition under Section 319, Cr.P.C. stating that the evidence have been brought out against Kelu Ch. Jena, Dillip Kumar Jena, Ranjan Jena and Chita Jena (petitioners) for commission of offences by them and the names of the said persons also appeared in the F.I.R. and, therefore, they be summoned to face the trial. On consideration of the materials and evidence on record, the court below came to hold that the present petitioners have committed the offences alleged in the instant case and, therefore, they are required to be tried together with the other accused person. Accordingly, it directed for issuance of summons to the present petitioners.

3. Mr. C.R. Lenka, learned counsel for the petitioners contended that out of seven prosecution witnesses examined during the trial before the court below, only two witnesses viz, P.Ws.6 and 7 implicated the present

petitioners and, therefore there is no sufficient evidence before the court below to exercise power under Section 319, Cr.P.C. and to issue summons to the petitioners. It is also his submission that the investigating agency having not charge-sheeted the present petitioners though they were named in the F.I.R., it is not open to the court to exercise power under Section 319, Cr.P.C. His further submission is that evidence of P.Ws.6 and 7, which has been taken into consideration by the court below to exercise its discretionary power under Section 319, Cr.P.C., being not sufficient or adequate for convicting the petitioners, the court below should not have exercised its discretionary power.

4. Mr. Goutam Mishra, learned Additional Standing Counsel, relying upon several decisions of the Supreme Court as well as this Court, refuted all the contentions raised on behalf of the petitioner. It is submitted by him that non-filing of charge-sheet against a person is not material for the purpose of exercising power under Section 319, Cr.P.C. by the court, if it appears from evidence that the said person committed any offence for which he could be tried together with the accused. He further submits that sufficiency or adequacy of evidence for the purpose of coming to a conclusion that the person is guilty of the offence is not to be considered for exercising the discretion and what is necessary is that it must be appearing from the evidence that the person concerned has committed an offence for which he could be tried together with the original accused.

5. Section 319, Cr.P.C. provides as under :

**"319. Power to proceed against other persons appearing to be guilty of offence**.-(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then-

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard:

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took

cognizance of the offence upon which the inquiry or trial was commenced."

It is evident from the impugned order of the learned C.J.M., that not only the petitioners were named in the F.I.R. as accused persons, but the informant (victim) and his son, the eyewitness, implicated them in their statement given to the Investigating Officer. Further, the informant and his son, who have been examined as P.Ws.6 and 7, have in their evidence in Court specifically implicated the present petitioners ascribing different roles played by each of the petitioners during the occurrence.

6. Regarding the nature and quantity of evidence that may be necessary for exercising the discretionary power under Section 319, Cr.P.C. it has been held by the Hon'ble Supreme Court in the case of **Rakesh and another v. State of Haryana; 2001 (II) OLR (SC)-333** as follows :

"12. Further, the scope of Section 319 was considered by this Court in [**Ranjit Singh v. State of Punjab** JT 1998 (6) SC 512 :1998 (7) SCC 149]. In paragraph 10, the Court held that Sub-section (1) of Section 319 contemplates existence of some evidence appearing in the course of trial wherefrom the Court can prima facie conclude that the person not arraigned before it is also involved in the commission of the crime for which he can be tried with those already named by the police. The Court has also clarified that :

"Of course it is not necessary for the Court to wait until the entire evidence is collected for exercising the said powers.""

7. Interpreting the expression, 'appears to have committed' used in sub Section (1) of Section 319, Cr.P.C., this Court have already held in the case of **Radharani Panda v. Arnapurna Padhi @ Panda and another; 1994(II) OLR-106** as follows :

"… The expression 'appears to have committed' used with reference to such person clearly shows that material to link him with the offence must exist. The adequacy or otherwise of the material for the ultimate result of trial is not the determinative factor".

8. In the case of **Ram Pal Singh & Others v. State of U.P. & Another; AIR 2009 S.C. 1723,** which is exactly a similar case as that of the present one, where some accused persons named in the F.I.R. were not charge-sheeted, but evidence came out against them during trial, the Hon'ble Supreme Court upheld the order of the Sessions Judge invoking power under Section 319, Cr.P.C. and issuing process to those accused persons. The Supreme Court held as under :

"16. All that is required by the Court for invoking its powers under Section 319, Cr.P.C. is to be satisfied that from the evidence adduced before it, a person against whom no charge had been

framed, but whose complicity appears to be clear, should be tried together with the accused. It is also clear that the discretion is left to the Court to take a decision on the matter."

9. Considering the evidence of P.Ws. 6 & 7 in the light of the aforesaid principles, I am satisfied that the discretionary power of the court below has been exercised judiciously and properly and the impugned order suffers from no infirmity.

The revision is, therefore, dismissed.

**2010 ( I ) ILR-CUT-733**

**B.K.NAYAK, J.**

## KUMAR DAS & ORS. -V- BANCHHANIDHI BEHERA & ANR.*

**MARCH 26, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974 ) – SECS.256(1), 300.**

**Complaint case ended in acquittal – Whether Second complaint in respect of the very same occurrence is maintainable – No**

**In the present case the subsequent complaint case was tried and petitioners were convicted and the same was confirmed in appeal – held, revision is allowed – Impugned original and appellate orders of conviction and sentence are set aside.** (Para 11)

**Case laws Referred to:-**

1.(1988)I OCR-474 : (Madan Mohan Tripathy -V-Rama Chandra Behera).
2.AIR 1958 Patna 239 : (Rasik Tatma -V-Bhagwat Tanti).
3.1979 C.L.J.555 : (Buchana Roy & Ors.-V-Paresh Kr.Ray).
4.(1977)1 SCC 417 : (State of Karnataka -V- K.H.Annegowda & Anr.).

For Petitioners – Mr.Biplab Kumar Das.
For Opp.Parties – Addl. Standing Counsel & Mr.K.K.Panigrahi (for O.P.No.1).

*CRIMINAL REVISION NO.51 OF 2001. From the judgment dated 22.12.2000 passed by Shri S.P.Raju, Addl. Sessions Judge, Cuttack in Criminal Appeal No.40 of 1998 confirming the conviction and sentence passed on 29.4.1998 by Shri L.N.Sahoo, S.D.J.M., Athagarh in ICC No.89 of 1994.

***B.K.NAYAK, J.*** The short point that arises for consideration in this revision is whether a second complaint is barred under Section 300, CrPC where an original complaint in respect of the very same occurrence and the offence ended in acquittal of the accused persons in terms of Section 256(1), CrPC.

2. The factual matrix that gives rise to the question are set forth below:-

Opposite party No. 1, Banchhanidhi Behera of village Kulalilo, P.S. Athagarh, District Cuttack filed a complaint petition against the petitioners on 16.3.1994 which was registered as ICC No. 29 of 1994 in the Court of S.D.J.M., Athagarh. The allegations in the complaint, in short, were that the complainant (O.P.No.1) was in possession of a land measuring Ac.0.03 decimals since 1950 and that on 1.3.1994 at about 8 A.M. while the complainant was fencing the said land the accused persons (petitioners) who were his neighbours, came there, abused him in filthy language and cut and damaged various trees and plants on the said land and also threatened the complainant. It appears that after inquiry u/s. 202, CrPC by order dated

13.4.1994 the learned S.D.J.M. took cognizance of the offence u/ss.427,294/34, IPC and issued processes against the accused-petitioners. Subsequently, the accused persons appeared in court and went on bail and were sometimes being represented by their counsel u/s. 317, CrPC. On 2.9.1994 the particulars of the offence were read over and explained to the accused persons and their counsel having not pleaded guilty, the case was posted to 7.10.1994 for evidence and the complainant was directed to be present with his witnesses. Ultimately, after an adjournment taken by the complaint the case was fixed to 9.11.1994 for evidence, on which date the complainant and his counsel having remained absent, the learned S.D.J.M. passed order u/s 256(1), CrPC acquitting the accused persons.

3. Subsequently, on 29.11.1994 the complainant-O.P. filed a fresh complaint against the accused-petitioners for same offences arising out of the very same occurrence for which the petitioners were earlier acquitted u/s 256(1), CrPC. The said complaint petition was registered as ICC No. 89 of 1994. The subsequent complaint is a verbatim reproduction of the earlier complaint in ICC No. 29 of 1994.

4. The learned Magistrate after inquiry took cognizance of the offence u/ss. 447,427,294/34, IPC against the accused-petitioners in ICC No. 89/1994 and after trial found the petitioners guilty and convicted them for t he offence u/s. 447,427/34, IPC and sentenced them to pay a fine of Rs.200/- each on each count, and in default to suffer S.I for ten days on each count.

5. The petitioners filed Crl. Appeal No. 40 of 1998 challenging the said order of conviction and sentence which was ultimately heard by the 2nd Addl. Sessions Judge, Cuttack and dismissed by judgment dated 22.12.2000.

6. Against the aforesaid appellate order passed in Crl. Appeal No. 40 of 1998 confirming the order of conviction and sentence passed by the learned S.D.J.M. in ICC No. 89 of 1994 the petitioners have filed the present revision.

7. The only contention raised by learned counsel for the petitioners in this revision is that in view of the acquittal of the petitioners in the earlier ICC No. 29 of 1994 by learned S.D.J.M., Athagarh u/s 256(1), CrPC, they could not have been tried and convicted in the second complaint case bearing No. 89 of 1998 in respect of the very same offence arising out of the very same occurrence in view of the bar contained in S. 300, CrPC. It is further submitted by him that the bar of the second complaint was specifically urged as a ground in the Criminal Appeal and also a petition was filed on behalf of the petitioner before the appellate court on 24.7.2000 to accept the certified copies of the complaint petition and the entire order sheet including the order of acquittal u/s 256(1), CrPC passed in ICC No. 29 of 1994 as additional evidence and though the appellate court passed order for

considering the said petition at the stage of final hearing of the appeal, the said petition has not been considered by the appellate court and no finding with regard to the bar of the second complaint has been given in the impugned judgment.

8. The learned counsel for the O.Ps., on the other hand, contended that an acquittal order u/s. 256(1), CrPC is a mere technical acquittal without any trial and, therefore, that will not operate as a bar for a second complaint.

9. The point of law raised in this revision is no more res integra. In an identical situation, this Court in the case of ***Madan Mohan Tripathy*** v. ***Rama Chandra Behera*** , (1988) I OCR-- 474 have in paragraphs 4 and 5 held as under:-

> "4. The submission that an acquittal under Sec. 256(1) Cr.P.C. is not covered under Sec. 300 (1), Cr.P.C. appears to be based upon the words "has once been tried" in that section, it being usually contended that when an order is passed under Sec. 256(1) acquitting accused, it could not be said of him having been tried and acquitted. The contention is not acceptable since it is evident that the word "tried" would include all stages after taking of cognizance the Court and the date fixed for appearance of the accused pursuant to the summons. The order may be passed even without any evidence being recorded or after all or some evidence being recorded. But in all such cases the accused would be deemed to have been tried and acquitted."
>
> "5. There seems to be unanimity of authorities on the subject. In A.I.R. 1958 Patna 239 ***(Rasik Tatma v. Bhagwat Tanti),*** dealing with a case under the old Code, it was held that an order passed under Sec. 247 (corresponding to Sec. 256 of the new Code) is a protection under Sec. 403 against the subsequent trial of the accused for the offence. In 1979 Criminal Law Journal 555 ***(Buchana Roy and others v. Paresh Kr. Ray),*** the question directly came for consideration where, for the very same reasons as discussed above, the same conclusion was reached. A case which throws much light on the question is (1977) 1 SCC 417 ***(State of Karnataka v. K.H. Annegowda and another)*** where the facts were that after committal of a case to the Court of Session and fixing of the date of trial by that Court, an application was moved by the Public Prosecutor praying for withdrawal from the prosecution under Section 494 of the old Code. The prayer was accepted and the learned Sessions Judge "discharged" the respondents. Thereafter, a fresh investigation was directed by the State in respect of the same offence and a new charge sheet was filed under the new Code. An objection was taken by the respondents under Sec. 300 Cr.P.C. that

> in view of their earlier acquittal they could not be tried again. Their plea being negatived, they came before the High Court which allowed the case being of the view that order "discharged" was actually an order of acquittal and hence the provisions of Sec. 300 would apply. On appeal by the State, the Supreme Court affirmed the view of the High Court deciding that a nomenclature of the order by the Sessions Judge as "discharged" would not alter the fact of acquittal of the respondents since the earlier order was passed only after charge had been framed by the Magistrate and commitment had been made to the Sessions Court where the trial on the charge, unless otherwise modified by the Sessions Court, was to take place and inasmuch as the order of discharge came after framing of the charge, it was in effect an order of acquittal and in that view of the mater, the respondents were entitled to the benefit of Sec. 300, Cr.P.C. The case is an authority for the present case and fortifies my view that "tried" under Sec. 300 (1) would include all steps taken after taking of cognizance and the date of appearing of the accused after issue of summons."

10. The certified copies of the complaint petition and the entire order sheet in ICC No. 29 of 1994 of the Court of S.D.J.M., Athagarh which were filed by the petitioners before the appellate court along with a petition for accepting those documents and additional evidence are perused by this Court. The certified copy of order dated 9.11.1994 in ICC No. 29 of 1994 also reveals that because of the absence of the complainant and his counsel on the date which was fixed for hearing of the case, the accused-petitioners were acquitted as per provisions of Sec. 256(1), CrPC. Factually, therefore, there is no doubt or dispute that in respect of the very same occurrence the petitioners were acquitted in ICC No. 29 of 1994 and have been subsequently tried and convicted in ICC No. 89 of 1994. It also appears from the order sheet of the appellate court that though the appellate court directed for consideration of the petition of the petitioners for additional evidence at the time of final hearing of the appeal, no order has been passed by the appellate court on the petition and the question of double jeopardy as contended in S. 300, CrPC has not at all been considered by the appellate court. Since the subsequent trial of the petitioners for the very same offences and the very same occurrence is a matter which touches the jurisdiction of the trial court, this Court in the revision can go into the same without remitting the matter to the appellate court as the same would only prolong the litigation.

11. In the light of the aforesaid discussion it is held that the subsequent trial of the petitioners in ICC No. 89 of 1994 is totally without jurisdiction and

amounts to double jeopardy and the consequential conviction is therefore illegal and unsustainable.

12. The revision is therefore allowed and the impugned original and appellate orders of conviction and sentence are set aside and the petitioners are acquitted of the offences.

Revision allowed.

2010 ( I ) ILR-CUT-738

**S.K.MISHRA, J.**

# SASHIREKHA NAYAK -V- CHIEF EXECUTIVE OFFICER/EXECUTIVE DIRECTOR, NESCO (ELECTRICAL),BALASORE & ORS.*

**MARCH 12, 2010.**

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

**Electrocution death – Deceased came in contact with live electric wire – Compensation claimed by the widow in writ petition.**

**Whenever there is any disputed fact in issue for adjudication, writ jurisdiction is not the proper forum – Held, petitioner should approach the Civil Court for redressal of her grievances.**

(Para 7 )

**Case laws Referred to:-**

1.2005(II) CLR 136 : (Nirmala Nayak & Ors.-V- Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. & Anr.).
2.2006(Supp-1) OLR 1114 : (Parvati Palai -V-Chairman-cum-Managing Director, CRID Corporation of Orissa Ltd. & Anr.).
3.2007(I) CLR 150 : (Gangadhar Mohanty -V- Chief Executive Officer CESCO, IDCO Tower, Bhubaneswar & Ors.)
4.(1999) 7 SCC 298 : (Chairman, Grid Corporation of Orissa Ltd.(GRIDCO) & Ors. -V- Sukamani Das (Smt) & Anr.).
5.(2000) 4 SCC 543 : (Tamil Nadu Electricity Board -V- Sumathi & Ors.).

For Petitioner - M/s. D.C.Swain & J.D.Barik.
For Opp.Parties – M/s.Prafulla Kumar Mohanty, D.N.Mohapatra, Smt.S.Mohanty P.K.Nayak, C.R.Nayak & S.N.Dash.

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*WRIT PETITION (CIVIL) NO.4336 OF 2007. In the matter of an application under Articles 226 & 227 of the Constitution of India.

***S.K.MISHRA, J.*** The petitioner, claiming to be the widow of deceased Upendra Nayak has filed this writ petition under Articles 226 and 227 of the Constitution of India for compensation arising out of death of the said Upendra Nayak.

2. The case of the petitioner is that the deceased Upendra Nayak had been to his agricultural lands in early morning on 18.09.2004. There he came into contact with one live electric wire, as a result of which he suffered severe injuries on his body. He was shifted to Dharmasala C.H.C., but on the way he died.

It is further pleaded that immediately thereafter, an F.I.R. was lodged before the Officer In-charge, Dharmasala Police Station, for which U.D. Case no.35 of 2004 corresponding to U.D.G.R. Case No. 210 of 2004 was

initiated. The Police Officer conducted inquest on the dead body of the deceased. The dead body was also subjected to postmortem examination.

The petitioner claims that the live electric were was lying on the path, which clearly proves that the opposite parties were negligent and they have failed to take safeguard to avoid the tragic death of the deceased. It is further pleaded that the deceased was a hard-working labourious person. He was also holding domestic animals. His monthly income was approximately Rs.3,000/-. The petitioner pleads that since there is no speedy, alternative and efficacious remedy available to the petitioner, she approached this Court.

On the above facts, the petitioner claims Rs.2,00,000/- (Rupees two lakhs) along with interest @ 18% per annum from the date of accident towards compensation arising out the premature death of the deceased, mental pain and suffering of the petitioner.

3. The opposite parties have filed their counter affidavit, inter alia, pleading that such claim of compensation basing on disputed questions of fact cannot be decided in a writ proceeding. The opposite party also plead that it is not known to them whether the petitioner is the only legal heir of the deceased. It is also not definite that the deceased died with coming in contact with the live wire which was lying on road and that he died on electrocution.

The positive case of the opposite parties is that there is no laches or negligence on the part of the opposite parties, the NESCO authorities, for which they are not liable to pay any compensation. The incident does not belong to the area of opposite party no.3, rather the alleged area comes with the Electrical Section, Neulpur. It is further pleaded that a Helper of Neulpur has reported to the Junior Engineer (Electrical) that on 18.09.2004 he came to know that in village Batijanga a person died by electrocution. Then he went to the said place and found that one 11 K.V. line, which was going over the paddy field, has fallen down because of heavy rain, thunder and lightening occurred on the last night i.e. on 17.09.2004 and as a result, the pin insulator was punctured. But there has been no V.C.B. Trip. However, due to falling of the side wire by the return current, the person has died. It is further pleaded that the said incident was beyond the control of the NESCO authorities and that apart, no laches or negligence can be attributed to their action. The opposite parties further plead that the deceased should have been careful while going over his paddy field. As the incident took place in the morning and hardly there was any time to find out such fault and to rectify same.

The opposite parties further plead that the allegations of latches and negligence on the part of the NESCO authorities is totally based on surmises and conjectures. It is further pleaded that the live line had been taken authorisedly in accordance with the procedure and there is no bar to draw such line by erecting the poles as per the provisions of the Act and the Rules. The further case of the opposite parties is that the deceased died due to his own negligence.

The opposite parties also pleads that they were not aware about the profession, income or financial condition of the petitioner and there is no proof in support of the same. The opposite parties pleads that the only way for adjudication of the disputed questions of fact is to take shelter of the common court of law instead of burdening the writ jurisdiction, wherein the same cannot be adjudicated.

On such pleadings, the opposite parties submit that the writ petition should be dismissed.

4. At the outset, learned counsel appearing for the opposite parties raised the question of maintainability of this writ petition. It is submitted that the petitioner should have filed a suit for redressal of his grievance and a writ court cannot decide the disputed questions like contributory negligence, legal heirs of the deceased and the amount of compensation.

5. Learned counsel for the petitioner, on the other hand, submitted that in ***Nirmala Nayak and others v. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. and another,*** 2005 (II) CLR 136; ***Parvati Palai v. Chairman-cum-Managing Director, GRID Corporation of Orissa Ltd. and another,*** 2006 (supp.-1) OLR 1114; ***Ketaki Lenka and another v. C.E.S.C.O. and others,*** 2007 (I) CLR 516 and ***Gangadhar Mohanty v. Chief Executive Officer, CESCO, IDCO Tower, Bhubaneswar and others,*** 2007(I) CLR 150, this court have awarded compensation in favour of the petitioner in cases of electrocution. Learned counsel for the petitioner also cites orders passed in W.P.(C) No.15498 of 2006 (***Patitapaban Das and others v. Chief Executive Officer, CESCO and others***) and W.P.(C) No. 4335 of 2007 (***Danoi Mohanty v. Chief Executive Officer, CESCO and others***), wherein this Court has awarded compensation in similar cases.

6. The Supreme Court in ***Chairman, Grid Corporation of Orissa Ltd. (GRIDCO) and others v. Sukamani Das (Smt) and another,*** (1999) 7 SCC 298; examined the jurisdiction of the High Court under article 226 of the Constitution. The fact of the case filed by Sukamani Das, widow of one

Pratap Chandra Das in the reported case is almost similar to the present case. In that case also, deceased Pratap Kumar Das was moving on road, while he came into contact with a live electric wire, which was lying across the road, after getting snapped from the over-head electric line. It was alleged that such electric wire had snapped because of negligence of the GRIDCO and its officers, as they were not maintaining the electric transmission line, and therefore they are liable to pay damages for this negligent act. F.I.R. was lodged, inquest was held and the dead body was subjected to autopsy. In a batch of cases of similar line, this Court had awarded compensation to the petitioners, who pleaded that they are the legal heirs of the deceased. The GRIDCO preferred an appeal before the Supreme Court against such cases. At paragraph 6 of the judgment, the Supreme Court has held as follows :

> "In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the appellants, that "admittedly/prima facie amounted to negligence on the part of the appellants". The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to appellant 1 had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the appellants and under which circumstances, he deceased had come in contact with the wire. In view of the specific defences raised by the appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorised intervention of third parties or that the deceased had not died in the manner stated by the petitioners. These questions could not have been decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ

petitioners to approach the civil court as it was done in O.J.C. No. 5229 of 1995."

Similar view has been taken in ***Tamil Nadu Electricity Board v. Sumathi and others,*** (2000) 4 SCC 543, wherein the Supreme Court held that where disputed questions of fact arises, the proper remedy is filing suits in the Civil Court.

7. Thus, it is clear from the above that whenever there is any disputed fact in issue for adjudication, writ jurisdiction is not the proper forum. The petitioner should have approached the Civil Court for redressal of her grievance. It cannot be said that in this case, denial of liability by the opposite party is only for the sake of the same. Real disputed question of fact like negligence of the opposite parties, act of nature, contributory negligence, if the petitioner is the only legal heir of the deceased and what should be the amount of compensation, which can be termed as just are to be decided in this case. This can be only done by a regular trial not on the basis of the affidavits. The learned counsel for the petitioner submitted that rightly or wrongly, the petitioner has approached this court and in the meantime about three years has elapsed. If the petitioner is directed to file a civil suit, then she will suffer insurmountable hardship. While exercising the discretionary jurisdiction under Article 226 of the Constitution of India, Court must not forget that law is to be tempered with equity and if equitable circumstance demands appropriate interim relief should be granted. In exercise of the writ jurisdiction under Article 226, discretion would be so exercised by the court that the justice may be rendered to both the parties.

8. In view of the aforesaid discussions, this Court comes to the conclusion that the petitioner should approach the Civil Court for redressal of the grievances. On such an event, the Civil Judge (Sr. Division), in whose court the case is filed shall do the needful to expeditiously dispose it of, preferably within a period of 6 (six) months from filing of the same. In the meantime, the opposite parties are directed to deposit a sum of Rs.50,000/- (Rupees fifty thousand) with the Registrar (Judicial) of the court within a month of passing of this order. The said amount shall be released in favour of the petitioner on her production of any material, viz. Legal Heir Certificate, to show that she is the only legal heir of the deceased. Such amount shall be adjusted towards the final compensation to be determined by the Civil Court.

The writ petition is accordingly disposed of. No costs.

Writ petition disposed of

**2010 ( I ) ILR-CUT-743**

**S.K.MISHRA, J.**

## HIRALAL GUPTA -V- REPUBLIC OF INDIA & ORS.*

**JANUARY 13, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974 ) – SEC.305.**

**Petitioner was appointed as representative of the Company U/s.305(2) Cr.P.C. – He filed petition before the trial Court for exempting him to go on bail – Application rejected – Hence this revision.**

**The provision has been enacted to overcome practical difficulties in trial of a corporation – The Parliament have not used the word accused to describe the representative of the Company – Moreover the question of bail arises only when any person is an accused – Held, there is no necessity for the petitioner to apply for bail.**

(Para 9 )

**Case law Referred to :-**

1.(1990) 3 OCR-108 : (Maharastra Vegetable Products Ltd.-V- State of Orissa & Ors)

For Petitioner - M/s.B.K.Nayak (1) & D.K.Mohanty.
For Opp.Parties – M/s.S.K.Padhi (Sr.Advocate)
(for O.P.No.1)

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*CRIMINAL REVISION NO.5 OF 2010. From the order dated 17.12.2009 passed by the Special Chief Judicial Magistrate (CBI), Bhubaneswar in S.P.E. No.32 of 1994.

A very short but interesting question arises in this revision. The petitioner, H.P. Gupta, who was nominated by one Doaba Industrial & Trading Company (Private) Ltd. (hereinafter referred to as " DITCO" for brevity), assails the order passed by the Special C.J.M. (CBI), Bhubaneswar in S.P.E. No.32 of 1994, wherein the learned trial court ordered that the representative of the Company should appear in the court and apply for bail. In other words, the prayer of the petitioner to exempt him from applying for on bail was rejected. Such order is assailed in this revision.

2. Succinctly stated, the facts of the case are that upon submission of charge sheet by the Central Bureau of Investigation (hereinafter referred to as "CBI" for brevity) for the offence under Section 406 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC" for brevity), cognizance was taken by the learned Magistrate and processes were issued against DITCO and against one P.R. Maniktala, Director-cum-General Manager, DITCO. In a revision application, this Court quashed the order of cognizance and prosecution against P.R. Maniktala. The CBI thereafter filed supplementary charge sheet against one J.K. Mediretta instead of P.R. Maniktala. Accordingly, processes were issued against J.K. Mediretta and charge was

framed. Thereafter, the Company nominated H.P. Gupta, being its Accounts Officer, under Section 305(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code" for brevity). The nomination was accepted by the learned Magistrate and the case was fixed for appearance of the said H.P. Gupta as an accused. The use of word "accused" in respect of the said H.P. Gupta was challenged before this Court in Criminal Misc. Case No.3220 of 2009 and this Court, as per the order dated 14.10.2009, directed that H.P. Gupta to be arrayed as representative of the Company (DITCO). Thereafter, he filed a petition for exempting him to go on bail as he is not an accused in this case. The learned Magistrate rejected the petition. Such order is challenged in this revision.

3. Keeping in view the limited nature of question involved and the fact that the petitioner has also served a copy of the brief on the learned Standing Counsel for the CBI, the matter is taken up for disposal at the stage of admission on consent of both the sides.

4. In course of hearing of the application, the learned counsel for the petitioner drew attention of this Court to the provision under Section 305 of the Code and the reported decision of ***Maharastra Vegetable Products Ltd. vs. State of Orissa and others,*** (1990) 3 OCR-108.

5. Various provisions like Sections 240, 242, 313 of the Code provide a concrete expression to the principle of natural justice. In trial of warrant cases, sub-section (2) of Section 240 provides that the Magistrate framing charge against the accused shall read over and explain to the accused, the charges leveled against him and the accused shall be asked whether he pleads guilty of the offence charged or claims to be trial. Section 242 of the Code provides that when the accused refuses to plead or does not plead, or claims to be tried the Magistrate shall examine all such evidence as may be produced in support of the prosecution. Section 273 of the Code provides that all evidences taken in course of trial or other proceeding shall be taken in presence of the accused or when his personal attendance is dispensed with, in presence of his pleader. After closure of evidence from the side of the prosecution a duty is cast upon the court under Section 313 of the Code to put all such incriminating materials to the accused so as to give him an opportunity to explain the incriminating evidence appearing against him. This is a concrete expression of the principles of natural justice. Before condemning any person, the charges leveled against him should be explained to him, evidence against him should be recorded in his presence, and he should be given an adequate and reasonable opportunity of being heard.

6. The court will not face any problem of following the above procedure in case of a real person but when it tries a case wherein the offence alleged to have been committed by an juridical person like a Company whose physical

presence cannot be secured in the court for explaining the charge, recording the evidence and examination under Section 313 of the Code, the court faces a practical problem. The Company in such criminal cases had to be represented by its nominee. It is noted that no such provision was there in the Code of Criminal Procedure, 1908. As such the provision of Section 305 of the Code was introduced.

7. Section 305 provides for the procedure when corporation or registered society is an accused. Under sub-section (1) of that Section, it is provided that "corporation" means any incorporated company or other body corporate and includes a society registered under the Societies Registration Act, 1860. Sub-section (2) provides that where a corporation is the accused person or one of the accused persons in an enquiry or trial, it may appoint a representative for the purpose of inquiry or trial and such appointment need not be under the seal of the corporation. Sub-section (3) provides that where a representative of a corporation appears, any requirement of this Code that anything shall be done in presence of the accused or shall be read or stated or explained to the accused, shall be construed as a requirement that thing shall be done in presence of the representative or read or stated or explained to the representative, and any requirement that the accused shall be examined shall be construed as a requirement that the representatives shall be examined. Sub-section (4) provides that where a representative of a corporation does not appear, any such requirement as is referred to in sub-section (3) shall not apply. Sub-section (5) speaks about the appointment of such representative by the Managing Director of the Company and sub-Section (6) speaks about the duty of the Court to determine whether any person is representative of the corporation or not if such a question arises.

8. Sub-section (3) of Section 305 in essence lays down that charges should be read over and explained to the representative of the Company, the evidence should be recorded in his presence and he should be examined under Section 313 of the Code, for and on behalf of the Company. The provision has been enacted to overcome practical difficulties in trial of a Corporation. In that situation, his representative is to be examined, charge has to be explained etc., It is also very clear that the Parliament have not used the word accused to describe the representative of the Company. Hence, a representative of the Company is not an accused and, therefore, there is no need to him for surrender in the court and go on bail.

9. This question can also be seen from another angle. Section 436 speaks of the duty of the court to release the accused on bail in case he is arrested etc., for offences which are bailable in nature. Section 437 provides that when any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of the police station or appears or is brought before the court other

than the High Court or Court of Session, he may be released on bail subject to certain conditions. So, the question of bail arises only when (i) any person is a accused of or suspected of the commission of bailable or non-bailable of offences and (ii) he is arrested by the police officer or he appears or brought before the court. There is no dispute regarding the assertion that the Company, DITCO is the accused and H.P. Gupta is its representative. The representative appointed under Section 305 Code is not a person accused of or suspected of commission of offence nor he has been arrested or detained without warrant. So, there is no necessity of his applying for bail.

10. Thus, this Court comes to the conclusion that there is absolutely no necessity of the representative praying for bail before the Magistrate. My view is supported by the reported decision of ***Maharastra Vegetable Products Ltd. vs. State of Orissa and Others*** (supra). Hence, this Court comes to the conclusion that the order passed by learned Special C.J.M. (CBI) Bhubaneswar on 17.12.2009 in S.P.E. No.32 of 1994 is illegal and unsustainable.

11. In the result, the revision petition is allowed and the aforesaid impugned order is set aside. The present petitioner shall appear before the learned Magistrate representing the accused-Company.

The CRLREV is accordingly disposed of.

Revision disposed of.

2010 ( I ) ILR-CUT-747

**S.K.MISHRA, J.**

## SUDARSAN SETHI -V- STATE OF ORISSA.*

**JANUARY 5, 2010.**

**BIHAR & ORISSA EXCISE ACT, 1947 (ACT NO.25 OF 1947) – SEC.47(a).**

**I.D. liquor recovered from the house of the accused – Whenever any article is seized from the house of the accused it is for the prosecution to establish that such contraband articles were in conscious and exclusive possession of the accused – In order to establish the same, the prosecution must prove the exclusivity of possession of such contraband by the accused by independent evidence.**

**In this case there is no iota of evidence regarding the sale and exclusive possession of the contraband articles by the accused – There is no independent evidence regarding his residence in the house – Secondly whenever there were other adult numbers in that house the prosecution must exclude the possession of other in mates of the house and prove that the accused was in fact in exclusive and conscious possession of the contraband articles – Held, judgment and sentence passed by the Courts below are set aside.**

(Para 8)

For Petitioner - M/s.R.K.Nayak, A.K.Swain & C.R.Swain.
For Opp.Party – Addl. Standing Counsel.

*CRIMINAL REVISION NO.458 OF 1996. From the judgment dated 21.08.1996 passed by Sri P.B.Pattnaik, learned Ist Addl. Sessions Judge, Cuttack in Crl.Appeal No.106 of 1995 in confirming the judgment dated 31.07.1995 passed by learned J.M.F.C., Cuttack in 2(a) C.C.Case No.156 of 1995/Trial No.506 of 1995.

***S.K.MISHRA, J.*** In this Revision petitioner assails his conviction under Section 47 (a) and (f) of Bihar and Orissa Excise Act, 1947 (hereinafter referred to as the "Act") in judgment dated 31.07.1995 passed by learned J.M.F.C., Cuttack in 2(a) C.C. No.156 of 1995, which has been confirmed by the learned Ist Addl. Sessions Judge, Cuttack in Criminal Appeal No.106 of 1995 as per his judgment dated 05.08.1996.

2. In short, fact of the case is that on 15.02.1995, S.I. of Excise seized two plastic Jerrycans, one containing twenty litres and another containing four litres of I.D. liquor from the bed room of the accused. Then he conducted blue litmus paper test and Sykes hydrometer test. From his departmental experience, he came to know that such liquid to be I.D. liquor and hence, he submitted prosecution report against the accused. The defence took the plea of denial.

3. Prosecution has examined three witnesses on its behalf, whereas defence has examined two witnesses.

4. Basing on the evidence of one independent witness and two departmental witnesses, learned trial court came to the conclusion that prosecution has established his case beyond all reasonable doubt and, therefore, he convicted the accused-petitioner for the offence under Section 47(a) of the Act and sentenced him to undergo simple imprisonment for six months and to pay fine of Rs.500/-, in default to further undergo simple imprisonment for two months. Such conviction was upheld by the learned Ist Additional Session Judge, Cuttack in Criminal Appeal No.106 of 1995.

5. Learned counsel for the petitioner mainly argued that in absence of any chemical examination report, it cannot be conclusively said that the seized liquid is I.D. liquor. He also submitted that appreciation of evidence of the departmental witnesses by the learned lower court is perverse and, therefore, it requires interference of the revisional court. Learned Addl. Standing Counsel supported the findings recorded by the trial court and prays to dismiss the revision.

6. It is now settled by a catena of decisions that chemical examination is not sine qua non for conviction under section 47 of the Act. Even the evidence of an experienced Excise Officer is sufficient to establish the nature of the liquid and is sufficient to hold, whether the seized liquor is I.D. liquor or not. Similar view has been taken by this Court in ***Subas Routand another v. State of Orissa***, (2000) 18 O.C.R. (S.C.) 438. In that case also relying upon the evidence of the Investigating Officer, who had departmental experience, the Court held that evidence of litmus paper test and Sykes hydrometer test is sufficient to establish the case of the prosecution. In this case also, an experienced Excise Officer conducted hydrometer test and litmus paper test and has come to a conclusion that the seized liquor was the I.D. liquor. So, on that count, the prosecution case cannot be rejected.

7. Coming to the question of conscious and exclusive possession of the seized articles, prosecution relies heavily on the version of the two departmental witnesses P.Ws. 2 and 3. The only non-official witness i.e. P.W. 1 has stated that excise officials did not seize anything in his presence but he has admitted his signature on Ext.1, i.e. the seizure list. This witness has not been cross-examined by the prosecution after obtaining permission from the court under section 154 of the Evidence Act. Thus, prosecution has not shown to the Court its intent of not relying upon the version of the said prosecution witnesses.

8. In a case under section 47 (a) of Bihar and Orissa Excise Act, conviction can be upheld if it is found that the petitioner has proved its case beyond all reasonable doubt that the liquor has been seized from the exclusive and conscious possession of the accused. In this case, the

jerrycans containing I.D. liquor were seized from a house. There is no material to come to a conclusion that the accused was residing in that house and the contraband articles were in his exclusive possession. The departmental witnesses i.e. P.Ws. 2 and 3, however, speak that the seized articles were recovered from the house of the accused. Whenever any article is seized from the house of the accused, it is for the prosecution to establish that such contraband articles were in conscious and exclusive possession of the accused. In order to prove the same, the prosecution must prove the exclusivity of possession of such contraband by the accused by independent evidence. In this case, there is no iota of evidence regarding the sole and exclusive possession of the contraband article by the accused. In fact, there is no independent evidence regarding his residence in that house. Secondly, whenever there were other adult members in that house, the prosecution must exclude the possession of other inmates of the house and prove that the accused was, in fact, in exclusive and conscious possession of the contraband articles. In this case, such evidence is completely lacking and, therefore, it has caused miscarriage of justice. Hence, it is necessary to interfere with the concurrent findings of the courts below.

9. In the result, the revision succeeds, the judgment and sentence passed by the learned J.M.F.C., Cuttack, which have been confirmed by the learned Ist Addl. Sessions Judge, Cuttack are hereby set aside.

Raevision allowed.

2010 ( I ) ILR-CUT-750

**S.K.MISHRA, J.**

## MANJUBALA PATTNAIK -V- GYANARANJAN BEHERA.*

**JANUARY 12, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.397(2) & 482.**

**Interlocutory order – Order challenged in revision – High Court can not entertain revision in view of the bar U/s.397(2) Cr.P.C. – However if the impugned order clearly brings about a situation which is an abuse of the process of the Court or where for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then nothing contained U/s.397(2) can limit or affect the High Court to exercise its inherent power.**

**Held, in this case High Court has power to interfere with the impugned order not by resorting to Section 397 but U/s.482 of the code.** (Para 7 & 8)

**Case law Referred to:-**

AIR 1978 SC 47 : (Madhu Limaye -V- State of Maharashtra).

For Petitioner - Mr. Sk.Zafarulla.
For Opp.Parties – M/s. S.Panigrahi & B.B.Mohanty.

*CRIMINAL REVISION NO.1413 OF 2007. From the order dated 17.11.2007 passed by the learned Sub-Divisional Judicial Magistrate, Panposh, Rourkela in 1 C.C.No.222 of 2003.

Heard learned counsel for the petitioner and learned counsel for opposite party. Perused the records. The case is disposed of at the stage of admission keeping in view the limited nature of prayer made.

2. The accused in 1.C.C. No.222 of 2003 of the court of S.D.J.M., Panposh, Rourkela has assailed the order passed by the learned trial court on 17.11.2007 rejecting his prayer under Section 311 of the Criminal Procedure Code (hereinafter referred to as the 'Code' for brevity). This is a case under Section 138 of the Negotiable Instruments Act, 1881(hereinafter referred to as the 'Act' for brevity). On 17.11.2007, the accused filed an application before the learned trial court to recall P.W.1 for further cross-examination, in view of the fact that, a disputed document has been enclosed in 1.C.C. No.67 of 2003, which has been filed by the complainant himself and limited questions are to be asked thereon. Learned S.D.J.M., has rejected the petition mainly on two grounds, i.e. first, there is a delay in filing the petition to recall the witness, and the second ground is that the document is a Xerox copy of the agreement which cannot be admitted into evidence.

3. Learned counsel for the petitioner submits that there was an agreement between the parties in which money was advanced on which interest was to be charged. Such fact can be borne out from the said document filed in 1.C.C. No.67 of 2003. On the prayer of the accused, the said case bearing 1.C.C No.67 of 2003 was called for but the lower court refused to recall P.W.1 for further cross-examination. Therefore, he prays that the revision application should be allowed.

4. Learned counsel for opposite party, on the other hand, submits that the petition under Section 311, Cr.P.C. is without any merit as the accused-petitioner has not indicated the questions, he wants to put to the witness to recall for cross-examination. He also contends that the revision application is not maintainable in view of the bar in sub-section (2) of Section 397 of the Code.

5. Since the question of maintainability is raised in this case, it is apposite to decide such question first.

6. Section 397 of the code provides calling for records to exercise powers of revision. Sub-section (2) of the said Section provides that the powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding. It is noted here that Section 397 empowers the High Court as well as Court of Session to call for the records to exercise power of revision. In addition to power of revision under Section 397 of the Code, the High Court has inherent power under Section 482 of the Code. Section 482 provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

7. This provision came for consideration before a Bench consisting three Hon'ble Judges of the Supreme Court in ***Madhu Limaye Vs. State of Maharashtra,*** AIR 1978 SC 47. At page-51 in the continuing paragraph – 10, their Lordships' held that the bar provided in sub-section (2) of Section 397 operates only in exercise of the revisional power of the High Court, meaning thereby that the High Court will have no power of revision in relation to any interlocutory order. Then, the inherent power will come into play, there being no other provision in the Code for the redressal of the grievance of the aggrieved party. If the order assailed is purely of an interlocutory character which could be corrected in exercise of the revisional power of the High Court under the Code of Criminal Procedure, 1898, the High Court will refuse to exercise its inherent power. The Apex Court further held that in case the impugned order clearly brings about a situation which is an abuse of the process of the Court or for the purpose of securing the ends of justice interference by the High Court is absolutely necessary, then

nothing contained in Section 397(2) can limit or affect the exercise of the inherent power by the High Court. But such cases would be few and far between. The High Court must exercise the inherent power very sparingly.

8. In view of the aforesaid clear position of law, the High Court has power to interfere with the impugned order not by resorting to Section 397 but under Section 482 of the Code.

9. In order to exercise the power under Section 482 of the Code, it is to be seen whether there has been abuse the process of the court or failure of justice in this case. The accused is facing trial for commission of offence under Section 138 of the Act, 1881, wherein defence available to the accused is a very limited in view of the presumption provided under Section 139 of the Act. Section 243 of the Code provides that the accused has a right of advancing such evidence as deem proper by him to defend his case. Such right is a valuable right. Moreover, the provision of Section 311 is a provision enabling, and in certain circumstances imposing, on the court, the duty of examining a material witness who would not be otherwise brought before it. Section 311 of the Code is couched in the widest possible terms and calls for no limitation, either with regard to the stage at which the powers of the court should be exercised, or with regard to the manner in which it should be exercised. It is not only the prerogative but also the plain duty of a court to examine such of those witnesses at it considers absolutely necessary for doing justice between the parties. A duty is cast upon the court to arrive at the truth by all lawful means and one of such means is the examination of witnesses of its own or on behalf of any of the parties appearing before it. Any application filed under Section 311 of the Code should also be examined at the stage in which the original case is posted before the trial court, along with Section 243 of the Code. Thus, the reason recorded by learned trial court that there was delay in filing of recall petition is clearly erroneous.

10. Secondly, it is seen that if at all there is an agreement in which the parties has agreed that an interest will be charged, then the consequences thereof has to be considered in this case. Once the accused is not allowed to ask questions to P.W.1, i.e. the complainant regarding that particular document, then that aspect of the case can not be brought to light and it will result in absolutely failure of justice. Therefore, it is expedient in this case to allow the accused persons to put the questions to P.W.1 with respect to the document filed in 1.C.C. No.67 of 2003. It is submitted that the document was filed by the complainant himself in that 1.C.C. No.67 of 2003. Even a Xerox copy of a document can be taken into evidence as secondary evidence, if the conditions laid down under Section 65 of the Indian Evidence Act, 1872 are satisfied. It is to be kept in mind while considering the admissibility of the said document.

11. Keeping in view the aforesaid consideration, this Court is of the opinion that the order passed by the learned trial court is unsustainable and requires interference. However, it should be in the interest of justice that the accused should clarify the questions he wants to put to said P.W.1, before he is asked to take the witness box. Accordingly, it is directed that within thirty days, hence, the accused shall make a fresh application before the learned S.D.J.M., Panposh, Rourkela, in 1.C.C. No.222 of 2003 delineating all the questions he wants to put forth. On such event, the lower court shall allow the application and direct P.W.1 to remain present on a date fixed by the court. It is, however, made clear that on the date fixed accused shall cross-examine the witness, P.W.1. No further time shall be granted. The parties are directed to appear before the lower court on 19.02.2010.

The CRLREV is accordingly disposed of. Interim order passed in Misc. Case No.2159 of 2007 stands vacated.

Revision disposed of.

2010 ( I ) ILR-CUT-754

**C.R.DASH, J.**

# PRAFULLA KUMAR MOHANTY -V- STATE OF ORISSA.*

**MARCH 29, 2010.**

**CRIMINAL PROCEDURE CODE, 1973 (ACT NO. 2 OF 1974 ) – SECS.438, 439**.

**Offence U/s.302/201 IPC – Petitioner has been given interim protection U/s.438 Cr.P.C. – While Under such protection petitioner moved an application U/s. 439 Cr.P.C. for regular bail – Maintainability of the said application.**

**Held, though the petitioner is on interim protection extended U/s.438 Cr.P.C. he is deemed to be in custody for the purpose of the present bail application U/s.439 Cr.P.C. and the same is maintainable.**

(Para 8)

**Case laws Referred to :-**

1.1997(II) OLR 499 : (Shri Indrajeet Roy -V- Republic of India).
2.(2007) 36 OCR (SC) 60 : (Kanaksinh Mohansinh Mangrola -V- State of Gujarat).

For Petitioner –Deepti Rekha Nanda .
For Opp.party –Manas Chand.

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*BLAPL NO.2924 OF 2010. In the matter of an application for Regular Bail U/s.439 Cr.P.C.

Heard.

2. The petitioner is implicated in offence punishable under sections 302/201 I.P.C. on the basis of allegation that the committed murder of a young student of Class-II and caused disappearance of the evidence with a view to screen himself from legal punishment.

3. The informant named, Keshasb Bhumia, whose foster son is alleged to have been killed by the present petitioner, has filed an affidavit asserting that on suspicion F.I.R was lodged against the petitioner and lodging of such F.I.R. was outcome of a misunderstanding of the matter.

4. In course of investigation the petitioner moved this Court under section 438 Cr.P.C. and vide order passed in BLAPL No.4657 of 2009 the petitioner has been given interim protection and period of such interim protection after extension is to expire tomorrow i.e. 30.3.2010. In the meantime while under the cover of the interim protection in the order passed by this Court under section 438 Cr.P.C., the petitioner moved the competent courts under sections 437 and 439 Cr.P.C., but in vain.Subsequently, on 22.2.2010 the present Bail Application under section 439 Cr.P.C. has been filed.

5. As the petitioner is not in custody in the strict sense of the terms as understood in the common parlance an obvious objection relating to maintainability of the Bail Application is raised by the State.

6. Learned counsel for the petitioner relies on the case of Shri Indrajeet Roy v. Republic of India; 1997(II) OLR 499 and the decision of Hon'ble Supreme Court in the case of Kanaksinh Mohansinh Mangrola v. State of Gujarat; (2007) 36 OCR (SC) 60 to substantiate her contention that the petitioner being under the cover of the interim protection extended by this Court under section 438 Cr.P.C. is to be deemed in legal custody of the competent court and the present petition for bail under section 439 Cr.P.C. is maintainable.

7. This Court in the case of Indrajeet Roy supra in paragraph-8 of the decision examined the connotation and meaning of the word "custody" and held thus;

"The expression "custody" though used in various provisions of the Code of Criminal Procedure, including Section 439, has not been defined in the Code, but keeping in view the setting in which it is used and the provisions contained in Section 437 which relate to jurisdiction of the Magistrate to release an accused on bail under certain circumstances which can be characterized as "in custody" in a generic sense, and the observation made in the Division Bench decision of the Orissa High Court noticed above, there cannot be any doubt that the expression "custody" as used in Section 439, must be taken to be a compendious expression referring to the events on the happening of which Magistrate can entertain a bail petition of an accused. Section 437 envisages, inter alia, that the Magistrate may release an accused on bail, if such accused appears before the Magistrate. There can not be any doubt that such appearance before the Magistrate must be physical appearance and the consequential surrender to the jurisdiction of the Court of the Magistrate".

Hon'ble Supreme Court in the aforesaid case of Kanaksinh Mohansinh Mangrola supra, in paragraph-4 of the decision has held thus;

"From the bail application filed on 19-A- 2005 by the appellant under Section 439 Cr.P.C., it clearly appears that on that day the appellant was in custody as he was on interim bail for 15 days from 13-A-2005 and his application could have been considered on merits instead of dismissing the same on the ground of non-maintainability."

8. Taking into consideration the rationale in the aforesaid decision, I have no hesitation to hold that the petitioner though on interim protection extended under section 438 Cr.P.C., is to be deemed to be in custody for the purpose of the present Bail Application and the same is maintainable.

9. Coming to the merit of the case, it is found from the post-mortem examination report that there is no sign of external injury on the dead body

and the petitioner is alleged to have (if the statements of the witnesses under section 161 Cr.P.C. are held to be believed for the purpose of finding prima fcie case) assaulted the deceased by a stick. Charge Sheet in this case has already been submitted. The petitioner being a Headmaster in the Government School, there is no chance of his absconding.

10. Regarding being had to the aforesaid facts, factum of permanent residence of the petitioner and completion of investigation in the meantime, it is directed that the petitioner shall be released on bail on his submitting to the jurisdiction of the learned S.D.J.M., Malakanagiri in G.R.Case No.27 of 2009 by executing bond of Rs.20,000/- (twenty thousand) with two sureties each solvent for the like amount to thesatisfaction of the aforesaid court, subject to such conditions as deemed fit and proper by the learned court below.

11. The BLAPL is accordingly disposed of.

Application disposed of.