FULL BENCH

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

W.P.(C) NO. 9251 OF 2009 (With Batch) (Decided on 25.02.2011)

BIJAY KU. PANIGRAHI & ORS. ……... Petitioners.

.Vrs.

STATE OF ORISSA … …….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.13, 14, 16, 19 & 21.

Petitioners are registered Contractors under Orissa Public Works Department Contractors Registration Rules, 1967 –Amendment of Rule 3 Dt. 13.02.2002 introducing that a contractor having licence for a particular class can offer tender for his next below class in addition to his own class – Petitioners challenged such amendment as violative of Art.14 on the ground that Contractors belonging to lower class i.e. class A, B, C, & D will be greatly prejudiced and contractors of higher class would encroach upon the works meant for them.

The un-amended Rule 3 allowed contractors to make offers meant for all categories below his registered category but by virtue of the amendment in 2002 a higher category contractor was restricted to only bidding for the next lower class alone and as such it restricted a higher class Contractor from grabbing work of a lower class Contractor – Moreover the 2002 amendment protects the interests of Contractors of lower categories and has been enacted to protect the big fishes from eating "small fish" – Held, the amendment is intra vires of the Constitution of India and not violative of Articles 13(1), 13(2), 14, 16(2), 19(1) (g) and 21 of the Constitution of India which is upheld – The reference made by the Division Bench is answered accordingly.

(Para 18,19,20)

Case laws Referred to:-

1.(2009) 1 SCC 540 : (Corporation Bank-V-Saraswati Abharansala & Anr.)
2.AIR 2009 SC 1858 : (V.Subramaniam -V- Rajesh Reghuvandra Rao)
3.(2009)2 SCC 630 : (Mumtaz Post Graduate Degree college -V- University of Lucknow).
4.(2008) 5 SCC 416 : (A.Satyanarayana & Ors.-V- S.Purushotham & Ors.)
5.AIR 1973 SC 1461 : (Kesavananda Bharati -V- State of Kerala).

For Petitioners - M/s. Prasanta Ku.Nayak, & S.Panda.

M/s. S.K.Sanganeria, P.C.Patnaik & P.C.Nayak.
M/s.B.P.Nayak, S.Mohanty & A.R.Mohanty.
M/s. Niranjan Panda & D.P.Mahapatra.
Mr. Sandipani Mishra, Jatindra Ku. Moahapatra.
M/s. P.K.Panigrahi, P.K.Panda, S.Pattanayak.
M/s.Janmejaya Katikia & A.Mohanty. Somadarsan Mohanty, A.P.Bose.
M/s. D.M und, R.K.Acharya
M/s. D.R.Swain & M.M.Swain.
M/s. Sidheswar Mallick & C.Mallick, A. Mallick.
M/s. Subash Ch. Acharya, J.K.Raya, P.Sethy, P.r.Mishra, K.P.Behera.
M/s. Barada Pr. Pattnaik, B.B.Panda.
M/s. Bibhuti B. Panda, B.P.Pattnaik.

For Opp.Party - Mr. D.Panda, Addl. Govt. Advocate.
M/s. M.Kanungo, S.Das & M.R.Dhal.

V. GOPALA GOWDA,C.J. This batch of writ petitions were listed before this Court on reference being made by the Division Bench of this Court vide order dated 06.05.2010 to answer the question framed therein, which reads thus :

> "as to whether the amendment amounts to encroaching upon the rights of livelihood, guaranteed as the fundamental rights enshrined in the Constitution of India, of the contractors belonging to lower class and as to whether the amendment permitting the higher class contractors to bid for the works earmarked for lower category is rational and as to whether the amendment permitting the higher class contractors to bid for a lower class works fulfills the object sought to be achieved by the Constitution and safeguards the rights of contractors belonging to lower classes ?"

2. The said order of reference was made in view of the decisions rendered by a Division Bench of this Court vide common judgment dated 23.3.2010 and also by another Division Bench of this Court vide order dated 25.3.2008 in earlier writ petitions filed on the similar grounds. Both Division Benches of this Court considered the validity of the amendment to Rule 3 of Appendix-VIII of the Orissa Public Works Department Code, Volume-II (Public Works Department Contractors Registration Rules, 1967) and held that the classification having been made on the basis of the value of the contract and the authorities having acted in a reasonable manner, there is no scope for interference.

3. Brief facts in a nutshell and rival legal contentions urged by the parties are necessary in this judgment with a view to answer the said points of reference. The same are stated as under:

All the petitioners are registered contractors under the Orissa Public Works Department Contractors Registration Rules, 1967 (hereinafter in short called 'the Rules'). The Government of Orissa brought an amendment in the Rules which was concurred by the Finance Department with effect from 14.09.1995 classifying the contractors and the amount regarding participation in the tender. The said classification is as under :

"(i)	Super Class	…….	Unlimited.
(ii)	Special Class	…….	Not exceeding Rs. 3 crores
(iii)	'A' Class	…….	Not exceeding Rs. 60 lakhs
(iv)	'B' Class	…….	Not exceeding Rs. 15 lakhs
(v)	'C' Class	…….	Not exceeding Rs. 6 lakhs
(vi)	'D' Class	…….	Not exceeding Rs. 3 lakhs"

On 13.02.2002 the State Government brought another amendment in respect of Rule-3 of the Rules. By the said amendment, all the contractors for the purpose of registration have been classified to different categories and by way of that the amount regarding participation in tender has been enhanced. The said amendment stipulates that while awarding work to any individual contractor, the cost of the wok, which exceeds the amount noted against the class to which the contractor belongs, should be strictly adhered to, except with the prior approval of the Engineer-in-Chief or Chief Engineer. By the said amendment, it was further introduced that a contractor having license for a particular class can offer tender for his next below class in addition to his own class. For example, a Super Class contractor can offer bidding meant for Special Class contractor in addition to Super Class and a Special Class contractor can offer bidding meant for 'A' class contractor in addition to Special Class and so on and so forth.

The case of the petitioners is that the impugned amendment is contrary to the principles laid down under Article 14 of the Constitution and it would frustrate the object to be achieved. It is further stated that by the aforesaid amendment, the contractors belonging to lower class, i.e., Class-A, B, C, & D will be greatly prejudiced inasmuch as the contractors of higher class would encroach upon the works, which are meant for them. Therefore, the prayer is made by the petitioners to declare the aforesaid amendment of the Rules as ultra vires.

4. The main grounds urged in these writ petitions are that the said amendment of the Rule is arbitrary and unreasonable and is violative of Article 14 of the Constitution of India. Further, by the impugned

amendment, the opposite party imposes unreasonable restrictions on the fundamental right of the petitioners to do work/to participate in tender meant for below classes guaranteed by Article 19(1)(g) of the Constitution. It is stated that the opposite party may authorize an exception to the policy/Rules, only if there is a most compelling reason to do so, such as when the Government's needs cannot reasonably be otherwise met. Therefore the same is void by reason of Articles 13(1) & (2), 14, 15(1), 16(2) and 19(1)(g) of the Constitution.

It is further submitted that there is also discrimination between the higher class and lower class contractors inasmuch as no equivalence of class is guaranteed to the other, namely, Super Class Contractors, Special Class Contractors, 'A' Class & 'B' Class contractors, who ought to be restricted to participate in the tender meant for lower class. The Amended Rule is contrary to the object in prohibiting one class of contractors to participate and bid with another class of contractors as classified in the impugned Rule and it affects the standard of work, performance, capacity, financial & technical aspect on the subject for issuing licence for higher class contractors. The amendment defeats the object for giving promotion from lower class to higher class as per Rule-5. The amendment is also bad on account of the fact that, the contractors of the lower class have no scope for promotion, as they will be stagnated only as lower class contractors.

With the amendment of the Rules, the Super Class, Special Class, 'A' class & 'B' will be permitted to participate in the tender meant for lower classes. Therefore, there is violation of the fundamental rights of the petitioners referred to supra and hence, it is prayed that the said amended Rule is liable to be quashed.

5. In support of the case of the petitioners reliance has been placed upon the judgments of the Supreme Court as follows:

6. In the case of **Corporation Bank Vs. Saraswati Abharansala & Anr.,** (2009) 1 SCC 540, it has been held that the State furthermore is bound "to act reasonably" having regard to the equality clause contained in Article 14 of the Constitution of India.

7. Placing reliance upon the case of **V. Subramaniam Vs. Rajesh Raghuvandra Rao**, AIR 2009 SC 1858, it has been submitted that the restrictions imposed in a statute by the State Government must be reasonable one and it must be in public interest, then only the same is constitutionally valid.

8. Learned counsel on behalf of the petitioners placed reliance in the case of **Mumtaz Post Graduate Degree College Vs. University of**

Lucknow, (2009) 2 SCC 630, in support of the legal proposition that the constitutionality of a statute, keeping in view the fact that the power of judicial review has been conferred by the Constitution of India only in the Superior Courts (namely Supreme Court of India & High Courts) of the country, cannot be determined by any other authority howsoever high it may be.

9. Placing reliance upon the case of **A. Satyanarayana & Ors. Vs. S. Puroshotham & Ors.,** (2008) 5 SCC 416, it is submitted that in service jurisprudence, promotions are granted to a higher post to avoid stagnations and also frustration amongst employees. Nexus, ultravirues-grounds, non-compliance with constitutional requirements-statutory rule must be made in consonance with constitutional scheme, it must be reasonable and not arbitrary.

10. Learned counsel on behalf of the petitioners further placed reliance on the decision of a thirteen Judge Bench of the Supreme Court in the case of **Kesavananda Bharati Vs. State of Kerala, AIR 1973 SC 1461** and submited that whether the law strikes a proper balance between Social Control on the one hand and the rights of individual on the other hand, on this aspect, the Court must take into account the following aspects:

(a) nature of the right infringed;
(b) underlying purpose of the restriction imposed.
(c) Evils sought to be remedied by the law, its extent and urgency;
(d) How far as the restriction is or is not proportionate to the evil and;
(e) Prevailing conditions at the time.

11. Learned Addl. Government Advocate, On the other hand, sought to justify the amended Rule, contending that the grounds urged in support of the case of the petitioners referred to supra are wholly untenable in law, for the reason that the amended Rule does not affect the fundamental rights of the petitioners, for the reason that there is neither any arbitrariness nor unreasonableness. It is submitted that the State Government after taking into consideration all the pros and cons of the problem faced by different class of contractors and giving due weightage to the interest of every class of contractors and maintaining equality between them has framed the Rules in conformity with the power vested on it. To facilitate the contractors the said amendment has been made increasing the financial limits fixed in the earlier notification dated 14.09.1995 classifying different contractors regarding participation in the tender. The stipulation as per the notification dated 14.09.1995, referred to supra has been increased in respect of all class of contractors as under:

"(i)	Super Class	…….	Unlimited.
(ii)	Special Class	…….	Not exceeding Rs. 5 crores
(iii)	'A' Class	…….	Not exceeding Rs. 1 crore
(iv)	'B' Class	…….	Not exceeding Rs. 25 lakhs
(v)	'C' Class	…….	Not exceeding Rs. 10 lakhs
(vi)	'D' Class	…….	Not exceeding Rs. 5 lakhs"

12. The amended Rule is in conformity with the Constitution and certain restrictions have been imposed by the Government in exercise of statutory power for better execution of public works, to be executed by various contractors, taking into account the rights and liberty of all classes of contractor, therefore, the same cannot be termed as unreasonable and cannot be said that it would frustrate the object to be achieved. The writ petitions filed by the petitioners challenging the amended Rule are only to protect their personal interest. If a contractor belonging to a higher class is permitted to participate in a tender meant for all his lower class(s), the contractor for whom the work is meant would not be deprived from participating in any tender of any work, thereby causing despair in their right to livelihood guaranteed under the fundamental rights. Therefore, the writ petitions are liable to be dismissed.

13. It is further contended by the learned Government Advocate that the said Rule has been rightly affirmed by the two Division Benches of this Court vide judgments dated 25.3.2008 and 23.3.2010 referred to supra after considering all aspects of the matter. In this view of the matter, the points referred to supra are required to be answered in view of the decisions rendered by this Court in the aforesaid two earlier writ petitions and these present writ petitions are liable to be dismissed.

14. With reference to the aforesaid rival legal contentions, it would be appropriate to extract the relevant provisions of the earlier Rules which were in force prior to the impugned amendment as well as the amended Rules.

15. Rule 3 of the Rules, as notified w.e.f. 14.09.1995, reads thus :

> "3. For the purpose of registration, the contractors shall be classified as follows and award of any work to any individual contractor the cost of which exceeds the amount noted against the class to which he belongs is prohibited except with the prior approval of Engineer-in-Chief or Chief Engineer.

Class of Contractor			**Amount**
(i)	Super Class	…….	Unlimited.
(ii)	Special Class	…….	Not exceeding Rs. 3 crores
(iii)	'A' Class	…….	Not exceeding Rs. 60 lakhs
(iv)	'B' Class	…….	Not exceeding Rs. 15 lakhs
(v)	'C' Class	…….	Not exceeding Rs. 6 lakhs
(vi)	'D' Class	…….	Not exceeding Rs. 3 lakhs"

16. Amendment to Rule-3 of the said Rules as amended on 13.2.2002 reads thus :

> "3. For the purpose of registration, the Contractors shall be classified as follows and award of any work to any individual contractor the cost of which exceeds the amount noted against the class to which he belongs is prohibited except with the prior approval of Engineer-in-Chief or Chief Engineer.

Class of Contractor			**Amount**
(i)	Super Class	…….	Unlimited.
(ii)	Special Class	…….	Not exceeding Rs. 5 crores
(iii)	'A' Class	…….	Not exceeding Rs. 1 crore
(iv)	'B' Class	…….	Not exceeding Rs. 25 lakhs
(v)	'C' Class	…….	Not exceeding Rs. 10 lakhs
(vi)	'D' Class	…….	Not exceeding Rs. 5 lakhs

> A contractor having licence for a particular Class can offer tender meant for his next below class of the contractor in addition to his own class, e.g.a Super Class Contractor can offer bidding meant for 'Special Class' in addition to 'Super Class' and 'Special Class' contractor can offer bidding meant for 'A' Class in addition to 'Special Class' and so on."

17. We have also examined the amended Rule. The classification of contractors has been made with reference to their status, nature of work to be executed, experience, financial capacity of different classes of contractor etc. as enumerated in the said Rules. The classification is made depending upon the volume of work required to be executed by different class of contractors registered under the Rules. Therefore, against each one of classes of contractors from 'Super Class' to Class 'D', limits are prescribed. By the amendment in the year 2002, classification of contractors has been retained by enhancing the financial limits for every class of contractor, taking into account the market condition, economic status of the contractors etc.

Apart from the above, the Engineer-in-Chief or Chief Engineer's power/authority to permit a contractor to bid for work exceeding the limits prescribed under Rule-3 is retained, even after the amendment on 13.2.2002. It is clear from the first part of Rule-3 which has been retained even after the amendment in the year 2002 that a contractor shall be classified in the manner prescribed.

18. While retaining the aforesaid part of Rule-3 in the amendment in the year 2002, a further Sub-Clause has been added to the following effect:

> "A contractor having licence for a particular Class can offer tender meant for his next below class of the contractor in addition to his own class, e.g. a Super class Contractor can offer bidding meant for 'Special Class' in addition to 'Super Class' and 'Special Class contractor can offer bidding meant for 'A' Class in addition to 'Special Class' and so on."

The aforementioned quoted portion of the Rule-3, is the subject matter of challenge. By bringing into force the aforequoted part of Rule-3, by amendment on 13.2.2002, it restricted a contractor registered for a particular class, for example 'Super Class' to be entitled to also bid for the next below class of contractor i.e. 'Special Class'. By virtue of the aforesaid clause brought in by the amendment in the year 2002, a higher class contractor could also offer tenders meant for his next lower class category.

The intent behind the aforesaid provision is clearly to limit contractors from bidding for tenders meant for lower category contractors. From the above it is clear that while the unamended Rule-3 allowed/permitted contractors to make offers meant for all categories below his registered category but post amendment of 2002, a higher category contractor was restricted to only bidding for the next lower class alone. It is clear that this amendment was brought about to restrict a higher class contractor from grabbing work of a lower class contractors since there was every possibility that 'a big fish will eat small fishes', which is the reason assigned by the Division Bench of this Court while making the order of reference in its order dated 6.5.2010.

19. We are unable to accept the contention advanced by the learned counsel for the petitioners that no rational object is sought to be achieved by the State by promulgating such an amendment and incorporating the clause quoted above. The State has considered the consequences while amending the aforesaid rule. The State is bound "to act reasonably" and such act on the part of the State has to be tested on the touchstone of public interest.

We are of the considered view that the public interest would be protected and limiting a higher class contractor to offering bids for his own category and the next lower class achieves the intent of protecting the

interests of lower category contractors. The claim of the petitioner-contractors of a higher category to permit them to bid for all work, meant for a lower category contractors is a clear attempt to try and make an inequals to compete as an equal and, therefore, violative of the constitutional guarantee of equality under Article 14. A contractor of a lower category would have a very poor chance or no chance of getting any work at all. Accordingly, we are of the view that the amendment made protects the interests of contractors of lower categories and has been enacted to protect the big fishes from eating "small fish". .

20. In our considered view, public purpose is served by brining in the aforesaid amendment. We are, therefore, of the considered view that the amendment of 2002 bringing into force, the later part of Rule-3, as quoted hereinabove in para-18 is intra vires of Constitution of India and not violative of Articles 13(1), 13(2), 14, 16(2), 19(1)(g) and 21 of the Constitution. Therefore, the amendment of Rule-3 in the year 2002 incorporating the later part of Rule-3 as noted herein above is upheld.

21. With the aforesaid observation and direction, these writ petitions are dismissed. The reference made by the Division Bench is answered accordingly. No order as to costs.

Writ petition dismissed.

2011 (I) ILR – CUT- 655

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

W.P.(C) No.11981 OF 2009 (Decided on 13.01.2011)

DHRUBA CHANDRA BEHERA ……. Petitioner.

.Vrs.

NATIONAL INSURANCE CO.LTD. & ORS. ……. Opp.Parties.

INSURANCE – Policy holder insured himself under the Janata Personal Accident Claim Policy – Insured declared the petitioner as his nominee – Death of Policy holder due to Snake bite – Policy holder was unmarried and the nominee was his nephew and he accepted the nominee as his legal heir in order to succeed to his estate – Repudiation claim challenged – Delay in payment of the dues in spite of the direction of this Court – Held, direction issued for payment of the claim amount under the policy with 6% interest per annum from the date the amount became due.

For Petitioner - M/s. Madhusudan Chhotray, R.Mohanty. R.K.Chhotray &
For Respondents - Mr. S.KPadhi, Sr Advocate & M/s Suresh Roy P.Roy, K. Ghosh & Miss A.Ghosh With him for O.P Nos. 1and 2 Mr.C.R. Swain for OP.Nos .3&4

V.GOPALA GOWDA, C.J. The petitioner, claiming to be the nominee of the policy holder, has filed this writ petition for a direction to the opposite parties to sanction and disburse the amount under the policy in question with interest as per this Court's order dated 6.5.2009 within a stipulated time and for payment of compensation for the loss of earning, mental agony and expenses for non-disbursement of the amount in spite of the direction of this Court in the order referred to above.

2. The case of the petitioner is that he is the nephew of one Birabara Behera who accepted him as his son with love and affection from his childhood. Said Birabara Behera had insured himself under the Janata Personal Accident Claim Policy with the opposite party no.1 which had a tie-up arrangement with opposite party nos. 3 and 4 for which they were empowered to cater personal life insurance policies like Mediclaim Insurance, Personal Accident Insurance and Amartya Siksha Yojana Policy to their members. In the policy, the insured had declared the petitioner as

his nominee. The insured was unmarried. The petitioner being the nominee was entitled to get all the legal compensation as per the insurance policy. After the death of the insured Birabara Behera on 9.8.2005 due to snake bite the petitioner being the nominee submitted the claim with the opposite party no.1 along with all relevant documents for disbursement of the amount under the policy in question. As there was no response from the insurer for a pretty long time and on repeated approaches on 4.5.2006 the insurer repudiated the claim without any basis, the petitioner approached this Court by filing W.P.(C) No.15847 of 2008 seeking for issuance of a direction to the insurer-opposite party no.1 to settle the claim under the insurance policy in question referred to supra. This Court vide order dated 6.5.2009 directed opposite party no.1 to consider and dispose of the claim of the petitioner as expeditiously as possible preferably within a period one month from the date of production of a certified copy of the order. Within the period stipulated in the order, the order was not complied with. Again the petitioner has approached this Court. It is the case of the petitioner that in spite of fulfilling all the requirements by filing the application claiming the insured amount, opposite party no.1 who is the sanctioning authority did not either sanction the amount or intimate by letter that his claim has been repudiated. Therefore, the petitioner enquired the matter through opposite party no.4 regarding his claim. In turn, opposite party no.4 informed the petitioner that they have sent letter regarding the insured amount to opposite party no.1. It is also further stated that the petitioner along with his advocate had gone to Kolkata Office of opposite party no.1 to intimate the Court order by taking another certified copy and another representation Annexure-2. In spite of the aforesaid efforts made by the petitioner, opposite party no.1 did not respond to the Court order either sanctioning the insured amount or repudiating the claim. Therefore, once again the petitioner has left with no other alternative but to approach this Court seeking for the reliefs as stated supra. The ground urged by the learned counsel for the petitioner in support of the claim is that inaction of the insurance company to disburse the amount despite the fact that the petitioner is the nominee and also the legal heir under the Hindu Succession Act, 1956 and the inaction of the Insurance Company violates Articles 14 and 21 of the Constitution. The petitioner has also placed reliance upon the guidelines which are extracted in this judgment.

3. It is also relevant to refer to the documents, i.e. the insurance policy Annexure-1 in the name of the insured, copy of the legal heir certificate Annexure-2 series, certificate issued by Officer-in-charge, Govindpur police station stating that the insured expired on 9.8.2005 due to snake bite as ascertained from the register of Mahidharpada P.H.C. and local enquiry,Annexure-3 the application for death claim of the insured, Annexure-

4 the Janata Personal Accident Insurance Policy Claim Form in respect of the insured wherein the Assistant Surgeon has certified in the relevant column to the following effect: " As the patient did not improve and went to coma state, the patient was referred to S.C.B.Medical College,Cuttack".

4. The claim is opposed by opposite party nos.3 and 4 by filing counter affidavit. In the counter affidavit, they have admitted about the order passed on 6.5.2009 in the earlier writ petition. At paragraph 9, it is stated that according to the memorandum of understanding existing amongst National Insurance Company Ltd., Division III, 8 India Exchange Place, Kolkatta-700001 and the answering opposite party, Golden Trust Multi Service Club of GTFS to extend the insurance coverage to its member under the Janata Personal Accident Insurance Policy. NIC have an exclusive right and authority to entertain process and settlement of such claim. GTFS have no role to play in this regard. Therefore, no liability attaches to GTFS. Opposite party nos.3 and 4 are not jointly and/or severally liable to settle the claim of the claimant. The authority to settle the claim is solely with opposite party nos.1 and 2 as per memorandum of understanding and subsequent letter dated 17.7.2001. With reference to the earlier order dated 6.5.2009 in the writ petition referred to supra, it is stated by the opposite party no.1 that after receipt of this Court's order supra it appointed an Investigator to ascertain the exact cause of nature of death of the deceased but from the investigation carried out by the Investigator it is revealed that deceased died a natural death and the death of the deceased due to snake bite is not correct. The entire investigation report has been annexed as Annexure-A/1 series to the counter affidavit filed on behalf of opposite party nos.1 and 2.At paragraph 6 of the counter affidavit it is stated that opposite party nos.1 and 2 issued the insurance policy in respect of the deceased which is subject to certain conditions. Condition nos.1 and 2 on which reliance is placed read thus:

> (1) Upon the happening of any event which may give rise to a claim under this policy the insured forthwith give notice thereof to the Company. Unless reasonable cause is shown, the Insured should within one calendar month after the event which may give rise to a claim under this policy, give written notice to the Company with full particulars of the claim.
>
> (2) Proof satisfactory to the Company shall be furnished of all matters upon which a claim is based. Any medical or other agent of the company shall be allowed to examine the person of the Insured on the occasion of any alleged injury or disablement when and so and so often as the same may reasonably be required on behalf of the company and in the event of death to make a PM report, if necessary shall be furnished within a space of 14 days after demand

in writing and in the event of a claim in respect of loss of sight the insured shall undergo at the insurer's expenses such operation as treatment as the company may reasonably deem desirable. Provided that in case of a claim by death or permanent total disablement all sums payable only on the delivery of this Policy cancelled and discharged. Condition no.2 has to be read with scope of cover. Therefore, learned counsel submits that the petitioner is not entitled for the relief as sought for.

5. This Court issued notice on 10.9.2009. Thereafter when the matter was listed on 15.9.2010 having regard to the facts pleaded by the parties and the documents produced in respect of the factual and legal contentions, after referring to the report of the doctor of Mahidharpada P.H.C., who had examined the policy-holder on 9.8.2005 at 9 p.m. and noted in Annexure-2 "poisonous snake bite" and at 11 p.m. on the same day he has mentioned in Annexure-2 that "as the patient did not improve, he is referred to S.C.B.Medical College, Cuttack", this Court directed the Chief District Medical Officer, Cuttack to conduct an enquiry and submit a report . With reference to the same, learned senior counsel Mr.Padhi placing reliance upon Annexure-C/1 submitted that the matter was considered to know whether there was snake bite or not of the deceased insured. This contention is required to be examined if such term and condition is there in the policy. It can be verified from the external injuries found on the body of the deceased person whether there was a snake bite or not. This aspect was kept out of consideration. Having regard to the documents Annexure-2 series filed in the earlier writ petition and the stand taken by the Insurance Company, we directed the C.D.M.O.,Cuttack to conduct enquiry in this regard with reference to Annexure-2 series and report whether the noting made by the doctor of Mahidharpada P.H.C. on 9.8.2005 is genuine or not and the said report should be submitted in a sealed cover within a period of 10 days from 15.9.2010. Pursuant to the same, the report was received on 27.11.2010 along with the Xerox copy of the letter written by the Medical Officer, P.H.C.,Mahidharpada, Cuttack.

6. With reference to the above said rival factual and legal contentions, following points would arise for consideration: (a) whether the deceased died on account of snake bite which is an unnatural death and therefore the petitioner is entitled as nominee/legal heir to get the assured sum and (b) whether the repudiation of the claim by the opposite party nos.1 and 2 is legal and valid? (c) What order?

7. The aforesaid points are required to be answered in favour of the petitioner for the following reasons. It is an undisputed fact that at the instance of opposite party no.4 the deceased insured has taken the policy

for a sum of Rs.5,00,000.00 with certain terms and conditions. It is also an undisputed fact that the claim made by the petitioner that the deceased insured is an unmarried person and the petitioner is his nominee in the policy and the averments that he being the nephew, he has accepted him as the legal heirs to succeed to his estate. In evidence of the fact the legal heir certificate issued in Misc.Case No.63 of 2005 by the Revenue Officer, Kantapada was produced in the earlier writ petition. The said document is not disputed. Further on 9.8.2005, the insured was taken to Mahidharpada P.H.C.,Cuttack and was examined by the doctor who noted in the out-door ticket "c/o snake bite (mentioning size of the wound), patient conscious and the doctor doubted the same to be a case of poisonous snake bite and on the same day at 11 a.m. it was further noted "as the patient did not improve, he is referred to S.C.B.Medical College, Cuttack". The correctness of the same was required to be enquired by the Chief District Medical Officer pursuant to our direction dated 15.9.2010.Accordingly, he addressed a letter to the office of P.H.C.,Mahidharpada and the Medical Officer, Mahidharpada P.H.C. in turn has written letter dated 27.9.2010 to the C.D.M.O.,Cuttack to furnish the information sought for by him. It is relevant to extract the contents of the said letter:

> " As per your advice, I verified the OPD and IPD registers of this institution on 27.9.2010 and found the following:
>
> One patient named Birabar Behera HM 54 years s/o. Banchhanidhi Behera of vill: Bhodala was seen vide OPD Regd.No.12346 dated 9.8.2005 at 9 p.m. for snake bite and was referred to S.C.B.Medical College & Hospital,Cuttack by Dr.Raghunath Nayak, MO. Mahidharpada P.H.C. on 9.8.2005. The patient was not admitted to IPD and there is no record in IPD Register regarding this patient.
>
> This is for your information and necessary action.
>
> Yours faithfully,
> Sd.
> Medical Officer, PHC,Mahidharpada,
> Cuttack."

The aforesaid letter was sent to this Court in sealed cover which was opened in Court. We have perused the same which clearly discloses the fact that the insured was examined in the PHC, Mahidharpada on 9.8.2005 and he was also referred to the S.C.B.Medical College, Cuttack which fact is forthcoming from the letter written by the Medical Officer, PHC, Mahidharpada on 27.9.2010 furnishing information to the C.D.M.O.,Cuttack. The said information is furnished from the records available in the PHC. From the said two documents it is very clear that the insured deceased was

considered to have poisonous snake bite and he was referred to S.C.B.Medical College and Hospital, Cuttack by Dr.Raghunath Nayak, Medical Officer, PHC, Mahidharpada. He was not admitted to IPD. There was no record in IPD regarding this patient. The said certificate is read with the certificate granted by the O.I.C.,Govindpur P.S. dated 4.11.2005 stating that the deceased Birabar Behera son of Banchhanidhi Behera of Bhodol, P.S.Govindpur, Cuttack expired on 9.8.2005 due to snake bite. The said certificate was issued after making local enquiry and from the register of Mahidharpada PHC. These documents would clearly go to show that the death was due to poisonous snake bite. Therefore, we have to accept the case pleaded by the petitioner. The investigation report produced as Annexure-A/1 cannot be accepted by this Court for the reason that the same is not based on the verification of record either from the aforesaid Mahidharpada PHC or from the police station OIC of which has issued the certificate. As could be seen from the said investigation report, the investigation was made by the Investigator on 28.7.2009, 12.8.2009, 26.10.2009 and 13.11.2009. Against col.6 Status of the claim it is mentioned: "Insured Birabara Behera was a physically handicap person and he was issueless. He has no income and died natural due to old age." Certain observations are made at page 4 of the report. With regard to findings from hospital, it is mentioned that on due verification of the OPD register it was observed that serial number of the out-patients are not mentioned in serial.OPD No.12346 dated 9.8.2005 seems to be a tampered one. Therefore, for better appreciation of facts the original OPD register may be called for through court along with the duty chart of the hospital on 9.8.2005. One Bishnu Charan Pradhan was examined by the investigator in presence of the claimant, i.e. petitioner. On the basis of his statement, the investigator recorded a finding that it is a fact that the insured died normally in his house due to old age. He has not died accidentally due to snake bite. The said finding in the report is contrary to the certificate given by the doctor who treated him on 9.8.2005 at Mahidharpada PHC which fact is affirmed by the letter of the present Medical Officer, Mahidharpada PHC who furnished the report pursuant to our direction and also the certificate issued by the Officer-in-charge of Govindpur P.S.referred to supra. The statement of Bishnu Charan Pradhan could not have been believed as he has not been put to the test of cross-examination. The investigator has believed him without believing the claimant's version without giving reasons. Therefore, the opinion formulated by the investigator could not have been the basis for not settling the claim of the petitioner herein. Insistence on the post-mortem report is not required in view of the guidelines which are required to be followed contained in Chapter 5 of Double Accident Benefit Claims and Disability Benefit Claims. Clause 1.5 reads as under:

> "1.5 Sometimes accidents are not reported to the Police and no police inquest or Post-mortem Examination is carried out. In the absence of Panchnama/FIR, Police Inquest and Post-Mortem Examination reports, the claimant must establish accident as the cause of death by other cogent evidence. But we cannot take a stand that cause of death can be established only by mans of the above reports. The alternate proofs such as statement of eye witness to the accident, the result of our own enquiries, attending Physician's or Hospital Certificate etc. may be sufficient to establish that the death of the life assured was by an accident and not by suicide or other causes excluded by the clauses in the proviso to the Accident Benefit condition. The claimant should state why the accident was not reported to the police."

From a reading of the aforesaid guidelines, insistence on post-mortem Report is not tenable. The claimant must establish accident as the cause of death by other cogent evidence as mentioned in the guidelines extracted above. In view of the aforesaid documents produced herein it is beyond reasonable doubt that the death of the insured was on account of bite of poisonous snake as certified by the doctor who treated him at Mahidharpada PHC which has been made available for our perusal along with the report of the C.D.M.O.,Cuttack supported by documents Annexure-2 series referred to supra. For the reasons stated supra, the claim of the petitioner is justified. The stand taken by the Insurance Company-opposite party no.1 on the basis of the investigation report after order was passed by this Court in the earlier writ petition is not acceptable. The investigation was not made immediately after the death of the insured and the report was submitted after examining a person who has not seen the death and without accepting the documentary evidence issued by the doctor who treated the insured at the PHC, Mahidharpada and the certificate issued by the OIC of the concerned P.S. Believing the statement of a person who has not seen the death and recording a finding and coming to the conclusion that the death is not accidental is contrary to the factual position and the materials on record. Therefore, accepting the opinion of the investigator and not willing to settle the claim is wholly untenable. Therefore, the case pleaded by opposite party nos.1 and 2 cannot be accepted. On the other hand, having regard to the facts pleaded and documents referred to and the report of the C.D.M.O. along with the letter sent by the Medical Officer, PHC, Mahidharpada stating that the insured was examined by the doctor on 9.8.2005 who has noted the nature of injuries and has referred the patient to S.C.B.Medical College, Cuttack at 11 a.m. on that day would clearly prove that it is an alternate method of proving accidental death as provided in the guidelines is sufficient for us to accept the case pleaded by the claimant that

the death of the insured is unnatural death/accidental death on account of poisonous snake bite. Therefore, we allow the writ petition and issue rule directing the opposite party nos.1 and 2 to settle the insurance claim and pay the amount of Rs.5,00,000.00 to the petitioner with 6 per cent interest from the date the amount became due, namely the date on which the claim petition was filed till the date of realization. Opposite party no.1 is directed to pay the insurance amount under the policy along with interest awarded within two weeks of receipt of the order as the claim is being pending for the last six years.

Writ petition allowed.

2011 (I) ILR – CUT- 663

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

W.P.(C) NO.694 OF 2011 (Decided on 11.02.2011)

M/S. INDIAN METALS & FERRO ALLOYS LTD. .. ….. Petitioner.

.Vrs.

ASST. COMMISSIONER OF INCOME-TAX ……. Opp.Parties.

INCOME TAX ACT, 1961 (ACT NO.43 OF1964) – S.147, 148.

Petitioner seeks declaratory relief to declare Sec.147, in so far as it permits authority to reopen the assessment on a mere change of opinion as unconstitutional being violative of Art.14 & 19 of the Constitution.

For the year 1990-91 to 1992-93 against disallowance of depreciation allowance by assessing officer, petitioner preferred appeal before C.I.T. (Appeals) where in the same was allowed –The Department preferred Second Appeal before ITAT – For 1993-94 to 1997-98 the Department has initiated proceeding U/s. 147 IT Act for which notice U/s.148 was issued – Since at the time of completion of assessment the amount of depreciation which was allowed was never before the first appellate authority and consequently before the IT AT, the notice in question is not untenable in law.

(Para 10,11)

For Petitioner - Mr. Ganesh, Sr. Advocate
M/s. J.Sahoo, D.Panda, P.Mohapatra &
A.Mohapatra.
For Opp.Party - Sr. Standing Counsel (Income tax)

V.GOPALA GOWDA,C.J. The petitioner, an assessee under the Income Tax Act, has filed this writ petition questioning the impugned notice dated 28.10.2010 issued under section 148 of the Income Tax Act, 1961 for the assessment year 2006-07 seeking for issuance of a writ of certiorari urging various facts and legal contentions and has sought for a declaratory relief to declare section 147 of the Income Tax Act, 1961 in so far as it permits the Assessing Officer to reopen the assessment on a mere change of opinion as unconstitutional being violative of Articles 14 and 19 of the Constitution and to issue a mandamus restraining the opposite party, his subordinates and agents from acting pursuant to section 147 of the Income Tax Act,1961.

2. Relevant brief facts are stated for the purpose of appreciating the rival legal contentions of the parties to find out if the petitioner is entitled for the relief as sought for in this writ petition.

3. The case of the petitioner is that the assessing officer issued the impugned notice on erroneous premises that the entire depreciation allowance for the period from Assessment year 1990-91 to 1997-98 aggregating to Rs.42578.02 lacs had lapsed before the assessment year 2006-07 by virtue of the provisions of Section 32(2) of the Act and therefore the petitioner was not eligible for the purpose of set off and carry forward of the said amount during the assessment year 2006-07 and that non-consideration of the explanatory note for the second amendment to Section 32(2) of the Act by Finance Act, 2001 was a fatal mistake committed by the assessing officer. Hence, the issuance of the impugned notice is patently erroneous and the same is without jurisdiction. The opposite party has failed to appreciate that the petitioner had preferred an appeal to the Commissioner of Income Tax (Appeals-II), Bhubaneswar against the assessment order dated 30.12.2008 of the opposite party in which appeal the issue with respect to unabsorbed depreciation allowance for the assessment year 2006-07 has been decided in petitioner's favour by the Commissioner of Income Tax (Appeals) by order dated 30.9.2010 after duly considering both the amendments to section 32(2) of the Act by Finance Act, 1996 and the Finance Act, 2001. While issuing the impugned notice, the opposite party has completely ignored the fact that the Commissioner of Income Tax (Appeals) has already considered and given a reasoned order adjudicating upon and determining the issue with respect to the unabsorbed depreciation for assessment year 2006-07. The Tax Department has filed an appeal against the said order of the Commissioner of Income Tax (Appeals) before the Income Tax Appellate Tribunal which is pending adjudication. Therefore, issuance of the notice is contrary to the second proviso to section 147 of the Act which specifically prohibits reassessment proceedings in respect of the income which is the subject matter of an appeal.

4. The opposite party is seeking to disallow the unabsorbed depreciation for the assessment years prior to and including 1997-98 aggregating Rs.425.78 crores on the patently erroneous ground that the amendment to section 32(2) by the Finance Act, 2001 being prospective, only the depreciation pertaining to assessment year 2002-03 and thereafter can be set off and carried forward without any restriction as regards the length of time. In doing so, the opposite party has failed to appreciate the provisions of section 32(2) and Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes which categorically provide, inter alia, that the unabsorbed depreciation

allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof. Accordingly, once the unabsorbed depreciation up to the assessment year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it was governed by the provisions of section 32(2) as amended by Finance Act, 2001 and was available for carry forward and set off without any limit whatsoever. This position has also been reiterated and held in favour of the petitioner by the Commissioner of Income Tax (Appeals) in the aforesaid order dated 30.9.2010 which issue is now pending in appeal before the Income Tax Appellate Tribunal.

5. It is further contended that the notice was issued under section 148 of the Act to the petitioner seeking to reopen the assessment of the petitioner for the assessment year 2006-07 on the ground that the income of the petitioner had escaped assessment. In response to the said notice, the petitioner addressed a letter dated 11.11.2010 requesting the opposite party to treat its return of the income filed on 28.6.2007 as its return furnished in response to the said notice without prejudice to its submission that the said notice has been issued without jurisdiction and is, therefore, not valid. In support o f the said contention, learned Senior Counsel Mr.Ganesh for the petitioner has placed reliance on the decision of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO, 257 ITR 702(SC) wherein the Supreme Court has made observation that the opposite party shall provide the reasons for issuing the impugned notice before commencing the proceedings under section 148 of the Act on furnishing the return of income by the assessee. The said letter is also produced in this writ petition.

6. The action of the assessing officer is contrary to section 32(2) as amended by Finance Act, 2001 by which the limitation introduced in 1997 was deleted and the law what it was prior to 1997 was restored. Non-consideration of the same by the assessing officer is rightly considered by the Commissioner of Income Tax (Appeals) and granted the relief to the petitioner. Placing reliance on Article 19 (1)(g) of the Constitution it is contended by the learned counsel for the petitioner that it is well settled law that power of restriction on the right of the petitioner to carry with on business guaranteed under the aforesaid fundamental right does not enable the department to reopen and unsettle closed and finalized assessments. He also placed strong reliance upon the judgment of the Supreme Court in S.C.Parashar v. Vasaantsen Dwarkadas & others, 49 ITR 1 SC.

7. Statement of counter is filed by opposite party no.1 *inter alia* opposing the prayer of the petitioner traversing the petition averments. It is necessary to refer briefly to paragraphs 7, 8 and 10. At para-7 it is stated that while giving effect to the order of the Commissioner of Income Tax(Appeals), it

was found that the then assessing officer had not appreciated the fact that the entire depreciation allowance beginning from the assessment year 1990-91 to the assessment year 1997-98 aggregating to Rs.42578.02 lakh had lapsed before the assessment year 2006-07 and, therefore, the petitioner was not eligible for the purpose of set off and carry forward during the relevant assessment year 2006-07 by virtue of the provision of Section 32(2) of the Income Tax Act., as the said provision was amended by Finance Act, 2001 with effect from 1.4.2002. The said provision was explained by the Finance Minister in his speech while moving Finance Bill 1996 by which the amendment was made. With regard to the reliance placed upon the amendment of Section 32(2) by the Finance Act, 2001 with effect from the assessment year 2002-03, it is stated that though the restriction of eight assessment years was removed by the said amendment, the said amendment was prospective in nature. It is specifically stated that the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and comes to his notice subsequently. Appeal against the order of the Commissioner of Income Tax in granting the relief against disallowance of depreciation amount for the aforesaid financial years is filed before the Tribunal urging relevant grounds. The ground on which impugned notice has been issued is not the subject matter either before the Commissioner of Income Tax (Appeals) or before the Tribunal. Therefore, the second proviso of section 147 does not come to the rescue of the appellant as urged in this petition. Hence, he has requested for dismissal of this petition. Learned counsel submitted that the writ petition against the show cause notice is not maintainable in law as he has appeared before the assessing officer and taken time. Whatever grounds urged in this writ petition may very well be stated before the assessing officer.

8. With reference to the above said rival legal contentions, the following points would arise for consideration: (a) whether this Court is required to exercise its extra ordinary jurisdiction to interfere with the show cause notice, (b) whether action taken under Section 147 of the I.T. Act to reopen completed assessment on the ground that while completing assessment under Section 143(3) the Assessing Officer has allowed excess amount of depreciation to which the petitioner is not entitled to; (c) What order?

9. For this purpose, it is necessary to extract the reasons for the show cause notice issued under section 147 for assessment of the escaped income chargeable under the provisions of the Act. Paragraphs 3 and 4 are relevant which are extracted hereunder:

"3 The AO disallowed the unabsorbed depreciation allowance pertaining the assessment year 90-91,91-92,92-93 aggregating to Rs.182,74,22,000/- for the purpose of being carried forward for the reason that such allowance had already lapsed for being carried forward before the relevant assessment year. He considered the remaining amount of Rs.319,41,24,000/- (Rs.502,15,46,000/--Rs.182,74,22,000/-) as eligible to be set off against current year's income and also for being carried forward to the next year. Thus, after set off he has allowed Rs.251,88,45,000/- to be carried forward to the next year.

4. The AO has not appreciated the fact that the entire depreciation allowance beginning from the A.Y.90-91 to A.Y.97-98 aggregating to Rs.42578.02 lakh had lapsed before the A.Y.2006-07 and therefore was not eligible for the purpose of set off and carry forward during the relevant A.Y.2006-07 by virtue of provision of Section 32(2) of the I.T. Act. As per the said provisions as amended by the Finance Act (FA) 2001 w.e.f.01.04.2002, depreciation allowance pertaining only to the previous year 2001-02 and the succeeding previous years which could not be adjusted due to insufficiency of profits was eligible for set off and carry forward. The depreciation allowance pertaining to the earlier previous years which remained unadjusted against profits as at the beginning of the previous year relevant for the A.Y.97-98 could be carried forward only up to end of the A.Y.2005-06. This is so because Section 32(2) as it existed prior to A.Y.97-98 was amended with effect from A.Y.97-98. As per this amended provisions depreciation allowance of earlier years which remained unabsorbed as on 01.04.1996 could be carried forward only up to eight assessment years beginning from the A.Y.1997-98. This provision was also explained so by the Finance Minister in his speech while moving the Finance (No.2) Bill 1996 by which the amendment was made."

10. Paragraph 3 is relatable to disallowance of unserved depreciation amount of Rs.182,74,22,000/- pertaining to assessment years 1990-91, 92-93 and 92-93. Appeal was carried before the Commissioner of Income Tax (Appeals) challenging such disallowance which was allowed by the latter for the reason stated in his order. Challenging the order of the Commissioner of Income Tax (Appeals), the Department preferred appeal before the Tribunal which is now pending. Now the Department initiates the reassessment proceeding under Section 147 on the ground that depreciation amounting to Rs.24.304 lakhs has been wrongly allowed pertaining to the assessment year 1993-94 to 1997-98 to which the petitioner was not entitled. This has been deemed to have escaped assessment within the meaning of Section

147 of the I.T. Act for which action under Section 147 was taken and the impugned notice under Section 148 is issued. It may be noted that the amount of depreciation which was allowed by the Assessing Officer while completing assessment under Section 143(3) was never before the 1st Appellate Authority and consequently before the ITAT. Therefore, the 2nd proviso to Section 147 upon which reliance is placed is wholly untenable in law and devoid of merit. Since the show cause notice contains the reason and the assessee is present before the Assessing Officer there is no need for interference by this Court with the same.

11. For the reasons stated supra, the petitioner is not entitled to any declaration as prayed for or issuance of mandamus. There is absolutely no merit in this writ petition. Accordingly, the writ petition is dismissed with liberty to the petitioner-assessee to participate in the proceedings and take all such legal contention which shall be examined by the assessing officer.

Writ petition dismissed.

2011 (I) ILR – CUT- 669

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

W.P.(C) NO.6359 OF 2004 (Decided on 19.01.2011)

ORISSA CONSUMERS ASSOCIATION & ANR. … ……. Petitioners.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226.

Writ petition – No provision earlier either in the Consumer Protection Act 1986 or in the Consumer Protection Rules, 1987 for payment of fees by consumers for filing of complaint for value of goods or deficiency in service – Section 12 (2) inserted in the Act in 2003 and Rule 9A inserted in the Rules in the year 2004 and 2005 providing payment of fees ranging from Rs.100/- to Rs.500/- except the persons below poverty line – Provisions inserted providing payment of fees challenged as unconstitutional – Held, insertion of Section 12(2) and Rule 9A does not defeat the object of the Act – However if the complainant produces attested copy of any other documentary evidence i.e. certificate or card like APL/BPL or any other similar card issued by any Government functionary Authorised to issue such document then the exemption shall be available – The provisions have to be read down in the aforesaid manner.

(Para 16 & 17)

Case laws Referred to:-

1.AIR 1994 SC 787 : (Lucknow Development Authority-V-M.K.Gupta)
2.AIR 1993 SC 1403 : (Common Cause, A Registered Society-V-Union of India & Ors)
3.AIR 2003 SC 1043 : (State of Karnataka-V- Vishwabarathi House Building Co-op. Society & Ors.)
4.AIR 1980 SC 2097 : (Seth Nanda Lal & Anr.-V- State Haryana & Ors.).
5.(1997) 1 SCC 373 : (Sultana Begum-V-Prem Chand Jain)
6.AIR 1961 SC 1107 : (M.Pentiah & Ors.-V-Muddala Veeramallappa & Ors.)
7.1949-2 All ER 155 : (Seaford Court Estates Ltd.-V- Asher).

For Petitioner - M/s. K.N.Jena, D.K.Mohapatra, A.K.Sahu, B.P.Bal, M.Ganguly, K.N.Sinha, J.N.Mohanty,

D.P.Mohapatra, Dr. M.R.Panda & G.P.Mohanty.
For Opp.Parties - Mr. S.D.Das, (Sr.Adv.)
Asst. Solicitor General (for O.P.No.1)
Mr. R.K.Mohapatra,Govt.Advocate (for O.P.No.2)

B.N. MAHAPATRA, J. This Writ Petition has been filed with a prayer to strike down sub-Section (2) of Section 12 of the Consumer Protection Act, 1986 (for short, 'Act, 1986') as well as Rule 9A of the Consumer Protection Rules, 1987 (for short, 'Rules, 1987'), as inserted/amended by the Consumer Protection (Amendment) Rules, 2004; and the Consumer Protection (Second Amendment) Rules, 2005 (Annexure-3), on the ground that the same are un-constitutional, invalid and illegal; and pass any other orders as deemed just and proper.

2. This petition is in the nature of a Public Interest Litigation seeking protection of rights and interest of the consumers of the society. Petitioner No.1 is a registered voluntary consumer organization and has been working since 1983 for protecting the rights and welfare of the consumers of the country seeking remedy and justice for them. It is also working for growth of consumer movement in the country to build up a healthy civil society. Petitioner No.2 is a conscious consumer working for the welfare, betterment of the citizens of the country and advancing for growth of consumers' increment.

3. Mr. K.N.Jena, learned Senior Advocate appearing for the petitioner submitted that the Act, 1986 was enacted with the object and purpose to provide better protection and promotion of consumers' interest and rights in the society. It is a social welfare legislation and was an important milestone in the history of consumer movement in the country to save the millions of illiterate, ignorant, unorganized, poor and helpless consumers which constitute 90% of the total population of the country from exploitation, cheating, unfair and restricted trade practice adopted by manufacturers, traders and service providers. Further, the object of the Act, 1986 is to provide and secure inexpensive and speedy justice to the consumers by setting up three tier redressal agencies, i.e., District Forums, Commissions at State and National levels adopting simplified procedure. Unfortunately, without making the Act, 1986 more effective and beneficial for the common men who are economically backward, some amendments in the said Act and Rules have been brought to deprive and deny justice to the consumers. Section 12 of the Act, 1986 has been substituted by the Amendment Act of 2002 (Act of 62 of 2002) inserting therein that every complaint shall be accompanied with such amount of fees payable in such manner as may be prescribed. Charging of fees for filing the complaint and amendment of

Section 12 to that extent is contrary to the basic structure as well as the object and the purpose of the Act. With a view to provide justice to poor and economically backward class of the people of different castes and tribes and women, the State Government as well as the Central Government has enacted laws to exempt them from paying the court fee, whereas a person who is purchasing one Kg. of rice or atta or a match box or a dot pen/ pack of bread/ tooth brush/ plain paper, pencil etc. or any other goods and services worth of a meager amount or less than a rupee is required to pay minimum fee of Rs.100/- and also to pay registered postal charge of Rs.25/-. The poor consumer is also required to pay for service of notice to each one of the opposite parties as State Government is not providing funds for service of notice to opposite parties on the plea of financial crunch. Thus, payment of fees on complaint petition is discriminatory, arbitrary and unreasonable. The petitioners strongly believe that unscrupulous traders and influential businessmen, manufacturers, service providers are manipulating and managing the helm of affairs for bringing out such amendment. Because of charging of the fees for filing complaint petition before the Consumer Forums, the poor people will not be able to file complaints for claiming damages though they are being cheated and exploited by the manufacturers, sellers of goods and service providers, as a result of which the number of cases is reducing day-by-day and thereby the retired persons, who are rehabilitated and appointed as Members of Forums and Commissions, are being maintained and paid without any work.

4. It is further submitted that after Section 12(2) of the Act, 1986 came into force with effect from 15.03.2003, the O.P. No.1-Central Government in exercise of its statutory power under Section 30 of the Act, 1986 amended the Rules, 1987 by C.P.(Amendment) Rules, 2004, which came into force with effect from 05.03.2004 inserting Rule 9A. Rule 9A was further amended by Consumer Protection (Amendment) Rules, 2005 with effect from 10.02.2005. Rule 9A provides a slab which varies from Rs.100/- to Rs.500/- on the basis of value of goods or services and the compensation claimed. Payment of fees as per Section 12(2) read with Rule 9A is grossly discriminatory, unjustified and violative of Article 14 of the Constitution of India as well as the directive principles of the Constitution and as such liable to be struck down. Rule 9A further provides that the draft and postal orders are to be drawn in favour of the Registrar of the State Commission payable at the place where the State Commission is situated. A poor farmer of remote village in order to claim protection under the Act has to undergo harassment, sufferings and incur expenses by running to the town covering the distance to obtain crossed postal orders and bank draft and to pay commission thereon. Before filing a complaint/ petition, he has to take the help and knowledge of some literate persons. Most of the State

Commissions of the country including the State of Orissa do not have any Registrar. Thus, because of this amendment, a difficult/peculiar situation has arisen in filing complaint before the District Consumer Forums in the State of Orissa. Narrating all these defects, the petitioner-Association had written letters to O.P. No.1 on 09.04.2004 and 18.04.2004 with a request to repeal the same, but till today no reply has been received from them nor the opposite parties have taken any step to withdraw such amendment. It is vehemently argued that the said Rules have not been framed in accordance with law and therefore, it is liable to be declared as illegal. The impugned amendment has been made in violation of Section 31 of the Act, 1986 and procedure and provisions of Section 23 of the General Clauses Act, 1897. O.P. No.1 issued a public notice which was published in "The New India Express", a daily English newspaper on 02.01.2005 inviting the voluntary consumer organizations, other bodies and public of the country to offer their views/ suggestions/comments for amendment of the existing provisions in the C.P. Rules within thirty days of such publication for the benefit the consumers. In response to such notice, the petitioner-Association submitted suggestions and comments by letter dated 27.01.2005 (Annexure-5) and also by mail. Without considering the suggestions and comments of the public and voluntary consumers' organizations including the petitioner Association the impugned Rule has been enacted and enforced. Section 31 of the Act, 1986 mandatorily requires that every rule and regulation made under the said Act shall be laid before the Houses of the Parliament. Rule 9A provides that complainants, who are below the poverty line and holding Antodoya Anna Yojana (for short, 'AAY') cards, are exempted from paying any fees for filing complaint, and no other complainants of the same category are exempted from paying court fees which is violative of Article 14 of the Constitution of India.

5. Concluding his argument, Mr. Jena, learned Senior Advocate prayed for striking down sub-Section (2) of Section 12 of the Act, 1986 and Rule 9A of the Rules, 1987 as inserted/amended by the C.P. Amendment Rules, 2004 and further amended by the C.P. (Second Amendment) Rules, 2005 (Annexure-3).

6. Per contra, Mr.S.D.Das, learned Asst. Solicitor General appearing on behalf of the opposite parties submitted that the power given to the Central Government to make rules under the provisions of Section 30 of the Act, 1986 is not subject to condition of the Rules or byelaws being made after previous publication. Therefore, the condition of publishing the draft of the proposed Rules or byelaws for the information of persons likely to be affected thereby does not apply. It is further submitted that Section 31(1) of the Act, 1986 provides that the Rules made under the provisions of the Act, 1986 have to be laid before the Parliament and accordingly the Department

of Consumer Affairs, Government of India had taken necessary action in the matter and after due authentication by the then Minister of State for Consumer Affairs, Food and Public Distribution, requisite copies of the Notification in English and Hindi were sent on 09.06.2004 requesting Lok Sabha and Rajya Sabha for laying the papers on the table of Lok Sabha and Rajya Sabha. As per bulletins of Lok Sabha dated 09.05.2005 and Rajya Sabha dtd. 06.05.2005 the C.P. (Second Amendment) Rules, 2005 published in Notification No.GSR64(E) in the Gazette of India on 10.02.2005 was laid on the tables of Lok Sabha and Rajya Sabha in terms of Section 31 of the Act, 1986. In order to check frivolous and bogus applications, the provisions of Section 12(2) were enacted by the Parliament in their own competency. It is further submitted that an Act cannot be labeled unconstitutional as charging of fees for filing of complaint is common practice which is followed. In fact, conscious view was taken for charging fees for filing complaint in Consumer Forums. Further, a graded structure of fees has been kept with the lowest amount of fees of Rs.100/- for filing complaints in District Forum in respect of total value of goods and services/compensation claimed up to Rs.1.0 lakh. Moreover, below the poverty line complainants, who are holders of AAY cards are exempted from paying fees for filing complaint in District Forums in respect of total value of goods/service and compensation claimed up to Rs.1.0 lakh. It would be clear from Annexure-4 that a general notice was issued calling for views, suggestions/comments on the Act, 1986 and Rules, 1987 as amended in 2003. This is a general notification for comment and not for any particular Section of the Act or any particular Rules. The letter of Government of Orissa giving suggestions regarding amendment in the Rules, 1987 under AnnexureB/2 was sent in response to a letter of this Department which did not call for any suggestion but was only addressed to all States and Consumer Forums enclosing copy of the Gazette Notification regarding Rules, 2004 dated 5th March, 2004 for information and necessary action.

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

(i) Whether the provisions contained in Section 12(2) of the Act, 1986 and Rule 9-A of the Rules, 1987 as inserted/amended by the C.P. (Amendment) Rules, 1994 and the Consumer Protection (Second Amendment Rules, 2005) (Annexure-3) defeat the aims and objects of the Act, 1986, and therefore, are liable to be struck down?

(ii) Whether the provisions contained in Rule 9-A of the Rules, 1987 as inserted/amended by the C.P.(Amendment) Rules, 1994 and the Consumer Protection (Second Amendment) Rules, 2005 are arbitrary and discriminatory in nature?

(iii) Whether Rule 9-A of the Rules, 1987 as amended by Consumer Protection (Second Amendment) Rules, 2005 has been notified without following the statutory provisions and thereby that provision is not valid?

8. To deal with the first question, it is necessary to know the aims and objects behind enacting the Act, 1986 and Rules, 1987. The statement of objects and reasons of the Act, 1986 indicates that it has been enacted to promote and protect the rights and interests of the Consumers and to provide them speedy and inexpensive redressal of their grievance.

The apex Court in ***Lucknow Development Authority vs. M.K. Gupta, AIR 1994 SC 787***, while ascertaining the purpose of the Act, 1986, and the objective it seeks to achieve and nature of social purpose it seeks to promote, held as follows:

> "To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. Various legislations and regulations permitting the State to intervene and protect interest of the consumers have become a haven for unscrupulous ones as the enforcement machinery either does not move or it moves ineffectively, inefficiently and for reasons which are not necessary to be stated. The importance of the Act lies in promoting welfare of the society by enabling the consumer to participate directly in the market economy. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into store house of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting for it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears

to be a silver lining, which may in course of time succeed in checking the rot."

9. The apex Court in ***Common Cause, A Registered Society Vs. Union of India & Ors.***, AIR 1993 SC 1403 held as follows:-

> "The object of the legislation, as the Preamble of the Act proclaims, is 'for better protection of the interests of consumers'. During the last few years preceding the enactment there was in this country a marked awareness among the consumers of goods that they were not getting their money's worth and were being exploited by both traders and manufacturers of consumers goods. The need for consumer redressal fora was, therefore, increasingly felt. Understandably, therefore, legislation was introduced and enacted with considerable enthusiasm and fanfare as a path breaking benevolent legislation intended to protect the consumer from exploitation by unscrupulous manufacturers and traders of consumer goods. A three-tier fora comprising the District Forum, the State Commission and the National Commission came to be envisaged under the Act for redressal of grievances of consumers."

The apex Court in ***State of Karnataka Vs. Vishwabarathi House Building Co-op. Society & Ors.,*** AIR 2003 SC 1043 held that the provisions of the Consumer Protection Act clearly demonstrate that it was enacted keeping in view the long felt necessity of protecting the common man from wrongs where for the ordinary law for all intent and purport had become illusory. In terms of the said Act, a consumer is entitled to participate in the proceedings directly as a result whereof his helplessness against a powerful business house may be taken care of.

10. Needless to say that the Act, 1986 is a social piece of legislation and the legislative intention is to protect a consumer against the services rendered. The objective of such social welfare measures no doubt is to provide better, efficient and cheaper justice to the people. The primary duty of the Court while interpreting the provisions of such an Act is to adopt a constructive approach to achieve the purpose of the Act. Any other interpretation that would defeat the very purpose of the Act is not permissible in law.

11. In the above backdrop of the case, we have to examine whether section 12(2) of the Act, 1986 and Rule 9-A of the Rules, 1987 as inserted/amended by C.P. (Amendment) Rules, 1994 and Consumer Protection (Second Amendment) Rules, 2005 are contrary to the aims and objects for which the Act, 1986 is enacted?

12. At this juncture, it is necessary for us to know what is contemplated in Section 12(2) of the Act, 1986 and Rule 9-A of the Rules, 1987 which are under challenge. These provisions are reproduced below:

Section "12. Manner in which complaint shall be made

xxxx xxxx xxxx

(2) Every complaint filed under sub-section (1) shall be accompanied with such amount of fee and payable in such manner as may be prescribed.

Rule "9A. Fee for making complaints before District Forum - (1) Every complaint filed under sub-section (1) of section 12, sub-section (1) of section 17 and clause (a) in sub-clause (i) of section 21 of the Act shall be accompanied by a fee as specified in the table given below in the form of crossed Demand Draft drawn on a nationalised bank or through a crossed Indian Postal Order drawn in favour of the President of the District Forum, Registrar of the State Commission or the Registrar of the National Commission as the case may be, and payable at the respective place where the District Forum, State Commission or the National Commission is situated.

(2) The concerned authority referred to in sub-rule (1) shall credit the amount of fee received by it into the Consumer Welfare Fund of the respective State and where such fund is not established into the Receipt Account of the State Government and in the case of the National Commission, to the Consumer Welfare Fund of the Central Government.

Sl. No.	Total Value of goods or services and the compensation claimed	Amount of fee payable
(1)	(2)	(3)
	District Forum	
(1)	Upto one lakh rupees – For complainants who are under the Below Poverty Line holding Antyodaya Anna Yojana Cards	Nil
(2)	Upto one lakh rupees – For complainants other than Antyodaya Anna Yojana card holders.	Rs.100
(3)	Above one lakh and upto five lakh rupees	Rs.200
(4)	Above five lakh and upto ten lakh rupees	Rs.400
(5)	Above ten lakh and upto twenty lakh rupees	Rs.500
	State Commission	
(6)	Above twenty lakh and upto fifty lakh rupees	Rs.2000
(7)	Above fifty lakh and upto one crore rupees	Rs.4000
	National Commission	
(8)	Above one crore rupees	Rs.5000

(3) The complainants who are under the Below Poverty Line shall be entitled for the exemption of payment of fee only on production of an attested copy of the Antyodaya Anna Yojana cards".

(underlined for emphasis)

13. Even though the Act was enacted in the year 1986, Section 12(2) quoted above has been brought into the statute by Consumer Protection (Amendment) Act, 2002 [Act No.62 of 2002] dated 17.12.2002. Thereafter, the Central Government in exercise of its statutory powers under Section 30 of the Act, 1986 has amended the C.P. Rules, 1987 by C.P. Amendment Rules, 2004, which came into force on 05.03.2004 inserting Rule 9A. The said Rule 9A was further substituted by Consumer Protection (Second Amendment) Rules, 2005 which came into force from 10th February, 2005. The fee structure for filing complaint before the Consumer Forum was provided for the first time in the said Rule 9A.

14. As stated above, the Consumer Protection Act, 1986 is a social and economic piece of legislation, which is directed to protect the interest of the

consumers in the country. Its objective is to provide better, efficient and cheaper justice to the people. It goes without saying that in our country a major portion of the population is living below poverty line. It will be certainly difficult for a consumer who is everyday struggling for his livelihood or managing his family with limited income, to pay Rs.100/- for filing a complaint before the statutory forum under the Act, 1986 for value of the goods and compensation. Therefore, initially when the Act, 1986 and Rules 1987 were enacted, no provision was made for payment of any fees by the consumers for filing any complaint for value of the goods and compensation in case of deficiency in service. This position remained unchanged till 2003, when Section 12(2) was inserted in the Act, 1986 and Rule 9A was inserted/amended in the year 2004 and 2005 providing for payment of fees for filing a complaint before the Consumer Forums for value of the goods and compensation in case of deficiency in service.

15. Now the question that has arisen is as to whether the insertion/amendment made in Section 12(2) and Rule 9A is justified?

It is well settled legal position that right of appeal is a creature of statute and while granting such right, the legislature is competent to impose conditions, which are reasonable and does not defeat the very purpose of giving such right. The Constitution Bench of the apex Court in the case of ***Seth Nanda Lal & Anr. Vs. State of Haryana and others,*** AIR 1980 SC 2097, held as under:

> "The right of appeal is a creature of a statute and there is no reason why the legislature while granting the right cannot impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory."

In the instant case, the specific stand of opp. parties is that in order to check frivolous and bogus applications, a conscious view was taken and the provisions of Section 12(2) were enacted by the Parliament in their own competency.

16. Section 12(2) provides that every complaint filed under sub-Section (1) shall be accompanied with such amount of fee and payable in such manner as may be prescribed and Rule 9A provides for payment of fees of Rs.100/- to Rs.500/- before the Consumer Forum though granting exemption to the complainants, who are holders of AAY cards. The provisions have to be read harmoniously. Though it appears at first flush that the application has to be accompanied by such amount as prescribed, it has to be read

along with the exemption provisions. The requirement is for payment of fees which is subject to exemption.

The apex Court in ***Sultana Begum vs. Prem Chand Jain*** (1997)1 SCC 373, held as follows:-

> "10. The rule of interpretation requires that while interpreting two inconsistent, or, obviously repugnant provisions of an Act, the Courts should make an effort to so interpret the provisions as to harmonize them so that the purpose of the Act may be given effect to and both the provisions may be allowed to operate without rendering either of them otiose."
>
> (Also see Election Commission of India vs. Telangana Rastra Samithi & Anr., 2010(8) Supreme 649)

Therefore, provisions of Section 12(2) of the Act, 1986 and Rule 9A of the Rules, 1987 do not defeat the object of the Act.

17. The second question is as to whether the provisions contained in Rule 9A of the Rules, 1987 are arbitrary and discriminatory in nature? The said rule provides for payment of fees ranging from Rs.100/- to Rs.500/- for filing a complaint before the District Consumer Forum. No doubt, under the said provision complainants, who are AAY card holders, are not required to pay any fee along with their complaints/petitions. Thus, the object of the statutory provision is to exempt persons below poverty line. But the provisions prescribing a particular mode for establishing it, i.e., holding AAY Cards has to be treated as one of the modes to avail the exemption. Needless to say that a major chunk of the population, whose financial condition is similar to or worse than the people holding AAY cards do not possess the AAY cards. They may have to pay fees for the reason that they will not be possessing AAY cards though they are similarly situated. We have therefore to read down the said Rules to make them valid. Such reading down of a statute is permissible, since it is well settled that the Court should make all efforts to sustain the validity of a statute, even if that involves reading its language down (vide G.P.Sing's *Principles of Statutory Interpretation*, 9th Edn., 2004, pp.496-503.)

The Doctrine of reading down or of recasting the statute can be applied in limited situations. It is essentially used, firstly, for saving a statute from being struck down on account of its unconstitutionality. The Courts, though, have no power to amend the law by process of interpretation, but do have power to mend it so as to be in conformity with the intendment of the legislature. Doctrine of reading down is one of the principles of interpretation of statute in that process. A statute can be declared to be valid where any term has been used which per se seems to be without jurisdiction, but can

be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment, by reading down the provisions of the Act. (See Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress & Ors., AIR 1991 SC 101).

The apex Court in ***M.Pentiah & Ors. Vs. Muddala Veeramallappa & Ors,*** AIR 1961 SC 1107 held as follows:-

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence…… Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity or the absolute intractability of the language used. Nevertheless, the courts are very reluctant to substitute words in a Statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense." See Maxwell on Statutes (10th ed.)p.229."

In ***Seaford Court Estates Ltd. v. Asher, 1949-2 All ER 155*** at p.164, Denning L.J. said,

> "when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament…….. and then he must supplement the written word so as to give "force and life" to the intention of the legislature…… A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

Thus, the object of reading down is to keep the operation of the statute within the purpose of the Act and constitutionally valid. Doctrine of reading down is, therefore, an internal aid to construe the word or phrase in a statute to give reasonable meaning.

Therefore, if the complainant produces attested copy of any other documentary evidence e.g. certificate or card like APL/BPL or any other similar card issued by any Government functionary authorized to issue such

document then the exemption shall be available. The provisions have to be read down in the aforesaid manner.

18. Now the third question is as to whether before making amendment of Rule 9A of the Rules, 1987 by Consumer Protection (Second Amendment) Rules, 2005, vide Notification dated 10th February, 2005, the procedures provided under the Statute have been followed or not. According to the petitioner, such amendments have been brought in violation of Section 23 of the General Clauses Act which provides for previous publication. The further case of the petitioner is that the said amendments have been made in contravention of mandatory provisions of Section 31 of the Act, 1986 which requires that the said amendment should be laid before both the Houses of the Parliament for a total period of thirty days prior to bringing those rules into force. On the other hand, according to learned counsel for the opposite parties, Rule 9A has been brought into force in exercise of the power under sub-section (1) of Section 30 of the Act, 1986 without violating the procedures provided in the statute.

19. At this juncture, it is necessary to know what is contemplated in Sections 30(1) and 31(1) of the Act, 1986 and relevant provisions Section 23 of the General Clauses Act. The same are reproduced below:

Consumer Protection Act, 1986 :-

"Sec. 30(1) The Central Government may, by notification, make Rules for carrying out the provisions contained in clause (a) of sub-section (1) of Section 2, clause (b) of sub-section (2) of Section 4, sub-section (2) of Section 5, sub-section (2) of Section 12, clause (vi) of sub-section (4) of Section 13, clause (hb) of sub-section (1) of Section 14, Section 19, clause (b) of sub-section (1) and sub-section (2) of Section 20, Section 22 and Section 23 of the Act."

"Sec. 31(1) Every Rule and every Regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the succession sessions aforesaid, both Houses agree in making any modification in the Rule or Regulation or both Houses agree that the Rule or Regulation should not be made, the Rule or Regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Rule or Regulation."

General Clauses Act,1897:-

"Sec. 23. **Provisions applicable to making of rules or bye-laws after previous publication**.-- Where, by any (Central Act) or Regulation, a power to make rules or bye-laws is expressed to be given subject to the conditions of the rules or bye-laws being made after previous publications, then the following provisions shall apply, namely:-

(1) The authority having power to make the rules or bye-laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of person likely to be affected thereby…."

Section 30 of the said Act empowers the Central Government to make Rules by notification for carrying out certain provisions of the Act including sub-section (2) of Section 12 of the Act, 1986. Thus, the Central Government is empowered to make Rules by notification.

20. Section 31 of the said Act provides that every Rule and Regulation made under the Act, 1986 shall be laid, as soon as may be after it is made, before each House of the Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the Rule or Regulation or both Houses agree that the Rule or Regulation should not be made, the Rule or Regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that Rule or Regulation. Thus, as per Section 31(1), the Parliament has every power to modify or annul the Rules made by the Central Government in exercise of the power under Section 31 of the Act, 1986.

21. In the present case, it is contended by the opposite parties that the Department of Consumer Affairs, Government of India had taken necessary action in the matter and after authentication by the then Minister of the State for Consumer Affairs, Food and Public Distribution, requisite copies of the Notification in English and Hindi were sent on 09.06.2004 requesting the Lok Sabha and Rajya Sabha Secretariat for laying the papers on the table of Lok Sabha and Rajya Sabha. The opposite parties further submitted that as per bulletins of Lok Sabha dated 09.05.2005 and Rajya Sabha dated 06.05.2005, the C.P. (Second Amendment) Rules, 2005 was laid on the tables of both the Houses of the Parliament.

Since it has been laid before both houses of the Parliament in terms of Section 31 of the Act, 1986 and no modification has been made or no opinion

was expressed that it should not be given effect to, the Rule has become operative.

22. The previous publication of draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby as provided in Section 23 of the General Clauses Act, 1897 has no application to the present case as the Consumer Protection Act does not provide any such condition.

23. In the result, the writ petition is allowed to the extent indicated in paragraph-17 above. No order as to costs.

Writ petition partly allowed.

2011 (I) ILR – CUT- 684

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

W.P. (C) NO.13202 OF 2006 (Decided on 3.11.2010)

ESSEL MINING & INDUSTRIES LTD., BARBIL …… Petitioner.

.Vrs.

COMMISSIONER OF SALES TAX & ANR. …….. Opp.Parties.

ORISSA VALUE ADDED TAX ACT, 2004 (ACT NO. 4 OF 2005)-S. 2(26)

Registration Certificate – Under the Orissa Value Added Tax Act, 2004 and the Central Sales Tax Act, 1956 – Deletion of goods namely High Speed Diesel (H.S.D) and Cement from Registration Certificate of the petitioner since they are not required in the manufacture of finished goods – Question for consideration is whether consumption/use of "HSD" and "Cement" are integrally connected in the process of mining activity under-taken by the dealer – Held, the goods intended for use integrally connected with production of finished goods without which commercial production would be commercially in-expendient is required to be incorporated in registration certificate – "HSD" being directly consumed in running the machineries for extracting and processing minerals, the same is found to be integrally connected in the mining operation and processing mining operation and processing mining ore – But as regards Cement the authorities are to consider whether it is integrally connected in the operation of mining – 'Functional test" is to be applied for determination.

(Para 13,14)

Case laws Referred to:-

1.(1965) 16 STC P-563 : (J.K.Cotton Spinning & Weaving Mills Co.Ltd.-V-The Sales Tax Officer, Kanpur & Anr.)
2.(1981)47 STC 124 : (Chowgule & Co.Pvt. Ltd. & Anr.-V-Union of India & Ors.)
3.AIR 1965(SC) 891 : (Indian Copper Corporation Ltd.-V-Commissioner of Commercial Taxes)
4.(1991) 81 STC 339(AP): (Delta Paper Mills Ltd.-V-Oil & Natural Gas Commission & Ors.)
5.(2007)10 VST 547(Orissa) : (Orient Paper Mills-V- State of Orissa & Ors.)

6.AIR 1965 SC 1310 : (M/s. J.K.Cotton Spinning & Weaving Mills Co.Ltd.-V- The Sales Tax Officer, Kanpur & Anr.)
7.(1972)29 STC 101(1972)4 SCC 121 : (Member, Board of Revenue, WestBengal-V- Phelps & Co. (P) Ltd.)
8.(1990) 76 STC 312 : (Star Paper Mills Ltd.-V-Collector of Central Excise, Meerut).
9.(1990) 77 STC 282 : (Collector of Central Excise, New Delhi-V- Ballarpur Industries Ltd.)

For Petitioner - Mr. Sanjit Mohanty
M/s. P.K.Harichandan, S.Kanungo & Ch.M.R.Mishra.
For Opp.Parties - Mr. R.P.Kar.

B.N.MAHAPATRA, J This Writ Petition has been filed for quashing Annexures-1 and 2 on the ground that those are illegal, arbitrary and contrary to the provisions of Orissa Value Added Tax Act, 2004 (for short, 'OVAT Act') and Central Sales Tax Act, 1956 (for short, 'CST Act') and settled principles of law decided by the apex Court. Annexure-1 is the order dated 18.08.2006 passed by O.P. No.1-Commissioner of Sales Tax, Orissa, Cuttack (for short, 'the Commissioner') passed in Revision Case Jajpur-39/06-07 under OVAT Act and CST Act confirming the order passed in Annexure-2. Annexure-2 is the order dated 24.06.2006 passed by O.P. No.2-Assistant Commissioner of Sales Tax by which "High Speed Diesel (HSD) and Cement" has been deleted from the registration certificate of the petitioner under OVAT Act and CST Act. The petitioner also challenges the initiation of penalty proceeding under Section 10A of the CST Act issued by O.P. No.2 vide notice dated 10.08.2006 for the period April 2005 to March, 2006 (Annexure-3).

2. Shorn of unnecessary details, the facts and circumstances giving rise to the present writ petition are that the petitioner is a public limited Company registered under the Companies Act, 1956. It is engaged in the business of extraction of mineral ore from the leasehold mines, processing of such ore in the crusher owned by it and selling of the processed materials inside and outside the State of Orissa. The petitioner was a registered dealer under the OST Act and CST Act bearing Registration Nos.KJB-28 and KJCB-116 with effect from 28.03.1953 and 01.07.1957 respectively. On the introduction of OVAT Act, 2004, the petitioner has been registered under the said Act. Under the above registration certificates, the petitioner was entitled to purchase HSD for its use as fuel/consumable directly in mining machineries and cement to utilize directly in the construction of mining and processing project and installation of machineries for manufacturing process. O.P. No.2-Assistant Commissioner of Commercial Taxes (for short, 'Asst.

Commissioner') issued notice dated 21.01.2006 under Section 32(3) of the OVAT Act and Section 7(4) of the CST Act to show cause as to why two items, namely, 'Cement and HSD' should not be deleted from the registration certificate granted under the OVAT Act and CST Act as neither of the goods is either a 'raw material' or 'input' used directly for mining or manufacturing of finished product and the petitioner is continuously misusing goods by resorting to widespread bulk purchase of items from outside the State against declaration in form-'C' on payment of concessional rate of 4% tax causing loss to the State Exchequer.

In reply, the petitioner has explained that the HSD purchased by it is being used for operating heavy earth moving machineries which is absolutely required for mining and crushing activities. Cement is being procured at a concessional rate of sales tax for utilization of the same in an on-going capacity expansion project. The petitioner is purchasing HSD and Cement on payment of full tax for use in their own light vehicle and other construction purposes. O.P. No.2 being not satisfied with the explanation of the petitioner passed the impugned order dated 24.06.2006 under Annexure-2 by deleting Cement and HSD from the registration certificate and issued the amended registration certificate under the OVAT Act and CST Act. Being aggrieved by the order of opp. party no.2, the petitioner moved a revision application before opp. party no.1 challenging the order dated 24.06.2006. The Revisional authority after hearing the petitioner has confirmed the order passed by opp. party no.2. Hence, the writ petition.

3. Mr. Sanjit Mohanty, learned Senior Advocate appearing on behalf of the petitioner submits that the impugned orders passed under Annexures-1 and 2 have been passed arbitrarily by the opp. parties contrary to the provisions contained in OVAT Act and CST Act and the settled principles of law. Under Section 2(25) 'input' includes consumables directly used in the processing or manufacturing. He placed reliance on Section 2(28), which defines 'manufacture'; Section 2(27), which defines 'input tax credit'; and also Rule 67(4), which provides for maintenance of true and up-to-date accounts. It is argued that the petitioner is a processing unit as defined under Section 2(28) of the OVAT Act and it is consuming HSD as fuel/consumable to run the mining machinery. Without using Cement, the machineries used for the mining process cannot be installed and operated. Under Rule 67(4), if a registered dealer engaged in manufacturing or processing of goods intends to claim input tax credit, he shall maintain the books of accounts prescribed under the said Rule. In the instant case, HSD and Cement are expedient for extraction and processing of minerals which are directly used in the machineries related to mining activities. In support of his contention, he relied upon a decision of the apex Court in ***J.K.Cotton Spinning & Weaving Mills Co. Ltd. Vs. The Sales***

Tax Officer, Kanpur & Anr., (1965) 16 STC page-563. Similarly, placing reliance on Section 8(1) (3) of the CST Act and Rule 13 of the CST (R & T) Rules and letter No.F-9(88)-ST/57 dated 12.11.1958 issued by the Government of India, Ministry of Finance, Mr. Mohanty submitted that HSD and Cement are coming under the heads 'fuel' and 'construction materials' respectively and therefore the said items should not be deleted on the ground that those are not directly used in the process of manufacturing of finished product. Placing reliance on the decision of the apex Court in ***Chowgule & Co. Pvt. Ltd. & Anr. Vs. Union of India & Ors.,*** (1981) 47 STC 124, it is argued that where a dealer is engaged in mining operation and also in processing of mineral ore, the item required for the said purpose could not be excluded from consideration. In support of his contention, he also relied on a decision of the apex Court in ***Indian Copper Corporation Ltd. Vs. Commissioner of Commercial Taxes***, AIR 1965 (SC) 891. With regard to penalty proceeding initiated under Section 10A of the CST Act vide notice dated 10.08.2006 (Annexure-3) for the period April, 2005 to March, 2006, it is submitted that the said action is a colourable exercise of power to impose an illegal penalty on the alleged ground that Cement and HSD are not goods used in the manufacturing and processing of goods for sale. The said notice is vague and without any basis and therefore, is liable to be quashed.

4. Per contra, Mr. R.P.Kar, learned Standing Counsel for Revenue on the other hand supported the impugned orders passed under Annexures-1 and 2 by O.Ps. 1 and 2. According to Mr. Kar, considering the factual realities, the O.P.-authorities deleted the items 'Cement and HSD' from the registration certificate of the petitioner in accordance with the statutory provisions and in consonance with the settled legal position. Learned Commissioner has properly construed the decision of the Andhra Pradesh High Court in ***Delta Paper Mills Ltd. Vs. Oil and Natural Gas Commission & Ors.****, (1991) 81 STC 339 (A.P.)* and has correctly applied the same in the case of the petitioner. According to Mr. Kar, the decisions relied upon by the learned Senior Counsel for the petitioner have no application to the case of the petitioner. Registering Authority under the OVAT Act has recorded the finding that Cement is inadmissible so far as mining and manufacturing activities are concerned. Similarly, HSD has no utility as raw material for mining. HSD and Cement could not be accepted as capital goods/raw materials under Section 2(8) of the OVAT Act. HSD was not used as raw material directly in the process of manufacturing of the finished product. Hence, the petitioner cannot avail the benefit of concessional rate of tax at the time of purchase of goods. HSD and Cement cannot avail input tax credit under the OVAT Act. In the instant case, Cement and HSD are neither considered as raw materials nor can be considered as capital goods used for manufacturing of goods for sale. Placing reliance on Section 8(3)(b) of the

CST Act and Rule 13 of the CST Rules, it is submitted that the opp. parties after careful consideration of all the relevant provisions of the OVAT Act and CST Act have come to the conclusion that HSD and Cement cannot be used as raw materials for manufacturing/processing of finished product of the petitioner. Therefore, the opp. parties have rightly deleted the said items from the registration certificates to save loss to State Exchequer. The present case is squarely covered by the judgment of this Court in ***Orient Paper Mills Vs. State of Orissa & Ors.,*** (2007) 10 VST 547 (Orissa) wherein this Court directed the petitioner to pay differential tax under Section 10A of the CST Act. It is alternatively argued that in the mining process, Cement is required at the initial stage of processing for installation of the machineries. Thereafter, same is not at all required. Since initial stage of mining operation had been completed long back the deletion of Cement from the registration certificate of the petitioner has been properly done.

5. Now the question that falls for consideration by this Court is whether use/consumption of HSD and Cement is integrally connected in the process of mining activities undertaken by the petitioner.

6. The said question is answered by assigning the following reasons.

The undisputed facts are that the petitioner-Company is a registered dealer under the OVAT Act and CST Act. It is a leaseholder of iron ore and manganese and engaged in mining activities of the said minerals. It processes ores in the crusher owned by it. The Items "HSD and Cement" were included in the registration certificates under the OVAT Act as well as CST Act. The case of the Revenue is that the petitioner has purchased Cement and HSD by furnishing declaration in Form-'C' although the same are not goods to be used in manufacturing or processing of goods for sale and therefore, it is not entitled to purchase those items at concessional rate of tax. Accordingly, these two items are deleted from the registration certificates of the dealer issued under the CST Act and OVAT Act. Petitioner's case is that it is eligible to purchase these two items at the concessional rate of tax on the strength of 'C' Form as those goods are inextricably connected with the process of mining activities of the minerals and processing of ores in the crusher owned by it.

7. Though various points have been raised, they are really side-stepping the real issue. The issue involved in the present case is about application of Section 8(3)(b) of the CST Act and Rule 13 of the CST (R & T) Rules to the petitioner.

8. For proper appreciation and consideration of the issue involved in this case, the provisions of Section 8(3)(b) of CST Act And Rule 13 of the CST (R & T) Rules are reproduced below:-

Section 8(3)(b) of CST Act :

"8. Rates of tax on sales in the course of Inter-State trade or commerce-

[1] Every dealer, who in the course of Inter-State trade or commerce-

(a) Sells to the Government any goods; or

(b) Sells to a registered dealer other than the Government shall be liable to pay tax under this Act, which shall be four percent of his turnover of at the rate applicable to the sale or purchase of such goods inside the appropriate State under the Sales Tax law of that State, whichever is lower.

xx xx xx xx

[3 The goods referred to in clause (b) of sub section (1)-

(a) xx xx

(b) …… are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for re-sale by him or subject to any rules made by the Central government in this behalf, for use by him in the manufacture or processing of goods for sale or [in the telecommunications network or] in mining or in the generation or distribution of electricity or any other form of power."

Rule 13 of the CST (R & T) Rules :

"The goods referred to in clauses (b) of sub-section (3) of Section 8 which a registered dealer may purchase, shall be goods intended for use by him as raw materials, processing materials, machinery, plant, equipment, tools, stores, spare parts, accessories, fuel or lubricants, in the manufacture or processing of goods for sale, or in mining, or in the generation or distribution of electricity or any other form of power."

9. Perusal of the provisions contained in Section 8 (3) (b) and Rule 13 quoted above, makes it clear that in order to qualify for specification under Section 8(3)(b) the goods must be intended for use of the nature mentioned in Rule 13 in manufacturing or processing of goods for sale or in mining or in generation or distribution of electricity or any other form of power. Rule 13 of the CST (R & T) Rules says that the goods referred to in clause (b) of sub-Section (3) of Section 8, which a registered dealer may purchase, shall be the goods intended for use by him as raw materials, processing materials and machinery, plant, equipment, tools, stores, spare parts, accessories, fuel or lubricants, in the manufacture or processing of goods for sale, or in the mining etc.

10. For prescription of the goods under Section 8(3)(b) of the CST Act, the Government of India, Ministry of Finance vide letter No.F.9 (88)-ST/57

dated 12.11.1958 issued the detailed list showing the important industry-wise goods intended for being used by a dealer as fuel and raw-material etc. In the said clarification, Form No.54 has been enclosed specifying the goods intended for being used in mining. The said list is given below:

"1. Fuels-

(i) Electricity (including lighting and heating)
(ii) Lubricating materials
(iii) Timber
(iv) Iron and steel goods
(v) Electrical goods
(vi) Safety lamps
(vii) Explosives- (1) gun power, (2) Salt peter, (3) Sulphur, (4) Catridge paper, (5) Safety fuses, (6) Gelignite, (7) Detonators, (8) Oil and catridge paper, (9) other explosives
(viii) Construction materials- (1) Cement, (2) Asbestos, zinc sheets etc., (3) Tiles, (4) Paints and varnishes, (5) others
(ix) Chemicals
(x) Other articles"

11. Thus, from the above, it follows that goods which are intended for use are integrally connected with production of goods without which commercial production would be inexpedient and therefore, the same must be treated as goods intended for use in the manufacturing of goods.

12. At this juncture, it will be profitable to refer to some of the judicial pronouncements.

In ***Indian Copper Corporation Ltd. (supra)*** the apex Court held as follows:-

> "….in a case where a dealer is engaged both in mining operations and in the manufacturing process—the two processes being inter-dependent—it would be impossible to exclude vehicles which are used for removing from the place where the mining operations are concluded to the factory where the manufacturing process starts. It appears that the process of mining ore and manufacture with the aid of ore copper goods is an integrated process and there would be no ground for exclusion from the vehicles those which are used for removing goods to the factory after the mining operations are concluded. Nor is there any ground for excluding locomotives and motor vehicles used in carrying finished products from the factory. The expression 'goods intended for use in the manufacturing or processing of goods for sale' may ordinarily include such vehicles as

> are intended to be used for removal of processed goods from the factory to the place of storage. If this be the correct view, the restrictions imposed by the High Court in respect of the vehicles and also the spare parts, tyres and tubes would not be justifiable. We are, therefore, of the opinion that the Corporation was entitled to specification as set out in the petition and explained in annexure B-2 to the petition in respect of items (*i*), (*ii*) and (*vi*)."

The Hon'ble Supreme Court in ***M/s. J.K.Cotton Spinning & Weaving Mills Co. Ltd. Vs. The Sales Tax Officer, Kanpur & Anr.,*** AIR 1965 SC 1310 considering the scope of section 8(3) (b) has held that the expression 'in the manufacture of goods' should normally encompass the entire process carried on by the dealer of converting the raw material into finished goods. Where any particular process is so integrally connected with the ultimate production of goods that in the absence of that process, manufacture or processing of goods would be commercially inexpedient, goods required in that process would fall within the expression 'in the manufacture of goods'. For instance, in the case of a cotton textile manufacturing concern, raw cotton undergoes various processes before cloth is finally turned out. Cotton is cleaned, carded, spun into yarn, then cloth is woven, put on rolls, dyed, calendered and pressed. All these process would be regarded as integrated process and included 'in the manufacture' of cloth. It would be difficult to regard goods used only in the process of weaving cloth and also goods not used in the anterior process as goods used in the manufacture of cloth. Reading the expression 'in the manufacture' of cloth in that restricted sense would give rise to many anomalies. Raw cotton and machinery for weaving cotton and even vehicles for transporting raw and finished goods would qualify under Rule 13 but not spinning machinery, without which the business cannot be carried on. Rule 13 does not justify importation of the restrictions, which are not clearly expressed nor imperatively intended. Goods used as equipment, such as tools, stores, spare parts, or accessories in the manufacture or processing of goods, in mining, and in the generation and distribution of power need not, to qualify for special treatment under Section 8(1), be ingredients or commodities used in the process, nor they be directly and actually needed for "turning out or the creation of goods."

The Hon'ble Supreme Court in ***Member, Board of Revenue, West Bengal V. Phelps & Co. (P) Ltd.*** [1972] 29 STC 101; [1972] 4 SCC 121, once again placed reliance on its earlier judgment in the case of *J.K.Cotton Spinning & Weaving Mills (supra)* and held that gloves used by workmen who were engaged in hot jobs or in handling corrosive substance in the course of manufacture cannot be denied those gloves which had to be used in the course of manufacture.

In the later judgment of the Hon'ble Supreme Court in ***Star Paper Mills Ltd. V. Collector of Central Excise, Meerut*** [1990] 76 STC 312, while dealing with the term "manufacture", their Lordships have held that term "manufacture" includes any process incidental or ancillary to the completion of a manufactured product.

The apex Court in *Chowgule & Co. Pvt. Ltd. & Anr. (supra)* held that where a dealer is engaged in mining operation and also in processing of mineral ore the item required for the said purpose could not be excluded from consideration.

Similarly, once again the Hon'ble Supreme Court in ***Collector of Central Excise, New Delhi V. Ballarpur Industries Limited*** [1990] 77 STC 282, has held that for an item to qualify as raw material, it need not necessarily and in all cases go into, and be found, in the end-product. Merely because this ingredient was consumed and burnt up in the course of chemical reactions it did not *ipso facto* cease to be a raw material.

13. Keeping in view the above statutory provisions and settled legal position, it is to be ascertained as to whether the 'Cement' and 'HSD' purchased by the petitioner are integrally related to the activities of mining and process of mining ore. It is also necessary to apply the 'functional test' to find out whether Cement and HSD are necessary to carry on the above activities.

14. It is not in dispute that HSD is directly consumed in running the mining machineries for extracting and processing of minerals. Cement is also used for construction of the foundation for installation of mining machineries and construction of benches and plates. These two items are integrally related to the mining activities. The extraction and process of minerals is not possible without use of the said items.

Considering the matter from any angle, we are of the view that HSD which is necessary to run the heavy machineries is integrally connected in the mining operation and processing of mining ore so long the said activities and the process is continuing. We are also of the view that 'Cement' is necessary for installation of the mining machineries and construction of benches/plates to carry on the mining operation and processing of mining ore. But the question that arises now is whether like HSD, Cement is necessary so long mining operation and processing of mining ore goes on. Cement as stated above, is necessary for installation of machineries, i.e., primary stage of the mining activities and construction of benches and plates. After installation of the machineries and construction of benches/plates, utilization of Cement is almost insignificant. Therefore, we feel it proper to remit the matter to O.P. No.2-Asst. Commissioner so far as the use of Cement is concerned to decide the extent of period for which the petitioner should be allowed to purchase Cement at a concessional rate of tax

for the purpose of utilizing the same in mining operation and processing of the mining ore.

15. In view of our findings in the preceding paragraphs, the decision in *Delta Paper Mills Ltd. (supra)* is of no help to the petitioner.

16. So far the initiation of the penalty proceeding under Section 10A of the CST Act is concerned, it is open for the petitioner to file his reply before O.P. No.2-Asst. Commissioner who has initiated the penal proceeding. O.P. No.2 is directed to decide the matter keeping in view the decision taken in this judgment.

17. In view of the above, we set aside the impugned orders under Annexures 1 and 2 passed by the O.Ps. 1 and 2 respectively and the writ petition is allowed to the extent indicated above. No order as to cost.

Writ petition allowed.

2011 (I) ILR – CUT- 694

B.P.DAS, J & M.M.DAS, J.

W.P.(C) NO.7553 OF 2005 with (Batch) (Decided on 06.01.2011)

PASUPATINATH TEMPLE &
SRI GANESH TEMPLE & ANR. . ….. Petitioners.

.Vrs.

THE COLLECTOR, CUTTACK & Ors. …… Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Unauthorized Construction of religious structures on public land, river banks belonging to C.D.A. – Eviction Proceedings under the Orissa Prevention of Land Encroachment Act, 1972 – Demolition order issued – Order challenged – Direction issued to C.D.A. to demolish the same after giving the encroachers two months time to remove such structures – Effective steps against officers deliberately allowing construction and not taking any action against the persons undertaking such construction – Held, direction issued to form a committee and the said committee shall form Anti Encroachment Squads which shall keep vigil on the encroachments and take effective steps against the encroachers at the appropriate time.

(Para 10)

For Petitioners - M/s. S.P.Mishra & R.N.Sinha, Sr.Advocates,
with M/s. S.Mishra, S.Dash,
B.S.Panigrahi, B.Mohanty & C.S.Ray.
Mr. B.B.Ratho Sr.Advocate (Amicus Curiae)

For Opp.Parties - Mr. Sisir Das, Addl.Govt. Advicate
& Mr. Dayananda Mohapatra.

For Petitioners - Mr. H.M.Dhal, B.Sahoo B.B.Swain & B.Patnaik.
Mr. B.B.Ratho, Sr.Advocate(Amicus Curiae)

For Opp.Parties - Mr. Sisir Das, Addl. Govt. Advocate
Shri S.K.Nayak, Sr.Advocate &
Mr. Dayananda Mohapatra.

B.P.DAS, J. In these writ petitions, the notices of eviction issued against Pasupatinath and Ganesh Temple, Bije at Ganeshghat, as well as against Maa Dakhinakali Temple, Bije at Ganeshghat and Lord Radhe Krishna Temple located at Belly View in village-Subarnapur under Cuttack Sadar Tahasil, in the proceedings initiated under the Orissa Prevention of Land

Encroachment Act, 1972 are under challenge. The action taken by the authorities of the State for demolition of the said temples and other unauthorized religious structures is on the allegation that such structures have been constructed unauthorisedly on public lands and on the lands reserved for park, community center and other public purposes in Cuttack City and within the areas of Bidanasi Housing Project and Sikharpur Housing Scheme of the Cuttack-Development Authority (CDA). In all the aforesaid four writ petitions the common question which arises for determination is as to whether the unauthorized religious structures like Temple, Gurudwara, Mosque, Church, etc. can be allowed to continue over public street/public land. Therefore, all these writ petitions were heard together and are being disposed of by this common judgment.

2. The brief facts leading to these writ petitions are as follows:

Cuttack was a very old and small city. It has completed 1000 years and, therefore, it is called as a Millennium City. Off late, within 10-15 years, there are mushroom growth of construction of religious institutions on public roads/public places unauthorizedly making encroachments on public lands as well as the lands along side the river banks of Mahanadi and Kathajodi and the lands belonging to the CDA in the Bidanasi Housing Project area and Sikharpur Housing Project Area, which were kept reserved for community centers, parks and open space. Such lands have been forcibly taken over by certain persons and temples and cluster of temples have been constructed thereon. When eviction proceedings were initiated and demolition orders were issued, the petitioners have approached this Court.

3. The issue relating to demolition of religious institutions on the Ring Road and on the embankment of river Kathajodi being a sensitive issue and looking into the far-reaching implications and consequences of the orders of demolition, apart from hearing the learned counsel for the petitioners, we have also heard the learned senior members of the Bar like Mr. B.B.Ratho and Mr.K.N.Jena. Learned counsel for the petitioners were of the view that the temples should not be demolished as some of the temples are very old and others like Radhe Krishna Temple of Shyama Shyama Satsang though has been constructed very recently, the same has made massive construction by spending a huge money.

4. Mr. Ratho appearing as Amicus Curiae submitted that Ring Road is of recent origin and its construction was started in the early part of 1983 and was almost over by 1985. The temples, which were there on the side of both the rivers Mahanadi and Kathajodi, particularly the old temples, did not pose any serious problem so far as traffic was concerned but for the development of the Ring Road. It was further submitted that Cuttack City is a cosmopolitan city, and multi-lingual, multi-religious people are living in the

city in harmony. The city has got several old temples, mosques, churches. Pir Stans, Gurudwaras and Jain Temples. At the same time those temples which have come up in recent past should not stand on the way of development of the city and/or create/cause public inconvenience. The sum and substance of the argument of Mr. Ratho is that the temples, which are within tolerable limit, should not be demolished.

Mr.Sinha, learned Senior Counsel appearing for the petitioners in O.J.C. No.7556 of 2005, submitted that there should not be any public nuisance in the place of worship and there can not be any doubt that no temple causing obstruction on public road or creating public nuisance should be allowed to remain. According to Mr.Sinha, within last 15 years there has been mushroom growth of temples in the city and a number of temples have come up in the meantime and some of them have been constructed on the lands given on lease. According to Mr.Ratho, those temples which are ancient in nature should be allowed to remain. In Ganeshghat, there are two temples, namely, Ganesh Temple and Kali Temple, in one compound and the same are ancient in nature. The ROR of 1927 stands in the name of Kali temple, which exists for more than a century. Duting British time, the said temple was constructed and there has been no encroachment of Govt. land. No further construction has also been made there. Only some renovation and repair has been done. Ganeshghat is named after Lord Ganesh whose temple is there. People of the locality used to take bath in the river in the morning and offer their prayers in the said temple and no other function is held there except Kali Puja in the Kali Temple. If necessary, the same may be demarcated with reference to the ROR. Some of the temples are mainly used for the purpose of selling Bhog and Prasad and people have converted those temples to commercial institutions. According to him, temples which are ancient in nature should be allowed to remain. Ganesh Temple and Kali Temple are ancient temples and the 1927 R.O.R stand recorded in the name of Kali Temple. So, those temples should not be demolished.

5. During the course of hearing of these cases, we directed the Tahasildar, Cuttack Sadar, to file an affidavit indicating the details of the temples constructed on both sides of the Ring Road leading from Khapuria Chhak to Sikharpur via Chahata including the nature of the lands over which such temples have been constructed. We also directed the CDA to furnish details of the temples and other religious institutions constructed unauthorizedly by encroaching the lands of the CDA in its housing project areas in Bidanasi and Mahanadi Vihar/Sikharpur. The Tahasildar and the Secretary, CDA, in terms of our order have filed separate affidavits furnishing the required information.

6. The Tahasildar in his affidavit dated 5.8.2009 has annexed detailed lists of the temples and other religious institutions constructed on Govt. lands on the road leading from Khapuria Chhak to Sikharpur via Chahata as well as on private lands, vide Annexure-A series. From the aforesaid lists, it appears that 61 religious institutions have been constructed on Govt. lands and 15 religious institutions have been constructed on private lands. In the Hal Settlement RORs the religious institutions constructed over private lands have been recorded either in the names of the deities or the persons on whose lands such institutions have been constructed. In these cases, we are not concerned with the religious institutions which have been constructed over private lands. Therefore, the aforesaid 15 religious institutions constructed over private lands are excluded from the purview of these writ petitions.

As regards other religious institutions, we find Sabik Settlement was done in the State of Orissa in 1927 and the Hal Settlement in Cuttack was done in the year 1986, the RORs of which were published in the year 1987. In our considered opinion, the religious institutions, which have been shown in the Hal Settlement RORs to have been existing, may not be demolished and effort be made by the authorities to regularize the same.

But the religious institutions, which have been constructed after 1987, and do not find mention in the RORs of 1987, and have been constructed over Govt. lands unauthorizedly and without permission from the competent authorities, and can not be regularized, should be demolished. In this regard, the Revenue authorities are directed to prepare a list of such religious institutions where after two months' time shall be given for removal of the unauthorized structures along with the deities installed therein. If the said unauthorized structures along with the deities are not removed within the time granted for the purpose, the authorities will be at liberty to remove the deities and demolish the unauthorized structures.

7. In terms of our order, the Secretary of the CDA has filed an affidavit on 24.7.2009 enclosing there with lists of religious institutions unauthorizedly constructed by encroaching different lay-out plots of the CDA in Sectors 6,7, 8,9,10 and 11 of Bidanasi Housing Project as well as in Sikharpur Housing Project in Mahanadi Vihar, vide Annexures A and B respectively. From the aforesaid lists, it appears that 6 religious strictures in Sector-6, 7 such structures in Section-7, 1 such structure in Sector-8, 8 such structures in Sector-9, 4 such structures in Sector-10 and 3 such structures in Sector-11 in Bidanasi Housing Project area and 6 such religious structures in Sikharpur Housing Project in Mahanadi Vihar have been constructed unauthorizedly and without permission of the competent authority of the CDA.

8. From the aforesaid lists, we find that the religious structures have been constructed unauthorizedly on the plots reserved for various public purposes, such as parks, primary schools, community centers, roads, land bank, group housing, police stations, open space, public utility centers, saleable plots in different sectors of Bidanasi Housing Project by the residents of different sectors. According to the learned counsel for the CDA, all the aforesaid religious structures have been raised unauthorizedly and without permission of the CDA. As it appears, there are two types of unauthorized structures found in the housing project areas of the C.D.a. – the first is religious structures, like temples, etc. and the other constructions made by persons encroaching the land of the C.D.A. for use of the same either for their won residence or for some other purposes. In our opinion, since the religious structures have been raised unauthorizedly on the lands ear-marked by the C.D.A. for public purposes, such as, primary school, community centers, roads, police station, public utility centers, etc., the C.D.A. shall demolish the same after giving the encroachers two months' time to remove the deities from such structures. As to the unauthorized structures raised by the encroachers over the land of the C.D.A. for purpose of using the same as their residence or for some other purpose, the C.D.A. shall also give two months' time to such encroachers to make the land encroachment-free failing which it shall demolish such structures and make the land encroachment-free.

9. Our attention was drawn to the order dated 29.9.2009 passed by the supreme Court in SLP (C) No.8519 of 2006 (Union of India v. State of Gujarat and others). By the aforesaid order, the Supreme Court considering a similar question while issuing notice to all the States and the Union Territories, as an interim measure directed that henceforth no unauthorized construction should be carried out or permitted in the name of Temple, Church, Mosque or Gurudwara, etc. on public streets, public parks or other public places etc. But in respect of unauthorized constructions of religious nature, which have already taken place, the Supreme Court in the said order directed the State Governments and the Union Territories to review the same on case to case basis and take appropriate steps as expeditiously as possible. We require a similar affidavit from the Chief Secretary and also direct him to take effective step against the officers, who are deliberately allowing construction of unauthorized religious structures and other structures on public places and are not taking any action against the persons undertaking such unauthorized constructions, even if the same is taken to their notice.

10. That apart, the Chief Secretary is directed to form a Committee under the chairmanship of the Revenue Divisional Commissioner, Central Zone, Cuttack with the Commissioner of Police, Bhubaneswar-Cuttack Police

Commissionerate, the Municipal Commissioner of the Cuttack Municipal Corporation and the Vice-Chairman of the C.D.A. as its members. The said Committee shall form Anti encroachment Squads consisting of personnel of the above four wings, i.e., the Revenue, Police, C.M.C. and C.D.A. and after dividing the city into different zones entrust each zone to one such Anti Encroachment Squad, which shall keep vigil on the encroachments and take effective steps against the encroachers at the appropriate time. The Anti Encroachment Squads shall be answerable to the Committee which shall sit once in two months to review the action taken by the Anti Encroachment Squads and take appropriate action in the matter. The Committee shall be formed within one month from the date of communication of this order.

11. The writ petitions are disposed of with the aforesaid directions but without any order as to costs. Let a copy of this judgment be sent to the chief Secretary, Govt. of Orissa, Bhubaneswar.

Writ petition disposed of.

2011 (I) ILR – CUT- 700

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

W.P.(C) NO.18494 OF 2009 (Decided on 03.03.2011)

UTKAL PHARMACEUTICALS MANUFACTURERS ASSOCIATION & ANR. ……Petitioners.

.Vrs.

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

Tender – Supply of drugs and medical consumables – Earlier it was awarded to the EPM rate contract holders i.e. local SSI Units/MSMEs – Decision taken to abolish the practice of procurement of drugs on EPM rate contract holders but to go for national bidding of 31 items of drugs and medical consumables - No allegation against any of the Units of the petitioner association regarding supply of drugs not of standard quality – Change in policy must be made fairly and should not be done arbitrarily or by any ulterior criteria which is the basic requirement of Article 14 of the constitution – Held, Tender call notice so far it relates to the 31 items of drugs and medical consumables is quashed and those items to be excluded from the Tender Call notice for being procured from the local SSI Units/MSMEs under the rate contract system.

(Para 6 to 10)

Case laws Referred to:-

1.(2003) 5 SCC 437 : (Union of India & Anr.-V-International Trading Co. & Anr.).

2.AIR 1999 SC 303 : (State of Bihar-V- M/s. Suprabhat Steel Ltd.)

For Petitioners - M/s. J.Patnaik, & S.Mohanty Sr.Advocates with M/s. S.P.Panda, S.Nanda, A.Mohapatra, A.Meher & A.Mohanty.

For Opp.Parties - Mr. Ashok Mohanty, Advocate General & Mr. J.P.Patnaik, Addl. Govt. Advocate

For Intervenor - M/s. Yuvraj Parekh, B.B.Jaysingh, S.Mukherjee, S.K.Behera & K.Ghadei.

B.P.DAS, J. Utkal Pharmaceuticals Manufacturers Association, an association of twenty Small Scale Pharmaceutical Industries registered

under the Societies Registration Act, 1860, and its Joint Secretary (Executive) have filed this writ petition under Article 226 of the Constitution of India challenging Tender Call Notice No.SDMU/2009-2010-DMC-1-008 issued by the Director of Health Services, State Drug Management Unit, Orissa, vide letter No.11106/SDMU-1-05/09 dated 28.10.2009, under Annexure-7, as illegal, arbitrary, discriminatory and contrary to the policy decisions of the Govt. of Orissa, i.e., the Industrial Policy Resolution, 2007 (IPR 2007) as well as the Orissa Micro, Small and Medium Enterprise Development Policy, 2009 ('Orissa MSME Development Policy 2009') and have prayed for quashing the said Tender Call Notice.

The Director of Health Services, State Drug Management Unit, O.P. no.2, floated the tender in Annexure-7 for supply of drugs and medical consumables for a period of one year from the date of approval of the tender on rate contract basis. The petitioners contended that the inclusion of 31 rate contract items, which are procured from the local Small Scale Industrial (SSI) Units/Micro, Small and Medium Enterprises (MSMEs), in the Tender Call Notice has contravened the IPR 2007 as well as the Orissa MSME Development Policy 2009.

2. The further contention of the petitioners is that all the members of petitioner no.1-Utkal Pharmaceuticals Manufacturers Association are engaged in manufacture and supply of drugs and pharmaceuticals to the Govt. of Orissa for the last twenty years having valid manufacturing licence, certificate of Good Manufacturing Practice (GMP) and ISO certifications, as required under the Drugs and Cosmetics Act, 1940.

The State Govt. in order to ensure that store items for Govt. Departments and agencies under its control are procured from industries located within the State and those local units get price preference for the aforesaid purpose and simultaneously to ensure that local products are cost-effective and meet overall quality requirement for competitiveness, the State made efforts to distribute purchase orders equitably among the participating industries prepared to accept the lowest negotiated rate keeping in view their production capacity.

According to the petitioners, to prevent monopoly, the rate contract system in Orissa was introduced at the behest of the Health Department of the Govt. of Orissa. The rate contract system for drugs of Small Scale Pharmaceutical Industries has been in force since last twenty years. The rate contract system is now within the domain of the Directorate of Export Promotion and Marketing (DEPM). Keeping in view the above objectives, certain items of drugs and medical consumables are earmarked by the State Govt. for purchase from approved local SSI units and those products are to be purchased only from the DEPM approved SSI units taking their past

performance and capacity of production into consideration. For this, the local SSI units should have (a) valid drug manufacturing licence and (b) valid Export Promotion and Marketing (EPM) rate contract.

The basic features of rate contract system for drugs and medicines formulated by the State Govt. are : (a) The rates of rate-contract items are to be finalized by the Drugs Committee of EPM in which the Health Secretary shall be the Chairman on cost plus basis and the rates so finalized by the DEPM Drugs Committee shall be subject to audit by the Comptroller and Auditor General (CAG); (b) The rate contract system is a unique system to provide market support to MSMEs as per the provisions of the Industrial Policy Resolution (IPR) since the Govt. of Orissa due to paucity of fund is unable to provide much subsidy, tax and excise exemption and other incentives as in other States; (c) by procuring drugs from outside, the Govt. of Orissa does not earn any revenue, nor does it address its objects of providing employment (direct/indirect),Development of the State by value addition by promoting MSMEs being vice versa as these MSMEs have investment limit of Rs.1 crore and (d) The rate contract in respect of specific store items not in the exclusive list and manufactured by the local SSI units are finalized by the DEPM on the basis of competitive offers received from local units, cost structure obtained from these offers, market price of similar items valid DGS & D rate, if any, and other relevant considerations,

A decision was thus taken that the Departments and Agencies under the control of the Govt. of Orissa would only purchase rate contract items from the rate contract holders/small scale industries at the price fixed, without inviting tenders.

Accordingly, the DEPM by Circular nos.2106(200) and 2003(200) dated 8.3.1999 issued fresh rate contracts in respect of drugs and medicines with SSI units in the State for supply of store items. Phase-I of the said rate contract included 31 items and Phase-II 44 items. The aforesaid identified drugs and medical consumables are purchased by the Director of Export Promotion and Marketing (DEPM) only from the approved local pharmaceutical enterprises taking their past performance, i.e., quality, timely supply, and capacity of production into consideration. For this, the local SSI units should have (a) valid drug manufacturing licence and (b) valid Export Promotion and Marketing (EPM) rate contract.

The State Govt. in Industries Department by circular No.XIV-HI-9/04-3042/1 dated 17.2.2004 framed the Purchase Policy as envisaged under the IPR, 2001. Clause 3 of the said Purchase Policy provides :

"3) Rate Contract :-

i. Rate contract in respect of specific store items not in the exclusive list and manufactured by the local small scale industrial units will be finalized by the Director of Export Promotion & Marketing. This will be done on the basis of competitive offers received from local units, cost structure obtained from these offers, market price of similar items valid DGS&D rate (if any) and other considerations relevant to fixing the price of the product. Besides, in respect of bulk items a representative of the purchasing Department would be actively associated at the time of rate contract finalization.

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

Periodic extensions were granted by the DEPM as to validity of rate contract with the local SSI units.

In the meantime, in the year 2003 the State Govt. with the financial assistance of the Central Govt. as per the schemes like Small Industry Cluster Development Programme (SICDP) formulated a special package for self-employment with the prime objective to promote small scale industries through development of industrial clusters, ancillary and downstream industries and all new SSI units and existing SSI units taking up expansion/modernized/diversification located in industrially backward areas which started commercial production between 1,4,2003 and 31.3.2007 were stated to be eligible for sales tax reimbursement for a period of 5 years limited to 100% Fixed Capital Investment. The Director of Industries, O.P. no.3, taking into account the views of the Director, SISI and other concerned organizations by order dated 7.7.2005 identified various clusters for different kinds of product/processing SSI units including pharmaceuticals. In a meeting held on 2.9.2006 under the chairmanship of the Commissioner-cum-Secretary, Industries Department regarding Cluster Development, after discussing various action points, it was resolved under paragraph 2 that Utkal Pharmaceuticals Manufacturers' Association (UPMA), petitioner no.1 herein, would registered the SPV (Special Purpose Vehicle) for implementation of the cluster development programme. The representative of UPMA was asked to furnish proposal under SICDP at the earliest. It was further resolved that UPMA would prepare a report on quantum of generic drug purchases of the State Government and submit proposal to the Industries Department for improving the share of local industries in the Government purchases. The proposal was to be submitted at the earliest under SICDP.

While the matter stood thus, IPR 2007 came into force with effect from 2.3.2007, inter alia, laying down marketing support to MSME (Micro, Small and Medium Enterprises) in Government procurement. The relevant clauses of the IPR 2007, i.e. Clauses 4, 4,1, 13,1 and 30, on which the petitioners placed reliance, are extracted here under :

"4. GENERAL POLICY FRAMEWORK

The Industrial Policy 2007 shall pursue a multi-pronged approach for industrial promotion by providing infrastructure support, institutional support and pre and post-production incentives. While the IPR shall support industrialization in general, directed efforts shall be made to incentives investment in thrust and priority sectors with a view to maximizing the triple objectives of value addition, employment generation and revenue augmentation.

4.1 Micro Enterprises : The focus shall be on

4.1.1 Promoting linkages with micro finance institutions

4.1.2 Product development through design and technology support.

4.1.3 Provision of raw material linkages. Orissa Small Industries Corporation (OSIC) shall set up raw material banks to provide such support.

4.1.4 Market development through focused market access initiatives.

4.1.5. Intensification of cluster development project with special emphasis on promotion of Common Facility Centers (CFC) through community based Public Private Partnership (PPP) initiatives."

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

13.1 The existing rules for extending marketing support to Small Scale Industries shall be brought in alignment with the newly enacted Micro, Small and Medium Enterprises Act, 2006 and corresponding Rules. The following measures shall be undertaken :

(a) Comprehensive review of the rate contract purchase list, exclusive purchase list and open tender purchase list shall be undertaken by a Committee consisting of Secretary, Industries Department, Director, Export Promotion and Marketing (EP&M), Director, Industries and representatives of Industries Associations, which shall submit their recommendations for Government approval in Industries Department.

(b) With a view to encouraging large and medium industries, including those in private sector, in the State to meet their store purchase requirements from the local MSEs, institutional mechanism in the line

of Plant Level Advisory Committee existing in respect of central public Sector Undertakings (CPSUs) shall be devised and implemented.

(c) Specific efforts shall be made to increase awareness amongst local MSMEs regarding export opportunities and export procedures. The Export Promotion Cell in the Orissa Small Industries Corporation Limited shall be strengthened to assist local small scale enterprise to access export market.

xxx xxx xxx"

"30. MISCELLANEOUS

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

xxx xxx xxx

According to the petitioners, "Priority Sectors" has been defined in the IPR 2007 to mean new industrial units where fixed capital investment commences on or after the effective date and which fall within the categories indicated therein including Pharmaceuticals.

Thereafter, the Industries Department in order to further the objective, i.e. to support to SSI units, formulated Orissa MSME Development Policy, 2009 by notification dated 17.2.2009 in conjunction with the IPR 2007 and in consonance with Section 11 of the MSME Act, 2006 for promoting the MSMEs in the State and the same was published in the extraordinary issue of the Orissa Gazette dated 9.3.2009 under Annexure-5. The Orissa MSMEs in the State and the same was published in the extraordinary issue of the Orissa Gazette dated 9..3.2009 under Annexure-5. The Orissa MSME Development Policy, 2009 was approved by the State Cabinet in their 44th meeting held on 1..2.2009, which aimed at broad-basing the growth of MSMEs of the State in all potential sectors of economy thereby widening opportunities for employment generation, revenue augmentation, exports and realizing the full potential of Micro, Small & Medium Enterprise Sector of the State.

In the meanwhile, in a meeting held on 11.7.2008 between the Health and Family Welfare Department of the State Govt. and the members of the petitioner-association, the Secretary, Health and Family Welfare, explained that a decision had been taken by the Govt. regarding floating of National Tender for 31 items, which were being earlier purchased through EPM rate contract. Certain Enterpreneur Associations submitted representation to the Chief Secretary requesting to review the aforesaid

decision of the Govt. to do away with the rate contract system for drugs and to allow the rate contract system to continue and to include more items in the rate contract list for which offer had also been invited by the DEPM.

According to the petitioners, the aforesaid MSME Development Policy, 2009, which was approved by the State Cabinet in their 44th meeting held on 1.2.2009, was formulated after an elaborate consultative process involving all stake-holders including the Industries Associations, Financial Institutions, Experts and Government Departments concerned. Thereafter the Directorate of Health Services, State Drug Management Unit, by letter dated 22.6.2009 intimated all the SSI units including the petitioner-association vide Annexure-6 to continue supply of drugs at the previous contract rate as the Govt. vide letter dated 18.6.2009 have allowed the procurement of drugs covered previously under EPM rate contract from the local SSI units having valid GMP and manufacturing licence and would agree to supply the drugs at the previous rate.

Despite the aforesaid policy decision of the State Govt. in Annexure-5 and despite the fact that the members of petitioner-association are enjoying the benefit of rate contract in terms of the IPR 2007 and the Orissa MSME Development Policy, 2009 and such practice is in vogue and, as would appear from Annexure-6, the local SSI units have been intimated to continue supply of drugs at the previous contract rate, the Director of Health Services, State Drug Management Unit, O.P. no.2, and the Commissioner-cum-Secretary, Health and Family Welfare Department of the State Govt., O.P. no.6, included 31 rate contract items in the impugned tender call notice in Annexure-7, which, according to the petitioners, is illegal, arbitrary and has no sanction and approval of the State Govt. and without any authority of law and contrary to the IPR 2007 and the Orissa MSME Development Policy, 2009. In other words, when the list of rate contract items manufactured by the local SSI units/MSMEs already exists, the decision to change the mode of purchase, i.e., switching over to procure the rate contract items through open tender by O.P. nos.2 and 6, is against the policy decision of the State Govt. and is clearly contrary to the IPR 2007 and the Orissa MSME Development Policy, 2009.

Learned counsel for the petitioners on the basis of the aforesaid facts submitted that effectiveness of the Orissa MSME Development Policy, 2009, which is a policy decision of the State Govt., can not be taken away by an executive fiat and the benefits granted under the aforesaid policy can not be denied or curtailed by the decision of O.P. Nos.2 and 6. According to him, the decision of the Director of Health Services to invite tender in Annexure-7 for supply of drugs and medical consumables, which have been included in

the list of rate contract items, is unsustainable in law and contrary to the policy decision of the State Govt.

3. O.P. Nos.2 and 6 have jointly filed a counter affidavit mainly taking the stand that the tender has been floated after the decision was taken by the committee chaired by the Chief Secretary in consultation with the DEPM, Secretary, Health and Family & Welfare Department, Director of Health Services, Financial Advisor, Health & F.W. Department and others to procure 31 items of drugs and medical consumables through open tender and approved by the Hon'ble Chief Minister. This has been done in order to ensure better quality of essential drugs which can be procured at the right time at a competitive price for the benefit of the patients. It has been stated that, as per the available information, in States like Kerala, Tamil Nadu, West Bengal, Andhra Pradesh, Madhya Pradesh, Gujarat and Karnataka there is no EPM rate contract like system for drugs. A further ground has been taken that there is every chance of formation of cartel and hiking of price of the items if tender is restricted to one group of firms.

Our attention was drawn to the proceedings of the meeting held on 11.2.2007 under the chairmanship of the Chief Secretary regarding procurement of drugs on EPM rate contract from SSI units of Orissa, under Annexure-E/2, wherein decision has been taken to abolish the present system of reservation through EPM rate contract availed by the SSI units for procurement of drugs and medical consumables and to adopt open national bidding for procurement of drugs and medical consumables of the items under EPM. The compelling reasons for taking the aforesaid decision, according to the learned Advocate General, were that the costing done by the EPM for those 31 items were much higher than the price of the same drugs prevalent in other States; the drugs supplied by the SSI units were found more to be "Not of Standard Quality" (NSQ) compared to drugs supplied by outside firms selected through tender; one item was supplied by 8-10 firms and each firm supplies in many batches, making the quality testing a very difficult task; and the Health Secretary emphasized that the Health Department had to provide good quality drugs within the available resources to all Govt. Health Institutions of the State.

Our attention was further drawn to the copy of the note sheet of the relevant file, which is annexed under Annexure-E/2. The relevant part of the minutes of the Principal Secretary to Govt., Health & F.W. Department is extracted herein below :

"xxx xxx xxx

In the last meeting it was presented that none of the states have rate contract and the decision that was taken in the meeting chaired by Chief Secretary was also agreed to by the Director, E.P.M. and according to his

insistence for the interest of local SSI Unit last three paras was agreed to by which a fair chance will be given to the SSI Unit of the state, as is done by Tamilnadu which is the best possible available.

> In the year 2000, saline was supplied on EPM rate contract; four persons died. Recently Director, EPM and Drugs Controller personally attended High court on this issue. Thereafter saline is no longer procured from EPM rate contract.
>
> At the time of untoward incident that took place in July, August when a fake medicine manufacturing unit was detected at Bolangir, news also surfaced about medicine-less strips and foreign material mixed in medicine which were supplied to the government health centers and both the cases relate to the local SSI Units. In a sensitive sector like health for giving protection only to 17 enterprises who supply medicines to more than 1700 health institutions at a very high cost than is available in market is more than a protection – It is rather promoting few business interest. I feel this is against the public interest. In the name of protection to a handful of industries state can not take risk. I feel decision taken in the meeting chaired by Chief Secretary was very sympathetic to local SSI units compared to many other states.
>
> I therefore do not agree with the proposition of Industries Department and request to approve the minutes as has been decided in the same meeting. This may be implemented during the year quickly as medicine availability is being affected."

The Chief Secretary agreed with the views of the Health Secretary and ultimately the Hon'ble Chief Minister has approved the decision.

4. A rejoinder affidavit has been filed by the petitioners rebutting the averments made in the counter affidavit.

5. On the facts stated and the submissions made by Shri J. Patnaik, learned Senior Advocate for the petitioners, and learned Advocate General for the State, the questions that fall for consideration and decision of this Court are as follows :

(1) Whether the benefits granted to the SSI units/MSMEs by the State Govt. under the IPR 2007 and the Orissa MSME Development Policy, 2009 can be taken away by a Department of the said Govt. on the ground of irregularity in supply of drugs ?

(2) Whether the case of the State that the decision to abolish the present system of procurement of drugs through EPM rate contract availed by the SSI units to adopt open national bidding in public interest, is correct and sustainable ?

6. Let us first see whether any cogent reason has been assigned for the decision taken in the meeting held under the chairmanship of the Chief Secretary to abolish the practice of procurement of drugs on EPM rate contract from SSI units of Orissa and whether the comments made by the Principal Secretary, Health & F.W., which led to the aforesaid decision is correct ? The reasons assigned for taking the decision to abolish the procurement of drugs through EPM rate contract are that the standard of quality of the drugs was not maintained and the price fixed by the EPM for the drugs in question was higher than the price of such drugs prevalent in other States. The Health Secretary indicated that four persons died due to administration of the Saline supplied in the year 2000 on EPM rate contract and that a fake medicine manufacturing unit was detected at Bolangir and news also surfaced that medicine-strips were found without any medicine and foreign material was mixed with the medicines which were supplied to Govt. health centers and both the cases related to the local SSI units.

In this regard our attention was drawn to the representation dated 11.1.2008 submitted to the Hon'ble Chief Minister, under Annexure-12 series to the rejoinder affidavit, wherein the petitioners have vehemently denied the aforesaid allegation. The reasons assigned in the minutes of the Health Secretary tear open the administrative failure rather than failure on the part of the EPM rate contract holders. There is no allegation against any of the units of the petitioner-association regarding supply of drugs not of standard quality (NSQ). That apart, there are different wings under O.P. nos.2 and 6, which are entrusted with the work of inspection of the drug manufacturing units and penal provisions have been made in the Drugs and Cosmetics Act and Drug Management Policy to punish the spurious drug suppliers. Apart from that, manufacturing licences are granted after thorough scrutiny of the products of the manufacturers of drugs so also Certificate of Good Manufacturing Practice (GMP) and ISO/ISI certificates are granted after quality testing of the products thoroughly and all those certificates are necessary for the purpose of registering a unit under the EPM rate contract. Therefore, if the aforesaid certificates are granted without thorough quality testing of drugs, then it is the Department of Health which is blame-worthy. That apart, there is nothing in the counter affidavit to show that any of the units of the petitioner-association has supplied at any time fake drugs. There is some force in the argument of the learned counsel for the petitioners that if the process of inspection and testing of the quality of the drugs manufactured is not continued and not done stringently or strictly, and regularly, there can be no guarantee that outside drug suppliers will not supply the drugs of NSQ. The argument advanced on behalf of the State and the apprehension expressed have no basis.

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

8. Now there is no dispute that the units of the petitioner-association are the Micro, Small and Medium Enterprises and for the last so many years they are getting the market support as per different Industrial Policies of the Govt. of Orissa and the Orissa MSME Development Policy, 2009, which was notified in the notification dated 17.2.2009, vide Annexure-5. The very purpose of the MSME Act, 2006 and the Orissa MSME Development Policy, 2009 is to protect the Micro, Small and Medium Enterprises. If the argument advanced on behalf of the State is accepted, the members of the petitioner-association have to compete with large industrial units which shall lead to competition among two unequals.

9. We have no hesitation to say that by the impugned action of the State, the benefits given to the SSI units/MSMEs by the State Govt. in the Industries Department under the MSME Act, 2006 and the IPR 2007 and Orissa MSME Development Policy, 2009 have been snatched away by another Department of the State Govt., i.e., Health and Family Welfare Department.

10. For the above reason, the action of O.P. no.2 in floating the tender for supply of drugs and medical consumables, which were earlier awarded to the EPM rate contract holders, i.e., local SSI units/MSMEs, by the DEPM, and during the subsistence of the order in Annexure-6, is illegal. We may further mention here that the decision to abolish the system of procurement of drugs and medical consumables through EPM rate contract from the local SSI units/MSMEs and to go for national bidding to procure the said rate contract items has been taken in a meeting chaired by the Chief Secretary and thereafter O.P. no.2 went ahead with the decision to float the open tender. This very process of decision is not in consonance with the settled position of law. The apex Court in the case of State of Bihar v. M/s. Suprabhat Steel Ltd., AIR 1999 SC 303 held that the incentives given under the Industrial Incentive Policy by the State Govt. on the basis of the resolutions of the State Cabinet can not be denied. In other words, there can be a change in the policy decision of the Govt. by the Cabinet itself. Having not done so, the decision taken by O.P. nos.2 and 6 to go for national

bidding of 31 items of drugs and medical consumables, which were reserved for EPM rate contract holders of the SSI units/MSMEs in consonance with the IPR 2007 and the Orissa MSME Development Policy, 2009 in accordance with the policy decision of the State Govt. is illegal. Accordingly we quash the Tender Call Notice in Annexure-7 so far as it relates to the 31 items of drugs and medical consumables. The said items of drugs and medical consumables be excluded from the Tender Call Notice for being procured from the local SSI units/MSMEs under the rate contract system. The writ petition is allowed to this extent. There shall be no order as to cost.

Writ petition allowed.

2011 (I) ILR – CUT- 712

L.MOHAPATRA, J & ARUNA SURESH, J.

W.P.(C) NO.4417 OF 2004 (Decided on 21.01.2011)

SANTOSH KU.SAHU (DEAD)
AFTER HIM SABITA SAHU ……Petitioner.

.Vrs.

ADDL. D.I.G.P., GROUP CENTRE,
CRPF,BBSR & ANR. ….. ….Opp.Parties.

Service – Departmental Proceeding against the petitioner for unauthorized absence in service - He willfully and intentionally disobeyed the lawful orders of the competent authority – Disciplinary authority imposed punishment of dismissal from service – Appeal filed but the appellate authority confirmed the punishment – Hence the writ petition.

Petitioner is in the habit of over staying whenever he goes on leave – There are nine such instances out of which for three such unauthorized overstay departmental proceedings were conducted and the petitioner had been punished – In spite of such punishment, the petitioner did not improve his conduct and again remained absent unauthorizedly taking the plea of his wife's illness –Retaining the petitioner in service or showing any lenience in the matter of punishment would set a bad example for other members of the organization to follow – Held, writ petition is liable to be dismissed.

(Para 5,6,7)

Case law followed:-

AIR 2005 SC 4289 : (Union of India & Ors.-V- Gulam Mohd.Bhat)

For Petitioner - M/s. Saswata Patnaik, L.Mishra & S.N.Ratha.
For Opp.Parties - Mr. Sakti Dhar Das
Asst. Solicitor General of India

L.MOHAPATRA, J. The petitioner, a Constable in Central Reserve Police Force (in short "C.R.P.F.") was proceeded departmentally and he having been found guilty of the charge, faced a major punishment of dismissal apart from other punishments and his appeal also having been rejected, this writ petition has been filed by him challenging the order of punishment as well as the order passed by the appellate authority.

2. The petitioner joined as a Constable in C.R.P.F. on 30.6.1985. He was posted at different places and while working at Bhubaneswar in the month of January, 1999, he was promoted to the post of Lance Naik. In

June 2002 after getting information about his wife's illness, he applied for three days leave and one day P.L. for 30th of June, 2002 was granted and two days C.L. for 1st of July and 2nd of July 2002 were also granted. The petitioner availing the leave left for Bolangir to attend his wife and could not come back and join on 3.7.2002 because of the condition of his wife. On 5th of July, 2002 he sent an application to the D.I.G. of Police, Group Centre, C.R.P.F., Bhubaneswar expressing his inability to join in time. Another similar letter was also written by him to the same authority on 15.8.2002. However, after the condition of his wife improved, he joined duty on 2.11.2002. Thereafter he submitted an application with all Medical Certificates for regularization of his absence from 3.7.2002 to 1.11.2002. Instead of regularizing the said period as leave, a departmental proceeding was initiated against him on the ground of "overstay" without intimation for the said period. In the enquiry he was found guilty of the charge and accepting the enquiry report, the disciplinary authority in Annexure-4 dismissed him from service. His period of unauthorized absence was treated as Dies-Non and the period of suspension from 7.3.2003 to 26.7.2003 was directed to be treated as such. All medals and decorations earned by him were directed to be forfeited. His appeal against the said order of punishment was dismissed by the appellate authority in Annexure-6. Challenging the order of punishment as well as the order of the appellate authority, this writ petition has been filed.

3. The learned counsel for the petitioner argued solely on the question of quantum of punishment and submitted that overstay for the reasons stated in the petition should not have attracted the punishment of dismissal from service. Shri S.D. Das, the learned Assistant Solicitor General referring to the counter affidavit filed by the Department submitted that earlier the petitioner had remained absent unauthorisedly on nine occasions and on three occasions he was proceeded with by the Department and had been punished. He being a habitual unauthorized absentee, no other punishment could have been imposed for such conduct.

4. The petitioner in the writ petition does not challenge the findings of the Enquiry Officer. Rather, the ground taken in the writ petition and the submission of the learned counsel for the petitioner are that because of illness of his wife he had no other option except remaining present by her side till her condition improved and he had not only sent two letters intimating these facts to the higher authority but also after joining, he had submitted an application for regularizing the period of absence as leave. Had that been allowed by the Department, the petitioner could not have been proceeded departmentally on the charge of unauthorized absence.

5. On perusal of the enquiry report, we find that evidence was adduced on behalf of the Department in support of the charge but the petitioner did not cross-examine those witnesses. Therefore, the uncontroverted statements of the witnesses examined on behalf of the Department were accepted by the Enquiry Officer and the petitioner was found guilty of the charge. While imposing punishment, the disciplinary authority has observed that the service conditions in C.R.P.F., which is a Para Military Force of the Union of India, are very sensitive and its members have to be extraordinary vigilant and obedient while discharging lawful duties. The petitioner seems to be of incorrigible character who willfully and intentionally disobeyed the lawful orders of the competent authority and continuation of such type of individual in the Force is likely to set bad example for others to follow. With these observations, the disciplinary authority imposed the punishment of dismissal from service apart from other punishments stated earlier. The appellate authority also took similar view while dismissing the appeal.

6. In the counter affidavit filed by the Department, it is stated that the petitioner is in the habit of overstaying whenever he goes on leave. Nine such instances have been given in paragraph-13 of the counter affidavit. In respect of three such unauthorized overstay, departmental proceedings were conducted and the petitioner had been punished. In spite of such punishment, the petitioner did not improve his conduct and again remained absent unauthorisedly taking the plea of his wife's illness.

7. Under such circumstances, we are also of the view that retaining the petitioner in service or showing any lenience in the matter of punishment would set a bad example for other members of the organization to follow. Our view is supported by a decision of the Hon'ble Supreme Court in the case of ***Union of India and others v. Gulam Mohd. Bhat, reported in AIR 2005 S.C. 4289***.

8. For the reasons stated above, we do not find any merit in the writ petition and accordingly dismiss the same.

Writ petition dismissed.

2011 (I) ILR – CUT- 715

L.MOHAPATRA, J & ARUNA SURESH, J

W.P.(C) NO.13332 OF 2008 (Decided on 17.2.2011)

STATE OF ORISSA & ANR. …… Petitioners.

.Vrs.

BIPIN BIHARI JENA & ANR. …… Opp.Parties.

Service – Departmental proceeding – Exparte inquiry – Punishment imposed for dismissal from service – Tribunal set aside the order of punishment directing fresh inquiry from the stage of recording of evidence – On fresh inquiry the Inquiry Officer exonerated O.P.1 from all the charges – Disciplinary authority differed with the findings of the Inquiry Officer and while issuing second show cause notice no reason assigned for his disagreement – Tribunal justified in setting aside the second show cause notice and the consequent punishment – Tribunal thought it proper to substitute the punishment instead of again remitting the matter back to the disciplinary authority – Held, no infirmity in the impugned order of the Tribunal either in setting aside the order of punishment or in substituting the punishment.

(Para 6)

For Petitioners - Addl. Govt. Advocate.
For Opp.Parties - M/s. A.Ghose & S.K.Mohanty
(for O.P.No.1)
(Mr. G.P.Dutta)

L.MOHAPATRA,J. This writ application is directed against the order of the State Administrative Tribunal, Bhubaneswar in O.A. No.1036 of 2004 at the Instance of the State authorities. Opposite Party No.1 was the applicant before the Tribunal. This case having a chequered carrier, it is necessary to refer the brief facts of the case before examining the legality of the impugned order.

2. Opposite party no.1 joined Orissa Administrative Service in the year 1981. It is alleged that while working as B,.D.O. at Gunupur in the erstwhile district of Koraput, he committed several serious irregularities during 1986 and a disciplinary proceeding bearing No.10028 dated 29.7.87 was initiated against him for such irregularities. Initially the memorandum of charges contained five different charges, but later on it was increased to s even. The inquiry was conducted and report submitted on 23.04.1990. The disciplinary authority accepted the report and in consultation with O.P.S.C. issued the order of punishment of dismissal from service. Opposite party no.1

challenged the order of punishment in O.A. No.1194 of 2004 before the Tribunal. The Tribunal after examination of the inquiry report found that the witnesses were examined ex parte, documents were admitted without giving opportunity to opposite party no.1 and an ex parte enquiry had been conducted. Accordingly, the Tribunal set aside the findings of the Inquiry Officer, the order of punishment by its judgment dated 27.03.1995 and remitted the matter back for fresh inquiry from the stage of recording of evidence. In terms of the order of the Tribunal in the said original application, the State Government by order dated 20th October, 1995 directed the same Inquiry Officer to proceed with the inquiry afresh from the stage as it stood on 30.05.1989. It was clarified in the said order that the Marshaling Officer will marshal the evidence during enquiry. After remand, the inquiry was conducted and report was submitted on 29.06.2001 and on receipt of the inquiry report, the first show cause notice along with the inquiry report was sent to opposite party no.1 for submitting his reply. The 2nd show cause notice was issued on 02.08.2002. Challenging the second show cause notice, opposite party no.1 again approached the Tribunal in O.A. No.1683 of 2002. The Tribunal disposed of the said original application on 21.4.2003 clarifying that as per Rule 15 (1) (i) (b) of the OCS (C.C.A) Rules, 1962 as amended in 2000, the disciplinary authority was required to furnish a statement of his findings with brief reasons of disagreement with the findings of the Inquiry Officer. Since the second show cause notice did not disclose the reasons of disagreement, the same was quashed and the disciplinary authority was directed to dispose of the proceeding after issuing fresh notice indicating the reasons for disagreement with the findings as well as the recommendation of the Inquiry Officer. In compliance of the order of the Tribunal, a second show cause notice was issued afresh and the opposite party no.1 submitted his reply to the same. On consideration of the reply, the disciplinary authority directed compulsory retirement of opposite party no.1 from service with immediate effect, recovery of Rs.21,500/- and the period of suspension was directed to be treated as such. Challenging the said order of the disciplinary authority, the present original application was filed before the Tribunal.

3. A counter affidavit was filed by the State before the Tribunal stating therein that all necessary procedures were followed by the Inquiry Officer and the second show cause notice was issued in terms of the amended Rule and considering the gravity of the charges, the order of punishment was rightly passed by the disciplinary authority and such punishment was also accepted by the OPSC.

4. The Tribunal in the impugned order found that there is no indication as to how the disciplinary authority came to the conclusion that charges 1 to 5 had been proved specially when the Inquiry Officer concluded that the

Marshalling Officer had failed to prove the charges due to non-production of the material documents. It was also indicated in the impugned order that few of the charges are based on ex parte evidence that had been collected by the I.O. at the first instance and the disciplinary authority could not have taken those ex parte evidence into consideration, the same having been struck down by the Tribunal in the first original application filed by opposite party no.1. After the judgment was delivered by the Tribunal in O.A. No.1194 of 2004, the disciplinary authority should have directed the inquiry to be conducted afresh from the stage as it stood on 30.05.1989 by adducing oral and documentary evidence, but no such steps were taken. The Tribunal found that there being no scope of appeal, the disciplinary authority is required to be more careful specially when it differs with the findings of the Inquiry Officer. With these findings the Tribunal set aside the impugned order of punishment and directed reinstatement of opposite party no.1 in service. However, he directed as a measure punishment that an amount of Rs.21,500/- is to be recovered from the arrear salary of opposite party no.1 with simple interest at the rate of 12% per annum from the date of taking the advance till the date of realization. It was also directed that the lapses the opposite party no.1 committed at the initial stage of his service, an order of caution in the service record for the year 1986-87 would be sufficient.

5. Learned Additional Government Advocate challenging the said order of the Tribunal, submitted that the disciplinary authority had every right to differ with the findings of the Inquiry Officer with reference to the evidence adduced in course of inquiry. After disposal of O.A. No.1683 of 2002 the disciplinary authority issued a fresh second show cause notice indicating the reasons for disagreement and not being satisfied with the reply given by opposite party no.1 had passed the order of punishment. There being no procedural irregularity, it was not open for the Tribunal to sit in appeal over the order of the disciplinary authority and substitute a punishment in place of the punishment imposed by the disciplinary authority. The learned counsel appearing for opposite party no.1 submitted that the opposite party no.1 has been harassed continuously for more than twenty years and in spite of specific direction of the Tribunal in two original applications, the disciplinary authority did not follow the procedure, relied on materials on which he could not have relied upon and disagreed with the findings of the Inquiry Officer. For the above reasons, the Tribunal was justified in interfering with the order of punishment and in order to bring an end to the litigation, substituted the punishment which according to the Tribunal was just and proper.

6. Admittedly, when the proceeding was initiated against opposite party no.1 in the year 1987, the said proceeding was concluded ex parte. The Tribunal in O.A. No. 1195 of 1994 set aside the order of punishment

passed on such ex parte inquiry and remitted the matter back for fresh inquiry from the stage of recording of evidence and consideration of documents. In compliance of the said order, the inquiry started from the stage as it stood on 30.05.1989. On conclusion of inquiry, the Inquiry Officer exonerated opposite party no.1 from all the charges with the specific finding that the Marshaling Officer had failed to prove the charges by not producing the material documents. In the event, the disciplinary authority differed with the findings of the Inquiry officer, while issuing second show cause notice, he should have indicated the reasons for disagreement. No reason, having assigned in the second show cause notice, the same was challenged before the Tribunal in O.A. No.1683 of 2002. The Tribunal while disposing of the said original application again observed that in the event the disciplinary authority differs with the findings of the Inquiry Officer, he has to assign reasons for such disagreement. What the displinary authority did is that while differing with the findings of the Inquiry Officer, he referred to certain findings of the Inquiry Officer recorded at the first stage prior to filing of O.A. No.1194 of 2004. In O.A. No.1194 of 2004 the findings of the Inquiry Officer recorded ex-parte having been set aside by the Tribunal and fresh inquiry having been directed, there was no scope at all on the part of the disciplinary authority to refer to any of the findings recorded ex-parte by the Inquiry Officer, which had been set aside by the Tribunal in O.A. No.1194 of 2004. It also appears from the impugned order of the Tribunal that the disciplinary authority while issuing the second show cause notice differed with the findings of the Inquiry Officer on the basis of certain materials which had never been proved in course of inquiry and, therefore, the Tribunal was justified in not only setting aside the said second show cause notice issued by the disciplinary authority differing with the findings of the Inquiry Officer but also consequent punishment imposed by the disciplinary authority. It will not be out of place to mention that the opposite party no.1 had approached the Tribunal three times for the irregularities committed by the disciplinary authority and, therefore, considering the nature of the charges leveled against opposite party no.1, the Tribunal thought it proper to substitute the punishment instead of again remitting the matter back to the disciplinary authority which had acted in illegal manner twice earlier. We find no infirmity in the order of the Tribunal impugned before us either in setting aside the order of punishment or in substituting a punishment in the facts and circumstances of the case.

7. The writ application being devoid of merit is dismissed.

Writ petition dismissed.

2011 (I) ILR – CUT- 719

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

JCRLA NO.19 OF 2000 (Decided on 09.2.2011)

DEEPAK PRADHAN …….. Appellant.

.Vrs.

STATE OF ORISSA ….. … Respondent.

PENAL CODE, 1860 (ACT NO. 48 OF 1860) – S.498-A & 302.

Conviction U/s. 488-A & 302 IPC challenged – No evidence on record to establish torture for dowry soon before the death – No evidence to establish a case U/s.4 D.P.Act – There is neither any charge nor any evidence to establish a case U/s.304-B IPC – Moreover the circumstances so established in this case do not form a complete chain unerringly pointing towards the guilt of the accused-appellant – Held, conviction recorded by the learned Sessions Judge is not sustainable under law.

(Para 13)

For Appellant - Mr. Birendra Kumar Mohapatra.
For Respondent - Addl. Govt. Advocate

S.K.MISHRA,J. The accused-appellant having been convicted for commission of offence under Sections 498-A/302 of the Indian Penal Code (hereinafter referred to as "the I.P.C." for brevity) and sentenced to undergo R.I. for life by the learned Sessions Judge, Sundargarh in Sessions Trial No.100 of 1997 has preferred this appeal.

2. Bereft of unnecessary details, the case of the prosecution is that the deceased Saudamini Pradhan was given in marriage to the accused on 20.4.1996. During the subsistence of marriage the allegation against the accused-appellant is that he was ill-treating and torturing the deceased as she was not satisfied with the T.V. and wrist watch that was given to him at the time of marriage. The accused-appellant allegedly assaulted her asking to get cash dowry from her parents. On 10.10.1996 at about 3.00 A.M. one Chandan Swain and Santosh Pradhan being the co-villagers of the appellant came to the informant and informed him that his daughter Saudamini has become seriously ill. The informant then proceeded to the village where he found that his daughter Saudamini was lying dead on a cot inside her bed room. He also noticed bloody forth in the mouth and nostril of his daughter

Saudamini. A ligature mark was noticed on the neck of the deceased. Suspecting that his daughter has been killed, he lodged a report before the Officer-in-Charge of Badgaon Police Station. On such report, the O.I.C. registered a P.S. case and took up investigation. The dead body was sent for post mortem examination. After completion of investigation, the Investigating Officer submitted charge sheet for alleged commission of offences under Section 498-A/304-B/302 of the I.P.C. and Section 4 of the D.P. Act.

3. The defence took the plea of denial and the alternative plea that Saudamini was in love with another boy and as her marriage could not be solemnized with that boy, she was unhappy and was quarreling with the in-laws and hence she committed suicide.

4. In order to prove its case, the prosecution examined as many as eighteen witnesses whereas the defence examined only one witness.

5. After taking into consideration the evidence led by the prosecution, the learned Sessions Judge has come to the conclusion that the prosecution has established the following circumstances:-

(i) that prior to the incident the accused was not pulling on well with his deceased wife for the simple reason that the wrist watch and the T.V. given to him at the time of marriage were not of his choice and therefore he used to demand Rs.15,000/- whenever his deceased wife used to go to her parents house;

(ii) that the accused also used to torture the victim at times and that the dead body of the deceased was found inside her bed room on a cot;

(iii) that while in custody the appellant made a disclosure statement before the Investigating Officer under Section 27 of the Evidence Act and led to the discovery of a plastic rope (M.O.1) from inside his house;

(iv) that the rope was stained with blood.

(v) that the doctor, who conducted the post mortem examination, opined that the death of the deceased was due to strangulation and not due to suicidal hanging.

Relying on such circumstances the learned Trial Judge has convicted the appellant for the offences under Sections 498-A and 302 of the I.P.C. There is absolutely no discussions regarding the charge under Section

4 of the D.P. Act. Furthermore, no charge has been framed under Section 304-B of the I.P.C.

6. Assailing the conviction recorded by the learned Sessions Judge, learned counsel for the appellant submitted that the prosecution has completely failed to prove its case of any torture or demand of dowry, inasmuch as there is no direct evidence regarding the same. Furthermore, it is contended that the circumstantial evidence as alleged by the prosecution do not prove the case of the prosecution and, therefore, it cannot be held to be sufficient to come to a conclusion regarding the guilt of the appellant.

7. Learned Addl. Government Advocate, on the other hand, supported the findings recorded by the learned Sessions Judge and prayed that the appeal be dismissed.

8. On an examination of the evidence on record, it is seen that P.W.1(Huraballava Behera) is the informant of the case. He happens to be the father of the deceased. He has stated on oath that the appellant and the deceased were married in the year 1996 on 'the Akshyayatrutiya' day. After marriage his daughter Saudamini was residing with her husband in his house. He has further stated that on 'Deepabali' in the night at about 3 A.M., Chandan Swain and Santosh Pradhan of village Gangajal came to his house in a trekker and informed that his daughter Saudamini was serious. He along with Polasti Kumar Behera and Madhusudan Purseth of his village went to see his daughter in that trekker. They reached village Gangajal at about 7.30 A.M. in the morning near the house of accused, Deepak Pradhan. He further stated on oath that he saw his daughter Saudamini lying dead on a cot inside her bed room. He noticed that blood was coming out of her nose. He asked the accused-Deepak Pradhan and his Samudhi about the cause of death of his daughter, but they did not give any reply. He alleges that Gountia of the village forcibly dragged him from the house of accused to the verandah of the house of the uncle of the accused. Thereafter the witness proceeded to Badgaon Police Station and lodged written report, which was treated as F.I.R. and marked as Ext.1.

Regarding the allegation of dowry torture, the witness has stated that his daughter had complained before him during her visit to his house that her husband and her in-laws were not appreciating the T.V. and wrist watch, which were given to the son-in-law of the witness at the time of marriage and that she was assaulted by her husband(Deepak Pradhan) by means of a lathi. The witness further added that his daughter had also complained before him during her visit to his house on the occasion of 'Bhaijuyintiaa' that her husband(Deepak Pradhan) was demanding cash of Rs.15,000/- from him. The witness had assured his daughter (the deceased) that after

harvesting he would go to her father-in-law's house with Rs.15,000/- for giving the same to her husband. On such allegation, the informant stated that he was suspecting that his son-in-law has caused the death of his daughter Saudamini due to non-fulfillment of his demand for cash. In cross-examination he has denied the suggestion that there was a proposal for marriage of Saudamini with Naru Muduli. He has further stated that he was not examined by the Police after lodging of the F.I.R. He admitted that he has not mentioned in the F.I.R. and the statement recorded under Section 161 Cr.P.C. that Gountia forcibly dragged him from the house of the accused to the verandah of the house of the uncle of the accused.

9. The evidence of Polasti Kumar Behera is also similarly placed as that of the evidence of P.W.1 with regard to the journey to village Gangajal after receiving information about the serious conditions of the deceased. P.W.3, Madhusudan Purseth, has gone there along with P.W.1. He has scribed the F.I.R. in the case which was presented before the O.I.C., Badagaon P.S.

P.W.4, Hiralal Panigrahi, had solemnized the marriage between the deceased and the accused being the priest thereof and his evidence is not in any way helping the case of the prosecution.

P.W.5, Rajendra Jena, P.W.6, Parbati Sahu and P.W.7, Kumari Rita Pradhan, have not supported the case of the prosecution and have been treated as hostile witnesses by the persecution. P.W.14, Mitrabhanu Rai, who happens to be the uncle of the deceased has also stated regarding the compliant made by the deceased about the torture meted out to her in connection with the demand of dowry. It is clear from the materials on record that there is no direct evidence regarding the torture meted out on the deceased. The only material forthcoming in this case is that the deceased made complaint before her father and uncle that she was ill-treated and tortured by the present appellant demanding a cash of Rs.15,000/- as dowry and she was being tortured also for inferior quality of the wrist watch and T.V. However, such materials are not admissible in evidence unless it comes within the four corners of sub-section (1) of Section 32 of the Evidence Act. Thus, those materials cannot be looked into.

10. The other pieces of evidence which have been relied upon by the learned Sessions Judge are recovery of the rope(M.O.1) and the disclosure statement allegedly made by the appellant. P.W.10, Narayan Pradhan and P.W.12, Indramani Muduli, are the two witnesses, who allegedly witnessed the discovery statement made by the appellant. P.W.10 has not supported the prosecution case and has been treated as hostile witness. He has stated that Police seized the Rasi (rope) in his presence and prepared the seizures list (Ext.6) and Ext.6/1 is his signature. He has denied the

Suggestion that accused while in police custody confessed his guilt and led the police and gave recovery of a rope from the place of concealment and that police seized the same.

P.W.12 has stated that he had been to Badgaon P.S. two to three days after the incident. On being called by the Police he had gone to the village Gangajal. Accused, Deepak Pradhan, also went with him. Accused Deepak brought out a rope from his house and gave the same to the police, who seized the same, and prepared the seizure list. He has been cross-examined by the prosecution wherein he denied that he stated before the I.O. that accused Deepak Pradhan while in police custody confessed his guilt and gave information that he had kept concealed the rope in his house by which the alleged crime was committed and that accused led the police to his house and gave recovery of a rope from his house and that police seized the same.

11. Thus the only evidence that is forthcoming in this case remains to be assessed is the statement of the I.O. regarding seizure of the rope at the instance of the appellant. P.W.18, the I.O. at paragraph-5 of the examination-in-chief states that on 18.11.1996 he arrested the accused Deepak Pradhan. While under Police custody the accused disclosed to have kept the rope by means of which he had killed the deceased and so saying he gave discovery of the said rope from beneath the 'paddy puduga' of his house. The I.O. recorded the statement of the accused under Section 27 of the Evidence Act. Ext.13 is the said statement and Ext.6 is the seizure list. However, in Ext.13 the recital reveals that the statement of the appellant was recorded earlier and the recovery was made later, which runs contrary to the statement given by the I.O. Thus in view of such contradictions coupled with the fact that the independent witnesses to the alleged discovery statement and recovery of the weapon of offence have not supported the case of the prosecution, the same has to be viewed with suspicion.

12. In any case based on circumstantial evidence, before convicting the accused, the Court must be satisfied about the following:-

(i) the circumstances on which the prosecution relies must be cogently and firmly established leaving no doubt in the mind of the Court about their proof,

(ii) each circumstance must be consistent with the hypothesis of guilt of the accused, though taken alone, it may not prove the guilt of the accused. In other words, it must not be capable of explanation by the defence,

(iii) all circumstances taken together must be forming a complete chain unerringly pointing towards the guilt of the accused.

13. Applying the above principles to the case at hand, it is seen that the prosecution has not proved the circumstances beyond all reasonable doubts and furthermore the circumstances so established in this case do not form a complete chain unerringly pointing towards the guilt of the accused-appellant.

The evidence afore discussed also do not establish a case under Section 304-B of the I.P.C. as the essential ingredient of torture for dowry soon before the death of the deceased is lacking. Furthermore there is no evidence to establish a case under Section 4 of the D.P. Act.

14. Thus, the case of the prosecution fails and the conviction recorded by the learned Sessions Judge, Sundargarh, is erroneous, requiring our interference and therefore we are of the considered opinion that the conviction recorded by the learned Sessions Judge is not sustainable under law.

Accordingly, we allow the appeal and set aside the conviction and sentence passed by learned Sessions Judge, Sundargarh, in Sessions Trial No.100 of 1997 against the accused-appellant for the offence under Sections 498-A/302 of the I.P.C. The accused-appellant be set at liberty forthwith, unless his detention is required in any other case.

Appeal allowed.

2011 (I) ILR – CUT- 725

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

JCRALA No.4 OF 2002 (Decided on 13.012011)

SUKUTA @SUKANTA@
ANATHA GURU & ORS . …… Appellants.

Vrs.

STATE OF ORISSA **..**…….. Respondent

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

Motive – P.W.3 is the son of the deceased – His evidence shows there was an altercation between him and the appellants over the theft of a pig for which the appellants had threatened him with dire consequences – There is nothing on record to disbelieve the evidence of P.W.3 the injured eye witness, rather he is a truthful witness and his evidence inspires confidence – His evidence gets corroboration from the medical evidence – The other incriminating material available against the appellants that appellant Lokanath Guru while in police custody gave recovery of the blood stained polyster Lungi and towel by leading to discovery – Held, both the appellants in furtherance of their common intention have committed the murder of the deceased and the trial Court has rightly convicted them U/s.302/34 I.P.C.

(para-8)

For Appellants - Mr.Ashok Das.

For Respondants - Mr.Saubhagya Ketan Nayak
Additional Govt. Advocate

PRADIP MOHANTY, J. This appeal is directed against the judgment dated 16.04.2002 passed in S.T. No.258 of 1999 whereby the learned 2nd Additional Sessions Judge, Cuttack has convicted the appellants under Sections 302/307/34, IPC and sentenced them to undergo imprisonment for life.

2. The case of the prosecution, as revealed from the FIR lodged by P.W.5 Binayaka Guru, is that he is a 'ghusuria' by caste and used to earn his livelihood by tending pigs. He came along with his pigs and camped at Kathajori river bed near village Bidyadharpur in the evening of 09.11.1998. The deceased Poka Guru, his eldest son Jogendra-P.W.3 and the

appellants, who were engaged as servants for tending pigs of the deceased, came along with their pigs and camped there at a distance of 200 metres from the camp of the informant. On 10.11.1998 at about 7.00 am, when the informant-P.W.5 went near the camp side of the deceased to ascertain as to why they had not got up for tending their pigs, to his utter surprise he found the deceased lying dead with bleeding injuries on his person and his son Jogendra (P.W.3) lying in his bed with a pool of blood having sustained fatal cut injury on his neck. On being asked by the informant, P.W.3 disclosed that their servants, i.e., the appellants, committed murder of his father and in course of assault when he protested he was assaulted by them with a knife. P.W.3 also gave out that the appellants had done so out of grudge as he and his deceased father charged them for committing theft of one pig while they were camping at Brahamanigaon on 06.11.1998. The informant, P.W.5 reported the matter orally before the Godisahi Outpost which was reduced to writing by the ASI of Police M.A. Jabar. The FIR was sent to Baranga P.S. and on receipt of the same the case was registered and investigation taken up by the C.I. of Police, P.W.7. After completion of investigation, charge-sheet was filed against the appellants under Sections 302/307/34, IPC. The trial court, however, on consideration of documents available before it framed charge against the appellants under Sections 302/307/380/34, IPC.

3. The plea of the appellants is complete denial of the allegations of the prosecution. Appellant Lokanath specifically pleaded that he has been falsely implicated in this case and on the date of occurrence he had gone to his brother-in-law's house.

4. In order to prove its case, the prosecution examined as many as eight witnesses including the doctors and the investigating officer and exhibited eleven documents. The defence examined none.

5. The trial court after conclusion of trial while acquitting both the appellants of the charge under Section 380/34, IPC, convicted them under Sections 302/307/34, IPC and imposed sentence of imprisonment for life for the offence under Section 302/34, IPC. It, however, did not award any separate sentence for the offence under Section 307/34, IPC.

6. Mr. Ashok Das, learned counsel appearing for the appellants assails the impugned judgment on the following grounds:

(i) The occurrence having been allegedly taken place at about 2.00 a.m. in a dark night, it is highly improbable on the part of P.W.3 to witness the occurrence and identify the appellants;

(ii) P.W.3 being the son of the deceased is an interested witness and in absence of any other corroborative evidence it is difficult to place reliance on his evidence.

7. Mr. S.K.Nayak, learned Additional Government Advocate vehemently contends that since the evidence on record reveals that the accused persons were engaged as servants of the deceased and P.W.3, and they were staying together in the same camp, the contention of the defence that P.W.3 could not have witnessed the occurrence and identified the accused persons cannot be sustained. Furthermore, since prior to the occurrence there was a quarrel/altercation between P.W.3 and the accused persons over the theft of a pig and that the accused persons had threatened to take revenge, a strong motive is attributable to the appellants. Therefore, there is no illegality or infirmity committed by the trial court in passing the impugned judgment so as to warrant interference by this Court.

8. Perused the records. P.W.1 is a seizure witness. P.W.2 is a post occurrence witness. He stated that from the police he heard about the death of the deceased, accompanied the police constable to the village of the deceased and intimated about the death of the deceased to his family members. P.W.3 is the son of the deceased and the sole eye witness. He deposed that both the accused persons were working under them as labourers. Accused Sukuta (appellant no.1) was working with them on monthly wage basis for about one month prior to the occurrence. Accused Lokanath (appellant no.2) was serving under them for about four years continuously prior to the occurrence on yearly wage basis and was getting Rs.5000/- per year towards his wages. They had about 156 number of pigs prior to the occurrence. On 06.11.1998, both the accused persons took away a pig weighing 6 Kgs from Brahmanigaon camp. On the next day, they were traced in their house at Thoriapada. On being asked they did not confess to have committed theft of the pig and they also abused P.W.3 in filthy language. On 8.11.1998, both the accused persons again joined their work at Brahmanigaon Camp. He further deposed that on 9.11.1998 they shifted to Naraj Bidyadharpur village river bed with their pigs and camped there. Both the accused persons were with them. P.W.3, his deceased father and both the accused persons slept on the river bed at night. At about 3.00 a.m. P.W.3 woke up from his sleep for urination and again slept. About half an hour thereafter, he heard groaning sound of his deceased father. So, suddenly he got up and found accused-Sukuta holding his deceased father and accused-Lokanath dealing tangia blows on the head of his deceased father. When P.W.3 attempted to rescue his father, accused-Sukuta assaulted him by means of a knife on his right side head region as well as

the head. Thereafter, accused-Lokanath assaulted him on his head with the blunt side of the tangia with which he was assaulting his father. He specifically stated that after being assaulted by both the accused persons his father died at the spot. He fell down on his bed with injuries. Both the accused persons fled away from the place taking cash of Rs.2,000/- from his deceased father. P.W.5-Binayak Guru, who was camping a little away from their camp, came to him at morning hour and he narrated the incident to him. P.W.5 brought to the spot an auto rickshaw in which they went to Godisahi Outpost and to the S.C.B. Medical College for his treatment. In cross-examination, P.W.3 has specifically stated that they were sleeping on the river bed spreading mats numbering three and the deceased was sleeping to the extreme corner. He, however, admitted in cross-examination that it was a dark night and that accused-Sukuta was holding the waist portion of the deceased while accused-Lokanath was dealing tangia blows on the deceased in standing position. Nothing substantial has been elicited in cross-examination to discredit the testimony of P.W.3.

P.W.4 is the doctor, who conducted autopsy over the dead body of the deceased and found the following injuries:

"(i) Chop wound of size 7 cm x 2 cm x skull deep present obliquely over the right forehead, 3 cm above the eye brow where the margins were found to be cleanly cut and directed from above downwards.

(II) Incised wound of size 3 cm x 1 cm x skin deep present horizontally over the left forehead 1 cm above the eye brow."

On dissection he found the following:

"(i) the scalp tissue under the external injury no.i is contused with haematoma in an area of 9 cm x 4 cm.

(ii) Under the external injury no.i the skull bone is cleanly cut measuring a size of 6 cm x 4 cm and it is driven into the brain cavity.

(iii) Subdural haemorrhage with laceration of right frontal lobe detected under the external injury no.i.

Other internal organs were found partly soften and pale."

He opined that the external injuries and the underlying injuries were ante mortem in nature. The external injury no.i and the corresponding internal injuries were fatal in ordinary course of nature. The death of the deceased

was due to cranio cerebral injuries. Nothing has been elicited from his cross-examination.

P.W.5 is the informant in this case. He deposed that on 10.11.1998 he had camped with his pigs at Bidyadharpur river bed where the deceased and his son (P.W.3) had camped. In the morning, he found that the deceased Poka Guru and his son (P.W.3) had not got up and their pigs were grazing scattered. He went to their camp and saw P.W.3 in an injured condition and blood was oozing out of his left ear. He also saw the deceased lying dead there. He further deposed that on query P.W.3 narrated before him that on the previous night the accused persons caused murder of his father and attempted to murder him. P.W.3 also narrated before him about the previous quarrel between them and the accused persons over the theft of a pig. He proved the F.I.R., Ext.4 and his signature thereon marked Ext.4/1. He also proved the enquiry report, Ext.5 and his signature thereon marked Ext.5/1. Nothing substantial has been brought out in cross-examination to discredit his evidence.

P.W.6 is a witness to the seizure of Tangia vide Ext.7 as also a blood stained lungi and a towel vide Ext.6. P.W.7 is the Investigating Officer, who registered the case, held inquest over the dead body of the deceased and sent the same for post mortem examination, arrested the accused persons, sent the sample blood for chemical examination to SFSL, Rasulgarh, Bhubaneswar and after completion of investigation filed charge-sheet.

P.W.8 is the Doctor, who examined P.W.3 on police requisition and found the following injuries :

"(i) There was a lacerated injury of right ear of size 3cm x ½ cm which has cut the upper 1/4th of it with only a tag of skin connecting the two segments.

(ii) there was a lacerated wound of the scalp just behind the root of right ear of size 4 cm x 1 cm."

He opined that injury no.i was simple in nature. Nothing has been elicited in cross-examination.

8. In the instant case, motive behind the crime has been proved by the prosecution through P.W.3 that there was an altercation between him and the appellants over the theft of a pig for which the appellants had threatened him with dire consequences. The contention of the learned defence counsel that the occurrence having taken place in a dark night P.W.3 could not have witnessed it and identified the accused, does not appeal to us for the simple reason that the appellants and P.W.3 were known to each other as they had been engaged as their servants since long for tending their pigs and were

residing in the same camp. There is nothing on record to disbelieve the evidence of P.W.3, the injured eye witness, and according to us he is a truthful witness and his evidence inspires confidence. The informant-P.W.5, who is an immediate post occurrence witness, is found to be a trustworthy witness in absence of any material to show that he was inimically disposed towards the appellants. The evidence of P.W.3 gets corroboration from the medical evidence. The other incriminating material available against the appellants is that appellant Lokanath Guru while in police custody gave recovery of the blood stained polyester lungi and towel by leading to discovery. For all these reasons, this Court comes to the conclusion that both the appellants in furtherance of their common intention have committed the murder of the deceased and the trial court has rightly convicted them under Sections 302/34, IPC. So far as their conviction under Sections 307/34, IPC is concerned, in view of the evidence of the doctor-P.W.8 that the injuries sustained by P.W.3 were simple in nature, the same is converted to one under Section 324/34, IPC.

9. In the result, conviction of the appellants under Section 302/34, IPC is confirmed and that under Sections 307/34, IPC is converted to one under Section 324/34, IPC. The appellants are sentenced to undergo imprisonment for life for the offence under Section 302/34, IPC and no separate sentence is imposed for the conviction under Section 324/34, IPC.

10. The Jail Criminal Appeal is accordingly disposed of with the modification of the impugned judgment to the extent indicated.

Appeal disposed of .

2011 (I) ILR – CUT- 731

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

JCRLA NO.7 OF 2000 (Decided on 31.03.2011)

RAGHAB NAIK ….. …. Appellant.

.Vrs.

STATE OF ORISSA ….. …..Respondent.

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

Deceased lodged F.I.R but did not sign the Dying declaration. – F.I.R. lodged by deceased – Held, F.I.R. lodged with the signature of the deceased can also be treated as another dying declaration.

Deceased was brought to the hospital with deep burn injuries – No attendant to look after her – Held, genuineness of the F.I.R. and dying declaration can not be doubted on the ground of delay – Dying declaration recorded by P.W.1 the Executive Magistrate who tested the patient by putting her some questions and satisfied that she was in a fit state of mind to give a statement – Thereafter he disclosed his identity to the deceased and asked her if she desired to give statement – She expressed her willingness and gave her dying declaration in oriya which was recorded in English and P.W.1 explained the contents of her statement in Oriya which the deceased admitted to be correct, but P.W.1 could not take signature or L.T.I. of the deceased on the dying declaration (Ext.1) – Held, merely because P.W.1 has not taken the signature of the deceased on Ext.1, his evidence can not be thrown away – Both Exts.1 and 3 are fully reliable dying declarations on which the conviction of the appellant can rest without any requirement of corroboration – Held, conviction of the appellant is well founded and needs no interference.

Case laws Relied on:- (para 8 to 13)

1.(1976) 3 SCC 104 : (Munnu Raja & Anr.-V-The State of Madhya Pradesh)

2.(1008) 17 SCC 337 : (Dharampal & Ors.-V-State of Uttar Pradesh).

3.(2003)12 SCC 490 : (Babulal & Ors.-V-State of M.P.)

Case law Referred to:-

1.AIR 1985 SC 22 : (Khushal Rao -V- State of Bombay).

For Appellant -Mr. Akshaya Kumar Sahoo.

For Respondent- Additional Government Advocate.

B.K.NAYAK, J. The appellant assails the judgment and order dated 16th November,1999 passed by the learned Sessions Judge, Ganjam-Gajapati, Berhampur in Sessions Case No.359 of 1998 convicting him under Section 302 of the I.P.C. and sentencing him to undergo imprisonment for life.

2. The prosecution case in brief is that the accused and the deceased-Mamata Padhi @ Naik fell in love with each other and had regular sexual contact that resulted in her pregnancy. The accused did not accede immediately to the proposal of the deceased for marriage, but on his suggestion she continued to live with him in a rented house in the Industrial Estate, Ankoli adjoining to the rented house of the uncle and aunt of the accused. While so living the accused suspected the character of the deceased and continued to quarrel with her. A few days thereafter on 25.4.1998 he poured kerosene on the deceased and set her on fire, as a result she sustained extensive burn injuries. She was hospitalized in the M.K.C.G. Medical College & Hospital without there being any one to attend to her. But in spite of treatment she succumbed to the injuries on 4.5.1998. The A.S.I. of Medical College Campus Outpost, Berhampur on 30.04.1998 having learnt about the incident met the deceased in the hospital. There the deceased lodged the oral report, which was reduced to writing by the A.S.I. Immediately, the services of a Magistrate was requisitioned by the police officer and the dying declaration of the deceased was recorded. The F.I.R. was forwarded and registered in the Berhampur Mahila Police Station and investigation was conducted and ultimately charge-sheet was filed against the accused for commission of offences under Sections 493/302 of the I.P.C.

The defence plea is completely denial of the prosecution case.

3. In order to establish its case, the prosecution examined seven witnesses. P.W.1 is the Executive Magistrate, who recorded the dying declaration of the deceased. P.W.2 is an employee of the M.K.C.G. Medical College & Hospital, who was a witness to the seizure of the bed head ticket of the deceased. P.W.3 is the A.S.I. of police of the Medical College Campus Outpost, who recorded the F.I.R. of the deceased. P.W.4 is the landlord in whose house the deceased and the accused were living together on rent.

P.W.5 is a lady constable, who took the dead body of the deceased for post mortem examination. P.W.6 is the Surgery Specialist, who treated the deceased in the hospital for burn injuries. P.W.7 is the Investigating Officer. Apart from oral evidence, the prosecution also proved documents like the F.I.R., dying declaration, seizure list, bed head ticket, inquest report, etc.

The accused did not lead any evidence in defence. On consideration of the evidence, the trial court while acquitting the appellant of the charge under Section 493 of the I.P.C., convicted him under Section 302 of the I.P.C. as aforesaid.

4. Assailing the impugned judgment, the learned counsel for the appellant contended that there being no eyewitness to the occurrence, the proof of the prosecution case is based on only dying declaration recorded by the Magistrate (P.W.1), which is very suspicious inasmuch as neither any doctor nor any hospital staff is a witness to the recording of dying declaration and that while in the F.I.R., the deceased put her signature, she has not put her signature in the dying declaration. It is his further submission that the deceased having not made any disclosure about the occurrence before the doctor, who treated her at the earliest opportunity, the allegation that she made declaration four days after the occurrence is a mere concoction and hence unreliable.

Learned Additional Government, on the other hand, contends that the deceased was in a fit state of mind to make a declaration and, therefore, the recording of her dying declaration on 30.04.1998 by the Magistrate cannot be doubted merely because no doctor has recorded her statement earlier. The genuineness of the dying declaration cannot be also doubted merely because the deceased has not put her signature on the same. His further contention is that even if the dying declaration recorded by the Magistrate is left out of consideration, the F.I.R. of the deceased which has been recorded by the A.S.I.(P.W.3) can also be treated and relied upon as a dying declaration and it would be sufficient to base a conviction on the same.

5. Law is well settled that even in the absence of any other corroboration, the conviction can be based on the dying declaration, if the declaration is found to be a reliable. (See ***Khushal Rao v. State of Bombay***; AIR 1958 SC 22 and ***Munnu Raja and another v. The State of Madhya Pradesh***; (1976) 3 SCC 104).

6. It is true that there is no eyewitness to the occurrence and that though as per the F.I.R. allegation uncle and aunt of the accused, namely, Bulu Parida and Manju Parida are the immediate post occurrence witnesses, who extinguished fire from the body of the deceased and left her in the

hospital unattended, they could not be examined as their attendance could not be procured for want of their whereabouts. The F.I.R. lodged by the deceased herself has been marked as Ext.3 and proved by P.W.3, the A.S.I. of Medical College Campus Outpost. The dying declaration recorded by the Magistrate (P.W.1) is proved as Ext.1. In both these documents deceased-Mamata Padhi @ Naik has clearly described that the accused and herself fell in love with each other and had regular sexual contact, as a result of which, she became pregnant. It is further stated that the accused, whom she has described as her husband, kept her in a rented house in the Industrial Estate area and that her pregnancy was aborted by the accused by administering some medicines. When she insisted that the accused should marry her, the mother of the accused promised that the marriage would be solemnized some time later, as there was financial stringency at that time. It is further stated that ten days before the occurrence, the accused assaulted the deceased suspecting her character and leaving her in the rented house went away to his own house in Gate Bazar area. It is further stated that on the date of occurrence the deceased went to Gate Bazar area and requested him to come back but the accused abused her for which she returned alone to the rented house. In the evening on that day, the accused came to the rented house and his aunt asked the deceased to cook dinner for which the deceased went to the shop for some purchases and returned to the rented house whereafter, the accused closed the door, poured kerosene on her and set her on fire lighting a match and then fled away. On hearing cries of the deceased, the uncle and aunt of the accused came inside and extinguished the fire. The aunt of the accused thereafter brought the deceased to the Gate Bazar house of the accused and from there to the City Hospital and from the City Hospital to M.K.C.G. Medical College and Hospital.

7. P.W.3 the A.S.I of the Medical College Campus Outpost has stated in his evidence that being directed by the Inspector-in-charge of B.N.Pur Police Station, he went to the Surgical Ward No.4 of the M.K.C.G. Medical College & Hospital had found Mamata Padhi @ Naik in bed No.354. On being asked Mamata Padhi @ Naik described the occurrence, as has been noted in the F.I.R. P.W.3 recorded her statement, read over and explained the contents to her which she admitted to be correct and put her signature. Signature of the deceased has been proved as Ext.3/1 and the signature and endorsement of P.W.3 marked as Ext.3/2. It is the further evidence of P.W.3 that he sent a requisition to the Sub-Collector, Berhampur for recording of dying declaration of the deceased and then sent the F.I.R. to I.I.C. of B.N.Pur Police Station. The Sub-Collector, Berhampur deputed Nizarat Officer-cum-Executive Magistrate, Mr. Satapathy (P.W.1). He has proved the orde r of the Sub-Collector, Ext.4. The Executive Magistrate recorded the

dying declaration of the deceased at the Medical College & Hospital in presence of P.W.3, who identified the deceased. P.W.3 has also signed on the dying declaration. He has proved the dying declaration, Ext.1 and his signature thereon, Ext.1/2. In cross-examination P.W.3 stated that he could not remember if any staff were present when he recorded the F.I.R. of the deceased. However, two witnesses named in the F.I.R. and some patients and their attendants were present in the ward. He also does not remember whether any doctor or medical staff was present while the Magistrate recorded the dying declaration. Although a suggestion was given to him that the deceased did not lodge the report before him, which he has denied, the signature of the deceased on the F.I.R. has not been challenged by the defence. Nothing substantial has been brought out in the cross-examination to disbelieve the evidence of P.W.3 with regard to the lodging of the F.I.R. by the deceased. His evidence that he was directed by the I.I.C., B.N. Pur Police Station to go to the hospital and find out the deceased in the surgical ward receives corroboration from the bed head ticket with history sheet, which was seized by the I.O. under seizure list, Ext.2 in presence of the Statistical Investigator of the Medical College and Hospital P.W.2. The bed head ticket has been proved as Ext.5. P.W.6 is the residential surgeon of M.K.C.G. Medical College and Hospital, who examined and treated the deceased has also proved bed head ticket along with the case history. The bed heat ticket shows that the deceased was admitted in the Medical College and Hospital with 60% deep burn injuries on both lower limbs and back and front of abdomen and lower chest. The deceased was admitted in Hospital on 26.4.1998 and died on 04.05.1998. The bed head ticket also reveals that the deceased had no attendant and she had no money to purchase medicine and other materials and was treated totally at the cost of the Hospital. Page-6 of the bed head ticket is a copy of the letter dated 26.4.1998 addressed by the residential Surgeon, Dr. S.P. Patnaik (P.W.6) to the Superintendent of the Medical College and Hospital to make arrangement for a Magistrate to record dying declaration of the patient (deceased). It further appears from page-9 of the bed head ticket, which is the copy of another letter dated 27.4.1998 written by the residential surgeon to the Superintendent of the Hospital for purchase of necessary drugs for the patient and for asking the I.I.C., B.N.Pur Police Station to arrange a Magistrate to record the dying declaration of the patient. Page-11 of the bed head ticket further reveals that the B.N. Pur Police Station was informed to arrange a Magistrate for recording dying declaration of the deceased. Page-13 of Ext.5 is a reminder letter sent by the residential surgeon to B.N. Pur Police Station for recording the dying declaration of the patient (deceased) on an urgent basis by a Magistrate. It has been mentioned in the said letter that the case appears to be one of bride burning. It is not known whether the

letters addressed to the Superintendent of the Hospital on 26/27.4.1998 for arranging a Magistrate for recording a dying declaration of the deceased were acted upon promptly or not, but it is quite apparent that pursuant to the repeated letters and the reminder dated 29.4.1998 the I.I.C., B.N. Pur Police Station directed P.W.3 to go to the Hospital and find out the deceased and do the further needful. The doctor (P.W.6) has stated in his evidence that the patient was conscious during the treatment period. Therefore, the evidence of P.W.3 that on his query the deceased described the occurrence which he reduced to writing and the deceased put her signature cannot be doubted.

8. P.W.1 is the Nizarat Officer-cum-Executive Magistrate, who stated in his evidence that on the direction of the Sub-Collector he proceeded to Berhampur Medical College and Hospital to record the dying declaration of the deceased. He went to the hospital in Ward No.4 of Female Surgery Wing, where the A.S.I. (P.W.3) identified the patient. He tested the patient by putting her some questions to which she gave proper and rational answers and as such he was satisfied that she was in a fit state of mind to give a statement. There were burn injuries on her body. He disclosed his identity to the deceased and asked her if she desired to give the statement. She expressed her willingness and gave her dying declaration in oriya, which he verbatim translated into English and recorded the same. P.W.1 then explained the contents of the statement in oriya, which the deceased admitted to be correct. After recording the statement he handed over the same to P.W.3. He has proved the dying declaration, Ext.1 and his signature and endorsement as Ext.1/1. In his cross-examination, he has admitted that no doctor or any attendant of the deceased was present when he recorded the dying declaration of the deceased. He has also admitted that he did not consult the treating doctor about the mental condition of the patient. He also produced copy of the order of the Sub-Collector, whereby he was directed to proceed to the hospital and record the dying declaration of the patient. The order of the Sub-Collector has been proved by P.W.3 as Ext.4, which shows that P.W.1 was directed by the Sub-Collector come to the hospital for recording dying declaration. In his cross-examination P.W.1 has further stated that he could not take the signature or LTI of Mamata Padhi @ Naik (deceased) on her declaration because her hands were badly burnt and she was not able to write or put her LTI.

9. Learned counsel for the appellant contends that in view of the evidence of P.W.1 that the deceased was not able to put her signature or LTI as because her hands had been burnt, it is doubtful whether the F.I.R. (Ext.3) is a genuine document, which bears the purported signature of the deceased. In this context, it may be stated that P.W.3 has stated in his evidence that he recorded the statement of the deceased, read over and

explained contents of the same to her which she admitted to be correct and put her signature, which has been proved as Ext.3/1. No question has been put to P.W.3 in cross-examination whether the deceased was able to write or not and whether her hand has been burnt or not. No suggestion has also been given that the deceased had sustained burn injuries on her hand and was incapable of putting her signature. The signature of the deceased (Ext.3/1) has not at all been disputed by the defence. The bed head ticket of the deceased shows that she suffered 60% deep burn injuries on both lower limbs and back and front of abdomen and the lower chest. The bed head ticket does not show any serious burn injures on the hands of the deceased which might have incapacitated her for putting the signature. P.W.6, the residential surgeon also does not speak about any serious injuries on the hands of the deceased. In the circumstances, we are of the view that having failed to take the signature or mark of the deceased on the dying declaration (Ext.1), in order to cover up the laches on his part. P.W.1 has stated in his cross-examination that the hands of the deceased were badly burnt. We are not in a position to accept this part of the evidence of P.W.1.

10. Merely because P.W.1 has not taken the signature of the deceased on Ext.1, his evidence cannot be thrown away. He is an Executive Magistrate and a responsible Government Officer and on the direction of the superior authority he came to the hospital and recorded the dying declaration of the deceased and has proved the same. There is no reason as to why he would speak falsehood against the accused with whom he has no animosity. About the fitness of the deceased to make statement it is clear from the evidence of P.Ws.1, 3 and 6 that the patient was conscious during treatment. The bed head ticket also shows that the patient was conscious and oriented till 1.05.1998. It is, therefore, clear that the deceased was in a fit state of mind to make a statement on 29.04.1998. Of course, there has been some delay in lodging of the F.I.R. and recording of the dying declaration, but that by itself would not be a ground to suspect the genuineness of the F.I.R. or the dying declaration. It is clear from the bed head ticket, Ext.5 that the deceased was brought with deep burn injuries to the hospital and there was no attendant to look after her. This shows that some body, may be the aunt of the accused as has been described in the F.I.R., brought her to the hospital and then left. As per the bed head ticket, since there was no attendant at any point of time, the deceased was given treatment by the hospital getting medicines from the hospital stock and local purchases. The several requisitions addressed by the treating surgeon to the hospital superintendent bear testimony to this fact. In such situation, it could not be expected that the F.I.R. and dying declaration would have been made earlier. Hospitalization of the deceased for burn injuries was brought to the notice of the I.I.C., B.N.Pur Police Station by the hospital authorities where

after the I.I.C. directed P.W.3 to proceed to the hospital. It is only after P.W.3 came to the hospital that he got the report of the deceased recorded and requisitioned the services of the Executive Magistrate (P.w.1). In the circumstances, the genuineness of the F.I.R. (Ext.3) and the dying declaration (Ext.1) cannot be doubted.

11. Apart from Ext.1, the F.I.R (Ext.3) which bears the undisputed signature of the deceased can also be treated as a dying declaration as has been held in ***Munnu Raja and another v. The State of Madhya Pradesh*****;** (1976) 3 SCC 104, ***Dharampal and others v. State of Uttar Pradesh***; (2008) 17 SCC 337 and ***Babulal and others v. State of M.P.;*** (2003) 12 SCC 490.

Both Exts.1 and 3 are fully reliable dying declarations on which the conviction of the appellant can rest without any requirement of corroboration.

12. P.W.7 is the O.I.C. of Mahila Police Station, Berhampur, who is the Investigating Officer. The F.I.R. (Ext.3) being forwarded, she registered the case on 30.04.1998 under Sections 493/307 of the I.P.C. Four days thereafter, the deceased succumbed to the burn injuries, whereupon the case turned to one under Section 302 of the I.P.C. P.W.7 has stated in her evidence that during investigation, she visited the Medical College & Hospital and examined the victim-Mamata Padhi @ Naik and the A.S.I. (P.W.3). She also visited the Industrial Estate area where the occurrence took place and prepared the spot map (Ext.6). On 4.5.1998, she received report from the Medical Officer that Mamata Padhi @ Naik died while undergoing treatment. She then went and held inquest over the dead body. She has proved the inquest report (Ext.7).

13. Basing on the dying declaration (Ext.1) and the F.I.R. (Ext.3) which can also be treated as another dying declaration, coupled with the evidence of P.Ws.1 and 3 and the medical evidence of P.W.6 and Ext.5, we hold that the conviction of the appellant is well founded and needs no interference.

The Jail Criminal Appeal is accordingly dismissed.

Appeal dismissed.

2011 (I) ILR – CUT- 739

M.M.DAS, J.

W.P.(C) NO.585 OF 2009 (Decided on 02.09.2010)

PRAFULLA BISWAL …… Petitioner.

.Vrs.

BANAJOSNA BARIK & ORS. …. …. Opp.Parties.

ORISSA G. P. ACT, 1964 (ACT NO.1 OF 1965) – S.38 (2) (b).

Election Tribunal while deciding an election dispute has jurisdiction U/s.38 (2) (b) of the Act to declare another candidate to have been duly elected.

In the present case only two candidates i.e. the petitioner and O.P.1 contested the election for the office of Sarpanch – Tribunal set aside the election of O.P.1. the returned candidate and declared the petitioner to have been duly elected – Appellate Court relying upon the case of D.K.Sharma set aside the judgment of the learned Election Tribunal declaring the petitioner as elected Sarpanch – Hence the writ petition – This Court filds that the learned Election Tribunal was correct in exercising his power U/s.38 of the Act by declaring the petitioner as the elected Sarpanch of Chahapara Gram Panchayat on the ground that holding a fresh election will amount to wastage of public money and time – Held, the impugned judgment of the Appellate Court reversing the direction of the Election Tribunal declaring the petitioner as elected to the office of Sarpanch is set aside and the judgment of the Election Tribunal with regard to such declaration is confirmed.

(Para 9 & 10&11)

Case law Relied on:-

(1969) 2 SCR 90:(AIR 1969 SC 604) : (Konappa Rudrappa Nadgouda-V-Vishwanath Reddy)

Case laws Referred to:-

1.AIR 1993 SC 95 : (D.K. Sharma-V-Rama Sharan Yadav & Ors.)
2.AIR 2002 SC 2345 : (Prakash Khandre -V- Dr. Vijaya Kumar Khandre & Ors.)

For Petitioner - M/s. Mahadev Mishra, C. Mallik & Mamata Mishra.
For Opp.Parties - M/s. P.K.Sahoo, A.C.Mohapatra & A.K. Panda (for O.P.1)

M.M. DAS, J. This writ petition has been filed by the petitioner, who was the election petitioner in Election Case No. 2 of 2007 challenging the election of the opp. party no. 1 to the office of Sarpanch of ChahaparaGrama Panchayat on the ground that the opp. party no. 1, who

was declared elected was disqualified to contest the election to the office of Sarpanch under the provisions contemplated in section 25 (i) (v) of the Orissa Grama Panchayat Act, 1964. It was alleged that the opp. party no. 1 has more than two children born after the cut-off date. The learned Election Tribunal allowed the Election Misc. Case declaring the election of the opp. party no. 1 as void and illegal and further holding that in order to save wastage of time and money , since the petitioner was the only contesting candidate against the opp. party no. 1, she is declared elected as Sarpanch of the said Grama Panchayat in view of section 38 (2) (b) of the Act.

2. A Civil Suit was filed by the petitioner for a declaration that Priyanka Priyadarshini is the daughter of opp. party no. 1 through her husband Saroj - opp. party no. 4.. The judgment of the learned Election Tribunal was challenged in appeal and the learned appellate court while confirming the judgment of the learned Election Tribunal with respect of the disqualification of the opp. party no. 1 to contest the election to the office of Sarpanch, reversed the finding of the learned Election Tribunal declaring the petitioner to be the elected Sarpanch. The said order was challenged by the opp. party no. 1 in W.P. (C) No. 19200 of 2008, wherein this Court without interfering with the said order with regard to disqualification of the opp. party no. 1 has disposed of the said writ petition subject to the result of the present writ petition.

3. Mr. Mishra, learned counsel for the petitioner submitted that the learned appellate court mis-interpreting the provision in section 40 of the Act has committed an error in concluding that there should be a fresh election to fill up the vacancy of the office of Sarpanch and reversing the finding of the learned Election Tribunal and declaring the petitioner to be the elected Sarpanch.

4. It appears from the judgment of the learned appellate court that for his conclusion to hold a fresh election and to reverse the finding of the learned Election Tribunal declaring the petitioner as an elected Sarpanch was arrived at relying upon the decision in the case of ***D.K.Sharma v. Rama Sharan Yadav and others,*** AIR 1993 S.C. 95.

5. Section 38 (2) (b) of the Act gives jurisdiction to the Election Tribunal deciding an election dispute to declare another candidate to have been duly elected. Section 40 of the Act, under Clause 1 (b), provides the ground on which the Tribunal can declare the petitioner or such other candidate, as the case may be, as duly elected after declaring the election of the returned candidate to be void . The aforesaid provisions of the Act are quoted herein below:

"38. **Decision of (Civil Judge) (Junior Division)-** (1) xx xx xx

(2) If the Civil Judge (Junior Division) finds that the election of any person was invalid, he shall either-

(a) xx xx xx

(b) declare another candidate to have been duly elected;

Whichever course appears, in the circumstances of the case to be more appropriate and in either case, may award costs at his discretion.

(3) & (4) xx xx xx"

"40. **Grounds for which a candidate other than the returned candidate may be declared to have been elected-** If any person who has lodged a petition, has in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the (Civil Judge (Junior Division)) is of opinion:

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate by a corrupt practice the petitioner or such other candidate would have obtained a majority of the valid votes;

he shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected".

6. A bare reading of the above provisions goes to show that section 38 relates to the decision, which can be rendered by the learned Civil Judge (Jr. Division) after making such enquiry in the election case and section 40 provides the grounds for which a candidate other than the returned candidate may be declared to have been elected. Section 40 (b) deals with a case, where eliminating votes obtained by a returned candidate, who adopts corrupt practice, the petitioner or such other candidate would have obtained a majority of the valid votes, the Tribunal can declare such candidate as elected after declaring the election of the returned candidate to be void. It , therefore, manifests that section 40 ipso facto does not apply to the fact of the present case which was not a case on the allegation of corrupt practice as defined in section 41 of the Act.

7. In the case of D.K. Sharma (supra), the Supreme Court was considering the judgment of the High Court in not declaring the appellant herein as elected candidate to Bihar Legislative Assembly from Goh Constituency at the poll held in February, 1990. The appellant therein relied

upon the decision in the case of ***Konappa Rudrappa Nadgouda v. Vishwanath Reddy*** (1969) 2 SCR 90 : (AIR 1969 SC 604) before the High Court and taking cue from the said decision, the appellant led evidence before the High Court to show that the voters were given sufficient notice and they were aware of the disqualification of the respondent no.1 therein, before they voted for him . From the facts of the case, it appears that during pendency of the election case before the High Court, the President of India in exercise of the power under sub-section (3) of section 8-A of the Representation of People Act, 1951, issued a notification on 3.7.1990 which was published in the Gazette of India on 9.7.1990 disqualifying the respondent no. 1 for a period of six years from October 30th, 1984. On the basis of the said Presidential notification the Speaker of the Bihar Legislative Assembly by notification dated 18.7.1990 declared the seat from Goh Assembly Constituency vacant. The appellant – petitioner, who was the election petitioner before the High Court, thereafter, confined his election petition to the second relief claimed therein for declaring him as the elected candidate from the said Constituency. It further appears that in the said election case, the result of which was challenged before the High Court, more than two candidates contested. The Supreme Court, while discussing the facts of the said case referring to the decision in the case of Konappa Rudrappa Nadgouda (supra), found that in Konappa's case there were only two candidates in the field. Vishwanath Reddy was declared elected to the Mysore Legislative Assembly and Konappa who was a contesting candidate challenged his election on the ground that Vishwanath Reddy was disqualified from standing as a candidate for election and for an order declaring that he (Konappa) be declared elected. The Supreme Court in the said case accepted the contention of Mr. Konappa in the facts of that case, where there were only two candidates in the field observing as follows:-

> "If the number of candidates validly nominated is equal to the number of seats to be filled, no poll is necessary. Where by an erroneous order of the Returning Officer poll is held which, but for that order, was not necessary, the Court would be justified in declaring those contesting candidates elected, who, but for the order, would have been declared elected…… When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and

> the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may as assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate".

Interpreting thus, the Supreme Court in the case of D.K.Sharma (supra) dismissed the appeal filed by the appellant for declaring him as elected candidate in view of the fact that there were more than two candidates contesting the said election.

8. Learned counsel for the opp. party no. 1 also relied upon the decision in the case of ***Prakash Khandre v. Dr. Vijaya Kumar Khandre and others,*** AIR 2002 SC 2345 and other case laws in defence of the judgment of the appellate court in respect of reversing the finding with regard to declaring the writ petitioner as elected, by the Election Tribunal. In the case of Prakash Khandre (supra), it would also be seen that there were not more than two candidates contesting the election.

9. In the present case, however, there were only two candidates who contested the election for the office of Sarpanch, i.e., the petitioner and the opp. party no.1. The ratio of the decision in the case of Konappa Rudrappa Nadgouda (supra), therefore, is squarely applicable to the facts of the present case and it is seen that the learned appellate court has mis-directed himself in relying upon the decision in the case of D.K. Sharma (supra) where, the facts were different, i.e. there were more than two candidates in the election fray.

10. In view of the above analysis of facts, this Court finds that the learned Election Tribunal was correct in exercising his powers under section 38 of the Act by declaring the petitioner as the elected Sarpanch of Chahapara Grama Panchayat on the g round that holding a fresh election will amount to wastage of public money as well as wastage of time.

11. In the result, therefore, the portion of the judgment of the appellate court passed in Election Appeal No. 31 of 2001 reversing the finding and direction of the learned Election Tribunal, i.e., Civil Judge (Jr. Division), Salipur in Election Case No. 2 of 2007 declaring the petitioner as elected to the office of Sarpanch is set aside and the judgment of the learned Election Tribunal with regard to such declaration is restored. The petitioner is, therefore, declared as the elected Sarpanch of the Chahapara Grama Panchayat, who shall assume the office immediately.

13. The writ petition is accordingly allowed.

Writ petition allowed.

2011 (I) ILR – CUT- 744

M.M.DAS, J.

W.P.(C) NO.10377 OF 2009 (Decided on 01.11.2010)

BASANTA KUMAR PRADHAN & ORS. …….. Petitioners.

.Vrs.

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

Examination – Annual +2 Exam. Conducted by C.H.S.E. Orissa – Report of subject Experts that students have given identical answers in History Paper-I – Examination Committee took the decision to award '00' marks – Presumption that petitioners adopted malpractice – Certificate of Centre Superintendent shows incriminating materials were collected by the Flying Squad from inside and out side the Examination hal – No such incriminating materials were placed before the Examination Committee or subject Experts to find out if any of the petitioners took aid of such materials – No such materials also found from the possession of any particular student – Held, the decision taken by the Examination Committee can not be sustained which is quashed – O.P. 2 & 3 are directed to publish the result of the petitioners and O.P.4 to supply them their mark sheets and certificates.

(Para 6 & 7)

Case law Referred to:-

AIR 1997 SCW 3946 : (Rajesh Kumar & Anr.-V-Institute of Engineers(India)

For Petitioners - M/s. S.D.Das, H.S.Satapathy, A.N.Sahu, M.Panda, D.Mohanty & M.M.Swain.

For Opp.Parties - Addl. Standing Counsel (for O.P.No.1) M/s. S.B.Jena & A.Mishra (O.P. Nos.2 & 3)

M.M. DAS, J. The petitioners are some of the students and guardians of students, who appeared in the Annual + 2 Examination conducted by the Council of Higher Secondary Education (CHSE), Orissa in the year 2009. They appeared in the said examination from Harishankar College, where they were prosecuting their studies. When the result of the students of the said college was declared, the result of the petitioners were withheld and a Tabulation Register which was supplied to the college disclosed that the petitioners have been awarded with '00' marks in History Paper-I. On 26th June, 2009, a Notification was published by the Council of Higher Secondary Education (for short 'the CHSE') inter-alia notifying that the results of 31 candidates of Harishankar College for history paper in the

Annual Higher Secondary Examination, 2009 be published by awarding the marks they have secured and the result of the rest of the candidates of the said examination, which were kept withheld, be published by awarding '00' marks in the concerned history paper. Being aggrieved by such awarding of '00' marks in History Paper-I, the petitioners have approached this Court for issuance of a writ of mandamus directing the CHSE to declare their results by awarding the marks they have been secured in the said paper, as was awarded by the evaluators. A counter affidavit has been filed by the CHSE inter-alia stating that on 07.03.2009 when the examination in History Paper-I was being conducted in Harishankar College, the Central Flying Squad visited the said Centre and as per their report, the examinees were found to be involved in mass mal-practice and it was also mentioned in the report that the answer scripts of almost all the examinees were identical with each other. This report was placed before the Examination Committee, which decided to withhold the result of the Centre and took the decision to verify the answer scripts of the said college once again by the Subject Experts. After reviewing the answer scripts in respect of History Paper-I of the petitioners' college, it was observed by the subject experts that some of the students were involved in mass mal-practice, as their answers were identical and there were identical errors. It was also mentioned in the report of the Subject Experts that some of the students were not involved in mass mal-practice. The Examination Committee in its meeting held on 07.07.2009 considering the report of the Subject Experts resolved to publish the result of 31 candidates by awarding the marks they have secured in the said paper and to publish the result of rest of the candidates by awarding '00' marks. It is also stated in the counter affidavit that the Central Flying Squad found that large number of students were involved in mal-practice and they collected a huge number of incriminating materials from inside and outside the examination hall. The students were found talking with each other and also found the answers of almost all the students to be identical.

2. The report of the Central Flying Squad has been annexed as Annexure-A/2 to the counter affidavit. The relevant columns of the said report i.e. Column Nos. 13, 15, 16 and 17 are quoted hereunder.

"13. Outsiders present – (a) Inside the Exam. Hall No
[If Yes specify the rooms]
(b) Inside the College campus No
(c) Outside the College campus Yes

15. Whether there was Malpractice inside the Examination Halls No

16. a] Malpractice detected and reported No
[If yes, Roll Numbers of malpractice case be mentioned]

b] i) Form No.20 [MP Form] duly filled in and submitted to C.S. ……

ii) Receipt of the same from C.S. obtained …….

c) i) Script seized and submitted to C.S. ……..
ii) Receipt from C.S. obtained ……

[Ask the C.S. to send such scripts and Form No.20 to Dy. Controller of Examinations by Regd. Post soon after each sitting of the Examination]

17. Misbehaviour of candidates No

[If yes, mention the Roll No. & Reg. No. of such candidates, with a detailed report.]"

However, the certificate of the Centre Superintendent has been annexed along with the said report of the Flying Squad which is as follows :-

*"*Certified that around 4.30 P.M. the Central Flying Squad members reached at our college and collected inside and outside the exam Hall these increasing materials on 07.03.2009 1- 34 pages of printed History incriminating materials.

Sd/-
Pramod Kumar Pani
7.3.09
Centre Superintendent
Harishankar College
Khaprakhol."

3.. The resolution of the meeting of the Examination Committee adopted in its meeting on 07.07.2009 under Item No.2 (b) in respect of Harishankar College is as follows :-

"2.b) BA-12 HS College, Khaparakhole, Dist- Bolangir "considering the report of the subject experts, the Committee resolved to publish the result of the following 31 candidates by awarding the marks they have secured in History (Roll Nos. 112BA006, 015, 025, 026, 027, 029, 036, 037, 044, 046, 048, 051, 052, 053, 054, 056, 058, 060, 061, 062, 065, 068, 070, 081, 089, 100, 102, 108, 412BA001, 005, & 006 = 31 cases). The result of the rest Regular and Ex-Regular candidates (Registered during the year 2006-2007) of Annual HS Exam.2009 in Arts stream of HS College, Khaparakhole which have been kept withheld be published by awarding Zero (O) marks in the concerned History paper. Further resolved that the results in respect of the old Ex-Regular candidates in Arts stream of HS College, Khaparakhole for the Annual HS Exam.2009 be kept withheld until the opinion of subject experts is obtained in History paper-II after verification."

4. It is strange that when the Flying Squad found no outsiders in the examination hall or inside the college campus and stated that there was no mal-practice inside the examination hall as well as no mal-practice was detected and reported nor there was any misbehaviour on the part of the candidates inasmuch as the relevant Clause nos.16 (b) & (c) were left blank but obtained a certificate from the Centre Superintendent that the Flying Squad collected incriminating materials from inside and outside the examination hall. The said incriminating materials have been mentioned in the certificate as 34 pages of printed materials of history subject. None of such alleged incriminating materials appear to have been produced before the Examination Committee or the subject expert have been considered by the Examination Committee while either resolving to review the answer nor scripts of the petitioners in respect of History Paper-I or taking the resolution to award '00' marks to the petitioners in the said paper. The entire basis of the decisions of the Examination Committee appears to be on the report of the Subject Experts, who stated that there were identical answers given by the candidates. In the facts of the present case, even if it is accepted that there ware identical answers given by the students, no presumption arises that they adopted mal-practice. In this contest, the observation made by the Hon'ble Supreme Court in the case of ***Rajesh Kumar and another v. Institute of Engineers (India)*** AIR 1997 SCW 3946 needs to be referred which is as follows :-

"All literate men have been students at a given point of time but all have not been crammers. Those who cram do not achieve their goal by a single reading. It is a ceaseless effort for days and days till the desired result is achieved. Crammers inter se do not have any nexus with each other. The text of a book as the common source for cramming establishes no connection. That per-se cannot be evidence of any conspiracy between the crammers to adopt unfair means in the examination unless there be material to show that there was copying of the answer books, descended from the answer book of one of the candidates, or directly from the book leading to the copying by others."

5. This Court has laid down that there cannot be any presumption of any mass mal-practice without any basis, which would result in depriving genuinely good students from succeeding in the examination and presence of such students in such circumstances cannot be ruled out. It has been further settled in law that the Examination Committee which is the authority to publish the results of an examination before taking a decision that the result of the students for a particular centre should be cancelled or they should be awarded with '00' marks in a particular paper on account of adopting mass mal-practice must have sufficient materials before them to

come to such a conclusion and cannot base their decisions on presumption, conjectures and surmises.

6. In the instant case, it is clearly evident that the Examination Committee took the decision to award '00' marks to the petitioners solely basing on the report of the Subject Experts that they have given identical answers to the question. This if-so-facto cannot lead to the presumption that the petitioners have adopted mal-practice. Moreso, when even though a certificate was obtained from the Centre Superintendent that incriminating materials were collected by the Flying Squad from inside and outside the examination hall, no such incriminating materials were placed before the Examination Committee or the Subject Experts to find out, if any of the petitioners took the aid of such incriminating materials while giving their answers. It is also seen that such incriminating materials were not found from the possession of any particular student nor were found from the examination halls as would be seen from the report of the Flying Squad.

7. In view of the above, the decisions of the Examination Committee to award '00' marks to the petitioners in History Paper-I of Higher Secondary + 2 Examination, 2009 cannot be sustained. The said decision is, therefore, quashed and the opposite party nos. 2 and 3, the Chairman and the Controller of Examinations, CHSE, Orissa, Bhubaneswar are directed to publish the result of the petitioners, of the aforesaid examination, by including the marks awarded to them in History Paper-I by the evaluators in the answer scripts, such result should be published and communicated to the opposite party no.4- the Principal of Harishankar College, Khaparakhole, Bolangir within a period of one month from the date of production of certified copy of this Judgment before the opposite party no.2- the Chairman, CHSE by any of the petitioners. Thereupon, the petitioners shall be supplied with the certificate and mark sheets by the Principal-opposite party no.4.

8. The writ petition is accordingly allowed, but in the circumstances without any cost.

Writ petition allowed.

2011 (I) ILR – CUT- 749

M.M.DAS, J.

W.P.(C) NO.2599 OF 2009 (Decided on 01.11.2010)

TIPNNA KESAB REDDY …….. Petitioner.

.Vrs.

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

ORISSA G.P. ACT, 1964 (ACT NO.1 OF 1965) – S.11(b) & 11(c) (iii).

A person on completing 20 years of age attains the age of 21 years and he is not required to complete 21 years of age for the purpose of Section 11 (c) (iii) of the Act.

In the present case the age of the petitioner was 20 years 7 months 15 days on the date of filing nomination but his election as Sarapanch was challenged on the ground that he had not completed 21 years of age on the said date.

According to Black's Law Dictionary the word "attain" means to reach or come to by progression or motion to arrive at as to attain a ripe old age – Thus to attain the age of 21 years would unambiguously mean that a person on completing 20 years of age attains the age of 21 years – So accepting the date of birth of the petitioner in the matriculation certificate he has already attained the age of 21 years as mandated U/s. 11 (c) (iii) of the Act and the learned Courts below have erred in law in interpreting the said clause to the effect that a person should complete 21 years of age at the time of filing nomination paper – The nomination paper of the petitioner was rightly accepted as he had already attained 21 years of age on the date of filing nomination paper – Held, impugned judgments passed by the Election Tribunal as well as the appellate authority are quashed – The petitioner shall continue as the elected Sarpanch of Ekasingi Gram Panchayat.

Case laws Referred to:- (para-12 &13,14)

AIR 2005 SC 3280 : (State of Punjab -V- Sibram & Ors.
2.AIR 2003 SC 3044 : (Surya Dev Rai -V- Ram Chander Rai)

For Petitioner - M/s. Mahadev Misra, M.Mishra, C.Mallick & R.s.Kunar.
For Opp.Parties - Addl. Standing Counsel (for O.Ps. 1 & 2)

Mr. Sanjay Kumar Pradhan
(Caveator- O.P no.3)

M. M.DAS, J. Gram Panchayat elections in the State of Orissa were held in the month of February, 2007. The date of filing of nomination papers wasfixed as 9th January, 2007. The petitioner as well as the opposite party no.3 filed their nomination papers for contesting in the election to the post of Sarpanch of Ekasingi Gram Panchayat in the District of Ganjam. The nomination papers were scrutinized and accepted. The result of the election was published on 22.02.2007 declaring the petitioner as the elected Sarpanch of the said Gram Panchayat.

2. On the date of filing of the nomination paper, the opposite party no.3 filed an objection before the Election Officer stating therein that the nomination paper filed by the petitioner should be rejected on the ground that he has not attained the age of 21 years as mandatorily required under section 11 (b) of the Orissa Gram Panchayat Act, 1964. However, the Election Officer accepted the nomination paper of the petitioner. Voting was held on 13.02.2007. The petitioner secured 609 votes and the opposite party no.3 secured 561 votes out of the valid votes cast. The opposite party no.3 thereafter filed a election dispute before the Civil Judge (Jr. Division), Berhampur registered as Election Petition No.2 of 2007 seeking declaration of the election of the petitioner as void and further to declare the opposite party no.3 as Sarpanch of the said Gram Panchayat. The petitioner filed his show cause/written statement on receiving the show cause notice in the election Misc. Case. The opposite party no.3 in support of his case relied upon the certificate granted to the petitioner by the Board of Secondary Education, Orissa in the High School Certificate Examination for proving his date of birth to be 25.05.1986 and, as such, the petitioner was 20 years 7 months 15 days old on the date of filing of the nomination paper.

3. The petitioner, on the other hand, claimed that he was born on 08.07.1984 and was admitted in a Project Upper Primary School on 08.11.1989. While continuing his studies in Class-II, he left the school on 30.04.1992 and was admitted in a school at Bhubaneswar. As the petitioner did not fair well at Bhubaneswar, he was again brought back to village Parapentho and was admitted in Biswanathpur Chakka Upper Primary School in Class-III on 10.07.1993 by mentioning his date of birth as 03.05.1985 where he continued for sometime and was admitted in some other school and completed Class-VII. Ultimately he was admitted in Costal Development Technical Bidyamandir, Biswanathpur wherefrom he completed his High School Examination. The petitioner further stated in the written statement that his date of birth cannot be possible after 21.12.1984

as his mother has undergone a family planning operation in the Public Health Centre at Keluha Palli vide entry No.300 dated 21.12.1984 and, therefore, the date of birth as entered in the First Admission Register at the Project Primary School is his correct date of birth.

4. The Opposite Party nos.1 and 2 in this writ petition, who are the State and the Block Development Officer-cum-Election Officer also filed a written statement denying the allegations made in the election petition and, inter alia, stating that the nomination paper was thoroughly scrutinized and the objection petition was rejected with the observation that the authorities have no power to adjudicate the matter within a short span of time and also denied the allegation with regard to unfair practice, i.e, influencing the opposite party no.2 in terms of money to accept the nomination paper. The voter list on the basis of which the Election Officer held the petitioner to be eligible to contest the election was stated to have been prepared in accordance with law and no objection was raised during preparation of the same.

5. The vital issue framed by the Election Tribunal was as to whether the opposite party no.1 attained the age of 21 years on the date of filing of the nomination. Parties examined witnesses in support of their respective cases and exhibited various documents. The learned Election Tribunal allowed the election petition by his judgment dated 07.09.2007 holding that the petitioner was not 21 years of age on the date of filing of the nomination. Petitioner being aggrieved preferred Election Appeal No.6 of 2007 before the learned District Judge, Ganjam-Gajapati. The learned District Judge by his judgment dated 10.02.2009 confirmed the order of the Election Tribunal. Being aggrieved, the petitioner has preferred the present writ application.

6. A preliminary objection was raised by the learned counsel for the opposite party no.3 (election petitioner) that the writ petition involves disputed questions of facts and concurrent findings of fact, should not be interfered with by exercising jurisdiction under Articles 226 or 227 of the Constitution, by this Court.

7. Mr. Mahadev Mishra, learned counsel for the petitioner, on the contrary, submitted that non-consideration of material evidence by the courts below is a substantial ground for this Court to exercise its power of superintendence under Article 227 of the Constitution to set the wrong right. Mr. Mishra, further submitted that both the courts below have been swayed away by only relying upon the Matriculation Certificate granted by the Board of Secondary Education, Orissa to come to the conclusion that the petitioner was born on 25.05.1986. It was further submitted by him that the courts have discarded the Ext-E, which is the entry in the Sterilization Payment Registe r at Sl. No.300 of the P.H.C., Keluha Palli, which shows that the

mother of the petitioner was sterilized on 21.12.1984 by giving a finding that ladies may conceive after such operation, without any materials in support of such finding. According to Mr. Mishra, Ext-B discloses that the petitioner was a major on 01.01.2002. Therefore, by the date of filing of the nomination paper, he was above 21 years of age and these materials have not been taken into consideration by both the courts below.

8. Learned counsel for the opposite party no.3, however, submitted that if the documents produced by the petitioner before the court below are taken into consideration, it would show different dates of birth of the petitioner and, as such, no reliance could have been placed on such documents more so in view of the Matriculation Certificate which according to law is a conclusive proof of date of birth.

9. On perusal of the judgment passed by the learned District Judge in appeal, it is found that though he has taken into consideration all the documents produced before the Tribunal but he has disbelieved Ext-D showing that the mother of the petitioner underwent Tubectomy operation on 21.12.1984 and hence, there was no chance of her giving birth to the petitioner on 25.05.1986 on the ground that failure of many sterilization operations are there and many women also have gives birth to child after undergoing such operation. For the above conclusion, he has relied upon the decision in the case of ***State of Punjab V. Sibram and Others***, A.I.R. 2005 S.C. 3280. With regard to placing reliance on the Matriculation Certificate, the learned appellate court relied upon different decisions of this Court as well as the Allahabad High Court.

10. However, even accepting all the materials, it is found that the date of birth mentioned in the Voter Identity Card Ext-B as on 01.01.2002 shows to be 18 years. It can, therefore, safely be concluded that the petitioner had a right to exercise his franchise as on 01.01.2002 having been considered to be eligible to be registered in the electoral roll being not less than eighteen years of age under section 19 (a) of the Representation of the People Act, 1950. It is a common knowledge and judicial notice can also be taken of the fact that parents have a tendency to reduce the age of the child by mentioning a subsequent date of birth in the school register, which would ultimately culminate in the certificate granted to the children in the High School Certificate Examination. No doubt, the date of birth as reflected in the Matriculation Certificate relates to the date of birth mentioned in the application form filled up by the candidate, which is required to be submitted before the Examining Authority for appearing in the said examination. But, while considering as to whether a person has attained the age of 21 years on the date of filing of the nomination paper as contemplated under section 11 of the Act, the age mentioned in the Voter Identity Card assumes

relevancy more so because such person is allowed to cast his vote in the General Election having attained the age of majority and registered in the electoral roll. .

11. In this view of the matter and keeping in view the law as laid down in ***Surya Dev Rai V. Ram Chander Rai***, AIR 2003 SC 3044, where the Hon'ble Apex Court held that a patent error is an error, which is self evident, i.e., which can be perceived or demonstrated without delving into any lengthy or complicated argument or a long drawn process of reasoning which can be corrected by the High Court in exercise of its power under Article 227 if such error is manifest and apparent on the face of the proceeding, such as, when it is based on clear ignorance or utter disregard of the provisions of law and grave injustice or gross failure of justice will be occasioned thereby.

12. The other vital question which is to be addressed in this case is with regard to interpretation of section 11 (c) (iii) of the Act. Section 11 of the Act reads as follows:-

> "11. **Qualification for membership in the Grama Panchayat;.** Notwithstanding anything in section 10, no member of a Grama Sasan shall be eligible to stand for election-
>
> (a) as a Sarpanch if he-
>
> (i) is a candidate for election as a member of the Grama Panchayat in respect of any ward; or
>
> (ii) xxx xxx xxx
>
> (iii) is a candidate for election or holds office as a Sarpanch of any other Grama Panchayat;
>
> (b) as a Sarpanch or Naib-Sarpanch, if he has not attained the age of twenty-one years or is unable to read and write Oriya;
>
> (c) as a member-
>
> (i) for more than one ward in the Grama or for more than one Grama Panchayat; or
>
> (ii) if he is unable to read and write Oriya; and
>
> (iii) if he has not attained the age of twenty-one years".

From the above, it would be clear that a person shall not be eligible to stand for election as a Sarpanch if he has not attained the age of 21 years.

Admittedly, according to the date of birth as mentioned in the matriculation certificate relied upon by the pp. parties, the age of the petitioner on the date of filing of nomination paper was 20 years 7 months and 15 days. According to Black's Law Dictionary, the word "attain" means to reach or come to by progression or motion; to arrive at; as, to attain a ripe old age. Thus, to attain the age of 21 years would unambiguously mean that a person on completing 20 years of age attains the age of 21 years. As such, even accepting the date of birth as mentioned in the matriculation certificate of the petitioner, he already attained the age of 21 years as mandate in section 11 (c) (iii) of the Act and the learned courts below have erred in law in interpreting the said clause to the effect that a person should complete 21 years of age. **(Emphasis supplied)**

13. This Court is, therefore, of the view that the learned courts below could not have ignored Ext-B, the Voter Identity Card produced by the petitioner while considering the question as to whether the petitioner was entitled to contest the election to the office of Sarpanch or not in view of mandate of section 11 of the Act and should have held that his nomination paper was rightly accepted as he already attained 21 years of age on the date of filing his nomination paper.

14. This Court, therefore, quashes the impugned judgments passed by the Election Tribunal as well as the appellate authority as at Annexures - 1 and 2 and directs that the petitioner shall continue as the elected Sarpanch of Ekasingi Gram Panchayat.

15. The writ petition is accordingly allowed, but in the circumstances without cost.

Writ petition allowed.

2011 (I) ILR – CUT- 755

M.M.DAS, J.

W.P.(C) NO.15311 OF 2010 (Decided on 03.11.2010)

GELHEI MALLICK & ORS. …… Petitioners.

.Vrs.

DIBAKAR MALLICK & ORS. …… Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 9, RULE 9.

Suit dismissed for default – Application filed under Order 9, Rule 9 C.P.C. for restoration of the Suit – Defendants filed application under Order 39 Rule 1 C.P.C. for grant of interim injunction – Application allowed directing status quo against plaintiffs – Plaintiffs challenged the order before the Addl. District Judge who confirmed the same – Hence the writ petition.

An interim order of injunction either prohibitory or mandatory is always passed relating to the subject matter of the suit – Held, in the present case since the suit is dismissed an application for interim injunction can not be maintained in an application filed by the plaintiff under Order 9, Rule 9 C.P.C. – Orders passed by the learned Trial Court and the lower appellate Court are set aside.

For Petitioner - P.C.Acharya
For Opp.Parties - None

M.M.DAS, J. Hearned Mr. P.C. Acharya, learned counsel for the petitioners and Mr. B.K.Nayak, learned counsel for the opposite parties.

A suit was filed by the petitioners' father for declaration of right, title and interest over Aco.0.29 decimals of land appertaining to sabik Plot No.105 under sabik Khata No.16 in Mouza Aliha in the erstwhile district of Cuttack, which corresponds to hal Plot No.94 under hal Khata No.6 in Mouza – Aliha. The suit was dismissed for default. Subsequently an application under Order 9, Rule 9 C.P.C. has been filed for restoration of the suit, which has been registered as I.A. No.364 of 2008 and is pending disposal before the learned Civil Judge (Senior Division), Kendrapara. The defendants, who were earlier set ex-parte in the suit, appeared in the said interim application and filed an application for grant of an interim injunction. The application was allowed directing maintenance of status quo against the plaintiffs, who were the petitioners in the application under Order 9, Rule 9 C.P.C. Against the

said order, they filed F.A.O. No.60 of 2009 before the learned Additional District Judge, Kendrapara. The said appeal having been dismissed and the order of status quo confirmed, the petitioners being aggrieved have preferred the present writ application.

The moot question which arises for a decision in this case is as to whether an application for grant of interim injunction can be maintained in an application filed under Order 9, Rule 9 C.P.C. for restoration of the suit before the suit is restored. Order 39, Rules 1 deals with grant of temporary injunction, which reads as follows:-

" 1. Where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree ; or
(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors ; or
(c) that the defendant threatens to dispossess the plaintiff, or otherwise cause injury or loss to the plaintiff, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property, or dispossessing or otherwise causing injury or loss as the Court thinks fit, until the disposal of the suit or until further orders."

Since the suit was already dismissed, it is clear that the provision of Order –39, Rule –1 C.P.C. could not have been made applicable for grant of an interim injunction. The next question would be as to whether the Court can grant an order of interim injunction or direction to maintain status quo over the suit property by exercise of its inherent power under section 151 C.P.C.

An interim order of injunction, either prohibitory or mandatory, in a suit, under Order 39, Rule 1 or e C.P.C. is always passed relating to the subject-matter of the suit. When the suit is dismissed and a petition is pending for restoration of the suit, the court is not in seisin over the dispute in respect of the subject-matter of the suit. The question to be decided in an application for restoration of the suit under Order 9, Rule 9 C.P.C. is as to whether the plaintiff had sufficient cause for his non-appearance when the suit was called on for hearing. When the court is, thus, in seisin of a petition of Order 9, Rule 9 C.P.C. the only jurisdiction which is exercisable by it is to find out as to whether the plaintiff had shown sufficient cause for non-appearance in the suit when the matter was called on for hearing and was dismissed for the plaintiff's non-appearance and if the finding is in favour of the plaintiff, the suit is to be restored. The court, therefore, at that stage, has

no jurisdiction to decide the dispute over the subject-matter of the suit which is in a stage of dismissal.

In the considered view of this Court, therefore, an application for injunction or for any other interim order over the subject-matter of the suit can not be maintained in an application filed by the plaintiff under Order 9 Rule 9 C.P.C. filed for restoration of the suit. The said application filed by the defendant in the instant case on which the interim orders have been passed was, therefore, misconceived and the learned courts below could not have passed such interim orders. Hence, the impugned orders passed by the learned Civil Judge (Senior Division), Kendrapara and the learned Additional District Judge, Kendrapara in I.A. No.257 of 2009 and F.A.O. No.60 of 2009 respectively are unsustainable which are accordingly set aside.

The writ petition stands allowed.

As it is submitted that I.A. No.257 of 2009 filed under Order 9, Rule 9 C.P.C. is pending since 2008, the learned Civil Judge (Senior Division), Kendrapara is directed to dispose of the said application by end of January, 2011.

Writ petition allowed.

2011 (I) ILR – CUT- 758

R.N.BISWAL, J.

W.P.(C) NO.10020 OF 2004 (Decided on 18.02.2011)

DANDAPANI MULI …….. Petitioner.

.Vrs.

P.O.,INDUSTRIAL TRIBUNAL
BBSR & ORS. …….. Opp.Parties.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.33 (2) (b).

Disciplinary Proceeding – Petitioner was a conductor – The Bus in which he was working was checked up and 32 passengers were found to be traveling without ticket – Charge framed – Enquiry Officer submitted report saying charge No.1 was partly proved and charge No.2 was proved – Disciplinary Authority differed with the view of the Inquiry Officer and said that charge No.1 fully proved and dismissed the petitioner – Petitioner approached the Tribunal which was a in vain – Hence the writ petition.

Disciplinary authority while differing with the view of the Enquiry officer should have given a chance to the petitioner on the tentative reasons of his disagreement – Failure to do so violates the principles of natural justice. The Tribunal while according approval to the order of the Disciplinary Authority did not take this fact in to consideration – Held, order of the Disciplinary Authority as well as the Tribunal are quashed.

(Para 5)

Case laws Referred to :-

1.2009 (I) OLE 243 : (Purna Chandra Pattnaik-V-State of Orissa & two Ors.)
2.AIR 2001 SC2398 : (S.B.I. & Ors.-V-Arvind Kumar Shukla).
3.2008 (II) OLR 201 : (Rushi Guman Singh-V- State of Orissa & Ors.)

For Petitioner - M/s. Kamala kanta Nayak & B.B.Das.

For Opp.Parties - M/s. A.Mohanty, J.Sahu, N.K.Tripathy
J.P.Patra, M.K.Rout & S.P.Nayak
(for O.P.No.3)
M/s. Brajakishore Sahoo, K.C. Sahoo & R.P.Bhagat.

R.N.BISWAL, J. As per the writ petition, the petitioner was working as conductor under the Orissa State Road Transport Corporation (in short 'OSRTC') in Keonjhar Zone during the year 1996. On 19.10.1996 at about 9.20 A.M. while he was conducting Keonjhar-Sambalpur (UP) bus bearing registration no.OSJ-1202 it is alleged that on signal the bus was stopped at a distance of 1/4th K.M. before Kalamati. The checking squad consisting of A.T.M. (Vigilance) OSRTC and two traffic inspectors, namely Sanat Kumar Mishra and Fakir Charan Panigrahi entered into the bus and took possession of the ticket book. On counting, 59 passengers were found to be there in the bus, but the petitioner had issued only 27 full and four half tickets. In other words 32 passengers were found traveling without ticket. Accordingly, the A.T.M. (Vigilance) prepared the checking report in presence of the petitioner and asked him to put his signature there, but he refused to do so. Thereafter, A.T.M. (Vigilance) reported the matter to the District Transport Manager (A), OSRTC, Keonjhar (disciplinary authority) on receipt of which he put the petitioner under suspension on 2.11.1996 and framed charge against him under two counts. Charge No.1, which is the main charge, reads as follows:-

> "That on 13.1096 while he was conducting Keonjhar-Sambalpur (UP) bus No.OSJ-1202, the said bus was signaled, stopped and checked by Sri S.K.Pradhan, A.T.M. (Gig.) and Sri F.C.Panigrahi, T.I. Hqrs at a distance of 1/4th K.M. before Kalamati at about 9.20 A.M. During the course of checking it was found by the checking officers that there were 53-4/2 passengers traveled in the bus as against 27-4/2 valid tickets and the rest 32 passengers were permitted by him (the conductor) to board into the bus and carry them without ticket in a transport vehicle of the Corporation at the place and time of checking. It is further reported that the check report No.3 dt.13.1096 duly filled in at the spot by the checking officers was refused to sign the same by him (the conductor) along with driver of the bus at the spot. These speaks of his misconduct as per Rule 136 (34) and (69) of OSRTC (CR & CS) Regulations, 1978 and (Amendment) Regulations 1986."

The 2nd charge relates to the past misconduct and punishment imposed against the petitioner.

2. An explanation was called for from the petitioner to explain the above charges. In his explanation, the petitioner, inter alia, conteded that the bus in question was checked at Kalamati bus stand and not 1/4th K.M. before it as alleged, just before a private bus which was competing with the bus conducted by the petitioner, suffered breakdown at Kalamati and a Kirtan Dal got down from that bus and forcibly entered into the bus of the petitioner. Since the explanation submitted by the petitioner was held not to be

satisfactory, the then Asst. Manager (Administration), Keonjhar was appointed as enquiry officer to enquire into the matter. Accordingly, he enquired into the matter and in course of enquiry examined the A.T.M. (Vigilance), Sri Fakir Charan Panigrahi, Transport Inspector, Sri Ratnakar Maharana, the driver of the bus in question, Akshya Kumar Mishra, an independent witness and the delinquent. After completion of enquiry he submitted his report holding as follows:-

> "In view of the above mentioned foregoing paras the enquiry hold that there were 32 passengers who were entered into the bus. Prior to issue of tickets violating the departmental circulars as such the charge No.1 is partly proved for negligence in duty.
>
> As regards charge No.2 the past punishment were inflicted basing on recordical evidence with due knowledge of the delinquent and hence it is proved."

3. The disciplinary authority different with the view of the enquiry officer in respect of charge No.1 and held that it was fully proved. So, he dismissed the petitioner from service vide order dated 7.11.1997 and treated the period under suspension as such. Since I.D. Case Nos.19 of 1989 and 45 of 1991, in which the petitioner was concerned, were pending before the Industrial Tribunal, Bhubaneswar the Disciplinary Authority filed an application under Section 33 (2) (b) of the I.D. Act before the said Tribunal seeking approval of his action in dismissing the petitioner. The said application was registered as I.D. Misc. Case No.51 of 1997 and the petitioner was asked to file show cause. In his show cause the petitioner took the same plea as he had taken in reply to the charge memo. Four witnesses were examined on behalf of the Management as against only one witness on behalf of the petitioner before the tribunal. After going through the oral and documentary evidence, the learned tribunal, vide order dated 21.5.2003 held that there was no infringement of the principle of natural justice, while holding the domestic enquiry against the petitioner and the statutory compliance as prescribed under Section 33 (2) (b) of the I.D. Act and accordingly approved the action of the management in dismissing the petitioner from service and allowed I.D. Misc. Case.

In this writ petition, the petitioner has challenged the order of dismissal dated 7.11.97 passed by the disciplinary authority (Annexure-5) and the order dated 21.5.2003 passed by the learned Presiding Officer (Annexure-6).

4. Learned counsel for the petitioner submitted that while adjudicating a petition under Section 33 (2) (b) of the I.D. Act, it is the primery duty of the tribunal to enquire whether the principle of natural justice had been followed

in the domestic inquiry. In the present case, the enquiry officer held that charge No.1 was partly proved and charge No.2 was proved, but the disciplinary authority differed with his finding holding that charge No.1 was also proved. So, it was the duty of the disciplinary authority to record its tentative reasons for disagreement and call for an explanation on the same from the petitioner. But it has not been done so. So, the order of dismissal passed by the disciplinary authority under Annexure-5 deserves to be quashed, as there was violation of natural justice. In support of his submission, learned counsel for the petitioner relied on the decisions in the case of Purna Chandra Pattnaik v. State of Orissa and two others, 2009 (I) OLR.243, S.B.I. and others v. Arvind Kumar Shukla, AIR 2001, SC 2398 and Rushi Guman Singh v. State of Orissa and others, 2008 (II) OLR, 201. On the other hand, learned counsel for the opp.party-management supported both the orders passed under Annexures-5 and 6.
In the decision Purna Chandra Pattnaik (supra), a division bench of this Court held that :

> "If the competent authority does not agree with the inquiry officer, he must record reasons for disengagement and supply the same to the delinquent to file his comments/objections – Otherwise, the order would stand vitiated for non-compliance of the principles of natural justice."

In the decision S.B.I. and others (supra), the Apex Court held that the disciplinary authority is required to record its tentative reasons for disagreement with the enquiry officer and to communicate the said reasons to the delinquent to represent, before it records its ultimate findings. In the case of Rushi Guman Singh 9supra), this Court has also taken the same view.

5. Admittedly, as rightly submitted by learned counsel for the petitioner, in the present case, the disciplinary authority has not given any chance to petitioner to file show cause on the tentative reasons of his disagreement with the view of the enquiry officer. So, there was violation of the principles of natural justice. The Tribunal while according approval to the order of dismissal passed by the disciplinary authority did not take this fact into consideration.

Therefore, the writ petition is allowed and the orders passed under Annexures-5 and 6 are quashed. No cost.

Writ petition allowed.

2011 (I) ILR – CUT- 762

INDRAJIT MAHANTY, J.

CRLMC. NO. 3624 OF 2010 (Decided on 20.01.2011)

ANANTA CHARAN PRASAD …… Petitioner.

.Vrs.

STATE OF ORISSA
(VIGILANCE DEPARTMENT) …..... Opp.Parties.

(A) P.C ACT, 1988 (ACT No. 49 OF 1988) – S.19.

Sanction – Offence committed by public servant when he was in office – When the Court takes cognizance of the offence the public servant already retired and ceased to be a public servant – Held, Court can take cognizance of the offence without sanction as mandated U/s.19 of the P.C. Act. (Para 4)

(B)) P.C ACT, 1988 (ACT NO.49 OF 1988) – S.13.

Allegation of Misappropriation of Rs.2,00,000/- by the petitioner on 13.04.1997 – On 3.5.1997 he deposited the above money in the office bank account – Deposit of the above money on a later date can not absolve the petitioner from the accusation of misappropriation – Held, no interference against the order framing charge against the petitioner. (Para 5)

Case laws Referred to:-

1.2006(1) SCC 557 : (Rakesh Kumar Mishra -V- State of Bihar & Ors.).
2.(2004) 8 SCC 40 : (State of Orissa -V- Ganesh Chandra Jew).

Case law Followed:-
(1998) 6 SCC 411 : (Kalicharan Mahapatra-V-State of Orissa.

For Petitioner - M/s. Trilochan Nanda & S.N.Mishra.
For Opp.Party - Mr. K.K.Mishra (Addl.Govt. Advocate)

I.MAHANTY, J. In the present application under Section 482 Cr.P.C. the petitioner-Ananta Charan Prasad has sought for quashing of the order dated 03.11.2010 passed by the learned Special Judge (Vigilance), Bolangir in C.T.R. No.19/113 of 2007, whereby, the learned Special Judge (Vigilance) has framed charges against the petitioner under Section 13(2) read with

Section 13(1)(c)(d) of the Prevention of Corruption Act, 1988 and Section 477-A/409 of the Indian Penal Code.

2. Learned counsel for the petitioner challenged the said order, inter alia, on the ground that prior "sanction" as required under Section 19 of the Prevention of Corruption Act, has not been obtained and further, the petitioner had deposited the alleged misappropriated amount of Rs.2 lakhs and due to mistake, the same had not been properly reflected in the cash book.

In this respect, learned counsel for the petitioner placed reliance on the judgments of the Hon'ble Supreme Court in the case of **Rakesh Kumar Mishra v. State of Bihar and others**, 2006(1)SCC 557 and **State of Orissa v. Ganesh Chandra Jew**, (2004)8 SCC 40.

3. Learned Additional Government Advocate on behalf of the State submitted that the petitioner had retired from Government service and, therefore, there is no requirement for "sanction" as laid down by the Hon'ble Supreme Court in the case of **Kalicharan Mahapatra v. State of Orissa**, (1998) 6 SCC 411. Apart from this, learned counsel for the State submitted that the charge-sheet would reveal that the Departmental Proceeding has been initiated against the accused-petitioner and the same had concluded in conviction and the accused-petitioner had deposited the misappropriated amount after the misappropriation has been detected. Therefore, the deposit of the misappropriated amount by the accused-petitioner is of no consequence at the present stage.

4. In the case of **Ganesh Chandra Jew** (supra), the Hon'ble Supreme Court has dealt with the scope and ambit of Section 197 of Cr.P.C. but in the said case, the accused was not a retired government servant and the question as to whether sanction under Section 19 of the P.C. Act, 1988 was required or not, was not the subject matter of the consideration therein. In the case of **Rakesh Kumar Mishra** (supra), similarly, the accused therein was not a retired government servant and, therefore, the said case as well is of no assistance to the petitioner herein.

On the other hand, the judgment of the Hon'ble Supreme Court in the case of **Kalicharan Mahapatra** (supra) is clear and unambiguous and Paragraph-14 thereof is quoted here in below:

> "14. The result of the above discussion is thus: A public servant who committed an offence mentioned in the Act, while he was a public servant, can be prosecuted with the sanction contemplated in Section 19 of the Act if he continues to be a public servant when the court takes cognizance of the offence. But if he

> ceases to be a public servant by that time, the court can take cognizance of the offence without any such sanction. In other words, the public servant who committed the offence while he was a public servant, is liable to be prosecuted whether he continues in office or not at the time of trial or during the pendency of the prosecution."

In the facts of the present case, the petitioner is admittedly a retired government servant and since he has ceased to be a public servant, the court can take cognizance of offence without any such sanction as mandated under Section 19 of the P.C.Act and, therefore, the first contention on behalf of the petitioner is of no further consideration.

5. Insofar as the second contention of the petitioner is concerned, that he has deposited the alleged misappropriated amount in the bank, the same is also of no consequence at the present juncture, inasmuch as, it was found during investigation that, the petitioner while working as Senior Clerk-cum-cashier in the office of the C.S.O.-Cum-D.M., OSCSC Ltd., Bolangir, on scrutiny of the cash book maintained by the accused-petitioner, it was found that on 13.4.1997 instead of the closing balance of Rs.5,45,127.85/-, the petitioner has mentioned the closing balance as Rs.3,45,127.85/- and thereby, he had reduced the closing balance of Rs.2,00,000/- and had misappropriated the said amount. Thereafter, the deposit was made by the accused-petitioner on 3.5.1997 of Rs.2,00,000/- in the bank account of the C.S.O.-Cum-D.M., OSCSC Ltd., Bolangir. Therefore, the deposit of Rs.2,00,000/- on a later date, cannot absolve the petitioner of the accusation of the misappropriation of Rs.2,00,000/- on 13.4.1997.

6. In the light of the aforesaid finding, I find no justification in the present petition under Section 482 Cr.P.C. against the order of framing charges against the petitioner. Accordingly, the CRLMC is dismissed and impugned order dated 3.11.2010 is affirmed.

Application dismissed.

2011 (I) ILR – CUT- 765

INDRAJIT .MAHANTY, J.

ARBA NO.7 & 9 OF 2008 (Decided on 01.07.2008)

DUSHASAN SAHOO & ANR. ….. …. Appellants.

.Vrs.

GEETARANI MOHANTY & ORS. …… Respondents.

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

Dispute relating to execution of partnership deed Dt.03.08.1991, Deed of retirement by respondent No.1 Dt.31.03.1993 and reconstitution of partnership firm Dt.01.04.1993 where in appellants were inducted – Respondent No.1 made application U/s.9 of the Act before the learned District Judge to declare those documents illegal on the ground of fraud – Appellants filed objection saying there is delay of more than 15 years which is not explained – Moreover the deed of retirement was not only signed by respondent No.1 but also by her husband as a witness who was noneelse but a senior Government Servant – It was also placed that Civil Suit No.4 of 2006 is pending before the Civil Court seeking injunction against the respondent and despite the same the learned District Judge allowed application U/s. 9 of the Act – Hence the appeal.

Relief for such declaration can only be granted by a Civil Court but not by an arbitrator – Since an arbitrator under the partnership deed Dt.03.08.1991 was not competent in law to declare reconstitution of partnerships deed Dt.01.04.1993 as illegal, consequently the learned District Judge was incompetent to pass any interim order on an application U/s.9 of the Act – Held, impugned order Dt.17.03.2008 passed by the learned District Judge is without jurisdiction hence set aside – Direction issued to the learned Civil Judge (Jr.Divn.) to proceed with the suit and consider the objections raised by the respondents U/s.8 of the Act.

(Para 41,42)

Case law Relied on:-

AIR 2008 SC 1016 : (Atul Singh & Ors. -V- Sunil Kumar Singh & Ors.)

Case laws Referred to:-

1.(2004) 9 SCC 619 : (MD. Army Welfare Housing Organisation-V- Sumangal Services Pvt. Ltd.)

2.(2003) 5 SCC 531 : (Sukanya Holdings Pvt. Ltd.-V-Jayesh H.Pandya & Anr.)
3.(2005) 8 SCC 618 : (SBP & Co.-V- Patel Engineering Ltd. & Anr.).
4.1990(1) CAL. L.T.200 : (Hindustan Papers Corporation Ltd.-V-Keneilhouse Angami)
5.(2004) ALD 121: AIR 1974 SC 1892 : (Krishna Cermics & Refractories, Rajahmundry -V-K.V.Naryanan & Ors.)
6.AIR 1968 SC 956 : (Ningawwa-V-Byrappa Shiddappa Hireknrabar & Ors.)
7.(2006) 5 SCC 353 : (Prem Singh & Ors.-V- Birbal & Ors.)
8.(1994) 1 SCC 502 : (Svenske Handelsbanken-V-Indian Charge Chrome).
9.(1996) 1 SCC 443 : (Biharilal Jaiswal & Ors.-V-Commissioner of Income Tax & Ors.)
10.AIR 2001 SC 2552 : (Dhurandhar Prasad Singh-V-Jaiprakash University & Ors.)
11.(2004) 8 SCC 706 : (Balvant N.Viswamitra & Ors.-V-Yadav Sadshiv Mule(dead) through L.Rs.).

For Appellants - Mr. P.C.Chatterji, Sr.Advocate
M/s. U.C.Patnaik, A.J.Mohanty, P.K.Swain & S.Patnaik.
For Respondents- Mr. R.K.Rath, Sr. Advocate
M/s. S.P.Sarangi,B.C.Mohanty,P.P.Mohanty, D.K.Das & P.K.Dash.
For Appellant - Mr. Jayanta Mitra, Sr. Advocate
M/s. D.K.Dey, C.K.Dey & A.K.Das.
For Respondents- Mr. R.K.Rath, Sr.Advocate.
M/s. S.P.Sarangi, B.C.Mohanty, P.P.Mohanty, D.K.Das, P.K.Dash & A.Patnaik.

I.MAHANTY, J. The aforesaid appeals, under section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (in short "1996 Act") have been filed by two sets of Defendants, against a common judgment and order dated 17.3.2008, passed by the learned Dist. Judge Khurda at Bhubaneswar, on an application filed by the Respondents under section 9 of the said Act which was registered as Arbitration Petition No.15 of 2008.

2. The operative part of the impugned order of the learned Dist. Judge, Khurda at Bhubaneswar is quoted hereunder:

> " That the arbitration petition u/s. 9 of the Act is allowed on contest against the O.Ps., but in the circumstances without any cost. As an interim measure of protection the scheduled mines are not to be operated by the partners of the reconstituted partnership firm comprising of the Opposite Parties under the partnership deed dated

1.4.93 and the partnership firm constituted under the partnership deed dated 3.8.91 comprising of the petitioner and the O.P.No.1 in which the O.P.No.1 is the Managing Partner is at liberty to carry on mining business in the scheduled mines in terms of the partnership deed dated 3.8.91 comprising of the petitioner and the O.P. No.1 in which the O.P.No.1 is the Managing Partner is at Liberty to carry on mining business in the scheduled mines in terms of the partnership deed dated 3.8.91, till the dispute is decided by arbitration. The petitioner is directed to take steps within three months hence for appointment of arbitrator for settlement of the dispute, failing which this order shall stand automatically vacated."

Whereas, Sri Dushasan Sahoo and Smt. Suprasanna Sahoo (opposite parties 2 and 3 in Arbitration Petition No.15 of 2008) have sought to challenge the same by way of Arbitration Appeal No.7 of 2008. Sri Srinivash Sahoo (opposite party no.1 in Arbitration Petition No.15 of 2008) has filed Arbitration Appeal No.9 of 2008 challenging the self-same order.

3. The facts as revealed in the pleadings leading to the application under Section 9 of the Act are noted as follows: -

30th March 1981	:	Smt. Geetarani Mohanty (Respondent-1) filed an Application for obtaining Mining lease at Raikela.
14th November 1990	:	Government of Orissa granted mining lease to Smt. Geetarani Mohanty.
10th January 1991	:	Smt. Geetarani Mohanty-Respondent No.1 Executed a General Power of Attorney in favour of Srinivas Sahoo (Appellant in ARNA No.9/2008).
2nd July 1991	:	State of Orissa executed a Lease Deed in respect of the said area in favour of Smt. Geetarani Mohanty (Respondent No.1).
3rd August 1991	:	Partnership firm in the name and style of "M/s. Geetarani Mohanty" was formed with M/s. Geetarani Mohanty and Srinivash Sahoo having 55% and 45% shares respectively.
3rd February 1992	:	Smt. Geetarani Mohanty made an application to the Government of Orissa for transfer of the mining lease in favour of the partnership firm.
17th October 1992	:	Government of Orissa accorded permission for transfer of the mining lease in favour of the partnership firm-M/s. Geetarani Mohanty.
13th February 1993	:	Smt. Geetarani Mohanty executed a Deed of Transfer in Form C of the mining lease in favour

of partnership firm. The Deed of Transfer was executed by Geetarani Mohanty through her constituted Attorney Sushanto Sahoo (Annexure-5).

31st March 1993 : Smt. Geetarani Mohanty issued a letter of Resignation for the partnership firm acknowledging having received her share as per books of account upon 31st March 1993. Deed of Retirement executed by Smt.Geetarani Mohanty retiring as a partner from the partnership firm. Her husband, a Senior Govt. Officer signed the Deed of Retirement. (Annexure-5) as a witness.

1st April 1993 : Deed of Reconstitution of the partnership firm M/s. Geetarani Mohanty inducting Dushashan Sahoo and Smt. Suprasanna Sahoo as partners in the reconstituted firm. The said deed is also signed by Smt.Geetarani Mohanty as well as her constituted attorney Sushanto Kumar Sahoo as witnesses.

16th January 2006 : Smt. Geetarani Mohanty purportedly issued a letter purportedly canceling the general Power of Attorney dated 10th January, 1991 in favour of Srinibash Sahoo.

17th February 2006 : Mr.Srinivash Sahoo as the Managing Partner of M/s.Geetarani Mohanty filed Civil Suit No.9 of 2006 in the Court of Civil Judge (Jr. Division), Bhubaneswar for permanent injunction against M/s. Geetarani Mohanty restraining her from interfering with the business, administration and activities in the firm.

21st February 2006 : the Civil Judge (Jr.Division), Bhubaneswar passed order of “status quo” in C.S. No.49 of 2006.

2nd January 2008 : Smt. Geetarani Mohanty sought to invoke the arbitration clause by appointing an Arbitrator.

7th January 2008 : Smt. Geetarani Mohanty filed Arbitration Petition No.15 of 2008 before the court of District Judge, Khurda under Section 9 of the Arbitration and Conciliation Act, 1996.

17th March 2008 : The impugned judgment was passed by the learned District Judge, Khurda at Bhubaneswar.

4. Mr. J.Mitra, learned senior advocate appearing for the Appellant in ARBA No.9/2008, submitted that the judgment and order dated 17.3.2008 passed by the learned District Judge, Khurda at Bhubaneswar is not only erroneous on facts as well as law, but is also wholly without jurisdiction. He submitted that the application under Section 9 of the Act which is in the nature of interlocutory application and could only have been sought as an aid to the main relief in an arbitration proceeding, whereas the prayer in the application U/s.9 has been made seeking in effect "substantive relief" which is impermissible in law. It is further submitted that, since the Partnership Deed of 1991 had came to an end with the retirement of Smt. Geetarani Mohanty (Respondent) on 31.3.1993, neither was an arbitration there under any longer possible nor could any order on an application under Section 9 of the Arbitration Act be passed on the said basis.

5. It is submitted that original partnership deed dated 3rd August, 1991 came to an end on 31st March, 1993 with Smt.Geetarani Mohanty issuing a "Letter of Resignation" and signing the "deed of retirement" where after on 1st April 1993, the partnership firm was reconstituted by inducting Shri Dushashan Sahoo and Smt. Suprasanna Sahoo (Appellant in ARBA No.7/2008) as partners. It is contended that, so long as the Deed of Retirement dated 31st March 1993 and the Deed of Reconstitution dated 1st April 1993 remain valid and operative in law and are not declared void and inoperative, Smt. Geetarani Mohanty, can not be permitted to seek any relief on the basis of the earlier partnership deed dated 3rd August, 1991 in order to claim any relief there under or arising there from. In essence, Mr. Mitra, learned Senior Counsel submitted that it is absolutely essential for Smt. Geetarani Mohanty to have the Partnership Deed dated 1st April, 1993 and the Deed of Retirement dated 31st March, 1993 declared illegal, void and inoperative and to have the same delivered and cancelled. Such relief can only be granted by the Civil Court in a civil suit and not by the Arbitrator under the original partnership deed. It is only thereafter, it becomes lawfully possible for Smt. Geetarani Mohanty if at all to seek for appointment of an Arbitrator under Clause-15 of the Partnership Deed dated 1st April 1993.

6. The learned counsel for the Appellant further submitted that, the learned District Judges' judgment and order dated 17th March, 2008, becomes wholly without jurisdiction and the interim measure of protection that has been directed by the District Judge, directing the partnership firm of 3.8.1991 comprising Smt.Geetarani Mohanty and Sri Srinivash Sahoo to carry on mining business in the scheduled mines, was in effect in final award, in so far as the status of the Deed of Retirement and Deed of Reconstitution are concerned. Learned counsel submits that the impugned order passed by the District Judge was entirely beyond/outside his jurisdiction and was therefore, liable to be set aside. Mr. Mitra, learned

counsel for the appellant placed reliance upon the decision of the Hon'be Supreme Court in the case of Atul Singh and others v. Sunil Kumar Singh and others, AIR 2008 SC 1016 in support of his contentions.

7. It is further submitted that, the impugned order passed by the learned District, Judge, effectively seeks to restrain the Respondent Nos.2 and 3 (Shri Dushashan Sahoo and Smt.Suprasanna Sahoo) who are partners of the reconstituted firm under the Deed of Reconstituted Partnership dated 1st April, 1993, from participating in the operation of the mines. It is submitted that the partners of the reconstituted firm (apart from Srinivash Sahoo) who are obviously not parties to the arbitration agreement contained in the earlier Partnership Deed dated 3rd August, 1991. Therefore, there being no privacy of contract between Smt. Geetarani Mohanty on the one hand and Shri Dushashan Sahoo and Smt. Suprasanna Sahoo on the other, no order could have been passed by the learned District Judge, which would directly or indirectly, affect the interest of Shri Dushashan Sahoo and Smt. Suprasanna Sahoo who were admittedly not parties to the Arbitration Agreement dated 3rd August, 1991. Therefore, learned counsel submits that the order of the learned district Judge is to be held to have been passed without jurisdiction.

8. In support of the aforesaid submissions, learned counsel for the appellants placed reliance upon a decision of the apex Court in the case MD. Army Welfare Housing Organisation Vrs. Sumangal Services Pvt. Ltd., (2004) 9 SCC 619 and in particular, the dicta of the Hon'ble Supreme Court in paragraph-58 of the said judgment which is quoted herein below:

> " A bare perusal of the aforementioned provisions would clearly show that even under Section 17 of the 1996 Act the power of the arbitrator is a limited one. He can not issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of court; the same is enforceable on its won force. Even under Section 17 of the 1996 Act, an interim order must relate to the protection of the subject matter of dispute and the order may be addressed only to a party to the arbitration. It can not be addressed to other parties. Even under Section 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, therefore, being coram non judice was wholly without jurisdiction and, thus, was a nullity."

Learned counsel further placed reliance on another decision of the Hon'ble Supreme Court in the case of Sukanya Holdings Pvt. Ltd. Vrs. Jeyesh H. Pandya and another, (2003) 5 SCC 531 and in particular, the

dicta of the apex Court in paragraphs-13,14 and 15 of the said judgment which are quoted herein below :

> "13. Secondly, there is no provision in the Act that when the subject matter of the suit includes subject-matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject-matter of the suit to the arbitrators.
>
> 14. Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement; As against this, under section 24 of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the court may refer the same to arbitration provided that the same can be separated from the rest of the subject-matter of the suit. The section also provided that the suit would continue so far as it related to parties who have not joined in such application.
>
> 15. The relevant language used in section 8 is "in a matter which is the subject of an arbitration agreement". The court is required to refer the parties to arbitration. Therefore, the suit should be in respect of "a matter" which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced – "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not parties to the arbitration agreement, there is no question of application of section 8. The words "a matter" indicate that the entire subject-matter of the suit should be subject to arbitration agreement."

9. Prior to the application under Section 9 of the 1996 Act being filed before the District Judge, it appears that the appellants have filed Civil Suit No.49 of 2006 before the learned Civil Judge (Jr. Divn.), Bhubaneswar seeking an order of permanent injunction against the present respondents from interfering with their mining operations. In the said proceeding, respondents herein have raised objections under section 8 of the 1996 Act challenging its maintainability. Apart from these two proceedings, learned counsel for the respondents submitted that the respondents have also filed a section 11 application before this High Court for appointment of an arbitrator. In other words, it is apparent that the question of existence of arbitral clause is a question which has been raised in all the aforesaid proceedings.

A seven Judges Bench of the Hon'ble Supreme Court by way of majority judgment in the case of ***SBP & Co. Vrs. Patel Engineering Ltd. and another*** (2005) 8 SCC 618 have taken note of the fact that a question regarding existence or validity of the arbitration agreement may arise in an application under section 8 of the 1996 Act as well as in the process of adjudication of an application under section 9 of the 1996 Act. It would, therefore, relevant to quote paragraph-19 of that judgment which reads as follows :

> " It is also not possible to accept the argument that there is an exclusive conferment of jurisdiction on the Arbitral Tribunal, to decide on the existence or validity of the arbitration agreement. Section 8 of the Act contemplates a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement, on the terms specified therein, to refer the dispute to arbitration. A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, in our opinion, include other courts and may even include a special tribunal like the Consumer Forum (See Fair Air Engineers (P) Ltd. V. N.K.Modi). When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject-matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause. It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it, and mechanically refer the parties to an arbitration. Similarly, section 9 enables a court, obviously, as defined in the Act, when approached by a party before the commencement of an arbitral proceeding, to grant interim relief as contemplated by the section. When a party seeks an interim relief asserting that there was a dispute liable to be arbitrated upon in terms of the Act, and the opposite party disputes the existence of an arbitration agreement as defined in the Act or raises a plea that the dispute involved was not covered by the arbitration clause or that the court which was approached had no jurisdiction to pass any order in terms of section 9 of the Act, that court has necessarily to decide whether it has jurisdiction, whether there is an arbitration agreement which is valid in law and whether the dispute sought to be raised is covered by that agreement. There is no indication in the Act that the

> powers of the court are curtailed on these aspects. On the other hand, Section 9 insists that once approached in that behalf, "the court shall have the same power for making orders as it has for the purpose of and in relation to any proceeding before it". Surely, when a matter is entrusted to a civil court in the ordinary hierarchy of courts without anything more, the procedure of that court would govern the adjudication."

Therefore, in terms of the aforesaid judgment of the Hon'ble Supreme Court, since the appellants who were Opp.Parties in the proceeding before the learned District Judge, in the application filed by the respondents under section 9 of the 1996 Act, disputed the existence of an arbitration agreement and raised a further plea that the dispute raised is not covered under the arbitration clause, that court had the necessary obligation to decide, whether there exists an arbitration agreement, which is valid in law and further as to whether the dispute sought to be raised is covered under that agreement. The present appeal under section 37 also casts a similar obligation on the appellate court.

10. Mr. P.C. Chatterjee, learned senior counsel appearing for the appellants-Sri Dushashan Sahoo in ARBA 7 of 2008 submitted that the impugned order had been passed by the learned District Judge, in an application under Section 9 of the Act, purportedly, relying upon an Arbitration Clause contained in the partnership deed dated 3.8.1991. He submitted that these appellants, namely, Sri Dushashan Sahoo and Smt. Suprasanna Sahoo, were not parties to the partnership deed of 1991 and, therefore, the appellants could neither have been made parties to the application under Section 9 of the Act, nor any order could have been passed against the present appellants. Learned counsel asserted that the purported Arbitration Clause in the partnership deed dated 3.8.1991, is obviously confined to the partners who were existing at the said time and does not bind the present appellants, who came to be inducted as the partners of the firm, pursuant to the reconstituted partnership deed dated 1.4.1993. It is submitted that Respondent No.1-Smt. Geetarani Mohanty, no longer being a partner of the reconstituted firm, is incompetent to raise any dispute under the Arbitration Clause contained in the earlier partnership deed dated 3.8.1991.

11. Learned counsel for the appellants strenuously urged that the respondent-Smt.Geetarani Mohanty had executed a deed of retirement dated 31.3.1993 which was signed not only by her, but was also, signed by her husband (a Government servant) as a witness and, therefore, the validity of the subsequent reconstituted partnership deed to which the respondent-Geetarani Mohanty is a witness, can not be questioned by her through any

arbitration proceeding. In other words, it is asserted that no relief against these appellants is or can be made subject matter to an arbitration proceeding, initiated by Smt. Geetarani Mohanty, since they were not parties to the arbitration agreement.

12. Mr. Chatterjee asserted that Section 9 of the Arbitration Act, empowered the civil court to pass limited protective orders in respect of "subject matter of the reference" and since no relief of any kind can be claimed against the present appellant, consequently the civil court acting on an application under Section 9 does not possess the necessary jurisdiction to pass any order, directly or indirectly affecting the rights of the appellants whose rights arise out of the deed of reconstituted partnership dated 1.4.1993. He further asserted that the impugned order directly and severely affects the rights of the appellants to carry on business under the partnership deed dated 1.4.1993, which business they have been carrying on for over fifteen years and more and the consequential order of restraining the appellants or directing status quo as existing prior to 1.4.1993, effectively amounts to a direction dispossessing the appellants from the properties in which they have been peacefully carrying on business for over fifteen years.

13. It is further submitted that the learned District Judge has given findings which are, inter alia, final in nature and it also appears that the District Judge has also sought to exercise jurisdiction of the Civil Judge (Junior Division) before whom the Civil Suit No.49 of 2006 is pending, apart from actually exercising the jurisdiction of an arbitrator, by giving his finding regarding the merit of the application filed by the appellants. Mr. Chatterjee, has also assailed the finding of the learned District Judge at pages-36 and 37 of the judgment wherein, learned District Judge has observed that "it can not be said that the deed of reconstitution is a genuine document and it has been held that the partnership dated 3.8.1991 is still subsists". Apart from that the District Judge has further held that the deed of retirement and the deed of reconstituted partnership are not in operation. He further assails the finding of the learned District Judge at Page-40 of the judgment, to the effect that, the learned District Judge has held that the Civil Judge (Jr.Division) has no jurisdiction to continue the suit once an appeal under Section 7 of the Act has been filed. Learned counsel asserts that, the learned District Judge has no jurisdiction to give any finding upon a matter pending before another court, which is admittedly a court of competent jurisdiction. Mr. Chatterjee draws the attention of this Court to the finding of the learned District Judge at pages-40 and 41 of the judgment, where in, the learned District Judge has held that Section 9 of the proceeding is maintainable "as the appellants are necessary parties." He asserts that since the learned District Judge has come to a conclusion that "appellants are necessary parties", the learned

District Judge had, in fact, no other alternative but to dismiss the said Section 9 application, since "the necessary parties" were not parties to the arbitration agreement.

14. Mr. Chatterjee in conclusion of the argument, placed reliance on various decisions including the case of ***Hindustan Papers Corporation Ltd. Vs. Keneilhouse Angami,*** 1990 (1) CAL. L.T. 200: Vol.68, Company Cases, 361 wherein, the Calcutta High Court in paragraph-9 of the judgment in which matter arose out of an application seeking an injunction from invoking the bank guarantee held that although the arbitration agreement may be very wide but that certainly does cover the dispute arising under "a separate agreement with a separate party". Mr. Chatterjee also placed reliance on the judgment of the Apex Court in the case ***of MD. Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd.,*** (2004) 9 SCC 619 and in particular, observations of the Court in Paragraphs-43 and 69 thereof, wherein, the Apex Court has observed that "an Arbitral Tribunal is snot a court of law. It's orders are not judicial orders. Its functions are not judicial functions. It can not exercise its power *ex debito justiae*. The jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject matter of reference."

15. Mr. Chatterjee, further placed reliance on the judgment of the Apex Court in the case of ***Sukanya Holdings Pvt. Ltd. Vs. Jeyesh H. Pandya and another*** (2003) 5 SCC 532, and in particular, on the observations of the Apex Court in Paragraphs 12 to 15 thereof, wherein the learned Supreme Court has held that "no matter which is not the subject matter of the arbitration agreement can be referred to arbitration that is why there is no provision in the said Act to the effect that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration". The Hon'ble Supreme Court has further observed that there is no provision for spitting the cause or parties for referring the subject matter to arbitration".

16. Mr. R.K.Rath, learned senior counsel appearing for the respondent-Smt.Geetarani Mohanty in both the appeals, laid emphasis on the facts leading to the present case. He asserted that the mining lease has been granted in the name of Smt. Geetarani Mohanty, as an individual whereafter, the same has been transferred to the name of a firm- M/s. Geetarani Mohanty comprising of partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo having shares of 55% and 45% respectively. He further submitted that permission was sought for by Geetarani Mohanty under the letter dated 3.2.1992, with an affidavit on the basis of which the Govt. of India granted permission for transfer of the mining lease in favour of the firm on 23.9.1992. He submitted that the transfer deed of the mining lease from

Smt.Geetarani Mohanty an individual to the firm M/s. Geetarani Mohanty was executed on 17.10.1992. Therefore, Mr. Rath laid great emphasis on the letters dated 8.5.1992 and 17.10.1992 issued by the Director of Mines and the State Government, to the fact of Smt. Geetarani Mohanty, retaining her share and substantial interest in the firm and in the lease has been clearly mentioned and submitted that such permission for transfer was granted only on the condition that the transfer firm shall undertake the mining operation after the actual transfer.

17. Mr. Rath asserted that the partnership firm has no legal entity, since it is an association of partners carrying on business of the partnership and in law, the name of firm is a compendious method of describing the partners and, therefore, the firm is not like a company and has no legal entity in the sense of a corporation or a company. He further asserted that the partners are individually called partners and the name under which the partners carry out their business is called the firm name. Therefore, Mr. Rath asserted that what is recognized is the firm comprising of partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo and since the Govt. of India accorded permission under Rule 37 of the Mineral Concession Rules, 1960, the firm is only through the partners Smt. Geetarani Mohanty and Sri Srinivash Sahoo, who are the lessees and are authorized to carry on mining operation under the lease.

18. Mr. Rath, submitted that the partners of the reconstituted firm, formed by the deed of reconstitution dated 1.4.1993 can not be taken to be lessees under the Mineral Concession Rules, since no permission has been granted under Rule 37 by the State Govt. for transfer of the lease in the name of the new partners and, therefore, the entire attempt to transfer Smt. Geetarani Mohantys' rights to the newly reconstituted firm is void ab initio. Consequently, he asserted that deed of reconstitution of partnership dated 1.4.1993 is not required to be set aside being completely void as per the provisions of Rule-37 of the Mineral Concession Rule. In this respect, Mr. Rath submitted that whenever a partnership is reconstituted in violation of law, the said reconstitution is to be held void ab initio. In support of his contention. Mr. Rath placed reliance on a decision in the case of ***Krishna Cermics and Refractories, Rajahmundry v. K.V. Narayana and others***, (2004) ALD 121 : AIR 1974 SC 1892.

19. Mr. Rath further submitted that a void document can not be utilized for any purpose being a nullity and is not required to be set aside at all. In support of this contention, Mr. Rath placed reliance on the decisions reported in :

(i) AIR 2001 SC 2552
(ii) 2005 (5) SCC 353

(iii) 2004(8) SCC 706 and
(iv) 2006(10) SCC 96.

20. Mr. Rath next contended that the issue whether partnership has come to an end or not has to be adjudicated by an Arbitrator and whether the contract has come to or not on grounds of fraud/compulsion/coercion as alleged – such matter has to be decided in the arbitration itself. In support of this contention has placed reliance on various judgments noted herein:

(i) AIR 1980 Orissa 198
(ii) AIR 1980 CAL. 354
(iii) 2004 (2) SCC 663
(iv) 2006 (4) (64) ARBLR 288 and
(v) 1994 (1) OLR 155

21. It is next contended by Mr. Rath that Respondent No.1 – Smt.Geetarani Mohanty has filed writ application being W.P.(C) 5537 of 2008 before this Court with a prayer to direct the State Govt. and its agencies to ensure that she is able to exercise her leasehold right strictly in conformity with the Govt. proceeding dated 17.10.1992 and the transfer deed dated 13.1.1993 and participate in the operation of the schedule mines and a Division Bench of this Court, headed by the Hon'ble Chief Justice by its order dated 21.4.2008 has been pleased to pass the following order:

'Heard learned counsel for the petitioner.

Mr. D.K.Dey, learned counsel accepts notice on behalf of opposite party no.5 and Mr.Umesh Patnaik, learned counsel accepts notice on behalf of opposite parties 6 and 7. Let extra copies of the writ petition be served on them by tomorrow who shall file their counter affidavit by 23.4.2008. Reply to the same shall be filed within a week.

Mr. Khuntia, learned State Counsel accepts notice on behalf of opposite parties 1, 2 3 and 4. Let extra copies of the writ petition be served on him by tomorrow who shall file the counter affidavit by 6th May,2008.

The matter shall appear in the list on the 9th May, 2008.

In the meantime, the position as reflected in annexure-3, which is a Government order dated 17.10.1992 shall continue till 12th May, 2008. This Court makes it clear that this order will not in any way affect the pending proceedings between the parties either before the civil courts or before the appellate forum of this Court in a proceedings under Section 37 of the Arbitration and Conciliation Act."

22. In conclusion, Mr. Rath submitted that the rights of Smt. Geetarani Mohanty as a lessee, under the State in partnership with Sri Srinivash

Sahoo, continues till date and that such a right can not be extinguished or taken away by any reconstituted deed, as the same does not have any sanction of law. Mr. Rath supported the order passed by the District Judge, directing Sri Srinivash Sahoo to carry on the business in the name of partnership which was created on 3.8.1991 and since the same had duly being approved by the State Govt. it can not be faulted.

23. Before proceeding to analyze and consider the rival contentions advanced before me, it now becomes necessary to take note of the pleadings made in the application under Section 9 of the Act before the Dist. Judge, especially pertaining to the alleged fraud/misrepresentation and dishonest actions of the appellant. Accordingly, relevant portions of the pleadings are quoted hereinunder:

> "8. That in less three months from the date of transfer of the original Mining Lease (13.01.1993) in favour of M/s. Geetarani Mohanty, the partnership firm comprising of the petitioner and the Opposite Party No.1, as stated in para 5,6 and 7 above, the Opposite Party No.1 taking full advantage of the extremely cordial and good relationship he enjoyed with the petitioner and also because of her absolute faith and trust in him, fraudulently obtained and made her executed a deed of retirement on 31.03.1993 and also a letter of resignation of the even date from the Partnership Firm (M/s. Geetarani Mohanty formed on 3.8.1991) relinquishing her share in favour of Opposite Party No.1 as the petitioner was a semi-literate and innocent house wife which she executed and signed without understanding the true purport and implication, farless knowing the nature of those documents.
>
> 8.2. That for her status as a semi-literate housewife, more so in the field of mining business and activities which require great deal of expertise and acumen, and her impeccable faith and trust in Opposite Party No.1, the latter successfully managed to keep the deed of retirement dt.31.3.1993 and letter of resignation off the scent and beyond the knowledge of the petitioner till early part of the year 2006 (when opposite party no.1 filed a civil suit). The petitioner remained bliss fully ignorant of this foulplay practiced upon her by way of obtaining this deed of retirement dt.31.03.1993 and the letter of resignation of the even date as the Opposite Party no.1 cunningly doled out few thousands of rupees intermittently to the Petitioner during 1993 to 2006 in the name of profit towards her shape in the deed of partnership dt.3.8.1991 and there by opposite party no.1 impressed

upon the petitioner that she continued to be the partner of the firm constituted on 3.8.1991.

13……..That even though opposite party no.1 has successfully concealed the so called retirement and resignation and the connected documents tainted with the plea of fraud from the knowledge of the petitioner from March 1993 till early part of 2006, the cat was eventually out of bag when the fraudulent activities practiced by them were unearthed and discovered by the children of the petitioner who had come off age by then.

20. That your petitioner humbly submits that she came to understand from various sources which she believes to be true that the opposite parties have mis-utilized the funds of the partnership firm M/s. Geetarani Mohanty comprising of this petitioner and Opposite Party no.1 and has committed various irregularities by obtaining her signatures on different papers with the impression to utilize the same in the business activities of the said partnership firm and on good faith she handed over some unsigned papers to the opposite party which are found to have been mis-utilized subsequently. There fore the opposite party no.1 has not acted faithfully and honestly but also surreptiously utilized the signed papers, detrimental to the interest of the petitioner and thereby committed fraud on the petitioner as well as on the state government for claiming his absolute right over the said mines together with two imposters (Opposite Party no.2 and opposite Party No.3), it is plainly clear that Opposite Party No.2 and Opposite Party No.3 can not and could not have made a back door entry through the reconstituted deed of partnership dt.1.4.1993 to act, perform and operate as lessee of the scheduled mines without prior approval of the State Government. Needless to say, by virtue of being partners of under the reconstituted deed of partnership dt.1.4.1993 which is otherwise an invalid and fraudulent document, those two Opposite Parties have been operating and functioning as co-lessees of the Scheduled Mines without the prior consent and approval of the Lessor."

It is now well settled in law that, fraudulent misrepresentation as regards the character of a document may render the document as "void", but a fraudulent misrepresentation, as regards the contents of a document is "voidable". (See ***Ningawwa v. Byrappa Shiddappa Hireknrabar and others,*** AIR 1968 SC 956).

From the nature of the allegation contained in the petition under Section 9 of the 1996 Act, it would be clear that challenge has been

made by the respondent on the ground of "fraudulent misrepresentation" as regards the contents of the documents, i.e., letter of resignation, deed of retirement, reconstitution of partnership and, therefore, these documents/transactions have to be held in law as to be "voidable" and not "void". This principle of law has been reiterated by a Division Bench of the Hon'ble Supreme Court comprising of Hon'ble S.B.Sinha and Hon'ble P.K.Balasubramanyan,JJ, in the case ***of Prem Singh and others v. Birbal and others*** reported in (2006) 5 SCC 353.

24. On a conjoint reading of the aforesaid averments, whereas the respondent Smt.Geetarani Mohanty has alleged that opposite party no.1 Srinivas Sahoo "fraudulently obtained and made her execute a deed of retirement on 31.3.1993 and also a letter resignation of the even date from the partnership firm relinquishing her share in favour of opposite party no.1 as the petitioner was a "semi-literate and innocent house wife", she executed and signed without understanding the true purport and implication, farless knowing the nature of those document". Therefore, she proceeded to state that the "remained blissfully ignorant of this faulplay practice upon her by way of obtaining the deed of retirement dated 31.3.1993 and the letter of resignation of the even date as the opposite party no.1 cunningly doled out few thousands rupees intermittently to the petitioner during 1993 to 2006 in the name of profit towards her share in the partnership dated 3.8.1991, thereby giving the petitioner an impression that she continued to be the partner of the firm constituted on 3.1.1991. She further alleged that the letter of resignation and reconstitution are sham documents since no reason whatsoever has been cited in none of the document for her retirement and resignation. Whereas it is pleaded that the opposite party no.1 has successfully concealed the so-called letter of resignation and such fraudulent practice was "unearthed by children of the petitioner who had come off age by them". Ultimately, it is seen from the pleadings that the petitioner came to understand from various sources which she believes to be true that the opposite parties have mis-utilized the funds of the partnership firm and has committed various irregularities by obtaining her signatures on different papers which the impression to utilize the same in the business activities of the said partnership firm and on good faith, she handed over some " unsigned papers" to the opposite party which are found to have been mis-utilized. Subsequently, it is further alleged by the petitioner is that opposite party no.1 has not acted faithfully and honestly and committed fraud on the petitioner.

Pleadings make only allegations or averments of facts. Mere pleadings do not by themselves make out a strong case or prima facie case of fraud. The material and evidence has to show it. It is important to note

herein that no material whatsoever is referred to by the learned District Judge in the impugned order in support of the plea of fraud and the petition does not contain any material in support of such allegation. (See ***Svenske Handelsbanken v. Indian Charge Chrome***, (1994) 1 SCC 502).

25. On a reading of the aforesaid averments the very least that can be derived therefrom is that there is absolutely no consistency in the pleadings and details of the alleged fraud are totally lacking. Apart from it, what remains totally unexplained, is the fact that, not only had Smt. Geetarani Mohanty signed the deed of retirement, but her husband, a senior Govt. officer had also signed the same as a witness to the reconstituted partnership apart from the signature of Shri Sushant Sahoo, the earlier power of attorney holder of Smt. Geetarani Mohanty. Not a single word has been stated in the petition explaining this aspect.

Another fact that becomes evident from the petition under Section 9, is that it has been verified by one Manoj Kumar Agarwal who states that he is the power of attorney holder of the petitioner and has been authorized to sign the verification. Said Manoj Kumar Agarwal who is aged about 39 years and is a permanent resident of Kolkata has solemnly stated that the facts stated in the petition are true to the best of "his knowledge and based on the documents."

It appears from the documents annexed that said Manoj Kumar Agarwal has been granted power of attorney by Smt. Geetarani Mohanty on 16.11.2007. On a perusal of the said "power of attorney", it appears that the power of attorney holder has been granted the authority to represent Smt. Geetarani Mohanty in connection with all matters and issues relating to the business of the firm and inter se relationship between the partners of the said firm and more importantly the power of attorney declares as follows:

> "This general power of attorney is being executed pursuant to the partnership deed executed by me on 16th November, 2007 with Shri Manoj Kumar Agarwal and Shri Nirmal Kumar Agarwal and as stipulated in the said agreement it shall be irrevocable."

This declaration contained in the power of attorney clearly indicates the "real" reason behind the issue of such power of attorney. The said reason being the alleged execution of another partnership deed by Smt. Geetarani Mohanty on 16.11.2007 with the said Manoj Kumar Agarwal and Nirmal Kumar Agarwal, which has not been disclosed in the petition and does not form the basis of filing of the application.

26. It is most important to note now that while there has been various allegations of fraud taken in the petition, the petition itself has not been

verified and supported by any affidavit filed by Smt. Geetarani Mohanty herself, but by one Manoj Kumar Agarwal claiming to be the power of attorney holder. The power of attorney in favour of Shri Manoj Kumar Agarwala is dated 16.11.2007 and is stated to have been executed in his favour pursuant to a "partnership deed", executed by Smt. Geetarani Mohanty with him on 16.11.2007. Therefore, obviously the verificant can not claim to have any personal knowledge of any matter prior to the said date and in absence of any explanation in the affidavit/verification, as to the source of knowledge of the fraud practiced, a plea of "fraud" can not/does not arise for consideration. Presently, there has been contradictory and sketchy allegation of fraud without the necessary details/particulars as required in law, nor has the same have been raised by the person against whom fraud is alleged to have been committed, but instead by a power of attorney holder who obviously, can not claim to have any personal knowledge of any event that took place more than 15 years prior to the issue of the power of attorney.

27. The next issue that is germane in this case relates to apparent lack of explanation for the delay of more than 15 years in initiating any lawful proceeding. There has been a feeble attempt made by the appellants to explain the delay by stating that, Sri Srinivas Sahoo has been paying few thousands from time to time and therefore Smt. Geetarani Mohanty, "remained under the impression", that she is continuing as a partner. It is important to note that no documentary evidence whatsoever is available on record to establish such payments (if at all) and, therefore, the delay of more than 15 years remains totally unexplained. The reconstituted partnership has been admittedly operating the mines for more than 15 years with the knowledge and consent of the State Govt. for all these years and no challenge has been until filing of the petition under Section 9 of 1996 Act.

28. At this stage it becomes extremely important to take note of the judgment of the Hon'ble Supreme Court in the case ***Atul Singh & Ors. V. Sunil Kumar Singh & Ors,*** reported in AIR 2008 SC 1016, which was relied upon by Mr. Jayanta Mitra, learned senior counsel appearing for one set of appellant.

The conclusion arrived at by their Lordships and in particular para-9 of the said judgment is quoted below for reference:-

> " The first relief claimed by the plaintiffs in the suit is a decree for declaration that the reconstituted partnership deed dated 17.2.1992 was illegal and void and there was no intention or desire of Shri Rajendra Prasad to retire from the partnership and further that the plaintiffs being heirs of Shri Rajendra Prasad Singh will be

> deemed to be continuing as partners to the extent of his share. It is true that the plaintiffs have also sought rendition of accounts and their share of profits from the partnership as well as interest over the unsecured loan and the principal amount of unsecured loan on rendition of accounts. For getting his relief, the plaintiffs undauntedly rely upon the partnership deed dated 13.1.1989. However, this deed of 1989 could be relied upon and from the basis of the claim of the plaintiffs only if the partnership deed dated 17..2.1992 was declared as void. If the deed dated 17.2.1992 was not declared as void and remained valid and operative, the plaintiffs could not fall back upon the earlier partnership deed dated 13.1.1989 to claim rendition of accounts and their share of profits. Therefore, in order to get their share of profits from the partnership business, it was absolutely essential for the plaintiff appellants to have the partnership deed dated 17.2.1992 declared as illegal, void and inoperative. The relief for such a declaration could only be granted by the civil Court and not by an arbitrator as they or Shri Rajendra Prasad Singh through whom the plaintiff derive title, are not party to the said deed. The trial Court had, therefore, rightly held that the matter could not be referred to arbitration and the view to the contrary taken by the High Court is clearly illegal."

29. Mr. Mitra, learned senior counsel for the appellant submitted that the facts of the present case are "pari material" with the facts dealt with by the Hon'ble Supreme Court in the aforesaid judgment. He asserted the essential challenge made by the defendants- petitioners in their application under Section 9 of the Arbitration and Conciliation Act, 1996 before the learned District Judge, Khurda at Bhubaneswar, was to question the letter of Resignation and Deed of Reconstitution of the partnership firm M/s. Geetarani Mohanty dated 1st April 1993 as illegal and void and account of fraud and misrepresentation. The respondent-Smt. Geetarani Mohanty has pleaded in her petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 that she had no intention to retire from the partnership firm and therefore, based her claims upon an arbitration clause in the original Partnership Deed dated 3rd August 1991. In other words the entire basis of the claim of the respondent was on the partnership deed dated 3rd August 1991, from which the defendant resigned on 31st March 1993 and signed the Deed of Retirement on the self same date, where after the deed of reconstitution of the partnership firm between the present appellant and respondents was signed on 1st April, 1993. Therefore, it is absolutely essential for the respondent (petitioner) to have the reconstituted partnership deed dated 1st April, 1993 declared as illegal, void and inoperative and such declaration could only be granted by the Civil Court and not by an Arbitrator.

The newly inducted partners namely, Sri Dushasan Sahoo and Smt. Suprasanna Sahoo-appellants in Arbitration Appeal No.7 of 2008 not being parties/signatories to the original deed of partnership dated 3.8.1991, under the terms of which, the respondents have sought to exercise their purported rights. Therefore, it is submitted that the trial court should not have entertained the application filed under Section 9 of the Arbitration and Conciliation Act, 1996 and should have rejected the same being without jurisdiction and premature.

30. Learned counsel for the respondents Mr. R.K.Rath, Sr. Advocate in course of argument submitted that there is no lawful necessity for the respondents to approach the civil Court and to seek to declare the reconstituted partnership deed, as void, since the said reconstitution was opposed to the law and prohibited in law and therefore the same was void ab initio.

31. In this respect, Sri Rath, learned counsel for the respondent relied upon the decision in the case of ***Biharilal Jaiswal and Ors. V. Commissioner of Income Tax and Ors.*** Reported in (1996) I SCC 443. On a perusal of the said decision of the Apex Court it is seen that the said case arose out of a proceeding under the Income Tax Act, in which a licence for retail sale of country spirit had been obtained by a person in respect of certain out-still shops, in a public auction, where after the successful bidder entered into a partnership with certain other persons to conduct the business under the said licnece. The Hon'ble Supreme Court came to hold that in terms of Madhya Pradesh Excise Rules, 1960 and General Licence Conditions there under, a holder of licence/privilege was debarred from entering into a partnership for the working of such privilege with any other person or in any manner without the "written permission" of the Collector. Considering the aforesaid provisions of law and the fact no such prior written permission of the Collector had been obtained,, the Hon'ble Apex Court came to hold that the partnership agreement was prohibited by law and was declared under Section 23 of the Contract Act as un-lawful and void.

32. Learned counsel for the respondent on this very issue also relied upon a judgment of the High Court of Andhra Pradesh at Hyderabad in the case ***Krishna Ceramics*** (supra) rendered by an Hon'ble Single Judge of the Andhra Pradesh High Court and from the facts that emanate there from it is to be found that the plaintiff had obtained a lease for fire clay mines from the State Government where after he entered into a further contract with the defendant and assigned his interest under the lease agreement to the defendant, without "prior consent" of the Government, thereby violating Rule-37 (1)(a) of the Mineral Concession Rules, 1960. On such a finding the

Hon'ble Court came to a conclusion that the assignment being without the prior approval of the Government was opposed to the public policy and therefore declared the contract of assignment as violative of Section 23 and unenforceable in a Court of law.

33. From the facts of the present case, it is clear that a mining lease was granted in favour of Smt. Geetarani Mohanty on 2nd July 1991 and thereafter the lessee made an application to the Government of Orissa on 3rd February 1992 for transfer of the said mining lease to a partnership firm M/s. Geetarani Mohanty. Based on such an application, Government of Orissa "accorded written permission" for transfer of mining lease in favour of the partnership firm of M/s. Geetarani Mohanty on 17th October 1992, where after a deed of transfer of the mining lease in favour of the partnership firm was executed on 13th January 1993. From these facts it is clear that necessary permission having been accorded for such transfer, the present case is distinguishable from the cases cited by the learned counsel for the respondent and the present case is not a case where the transfer was effected without necessary permission.

34. The partnership deed on the basis of which application under section 9 of the 1996 Act was filed contained the following clauses :

> "10. New Partner or Partners may be admitted to the firm on the mutual agreement among the existing partners on such terms and conditions and will be agreed upon by the partners.
>
> 12. The retirement or death of any partner shall not have the effect of dissolving the partnership between the other partners and the share of such retiring or deceased partner shall be purchased by one or more of the remaining partners, provided that in no case shall the right of the heirs and legal representatives of a deceased partner be prejudicial and in all such cases they shall be given the first preference to take the place of the deceased or retiring partners.
>
> 13. Every partner shall have a right to sell or mortgage his share or interest, but such partner before selling or mortgaging his share or interest to a stranger shall make the offer to other partners who shall have the first option to purchase the same at a valuation to be made in the manner as will be decided by the partners."

This partnership deed had been submitted before the State Government on 3.2.1992 by the respondent-Smt. Geetarani Mohanty while seeking permission from the State Government to transfer her lease in favour of the said partnership firm and by order dated 8.5.1992, the State Government was pleased to permit transfer of the mining lease

in favour of the partnership firm in terms of Rule 37 of the Minerals Concession Rules, 1960.

From the above it is clearly established that in terms of the deed of partnership, the partnership would not cease with the death of either partner and either partners could retire as well as new partners could be included with the consent of the existing partners. It would be important to note herein that the State Government having given its consent for the transfer of the lease also obviously consented to the terms of the deed of partnership.

35. The learned counsel for the Appellant on the other hand contended that not only had the respondent issued a letter of resignation on 31st March 1993 and signed the deed of retirement on the same date, but also her husband (a senior Government officer) has signed as a witness to the said deed retirement. It is further evident that on 1st April 1993 when the deed of reconstitution of the partnership firm M/s. Geetarani Mohanty was executed inducting Shri Dushasan Sahoo and Smt.Suprasanna Sahoo as partners, the said deed of reconstitution itself was also signed by Smt. Geetarani Mohanty as a witness along with her earlier power of attorney Shri Sushanta Sahoo as a witness to the said deed of reconstitution.

36. It is further submitted by the appellants that vide letter dated 21.5.1993 they had informed the Additional Secretary, Government of Orissa regarding the reconstitution of the firm with copies addressed to the Director of Mines and Deputy Director of Mines (Annexure-7). Further it appears that the appellant put in an advertisement in daily news paper “Prajatantra” on 16.7.1993 bringing to public notice the fact that the respondent Smt. Geetarani Mohanty had resigned from the partnership firm and that the newly inducted partners had joined as new partners. It is further contended that these acts on the part of the appellant, of informing the Additional Secretary to the Government of Orissa and the Director of Mines as well as the advertisement of the resignation of the respondent and induction of the new partners, in terms of Rule 62 of the Mineral Concession Rules, 1960 and Rule 37 has no application to the facts of the present case. It is submitted that Rule 62 castes upon the appellant an obligation to inform the State Government, if any changes occur in the constitution of the partnership firm, which they have duly complied with.

37. The next contention raised by Mr. Rath, learned senior counsel for the respondent is that the letter of resignation of the respondent as well as deed of retirement and reconstitution of firm being “void documents” on account of fraud and misrepresentation can not be used for any purpose being a nullity in the eyes of law and is not required to be set aside at all. In

this respect Mr. Rath, learned counsel for the respondent relied upon the judgment in thecase of ***Dhurandhar Prasad Singh v. Jaiprakash University and others,*** AIR 2001 SC 2552.

I am of the view that this judgment does not support the contentions of the petitioner and on the contrary in paragraph-21 of the said judgment the Hon'ble Supreme Court has laid down the following dicta: -

> " …….If it is proved that the document is forged and fabricated and a declaration to that effect is given a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases, where legal effect of a document can not be taken away without setting aside the same, it can not be treated to be void but would be obviously voidable."

Therefore, this judgment and the facts of the present case and the challenge made herein pertain to a letter of resignation, deed of transfer and deed of reconstitution of the partnership firm, on the ground of fraud and misrepresentation. Therefore, these documents are "voidable" documents/transactions and unless such a transaction/document is declared void by a Civil Court of competent jurisdiction to be invalid in law, the same continue to be binding effective, and operative in law and the legal effect of such document/transaction can not be taken away without setting aside the same.

38. Mr. Rath, learned counsel for the respondent relied upon the decision of the Hon'ble Supreme Court in the case of ***Balvant N.Viswamitra and Ors. V. Yadav Sadshiv Mule(dead) through LRS***., (2004)8 SCC 706. In the aforesaid judgment Hon'ble Supreme Court has declared that, where a court lacks inherent jurisdiction in passing a decree or making an order, any decree or order passed by such court would be without jurisdiction, non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as a basic and fundamental defect and a decree or order passed by a court or an authority having no jurisdiction is nullity.

In the present case at hand, there is no challenge to any order/decree of any court or authority on the ground of "lack of jurisdiction". Therefore, the citation is not of any much assistance in deciding the present dispute.

39. Before concluding, it would be necessary for me to note that I have refrained from giving any finding on certain issues raised and noted herein since there is a possibility of the parties approaching a competent Civil Court

for adjudicating such rights and in order to prevent any possible prejudice likely to occur to the parties.

40. It is incumbent upon me also to take note the direction of the Division Bench presided by the Hon'ble Chief Justice in W.P.(C) No.5537 of 2008, which has been quoted hereinabove and keeping in view the observation of the Court that the pendency of the said writ application and the orders passed therein would not in any manner affect the pending proceedings between the parties, either before the Civil Court or the appellate forum in a proceeding under Section 37 of the Arbitration and Conciliation Act, 1996, therefore, I have proceeded to hear the matter and to pronounce my judgment in appeal.

41. I am of the considered view that, the present appeals are covered by the judgment of the Hon'ble Supreme court, rendered in the case of ***Atul Singh*** (supra). In order to get her share of the profits from the partnership business, it was absolutely essential for the profits from the partnership business, it was absolutely essential for the respondent Smt. Geetarani Mohanty, to have her 'letter of resignation" and "deed of retirement" dated 31.3.1993 as well as "deed of reconstitution" dated 1.4.1993, declared illegal, void and inoperative. Accordingly, the relief for such a declaration can only be granted by a Civil Court of competent jurisdiction and not by an arbitrator since the respondent Smt. Geetarani Mohanty is not a party to the deed of reconstitution. Therefore, since an arbitrator under the partnership deed dated 1.4.1993 as illegal, void and inoperative, consequently, the learned District Judge was incompetent to pass any interim order on the application under section 9 of the 1996 Act, filed by the respondent Smt. Geetarani Mohanty.

I am further of the view that the present case is also covered by the judgment of the Hon'ble Supreme Court in the case ***MD Army Welfare Housing Organisation*** (supra). The Hon'ble Supreme Court has clarified that even under section 17 of the 1996 Act, an arbitrator's jurisdiction to issue an "interim order" must relate to the protection of the subject matter of dispute and such a matter may only be addressed to the party to the arbitration and it can not be addressed to other parties. Accordingly, the impugned order of the learned District Judge is violative of such direction, inasmuch as, it has sought to exercise jurisdiction over a subject matter (deed of reconstitution dt.1.4.1993) which is outside the scope of the partnership deed dt.3.8.1991, on the basis of which the petition under section 9 was filed. Further, the learned District Judge has also sought to address the appellants (in Arbitration Appeal No.7 of 2008) and in effect take away their rights as partners of the firm which they acquired by virtue of the

reconstituted partnership deed of 1.4.1993., therefore, amounting to addressing parties who are not parties to the arbitrator agreement, as well.

Apart from the above, the present lis is also covered by the judgment of the Hon'ble Supreme Court in the case of Sukanya Holding Pvt. Ltd.(supra). The respondents in their application under section 9 of the 1996 Act have sought for "multifarious reliefs" not only against the party to the arbitration agreement (vide partnership deed dated 3.8.1991 i.e. Shri Srinivas Sahoo) but also against "third parties" (Appellants Shri Dhusasana Sahoo and Smt. Suprasanna Sahoo in Arbitration Appeal No.7 of 2008) who are admittedly strangers to the aforesaid arbitration agreement.

42. For the reasons as noted hereinabove, I hold that the impugned order dated 17.3.2008 under Annexure-1, passed by the learned District Judge, Khurda in Arbitration Petition No.15 of 2008 has been passed without jurisdiction and/or prematurely and is, therefore, set aside as being unsustainable in law. I further hold that there exists no legal impediment for the proceeding in C.S. No.49 of 2006 pending before the learned Civil Judge (Jr. Divn.), Bhubaneswar from continuing and accordingly, direct the learned Civil Judge (Jr.Divn.) to proceed with the matter and also consider the objections raised by the respondent (defendant in the said suit), under Section 8 of the 1996 Act on its own merit and in accordance with law.

Both the appeals are allowed in terms of the directions given hereinabove. There shall be no order as to costs.

Appeals allowed.

2011 (I) ILR – CUT- 790

H.S.BHALLA, J.

MISC.CASE NO.1878 OF 2008
(ARISING OUT OF MACA No. 836 OF 2008)
(Decided on 04.03.2011)

RAM CHANDRA MISHRA & ORS. ….. … Appellants.

.Vrs.

NIRANJAN NAYAK & ORS. ….. …. Respondents.

MOTOR VEHICLES ACT, 1988 (ACT No.59 of 1988) – S.173 (1).

Condonation of delay – Discretion of the Court – Discretion is to be exercised judicially and not to be swayed by sympathy or benevolence – Appellant has to establish that in spite of all care and diligence it was not possible for it to prefer the appeal in time.

In the present case there is 736 days delay in filing the appeal – Delay can be condoned if sufficient cause or sufficient reason exists – There being no satisfactory explanation in this case delay can not be condoned – Held, petition filed by the appellants for condonation of delay is dismissed and consequently the appeal filed by the appellants is dismissed being barred by time.

(Para 3 & 5)

For Appellant - M/s. L.Samantaray & associates
For Respondents - None

H.S.BHALLA, J. Heard learned counsel for the appellant.

2. Prayer made in the application is for condonation of delay of 736 days in filing the appeal.

3. It is incumbent on a person preferring an appeal under Section 173(1) of the Act to take all care to see that the appeal is filed within time and unless he shows 'sufficient cause' which prevented him from preferring the appeal in time in spite of care and diligence, the appellate court will not be inclined to entertain an appeal preferred out of time. The satisfaction of the court under the Second proviso to Section 173(1) of the Code will naturally have to depend on the appellant establishing that in spite of all care and diligence it was not possible for it to prefer the appeal in time. The appellants are required to explain each day's delay. The discretion to condone the delay is to be exercised judicially, one is not to be swayed by

sympathy or benevolence. Discretion can be exercised in favour of a person if sufficient cause is pointed out. In the instant case, the appellants have put forward a reason by way of sufficient cause that they were not aware of the fact of disposal of the claim petition by the learned Tribunal. Moreover, the delay is to the tune 736 days in filing the appeal and the negligence, carelessness and want of means at the time on the part of the appellants would be sufficient cause and in fact the appellants have not taken steps which they could have or should have taken. The question of existence of sufficient cause is one to be decided from the facts and circumstances of the particular case and it is difficult to define precisely the meaning of the words "sufficient cause" or "sufficient reason". In the present case, no satisfactory explanation has come forward and in the absence of sufficient cause, delay cannot be condoned.

4. In view of the above discussion, I do not find any substance or merits in this application for condoning the delay of 736 days in filing the appeal against the award passed by the learned Tribunal.

5. For the reasons stated above, the petition filed by the appellants for condonation of delay of 736 days is dismissed. Accordingly, the appeal filed by the appellants is dismissed being barred by time.

6. It is pity that main appeal is not being heard on merit seeing the conduct of the appellants and thereby making a considerable delay of 736 days in filing the appeal.

Appeal dismissed.

2011 (I) ILR – CUT- 792

ARUNA SURESH, J.

S.A. NO.278 OF 1990 (Decided on 23.03.2011)

SHIBA SANKAR NANDA ……. Appellant.

.Vrs.

PADMINI NAIK & ORS …….Respondents.

(A) EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – S.90.

Where documentary evidence is available no amount of oral evidence against the admitted document is admissible nor can be considered by the Court.

In this case the sale deed (Ext.A) was executed in the year 1993 – Presumption is, it being a document of more than 30 years old, it is genuine, legal and valid and prima-facie it is free from any suspicion – Held, this Court finds no reason to interfere in the finding of the trial Court with regard to the genuineness of Ext.A and ownership right of the respondent No.2 in the suit property. (Para 11,12,13)

(B) CIVIL PROCEDURE CODE, 1908 (ACT No.5 OF 1908) – S.100.

Substantial question of law – Contradiction between the contents in the sale deed and oral evidence regarding payment of consideration money – Plea was never raised by the appellant either in the plaint or at the time of trial or before the First Appellate Court – Submissions which are beyond pleadings do not raise any substantial question of law and are based on finding of fact – Held, appellant can not be allowed to agitate this issue before this Court. (Para 15)

(C) TRANSFER OF PROPERTY ACT, 1882 (ACT NO.4 OF 1882) – S.44.

Section 44 T.P. Act gives a right to the purchaser to claim his specific share in the property by way of partition after having purchased undivided share in the joint property – He has also the right to take physical possession of a portion of the property and enjoy fruits of the same. (Para 16)

(D) PARTITION ACT, 1893 (ACT NO.4 OF 1893) – S.4.

Section 4 of the partition Act comes in to operation when a suit for partition is filed by a purchaser against the other co-sharers – In that case if the other co-sharers are ready and willing to purchase the share sold to the purchaser, the Court has to fix the price of the same and it is on payment of the said price that co-sharers are entitled to purchase that part of the property which was sold to the third party.

In this case respondent No.1 has not filed a suit for partition – Held, appellant who did not make any claim by invoking Section 4 of the partition Act can not be allowed to agitate this issue for the first time in Second Appeal. (Para 18)

For Appellant - D.Patra

For Respondent - H.S.Patra

JUDGMENT

ARUNA SURESH, J. (Oral)

Impugned in this appeal is the judgment and decree dated 28.4.1990 and 7.5.1990 of the First Appellate Court dismissing T.A. No.1 of 87 and confirming the judgment and decree dated 24.11.1996 passed by the learned Subordinate Judge, Sambalpur in T.S. No.53 of 1981, dismissing the suit of the appellant.

2. In brief, case of the appellant is that in the year 1933, his father Madhusudan purchased the property measuring 0.075 acre of land with house constructed thereon appertaining to Major Settlement Plot No.830, area of 0.050 acre and 830/1358, area of 0.025 acre, in total 0.075 acre of Khata No.492 and 497 of Modipara of Sambalpur Town, Unit No.7, P.S. No.18, Tahasil No.226, Sambalpur District, Sambalpur from Samsundar Mishra and Gopinath Gadtia for a consideration of Rs.140/-(A Schedule). Madhusudan paid this money to his brother Raghunath Nanda (predecessor of respondent no.2, 2(a) to 2(d)) for getting the sale deed executed and registered. A house was constructed on the said land by Madhusudan under the supervision of Raghunath Nanda. Raghunath and his family was permitted by Madhusudan to live in a part of the house("B schedule") as he had no means to pay the rent for rented accommodation. After marriage of his daughter, Raghunath shifted to his daughter's house and while living their, he expired. After Raghunath left the portion in his occupation,

Madhusudan let out the same to one Dhananjaya Sahu on monthly rent of Rs.60/-. Subsequently, when a House Rent Control Case was filed by Madhusudan against the tenant, it transpired that Raghunath got registered the sale deed in the joint name of Madhusudan and his own name without contributing any money towards consideration amount. After vacation of the premise by the tenant, Madhusudan remained in khas possession of the said portion of the house along with other portion of the suit property. In the meantime major settlement operation commenced in the area wherein respondent no.2 claimed herself to be a married wife of Raghunath and raised her claim over half of the "A schedule" property. The settlement authority recorded the claim of Raghunath Nanda as well as Madhusudan Nanda while rejecting the claim of respondent no.2, thus, creating a title and right of Raghunath Nanda in the "A schedule" property. Madhusudan died on 26.11.1980 while in exclusive possession in his own right of the entire "A schedule" property. After the death of Madhusudan, appellant as well as his brother, respondent no.3 allegedly inherited the suit property. Respondent no.2 executed a registered sale deed dated 2nd July, 1981 in favour of respondent no.1 in respect of 1380.030 decimals, out of the impugned property, with a view to derive benefit of the property which she otherwise could not get. Challenging the said sale deed executed by respondent no.2 as fictitious, collusive, sham and nominal transaction without consideration, the suit was filed by the appellant.

3. The respondents contested the suit.

4. Vide detailed judgment dated 24th November, 1986, the Subordinate Judge, Sambalpur dismissed the suit.

5. Aggrieved by the said judgment and decree of Sambalpur Judge, appellant filed an appeal before the Additional District Judge, Sambalpur. The appellate court while upholding the judgment and decree of the Subordinate Judge dismissed the appeal vide judgment and decree dated 28.4.1990 and decree dated 7.5.1990. Hence, this second appeal.

6. Vide order dated 12.11.1990, this Court was pleased to admit the appeal treating ground A, F, J and K of the appeal as substantial questions of law. They are:-

A. Whether in view of the settled position of law that the learned trial courts must discuss the evidence of each and every witnesses, each and every document and then come to their own conclusion, the present judgments are at all sustainable in law in absence of any discussion of the evidences of the witnesses and the documentary evidence. Except Ext.6, Ext.1 to 5 and 7 to 11 have not been touched. Similarly D.Ws and P.Ws. 1,

2 and 5 have not been touched. The evidence of P.Ws. 2 and 4 not discussed at all, though casually referred?

F. Whether non-examination of scribe attesting witnesses to Ext.F is fatal to the case specially when the fake and fictitious nature of the transaction has been asserted and there has been contradiction in evidence of the vendor herself with regard to passing of consideration and non-delivery of possession. There is a sharp contradiction between the sale deed, Ext.F and the evidence in as much as, the Ext.F recital, the money was paid in presence of witnesses but the vendor says that the consideration was paid before Sub-Registrar. Non-payment of consideration renders the sale invalid (AIR 1982 SC 84)?

J. Whether in view of Section-44 of T.P. Act, Section-4 of Partition Act, and in view of Section-22 of the Hindu Succession Act, alienation by a co-sharer with regard to undivided interest can be sustained without the knowledge and the consent of the other co-sharers, in such case no title can accrue on the basis of such a document in favour of vendee?

K. Whether formal admission of a 30 years old document as exhibits automatically draw the genuineness and correctness of the recitals of the document of requires independent proof as to the payment of consideration, genuineness and delivery of possession of the property?

7. Only respondent no.1 has contested this appeal.

8. I have heard Mr. J. Patnaik, learned counsel for the appellant and Mr. H.S. Mishra, learned senior counsel for the respondent. My observations on the above questions of law are:-

Substantial Question “A” & “K”

9. It is admitted case of the parties that sale deed (Ex.A) was executed in favour of Madhusudan and Raghunath in respect of the property as described in “A” schedule” of the plaint, in the year 1933. At the relevant time Madhusudan was employed as an Inspector. Not only that Madhusudan resided in the said property, his brother Raghunath was also in possession of a part of the house. As per the case of the appellant himself the house was constructed under the supervision of Raghunath. Be that as it may, sale deed (Ex.A) was never challenged by Madhusudan during his life time. He died on 26.11.1980, after about 47 years of execution of the sale deed. Genuineness of the sale deed is not in question. Since sale deed (Ex.A) being more than 30 years old and also an admitted document and the fact that the appellant also claimed his right in the impugned property through sale deed (Ex.A), the trial court rightly did not accept the claim of the appellant. It is settle principle of law that where documentary evidence is

available no amount of oral evidence against the admitted document is admissible nor can be considered by the Court. It is only if the execution of the document and its genuineness is under challenge, the Court has to consider and analyse the oral evidence produced on record by the respective parties to reach to a proper conclusion, if the disputed document is genuine or is fake and sham. In the instant case, there was no occasion for the Subordinate Judge to consider oral evidence of the witnesses to adjudicate on the genuineness of the document (Ex.A) as its genuineness was not under challenge. Even if the Subordinate Judge had considered the oral evidence, it in no manner would have demolished the defence of respondent no.1 nor would have come to the rescue of the appellant. The trial court referred to Ex.K, a petition filed by late Madhusudan Nanda before the Executive Officer, Sambalpur Municipality seeking splitting of the holding and to get it mutated in the name of Madhusudan Nanda and Raghunath Nanda, and Ex.B and C, the orders in Mutation Case No.15/76 and Appeal No.71/77. The Court in fact had fairly considered various documents proved in evidence by the respective parties while rejecting the claim of the appellant. Appellant did not file any document nor produced any substantive evidence to demolish the claim of ownership of respondent no.2.

10. In para-11 of the judgment, the trial court while disbelieving the statement of D.W.2 being contrary in nature, did observe that his statement corroborated the documentary evidence adduced by respondent no.1 that property described in "B schedule" was mutated in the name of Raghunath Nanda and was in his exclusive possession and after his death it was possessed by Sukanti Nanda in hers own right, title and interest.

11. By virtue of Section-90 of the Indian Evidence Act, a presumption is raised that sale deed (Ex.A) being more than 30 years old is genuine, legal and valid document. It has been produced from proper custody. Its execution by the vendors and their signatures are an accepted fact. Prima facie it is free from any suspicion. Document being more than 30 years old, has proved itself. Of course, this presumption is rebuttable. However, as discussed above, appellant did not rebut the presumption. Rather execution of the sale deed in favour of Madhusudan and Raghunath is an admitted fact on the record.

12. Trial Court had amongst others framed following two issues.

Issue No.2

Whether late Sukanti Nanda, respondent No.2 was the concubine of late Raghunath Nanda?

Issue No.5

Whether the sale deed dated 2.7.1981 executed by Sukanti Nanda in favour of defendant No.1 is valid and defendant No.1 has acquired right, title and interest by virtue of the sale deed?

While discussing the above said issues, the trial court observed that Sukanti Nanda was the wife of Raghunath Nanda and appellant had failed to prove that she was concubine of Raghunath and not his legally wedded wife. This finding of fact of the trial court has been upheld by the First Appellate Court. Since respondent no.2 acquired her right, title and interest in a part of the property after her husband's death, she had right to sell her undivided share in the suit property in favour of respondent no.1.

13. In view of my observations as above, I find no reason to interfere in the findings of the trial court as regard to the genuineness of the sale deed (Ex.A) and ownership right of respondent no.2 in the suit property. Hence, these substantial questions of law are decided against the appellant.

Substantial Question "F"

14. Once the execution of the impugned sale deed dated 2.7.1981 (Ex.F) was admitted by the appellant, there was no necessity to examine the scribe who had written the document. Genuineness of Ex.F has been challenged only on the ground that respondent no.2 had no right, title and interest in the suit property which she could transfer in favour of respondent no.1. It is not the case of the appellant that it is a false and fabricated document.

15. It is alleged that there is a material contradiction between the contents of sale deed (Ex.F) and the oral evidence as according to the contents of the sale deed, consideration amount was paid in the presence of the witnesses whereas vendor has deposed that the consideration money was paid before the Sub-Registrar and therefore for non-payment of consideration, the sale deed (Ex.F) is invalid. It is noted that this plea was never raised by the appellant either in the plaint or during trial of the case before the trial court or even before the First Appellate Court. It is possible that the consideration amount was paid by respondent no.1 in the presence of witnesses before the Sub-Registrar. Under no circumstance, it can be said that sale deed (Ex.F) was executed without any consideration and is therefore invalid. Appellant cannot be allowed to agitate this issue before this Court which was never raised during the trial of the case. Besides these submissions, which are beyond pleadings do not raise any substantial question of law and are based on finding of fact. Since the right of respondent no.2 to transfer the disputed property in favour of respondent no.1 is proved, I find no infirmity or illegality in the impugned judgment. Hence, this question stands decided accordingly.

Substantial Question "J"

16. It is argued by the counsel for the appellant that in view of Section-44 of Transfer Property Act, Section-4 of the Partition Act and in view of Section-22 of the Hindu Succession Act, alienation by a co-sharer with regard to undivided property cannot be sustained without the knowledge and consent of the other co-sharers and therefore no title could be transferred by respondent no.2 on the basis of document Ex.F in favour of respondent no.1. Perusal of the record indicate that appellant never claimed any right by invoking Section-44 of Transfer Property Act, Section-4 of the Partition Act and Section-22 of the Hindu Succession Act. In fact, Section-44 of Transfer Property Act gives a right to the purchaser to claim his specific share in the property by way of partition after having purchased undivided share in the joint property. He also has the right to take physical possession of a portion of the property and enjoy fruits of the same. Under the circumstances, Section-44 of Transfer Property Act rather helps respondent no.1 to the disadvantage of the appellant.

17. Section-22 of The Hindu Succession Act permits a co- owner to exercise pre-empty rights, if the other co-owner intends to sell his share in the property to a third person. Appellant in this case never claimed any such right in the suit property. He has only claimed a decree of declaration for declaring sale deed (Ex.F) as null and void and also that executant of the sale deed had no right, title or interest in any part of the property. Till date appellant has not claimed any pre-empty rights under Section-22 of the Act in the suit property.

18. Section-4 of the Partition Act comes into operation when a suit for partition is filed by a purchaser against the other co-sharers. In that case, if the other co-sharers are ready and willing to purchase the share sold to the purchaser, the Court has to fix the price of the same and it is on payment of the said price that co-sharers are entitled to purchase that part of the property which was sold to the third party. Admittedly, respondent no.1 has not filed a suit for partition. Therefore, appellant who did not make any claim by invoking Section-4 of the Partition Act cannot be allowed to agitate this issue for the first time in second appeal.

Hence, this substantial question of law is accordingly decided against the appellant.

In view of observation as above, I find no merit in the appeal and the same is accordingly dismissed. There are no orders as to costs.

LCR be returned back to the Court below along with an attested copy of the judgment.

Appeal dismissed.

2011 (I) ILR – CUT- 799

SANJU PANDA, J.

CRLA. NO.22 OF 2011 (Decided on 9.2.2011)

SAKILA MAJHI & ORS. …….. Appellants.

.Vrs.

STATE OF ORISSA ……. Respondent.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – S.374 (2).

Appeal against conviction – Appellants in jail custody – Delay of 133 days in filing appeal – Condonation of delay – State Counsel prayed to impose cost.

Right of appeal is a statutory as well as Constitutional right of a convict – A prisoner belongs to handicapped class – The morbid cell which confines them to walls cut off them from the world outside – To get legal remedies is beyond their physical and even financial reach – As they are in custody their personal liberty is in jeopardy and if cost will be imposed to condone delay in filing appeal it will cause double jeopardy to their personal liberty which is uncommon in criminal jurisprudence – Held, since the petitioners are in jail custody and State has not taken any steps to provide legal assistance no costs should be imposed on them.

(Para 9,10 & 19)

Case laws Referred to:-

1.AIR 1978 SC 1548 : (Madhav Hayawadanrao Hoskot-V- State of Maharashtra).
2.(2007) 6 SCC 528 : (Dilip S. Dahanukar-V- Kotak Mahindra Co. Ltd.)

For Appellant - M/S. D.P.Dhal
For Respondent -

Misc. Case No.88 of 2011

Heard learned counsel for the petitioners and learned Addl. Standing Counsel for the State.

2. This misc. case has been filed by the appellant-petitioners for condonation of delay of 133 days in filing the appeal.

3. The appellant-petitioners have filed the present Criminal Appeal challenging the judgment dated 2.7.2010 passed by the learned Addl.

Sessions Judge, Rairangpur in C.T. Case No.6 of 2009 convicting and sentencing them to undergo rigorous imprisonment for a period of seven years for the offence under Sections 304(II) read with Section 34 of the Indian Penal Code.

4. The appellants are in custody since their arrest. They have preferred the appeal from the jail custody invoking the jurisdiction of this Court under Section 374(2) of the Criminal Procedure Code which provides for a right of appeal. The right of appeal against a judgment of conviction is also considered as a fundamental right of an accused enshrined in Article 21 of the Constitution of India.

5. Learned Addl. Standing Counsel for the State submitted that since there is delay of 133 days in filing the appeal, some cost may be imposed on the appellants to be paid to the Welfare Fund of the Orissa High Court Bar Association as a condition for condonation of delay.

6. Having given consideration to the rival submissions of the parties, the question arises to determine as to whether a person who files an appeal against an order of conviction after expiry of period of limitation can ask to pay cost for condonation of delay before admission of the appeal or in other words can a condition be put for entertaining the appeal which is a constitutional and statutory right?

7. A right to appeal provides under Section 374 of the Criminal Procedure Code against an order of conviction. The same is also the fundamental right of an accused as enshrined in Article 21 of the Constitution of India. The said Article 21 provides to a citizen for protection of life and personal liberty which reads that "no person shall be deprived of his life or personal liberty except according to procedure established by law" (emphasis supplied).

8. Procedure means, "Procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Art.21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself." (See **AIR 1978 SC 1548**, **Madhav Hayawadanrao Hoskot v. State of Maharashtra**)

9. A fair trial is the first imperative of the dispensation of justice. Further Article 22 of the Constitution of India gives protection against an arrest and detention in certain cases. Clauses I and II of the said Article 22 apply to a person arrested or detained under law otherwise than preventive detention. Article 21 supplement the various requirements laid down under Article 22 of the Constitution of India. Personal liberty is invaded by arrest and continues to be restrained during a period even if the person is on bail. Personal liberty

cannot be cut out or cut down without fair legal procedure. Enough has been set out to establish that a prisoner deprived of his freedom by Court sentence but entitles to an appeal against such verdict as part of his protection under Article 21 of the Constitution of India and as implied in his statutory right of appeal. It is a fact that a prisoner regardless means are particularly handicapped class. The morbid cell which confines them to walls cut off from the world outside. Legal remedies, Civil and Criminal, are obtained beyond their physical and even financial reach. Under the said circumstances in case cost imposed on them to condone the delay in filing the appeal will cause further hardship, inconvenience and the same will be prejudicial to their interest. A fundamental right at no stretch of imagination can be taken away by way of technicalities.

10. Keeping in view the above requirement of law, in my view, it is elementary that a person when arrested and produced first time before the Magistrate his personal liberty is at jeopardy so also a person who is inside the custody his personal liberty is jeopardy. Therefore, imposing cost to condone the delay in filing the appeal by such convict will cause double jeopardy to his personal liberty, which is uncommon to criminal jurisprudence.

11. A litigant cannot take advantage of his laches while approaching the higher forum because after the decision of the Court passed against him, a valuable right accrues in favour of the winning side. However, Section 5 of the Limitation Act provides that in certain circumstances if an aggrieved person shows sufficient cause, the Court can entertain such appeal after condoning the delay to decide the case on merits. While condoning the delay in filing the appeal, the Court can award compensation to such person in whose favour the right has been accrued, for the inconvenience faced by him to entertain the appeal after the period of limitation. However, in case a person does not file any appeal against an order of conviction within the statutory period of limitation, no right is accrued in favour of the State because the State set in motion the process which deprives the personal liberty of the accused and prosecuted the prisoner. Ordinarily a litigant does not stand to benefit by lodging an appeal late. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

12. Considering the another aspect also since the right of appeal is a statutory right and constitutional right of a convict and in case he will not pay the cost as a condition to admit the appeal can his appeal be dismissed

depriving him the constitutional right as enshrined in Article 21 of the Constitution of India ? The answer is 'NO'.

13. Law is well settled that no person should be permitted to take benefit of technical rule of limitation depriving the other side of its statutory right and constitutional right.

14. The apex Court in the case of **Madhav Hayawadanrao Hoskot v. State of Maharashtra**, **AIR 1978 SC 1548** declaring the legal position to put it beyond doubt held as follows:

> "1. Court shall forthwith furnish a free transcript of the judgment when sentencing a person to prison term;
>
> 2. In the event of any such copy being sent to the jail authorities for delivery to the prisoner, by the appellate, revisional or other court, the official concerned shall, with quick despatch, get it delivered to the sentence and obtain written acknowledgment thereof from him.
> 3. Where the prisoner seeks to file an appeal or revision, every facility for exercise of that right shall be made available by the Jail Administration.
>
> 4. Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the Court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign competent counsel for the prisoner's defence, provided the party does not object to that lawyer.
>
> 5. That State which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix.
>
> 6. These benign prescriptions operate by force of Art. 21 (strengthened by Art.19(1)(d) read with sub-art.(5)) from the lowest to the highest court where deprivation of life and personal liberty is in substantial peril."

15. Further, in the case of **Dilip S. Dahanukar v. Kotak Mahindra Co. Ltd., (2007) 6 SCC 528**, the apex Court has held that Article 21 of the Constitution of India read with Section 374 Cr.P.C confers a right of appeal. Right of appeal from a judgment of conviction affecting the liberty of a person keeping in view the expansive definition of Article 21 as also the international covenants operating in the field, is also a fundamental right. Such a right is an absolute one. Right of appeal, thus, can neither be interfered with or impaired, nor can it be subjected to any condition.

16.. The apex Court in Dilip S. Dahanukar's case (supra) has further held as follows:

"67**.** It is of some significance to notice that in Jolly George Varghese v. Bank of Cochin this Court opined:

> "10. Equally meaningful is the import of Article 21 of the Constitution in the context of imprisonment for non-payment of debts. The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence. Maneka Gandhi case as developed further in Sunil Batra v. Delhi Admn., Sita Ram v. State of U.P. and Sunil Batra (II) v. Delhi Admn. lays down the proposition. It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra narayana, is no crime and to recover debts by the procedure of putting one in prison is too flagrantly violative of Article 21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness. Unreasonableness and unfairness in such a procedure is inferable from Article 11 of the Covenant. But this is precisely the interpretation we have put on the proviso to Section 51 CPC and the lethal blow of Article 21 cannot strike down the provision, as now interpreted.
>
> 11. The words which hurt are 'or has had since the date of the decree, the means to pay the amount of the decree'. This implies, superficially read, that if at any time after the passing of an old decree the judgment-debtor had come by some resources and had not discharged the decree, he could be detained in prison even though at that later point of time he was found to be penniless. This is not a sound position apart from being inhuman going by the standards of Article 11 (of the Covenant) and Article 21 (of the Constitution). The simple default to discharge is not enough. There must be some element of bad faith beyond mere indifference to pay, some deliberate or recusant disposition in the past or, alternatively, current means to pay the decree or a substantial part of it. The provision emphasises the need to establish not mere omission to pay but an attitude of refusal on demand verging on dishonest disowning of the obligation under the decree. Here considerations of

the debtor's other pressing needs and straitened circumstances will play prominently. We would have, by this construction, sauced law with justice, harmonised Section 51 with the Covenant and the Constitution."

xxx xxx xxx

72**.** We, therefore, are of the opinion:

(*i*) in a case of this nature, sub-section (2) of Section 357 of the Code of Criminal Procedure would be attracted even when the appellant was directed to pay compensation;

(*ii*) the appellate court, however, while suspending the sentence, was entitled to put the appellant on terms. However, no such term could be put as a condition precedent for entertaining the appeal which is a constitutional and statutory right;

(Emphasis supplied)

(*iii*) the amount of compensation must be a reasonable sum;

(*iv*) the court, while fixing such amount, must have regard to all relevant factors including the one referred to in sub-section (5) of Section 357 of the Code of Criminal Procedure;

(*v*) no unreasonable amount of compensation can be directed to be paid."

17. In view of the above position of law and when the accused, who has a right of appeal against the order of conviction, is inside the jail custody, it is the duty of the State to provide legal assistance. Even though Jail Welfare Officers are posted for the welfare of the prisoners, they are also not giving proper assistance to the prisoners. In such a situation, it cannot be expected from a prisoner that he will prefer an appeal against the order of conviction within the statutory period which is the fundamental right of the accused.

18. While considering the matter regarding condonation of delay in filing the appeal, a liberal view should be taken and imposition of cost in such a situation for condoning the delay will be very unreasonable, unfair and a burden on the accused which is not the fundamental principle of jurisprudence.

19. In the present case, since the appellants are inside the jail custody and the State has not taken any step to provide legal assistance to them, this Court is of the view that no cost should be imposed on the appellants to be paid to the Welfare Fund of the Orissa High Court Bar Association.

20. Accordingly, the delay in filing the appeal is condoned. No costs. Misc. Case is disposed of.

Application allowed.

CRLA No.22 of 2011

Heard.
Admit.
Call for the LCR.

2011 (I) ILR – CUT- 806

S.C.PARIJA, J.

R.F.A. NO.210 OF 2007 (Decided on 03.03.2011)

CHAMPAKALATA MOHANTY ……. Appellant.

.Vrs.

ATMARANJAN MOHAPATRA & ORS. ……Respondents.

T. P. ACT, 1882 (ACT NO.4 OF 1882) – Ss. 106,111(a).

Service of statutory notice U/s. 106 T.P. Act – Admittedly the lease in respect of the tenanted premises expired on 30.04.1999 – Where a definite period is fixed as the term of a lease, the lease will automatically come to an end by efflux of time as provided U/s. 111 (a) of the T.P. Act and notice U/s. 106 T.P. Act will not be necessary to determine such a lease – Held, no illegality said to have been committed by the trial Court for interference in this appeal.

(Para 18,19)

For Appellant - M/s. P.K.Routray, B.K.Mishra, R.K.Rout, A.Routray.

For Respondents- M/s. R.K.Mohanty, D.K.Mohanty, A.P.Bose, S.N.Biswal & S.Mohanty (for Respondent no.1).
M/s. K.K.Dash & J.Pradhan (for Respondent no.3).

S.C. PARIJA J. This appeal is directed against the judgment and decree dated 10.5.2007 and 29.6.2007 respectively passed by the Adhoc Addl. District Judge, Fast Track Court No.1, Cuttack, in T.S. No.271 of 2001, decreeing the plaintiff's suit and directing the defendants to give vacant possession of the suit scheduled premises to the plaintiff within two months.

2. The original appellant, Smt. Champaklata Mohanty, who was defendant no.2 in the suit, having died during pendency of this appeal, she has been substituted by the present appellants and proforma respondent no.4, as her legal representatives.

3. The plaintiff-respondent no.1 filed T.S. No.271 of 2001 seeking eviction of the defendants from the tenanted premises mentioned in Schedule 'B' and 'C', situated over Schedule 'A' land, as detailed in the plaint. The case of the plaintiff was that he had agreed to let out the first floor of the building, as per Schedule 'B' to the defendants vide lease agreement

dated 8.12.1991, with a stipulation that the said lease would be for a period of three years, commencing from 1.2.1992 to 31.1.1995, with a monthly rent of Rs.4,500/-. Subsequently, on the request of the defendants a supplementary agreement was executed between the parties on 18.4.1992, extending the period of tenancy from three years to seven years, commencing from the date of their original occupation and it was stipulated therein, that the monthly rent of Rs.4,500/- would be payable for three years from the date of commencement of the tenancy, i.e.1.2.1992, and thereafter the monthly rent would be Rs.5,800/- per month for the balance period of four years.

4. In August, 1993, the defendants approached the plaintiff for taking the second floor of the building as per Schedule 'C' on rent and accordingly the plaintiff entered into a lease agreement with defendants 2 and 3 dated 19.9.1993, for letting out the second floor of the building for five years with effect from 1.1.1994, terminating on 31.12.1998, on a monthly rent of Rs.4,500/- till 31.12.1996 and Rs.5,800/- for the balance period till 31.12.1998.

5. On 29.4.1995 a meeting was convened between the plaintiff and the defendants and as per the minutes of the said meeting, it was agreed between the parties that the defendants will continue in the tenanted premises up-to 30.4.1999, on the same terms and conditions entered into earlier regarding first floor and second floor premises.

6. The case of the plaintiff was that the lease of the tenanted premises expired on 30.4.1999 and despite notice, three months prior to the expiry of the terms of the lease, expressing his intention not to extend the lease any further, the defendants did not vacate the tenanted premises, even after expiry of the period of lease and continued to occupy the same. The plaintiff finally served a notice dated 28.7.2000 under Section 106 of the Transfer of Property Act (for short the 'T.P. Act'), but the defendants did not vacate the tenanted premises, thereby compelling the plaintiff to file the suit for eviction of the defendants from the said tenanted premises, as detailed in Schedule 'B' and 'C' of the plaint.

7. Defendant no.1 having been served with notice did not choose to appear and was set ex parte. Defendant no.2 appeared and filed written statement, denying the plaint allegations, though admitting the execution of the lease agreements with regard to the tenancy. She challenged its various stipulations and claimed her possession over the tenanted premises to be authorized by virtue of the terms and conditions of the lease agreements.

Defendant No.2 further pleaded that no notice, as required under Section 106 of the T.P. Act has been served on her and therefore the suit for eviction is not maintainable. She justified her possession over the tenanted premises and claimed the same to be authorized and lawful.

8. Defendant No.3 appeared and filed her written statement denying the plaint allegations and taking similar stand as that of defendant no.2.

9. On the pleadings of the parties, the Trial Court framed the following issues :

"I S S U E S

(i) Whether the suit is maintainable ?

(ii) Whether the agreements dt.8.12.91, 18.4.92, 19.9.93 and 22.10.93 are enforceable in the eye of law ?

(iii) Whether a notice U/S.106 of T.P. Act was required to be served by the plaintiff on the defendants ?

(iv) Whether the notice dt.28.7.2000 is a notice U/S.106 of Transfer of Property Act ?

(v) Whether the defendants are liable for eviction from Schedule 'B' and 'C' premises.

(vi) Whether the plaintiff is entitled to any relief ?"

10. The plaintiff examined himself as P.W.1 and adduced evidence to substantiate his pleadings made in the plaint and relied on several documents filed by him, which were taken into evidence and marked as Exts. 1 to 16.

11. Defendant no.2 examined one witness (D.W.1) in support of her case and relied on certain documents which were marked as Exts. D-2/A to D-2/C/1.

12. Defendant no.3 filed her evidence through affidavit, as provided under Order 18 Rule 4 C.P.C. but did not come forward to face the cross examination. The Trial Court accordingly proceeded to expunge her evidence.

13. The Trial Court, considering the evidence on record, both oral and documentary, came to hold that the suit for eviction was maintainable and decreed the same against defendants 2 and 3 and ex parte against defendant no.1 and directed the defendants to give vacant possession of the tenanted premises detailed in Schedule 'B' and 'C' to the plaint within two months.

14. The two main contentions raised by the learned counsel for the appellants are :

(a) The lease agreements (Exts.1 to 4) executed between the parties, in respect of the tenanted premises being not registered, as required under Section 17 of the Indian Registration Act, the same could not have been taken in evidence and considered for adjudicating the dispute between the parties.

(b) As no notice has been served on the defendants, as required under Section 106 of the T.P. Act, the suit for eviction filed by the plaintiff is not maintainable.

15. On a perusal of the impugned judgment, it is seen that the Trial Court has taken into consideration the plea of the defendants with regard to non-registration of the lease agreements relied upon by the plaintiff (Exts.1 to 4) and on an analysis of Sections 17 and 49 of the Indian Registration Act, the Trial Court has come to find that the said unregistered lease agreements can be taken in evidence for collateral purpose to ascertain the nature and character of possession. The relevant findings of the Trial Court in this regard is extracted below :

"xx xx xx From perusal of the Exts. 1 to 4 it appears that none of them are registered documents. The Exhibits further reveals that the lease of Sch. 'B' premises was initially for a period of 3 years which was subsequently enhanced for a further period of four years commencing from 8.12.91 till 30.4.99. The tenancy created for the Sch. 'C' premises subsequently vide Ext.4 was to expire on 30.4.99. From the above it is clear that Exts. 1 to 4 creates tenancy for more than one year to year or for any term exceeding one year or reserving a yearly rent requires compulsory registration. Sec. 49 of the Registration Act stipulates the effect of non-registration of documents required to be registered and enunciated that no document required by Section 17 to be registered shall :

(a) Affect any immovable property comprised therein :

(b) Confer any power to adopt.

(c) Be reserved as evidence of any transaction affecting such property or conferring such power.

The aforesaid provision U/S.49 of the Registration Act, however, empowers that the unregistered documents can be taken in the evidence for collateral purpose to ascertain the nature and character of possession. xx xx xx"

16. Coming to the question regarding service of statutory notice under Section 106 of the T.P. Act, the Trial Court on the basis of the materials on record has come to find that as the defendants occupied the tenanted premises under a unregistered lease agreements (Exts.1 to 4), which were compulsorily registrable under Section 17 of the Indian Registration Act, the defendants do not become tenant from month to month and therefore the notice terminating their tenancy under Section 106 of the T.P. Act was not necessary. Even otherwise, the Trial Court found from the evidence on record that the plaintiff had served a notice under Section 106 T.P. Act dated 28.7.2000 (Ext.11) by registered post with A.D. which had been duly served on the defendants as per postal receipts showing despatch through registered post (Ext.11/a) and postal acknowledgement receipts (Ext. 11/b).

17. It is a well-established proposition of law that a deed which is compulsorily registrable under Section 17 of the Indian Registration Act, cannot be looked into, if it is not so registered, to create, declare, assign, limit or extinguish any right in immovable property. That is what Section 49 of Indian Registration Act lays down. It is equally well-established that such a document could be looked into as evidence for collateral purpose. Such a document, though inadmissible in evidence, for the purpose of proving the terms and conditions of the document, the same can be admitted in evidence, for collateral purpose of proving the nature and character of possession of the parties. The document can be relied upon to establish the jural relationship between the parties and can also be relied on to prove the admission of the defendant, in which capacity he is occupying the tenanted premises and the nature of such possession.

18. Coming to the question regarding service of statutory notice under Section 106 of the T.P. Act on the defendants, as the lease in respect of the tenanted premises admittedly expired on 30.4.1999, no notice was necessary to determine such a lease. It is trite law that where a definite period is fixed as the term of a lease, in such a case, the lease will automatically come to an end by efflux of time limited thereby, as provided under Section 111 (a) of the T.P. Act and a notice will not be necessary to

determine such a lease. After the expiration of the term fixed by the lease, the lessee continuing in possession, in the absence of an assent by the lessor, will only to be a tenant by sufferance and can be sued for ejectment at any time without any previous notice or demand of possession. Being a trespasser and not a tenant holding over, no notice is necessary.

19. Applying the principles of law as discussed above to the facts of the present case and considering the findings of the Trial Court as given in the impugned judgment and the reasons assigned in support of the same, no impropriety or illegality can be said to have been committed by the Trial Court so as to warrant any interference in this appeal.

20. Learned counsel for the appellants has filed a memo stating therein that as the appellants are running a Nurshing Home in the tenanted premises, they may be given some time to vacate the said premises, as they have to arrange a suitable accommodation for shifting the Nurshing Home from the suit premises.

21. Considering such prayer, the appellants are granted time till end of April, 2011, to vacate the tenanted premises, failing which the execution proceeding shall continue.

R.F.A. is accordingly dismissed with the above modification.

Appeal dismissed.

2011 (I) ILR – CUT- 812

B.K.PATEL, J.

F.A. NO.18 OF 1983 (Decided on 14.01.2011)

PAKINI @ DALIMBA NAIK & ORS. …. …. Appellants.

.Vrs.

GAJENDRA PATEL(DEAD),
AKSHYA KU.PATEL & ORS. …… Respondents.

Partition between the members of the Hindu undevided family – Partition effected Under Ext.9 which has not been registered – Ext.E is also an unregistered document where in some properties were again partitioned – Admittedly shares allotted to the three brothers in the partition deeds under Ext.9 and Ext.E were unequal – Original plaintiff No.1 was a minor when the alleged partition was effected –Held, an unjust and unfair partition can be reopened by a minor at any time.

(Para 17)

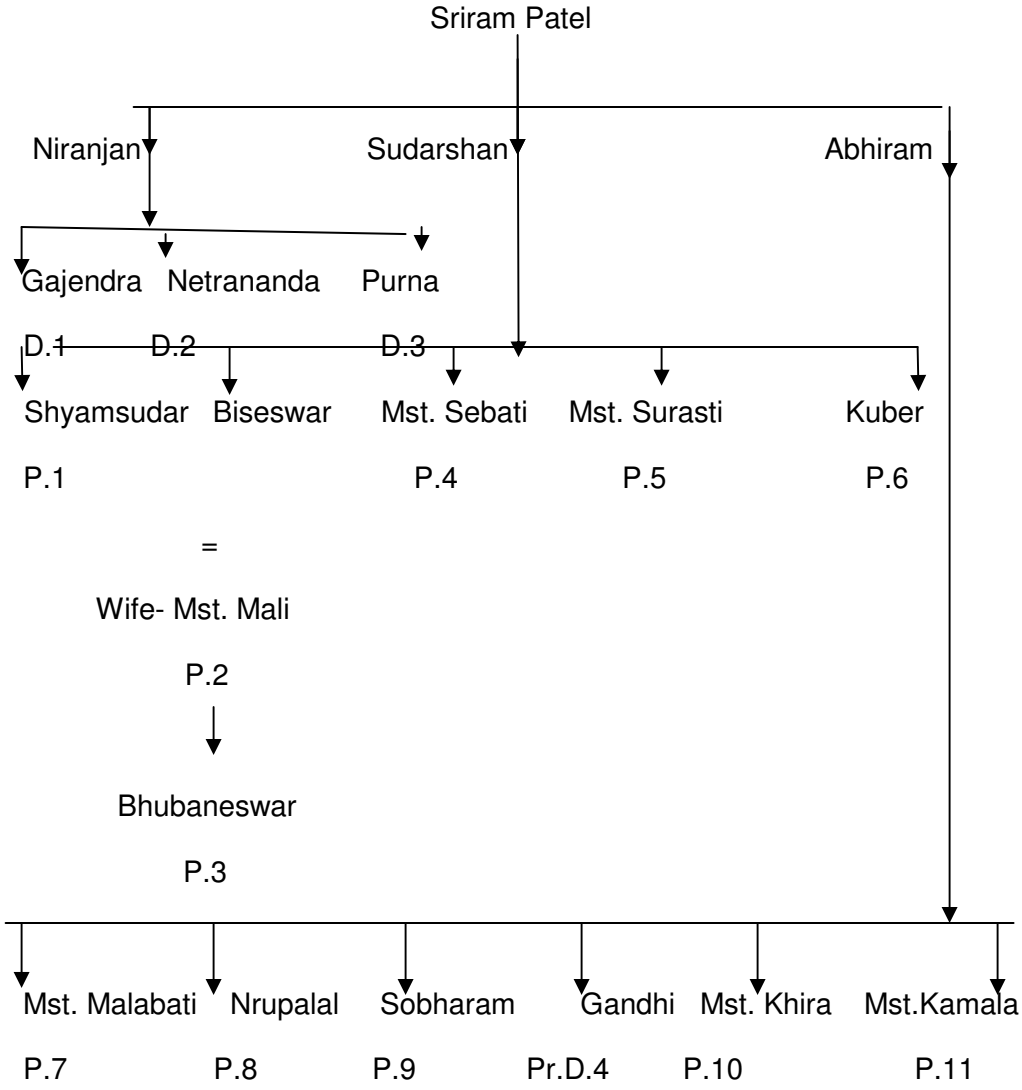
Case laws Referred to:-

1.AIR 1968 SC 1299 : (Siromani-V-Hemkumar)
2.AIR 1968 SC 1018 : (Puttrangamma & Ors.-V-M.S.Ranganna & Ors.).
3.XLI (1975) CLT 978 : (Makha Bewa-V-Bimbadhar Kandi)
4.AIR 1994 Orissa 113 : (Sri Kishore Ray Thakur Bije-V-Smt.Basanti Kumar Das &Ors)
5.AIR 1989 SC 1806 : (M/s. Bajaj Auto Ltd.-V-Behari Lal Kohli).
6.AIR 1965 Orissa 37 (Dandapani Sahu-V-Kshetra Sahu & Ors.)
7.AIR 1976 SC 1 : (Ratnam Chettiar & Ors.-V-S.M.Kuppuswami Chetiar & Ors.)

For Appellants - M/s. U.C.Panda, S.S.Das, S.P.Mishra, B.Routray, K.B.Kar, R.c.Das, R.K.Das, D.P.Das, N.K.Sahu, B.Swain & P.Prusty.
For Respondents - M/s. A.C.Mohanty, G.N.Rout, M/s. K.A.Guru, A.K.Mohanty, S.K.Mohapatra, T.K.Mohanty.

B.K. PATEL, J. The unsuccessful plaintiffs are in appeal against judgment and decree passed by learned Subordinate Judge (now Civil Judge, Senior Division), Sambalpur in T.S. No. 31 of 1978, a suit for partition.

2. It is not disputed that the suit land originally belonged to late Sriram Patel, the common ancestor of parties. Admitted genealogy of parties to the suit is as follows:



During pendency of the suit plaintiff no.1 died and was substituted by his daughter who is presently the appellant no.1.

3. Plaintiffs filed the suit on the allegations that plaintiffs' predecessors of plaintiffs and proforma defendant no.4, namely, late Sudarshan and

Abhiram were idiotic, simpletons, illiterate and of incomplete development of mind. The predecessor of the defendants, namely, late Niranjan playing fraud, executed a document on 18.6.1924 (Ext.9), purported to be a deed of partition, allotting major share for himself and such partition was allegedly acknowledged in another document executed on 13.10.1929 (Ext.E) wherein further partition of some other properties was also stated to have been effected. Plaintiffs further alleged that, due to such fraud, partition, if any, is inequitable and disproportionate on the face of the document. It was pleaded that late Niranjan kept the fact of inequitable partition made in Ext.9 and Ext.E concealed and cleverly allowed Sudarshan and Abhiram to possesses larger parcels of lands, than what was mentioned in Ext.9. Plaintiffs could know about the fraud when defendant no.1, Gajendra produced Ext.9 and Ext.E before the authorities in order to get most of the lands recorded in the name of defendants during current Major Settlement operation. Defendant no.1's attempt failed due to objection raised by plaintiffs. Defendants filed written statement denying plaint's allegation that plaintiffs' predecessors, namely, late Sudarshan and late Abhiram were not the legitimate children of late Sriram Patel. It was averred that Ext.9 and Ext.E were duly executed effecting complete partition and the parties are in possession accordingly. Defendants also advanced the plea that suit is barred by limitation under Orissa Land Reforms Act.

4. Learned trial court framed the following issues for adjudication.

> "1. Is the partition of 1924 evidenced by document on 18.6.1924 and 3.11.1929 is inequitable?
>
> 2. Are late Sudarsan and Abhiram legitimate sons of Sriram Patel ?
>
> 3. Have Niranjan or the defendants played fraud on the plaintiffs or their fathers ?
>
> 4. Is the suit barred by limitation ?
>
> 5. Is the suit as framed maintainable ?
>
> 6. Has the Court jurisdiction to entertain the suit for partition ?
>
> 7. To what relief ?"

5. In order to substantiate their respective stands, plaintiffs examined two witnesses including plaintiff no.3 as P.W.1 and relied upon documents marked Exts.1 to 9 whereas defendants examined four witnesses including defendant no.1 as D.W.1 and relied upon documents marked Exts. A to G.

6. Learned trial court, on appraisal of evidence on record and on consideration of rival contentions, held that though Ext.9 is not admissible for want of registration, as the fact of partition is acknowledged in Ext.E, there was complete partition among the predecessors of the parties. Learned trial court also held that the predecessors of plaintiffs were not illegitimate children. Learned trial court also disbelieved the allegation of fraud and the assertion that plaintiffs' predecessors were idiotic, simpletons, illiterate, and of incomplete development of mind. However, it was held by the learned trial court that though the court has jurisdiction to decide the suit, the same is barred by limitation.

7. Learned counsel for the appellants contended that in Ext.9 the properties were stated to have been partitioned among the predecessors of the parties but the document was executed solely by defendants' predecessor Niranjan. Also, admittedly, Ext.9 has not been registered. Ext. E is also an unregistered document wherein some properties were again partitioned among the predecessors of plaintiffs and defendants and there was an acknowledgement by the predecessors of the parties of the partition as mentioned in Ext.9. Learned trial court held that Ext.E is a document wherein Niranjan had admitted the partition effected on 18.6.1924 and it contained description of properties which fell to share of the three brothers. In addition, it is mentioned in Ext. E that some more properties were given to Sudarshan and Abhiram. Therefore, Ext.E is a document acknowledging the previous partition and it described definitely the properties which fell to the shares of the three brothers for which the document was not compulsorily registerable. It was also held by the learned trial court that fact of partition of the year 1924 has been mentioned in Ext.E for which both the documents are evidence of partition of the year 1924. Before coming to such conclusion, learned trial court held that Ext.9 is not admissible in evidence as it is coming under the mischief of Section 17 of the Registration Act**.** Learned counsel for the appellants argued that as both the documents are unregistered, the contents thereof cannot be taken into consideration. It was further argued that at the worst the unregistered documents Ext.9 and Ext.E would be considered for a limited purpose to show severance of joint status and it is inadmissible to prove the actual partition of specific properties to the different shares. In this connection, learned counsel for the appellants relied upon the decisions of the Hon'ble Supreme Court in **Siromani -vrs.-**

Hemkumar: AIR 1968 SC 1299 and **Puttrangamma and others –vrs.- M.S. Ranganna and others** : AIR 1968 SC 1018. It was also argued that D.W.1 in his evidence admitted that Niranjan and Sudarsan were illiterate for which documents were read over and, after understanding the contents to be true, they put their signatures. However, the defendants neither pleaded such fact nor led any evidence to that effect. It was strenuously contended that in absence of any certificate under Ext.E to the effect that the executants put their signatures after understanding the contents thereof, the document is not capable of being acted upon. It was further contended that on the face of defendants' admission that Sudarsan was illiterate, even though the learned trial court held that plea of fraud had not been proved by the plaintiffs, defendants were required to discharge the onus to prove the factum of due execution of Ext.E.

8. Learned counsel for the respondents supported the impugned judgment and argued that the learned trial court has rightly held that prior partition among the predecessors of the parties cannot be reopened in a suit which is barred by limitation.

9. Respondents having not filed any cross objection or cross appeal, their contentions regarding lack of jurisdiction of the court in view of bar contained under Orissa Land Reforms Act and their assertions regarding legitimacy of plaintiffs' predecessors need no adjudication. Controversy between the parties in the appeal is confined to resolution of the following two questions:

(a) whether there was any prior partition? and

(b) whether suit is barred by limitation?

10. On perusal of the impugned judgment it is found that while deciding issue no.3 it has been held by the learned trial court that though in Ext.E all the three predecessors of the parties had put their signatures and L.T.I., execution of the document is not proved as there is no presumption that executants understood the contents of the document. It is well settled that burden lies on a party to prove execution of a document on which he relies. D.W. 1 testified that Niranjan and Sudarsan were illiterate whereas Abhiram was literate to the extent of reading Bhagabat. In order to prove due execution of a document, it is required to be proved that the executant, being illiterate, put his signature after understanding the contents to be true. Otherwise, the mind of the signatory cannot be said to have accompanied the signature. In other words, it cannot be said that he intended to sign which

means the executant has not signed in the eye of law. On considering the entire evidence on record, it is found that there has not been any attempt to duly prove that Ext. E was executed as required under law. Ext.E does not contain any certificate indicating that contents of the document was read over and explained to the executants who put their signatures after understanding the contents to be true. In **Makha Bewa –vrs.- Bimbadhar Kandi** : XLI (1975) CLT 978, it has been held:

> "In Ext.A there is no certificate to the effect that the plaintiff executed the said deed after understanding the contents of the same. It is merely stated therein that the said deed was read over and explained to her. D.W.1, the scribe of the deed, has not stated that the contents of the deed were understood by the executant and after understanding the same she executed the said deed. D.W. 1 merely stated in examination-in-chief that the document was read over and explained to the executant and she admitted its contents. Even if the abovementioned evidence of D.W.1 in his examination-in-chief is taken on its face value, that would not satisfy the required test that the illiterate executant of the deed executed the same after clearly understanding the contents and the nature of that document.

Therefore, evidence on record does not sustain the finding of the learned trial court that Ext.E was duly executed.

11. Specific case of the plaintiffs is that fraud was played by Niranjan on their predecessors. Learned trial court has rightly held that plaintiffs have failed to establish the allegation of fraud due to want of proper pleadings and adequate evidence. However, fact remains that when it is admitted that executants were illiterate, the parties' relying on the document has to prove due execution. In **Sri Kishore Ray Thakur Bije –vrs.- Smt. Basanti Kumar Das and others**: AIR 1994 Orissa 113 it has been held by this Court:

> "The rule evolved for the protection of paradanasin ladies in relation of execution of document should not be confused with the other doctrines such as fraud, duress and actual undue influence, which apply to all persons whether they be paradanasin ladies or not. This being the position of law, if the plaintiff alleges fraud, then plaintiff must establish the same but if plaintiff is an illiterate or paradanasin lady and alleges fraud and fails to establish fraud, yet the defendant must establish the fact that the plaintiff executed the document after the document was read over and explained to her and after she understood the contents thereof. This protection which law affords

to a paradanasin or illiterate lady must be borne in mind by the Court."

12. While deciding issue no.1 learned trial court on a plain reading of Ext.9 held that Niranjan alone executed the document stating that he effected the partition of the joint family property and allotted shares to Sudarsan and Abhiram respectively. Therefore, Ext.9 is a document purporting to create partition coming under the mischief of Section 17 of the Registration Act being a compulsorily registerable instrument. When registration has not been effected, Ext.9 cannot be admitted. However, in the later part of the judgment learned trial court came to a finding that Ext.E is a document where Niranjan had admitted partition effected on 18.6.1924 mentioning the properties which fell to the shares of brothers and it is also mentioned in Ext.9 that some more properties were given to Sudarsan and Abhiram. Ext.E is, therefore, a document acknowledging the previous partition in which definite description of properties which fell to the shares of brothers have been given. According to the learned trial court, in such circumstances, Ext.E is not compulsorily registerable. It was observed that in Ext.E the fact of partition of the year 1924 is also admitted and, therefore, both the documents are evidence of partition of 1924. Such an inconsistent conclusion arrived at by the learned trial court is wholly erroneous. Ext.9 and Ext.E cannot be admitted for the purpose of proving the partition between the predecessors of the parties. It has been held in **M/s. Bajaj Auto Limited –vrs.- Behari Lal Kohli** : AIR 1989 SC 1806 that "if a document was inadmissible for non-registration, all its terms were inadmissible xx xx xx xx".

13. Section 49 (c) of the Registration Act provides that no document required by Section 17, or by any provision of the Transfer of Property Act, to be registered shall be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. In **Dandapani Sahu –vrs.- Kshetra Sahu and others** : AIR 1965 Orissa 37, it has been held by this Court:

> " There is no dispute over the proposition that the unregistered partition deed can be used as evidence to show severance of joint status and it is inadmissible to prove the actual allotment of specific properties to the different shares. The only interesting question for consideration is whether the statement in the unregistered partition deed that there was a partition by metes and bounds amongst the members of the joint family is admissible in evidence. On a plain reading, such a statement appears to be clearly hit by Sec. 49(c) of the Act. Partition is a "transaction" which affects the immoveable

> property comprised in the partition deed as what was a joint ownership is converted into separate ownership of the different members in specific shares. Such a statement in the unregistered partition deed is therefore inadmissible in evidence. Xx xx xx xx."

14. In **Siromani and another V. Hemkumar and others : AIR 1968 S.C. 1299**, the Hon'ble Supreme Court was considering the question as to whether unregistered deed Ext. D-4 was admissible in evidence in view of provision under Section 17 of the Registration Act. It was held:

> "In view of the recitals in Ext. D-4 we are of opinion that there is allotment of specific properties to individual coparceners and the document therefore falls within the mischief of Section 17(1)(b) of the Registration Act. It follows that Ext. D-4 is not admissible in evidence to prove the title of any of the coparceners to any particular property or to prove that any particular property has ceased to be joint property. Of course, the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove that the parties ceased to be joint from the date of the instrument dated December 27, 1943."

It was further pointed out in the above said decision that the principle of Hindu Law is equality of division and the exceptions to that rule have almost, if not altogether, disappeared. As between brothers or other relations, absolute equality is now the invariable rule in all the States, unless perhaps, where some special family custom to the contrary is made out.

15. Thus, Ext.9 and Ext.E cannot be considered except for the purpose of proving severance of joint status of the predecessors of the parties. In spite of execution of Ext.9 and Ext.E, they would be treated as tenant-in-common. Neither of the documents can be considered to prove complete partition. In fact, while deciding issue no.6 learned trial court has held that partition suit is maintainable.

16. In deciding issue no.5 learned trial court has held that the suit is barred by limitation. Averment made by the respondents at paragraph 6 of the written statement reads:

> "Since 1924 (nineteen twenty four) Niranjan and the defendants 1 to 3 (one to three) openly and exclusively have been possessing the lands which fell to Niranjan's share and have prescribed their title thereto by adverse possession.

> Similarly Sudarsan and Abhiram and their sons possessed their shares of lands as evidenced by the documents of 13.11.29 (thirteenth November twenty nine). It is false to say that Sudarsan and Abhiram over possessed the extent of lands mentioned in Sch. 'C' and Sch. 'D' of the plaint"

The limitation for partition suit starts from the date when a co-owner or tenant-in-common claims adversely to others. As has been discussed above, the parties are still tenant-in-common for which in order to claim adverse possession among themselves, they have to establish ousters from others**,** otherwise possession of one has to be treated as possession of other. Pleading as well as evidence of the defendants lack such requirement for which the suit cannot be treated as barred by limitation. In fact, in course of hearing it was fairly conceded by the learned counsel for the respondents that in case it is held that no partition was effected by virtue of Ext.9 and Ext.E, the suit would not be barred by limitation.

17. Admittedly shares allotted to the three brothers in the partition stated to have been effected on the strength of Ext.9 and Ext.E were unequal. Defendants have not pursued their stand to the effect that Sudarsan and Abhiram were illegitimate for which Niranjan allotted smaller shares to them. Therefore, there is no basis for allotting unequal shares. Also, both the deeds Ext. 9 and Ext. E being unregistered, and Ext. 9 being a unilateral instrument also, there is no basis to uphold the plea of prior partition. Thus, in any event defendants' stand of prior partition as a bar to the present suit is not tenable. Moreover, it is well settled that an unjust and unfair partition can be reopened by a minor at any time. Original plaintiff No.1 late Shyamsundar was a minor when the alleged partition was effected. In **Ratnam Chettiar and others V. S.M. Kuppuswami Chetiar and others : AIR 1976 S.C. 1**, it has been held:

> "Where however, a partition effected between the members of the Hindu Undivided Family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors the partition can certainly be reopened whatever the length of time when the partition took place."

18. For the reasons stated above, impugned judgment is not sustainable in law under the facts and circumstances of the case. Therefore, the impugned judgment is set aside. Title Suit No.31 of 1978-I of the court of learned Subordinate Judge now Civil Judge(Senior Division), Sambalpur is decreed. Plaintiff Nos. 1 to 6 are held to be entitled to 1/3rd share, and plaintiff nos. 7 to 11 and proforma defendant no.4 are held to be entitled to

1/3rd share of the joint family properties. Accordingly, the appeal is allowed with cost.

Appeal allowed.

2011 (I) ILR – CUT- 822

S.K.MISHRA, J.

CRLA. NO.21 OF 1992 (Decided on 03.01.2011)

S. VENKAT RAO @ SURU VENKATRAMAN MURTY RAO& ANR. ……. Appellants.

.Vrs.

STATE ……. Respondent.

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO. 10 OF1955) – S.7 (1) (a) (ii).

Appellants were convicted U/s. 7 (1) (a) (ii) E.C.Act where in each of them were sentenced to undergo R.I. for six months and to pay fine of Rs.500/- in default to undergo R.I. for one month – Conviction challenged.

Main allegation against the appellants are that they have not maintained the books of accounts and have not displayed the stocks in the Board – No allegation that the appellants were resorting to black marketing nor there is any previous conviction against them – In this case occurrence took place on 17.11.1988 -No useful purpose shall be served by imposing substantive sentence of imprisonment requiring the appellants to be imprisoned – Held, appellants to undergo imprisonment till rising of the court and each of them shall pay a fine of Rs.10,000/- failing which they will have to serve out the sentences as directed by the learned trial Court.

(Para 7,8 & 9)

Case law Relied on:-

(2010) 6 S.C.C. 540 : (RPG Life Sciences Ltd. & Anr.-V-State of Tamil Nadu).

For Appellants - M/s. Manoj Mishra, U.C.Patnaik, B.Mishra, D.Sarangi, D.S.Mohanty & P.K.Das.

For Respondent - Addl. Govt. Advocate.

S.K.MISHRA,J. The appellants assail their conviction under Section 7(1)(a)(ii) of the Essential Commodities Act, 1955 for contravening Clause 3 of the Orissa Declaration of Stocks and Prices of Essential Commodities Order, 1973, Clauses 12(i) and (ii) and 13 of the Orissa Pulses Edible Oil Seeds and Edible Oil Dealer's (Licensing) Order, 1977 and Conditions 2(b),

3(b) and 7 of the Licence granted in favour of the Firm M/s. Srinivas Oil and Flour Mill by the Collector, Koraput.

2. Bereft of unnecessary details the case of the prosecution is that on 17.11.1988 at about 1.30 P.M. the Inspector of Supplies along with the Marketing Inspector checked the books of accounts and stock of M/s. Srinivas Oil and Flour Mill, Nadiabado Street, Jeypore (hereinafter referred to as the "Firm") and found that the accused S.Prabhakar Rao, one of the partners of the Firm was present and showed the books of accounts and stock. On verification of the stock book maintained till 16.11.1988, it was found that the closing balance on 16.11.1988 was 20 Kgs. of niger seeds and 11 tins and 13 Kgs. of niger oil. However on actual physical verification, the stock was found to be 23 quintals and 20 Kgs. Of niger seeds and 11 tins and 13 Kgs. of niger oil. Thus, there was an excess stock of niger seeds. The stock was therefore seized in presence of the witnesses and was kept in zima of P.Viravadra Rao.

On the same day at about 4.00 P.M. the Supply Inspector along with others checked the books of accounts and stock of the said Firm and at the time of checking accused S.Venketa Rao stated that he was the Managing Partner of the said Firm and produced the books of accounts. The Firm stored different stocks in the go-down situated at Nadiabado Street, Jeypore. Besides the go-down the Firm had also a shop-cum-show room in Daily Market in Stall No.24 where they were selling essential commodities. On verification at the go-down situated at Nadiabado Street, the checking party found three tins of til oil and at Daily Market found different stocks as per the seizure list. The Firm in the name of M/s. Suru Neelakantham & Sons, Jeypore, have been issued licence bearing Nos.100/88-89 for Jeyproe P.S., 101/88-89 for Borigumma P.S., 102/88-89 for Pottangi P.S., 103/88-89 for Chitrakonda P.S., 104/88-89 for Machkund P.S., 105/88-89 for Padwa P.S. and 106/88-89 for Boipariguda P.S. by the Collector under the Orissa Pulses, Edible Oil Seeks and Edible Oil Dealer's (Licensing) Order, 1977. The prosecution further alleges on that checking the wholesale stock register and the stock held in their show room it was found to be discrepant. Besides the stock of green gram, green gramdal, Biridal, etc. were not accounted for. On further checking it was found that the stock and Price Declaration Board affixed in the show room was not prominently displaced although 25 items of essential commodities were found to be in the show room.

3. The prosecution further alleges that the licensee was transacting the business in the Municipal Stall No.24 at Daily Market, Jeypore, which was not the specified go-down of the licensee. Further the licensee did not furnish the information in the cash bill as required under Condition No.7 of

the licence. On further checking the go-down situated at Nadiabado Street, it was found that three tins of til oil, which were kept in the go down, were not displayed in the Stock Declaration Board. The fortnightly return in Form 'C' has not been submitted by the firm for the period from 1.11.1988 to 15.11.1988. Hence prosecution report was submitted against the appellants.

4. The defence took the plea of denial. Their specific plea is that the shop situated in Daily Market Stall No.24 is the separate retail business of accused S. Venketa Rao and excess stock of niger seeds found in the Nadiabado Street Mill premises was purchased on the date of checking. Since the shop in Stall No.24 is the separate business of the accused S. Venketa Rao, he has not contravened any of the provisions of Orissa Declaration of Stock and Prices of Essential Commodities Order, 1973 or Orissa Pulses, Edible Oil Seeds and Edible Oil Dealer's (Licensing) Order, 1977.

5. The prosecution examined two witnesses on its behalf and the defence examined two. On behalf of the prosecution number of documents have been exhibited and on behalf of the defence only the licence led into evidence as Ext.A.

6. Learned Special Judge, Jeypore, having considered the evidence on record, came to the conclusion that the prosecution has proved its case beyond reasonable doubt and has convicted the accused persons for the offence under Section 7 of the Essential Commodities Act and has sentenced each of the appellants to undergo R.I. for six months and pay fine of Rs.500/- in default to undergo R.I. for one month.

7. In course of hearing of the Criminal Appeal, learned counsel for the appellants did not assail the finding of facts rather submitted that in the meantime more than two decades have elapsed and since the offence is mainly relating to in-proper keeping of accounts and declaration of stocks a lenient view on the quantum of sentence may be taken with the increase in the fine. In the reported case of ***RPG LIFE SCIENCES LIMITED AND ANOTHER versus STATE OF TAMIL NADU,*** (2010) 6 Supreme Court Cases 540, the Hon'ble Supreme Court considering the fact that the incident in that case took place in the year 1985 and the peculiar facts of the case, held that it is not desirable to send the appellants to jail after a lapse of about 25 years and, therefore, the Hon'ble Supreme Court increased the fine amount without imposing any sentence for substantive imprisonment.

8. In this case also it is seen that the occurrence took place on 17.11.1988 and the main allegation against the appellants are that they have not maintained the books of accounts and have not displayed the

stocks in the Board, so the offences alleged are more or less technically in nature. There is no allegation that the appellants were resorting to black-marketing nor a previous conviction has been proved against them.

9. Thus, considering the aforesaid factual backgrounds and the case aforesighted, this Court comes to the conclusion that no useful purpose shall be served by imposing substantive sentence of imprisonment requiring the appellants to be imprisoned. Accordingly, this Court directs the appellants to undergo imprisonment till rising of the Court and each of them shall pay a fine of Rs.10,000.00 within a period of six weeks from today. In case of failure of payment of fine, this order would be of no avail to the accused persons and they will have to serve out the sentences as directed by the learned trial court. The appellants are directed to appear before the learned Special Court on 15.2.2011 for the purpose of the sentence.

The Criminal Appeal is accordingly disposed of.

Appeal disposed of.