R.M. LODHA, J & JAGDISH SINGH KHEHAR, J.

CIVIL APPEAL NO.1735 OF 2006 (Dt.01.11.2011)

DURGA CHARAN RAUTRAY …… Appellant

.Vrs.

STATE OF ORISSA & ANR. ……Respondents

ARBITRATION ACT, 1940 (ACT NO.10 OF 1940) - Ss. 30,33

Despite receipt of payment on the preparation of the final bill it was still open to the appellant to raise his unsatisfied claims before an arbitrator under the contract agreement, even though he had not raised any objection.

The High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings – Held, the impugned judgment rendered by the High Court Dt.22.12.2003 is set aside and the order passed by the Civil Judge, Senior Division, Bhubaneswar Dt.30.04.2002 is upheld – Direction issued to the respondents to pay the awarded amount to the appellant, failing which the appellant shall be at liberty to recover the same through Court.

(Para 8,9)

Case law Referred to:-

(2003) 8 SCC 154 : (Bharat Coking Coal Ltd.-V- Annapurna Construction)

JAGDISH SINGH KHEHAR, J.

1. The appellant was entrusted with the construction of balance work of earth dam in connection with the Kharkhai Irrigation Project up to RL 316.50 on 31.12.1975. The estimated cost of the said balance work was Rs.13,78,810/-. As per the contract agreement, the work was to commence on 1.1.1976 and was to be completed on or before 31.7.1976. For some reasons including change in design, the work could not be completed within the prescribed time. The appellant eventually completed the assigned work in July, 1978. This delay in completion of work, according to the appellant, resulted in financial loss to the appellant. In addition to the aforesaid, the appellant had some other grievances as well. Illustratively, the appellant sought payment towards some additional work executed by him, and also, refund of royalty deducted on account of the supply of "morum". All these disputes were raised by the appellant, with the concerned respondent(s).

The respondent(s) chose not to entertain the claims raised by the appellant. In fact, all communications addressed by the appellant to the respondents remained unanswered. The appellant then sought reference of his claims for adjudication before an arbitrator. This request of the appellant was also not heeded to. The appellant thereafter obtained a Court order dated 15.5.1981, whereby the disputes raised by the appellant were referred to an arbitral tribunal. The arbitral tribunal examined nine items of claim raised by the appellant.

2. The award rendered by the arbitral tribunal dated 15.9.1998, adjudicated claim item nos.4,5,6 and 9, in favour of the appellant. In so far as claim item no.4 is concerned, the appellant had demanded an additional amount of Rs.2 lakhs on account of price escalation. This claim was based on the fact, that after the work was assigned to him, the State Government had revised minimum wages of labour, and increased the same by 16%. The appellant, accordingly, claimed extra payment of 16% over the gross amount paid in the final bill. The arbitral tribunal held the appellant entitled to Rs.24,380/- towards price escalation. In claim item no.5, the appellant claimed Rs.5,51,173/- towards cost of "morum" supplied, but for which no payment had been released. In this behalf, the appellant claimed carriage of 47,106 cubic meters with 15 kilometers lead, at the rate of Rs.21.35 per cubic meter. While adjudicating the instant claim, the arbitral tribunal found the appellant entitled to the difference between the cost of supply of "motum", as against the cost of supply of "earth". In respect of claim item no.5, the appellant was held entitled to a sum of Rs.78,667/-. In claim item no.6, the appellant demanded a refund of Rs.20,727/- deducted towards royalty from his bills. The aforesaid royalty was allegedly charged on the "motum" supplied by the appellant. The appellant was held entitled to refund of the entire sum of Rs.20,727/- deducted from his bills towards royalty. In so far as claim item no.9 is concerned, the appellant claimed interest at the rate of 18% per annum on the principal claim amount, from the due date till the date of final payment. The arbitral tribunal held the appellant entitled to interest at the rate of 10% per annum on the principal awarded amount of Rs.1,23,724/-, with effect from 19.8.1981 (i.e. the date with effect from which the interest Act, 1978 came into force) till 5.4.1992. Calculated in the aforesaid terms, the arbitral tribunal awarded interest of Rs.1,31,544/- to the appellant.

3. Notice to make the arbitral award dated 15.9.1998 "rule of the court" was issued on 22.2.1999. In March, 1999, the respondents were served with the said notice. On 21.12.1999 the Government Pleader entered

appearance on behalf of the respondents, and sought time to file objections. Objections on behalf of the respondents were filed before the Civil Judge, Senior Division, Bhubaneswar on 6.3.2000. To contest the arbitral award dated 15.9.1998, the respondents filed objections under section 30 and 33 of the Arbitration Act, 1940 by filing a "Miscellaneous Case". It would be relevant to mention that section 30 aforesaid, postulates the grounds for setting aside an award, whereas, section 33 lays down the course to be adopted for challenging, inter alia, the validity of an arbitral award.

4. The "Miscellaneous Case", filed by the respondents was contested by the appellant inter alia by raising a preliminary objection. It was sought to be asserted, that the "Miscellaneous Case" was barred by limitation. The "Miscellaneous Case" filed by the respondents was rejected by the Civil Judge, Senior Division, Bhubaneswar by accepting the plea of limitation raised by the appellant. The suit filed by the appellant was decreed on 30.4.2002. The award of the arbitral tribunal dated 15.9.1998 was made "rule of the court". The respondents were directed to pay the awarded amount to the appellant, failing which, the appellant was granted liberty to recover the same through Court.

5. Dissatisfied with the order passed by the Civil Judge, Senior Division, Bhubaneswar, the respondents preferred an appeal before the High Court of Orissa under section 39 of the Arbitration Act, 1940. In the said appeal, the respondents raised two contentions. Firstly it was sought to be asserted, that the objections filed by the respondents through the "Miscellaneous Case" filed under sections 30 and 33 of the Arbitration Act, 1940, were wrongly rejected by the Civil Judge, Senior Division, Bhubaneswar, on the ground of limitation. Secondly it was asserted, that the controversy raised by the appellant could not have been referred for adjudication by way of arbitration, after the appellant had received the final bill without raising any objection.

6. The determination by the Civil Judge, Senior Division, Bhubaneswar, on the issue of limitation was upheld by the High Court. Yet the contention advanced at the hands of the respondents, that it was not open to the appellant to have sought adjudication of his claims, by way of arbitration, after the appellant had received payments on the preparation of the final bill without raising any objections, was accepted. In sum and substance, therefore, by its order dated 22.12.2003 it was concluded by the High Court, that the appellant could not reap the benefits of the award rendered by the arbitral tribunal in his favour on 15.9.1998.

7. Dissatisfied with the judgment rendered by the High Court dated 22.12.2003, the appellant filed a petition for special leave to appeal bearing

no.12183 of 2004. Leave was granted on 20.3.2006. Consequently, the matter came to be renumbered as Civil Appeal No.1735 of 2006.

8. Since the plea of limitation had been decided in favour of the appellant and against the respondents, the only question to be adjudicated upon, in the present appeal filed by the appellant is, whether the disputes/claims raised by the appellant could have been referred for arbitration, after the appellant had received payment after the preparation of the final bill, without raising any objections. The answer to the instant query must necessarily flow from the relevant clause of the agreement which entitled the appellant to seek redressal of disputes through arbitration, as it is the arbitration clause alone which defines the parameters of the disputes which rival parties can raise for adjudication before an arbitrator (or arbitral tribunal). In so far as the instant aspect of the matter is concerned, clause 23 of the agreement dated 31.12.1975 is relevant. The same is being extracted here in below:

> "Clause 23 – Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions hereinbefore mentioned and as to the quality of workmanship of materials used on the work, or as to any other questions, claim, right matter, or thing whatsoever, if any way arising out of, or relating to the contract, designs, drawings, specifications, estimates instructions, orders or these conditions, or otherwise concerning the work or the execution, or failure to execute the same, whether arising during the progress of the work, or after the completion or abandonment thereof shall be referred to the sole arbitration of a Superintending Engineer of the State Public Works Department unconnected with the work at any stage nominated by the concerned Chief Engineer. If there be no such Superintending Engineer, it should be referred to the sole arbitration of the Chief Engineer concerned. It will be no objection to any such appointment that the arbitrator so appointed is a Government Servant. The award of the Arbitrator so appointed shall be final, conclusive and binding on all parties to these contract."

A perusal of clause 23 of the contractual agreement extracted above, leaves no room for any doubt that the appellant could claim arbitration on account of disputes arising from the contract "except where otherwise provided". It is not the case of the respondents, shall the appellant was precluded by any clause in the contractual agreement from seeking settlement or claims raised by the appellant (which have been allowed in favour of the appellant by the

arbitral tribunal). Clause 23 includes within the purview of arbitration, disputes whether arising during the progress of the work or after the completion or abandonment thereof. There is no restraint whatsoever expressed in clause 23, which would deprive the appellant from seeking redressal by way of arbitration, merely because he had received payments after the preparation of the final bill, without raising any objections. Accordingly, we are of the view, that even after the receipt of payment on the preparation of the final bill, it was open to the appellant to seek redressal of his disputes by way of arbitration, even though he had not raised any objections. Secondly, in so far as the instant aspect of the matter is concerned, the issue in hand stands concluded by this Court in ***Bharat Coking Goal Ltd. v. Annapurna Construction (2003) 8 SCC 154*** where in it has been held as under:

> "Only because the respondent has accepted the final bill, the same would not mean that it was not entitled to raise any claim. It is not the case of the appellant that while accepting the final bill, the respondent had unequivocally stated that he would not raise any further claim. In absence of such a declaration, the respondent cannot be held to be estopped or precluded from raising any claim… ".

In the instant case also the appellant, while accepting payment on the preparation of the final bill, did not undertake that he would not raise any further claims. As such, we are satisfied that the judgment rendered in ***Bharat Coking Coal Ltd., case (supra)*** leads to the irresistible conclusion, that despite receipt of payment on the preparation of the final bill, it was still open to the appellant to raise his unsatisfied claims before an arbitrator, under the contract agreement. Thirdly, it was no longer open to the respondents to contest the claim of the appellant on the instant issue after the appellant had obtained the court order dated 15.5.1981 which referred the disputes raised by the appellant to an arbitral tribunal. The Court order dated 15.5.1981 referring the disputes raised by the appellant to arbitration, attained finality inasmuch as the same remained uncontested at the hands of the respondents. The respondents were, thereafter precluded from asserting that the claims raised by the appellant could not be adjudicated upon by way of arbitration. Once the disputes raised by the appellant were referred for arbitration and the rival parties submitted to the arbitration proceedings without any objection, it is no longer open to either of them to contend that arbitral proceedings were not maintainable. And fourthly, the order passed by the High Court is contradictory in terms. Once the High Court had concluded, that the Miscellaneous Case filed by the respondents raising objections was barred by limitation, it was not open to the High Court to

consider one of the objections raised by the respondents and to uphold the same, so as to disentitle the appellant from reaping the fruits of the arbitral award. In other words, once the plea of limitation had been upheld, the objection(s) filed by the respondents, irrespective of the merit(s) thereof were liable to be rejected.

9. For the reasons recorded hereinabove, we are of the view that the High Court erred in concluding that the appellant having received payment after preparation of the final bill, without having raised any objection, could not have initiated arbitral proceedings. The judgment rendered by the High Court dated 22.12.2003 is, accordingly, set aside. The order passed by the Civil Judge, Senior Division, Bhubaneswar dated 30.4.2002 is upheld. The instant appeal is accordingly allowed. The respondents are directed to pay the appellant the awarded amount, falling which, the appellant shall be at liberty to recover the same through Court.

10. There will be no order as to costs.

Appeal allowed.

2012 (I) ILR- CUT- 735

V.GOPALA GOWDA, CJ.

M.A. NO. 97 OF 2002 (Dt.06.01.2012)

ORIENTAL INSURANCE COMPANY LTD. … …Appellant.

.*Vrs.*

UMA SANKAR GUPTA & ANR. ……Respondents.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – Ss.168, 173 r/w Order 41 Rule 33 C.P.C.

Motor Accident Case - Statutory duly of the Tribunal to determine just and reasonable compensation irrespective of the claim made by the claimants – Death of minor child, aged about 13 years studying in Class-VII – Claimants made claim of Rs.65,000/- - Tribunal awarded Rs.1,55,000/- with 9% interest from the date of application within 30 days failing which 12% penal interest be charged –Insurance Company challenged the same in appeal.

This Court by applying the provisions under Order 41 Rule 33 C.P.C. enhanced the compensation awarded by the Tribunal to Rs.2,50,000/- as adequate and reasonable compensation and set aside the portion of the award imposing penal interest – The award of the Tribunal is modified to the extent that interest @ 9% on Rs.1,55,000/- shall be paid from the date of claim application till the date of payment and interest at the rate of 6% on the enhanced amount of Rs.95,000/- shall be paid from the date of filing of the appeal till the date of payment. (Para 8)

Case laws Referred to:-

1.AIR 2000 SC 43 : (Delhi Electric Supply Undertaking-V-Basanti Devi & Anr.)
2.(2001)8 SCC 197 : (Lata Wadhwa-V-State of Bihar)
3.2011(5) S.382 : (Ranjana Prakash & Ors.-V-Divisional Manager & Anr.)
4.2011(7) S.459 : (Sanjay Parihar & Ors.-V-Munnala Parihar & Ors.)

For Appellant - M/s. A.K.Mohanty, M.C.Nayak & D.C.Dey.
For Respondents - Mr. D.Mund & S.K.Sahu.

V. GOPALA GOWDA, C.J. This Miscellaneous Appeal is directed against the Judgment/Award dated 4.10.2001 passed by the Shri A.K.Das, Addl. District Judge –cum-M.A.C.T., Nabarangpur in M.J.C. No.46 of 2000 in allowing the application filed by the petitioner by answering the contentious issues in favour of the respondent/claimant and fastening the liability upon the appellant-Oriental Insurance Company to pay sum of Rs. 1,55,000/- (Rupees One Lakh Fifty Five Thousand) with interest @ 9% per annum from the date of application within a period of thirty days, in default it shall be liable to pay interest @ 12% per annum on the awarded amount till realization urging various grounds.

2. The ground of attack on the quantum of compensation awarded in this impugned judgment by the Tribunal is that the compensation awarded is more than the claim made by the claimant at Rs. 65,000/-. Therefore, the impugned judgment is bad in law and liable to be set aside and prayed for modification of the same by awarding compensation at Rs.65,000/- and the penal interest awarded is arbitrary, unreasonable and therefore liable to be set aside. The second ground of attack of the impugned judgment is that Respondent No.2 who is the custodian of the driving licence has failed to produce the same and the fact of non-production of the driving licence, the Tribunal ought not to have awarded the compensation in favour of the respondent/claimant fastened the liability upon the Insurance Company and further the Tribunal ought to have seen the driving licence which is a fake one and there is violation of the terms and condition of the policy in allowing the driver who did not possess effective and valid driving licence. Therefore, the Tribunal ought not to have awarded compensation in favour of the first respondent/claimant.

3. This Court has called upon the learned counsel for the appellant to make submission with reference to the judgment of the Hon'ble Supreme Court in the case of **Delhi Electric Supply Undertaking Vs. Basanti Devi & Anr.**, reported in AIR 2000 SC 43, as to why the compensation in the appeal filed by the Insurance Company shall not be enhanced if the compensation awarded in favour of the claimant in the impugned judgment is inadequate and his legitimate right to get adequate compensation had not been determined and awarded just and reasonable compensation keeping in view the decision of the Supreme Court in the case of **Lata Wadhwa Vs. State of Bihar,** reported in (2001)8 SCC 197 wherein the Apex Court has laid guiding principles to award compensation in respect of minor children died in an accident who have no independent income. The minor children were divided into two groups, i.e. the first group between the age group of 5 to 10 years and the second group between the age group of 10 to 15 years.

The guiding principle laid down in the aforesaid case has to be followed by the Tribunal for the purpose of awarding compensation. This Court has applied the above referred case in W.P.(C) No. 3214 of 2010 and batch of cases in the case of **Guri Behera Vrs. Divisional Railway Manager, East Coast Railway, Khurda Road, Jatni** etc and awarded just and reasonable compensation in favour of the petitioners in those cases.

4. Learned counsel Mr. A.K.Mohanty appearing for the appellant strongly opposed for enhancement of compensation with reference to the above decision of the Apex Court contending that in the appeal filed by the Insurance Company is aggrieved of the impugned judgment in awarding compensation awarded by the Tribunal in favour of the claimant more than the claim made and therefore he would contend that enhancing the amount of compensation in favour of the claimant in this appeal is wholly untenable in law. Therefore, to that extent, the impugned judgment is required to be modified and also set aside the penalty interest awarded at 12% by allowing the appeal of the Company. Therefore, learned counsel for the Insurance Company submits that the exercise of power by this Court invoking Order 41, Rule 33 C.P.C. by placing reliance upon the judgment of the Supreme Court referred to supra which principle has been followed by decisions of the Supreme Court in the case of **Ranjana Prakash & Ors. Vs. Divisional Manager & Anr.,** reported in 2011(5) Supreme 382 and in the case of **Sanjay Parihar & Ors. Vs. Munnalal Parihar & Ors.,** reported in 2011 (7) Supreme 459 is not correct. The facts of those cases have no application to the present case on hand. Therefore, he requested this Court not to enhance the compensation in the appeal filed by insurance company by modifying the impugned judgment.

5. Learned counsel for the first Respondent justified the compensation awarded by the Tribunal keeping in view the decision of the Hon'ble Supreme Court and further contends that the compensation awarded is inadequate though cross appeal or objection not filed in this appeal, the claimant is entitled to seek for enhancement of the compensation in the appeal of the Insurance Company by invoking his right under Order 41, Rule 33 CPC and the decisions of the Apex Court referred to supra. In view of the above said decisions of the Supreme Court learned counsel for the first Respondent submits that according to the judgment of the Supreme Court which decision in the case of Lata Wadhwa Vs. State of Bihar has been followed by the Division Bench of this Court in the case of Guri Behera referred to supra, awarded just compensation and therefore he submits that the claimant-first respondent is entitled for enhancement of compensation with interest. Hence, the claimant's counsel has requested this Court for

enhancement of compensation for which he is entitled in law, as this Court is required to determine the just and reasonable compensation as the Tribunal has not applied guiding principles for awarding just and reasonable compensation which is the statutory duty of the Tribunal. Therefore, he submits that it is a fit case for this Court to enhance the compensation in favour of the first respondent in the appeal filed by the insurance company.

6. With reference to the above rival legal contentions, the following points that would arise for consideration of this Court are

(i) Whether the compensation awarded by the Tribunal at Rs. 1,55,000/- is excessive and if, it is inadequate, at the instance of the appellant /Insurance Company the same can be interfered with and enhanced by this Court ?

(ii) In view of the law laid down by the Hon'ble Supreme Court in the case of Delhi Electric Supply Undertaking Vs. Basanti Devi & Anr., reported in AIR 2000 SC 43, and other decisions if the compensation awarded by the Tribunal is on the lower side, whether order 41, Rule 33 of the CPC is required to be applied by this Court in the facts situation of the case and award just compensation?

(iii) What award?

7. Both the first and second points are required to be answered together in favour of the claimant as they are inter-related in view of the claim made by him.

8. It is an undisputed fact that at the time of accident, the deceased son of the petitioner was aged about 13 years and he was studying in Class-VII and was intelligent and a good student. It is an undisputed fact that the offending vehicle dashed against the deceased who was coming after attending the call of nature and was walking at the left side of the road. The claimant filed a claim petition before the Tribunal to award compensation. Before the Tribunal, no doubt the claim was made by the claimant at Rs. 65,000/-. Statutory duty cast upon the Tribunal irrespective of the claim to determine just and reasonable compensation in the claim case and award the same by applying the guiding principles applicable to the fact situation. Applying the guiding principles laid down by the Apex Court in Lata Wadhwa Vs. State of Bihar referred to supra, this Court has awarded the compensation in a railway accident claim cases in the case of Guri Behera Vs. Divisional Railway Manager, East Coast Railway, Khurda Road, Jatni (in W.P.(C) No. 3214 of 2010 and batch of cases decided on 10.2.2011). Therefore, the quantum of claim made by the claimant is not the relevant

criteria for the Tribunal for determination of just and reasonable compensation on the date of passing the award but the entitlement of compensation is the relevant criteria. The just and reasonable compensation would be in this case having regard to the age of the deceased boy is at Rs. 2,50,000/-. The Tribunal in not awarding just compensation has deprived the legitimate and statutory right conferred upon the claimant. Therefore, the guiding principles laid down by the Hon'ble Supreme Court in the case of Lata Wadhwa Vs. State of Bihar referred to supra shall be applied to the facts of the present case. In the present case, the claim made by the claimant is at Rs. 65,000/-, but the Tribunal has considered that as the claim made by the claimant is inadequate, it has awarded the compensation amount to Rs.1,55,000/-. Therefore, the question of challenging that portion of the award by the Insurance Company is totally impermissible in law more than one reason namely, as the compensation claimed by the claimant is inadequate, a sum of Rs. 2,50,000/- should have been awarded as compensation by the Tribunal. The same has not been done. Secondly, the Insurance Company should not have challenged the quantum of compensation as the offending vehicle was insured with the Insurance Company. Therefore, the first point is answered against the Insurance Company and the appeal filed by the Insurance Company is required to be partly allowed with regard to the penal interest awarded. In view of Order 41, Rule 33 of the CPC and law laid down by the Apex Court in the case of Delhi Electric Supply Undertaking Vs. Basanti Devi & Anr., which principle is reiterated in the subsequent decision of the Apex Court in the case of Sanjay Parihar & ors Vs. Munnalal Parihar & Ors., the guiding principles laid down by the Apex Court in the case of Lata Wadhwa Vs. State of Bihar referred to supra, with all fours is applicable to the fact situation of the present case. Accordingly, the second point is also required to be answered in favour of the claimant by enhancing the compensation of Rs.1,55,000/- awarded by the Tribunal to Rs. 2,50,000/- with interest @ 6% per annum on the enhanced amount only from the date of appeal till the payment. The penal interest @ 12% which has been awarded by the Tribunal at Rs. 1,55,000/- is hereby set aside as the compensation awarded by the Tribunal has been enhanced to Rs.2,50,000/- which is adequate and reasonable compensation in exercise of this Court's power under Order 41, Rule 33 CPC. Accordingly, the appeal filed by the Insurance Company is partly allowed to the above extent. The award of the Tribunal is modified to the extent that interest @ 9% on Rs.1,55,000/- shall be paid to the claimant from the date of claim application to the date of payment and interest at the rate of 6% on the enhanced amount of Rs.95,000/- shall be paid from the date of filing of the appeal till the date of payment.

9. The Misc. Appeal is accordingly disposed of in the above terms by modifying the impugned judgment. Office is directed to draw the award. The Insurance Company shall pay the awarded compensation with interest within four weeks from today, less the statutory deposit amount/paid to the claimant. The statutory deposit shall be transmitted to the Tribunal along with the interest amount earned by the Registry of this Court to facilitate the claimant to draw the same.

Appeal disposed of.

2012 (I) ILR- CUT- 741

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

W.P.(C) NOS. 2244, 2245 OF 2009 (Dt. 02.02.2012)

SABITA PRADHAN & ANR. ……..Petitioners.

.*Vrs.*

UTKAL GRAMYA BANK & ORS. .…….Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Agricultural Debt Waiver and Debt Relief Scheme, 2008 – Finance Minister announced the above scheme in his Budget speech – Petitioners obtained loan for cultivation of medicinal plants on 5 acres of land – Due to crop loss they made applications for waiver of loan – Their applications rejected on the ground that they own more lands than 5 acres and as such they come under the status of "other farmer" but not "Small farmer" for getting benefit under the Scheme-2008 – Order challenged.

Held, since petitioners have been granted loan for cultivation of medicinal plants on 5 acres of land only, rejection of their application is contrary to the Scheme-2008 which is liable to be quashed – Direction issued to O.P.1,2 & 4 to consider the case of the petitioners and extend benefits to them as provided under Clause 5 of the Scheme-2008.

(Para 14 to 17)

Case laws Referred to:-

1.AIR 1965 SC 1196 : (The State of Assam & Anr.-V-Ajit Kumar Sarma & Ors.)
2.AIR 1967 SC 1753 : (G.J. Fernandez-V-The State of Mysore & Ors.)

For Petitioners - M/s. U.K.Samal, C.D.Sahoo, M.R.Mohapatra & S.P.Patra.
For Opp.Parties - M/s. B.Mohanty-I, S.Patra, P.K.Mohapatra & A.Panda, (for Opp.Party Nos.1,2 & 4)

V. GOPALA GOWDA, C.J. The aforesaid writ petitions have been filed by the petitioners with a prayer for quashing letter dated 22.09.2008 (Annexure-4) issued by opposite party No.2-Grievance Redressal Officer,

Utkal Gramya Bank, Sambalpur directing the opposite parties to categorize and enlist the petitioners as Small Farmers and to waive their loan/debt amount as per the Agricultural Debt Waiver and the Debt Relief Scheme, 2008 urging various facts and legal contentions.

2. Since these two writ petitions involve similar facts and law, the same are taken up together for hearing and final disposal on merits.

3. With reference to W.P.(C) No.2244 of 2009, learned counsel for the petitioners submits that as per Agricultural Debt Waiver and the Debt Relief Scheme, 2008 (for short, "Scheme-2008") announced by the Finance Minister, Government of India in his Budget Speech for 2008-2009, an application dated 07.06.2004 (Annnexure-C/1) was presented by the petitioner for grant of loan under the Scheme-2008 for the purpose of cultivation of medicinal plants in the land owned by her. The said application of the petitioner was accepted and loan amount of Rs.12.00 lakhs was sanctioned by opposite party No.4 on 12.07.2004 in favour of the petitioner for cultivation of "Musli Safed" over an area of Ac 5.00 decimals basing on the recommendation and documents submitted by her. It is submitted that though the petitioner had taken a lease of an area of Ac 5.10 decimals for cultivation of "Safed Musli", which is Ayurvedic Medicinal Plant but the bank sanctioned loan for an area of Ac 5.00 decimals.

4. So far as the connected writ petition bearing W.P.(C) No.2245 of 2009 is concerned, the petitioner also submitted an application dated 07.06.2004 (Annnexure-C/1) for grant of loan as per the Scheme-2008 for the aforesaid purpose in respect of the land owned by him. The said application of the petitioner was also accepted and loan amount of Rs.12.00 lakhs was also sanctioned in his favour by opposite party No.4 on 12.07.2004 for cultivation of "Musli Safed" over an area of Ac 5.00 decimals basing on the recommendation and documents submitted by him though the petitioner had taken lease of an area of Ac 5.05 decimals but the bank sanctioned loan for an area of Ac 5.00 decimals.

5. Accordingly, the petitioners spent the entire loan amount for cultivation of "Musli Safed" over an area of Ac 5.00 decimals each. It is submitted that "Musli Safed" is an herbal plant which is used for preparation of Ayurvedic Medicine. The cost of the seed was Rs.450/- per kg and for cultivation of Ac 5.00 decimals of land 2,500 kg of seeds were required. Accordingly, the petitioners spent Rs.12,50,000/- towards cost of the seeds and other expenses. As the crop raised in the area of Ac 5.00 decimals was lost and it was not a successful crop, they are entitled to get waiver of the

loan amount sanctioned as per Clause 5.1 of the Scheme-2008. Clause 5.1 of the Scheme-2008 reads thus:

> "5.1 In the case of a small or marginal farmer, the entire 'eligible amount' shall be waived."

6. It is further submitted that though the petitioners submitted applications dated 02.07.2008 (Annexure-3) to opposite party No.2 claiming benefits as per Clause 5.1 of the Scheme-2008, the same have been rejected by issuing letter dated 22.09.2008 (Annexure-4) which is impugned in each of the writ petitions, wherein it is stated that the petitioners are not entitled to get the benefits as they are not small farmers. While issuing Annexure-4, the Branch Manager, Utkal Gramya Bank, Birbira Branch has classified the petitioners as other farmers but not small farmers under the Scheme-2008 which is illegal and arbitrary and liable to be quashed.

7. Learned counsel for the petitioners further submits that the petitioners have only cultivated an area of Ac 5.00 decimals each out of their leased land of area Ac 5.10 decimals and Ac 5.05 decimals respectively as could be seen from Annexure-A/1. If Annexure-1 is taken into consideration, it would be clear that the Bank authorities sanctioned agricultural cash credit to the petitioners for cultivation of "Safed Musli". Therefore, the petitioners are coming under the purview of "Small Farmers" and they are entitled to the benefits claimed. Hence, the present writ petitions.

8. Learned counsel appearing for opposite party Nos.1,2 and 4 sought to justify the impugned order under Annexure-1 placing strong reliance upon the Memorandum of Understanding (MoU) (Annexure-B/1), wherein the MoU has been entered into between the petitioner and the Director, Radha Madhab Herbals Agro (P) Ltd. In the MOU, the petitioners have furnished information i.e. the details of area for cultivation is Ac 5.10 decimals and Ac 5.05 decimals respectively. Therefore, the petitioners come under the definition of "Other Farmer" as provided under Clause 3.7 of the Scheme-2008. Further, placing strong reliance upon paragraph-4 of the counter affidavit, he submits that the total land in possession of each of the petitioners being Ac 5.10 decimals and Ac 5.05 decimals respectively, therefore, they cannot be treated as "Small Farmer". If they are categorized as "Small Farmer", then the spirit of the Scheme-2008 (Annexure-2) would be defeated. Therefore, their prayer for quashing of Annexure-4 does not arise.

Further placing reliance upon Sl.No.4 of the application submitted by each of the petitioners under Anexure-C/1, it is submitted that the petitioners don't belong to SC/ST/Back Ward Community/Minor Community. Sl. No.6 of Annexure-C/1 also states that the extent of land of each of the petitioner is Ac 5.10 decimals and Ac 5.05 decimals respectively, which are beyond towards the loan sanctioned as per the Scheme-2008. Therefore, they do not come under the purview of Clause 3.7 and explanation thereto. Hence, they are not entitled to the claim made in the writ petitions.

Further placing reliance upon paragraph 4 of the counter affidavit, learned counsel for the opposite party Nos.1,2 and 4 has denied the claim made by the petitioners for the reasons stated in the said paragraph. Relevant portion of paragraph-4 of the counter affidavit reads thus:

> "….So far as Administrative Circular under Annexure-2 is concerned, it is submitted that the petitioner has forgotten about Explanation attached to Para-3 and Interpretation Clause under Para-13. Clause-1 of Explanation makes it clear that classification of eligible farmers as per the land holding criteria indicated in paras 3.5, 3.6 & 3.7 would be based on total extent of land owned by the farmers or total extent of land cultivated by Farmer as tenant or share cropper. Since the total extent of land held by petitioner is in excess of Ac 5.00 dec., she cannot be categorized under "Small Farmer". Secondly, Para-13 of Annexure-2 makes it clear that if any doubt arises in interpreting any para of the Scheme, the Central Government would resolve the doubt and decision of Central Govt. would be final. Accordingly, Central Govt. issued following clarification on 18.06.2008.
>
> "Clarification on queries raised by lending institutions

Sl.No.	Queries	Clarifications
28.	If farmer owns less than 2.5 acres and has taken 10 acres on lease, whether he should be treated as a small farmer or 'other farmer' ? In other words, is it the land ownership or the area of cultivation that need to be reckoned ?	Paragraphs 3.5, 3.6 & 3.7 describe the status of the farmer, namely, marginal or small or other farmer, That status is determined on the basis of the Agricultural land that is in the possession of the farmer as owned or tenant or share-copper. Hence, all land in the possession of the farmer as owner or tenant or sharecropper should be taken into account for determining whether he is a marginal or small or other farmer."

9. Having regard to the particulars given in the MoU as well as the application filed by each one of the petitioners holding that they have owned Ac 5.10 acres and Ac 5.05 decimals respectively, the clarifications issued by the Central Government, are not applicable to the claim of the petitioners. Hence, the rejection of the claim under Annexure-4 is perfectly legal and valid and the same does not call for any interference by this Court.

10. Apart from the stands taken by opposite party Nos.1,2 and 4 in the counter affidavit, learned counsel for the said opposite parties further places reliance upon a Constitutional Bench judgment of the Hon'ble Supreme Court in the case of *The State of Assam and another vs. Ajit Kumar Sarma and others,* AIR 1965 SC 1196 and a three Judge Bench decision of the Hon'ble Supreme Court in the case of *G.J. Fernandez vs. The State of Mysore and others,* AIR 1967 SC 1753 and submits that the administrative instructions/orders issued by the Government do not confer any statutory right in favour of the petitioners for enforcement. Therefore, a writ of mandamus cannot be issued against the opposite parties. Hence, the writ petition is devoid of merit and liable to be dismissed.

11. On the rival, factual and legal contentions advanced by the parties, the following questions that would arise for our consideration in these proceedings :-

(i) Whether rejection of application of the petitioners under Annexure-4 treating the petitioners as other farmer in view of clause 3.7 and explanation (1) is legal and valid ?

(ii) Whether a writ of mandamus can be issued to the opposite parties in view of the Constitutional Bench decisions of the Hon'ble Supreme Court referred to supra ?

(iii) What order ?

12. Question No.(i) is as to whether rejection of application of the petitioners under Annexure-4 treating the petitioners as other farmer in view of clause 3.7 and explanation (1) is legal and valid.

13. The impugned order under Annexure-4 issued by the Branch Manager treating the petitioners as "other farmers" is contrary to the Scheme-2008 and the loan sanctioned order issued in favour of the petitioners.

It would be suffice for this Court to extract definition of "Small Farmer" and "Other Farmer" as provided under Clauses 3.6 and 3.7 of the Scheme-2008, which reads thus:

> "3.6. '**Small Farmer'** means a farmer cultivating (as owner or tenant or share cropper) agricultural land of more than 1 hectres and upto 2 hectres (5 acres).
>
> 3.7. '**Other Farmer'** means a farmer cultivating (as owner or tenant or share cropper) agricultural land of more than 2 hectres (more than 5 acres)."

14. The definition of "farmers" as defined under the Scheme-2008 also does not support the case of opposite parties. As per the loan holding criteria, a person could be either an owner/farmer or tenant or share creditor. The total extent of cultivation to get the benefit as a small farmer shall not exceed more than 5 Acres. Therefore, explanation (1) under Clause 3.7 of the Scheme-2008 cannot take away the right given to the small farmers, particularly, the petitioners herein as their claim is justified on the basis of the loan sanctioned in their favour. Further at Sl. No.1(c) in the MoU entered into between the petitioner and the Director, Radha Madhab Herbals Agro (P) Ltd, it is stated that the approximate quantity to be traded : 60,000 plants per acre (500 kg in wt. basis) and total cultivated area – 5 Acres. So 5 Acres is cultivated by the petitioners, is an undisputed fact. According to the Sl.No.2 of the MoU, there are different plots which are in total Ac 5.10 decimals as well as Ac 5.05 decimals is not a relevant consideration in the facts situation. Further in Annexure-C/1 upon which strong reliance has been placed by learned counsel for the opposite party Nos.1,2 and 4 at Sl No.6, which is relatable to the particulars of the land holding but not actual cultivated area as per loan sanctioned order issued by opposite party No.2. Further, at Sl.No.10 of the loan application form, which relates to the particulars of moveable/live stock/immovable property owned. Accordingly the land is shown as Ac 6.22 decimals as agricultural land, which is beyond Ac 5.00 decimals but actually the petitioners have been granted loan only on Ac 5.00 decimals each for cultivation of medicinal plants. Therefore, rejection of the claim of the petitioners are contrary to the Scheme-2008 and the same is bad in law. Rejecting the claim that they are "other farmer" but not "small farmer" is also contrary to the loan sanction order and the Scheme-2008 referred to supra. Therefore, the impugned order under Annexure-4 in both the petitions is liable to be quashed. Accordingly, we quash the impugned order under Annexure-4 in both the writ petitions.

15. Question No.(ii) is required to be answered in favour of the petitioners for the following reasons:

As could be seen from Annexure-2, the Finance Minister, in his Budget Speech for 2008-2009, announced a Debt Waiver and Debt Relief Scheme for the farmers. The Hon'ble Supreme Court has also held that the Budget Speech delivered by a Hon'ble Minister shall be treated as a law and the same shall be given effect to.

16. In this view of the matter, the Scheme announced by a Minister of the Central Government shall not be treated as an administrative order. It has got status of the law as certain benefits have been extended to the small farmers for the purpose of permitting such farmers to raise certain crops. Here benefits have already been extended under the aforesaid Scheme. Clauses 3.5, 3.6 and 3.7 of the Scheme-2008 describe the status of farmer, namely, marginal or small or other farmers, who will get the benefits extended under the Scheme-2008. Therefore, the legal principles laid down by the Hon'ble Supreme Court in the Constitution Bench decision in the case of ***Ajit Kumar Sarma*** *(supra)* and the three Judge Bench decision in the case of ***G.J. Fernandez*** (supra), have no application to the facts situation of the case. Accordingly, question No.(ii) is answered against the opposite party Nos. 1, 2 and 4.

17. Opposite party Nos.1,2 and 4 are hereby directed to consider the claim application of the petitioners as per the Scheme-2008 under Annexure-2 and extend benefits to them as provided under Clause 5 of the Scheme-2008 as expeditiously as possible but not later than eight weeks from the date of receipt of this judgment.

18. With the aforesaid observation and direction, the writ petitions are allowed. Rule issued.

Writ petitions allowed.

2012 (I) ILR- CUT- 748

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

W.P.(C) NO. 23867 OF 2011 (Dt. 29.02.2012)

**M/S. GENERAL SECURITY &
INFORMATIONSERVICES (P) LTD.** ..…… Petitioner.

.Vrs.

**CHIEF ROLLING STOCK ENGINEER
OF EAST COAST RAILWAY
ADMINISTRATION,B B S R &
THREE ORS.** ……..Opp.Parties.

MINIMUM WAGES ACT, 1948 (ACT NO.11 OF 1948) – S.20.

Payment of less than the minimum rates of wages to the workmen – Delay in filing application for computing the minimum wages – Held, delay condoned as the statutory rights of the workmen has been violated – On enquiry the petitioner-employer failed to produce positive evidence i.e. the Pay Acquittance Register maintained in the establishment – Adverse inference drawn by the Minimum Wages Authority – Fundamental rights of the workmen infringed as guaranteed Under Article 21 of the Constitution of India – Award of compensation three times of the minimum wages – Hence the writ petition.

Since the Authority can award ten times more than the minimum wages U/s.20(3) of the Act, awarding compensation of three times of the minimum wages payable by the petitioner to the workman is legal and valid and the same cannot be said to be arbitrary, unreasonable or on the higher side – Held, no reason to interfere with the impugned order – Writ petition is dismissed with cost of Rs.10,000/- payable by the petitioner to the workmen. (Para 13,14)

Case laws Referred to:-

1.AIR 1980 SC 1896 : (Gujarat Steel Tubes Ltd.etc-V-Gujarat Steel Tubes Mazdoor Sabha & Ors.)
2.AIR 1984 SC 802 : (Bandhua Mukti Morcha-V- Union of India)
3.(1983)1 SCC 525 : (Sanjit Roy-V-State of Rajasthan)

For Petitioner - Mr. Prasanta Ku.Mishra-1, P.Mishra & A.K.Sahoo

For Opp.Parties - M/s. A.K.Mishra, H.M.Das, A.K.Sahoo
(for O.P.No.1 & 2)
Mr. Sidharth Sankar Mohapatra
(for O.P.3 & 4)

V.GOPALA GOWDA, C.J. This writ petition has been filed by the petitioner, which has entered into a contract with opposite party-Railway to render services of cleaning of Railway coaches at Bbhubaneswar Coaching Depot and depot premises by adopting mechanized method as per the agreement dated 10.5.2007. The period of contract is for five years from 20.3.2007 to 19.3.2012. As per the contract between the petitioner and the opposite party-Railway, the petitioner is required to clean approximately 93 coaches per day at Bhubaneswar Coaching Depot and Depot premises through advanced machinery with the help of its workers. Prior to the work undertaken by the petitioner, similar work was done by the petitioner by engaging workers at the supervision of the personnel of the opposite party no.1. The rate of wages payable to the employees is stipulated Clause-90 of the Agreement wherein it is stated that the Contractor shall be responsible to ensure compliance with the provision of the Minimum Wages Act, 1948 and the Rules made there under in respect of any employee directly or through petty Contractors or Sub-Contractors employed by him.

2. The petitioner is before this Court questioning the correctness of the order dated 29.4.2010 passed by the Regional Labour Commissioner(Central), Bhubaneswar who is the authority under the Minimum Wages Act, 1948, wherein the petitioner was directed to pay minimum wages for 122 workers for the period from 7.8.2008 to 31.10.2008 amounting to Rs. 5,60,600.52 and overtime wages for the period from 1.10.2008 to 31.10.2008 amounting Rs.31,000/-, in total Rs.5,91,600.52 and towards compensation three times of the claimed amount i.e. Rs. 16,81,801.56 and Rs.1,220.00. The petitioner has been directed to deposit a total sum of Rs.22,74,623.00 towards the claim and compensation. The correctness of the same is questioned by the petitioner in this writ petition urging various grounds.

3. The first ground urged is that the claim petition is not maintainable in view of the limitation of six months as stipulated under Section 20 of the Minimum Wages Act, 1948 as the claim is preferred by the Labor Enforcement Officer (Central), Bhubaneswar-II on behalf of the concerned workers who are working under the petitioner. Therefore, the application for minimum wages filed beyond the period of limitation without there being an application seeking for condonation of delay as provided under the proviso to sub-section (2) of Section 20 of the Minimum Wages Act, 1948 under which

the authority is empowered to condone the delay, if an application is filed beyond the period of six months showing sufficient cause for not making an application within time. No such application was filed by the applicant-opposite party no.3, before the opposite party no.4. Hence, order passed by opposite party no.4 on the merits of the case determining the minimum wages, overtime wages with direction to pay compensation three times of the amount claimed are invalid in the eye of law and the same is liable to be quashed.

4. The second ground urged is that since the minimum wages has been paid to the workmen as per the rates fixed by the Labour Department, the finding recorded in the impugned order that the minimum wages were not paid to the workers engaged is erroneous and not tenable. Therefore, the impugned order is liable to be set aside.

5. The third ground urged by the petitioner is that opposite party no.1 is the principal employer and therefore the order fastening the liability should have been passed against opposite party no.1. Hence, the impugned order is bad in law and liable to be quashed.

6. With reference to the aforesaid legal contentions, learned counsel Mr. Mishra, appearing on behalf of the opposite party no.1 sought to justify the impugned order passed by the Authority under the Minimum Wages Act placing strong reliance upon Clause-90 of the Agreement which casts a statutory obligation on the petitioner who is the contractor and agreed to pay the minimum wages fixed either by himself or sub-contractors or anybody through whom labourers are employed for the purpose of performing the contractual work of cleaning the railway coaches at Bhubaneswar Coaching Depot. It is contended that the said clause has been violated by the petitioner is the report of the opposite party no.3-Labour Enforcement Officer (Central), Bhubaneswar who is competent under the provisions of Minimum Wages Act. Though the petitioner agreed to abide by Clause-90 of the Agreement and pay the minimum wages, the same has not been paid to the concerned workmen which revealed from the preliminary enquiry conducted by opposite party no.3 after ascertaining the same from the workers. Therefore, opp. party no.3 has filed application before the Regional Labour Commissioner (Central), Bhubaneswar and opportunity was given to the petitioner for filing objection to the said application. Accordingly, objection was filed by the petitioner. The said claim was disposed of by the Authority with the aforesaid direction to the petitioner.

7. Further, learned counsel Mr. Mishra has invited our attention to Clauses 77 and 78 of the Agreement which provide for withholding and lien

in respect of the sums claimed. Clause-77 provides that whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Railway shall be entitled to withhold and also have a lien to retain such sum or sums in whole the Railway shall be entitled to withhold the said cash security deposit or the security if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. The claim includes payment of minimum wages as agreed to under Clause-90 of the Agreement. Clause-78 also provides for lien in respect of claims in other contracts in which security deposit is made by the petitioner.

8. It is the duty of the opposite party-Railways having entered into an agreement to get its work done for cleaning the coaches at Bhubaneswar Depot by adopting advanced machinery and engaging employees. The payment of minimum wages by the petitioner shall be enforced under the terms and conditions of the contract and amount of security deposit in respect of the contract can also be enforced and payment shall be made to the employees. Therefore, the order passed under the Minimum Wages Act directing the petitioner to pay the minimum wages, overtime wages and the compensation of three times of the amount claimed is legal and justifiable in law.

9. Further on technical ground, it is contended that the claim is barred by limitation in the interest of justice on fixing the minimum wages under the Minimum Wages Act, 1948 paid to the workers employed by him who earned their livelihood through labour if that has been done. The Apex Court in a catena of decisions held that it is in violation of the fundamental rights guaranteed under Article 21 of the Constitution of India is one of the reasons assigned for awarding compensation. This Court can exercise its discretionary power to condone the delay so that fundamental rights of a large number of workers employed by the petitioner can be protected since the petitioner had agreed under Clause-90 to pay minimum wages as it is statutorily liable to pay the minimum wages to the workers engaged. The finding recorded on the basis of the claim made by the Labour Enforcement Officer is that the minimum wages was not paid to the workers although the petitioner has contended that minimum wages are already paid. To evidence that fact, no documentary evidence is produced. Therefore, the finding of fact recorded by the Fact Finding Authority need not be interfered with. If there is any delay, this Court for the interest of rendering social justice to the labourers who have been excluded from payment of minimum wages after getting the work done by engaging the workmen and getting the amount received from the railways, this Court can exercise its power what the

Minimum Wages Authority can do. He has placed reliance in the decision of the Supreme Court in the case of **Gujarat Steel Tubes Ltd etc. vs. Gujarat Steel Tubes Mazdoor Sabha & ors.**, reported in AIR 1980 SC 1896 wherein the Supreme Court at paragraph-79 laid down the legal principles. He, therefore, submits that on that ground the application is barred by limitation as no application is filed and therefore, the order passed by the Authority is a nullity in the eye of law, hence the same is liable to be quashed. The above contention urged on behalf of the petitioner need not be accepted as this Court can exercise its power and grant the relief as that of the Original Authority instead of remanding the matter giving opportunity to the opposite party no.3 to file application explaining the delay in approaching the Minimum Wages Authority beyond the period of six months. Further, he has placed strong reliance upon Clause 82-B of the Agreement regarding claim for arbitration, if the security deposit of this contract and other contracts are withheld and paid towards the minimum wages and compensation awarded to the workers, and if any dispute is raised by the petitioner in this regard against opposite party no.1, it shall work out its right by raising claim and getting the matter referred to the Arbitration and get the dispute resolved. Therefore, he submits that the impugned order does not call for interference and requests this Court for dismissal of the writ petition.

10. With reference to the aforesaid rival factual and legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court.

(i) Whether the impugned order passed by the Minimum Wages Authority is not maintainable in the absence of an application for condonation of delay and whether in such event, this Court can exercise its power even in the absence of application for seeking for condonation of delay?

(ii) Whether the finding recorded in the impugned order that the minimum wages and overtime wages are not paid to the concerned workmen and order has been passed by the Minimum Wages Authority and also awarded the compensation of three times of amount claimed is legal and valid?

(iii) What order?

11. All the points are required to be answered against the petitioner for the following reasons:-

It is not in dispute that the petitioner has entered into a contract with the opposite party no.1 to render service of cleaning of coaches by providing workers. Clause-90 of the Agreement casts contractual obligation on the part of the petitioner pursuant to the contract that it shall pay the minimum wages to the workers who are employed to discharge the contractual work for opposite party no.1. In this regard, opposite party no.3 conducted preliminary enquiry with regard to the claim of workers concerned who were employed by the petitioner. They have categorically stated that the minimum wages are not paid to them is the basis on which the application was filed by opposite party no.3 before opposite party no.4. The stand taken by the petitioner in these proceedings is that the order is a nullity in the eye of law as the claim petition was filed beyond the period of six months as stipulated under Section 20 of the Minimum Wages Act. This contention was not raised before the Minimum Wages authority. Nonetheless, the legal contention can be permitted to be urged in the present proceedings. This Court instead of remanding the matter to the Minimum Wages Authority with regard to the findings of the Authority that minimum wages not paid to the workmen in its order can exercise its power of Minimum Wages Authority to avoid any further delay in the proceedings to get their legitimate statutory dues. The workmen who were employed by the petitioner to execute his contractual work with opposite party no.1 and not paid the minimum wages to them, thereby the fundamental rights of those workmen were infringed which has been guaranteed under Article 21 of the Constitution of India is one of the reasons assigned in the impugned order after referring to the decisions of the Supreme Court referred to supra to award minimum wages and compensation in favour of the concerned workmen. In this regard, it is worthwhile to refer to the principle laid down by the Apex Court on which the power under Article 226 can be exercised by this Court as what the Minimum Wages Authority can do. The relevant paragraph 79 reads thus:-

> " The basis of this submission, as we conceive it, is the traditional limitations woven around high prerogative writs. Without examining the correctness of this limitation, we disregard it because while Article 226 has been inspired by the royal writs its sweep and scope exceed hide-bound British processes of yore. We are what we are because our Constitution framers have felt the need for a pervasive reserve power in the higher judiciary to right wrongs under our conditions. Heritage cannot hamstring nor custom constrict where the language used is wisely wide. The British paradigms are not necessarily models in the Indian Republic. So broad are the expressive expressions designedly used in Article 226 that any order which should have been made by the lower authority could be made by the

> High Court. The very width of the power and the disinclination to meddle, except where gross injustice or fatal illegality and the like are present, inhibit the exercise but do not abolish the power."

12. The aforesaid principle laid down by the Supreme Court is aptly applicable to the fact situation of the present case having regard to the illegality, injustice and miscarriage of justice done to the concerned workers by the petitioner in not paying the minimum wages to them for the period in question as mentioned in the order passed by the Minimum Wages Authority and we have to exercise our discretionary power to condone the delay in filing the application for computing the minimum wages and award compensation along with other monetary benefits as the Minimum Wages Authority has done justice to the workmen after placing reliance upon the decisions of the Apex Court. We accordingly condone the delay and supplement to the order passed by the Minimum Wages Authority to render justice to the workmen as their statutory rights has been flagrantly violated.

13. The findings of fact were recorded by the Minimum Wages Authority on the basis of the statement of counter and the evidence placed before the Minimum Wages Authority by opposite party no.3. In the absence of non-production of record by the petitioner-employer, the substantive plea taken in the statement of objection that the minimum wages were paid to the workmen, he has not proved his case. The petitioner should have discharged its duty by producing positive and substantive evidence on record, viz., the Pay Acquittance Register, which was required to be maintained in the Establishment. The same has not been done in the instant case and the minimum wages are not paid to the workers. Adverse inference should have been drawn by the Minimum Wages Authority for non-production of such documentary evidence. However, no adverse inference has been drawn by opposite party no.4. The finding that minimum wages were not paid to the concerned workmen for the period in question is based on proper appreciation of legal evidence in the absence of positive documentary evidence required to be produced by the petitioner before the Minimum Wages Authority. Therefore, the finding of fact recorded by the Authority on the contentious issue cannot be termed as erroneous. Having recording the finding of fact that minimum wages were not paid by the petitioner to the concerned workmen for the period in question awarding the same with compensation three times of the amount claimed is also justified in view of the fact that under the provision of Section 20 read with sub-section (3) of the Minimum Wages Act, the Authority has the power to award ten times compensation. In the instant case, having regard to the findings of non-payment of minimum wages to the workmen it is in violation of

fundamental rights guaranteed under Article 21 of the Constitution of India which is the ratio laid down by the Supreme Court in the case of Bandhua Mukti Morcha Vs. Union of India, reported in AIR 1984 SC 802. The Hon'ble Supreme Court in the case of Sanjit Roy Vs. State of Rajasthan, reported in (1983) 1 SCC 525, has held that the payment of less wages than the minimum wages is a violation of fundamental rights under Article 21 of the Constitution. In that view of the matter awarding compensation of three times of the minimum wages payable by the petitioner to the workmen is perfectly legal and valid, and it cannot be said that the same is on the higher side for the reason that the same could have been ten times more than the minimum wages payable to the workmen by the petitioner-employer awarded by the authority. That has not been done in the instant case and only compensation of three times of the amount claimed has been awarded which cannot be termed as arbitrary, unreasonable or on the higher side.

14. We do not find any cogent reason to interfere with the impugned order as the same is perfectly legal and valid. Hence, the petition is liable to dismissed and is accordingly dismissed with cost of Rs.10,000/- (Rupees Ten Thousand) payable by the petitioner to the workmen.

Writ petition dismissed.

2012 (I) ILR- CUT- 756

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

W.P.(C) NO. 13441 OF 2009 (Dt. 28.07.2011)

PRATAP KUMAR NAYAK ……..Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.21.

Right to life includes right to health and medical care – Petitioner's son born having no anal canal – He underwent surgery twice and on each surgery there was transfusion of blood – Blood collected from the Red Cross Blood Bank Municipal Hospital, Bhubaneswar – Baby was found infected with HIV+ve – Petitioner alleged due to negligence of O.P.2 Director Red Cross Blood Bank Municipal Hospital and due to lack of proper control and supervision of O.P.1 state such tragedy took place.

Medical Science identified four courses for infection of HIV i.e. (i) through unsafe sex, (ii) a child born from HIV infected parents (iii) through needles and (iv) through transfusion of HIV infected blood – In this case son of the petitioner infected with HIV+ve at the age of 17 months so possibility of HIV through unsafe sex is not expected – Since blood of the parents of the infected baby found to be negative it can not be said that the child was born through HIV affected parents – Scope of infection through needle is remote as disposable needle used in transfusion of blood by O.P.4 – So the baby has been infected after transfusion of blood during the second operation – Held, O.P.1 state and O.P.2 Director Red Cross Blood Bank are negligent in not conducting Antizen Test through PCR method at the time of collecting blood which is the only method to detect the virus of HIV hence they are jointly and severally liable to pay compensation of Rs.3,00,000/- (Rupees three lakhs) to the petitioner – Further direction issued to O.P.1 state to provide free medical treatment to the baby.

(Para 9,15,18,19)

Case laws Referred to:-

1.AIR 1996 SC 929 : (Common Cause-V- Union of India & Ors.)
2.AIR 1987 SC 990 : (Vincent Panikurlangara-V-Union of India & Ors.)
3.AIR 1995 SC 922 : (Consumer Education & Research Centre & Ors.-V-

Union of India & Ors.
4.AIR 1996 SC 1051 : (Chameli Singh & Ors.-V-State of Uttar Pradesh & Anr.)
5.AIR 1983 SC 109 : (Board of Trustees of the Port of Bombay-V-Dilipkumar Raghavendranath Nadkarni)
6.AIR 1986 SC 180 : (Olga Tellis & Ors.-V-Bombay Municipal Corporation & Ors.)
7.(2003)6 SCC 1 : (Kapila Hingorani-V- State of Bihar)
8.AIR 1993 SC 1960 : (Smt.Nilabati Behera @ Lalita Behera-V-State of Orissa & Ors)

For Petitioner - Mrs. Sujata Jena, Mr. G.B. Jena & Miss S.Mohanty.
For Opp.Parties - Govt. Advocate (for O.P.1)
M/s. Manas Mohapatra, L.N.Sahoo, S.K.Routray, S.Mohanty, R.P.Kar & A.N.Ray (for O.P.2)
Mr. D.Sarangi (for O.P.4).

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to direct opposite party No.1-State of Orissa, represented by the Secretary to Government of Orissa, Department of Health and opposite party No.2-Director of Red Cross Blood Bank, Municipal Hospital, Bhubaneswar to pay a compensation of Rs.20,00,000/- to the petitioner. Further prayer is for a direction to opposite party No.4-Managing Director, Neelachal Hospital Pvt. Ltd, Bhubaneswar to pay all the expenses which were spent by the petitioner for treatment of the petitioner's son.

2. Petitioner's case in a nutshell is that his son Adarsh was born on 21.10.2007 in Kalapathara Public Health Centre in the district of Nayagarh by a normal delivery. One day after the delivery, it was found that the baby has no anal canal. For proper treatment, the mother of the baby went to the nearest Public Health Centre where she was advised to move to Khurda Hospital as there was no paediatric specialist in the said P.H.C. In Khurda Hospital being advised by Dr. Jayaram Patra she contacted Dr. Subrat Mohanty, who was a Paediatric Surgery Specialist and as per the advice of Dr. Mohanty, she went to Neelachal Hospital, Bhubaneswar. The petitioner's son was admitted in Neelachal Hospital on 24.10.2007 and was operated on 25.10.2007. The operation was successful and the baby stayed there for about 10 days. At the time of discharge, Dr. Mohanty advised for check up of the baby every month and next surgery was suggested to be taken up after the weight of the baby is reached 9 K.G. Before the 1st surgery was taken up one bottle of blood was given to the baby which was collected from Red-

Cross Blood Bank, Municipal Hospital, Bhubaneswar by depositing a sum of Rs.450/. The baby was again admitted to the Neelachal Hospital on 18.8.2008 for second surgery. The baby being found under weight, the Doctor advised for transfusion of a bottle of blood. Accordingly, a bottle of blood was brought from the Red Cross Blood Bank, Municipal Hospital, Bhubaneswar on 19.8.2008 by paying a sum of Rs.330/- and the baby was operated on that day. The second operation was also successful like the earlier occasion and the baby was discharged after ten days of the operation. As advised by the Doctor, the baby was again admitted in Neelachal Hospital on 25.2.2009 for final surgery. As usual, before operation the blood of the baby was tested and on seeing the report Dr. Mohanty cancelled the surgery and advised the petitioner and his wife for another blood test to be done at Bangalore and collected the blood sample for the purpose. The baby was discharged immediately. While collecting the blood report which was sent to Metropolis Laboratory for testing, the petitioner was told that the baby was infected with HIV +ve. The doctor advised him and his wife to go to ICTC Centre for testing of their blood on 2.3.2009. On testing their blood it was found to be negative and the blood of the child was found to be HIV +ve. Thereafter the baby was taken to S.C.B. Medical College & Hospital, Cuttack for collection of blood sample and the same was sent to M.K.C.G. Medical College, Berhampur for testing and also for CD 4 counting and the count was 1139 cells per M.M. on 17.3.2009. On 26.8.2009 Mr. Mohanty refused to operate the baby on the ground that there is no facility in Neelachal Hospital for operation of HIV +ve patient.

3. Mrs. Sujata Jena, learned counsel appearing on behalf of the petitioner submits that a person suffering from HIV +ve has a legal right to be provided with the treatment. Therefore, by denying the petitioner not to treat his son in the Hospital the opposite party-Neelachal Hospital committed illegality. As it reveals from the reports, the petitioner's son was not infected with HIV+ve from his birth. It seems that he was infected with it soon after the transfusion of blood on 19.8.2008 which was collected from the Red Cross Blood Bank, Municipal Hospital-opposite party no.2. The receipt granted by opposite party no.2 shows that the blood units are tested against Malaria, VDRL, Jaundice (MB & Ag AIDS (HIV +2) and HCV before use. Mrs. Jena further submitted that medical science so far has identified four causes for infection of HIV i.e. (i) through unsafe sex, (ii) a child born from HIV infected parents; (iii) through needles and (iv) through transfusion of HIV infected blood. Considering age of the baby the source of infection through unsafe sex is ruled out. The petitioner and his wife are not infected by HIV as could be seen from the blood reports under Annexures-9 & 10. The scope of infection through needle is remote since disposable needle was used in

transfusion of blood by opposite party no.4. Therefore, the source of infection is the blood which was brought from opposite party no.2. The petitioner is a labourer in Sazan India, a Chemical Factory at Gujarat and earning a paltry sum of Rs.4,000/- per month. He has already spent Rs.88,000/- at the Neelachal Hospital towards medicines and hospital charges by taking hand loans from his friends and relatives and selling a plot of 10 Gunths of fertile land. Due to the lower middle class status of the petitioner, it is impossible for him to take additional burden of treatment of a HIV patient. The constitutional mandate is to provide all medical facilities to the citizens of the country. Therefore, opposite party no.1-State is responsible under law to provide all health facilities to the people. It is because of the negligent action of opposite party nos. 1 & 2, the son of the petitioner has been infected with incurable disease. In this case the blood which was collected for transfusion was contaminated thereby putting the people of the entire State into peril. The action of opposite party nos. 1 & 2 are also contrary to the rulings of the Hon'ble apex Court in the case of *Common Cause vs. Union of India and others,* AIR 1996 SC 929. As per study of the medical science, the length of time following the infection of an individual to develop detectable antibodies is about three months after the infection. This is called the "Window Period". The petitioner's son is detected with the disease after about 5 months of blood transfusion. Therefore, the blood brought from the Blood Bank on 19.8.2008 was infected with HIV +ve. According to the Supreme Court, right to live includes right to health. The apex Court in *Common Cause (supra),* has directed the National Council and State Council for proper storage, transport and quality control of the blood apart from other pecuniary measures. There is no provision in the State to identify virus during the Window Period. Unless special test known as Antizen Test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified during the Window Period i.e. during three months of infection. Therefore, the receipt given by the blood bank stating therein that the blood units are tested against HIV seems to be a myth. The petitioner is entitled to compensation under the public law remedy. Concluding her argument Mrs. Jena prayed to grant compensation of Rs.20,00,000/- for the latches of opposite parties Nos. 1 & 2.

4. Learned Government Advocate appearing on behalf of opposite party No.1 submits that the allegation of the petitioner that his son has been infected with HIV +ve due to blood transfusion made at Neelachal Hospital Pvt. Ltd., Bhubaneswar obtained from the Red Cross Blood Bank of Municipal Hospital, Bhubaneswar, is baseless and without any proof. Rather the drawal and storage of blood in Red Cross Blood Bank are done following the strict procedure and safety standard with little scope for any compromise

with quality. The blood procured by the petitioner from Red Cross Blood Bank of Municipal Hospital, Bhubaneswar on the basis of requisition made by Neelachal Hospital Pvt. Ltd. has undergone mandatory tests like HIV, HBV, HCV, VDRL and Malaria before issue of blood for transfusion. In the case of the petitioner, all these mandatory tests have been conducted and more particularly, HIV test has been found to be negative before issue. As per the report of the Technical Committee dated 06.05.2011 both the blood units issued in favour of Sri Adarsh Nayak were tested for HIV infection and found negative before it was issued. Therefore, the allegation of the petitioner is not correct as the son of the petitioner was provided with sufficient and adequate treatment in the hospital and the A.R.T. Centre of SCB Medical College and Hospital, Cuttack in terms of the procedure prescribed. There is no conclusive proof that the bottles of blood obtained from opposite party no.2 and transfused by Neelachal Hospital Pvt. Ltd. was infected and resulted into HIV +ve for the patient. The State Government has not been shirking from its responsibility and there is a reasonable facility for treatment of HIV patients. The petitioner is not interested for treatment of his child rather more interested for getting compensation from the Government misrepresenting the facts before this Court.

5. In the counter affidavit filed by opposite party No.2, it is stated that there has been absolutely no negligent action on the part of opposite party No.2 towards the son of the petitioner as has been alleged. The record reveals that a bottle of blood was issued on requisition from Neelachal Hospital, Bhubaneswar on 25.10.2007 for the baby of the petitioner after due test on usual payment. It is further submitted that unless somebody's blood is tested for HIV +ve and found to be so, it cannot be said that he/she is infected. Therefore, the evidence adduced by the petitioner vide Annexures-1 to 6 to the writ petition are not enough to say whether the child suffered or not from HIV infection from its birth. Opposite party No.2 had conducted all the tests as mentioned in the test reports of the collected blood and found to be free from infections, stored it in tested freeze. There is no scope of issuing blood having infection to any person. Since the child was continuously being treated medically and had undergone two surgeries, in the process of treatment and surgery there is every chance of infections by use of various types of needles etc. The allegation that the blood collected from opposite party No.2 on 19.08.2008 is contaminated, is absolutely false and baseless.

It was further contended that the treatment of Adarsh Nayak is sufficient and A.R.T. Centre found the patient in a severe Immuno Suppression state and accordingly, the treating physicians advised

medication so that the patient could be substantially fit immunologically for corrective surgery on the patient without any life threatening complication. Father of the patient has communicated to the Superintendent of Sardar Vallabbai Patel Post Graduate Institute of Paediatrics (Sishu Bhawan), Cuttack that he is not ready to take the drugs advised by A.R.T. Centre of SCB Medical College and Hospital, Cuttack and if by taking medicines anything happens to him then doctors will be held fully responsible for the same and the patient is not taking medicine given by A.R.T. Centre, SCB Medical College and Hospital. There is no conclusive proof that transfusion of those two bottles of blood used by Neelachal Hospital has infected the patient with HIV +ve.

6. Opposite party No.4-Neelachal Hospital in its counter affidavit submitted that the type of operation needed for the patient was very serious in nature and may result in multiple complications for which specialized paediatric Intensive Care Unit is necessary which is not available in the opposite party-Neelachal hospital. Therefore, the treating doctor rightly refused for further treatment. Considering the financial status of the petitioner, concession has been given on two occasions when the child was operated and the same was done successfully.

7. On the rival contentions of the parties, the question that falls for consideration by this Court is as to whether due to negligence on the part of opposite party no.1-State and opposite party no.2- Director, Red Cross Blood Bank, petitioner's son was affected by HIV+ve for which they are liable to pay compensation to the petitioner.

8. The petitioner's case is that due to negligence on the part of opposite party No.2-Director, Red Cross Blood Bank, Municipal Hospital, Bhubaneswar, his son was affected by HIV $+^{ve}$ through transfusion of the blood he bought from opposite party no.2. His further case is that due to lack of proper control and supervision of opposite party No.1-State, such tragedy took place. The undisputed facts are that HIV +ve can only be infected through the following four causes :- (i) Unsafe sex, (ii) child born through HIV affected person, (iii) through needles, and (iv) through blood transfusion.

9. In the instant case, the son of the petitioner was found infected with HIV+ve at the age of 17 months. Therefore, the possibility of infection of HIV through unsafe sex is totally out of consideration. Since blood of the father and mother of the infected baby was tested in ICTC Centre and the reports under Annexure-9 series are found to be negative, it cannot be said that the child was born through HIV affected parents. The scope of infection through

needle is remote since according to the petitioner disposable needle was used in transfusion of blood by opposite party No.4.

Circumstances of the case reveal that only after second surgery, the baby was found to be infected with HIV +ve. It further reveals that the baby has been infected with HIV +ve soon after the transfusion of blood during the second operation which was done on 19.08.2008 and the infection was identified on 25.02.2009. According to the petitioner, as per the study of medical science length of time following the infection of an individual to develop detectable antibodies is about three months after the infection and this is called the "Window Period". In the case of son of the petitioner, the same was detected on 25.02.2009 which is five months after the blood transfusion. Therefore, the petitioner's case is that the blood brought from the Blood Bank on 19.08.2008 was infected with HIV +ve. Further assertion of the petitioner is that as per the medical science during window period unless the special test known as Antizen test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified. The further case of the petitioner is that such Antizen test conducted through PCR method is not available in the State of Orissa, therefore, there was no scope for opposite party No.2 to conduct Antizen test through PCR after collecting the blood from the donor. Annexure-A/1, enclosed to the counter affidavit filed by opposite party No.1-State, is the report on the HIV status of two units of blood issued to Adarsh Nayak, son of Pratap Kumar Nayak which is alleged to have transmitted HIV. According to the said report, the second blood bag No.2077 was collected on 01.08.2008 from the donor Prafulla Kumar Sahoo, in respect of which HIV test was done on 04.08.2008 and found negative. The same blood was issued to the petitioner's son on 19.08.2008. As admitted by opposite party No.2, no PCR test has been done in respect of the blood issued to the petitioner's son on 19.08.2008. The assertion of the petitioner that unless the special test, known as Antizen test is conducted through PCR method, the virus of HIV +ve cannot be identified and such a test is not available in our State is not denied by the opposite parties. From the letter addressed to Sri Manas Mohapatra, learned advocate appearing for opposite party No.2 by Blood Bank Officer, B.M.C. Hospital, Bhubaneswar-2, it reveals that opposite party No.2 does not have the facility for PCR test and therefore, such methodology has not been adopted in the present case. It is also not the case of opposite party No.1-State that the said Antizen test is conducted through PCR method to identify the HIV $+^{ve}$ virus. Therefore, in the absence of Antizen test through 'PCR' method after collecting the blood from donor, the receipt given by the Blood Bank stating therein that the blood units are tested against HIV +ve is not worth acceptable. After collection of blood from the donor, the Antizen test through PCR method was required to be done to

identify the virus of HIV +ve but without such test the blood collected on 01.08.2008 has been supplied to the petitioner on 19.08.2008. It is certainly an act of negligence on the part of opposite party No.2 as well as opposite party No.1-State, who have not ensured such test.

10. The apex Court in ***Common Cause vs. Union of India and others,*** AIR 1996 SC 929, held that:

> "Blood is an essential component of the body which provides sustenance to life. There can be no greater service to the humanity than to offer one's blood to save the life of other fellow human-being. At the same time blood, in stead of saving life, can also lead to death of the person to whom the blood is given if the blood is contaminated. As result of developments in medical science it is possible to preserve and store blood after it has been collected so that it can be available in the case of need. There are blood banks which undertake the task of collecting, testing and storing the whole blood and its components and make the same available when needed. In view of the dangers inherent in supply of contaminated blood it must be ensured that the blood that is available with the blood banks for use is healthy and free from infection"

In the above case, considering the serious deficiency and shortcomings in the matter of collection, storage and supply of blood through various blood bank centres operating in the country, the Hon'ble Supreme Court issued direction to the Union Government and the State Government to take speedy action to remove serious deficiency and shortcomings.

11. The apex Court in ***Vincent Panikurlangara vs. Union of India and others,*** AIR 1987 SC 990, observed that the branch of health care of citizens involves an ever changing challenge. The problem is a shifting one and one cannot have a fixed process to deal with the situations that would arise from time to time. The Central Government on the basis of the expert advice can indeed adopt and approved national policy and prescribe an adequate number of formulations which would on the whole meet the requirement of the people at large.

12. The right to health and medical care is a fundamental right under Article 21 read with Articles 39(c), 41 and 43 of the Constitution of India, right to life includes protection of health (See ***Consumer Education and Research Centre and others vs. Union of India and others,*** AIR 1995 SC 922).

13. The apex Court, in the case of **Chameli Singh & others Vs. State of Uttar Pradesh and another**, AIR 1996 SC 1051, held as follows:

> "Right to life" means to live like a human being and it is not ensured by meeting only the animal needs of man. It includes the right to live in any civilised society implies the right to food, water, decent environment, education, medical care and shelter."

14. The term "life" used in Article 21 of the Constitution of India has a wide and far-reaching concept. It means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. (vide ***Board of Trustees of the Port of Bombay Vs. Dilipkumar Raghavendranath Nadkarni***, AIR 1983 SC 109; ***Olga Tellis & Ors. Vs. Bombay Municipal Corporation & Ors.***, AIR 1986 SC 180; and ***Kapila Hingorani Vs. State of Bihar***, (2003) 6 SCC 1)."

15. In the peculiar facts and circumstances of this case and taking note of above judicial pronouncement, we are of the view that opposite party No.1-State Government and opposite party No.2-Director, Red Cross Blood Bank are negligent in not conducting Antizen Test through PCR method at the time of collecting blood which is the only method to detect the virus of HIV during the window period and therefore, they are jointly and severally liable to pay compensation to the petitioner, whose son was affected in HIV +ve after transfusion of the blood obtained from opposite party No.2 on 19.08.2008 which was collected from the donor on 01.08.2008.

16. At this juncture, it is profitable to refer to the decision of the Apex Court with regard to the award of compensation for contravention of human rights. The Apex Court in ***Smt. Nilabati Behera @ Lalita Behera vs. State of Orissa and others, AIR 1993 SC 1960***, held that:

> "A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution is an acknowledged remedy for enforcement and protection of such rights, and such a claim based on strict liability made by resorting to a constitutional remedy provided for the enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from the contravention of the fundamental right. The defence of sovereign immunity being inapplicable, and alien to the concept of guarantee of fundamental rights, there can be no

> question of such a defence being available in the constitutional remedy. It is this principle which justifies award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for the contravention made by the State or its servants in the purported exercise of their powers, and enforcement of the fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Arts. 32 and 226 of the Constitution.

17. In ***Consumer Education and Research Centre*** *(supra)*, the Apex Court held that:

> "In public law claim for compensation is a remedy available under Article 32 or 226 for the enforcement and protection of fundamental and human rights. The defence of sovereign immunity is inapplicable and alien to the concept of guarantee of fundamental rights. There is no question of defence being available for constitutional remedy. It is a practical and inexpensive mode of redress available for the contravention made by the State, its servants, its instrumentalities, a company or a person in the purported exercise of their powers and enforcement of the rights claimed either under the statutes or licence issued under the statute or for the enforcement of any right or duty under the constitution of the law".

18. In view of the above, we direct opposite parties 1 and 2 to pay the compensation of Rs.3,00,000/- (rupees three lakhs) to the petitioner. Both the opposite parties 1 and 2 are jointly and severally liable to pay the above said compensation awarded in this petition. Out of the total amount of compensation, Rs.2,00,000/- (rupees two lakhs) shall be kept in a fixed deposit in any nationalized bank in the joint names of the petitioner and his wife for a period of ten years and monthly interest accrued thereon shall be paid to the petitioner on proper identification. If the amount directed to be kept in fixed deposit is required to meet any pressing needs or for any development of the family, the same may be withdrawn by filing an application before this Court for grant of such permission. The balance amount of Rs.1,00,000/- (rupees one lakh) shall be paid to the petitioner on proper identification.

19. Needless to say that blood donated by one saves life of another. Donation of blood is a noble work. In order to achieve this avowed objective

all necessary safeguards must be taken while collecting, testing, storing and supplying blood. Otherwise, instead of saving the life, the contaminated blood would take the life. It is not disputed that during window period, unless the special test known as Antizen test is conducted through Polymer Chain Reaction (PCR) method, the virus cannot be identified. Therefore, the Government must ensure that in all blood Banks the Polymer Chain Reaction (PCR) method is available to identify the virus of HIV during window period. We, further direct opposite party no.1-State to provide free medical treatment to the baby of the petitioner who is a HIV patient.

20. In the result, the writ petition is allowed with above observations and directions. No order as to costs.

Writ petition allowed.

2012 (I) ILR- CUT- 767

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

W.P.(C) NO. 22045 OF 2011 (Dt.17.11.2011)

AKHILA KUMAR MOHAPATRA ……Petitioner.

.Vrs.

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

TENDER – Pursuant to the tender call notice petitioner and O.P.4 submitted their sealed tender papers disclosing their rates – Since petitioner's technical bid was rejected he filed writ petition disclosing the quoted rate at 1.5% less which is admittedly less than the rate quoted by O.P.4 – Thereafter O.P.4 filed an affidavit expressing his willingness to execute the work at 2.8% less so O.P.3, the tender inviting authority has rejected the bid and cancelled the tender process by a non-speaking order – Hence this writ petition.

Affidavit filed by O.P.4 without being asked by the tender deciding authority for negotiation – Once the parties participate in the tender call notice and disclose their rates in the sealed tender, no right accrues in favour of any of the participants to revise its rate as the purpose of sealed tender is that a competitor should not know the amount quoted by another tenderer – After quoting the rate in the bid document, if it is subsequently allowed to be revised by an affidavit, the very purpose of maintaining secrecy in submitting bid documents in sealed cover will be frustrated – So none of the participants has any right to change its bid subsequent to submission of the sealed tender after the last date of submission of the tender paper – Moreover sanctity of tender is not tampered by disclosing the rate in the writ petition after the last date of submission of the tender.

Failure to give reasons while cancelling the tender process amounts to denial of justice – Every action of the State and its instrumentality should be fair, legitimate, above board and without any affection or aversion and a public authority possesses powers only to use them for public good – Held, the impugned action being arbitrary is quashed and Opp.Parties are directed to proceed with the tender paper submitted by the petitioner, who is the successful bidder in the instant case.

(Para 17,18,20,21,22)

Case laws Referred to:-

1.AIR 1990 SC 1984 : (S.N.Mukherjee-v- Union of India)
2.(2003)11 SCC 519 : (Raj Kishore Jha-V- State of Bihar)
3.(1971) 1 All ER 1148 : (Breen -V- Amalgamated Engg.Union)
4.(1974)ICR 120(NIRC): (Alexander Machinery(Dudley) Ltd.-V-Crabtree)
5.(1999)1 SCC 45 : (Vasant D.Bhavsar-V-Bar Council of India)
6.AIR 1991 SC 1216 : (Union of India & Ors.-V-E.G.Nambudiri)
7.AIR 1988 SC 157 : (Haji T.M.Hassan Rawther-V-Kerala Financial Corporation)
8.AIR 1974 SC 555 : (E.P.Royappa-V-State of Tamil Nadu & Anr.)
9.AIR 1967 SC 1458 : (State of Andhra Pradesh & Anr.-V-Nalla Raja Reddy)
10.(1993)1 SCC 71 : (Food Corporation of India-V-M/s.Kamdhenu Cattle Feed Industries)

For Petitioner - Mr. R.K.Rath, Sr. Advocate
M/s. Suryakanta Dash & H.K.Moharana
For Opp.Parties- Mr. R.K.Mohapatra.
Govt. Advocate

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the decision taken by opposite party No.3-Superintending Engineer, Central Circle (R & B), Bhubaneswar, District : Khurda under Annexure-10 by which he rejected the bid and cancelled the tender in respect of the work "construction of 33 seated Women's Hostel for Government Women's College at Puri for the year 2010-11" invited vide Tender Call Notice No.9 dated 10.01.2011. Further prayer of the petitioner is to direct opposite party Nos.1 to 3 to issue work order in his favour in respect of the said work.

2. The petitioner's case in a nut-shell is that he is a 'B' Class Contractor. A tender call notice bearing No.9 dated 10.01.2011 (Annexure-1) was issued by opposite party No.3 inviting online tenders from the eligible registered contractors for execution of the work in question. Pursuant to such tender call notice, petitioner along with others submitted their bids through e-tender process on 27.01.2011. The technical bid of the petitioner was treated as non-responsive on the sole ground that he had furnished wrong registration number of one of the four trucks which were supposed to be hired for execution of the work in question. The petitioner was intimated about such rejection through SMS on 10.02.2011. The petitioner challenged the said action of the opposite party No.3 in W.P.(C) No.3230 of 2011 and this Hon'ble Court after hearing the parties and also taking note of the instructions supplied by opposite party No.3 to the learned Additional Government Advocate allowed the writ application by

setting aside the decision of opposite party No.3 in declaring the technical bid of the petitioner as non-responsive and consequently rejecting the same. This Court further directed that the technical bid of the petitioner shall be evaluated vis-à-vis opposite party No.4 so also the financial bid and thereafter appropriate decision thereon shall be taken. After getting the said order of this Court, opposite party No.3 vide letter dated 23.03.2011 informed the petitioner that his technical bid was responsive and accordingly called upon him to attend his office for opening of the price-bid for the work on 25.03.2011. The petitioner attended the office of opp. party no.3 for opening of the price bid at the scheduled place and time and upon opening of the price bid, the petitioner was found to be the lowest bidder i.e. L-I. The financial bid opening summary was also uploaded to the e-tendering System of Government of Orissa. Since after a lapse of considerable time, the opposite party authorities did not communicate their decision on the bid and the petitioner received information from a reliable source that opposite party No.4 was likely to be allotted with the work in question, he once again approached this Court by filing a writ petition bearing W.P.(C) No.12329 of 2011. In the counter affidavit filed in the said writ petition, it was categorically stated that opposite party No.4 had initially quoted 9.1% excess over the corresponding estimated cost of the work and even the negotiated price quoted by him was still 5% excess, but the price quoted by the petitioner was 1.7% less. It further revealed from the said counter affidavit that in the affidavit submitted by opposite party No.4 before opening of the price bids, he expressed his willingness to execute the work at 2.8% less. The matter was referred to the Office of the Advocate General, Orissa for legal advice and the learned Advocate General vide letter dated 03.05.2011 advised them to finalise the tender ignoring the offer made by opposite party No.4. The said writ petition was disposed of on 19.07.2011 by this Court with a direction to complete the tender process within fifteen days from the date of the order. Thereafter, opposite party No.3 by a letter dated 11.08.2011 published in the official website of the Government of Orissa, informed all the concerned regarding the rejection of the bids and cancellation of the tender under Clause 32 of the Detail Tender Call Notice. Hence, the present writ petition.

3. Mr. R.K. Rath, learned Senior Advocate appearing on behalf of the petitioner submits that the rejection of the bids and cancellation of the tender by a non-speaking order by taking recourse to Clause 32 of the Detail Tender Call Notice shows the vindictive attitude of the decision making authorities, who are bent upon to stand by their earlier decision to reject the bid of the petitioner and allot the work in favour of opposite party No.4 by any means. Thus, the tender has been cancelled without any rhyme or reason notwithstanding the fact that earlier rejection of the technical bid of the petitioner was set aside by this Court and the petitioner being the lowest bidder was entitled to get the work order.

Opposite party Nos.1 to 3, who as responsible public servants are supposed to act in a fair manner, have joined their hands with opposite party No.4 and have resorted to Clause 32 of the Detail Tender Call Notice mechanically in an arbitrary manner in order to fulfil their dishonest intention. The impugned decision to reject the bids and cancel the tender at the final stage of the tender process is apparently unreasonable and the same also smacks of mala fide. Such a decision clearly shows the intention of opposite party Nos.1 to 3 to over reach the process of law and cause hindrance in the smooth administration of justice. The bidding authority was very much interested for opposite party No.4 and illegally cancelled the bid in question the moment he felt that in the present bidding process he may not be able to achieve his goal. The said action of the bidding authority cannot stand to the judicial scrutiny in any manner whatsoever particularly in view of the legal opinion obtained from the highest legal consultant of the State and the impugned cancellation of the tender also violates the constitutional rights of the petitioner to pursue his profession as a contractor guaranteed under Article 301 of the Constitution. The authorities are required to act in a non-partisan and fair manner which has been violated here. Hence, it is desirable in the interest of justice, equity and fair play to lift the veil in order to find out the mala fide intention of the executive behind the impugned administrative action and quash the same in exercise of the extraordinary jurisdiction conferred upon this Court under Article 226 of the Constitution.

4. Mr. R.K. Mohapatra, learned Government Advocate appearing on behalf of the State submits that opposite party No.3-Superintending Engineer, the tender inviting authority is justified to reject the bid and cancel the tender for the work in question as the petitioner in his writ petition bearing W.P.(C) No.3230 of 2011 had disclosed his quoted rate as 1.5% less which lost the sanctity of the sealed tender process. The evaluation committee meeting was held on 23.03.2011 in which the petitioner was found responsive and the price bid was opened on 25.03.2011 in which the petitioner had quoted 1.7% less than the corresponding estimated cost. Opposite party No.4-Biswajit Chhotray filed an affidavit dated 24.02.2011 stating therein that he is willing to execute the said work at 2.08% less. The rate quoted by opposite party No.4 is less than the rate of the petitioner. The affidavit being genuine, the same was received on 24.02.2011, though he was not asked for further negotiation. In the above situation, as the essence and sanctity of tender was destroyed, legal instruction from the learned Advocate General, Orissa was sought for. After careful consideration and discussion with the competent/appropriate authorities it was decided to reject the bids of both the bidders and cancel the tender for the aforesaid work as per Clause 32 of the Detail Terms and Conditions of the Notice to avoid future litigation. The tender inviting authority by cancelling the tender has not debarred any bidder from participating in the re-tender process

for the said work. In the latter tender, all the bidders will have equal opportunity to take part in the bidding process. The bidding authority felt that the affidavit submitted by opposite party No.4 to execute the work at 2.8% less, may cause an audit objection as he has quoted less than the petitioner. Therefore, the authority has acted in a fair manner and has rightly cancelled the tender. Concluding argument, Mr. Mohapatra prayed for dismissal of the writ petition.

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

(i) Whether due to disclosure of the rate quoted in the tender paper by the petitioner in the writ petition, the sanctity of the sealed tender process is lost?

(ii) Whether in the facts and circumstances of the case, opposite party No.3-tender inviting authority is justified to reject the bid of the petitioner and cancel the tender for the work "construction of 33 seated Women's Hostel for Government Women's College at Puri for the year 2010-2011" and for re-tender of the said work ?

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

7. In the present writ petition, the decision making process of the tender inviting authority resulting in rejection of bid and cancellation of the tender for the work in question is under challenge. One of the grounds of attack of the petitioner is that the order of rejection of the bid and cancellation of the tender passed under Annexure-10 does not disclose any reason for taking such action. For better appreciation, it is felt necessary to quote the said order:

> "OFFICE OF THE SUPERINTENDING ENGINEER, CENTRAL CIRCLE (R & B) ORISSA, BHUBANESWAR
> NO.2772/11.08.2011
>
> Cancellation of Tender for the work : - Construction of 33 seated Women's Hostel for Government Women's College at Puri for the year 2010-11 invited vide Tender Call Notice No.9 Dt. 10.01.2011]
>
> After careful consideration, the undersigned i.e. the tender inviting authority do hereby reject the bids and cancel the tender for the work "Construction of 33 seated Women's Hostel for Government Women's

College at Puri for the year 2010-11" invited vide Tender Call Notice No.9 Dt.10.1.2011, under Clause No.32 of Detail Tender Call Notice.

Sd/-M. Samantaray
Superintending Engineer
Central Circle (R & B) Bhubaneswar"

8. Admittedly, the aforesaid order does not contain any reason for rejection of the bid and cancellation of the tender. Law is no more res integra that an authority must pass a reasoned order indicating the material on which its conclusions are based.

Every administrative decision must be hedged by reasons. (See *Life Insurance Corporation of India & Anr. Vs. Consumer Education and Research Centre & Ors [1995] 5 SCC 482).*

09. The apex Court in ***S.N.Mukherjee-v-Union of India, AIR 1990 SC 1984,*** held that the recording of reasons by an administrative authority serves a salutary purpose namely; it excludes chances of arbitrariness and ensures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. The need for recording of reasons is greater in a case where the order is passed at the original stage.

10. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same it becomes lifeless. [S*ee Raj Kishore Jha V. State of Bihar (2003) 11 SCC 519]*.

11. Even in respect of administrative orders Lord Denning, M.R. in ***Breen V. Amalgamated Engg. Union (1971) 1 All ER 1148***, observed: "The giving of reasons is one of the fundamentals of good administration."

12. In ***Alexander Machinery (Dudley) Ltd. V. Crabtree (1974) ICR 120 (NIRC)*** it was observed: "Failure to give reasons amounts to denial of justice".

13. In ***Vasant D. Bhavsar V. Bar Council of India (1999) 1 SCC 45***, the apex Court held that an authority must pass a speaking and reasoned order indicating the material on which its conclusions are based.

14. The apex Court in ***Union of India & Ors. v. E.G. Nambudiri, AIR 1991 SC 1216***, held that there is no dispute that there is no rule or administrative order for recording reasons in rejecting a representation. In

the absence of any statutory rule or statutory instructions requiring the competent authority to record reasons in rejecting a representation made by a Government servant against the adverse entries the competent authority is not under any obligation to record reasons. But the competent authority has no licence to act arbitrarily, he must act in a fair and just manner. He is required to consider the questions raised by the Government servant and examine the same in the light of the comments made by the officer awarding the adverse entries and the officer countersigning the same. If the representation is rejected after its consideration in a fair and just manner, the order of rejection would not be rendered illegal merely on the ground of absence of reasons. In the absence of any statutory or administrative provision requiring the competent authority to record reasons or to communicate reasons, no exception can be taken to the order rejecting representation merely on the ground of absence of reasons. No order of an administrative authority communicating its decision is rendered illegal on the ground of absence of reasons ex facie and it is not open to the court to interfere with such orders merely on the ground of absence of any reasons. However, it does not mean that the administrative authority is at liberty to pass orders without there being any reason for the same. In governmental functioning before any order is issued the matter is generally considered at various levels and the reasons and opinions are contained in the notes on the file. The reasons contained in the file enable the competent authority to formulate its opinion. If the order as communicated to the government servant rejecting the representation does not contain any reason, the order cannot be held to be bad in law. If such an order is challenged in a court of law it is always open to the competent authority to place the reasons before the court which may have led to the rejection of the representation. It is always open to an administrative authority to produce evidence aliunde before the court to justify its action.

15. In the counter affidavit it is stated that due to disclosure of the rate by the petitioner in W.P.(C) No.3230 of 2011, the sanctity of the sealed tender process is lost.

16. Undisputedly, pursuant to the Tender Call Notice No.9 dated 10.01.2011 both the petitioner and opposite party No.4 submitted their bids disclosing their rates in their sealed tender paper. Since, the petitioner's technical bid was rejected he approached this Court in W.P.(C) No.3230 of 2011 wherein he had disclosed the quoted rate at 1.5% less. Therefore, by the time when W.P.(C) No.3230 of 2011 was filed since the petitioner and opposite party No.4 both have already quoted their rates in their respective tenders, the disclosure of the rates by the petitioner in W.P.(C) No.3230 of 2011 by no stretch of imagination

amounts to loss of sanctity of the sealed tender process. The tender inviting authority ought to have proceeded with the rates quoted by the petitioner as well as opposite party No.4 in their respective sealed tenders. It was further categorically stated in the counter affidavit filed by opposite party Nos.1 to 3 in W.P.(C) No.12329 of 2011 that opposite party No.4 before opening of the price bids expressed the willingness to execute the work at 2.8 % less though he was not asked for any further negotiation for which the matter was referred to the office of the Advocate General, Orissa for legal advice and the learned Advocate General by letter dated 03.05.2011 advised them to finalize the tender ignoring the offer made by opposite party No.4. However pursuant to such advice, no final decision could be taken as the writ petition bearing W.P.(C) No.12329 of 2011 was pending before this Court. Taking into consideration the facts stated in the counter affidavit and submission made on behalf of the State, the writ petition was disposed of by order dated 19.07.2011 with a direction to complete the tender process within fifteen days from the date of the order. It is also difficult to accept the contention of learned Government Advocate that communication between opposite party-tender inviting authority and learned Advocate General is a privileged communication which cannot be taken into consideration for deciding the issue involved in the present case simply because the opposite parties have disclosed the communication between them and learned Advocate General in their counter affidavit. Therefore, that communication is no more protected under the privileged communication and section 29 of the Advocate's Act has no application to the fact situation of the present case.

17. While the matter stood thus, one of the glaring irregularities which is noticed is that basing on the affidavit of opposite party No.4 expressing his willingness to execute the work at 2.8% less, opposite party No.3-tender inviting authority has rejected the bid and cancelled the tender process in question. Undisputedly, such an affidavit was filed by opposite party No.4 without being asked by the tender deciding authority for negotiation. Once the parties participate in the tender call notice and disclose their rates in the sealed tender, no right accrues in favour of any of the participants to revise its rate. The tender should be decided on the basis of the rate quoted by the participants in bid document. There is a purpose for submitting the bid documents in sealed tender. The purpose is that a competitor should not know the amount quoted by another tenderer. After quoting the rate/amount in the bid document, if it is subsequently allowed to be revised by an affidavit, the very purpose of maintaining secrecy in submitting the bid documents in sealed cover is lost. Therefore, none of the participants has any right to change its bid subsequent to submission of the sealed tender after the last date of submission of the tender paper.

18. Admittedly on opening of the price bid, it was found that the rate quoted by the petitioner in the tender paper was much less than the rate quoted by opposite party No.4 in the tender paper. Therefore, there is no occasion for opposite parties to take into consideration the revised rate filed by way of an affidavit dated 24.02.2011 by opposite party No.4, otherwise no sanctity can be maintained in the tender process and any bidder may come at any time with a revised offer to create uncertainty, which would be against the concept of finality. Therefore, a particular date is fixed for receiving and also opening of the tender papers. Sanctity of tender is not tampered by disclosing the rate in the writ petition after the last date of submission of the tender.

19. It is certainly unfortunate that the tender inviting authority on the basis of the revised rate quoted by opposite party No.4 in the affidavit dated 24.02.2011 stating therein that he was willing to execute the work at 2.08% less rejected the bid and cancelled the tender of the work in question. This action of the said opposite party No.3 is not just and fair. There is no valid reason to take such action in the circumstances of the case.

20. Law is well settled that every action of the State and its instrumentality should be fair, legitimate and above board and without any affection or aversion. (See ***Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation,*** AIR 1988 SC 157; ***E.P. Royappa Vs. State of Tamil Nadu & Anr.,*** AIR 1974 SC 555 and ***State of Andhra Pradesh & Anr., -vs- Nalla Raja Reddy,*** AIR 1967 SC 1458).

21. Law is also well settled that in contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of

arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. (See ***Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries (1993) 1 SCC 71***).

22. In the result, the writ petition is allowed. Annexure-10 is hereby quashed and opposite parties are directed to proceed with the tender paper submitted by the petitioner, who is a successful bidder in the instant case.

Writ petition allowed.

2012 (I) ILR- CUT- 777

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

W.P.(C) NO. 148 OF 2003 (Dt.13.01.2012)

BANALATA DASH …….Petitioner.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART. 226

Custodial death – Duty of the jail authorities to ensure safety and security of the inmates of the jail – Authorities of the jail are responsible for the death of the UTP and they being employees of the State of Orissa, the State is vicariously liable to pay compensation to the petitioner – Held, keeping in view the age of the deceased, age of the petitioner and other attending circumstances the State is liable to pay Rs.3,00,000 towards compensation to the petitioner with interest @ 6% from the date of filing of the writ petition.

Case laws Referred to:-

1.(1993) 2 SCCs 746 : (Nilabati Behera(Smt.) @ Lalita Behera(Through the Supreme Court Legal Aid Committee) -V- State of Orissa)
2.AIR 1997 SC 1203 : (People's Union for Civil Liberties-V-Union of India & Anr.)
3.2009(I) OLR 526 : (Ahalya Pradhan-V- State of Orissa).

For Petitioner - M/s. A.K.Choudhury, K.K.Das, S.Dey & B.Dash.
For Opp.Parties - Government Advocate

S.K.MISHRA, J. The petitioner, mother of the deceased-Smruti Ranjan Das @ Papu, has filed this writ petition seeking directions from the Court to handover investigation of the custodial death of her son to CBI for independent and fair investigation and direct the State to give adequate compensation to her for the death of her son.

2. The petitioner's son, Smruti Ranjan Das, was arrested on 05.09.2001 in connection with G.R. Case No.1408 of 2000 and was forwarded to the Choudwar Circle Jail on 06.09.2001, vide Admission No.3455 of 2001. While the said Smruti Ranjan Das was in Choudwar Jail under the supervision and control of the Choudwar Jail authorities, he was

declared dead on 02.12.2001. On receiving the information, the petitioner and others went to Choudwar Jail and were informed that the dead body of the deceased has been sent for post-mortem examination to the S.C.B. Medical College and Hospital, Cuttack. In S.C.B. Medical College and Hospital, she requested the authorities to see the dead body but she was not allowed to see dead body before the post-mortem was conducted. After conducting post-mortem examination the authorities handed over the dead body of the deceased to the petitioner. The petitioner could notice that the deceased has sustained injuries on his body.

The petitioner further plead that this matter was reported in different newspaper leaving it to be cold blooded murder. The petitioner approached higher authorities for impartial investigation regarding the death of her son but she was informed that her son Smruti Ranjan Das had committed suicide. Therefore, she finding no other alternative filed this writ petition.

3. Notice has been issued to the opposite parties but no affidavit has been filed by the Secretary to Government, Home Department. The opposite party no.3, Superintendent of Choudwar Jail, has filed a counter affidavit. No post-mortem report has been attached to the same. The Superintendent admitted that the petitioner's son was admitted to Choudwar Jail in connection with the aforesaid G.R. Case. It is further pleaded that the deceased had committed suicide inside jail on 02.12.2001 and was not murdered. The Superintendent pleaded that if the any of the inmate desires to committee suicide. It is difficult to prevent him that too in course of mentally depressed as happened in the present case.

4. On such pleadings, in this case, two important questions arise for determination. First, whether the death of the deceased was custodial death and secondly, whether the State should be directed to pay compensation to the petitioner because of the death of the deceased.

5. As seen above, in the counter affidavit the opposite parties have not filed the post-mortem report. In course of hearing, the learned Government Advocate, however, produced a copy thereof, which shows that the doctor, who conducted post-mortem examination, have opined that it to be a case of suicidal hanging. It is further apparent from the post-mortem report that Dr. Sarabana Kumar Naik and Dr. Braja Kishore Dash have conducted the post-mortem examination. At the time of examination, they found the following external injuries.

(i) 3 cut wounds of the size 1.75 cm x 0.1 cm x epidermal death, 2 cm x 0.2 x skin deep situated more or loss parallel to each other and 3rd relatively deeper wound of size 3.25 cm x 0.5 centimeter x upto muscle depth found in the flexor aspect of mid part of right forearm in a transversely manner lying 9 cm, 10 cm and 12.5 cm proximal to the wrist. The wounds are found more deeper towards medial aspects.

(ii) 3 cut wounds of sizes 3 cm x 0.5 cm x upto muscle depth, 4 cm x 0.1 cm x epidermal depth, 2 cm x 0.1 cm x epidermal depth situated more or less parallel to each other toe transversely on the flexor-ulnar aspect of left forearm 15 cm, 15.5 cm and 17 cm. proximal to the left wrist respectively. The wounds are found more deeper towards medial aspects. The cut wounds mentioned above have not cut any larger superficial vein of forearms.

(iii) Ligature Mark: Ligature mark in the form of pressure abrasion of 4 cm broad situated around neck extending obliquely upwards from right to left side of neck on both fronts and back aspects of neck lying 5 cm below the right ear lobule in right lateral aspect of neck, passing above the level of laryngeal prominence in the front of neck to end as inverted "V" shaped impression below the left angle on mandible. The base of the ligature mark found parchmentised at places where as the margins are congested with upper margin showing postmortem lividity. No other external injuries were found.

At the time of post-mortem examination the doctors also noticed that the wrists of the deceased tied on the back side by means of thin cotton rope.

6. After post-mortem examination the doctors opined that the above mentioned injuries were ante-mortem in nature, fresh in duration out of which the cut wounds could have been caused by light sharp cutting weapon which are not fatal in ordinary course of nature, where as the ligature mark is consistent with hanging possibly using the alleged ligature material which is strong enough to bear the weight and jerk of the deceased. The doctors further opined that the cut wounds ligature mark of hanging and manner of tying of both wrists are suggestive of suicide. Thirdly, death was due to combined effects of asphyxia and venous congestion as a result of constructing force round the neck due to hanging. The time of post-mortem examination was found to be 18 to 24 hours after the death of the deceased.

On further query the doctors opined that the injuries found on the forearms of the deceased could be self-inflicted and could have been caused by razor blade, which are sent for examination. They further opined that an adult portion can tie both his hands on the back using slipping knot at one hand or both hands before committing hanging to prevent self rescue.

7. On the basis of such findings the U.D. Case was closed on the conclusion that the deceased committed suicide. The magisterial enquiry conducted by Bijaya Kumar Rath, OAS, Ex-Tahasildar-cum-Executive Magistrate, Tangi, Chaudwar, reveals that at the time of spot visit he along with senior Superintendent Medical Officer and other jail staff and found that the body of the deceased of UTP- Smruti Ranjan Das was hanging from the branch of a small mango tree by means of cotton towel (Gamucha) behind the jail school building in a bushy and isolated place in the jail premises. The body was identified by the Senior Superintendent, Assistant Jailor Sri Ashok Das and other jail staff. Both his hands were tied in a cotton leaving one gape between two hands and his hand was found tilted towards right side, open mouth, both the eyes were half open, both the legs were touching the ground.

8. Thus, from the factual findings the following fact emerges :-

1. the deceased was in the custody of the jail authorities when the occurrence of the incident took place.
2. The dead body of the deceased was hanging from small mango tree by means of cotton towel.
3. the hands of the deceased were tying at the wrist on the back of his body with a gap of one foot between two hands.
4. the legs of the deceased were touching the ground where the dead body was found to be hanging and
5. there were some cut wounds on both the forearms of the deceased.

9. Though the authorities has come to the conclusion that the injuries were self-inflicted and the deceased himself tied his hands on his back side and committed suicide by hanging himself. this Court is of the opinion that the investigation in this case do not reveal the correct picture and this is definitely a case of custodial death.

10. This Court in ***Sabitri Kanhar and others vs. State of Orissa***, W.P.(C) No.23407 of 2010, disposed of on 18.03.2011, has come to the conclusion that in an incident where two persons were killed by another inmates, the jail authorities are responsible for the same as there has been a negligence on the part of the jail authorities keeping prisoner in safe custody. Holding, thus, a Division Bench of this Court in the aforesaid case, awarded compensation to the legal heirs of the deceased.

11. It is duty of the jail authorities to ensure safety and security of the inmates of the jail. Only when they have been negligence on their part. such an incident could take place. Though the authorities have termed the incident as a suicide, foul play cannot be ruled out. Therefore, this Court comes to the conclusion that it is a case of custodial death and the authorities are responsible for the same. The authorities being the employees of the State of Orissa, the State is vicariously liable for the death of the aforesaid deceased-Smruti Ranjan Das,

12. In ***NILABATI BEHERA (SMT) @ LALITA BEHERA (THROUGH THE SUPREME COURT LEGAL AID COMMITTEE) VS. STATE OF ORISSA***, (1993) 2 SCCs 746, the Supreme Court examined a similar case and has come to the conclusion that enforcement of the constitutional right and the grant of redress embraces award of compensation as part of legal consequences of contravention. Award of compensation in a proceeding under Article 32 by the Supreme Court or by the High Court under Article 226 is remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available in a defence in private law in an action based on tort. A claim in public law for compensation for contravention of human rights and fundamental freedoms, the protection of which is guaranteed in the Constitution, is an acknowledged remedy for enforcement and protection of such rights and such a claim based on enforcement of a fundamental right is distinct from, and in addition to, the remedy in private law for damages for the tort resulting from contravention of the fundamental rights. Thus, holding the Supreme Court further clarified that such principle justified award of monetary compensation for contravention of fundamental rights guaranteed by the Constitution, when that is the only practicable mode of redress available for contravention made by the State or its servant in the purported exercise of their power, and enforcement of fundamental right is claimed by resort to the remedy in public law under the Constitution by recourse to Articles 32 and 226.

13. Similar view has been taken in ***People's Union for Civil Liberties, vs. Union of India and another***, AIR 1997 SC 1203, wherein the ratio decided in Nilabati Behera's case (supra) was relied upon and it was further stated that in assessment of the compensation, the emphasis has to be on the compensatory and not on punitive manner. The objective is to apply alm to the wounds and not to punish the transgressor or the offender, as awarding appropriate punishment for the offence, irrespective of compensation, must be left to the criminal court in which offender prosecuted , which the State, in law, is duty bound to do. A similar view has been taken by the Division Bench of this Court in ***Ahalya Pradhan vs. State of Orissa***, 2009 (I) OLR -526 wherein the custodial death was revealed as a suicide, which was negatived by fact finding commission, the Division Bench of this Court has come to the conclusion that the legal heirs of the deceased are entitled to receive compensation

14. Keeping in view the aforesaid proposition of law, this Court comes to the conclusion that on facts the death of the deceased-Smruti Ranjan Das is custodial death and the authorities are responsible for the same. As such the State is liable to pay compensation to the petitioner keeping in view the age of the deceased, age of the petitioner and other such attending circumstances This court comes to the conclusion that a compensation of Rs.3,00,000/- shall be sufficient to subserve the interest of justice.

15. Accordingly, it is directed that the opposite parties shall pay a sum of Rs.3,00,000/- (rupees three lakhs) to the petitioner along with interest @ 6% from the date of filing of the writ application. The amount of compensation along with interest shall be paid to the petitioner within four weeks from the date of judgment.

Writ petition allowed.

2012 (I) ILR- CUT- 783

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

W.P.(C) NO. 30948 OF 2011 (Dt.24.02.2012)

DR. DEBI PRASAD ACHARYA ……..Petitioner

.Vrs.

STATE OF ORISSA & ORS. … …Opp.Parties

Service law – Petitioner was appointed as Homoeopathic Medical Officer – His post was sanctioned and he was allowed to continue till December, 2004 and thereafter he was not allowed to work.

Sanction has been extended in respect of several other employees – Negligence on the part of the Cuttack Municipal Corporation – For larger public interest the post of Homoeopathic Medical Officer in which the petitioner was working be declared as a regular post and the State Government to take a decision for sanction of the post and the hospital be opened within one month.

(Para 6)

For Petitioner - M/s. B.R.Sarangi & S.N.Jena.
For O.Ps. 1 & 2 - Mr. J.P.Pattnaik,
Addl. Govt. Advocate.
For O.Ps. 3 to 7 - M/s. P.K.Mohanty, D.N.Mohapatra,
J.Mohanty, R.K.Nayak & S.N.Dash.

B.P.DAS, J. The petitioner, who is working as a Homoeopathic Medical Officer under the Cuttack Municipal Corporation (C.M.C.), has filed this writ petition on the allegation that the Corporation authorities are not allowing him to discharge his duty as a Medical Officer at Homoeopathic Dispensary, Deulasahi, Cuttack, though he has been appointed under the provisions of the Local Fund Service Rules, 1975 by the State Government and his service has been regularized with effect from 31.12.1994 and allowed to draw regular scale of pay with effect from 1.6.1998 in pursuance of the order dated 28.1.2004 passed by the Director, Municipal Administration-cum-Ex-Officio Additional Secretary to Government, Housing & Urban Development Department.

It is also averred that on account of larger public interest, it was resolved by the C.M.C. in its resolution dated 31.12.1994 to create a post of

Homoeopathy Medical Officer in the scale of pay of Rs.1640-3500/- by getting Government approval. In pursuance of such resolution, the C.M.C. allowed the petitioner to work as Homoeopathic Doctor on daily wage basis @ Rs.40/- per day for a period of 44 days and the petitioner accepted the same. Ultimately, a post was created by virtue of the resolution of the C.M.C. dated 17.4.1996 and vide office order dated 1.6.1998, the petitioner was appointed as Homoeopathic Medical Officer on ad hoc basis in the time scale of pay of Rs.1640-2900/- with usual D.A. and other allowance and posted as such at Deula Sahi, Cuttack in a rented house. Ultimately, by order dated 28.1.2004, sanction was accorded by the Government under Section 73(1) of the Orissa Municipal Corporation Act to the creation/function of the temporary posts included in the Local Fund Service Cadre wherein the petitioner's service has been regularized from 1.6.1998 to 31.5.2004. Accordingly, order of regularisation was passed on 27.5.2004.

It is pertinent to mention here that sanction was for the period from 1.6.1998 to 31.5.2004. Thereafter, on 12.7.2004 (Annexure-11), the Additional Executive Officer, C.M.C., wrote a letter for extension of sanction order because creation of post made on 28.1.2004 from 1.6.1998 to 31.5.2004 has already been over. But according to Mr.Mohanty for the C.M.C., the petitioner was allowed to continue in the post till December, 2004 but thereafter, he was not allowed to work due to want of sanction order from the Government beyond 31.5.2004 and for closure of Deula Sahi Homoeopathy Dispensary. The petitioner has filed several representations but the same were of no use, for which the petitioner filed the present writ petition.

2. Counter affidavit has been filed on behalf of the C.M.C. in W.P.(C) No.12109/2006, which has been filed by the present petitioner for separate cause of action, and the same be adopted in the present proceeding, as stated by the learned counsel for the C.M.C. In the counter affidavit, the C.M.C. has taken a stand that since there is no order of sanction beyond 31.5.2004 even though several correspondences were made with the State Government, more specifically Annexure-16, i.e., communication dated 4.2.2006, there is no justification for the petitioner to continue. That apart, they have closed the Homoeopathy Dispensary.

3. In course of hearing, Mr.Sarangi, learned counsel for the petitioner, draws our attention to Annexures-21 & 22. Annexure-21 is the communication dated 9.1.2009 from the Deputy Secretary to Government, Housing & Urban Development Department to the Municipal Commissioner, C.M.C., in which the State Government has blamed the C.M.C. that there

was gross negligence on their part in handling the matter, for which the petitioner could not be continued in the post of Homoeopathic Medical Officer. Annexure-22 is another communication dated 17.6.2009 from the State Government to the Municipal Commissioner, C.M.C., relevant portion of which reads as follows :-

> "As it is revealed from the official records, continuance of temporary posts under L.P.S. Cadre of C.M.C. has not been sanctioned by Govt. since long, but in no occasion discontinuance of service of any employee of that cadre for the said reason has been reported to this Department. This shows discrepancy on the part of C.M.C. to Dr.Debi Prasad Acharya, HMO, who has been debarred from Municipal Service since 2005. This position has dragged Govt. into unnecessary legal complications.
>
> You are, therefore, requested to kindly look into this matter personally and send a line of reply to this Deptt. explaining the actual position."

Basing upon the communication in Annexure-22, Mr. Sarangi, learned counsel for the petitioner, advances an argument that the Government is right in saying that there were several other employees, in whose cases, sanction has been extended but for the reasons best known to the authorities, the case of the petitioner was not considered.

4. During course of hearing, we directed the Secretary, Housing and Urban Development Department, to file counter affidavit. The Secretary filed his counter affidavit on 23rd February, 2012, relevant paragraphs-3, 10 & 12 of which are quoted herein below :-

> "3.That with regard to the averments made in Para-1 of the writ application, it is humbly submitted that Govt. in H & U.D.Deppartment Order No.2056/HUD, dt.28.1.2004 had accorded sanction to the creation of the post of HMO in CMC for the period from 1.6.1998 to 31.5.2004 and in Sl.No.5 of the said order under Annexure-8 to the writ petition, it is clearly mentioned that on the recommendation of council resolution No.1, dtd.17.4.1996 of Cuttack Municipal Corporation, the petitioner Sri Debi Prasad Acharya is appointed as HMO in CMC on regular basis as per the following terms & conditions :

a) Dr.Acharya may be appointed in the post on regular basis & his services may be counted from the date he has joined as DLR for pensionary benefit only.

b) The period of absence from duties by Dr.Acharya from the post due to the legal order of Executive Officer, CMC may be condoned.

c) The pay etc. of Dr.Acharya will be paid as HMO from the date he actually joins on regular basis without any restrospective/notional financial benefit.

d) The pay, etc. of this post of Homoeopathic Doctor will be borne by the CMC without any burden to Govt.

After issue of G.O.No.2056/HUD, dt.28.1.2004, the CMC had issued the appointment letter in their order No.4599, dt.27.5.2004 to Dr. Acharya to join as HMO. As per CMC order dtd.27.5.2004, Dr.Acharya has submitted his joining report on 29.5.2004 F.N. Hence Dr.Acharya is eligible to get his regular scale of pay from the date he actually joined in CMC i.e. 29.5.2004.

10. That with regard to the averments made in paragraphs 19 to 21 of writ application, it is humbly submitted that the proposal of continuance of the post of HMO submitted by CMC is under active consideration and the same is under process.

12. That with regard to the averments made in paragraph-34 of writ application, it is humbly submitted that after receipt of letter dtd.30.12.2010 under Annexure-26 of writ application, the Municipal Commissioner CMC vide H & U.D.Deptt., letter dt.2.12.2011 was requested to furnish clarification which has been received on 21.2.2012 from Cuttack Municipal Corporation. It is worthwhile to reiterate that decision on the proposal submitted by CMC is under process."

5. Today Mr.PK.Mohanty, learned counsel for the C.M.C., filed a memo enclosing a copy of letter dated 2.2.2012 issued to the Deputy Secretary to Govt., Housing & Urban Development Department, by the Municipal Commissioner, C.M.C., paragraph-2 of which is quoted herein below :-

"2. As regards sanction of post of the Homoeopathy Medical Officer (HMO), it may be mentioned here that Government have already given approval for this post for the period up to 31.5.2004

> and since thereafter was no approval thereafter, the Homoeopathy Medical Officer posted there was not engaged. Hence, no continuance proposal as well as proposal for a formal approval could be given for the operation of the hospital. Now keeping in view the proposal for operating the hospital with immediate effect as mentioned above, the post of Homoeopathy Medical Officer also may be sanctioned which was created earlier as a matter of continuance so that Sri Debi Prasad Acharya who was engaged as the Homoeopathy Medical Officer earlier would be re-engaged early and the hospital would be made functional."

6. In view of the affidavit of the Secretary, Housing & Urban Development Department, and the letter dated 2.2.2012 issued to the Government by the C.M.C. and the proposal submitted in Annexure-16, vide letter dated 4.2.2006, it is clear that the petitioner was appointed as Homoeopathy Medical Officer on regular basis on certain terms and conditions and continuance of the said post, as submitted by the C.M.C., is under active consideration and under process. So the intention of the Government is crystal clear that the post of Homoeopathy Medical Officer shall continue and from the letter dated 2.2.2012, which is filed by the C.M.C. today in Court, it is also clear that the C.M.C. is desirous of running the Homoeopathic Dispensary at Deula Sahi, Cuttack and this Court is of the view that the larger public interest would be served best if Homoeopathic medical facilities, which had been extended in the year 1994, are not be closed. Keeping in view the rapid growth of population in Cuttack City, more medical dispensaries and hospitals are necessary in order to cater to the needs of the people, who depend upon Homoeopathic medicine. When there is need for opening more number of Homoeopathic dispensaries, it will not be wise to close one, which has been opened. The view of the Government is also to run the dispensary.

7. In such view of the matter, we dispose of this writ petition with the following declarations and directions :-

I) The post of Homoeopathic Medical Officer, in which the petitioner was working, is a regular post.

II) There would not be any permission to discontinue the same on the plea that it lacks Government sanction.

III) As the proposal for sanction is under active consideration of the State Government, the State Government shall take a decision on the same within a period of one month from today.

IV) Let the hospital be opened within one month from today.

V) Let the salary of the petitioner for the period, for which he has not worked, be computed and looking at the budgetary provision and financial condition of the C.M.C., 50% of the same be paid to the petitioner, which shall be borne by C.M.C., within two months from today.

VI) Adequate medicines shall be supplied to the Homoeopathic Dispensary at Deula Sahi, Cuttack. If there is any constraint in getting private accommodation for opening of the dispensary, it will be open to the C.M.C. to find out an undisputed shop room under the jurisdiction of C.D.A. in the vicinity of Deula Sahi.

Writ petition disposed of.

2012 (I) ILR- CUT- 789

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

MATA NOS. 51 & 52 OF 2009 (Dt. 21.03.2012)

KIRAN KUMAR PARIDA …….Appellant.

.Vrs.

PRAVEENA SAMAL ……..Respondent.

HINDU MARRIAGE ACT, 1955 (ACT NO.25 OF 1955) – S.13 (ia).

Divorce – Husband filed petition on the ground of cruelty by wife – To constitute cruelty the conduct complained should be grave and weighty – Husband to prove that a particular part of conduct or behavior of the wife resulted in cruelty to him – From the facts and evidence on record this Court finds no such conduct of the wife which may amount to cruelty rather the husband has withdrawn from the society of the wife without any reasonable cause – Held, orders passed by the learned Judge, Family Court are confirmed by this Court.

(Para 12)

Case law Relied on:-

2010(II) CLR (SC) 1093 : (Gurbus Singh-V-Harminder Kaur)

Case laws Referred to:-

1.2005(I)OLR (SC)457 : (A. Jayachandra -V- Aneel Kaur)
2.AIR 2002 RAJASTHAN 138 : (Rakesh Sharma -V- Surbhi Sharma)

For Appellant - M/s. B.H.Mohanty, D.P.Mohanty, J.K.Mohanty, J.K.Bastia, M.Pal & P.K.Swain.
For Respondent- M/s. S.P.Mishra, R.K.Prusty, B.C.Majhi, D.Das, S.R.Chhatoi, M.K.Swain, M.L.Jena & S.K.Dash.

B.P. DAS, J. Both the appeals have been filed by the appellant-Kiran Kumar Parida under Section 19 of the Family Court's Act.

2. Both these two appeals are heard analogously and disposed of by this common judgment.

3. Two applications were filed before the Judge, Family Court, Cuttack, one is under Section 13 of the Hindu Marriage Act bearing Civil Proceeding No.478 of 2004 filed by the husband-appellant for dissolution of marriage by

decree of divorce on the ground of cruelty and desertion and the other is Civil Proceeding No.482 of 2008 under Section 9 of the Hindu Marriage Act,1955 filed by the respondent-wife for restitution of conjugal rights.

4. Briefly stating, both the parties, i.e., husband and wife are working in Government Organisation. The parties were married to each other on 14.07.1991 and after their marriage they resided in the house of husband at Village-Raghunathpur. Since both the parties are Government servants and the appellant-husband was prosecuting his study in Orissa University of Agriculture and Technology, Bhubaneswar and respondent-wife was serving as Ophthalmic Assistant at Bangirposhi Community Health Centre they went to their respective service places and stayed there.

5. It is alleged in the application under Section 13 of the Hindu Marriage Act that after some days of marriage it was detected that the respondent-wife was physically handicapped having been affected by Polio disease and she was suffering from genetical and gynecological problems along with Lucodoma (white patches). It is further alleged that the wife being a working lady she is very adamant and never cares and gives respect to the husband-appellant and never treated the husband-appellant in usual manner and she also did not behave properly. Husband-appellant's efforts to maintain peace and harmony in the family went in vain due to attitude of the wife-respondent. The wife-respondent conceived in the year 1992 and a male child was born on 15.07.1993, who was found mentally retarded and physically handicapped and died in the year 2002. The second child was born to them on 26.09.2004 and the child was physically and mentally retarded and also died. After a medical check-up it is found that the children born to the parties suffered from "MUCO-POLY-SACHHARIDE" which is a genetic disease and caused due to genetical problem suffered by the respondent-wife. The wife was also treated at AIIMS where it was advised that the disease is not curable and the wife should take rest during the first three months of pregnancy. Thereafter the fourth child was conceived, but according to the appellant-husband as the wife did not adhere to the advice of the doctor and moved from Cuttack to Dhenkanal as well as to her village by bus for which there was miscarriage of pregnancy for three times, i.e., from 2003 to 2004. It is also alleged that, from 1995 to 1998 the wife-respondent cut off all relationships with the appellant-husband and did not come to the husband-appellant nor allowed him to come to her and their conjugal life was totally disrupted. The case of appellant-husband before the Judge, Family Court was that due to non-cooperation of respondent-wife, the family life of the appellant-husband was seriously affected and the appellant suffered from serious mental agony and torture. It is further alleged that on

07.02.2004 the respondent-wife with some of her men attacked the husband-appellant with deadly weapons for which it is not possible for him to stay with his wife-respondent as he apprehends danger to his life.

6. Another application under Section 9 of the Hindu Marriage Act was filed by the wife-respondent for restitution of conjugal rights.

In her petition and also in the written statement in the divorce proceeding the wife –respondent averred that she tried her best to keep good relation with the husband-appellant and she also did not hesitate to keep his nephew and niece, i.e., the son and daughter of elder brother of her husband and to educate them. She was bearing all expenses towards their boarding, dress and education. According to her, she always received the husband cordially and due to the death of four children on account of ailments, husband-appellant in one plea or other wants to get rid of her by getting an order of divorce and go for a second marriage. According to her, the mentally retarded child was born in 1993 and could survive till 2005, which was only due to the care and nursing given by her. The allegation of husband that there is no co-operation on the part of the wife is totally false and that they have got cordial relationship and their marital life was also consummated for which she bore four children and she is interested to stay with the appellant-husband and according to her, the appellant-husband is not accepting her as his wife as he wants to go for a second marriage after divorce.

7. In order to substantiate his claim in his application under Section 13 of the Hindu Marriage Act the husband-appellant examined as many as four witnesses and marked three documents as exhibits. Wife-respondent also examined four witnesses and marked seven documents as exhibits in C.P.No.478 of 2004. In C.P.No.482 of 2008 the wife was examined as P.W.1 and the husband was examined as OPW.1, but no document was exhibited from either side.

8. After evaluating the evidence on record the Judge, Family Court, Cuttack came to a conclusion that the husband-appellant has not discharged the burden of proof cast upon him to prove that the husband-appellant has been subjected to mental and physical cruelty and desertion due to conduct of the respondent-wife and held that the husband-appellant is not entitled to get the decree of divorce and also allowed the application under Section 9 of the Hindu Marriage Act against the husband-appellant.

9. We have gone through the evidence on record.

10. Learned counsel for the appellant-husband, Mr. B.H. Mohanty files a written note of argument. Save and except revealing that the children born by the wife could not survive and that there was some quarrel between the parties which usually occurs in one's family there is nothing on record to show that the wife was giving mental or physical torture and deserted the husband. The fact that four children were born out of their wedlock is ample proof of their good relationship. Learned counsel for the appellant relies upon the judgment of the apex Court in the case of ***A. Jayachandra v. Aneel Kaur;*** 2005 (I) OLR (SC) 457 and submits that in order to do complete justice and shorten the agony of the parties engaged in long drawn legal battle the Court should give direction for dissolution of marriage. In the said judgment also in paragraph-12, the apex Court held as follows :

> "**12.** To constitute cruelty, the conduct complained of should be 'grave and weighty' so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than 'ordinary wear and tear of married life' "

We do not find anything on record to consider that the conduct of the wife complained of is grave and weighty. So also the judgment in the case of ***Rakesh Sharma v. Surbhi Sharma;*** AIR 2002 RAJASTHAN 138 is not applicable as the facts and circumstances of that case are different from that of the present one.

11. Mr. Mohanty, learned counsel for the appellant also relies upon a decision of this Court in the case of ***Satya Sundar Tripathi v. Mamata Tripathi;*** 2008 (Supp.-II) OLR-926 which is also factually totally different. That was a case where the husband totally deserted the wife and neglected the wife.

12. Mr.S.P.Mishra, learned counsel for the wife-respondent draws our attention to the decision of the apex Court in the case of ***Gurbux Singh v. Harminder Kaur*** **:** 2010(II) CLR (SC) 1093. In paragraph-11 of which it is held as follows:

> "11. A Hindu marriage solemnized under the Act can only be dissolved on any of the grounds specified therein. We have already pointed out that in the petition for dissolution of marriage, the appellant has merely mentioned Section 13 of the Act and in the body of the petition he highlighted certain instances amounting to cruelty by the respondent-wife. Cruelty has not been defined under

> the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors, in different set of circumstances. Therefore, it is essential for the appellant, who claims relief, to prove that a particular/part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will, under all circumstances, amount to cruelty, vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty."

In view of such, after examining the facts and circumstances and getting into the evidence on record we find no such conduct of the wife which may amount to cruelty. Rather it is a case where the husband has withdrawn from the society of the wife without reasonable cause. We have therefore no hesitation to dismiss the appeals and confirm the orders of the Judge, Family Court, Cuttack.

13. Both the appeals are accordingly dismissed and orders of the Judge, Family Court are confirmed.

Appeals dismissed.

2012 (I) ILR- CUT- 794

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

W.P.(C) NO. 1002 OF 2009 (Dt. 25.01.2012)

DAMODAR MOHAPATRA ……..Petitioner.

.Vrs.

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

Service Law – Disciplinary Proceeding – Allegation is that petitioner produced false Caste Certificate during appointment – Inquiry Officer exonerated him from the charge – Disciplinary Authority found him guilty – No opportunity of hearing to the petitioner – Notice issued to show cause on the proposed punishment – Appeal filed before the appellate authority – Due to delay in disposal of the appeal writ petition filed – A Division Bench of this Court disposed of the writ petition with a finding that there was no acceptable evidence before the disciplinary authority that the petitioner belongs to either "MALLA" or "MALHA" Caste – Appellate Authority confirmed the order passed by the disciplinary authority without taking note of the finding of the Division Bench – Held, both the original and appellate orders are quashed – Petitioner is deemed to be continuing in service from the date of his termination till he reached the date of superannuation and shall be entitled to all financial benefits. (Para 9,10,12)

Case law Referred to:-

AIR 1995 SC 94 : (Kumari Madhuri Patil & Anr.-V- Addl.Commissioner, Tribal Development & Ors.)

For Petitioner - M/s. S.P.Mishra (Sr.Advocate) S.Nanda, S.Mishra, S.K.Mohanty, S.S.Kasuyap & S.K.Sahoo.
For Opp.Party 1 - Mrs. Bharati Dash
For Opp.Party - nos.3 to 6 Mr. C.A.Rao, M.K.Mohanty & Mr. B.C. Panda.

B.K.NAYAK, J. The petitioner in this writ application prays for quashing the order of termination from service vide Annexures-14 & 17 and the confirming appellate order vide Annexure-21.

2. The facts leading to filing of the writ application are that the petitioner pursuant to a campus selection made by opposite party no.3 was selected

for appointment as Mechanic-B under opposite party nos.3 to 7. In the application and attestation form for such appointment he had declared his caste as scheduled caste, (MALA caste) and accordingly produced the caste certificate (Annexure-4) granted by the Additional District Magistrate, Cuttack dated 12.03.1973. Annexure-1 is also another caste certificate issued by the Additional District Magistrate in favour of the petitioner on 18.05.1972. The caste 'MALA' has been included as a scheduled caste in the Constitution (Scheduled Caste) Order, 1950 in so far as it relates to the State of Orissa vide Annexure-2. While the petitioner was continuing in service, the Senior Manager, Security and Vigilance, H.A.L. vide his letter dated 18.08.1995 (Annexure-11) requested the Collector, Cuttack to verify the genuineness of caste certificates of some employees including the petitioner as the H.A.L. authorities have received letters from S.P., C.B.I., Bhubaneswar that some employees of H.A.L. had allegedly submitted false caste certificates at the time of employment. On receipt of such letter in the office of the Collector, Cuttack, the Additional District Magistrate, Cuttack vide his letter dated 04.09.1995 under Annexure-7 requested the Tahasildar, Cuttack to enquire and report regarding the caste, sub-caste and religion of the petitioner opining that the caste certificate produced by the petitioner (Annexure-4) appears not to have been issued from the office of the Additional District Magistrate, Cuttack, as it does not bear the Misc. Case No./Year or issue number & date. In turn, vide letter no.5336 dated 14.09.1995 under Annexure-8 the Additional Tahasildar, Cuttack intimated the Senior Manager (S & V), H.A.L. that on verification it was found that the caste of the petitioner is 'MALLA' which does not come under S.T. or S.C. community. Thereafter, vide letter dated 19.10.1995 under Annexure-9, the H.A.L. Authorities called upon the petitioner to show cause as to why disciplinary action shall not be taken against him on the charge that the petitioner at the time of his initial appointment and also subsequently during promotion declared that he belonged to scheduled caste and also produced the caste certificate at the time of initial appointment, but on verification it was found that he does not belong to 'MALA' community, as claimed by him, but actually he belongs to 'MALHA' community which is not a scheduled caste and as such he has made false declaration of his caste and fraudulently secured appointment in violation of Clause Nos.25(b) (ii), 25(b) (vi) and 25(b) (xxii) of the Company's Standing Orders and as such committed breach of such rules and misdemeanour. The petitioner submitted his show cause (Annexure-10) denying the charges and further contended that he is a member of 'MALA' community, which is a Scheduled Caste and accordingly caste certificate was issued in his favour and that he does not belong to 'MALHA' community. It is further stated by him that for generations his family members are being treated as scheduled caste. Dissatisfied with

the explanation of the petitioner, the authorities initiated the disciplinary proceeding against the petitioner and the Senior Manager, Training was appointed as Inquiry Officer. On completion of the enquiry, the Inquiry Officer submitted his enquiry report vide Annexure-12 wherein he held that the letter of the Additional Tahasildar bearing No.5336 dated 14.09.1995 no where mentioned that the original caste certificate issued in favour of the petitioner was false or it was cancelled. It was further held that in the said letter though the Additional Tahasildar has stated that the petitioner is 'MALLA' by caste, in the charge-sheet it is mentioned that the petitioner is 'MALHA' by caste. The Inquiry Officer, therefore, concluded that if the statement of the Additional Tahasildar in his letter is to be taken as correct then the charge-sheet against the petitioner should be withdrawn. It was ultimately found by the Inquiry Officer from other documents produced in course of the proceeding that the petitioner belongs to scheduled caste, i.e., 'MALA' and relations of the petitioner were issued scheduled caste certificate as 'MALA'. The State Government was issuing scheduled caste certificate to 'MALLA' and 'MALHA' community people as 'MALA' and, therefore, the petitioner did not submit false caste certificate at the time of his appointment. The Inquiry Officer ultimately suggested for a fresh verification from the Government authority as to whether the caste certificate issued to the petitioner as 'MALA' which was a synonym of 'MALLA' or not and whether the authorities were issuing Scheduled Caste certificates to 'MALHA' and 'MALLA' community people as 'MALA' or not before taking any further action. The petitioner was, therefore, found not guilty by the Inquiry Officer.

3. On receipt of the enquiry report, the General Manager, H.A.L.-opposite party no.4, who is the disciplinary authority, issued notice dated 08.02.1997 (Annexure-13) to the petitioner asking him to show cause as to why he shall not be visited with the proposed punishment of termination from service. The notice reveals that the disciplinary authority differing from the findings of the Inquiry Officer had already taken a decision that the petitioner was guilty of the charge on the ground that the Additional Tahasildar, Cuttack in his letter no. 5356 dated 14.09.1995 had indicated that the petitioner belongs to 'MALLA' community which is not a scheduled caste and that as per the suggestion of the Inquiry Officer on further re-verification it was established that 'MALLA' community to which the petitioner belongs is not a local variant of 'MALA' community. It was further indicated by the disciplinary authority that the caste certificate issued to the petitioner by the Government authorities in the name of 'MALA' is based on false declaration given by him and the said certificate is defective. The petitioner submitted his

explanation dated 13.03.1997. The disciplinary authority passed order dated 21.04.1997 as per Annexure-14 terminating the service of the petitioner. Challenging the show cause notice under Annexure-13, the petitioner had field OJC No.2912 of 1997 and in Misc. Case No.2315 of 1997 arising there from this Court by order dated 04.03.1997 had directed that though the disciplinary proceeding may continue, no coercive action would be taken against the petitioner. The proceeding having come to an end on passing of the order of punishment under Annexure-14, the aforesaid writ application was withdrawn as infructuous giving the petitioner liberty to move appropriate forum challenging the final order of punishment. On the disposal of the writ application letter dated 23.02.2000 was issued by the authorities under Annexure-17 whereby the order of punishment of termination from service was given effect to. Thereafter, the petitioner preferred an appeal before the Managing Director, H.A.L. in the form of a representation under Annexure-19 to reconsider his case with the further clarification of the Tahasildar, Cuttack vide Annexure-18 which was to the effect that till 01.10.1993 'MALA' community included 'MALHA' and 'MALHAR' and that on enquiry it was revealed that the petitioner had been issued with scheduled caste certificate vide Memo No.1412 dated 19.05.1972 (Annexure-1). It is the further case of the petitioner that since the appellate authority did not take steps to dispose of his appeal, the petitioner approached this Court by filing W.P.(C) No.5190 of 2000. After hearing the learned counsel for both parties this Court vide order dated 22.09.2008 (Annexure-20) directed the appellate authority to hear and dispose of the representation/appeal filed by the petitioner before the Managing Director within a period of six weeks from the date of receipt of records from the Managing Director. Before passing such direction, this Court clearly held that the petitioner does not belong to 'MALLA' or 'MALHA' caste and to that effect there was no evidence available before opposite party nos. 3 to 6. Such finding of the court is apparent from the following observation :

> "On due consideration of the aforesaid contention, we are prima facie satisfied that the petitioner does not belong to 'MALLA' OR 'MALHA' caste and at least to that effect there was no evidence available before opposite party nos. 3 to 6, when they took a decision to issue the second show cause notice to terminate him. Be that as it may, when the matter is pending in shape of appeal, it is for the appellate authority to consider the same in accordance with law. As stated by learned counsel for opposite party nos. 3 to 6, if the Managing Director is not the appellate authority and some body else is the appellate authority, then it would be for the Managing Director to transfer the said appeal pending in shape of representation for

due consideration by the appellate authority. When, we intend to pass such an order, it will not be appropriate at this stage to quash Annexures-14, 15 and 17 and that is to be considered and appropriate order is to be passed by the appellate authority."

4. After disposal of the writ application, the appeal of the petitioner was transferred to the Executive Director, H.A.L., Koraput Division, Koraput (opposite party no.7) and the said appellate authority by his order dated 20.10.2008 under Annexure-21 confirmed the order of punishment of termination of service of the petitioner holding that on verification of caste certificate with the concerned district authorities, it was ascertained that the petitioner belonged to 'MALLA' community , which was not a Scheduled Caste and therefore, it was proved in the enquiry proceeding that the petitioner does not belong to 'MALA' caste, which is a Scheduled Caste.

5. In assailing the impugned order of punishment passed by the disciplinary authority and the confirming order of the appellate authority, it is contended by the learned counsel for the petitioner that the Inquiry Officer exonerated the petitioner from the charge, but the disciplinary authority without affording any opportunity of hearing to the petitioner pre-judged the matter and found the petitioner guilty of the charge and thereafter issued the notice to the petitioner to show cause on the proposed punishment, which was in clear violation of principle of natural justice and as such illegal. Therefore, the final order of punishment passed under Annexure-14 by the disciplinary authority and the subsequent order giving effect to the same vide Annexure-17 are bad in law. It is further submitted that there was no acceptable evidence to the effect that the petitioner does not belong to 'MALA' caste or that he belongs to 'MALLA' caste and, therefore, the finding of the disciplinary authority cannot be sustained. It is his further submission that this Court in W.P.(C) No.5190 of 2000 has clearly given a finding that the petitioner does not belong to 'MALLA' or 'MALHA' caste and to that effect there was no evidence available before the opposite parties when they took decision to issue the second show cause notice to terminate him and that the said finding has become final inasmuch as the order of this court was not challenged by the opposite parties, but the appellate authority-opposite party no.7 mechanically passed the appellate order confirming the order of punishment of the petitioner ignoring the finding of this Court and, therefore, the appellate order is illegal and unjust, which is liable to be quashed.

6. Opposite party no.3 to 6 have filed a counter affidavit contending inter alia that in view of the observation of the Additional District Magistrate in his letter under Annexure-7 that the caste certificate of the petitioner was

not issued from his office as because it does not bear Misc. Case No./Year or issue number & date, the caste certificate must be held to be a false one and not genuine and therefore, the petitioner cannot be said to be a member of 'MALA' caste, which is a scheduled caste and that the authorities having been satisfied in that respect the petitioner was rightly visited with the punishment. It is further stated that the disciplinary authority was not inclined to accept the findings recorded by the Inquiry Officer and after going through materials on record and taking into consideration the submission made by the petitioner came to hold that the caste certificate produced by the petitioner was false and he belonged to caste 'MALLA' , which was not a scheduled caste, and that the petitioner failed to establish that he was a member of the caste, 'MALA' and accordingly passed the order of punishment and there was no violation of principle of natural justice. It is stated further that the appellate authority applied his mind to all relevant facts and circumstances of the case including the judgment of this Court rendered in W.P.(C) No.5190 of 2000 and, therefore, his order does not suffer from infirmity.

Opposite party no.1-the Union of India has filed a counter affidavit through the Asst. Director, Government of India, Ministry of Social Justice & Empowerment disputing the facts stated in the writ petition but further stated that no relief has been sought against it by the petitioner.

7. It is quite apparent from the report of the Inquiry Officer (Annexure-12) that after taking into consideration all materials placed before him, the Inquiry Officer gave his finding that the original caste certificate of the petitioner bears Government Seal and was signed by Additional District Magistrate and District Welfare Officer, Cuttack, which is the correct procedure for issuing a Scheduled Caste certificate and the said certificate was not a false certificate, nor it was cancelled and, therefore, he exonerated the petitioner of the charge. The Inquiry Officer also took into account the defect in the charge to the effect that though the basis of initiation of the proceeding against the petitioner was letter No.5356 dated 14.09.1995 (Annexure-8) in which Additional Tahasildar, Cuttack indicated that the petitioner belongs to 'MALLA' caste which was not a Scheduled caste, in the charge-sheet the petitioner was intimated that he belongs to 'MALHA' caste. However, having come to the conclusion that the communities 'MALLA' and 'MALHA' were local variations of the caste, 'MALA' and accordingly the competent authorities were issuing caste certificates in favour of all such communities as 'MALA' caste which is admittedly a scheduled caste, he suggested for a further verification and accordingly exonerated the petitioner on benefit of doubt. The disciplinary authority, on the other hand, differed

from the finding of the Inquiry Officer but has apparently accepted the suggestion of the Inquiry Officer and carried out a further verification of the social status of the petitioner unilaterally, as revealed from paragraph-2 of the second show cause notice under Annexure-13, and came to the conclusion that the petitioner belongs to caste 'MALLA' which is not a local variant of 'MALA' community. The manner in which the disciplinary authority conducted further verification is not clear from Annexure-14. Whatever verification was made by him is behind the back of the petitioner, for which he did not get any opportunity to contest the same. This amounts to clear violation of the principle of natural justice with regard to the conduct of the proceeding. It further appears that the disciplinary authority has fully relied upon the letter of the Addl. Tahasildar, Cuttack bearing No.5356 dated 14.09.1995 (Annexure-8), which had been rejected by the Inquiry Officer giving cogent reasons for the same. The second show cause notice and the order of the disciplinary authority, however, mentioned no reason as to why the said letter of the Additional Tahasildar should be accepted. Apparently that letter was collected and utilised from the side of the department. Therefore, the dissenting finding of the disciplinary authority cannot be legally sustained.

8. We also find a material discrepancy in the charge as well as in the punishment order passed by the disciplinary authority and that to a great extent the finding of the disciplinary authority is not in consonance with the charge levelled against the petitioner. The charge was framed alleging that the petitioner did not belong to 'MALA' community but he belongs to 'MALHA' community. However, the charge was framed on the basis of letter of the Addl. Tahasildar under Annexure-8 in which it was stated that the petitioner belongs to 'MALLA' community. Undisputedly, 'MALLA' and 'MALHA' are two distinct communities and neither of them is synonymous with the other. The finding of the disciplinary authority, however, is primarily based on the letter of the Additional Tahasildar that the petitioner belongs to 'MALLA' caste which was not the charge against him. In such view of the matter, the petitioner could not have been held guilty by the disciplinary authority.

9. It is very significant to note that in W.P.(C) No.5190 of 2000 filed by the petitioner against the opposite parties a Division Bench of this Court while disposing of the writ application by order dated 22.09.2008 gave a clear finding that the petitioner does not belong to 'MALLA' or 'MALHA' caste and to that effect there was no evidence available before opposite party nos. 3 to 6 when they decided to issue second show cause notice to

terminate him. This finding of the court has reached finality and, therefore, a different finding by the appellate authority was wholly uncalled for. Theappellate order under Annexure-21 reveals that the appellate authority has not taken into consideration, the aforesaid finding of this Court. This Court having already come to the conclusion that there was no acceptable evidence before the disciplinary authority to come to the conclusion that the petitioner belongs to either 'MALLA' or 'MALHA' community, it was not open to the appellate authority to accept the very same material and to agree with the finding of the disciplinary authority. With the finding of this Court, the appellate authority should have set aside the order of punishment of the petitioner. But he has failed to do so. His order is wholly contrary to the finding of this Court in the earlier writ application and therefore it cannot be sustained.

10. For the aforesaid reasons, we are unable to sustain the original and appellate orders of punishment of termination of service of the petitioner.

11. During the course of hearing the learned counsel for opposite party nos. 3 to 7 submitted that now that a Scrutiny Committee has been formed by the State Government in terms of the direction given by the apex Court in the case of ***Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development and others;*** AIR 1995 SC 94, the enquiry with regard to the caste status of the petitioner may be referred to the said Scrutiny Committee. Being satisfied that the original caste certificate of the petitioner which he produced before the opposite parties at the time of his appointment was not false and that admittedly in the meantime the petitioner having crossed the age of superannuation since years, we are unable to accept the suggestion made by the learned counsel for the opposite parties.

12. In the result, we allow the writ application and quash Annexures-14, 17 and 21 and further declare that the petitioner be deemed to be continuing in service from the date of his termination till he reached the date of superannuation and shall be entitled to all financial benefits. The writ application is accordingly disposed of. No costs.

Writ petition allowed.

2012 (I) ILR- CUT- 802

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

CRA. NOS. 53, 56 OF 1999 (Dt.04.11.2011)

BRAJABANDHU ACHARYA & ANR. .....Appellants

. Vrs.

STATE OF ORISSA .....Respondent

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

Dowry death – The following are required to be proved to establish an offence U/s.304-B IPC.

1. **Death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage.**
2. **It is specifically shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.**

In this case this Court perused all the letters exchanged between the two families but did not find allegation with regard to demand of dowry in any of the letters – So although the first ingredient has been proved by the prosecution that the death of the deceased occurred otherwise than under normal circumstances within seven years of marriage, the second requirement has not been proved – Held, prosecution failed to prove the charges levelled against the appellants and this Court set aside the impugned judgment and acquit the appellants. (Para 7,8)

Case laws Referred to:-

1.(2009) 42 OCR 385 : (State of Orissa-V-Dasaratha Mahapatra & Anr.)
2.(1992) 5 OCR 18 : (Pramila Pattnaik & Ors.-V-State of Orissa)

For Appellant - M/s. Bibhu Prasad Mohanty, D.Kumar & A.P.Ray.
For Respondent - Addl. Govt. Advocate

L. MOHAPATRA, J. Both the Criminal Appeals arise out of the judgment and order dated 30.1.1999 passed by the learned Second

Additional Sessions Judge, Puri in S.T.No.9/116 of 1996. Two appellants in both the appeals are related as father and son. Brajabandhu Acharya-appellant in Criminal Appeal No.53 of 1999 is father of Girijanandan Acharya, appellant in Criminal No.56 of 1999. Both of them have been convicted for commission of offence under Sections 498-A and 304-B read with Section 34 of the Indian Penal Code (in short 'IPC') and each one of them has been sentenced to imprisonment for life for conviction under Section 304-B IPC. No separate sentence has been imposed for their conviction under Section 498-A IPC.

2. Case of the prosecution is that appellant-Girijanandan Acharya married the deceased-Pravasini on 30th June 1994. It is alleged that at the time of negotiation for marriage, there was demand of dowry. Appellant-Girijanandan demanded a Hero Honda Motorcycle whereas appellant-Brajabandhu demanded a colour T.V. and cash of Rs.15,000/- towards travelling expenses of the bridegroom party. Two days prior to the marriage, elder brother of the deceased, P.W.6 handed over Rs.15,000/- to the appellant- Brajabandhu through his brother-in-law, P.W.12 and at the time of marriage, he also gave Rs.55,000/- to the mediator, P.W.13, who in turn gave the same to appellant-Girijanandan for purchasing a Motorcycle. Apart from the above, on demand of the appellants, a further sum of Rs.20,000/- was given towards the cost of utensils and furniture. It is also alleged in the F.I.R. that the deceased-Pravasini was ill-treated and tortured by both the appellants and appellant-Girijanandan, husband of the deceased, made further demand of a Motorcycle as the amount of Rs.55,000/- given by P.W.6 for purchasing a Motorcycle was spent by both the appellants in course of marriage of appellant-Girijanandan. It is also alleged that deceased-Pravasini used to tell about the ill-treatment and torture meted out to her by both the appellants whenever she visited her parent's house or when anyone visited the house of the appellants. Case of the prosecution is that for non-fulfillment of second demand for a Motorcycle, Pravasini was killed in the night of 2nd/3rd August, 1995 in the house of the appellants. At about 2.00 A.M. on the said date appellant-Brajabandhu presented a written report (Ext.11) in Kumbharapara Police Station, which was registered as Kumbharapara P.S.Case No.105 of 1995 under Section 302 IPC and investigation was taken up by P.W.25. In course of investigation, it was found that bed room of appellant-Girijanandan was locked from outside and P.W.25 learnt from the appellant-Brajabandhu that the dead body is lying on a cot inside the said room. As the key of the lock was not available, P.W.25 broke open the lock in presence of witnesses and found the deceased lying dead in a poll of blood on her face on the bed in flat position facing upward and three pillows had been kept under her body from knee to neck. Bleeding

injuries were found on her left check and upper lip. Some household articles were lying scattered in the said room. Appellant-Girijanandan was not available in the house. On 5.8.1995 on receipt of information, appellant-Girijanandan was arrested from Baramunda Bus Stand, Bhubaneswar. After getting information about death of the deceased-Pravasini, P.W.6 and other relatives immediately came to Puri and after ascertaining the cause of death, a written report was lodged in Kumbharapara Police Station (Ext.3) but the same was not treated as F.I.R. as an F.I.R. has already been lodged by appellant-Brajabandhu in that respect earlier and on completion of investigation, charge-sheet was submitted against the appellants for commission of offence under Sections 304-B and 498-A IPC but at the time of trial, both the appellants faced trial for commission of offence under Sections 304-B and 498-A IPC read with Section 34 of the said Code and appellant-Girijanandan was separately charged under Section 302 IPC for intentionally causing death of his wife-Pravasini in the night of occurrence.

3. Twenty six witnesses were examined on behalf of prosecution to bring home the charges and the relevant witnesses for the purpose of the case are P.Ws.6,7,8,9,10,11,12,13 and 14, who are related to the deceased and three of them acted as either mediator or barber or priest. Apart from two investigating officers, P.Ws. 25 and 26, other witnesses are mostly seizure witnesses. The doctor, who conducted postmortem examination, was examined as P.W.15 and the Scientific Officer, who visited the spot and prepared a spot map, was examined as P.W.19. The Executive Magistrate, in whose presence inquest was done, was examined as P.W.22.

Both the appellants denied the charges and appellant-Girijanandan took a plea that on the date of alleged occurrence, he had gone to the house of his maternal uncle situated at Sakhigopal and returned home on 3.8.1995 when the police arrested him and took to the police station. Appellant-Brajabandhu took a plea that after his retirement, he was having a nursery in front of his residential house and the boys of his basti demanded a part of the nursery for their play ground to which he did not agree and, therefore, his neighbourers had become his enemy. According to appellant-Brajabandhu in absence of his son, some unknown culprits committed the murder of decease-Pravasini and took away his cycle and attachi.

4. Learned Additional Sessions Judge relied on the evidence of P.Ws.6,7,8,11,12 and 14 and came to a conclusion that not only at the time of marriage but also after the marriage, there was demand of dowry and deceased-Pravasini was ill-treated and tortured for non-fulfillment of demand of dowry by appellant-Girijanandan for a Motorcycle. Relying on the

evidence of the above witnesses and evidence of the doctor, who conducted post mortem examination, learned Additional Sessions Judge found both the appellants guilty of the charge under Sections 304-B and 498-A read with Section 34 IPC and convicted them thereunder. Appellant-Girijanandan, who had been separately charged under Section 302 IPC, was acquitted of the said charge.

5. Challenging the impugned judgment, learned counsel for the appellants in both the appeals submitted that the entire case of the prosecution relating to demand of dowry before, at the time of and after the marriage is after thought. At no point of time there was any demand of dowry by either of the two appellants and the same is evident from the evidence of P.Ws.25 and 26, who had examined the above relevant witnesses at the time of investigation. According to the learned counsel for the appellants though death of Pravasini took place one and half years after the marriage, in absence of any material whatsoever to show that she had been subjected to torture or ill-treatment for non-fulfillment of demand of dowry, offence under Section 304-B cannot be said to have been made out. It was also contended by the learned counsel that entire case of the prosecution that the deceased-Pravasini had been subjected to torture and ill-treatment at the hands of both the appellants is not supported by any legal evidence, on the basis of which, an order of conviction can lie.

Learned counsel for the State relying on the evidence of said witnesses submitted that there is clear and cogent evidence with regard to demand of dowry before, at the time of and after marriage and there is also evidence to show that not only the appellant-Girijanandan ill-treated and tortured the deceased-Pravasini for non-fulfillment of demand of dowry in respect of a Motorcycle, but also appellant Brajabandhu misbehaved with her on several occasions. Therefore, the learned Additional Sessions Judge rightly placed reliance on the said witness to record an order of conviction for the offence committed by them.

6. In order to appreciate the submission of the learned counsel appearing for the appellants as well as for the State, it is not necessary for the Court to look into the evidence of twenty six witnesses examined on behalf of the prosecution. We would like to deal with the evidence of relevant witnesses, namely, P.Ws.6, 7, 8, 9, 10, 11, 12, 13 and 14 specially with reference to the evidence of P.Ws.25 and 26

P.W.6 is the brother of deceased-Pravasini. He, in his deposition, has stated that when his family was in search of a suitable bridegroom for the

deceased, P.W.13 came with a proposal of appellant- Girijanandan and the matter proceeded thereafter. Ultimately a decision was taken to solemnize the marriage between the appellant- Girijanandan and deceased. He, in his deposition, has also stated that there was no demand for dowry from the side of appellant-Brajabandhu and his wife. But the appellant-Girijanandan had demanded a Hero Honda Motorcycle as dowry. They accepted the demand and fixed a date for betrothal ceremony. In the said date, marriage was fixed to 30th June, 1994 and appellant-Brajabandu raised a demand for colour T.V. and Rs.15,000/- towards travelling expenses. Two days before the marriage, this witness stated to have sent Rs.15,000/- to appellant-Brajabandu through his brother-in-law, Nikunja, P.W.12 and on the date of marriage he stated to have paid Rs.55,000/- to the mediator, P.W.13, for purchasing a Motorcycle. The said amount was handed over to appellant-Girijanandan by P.W.13. Later, on the demand of appellants, a further sum of Rs.20,000/- was given towards cost of utensil and furniture. After marriage, the deceased came to her in-laws house. One month after the marriage when he visited the house of appellants to see the deceased, he invited appellant-Girijanandan and deceased-Pravasini to come to his house and also took them with him.. Two days thereafter appellant-Girijanandan came back to Puri and deceased-Pravasini remained along with her parents for two months. During her stay, she disclosed that she was being assaulted by the appellants and she was being forced to bring another Motorcycle from her father's house since Rs.55,000/- given at the time of marriage for purchasing a Motorcycle was spent to meet the marriage expenses. This witness has further stated that to his hearing, the deceased told to her mother, P.W.7, that she was being harassed and tortured and was subjected to in-human behavior by appellant-Brajabandhu. She was alleged to have stated that she was not being allowed to dine with the appellants on the dining table and was not allowed to sleep on the cot. Two months after the deceased stayed in her parent's house, appellant-Girijanandan brought her back to Puri. In the second week of December, 1994, the elder sister of deceased-Pravasini, P.W.8, visited the house of the appellants along with her husband, P.W.14 and it was disclosed before them by the deceased that she was being tortured in connection with demand for a Motorcycle. During last week of December, 1994, this witness visited house of the appellants with an intention to bring back the deceased and on that day both the appellants demanded a Motorcycle and said that they would allow the deceased to go provided a Motorcycle is given. He promised to give a Motorcycle and brought the deceased to his house. The deceased remained in the house of her parents till June, 1995 and in the first week of June, 1995, appellant-Girijanandan again came to his house and wanted to take back the deceased. The parents of the deceased did not agree as the

Motorcycle had not been arranged but on insistence of appellant-Girijanandan, deceased-Pravasini was allowed to go with him. Two days thereafter on 3.8.1995 at about 2 P.M. they were informed from the local police station that the deceased has been killed in the night of 2.8.1995. This witness has been cross-examined at length and all the suggestions made to him were denied. During investigation, P.W.6 was examined by I.O. P.W.25. In course of cross-examination, P.W.25 stated that at the time of investigation, when P.W.6 was examined by him, he did not state that appellant- Girijanandan demanded a Hero Honda Motorcycle. He also did not say that he had given Rs.55,000/- to the mediator, Govinda Satpathy on the marriage alter to give the same to the appellants. He did not state before him that the appellant refused to accept the articles such as utensil and furniture, which were arranged for giving to the deceased after marriage and demanded cash in place of those articles. He did not also state that the deceased while in their house told him that she was forced to bring another Motorcycle from her father. He did not also state that the deceased told him that the appellants spent the money, which was given to them at the time of marriage, to meet the marriage expenses. In view of the above, the whole story put forth by P.W.6 in Court had never been told before the police during investigation.

P.W.7 is mother of the deceased. She, in her deposition, has stated that prior to betrothal ceremony, appellant-Girijanandan demanded a Motorcycle and after the ceremony, appellant-Brajabandhu demanded a colour T.V. and travelling expenses. She came with a little different story saying that on the date of marriage, the appellants refused to take T.V. and Motorcycle, which was demanded earlier. The appellants demanded cash of Rs.55,000/- i.e. Rs.20,000/- towards colour T.V. and Rs.35,000/- for the Motorcycle. She has also stated about demand of Rs.20,000/- in place of utensil and other articles. Like P.W.6, she also stated in Court that the deceased was being abused in filthy language by appellant-Brajabandhu and that she was subjected to cruelty and harassment by the appellants. She has also stated that some time after the marriage, appellant-Girijanandan raised a fresh demand for Motorcycle. This witness was also examined in course of investigation by P.W.26. In cross-examination, P.W.26 has stated that during investigation she had examined P.W.7 and in course of her examination, she never stated before him that the appellant-Girijanandan demanded a Motorcycle prior to betrothal ceremony. She also did not state before him that on the date of betrothal ceremony, appellant-Brajabandhu demanded a colour T.V. and wife of appellant-Brajabandhu demanded travelling expenses for the marriage. She also did not state that during investigation before P.W.26 that her eldest daughter and son-in-law

had come to Cuttack in connection with their land dispute and that she asked her eldest daughter-Pratima to go to the house of the deceased and that the eldest daughter visited the house of the deceased and on her return, told that condition of the deceased was not good in her marital home and suggested her to bring back the deceased. She also did not state that she asked her son to go to the house of the deceased to bring her immediately. She also did not state before P.W.26 that appellant-Brajabandhu was abusing the deceased in filthy language or that the deceased was subjected to cruelty and harassment by the appellants in every walk of her life in her matrimonial home or that appellant-Girijanandan demanded a Motorcycle and was ill-treating the deceased. It is, therefore clear that whatever P.W.7 stated in the Court had not been stated before the I.O., P.W.26 at the time of investigation.

Now coming to the evidence of P.W.8, it appears that she is sister of the deceased-Pravasini. She, in her deposition, has stated that her brother Deba Prasad Sarangi, P.W.-6 had given Rs.55,000/- to the mediator, Govinda Satapathy, P.W.13 and in turn P.W.13 gave the said amount to appellant-Girijanandan. She further stated that there was further demand of Rs.20,000/-. She also stated that in the 2nd week of December, 1994 she, her husband, her father and one of her brothers had been to Cuttack and from Cuttack, she and her husband had gone to the house of deceased at Puri. On that occasion, she observed that the deceased was in a depressed state of mind and the deceased also expressed before her that she was being given food on some leaves and she was subjected to cruelty and harassment in connection with demand of dowry of a Motorcycle. Subsequently when the deceased visited her father's house, she also came there and the deceased told her that she was being ill-treated in her matrimonial home and at times her father-in-law appellant-Brajabandhu asked her for illicit relationship. Again in 1995, she visited the house of the deceased along with her husband but they were not properly treated by the family members of the appellants. She was also not allowed to talk with the deceased. While she was on the roof of the house, the deceased came to her with a pillow and at that time appellant-Girijanandan came and dragged her from that place. On the next date, they had to leave Puri and while leaving, they also saw the appellant-Girijanandan misbehaving with the deceased. This witness was examined during the investigation by P.W.26. In cross-examination P.W.26 stated that at the time of examination of P.W.8, she had not stated that on the marriage alter her brother had given Rs.55,000/- to P.W.13, who gave that amount to appellant-Girijanandan. She had also not stated about further demand of Rs.20,000/-. She had not stated before P.W.26 that the deceased was being given food on leaf and she had

also not stated that on her return from the house of deceased she told about the condition of the deceased to her brother. She had also not stated before P.W.26 that the appellant-Girijanandan dragged the deceased in her presence in his house during Bahuda Yatra in the year 1995. Therefore, this witness has also developed the case of the prosecution at the time of trial.

P.W.9 is the Priest, who conducted the marriage and he in his deposition has stated that before the Hastagranthi Ceremony, the groom's party demanded the dowry amount saying that unless the demand was paid, marriage would not be performed. At that time P.W.6 handed over a sum of Rs.55,000/- to P.W.13, who paid the said amount to appellant-Girijanandan. This witness was also examined by P.W.26 during investigation and at the time of investigation, he had not stated that P.W.6 had paid a cash of Rs.55,000/- to the appellants. Similar is the evidence of P.W.10, who acted as Barbar during marriage. Therefore, P.Ws.9 and 10, who had not stated regarding demand of dowry at the time of their examination, during investigation, developed the prosecution case and stated about the demand of dowry.

P.W.11 is father of the deceased-Pravasini. He has repeated most of the statements made by P.W.6 with regard to demand of dowry. However, this witness in course of his examination during investigation by P.W.26 had not stated that before celebration of Hastagranti, appellants demanded a colour T.V. and Motorcycle as dowry. He had not also stated that his son, P.W.6 gave Rs.55,000/- to the Mediator P.W.13, who gave the same amount to appellant-Girijanandan. He had also not stated during investigation that the deceased complained before them that her father-in-law is a characterless person and at times wanted to treat her as his wife. He had also not stated before P.W.26 that the deceased complained of ill-treatment and harassment at the instance of the appellants in various ways. Therefore, this witness has also developed the prosecution case at the time of trial.

P.W.12 is the brother-in-law of deceased and has stated in his deposition that he had paid Rs.15,000/- to the appellant-Brajabandhu towards traveling expenses of the groom's party and in his presence, P.W.6 had given Rs.55,000/- to P.W.13, who in turn handed over the amount to appellant-Brajabandhu. He in his deposition has stated that a further sum of Rs.20,000/- was paid in place of household articles as per demand of the appellants. He has further stated that when he had visited the house of appellants during Gundicha Festival day in the year 1995, the deceased complained before him that the accused persons instead of purchasing a motorcycle spent the amount otherwise and requested her to tell her brother

to give a Motorcycle to her husband. She also complained that she was subjected to cruelty and harassment. On examination of the evidence of this witness, we find that though he claimed to have visited the house of appellants during Gundicha Yatra in the year 1995, P.W.8, who is sister of the deceased claimed to have visited the house of deceased on the very same day but does not speak of presence of P.W.12 in the house of the deceased on that day. On the other hand, she only stated to have visited the house of the deceased at Puri along with her husband P.W.14. Therefore the evidence of this witness is not free from doubt.

P.W.13 is the Mediator, He also stated with regard to the demand of colour T.V. and Motorcycle by appellant-Brajabandhu and also stated that a cash of Rs.50,000/- had been paid to the appellants for purchasing a colour T.V. and Motorcycle. This witness was examined by P.W.25 at the time of investigation. From the evidence of P.W.25, it appears that in course of investigation, he had not stated before P.W.25 that appellant-Brajabandhu demanded a colour T.V. or that the appellant-Girijanandan demanded a Motorcycle. He had not stated during investigation before P.W.25 that in his presence, the appellant-Brajabandhu demanded a colour T.V. for his son on the betrothal ceremony. Therefore, this witness has also developed the case of the prosecution at the time of trial.

P.W.14 is the brother-in-law of the deceased and husband of P.W.8. He, in his deposition, has stated that at the time of marriage, cash of Rs.55,000/- was paid to the groom at the marriage alter for a Motorcycle and a colour T.V. and P.W.6 had given that money through P.W.3 to appellant-Girijanandan. After the marriage, he had visited the house of appellants on two occasions, once in December, 1994 and again in Bahuda Yatra day in the year 1995. He did not find the deceased in a proper state of mind and on being asked, wife of appellant-Brajabandhu stated that appellant-Girijanandan and the deceased were not pulling on well in connection with the Motorcycle promised to be given at the time of marriage. This witness was examined during investigation by P.W.25. At the time of investigation, he had not stated before the I.O., P.W.25 that the deceased and appellant-Girijanandan were not pulling on well in connection with a Motorcycle promised to be given to appellant-Girijanandan at the time of marriage. Therefore, this witness has also developed the case of the prosecution to some extent at the time of trial.

Rest of the witnesses are not material for the purpose of the case since they are either seizure witnesses or the scientific officer or photographer or the Executive Magistrate, who was a witness to the inquest.

7. On careful examination of the evidence of all the above witnesses, it appears that though P.Ws.6, 7, 8, 9, 10 and 11 stated in course of trial that the appellants had demand a colour T.V. and Motorcycle and also demanded further sum of Rs.20,000/- towards cost of utensil and furniture, but they had not stated so during investigation either before P.Ws.25 or P.W.26. They developed the case of the prosecution to that extent in course of trial. So far as further demand of a Motorcycle after marriage is concerned, these witnesses were also silent about the same during their examination under Section 161 Cr.P.C. by P.Ws.25 and 26. The entire case relating to demand of dowry before, at the time of and after marriage has been developed only in course of trial. Though the evidence of P.Ws.11 and 14 has been contradicted by evidence of P.Ws.25 and 26 to some extent, considering the entire evidence placed by the prosecution with regard to demand of dowry, we are unable to accept the evidence of the above two witnesses and consequently hold that the prosecution only at the time of trial developed the case and tried to put forth before the Court that there was a demand of dowry before, at the time of and after marriage, though no such allegation had ever been made during investigation in their statements recorded under Section 161 Cr.P.C. by P.Ws.25 and 26. In a case registered for commission of offence under Section 304-B of IPC, the following are required to be proved.

1. Death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage.

2. It is specifically shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.

Though the first ingredient has been proved by the prosecution to the extent that death of the deceased-Pravasini occurred otherwise than under normal circumstances within seven years of her marriage, the second requirement has not been proved for the reasons stated earlier. Therefore, offence under Section 304-B has not been established by the prosecution through evidence of P.Ws.6, 7, 8, 9, 10, 11, 12, 13 and 14. Even the offence under Section 498-A has not been proved for the very same reasons.

Several letters have been exhibited in course of trial. We have perused all the letters exchanged between two families but did not find allegation with regard to demand of dowry in any of the letters. In this connection, reference may be made to a decision of this Court in the case of

State of Orissa Vrs. Dasaratha Mahapatra and another reported in (2009) 42 OCR-385. In the said reported case, allegations were made with regard to demand of dowry but one of the letters exhibited in course of trial written by the deceased did not state about the torture on account of dowry demand by her in-laws and on the other hand, the letter disclosed that the deceased was living happily in her in-laws house. This Court in the circumstances held that on the basis of bald allegation made by the family members of the deceased, charge is not established. Similar views under similar facts were expressed by this Court in the case of ***Pramila Pattnaik and others Vrs. State of Orissa*** reported in (1992) 5 OCR-18.

8. In view of the discussions made above, we find that prosecution has failed to prove the charges levelled against both the appellants and, accordingly, we allow the appeal and set aside the impugned judgment passed by the learned Second Additional Sessions Judge, Puri in S.T.No.9/116 of 1996 and acquit both the appellants of the charges.

Appeal allowed.

2012 (I) ILR- CUT- 813

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

JCAR NO. 96 OF 2001 (Dt.29.11.2011)

NAGESH KHILLO ……Appellant

.Vrs.

STATE OF ORISSA …….Respondent

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

Appellant in his statement recorded U/s. 313 Cr.P.C. had taken a plea that he had become temporarily insane at the time of occurrence – No evidence led on behalf of the appellant in support of such plea – Appellant though examined himself as defence witness there was nothing to suggest from his deposition that he was temporarily insane at the time of occurrence – Except suggestions made to some villagers in their Cross-examination there is no other evidence on the basis of which it can be held that the appellant was temporarily insane at the time of occurrence – Plea of the appellant that he was temporarily insane is not accepted.

For Appellant - Mr. Harekrushna Mallick
For Respondent- Mr. Sangram Das,
Addl. Standing Counsel.

L. MOHAPATRA, J. This appeal is directed against the judgment and order dated 16.10.2001 of the learned Additional Sessions Judge, Jeypore in Sessions Case No.68 of 1998. The appellant who stood charged for commission of offences under Sections 302/307/324/436 of the Indian Penal Code (for short 'the I.P.C.') was found guilty of offences under Sections 324/436 of the I.P.C. for voluntarily causing hurt to his co-villagers, namely, Madhaba Garam, Monima Khillo, Dohana Khillo, Shyamo Khillo, Sukra Garam and Kumudan Garam, and for setting fire to the dwelling houses of the villagers. He was also found guilty under Sections 302 of the I.P.C. for committing murder of deceased Sellu Garam. Learned Additional Sessions Judge sentenced him to undergo imprisonment for life for conviction under Section 302 of the I.P.C. and also imposed fine of Rs.1000/-. For conviction under Section 436 of the I.P.C. the appellant has been sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.1000/-. For conviction under Section 324 of the I.P.C., no sentence has been imposed. All the sentences have been directed to run concurrently.

2. The case of the prosecution is that in the night of 27/28 of March, 1998 there was a quarrel between the appellant and his wife. The appellant for the above reason set fire to his own house by means of a burning fire wood. His wife ran away to the house of Ram Chandra Garam P.W.3. The appellant, therefore, set fire to the house of P.W.3. Then a pandemonium broke out in the village. The appellant suddenly thereafter assaulted the villagers by means of the said burning fire wood and also set fire to other houses in the village. The appellant also set fire to the houses of P.Ws.1 and 2 and assaulted the deceased, who happens to be the mother of P.W.1 and wife of P.W.2, by means of an axe he was holding. Because of such conduct of the appellant, entire village was destroyed due to fire and the deceased who was assaulted by means of an axe succumbed to the injuries. P.W.1 lodged a report before the Officer-In-Charge of Boipariguda P.S. and a case was registered. On completion of investigation, charge-sheet was submitted against the appellant for commission of offences under Sections 302/307/324/436 of the I.P.C.

3. The prosecution examined as many as eighteen witnesses to establish the charges. Out of eighteen witnesses examined on behalf of the prosecution, P.W.1 is the son of the deceased and is also the informant. P.W.2 is the husband of the deceased. P.Ws.3, 4, 5, 6, 7, 8, 9, 10, 13, 14 and 15 are witnesses to setting fire to different houses as well as assault on some of them. P.Ws.11 and 18 examined some of the injured witnesses. P.W.16 also examined some of the injured witnesses and conducted post-mortem examination. P.W.17 is the I.O. in the case.

4. The appellant not only took the plea of denial of the prosecution allegation but also took the plea of temporary insanity and to support such plea he examined himself as D.W.1.

The trial court relying on the evidence of the above witnesses did not find the appellant guilty of charge under Section 307 of the I.P.C. but found him guilty of rest of the charges and convicted him thereunder.

5. Learned counsel appearing for the appellant assails the impugned judgment solely on the ground that the appellant was temporarily insane at the time of occurrence and the said fact is proved from his conduct in course of the entire incident. According to the learned counsel, the appellant is entitled to the benefit under Section 84 of the Indian Evidence Act.

6. Learned counsel for the State referring to the evidence of all the villagers including P.Ws.1 and 2 submits that the witnesses are consistent in

their statements with regard to conduct of the appellant at the time of the occurrence and their evidence is also corroborated by the evidence of three doctors, namely, P.Ws.11, 16 and 18. It is also contended by the learned counsel for the State that though the plea was taken by the appellant that he was temporarily insane, no evidence was adduced in support of such plea. Accordingly, the appellant is not entitled to benefit under Section 84 of the Indian Evidence Act.

7. The prosecution examined as many as eighteen witnesses to prove the charges. P.W.1 is the informant and is also the son of the deceased. He in his deposition stated that in the night of occurrence he was sleeping in his cottage which is situated at a distance of 5 to 10 feet from the cottage of his parents. Hearing shout he came out and saw that the appellant was holding an axe in one hand and a torch (Nia Hula) on the other. He also saw the appellant setting fire to his own house and thereafter to the houses of Ram Chandra Garam, Durjaya Garam, Kundan Garam, Sunadhar Garam and some others. He further stated that the appellant came to the cottage occupied by his parents and assaulted his father P.W.2 by means of the burning fire wood as a result of which he left the place out of fear. Thereafter, the appellant dealt an axe blow on the back of his mother as a result of which she fell down sustaining bleeding injury and died. Before assaulting by means of the axe the appellant had also dealt a blow by means of the burning fire wood to the deceased. Nothing has been brought out in cross-examination of this witness to disbelieve his testimony. P.W.2, who happens to be the husband of the deceased, in his deposition stated that the appellant in the night of occurrence set fire to different houses and when he came out of his cottage, he was given a blow by the appellant by means of the burning fire wood and he ran way from the place. While running away he saw the appellant dealing an axe blow on the back of the deceased. He also saw that the deceased falling down on the ground being assaulted by the appellant. Though P.W.2 stated so in the court, from the evidence of the I.O. P.W.17 it appears that during investigation P.W.2 had not stated before him that he had seen the appellant dealing blow by means of an axe to his wife. Therefore, much reliance cannot be placed on the evidence of P.W.2 so far as assault on the deceased is concerned, he having been contradicted by the I.O. P.W.17. From the evidence of P.W.16, the doctor, who conducted post-mortem examination, we find that the deceased had sustained as many as eight injuries and he was of the opinion that the cause of death was due to head injury leading to intracranium haemorrage and shock. He was also of the view that the injuries could be caused by hard and blunt object. On analysis of evidence of these three witnesses, we find that P.W.1 the son of the deceased is a reliable witness

and his evidence has been corroborated by the evidence of P.W.16. Therefore, the charge under Section 302 of the I.P.C. has been established against the appellant. So far as charge under Section 436 of the I.P.C. is concerned, from the evidence of all the injured witnesses and P.W.1 it is clear that in the night of occurrence the appellant by means of a burning fire wood set fire to different houses of the village and also assaulted some of the villagers who were examined by the three doctors P.Ws.11, 16 and 18. Evidence of the injured villagers has been closely examined by us. We find no reason to disbelieve them except P.Ws.5, 6 and 14 who had not made any allegation with regard to setting fire to their respective houses at the time of investigation. Therefore, charge under Sections 436/324 of I.P.C. is also well established.

8. Coming to the plea of defence it appears that in the statement recorded under Section 313 of the Cr.P.C. a plea was taken by the appellant that he had become temporarily insane at the time of occurrence. No evidence whatsoever was led on behalf of the appellant in support of such plea. On the other hand, the appellant examined himself as defence witness, and from his deposition we find nothing to suggest that he was temporarily insane at the time of occurrence. Except the suggestion made to some of the villagers in their cross-examination there is no other evidence on the basis of which it can be held that the appellant was temporarily insane at the time of occurrence.

9. For the reasons stated above, we find no infirmity in the judgment of the trial court. Accordingly, the appeal, being devoid of merit, is dismissed.

Appeal dismissed.

2012 (I) ILR- CUT- 817

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

JCRLA NO. 33 OF 2003 (Dt.04.01.2012)

BILSI MURMU ……. Appellant.

,Vrs.

STATE OF ORISSA ……..Respondent.

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

Child witness – Evidence of a child should be examined cautiously and Courts should need some corroboration.

In this case P.W.2 is the child witness – There is no corroboration to the evidence of P.W.2 with regard to assault by the appellant on the deceased – It has also been elicited in his Cross-examination that by the time he came to his house from the place where the appellant and P.W.6 were quarrelling, the deceased was lying dead – Held, it is not safe to place reliance on the evidence of P.W.2 to sustain the charge U/s.302 I.P.C. (Para 12)

Case law Referred to:-

AIR 1992 SC 1131 : (Nirmal Kumar -V- State of U.P.)

For Appellant - M/s. Manoj Mishra, P.K.Das, B.K.Mishra, Pradeep Ku. Khuntia.

For Respondent - Mr. Sangram Das, Addl. Standing Counsel

B.K. PATEL, J. This appeal is directed against the judgment dated 25.3.2003 passed by learned Additional Sessions Judge, Fast Track Court, Baripada in S.T. No.26/118 of 2002 convicting the appellant under Sections 302 and 323 of the Indian Penal Code (for short 'the I.P.C.'), and sentencing him to undergo imprisonment for life and to pay fine of Rs.2000/-, in default to undergo R.I. for six months, under Section 302 of the I.P.C. No separate sentence has been awarded under Section 323 of the I.P.C.

2. Allegation in the case relates to murder of deceased Sara and causing hurt to P.W.6. P.W.6 is deceased's husband. Informant P.W.1 and

eye-witness P.W.2 are their sons. P.Ws.6 and 8 are appellant's brothers. Occurrence took place on 12.1.2002.

3. Prosecution case is that appellant suspected practice of witchcraft by the deceased on his son for which he was ailing. It is alleged that on the date of occurrence at about 5 P.M. when P.W.6 was returning from the house of his co-villager P.W.7, near the house of Nabakrushna the appellant challenged P.W.6 as to why his son was suffering from fever. Thereafter, the appellant dealt fist blows and slaps on P.W.6. Being informed regarding such incident, P.W.8 came and asked the appellant as to why he was assaulting their elder brother. The appellant threatened P.W.8, ran to his house, procured sword M.O.I. and chased P.W.8. P.W.8, however, escaped. The appellant, thereafter, ran towards the house of P.W.6 and dealt successive sword blows on the deceased as a result of which she sustained fatal injuries and died. The appellant went and produced the sword M.O.I confessing his guilt before P.W.10, the Officer-In-Charge of Rasgobindapur Police Station, who seized the sword under seizure list Ext.4 and made Station Diary Entry. At about 8.15 P.M. informant P.W.1 lodged written report upon which P.W.10 registered the case and took up investigation. On completion of investigation, charge-sheet under Sections 302 and 323 of the I.P.C. was submitted against the appellant.

4. Appellant took the plea of complete denial.

5. In order to substantiate the charge, prosecution examined ten witnesses. P.Ws.1, 2, 6, 8 and 10 have already been introduced. P.W.3 deposed regarding the quarrel between appellant and P.W.6. She was declared to be a hostile witness. P.Ws.4 and 5 are seizure witnesses. P.W.7 is a post-occurrence witness who was declared to be a hostile witness. P.W.8 also was declared to be a hostile witness. P.W.9 is the doctor who conducted post-mortem examination over the dead body of the deceased. Prosecution also relied upon documents marked Exts.1 to 13 and material objects M.Os.I to VII.

Placing reliance mainly on the evidence of eye-witness P.W.2 and his father injured P.W.6, stated to have been corroborated by incriminating circumstances including medical evidence the trial court held the appellant guilty of the charge.

6. It is submitted by the learned counsel for the appellant that the only eye-witness to the occurrence P.W.2 is a child witness who was aged about six years during the period of occurrence. It is contended that a combined

reading of evidence of P.Ws.2 and 6 indicates that P.W.2 was not a witness to the assault on the deceased by the appellant. Rather, he found his mother the deceased lying dead when he came to the spot from the place where his father was quarrelling. Also evidence of P.W.2 regarding the sequence of incidents in course of occurrence is not consistent with the evidence of P.W.6. It is argued that in view of infirmities in the evidence of P.W.2 the trial court should not have placed reliance on him in order to sustain the charge.

7. Learned counsel for the State places reliance on evidence of P.Ws.2 and 6, and other circumstances including medical evidence and seizure of sword M.O.I to support the impugned judgment.

8. We have carefully examined the evidence on record. Informant P.W.1 is son of deceased and P.W.6. He is a post-occurrence witness. His testimony in the court and version in the F.I.R. are stated to be based on the information derived from P.W.2. P.W.3, who was declared to be a hostile witness, stated in her evidence that she saw the appellant and his brother P.W.6 were quarrelling and assaulting each other. She asked the appellant not to indulge in such quarrel and took P.W.6 to his house. P.W.4 is a witness to seizure of blood stained earth from the spot and inquest over the dead body of the deceased. P.W.5 was a Gramarakshi who stated that he found the appellant sitting in the police station premises. One bicycle had been kept and a sword was hanging on the rod of the bicycle being tied with a rope. Police seized the sword under seizure list Ext.4. P.W.5 further stated to have witnessed the seizure of wearing apparels of the appellant under seizure list Ext.5. Thus, evidence of P.W.5 is not material in indicating any nexus between the seized sword and the appellant. P.Ws.7 and 8 did not support the prosecution and were declared to be hostile witnesses.

9. P.W.9 conducted post-mortem examination over the dead body of the deceased. He found three incised wounds on the mandible, neck and below the left ear of the deceased. He opined that cause of death of the deceased was due to severe blood loss on account of injuries to the carotid artery and the jugular vein of the neck caused by sharp cutting weapon. According to him, injuries on the deceased were possible by sword M.O.I. Therefore, it is well established that death of the deceased was homicidal in nature.

10. The solitary eye-witness to the occurrence P.W.2 is a child witness who was aged about six years during the period of occurrence. He testified that he saw that his father and the appellant was quarrelling near the house of Nabakrushna Soren while he was driving out the bullock which was

grazing straw in their thrashing floor. Appellant's wife went to the house of P.W.7 and called P.W.8. P.W.8 asked the appellant as to why he was assaulting P.W.6. Appellant went to his house, brought a sword and threatened to kill P.W.6. P.W.8 left that place out of fear. Deceased was driving out the bullock from their thrashing floor towards their cow-shed. Appellant ran to their house and assaulted the deceased on her throat by dealing three to five sword blows. Deceased fell down on the ground. P.W.2 stated that he rushed to the place and saw his mother lying dead. The appellant, thereafter, went to assault P.W.6. However, P.W.3 rescued P.W.6 and brought P.W.6 to his house.

11. P.W.6 stated in his evidence that he had been to the house of P.W.7 at 4 P.M. and was returning home at about 5 P.M. on the date of occurrence. Near the house of Nabakrushna, the appellant challenged as to why his son was suffering from fever. Thereafter, the appellant assaulted P.W.6 by fist blows and slaps on his cheek when P.W.6 told him to consult a doctor. P.W.6 fell down on the ground and sustained injury on the back side of his head due to fall. Appellant, thereafter, went to his house and returned with a sword. At that time P.W.8 came there and asked the appellant as to why he was assaulting P.W.6. Appellant chased P.W.8 holding the sword. At that time deceased was driving away the bullock from the thrashing floor to cow-shed. Appellant proceeded towards P.W.6's house holding the sword. P.W.6 remained sitting near the house of Nabakrushna. At that time P.W.3 was returning from the weekly market when the appellant came holding the sword from P.W.6's house and threatened to kill P.W.6. P.W.3 protested and the appellant went towards P.W.6's house. When P.W.3 was escorting P.W.6 towards his house, P.W.2 came from his house and told that the appellant had already killed his mother the deceased. P.W.6 saw the deceased lying dead with injuries on her.

12. On an analysis of the evidence of P.Ws.2 and 6 it is found that they are not consistent with regard to the nature and sequence of events of death of the deceased. P.W.6 stated that at first appellant assaulted him by fist blows and slaps as a result of which he fell down and sustained injuries. P.W.2 stated that at first he saw the appellant and the deceased quarrelling. P.W.6 did not claim to have seen the assault by the appellant on the deceased while he was sitting near the house of Nabakrushna. It appears from the evidence of P.W.6 and the spot map Ext.8 that house of Nabakrushna and the spot where the dead body of the deceased was found lying are situated at a distance being intervened by village road. There is a house also in between. P.W.2 deposed to have seen the assault on P.W.6 by the appellant before he procured the sword and also deposed to have

seen the appellant going to assault P.W.6 after assaulting the deceased. Learned counsel for the appellant vehemently contended that in case P.W.2 was present near his father near the house of Nabakrushna all along and P.W.6 did not claim to have seen the assault on the deceased, evidence of P.W.2 to have seen the occurrence is not acceptable. In this connection, it is pertinent to note that it has been elicited from P.W.2 in course of his cross-examination at paragraph-4 of the deposition that he saw his mother lying dead in front of their house coming from the place where his father was quarrelling. Such an admission on the part of P.W.2 amounts to admitting that by the time he came from near the house of Nabakrushna his mother the deceased was lying dead. There is no corroboration to the evidence of P.W.2 with regard to the allegation of assault on the deceased by the appellant. In **Nirmal Kumar –vrs.- State of U.P.** : AIR 1992 SC 1131 it has been pointed out by the Hon'ble Supreme Court that in a number of cases it has been observed that the evidence of child should be examined cautiously and courts should find some corroboration. In the present case, not only there is no corroboration to the evidence of P.W.2 with regard to assault by the appellant on the deceased but also it has been elicited in his cross-examination that by the time he came to his house from the place where the appellant and P.W.6 were quarrelling, the deceased was lying dead. Therefore, it is not found safe to place reliance on the evidence of P.W.2 to sustain the charge under Section 302 of the I.P.C. against the appellant.

13. As has been pointed out earlier prosecution case of the appellant to have produced M.O.I. before P.W.10 has been negated by P.W.5. Therefore, circumstances of seizure of sword M.O.I does not lead to the conclusion of complicity of the appellant with the offence of murder.

14. Also, evidence on record shows that there was mutual quarrel between the appellant and P.W.6 in course of which P.W.6 fell down and sustained injury. P.W.3 categorically deposed that appellant and P.W.6 were quarrelling and assaulting each other. Therefore, conviction of the appellant under Section 323 of the I.P.C. is also vulnerable.

15. In view of the above, the appeal is allowed. The judgment and order of conviction and sentence dated 25.3.2003 passed by learned Additional Sessions Judge, Fast Track Court, Baripada in S.T. No.26/118 of 2002 convicting the appellant under Sections 302 and 323 of the I.P.C. and sentencing him to undergo imprisonment for life and to pay fine of Rs.2000/-, in default to undergo R.I. for six months, under Section 302 of the I.P.C. is set aside, and he is acquitted of the charge.

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

Appeal allowed.

2012 (I) ILR- CUT- 823

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

JCRA NO. 189 OF 2000 (Dt.15.07.2011)

SIBA CHARAN SABAR ……. Appellant.

.Vrs.

STATE OF ORISSA ……..Respondent.

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

Plea of insanity – Proof – P.W.3 the informant and eyewitness to the occurrence admitted that some days prior to the occurrence, the appellant was insane and moved hither and thither – The Appellant was almost talking incoherently and behaving like mad and he was naked – When the witnesses tried to snatch away the tangia, the appellant threatened to his father by showing the said tangia – In cross-examination he has also admitted that the appellant is a mad person – P.Ws. 4 & 5 have stated that the appellant was totally mad – P.W.7 the father of the appellant corroborated the testimony of P.Ws.3 to 5 with regard to insanity of the appellant – Held, the appellant by reason of unsoundness of mind was incapable to know the nature of the act at the time of commission of the offence and he is entitled to get benefit U/s. 84 I.P.C. – Impugned judgment including order of conviction and sentence is set aside. (Para 10)

Case laws Referred to:-

1.AIR 1964 SC 1563 : (Dahyabhai Chhaganbhai Thakkar-V- State of Gujarat)

2.AIR 1972 SC 2443 : (Sheralli Wali Mohammed-V-State of Maharashtra)

For Appellant - M/s. Karunakar Sahoo & S.K.Mishra.

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

PRADIP MOHANTY, J. This appeal is directed against the judgment and order of conviction passed by the Additional Sessions Judge, Nuapada in S.C. No.1/6 of 1999-2000 convicting under Section 302 I.P.C and sentencing the appellant to undergo imprisonment for life.

2. The case of the prosecution, in short, is that on 4.9.98 at about 10:00 AM, the deceased (Dalsingh Majhi), who is a snake charmer, came to the

house of the informant (P.W.3) to teach the son of the informant 'mantra'. After the arrival of the deceased, the appellant, who happens to be the husband of informant's neice, reached there. Two hours thereafter, father of the appellant (P.W.7) came to the house of the informant and stayed there. At about 8 PM, all of them took food and went to bed in the study room of the son of P.W.3, who slept in the door side of the said room. The door was open and electric light was available in the said room. At about 9:30, P.W.3 heard some sound and noticed that the appellant brought an axe from the room where he was sleeping and dealt two blows on the left side neck of the deceased causing profuse bleeding. Deceased succumbed to injury at the spot. Father of the appellant got up and asked the appellant as to why he did so to which the appellant replied the he would kill him. After the occurrence, P.W.3 went to Komna plice station and lodged the F.I.R. Police registered the case, took up investigation, held inquest over the dead body and sent the same for autopsy and after completion of the investigation, filed charge sheet against the appellant under Section 302 I.P.C.

3. The plea of the appellants is complete denial of the allegation. He took a specific plea of insanity during trial.

4. To bring home the charge, prosecution examined as many as eight witnesses including the doctor and the I.O. and exhibited twelve documents. The defence has examined none.

5. Learned Additional Sessions judge, who tried the case, convicted the appellant under section 302 I.P.C mainly basing upon the testimony of the informant (P.W.3) and P.W.7.

6. Learned counsel appearing for the appellant submits that there is no evidence to show that it was the appellant who caused injuries on the person of the deceased and even if it was the appellant, who caused injuries, he was not in a fit state of mind at the time of occurrence.

7. Mr. Nayak, learned Additional Government Advocate vehemently contends that the evidence of the informant (P.W.3) is very clear and cogent and is corroborated by the evidence of P.Ws.4 and 5. The evidence of the ocular witnesses is also corroborates the medical evidence. No evidence was adduced by the defence to show that the appellant was insane at the relevant point of time.

8. Perused the L.C.R. P.W.1 is the doctor who conducted the autopsy of the dead body of the deceased and found the following injuries.

(i) One incised contused wound 2”X½”X½” on the left supra clavicular fossal; and

(ii) One incised contused wound 2”X1”X3” depth obliquely situated on the left side of the neck 1½” above injury no.i.”

He opined that all the injuries were ante mortem in nature. The cause of death was due to shock and haemorrhage due to injury no.ii caused by heavy and sharp cutting weapon. After examining the weapon of offence produced by the I.O, he opined that the above injuries could be possible by the said weapon of offence. He proved the post mortem report Ext.1. P.W.2 is the doctor who collected the nail clippings of the appellant, examined the same and gave his report under Ext.3.

P.W.3 is the informant of the case. In chief, he stated that on the day of occurrence, the deceased and the appellant slept in one room. On hearing ‘KAT KAT’ sound from the room, he went and found the appellant was holding tangia, dealt a blow to the neck of the deceased. Father of the appellant tried to snatch away the tangia from the appellant. He shouted and gentlemen of the village came to the spot. Thereafter, he along with gentlemen and ward member went to the Komna police station and lodged report. In cross-examination, he admitted that before the occurrence, the appellant was insane and moved hither and thither and did not return to the village. As he came to know that the appellant is mad, he brought him to his house under good surveillance. He was talking incoherently and behaving like a mad man. His father some how came to know that the appellant is a mad man, he went in search of him to different places and ultimately came to his village in search of him. He also admitted that the appellant had never seen the Guru. When they tried to snatch the tangia from the appellant, he threatened his father also by showing the said tangia. Since the behaviour of the appellant had gone beyond control, his family members, out of panic, closed the door and remained outside. When the police came, the appellant was moving hither and thither in the house by holding the tangia.

P.W.4 is a co-villager of the informant. Hearing hullah, he went to the spot and found the appellant moving by holding the tangia. The dead body was lying with bleeding injury. He also put his signature in the F.I.R. (Ext.4). He is a witness to the seizure of wearing apparels (Ext.5) of the appellant. In cross-examination, he admitted that as per his knowledge, the appellant is a mad man for which the informant and others brought him to his house. When they reached the spot, the appellant was in a state of madness and shouting to kill others.

P.W.5 is another co-villager of the informant and a witness to the seizure of tangia (Ext.7). P.W.6 is the O.I.C. who reduced the F.I.R. into writing and directed the Sub-inspector of Police to take up investigation.

P.W.7 is the father of the appellant. He specifically stated that 15 days prior to the occurrence, appellant behaved abnormally and became mad. Thereafter, the appellant ran away from the house and had been to different villages. He found his son in the house of P.W.3. He remained with him and thereafter, he found his son mad. P.W.7, Guru and P.W.3 remained in one room. At about 10:00 PM, after they slept, the Guru was found in bleeding condition. The appellant was holding tangia and moving from one place to other. Thereafter, he ran away from the place. In cross-examination, he admitted that his son had become mad and he did not know what he was doing. On the date of occurrence, he had been to the house of P.W.3 where his son was in insane and mad condition.

P.W.8 is the I.O., who sent the dead body for autopsy, seized the wearing apparels and blood stained earth and tangia and sent the same of chemical examination, arrested the appellant and after completion of the investigation, filed charge-sheet against the appellant. In cross-examination, he also admitted that during investigation, it was revealed that some time, the appellant was behaving like a mad and had come to take the medicine in the village of the informant on the fateful day of the occurrence. He further admitted that prior to the occurrence, there was no relationship between the appellant and the deceased.

9. After scrutiny of the entire evidence, it is clear that P.W.3 had seen the occurrence. He specifically stated that the appellant gave axe blows to the deceased on the neck of the deceased. The post-occurrence witnesses (P.Ws.4 to 7) also corroborated the statement to the effect that the deceased was lying with bleeding injuries and the appellant was moving here and there. There is no material to disbelieve the evidence of P.Ws.3 and 7 which is corroborated by medical evidence. The doctor (P.W.1), who conducted the autopsy specifically stated that the death was due to shock and following haemorrhage due to injury no.2. Human blood stain was detected from the wearing apparels of the appellant and the axe which was seized from the possession of the appellant. Therefore, there is no doubt that the appellant was the author of the crime.

10. To establish that the acts done by the appellant are not an offences under Section 84 I.P.C., it must be proved clearly that, at the time of the commission of the acts, the appellant, by reason of unsoundness of mind,

was incapable of either knowing the nature of the act or that the acts were either morally wrong or contrary to law. By applying the ratio decided in the cases of ***Dahyabhai Chhaganbhai Thakkar V. State of Gujarat; AIR 1964 SC 1563*** and ***Sheralli Wali Mohammed V. State of Maharashtra; AIR 1972 SC 2443***, this Court has to examine the evidence to see whether the appellant was in a fit state of mind or not at the time of commission of offence.

The eye witness and the informant (P.W.3) admitted that some days prior to the occurrence, the appellant was insance and moved hither and thither. When the appellant came ho his house in the evening hour, he was also not taking food. As he came to know that the appellant is mad, he arranged 3 cots for sleeping in that room. The appellant was almost talking incoherently and behaving like a mad and he was naked. When P.W.3 and others tried to snatch away the tangia, the appellant gave threatening to his father also by showing the said tangia. He also admitted that the appellant had never seen the deceased. P.W.4, a post-occurrence witness, also specifically stated that the appellant was moving by holding the tangia from one place to other. In cross-examination, he admitted that the appellant is a mad person. When they reached the spot, the appellant was in a state of mad condition and shouting to kill others. He has further admitted that to the knowledge of P.W.4, the appellant was totally mad. P.W.5 also corroborated the above statement. P.W.7, the father of the appellant, also corroborated the testimony of P.Ws.3 to 5 with regard to insanity of the appellant. The I.O. in his cross-examination, admitted that during investigation, it was ascertained that the appellant was some time behaving mad like and had come to the village of the informant to take medicine. In the instant case, though the IO admitted about the madness of the appellant but he did not send him to the doctor to ascertain his mental condition.

In view of the above, it is crystal clear that at the time of occurrence, the appellant was insane and is entitled to the benefit of Section 84 I.P.C. Accordingly, this Court sets aside the judgment and order of conviction passed by the Additional Sessions Judge, Nuapada in S.C. No.1/6 of 1999-2000 convicting and sentencing the appellant to undergo imprisonment for life for the offence under Section 302 I.P.C. The Jail Criminal Appeal is allowed.

Appeal allowed.

2012 (I) ILR- CUT- 828

M.M.DAS, J.

W.P.(C) NOS. 5219 & 5923 OF 2009 (Dt.09.02.2012)

NON-NALCONIANS PARENTS ASSOCIATIONS,ANGUL & ORS. ……...Petitioners.

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.14.

Delhi Public School (Nalco Nagar) – Increase in monthly tuition fees and Registration fees challenged by the Parents Associations.

Articles 14 forbids class legislation but it does not forbid reasonable classification – In this case NALCO intends to provide quality education to the children of its employees – Although the wards of Nalconians pay less fees than the wards of Non-Nalconians such differential amount is made good by NALCO which meets all deficit expenses of the school – Held, classifying the students, who are the children of the petitioners not being employees of NALCO differently than the students who are children of NALCO employees is an intelligible differentia and it can not be said that such classification is unreasonable – No discrimination is found to have been meted out by the impugned action on the part of the school authorities so as to conclude that such action violates Art.14 of the Constitution of India – Writ petitions deserve no interference. (Para 12)

Case laws Referred to:-

1.1979 SC 1628 : (Ramana Dayaram Shetty -V- The International Air Port Authority of India & Ors.)
2.AIR 1955 SC 191 : (Dudhan Choudhary-V- State of Bihar)
3.AIR 1996 SC 1864 : (Madhu Kishwar & Ors.-V-State Bihar & Ors.)

For Petitioners - M/s. Samir Kumar Mishra, K.R.Sahoo & K.R.Mohanty.
For Opp.Partoes - M/s. Addl. Govt. Advocate (for O.Ps. 1,2 &4)
M/s. R.K.Rath, Sr. Advocate, N.R.Rout & Miss Pami Rath (for O.P.3& 5)

For Petitioners - M/s. J.Sahoo & P.S.Das,
For Opp.Parties - M/s. Addl. Govt. Advocate (for O.Ps.1,2,&4)

M.M. DAS,J. These two writ petitions have been filed by the parents associations constituted by the parents of the students of Delhi Public School, Nalco Nagar, Angul and Delhi Public School, Damanjodi along with others, who are of parents/guardians of students of those schools and are not employees of National Aluminum Company Ltd. (in short, 'the NALCO') challenging increase in registration fees and monthly tuition fees in respect of their children reading in Nursery to Class-XII in the said schools.

2. It appears that the school authorities issued a circular in the month of March, 2009 in both the schools prescribing the fees in respect of NALCO Nagar, Angul D.P.S. and Damanjodi D.P.S. as quoted hereunder:-

"**DELHI PUBLIC SCHOOL**
NALCO NAGAR

Ref. DPS/AGL/Admn/87/2009 Date: 23.03.09

C I R C U L A R

Dear Parents,

As we are about to conclude the session, we wish to thank you for your co-operation and help extended during the session 2008-09. We look forward to your continued support in the year to come.

The following is the schedule for distribution of Text Books for the session 2009 – 10 at Jr. School premises. The payment is to be made to the Book seller at the counter.

Date	Classes	Timings
01.01.09	Nursery, Prep. I	8.00 A.M. – 1.00 P.M.
01.04.09	II, III, IV	2.00 p.m. – 6.30 P.M.

(Evening 7.30 P.M. to 9.30 P.M. – Nursery, Prep. I, II, III, IV)

02.04.09	V, VI, VII	8.00 A.M. – 1 P.M.
02.04.09	VIII, IX	2. 00 P.M. – 6.30 P.M.

(Evening 7.30 P.M. to 9.30 P.M. – V, VI, VII, VIII, IX)

03.04.09 All classes 8.00 P.M. – 1.00 P.M.
All classes 2. 00 P.M. – 5.00 P.M.

The new session will commence on 4th April, 2009 and the reporting time for the students is 6.30 A.M. and the classes will be over at 10.30 A.M. The students are required to wear summer uniform from 4th April, 2009 (Ties need not be worn). The students are allowed to put on canvas shoes on the days they have PT classes).

The following is the fees chargeable from the wards of Non-Nalconians w.e.f. 01.04.2009.

Sl. No.	Particulars	Revised fees
01.	Annual Fees (per annum)	Rs.2,400/-
02.	Assignment fees (per annum)	Rs.200/-
03.	**Tuition Fees** a) Nursery to class – VIII (per month) b) Class IX & X c) Class XI & XII	 Rs.1,200/-(per month) Rs.1,300/-(per month) Rs.1,500/-(per month)

The fees of NALCO, CISF, DPS & SVM employees wards remain unchanged.

Your co-operation in this regard will be appreciated.

(Sd/- V.K. Arora)
Principal "

" **DELHI PUBLIC SCHOOL**
DAMANJODI

No: DPS: DMJ: ADM: 98 31st March 2009
Dear Parent,

As per the decision taken by the school Managing Committee, the fee structure has been revised and will be implemented with effect from 1st April, 2009. The details are given below.

SN.	PARTICULARS	FEE TRUCTURE
01	Registration Fees (One Time)	Rs.400/-
02	Admission Fees (One Time)	Rs.4000/-
03	Annual Fees (Annually)	Rs.2400/-

04	Caution Fees (Refundable)	Rs.1000/-
05	Tuition Fee From Nursery toClass XII (Monthly)	Rs.1935/-

However, fees charged from the parents of Nalco, CISF & SVM remains as it was.

All of you are requested to extend co-operation in this regard.

With kind regards,

Sincerely yours,

Sd/- Deepanwita Das
Principal (I/c) "

3. The only question canvassed in both the writ petitions is that the school authorities are charging different fees from the children of employees of NALCO and from the children of the petitioners-parents who are not employees of NALCO and, therefore, the same amounts to discrimination.

4. Counter affidavits have been filed in both the writ petitions by the authorities of the schools, inter alia, stating that the Delhi Public Schools in both the places are societies registered under the Societies Registration Act and were established at Angul and at Damanjodi in the year 1984 and 1983 respectively pursuant to agreements dated 24.1.1984 and 28.9.1983 entered into between NALCO and the DPS society, New Delhi and both the schools were established by NALCO. The agreements have been annexed to the counter affidavits.

5. Mr. R.K. Rath, learned senior counsel appearing on behalf of the NALCO as well as the school authorities submitted that pursuant to the agreement entered into between the Company- NALCO and the DPS society, as per its terms, NALCO provided land for establishment of the schools, it bore the entire cost of the building and other infrastructure and all the properties of the schools as per terms of the agreement are the properties of NALCO. The entire revenue deficit of the schools is also borne by the NALCO as per the contract. Children of employees of NALCO are given admission on priority basis to the tune of about 85% of the seats of the schools and the balance 15% is offered to the outsiders.

In respect of the school at Angul, students, who were admitted after 2002, were being charged Rs. 500/- per month. Students admitted prior to

2002 have been paying Rs. 400/- per month. This arrangement was made for students, who are children of outsiders and not the children of NALCO employees. As far as children of NALCO employees are concerned, only Rs. 25/- was charged from them towards monthly fees which was subsidized by the company for the entire institution and the fees collected from the students is a meager amount in comparison with the expenses incurred by the school for imparting education which is of very high standard. A statement of income and expenditure has also been enclosed to the counter affidavit for the period from 1.4.2008 to 13.2.2009 showing a deficit of Rs. 2,66,30,950/- which is stated to have been borne by NALCO in respect of the school at Angul. Similarly, in respect of the school at Damanjodi, outsider students were charged Rs. 500/- per month after 2003-04 which was earlier Rs. 250/- per month and the income and the expenditure statement under Annexure-B/3 shows that there is a deficit of Rs.2,70,57, 504/- which is stated to have been borne by the NALCO.

6. With regard to the allegation of discrimination, Mr. Rath, submitted that same facilities are being provided to the children of the NALCO employees as well as the children of the petitioners and no discrimination can be alleged even though the children of NALCO employees are paying less monthly fees than the outsider students since the entire expenses of the school is being borne by the NALCO.

7. This Court on perusal of the agreements entered into between the NALCO and the DPS society annexed to the counter affidavits finds that both the schools were primarily established to provide quality education to the children of the employees of the Company and, as stated by Mr. Rath, in order to give facility to the outsider students of the locality as a social corporate obligation, the Company allowed 15% of the seats to be filled up by the children of persons who are not employees of the Company. The objectives, therefore, for establishing both the schools were to provide quality education to the children of the employees of the company and in that view of the matter, the children of persons, who are not the employees of the Company and the children of the employees of the Company, who are studying in the said schools cannot be equated so as to allege discrimination. Mr. Rath further submitted that even assuming that the children of the petitioners and the other children, who are children of the employees of the Company, are all students and belong to one class, the differentiation with regard to collection of fees amounts to an intelligible differentia for which it cannot be said that there is violation of Article 14 of the Constitution of India.

8. Learned counsel for the petitioners, in support of his contention that the school authorities have discriminated between the children of the petitioners and the children of the employees of the NALCO being students of same classes in the school, imparted with similar education and are to appear in the same examinations, they cannot be discriminated with regard to collection of fees from them and from the students, who are children of employees of NALCO.

9. It is no-doubt true that the children of the petitioners and the children of the employees of NALCO, all studying in same classes, are subjected to same tests and examinations by the school authorities. But, however, keeping in view the fact that a plea of unlawful discrimination cannot be adjudged unless the petition contains full averment of the grounds on which equality is claimed and the denial of equality is pleaded to be not based on a rational relation to the objects sought to be achieved and discrimination with regard to equal treatment envisaged under Article 14 of the Constitution is to be a conscious discrimination, such allegation of discrimination is to be examined. Article 14 of the Constitution, which forms a part of the basic structure of the Constitution of India, strikes at arbitrariness in State action in ensuring fairness and equality of treatment. It requires that state action or the action of an instrumentality of the State must not be arbitrary but must be based on some rational and relevant principle, which is not discriminatory and such action should not be guided by any extraneous or irrelevant consideration as that would amount to denial of equality. As stated by the Supreme Court in the case of ***Ramana Dayaram Shetty v. The International Air Port Authority of India and others,*** 1979 SC 1628, the principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it characterizes every State action, whether, it being under authority of law or in exercise of executive power without making of law.

10. But, however, it is to be remembered that while Article 14 forbids class legislation, it does not forbid reasonable classification. In order to pass the test of permissible classification, two conditions must be fulfilled, namely, (i) that the classification must be founded of an intelligible differentia which distinguishes persons or things that have been grouped together from others left out of the group; and (ii) that the differentia must have a rational relation to the object sought to be achieved. Such classification may be founded on different bases, namely, geographical or according to objects of occupation of the life. What is necessary is that there must be a nexus between the basis of classification and the objects of the action under

consideration (See ***Budhan Choudhary v. State of Bihar***, AIR 1955 SC 191)

11. It is well founded that Article 14 of the Constitution applies, when there is discrimination among the equals. Un-equals cannot claim equality. In ***Madhu Kishwar and others v. State of Bihar and others***, AIR 1996 SC 1864, it has been held by the apex Court that every discrimination does not necessarily fall within the ambit of Article 14 of the Constitution and become liable to be struck off and every case has to be examined in the peculiar facts and circumstances involved therein otherwise it would create a chaotic situation. The Supreme Court in no uncertain terms, in several cases, interpreting Article 14 of the Constitution, has laid down that the said Article permits reasonable classification on legally valid grounds, where two categories from a class cannot be held to be similarly situate and the issue of discrimination cannot be agitated if they are treated differently.

(Emphasis supplied)

12. Examining the facts of the present case as already stated above, the object to be achieved by the NALCO was to give quality education to the children of its employees for which agreements were executed with Delhi Public School Society and the aforesaid two schools were established. From the facts, it is further revealed that though the children of employees of NALCO pay less fees than the children of the petitioners, such differential amount is made good by NALCO, which also meets all deficit expenses of the schools to run the schools and see that the schools impart quality education to the students. Hence, as contended by Mr. Rath, classifying the students, who are the children of the petitioners and other persons, not being employees of NALCO differently than the students who are children of NALCO employees is an intelligible differentia and it cannot be said that such classification is unreasonable. It is, therefore, seen that on the facts of the present case, no discrimination is found to have been meted out by the impugned action on the part of the school authorities so as to conclude that such action violates Article 14 of the Constitution of India.

13. In the result, the writ petitions deserve no interference and being devoid of merit, stand dismissed.

Writ petitions dismissed.

2012 (I) ILR- CUT- 835

M.M.DAS, J.

W.P.(C) NO.5110 OF 2011 (Dt.27.03.2012)

SUMIT KUMAR BOSE & ORS. .....Petitioners.

.Vrs.

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

ORISSA HINDU RELIGIOUS ENDOWMENTS ACT, 1951 (ACT NO. 9 OF 1951) – S.19-A.

Application U/s.19-A OHRE Act – No existence of a religious institution/temple at the spot as per the report of the Inspector of Endowments – Application rejected – Hence the writ petition.

There is absence of rules with regard to the procedure to be followed for making an application U/s.19-A of the Act and the manner in which the said application to be dealt with.

Held, the impugned order rejecting the application U/s.19-A of the Act is quashed – Till appropriate procedure is prescribed in the Rules for dealing with an application U/s.19-A of the Act and a form for grant of "No objection certificate" as contemplated in the said section is prescribed in the Rules, Section 19-A of the Act shall remain in operative and the Registering Authority cannot insist upon production of a "No objection certificate" from the Commissioner U/s.19-A of the Act – Direction issued to the Registering Authority to register the documents if already presented by the petitioners or to be presented for transfer of the land in question or any portion there of without insisting upon a "No objection certificate" U/s.19-A of the Act.

(Para 23,23,25)

Case laws Referred to:-

1.AIR 1981 SC 798 : (Radhakanta Deb & Anr. -V-The Commissioner of Hindu Religious Endowments, Orissa)

2.(1952) Appeal Case 189 : (Magor & St. Mellons R.D.C. -V- New Port Corpn)

3.(1888) 13 Appeal Cases 595, 602 : (Lord Halsbury in Mersey Docks-V-Henderson)

For Petitioner - M/s. S.K.Choudhury, S.R.Kanungo, P.S.Acharya & M.R. Nayak.

For Opp.Parties - M/s. Dr. A.K.Rath, P.K.Mohanty, A.K.Mishra (for O.P.2)

M. M. DAS J. This writ application has been filed seeking quashing of the order vide Annexure-5, by which the Commissioner of Hindu Religious Endowments rejected the application filed by the petitioners under section 19-A of the Orissa Hindu Religious Endowments Act, 1951 (hereinafter referred to as 'the Act').

The petitioners claim to be the owners in possession of Ac. 0.919 dec of homestead land appertaining to Hal Plot No.2049 under Hal Khata No.1203/305 situated in Mouza - Unit No.13, Chandinichowk, Cuttack Town, which has been recorded in the name of the deity Sri Sri Gopal Thakur in the Record of Rights. It is further averred in the writ petition that originally the land was recorded in the name of the predecessor-in-interest of the petitioners in the Sabik Settlement Record and after their death the petitioners and others being their successors have partitioned their ancestral properties amongst them. The case land has been allotted to the share of the petitioners, who are in peaceful possession over the same. In the Hal Settlement Record, it has been recorded in the name of the deity nominally, which is their property of the family deity. On account of legal necessity and in order to dismantle their dilapidated residential house and raise a new construction as they required funds, they decided to transfer the case land. On fixing a purchaser, they approached the Office of the Sub-Registrar and they were informed that they are required to produce "No Objection Certificate" to be granted by the Commissioner of Endowments, Orissa in accordance with section 19-A of the Act. Accordingly, they made an application before the Commissioner, which was registered as O.A. Case No.152 of 2008. Thereafter, the Commissioner caused an inquiry/inspection through the Inspector of Endowments, Cuttack as regards the status of the land and the Inspector accordingly conducted the said inquiry and submitted a report to the Commissioner of Endowments stating therein that no deity by the name of Sri Gopal Thakur exists in the locality in Chandinichowk. The report has been annexed as Annexure-4 to the writ petition.]

2. The petitioners have alleged that in spite of such report the Commissioner of Endowments rejected the application made by them for grant of "No Objection Certificate" under section 19-A of the Act. Being aggrieved, they have approached this Court in the present writ petition.

3. Mr. Choudhury, learned counsel for the petitioners submitted that this Court has already decided in the order passed in W.P.(C) No.16978 of 2008

that when there is no deity, a "No Objection Certificate" under section 19-A of the Act could not be insisted for transferring the land. A copy of the said order has been produced before this Court. On perusal of the said order passed in W.P.(C) No.16978 of 2008 (**Smt. Jhari Dei Vrs. Commissioner of Endowments**), it is seen that the learned Single Judge of this Court after taking note of the provisions under section 19-A of the Act concluded on the facts of the said case that as per the report of the Revenue Inspector, there was no deity in the concerned village and on that basis came to the conclusion that no deity was installed. So there is no question of "ceased to exist" of any religious institution and when there was no deity at all, the provision under section 19-A of the Act could not be applicable to the facts of the said case and, therefore, no permission is necessary under the said section for sale of the land involved in the said writ application and registration thereof.

4. On perusal of the aforesaid order relied upon by Mr. Choudhury, I find that the said order was passed in the facts of the said case where the Court came to the conclusion that no deity was installed at all. This Court is of the view that the said order was rendered on the peculiar facts of the said case, where this Court concluded that no deity was installed at all. In the present case, however, the report of the Inspector of Endowments does not indicate that no such deity in the name of Sri Gopal Thakur was ever installed in the locality. But the Inspector of Endowments has reported as follows:

> "The Khasmahal Lease deed has been granted in favour of Sri Gopal Thakur be swagrugh a marfat Salil Kumar Bose, Sumit Kumar Bose and Miss Subhra Bose (the present petitioners). Subsequently, the Khasmahal lands have been recorded in the name of the deity Sri Gopal Thakur Bije swagruha with the petitioners as marfatdars with patadar satwa paying rent to the Government after going through the papers. I on the spot found the residential house of the petitioners in a dilapidated condition and in fact nobody is residing in the house at present.
>
> I examined few inhabitants of the locality and found that no deity by the name of Sri Gopal Thakur in the locality, i.e., in Chandinichowk near Bandha Baseli. That it would be clear from the statements of the inhabitants that at present no deity by the name of Sri Gopal Thakur exists in the locality in Chandinchowk.
>
> I here with enclose the statements of Sri Duruyodhan Behera, Sri Gati Krushan Maharan and Damodar Behera."

6. Hence, this Court is of the view that the said order passed in the case of Smt. Jhari Dei (supra) has no application to the facts of the present case.

5. Mr. Choudhury, learned counsel for the petitioners further contended that the deity being a private deity, the Act, itself has no application to the properties of the said deity, even if, it is assumed that the deity existed and the deity's name has been recorded in the settlement record. Hence, he contended that section 19-A of the Act could not be made applicable to the case land.

6. Dr. A.K. Rath, learned counsel for the Commissioner of Endowments, on the contrary, submitted that since the deity, in question, has not been declared as a private deity in a proceeding under section 41 of the Act, presumption always arises that the deity is a public deity. He further, placing reliance on section 8-B (2) of the Act contended that where any person disputes the power of the Commissioner to take action under any of the provisions of the Act in respect of any institution on the ground that the institution is not a religious institution within the meaning of the Act, he is required to raise a dispute as provided under section 41 of the Act. He, therefore, urged that the Commissioner in the impugned order has taken a holistic view of the matter and rightly rejected the application made by the petitioners, which is legal and valid and, therefore, the said order is immuned from being interfered with by this Court under Articvle-226 of the Constitution.

7. After hearing the learned counsel for the parties, this Court feels it appropriate that in order to examine the applicability of section 19-A of the Act for transfer of the land in question by a registered document, it would be apt to trace out the history of law relating to Hindu Religious Endowments and also gather the intention of the Legislature in introducing section 19-A into the Act by way of amendment in 1989 under the Orissa Hindu Religious Endowments (Amendment) Act (Act, 22 of 1989), which came into operation with effect from 15th November, 1989. The first legislation in India with regard to Religious and Charitable Trust was the Bengal Regulations of 1810, which was followed by the Madras and Bombay Regulation of 1817 and 1827 respectively. The statutes having been found inadequate for meeting the fast increasing problems of religious institutions, the Madras Hindu Religious and Charitable Endowments Act, 1927 was legislated as a comprehensive local legislation. The Orissa Hindu Religious Endowments Act, 1939 followed the Madras legislation, which operated with effect from 4th day of November, 1939. For assuming more effective control over the religious institutions, the State of Madras consolidated and amended its Act

into the Madras Hindu Religious and Charitable Endowments Act, 1951. In the same manner, the State of Orissa also consolidated the 1939 Act. But as certain provisions of Madras Act and sections 38 and 39 of the Orissa Act were declared ultra vires the Constitution of India, both Acts needed further amendments. Consequently the Orissa Hindu Religious Endowments Act, 1951 was brought into force with its amending Act in 1954 on the 1st day of January, 1955. Till date, though there are many other pieces of such State legislations in other States, which are in force, there is no requirement to refer to such legislations for deciding the present lis. Apart from the legislative enactment, there is huge contribution on the part of the Judiciary by pronouncing various judgments by different High Courts and the Hon'ble Supreme Court, on management and control over of Religious and Charitable Endowments. The Orissa Act, in section 1(2), provides that the Act shall have the application to the whole of the State and shall apply to all Hindu Public Religious Institutions and Endowments. The scheme of the Act itself shows that it intends to regulate not all religious institutions, but religious institutions impressed with the character of public trust. The existence of a public trust is the *sine-qua-non* for its applicability in respect of Temples and Maths. If the basic condition is missing, the Act is not applicable. To attract the provisions of the Act, benefits of the Endowments must be confined exclusively to Hindus. The prefix "Hindu" indicates exclusiveness.

8. A bare reading of the definition of "Religious Endowments" or "Endowment' in section 3(XII) clearly shows that all properties belonging to or given or endowed for the support of a Math or a Temple or given or endowed for the performance of any service or charity connected with such Math or Temple or of any other religious charity including the institution concerned and the premises thereof and also all properties used for the purposes or benefit of the institution including the properties acquired from the income of the endowed property will come under the definition of such 'Religious Endowment' or 'Endowment' except the exception provided under the proviso to the said definition.

It is, therefore, clear that from the scheme of the Act, as already stated, the Act has application only to Public Religious Endowments including the Temples and Maths.

9. The Act provides 'control' with regard to dealing with properties of such Religious Endowments including the institution, under section 19 thereof.

10. From the aforesaid provision of the Act, it is clear that any form of transfer of immovable property belonging to a Religious Trust is barred, except, a lease for a term less than five years and such transfer can be made only if sanctioned. Any transfer made without a sanction granted under section 19 shall be an invalid and inoperative transfer. While such a provision as section 19 is in existence in the Act, the Legislature in its wisdom felt necessary to introduce a further provision with regard to restriction on transfer of immovable property belonging to or given or endowed for the purpose of any public religious institution by amending the Act and introducing section 19-A into the Act under the amending Act, 1989. The statement of objects and reasons for brining the amendments into the Act by the Legislature is as follows:

"STATEMENT OF OBJECTS AND REASONS

In course of implementation of the O.H.R.E. Act, 1951, certain difficulties and deficiencies have come to the notice of Government. In order to remove them and provide for more effective administration of the endowments, amendments to the following effect are felt necessary.

1. For preventing renewal of the lease of debottar lands beyond a term of five years.

2. Before registration of documents relating to alienation of any property of a public religious institutions permission from the Commissioner of Hindu Religious Endowments, Orissa is required for the purpose of preventing unauthorized alienation of properties of such institution.

3. To put restriction on the power of borrowing and lending of the Trustees of institutions by subjecting it to the prior sanction of the Commissioner of Hindu Religious Endowments.

4. To make penal provisions in section 70 applicable to the cases of failure of Trustee or Executive Officer to handover charge of the religious institution along with records, accounts and properties to a succeeding Trustee.

The prior concurrence of the Government of India has been obtained for introduction of the Bill in the State Legislature

The Bill seek to achieve the above objectives."

(emphasis supplied)

The new section 19-A is as follows:

> "[19-A. Regulation of registration of documents – Notwithstanding anything contained in any other law for the time being in force, where any document required to be registered under Section 17 of the Registration Act, 16 of 1908, purports to evidence transfer, by exchange, sale, mortgage or by lease for a term exceeding five years, of any immovable property belonging to or given or endowed for the purpose of any public religious institution, no Registering Officer, appointed under that Act, shall register any such document unless the transfer or produces before such Registering Officer, the sanction order passed by the Commissioner under Section 19, or, as the case may be, no objection certificate in the prescribed form granted by the Commissioner or any Officer authorized by him in that behalf:
>
> Provided that a no objection certificate granted under this sub-section shall not be a bar to a dispute or abate any dispute, if pending under section 41 :
>
> Provided further that a no objection certificate shall be deemed to have been granted, if the Registering Officer is satisfied that the transfer or having applied for grant of no objection certificate to the Commissioner or the authorized officer, as the case may be, has not received the same within three months from the date of the application under section 19 is moved before the Commissioner and that the application has not been rejected before expiry of that period." ***(emphasis supplied)***

11. From the statement of objects and reasons as well as the aforesaid new section introduced by way of amendment to the Act, it is clear that the said section imposes restriction on the Registering Officer on registering a document when such document requires to be registered under the Registration Act, evidencing transfer of immovable property by exchange/sale/mortgage or by lease for a term exceeding five years, belonging to or endowed for the purpose of any public religious institution if a sanction under section 19 or a "No Objection Certificate" in the prescribed form granted by the Commissioner or any Authorized Officer is not produced. The rules under the Act, however, have not been amended providing the prescribed format for "No Objection Certificate" as per section 19-A, which makes the said section redundant as a transferee of immovable property of the nature mentioned in the said section cannot produce a "No

Objection Certificate" in the prescribed form since no such prescribed form has been provided in the rules under the Act. **(emphasis supplied)**

12. It is, therefore, inevitable that till the rules are amended and a form is prescribed for grant of "No Objection Certificate" under section 19-A, the said section cannot be operated. In addition to the above, it is clear from the aforesaid section 19-A that such "No Objection Certificate" is required when transfer is proposed to be made by a deed compulsorily registerable in relation to any property belonging to a public religious institution. Though specific rules have been made under the Orissa Hindu Religious Endowments Rules, 1959 with regard to the procedure for obtaining sanction under section 19, there is absence of rules with regard to the procedure to be followed for making an application for grant of "No Objection Certificate" under section 19-A of the Act and the manner in which application is to be dealt with. As such in present form of Section 19-A, no uniform procedure can be followed for either making an application for grant of "No Objection Certificate" or for disposal of the same under Section 19 – A of the Act.

13. Without any procedure prescribed under the Rules with regard to disposal of an application made under section 19-A of the Act for grant of no objection certificate, in the event an application is made to the Commissioner for grant of such "No Objection Certificate" in the form of a petition, the Commissioner is bound to be prima facie satisfied that the property sought to be transferred on the basis of "No Objection Certificate" to be granted does not belong to a public religious institution or has not been given or endowed for the purpose of a public religious institution. It is only then the Commissioner is empowered to grant a 'No Objection Certificate'. As an illustration, it can be stated that a religious institution if has already been controlled and managed as per the provision of the Act by constitution of a Trust Board either hereditary or nonhereditary or as per the scheme framed or constituted, as an interim major, during pendency of a proceeding under the Act, property of such institution, if sought to be transferred, mandates a sanction under section 19 of the Act, for which specific procedure has been provided in the Rules. In the event, no such sanction has been obtained by such an institution, the Commissioner is bound to reject the prayer for grant of "No Objection Certificate" under section 19-A. However, if a religious institution is neither indexed nor is being managed by a Trust Board as stated above, nor has been declared to be a public religious endowment, it would be incumbent upon the Commissioner to be prima facie satisfied as to whether such an institution is a public religious institution or a private institution. For being prima facie satisfied, it is open

for the Commissioner to cause an inquiry. The variety of factors, which may have to be considered for coming into conclusion as to whether an endowment is a private or of a public nature was considered by the Supreme Court in the case of ***Radhakanta Deb and Another Vrs. The Commissioner of Hindu Religious Endowments, Orissa***, A.I.R. 1981 SC 798. The Supreme Court laid down that there can be religious trust of a private character under the Hindu Law which is not possible in English law. It is well settled that under the Hindu law, it is not only permissible but also very common to have private endowments which though are meant for charitable purposes, yet the dominant intention of the founder is to install a family deity in the temple and worship the same in order to effectuate the spiritual benefit to the family of the founder and his descendants and to perpetuate the memory of the founder. In such cases, the property does not vest in God but in the beneficiaries who have installed the deity. In other words, the beneficiaries in a public trust are the general public or a section of the same and not a determinate body of individuals as a result of which the remedies for enforcement of charitable trust are some-what different from those which can be availed of by the beneficiaries in a private trust. The members of the public may not be debarred from entering the temple and worshipping the deity but their entry into the temple is not as of right. This is one of the cardinal tests of a private endowment. The question as to whether the religious endowment is of a private nature or of a public nature has to be decided with reference to the facts proved in each case and it is difficult to lay down any test or tests which may be of universal application. The Supreme Court further provided certain tests, which were held to be sufficient guidelines to determine on the facts of each case whether an endowment is of a private or of a public nature. Such guidelines prescribed by the Supreme Court are as follows:

(1) Where the origin of the endowment cannot be ascertained, the question whether the user of the temple by members of the public is as of right;

(2) The fact that the control and management vests either in a large body of person or in the members of the public and the founder does not retain any control over the management. Allied to this may be a circumstance where the evidence shows that there is provision for a scheme to be framed by associating the members of the public at large;

(3) Where, however, a document is available to prove the nature and origin of the endowment and the recitals of the document show that the control and management of the temple is retained with the founder or his descendants, and that extensive properties are dedicated for the purpose of

the maintenance of the temple belonging to the founder himself, this will be a conclusive proof to show that the endowment was of a private nature;

(4) Where the evidence shows that the founder of the endowment did not make any stipulation for offerings or contributions to be made by members of the public to the temple, this would be an important intrinsic circumstance to indicate the private nature of the endowment.

14. However, these guidelines are applicable when evidence is led both oral and documentary in a proceeding under section 41 of the Act. But for the purpose of section 19-A , as already stated, the Commissioner is required to be prima facie satisfied that the religious institution is of public character. Without being satisfied in that regard and without assigning any reason, it is not open for the Commissioner to reject the application under section 19-A of the Act.

15 However, in the instant case, this Court is called upon to interpret the new Section – 19 – A introduced into the Act by way of amendment in 1989, in its present form. It is a foregone conclusion and a settled position of law that the Court should not depart from the ordinary canons of construction and give the enacting words some other construction. The Court is bound to take the Act of legislature, as they have made it ; a *casus*, *omissus* can in no case be supplied by the Court of law, for, that would be to make law. In ***Crawford vs. Spooner*** (1846) 6 Moore P.C. 1, 8, 9 the Judicial Committee said "we cannot aid the legislature's defective phrasing of an act, we cannot add and mend and by construction, make up deficiency, which are left there". In 1951, in ***Magor and St. Mellons R.D.C. vs. New Port Corpn.*** (1952) appeal cases 189 it was held by the House of Lords that a Court has no power to fill any gap disclosed in an Act. To do so, would be to usurp the function of the legislature. ***Lord Halsbury in Mersey Docks v. Henderson*** (1888) 13 appeal cases 595, 602 held that "no case can be found to authorize any Court to alter a word so as to produce a *casus omissus*."

16. Thus it is seen that meaning, which 'words' ought to be understood to bear, is not to be ascertained by new process akin to speculation. The primary duty of a Court of law is to find the natural meaning of the words used in the context in which, they occur, that context including any other phrases, which may so like on the sense in which, the maker's of the Act used the words in dispute.

17. However, it is common knowledge that the increasing complexity of modern administration and increasing difficulty of passing complicated

measures through the ordeal of Parliamentary discussion, have laid to an increase in the practice of delegating legislative power to executive authorities. Long ago in 1878, it was stated "legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the legislature to persons in whom it places confidence is no uncommon thing and in many circumstances it may be highly convenience. (See R. v. Burah) (1878) 3 appeal cases 889, 906. It is well founded that "Statutory rules are in themselves of great public advantage because the details can thus be regulated after a Bill passes into an Act with greater care and minuteness and with better adaptation to local or other special circumstances than they can possibly be in the passage of a Bill through Parliament. Besides, they mitigate the inelasticity which would otherwise make an act unworkable and are susceptible of modifications … as circumstances arise." This was written in the official minute in 1893 by Sir Henry Jenkyns. Thus, the method of delegated legislation permits rapid utilization by the operation of new Acts to be translated into practice and affords an opportunity, which is otherwise difficult to ensure, of utilizing/operating a provision of an enactment.

18. Keeping the above guidelines of interpretation of statute, it would be seen that the Act provides in Section – 76, the power of the State Government to make rules, which is delegated power for making statutory provision in the Act capable of being operated. The relevant portions of the said Section – 76 are quoted hereunder :-

> "76. Power to make rules – (1) The State Government may make rules to carry out all or any of the purposes of this Act not inconsistent therewith.
>
> (2) In particular and without prejudice to the generality of the foregoing power, they shall have power to make rules with reference to the following matters.
>
> (a) all matters expressly required or allowed by this Act to be prescribed ;
>
> (b) the effectual exercise of the powers of superintendence vested the State Government ;
>
> (c) the form and manner in which applications and appeals should be submitted to the State Government, [the Commissioner], [the Deputy Commissioner] or an Assistant Commissioner ;

(d) the powers of the State Government, [the Commissioner], [the Deputy Commissioner] or an Assistant Commissioner to hold enquiries, to summon and examine witnesses and to compel the production of documents ;

Xxx xxx xxx

(m) the preservation, maintenance, management and improvement of the properties and buildings of religious institutions ;

Xxx xxx xxx

(v) all matters which under the provisions of this Act are required to be or may be prescribed."

19. In view of the above, this Court interpreting the new Section 19 – A, finds that no rules having been framed by exercise of the power of delegated legislation available under Section - 76 of the Act, prescribing the procedure and guidelines with regard to disposal of an application made by any person for grant of a "No Objection Certificate" under section 19-A of the Act, the Commissioner, if, does not enquire into the matter, to be prima facie satisfied as to whether the religious institution is of public character or private, an anomalous situation will arise. In this regard taking an instance that if the property sought to be transferred, is recorded in the name of a private deity of a family and on an application made for grant of "No Objection Certificate" to transfer such property, if the Commissioner rejects such application due to want of any declaration in a proceeding under section 41 of the Act and compels the applicant to file a dispute under section 41 of the Act, even though the applicant is a bona fide owner of the property, such action will be amounting to compelling the applicant to enter into an unnecessary litigation by filing an application under section 41 of the Act, which inevitably would also consume a lot of time to be finally decided and till such period a bona fide owner of the property will be deprived from exercising its right over immovable property, which he is entitled to do under the provisions of The Transfer of the Property Act , Contract Act and other enactments relating to exercise of right over immovable property by a bona fide owner.

20. Hence, this Court is of the view that in the event the Rules are amended, providing the procedure for disposal of an application under section 19-A of the Act, this aspect is required to be taken care of, to prevent unnecessary litigations from being initiated under section 41 of the Act and such Rules should provide enough guidelines for the

Commissioner to follow for granting or rejecting an application for grant of "No Objection Certificate" under section 19-A of the Act.

21. A complex situation arises when the Commissioner on causing an inquiry finds that there is no existence of religious institution like a Temple and material shows that no such religious institution of public nature existed at the spot. In such a situation, the Commissioner has no other option but to grant a no objection certificate.

22. All the above observations of this Court are subject to the Legislature introducing specific procedure in the Rules, to be followed in case, an application is made under section 19-A of the act.

23. As this Court has already found that the Rules are silent with regard to the procedure to be followed by the Commissioner in case an application is made under section 19-A of the Act, and no specific form is prescribed as mentioned in the section for granting a "No Objection Certificate, this Court is of the affirmative view that until such procedure is laid down in the Rules by way of amendment and the form is prescribed for grant of "No Objection Certificate", the Registering Authority cannot insist upon production of a "No Objection Certificate" from the Commissioner under section 19-A of the Act and, therefore, the said section 19-A cannot be operated in its present form.

24. In view of the above, this Court finds that in the instant case the Commissioner could not have gone into the application made under section 19-A of the Act by the petitioners and as a consequence could not have rejected the said application. It is further found that in the instant case also it is evident that there is no existence of a religious institution/temple at the spot as per the report of the Inspector of Endowments and, therefore, also the Commissioner could not have rejected the application under section 19-A of the Act. Aneuxre-5, which is the order of rejection, is bound to be quashed, which is accordingly done. This Court makes it clear that till appropriate procedure is prescribed in the Rules for dealing with an application under section 19-A of the Act and a form for grant of such "No Objection Certificate" as contemplated in the said section is prescribed in the Rules, Section 19-A of the Act shall remain inoperative. In the event, such procedure is laid down in the Rules by way of amendment and a form for grant of "No Objection Certificate" is prescribed only thereafter the Registering Authority will be entitled to seek for such a "No Objection Certificate" when a deed executed to transfer property recorded in the name of a deity/religious institution is presented for registration, as a precondition for registering the same.

25. Accordingly, the writ application is allowed with a direction to the Registering Authority to register the document if already presented by the petitioners or to be presented by the petitioners for transfer of the land, in question, or any portion thereof, without insisting upon a “No Objection Certificate” under section 19-A of the Act.

Application allowed.

2012 (I) ILR- CUT- 849

INDRAJIT MAHANTY, J.

O.J.C. NO. 3469 OF 1995 (Dt.03.03.2012)

PRAKASH CHANDRA AGRAWAL ……..Petitioner.

.Vrs.

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

ESSENTIAL COMMODITIES ACT, 1955 (ACT NO.10 OF 1955) – S.6-A.

It is mandatory to establish mens rea against the accused for prosecution U/s 6-A of EC Act and to effect confiscation of the materials seized.

In this case petitioner applied for licence on 17.01.1990 – Licence issued to the petitioner on 23.03.1991 which was valid from Dt. 01.04.1990 till 31.03.1991 – On 09.11.1990 eight hundred tins of mustard oil seized at Manguli Chhak, Cuttack while the goods were moving from Sarada Oil Mills, Kasikelen (U.P.) to M/s. Pritam General Store at Bhubaneswar, prior to the goods reach the destination.

The petitioner could not be said to have intentionally contravened the provisions U/s.3 of the Act and there being no mensrea the petitioner is acquitted of the offence U/s 7 of the Act – Held, the impugned order of confiscation is quashed – The Collector, Cuttack is directed to refund all sale proceeds of 800 tins of mustard oil with simple interest @ 9% for annum. (Para 7,8)

Case laws Referred to:-

1.AIR 1966 SC 43 : (Nathulal-V- State Madhya Pradesh)
2.1991(2) Crimes 583 : (State of Assam-V- Monglunia & Co. & Ors.)

For Petitioner - M/s. B.M.Patnaik, S.Mohanty, P.K.Choudhury, S.Patnaik & B.K.Sahoo.
For Opp.Parties - Addl. Govt. Advocate.

I. MAHANTY, J. In the present writ application, the petitioner-Prakash Chandra Agrawal has sought to challenge the order dated 29.03.1993 passed in Misc. Case No.39 of 1990 under Section 6-A of the Essential Commodities Act, 1955 (in short 'E.C. Act'), whereby the Collector, Cuttack (O.P. No.3) has directed confiscation of 800 tins of mustard oil worth

Rs.3,86,660/- which were originally seized by the Inspector of Police, Vigilance (C.B.), Cuttack on 9.11.1990 at 7 P.M. at Manguli Chhak about a distance of about 8 Kms. from the Cuttack city.

Apart from the above, the petitioner also sought to challenge the appellate order dated 27.08.1994 passed in L.S. Appeal No.06 of 1993, whereby the Additional Secretary to the Government of Orissa, Department of Food Supplies and Consumer Welfare Department, Bhubaneswar (O.P. No.2), has confirmed the order of confiscation passed by the Collector, Cuttack under Section 6-A of the E.C. Act.

2. The short facts of the present case are that on 17.01.1990, the petitioner-Prakash Chandra Agrawal applied for a license under the licensing order before the A.D.M., Bhubaneswar, who was the competent authority for grant of license at Bhubaneswar. In fact, the license in favour of the petitioner was granted for the year 1990-91 on 28.03.91 vide Annexure-3. While the petitioner's application for license was pending consideration, the Inspector of Police, Vigilance (C.B.), Cuttack acting purportedly on certain information received about clandestine trade in oil, proceeded to Manguli Chhak near Cuttack and stopped a truck bearing Regd. No.OIC-9549, on which 800 tins of mustard oil weighing about 15 Kgs. each had been dispatched by Sarada Oil Mills, Kasikelen (U.P.) in favour of M/s. Pritam General Store, Bhubaneswar, of which the petitioner happens to be the proprietor. The Inspector of Police, Vigilance (C.B.), Cuttack was not satisfied by the explanation provided by the truck driver and registered a case i.e. G.R. Case No.71 of 1990 under Section 7 of the E.C. Act read with Section 420/128-B I.P.C. apart from recommending confiscation of the seized quantum of mustard oil.

3. On the seizure effected by the Inspector of Police, Vigilance (C.B.), Cuttack, confiscation proceeding was initiated before the Collector, Cuttack and although the Collector, Cuttack took note of the fact that M/s. Pritam General Store had its place of business at Bhubaneswar and had been cited as the consignee and had also been issued with the necessary license by the A.D.M., Bhubaneswar but since the same had only been issued on 28.3.91 for the year 1990-91 and was valid till 31.03.91, he came to hold that at the time of seizure, the petitioner was carrying on business in edible oils without obtaining license for which he had applied for earlier. The Collector, Cuttack also took note of the fact that, based on the prosecution report filed by the Inspector of Police (Vigilance), charge sheet under Section 7 of the E.C. Act read with Section 428/434 I.P.C. was filed against the petitioner and two others before the Court of Special Judge, Cuttack

which was subjudice at that time. Considering the aforesaid facts, direction was issued for effecting confiscation of the seized mustard oil and for deposit of the sale amount in the Treasury within three weeks.

4. Although the petitioner-proprietor of M/s. Pritam General Store filed an appeal before the Additional Secretary to Government of Orissa, Food Supplies and Consumer Welfare Department, Bhubaneswar and the same was registered as L.S. Appeal No.06 of 1993 which came to be dismissed by order dated 27.8.1994 confirming the order of confiscation passed by the Collector, Cuttack.

5. Mr. B.M. Patnaik, learned Sr. Advocate appearing for the petitioner submits that in the facts and circumstances of the present case, since the petitioner had in fact applied for a license on 17.1.1990 and the license had been recommended by all concerned, yet due to delay caused in the office of the A.D.M., Bhubaneswar in the issue of such license though applied on 17.01.1990 and was in fact issued for the year 1990-91 only on 28.03.1990. He further submits that the mustard oil in question had been consigned in favour of M/s. Pritam General Store which was duly registered in the Sales Tax Act and more importantly, the consignment had not reached the godown of the petitioner and was seized on the National Highway at Cuttack, while the consignment was enroute to Bhubaneswar, without there being any basis whatsoever for effecting such seizure.

Apart from the above, learned counsel for the petitioner placed reliance on a judgment of the Hon'ble Supreme Court of India in the case of ***Nathulal v. State of Madhya Pradesh***, AIR 1966 Supreme Court 43 as well as a judgment of a Division Bench of the Gauhati High Court in the case of ***State of Assam v. Monglunia & Co. & Others,*** 1991(2) Crimes 583 and contended that when a dealer has made an application for license and had deposited the requisite license fee and purchased the food grains from time to time, no prosecution under Section 7 of the E.C. Act, 1955 can be made since the accused could not possess the 'mens-rea'. Mr. Patnaik has also filed a memo enclosing thereto certified copy of the judgment dated 30.08.2000 passed in G.R. Case No.71 of 1990, wherein the present petitioner and others had faced trial for offence under Section 7 of the E.C. Act. On perusal of the said judgment, it is clear therefrom that the petitioner had been acquitted under Section 255(1) of Cr.P.C., having been found not guilty of the charge under Section 7 of the E.C. Act. In the said case, the learned Ist Additional Sessions Judge, Cuttack came to a finding that even though the license had been issued in favour of the petitioner's

proprietorship firm only on 28.03.1991, there is nothing on record to show that the accused had no authority to deal with the edible oils during the period from 17.01.1990 to 31.03.1991 since the license in question was for the aforesaid period. It is also submitted that this acquittal has attained the finality and no challenge to the same has been made by the prosecution.

6. Learned counsel appearing for the State on the other hand supports the order impugned herein and stated that there can be no presumption of operating the business on a valid license and the mere application for a license would not clothe the petitioner with any right to deal with the controlled product, namely, mustard oil.

7. Having heard learned counsel for the petitioner as well as the learned counsel for the State and on perusing the judgment referred herein above, the following facts emanate.

Admittedly, the petitioner had applied for a license on 17.01.1990 and was also duly registered his proprietorship firm under the Sales Tax Act. Further, the license, in fact, was issued to the petitioner on 28.03.1991 but the same was valid for the period from 01.04.1990 till 31.03.1991. The said license was exhibited as Ext.B in the criminal trial faced by the petitioner. On 09.11.1990 the Inspector of Police, Vigilance (C.B.), Cuttack purportedly on suspicion stopped a vehicle bearing Regd. No.OIC-9549 and the entire prosecution is based merely on such suspicion. Admittedly, when the goods were moving from Sarada Oil Mills, Kasikelen (U.P.) to M/s. Pritam General Store at Bhubaneswar, at Manguli Chhak, Cuttack on the National Highway, seizure was effected of the said goods prior to the goods reaching the destination. Admittedly, also the prosecution has failed in prosecuting the petitioner and others under Section 7 of the E.C. Act and the petitioner has been acquitted by judgment dated 30.08.2000 in G.R. Case No.71 of 1990 by the learned Ist Additional Sessions Judge, Cuttack.

The judgment of the Hon'ble Supreme Court in the case of ***Nathulal*** (supra) is clear on this point that in the case where an applicant makes an application for a license and rejection thereof is not communicated to him and the accused carried on business on the plea that he was duly authorized to do so, he could not be said to have intentionally contravened the provision of Section 7 of the Act or those of the order made under Section 3 of the Act. Further, in the case of ***State of Assam (***supra), a Division Bench of the Gauhati High Court headed by the then Acting Chief Justice came to a conclusion in paragraph-4 thereof that where an applicant makes an application for license and the same has been recommended and

remains pending consideration, he could not be held that the accused had any mens-rea in this respect. In the aforesaid case, it was an admitted fact that the respondents had no license on the date of seizure but application along with necessary recommendation of the Supply Officer to grant license were pending before the licensing authority. Therefore, for prosecution under Section 6-A and effecting confiscation of the materials seized, it was mandatory that mens-rea against the accused must be established in order to sustain confiscation as valid.

8. In the light of the aforesaid findings and in terms of the judgment of the Hon'ble Supreme Court in the case of ***Nathulal*** (supra) as well as keeping in view of the fact that the petitioner has been acquitted of offence under Section 7 of the E.C. Act, I find no justification in passing of the impugned order of confiscation by the Collector, Cuttack under Annexure-5 dated 29.03.1993 nor any justification in the order passed by the Additional Secretary to the Government of Orissa, Food Supplies and Consumer Welfare Department, Bhubaneswar in dismissing the L.S. Appeal No.06 of 1993 by order dated 27.08.1994 under Annexure-7.

In view of such findings, the writ application is allowed and Annexures-1, 5, & 7 are hereby quashed. The Collector, Cuttack is directed to refund all the sale proceeds of 800 tins of mustard oil and such refund be effected within three months from the date of receipt of the certified copy of this judgment along with simple interest @ 9% per annum.

Writ petition allowed.

2012 (I) ILR- CUT- 854

INDRAJIT MAHANTY, J.

O.J.C. NO. 4808 OF 1997 (With Batch) (Dt.03.03.2012)

M/S. BINAYAK FOOD PRODUCTS & ORS. ……..Petitioners.

.Vrs.

FOOD CORPORATION OF INDIA & ANR. …….Opp.Parties.

SALE OF GOODS ACT, 1930 (ACT NO.3 OF 1930) – S.25.

Sale being completed, additional price for the said transaction can not be demanded or legally payable.

In this case petitioners had deposited the entire amount claimed by F.C.I. towards the price of the wheat and there after delivery orders were issued in their favour and petitioners took possession of the wheat – Thereafter F.C.I. issued letters to the petitioners raising additional demands which is under challenge.

The petitioners in fact lifted the goods i.e. wheat within the stipulated period without any condition – Transaction i.e. the sale and purchase between the petitioners and F.C.I. was completed before raising any additional demand – Held, the F.C.I. had no power to re-determine the price when the sale of wheat to the licensees had become complete. (Para 5,10)

Case law Relied on:-

68(1989) CLT : 523 : (Auro Flour Mills (P) Ltd.-V-Union of India)

Case laws Referred to:-

1.AIR 1984 Patna 331 : (M/s. Bokro Roller Flour Mills Pvt.Ltd. & Ors.-V-The Union of India & Ors.)
2.AIR 1965 SC 1773 : (A. Venkata Subbarao, etc.-V-The State of Andhra Pradesh etc.)

For Petitioners - M/s. A.Mohapatra, R.C.Sahoo, B.Nayak, J.M.Rout, S.R.Singhsamanta & G.C.Pattnaik. (In all writ applications)

For Opp.Parties - M/s. S.K.Nayak (1), A.K.Baral, K.Ray, S.K.Nayak & S.Mohapatra. (In all writ applications).

I. MAHANTY, J. In this batch of writ applications, challenge has been made by the petitioners to the "revised demand" made by the Opp. Party-Food Corporation of India (in short 'F.C.I.') for which all the matters are taken up together on consent of the learned counsel for both the parties and disposed of by this common judgment.

In this batch of writ applications the petitioners have prayed for quashing of the additional demand made by the F.C.I. under Annexure-8 on the plea that they are not liable to pay any differential amount as claimed. The petitioners have pleaded that they purchased wheat from the F.C.I. at the rates fixed by it and such purchase while being unconditional, after purchase of the wheat the petitioners being traders, have in turn resold the same to other traders on the basis of the price paid by them to the F.C.I. with some marginal profit. In terms of the usual practice, the petitioners are required to deposit the value of the wheat with the F.C.I. by way of Bank Draft and the F.C.I. on receipt of the Bank Draft issued delivery orders pursuant to which the petitioners procured such wheat, whereafter the same was resold.

2. It appears from the pleadings of the parties that after the transaction of purchase and sale of wheat between the petitioner and the F.C.I. is completed and dues paid, letters were addressed to the petitioners raising different additional demands, for example a letter dated 25.2.1997 was issued by the F.C.I. under Annexure-8 calling upon the petitioner to pay an amount of Rs.38,315/- towards the "differential cost" of the wheat purchased by them from the F.C.I. during the months of December, 1996 and January, 1997. For reference, a sample demand letter is quoted herein below:

"THE FOOD CORPORATION OF INDIA
DISTRICT OFFICE : SAMBALPUR

No.S&S/2/Open Sale Wheat/Jan'97/96-97 Dated 25.2.1997

To

M/s. Jai Maa Kali Store
Bargarh .

Sub:- Deposit of differential cost of wheat under Open Sale with effect from November 96 to January 97.

Sir,

In inviting a reference to the above cited subject, it is to inform that as per Hqrs. Instruction the price/rate of Wheat under Open Sale will be Rs.549.30 ps. per qtl. due to change of centre from outside State to own State/Region w.e.f. November 96 to January 97. But the price has been calculated @ Rs.341.60 per qtl. for FSL, Balijhori and @ Rs.540.60 for FSI Rourkela.

As such, you are requested to deposit the differential cost of the wheat lifted by you for the month of November 95 to January 97 @ Rs.549.30 per qtl.

The detailed of month-wise qty. of Wheat lifted by you for the month of November 96 to January 97 and the differential cost to be deposited by you is appended below for your early deposit please.

Name of the Month	Quantity lifted	Differential cost to be deposited	Grand Total
01	02	03	04
November' 96	--	--	--
December' 96	2500.00	Rs.20,225.00	Rs.38,315.00
January' 97	1000.00	Rs.8,090.00	--

Yours faithfully

District Manager"

3. Learned counsel for the petitioners asserted that the transaction entered into between the petitioners and the F.C.I. was based upon the policy of the F.C.I. under Annexure-1 to the writ petition and the Clause "B" thereof meant for the price is quoted herein below:

"B. PRICE :

> The prices of wheat and rice for open sale will continue to be the same as communicated vide this office FAX No.J.1.(1)/96/PY/S.111 dated 18th September, 1996 in respect of wheat and Fax No.J/1/US/Rice/96/S.111 dated 1st July, 1996 for rice without any change till further orders. However, in case of open sale of wheat at depots at other centers, wheat price fixed for nearest major centre(s) falling within the State/Region shall apply."

4. Mr. Mohapatra, learned counsel for the petitioners asserted that the petitioners having acted in terms of the stipulations contained in Annexure-1 and have, in fact, deposited and/or paid the price of the wheat lifted in the month of December, 1996 and January, 1997 in "advance", by way of Bank Draft. The F.C.I. only after receipt of the said amount, issued delivery orders in favour of the petitioners and such delivery orders were utilized by the petitioners to take delivery of wheat during the months of December, 1996 and January, 1997. It is further asserted that the petitioners being the traders, after purchase of the wheat, sold the same to different traders by retaining a small margin. It is asserted that since the transaction in question between the petitioners and the F.C.I. being completed transactions, the F.C.I. is not justified in law for raising any demand for additional sum payable on a transaction which was already completed.

In this respect Mr. Mohapatra placed reliance on a Division Bench decision of this Court in the case of ***Auro Flour Mills (P) Ltd. Vrs. Union of India,*** 68 (1989) C.L.T. 523. In the said judgment reliance was placed on a judgment of Patna High Court in the case of ***M/s. Bokro Roller Flour Mills Pvt. Ltd. And Others Vrs. The Union of India and Others,*** AIR 1984 Patna 331, following the observations of the Hon'ble Supreme Court in the case of ***A. Venkata Subbarao, etc. Vrs. The State of Andhra Pradesh***, ***etc.***, AIR 1965 SC 1773 in which the Hon'ble Supreme Court came to hold that, the authorities had no power to re-determine the price when the sale of wheat to the licensees had become complete. A similar view has been taken by the Allahabad High Court in the case of ***The Sheo Rice Mill etc. Vrs. Union of India & Others,*** in Civil Misc. W.P. No.3404 of 1983, disposed of on 07.2.1985 and held that after purchase at the price fixed by the State Government, the roller flour mill becomes owner of the wheat so purchased by it and is free to dispose of its products to anyone.

5. Learned counsel for the petitioners asserted that in the instant cases, release order under Annexure-7 was issued by the F.C.I. directing release of wheat on different dates much prior to the letter of demand dated 25.2.1997 claiming payment of differential amount. He further asserted that the petitioners cannot be saddled with additional demand since the transaction in question was a complete transaction and the petitioners had already paid the price, hence in terms of Section 25 of the Sale of Goods Act, 1930, the Sale being completed, additional price for the said transaction cannot be demanded or legally payable.

6. Mr. Nayak, learned counsel appearing for the F.C.I., on the other hand, submitted that the aforesaid batch of cases fall in two distinct

categories. Whereas the case of M/s. Jai Maa Kali Store in OJC No.8141 of 1997 and Others, the petitioners seek to challenge the "additional demand" raised under Annexure-8 for delivery of wheat made prior thereto. But in so far as the case of M/s. Shankar Galla Bhandar in OJC No.8150 of 1997 is concerned, demand has been made on the petitioner due to the rise in price of the wheat with effect from 04.2.1997 in terms of the Press Note issued by the Central Government, copy of which is Annexure-A to the counter affidavit filed by the F.C.I.

In so far as the case of M/s. Jai Maa Kali Store and Others are concerned, it is claimed by the F.C.I. that due to a bona fide omission or inadvertent mistake, correct price of the wheat applicable at the time of lifting could not be collected. It is further asserted that the present policy decision of the Central Government is well known to the petitioners who are traders for which most of the traders have deposited the differential amount as per Annexure-8 and it is only the petitioners in this batch of writ applications that have attempted to take undue benefit by seeking to challenge the demand. He further asserted that when the release orders were issued in favour of the petitioners, a condition was imposed thereunder that the price of wheat would be the price applicable at the "time of issue/lifting/delivery" and by issuing the release order in favour of the petitioner, the sale was not completed. According to him, the release order may be an agreement to sell, but the 'Sale' as envisaged under the Sale of Goods Act, 1930 was not complete at the time of demand.

7. In so far as the judgment of this Court in the case of ***Auro Flour Mills*** (supra) is concerned, Mr. Nayak submitted that the said judgment has no application to the present case, since in the said case the goods had been delivered/lifted, prior to increase in price or redetermination of the price by the Central Government, which is not the fact in the present case.

8. In so far as the case of M/s. Shankar Galla Bhandar in OJC No.8150 of 1997 is concerned, Mr. Nayak submitted that the demand raised against the petitioner was not prior to 04.2.1997 and therefore, the decision in the case of ***Auro Flour Mills*** (supra) has no application to the present case. In the present case, the petitioner had given an undertaking which is annexed as Annexure-C to the counter affidavit to deposit the differential amount along with other dues at the enhanced rate before 10.2.1997 i.e. the last date for lifting of the stock for January, 1997 and in view of such undertaking, the petitioners had been permitted to lift the wheat in question, but when additional demand was raised basing on the price fixed by the Union of India, instead of depositing the same and complying with their own

undertaking, the petitioners chose to challenge the same by filing OJC No.8150 of 1997.

9. Having heard learned counsel for the respective parties and noting their contentions, I find that in the first batch of cases i.e. M/s. Jai Maa Kali Store & Others, the petitioners had in fact deposited the entire amount claimed by the F.C.I. towards the price of the wheat, only whereafter delivery orders were issued in their favour. On receiving such delivery orders, the petitioners took possession of the wheat and in clear and categorical terms mentioned in the delivery orders, completed delivery of goods within the time stipulated and it was only thereafter additional demand was raised which is under challenge before this Court.

For the sake of argument, even there was need for rise in price, the same ought to have been determined prior to issue of the delivery orders in favour of the petitioners. The delivery/release orders do not contain any clause to the effect that the amount collected subject to revision for the reasons whatsoever. But on the other hand, after the release order was issued in favour of the petitioners, the petitioners were also delivered with the goods in question. In terms of Section 19 of the Sale of Goods Act, 1930 where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. In sub-section (3) thereof it is stipulated that unless a different intention appears, the rules contained in Sections 20 to 24 are rule for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

On a conjoint reading of Sections 20 and 24 of the Act and in particular, sub-section (2) of Section 23 wherein it is stipulated that, where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

10. In the case at hand on perusal of the release orders and in particular, Clause-3 thereof, it appears that the F.C.I. not only directed the petitioners to lift the quantity of wheat mentioned in the release order, but also stipulated the period within which delivery must be completed failing which the F.C.I. would collect storage charges from the petitioners. It is further admitted case between the parties that the petitioners, in fact, lifted the goods i.e. wheat within the stipulated period without any condition. Therefore, there cannot be any doubt that the transaction i.e. the sale and

purchase between the petitioners and F.C.I. was completed before raising any additional demand and hence, there is no doubt that the judgment of this Court in the case of ***Auro Flour Mills*** (supra) clearly applies to the facts situation of M/s. Jai Maa Kali Store and Others.

11. In this respect it is relevant to refer to Section 64A of the Sale of Goods Act, 1930. In terms of the aforesaid provision, only certain specified claims resulting increase or decrease of taxes are permitted to be added. In other words, it is only those taxes with increase or decrease can be added which are permissible under Section 64A of the Act. Therefore, it appears that after the transaction is completed, the F.C.I. had no right to claim differential dues under Annexure-8 and accordingly, in respect of these batch of writ applications, Annexure-8 is quashed.

12. In so far as OJC No.8150 of 1997 is concerned, this case is distinct from the other batch of cases since the demand in this case is based on increase of price of the wheat with effect from 04.2.1997 and further that delivery was effected in favour of the petitioner only on the petitioner giving an undertaking to deposit the differential amount and other dues due to increase in rate.

In view of the observations made herein above, O.J.C. Nos.4808, 4809, 8141, 8148 and 8151 of 1997 are allowed and impugned demands raised are quashed and O.J.C. No.8150 of 1997 is dismissed.

Writ petitions allowed
except OJC No. 8150 of 1997.

2012 (I) ILR- CUT- 861

SANJU PANDA, J.

OJC. NOS. 6101 & 6097 OF 2000 (Dt.07.03.2012)

BANAMALI MALLICK ……..Petitioner

.*Vrs.*

SUB-COLLECTOR,
KEONJHAR & ORS. … ….Opp.Parties

CONSTITUTION OF INDIA, 1950 – ART.341, 342.
r/w Section 23 of the OLR Act, 1960.

A person who is recognized as a member of Schedule Caste or Schedule Tribe in his original state will be entitled to all the benefits under the constitution in that state alone but not in other states/parts of the Country wherever he migrates.

Since the petitioner belongs to Schedule Caste of the State of Bihar as per presidential notification, he is not entitled to become a Schedule Caste so far as the State of Orissa is concerned – Held, there is no error apparent on the face of the impugned orders passed by O.P.1 & 2 under the provisions of the OLR Act 1960. (Para 13,14)

Case laws Referred to:-

1.(1994)5 SCC 244 : (Action Committee on Issue of Caste Certificate to SC & ST In the State of Maharashtra & Anr.-V-Union of India & Anr.)
2.(1990)3 SCC 130 : (Marri Chandra Shekar Rao-V-Dean Seth G.S.Medical College & Ors.)

For Petitioners - M/s. K.K.Mohanty, S.S.Parida & A.K.Rath
For Opp.Parties - M/s. G.K.Mishra, G.N.Mishra, R.K.Sahoo, A.Parida, S.Biswal & S.P.Mohanty.
M/s. D.Mohapatra, S.Mohapatra, K.K.Jena, S.Swain (for O.P.3)

S. PANDA, J. Both the writ petitions having involved common questions were heard together and are being disposed of by this common order.

2. The petitioners, in both the writ petitions, has challenged the impugned orders passed by the Sub-Collector, Keonjhar and Addl. District Magistrate (Revenue), Keonjhar, opposite parties 1 and 2 respectively

cancelling alienation of the land measuring Ac.0.30 decimals of land appertaining to Plot No.717 under Khata No.21 of Mouza-Gambharia in the district of Keonjhar and issuing warrant of restoration for execution of order.

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

The petitioner belongs to village Dhamuria in the district of Singhbhumi of the State of Bihar. The caste of the petitioner is "Tanti" which is declared to be Scheduled Caste, as amended by the Scheduled Castes/Scheduled Tribes List Modification Order, 1956 so far as the State of Bihar is concerned. He migrated from Bihar to Orissa. The petitioner and his wife purchased the aforesaid property from Kathin Patra, Gai Patra and Narottama Patra by virtue of different sale deeds dated 27.3.1989. After purchasing the said property, the petitioner and his wife separately filed two mutation cases before the Tahasildar, Keonjhar for mutation of their names. Both the cases were allowed, ROR was corrected and separate Khata Nos.159/44 and 159/48 respectively were issued in their favour on 9.8.1996. The vendors of the petitioner are Scheduled Caste persons as per the Presidential Notification, 1950 relating to the State of Orissa. Since both the vendors and the purchasers belonged to Scheduled Caste, at the time of purchase, no prior permission was obtained from the competent authorities. Opposite party no.3 along with the petitioner purchased an area of Ac.0.12 decimals of land in Plot No.717/1501 under Khata No.159/11. Opposite party no.3 claiming about encroachment by the petitioner filed OLR Case No.5 of 2000 before the Sub-Collector, Keonjkhar who directed to depute an R.I to conduct an inquiry. Accordingly, the concerned R.I conducted an inquiry in the absence of the petitioner. Said OLR Case No.5 of 2000 was allowed by opposite party no.1 on 10.12.1999. In that case, the petitioner had taken a plea that since both are Scheduled Caste persons, Section 23 of the Orissa Land Reforms Act (in short, "the Act") was not applicable to the said case. However, the said plea of the petitioner was rejected. The petitioner also contended that he is residing in the State of Orissa for the last 20 years. His name has been included in the voter-list and photo identity card has been issued in his favour and he is enjoying all the benefits of Scheduled Caste in the State of Orissa. However, opposite parties 1 and 2 did not accept the plea of the petitioner following G.O No.BE 160141-82-SC and BCD-I dated 22nd February, 1985 passed by the Government of India in the Ministry of Home Affairs and G.O No.36259/R dated 17.9.1996 passed in the Revenue and Excise Department of Government of Orissa to the effect that Scheduled Tribe/Scheduled Caste persons of other States/Union Territories will be deemed to be the Scheduled Tribe/Caste persons of the State/Union Territories of the origin. Any alienation made in their favour without valid permission will be null and void. Being aggrieved by the order passed by

opposite party no.1, the petitioner preferred OLR Appeal Case No.1 of 2000 before opposite party no.2 under Section 58 of the Act. However, the appeal was also dismissed confirming the order of the Sub-Collector on 7.6.2000. The petitioner further contended that the Tahasildar, Keonjhar, who is the competent authority, issued Scheduled Caste Certificate to his daughter Manju Mallick as per the Rules prevailing in the State of Orissa and is getting all the benefits as Scheduled Caste in the State of Orissa. Though he filed all the documents before the authorities, they did not consider those materials.

4. Learned counsel appearing for the petitioner submitted that in the State of Bihar, "Pana" and "Swasi" Castes are called as "Tanti" and those castes are enlisted in the categories of Scheduled Caste as per the amended Notification of 1956 relating to the State of Bihar. Since the petitioner belongs to the caste "Tanti" which is a Scheduled Caste in the State of Bihar and the same caste is also declared as Scheduled Caste in the State of Orissa and he is residing in Orissa, he is entitled to get all the benefits as provided to the category of Scheduled Caste in the State of Orissa and the impugned orders passed by opposite parties 1 and 2 are liable to be set aside.

5. Learned counsel appearing for opposite party no.3 contended that the Scheduled Caste and Scheduled Tribe persons who have migrated from one State to another will be deemed to be Scheduled Caste or Scheduled Tribe persons of the State of their origin. However, they will not be treated as Scheduled Caste or Scheduled Tribe in the State to which they have migrated. In support of his contention, he placed reliance on a decision of the apex Court in the case of Action Committee on Issue of Caste Certificate to Scheduled Caste and Scheduled Tribes in the State of Maharashtra and another vrs. Union of India and another, **(1994) 5 SCC 244**. He also relied on G.O. No.B.C.16014/1/82-S.C. and B.C.D.-I dated 22nd February, 1985 issued by the Government of India, Ministry of Home Affairs wherein it is clarified that a Scheduled Caste/ Tribe person, who has migrated from the State of origin to some other State for the purpose of seeking education, employment, etc., will be deemed to be a Scheduled Caste/Tribe of the State of his origin and will be entitled to derive benefits from the State of origin and not from the State to which he has migrated. He also placed reliance on G.O No.36259 dated 17.8.1996 of the Government of Orissa in the Revenue and Excise Department wherein it is clarified that since the Scheduled Tribe/Scheduled Caste persons of other State/Union Territories will be deemed to be Scheduled Tribe/Caste persons of the State/Union Territories of the Origin, any alienation made in their favour without valid permission will be null and void. Accordingly, he supported the

impugned orders passed by opposite parties 1 and 2 and submitted that the writ petition is liable to be dismissed being devoid of merit.

6. From the facts narrated above and the submissions made by the learned counsel for the parties, it is to be decided as to whether the petitioner, who originally belongs to the State of Bihar and whose caste is declared as a Scheduled Caste as per the Presidential Notification in respect of the State of Bihar, is entitled to get similar benefits as a Scheduled Caste in the State of Orissa ?

7. The factual aspects of the case are not disputed in this writ petition though the petitioner is residing in the State of Orissa for the last 20 years and also Scheduled Caste certificate has been issued in favour of his daughter. The petitioner originally belongs to the State of Bihar. Migrating from Bihar to Orissa, he is now residing in Orissa. He belongs to Scheduled Caste, so far as the State of Bihar is concerned. However, he cannot claim the same benefits in the State of Orissa as are available to a Schedule Caste person in the State of Bihar.

8. The President in the year 1950 in exercise of the powers under Article 341(1) and 342(1) of the Constitution of India notified the Scheduled Castes and Scheduled Tribe respectively in respect of the States after consultation with the Governors of the respective States by public notification. The said Presidential declaration, subject to amendment by the Parliament being conclusive no addition to it or declaration of castes/tribes or sub-castes/parts of groups of tribes or tribal communities is permissible.

9. The apex Court in the State of Maharashtra's case (supra) has held that the declaration by the President by a public notification in relation to a State in consultation with the Governor of that State is conclusive and the Court cannot give such a declaration.

10. The Union of India and the State Governments have prescribed the procedure and have entrusted duty and responsibility to Revenue Officers of gazetted cadre to issue social status certificate, after due verification. It is common knowledge that endeavour of States to fulfill constitutional mandate of upliftment of Scheduled Castes and Scheduled Tribes by providing for reservation of seats in educational institutions and for reservation of posts and appointments, are sought to be denied to them by unscrupulous persons who come forward to obtain the benefits of such reservations and also grab the landed property of Scheduled Castes/Scheduled Tribes. Therefore, the Union of India and the State Governments are issuing G.O giving certain

instructions to their officers so that the Scheduled Caste/Scheduled Tribe persons of the State will get the benefits and they will not cease to get the better and more social free and liberal atmosphere and their status will be uplifted in the State and they will get the full scope to blossom and flourish.

11. The Scheduled Castes and Scheduled Tribes belonging to a particular area of the country must be given protection so long as and to the extent they are entitled to in order to equal with others but those who go to other areas should ensure that they make way for the disadvantaged and disabled of that part of the community who suffer from disabilities in those areas.

12. A Constitution Bench of the apex Court in the case of Marri Chandra Shekar Rao v. Dean Seth G.S. Medical College and others, **(1990) 3 SCC 130**, has held as follows:

> "In other words, Scheduled Castes and Scheduled Tribes say of Andhra Pradesh do require necessary protection as balanced between other communities. But equally the Scheduled Castes and Scheduled Tribes say of Maharashtra in the instant case, do require protection in the State of Maharashtra, which will have to be in balance to other communities. This must be the basic approach to the problem. If one bears this basic in mind, then the determination of the controversy in the instant case does not become difficult."

13. In view of the above decision of the apex Court, the petitioner who belongs to Scheduled Caste of State of Bihar as per the Presidential Notification is not entitled to become a Scheduled Caste so far as the State of Orissa is concerned.

14. Law is well settled that the President, as required under Articles 341 and 342 of the Constitution of India with respect to other State and Union Territory, and where it is a State, after consultation with the Governor of the concerned State, has issued orders notifying various castes and tribes as Scheduled Castes and Scheduled Tribes in relation to that State or Union Territory from time to time. The inter-state area restrictions have been deliberately imposed so that the people belonging to the specific community residing in a specific area, which has been assessed to qualify for the Scheduled Caste or Scheduled Tribe status, only benefit from the facilities provided for them.

15. In view of the above analysis and as there is no error apparent on the face of the impugned orders passed by opposite parties 1 and 2, this Court

is not inclined to interfere with the same in exercise of its jurisdiction under Article 227 of the Constitution of India. Accordingly, both the writ petitions are dismissed.

Writ petitions dismissed.

2012 (I) ILR- CUT- 867

S.K.MISHRA, J.

W.P.(C) NO.16619 OF 2011 (With Batch) (Dt.31.01.2012)

M/S. U.K. SAHOO & ORS. ……Petitioners.

.Vrs.

THE PRESIDING OFFICER, CGIT-CUM-LABOUR COURT, BBSR & ORS. …… Opp.Parties.

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – Ss. 10, 12.

Whether the Industrial Tribunal or Labour Court is required to decide the question regarding validity/fairness of a domestic enquiry as a preliminary issue pursuant to which a punitive order of dismissal passed against a workman – Held, Yes.

In this case management terminated the service of the workman – Workman raised industrial dispute – Government referred the dispute to CGIT – Workman filed statement of claim taking the plea that the domestic inquiry was not proper – Management filed written statement taking an alternative plea to consider the point of domestic enquiry as preliminary issue – Issues framed – One of the issues was whether domestic inquiry conducted by the management was fair or not – Petitioner-management filed a petition before the CGIT to decide the question of domestic inquiry as preliminary issue – Application rejected – Hence the writ petition.

If at all a departmental proceeding is held to be violative of natural justice then there is every possibility that the management may initiate a further proceeding and remove the defect that was pointed out during the proceeding before the labour Court and punish the workman again – That is the reason the question of fairness of a domestic enquiry should be decided as a preliminary issue and if the management has raised an objection and made a prayer on the initial stage to give rebuttal evidence the management should be allowed to lead rebuttal evidence, so that the matter may be disposed of by the Tribunal itself without the same being taken up again by the disciplinary authority or enquiring officer – Held, impugned order passed by the CGIT rejecting the application to decide the question of domestic enquiry as preliminary issue is set aside.

(Para 16,17)

Case laws Relied on:-

1.AIR 1975 SC 1900 : (The Cooper Engineering Ltd.-V-P.P.Mundhe)

2.AIR 1984 SC 289 : (Shambhu Nath Goyal-V- Bank of Baroda)
3.AIR 2001 SC 2090 : (Karnataka State Road Transport Corporation-V- Lakshmidevamma & Anr.)

Case laws Referred to:-

1.AIR 1965 SC 1803 : (Workmen of the Motipur Sugar Factory Pvt. Ltd.-V- The Motipur Sugar Factory Pvt. Ltd.)
2.AIR 1979 SC 1652 : (Shankar Chakravarti-V-Britannia Biscuit Co.Ltd. & Anr.)
3.(1983)4 SCC 293 : (D.P.Maheswari-V- Delhi Administration & Anr.)
4.AIR 1984 SC 1696 : (Rajendra Jha-V- Presiding Officer, Labour Court, Bokaro Steel City & Anr.)
5.2010(I) OLR 927 : (Sankar Prasad-V- Tata Iron & Steel Company Ltd.)

For Petitioner - M/s. Bijoy Dasmohapatra & B.N.Bhol
For Opp.Parties - Sri Saktidhar Das (O.P.No.1)
Miss. Deepali Mohapatra & Sandeep Parida (for O.P.Nos.2 to 6)

S.K.MISHRA, J. A subtle but interesting question arises in this batch of writ petitions. Whether the Industrial Tribunal or Labour Court is required to decide as a preliminary issue, the question regarding the validity/fairness of the domestic enquiry in pursuance of which a punitive dismissal order has been passed against the workman ?

2. Short facts leading to filing of these writ petitions are that the opposite parties were working as Mazdoor of the petitioner. On 22.04.2006, it is alleged that while working in the Dungri Lime Stone Quarry of ACC Cement Ltd., they indulged in disruptive activities which amounted to misconduct. So explanation was called for from them. Not finding explanation to be satisfactory, disciplinary actions were initiated and after due enquiry they are found guilty as alleged. Thereafter, 2nd show-cause notices were issued. Causes shown were found unsatisfactory. Thereafter, as a disciplinary measure, the management imposed punishment for their dismissal from service. On being aggrieved by such order of dismissal, the opposite parties raised industrial dispute which cumulated in reference to the Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar, hereinafter referred to as 'the CGIT' for brevity. Thereafter, the parties appeared before the CGIT and put in their pleadings. On the basis of pleadings, the following issues were casts by the CGIT:

(i) Whether the domestic enquiry conducted by the First Party-Management M/s U.K. Sahu, Contractors of Dungri Lime Stone

(ii) Quarry of ACC Ltd. against Panchanan Pradhan, Sanatan Biswal, Sukadeb Biswal, Arjun Biswal and Binaya Pradhan is fair and proper ?

(II) Whether the action of the Management of M/s. U.K. Sahu, Contractor of Dungri Lime Stone Quarry of M/s. ACC Ltd., to dismiss the workmen viz. S/Sh. Panchanan Pradhan, Sanatan Biswal, Sukadeb Biswal, Arjun Biswal, Binaya Pradhan, with effect from 29.06.2007 for the alleged serious mis-conduct is justified.

(iii) If not, what relief the workmen is entitled to ?

3. The petitioner-management in its written statement took up the plea that since the workmen have challenged the fairness of the domestic enquiry, the question of fairness of domestic enquiry be decided as a preliminary issue, and in case the Tribunal finds any frailty in the enquiry, the petitioner be granted opportunity to establish the charges against the opposite parties-workmen. Such a prayer was made as an alternative plea and not as an admission of illegality in the domestic enquiry.

4. An application was also filed by the petitioner to decide it as a preliminary issue. While the learned Presiding Officer, CGIT, Bhubaneswar disposed of this petition to take up issue no.1 as preliminary issue on 01.06.2011, it held that the proceedings are of summary nature and there is a catena of judgments of the issues in such a proceeding shall be heard and decided at the final stage after taking evidence of the parties at one stage and the same time. Thus, the CGIT rejected the application filed by the management. Such order has been assailed in these writ petitions.

5 In course of hearing the learned counsel for the petitioner submitted the ratio decided by the Supreme Court in various cases, who does not leave any room for doubt that, in such a case, if the workman has raised the question of fairness of the domestic enquiry and the management asserts that domestic enquiry was in accordance with law and was fair at the earliest stage, then the issue relating to the fairness of such domestic enquiry should be decided as a preliminary issue so that in case the Labour Court comes to the conclusion that such enquiry was not fair or the findings recorded by the enquiring officer is incorrect, further evidence may be given by the management to substantiate the charge of misconduct. The learned counsel for the opposite parties, on the other hand, submitted that the ratio decided in various cases leads to the only conclusion is that such an issue cannot be decided as a preliminary issue.

6. In ***Workmen of the Motipur Sugar Factory Pvt. Ltd., vs. The Motipur Sugar Factory Pvt Ltd***., AIR, 1965 SC 1803, the Hon'ble Supreme Court held that it is now well settled by a number of decisions of the Supreme Court that where an employer has failed to make an enquiry before dismissing or discharging a workman it is open to justify before the Tribunal by leading all relevant evidence before it. In such a case, the employer would not have the benefit which he had in cases where domestic enquiries have been held. The entire matter would be open before the Tribunal which will have jurisdiction not only to go into the limited questions open to Tribunal where domestic enquiry has been properly held but also to satisfy itself on the evidence adduced before it by the employer whether the dismissal or discharge was justified. The Hon'ble Supreme Court further observed that if it is held that in cases where the employer dismisses his employee without holding any enquiry, the dismissal must be set aside by the Industrial Tribunal only on that ground, it would inevitably mean that the employer will immediately proceed to hold enquiry and pass an order dismissing him once again. In that case, another industrial dispute would arise and the employer would be entitled to rely upon the enquiry which he had held in meantime. This course would mean delay and on the second occasion it would entitle the employee to claim the benefit of the domestic enquiry. On the other hand, if in such cases, the employer is given an opportunity to justify the impugned dismissal on the merits, the employee has the advantage of having merits of his case considered by the Tribunal for itself and that clearly would be to the benefit of the employee. That is why the Hon'ble Supreme Court has consistently held that if the domestic enquiry is irregular, invalid or improper, the tribunal may give opportunity to the employer to prove his case and in doing so, the Tribunal tries the merits itself. This view is consistent with the approach which the industrial adjudication generally adopts with a view to do justice between the parties without relying too much on technical consideration and with an object of avoiding delay in disposal of industrial disputes.

7. The Hon'ble Supreme Court having taken into consideration the aforesaid ratio and many other decided cases in ***the Cooper Engineering Ltd., vs. P.P. Mundhe,*** AIR, 1975 SC 1900 has held that it is of the opinion that when a case of dismissal or discharge of an employee is referred for industrial adjudication the Labour Court should first decide as a preliminary issue whether the domestic enquiry is violative of principles of natural justice. When there is no domestic enquiry or defective enquiry is admitted by the employer, there will be no difficulty. The Hon'ble Supreme Court, further, held that when the matter is in controversy between the parties that question must be decided as a preliminary issue. On that decision being

pronounced it will be for the management to decide whether it would adduce evidence before the Labour Court. If he chooses not to adduce any evidence, it will not be thereafter permissible to raise the issue. It is further made clear that there will no justification for any party to stall the final adjudication by the Labour Court by questioning its decision with regard to the preliminary issue when the matter, if worthy, can be adjudicated even after the final award.

8. Thus, on the basis of this ratio, the learned counsel for the petitioner contended that the CGIT erred in rejecting the petition filed by the management to try the issue regarding the fairness of domestic enquiry as a preliminary issue is erroneous. The learned counsel for the opposite parties, on the other hand, relied upon the reported cases of ***Shambhu Nath Goyal vs. Bank of Baroda,*** AIR, 1984 SC 289, ***Shankar Chakravarti vs. Britannia Biscuit Co. Ltd. and another,*** AIR 1979 SC 1652 and the constitution Bench decision in ***Karnataka State Road Transport Corporation vs. Smt. Lakshmidevamma and another,*** AIR 2001 SC 2090. The learned counsel for the opposite parties also relied upon the reported cases of ***D. P. Maheswari vs. Delhi Administration and another,*** (1983) 4 SCC 293, ***Sankar Prasad vs. Tata Iron & Steel Company Ltd.,*** 2010 (I) OLR 927 and unreported case of this Court in W.P.(C) No.866 of 2012.

9. The facts involved in Sankar Chakravari case (supra) is somewhat different. In that case, the management argued, on the basis of Cooper Engineering case, that it is the duty and obligation of the Tribunal to call upon the employer by giving it a specific opportunity to lead evidence if it so chooses to do, to substantiate the charges preferred against the workman. It was further argued that failure to give such an opportunity either on request of the employer or *su moto* by the Tribunal, the proceedings would be vitiated. After considering various case laws governing the field, the Hon'ble Supreme Court came to the conclusion that if no pleading is put forth either at the initial stage or during pendency of the proceeding, then there arises no question of advisory role of the Labour Court or Industrial Tribunal, unintended by the Act, to advise the employer, a party must much better off than the workman, to inform about its rights, namely, right to lead additional evidence and then give an opportunity which was never sought. The Hon'ble Supreme Court, further, held that the ratio decided in Cooper Engineering Ltd., (supra) do not laid down any duty on the Industrial Tribunal or the Labour Court while adjudicating upon a penal termination of service of a workman either under Section 10 or under Section 33 of the Act to call upon the employer to adduce additional evidence to substantiate charges of

misconduct by giving specific opportunity after decision on the preliminary issue whether the domestic enquiry was at all held, or if held, was defective, in favour of the workman. Cooper Engineering case merely specified the stage at which such opportunity is to be given, if sought. The Hon'ble Supreme Court, further, held that both the right and obligation of the employer, if it so chooses, to adduce additional evidence to substantiate charge of misconduct. It is for the employer to avail such opportunity by a specific pleading or by specific request. If such an opportunity is sought in course of proceeding, the Industrial Tribunal or the Labour Court, as the case may be, should grant the opportunity to lead additional evidence to substantiate the charges. But if no such opportunity is sought nor there is any pleading to that effect no duty is cast on the Labour Court or the Industrial Tribunal *suo motu* to call upon the employer to adduce additional evidence to substantiate the charges.

10. The ratio decided in the aforesaid case is, therefore, not applicable to this case as it is contended that the CGIT should give a chance of rebuttal evidence to the management. In this case is whether the correctness or otherwise of the domestic enquiry is to be decided as a preliminary issue or nor is the question.

11. In Shambhu Nath Goyal's case (supra) the question is regarding the stage at which the management should seek permission for adducing evidence regarding the fairness of the domestic enquiry. In the aforesaid case, the Hon'ble Supreme Court has not decided whether or not the issue has to be decided as a preliminary issue or not. A. Varadarajan, J, speaking himself and on behalf of O. Chinnappa Reddy, J, in the said case, has come to the conclusion that the application of the management to seek permission of the Labour Court or Industrial Tribunal for availing the right to adduce further evidence to substantiate the charge or charges framed against the workman in the application, which may be filed by the management during pendency of its application made before the Labour Court or Industrial Tribunal seeking its permission under Section 33 of the I.D. Act to take certain action or grant approval of the action taken by it. The management is made aware of the workman's contention regarding the defect in the domestic enquiry by the written statement of defence filed by him in the application filed by the management under Section 33 of the I.D. Act. Then, if the management chooses to exercise its right it must make its mind at the earliest stage and file the application for that purpose without any unreasonable delay, But when the question arises in a reference under Section 10 of the Act after the workman has been punished pursuant to a finding of the guilt recorded against him in the domestic enquiry, there is no

question of management filing any application for permission to lead further evidence in support of the charge or charges framed against the workman, for the defect in domestic enquiry is pointed out by the workman in his written claim statement filed in the Labour Court or Industrial Tribunal after reference has been received and the management has the opportunity to look into that statement made before it files its written statement of defence in the enquiry before the Labour Court or Industrial Tribunal and could make a request for the opportunity in the written statement itself. If it does not choose to do so at that stage, it cannot be allowed to do it at any later stage of the proceeding by filing any application for the purpose which may result in delay, which may lead to wrecking the morale of the workman and compel him to surrender which he cannot otherwise do. In this case, D.A. Desai (J), has also held that the management filing an application after 13 years of the reference is without merit.

12. The learned counsel for the opposite parties contended that the constitution bench of the Supreme Court in Karnataka State Road Transport Corporation (supra) has approved the ratio decided by the Supreme Court in Shambhu Nath Goyal's case, and therefore, the management is precluded from leading any evidence to substantiate the charge in the Labour Court itself. In Karnataka State Road Transport Corporation (supra), Santosh Hedge, J. speaking himself and on behalf of S.P. Bharucha (J), held that the management has to exercise its right of leading fresh evidence at the first opportunity and not at any time thereafter during the proceeding before the Tribunal/Labour Court. This observation has been made following the principle laid down in Sambhu Nath Goyal's case.

Santosh Hedge, J., further, held that keeping in mind the object of providing opportunity to the management to adduce evidence before the Tribunal/Labour Court, the Hon'ble Supreme Court are of the opinion that the decisions taken by the Supreme Court in Shambhu Nath Goyal's case need not be varied, being just and fair. There can be no complaint from the management side for this procedure because this opportunity of leading evidence is being sought by the management only as an alternative plea and not as admission of illegality in its domestic enquiry. At the same time, the Hon'ble Supreme Court, added, it is also of advantage to the workman, in as much as, they will be put to notice of the fact that the management is likely to adduce fresh evidence, they can keep their rebuttal or other evidence ready. This procedure also eliminates to the likely delay in permitting the management to make belated application whereby the proceedings before the Labour Court/Tribunal could get prolonged. Thus, the

Hon'ble Supreme Court held that the procedure laid down in Shambhu Nath Goyal's case is just and fair.

Thus, holding the Supreme Court came to the conclusion that the management-employer did not seek permission to lead evidence until after the Labour Court had held that its domestic enquiry was vitiated. Applying the aforesaid principle to the facts, the Supreme Court was of the opinion that the High Court has rightly dismissed the petition of the applicant. However, Y.K. Sabharwal, J. held that the law laid down in Shambu Nath Goyal's case is not the correct law. Shivraj V. Patil, J. speaking himself and on behalf of V.N. Khare, J. on the aforesaid case, reiterated that in order to avoid unnecessary delay and multiplicity of proceedings, the management has to seek leave of the Court/ Tribunal in the written statement itself to lead additional evidence to support its action in the alternative and without prejudice to its rights and contentions. But this should not be understood as placing fetters on the powers of the Court/Tribunal requiring or directing parties to lead additional evidence including production of document at any stage of proceeding before they are concluded if on facts and circumstances of the case it is deemed just and necessary in the interest of justice. Thus, reading of the aforesaid case, I am of the affirm that the constitution bench in Karnataka State Road Transport Corporation (supra), has not held that the ratio decided by the Supreme Court in Cooper Engineering's case is bad nor the ratio decided in Cooper Engineering's case is over ruled.

13. In ***Rajendra Jha vs. Presiding Officer, Labour Court, Bokaro Steel City and another***, AIR 1984 SC 1696 the employer filed an application under Section 33(2)(b), but it did not ask alternatively in the application itself for an opportunity to lead evidence to justify the order of dismissal. The circumstances of the case and the order of the Labour Court, however, revealed that, in all probability, an oral request for permission to adduce evidence was made by the employer to the Labour Court when the hearing of the application was filed under Section 33(2)(b) was coming to close. The Hon'ble Supreme Court held that it could not be said the Labour Court acted on its own initiative in allowing the employer to lead evidence. In fact, the delinquent-employee has at one stage accepted the order of Labour Court and has acted upon him. It is, further, held that the order of the Labour Court was not being challenged for the first time by the employer, and therefore, the principle of *res judicata* operated. If an erroneous decision on a question of law assuming jurisdiction, which does not possess, it may not be possible to argue that the decision cannot operate as *res judicata* even between the self-same parties. But, in the instant case, the Labour Court had the jurisdiction to decide whether to allow the employers to lead evidence or

not. It may have acted irregularly in exercise of that jurisdiction but that is to be distinguished from the cases in which the Court inherently lacks jurisdiction to entertain a proceeding or to pass a particular order.

In view of the aforesaid discussion, however, this Court comes to the conclusion that the ratio decided in the Rajendra Jha's case is not correct and the decided in Sambhu Nath Goyal's case, which has been approved by the constitution Bench in Karnataka State Road Transport Corporation case (supra) is laying down the correct position of law.

14. The learned counsel for the opposite parties has also relied upon the reported case of ***D. P. Maheswari vs. Delhi Administration and another***, 1983 (4) SCC 293, wherein the appellant was an employee in a private limited company. He was working as Accounts Officer. A dispute was raised in 1969 consequent upon termination of his services, which was referred under Sections 10(1)(c) and 12(5) of the Industrial Disputes Act to the Additional Labour Court for adjudication in 1970. The management raised preliminary objection before the Court that the appellant was not a workman under section 2(s) of the Act. After examining entire evidence adduced by both the parties, the Labour Court concluded that the appellant was mainly discharging duties of clerical nature and was a workman. The management then filed a writ petition under Article 226 and the High Court, which was allowed, and the view taken by the Labour Court on the preliminary issue was set aside allowing special leave to appeal under Article 136 of the Constitution. The Hon'ble Supreme Court has observed that employers have been raising various preliminary objections, invite decisions on those objections in first instance, carry the matter to the High Court under Article 226 of the Constitution and to the Supreme Court under Article 136 of the Constitution and delay a decision of the real dispute for years, sometimes over a decade, Industrial peace, one presumes, hangs in the balance in the meanwhile. The Hon'ble Supreme Court, further, held that there was a time thought procedure to decide preliminary issue first. But the time appears to be right for reversal of that policy. We think it better that Tribunal, particularly those entrusted with the task of adjudicating labour disputes where delay may lead to misery and jeopardize industrial peace should decide all issues in dispute at the same time without trying some of them as preliminary issue. Nor should High Court in exercise of their jurisdiction under Article 226 of the Constitution stop proceedings before a Tribunal so that a preliminary issue may be decided by them. The Hon'ble Supreme Court, further, held that neither the jurisdiction of the High Court under Article 226 of the Constitution nor the jurisdiction under Article 136 of the Supreme Court may be allowed to be exploited by those who can ill afford to wait by dragging the latter from

court to court for adjudication of peripheral issues, avoiding decision on issues more vital to them. Articles 226 and 136 are not meant to be used to break the resistance of workman in this fashion. Tribunals and Courts who are request to decide preliminary questions must therefore ask themselves whether such threshold part adjudication is really necessary and whether it will not lead to other woeful consequences. After all Tribunals like Industrial Tribunals are constituted to decide expeditiously special kinds of dispute and their jurisdiction to so decide is not to be stifled by all manner of preliminary objections and journeying up and down. It is also worthwhile remembering that the nature of jurisdiction under Article 226 is supervisory but the court may exercise all necessary appellate powers to do substantial justice. In exercise of such jurisdiction, neither High Court nor Supreme Court is required to be too astute to interfere with the exercise of jurisdiction by special tribunals at interlocutory stages and on preliminary issues.

15. Thus, the Hon'ble Supreme Court, in the aforesaid case, has held that the Tribunal or the Labour Court should not decide any issue as preliminary issue but it must ask itself whether such threshold part adjudication is really necessary and whether it will not lead to any other woeful consequence.

16. The reported case of D.P. Maheshwari (supra) was taken into consideration by a Bench of this Court in ***Sankar Prasad vs. Tata Iron & Steel Company Ltd.,*** 2010 (I) OLR 927. It was held by this Court that a issue regarding the fairness of domestic enquiry cannot be decided as a preliminary issue.

17. In all fitness of things, it must be remembered in mind that in the case of ***Sankar Prasad*** (supra) the Bench decided the case has not taken into consideration the ratio decided by the Supreme Court in ***Workmen of the Motipur Sugar Factory Pvt. Ltd.,*** (supra) and in ***the Cooper Engineering Ltd., case*** (supra). If at all a departmental proceedings is held to be violative of natural justice then there is every possibility for the management may initiate a further proceeding and remove the defect that was pointed out during the proceeding before the Labour Court and punished the workman again. That is the reason why Supreme Court has developed the procedure of deciding the question fairness of a domestic enquiry as a preliminary issue and if the management has raised an objection and made a prayer on the initial stage to give rebuttal evidence then to allow it to lead rebuttal evidence, so that the matter may be disposed of by the Tribunal itself without being the same again taken up by the disciplinary authority or enquiring officer.

18. Thus, on the analysis resorted to in the fore-going paragraphs, this Court comes to the conclusion that the view taken by the learned Presiding Officer, CGIT, Bhubaneswar is erroneous. Hence, the same requires interference. Accordingly, the orders passed by the CGIT, Bhubaneswar, on 01.06.2011, in each of the writ petitions, i.e. I.D. Case No.10 of 2008 (W.P. (C) No.16619 of 2011), I.D. Case No.12 of 2008 (W.P.(C) No.16620 of 2011), I.D. Case No.8 of 2008 (W.P.(C) No.16621 of 2011) and I.D. Case No.13 of 2008 (W.P. (C) No.16622 of 2008), respectively, are hereby set aside. It is, further, directed that the parties shall appear before the CGIT, Bhubaneswar on 22.02.2012 whereupon the CGIT shall adjourn the case to another date and take up all the cases on the preliminary issue. In case, the CGIT comes to the conclusion that, while deciding the preliminary issue, there is any domestic enquiry or there appears to be some defect in the same, the petitioner shall be given an opportunity to give evidence in that regard on merit. It is needless to say that the opposite parties are at liberty to lead rebuttal evidence on that score also. Accordingly, all the writ petitions are allowed. No costs.

Writ petition allowed.

2012 (I) ILR- CUT- 878

S.K.MISHRA, J.

O.J.C. NOS. 3262/1996 & 12504/1997 (Dt.23.02.2012)

MANAGEMENT OF STATE BANK OF INDIA ……. .Petitioner.

.Vrs.

BHASKAR MOHARANA & ANR. …….Opp.Parties.

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

The term" Workman" as appeared U/s 2(s) of the Act – How to determine – There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a causal employee or for doing duty for fixed hours is not a workman – The source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act – The definition of "workman" also does not make any distinction between full time and part-time employee or a person appointed on contract basis.

In this case the award passed by the Industrial Tribunal does not suffer any jurisdictional error or any error of law apparent on the face of the award – Held, no scope for this Court to interfere with the findings recorded by the Tribunal. (Para 9,11)

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – S.25-f.

Termination of workman – Non-compliance of Section 25-F at the time of termination makes the termination illegal.

(Para 8)

Case laws Referred to:-

1.AIR 2006 SC 1806 : (Secretary, State of Karnataka & Ors.-V-Umadevi & Ors.)
2.AIR 2010 SC 1116 : (Harjinder Singh -V-Punjab State Warehousing Corporation)
3.2011 AIR SCW 3455 : (Devinder Singh-V-Municipal Council, Sanaur).

For Petitioner - M/s. A.K.Mishra, G.S.Panda, N.Mohanty,

Tapan Mishra.
For Opp.Parties – M/s. R.K.Bose & G.Bhol
(for O.P.No.1)
Addl. Govt. Advocate (for O.P.No2)

S.K.MISHRA, J. In O.J.C. No.3262 of 1996, the Management of State Bank of India, Khodasingh A.D.B., Berhampur assailed the correctness of the award dated 29.09.1995 passed by the Industrial Tribunal, Bhubaneswar in I.D. Case No.28 of 1994. In the connected writ application bearing O.J.C. No.12507 of 1997, the workman has prayed for granting of back wages in addition to the award of reinstatement as daily wager. The Industrial Dispute was referred by the Central Government to the Industrial Tribunal, Bhubaneswar to determine; whether the action of the Management of State Bank of India, Khodasingh A.D.B., Berhampur in terminating the services of Bhaskar Moharana, Night Watchman, hereinafter referred to as the 'Workman', for brevity, w.e.f. 09.09.1988 is legal and justified and to what relief the workman is entitled to. Second dispute referred to for adjudication is whether the action of the Management in reducing the wages of the said workman from Rs.1011.80 to Rs.900/- per month is justified and to what relief the workman is entitled to.

2. The parties have put in their statements of claim. The concerned workman claimed that he was working as a Messenger in the said Bank from 15.11.1984 to 31.01.1986 temporarily. He was given continuous employment from 15.1.1986 to 09.09.1988; that his salary has abruptly been reduced by the Management during the period June, 1988 to 09.09.1988 without any rhyme and reason; that he was also doing the duty of the Night Watchman beside the duty of the Messenger; from 10.09.1988 he was refused employment by the Management and since then he is out of employment. Claiming that while refusing the further employment to the workman, the Management did not comply with the provisions of Section 25-F of the Industrial Disputes Act, 1947, hereinafter referred to as the 'Act', for brevity. The workman claimed for reinstatement with full back wages and ancillary service benefit.

3. The Management took the plea that during the period 15.11.1984 to 13.01.1986, the workman was engaged on daily wage basis to assist the Record Keeper, to spray water to khaskhas screen during the summer and performed the duty of the messenger during the leave vacancy of regular messenger and in total, he worked for 101 days intermittently and not continuously as alleged by the petitioner. The further case of the

Management is that the Workman was engaged as temporary Night Watchman from 15.01.1986 to 09.09.1988 on daily wage basis and he absented himself from duty after 09.09.1988. Therefore, another person was engaged in duty to perform the work of Night Watchman. The Management further pleaded that as the workman worked on daily wage basis and on his own accord, he abandoned his job, the Management needed no obligation to follow the legal procedure to prevent for instant of retrenchment. As per the alleged reduction of the wages, the Management contended that it paid consolidated wage of Rs.30/- per day on the basis of mutual agreement, which the workman accepted during the period without any objection. Therefore, the Management pleads that the workman is not entitled to any relief.

4. On such pleadings, learned Presiding Officer, Industrial Tribunal framed several issues and addressed itself to determine whether the workman was refused employment by the first party Management; and if such refusal amounts to termination. It also addressed itself to adjudicate whether the action of the Management in terminating the services of the workman w.e.f. 09.09.1988 is legal and justified; whether the action of the Management in reducing the wages of the workman from Rs.1011.80 paise to Rs.900/- per month from June 1988 is legal and justified and to what relief the workman is entitled. In order to substantiate his case, the workman examined himself as WW 1, and exhibited three documents. The Management, on the other hand, examined two witnesses to substantiate its claim.

5. After taking into consideration the materials available before it, the Industrial Tribunal came to the conclusion that the reduction of wages from Rs.1011.80 to Rs.900/- on mutual consent is not tenable and, as such, it held that such reduction is illegal. The Tribunal also refused to accept the plea of Management that the workman has abandoned the employment on his own accord and there is no termination on their side. Thus holding, the Tribunal directed reinstatement of the workman in service as a daily wager till the Management create a post or alternatively to allow to continue the workman as a casual labourer and receive salary as a messenger as before till a regular vacancy arises in due course.

6. In assailing the award passed by the Industrial Tribunal, learned counsel for the petitioner submitted that in view of the ratio decided by the Constitution Bench of the Supreme Court in ***Secretary, State of Karnataka and others v. Umadevi and others,*** AIR 2006 SC 1806, the services of the workman, who was not engaged against a vacancy and without following the

procedure for selection and appointment, cannot be reinstated in service. Learned counsel appearing for the workman, on the other hand, submitted that the award passed by the Industrial Tribunal does not suffer from any illegality and there is no scope of interference of the same for a court exercising writ jurisdiction.

7. In ***Secretary, State of Karnataka and others v. Umadevi and others*** (*supra*), the Constitution Bench of the Supreme Court has held that the High Court acting under Article 226 of the Constitution of India should not ordinarily issue directions for absorption, regularization or permanent continuance, unless the recruitment itself was made regularly and in terms of the Constitutional scheme. Further, the Supreme Court held that there is an essential distinction between a person engaged on daily wage and they cannot claim to be equal to those who have been employed by regular process of recruitment. There is no fundamental right in those who have been employed on daily wage or temporarily or on contractual basis to claim that they have a right to be absorbed in service. While there is no dispute regarding the ratio decided by the Hon'ble Supreme Court in the aforesaid case, there is a settled distinction between the claim of regularization in service and reinstatement for noncompliance of Section 25-F of the Act. In ***Secretary, State of Karnataka and others v. Umadevi and others*** (*supra*), the ratio decided by the Supreme Court is that they cannot claim to be regularized in service. The said case does not lay down that in case where a person has been retrenched without complying the provisions of Section 25-F of the Act cannot be reinstated in service, even though his initial appointment was not through a proper selection procedure.

8. It is not disputed in this case 5hat the workman remained in continuous employment from 15.01.1986to 09.09.1988.Thus, he had completed 240 days of employment in the year preceding his termination. In this case, the Tribunal has taken into consideration the continuation of the correspondence in Bank's letter No. 42/200 dated 13.05.1986 and No.42/290 dated 17.09.1987. The Branch Manager has stated in that letter that B. Moharana (concerned workman) is still continued to work as Night Watchman of the Branch on daily wage basis and is being paid salary equal to that of a messenger. He further wrote that since the Night Watchman is required to stay in the branch premises over night and is in charge of Bank's guest room, it will be better if a person in regular Bank's service is posted instead of a temporary person. Thereafter, an interview was held and another person was appointed. This itself speaks that the Management did not give employment to the workman after 09.09.1988. It is also not disputed that the Management did not comply with the provisions of Section 25-F of

the Act. In that view of the matter, the order passed by the learned Presiding Officer, Industrial Tribunal is correct.

9. The Supreme Court in ***Harjinder Singh v. Punjab State Warehousing Corporation,*** AIR 2010 SC 1116 has held that while exercising jurisdiction under Articles 226 and 227 of the Constitution in the matters of industrial dispute, the High Court are duty bound to keep in mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in preamble of Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39 (a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of community to subserve the common good and also ensure that the workers get their dues.

The Supreme Court in ***Devinder Singh v. Municipal Council, Sanaur,*** 2011 AIR SCW 3455 has held that the source of employment, the method of recruitment, the terms and conditions of employment/contract of service, the quantum of wages/pay and the mode of payment are not at all relevant for deciding whether or not a person is a workman within the meaning of Section 2(s) of the Act. The definition of workman also does not make any distinction between full-time and part-time employee or a person appointed on contract basis. There is nothing in the plain language of Section 2(s) from which it can be inferred that only a person employed on regular basis or a person employed for doing whole-time job is a workman and the one employed on temporary, part-time or contract basis on fixed wages or as a casual employee or for doing duty for fixed hours is not a workman.

10. In the aforesaid case, the Supreme Court further held that there is limit in the jurisdiction of the High Court in issuing writ of certiorari under Article 226 of the Constitution. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or tribunals: these are cases where orders are passed by inferior courts or tribunals without jurisdiction, or is in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the court or tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however,

no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the court exercising it is not entitled to act as an appellate court. The Supreme Court further held that this limitation necessarily means that findings of fact reached by the inferior court or tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, the Supreme Court further ruled that a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with such cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding.

11. In applying these principles to the case in hand, this Court comes to the conclusion that the award passed by the Industrial Tribunal does not suffer from any jurisdictional error or any error of law apparent on the face of it, nor there is any grave error of fact based on any admissible evidence or own evidence. Such being the case, there is hardly any scope to interfere in the findings recorded by the Tribunal.

12. It was submitted in course of hearing of the writ petitions that the workman is still discharging his duty and is being paid Rs.1011.80 paise which was wage of a workman in the year 1988. This is grossly inadequate and it is also against the provisions of the Minimum Wages Act. The workman has claimed for his back wages in addition to reinstatement in service. The Industrial Tribunal has come to the conclusion that the workman is not entitled to back wages in view of the fact that the workman kept silent and did not agitate the matter for over two years. The Tribunal further noted that any direction for payment of back wages for the period of inaction on the part of the workman would be an avoidable and unnecessary burden on the Bank's exchequer. Such reasoning appears correct to this Court and hence, there is no reason to modify the same. So before parting with the cases, this Court directs that the workman be paid minimum wages as a daily wager as long as he is discharging his duties. With the above observations, both the writ petitions are disposed of.

Writ petitions disposed of.

2012 (I) ILR- CUT- 884

B.K.MISRA, J.

W.P.(C) NO.33734 OF 2011 (Dt.19.03.2012)

SRIMATI BANANI PATTANAIK ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp.Party

COURT FEES ACT, 1870 (ACT NO.7 OF 1870) – S.19- I

Application seeking probate of the "will" – Petitioner being a woman filed petition before the learned District Judge, Cuttack, for exemption of Court fee basing on the Notification i.e. SRO No.575 of 1994 issued by the State Government in exercise of power U/s.35 of the Court fees Act, 1870 – Application dismissed – Hence the writ petition – Held, this Court set aside the impugned order saying that the petitioner is entitled to derive the benefit of the above notification for exemption of Court fees. (Para 10,11,12)

Case law Relied on:-

Vol.92(2001) CLT 622 : (Smt. Sarojini Mishra-V- State of Orissa).

Case law Referred to:-

2003(II) OLR 215 : (Hasina Bibi-V- Amurat Bibi & Ors.)

For Petitioner - M/s. Sanatan Das, M.K.Sahu & S.K.Mohapatra.

For Opp.Party - Addl. Govt. Advocate.

B.K.MISRA,J. The petitioner while presenting an application under Section 276 of the Indian Succession Act seeking probate of the will prayed in Test Case No.10 of 2011 in the court of learned District Judge, Cuttack for exemption from payment of Court fees as duty money contending that she being a woman is exempted from payment of Court fees on the basis of the Government of Orissa Notification Vide S.R.O. No. 575 of 1994 dated 7.6.1994. When such prayer was disallowed by the learned District Judge, Cuttack by the impugned order at Annexure-3, being aggrieved, the petitioner has approached this Court with a prayer to quash the impugned order at Annexure-3 and to exempt her from payment of Court fees.

2. Mr. Sanatan Das, learned counsel appearing for the petitioner while assailing the impugned order at Annexure-3 contended that the learned District Judge, Cuttack should have allowed the prayer of the petitioner for exemption of payment of Court fees. It was also contended that the ratio of the Division Bench decision relied upon by the learned District Judge, Cuttack i.e. in the case of ***Hasina Bibi V. Amurat Bibi and others, 2003 (II) OLR-215*** has no application to the case of the petitioner as that decision relates to the point as to whether a person would be exempted from payment of Court fees while applying for grant of Succession Certificate under Sections 372 and 379 of the Indian Succession Act, pursuant to the Government Notification No. S.R.O. 575 of 1994 dated 7.6.1994.

3. The learned Addl. Government Advocate opposed the contention of the learned counsel for the petitioner and contended that in view of the ratio propounded in ***Hasina Bibi's case*** (supra), the earlier decision of this Court i.e. ***Smt. Sarojini Mishra V. State of Orissa, Vol-92 (2001) CLT-622*** has no application to this case and the Court is bound by the judicial discipline in view of the Division Bench decision i.e.***Hasina Bibi's case*** (supra).

4. Since the controversy in this case centers around an interesting question as to whether a woman is entitled to exemption of Court fees by virtue of the Law Department Notification No. S.R.O. 575 of 1994 dated 7.6.1994 while applying for grant of probate, the learned Members of the Bar including learned counsel for the respective parties were heard .at length.

5. The Law Department Notification No. S.R.O. 575 of 1994 dated 7.6.1994 reads as follows :-

> "SRO No.575/94 – In exercise of the powers conferred by Section 35 of the Court Fees Act, 1870 (VII of 1870) the State Government do hereby remit in the whole of the State of Orissa all fees mentioned in Schedules-I and II to the said Act payable for filing or instituting cases or proceedings in any Court in Orissa by the following categories of persons, namely :
>
> (i) ……
> (ii) …….
> (iii) Women
> (iv) ……..
> (v) ……..

(vi) ……..
(vii) ……..”

6. Article 11 of the Schedule-1 of the Court Fees Act prescribes quantum of fees payable on an application for probate of a will or letters of administration. The quantity of Court fee depends on the amount or value of property in respect of which grant of probate or letters of administration is applied for.

Section 19-I of the Court Fees Act reads as follows:-

> “19-I. Payment of Court fees in respect of probates and letters of administration- No order entitling the petitioner to the grant of probate or letters of administration shall be made upon an application for such grant until the petitioner has filed in the Court a valuation of the property in the form set forth in the third schedule, and the Court is satisfied that the fee mentioned in No.11 of the first schedule has been paid on such valuation”.

7. Section 19-A of the Court Fees Act makes provision for refund of any excess Court fees where too high a Court fee has been paid on the basis of estimated value of the property involved upon an application to be filed by the concerned party.

8. Similarly, Section 19-E of the Court Fees Act speaks about the realization of appropriate Court fee with penalty, where too low a Court fee has been paid on an application for probate of will. The detailed procedures have been laid down in Section 19-H of the Court Fees Act which deals with procedure in respect of an application for probate or letters of administration.

> “As per the said Section, when an application for probate or letters of administration is made to any Court (other than the High Court), it shall cause notice of the application to be given to the Collector who is required to examine if the applicant has underestimated the value of the property in question. On examination, if the Collector finds that the value of the property has been underestimated, he may require the applicant to amend the valuation. If no amendment of the valuation to the satisfaction of the Collector is made, he may move the Court to hold an enquiry into the true value of the property. The Court when so moved shall hold an enquiry and shall record a finding as to the true value at which the property in question should have been estimated.”

9. Admittedly, no such provision is there with regard to grant of Succession Certificate. The Division Bench decision which was relied upon by the learned District Judge, Cuttack in negativing the prayer of the petitioner and also which is being heavily relied upon by the State as trump card relates to determining the question whether the Government Notification No. S.R.O. 575 of 1994 dated 7.6.1994 is applicable to grant of Succession Certificate under Sections 372 and 379 of the Indian Succession Act. With great respect and humility, I am to hold that the ratio of ***Hasina Bibi's case*** (supra) is completely on a different point and is distinguishable with the facts scenario of the case at hand. The said decision does not relate to the question of exemption of Court fees when a woman applies for probate of a will.

10. Admittedly, the petitioner is a lady and had applied for grant of probate of a will and prayed for exemption of Court fees on the basis of the Government Notification No. S.R.O. No. 575 of 1994 dated 7.6.1994. Section 35 of Court Fees Act empowers the Government to reduce or remit all or any of the fees mentioned in the first and second schedules of the Court Fees Act by issuing notification in the Official Gazette. There is no dispute about the Government of Orissa Notification No. S.R.O. No. 575 of 1994 dated 7.6.1994 which was published in the Orissa Gazette (Extra-ordinary) No. 670 dated 10.06.1994.

11. On analyzing the different citations relied upon by the learned counsel for the respective parties and after going through the various provisions of the Court Fees Act and provisions of the Indian Succession Act, the irresistible conclusion would be unlike an application for a Succession Certificate and in absence of any provision like Section 379 of Indian Succession Act, the Court fee required to be paid under Entry No. II of the First Schedule of Orissa Court Fees Act (Amendment Act), 1958 is a Court fee payable for filing an application for probate or grant of letters of administration. Thus, the Notification dated 7.6.1994 vide S.R.O. 575 of 1994 is attracted to the Court Fees payable for filing an application for grant of probate or letters of administration and the decision relied upon by the learned court below i.e. ***Hasina Bibi's case*** has no application with regard to the case for grant of exemption from payment of Court Fees by the deserving person in a Probate Proceeding as per S.R.O. No. 575 of 1994.The decision of this Court in ***Smt. Sarojini Mishra's case*** (supra) is squarely applicable to this case as it is directly on the point.

12. Thus, for the aforesaid reasons, I do not agree with the views xpressed by the learned trial court and hold that the petitioner is entitled to

derive the benefits of the Notification i.e. S.R.O. No. 575 of 1994 issued by the State Government in exercise of its power under Section 35 of the Court Fees Act. The impugned order at Annexure-3 is accordingly set aside. The writ petition is accordingly allowed.

Writ petition allowed.