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

W.P.(C) NO.24213 OF 2011 (Dt.13.12.2012)

SUBASH CHANDRA PANDA .....Petitioner

.Vrs.

STATE OF ODISHA & ORS. .....Opp.Parties

SERVICE LAW – Dismissal – Petitioner was neither allowed to engage an advocate to defend his case nor he was permitted to Cross-examine the witnesses examined by the corporation – Violation of principles of natural justice – Enquiry report submitted by the authority could not have been accepted by the Disciplinary authority but the same was accepted and basing their on second show cause notice was issued – That apart past service record of the petitioner was not taken into consideration while imposing major punishment–Held, punishment imposed is shockingly disproportionate to the charges proved – Impugned order of removal of the petitioner from service is quashed as the same suffers from doctrine of proportionality.

(Para7)

Case laws Referred to:-

1.(1995) 2 SCC 474 : (Surjit Ghosh -V- Chairman & Managing Director, United Commercial Bank & Ors.)
2.(1983)1 SCC 124 : (Board of Trustees of the Port of Bombay -V- Dilip Kumar Raghavendranath Nadkarni & Ors.)
3.(2009)12 SCC 78 : (Union of India & Ors.-V- Gyan Chand Chattar)
4.(2009)7 SCC 301 : (Jagdish Singh -V- Punjab Engineering College & Ors.)
5.AIR 1996 SC 484 : (B.C. Chaturvedi -V- Union of India & Ors.).
6.(2005)7 SCC 338 : (v. Ramana -V- A.P. SRTC & Ors.).
7.AIR 1964 SC 506 : (State of Mysore -V- K. Manche Gowda).
8.AIR 1980 SC 1896 : (Gujarat Steel Tubes Ltd. & Ors.-V- Gujarat Steel Tubes Mazdoor Sabha & Ors.)

For Petitioner - M/s. Jayant Das, Jairaj Behera, S.Das, S.N.Biswal, S.Das.
For Opp.Parties Nos.2 to 5. - M/s. S.Palit, S.N. Nayak, A.K.Mahana, A. Mishra, A.Kejariwal & S.Mishra.

V.GOPALA GOWDA, C.J. This Writ Petition has been filed by the petitioner with a prayer to quash the order of his removal from service dated

30.6.2011 under Annexure-1 passed by the Chairman-cum-Managing Director, The Odisha State Police Housing & Welfare Corporation Ltd., Bhubaneswar and to direct opposite party nos.1 to 3 of the Corporation to pay the salary and other allowances admissible from time to time from the date of suspension till the date of reinstatement of the petitioner with all consequential and financial benefits.

2. The case of the petitioner is that he was initially appointed as a Junior Engineer (Civil) by the Managing Director of Odisha State Police Housing & Welfare Corporation Ltd., Bhubaneswar - opposite party no.2 vide order dtd.23.1.1989 on *ad hoc* basis for a period of 44 days only on a consolidated pay of Rs.900/- with site allowance of Rs.150/- per month. His services were regularized w.e.f. 23.9.1991 and he was posted as an Asst. Project Manager (Civil). Being aggrieved by the action of the opposite party-Corporation in not considering the case of the petitioner for promotion to the post of D.P.M, he had approached this Court in W.P.(C) No.10388 of 2007 challenging promotion of two persons from the post of Asst. Project Manager (Civil) to the post of D.P.M. The main ground of challenge in the said Writ Petition was that the said two persons had only about six months of regular service, whereas the petitioner had more than 2 ½ years of regular service and therefore, their promotion was made arbitrarily and on extraneous consideration. There was some allegation with regard to corruption and misappropriation of funds against opposite party nos.2, 3 and 4 respectively, which was published in various newspapers both in Odia and English. Assuming that the paper publications were made at the instance of the petitioner and the fact that the petitioner had filed a Writ Petition before this Court against the Corporation, a charge sheet was issued on 01.12.2010 by opposite party no.2 against the petitioner. The petitioner had filed his explanation against the charges vide letter dtd.14.12.2010 under Annexure-17 series. Prior to issuance of charge sheet against the petitioner, he was placed under suspension vide order dated 02.9.2010 under Annexure-5 while working as Dy. Manager in Solara in the district of Jajpur and a Departmental Proceeding bearing No.2 of 2010 was initiated against him. During the suspension period the headquarters of the petitioner was fixed at Rayagada, which is about 400 Kms. away from his place of working. An employee is entitled to get subsistence allowance during his suspension period but as the said benefit was not extended to the petitioner during his suspension period, he had approached this Court in W.P.(C) No.15285 of 2010. The said Writ Petition was disposed of by this Court directing the Corporation to fix the headquarters of the petitioner at either Cuttack or Bhubaneswar Head Office of the Corporation and release the subsistence allowance in favour of the petitioner. In the Departmental Proceeding the

Chairman-cum-Managing Director of the Corporation passed an order on 23.4.2011 that it is proposed to remove the petitioner from employment and treat the period of suspension as such in calculation of financial dues and directed the petitioner to show-cause before 10.5.2011. Pursuant to the said letter, the petitioner filed his show cause reply to the proposed punishment on 31.5.2011. The petitioner vide letter dated 07.3.2011 under Annexure-19 requested opposite party no.2 to change the Enquiry Officer as he was not expecting a fair enquiry from the said Enquiry Officer. The opposite party no.2 vide order dated 14.3.2011 under Annexure-10 rejected the request of the petitioner with regard to change of Enquiry Officer. The Enquiry Officer after careful examination of the evidence on record and written statement of witnesses came to the conclusion under Annexure-22 that the charge of gross misconduct, dereliction of duty and disobedience of orders against the petitioner in Departmental Proceeding No.2 of 2010 have been proved and submitted the report to the Disciplinary Authority for necessary action. The Chairman-cum-Managing Director of the Corporation after careful examination of the show cause submitted by the Charged Officer and other connected records, passed an order on 30.6.2011 under Annexure-1 removing the petitioner from service and also held that the period of suspension from 02.9.2010 to 30.6.2011 is to be treated as such. The said order is challenged in this Writ Petition on the ground that the same is highly illegal, arbitrary, prejudged, without having competency to do the same and also in gross violation of the principles of natural justice as well as tainted with *mala fide, legal malice* and also violation of both the Service Rules and the provisions prescribed under Article 311 of the Constitution of India.

3. Mr. Jayant Das, learned Senior Advocate appearing for the petitioner placing reliance on the charge memo dtd.01.12.2010 under Annexure-4 series submitted that it is alleged that while the petitioner was posted at Police Training College, Solara, he was allowed to remain in-charge of construction but he was frequently found absent, did not show any interest in the work, did not go to the site for supervision and also did not listen to the instructions of the superiors, which amounted to negligence in duty, whereas in the statement of imputation there is no mention of any advise / instruction nor is there any letter whatsoever containing any advise / instruction alleged to have not been listened. He further submits that as per letter dated 26.3.2010 under Annexure-7 issued by opposite party no.2 the petitioner was required to report day-to-day progress to opposite party no.3, the Chief Engineer of the Corporation and pursuant to the said letter the petitioner joined and submitted his joining report on 30.3.2010 under Annexure-8 before opposite party no.3. Thereafter as per instruction of opposite party no.2 the petitioner submitted his joining report to opposite

party no.4, the Joint Manager of Cuttack Division of the Corporation on 26.5.2010 under Annexure-9 and reported the progress of work with a request to provide adequate manpower and official instruments i.e. estimates, drawing designs, agreements for smooth progress of the work. The petitioner vide letter dtd.02.7.2010 informed opposite party no.3 that at the instance of opposite party no.4 one B.R.Bhola, A.P.M (Civil) ad hoc bypassing the petitioner, submitted bills to opposite party no.4 which was passed by the said opposite party. Thereafter the petitioner was placed under suspension on 02.9.2010. It is submitted that whenever opposite party nos.2 and 3 visited the spot found the petitioner present. The petitioner has received full pay and allowances from the date he was posted at Solara till the date of suspension which proves that the petitioner has shown interest in his work and took the responsibility of supervising the construction and as such the allegations in support of the charge are deliberately false. The petitioner was not permitted to engage an Advocate to defend his case which is in violation of the principles of natural justice. Mr. Das, further submits that the charges levelled against the petitioner are not so grave and hardly there is any loss of image or any pecuniary loss so also any damage to the name and fame of the Corporation for which the charge cannot be accepted as so grave which may warrant dismissal or removal from service. The punishment so imposed against the petitioner considering the charges are shockingly disproportionate and not in commensuration of the alleged act or omission on the part of the petitioner. Opposite party no.2 who has already predetermined the issue and prejudged it, has specifically observed that 'the conduct of the petitioner is an example of irresponsibility, contemptuous nonchalance of accountability and total negligence in duty besides an extremely high degree of insubordination' which is neither the part of the charge nor the conclusion of the enquiry. It is also evident that opposite party no.2, who had bent upon to punish the petitioner at any cost before framing the charge even has misused his power and imposed the punishment of removal from service against the petitioner. Hence the punishment imposed against the petitioner is not in proportion to the charges alleged to have been proved. That apart the Managing Director of the Corporation is the Disciplinary Authority and Chairman is the appellate authority. Before any amendment of bye-law, the Chairman-cum-Managing Director cannot act as the Disciplinary Authority irrespective of the incumbents carrying the post with a maximum scale of Rs.500/- of corresponding pay during 1981 or the scale above to the same. Further the Managing Director has been declared as the Disciplinary Authority of the employees and the Chairman has been declared as the appellate authority of the employees against the order of the Managing Director. That being the position, after declaring the post as Chairman-cum-Managing Director, the

right to appeal against the order of the Disciplinary Authority has been denied inasmuch as the order of punishment in respect of the petitioner has been passed by the appellate authority, which is *per se* illegal in view of settled position as decided by the Hon'ble Apex Court in the case of **Surjit Ghosh Vs. Chairman & Managing Director, United Commercial Bank and Others** reported in **(1995) 2 SCC 474**. It is further stated that the impugned order of punishment under Annexure-1 is arbitrary, discriminatory, illegal, *mala fide* and disproportionate to the charges levelled against the petitioner and as such the same is liable to be quashed.

3.1 So far as the allegation of the petitioner with regard to denial of right to appeal is concerned, Mr. Das submitted that the Supreme Court in the case of **Surjit Ghosh Vs. Chairman & Managing Director, United Commercial Bank and Others** reported in **(1995) 2 SCC 474** held that when an appeal is provided to the higher authority against the order of the disciplinary authority or of a lower authority and the higher authority passes an order of punishment, the employee concerned is deprived of the remedy of appeal which is a substantive right given to him by the Rules. An employee cannot be deprived of his substantive right.

3.2 As regards the allegation of the petitioner with regard to denial of the prayer for engaging an Advocate as defence counsel, Mr. Das stated that the Supreme Court in the case of **Board of Trustees of the Port of Bombay Vs. Dilip Kumar Raghavendranath Nadkarni and others** reported in **(1983) 1 SCC 124** held that in a Disciplinary Proceeding denial of a request of the delinquent employee, seeking permission to appear and defend himself by a legal practitioner, would vitiate the enquiry on the ground that the delinquent employee had not been afforded a reasonable opportunity to defend himself, thereby violating one of the essential principles of natural justice.

3.3 So far as the allegation that the enquiry report is perverse and prejudged is concerned, the learned counsel for the petitioner submitted that the Supreme Court in the case of **Union of India and Others Vs. Gyan Chand Chattar** reported in **(2009) 12 SCC 78** held that an enquiry is to be conducted against any person giving strict adherence to the statutory provisions and principles of natural justice. The charges should be specific, definite and giving details of the incident which formed the basis of charges. No enquiry can be sustained on vague charges. Enquiry has to be conducted fairly, objectively and not subjectively. Finding should not be perverse or unreasonable, nor the same should be based on conjectures and surmises. There is a d istinction in proof and suspicion. Every act or

omission on the part of the delinquent cannot be a misconduct. The authority must record reasons for arriving at the finding of fact in the context of the statute defining the misconduct.

3.4 So far as the allegation of the petitioner with regard to disproportionate punishment is concerned, it is submitted on behalf of the petitioner that the Supreme Court in the case of **Jagdish Singh Vs. Punjab Engineering College and Others** reported in **(2009) 7 SCC 301** held that the Courts can interfere with the decision of the disciplinary authority only when it is satisfied that the punishment imposed by the disciplinary authority is shockingly disproportionate to the gravity of the charges alleged and proved against a delinquent employee and not otherwise.

It was contended by Mr. Das, learned Senior Advocate that in the case of **B.C.Chaturvedi Vs. Union of India and Others** reported in **AIR 1996 SC 484** the Supreme Court held that the Disciplinary Authority, or on appeals, the appellate authority are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court while exercising the power of judicial review cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

It was further contended by Mr. Das that in the case of **V.Ramana Vs. A.P.SRTC and Others** reported in **(2005) 7 SCC 338** the Supreme Court held that the common thread running through in all these decisions is that the Court should not interfere with the administrator's decision unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court, in the sense that it was in defiance of logic or moral standards. In view of what has been stated in *Wednesbury case* the Court would not go into the correctness of the choice made by the administrator open to him and the Court should not substitute its decision for that of the administrator. The scope of judicial review is limited to the deficiency in decision making process and not the decision. To put it differently unless the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the Court, there is no scope for interference. Further to shorten litigations it may, in exceptional and rare cases, impose appropriate punishment by recording cogent reasons in support thereof. In a

normal course, if the punishment imposed is shockingly disproportionate, it would be appropriate to direct the disciplinary authority or the appellate authority to reconsider the penalty imposed.

4. A counter affidavit has been filed by opposite party nos.2 to 5 denying the allegations levelled in the Writ Petition. Relying on the counter affidavit Mr. Palit, learned counsel appearing for opposite party nos.2 to 5 submits that generally the conduct of the petitioner is extremely subversive of discipline and hence, in contemplation of initiation of Disciplinary Proceedings, he was placed under suspension. He further submits that instead of doing the duty assigned to the petitioner, he was keeping himself engaged in all other activities and was in a habit of sulking and shirking the responsibilities whatever responsibilities had been assigned to him besides using foul and abusive languages against the superiors and colleagues. It is stated that this Court while disposing of W.P.(C) No.15285 of 2010 vide order dated 08.3.2011 did not incline to interfere with the order of suspension of the petitioner. Against the said order the petitioner approached the Supreme Court in S.L.P (Civil) No.13969 of 2011, which was dismissed at the stage of admission. It is further stated that the petitioner was assigned enough work commensurate to his status as a Deputy Manager keeping him in exclusive charge of the new Solara Project and instead of carrying out his responsibility, the petitioner did not visit the work site which is highly negative and unprofessional approach for undertaking work by a public servant and also quite irresponsible raising further frivolous demand regarding drawings, estimates, grant etc. without reporting to the site. It is stated that the order of removal from service passed by opposite party no.2, was purely based on evidence on record, far from being biased and enquiry had been conducted in an extremely fair manner strictly adhering to the principles of natural justice where fullest opportunity was given to the petitioner to present his case and the Enquiry Officer has given clear, cogent, valid and genuine reasons for disallowing the prayer of the petitioner to engage an Advocate of his choice to defend his case in the enquiry proceeding. Relying on several judgments of different Courts including Supreme Court Mr. Palit, learned counsel appearing for opposite party nos.2 to 5 submits that as the order of removal from service passed against the petitioner is proportionate to the charges levelled against him, this Court may not interfere with the same.

5. In the case of **Om Kumar Vs. Union of India** reported in **(2001) 2 SCC 386** the Supreme Court held as follows:

"27. The principle originated in Prussia in the nineteenth century and has since been adopted in Germany, France and other European countries. The European Court of Justice at Luxembourg and the European Court of Human Rights at Strasbourg have applied the principle while judging the validity of administrative action. But even long before that, the Indian Supreme Court has applied the principle of 'proportionality' to legislative action since 1950, as stated in detail below.

28. By 'proportionality', we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority 'maintain a proper balance* between the adverse effects which the legislation or the administrative order may have on the rights, liberties or interests of persons keeping in mind the purpose which they were intended to serve'. The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.

xx xx xx xx xx

37. The development of the principle of 'strict scrutiny' or 'proportionality' in administrative law in England is, however, recent. Administrative action was traditionally being tested on *Wednesbury* grounds. But in the last few years, administrative action affecting the freedom of expression or liberty has been declared invalid in several cases applying the principle of 'strict scrutiny'. In the case of these freedoms, *Wednesbury* principles are no longer applied. The courts in England could not expressly apply proportionality in the absence of the convention but tried to safeguard the rights zealously by treating the said rights as basic to the common law and the courts then applied the strict scrutiny test. In the *Spycatcher case (Attorney General Vs. Guardian Newspapers Ltd. (No.2) (AC at pp.283-284),* Lord Goff stated that there was no inconsistency between the convention and the common law. In *Derbyshire Country Council Vs. Times Newspapers Ltd.* Lord Keith treated freedom of expression as part of common law. Recently, in *R.v.Secy. of State for Home Deptt.,*

ex p Simms the right of a prisoner to grant an interview to a journalist was upheld treating the right as part of the common law. Lord Hobhouse held that the policy of the administrator was disproportionate. The need for a more intense and anxious judicial scrutiny in administrative decisions which engage fundamental human rights was re-emphasized in *R. v. Lord Saville, ex p A (All ER (870, 872) CA).* In all these cases, the English courts applied the 'strict scrutiny' test rather than describe the test as one of 'proportionality'. But in any event, in respect of these rights 'Wednesbury' rule has ceased to apply."

6. In the case of **State of Mysore Vs. K.Manche Gowda** reported in **AIR 1964 SC 506** the Supreme Court held that under Article 311 (2) of the Constitution, a Government Servant must have a reasonable opportunity not only to prove that he is not guilty of the charges leveled against him, but also to establish that the punishment proposed to be imposed is either not called for or excessive. The said opportunity is to be a reasonable opportunity and, therefore, it is necessary that the Government servant must be told of the grounds on which it is proposed to take such action. If the grounds are not given in the notice, it would be well nigh impossible for him to predicate what is operating on the mind of the authority concerned in proposing a particular punishment, he would not be in a position to explain why he does not deserve any punishment at all or that the punishment proposed is excessive. If the proposed punishment is mainly based upon the previous record of the Government servant and that was not disclosed in the notice, it would mean that the main reason for the proposed punishment was withheld from the knowledge of the Government servant. It would be no answer to suggest that every government servant must have had knowledge of the fact that his past record would necessarily be taken into consideration by the Government in inflicting punishment on him, nor would it be an adequate answer to say that he knew as a matter of fact that the earlier punishments were imposed on him or that he knew of his past record. This contention misses the real point, namely, that what the government servant is entitled to is not the knowledge of certain facts but the fact that those facts will be taken into consideration by the Government in inflicting punishment on him. It is not possible for him to know what period of his past record or what acts or omissions of his in a particular period would be considered. If that fact was brought to his notice, he might explain that he had no knowledge of the remarks of his superior officers, that he had adequate explanation to offer for the alleged remarks or that his conduct subsequent to the remarks had been exemplary or at any rate approved by the superior officers. Even if the authority concerned took into consideration only the facts for which he was

punished, it would be open to him to put forward before the said authority many mitigating circumstances or some other explanation why those punishments were given to him or that subsequent to the punishments he had served to the satisfaction of the authorities concerned till the time of the present enquiry. He may have many other explanations. The point is not whether his explanation would be acceptable, but whether he has been given an opportunity to give his explanation. The Court cannot accept the doctrine of 'presumptive knowledge' or that of 'purposeless enquiry', as their acceptance will be subversive of the principle of 'reasonable opportunity'.

7. Not allowing the petitioner to engage an Advocate to defend his case and not permitting the petitioner to cross-examine the three witnesses examined by the Corporation is violative of the principles of natural justice and erroneous in law and hence the enquiry report submitted by the authority could not have been accepted, but the same has been accepted by the Disciplinary Authority and basing thereon second show cause notice was issued. That apart the past service record of the petitioner was not taken into consideration. Therefore, the major punishment imposed on the petitioner is shockingly disproportionate to the charges proved and violative of the principles of natural justice. On this ground the impugned order of removal of the petitioner from service is liable to be quashed.

8. In the case of **Gujarat Steel Tubes Ltd. and others Vs. Gujarat Steel Tubes Mazdoor Sabha and others** reported in **AIR 1980 SC 1896** the Supreme Court at paragtraph-79 held as follows:

> "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."

In view of the aforesaid decision of the Apex Court, even assuming for the sake of argument that the charges levelled against the petitioner have been proved, the punishment of removal from service which has been imposed on the petitioner being a major punishment under the Service Rules, is shockingly disproportionate and the same is required to be suitably substituted by this Court.

9. The contention of the petitioner that having regard to the misconduct proved on the basis of the enquiry report, the punishment of removal from service imposed on the petitioner, which is a major punishment under the Service Regulations, is shockingly disproportionate to the gravity of the charges alleged and proved against the petitioner. This Court therefore, proceeded to examine this aspect only though other legal aspects were raised on behalf of the petitioner to substantiate his case, and considering the decisions of the Apex Court referred to supra and taking into account the facts and circumstances of the case, this Court found that the punishment of removal from service imposed on the petitioner is shockingly disproportionate and the same is contrary to law laid down by the Hon'ble Supreme Court in the cases referred (supra). While exercising power under the Service Regulations to remove the petitioner from service, which is a major punishment, his past records have not been taken into consideration, which is the statutory duty cast upon the Disciplinary Authority and therefore, it is a clear case of *legal malice* as held by the Supreme Court. This Court in exercise of its judicial review power feels that it is a fit case where the punishment of removal from service imposed on the petitioner under Annexure-1 is liable to be quashed as the same suffers from *doctrine of proportionality,* based on perverse enquiry report, without following the procedure and law laid down by the Supreme Court in catena of cases particularly not taking into consideration the past service record and made the petitioner to suffer mental agony from the date of passing of the order of his removal till today as it has not been proved that the petitioner was gainfully employed during the said period. This Court is also of the view that the order of removal of the petitioner from service is disproportionate to his misconduct and contrary to law and as the petitioner remained unemployed from the date of his removal from service, he is entitled to 50 % of his salary from the said date till today. Further the impugned order of removal is also bad in law on the ground that pending disposal of Disciplinary Proceeding the petitioner was kept under suspension and pursuant to the order passed by this Court, the subsistence allowance was paid to the petitioner as provided under Service Rules. After completion of the enquiry, accepting the enquiry report, the punishment of removal from service was imposed on the petitioner treating the period of suspension as such is also a punishment in

additon to the order of removal from service, which amounts to double punishment and not permissible under Service Rules. In this case after accepting the finding of the Enquiry Officer, notice was issued to the petitioner regarding imposition of penalty of removal from service, which is a major punishment under the Service Regulations. The Disciplinary Authority was required to take into consideration the mitigating circumstances while imposing penalty with regard to the gravity of misconduct against the petitioner keeping in view the *doctrine of proportionality*. This aspect of the matter has not been taken into consideration by the Disciplinary Authority. Though the petitioner had given the detail points to examine adequate number of defence witnesses so as to prove his defence, the Enquiry Officer only permitted three official witnesses, who could be gained over with the sole motive of leading the proceeding to prove the guilt against the petitioner, which is not permissible in law. The Enquiry Officer vide order dated 07.3.2011 under Annexure-18 observed that 'the improper behavior of the petitioner during the conduct of the proceeding is kept on record for future reference', which clearly shows that the authorities were vindictive and biased to take action against the petitioner. The Enquiry Officer further vide order dated 25.3.2011 under Annexure-22 observed that the petitioner requested to engage an Advocate to assist him in defending his case in course of enquiry, which was disallowed. The said action of the Enquiry Officer is illegal, arbitrary and violative of principles of natural justice. Not giving an opportunity to the petitioner to examine the persons whose statements are recorded and are taken into consideration for recording a finding against the petitioner is violative of principles of natural justice and on this ground also the enquiry report is liable to be quashed. If the enquiry report is liable to be quashed then the matter is required to be remanded to the Disciplinary Authority for conducting the enquiry *de novo.* But having regard to the nature of charges and the explanation offered by the petitioner wherein it is stated that the Disciplinary Proceeding was initiated as a measure of counter blast and as the punishment imposed on the petitioner is *shockingly disproportionate*, this Court is of the view that the punishment imposed against the petitioner should be modified to that of stoppage of two annual increments with cumulative effect.

10. After hearing learned counsel for the parties, going through the materials available on record and following the principles laid down by the Supreme Court in the cases (supra), this Court, while quashing the impugned order of removal from service passed against the petitioner by opposite party no.2 on 30.6.2011 under Annexure-1 imposes the punishment of stoppage of two annual increments of the petitioner with cumulative effect and directs the said opposite party to r einstate the

petitioner in the post of Dy. Manager, OPHWC, Cuttack and release 50 % of his back salary from 30.6.2011 i.e. the date of order of dismissal from service till today within a period of four weeks from the date of production of a certified copy of this judgment. The Writ Petition is accordingly allowed. Issue Rule.

Writ petition allowed.

2013 (I) ILR - CUT- 762

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

W. P. (C) NO. 20576 OF 2010 (Dt.14.12.2012)

MANUEL @ M. ORAM & ORS. .....Petitioners

.Vrs.

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

A. LAND ACQUISITION – Land acquired by the State Government for establishment of steel plant vide notification Dt.22.2.1954 – Land vested with the State Government – Acquisition challenged – Held, land settled long ago cannot be unsettled at the instance of the petitioners who have approached this Court belatedly.

(Para 24)

B. LAND ACQUISITION – Land acquired for establishment of steel plant at Rourkela – Surplus land – Utilization of surplus land for the purpose other than the purpose mentioned in the notification challenged – Acquisition of land being legal and valid the petitioners cannot question utilization of surplus land which is also for public purpose – Held, sub-lease made by Rourkela steel plant and the State Government in favour of Education Trust is permissible under law.

(Para 24)

C. LAND ACQUISITION – Petitioners claim that they are continuing in possession over 10 acres of land including residential house from the time of their ancestors and no compensation paid to them – Opp.parties dispute their contention saying that the area in question is recorded in the ROR as "Karkhana Zami" so the claim made by the petitioners is not acceptable – Held, petitioners may approach the

appropriate forum seeking relief as prayed for.

(Paras 25,26)

Case law Referred to:-

1.AIR 1977 SC 1456 : (Mangal Oram-V- State of Orissa & Ors.).
2.1995(Supp.II)SCC 225 : (Butu Prasad Kumbhar-V- SAIL & Ors.).
3.(2003)1 SCC 335 : (North India Glass Industry-V- Jaswant Singh & Ors.)
4.AIR 2005 SC 492 : (Government of Andhra Pradesh & Anr. -V- Saheed Akbar)
5.AIR 1977 482 : (Municipal Corporation of Greater Bombay-V- Industrial Development Investment Company)
6.ILR 1972 Cuttack 66 : (Sitaram Agarwalla & Ors.-V- State of Orissa & Anr.)
7.AIR 1977 SC 448 : (Gulam Mustafa -V- State of Maharashtra)

For Petitioner - M/s. Upendra Kumar Samal, C.D.Sahoo, M.R. Mohapatra, S.P. Patra & S. Naik.
For Opp.Parties- Mr. D.Panda, Addl. Govt. Advocate (for O.P.Nos.1 to 3) M/s. B. Routray, S.Jena, S.K.Samal & P.K.Sahoo (for O.P.No.4)
M/s. Lalitendu Mishra & S.Das (for O.P.No.5)

V.GOPALA GOWDA, CJ. The petitioners, who are the villagers of Dahiposh village under steel township of Rourkela Steel Plant Limited (hereinafter referred to as 'the RSP) whose lands were acquired by the State Government under the Revenue Department vide Notification dated 22.2.1954 for establishment of Steel Plant and allied and ancillary industries under the provisions of Orissa Development of Industries, Irrigation, Agriculture, Capital Construction and Resettlement of Displaced persons (Land Acquisition Act, 1948) (in short 'the LA Act, 1948), have filed this writ application seeking for issuance of a writ of certiorari to quash the tripartite agreement dated 29.6.2005 (Annexure-4) and restore the suit lands to the original land owners and the petitioners who are their descendants, urging various facts and contentions.

2. Necessary brief facts are stated for the purpose of appreciating the rival legal contentions urged in this writ application to find out as to whether the petitioners are entitled for the reliefs sought for in this writ application.

3. It is the case of the petitioners that their lands had been acquired by the Government under the LA Act, 1948. As per the policy, the land oustees

are entitled for cultivable waste lands in lieu of acquired cultivable land with the ancillary benefits. It is their case that though some compensation was paid to the petitioners' ancestors, no cultivable waste land in lieu of acquired land was provided to them, the petitioners' ancestors and after them the petitioners are in possession of the land, they are staying in the house constructed by them thereon and cultivating the land by raising double crops from the date of notification till date. It is their further case that the petitioners are tribal persons of the scheduled area and they were not aware of the acquisition and the tripartite agreement executed between the State Government, Rourkela Steel Plant and Padmanav Educational Trust which is impugned in this writ application. Though the Tripartite lease agreement was executed on 1.7.1993, the same had not seen the light of the day as the education trust had not taken any action for eviction of the petitioners from the land in question. The said Trust filed FIR in 2010 by virtue of the said tripartite agreement for taking action for demolition of the house of the petitioners and their eviction from the suit land forcibly. Therefore, the actions of the opposite parties are highly illegal, arbitrary, and unconstitutional and need interference of this Court.

4. The suit land appertains to Hal Khata No.1, Hal Plot Nos.51 (p), 52 (p), 53(p), 62(p) and 64(p) of Unit No.5 in Sector-10 of the Rourkela Steel township measuring an area of Ac. 10.00 decimals. The Notification referred to supra was issued by the State Government in the Revenue Department under the provisions of the LA Act, 1948 for acquisition of the land of the petitioners and other lands for the purpose of establishment of Steel Plant and allied ancillary industries. Their further case is that under Article 244 of the Constitution of India, the provisions of the fifth schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in the State of Orissa which schedule provides the power of the Hon'ble Governor to report to the Hon'ble President regarding administration of scheduled areas and the applicability of any Central and State Act not apply to the scheduled areas. In other words the Hon'ble Governor is the custodian of the rights guaranteed to the scheduled tribe persons residing in scheduled areas in the district of Sundargarh, State of Orissa as per the scheduled area Notification issued by the Government of India, Ministry of Law, Justice and Company Affairs, Legislative Department dated 31.12.1977 republished in the Orissa Gazettee vide Notification dated 10.2.1978 under the Scheduled areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) Order, 1977. In the same Order under the State of Orissa, Sl. No.2 Sundargarh District is included within the scheduled areas under the said Notification. Therefore, the properties of the petitioners are required to be protected by the Hon'ble Governor by enacting Special laws. The Act 18 of 1948 provides for payment

of compensation to the persons from whom land is acquired by the State Government. To help the displaced person, to resettle and rehabilitate themselves, the following assistance has been given and expenditure incurred are to be shared equally between Hindustan Steel Limited and the State Government:

"a) A Plot of land measuring 60' x 40' in the resettlement colonies free of cost for construction of houses by each family.

b) A subsidy to each family ranging from Rs.200/- to Rs.400/- for the construction of new houses.

c) Grant of cultivable waste land in lieu of acquired land free of cost of to a maximum of 33 per cent acres to each recorded tenant, and

d) Land reclamation subsidy of Rs.100/- per acre to each family. This fact has been mentioned in the Orissa District Gazettee file Sundargarh."

5. It is further stated that though the land was acquired from the ancestors of the petitioners and some compensation amount was paid to them but no cultivable waste land in lieu of acquired cultivated land was given to them. Therefore, the ancestors of the petitioners were in possession over the acquired suit land of about 10 acres and cultivating the same and the land is the main source of earning of their livelihood. The petitioners' ancestors and after them the petitioners are staying in the house constructed by them and cultivating the suit land which is a double crop land. The petitioners are exercising their right of franchise as resident of village-Dahiposh and their ancestors were also exercising their franchise as against the houses which are situated over the suit acquired land. The petitioners are also enjoying the benefit of voter list, ration card which have been issued to them as against their houses situated over the suit land. It is further stated that the petitioners are cultivating the substantial portion of the suit land and earning their livelihood from out of the usufructs.

6. The petitioners have learnt that about Ac.19722.69 decimals of land was acquired for Rourkela Steel Plant and out of that about 4000 acres of land was found surplus and has been surrendered to the State Government.

7. It is the further case that the Trustee of opposite party no.5-Padmanav Education Trust (which has been wrongly described as opposite party no.6) (herein called as "the Trust") visited the suit land and expressed to the petitioners about the tripartite agreement between the State Government, the Rourkela Steel Plant and the Trust and requested the petitioners to vacate the suit land in their favour. Since the petitioners

refused to leave the suit land, the Trust filed an FIR before the Sector-7 Police Station, Rourkela and intimated to the Superintendent of Police, Rourkela. Since no action was taken, the Trust filed W.P.(Crl.) No.556 of 2010 before this Court. This Court vide its order dated 20.8.2010 disposed of the said writ application after referring to certain facts and also the judgment of this Court reported in 107 (2009) CLT 269. SLP No.1859-1861of 2009 has been filed by the Rourkela local Displaced Association before the Apex Court. The Apex Court vide its order dated 6.2.2009 had passed the following order:

"UPON hearing counsel the counsel the Court made the following

ORDER

We find no ground to interfere. The special leave petitions are dismissed.

Learned counsel for the petitioner voices an apprehension that the dismissal of the writ petition filed by the petitioner-association may be held against any individual who wants to seek relief. The dismissal of the petition by the petitioner-association, will not come in the way of any person agitating his right in accordance with law if he has any existing enforceable right."

8. It is the case of the petitioners that the tripartite agreement was executed between the Hon'ble Governor of Orissa represented by the Additional District Magistrate, Rourkela, Steel Authority of India Limited, Rourkela represented through its authorized representative Deputy General Manager (Town Service) and Padmanav Education Trust represented through its trustee Dipti Ranjan Pattnaik. The said lease agreement was executed for a period of 99 years.

9. It is also alleged by the petitioners that the Education Trust with the help of local police and district administration has taken action for demolition of the houses of the petitioners and eviction of the petitioners from their ancestral cultivable lands. It is stated that neither the Additional District Magistrate has the competency to represent the Hon'ble Governor of Orissa nor the Deputy General Manager of the Trust (Town Service), SAIL, Rourkela Steel Plant Limited, Rourkela is competent to represent the company who is neither the principal Officer nor a Director of the company. Therefore, it is stated that the tripartite agreement executed under Annexure-4 is a void document and the same cannot be enforced in law as the agreement is not in accordance with the requirement of law.

10. It is the case of the petitioners that the Rourkela Steel Plant had surrendered the suit land being surplus land to the State Government and that being the position the Rourkela Steel Plant is not entitled to receive the premium at the market value which has been determined by a committee and fixed at Rs.4,12,92,940/-. The tripartite agreement has been executed without ascertaining, who is the rightful owner of the suit land. Therefore, the petitioners have prayed for quashing of the same. The suit land was given in favour of the Education Trust on sub-lease basis for 99 years which is a private body for running educational trust which is not satisfying the requirement under Section 3 of the Act 18 of 1948. The said provision confers the power upon the State Government that whenever it appears to the State Government that it is necessary and expedient to acquire speedily any land for the purpose of the development of industry, irrigation, agriculture, capital construction or resettlement of displaced persons or any matter incidental thereto, a notification to that effect shall be published in the Gazettee. Therefore, the tripartite agreement executed by the persons referred to supra in favour of the Education Trust is not legal and valid. Hence, the same is liable to be quashed.

11. The petitioners placed reliance upon the statement of objects and reasons of the Act, 1948 which was subsequently substituted by the adoption of laws order, 1950. The said Act has been repealed in the year 1994 without any Saving Clause. Therefore, the petitioners has placed reliance upon the provisions of Section 5 of the Orissa General Clauses Act, which provides that where any Orissa Act, repeals any enactment hitherto made, or hereafter to be made, then, unless a different intention appears in the repealing Act, the repeal shall not revive anything not in force or existing at the time at which the repeal takes effect and strongly placed reliance upon Clause-(e) which states that such repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as stated in Clauses (a) to (d). The petitioners strongly placed reliance upon the executive instructions which have been issued under the Act by the Government of Orissa. In Clause-162 of the Executive Instructions, the procedure relating to settlement of surplus land has been elaborately indicated. The said Clause reads thus:

> "As regards land falling in class (i) of Paragraph 158, i.e., lands situated within agricultural or pastoral areas their disposal should be guided by the following general considerations, which are based on the principles of the Resolution of the Government of India in the Department of Revenue and Agriculture No.13-44-13 dated 30th

October, 1896, reproduced in Appendix-N to the Railway Boards Revised Land Acquisition Rules:-

(a) All rights of proprietors and permanent tenure holders and all rights of occupancy, which extinguished by the acquisition of those lands, should be first offered to the persons from whom they were acquired, or to their heirs if discoverable, the offer to the person of superior status being in every case subject to his recognition the person of inferior status under the provisions of the Crown Grants Act, XV of 1895. In cases in which at the time of acquisition abatement of revenue was made, the offer of restoration should be made subject to the express condition that lands will be reabsorbed in to the revenue paying estate of which they originally formed part. When an abatement of revenue has been granted at the time of acquisition, in the case of permanently settled estate, the amount originally abated should be added to the revenue of the estate as it stands at the time of restoration; in the case of temporarily settled estate, the lands should be restored subject to a fair assessment at the rate or rates current for adjoining lands of similar quality.

(b) No elaborate enquires are necessary to find out the original owners or their heirs, and the titles of claimants should be determined summarily, as the above concession is made as an act of grace, and is wholly within the pleasure of Government to grant or to refuse in any particular case. It will be sufficient if a general notice is published locality.

(c) The price at which the rights above referred to are to be offered should be the amount of compensation originally paid for them less the 15 per cent which may have been given in excess of the value, should be acquisition have been compulsory. This price may be reduced if necessary, on account of any deterioration that may have taken place in the fitness of the land for agriculture or pastoral purposes while it was in the occupation of Government, but is should not be increased, except in the case stated below on account of any rise in its market value during that period. In the case of plots which, by reason of their size or shape are practically of no value to any one but o that owners of the adjoining land, of those owners are not entitled to the first offer as above, they ought nevertheless to receive the first offer, but in that case there is no objection to asking the market value, though the reasonable offer of a neighbouring holder should always have the preference over that of an outsider. The price

thus fixed should be considered as the highest bid for the lands for which it is offered.

(d) The Commissioner will always retain and exercise discretion in the application of the Rule about the charge of cost price. Special cases may occur and exceptions will be justifiable, as for example when the persons first entitled are remote descendants or relations of the original holders, or when the rise in the market value of the land has been so exceptionally grant as to take the case out of the general Rule. Before the day of sale, the Collector should bring any such case specially to the notice of the Commissioner.

If however, such lands were originally acquired at the expense of a company which has acquire right over the land subsequent to its acquisition and surrender to the Railway, the company should be given the first option of acquiring the land before it is put up to action. In such case the land should be made over for a nominal sum to the company, to which in any case the sale proceeds will be surrendered under the provisions of paragraph 166 below."

12. It is pertinent to mention here that when the law requires that the surplus land shall be returned to the original land owner or their heirs when the purposes for which they were acquired is accomplished, the opposite parties have no other option except to restore the land to the original land owners or their heirs. Therefore, the action of the opposite parties in executing the tripartite lease agreement in favour of opposite party no.7 is contrary to law and hence the same is liable to be quashed.

13. Learned counsel for the petitioners submits that the petitioners and before them their ancestors are in possession over the suit land from time immemorial and at no point of time the possession of land was ever disturbed by the opposite parties. The ancestors of the petitioners and after then the petitioners are in peaceful possession over the suit land. Without considering the long possession of the petitioners and the possessory right, title and interest of the petitioners, a tripartite agreement has been executed which is unlawful and not binding on the petitioners and hence the same is liable to be quashed.

14. The same has been countered by the State Government, the Rourkela Steel Plant-opposite Party No.4 and Education Trust-opposite party no.6. The brief facts leading to the statements in the counter are stated hereunder:

15. It is stated that the petitioners have no locus standi to file the writ application as their lands have been acquired under the Notification dated 22.2.1954 issued under Section-3 of the Act 18 of 1948 for establishment of Rourkela Steel Plant. On 5.5.1955 in L.A. Case No.01 of 1955-56, AC.241.58 decimals of land was required for acquisition. Notice under Section 4 (1) was issued on 28.05.1955 for Dahiposh. On 23.6.1955 possession of Ac.83.02 decimals of land was taken. On 15.7.1955 certificate of delivery of possession was issued. On 4.8.1955 notice under Section 4(1) was issued for rest of Dahiposh village. On 9.2.1956 notices prepared inviting claims under Section 4(2). On 24.2.1956 compensation assessed at Rs.69.804.60 out of which Rule 5(2) notices issued for disbursement of Rs.61,456.90 on different dates. On 22.3.1956 Rule-4 (2) notices were served regarding measurement of houses inviting claims if any. Compensation for private houses assessed as Rs.21.243-13-0 and Rule 5(2) notices prepared and directed to be issued on different dates starting from 17.11.1956 to 29.1.1958. On 7.2.1958 notices under Section 5(2) was issued for taking possession of houses. On 4.3.1958 endorsement in the order sheet about villagers having represented to General Manager, HSL not to disturb them until house sites are actually needed by HSL. Orders were passed to inform villagers to vacate houses by 1.4.1958 and compensation was disbursed on 11.4.1958. On 27.5.1958 fresh notices were issued to the villagers for vacating the houses. Compensation was disbursed on 15.10.1958. On different dates notices were issued during the period 27.5.1958 to 3.3.1960 and possession was taken over of Ac.3.91 decimals of land and 16 vacant houses and handed over to Estate Officer, HSL. Notice were issued on 16.10.1960 to two tenants who had not received compensation. Therefore, it is stated that the petitioners have no right over the acquired land and hence they are not aggrieved and they cannot question the lease deed executed between the Odisha and SAIL on 1.7.1993 demising acquired lands on 99 years long term basis. Clause-8 of the lease deed empowers the Rourkela Steel Plant to sanction sub-lease of the land for Educational and Professional Institutions. Recommendation Committee was constituted. Clause-9 empowers the State Government of review Committee's decision. Clause-10 provides for ratification for past sub-lease granted by the SAIL and Clause-11 of the lease deed provides for Tripartite Agreement to be executed. Therefore, the impugned tripartite agreement was executed in favour of the private education trust by the Addl. District Magistrate, Rourkela on behalf of Governor, the Deputy General Manager (Town Service), Rourkela Steel Plant Limited on behalf of SAIL and D.R. Pattnaik on behalf of Trust sub-leasing Ac.10.00 decimals of land in Dahiposh. Hence, the tripartite agreement is valid in law. With regard to the ground that the acquisition of land in favour of RSP is an abuse of power of

eminent domain to benefit private parties, there is no provision akin to Part VII of L.A. Act available in Orissa Act 18 of 1948 and the same amounts to colourable exercise of power by the State Government and is beyond the purpose for which land was acquired, it is stated the acquisition proceedings have attained finality and the question has been well settled by this Court in ILR 1972 Cut 66 and the apex Court in the case of Mangal Oram v. State of Orissa and others reported in AIR 1977 SC 1456 and subsequent judgments of this Court, apex Court and more specifically on similar facts in earlier writ petitions. In ILR 1958 Cuttack 269 similar question had been raised and reliance was place on ILR 1958 Cut 269 (Satrughna Sahu v. State of Orissa) and it was held that while in the earlier case there were no materials before the Court to hold that establishment of the paper mill at Choudwar had any connection with Section 2 (c) of Orissa Act of 1948, positive material was available to show that location of steel Mill at Rourkela had direct bearing and relationship with the Hirakud Project and holding that the acquisition to be valid and for public purpose repelled the contention advanced by the petitioner that the State had no powers to acquire lands for RSP, Reliance was placed on the observations of the apex Court in AIR 1955 SC 810 wherein it has been held that acquisition of sites for building of hospitals or educational institutions by private benefactors will be a public purpose, though it will not strictly be a State or Union purpose. Therefore, the petitioners have no right to question the tripartite agreement. Hence, this writ petition is misconceived and liable to be rejected. With regard to the contention of the petitioner that they being in possession of the land, have got possessory rights, it is stated that their possession has been denied both by the State Government and opposite party no.5. It is stated that the possession of the land was delivered to the private education institution on 4.6.2010 and demarcation was also done. The same stand is taken in paragraph-5 of the counter affidavit filed by opposite party no.5. In support of the said contention, reliance has been placed upon Annexure-B/6, the demarcation document. The claim of the petitioners is that they are in possession being disputed, the disputed question cannot be decided in this Court.

16. With regard to the contention of the petitioners that they have not been given rehabilitation assistance as per scheme, the case of the State is that the affected persons were paid all dues and allotted agricultural land on the condition that they should reclaim the same within three years. They having not applied for reclamation subsidy within the stipulated period, allotments were subsequently cancelled. With regard to the case of the petitioners that on earlier occasion some persons filed writ applications claiming that the land acquired by Government for RSP cannot be utilized for any other

purpose, the State placed reliance upon Mangal Oram's case wherein the apex Court clearly said that ancillary purpose includes 'Educational Institution' also. Similar stand was taken in W.P.(C) No.4388 of 2004. This Court dismissed the same. The matter was taken to the Supreme Court. The SLP was also dismissed. It is further submitted that with regard to the Repealed Act 18 of 1948 the repealed shall not revive anything not in force or existing at the time at which the repealed takes effect. Reliance placed upon the decision of the apex Court in State of Haryana Vrs. Suraj & Ors., reported in (2004) 12 SCC 538 is not applicable as no law was laid down in Suraj's case which could be treated as a binding precedent. It was further contended that in Civil Appeal Nos.7425-26 of 2002 and 774-778 of 2005 disposed of on 2.2.2012 in the case of Bangalore City Cooperative Housing Society Limited v. State of Karnataka and others, the validity of two sets of judgment and order passed by the Division Bench of Karnataka High Court had been challenged. The said decision has no application to the facts of the case for the reason that the decision of the Government in the said case to acquire the lands suffered from legal mala fides and therefore, the impugned acquisition Notifications in those cases were struck down as the procedure required to be followed under sub-clause-3 of Clause-6 was not followed. The said provision is not applicable to the facts of the case. Therefore, opposite party nos.1 and 2 prayed for dismissal of the writ petition. Further contended that the Additional District Magistrate is competent to represent the Government.

17. So far as the SAIL is concerned, it strongly placed reliance upon Section 6(1) of the Act, 1948, it is submitted that the land was acquired at the cost of the company and displaced farmers were paid due compensation for the land, plot in re-settlement of colonies and other benefits as per the provisions of the Act 1948. Any dispute in this regard has to be redressed by the competent authority and all the dispute arising there from have been redressed and have become final. After more than 55 years from the date of acquisition, the present petitioners have challenged the same. The suit land has been in exclusive possession and the record of rights has been prepared in successive settlements and the same has been duly declared as Karkhana Jami. Final ROR was prepared and published in favour of the company on 1.7.1993.

18. On 15.4.1995 the land under the possession of the SAIL and the Rourkela Steel Plant area at Rourkela was declared as Industrial Township under Sub-section 1 of Section 4 of the Orissa Municipal Act, 1956 by the State Government represented by His Excellency, the Governor of Orissa. On 29.6.2005 as per the recommendation of the sub-lease Committee and

approval thereon by the Government of Orissa, tripartite sub-lease was executed by the Government-SAIL in favour of opposite party no.5. As per Clause-7 of the lease deed, the company shall not except with the previous sanction of the Government use the land or allow the same to be used for any other purpose other than that for which it was acquired. This is in conformity with the judgment of the Apex Court reported in AIR 1977 SC 1456 (Mangal Oram v. State of Orissa and others) wherein the very land acquisition for Rourkela Steel Plant has been held to be valid and lawful. In that case the Apex Court referred to its earlier decision reported in AIR 1955 SC 810, in which it had been held that acquisition of sites for building hospitals or educational institutions by private benefactors will be a public purpose, though it will not strictly be a State or Union purpose. Therefore, the tripartite agreement cannot be questioned by the petitioners.

19. The claim of the petitioners is that they are successors of recorded tenants and continuing in physical and cultivable possession over the land in question since acquisition. Although the land was acquired their ancestors/recorded tenants were not paid compensation (in para-7 petitioners admit to have received compensation but allege the same to be inadequate) or not rehabilitated nor physically displaced. Land is a surplus land not required by the Rourkela Steel Plant and as such should be returned to the petitioners. The sublease agreement in Annexure-4 is illegal and without competency and his by the provisions of Article-244 of the Constitution of India and the corresponding provisions in the 5th schedule. The petitioners are rank tress passers. They have not filed a single scrap of paper to show that either they are the successors or they belong to the family of erstwhile recorded tenants to establish their locus standi in respect of the land in question. Since the land was acquired and vested with the Government free from all encumbrances under the provisions of Orissa Act, 1948, the law is well settled that any subsequent claim by the displaced person for return/restitution of the land on the ground whatsoever cannot be entertained. There is no surplus land. The land has either been utilized or in the process of utilization or for future utilization and in the process an area to the extent of Ac.4514.60 decimals have been surrendered to the Government for the purpose of Rourkela Engineering College (now NIT), Railway, Bus stand, Government buildings, Courts, Civil Township, Quarters, Educational Institutions, University, Stadium, etc. The use of the land for the said purpose cannot be said to be not for public purpose as held by the apex Court in the decision reported in AIR 1977 SC 1456 wherein the land acquired for Rourkela Steel Plant has been held to be valid and lawful.

20. Mr. Budhadev Routray, learned Senior Counsel also placed reliance upon the judgement of the apex Court reported in **1995 (Supp. II) SCC 225**

(**Butu Prasad Kumbhar v. SAIL and others**) wherein the apex Court held that the petitioners or their ancestors were not deprived of their land without following the procedure established by law. The land was acquired under the Land Acquisition Act. They were paid compensation for it. Therefore, the challenge raised under violatioin of Article is devoid of any merit. He further placed reliance upon two other two judgments of the apex court reported in **(2003) 1 SCC 335 (North India Glass Industry v. Jaswant Singh and others**) and **Government of Andhra Pradesh and another v. Saheed Akbar** reported in **AIR 2005 SC 492**, where it was held that once land is acquired and it vests with the Government unutilized land can not be re-conveyed or reassigned to erstwhile owner. He also placed reliance upon the judgement of this Court in the case Lakha Oram and another v. state of Orissa and others in W.P.(C) No.4984 of 2004 which was dismissed on 23.1.2006 wherein this Court has held that when the petitioners' land had been acquired by the Sate Government and they were paid compensation, they cannot claim refund of the same, on the ground that for some reason or the other a portion of the land has not been utilized. Similar view has also been taken by this Court in OJC No. 1015 of 1998 vide its order dated 23.10.2006 (Bisra Oram v. State of Orissa and others). He also place reliance upon another judgement reported in **107 (2007) CLT 269**. He also relied upon the judgement in the case of Bandhu Baxia Vs. State of Orissa & Ors., reported in 108(2009) CLT 85. In 107 (2009) CLT 269, the local displaced association on behalf of the displaced persons had filed the aforesaid writ petition wherein this Court has held that once the land is acquired and vested in the State, land owner is not concerned with its use and he cannot claim right of restitution on any ground. Lastly he placed reliance upon the judgment of apex Court of Municipal Corporation of Greater Bombay v. Industrial Development Investment Company reported in AIR 1977 482 wherein the apex Court held that belated writ petition challenging any matter relating to land acquisition or referring to the right of the erstwhile land owner cannot be entertained at the threshold on the ground of delay and latches. Therefore, Mr. Routray prayed for dismissal of the writ petition.

21. On the same ground, Mr. Mishra appearing for the Educational Trust also traversed the petition averments denying the allegations made in the writ petition. The claim of right of the petitioners has been denied. It is stated that the tripartite lease deed has been executed as per the decision taken by the Sub-lease Committee which had been constituted as per the decision of the Government and Rourkela Steel Plant with the approval of Governor at the time of handing over of possession of the lands to SAIL. Therefore, the ADM as a Government official is competent to sign the deed on behalf of the

Governor and the DGM on behalf of the SAIL. He also placed reliance upon the decision of a Division Bench of this Court reported in ILR 1972 Cuttack 66 (Sitaram Agarwalla and others v. State of Orissa and another) and a judgment of the apex Court reported in 1977 SC 1456 and various other judgments reported in AIR 1977 SC 448 (Gulam Mustafa v. State of Maharashtra) wherein the apex Court held that there is no principle of law by which a valid, compulsory acquisition stands voided because long after the requiring authority diverts it to a public purpose other than the one stated in the declaration. The said principle has been reiterated in the subsequent judgment of the apex Court reported in (2005) 1 SCC 558 (Government of Andhra Pradesh and another v. Syed Akhar). Therefore, Mr. Mishra, learned senior counsel has placed reliance upon judgment of the apex Court in Prakash Amichand Shah vs. State of Gujarat and Ors. Reported in (1986) 1 SCC 581 : reported in (2011) 2 SCC 706 in support of the contention that issues settled by judgments of courts which have attained finality shall not be permitted to be re-agitated all over again and it is not open to unsettle all settled transaction which have been upheld long time ago. Therefore, Mr. Mishra prayed for dismissal of the writ application.

22. In view of the aforesaid rival legal contentions, the following questions arose for determination in this case/

(i) Whether this Court can examine the legality and validity of the acquisition of land of the petitioners on the basis of the legal contention in view of the judgment of this Court reported in ILR 1972 Cuttack 66, AIR 1977 SC 1456 and other judgments referred ?

(ii) Whether the petitioners are entitled for the relief of issuance of a writ of certiorari?

23. Large extent of land was acquired by the State Government for establishment of Steel Plant at Rourkela including the petitioners' ancestors land of village Dahiposh vide Notification dated 22.2.1954. After acquisition, the land vested with the State Government under the Act. The State Government in their counter-affidavit stated that notices were issued to the land owners inviting claims for claiming compensation for their land and houses. Compensation has been paid to some land owners. The petitioners claimed that though the State Government had allotted agricultural land in lieu of the land acquired, the same has been cancelled by the State Government. The acquisition was challenged by some of the land owners before this Court which was decided in the year 1971. In the judgment reported in ILR 1972 CTC 66 (Sitaram Agarwalla & Ors. Vs. State of Orissa & Anr.), this Court held that land has been acquired for the purpose of steel

mill. In this case, this Court referred to the judgment of the apex Court reported in AIR 1955 SC 810 wherein it has been held that acquisition of sites for building of hospitals or educational institutions by private benefactors will be a public purpose, though it will not strictly be a State or Union purpose. The same question was raised in another case, namely, Mangal Oram v. State of Orissa and others, which went to the apex Court, reported in AIR 1977 SC 1456 which was rejected. In the said case it was contended by the petitioners that part of the land which was acquired has been used for civil township. It was further contended that the acquired land can only be used for the Steel Mill and ancillary industries. He has placed reliance upon the judgment of apex Court in Gulam Mustafa & Ors. Vs. State Maharashtra & Ors., reported in AIR 1977 448 referred to supra in support for its reason that there was no principle of law by which a valid, compulsory acquisition stands voided because long later the requiring authority diverts it to a public purpose other than the one stated in the declaration. The aforesaid principle has also been dealt with in the case of Government of Andhra Pradesh and another v. Saheed Akbar, reported in (2005) 1 SCC 558 upon which reliance has been placed by Mr. Mishra appearing on behalf of the Educational Trust and also by Mr. Routray appearing on behalf of Steel Authority of India in support of the proposition that once land is acquired for a public purpose, it vests with the Government, unutilized land cannot be reconveyed or reassigned to erstwhile owner. He also placed reliance on another decision of this Court passed in W.P.(C) No.4984 of 2004 dismissed on 21.3.2006. Similar writ application, i.e., OJC No.1015 of 1998 was also dismissed on 23.10.2006 and OJC No.7433 of 1998 and the judgment has been reported in 107 (2009) CLT 269. This Court dismissed the writ application in identical matters where the surrendered land was utilized for establishment of BPUT at Rourkela. The said allotment was challenged by the displaced association in SLP which was not entertained by the apex Court which is referred at paragraph-11 of the writ petition. Subsequently one of the Tribals, namely, Bandhu Baxia re-agitated the matter in W.P.(C) No.2552 of 2009 which was also dismissed by this Court vide judgment dated 22.4.2009 (reported in 108 (2009) CLT 85) wherein this Court held that once the land is acquired and vests with the State, the land owner has no concern for its use and he cannot claim right of restitution on any ground.

24. The learned Additional Government Advocate placed reliance upon the judgment reported in AIR 1955 SC 810 and the principle of res judicata in the case reported in (2011) 3 SCC and upon the decision of the apex Court reported in AIR 1986 SC 581 holding position settled long ago cannot be unsettled at the instance of the petitioners, who have approached this

Court belatedly. In view of the aforesaid series of judgment of this Court and the apex Court laying down the legal principle referred to by the Additional Government Advocate, legal contentions urged by the petitioners that the surplus land cannot be utilized for the purpose other than the purpose which has been declared in the notification and the sublease by the Rourkela Steel Plant and the State Government in favour of the Education Trust is not permissible under law, cannot be accepted by this Court in this proceeding in view of the acquisition of land held to be legal, valid and the land having vested with the State government. Accordingly, the first point is answered against the petitioners.

25. So far as the second point is concerned, the claim made by the petitioners is that they have been in possession of 10 acres of land including the residential house and are residing thereon the before them their ancestors were in possession of the same; they are exercising their right of franchise and they have not been evicted from the land in question has been disputed by the State Government. The State Government has vividly given the sequence of events in the notes of submission relating to the acquisition of the land, the date on which notices were issued, date of taking over possession, dates on which compensation amount was disbursed to the displaced persons, date of taking over and handing over of possession of the land in question and also the date of notice to the petitioners to prefer claim which have been seriously disputed by the petitioners. Petitioners claim that no compensation has been paid to them and they continued to be in possession of the land. The same has been seriously disputed by the State Government, Rourkela Steel Plant and the Education Trust stating that the area in question has been recorded in the ROR as “Karkhana Zami’ and it is no longer the agricultural land. Therefore, the claim of the petitioners that they are in possession and cultivating the same is not acceptable. All these are disputed questions of fact and cannot be decided in the proceeding under Article 226 of the Constitution. Hence, the said question is required to be adjudicated by approaching the appropriate forum. Further in the statement of counter filed by the Education Trust, it has been stated that the land has been leased in favour of the Education Trust. Tripartite agreement as stated in the contention portion is produced which is disputed by the petitioners. The disputed facts cannot be gone into by this Court. All the points raised in the writ petition have already been decided by this Court in several writ applications bearing W.P.(C) No.16554 of 2005, W.P.(C) No.4441 of 2006 and W.P.(C) No.2308 of 2007 by dismissing those writ petitions vide order dated 5.12.2008. SLP No.1859-61 of 2009 were filed against the said order before the apex Court and the apex Court affirmed the same vide order dated 6.2.2009.

26. In view of the aforesaid observation, it is open for the petitioners to work out their rights by approaching the appropriate forum in accordance with law. The tripartite agreement has been questioned by the petitioners as having not been made in accordance with Article 299 (1) of the Constitution. They have stated that the A.D.M. is not competent to sign the agreement on behalf of the Governor of the State. The case of the opposite party-State is that as per Clause 8 of the Deed of Lease executed in 1993, the Tripartite agreement has been executed and the ADM is legally authorized officer to represent the Governor for execution of lease. This has been seriously disputed by the petitioners. In view of the above, this Court cannot record any finding on such issue in view of the disputed questions of fact and also the legal aspects to record the finding on such issues. It is also open to be decided in a proper forum in a suit. Accordingly, we answer to second point. Further reliance has been placed by the Educational Trust upon the order of this Court dated 20.8.2010 passed in W.P.(Crl.) No.556 of 2010. By the said order, this Court disposed of the writ petition with a direction to the Superintendent of Police, Rourkela to take appropriate action in the matter of investigation on the FIRs dated 5.6.2010 and 10.7.2010 lodged by the Education Trust against the petitioners and some others who had been making illegal demand and for providing necessary protection to the Education Trust at the time of construction of Engineering College building on the land sub-leased to it under the tripartite agreement executed between the State of Orissa, Rourkela Steel Plant and the Trust on 29.6.2006 and to overcome the said order, the petitioners have filed the present writ petition even though they are not any way connected with the land in question. The case of the petitioners in this regard is that when they refused to leave the land in question such FIRs have been lodged. Again these are all disputed questions of fact this Court cannot record the finding on the same in exercise of writ jurisdiction. Therefore, for this reason also the petitioners are required to approach the competent court to get their rights adjudicated. For the reasons stated supra, we cannot grant any relief to the petitioners. We, therefore, dispose of the writ petition with a liberty to the petitioners, if so advised, to approach the appropriate forum for the purpose of seeking appropriate relief as prayed for by initiating appropriate proceeding before the proper forum. The writ petition is accordingly disposed of.

Writ petition disposed of.

2013 (I) ILR - CUT- 779

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

W.P.(C) NOS. 18036 & 18312 OF 2012)

CAPITAL BAR ASSOCIATION,
BBSR & ORS. .....Petitioner

.

.Vrs.

STATE OF ODISHA & ORS. .....Opp.Parties

ODISHA STAMP (AMENDMENT) RULES, 2001 – RULES 37, 41, 45.

Bench Mark Valuation (BMV) – Procedure for enhancement – District Level Valuation Committee (DLVC) should consider the market value of the immovable properties in different parts of the district and other relevant aspects in order to fix up revised BMV by duly following relevant procedure contemplated under the Rules.

In this case while determining revised BMV, the committee has not followed procedure Under Rules 37,41 & 45 – Firstly the Chairman of the committee failed to nominate an expert valuer to the committee as required Under Rule 37, Secondly the committee has not taken into consideration the principles of valuation as mentioned in Appendix-II as required under Rule 41 and thirdly the committee although issued notice to the public has not summoned appropriate public officers as required Under Rule 45 – Held, the impugned notification is quashed and the matter is remitted back to the DLVC for fresh consideration of the matter. (Para 27)

Case laws Referred to:-

1.AIR 1976 SC 578 : (Jasbhai Motibhai Desai-V- Roshan Ku. Haji Bashir Ahmed)
2.AIR 1962 SC 1044 : (Calcutta Gas Company (Proprietor Ltd.)-V- State of West Bengal)
3.AIR 1977 SC 276 : (Mani Subrat Jain & Ors.-V- State of Haryana)
4.AIR 1987 SC 331 : (State of Kerala-V- Smt. A. Lakshmikutty & Ors.)
5. AIR 1936 PC 253 : (Nazir Ahmed Vs. King Emperor)
6. AIR 1961 SC 1527 : (Deep Chand Vs. State of Rajasthan)
7. AIR 1963 SC 1077 : (Patna Improvement Trust Vs. Smt. Lakshmi Devi)
8. AIR 1964 SC 358 : (State of Uttar Pradesh Vs. Singhara Singh & Ors.,)
9. AIR 1979 SC 1573; : (Chettiam Veettil Ammad Vs. Taluk Land Board & Ors.)

10. AIR 1980 SC 327 : (State of Bihar Vs. J.A.C. Saldanna)

For Petitioner - M/s. Ramakant Mohanty, D.K. Mohanty, S.Mohanty, S.Mohanty & S.N. Biswal.

For Opp.Parties - Mr. R.K. Mohapatra, Govt. Advocate & Mr. B. K. Nayak, Addl. Govt. Advocate.

For Petitioners - M/s. Prafulla Ku. Rath, P.K. Satpathy, R.N. Parija, A.K. Rout, S.K.Pattnaik, D.P. Pattnaik, A. Behera.

For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate.

V. GOPALA GOWDA, C.J. These two writ petitions have been filed challenging the Bench Mark Valuation fixed by the District Level Valuation Committee, Khurda in their meeting dated 11.06.2012 in respect of the area under the Khurda district under Rule 40(1) of the Orissa Stamp (Amendment) Rules, 2001 (hereinafter called the 'Rules, 2001') and approval thereof by the Government of Odisha in the Revenue & Disaster Management Department vide letter dated 28.08.2012 and consequent Notification dated 31.08.2012 of the Sub-Registrar, Khurda, Bhubaneswar enhancing the Bench Mark Valuation (hereinafter referred to as 'BMV').

2. The first writ petition being W.P.(C) No. 18036/2012, in the nature of Public Interest Litigation, has been filed by the Capital Bar Association, Bhubaneswar challenging the aforesaid action of the opposite parties on various grounds particularly on the ground that the Bench Mark Valuation fixed by the opposite parties are not in accordance with the Orissa Stamp Act & Rules, therefore, it is prayed that the letter dated 28.08.2012 of the Government of Odisha and Notification dated 31.08.2012 under Annexures-1 & 2 respectively to the first writ petition is required to be quashed.

3. The second writ petition being W.P.(C) No. 18312/2012 has been filed by the petitioners, who are the vendor and vendee of a piece of property in Bhubaneswar, seeking issuance of a writ of certiorari quashing the aforesaid Notification dated 31.08.2012 and further to direct the Sub-Registrar, Khordha to register their sale deed in terms of the earlier Bench Mark Valuation dated 26.2.2011.

4. The case of the petitioners in the second writ petition in brief is that petitioner No.1 (vendor) wanted to sale a piece of property and executed the registered sale deed dated 13.9.2011 and presented it for registration, wherein petitioners disclosed the value of the land as per the Bench Mark Valuation fixed vide earlier Notification dated 26.2.2011. On presentation of

the sale deed, the same was not registered by the Registering authority on the ground of new Bench Mark Valuation fixed by the Committee vide aforesaid Notification dated 31.08.2012. Therefore, the Dist. Sub-Registrar-cum-Stamp Collector, Khordha issued notice dated 17.9.2012 (Annexure-2) to the petitioners stating that the valuation of the lan in question is undervalued as the Bench Mark Valuation of the said land fixed by the government under Rule 38(e) of the Rules, 2001 comes to Rs. 5.00 lakhs and as such the said deed is found to be undervalued in terms of B.M.V. of the property involving the deficit stamp duty of Rs.20,000/-, therefore, petitioner was directed to pay the deficit Stamp duty of Rs.20,000/-. It is stated by the petitioners that on receiving such notice petitioners found that the valuation disclosed in the said notice is 500% excess to the earlier Bench Mark Valuation dated 26.2.2011. It is submitted that the last revision of Bench Mark Valuation was made and given effect to by the Bench Mark Valuation Committee in the district of Khurda on 25.2.2011. In view of the provisions under Rule 40 of the Orissa Stamp Rules, 1952 (hereinafter called 'the Stamp Rules') the period of revision has to be biennial that means further revision is not provided until further two years of last valuation is completed. Therefore, it is submitted that since the last revision of valuation was fixed on 25.2.2011 it has to be inforce up to February, 2013. Therefore, the main contention of the petitioners in second writ petition is that as before completion of two years the impugned Notification has been issued enhancing the Bench Mark Valuation to an unreasonable extent, the impugned Notification is bad in the eye of law and is required to be quashed.

5. The case of the petitioner-Association in the first writ petition in brief is that a meeting of the District Level Valuation Committee (DLVC), Khurda was held on 11.05.2012 under the Chairmanship of Collector & District Magistrate, Khurda. In the said meeting the DLVC recommended biennial revision of the market value of the immovable properties in respect of villages under the Khurda district under Rule 40(1) of the Rules, 2001. Thereafter, the Government of Odisha vide impugned communication dated 28.8.2012 has accorded the so called approval of the said recommendation of the DLVC. In pursuance thereof the District Sub-Registrar, Khurda issued the impugned Notification dated 31.8.2012 directing implementation of the new guidelines and enhanced Bench Mark Valuation w.e.f. 1.9.2012. It is stated that in pursuance of powers conferred on the Collector under Rule 40(2) of the 2001 Rules, there was an order of 10% enhancement of the Bench Mark Valuation (BMV) w.e.f. 01.04.2012 which is communicated vide letter dated 29.03.2012 under Annexure-4 to the Addl. Sub-Registrar of Khurda. Therefore, it is submitted that the said order under Annexure-4 enhancing 10% BMV was a final order passed under Rule 40(2) of the 2001

Rules, therefore, the DLVC again cannot resort to their power under Rule 40(1) of the 2001 Rules and revise the BMV again vide impugned Notification dated 31.8.2012. Therefore, it is submitted that further exercise of power under Rule 40(1) of 2001 Rules can be restored to only after six months from the last revision and not before that.

6. It is further stated that the communication of the Government under Annexure-1 shows that the DLVC meeting was held on 11.06.2012 for biennial revision of the market value of the immovable properties in respect of Khurda district under Rule 40(1) of 2001 Rules, but on the other hand the impugned Notification dated 31.8.2012 (Annexure-2) reflects that the said Notification is on the basis of the DLVC meeting held on 31.8.2012.

7. It is submitted by the learned Sr. Counsel on behalf of the petitioner-Association that Rule 37 of the 2001 Rules deals with the Constitution of DLVC and Sub-District (Tahasil) level Valuation Committee and according to Rule 37(a)(vi) two public persons are to be nominated by the Chairman, one of whom should be an expert valuer or an expert familiar with principles and practices of valuation of land, building and other immovable properties. However, in the instant case the Chairman has nominated one Mr. Rabi Burma, a practicing Advocate of Khurda Bar and another Smt. Surama Satpathy, a Member of the Independent Party. None of them is an expert valuer or expert in the relevant field which is the mandate of Rule 31 of 2001 Rules. Therefore, it is submitted that the constitution of the DLVC is also bad in law. It is further submitted that the said Committee was formed way back in the year 2007 and till date no attempt has been made to replace the said Committee with experts. It is contended by the petitioner-Association that the Committee should have taken into account the principles of valuation mentioned in the Appendix-II while revising or fixing the Bench Mark Valuation as enumerated under Rule 41(1) of the 2001 Rules. For determination of BMV, the decision of DLVC will have civil consequences and the said statutory Committee should have complied with the legal requirements as per Appendix-II, which has not been done by the Committee in the instant case while determining the BMV.

8. It is further contended that statutory obligation cast upon the Committee to issue public notice to bring it to the notice of public and to examine the public officers as per Rule 45 of the 2001 Rules. However, there was no notice issued inviting objections from the interested persons in the instant case in compliance with Rule 45 nor any enquiry was conducted by the DLVC by recording statement of public officers which is very much essential. The Committee has not called the objectors to submit their objections for determining the BMV of the District for Registration of conveyance deeds. It is stated that the so called notice under Annexure-5

was never circulated nor displayed at any conspicuous place so as to make the public aware of their statutory obligation to file their objections to the proposed BMV as suggested in the notification. The Committee has not complied with the mandatory requirement of 2001 Rules before or while deciding the Bench Mark Valuation. Therefore, it is prayed that this writ petition is required to be allowed quashing the impugned Notification.

9. Traversing the averments made in the writ petitions counter affidavit has been filed on behalf of the opposite parties. Raising the objection with regard to maintainability of the first writ petition filed by the Capital Bar Association, it is submitted that the Bar Association is nothing to do with the Bench Mark Valuation enhanced by the Government for the reason that it is neither affecting Members of the Bar Association nor they have any locus standi to file the writ petition. It is submitted that Khordha district is having nine Sub-Registrars offices out of which Dist. Sub-Registrar Office and Sub-Registrar Office, Khandagiri i.e. only two Sub-Registrar Offices are only functioning within the city limit of Bhubaneswar and the rest seven Sub-Registrar Offices are functioning in different parts of the District. The BMVs have been prepared for the entire district of Khurda and not for Bhubaneswar only. No objection has been received from any parts of the entire district either during the objection period or even after finalization of the BMV from any persons. Therefore, petitioner's Association, which is in no way connected with the affairs of the Bench Mark Valuation or affected thereby, should not have any grievance when the persons who would be affected are not before this Court.

10. It is also stated that the petitioners in the second writ petition can also raise no grievance in this writ petition for the reason that the Bench Mark Valuations have been prepared for the entire district of Khurdha and neither the petitioners in the second writ petition nor any other persons had raised any objection during the objection period nor even after finalization of Bench Mark Valuation.

11. It is further stated that the price of land situated within the developing city of Bhubaneswar is increasing at a high speed because of its geographical location and other developmental aspects. Further, the fixation of BMV and collection of stamp duty and registration fees on the basis of such valuation is only meant for augmentation of the State revenue which is spent for developmental purpose of the State, therefore, the fixation of BMV is an ingredient of the developmental process of the State which will help to enhance the Government revenue and strengthen the backbone of the State in socio-economic and infrastructural front, which will be in pubic interest and not against the public.

12. It is submitted by the opposite parties that prior to implementation of revised BMV, all procedures and formalities as required under the Rules and guidelines have been duly observed. After receipt of proposals of revised values of immovable properties from the respective Sub-District Tahasil Level Valuation Committees (SDTLVC) the same were thoroughly examined and finalized by the DLVC in its meeting dated 11.06.2012 and proclamation period of 30 days as per Rules, starting from 12.06.2012 to 11.07.2012 was fixed and it was published inviting objections, if any, from the public. No objection was received during that period. As no objection was received from the general public, after expiry of the said proclamation period, the proposals of village wise revised Bench Mark Valuation of the properties for entire district of Khordha were submitted to the State Government in prescribed proforma vide letter dated 04.08.2012. Thereafter, the revised BMVs were approved by the State Government vide impugned letter dated 28.08.2012. It was the instruction of the State Government that the BMV should be implemented with immediate effect. Therefore, the decision has been taken in the DLVC meeting held on 31.08.2012 to implement the revised BMV in the district w.e.f. 01.09.2012 and accordingly the impugned notice dated 31.08.2012 has been issued as per the order of the Chairperson of the DLVC.

13. It is further stated by the opposite parties that immediately after receiving the instructions from the Government in the Revenue & Disaster Management (R&DM) Department vide letter dated 31.03.2011 series of meetings at Sub-District Level and district level to work out the modalities for revision and fixation of BMV besides frequent field surveys were conducted. Due to vigorous industrial and urban development in and around Bhubaneswar and other parts of Khordha district, various categories of land are being acquired by the big industrialists as well as by the Government for different projects and because of the existing lower Bench Mark Valuations, the people will suffer to get their legitimate land value in the event of land acquisition and also the Government loose the substantial revenue as a result big industrialists or businessmen or land mafias will get the benefit. As in the meantime the market value of land of all categories have increased to the extreme point due to rapid progress in urban and industrial growth & its developments, as per the instructions of the State Government in its letter dated 31.03.2011, the Committee decided to increase the value of the land situated within a radius of 25 kms from the Bhubaneswar Municipal Council's area and 10 kms from Jatni and Khordha Municipality and in all other villages of the Khordha district keeping in view all the criterion laid down in the 2001 Rules and the Bench Mark Valuations have been fixed by following due procedure prescribed under 2001 Rules.

14. Supporting the necessity of enhancement of BMV, it is stated that the main rationale for costing of land in Bhubaneswar Sub-Division is the rapid urbanization, industrialization and infrastructure building sweeping across the State has determining role in escalation of land prices in the capital city of Odisha and being the only city of the State having Airport, best of hospitals and best educational institutions and having growing companies in the IT sectors. Due to large influx of population, there is a huge demand for residential and commercial land in the city and its periphery. The market value of the land in these days is enhanced to the extent beyond imagination. It is stated that such factual aspects can be evident from certain documents like agreement of sale and advertisement issued by various Developers quoting the rate of land per square feet, which is very much evident from the documents produced under Annexures-G/3 & H/3. From the said documents it would be clear that taking into consideration the present market value of the land the revised BMV fixed by the Government is very low. A bare perusal of documents under Annexure-H/3 would clearly show that a particular piece of land has been agreed to be sold at the rate of 98 lakhs per acre in village Deuliapatna, whereas the present BMV for that area has been fixed at Rs. 30 lakhs per acre, much lesser than the present market value. Therefore, it is submitted that the allegation of the petitioners that the BMV has been fixed at a much enhanced rate is not at all correct.

Placing reliance upon the said documents learned Government Advocate submits that the present petitioners are only taking into consideration the enhanced BMV, but not the present market value of the land in Bhubaneswar and in Khordha district. Further, the BMV has been enhanced taking into consideration the area, location and nature of land. The Bench Mark Valuation suggested to the Government in respect of entire district of Khordha is an outcome of a phased, systematic and structured exercises made at different levels. The deed writers and the Advocates are in no way affected by implementation of this new benchmark price except in the capacity of being general public. Further, the allegations made in these writ petitions are completely baseless. While determining the BMV, each and every provision of the 2001 Rules has been strictly followed.

15. In reply to averments made at paragraph 4 of the first writ petition, it is stated by the opposite parties that as per Rule 40(1) of 2001 Rules, the periodical revision is two years (biennial) and as per Rule 40(2), the Collector & Chairman would enhance the value by 10% of the value so fixed, but if the District Valuation Committee for any reason could not be able to revise the valuation in time, such enhancement of 10% under Rule 40(2) cannot be considered as proper valuation of the land as the said enhancement is an interim revision for the time being and remain in force till

regular revision is made by the Committee and implemented after approval by the Government. Therefore the allegation of the petitioners, that as there was revision of BMV vide letter dated 29.3.2012 by the Collector, no further revision can be made, is not at all correct reason being, that was an interim enhancement of 10% as per Rule 40(2) of 2001 Rules, and after fulfilling all the formalities as required under the Rules the regular revision has been made and the DLVC has fixed the BMV, which has duly been approved by the Government. Thereafter, as per the provisions of the guidelines issued by the Inspector General of Registration (IGR), Odisha, Cuttack in terms of Rule 47 of the 2001 Rules vide letter dated 21.5.2002, decision was taken by the DVLC in its meeting dated 11.06.2012 for issuance of notice and accordingly notice was issued on 12.06.2012 inviting objections within 30 days i.e. by 11.7.2012 and Sub-Collectors/Tahasildars/BDO/Commissioner BMC/Secretary BDA etc. were requested to publish the notice at conspicuous places for information of general public. During the said proclamation period, no objection was received from the general public opposing the proposed BMV. Therefore, it is stated that, having not submitted the objection in time by any person, the petitioner Association has no locus-standi to file the present writ petition questioning the correctness of the same before this Court.

16. It is further stated that as per Rule 38(e) of the 2001 Rules, after approval by the State Government, the Committee shall issue the market value guidelines for different areas of its own District without prejudice to the powers conferred on the Collector under Section 47-A of the Act. Accordingly, after obtaining approval of revised BMV from the State Government vide letter dated 28.8.2012, the DLVC held its meeting on 31.8.2012 to discuss the matter to notify and implement the revised BMV and immediately notice was issued on the same date i.e. on 31.8.2012 for implementation of the revised BMV. Therefore, allegation of the petitioners as made at paragraph 5 of the writ petition is not at all correct. In reply to the allegations made at paragraph 6 of the writ petition with regard to the Constitution of DLVC, it is submitted that two members namely, Mr. Ravi Burma and Smt. Surama Satapathy have been continuing as the Members of the DLVC since 2007. Nowhere in the Rules it is mentioned that the Members of the Committee shall be replaced each time. Since 2007 till date there was no allegation against any of those members. Traversing the averments made at paragraph 7 of the writ petition it is stated by the opposite parties that the revision has been conducted strictly in consonance with the principles for determination of market value as provided under Appendix-II under Rule 41 of 2001 Rules and special features for valuation on the basis of reports received from various revenue field functionaries who

collected such information on the basis of field verification vis-à-vis the study of village maps as well as the information gathered from the local people and taking into consideration all other factors. Further, as no representation/objection was received from any quarter within the proclamation period, issuing summons to any public for recording statements does not arise. However, a representation received from the Members of "Rajadhani Dalil Lekhaka Sangha" after the proclamation period is over has been disposed of and communicated to them and so far as the representation from the petitioner's Association, which is originally addressed to the Hon'ble Chief Minister, Odisha, that too after lapse of the proclamation period is under examination at higher forum.

17. Placing reliance upon the judgment of the Supreme Court in the case of State of Haryana and others Vs. Manoj Kumar (civil Appeal No. 2226 of 2010) it is stated by the opposite parties that in order to ensure that there is no evasion of stamp duty, circle rates are fixed from time to time and the notification is issued to that effect. The issuance of said notification has become imperative to arrest the tendency of evading the payment of actual stamp duty on the conveyance deeds. Further petitioner's Association is no way affected by implementation of the revised BMV. The revised BMV has been operationalised in the entire district of Khordha w.e.f. 1.9.2012 and except the District Registration Office at Bhubaneswar in other places of entire district; registration of documents has been going on without any resistance. But, only in Bhubaneswar due to the agitation by the Bar Members and Deed Writers, the general public who are the land owners and are not objecting to this revision are being prevented from approaching the Registering Officers for registration of their documents. Therefore, it is submitted by the opposite parties that the writ petition is baseless and petitioner's Association has no locus-standi to challenge the same and to prevent the intending general public from registering their documents. Hence it is prayed that the writ petitions may be rejected.

18. With reference to the aforesaid factual & rival legal contentions urged on behalf of the parties the following points arise for consideration for this Court:

(1) Whether the Bar Association has got the locus-standi to maintain the first writ petition ?

(2) Whether the second writ petition filed by two vendor and vendee seeking the self same relief is maintainable?

(3) Whether the constitution of the DLVC for determination of the BMV is in conformity with Rule 37 of the Rules?

(4) Whether the Committee has complied with Rules 41 and 45 read with Appendix II of the Rules at the time of fixing the BMV?

(5) Whether non-compliance with the aforesaid provisions entail the impugned orders to be quashed ?

(6) What order ?

19. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. The Supreme Court in catena of decisions, one of them in Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed, AIR 1976 SC 578, the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has more particular or peculiar interest on his own beyond that of general public in seeing that the law is properly administered.

20. In the instant cases, so far as the petitioners in the second writ petition are concerned, they are the vendor and vendee of a piece of property and executed the registered sale deed dated 13.9.2011 and presented it for registration, wherein petitioners disclosed the value of the land as per the Bench Mark Valuation fixed vide earlier Notification dated 26.2.2011. On presentation of the sale deed, the same was not registered by the Registering authority on the ground of the revised Bench Mark Valuation dated 31.08.2012 and thereafter issued notice dated 17.9.2012 (Annexure-2) to the petitioners indicating the under valuation of the said deed in terms of B.M.V. of the property involving the deficit stamp duty of Rs.20,000/-, and directed to pay the said deficit Stamp duty. It is stated by the petitioners that on receiving such notice petitioners found that the valuation disclosed in the said notice is 500% excess to the earlier Bench Mark Valuation dated 26.2.2011 fixed by the State Government. Being aggrieved on the same the petitioners in the second writ petition have approached this Court seeking the relief. Therefore, definitely they are the aggrieved persons, who can maintain the second writ petition. Hence the point No.2 is answered in favour of the petitioners in second writ petition.

21. It is also a well settled proposition of law laid down by the Supreme Court in a catena of decisions that writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the respondents. Therefore, there must be judicially

enforceable right for the enforcement on which the writ jurisdiction can be resorted to. This Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction of this Court. Similar view has also been taken by the apex Court in the cases of Calcutta Gas Company (Proprietor Ltd.) Vs. State of West Bengal & Ors., AIR 1962 SC 1044; Mani Subrat Jain & Ors. Vs. State of Haryana, AIR 1977 SC 276; State of Kerala Vs. Smt. A. Lakshmikutty & Ors., AIR 1987 SC 331; Rajendra Singh Vs. State of Madhya Pradesh, AIR 1996 SC 2736; Rani Laxmibai Kshetriya Gramin Bank Vs. Chand Behari Kapoor & Ors., AIR 1998 SC 3104; & Utkal University Vs. Dr. Nrusingha Charan Sarangi & Ors., AIR 1999 SC 943..

In Akhil Bharatiya Soshit Karamchari Sangh (Railway) Vs. Union of India & Ors., AIR 1981 SC 298, the Supreme Court while dealing with the issue of locus standi observed as under:–

> "Our current processual jurisprudence is not an individualistic Anglo-Indian mould. It is broad based and people-oriented, and envisions access to justice through 'class actions', 'Public Interest Litigation', and representative proceedings'. Indeed, little Indians in larger numbers seeking remedies in Courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."

22. In the case on hand, the Capital Bar Association, Bhubaneswar, which have filed the first writ petition is definitely a person not directly affected or aggrieved in the present BMV, but the Association has filed the writ petition on a representative capacity taking into consideration the interest of large number of people of the district and ventilating the grievance through this writ petition that the statutory authorities, while fixing the BMV, have not acted in the manner in accordance with the Rules, which they are required to do, thereby there is a breach of the statutory duty on the part of the opposite parties. Therefore, there must be judicially enforceable right for the enforcement on which the writ jurisdiction can be resorted to. Therefore, though the petitioner's Association is not directly affected, as the Members of the Association who are in the legal profession, when they feel that the statutory authority has taken certain action without following the statutory

provisions and rule of law has been violated, they have brought it to the notice of this Court for its interference and grant of relief as prayed for in this writ petition. Therefore, the writ petition filed by the Bar Assocaition cannot be thrown away merely on the technical plea and ground that the Association is not the affected party, and accordingly the same is required to be considered on merits and it is necessary to pass appropriate orders that may warrant in the case on hand. Accordingly, both point Nos. 1 & 2 are answered in favour of the petitioners.

23. By a careful reading of Rule 37 of 2001 Rules, which clearly provides that two public persons are to be nominated by the Chairman to the DLVC and as per the note to the said Rule, one of the nominees between the said two persons be preferably an expert valuer or an expert familiar with principles and practices of valuation of land, buildings and other immovable properties. If we give a careful and purposive interpretation to the said Rule and the Note thereof, it would make clear that one of the nominee of the Chairman should be an expert valuer, who can make the correct valuation of the property taking into consideration the present market value of the land and the principles of Bench Mark Valuation and present his suggestions before the Committee to take proper decision in the matter for fixing the correct Bench Mark Value of the properties. Learned Government Advocate, placing reliance upon the counter of the opposite parties, submits that one of nominee of the Chairman is a Civil Lawyer who knows the principles of valuation of land and another person is a social activist. It is the contention of the learned counsel for the petitioners in both the writ petitions that either one of the nominees are not the expert valuer. It is stated that a lawyer cannot be treated as an expert valuer of the land. Further, the nominees, who were nominated by the Chairman in the year 2007 are continuing till date. The present Chairman could have nominated one of the best expert land valuer as her nominee in accordance with Rule 37 who could have given the best suggestion while determining the revised BMV in question by the Committee. Therefore, we are of the view that Constitution of the Committee is not in accordance with Rule 37, particularly in view of selection of the nominees by the Chairman. Accordingly Point No. 3 is answered against the opposite parties and in favour of the petitioners.

24. Before answering point No.4, it would be necessary to extract Rules 41 & 45 of the 2001 Rules, which read thus:

> **"41. Procedure to prepare Market value guidelines:-** While working out the values of immovable properties, the respective Committee shall take into account the principle of valuation

mentioned the Appendix II and such other instructions issued/to be issued by Government from time to time."

45. Summons to the public, Public Officers and recording statement by the Committee : The Committee after serving of the notices, if they think fit to do so, record the statement of the persons and for the purpose of enquiry :-

(a) May call for any information or record from any public office or officers or Authority under the State/Central Government or any local authority or Statutory authority.

(b) May record statement from any Member of the public office or authority as mentioned under clause (a)

(c) May call the parties to be present on the date specified in the notice and on such other date as may be fixed by it.

25. Rule 41 makes it clear that while fixing the value of immovable properties the Committee must take into consideration the principle of valuation as mentioned in Appendix-II, which provides some principles & characteristics for valuation of the property, along with other relevant criteria and such other instructions issued/to be issued by Government from time to time. Further, Appendix-II clarifies that while the characterization preferred in the said Appendix cannot be called exhaustive of the various facts of a property, it is necessary to be selected in choosing a few characteristics out of many of the system to be practicable. However, as it appears from the records produced by the opposite parties that, all those aspects of the matter have not been taken into consideration properly by the DLVC. It is submitted by the opposite parties that price of land situated within the developing city of Bhubaneswar is increasing at a high speed because of its geographical location and other developmental aspects and taking into consideration all those facts also the BMV has been fixed by the Committee. No doubt it is true that the authority must take into consideration all those aspects also, but the principles laid down under Rules 41 & 45 shall also be adhered to by the Committee at the time of fixing BMV for the property. Further, as it appears from the records that the Committee has not properly adhered to Rule 45 also. In view of the said Rule there is a statutory obligation cast upon the Committee to issue public notice and to examine public officer by recording their statement. It is submitted by the opposite parties that notice was issued following the due procedure under the Rules, but as no objection was received from any public, issuing summons to any public for recording

statements does not arise. The said statement cannot be appreciated by this Court for the reason that Rule 45 provides for summons not only to the public but also to Public Officers. Therefore, if any public is not available, the Committee must have summoned the appropriate public officers, but the same has not been done.

26. It is the well settled preposition of law that when the statute provides for a particular procedure to do a particular thing in a particular manner, the authority has to follow the same. The Privy Council in the case of Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253 and the Supreme Court in the cases of Deep Chand Vs. State of Rajasthan, AIR 1961 SC 1527; Patna Improvement Trust Vs. Smt. Lakshmi Devi, AIR 1963 SC 1077; State of Uttar Pradesh Vs. Singhara Singh & Ors., AIR 1964 SC 358; Chettiam Veettil Ammad Vs. Taluk Land Board & Ors., AIR 1979 SC 1573; State of Bihar Vs. J.A.C. Saldanna, AIR 1980 SC 327 ; Prabha Shankar Dubey Vs. State of Madhya Pradesh, AIR 2004 SC 486; and Ram Phal Kundu Vs. Kamal Sharma, AIR 2004 SC 1657 have observed that it has been hither to uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way. The aforesaid settled legal proposition is based on a legal maxim *"Expressio unius est exclusio alterius"*, meaning thereby that if a statute provides for a thing to be done in a particular, then it has to be done in that manner, otherwise it would not have the sanctity in the eye of law.

27. For the reasons stated supra, we are of the view that the Committee has not properly followed principles laid down under Rules 41 & 45 and hence point Nos. 4 & 5 are also answered against the opposite parties. As we have answered point Nos. 3 to 5 against the opposite parties, the impugned Notification dated 31.08.2012 is hereby quashed and the matter is remitted back to the District Level Valuation Committee, Khordha for fresh consideration of the matter. The Chairman shall reconstitute the Committee by choosing two best suitable nominees strictly in compliance with Rule 37 of 2001 Rules. Further, while quashing the impugned Notification, we must also see that the revenue of the State shall not go on wasted because it is being utilized for the development of State for the benefit of the people and different weaker strata of the society in the State and with that revenue, the welfare activities will get a fillip and shot in the arm. Financial constraints may weaken the tempo of activities of the State.Therefore, we direct the opposite parties-authorities to constitute the Committee immediately and proceed in fixing the revised Bench Mark Valuation duly following the relevant procedure contemplated under the Rules and also taking into consideration the market value of the immovable properties prevailing in the different parts of the

district and other relevant aspects of the matter in accordance with law and to see that the entire process of fixing revised Bench Mark Valuation must be completed as early as possible, preferably within a period of three months from today.

In the result the writ petitions are allowed to the extent indicated above.

Before parting with the judgment, we feel it right to make certain observations that is warranted for future guidance. Our Constitution provides for an independent and efficient justice delivery system to render justice to the people of the country & others. The dispensation of justice must not be stopped for any reason. Members of the legal fraternity as important as that of the Judges of the judicial system and they are required to protect the interest of the general public as well as the Nation, therefore, they are always termed as learned and belong to the noble profession. However, it is noticed that raising voice against the revised Bench Mark Valuation in question, Members of the petitioner's Association as well as the Deed Writers have boycotted both the District as well as Sub-Registrars Office & Registration works, even though the BMV Notification has been challenged before this Court seeking the relief to quash the same, and for that reason large number of people as well as the government revenue have been affected. Therefore, we hope and trust that the learned Members of the Bar Associations will refrain themselves from such kind of practice in future and if they feel aggrieved, they can challenge the same in accordance with law and get redressal of the public grievance by approaching the appropriate court of law to protect the public interest & to see that rule of law shall prevail in the Democratic Country.

Further, the Deed Writers, who are the licence holders under the Government must also refrain themselves from preventing the general public from registering the documents, who want to register the same, in future.

Writ petitions allowed.

2013 (I) ILR - CUT- 794

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

W.P.(C) NO. 10891 OF 2009 (Dt. 22.12.2011)

BILASINI BEHERA .....Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.226

Death of petitioner's son due to fright caused by the presence of the police party in late hours of the night – Police party did not consist of any female officer – Compensation – Human rights Commission U/s. 18 (a)(i) of the protection of Human Rights, Act, 1993 recommended the State Govt. for payment of compensation of Rs.1,00,000/- - Hence this writ petition for enhancement and to direct C.B.I. for investigation.

Findings of the learned Human Rights Commission show that there was no assault on the deceased by police – Held, although this case is not a fit case to be entrusted to C.B.I. but considering that the age of the deceased is 20 years at the time of death the compensation is enhanced from 1 lakh to 4 lakhs. (Para 8,10,15)

Case laws Referred to:-

1.AIR 1983 SC 1086 : (Rudul Sah-V- State of Bihar & Anr.)
2.(2011)1 SCC 694 : (Siddhara,a Satlingappa Mehetre-V-State of Maharastra)
3.AIR 1992 SC 2069 : (Smt. Kumari -V- State of Tamil Nadu & Ors.
5.AIR 1962 SC 933 : (State of Rajastjan-V- Mst. Vidhyawati)

For Petitioner - M/s. Bisweswar Mishra, R.Mishra, S.Mishra, D.Sahoo, P.K.Sahoo, B.K.Mishra,B.S.Mishra.
For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate.

B.N. MAHAPATRA, J. This Writ Petition has been filed by petitioner-Bilasini Behera, wife of Rohit Behera of village Rajnagar, PS: Athagarh, Dist: Cuttack with several prayers, i.e., to enhance the amount of compensation from Rs.1,00,000/- awarded by the Human Rights Commission to Rs.10,00,000/-; to direct the opposite party-Government of Orissa to pay the same within two weeks; to entrust the investigation to C.B.I. to unearth the

real motive of the culprits and the persons under whose spell such a heinous murder took place; to punish the officers, persons and any other agency helping, aiding to screening the offenders and to issue direction to the S.D.J.M., Athagarh not to accept the final report and to wait for investigation by C.B.I. or any agency or for a judicial probe.

2. Petitioner's case in a nutshell is that her son Bhaskar was working as a Helper and part-time driver at Paradeep. He came to the house to celebrate Raja Festival. On 14th June, 2007, at about 10 P.M. in the night, one Narendra Kumar Das, A.S.I. of Athagarh Police Station along with three constables were found shouting in filthy language against her son Bhaskar in front of their house. Hearing the shouting of the police officials, the petitioner and the entire family members bolted the door from inside. The Police party scaled over the boundary wall by help of two Gram Rakhees and entered into the premises of the petitioner and went on kicking the door of the petitioner. Finding no other alternative, the petitioner and the entire family members went out of the house and wanted to know the reasons of immediate entrance of the Police into their house by shouting in filthy language and breaking the door from outside. The Police party thereafter searched for Purusottam Behera, the younger brother of the petitioner's husband. The petitioner replied that he was not present there in the house. Despite their statement that Purusottam Behera, the younger brother of the petitioner's husband was not there in the house, the Police party went on beating another door of a room where deceased Bhaskar was sleeping. When Bhaskar opened the door, the Police party forcibly brought him outside and went on assaulting him in a brutal manner. The entire Police party individually assaulted the deceased by means of lathi, kicks and slaps. All of them went on kicking the deceased for which the deceased Bhaskar fell down on the ground with bleeding from his mouth. When his old grandfather was crying to give water to the deceased, the Police party behaved like demons and went on assaulting denying water. The Police party thought that Bhaskar was dead. They tried to flee away from the place. The two Grama Rakhees and few other constables who were standing on the main road joined together with the Police party and tried to escape through the police van but hearing the cry, some villagers by that time gathered there and requested the Police party to shift Bhaskar to Hospital. Finding no other way out, the Police party carried Bhaskar, his father and another man in the vehicle to the hospital. While carrying Bhaskar to hospital, on the way, the other persons were directed by the Police to get down from the vehicle and the ASI N.K.Das talked to the Circle Inspector of Police and O.I.C. over mobile phone that Bhaskar was probably dead and requested them to come to the Hospital to where they were carrying the

dead body. As soon as the deceased reached at the hospital, the doctor attending him declared that Bhaskar was dead. By then, the O.I.C. and other police officers who were present there left the place immediately escaping themselves from the spot as hundreds of villagers came down to the hospital following Bhaskar. The dead body was laying there for the whole night and on the next day the father of the deceased went to the office of S.D.P.O., Athagarh to lodge an F.I.R. against the Circle Inspector, O.I.C., A.S.I. and other constables who were involved in the case. The SDPO, Athagarh soon after getting FIR sent it to the OIC, Athagarh to register a case and take up investigation, but the O.I.C., Athagarh Police Station did not register the F.I.R. as a case immediately even though the case was of house-breaking and murder and tried to conduct post mortem through doctors of Athagarh without making any inquest there. The doctors though started the post mortem but subsequently declined to conduct the post mortem and referred the case to FMT Department of S.C.B. Medical College & Hospital, Cuttack. After the post mortem was conducted at S.C.B. Medical College & Hospital, Cuttack, the O.I.C., Athagarh Police Station registered the F.I.R. already sent by SDPO, as a case bearing Athagarh PS Case No.119/07 under Sections 457/302/34, I.P.C. The matter was communicated to the Collector, Cuttack, I.G. of Police, who reached at the spot and wanted to negotiate with the people who were present near the dead body. Immediately, the ASI N.K.Das was put under suspension and thereafter the post mortem wok was started. The Collector, Cuttack assured that suitable action shall be taken against the real culprits. The Collector, Cuttack gave Rs.10,000/- to the petitioner and the family members from Red-cross Society as ex-gratia. A spot enquiry was made through an Officer in the rank of Additional District Magistrate, who was the Presiding Officer, DRDA, Cuttack. On 16.06.2007, he went to the village as well as the house of the petitioner and recorded statements of ten persons. Since the petitioner suspected that the real truth cannot come up as the local MLA, who is an ex-Minister and belongs to the ruling party, and at his instance Police has taken action, she filed W.P.(C) No.7399 of 2007 with prayer for prosecution of all the accused persons who were present at the spot, assaulted the deceased, tried to suppress the truth of the case and for providing proper protection to the family of the petitioner and adequate compensation. This Court vide order dated 18.02.2008 disposed of W.P.(C) No.7399 of 2007 directing the Chairman, Orissa State Human Rights Commission (for short, 'the Commission') to make an enquiry into the matter and submit a report to the Registrar (Judicial) of this Court within a period of three months from the date of receipt of the record of that case.

3. Since no proper relief was granted to the petitioner by learned Commission, the petitioner has filed the present writ petition with the above prayers.

4. Mr.Mishra, learned counsel appearing on behalf of the petitioner submitted that pursuant to the order of this Court, the Commission registered three cases bearing OHRC Case No.667 of 2007 (suo motu), ORHC Case No.669 of 2007 and OHRC Case No.437 of 2008. All the three cases were tagged together and decided on 07.08.2008. The learned Commission gave a finding that the un-natural death caused by the Police officials was sudden and without any warrant, and house trespass made by the Police in the night without any case and without any woman police is an offence. Therefore, Athagarh P.S. Case No.119 dated 15.06.2007 under Sections 457/302/34, I.P.C. has to be investigated into and the investigation was to continue against ASI N.K.Das and Rs.1,00,000/- be given to this petitioner towards compensation for death of her son-Bhaskar. The Commission further observed that independent of the outcome of the investigation of the case, the State Government shall initiate departmental proceeding against ASI N.K.Das and Constable Artatran Nayak for misconduct. The compensation of Rs.1,00,000/- awarded by the Commission is very negligible. Had the deceased been alive, the parents could have been able to get the benefit of earning of their deceased son for their life time. Therefore, minimum compensation of Rs.10,00,000/- should have been awarded to them. The Commission has not given any finding on the report of the doctor, police official, C.I. of Police, Athagarh, namely, Sudam Charan Sahu and Sri R.P.Swain under whose spell everything was done. The Police did not proceed against the culprits, who are the doctors and the police as they belonged to the group of one ruling party MLA. Therefore, proper investigation by CBI to find out the truth should be made. Because of death of son of the petitioner, the old father in-law of the petitioner who was about 84 years and the eyewitness also expired due to shock of assault on his grandson. The learned Commission has also not examined the witnesses and employees of the Sub-Divisional Hospital, Athagarh who could have narrated about the treatment and post mortem made by the doctor in order to hush up the matter. The then Circle Inspector of Athagarh Police Station, who was the real architect of such a crime, goes unpunished for such ghastly murder and unlawful activities. The learned S.D.J.M., Athagarh had issued notice inviting objection against final report submitted by the Police against which the informant, the father of the deceased, filed protest petition in spite of the findings of the Commission and this Court. The State Police have become callous and have deliberately and intentionally filed final report alleging the facts to be true, but there was no clue to array the police officials

in any such crime. The petitioner has no trust on the Police agency because of the conduct of the Police. The Commission though categorically directed to prosecute the Police officials, the same has not yet been done. The State Police agency and their Police personnel carelessly and deliberately handled the case to save their Police personnel, who are accused persons and to wash out the case of murder.

5. Per contra, Mr. R.K. Mohapatra, learned Government Advocate submitted that there is no evidence on record to show that Bhaskar was murdered by the Police. On the other hand, the learned Commission in paragraph 14 of its order held that Bhaskar was not assaulted by Police. The cause of death might be due to aspirated stomach contents which got into the air passage which happened when he was shocked and scared to find Police standing in front of him. The State Police has also filed the final report. There is nothing on record to show that the Police officials have murdered the deceased and the allegations raised against other accused persons are true. Therefore, the Government Advocate prayed for dismissal of the writ petition.

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

(i) Whether it is a fit case to be handed over to the C.B.I. or any other independent agency for investigation?

(ii) Whether compensation of Rs.1.00 lakh awarded by the Human Rights Commission is adequate?

7. The undisputed facts are that on 14th June, 2007 while the deceased was sleeping in his house the Police officials entered into the house of the petitioner and the deceased died in their front. Pursuant to the direction of this Court vide order dated 18.02.2008 passed in W.P.(C) No.7399 of 2007, the Commission registered three cases – those are *suo motu* proceedings initiated on the basis of the news report published in the Oriya daily 'The Samaja' in its issue dated 16.06.2007. OHRC Case No.669 of 2007 was registered on the basis of a petition filed by Bilasini Behera, the mother of the deceased-Bhaskar Behera, who alleged that her son was assaulted to death in the night of 14.06.2007. OHRC Case No.437 of 2008 was registered pursuant to the direction given by this Court vide order dated 18.02.2008 passed in W.P.(C) No.7399 of 2007. The learned Commission considered all the three cases together and passed a common order on

07.08.2008 taking into consideration the evidence of several persons. The Commission, inter alia, came to the following conclusion.

> "14. On a close analysis of the evidence mentioned above and having regard to the expert medical opinion, we are inclined to hold that Bhaskar was not assaulted by the police. The only external injury (abrasion on the left upper eyelid of size 1 cm. x 5 cm.) could not have been the cause of his death. The cause of death might be due to aspirated stomach contents which got into the air passage which happened when he was shocked and scared to find police standing in front of him. Assuming that Bhaskar had taken alcohol (as per the chemical examination report, presence of alcohol was evident), the proximate cause of his death was fright caused by the presence of police in the late hours of the night in the house.
>
> 15. The entry of the police personnel into the house of the father of Bhaskar in the night of 14.06.2007 under the leadership of the A.S.I. (N.K.Das) is admitted. The Police had come to village-Rajnagar in connection with investigation of a case of minor girl Anupama being allegedly assaulted by Kabu Behera. In stead of investigating into that case, they made entry into house of Rohit Behera to apprehend his brother-Purusottam Behera. No scrap of paper is produced before us that Purusottam Behera was involved in any cognizable offence which led A.S.I. (N.K/Das) to search for him. They entered into the house in the late hour of the night when family members were expected to have gone to bed. There were number of female members in the house, but the police team did not consist of any female police officer. It is an admitted case that they were not in search of Bhaskar. The provision of Section 47 of the Code of Criminal Procedure was observed with breach by the police. The right to life and right of privacy of the family members of Bhaskar were infringed by the police when they failed to offer any ostensible reason for their entry into the house of Rohit Behera in the late hours of the night. The fact that Bhaskar did not die due to assault by the police, does not mitigate the violation of human right of Bhaskar and his family members. The police was guilty of excesses in entering into the house in the night of occurrence. The District Administration perhaps in recognition of such excesses granted rupees 10,000/- as ex-gratia to the bereaved family. Bhaskar was a bachelor aged about 20 years and was earning and his parents were depending on him.

> 16. We have given our anxious consideration and having regard to the circumstances in which Bhaskar died, we recommend to the State Government under section 18(a)(i) of the Protection of Human Rights Act, 1993 to pay to the parents of Bhaskar a sum of rupees 1,00,000/- (one lakh) as compensation. Investigation of Athagarh P.S. Case No.119 of 2007 under sections 457/302/34 IPC is in progress. We make it clear that any observation by us in this order would not affect the course of the investigation. Independent of the outcome of the investigation of the case, the State Government shall initiate departmental proceeding against the A.S.I. (N.K.Das) and the constable (Artatran Nayak) for misconduct."

8. In view of the categorical findings of the learned Commission that deceased-Bhaskar was not assaulted by the Police for the reasons stated in its detailed order, we do not feel that the present case is a fit one to be entrusted to the C.B.I. for investigation.

9. Next question for consideration is with regard to grant of adequate compensation. The learned Commission in its order held that the proximate cause of death of Bhaskar Behera was due to fright caused by the presence of the Police party in the late hours in their house. Learned Commission further held that the Police personnel entered into the house of the petitioner in the late hours of the night when the family members were expected to have gone to bed, but the Police party did not consist of any female official/officer in the team. Learned Commission has also further held that the police personnel were not arrived there for searching Bhaskar. Right to life and privacy of family members of the petitioner's family was infringed when the Police party failed to offer any ostensible reason for their entry into petitioner's house in the late hours of the night of occurrence. The fact that Bhaskar did not die due to assault by the Police does not mitigate the violation of human right of Bhaskar and his family members. The Police was guilty of entering into the house of the petitioner in the late hours of the night of occurrence.

10. In view of this categorical finding arrived at by the learned Commission, we are of the view that it is a fit case where adequate compensation should have been awarded to the petitioner.

11. At this juncture, it will be beneficial to refer to some of the decisions of the Hon'ble Supreme Court. In the case of ***Rudul Sah v. State of Bihar and another,*** AIR 1983 SC 1086, the Hon'ble Supreme Court observed that in appropriate cases, the Court discharging constitutional duties can

pass orders for payment of money in the nature of compensation consequent upon deprivation of a fundamental right to life and liberty of a person as the State must repair the damage done by its officers to such person's right.

12. The Hon'ble Supreme Court in the case of ***Siddharama Satlingappa Mehetre Vs. State of Maharastra***, (2011) 1 SCC 694, held in paragraph 36 that all human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. Life bereft of liberty would be without honour and dignity and it would lose all significance and meaning and the life itself would not be worth living. That is why liberty is called the very quintessence of a civilized existence.

13. In ***Smt. Kumari vs. State of Tamil Nadu and others,*** AIR 1992 SC 2069, the Hon'ble Supreme Court overruling the decision of the High Court of Tamil Nadu observed that the writ jurisdiction under Article 226 of the Constitution of India can be invoked by the Writ Court for awarding compensation to a victim, who suffered due to negligence of the State or its functionaries. In that case six years' old child had fallen down in the uncovered sewerage tank. The High Court refused to entertain the claim of compensation in a writ petition under Article 226 of the Constitution, but the Hon'ble Supreme Court directed the State to pay compensation.

14. The Hon'ble Supreme Court in the case of ***State of Rajasthan v. Mst. Vidhyawati,*** AIR 1962 SC 933, held as under:

> "Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such, as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common law immunity never operated in India……."

15. In the fact situation, considering the age of the deceased at the time of death that he was 20 years old, we are of the considered view that

Rs.4.00 lakhs would be the adequate compensation in the facts and circumstances of the present case. Since the father of the deceased has already received Rs.1.00 lakh pursuant to the order of the Commission, the State Government is directed to pay Rs.3,00,000/- (rupees three lakhs) more to the petitioner towards compensation within a period of two months from today and if the same is not paid, it shall carry interest @ 9% per annum from the date of death of the deceased, i.e., 14.06.2007 till the date of payment. Out of the above amount of Rs.3.00 lakhs, Rs.2.00 lakhs be kept in Fixed Deposit in any Nationalized Bank for a period of five years in joint names of father and mother of the deceased, which shall be renewed from time to time. In the event, the amount so directed to be kept in fixed deposit is required to meet the urgent need of the petitioner, the same may be withdrawn by the petitioner by filing an application before this Court for grant of such permission. The balance amount of Rs.1.00 (one lakh) be paid equally to the parents of the deceased.

16. In the result, the writ petition is allowed to the extent indicated above.

Writ petition allowed.

2013 (I) ILR - CUT- 802

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

W.P.(C) NOS.1769/2010 & 25170/2011 (Dt.03.12.2012)

BIRENDRA KUMAR NAYAK ……Petitioner

.Vrs.

STATE OF ORISSA & ORS. ……Opp.Parties

SERVICE LAW – Compulsory retirement – Grounds – Adverse entries against Judicial Officer – Non-communication of such entries – Officer promoted earlier in spite of those adverse entries – Order of punishment challenged.

Authority to examine the entire service record including character rolls and confidential reports of the officer, irrespective of the fact that adverse entries had not been communicated to him – Held,

even a single adverse entry touching the integrity of an officer in the remote past is sufficient to award compulsory retirement – No reason to interfere with the impugned order of punishment.

(Para 10 to 20)

Case laws Referred to:-

1.AIR 2010 SC 151 : (Swaran Singh Chand-V- Punjab State Electricity Board).
2.AIR 1999 SC 1677 : (High Court of Punjab & Haryana through R.G.-V- Ishwar Chand Jain & Anr.)
3.103(2007)CLT 254 : (Hari Das-V- Director of Fisheries, Orissa & Anr.)
4.AIR 2009 SC 2637 : (National Aviation Company of India Ltd.-V- S.M.K. Khan)
5.AIR 1994 SC 1261 : (Union of India-V- V.P.Seth & Anr.)
6.AIR 1996 SC 2436 : (State of Orissa & Ors.-V- Ram Chandra Das)
7.AIR 1997 SC 3740 : (I.K. Mishra-V- Union of India & Ors.)
8.AIR 2002 SC 1345 : (State of U.P. & Ors.-V- Vijay Kumar Jain)
9.(2010)10 SCC 693 : (Pyare Mohan Lal-V- State of Jharkhand & Ors.)
10.(1996)5 SCC 331 : (State of Orissa-V- Ram Chandra Das)
11.(1992)2 SCC 299 : (Baikuntha Nath Das & Anr.-V-Chief District Medical Officer Baripada & Anr.)
12.2012(2)OLR 45 : 114(2012)CLT 577 : (Kailash Chandra Padhi-V-State of Orissa & Anr.)

For Petitioner - M/s. P.K. Khuntia, B.Pujari, S.K. Pradhan, N.Moharana & M.R. Nayak.

For Opp.Parties - Mr. R.K.Mohapatra, Govt. Advocate,
Mr. P.K.Muduli, Add. Standing Counsel.
In both the cases.

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the notification dated 24.02.2009 (Annexure-3) and order dated 13.11.2009 (Annexure-4). Annexure-3 has been issued by the Government of Odisha in Department of Law giving retirement to the petitioner, who was an officer in the cadre of Civil Judge working as S.D.J.M. with immediate effect. Annexure-4 has been issued under R.T.I. Act intimating the petitioner that after careful consideration of the entries made in his Confidential Character Role (CCR), this Court was of the opinion that the petitioner did not possess standard of efficiency required to discharge the duties of the post held by the petitioner and in the public interest as well as in the interest of betterment of administration of justice his continuance in service was thought not proper. Accordingly, his

name was recommended to the Government of Odisha, Department of Home for premature retirement in public interest on payment of three months' salary and allowances in lieu of three months notice as provided under Rule 44 of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (for short, "O.S.J.S. & O.J.S. Rules, 2007")

2. Petitioner's case in a nutshell is that he was appointed as Munsif in the Odisha Judicial Service, Class-II as notified by the Law Department, Government of Odisha vide Notification No.IJ-5/84-393/I/L dated 10.04.1985. His service was confirmed with effect from April, 1987. While the petitioner was working in the cadre of Civil Judge as S.D.J.M., Athagarh, opposite Party No.2 notified retirement of the petitioner vide notification No.VJ-29/07(Pt) 2874/L dated 24.02.2009 in pursuance of Rule 44 of the O.S.J.S. & O.J.S. Rules, 2007 read with first proviso to Rule 71(a) of the Orissa Service Code with immediate effect in public interest. Hence, the present writ petition.

3. Mr. P.K. Khuntia, learned counsel appearing for the petitioner submits that the notification under Annexure-3 has been passed on recommendation of this Court. In response to the application filed by the petitioner the Public Information Officer, Orissa High Court has intimated the petitioner that the recommendation for retiring the petitioner was made in careful consideration of the circumstances and CCR and on the basis of the opinion that the petitioner did not possess the standard of efficiency required to discharge the duties of the post held by him and in public interest as well as in the interest of betterment of administration of justice his continuance in service was thought not proper. The petitioner has been issued with a memo bearing Memo No.1824(2) dated 09.03.2009/16.03.2009 by the Special Officer (Administration) of this Court. By the said Memo, the Special Officer (Administration) of this Court forwarded copy of his letter addressed to the Chief Judicial Magistrate, Cuttack-cum-Enquiring Officer whereby the Enquiring Officer had been intimated that the Court while recommending for premature retirement of the petitioner under Rule 44 of the O.S.J.S. & O.J.S. Rules, 2007 have been pleased to resolve that the disciplinary proceeding, if any, against the officer be dropped. Prior to initiation of D.P. No.13 of 2005 another Disciplinary proceeding had been initiated against the petitioner in D.P. No.2/1994 which had been culminated in February, 2000 and punishment of stoppage of one increment with cumulative effect had been awarded against the petitioner. Besides the above two disciplinary proceedings there had never been any other disciplinary proceeding against the petitioner during his entire service career from 1985 when he joined the service till 07.03.2009 when he was made to retire. During the entire service career, the petitioner had never been intimated of any adverse entry in his Character Roll nor was he at any point of time found any fault with or called upon to improve on

any account, much less, in respect to his standard of efficiency vis-à-vis the efficiency required to discharge the duties of the post held by him. Therefore, the order under Annexure-3 is neither reasonable nor just or lawful. It does not fulfil to the requirement of service jurisprudence.

4. Mr. Khuntia further submitted that after the first departmental proceeding culminated with a punishment in the year 2000, the petitioner was promoted to the rank of Munsif, higher in rank of the post of Additional Munsif-cum-JMFC. Obviously the promotion was accorded in consideration of the petitioner's service records and suitability, seniority and merit for holding the post of higher rank of Munsif. The order under Annexure-3 has been passed as a penalty instead of initiating the disciplinary proceeding. The subject matter of D.P. No.13 of 2005 could not have been taken into consideration for the purpose or to the disadvantage of the petitioner. Thus, the petitioner has been retired under Annexure-3 solely in consideration of the subject matter of D.P. No.13 of 2005 and the retirement stated to be in public interest has only been imposed as a measure of punishment. The petitioner was given retirement when D.P. No.13 of 2005 was pending. Instead of taking the proceeding to its logical end, the authorities have imposed the punishment of retirement on the petitioner. The authorities having come to the conclusion that the charges levelled against the petitioner would not stand scrutiny of law on the face of the written statement of defence filed by the petitioner, they have resorted to take aid of Rule 44 of the O.S.J.S. & O.J.S. Rules, 2007 and Rule 71(a) of the Odisha Service Code to punish the petitioner. Therefore, they have only tried to camouflage their intention of punishing the petitioner at any cost. The action of the authorities amounts to misusing the provisions of Rule 44 of the O.S.J.S. & O.J.S. Rules, 2007 and Rule 71(a) of the Odisha Service Code. Law is very clear that during pendency of a disciplinary proceeding, order of compulsory retirement ought not to be passed.

5. It was further argued that Rule 13 of the OCS (CCA) Rules envisages that compulsory retirement is a major penalty. The OCS (CCA) Rules also provide the procedure to be followed before imposing a major penalty in Rule 15 thereof. Rule 41 of the O.S.J.S. & O.J.S. Rules, 2007 provides that the provisions of service rule including Rules 13,14,15 and 16 of the OCS (CCA) Rules and the provisions of the Odisha Services Code shall mutatis mutandis be applicable to the members of the service. In G.A. Department letter No.30495 dated 24.11.1987 the Government of Orissa has clarified that premature retirement should not be made as a measure of penalty but it can only be ordered in public interest. There are no materials to apply the said two terms i.e. public interest and interest of betterment of administration of justice and make recommendation to the Government for compulsory retirement on the

said two grounds. Adverse remark, if any, cannot and must not be allowed to be the basis for recommendation for premature retirement. In that view of the matter, the recommendation for retirement itself violates principles of natural justice. Petitioner's case was reviewed and he was found by the competent authority suitable for continuance in his employment after attaining 50 years of age. Therefore, there should have been no further review till he attained 55 years of age. Annexurers-3 and 4 are baseless, unreasonable, unjust, whimsical and arbitrary and suffers from vices of bias and non-application of mind and have been passed ignoring the procedure prescribed under law and the requirement of service jurisprudence and logic. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case *Swaran Singh Chand v. Punjab State Electricity Board, AIR 2010 SC 151,* Mr. Khuntia, learned counsel for the petitioner submitted that when an order suffers from malice in law, neither any averment as such is required to be made nor strict proof thereof is insisted upon. Such an order being illegal would be wholly unsustainable. In the present case, clause (6) of G.A. Department Letter No.30495 dated 24.11.1987 has not been followed.

6. Placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *High Court of Punjab and Haryana through R.G. vs. Ishwar Chand Jain and another etc. AIR 1999 SC 1677,* it is submitted that while the disciplinary proceeding is pending the petitioner should not have be given compulsory retirement. Further placing reliance upon the judgment of this High Court in the case of *Hari Das vs. Director of Fisheries, Orissa and another, 103 (2007) CLT 254,* Mr. Khuntia submitted that compulsory retirement which been passed against the petitioner is not in accordance with law. Hence, compulsory retirement of the petitioner is illegal and therefore liable to be quashed.

Further, placing reliance upon the decision of the Hon'ble Supreme Court in the case of *National Aviation Company of India Ltd. vs. S.M.K. Khan,* AIR 2009 SC 2637, Mr. Khuntia submitted that compulsory retirement can be resorted to on a review of the service on completion of specified years of service or reaching a specified age, in terms of relevant rules or regulations where retention is not in the interest of the institution or of utility of the employer. Concluding his argument, Mr. Khuntia prays to set aside the order of compulsory retirement.

7. Mr. R.K. Mohapatra, learned Government Advocate submitted that there is no infirmity or illegality in the order passed under Annexures-3 and 4. Nature of judicial service is completely different from other service. Judicial service is not under the supervision of the State. Compulsory retirement is also not a punishment. Mr. Mohapatra, further submitted that prior to initiation of D.P.

No.13 of 2005, another department proceeding i.e. D.P. No.2 of 1994 was initiated on the charge that the petitioner had prepared a conviction judgment in I.C.C. 41 of 1990 which was to be pronounced on 23.11.1993 and hinted to the advocate for the complainant to make payment. When the advocate for the complainant avoided, he deferred the judgment to 27.11.1993 and changed the judgment of conviction to acquittal by making several corrections in the conviction judgment in his own handwriting. After enquiry he was found guilty and penalty was imposed which was stoppage of one increment with cumulative effect.

In support of his contention, Mr. Mohapatra, learned Government Advocate placed reliance upon the judgment of the Hon'ble Supreme Court in the case of *Union of India vs. V.P. Seth & Anr., AIR 1994 SC 1261* and submitted that the adverse remarks against the employees and particularly of the integrity would not stand eclipsed by his subsequent promotion while considering the case of compulsory retirement. Mr. Mohapatra also placed reliance upon the judgment of the Hon'ble Supreme Court in the cases of *State of Orissa and others vs. Ram Chandra Das, AIR 1996 SC 2436, I.K. Mishra, vs. Union of India and others, AIR 1997 SC 3740, State of Punjab vs. Gurdas Singh, AIR 1998 SC 1661, and State of U.P. & Ors., vs. Vijay Kumar Jain, AIR 2002 SC 1345.*

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

(i) Whether without communicating the adverse entries in CRR of a Judicial Officer to him/her, the same can be taken into account while assessing whether the petitioner can be given compulsory retirement ?

(ii) Whether inspite of the adverse entries in the CCR, if a Judicial Officer is given promotion, those adverse entries can be taken into account while considering that Officer's case for the purpose of giving compulsory retirement ?

(iii) Whether a single adverse entry regarding integrity of a Judicial Officer in remote past is sufficient to award compulsory retirement ?

(iv) Whether after promotion of the petitioner in the year 2001 to the higher rank in absence of any material before the authority, order of compulsory retirement is justified ?

(v) Whether during pendency of disciplinary proceeding against any Judicial Officer, compulsory retirement can be given to such Officer ?

9. Since, question Nos.(i) to (iv) are inter linked with each other, they are dealt with together.

10. Undisputed facts are that there were two disciplinary proceedings initiated against the petitioner i.e. D.P. No.2 of 1994 and D.P. No.13 of 2005. D.P. No.2 of 1994 had been culminated in February, 2000 and punishment of stoppage of one increment with cumulative effect have been awarded against the petitioner. D.P. No.2 of 1994 was initiated on the charge that the petitioner had prepared a conviction judgment in I.C.C. No.41 of 1990 which was to be pronounced on 23.11.1993 and the petitioner hinted to the advocate for the complainant to make payment. When the advocate for the complainant avoided, he deferred the date of pronouncement of the judgment to 27.11.1993 and changed the judgment of conviction to acquittal by making several corrections in the conviction judgment by his own handwriting. After enquiry, he was found guilty and penalty was imposed which was stoppage of one increment with cumulative effect.

11. Apart from the above, in paragraph-10 of the counter affidavit the opposite party has narrated the adverse remarks in the CCR of the petitioner and other records which are produced below:-

> "10. That the averments made in paragraph-12 of the writ application are far from truth. In fact the following are the adverse entries in his C.C.Rs. and other records.

1986	Knowledge of law andJudicial Capacity.	He is a beginner. His criminal judgments need improvement.
1990		His behaviour towards the officers of other departments should be more restrained.
1991 to 1992	Attitudetowards Superiors, Subordinate and Colleagues	Needs improvement.
1993	Knowledge of law and judicial capacity	Needs improvement
	Behaviour towards members of the Bar and public	Should improve
	General reputation	Not good

	About reputation of integrity and impartiality	To be kept under close surveillance
1997	Knowledge of law and judicial capacity	Poor
	General reputation	Not good
	Net result	Poor
1998		D.P. No.2/94 was started against him for having changed the judgment of conviction in I.C.C. No.41/90 to that of acquittal making corrections in his own hand during his incumbency as J.M.F.C., Sambalpur, which was enquired into by the Addl. Dist. Judge, Jeypore and report was against him which was accepted by the Full Court in the meeting dated 4.8.99 and second show cause notice was issued, hence, on account of his past record. I disagree with the remarks of the District Judge.
	Net result	Poor
	Fitness for promotion to the higher grade	Unfit
2000	Quality of work	Not up to the standard
	Fitness for promotion to the higher grade	Unfit
2001	Report of the Judge-in-charge of the Judgeship	In view of his poor performance in civil side his disposal has been assessed as very low as per the norms fixed by the High Court.

All the above adverse entries relating to the periods from the year, 1991-1992, 1993 and 1997 were communicated to the petitioner vide Court's D.O. Letter No.7075 dated 09.09.1999 excepting the entry relating to reputation, integrity and impartiality for the year 1993 which could not be communicated due to inadvertence."

12. In the rejoinder affidavit, the petitioner has not denied the adverse remarks narrated in paragraph-10 of the counter affidavit.

13. At this juncture, it is necessary to refer to some of the judgments of the Hon'ble Supreme Court as well as this Court pertaining to the issue involved in the case at hand.

14. The Hon'ble Supreme Court in the case of ***Pyare Mohan Lal vs. State of Jharkhand and others,*** (2010) 10 SCC 693, has held as under:

> **"29.** The law requires the authority to consider the "entire service record" of the employee while assessing whether he can be given compulsory retirement irrespective of the fact that the adverse entries had not been communicated to him and the officer had been promoted earlier in spite of those adverse entries. More so, a single adverse entry regarding the integrity of an officer even in remote past is sufficient to award compulsory retirement. The case of a judicial officer is required to be examined, treating him to be different from other wings of the society, as he is serving the State in a different capacity. The case of a judicial officer is considered by a committee of Judges of the High Court duly constituted by the Hon'ble Chief Justice and then the report of the Committee is placed before the Full Court. A decision is taken by the Full Court after due deliberation on the matter. Therefore, there is hardly any chance to make the allegations of non-application of mind or mala fides."

15. In the case of ***State of U.P. vs. Vijay Kumar Jain,*** (2002) 3 SCC 641, the Hon'ble Supreme Court held that the vigour or sting of an entry does not get wiped out, particularly, while considering the case of employee for giving him compulsory retirement, as it requires the examination of the entire service record, including character rolls and confidential reports.

16. The Hon'ble Supreme Court in the case of ***State of Orissa Vs. Ram Chandra Das,*** (1996) 5 SCC 331 has held as under:

> "*7*. … *Merely because a promotion has been given even after adverse entries were made, cannot be a ground to note that compulsory retirement of the government servant could not be ordered*. The evidence does not become inadmissible or irrelevant as opined by the Tribunal. What would be relevant is whether upon that state of record as a reasonable prudent man would the Government or competent officer reach that decision. We find that

selfsame material after promotion may not be taken into consideration only to deny him further promotion, if any. But that material undoubtedly would be available to the Government to consider the overall expediency or necessity to continue the government servant in service after he attained the required length of service or qualified period of service for pension."

17. The Hon'ble Supreme Court in the case of ***V.P. Seth*** *(supra),* held that adverse remark against the employee and particularly of integrity would not stand eclipsed by his subsequent promotion while considering the case of compulsory retirement.

18. The Hon'ble Supreme Court in the case of ***Baikuntha Nath Das & Anr. V. Chief District Medical Officer, Baripada & Anr,*** (1992) 2 SCC 299 held as under:

"34. The following principles emerge from the above discussion:

(i) An order of compulsory retirement is not a punishment. It implies no stigma nor any suggestion of misbehaviour.

(ii) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(iii) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (a) mala fide or (b) that it is based on no evidence or (c) that it is arbitrary — in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(iv) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before 316 taking a decision in the matter — of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential

records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(v) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference."

19. This Court in the case of ***Kailash Chandra Padhi vs. State of Orissa and another,*** 2012(2) OLR 45 : 114 (2012) CLT 577, held as under:

"7. ……Needless to say that for effective administration of justice, honest, impartial and law knowing Judicial Officers are required. However, an officer having knowledge in law but without integrity is a great danger to the smooth functioning of the Judiciary. Withholding the integrity of a Government employee is a serious matter. As fire and water don't agree so also the judiciary and dishonesty cannot join their hands together."

20. In view of the above settled legal position, we don't find any infirmity or illegality in the order passed under Annexures-3 and 4 and the various contentions taken by learned counsel for the petitioner merit no consideration.

21. In view of the answer to question nos.(i) to (iv), there is no need to answer question No.(v) as the same would amount to mere academic in nature. Otherwise also as it appears from the averments made in paragraph-9 of the writ petition, vide Memo No.1824(2) dated 09.03.2009/16.03.2009 the Special Officer (Administration) of this Court intimated the Chief Judicial Magistrate-cum-Enquiring Officer that the Court while recommending for premature retirement of the petitioner under Rule 44 of the O.S.J.S. & O.J.S. Rules, 2007 had been pleased to resolve that the disciplinary proceeding, if any, against the officer be dropped. This shows that the allegation on the basis of which D.P. No.13 of 2005 was initiated against the petitioner was not taken into consideration for directing compulsory retirement of the petitioner.

22. The decision of Hon'ble Supreme Court in the case of ***Ishwar Chand Jain*** *(supra),* has no application to the present case as the facts of that case are completely different from that of the present case.

23. In view of the above, we don't find any cogent reason to interfere with the impugned order passed under Annexures-3 and 4. 24. In result, the writ petitions are dismissed. No order as to costs.

Writ petitions dismissed.

2013 (I) ILR - CUT- 813

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

W.P.(C) NO. 3369 OF 2010 (Dt.20.12.2012)

SUBAS SINGH & ORS. ……..Petitioners.

.Vrs.

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

A. P.I.L. – Whether the action of the State Authorities in leasing out the lands earmarked to be used as bus stand at Badambadi for a long term of 33 years with option to renew the same on mutual consent after completion of the period of lease in favour of Reliance Retail Ltd. (O.P.4) for its commercial use on the ground that it would develop Badambadi Bus stand on public private participation mode is justified – Held, No. (Para 16)

B. P.I.L. – Whether the State Authorities are justified in leasing out the lands and buildings of Badambadi Bus stand for generation of funds to liquidate the pending dues of the employees of the OSRTC – Held, No.

In this case cabinet approval not taken before taking a final decision in the matter of selling/leasing out the property in question – Hence the matter may be placed before the cabinet and in case the cabinet approves the proposal then a transparent method should be followed in order to fetch best price and in case cabinet does not approve O.P.4 shall not be entitled to be granted with the lease and the State Authorities to return the amount paid by O.P.4.

(Paras 19,32, 34)

Case laws Referred to:-

1.2009 (7) SCC 462 : (Ravi Development-V- Shree Krishna Prathisthan & Ors.)
2.AIR 2002 SC 350 : (BALCO Employees' Union (Regd.)-V- Union of India & Ors.)
3.AIR 1995 SC 94 : (Kumari Madhuri Patil & Anr.-V- Addl.Commissioner, Tribal Development & Ors.)
4.AIR 2003 SC 2562 : (Onkar Lal Bajaj & Ors.-V- Union of India & Ors.)
5.AIR 2011 SC 1834 : (Akhil Bhartiya Upbhokta Congress-V- State of M.P. & Ors.)

For Petitioners - M/s. Asim Amitav Das, M.B. Roy, A.K. Behera, J. Mohanty, B.K. Parida, B. Sahoo, S. Roy, R.K. Das.

For Opp.Parties - Mr. Ashok Mohanty, (Advocate General) & Mr. Hrusikesh Tripathy (for O.P.No.1 to 3)
Mr. S.K. Padhi, Sr. Advocate(for O.P.No.4)

B.N. MAHAPATRA, J. By means of the present writ petition, challenge has been made to the decision of the opposite party-authorities for leasing out the land, building and other infrastructure of Badambadi Bus Stand, Cuttack in favour of opposite party No.4-Reliance Retail Ltd. (for short, 'RRL') on the ground that such decision is illegal, unwarranted and uncalled for, and against the interest of the people of State of Odisha, more particularly the people of Cuttack.

2. The present writ petition has been filed in the nature of public interest litigation. Petitioner No.1 is a social worker and a Trade Unionist and also the Convener of the "Cuttack Banchao Committee", which has been formed in the year 2005 and since then it has been taking the issues relating to the interest of the people. Petitioner No.2 is a renowned person of Cuttack and presently is the President of Utkal Sahitya Samaja. He is associated with various social organizations and is also one of the functionaries of Cuttack Banchao Committee. Petitioner No.3 is an eminent educationist and former Vice-Chancellor of Berhampur University and also associated with different social organizations and activities concerning the public issues. Thus, all the petitioners claim to be public spirited persons.

3. Petitioners' case is that Badambadi Bus-Stand situates in both sides of the road which is called "Link Road" measuring about 50 acres of land belonging to State Government. The Bus stand was established in the early part of 1970 by the State Government. At that point of time, Government was owner of two main Transport Corporations, namely, Orissa Road Transport

Corporation (ORT) and Orissa State Road Transport Corporation (for short 'OSRTC') which were plying their buses from Badambadi Bus Stand. Besides the Government Corporation owned buses, some private buses were plying from Badambadi Bus Stand when the bus stand was established. Initially, Badambadi Bus Stand was planned to provide parking place for 100 buses in the early 1970. By efflux of time, number of buses increased and many private buses came to ply. Practically, there are three bus stands, namely, main bus stand, Rourkela-Angul bus stand and Puri-Bhubaneswar bus stand. All the bus -stands were being maintained by the State opposite parties and the private buses were plying from the said bus stands on payment of prescribed fees and were enjoying the facilities on *quid pro quo* basis. At present, about 2200 buses are plying from Badambadi Bus stand to different parts of Odisha. Out of that, 1000 buses are express buses, which reach Badambadi in the morning and mostly park on the road side. Apart from that, about 4000 auto rickshaws, 200 taxies and about 1000 town buses are operating daily from Badambadi Bus Stand. Thus, more than 7000 vehicles are operating from Badambadi Bus Stand everyday catering to the need of the people and provide private transport facilities. In the year 2006, petitioners came to know that the State Government has taken a decision to sell out/lease out the land of five Bus stands of the State, such as, Cuttack, Dhenkanal, Sundargarh, Berhampur and Baripada to private parties and also to handover the maintenance of those bus-stands, which was seriously objected by the Social Organizations at the relevant point of time. In the year 2008, members of the Cuttack Banchao Committee had taken up the issues with the State Government for making the Bus stand a model and planned one under control of the State Government and also to provide all other necessary facilities for parking of the buses and amenities to the passengers as Badambadi Bus stand is linked with the State Transport and it is the prime Bus stand of the State. The petitioner-Cuttack Banchao Committee protesting the transfer of Badambadi Bus Stand staged a two days' day and night Dharana on 3rd and 4th December, 2008. A similar Dharana was also staged on 28th February, 2009 for development of Badambadi Bus Stand and for opposing the sale of land belonging to the Corporation to RRL. Despite the protest against leasing out the Badambadi Bus Stand to RRL and when the State Government without reversing its decision proceeded to lease out Badambadi Bus Stand, petitioners approached this Court by filing the present writ petition for appropriate order.

4. Mr. A. A. Das, learned counsel appearing for the petitioners, submits that the decision of the State Government to lease out Badambadi Bus stand to RRL is against the public interest and such a decision has been taken with mala fide intention. The deal with the RRL is clandestine one; no public

notification was made in this regard, the land in question has been leased out to opposite party No.4-RRL just to favour it. Since vast valuable Government land in Cuttack town at Badambadi Bus Stand is leased out in favour of RRL, the petitioners as well as the other social organizations have raised their protest. The Odia daily newspaper "Dharitri" has also published in an editorial revealing the fact and clandestine deal of the State Government and State opposite parties in leasing out the Badambadi Bus Stand in favour of opposite party No.4-RRL instead of making it a model bus stand by providing better facilities for transport as demanded by the petitioners.

5. Per contra, Mr. Asok Mohanty, learned Advocate General appearing for opposite party-authorities vehemently argued that the Badambadi Bus stand has not been decided to be leased out in favour of any private party, rather it has been decided to be developed on public-private participation mode. No decision has also been taken to hand over the Badambadi Bus stand to RRL. As per the decision of the State Government, to liquidate the arrear liabilities and pending dues of the retired employees of OSRTC, unutilized land of OSRTC was decided to be developed on public private participation basis. Accordingly, unutilized lands of 5 places, such as Keonjhar, Dhenkanal, Bhubaneswar, Cuttack, Barbil were initially decided to be given on rent and land at Baripada was decided to be sold out. The decision taken to lease/sell out the property in question is not illegal, unwarranted and uncalled for. The said decision was taken in the interest of Corporation. No land or building or other infrastructure of any other bus stand where buses are parking and passengers are boarding has been leased out. The main bus stand at Badambadi consists of an area of Ac.4.059 decimals and the Corporation is maintaining the said bus stand and collecting parking fees. Only 700 numbers of buses are using three bus stands and paying their parking fees to OSRTC.

6. It was further argued that keeping in view the growing need and increasing inflow of buses, the main bus stand at Badambadi has been decided to be developed on Public Private Participation mode and tender process for the same is in progress. The OSRTC is paid a sum of Rs.2.75 lakhs per month towards parking fees for three bus stands. An area of Ac.2.605 decimals which was lying vacant and one dilapidated building standing therein was proposed to be leased out for commercial purposes since the State Government was not in a position to pay the outstanding dues of OSRTC employees. A policy decision was taken by the OSRTC and the Government that some of the unutilized lands which were being used earlier as garage, office and bus stand would be leased out for commercial

purpose and the money which would be fetched shall be utilized for payment of unpaid wages and other liabilities and for compliance of several orders of this Court for payment of wages and other VRS dues. The land in question is vulnerable for encroachment and utilization by antisocial elements and outsiders.

7. On 29.4.2007, a comprehensive proposal was received from the RRL for utilization of unutilized lands of OSRTC at Bhubaneswar, Cuttack, Berhampur, Keonjhar, Dhenkanal, Barbil and Baripada for commercial use in which they had submitted that they shall make down payment of Rs.20 crores towards sub-lease of lands and Rs.6 crores towards purchase of Baripada land and will pay monthly rent of Rs.15 lakhs for 33 years with increase by 10% after expiry of every five years. The proposal of RRL was forwarded to the Government on 14.5.2007 as it was a much better offer than all other offers which were received earlier and pending with the Government; after decision of the Government and as per the Swiss Challenge mode the offer placed by RRL was made public. It is submitted that Swiss Challenge mode received approval of the Hon'ble Supreme Court in the case of *Ravi Development V. Shree Krishna Prathisthan and others*, 2009 (7) SCC 462. The OSRTC issued paper publication in various newspapers and it was uploaded in Government Website. There was no challenge in any form to the publication of 2004 and subsequent publication in 2007 issued by OSRTC of its proposal to tie up with the private Company for sub-lease of its lands at Cuttack, Bhubaneswar, Berhampur, Keonjhar, Dhenkanal for a period of 33 years. On 13.09.2007, the State Government approved the proposal of sub-lease of the lands of those areas including Cuttack and directed to prepare a draft tripartite agreement. On 14.12.2007, RRL deposited Rs.7 crores which included Rs.6 crores for down payment for sale of land and building at Baripada and Rs.1 crore as advance towards the down payment in respect of other areas. On 6.8.2008, RRL deposited the rent of Rs.19 crores towards the balance down payment of Rs.20 crores to OSRTC. The tripartite agreement which was prepared by OSRTC was also sent for approval of the State Government. On 25.04.2008, the State Government approved the said tripartite agreement.

8. A decision had been taken not to lease out the area of Cuttack and Angul Bus stand which were being utilized for bus stand. An area of Ac.1.224 which was being utilized as bus-stand was demarcated and kept apart and rest land of Ac.2.605 decimals was proposed to be given for commercial purpose to RRL. After deposit of the initial money, possession of the land was handed over to RRL and the land at Cuttack measuring Ac.2.605 decs. was settled in favour of RRL on 28.8.2008. An agreement was entered into

on 29th September, 2009 and the same was sent to the District Sub-Registrar, Cuttack for registration.

9. Learned Advocate General further submitted that the aforesaid lands were the subject-matter of an earlier writ petition bearing W.P.(C) No.10907 of 2006 filed before this Court with a prayer that this area should be utilized for an ideal parking place. This Court after hearing the parties dismissed the writ petition on 19.11.2007. Only a part of the land of OSRTC not being used as bus stand is now being given on lease for commercial purpose. The present writ petition in the nature of Public Interest Litigation is filed belatedly in the year 2010. A policy decision taken after due approval of the State Government following proper procedure, cannot be said to be illegal. With all these averments, learned Advocate General submitted that the writ petition is not maintainable and the same is liable to be dismissed.

10. Mr. S.K. Padhi, learned Senior Advocate appearing on behalf of RRL, the intervenor-O.P. No.4 while supporting the stand taken by opposite parties Nos. 2 & 3 submitted that land measuring Ac.2. 605 decimals, which has been handed over to RRL does not belong to Badambadi bus stand. It is an old garage of the bus stand not being in use and has remained unutilized and abandoned since 1998-99. The amount offered by RRL was published in all the leading newspapers and in the Government website since 2007. Since no better offer was received, it was decided to accept the offer of the intervenor-RRL. The present public interest litigation has been filed almost after 3 years of finalization of the tender process and after the entire process of tender was examined and scrutinized, a tripartite agreement was executed among the State Government, OSRTC and RRL. Relying on a decision of the apex Court in the case of *BALCO Employees' Union (Regd.) v. Union of India & others*, AIR 2002 SC 350, it was contended that the process of disinvestment is a policy decision involving complex economic factors, and Courts have consistently refrained from interfering with the economic decisions taken by the Executives.

The tripartite agreement has also been entered into. RRL has already invested a huge sum and is in the process of setting up of the commercial Complex which would in no way affect the public interest as the said land has remained unutilized for a pretty long period.

11. On rival contentions, both factual and legal, raised by the parties, questions that fall for consideration by this Court are as follows:-

(i) Whether the action of opposite party-Authorities in leasing out the lands earmarked to be used as bus stand at Badambadi for a long term of 33 years with option to renew the same on mutual consent after completion of the period of lease to RRL, a private party for its commercial use amounts to development of Badambadi Bus-stand on Public Private Participation mode?

(ii) Whether opposite party-authorities are justified in leasing out the lands earmarked to be used as Bus-stand at Badambadi for a long term of 33 years to a private party to generate funds to liquidate the arrear liabilities and pending dues of the retired employees of the OSRTC and for compliance of several orders of this Court for payment of such dues at the cost of larger interest of public?

(iii) Whether in the facts and circumstances of the case this Court should refrain itself from interfering with the economic decision taken by the Executive to sell/lease out the properties in question to private party?

(iv) What order?

12. Question No.(i) is as to whether action of opposite parties authorities in leasing out Badambadi Bus stand on long term basis to private party-RRL amounts to development of Badambadi Bus stand on Public Private Participation mode as contended by opposite party authorities.

In the counter affidavit, opposite parties have stated time and again that it has not been decided to lease out Bus stands in favour of any private party, rather it has been decided to develop the Bus stands on Public Private Participation mode. If such a decision has been taken by opposite party-authorities, then the alleged action of the authorities in leasing out the lands in 5 places ear-marked for bus-stand and selling out one land at Baripada is contrary to the decision taken by opposite parties to develop the land in question on Public Private Participation mode. If the land ear-marked for bus-stand is sold out to a private party as has been done at Baripada, there is no question of developing the said land for bus-stand purpose on public private participation. Similarly, if any land earmarked for bus-stand is leased out for a long term of 33 years with option to renew the same for further period on mutual consent after completion of the period of lease to a private party to utilize it for its commercial purpose, the very purpose of developing the land for bus-stand on public private participation would be frustrated.

13. At this juncture, it is necessary to refer to clauses (1), (2), (3), (5) and (10) of the notice inviting tender published in different newspapers and also Government website as extracted in paragraph 12 of the further affidavit dated 10.05.2010 of opposite party nos. 2 and 3. The said clauses read as under:

> "(1) The sub-lease for six places will be given initially for a period of 33 years, which may be renewed after mutual consent after completion of the period of lease.
>
> (2) Bid price for 6 places will be at least Rs.98/- crores of which at least Rs.20 cores will be deposited with OSRTC in one instalment at the time of execution of agreement and the balance to be paid to OSRTC IN MONTHLY INSTALMENTS OF Rs.15 lakhs over the entire period of lease with 10% increase every 5 years.
>
> (3) Purchase price of land and building at Baripada shall be at least Rs.6 crores including stamp duty and registration fees.
>
> xx xx xx
>
> (5) The sites will be for commercial use and not to be used for residential purpose.
>
> xx xx xx
>
> (10) The tender will bid a consolidated amount for sub-lease of all the six places and purchase of the Baripada land, and bids for any single site or for less than all the lands referred to will not be considered".

14. Thus, as per the above Tender Call Notice, the property earmarked for bus-stand was decided to be leased out initially for a long period of 33 years with the option of renewal on mutual consent after completion of period of lease. According to clause (5), the site will be used for commercial purpose. Purchase price of land and building at Baripada is fixed at Rs.6 crores. Thus, perusal of the entire advertisement does not reveal that leasing out of the lands in 5 places and selling of land in one place were for the purpose of development of the bus-stand.

15. It goes without saying that the constitutional obligation on the part of the State is to provide to its citizens adequate facilities like transport, education, health, electricity, water supply etc. Compared with the

increase in population, the number of buses is also increasing. Due to increase in number of buses, more space is required for parking of the buses so also various other amenities are required, such as, shelter to the commuters and rest rooms etc. for passengers. On the other hand, the extent of land earmarked for bus stand is not increasing rather the same remains constant. Therefore, the land already earmarked for bus-stand should not be sold or leased out to any private party causing prejudice to the larger interest of general public. Opposite party-authorities instead of selling/leasing out the property earmarked for bus-stand to private party for its commercial use, should take steps to make for its commercial use, should take steps to make model bus-stands in a planned manner and provide all necessary facilities for parking of more number of buses and amenities to the passengers and also provide commercial accommodations to restaurants and other allied facilities so as to render better services to the commuters as the bus-stand has link with the State Transport Service.

16. For the reason stated above, we are of the view that the action of opposite party-Authorities in leasing out the lands earmarked to be used as bus stand at Badambadi for a long term of 33 years with option to renew the same on mutual consent after completion of the period of lease to RRL, a private party for its commercial use does not amount to development of Badambadi Bus stand on Public Private Participation mode.

17. Question no.(ii) is whether opposite parties are justified to lease out the property in question to the private party for generation of funds to liquidate the arrear liabilities and pending dues of the employees of the OSRTC.

It does not appear to be appropriate to sell and lease out the land earmarked to be utilized for the purpose of Bus Stand in view of the growing population and increase in the number of buses. In order to liquidate the arrears and pending liabilities of the retired OSRTC employees, the opposite parties-authorities should adopt other methods as have been adopted by different Government Sector Undertakings running in loss to meet their liabilities. Sale / lease out of the land earmarked to be used as Bus Stand cannot be the only option to liquidate the arrear liability and pending dues of the retired employees of the OSRTC, that too at the cost of larger public interest.

18. The other plea of opposite party-authorities to justify their action is that the land was vulnerable to encroachment and utilization by antisocial elements and

outsiders. If a private party could able to evict the antisocial elements from the land in question for its own commercial use, we fail to understand how opposite party-authorities are not able to do so. It is ridiculous. Government is competent to take possession of its own land and the land belonging to the Corporation from antisocial elements.

19. In the rejoinder affidavit dated 27.09.2010, petitioners took a stand that about Rs.6 crores was sanctioned by the State Government for expansion of Badambadi bus stand which has not been implemented because of the shortage of land. Instead of selling/leasing out the land in question for commercial purpose, opposite parties should take steps to expand the parking area and provide necessary amenities to the passengers, which is more important. Therefore, the land can be utilized by the State Government for other public purpose connected to running a model Bus stand instead of leasing and selling out the same to RRL, a private concern.

20. Question No.(iii) is as to whether in the facts and circumstances of the case this Court should refrain itself from interfering with the economic decision taken by the Executive to sell/lease out the properties in question to private party?

It is true that the Courts have very limited power of judicial review in the matter of policy decision of the Government. At the same time, the Courts have constitutional duty and responsibility in exercise of their power of judicial review to see that constitutional goals set down in the Preamble; the Fundamental Rights and Directive Principles of the Constitution are achieved. (See ***Kumari Madhuri Patil and another v. Addl. Commissioner, Tribal Development and others***, AIR 1995 SC 94).

21. It is settled position of law that when the Court is satisfied that there is substantial amount of public interest the Court should intervene under Article 226 of the Constitution of India [See *Jagdish Mandal Vs. State of Orissa*, (2007) 17 SCC 517; *Air India Limited Vs. Cochin International Airport Limited*, (2000) 2 SCC 617; *Assn. of Registration Plates Vs. Union of India*, (2005) 1 SCC 679]

22. In the case at hand, the decision taken by opposite party-authorities to sell/lease out the land earmarked for bus-stand amounts to flagrant violation of the very object sought to be achieved by the Road Transport Corporation Act, 1950, which has been enacted to enable the State Governments to set up Transport Corporation with the object of providing efficient, adequate, economical and properly organized system of road transport services.

23. It is the constitutional obligation on the part of the State to provide better transport facility and maintain the bus-stand properly for convenience of the

citizens of the State. In that view of the matter, the action of opposite parties-authorities in the present case to sell/lease out the property earmarked for the purpose of bus-stand to a private party for their commercial use is contrary to such constitutional goal.

24. The decision of the apex Court in ***BALCO Employees Union (Regd.)*** (supra) relied upon by opposite party-authorities has no application to the present case. In BALCO case, the employees had challenged the decision to disinvest majority of shares of Bharat Aluminum Co. Ltd. which is a Public Sector Undertaking. The workmen contended that they have been adversely affected by the decision of the Government of India to disinvest 51% of the shares in BALCO in favour of a private party. It was also contended that because of disinvestment the workmen have lost their rights and protection under Articles 14 and 16 of the Constitution and this having an adverse civil consequence, they had a right to be heard before and during the process of disinvestment. The question arose for consideration in that case was whether such a decision is amenable to judicial review and if so, within what parameters and to what extent. It is held that process of disinvestment is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of authority. There was no case made out by the petitioners that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers' rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law.

In the present case, the basic issue is as to whether the land ear-marked for development of bus-stand could be sold/leased out to a private party on long term basis with a renewal clause. Here the question is not with regard to investment or disinvestment of share of the State Government in any business organization like BALCO. The paramount consideration in the present case is the interest of citizens of the State and not of a few employees of any commercial organization. Therefore, in the BALCO case the Hon'ble Supreme Court has held that while it was a policy decision to start BALCO as a Company owned by the Government, as a change of policy that disinvestment has taken

place. If the initial decision could not be validly challenged on the same reasoning, the decision to disinvest also cannot be impugned without showing that it is against any law or *mala fide*.

Therefore, the decision of the Hon'ble Supreme Court in the case of *BALCO Employees Union (Regd.)* (supra), has no application to the case at hand.

25. Law is also settled that the Government has to rise above the nexus of vested interests and nepotism and eschew window–dressing. The principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it, the decision may look legitimate but as a matter of fact, the reasons are not based on values but to achieve popular accolade; that decision cannot be allowed to operate (Vide ***Onkar Lal Bajaj & Ors. Vs. Union of India & Ors***., AIR 2003 SC 2562).

26. At this juncture, it is necessary to refer to the decision of Hon'ble Supreme Court in the case of ***Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh & Ors***., AIR 2011 SC 1834, wherein it is held as follows:-

> "31. What needs to be emphasized is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transparent, discernible and well defined policy, which shall be made known to the public by publication in the Official Gazette and other recognized modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favoritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State."

27. In the present case, we summoned the records which were produced by the learned Government Advocate.

From page No.277/C it appears that on 16.01.2003 Cabinet has taken a decision as follows:-

> "Transport Department should consult Revenue Department in particular cases for disposal of land after which the Cabinet approval is to be obtained."

In the note sheet on 19.05.2007 at page 181/N, CRC & Special Secretary put a note to the Principal Secretary to Government, wherein he noted that in the Cabinet meeting held on 27.02.2007 the proposal of selling out the land of OSRTC at Baripada was approved. In the said note sheet, joint report of CMD, OSRTC and Transport Commissioner have been referred to. As per the proposal 'd', "the Cabinet approval may be obtained after the deal is finalized."

28. From the note sheet at Page 218 it appears that the decision of the Cabinet dated 16.01.2003 and proposal by CRC and Special Secretary dated 19.05.2007 at page 181/N was not given effect to in view of the decision of the Hon'ble Chief Minister at page 470/C followed by the Commissioner of Revenue and Disaster Management Department at page 292/C.

29. From page 470/C, it appears that on 20.08.2007 the Hon'ble Chief Minister, Odisha has taken a decision that the Administrative Department is competent to accord necessary permission for sanction of sub-lease within the over-all terms and conditions of the original lease deed. Hence, they may dispose of the proposal by following the due procedure in a transparent manner.

From page 292/C, it appears that the Joint Secretary to Government in Revenue and Disaster Management Department informed the CMD, OSRTC that after careful consideration of proposal of CMD, the Government has decided that the OSRTC may sub-lease the Government land leased out to the Corporation at Dhenkanal, Barbil and Keonjhar and the land acquired for OSRTC through land acquisition process at Cuttack in favour of the Company desirous of taking land on sub-lease basis following the due procedure in transparent manner.

30. Fact remains that on 16.01.2003 the Cabinet had taken a decision that the Transport Department should consult with the Revenue Department in particular cases for disposal of the land after which the Cabinet approval is to be obtained.

31. At this juncture, it is necessary to refer the Orissa Government Rules of Business published vide Notification No.4192-Gen/14.12.1956.

Rule 8(1) of the said Rules provides as follows:

> "8. (1) All cases referred to in the Second Schedule shall be brought before the Cabinet by the direction of–
>
> (i) the Chief Minister, or
> (ii) the Minister in-charge or the Minister of State in-charge of the case with the consent of the Chief Minister."

Clause 19 of the Second Schedule of Orissa Government Rules of Business provides as follows:

> "19. Proposal involving the alienation (temporarily or permanently), abandonment or reduction of revenue, or sale, grant or lease of Government property exceeding rupees one lakh in value, except when such alienation, abandonment, reduction sale, grant or lease is in accordance with the rules or a general scheme already approved by the Cabinet."

32. Therefore, in view of the decision of the Cabinet dated 16.01.2003, in all fairness, before taking a final decision in the matter of leasing out the property in question to opposite party No.4 and executing the agreement with it, the Cabinet approval ought to have been obtained which has been given a go by in the case at hand.

33. In the peculiar fact situation, it would be appropriate that the Cabinet should take a decision in the matter of selling/leasing out of the properties in question to private party at different places including Badambadi Bus Stand at Cuttack, keeping in mind our observations made above, the earlier decision of the Cabinet dated 16.01.2003, proposal of CRC and Special Secretary dated 19.05.2007 and provisions contained in Clause 19 of the Second Schedule of the Orissa Rules of Business.

34. If the Cabinet ultimately approves the proposal for selling/leasing out of properties in question then a transparent method should be followed to ensure that best price is fetched.

In case the Cabinet does not approve the proposal for selling/leasing out the properties in question or for any reason opposite party No.4-RRL

shall not be entitled to be granted with lease of the properties in question, opposite party-State Authorities are directed to return the amount paid by opposite party No.4-RRL to it.

35. The writ petition is disposed of with the above observations / directions. No order as to costs.

Writ petition disposed of.

2013 (I) ILR - CUT- 827

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

W. P. (C) NO. 6382 OF 2010 (Dt.14.12.2012)

BISWANATH SENAPATI ……..Petitioner

.Vrs.

CHIEF EXECUTIVE OFFICER … ….Opp.Party

ELECTRICITY – Petitioner sustained burn injuries as 11 K.V. line got snapped and fell on him – Petitioner suffered 65% disability and was advised to use wheel chair – He requires treatment throughout his life – Writ petition filed claiming compensation.

The above shocking incident occurred due to lack of care and caution of the Opp.Parties and its functionaries – Held, Opp.Party-company is liable, on the principles of strict liability, to pay compensation to the petitioner. (Para 6)

Case laws Referred to:-

1. (1987)1 SCC 395 : (M.C. Mehta-V- Union of India)
2. (2001)8 SCC 151

For Petitioner - Mr. Subrat Ku. Nayak-3.

For Opp.Party - M/s. Sanjib Swain, S.C.Panda, B.Rath.

B.K.MISRA,J. The petitioner claims for compensation of Rs.5,00,000/- from the opposite party no.1 because of the grievous burn injuries sustained by him when a live conductor got snapped from the over head main electric line and fell on him.

2. The case of the petitioner is that on 26.10.2007 while he was working in his paddy field a live electric wire of the over head 11 K.V. line which was passing over the paddy fields because of poor maintenance by the opposite party Company got snapped and fell on him for which he sustained extensive burn injuries on his body. It is alleged that the co-villagers of the petitioner who were working in the nearby fields immediately rushed to the spot and rescued him. The petitioner initially received treatment in Government Hospital, Gop, but since his condition deteriorated he was removed to S.C.B. Medical College and Hospital, Cuttack where he received treatment for quite a long time. The petitioner was discharged from the hospital after prolonged treatment for about three months. But the extensive burn injuries on different parts of his body made him physically handicapped. The discharge certificate of S.C.B. Medical College and Hospital, Cuttack in respect of the petitioner has been annexed to the writ petition as Annexure-4 and the disability certificate in respect of the petitioner furnished by the District Medical Board on 4.8.2008 is annexed to the writ petition as Annexure-5. Regarding the incident an F.I.R. was lodged at Gop Police Station basing upon which Station Diary Entry No.519 dated 26.10.2007 was made. About the accident the opposite party Company was informed and the wife of the petitioner applied to the authorities to provide her a job as her husband, namely the petitioner who became physically handicapped because of the aforesaid accident was unable to earn his living. It is alleged that despite several requests to opposite party and after running from pillar to post when the petitioner could not get a single pie as compensation for the injuries he sustained, he approached this Court for compensation. According to the petitioner when the opposite party Company is engaged in a hazardous and inherently dangerous activity and when he sustained injury on account of the accident during the course of such activity of the opposite party Company it is the Company who is liable to compensate him as the accident in question and snapping of the over head electric line cannot be said to be an act of God.

3. The opposite party no.3 entered appearance and filed counter affidavit wherein while denying the claim of the petitioner for compensation it is their case that the alleged accident if any was not due to their fault and moreover they had no knowledge about the snapping of the over head electric line in question. Besides that it is their case that the entire claim of

the petitioner is based on disputed questions of facts which cannot be adjudicated by this Court in a writ jurisdiction. Accordingly, the opposite parties prayed that the writ petition should be dismissed.

4. We have heard the learned counsel appearing for the parties at length and perused the materials on record. Annexure-3 the extract of Gop Police Station Diary Entry No.519 dated 26.10.2007 reveals about the lodging of information by one Sudarsan Senapati, the nephew of the petitioner stating that the petitioner while going to his paddy field was injured as an live electric wire fell on him. The F.I.R. lodged by Sudarsan Senapati as well as the wife of the petitioner at Gop Police Station shows that on 25.10.2007 around 10.45 A.M. when the petitioner was going to his paddy field a live electric wire fell on him for which he sustained severe burn injuries and was removed to Gop Hospital first and later on removed to the S.C.B. Medical College and Hospital, Cuttack. The photo copy of the discharge certificate (Annexure-4) shows that the petitioner was admitted into the S.C.B.Medical College and Hospital, Cuttack as an indoor patient on 25.10.2007 as he had deep electric burn injuries and the patient was 25% in low condition. The petitioner was discharged from the S.C.B. Medical College and Hospital, Cuttack on 17.1.2008. Annexure-5 the disability certificate furnished by the District Medical Board, Puri shows that the petitioner had 65% disability as he had stiffness of left shoulder, stiffness of left ankle and foot. There was traumatic condition of left hand. He was advised to use wheel chair. The opposite parties in their counter affidavit have not specifically denied about the accident in question and the deep burn injuries which the petitioner had sustained as a live electric wire fell on him. The denials appear to be evasive in nature. Thus, at this stage we are satisfied after perusing the series of photocopies of the prescriptions at Annexure-8 series and Annexures-4 & 5, that the petitioner suffered physical deformities which were permanent in nature for which he has become disabled on account of a live electric wire getting snapped from the main over head line fell on him. There is no doubt, that the opposite party company is responsible for the maintenance of the electric line and they are duty bound to take protective measures so that live electric wires do not fall on any surface or touch any live object more so a human being. Had the opposite party exercised proper care and supervision and replaced the weak conductor in time the accident in question could have been averted. Therefore, the accident was solely due to lack of care and caution on the part of opposite party Company and its functionaries. The argument that the officials of opposite party Company had no knowledge of the snapping of the conductor (live wire) is not acceptable to us.

5. The rule of strict liability has been applied in our country and there are catena of decisions on the point including that of the Apex Court and of this Court also. In ***M.C. Mehta –v- Union of India (1987) 1 SCC 395)*** the Apex Court by going beyond the rule of 'strict liability' held that:-

> "Where an enterprise is engaged in a hazardous or inherently dangerous activity and harm is caused on any one on account of the accident in the operation of such activity the enterprise is strictly and absolutely liable to compensate those who are affected by the accident, such liability is not subject to any of the exception to the principle of strict liability under the rule in Ryelands –v- Flecteher".

6. By following the dictum of the Apex Court reported in ***M.S. Grewal –v- Deep Chand Sood (2001) 8 SCC 151, D.K.Basu –v- D.K.Basu –v- State of West Bengal (Supra), Ramesh Singh Pawar –v- Madhya Pradesh Electricity Board and others (Supra), Executive Engineer, CESU, Cuttack Electrical Division, Jobra, Cuttack –v- Hema Sethy, 2011 (II) OLR 70, AIR 1997 Orissa 109, A.Krishna Patra v. Orissa State Electricity Board and others, 2011(1) OLR 198, Dhananjaya Behera v. CESU represented through its Chief Exeutive Officer and others,*** and after hearing the learned counsel for both parties, we have no hesitation in coming to a clear and cogent conclusion that the writ petition under Article 226 of the Constitution is maintainable and the respondents are liable on the principles of strict liability to pay compensation to the petitioner.

7. The petitioner has claimed compensation to the tune of Rs.5,00,000/- for the injuries he sustained because of falling of the live electric conductor on him. It is claimed by the petitioner in the writ petition that he was earning Rs.150/- a day by working as daily wage earner in his village. He also claims to have spent a sum of Rs.2,00,000/- for his treatment.

8. Following the guidelines laid down by the Apex Court in the case of **Lata Wadhwa V. State of Bihar, (2001) 8 SCC 197, M.S.Grewal V. Deep Chand Sood and the decisions of this Court in the case of Executive Engineer, Central Electricity Supply Utility Limited, Cuttack Electrical Division, Jobra, Cuttack V. Hema Sethy (supra) and Nirmala Nayak and others V. Chairman-cum-Managing Director, Grid Corporation of Orissa Limited and another and Sambari Nayak V. the Chief General Manager, Telecom Orissa Circle, Bhubaneswar and others**, the quantum of compensation is to be determined in a scientific method with reference to the 2nd schedule of the Motor Vehicles Act, 1988. Besides that in a recent pronouncement the Apex Court in the case ***Sri Laxman @ Laxman***

Mourya v. Divisional Manager, Oriental Insurance Company Limited and another reported in ***2012 (1) OLR (SC) 171*** have held that in case of personal injury the following factors are to be taken into consideration for determining the quantum of compensation, namely:-

i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food.

ii) Loss of earning during the period of treatment, loss of future earnings on account of permanent disability.

iii) Future medical expenses.

iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) Loss of amenities.

By following the decision in ***Raj Kumar v. Ajay Kumar (2011) 1 SCC 343***, the Apex Court in the case of ***Sri Laxman @ Laxman Mourya*** (Supra) further observed that if the victim of an accident suffers from permanent or temporary disability, then effort should always be made to award adequate compensation by the Court not only for the physical injury and treatment, but also for the pain, suffering and trauma caused due to accident, loss of earning and inability to lead a normal life and enjoy amenities, but for the disability caused due to the accident. The compensation so determined must be just and unjust enrichment should be discouraged in calculating the compensation to be so awarded. It is the consistent view of the Apex Court in umpteen numbers of judicial pronouncements that the calculation of the amount of compensation to be so awarded involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

9. In the instant case, Annexure-5 the disability certificate furnished by the District Medical Board, Puri shows that the petitioner was found with 65% disability i.e. Locomotor and he was recommended for movement with wheel chair as there was stiffness of left hand, left shoulder, stiffness of left ankle and foot. The photo which was produced before us exhibit the physical deformities of both the lower limbs of the petitioner because of the accident. From that one can well visualize the amount of pain and sufferings the petitioner has undergone being produced by the fall of the live electric conductor on his person and also must be undergoing because of the traumatic accident in question.

10. Thus, keeping in view the nature of injuries suffered by the petitioner and the fact that he will have to take treatment throughout his life, we feel ends of justice would be met by awarding him a sum of Rs.2,00,000/- (Rupees two lakhs) under that head. Besides that we also direct the opposite party Company to pay Rs.1,50,000/- (Rupees one lakh fifty thousand) to the petitioner towards the pain, suffering and trauma caused due to the accident. Thus, in all, the petitioner is entitled to Rs.3.5 lakhs as compensation with interest at the rate of 6% per annum from the date of filing of the writ petition i.e. 31.3.2010 till the date of realization. The opposite party Company is to pay Rs.1,00,000/- (Rupees one lakh) in shape of cash to the petitioner within a period of three months from the date of receipt/production of the copy of the judgment and the balance amount of Rs.2.5 lakhs be kept in fixed deposit in the name of the petitioner in any Nationalised Bank for a period of five years with condition that the monthly interest accrued on such fixed deposit be paid to him (petitioner) regularly. Further, we give liberty to the petitioner to move this Court for early disbursement of the amount so kept in fixed deposit, if the petitioner would be in dire necessity of money to meet emergency medical expenses, repairing the dwelling house as well as defraying marriage expenses of the children.

With the aforesaid observations and directions, the writ petition stands allowed.

Writ petition allowed.

2013 (I) ILR - CUT- 832

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

W.A. NO.268 OF 2011 (Dt.20.12.2012)

STATE OF ORISSA & ANR. …..….Appellants

.Vrs.

ORISSA KHADI & VILLAGE INDUSTRIES BOARD KARMACHARI SANGHA & ANR. ……..Respondents

SERVICE LAW - Writ petition filed by the employees of Orissa Khadi and village Industries Board claiming pensionary benefits – Learned Single Judge directed the State Government to amend Orissa

Khadi and village Industries Board Regulation 1960 and to extend pensionary benefit to its employees within a period of three months – Hence this appeal.

Provisions of Orissa Khadi and Village Industries Act, 1955, Rules 1956 and Regulation 1960 show that the State Government has all pervasive control over the Board and got power to frame rules U/s.35 of the Act, 1955 – Though Regulation 52 provides that the employees of the Board are not entitled to pensionary benefits, the Board had recommended to amend that Regulation – Since all service conditions of the State Government employees are applicable to the Board employees, refusal to extend the pensionary scheme to such employees amounts to discrimination and violative of Articles 14 & 16 of the Constitution of India – Held, decision of the learned single Judge does not call for any interference. (Paras 10, 11)

Case laws Referred to:-

1.AIR 1990 SC 1251 : (Mallikarjuna Rao & Ors. Etc.etc.-V- State of A.P. & Ors.)
2.AIR 2007 SC 3074 : (Bal Ram Bali & Anr.-V- Union of India)
3.AIR 1998 SC 2789 : (Transport Manager, Pune Municipal Corporation Transport Undertaking-V-Vasant Gopal Bhagwat(dead) by L.Rs. &Ors.)
4.AIR 2009 M.P. 169 : (Indore Development Authority-V- M/s. Shri Ram Builders & Ors.)

For Appellants - Mr. R.K. Mohapatra, Govt. Advocate.

For Respondents - M/s. M.R.Das & Mr. P.P.Mohanty, (for Respondent No.1)
M/s. S.B. Jena & Mr. S.Das (for Resp.No.2)
Mr. S.S.Mohapatra (for caveator).

B.K.MISRA,J. The State in this writ appeal assails the order of the learned Single Judge dated 25.10.2010 in W.P. (C) No.8438 of 2010, wherein the learned Single Judge while quashing Annexure-12 directed the State Government to amend the Orissa Khadi and Village Industries Board Regulation, 1960 in extending pensionary benefits to its employees and to complete the entire process within a period of three months from the date of communication of the said order.

2. The Orissa Khadi and Village Industries Board Karmachari Sangha represented through its Secretary as petitioner had approached this Court by way of filing a writ petition which was registered as W.P.(C) No.8438 of 2010 for quashing the decision of the Government at (Annexure-17) expressing its inability in implementing the pension scheme for the Orissa Khadi and Village Industries Board employees which was communicated to the petitioner by the Additional Secretary to the Government in Industries Department in his letter no.18583 dated 14.12.2009. Further, the petitioner has prayed for directing the Opposite Party No.1 to make regulation under Section 36(2) of the Odisha Khadi and Village Industries Board Act, 1955 (Odisha Act 3 of 1956) in introducing the pension scheme as per the Resolution of the aforesaid Board dated 10.2.2009.

3. Bereft of unnecessary details in brief the case of the present respondent who was the petitioner in W.P.(C) No.8438 of 2010 is that the Orissa Khadi and Village Industries Board (hereinafter referred to as "the Board", in short) was established in the year,1956 by the Orissa Act 3 of 1956 with the aim and object to organize, promote, develop and regulate the Khadi and Village Industries throughout the State of Odisha basing upon the Gandhian thought and philosophy to make the people self-reliant and to eradicate poverty with the further object of improving the socio-economic status of the people who lived in rural areas. The said Board has its own Act i.e. the Odisha Khadi and Village Industries Board Act, 1955 (in short, "Act, 1955") as well as the Odisha Khadi and Village Industries Board Rules, 1956 (in short, "Rules, 1956")and Odisha Khadi and Village Industries Board Regulation, 1960 (in short, "Regulation, 1960"). It is alleged that the State Government has direct control over all the affairs and entire activities of the Board. The Regulation 40 of the Regulation, 1960 provides that the Rules of Orissa Service Code, Volume-1 with all its Appendices, except Appendice 1 to 4 and 8 to 12, as amended from time to time by the Government, would apply to the employees of the Board. The administrative and financial matters of the Board are controlled by the Industries Department of the State Government. It is the further case of the petitioner that though the Industries Department moved for amendment of Regulation-52 of the Regulation, 1960 for incorporating the provision with regard to extending the pensionary benefits to its employees and despite recommendations, the Government for no valid reason and without considering the grievance of the employees did not effect any amendment to the Regulation as stated above and ultimately rejected the same on the ground of financial crunch. For providing pension to the employees of the Board, a writ petition had been filed by the petitioner in the year 1998, which was registered as O.J.C. No.15344 of 1998 and the same was disposed of

with a direction to the Director, Industries Department, Government of Odisha to consider the case and to take decision within a period of three months. But the Government did not take any step in that regard. Thereafter, another writ petition was filed by the employees of the Odisha Khadi and Village Industries Board in the year 2007 which was registered as W.P(C) No.14729 of 2007 and besides that in the year 2002 another writ petition had been filed which was registered as W.P(C) No.1951 of 2002. W.P. (C) No.1951 of 2002 was disposed of on 12.9.2008 with an observation that no direction can be issued regarding pension in view of the pendency of Writ Petition No.14729 of 2007. Writ Petition No.14729 of 2007 was disposed of by this Court with a direction to the State Government for reconsideration of the matter. But ultimately the Government expressed its inability in implementing the pension scheme for the employees of the Khadi and Village Industries Board. The grievance of the petitioner is that the Government has adopted step motherly attitude towards the employees of the Board. When the employees of the Khadi and Village Industries Board of other States, namely Andhra Pradesh, Tamilnadu, Karnataka and others have extended pension scheme for the employees of the Board at par with Government employees and besides that when at the Union level also the employees of Khadi and Village Industries Commission have been provided with pension,there is no reason as to why the employees of Odisha Khadi and Village Industries Board would be deprived of such pension facility. Thus, when the employees of the Odisha Khadi and Village Industries Board became desperate with the apathetic attitude of the State Government approached this Court for the reliefs as has been stated earlier.

4. The Odisha Khadi and Village Industries Board who was opposite party no. 3 in W.P(C) No.8438 of 2010, filed the counter affidavit wherein it is their stand that the Board Regulations are silent about the pension to be given to its employees. The Board also has no capacity of its own to provide pension to its employees without any financial support from the State Government. It is the further stand of the Board that the Board in the year 1984, 1994, 2008 and 2009 have adopted resolutions for amendment of Regulation-52 of the Regulation, 1960 and the opposite party no.1 i.e., the State Government was moved for extension of pensionary benefits to the employees of the Board. But the Government on the ground of financial stringency did not accept such proposal whenever it was sent to them.

5. The opposite party nos.1 and 2 have entered their appearance and filed their joint counter wherein it is their stand that the Odisha Khadi and Village Industries Board is an autonomous body and, therefore, its employees are not Government servants but are employees of the Board.

The Board meets the entire establishment expenditure out of the grant made available by the State Government and the Khadi and Village Industries Commission provides financial support only for programmes to be carried out and do not share any expenditure of the establishment. Though they have admitted in their counter about the filing of different writ petitions but it is also their stand that the State Government is unable to bear the financial liability in implementating the pension scheme for the employees of the Board because of the financial constraints. Thus, it would be inappropriate and incorrect to say that the State Government did not take adequate steps pursuant to the direction of this Court with regard to the implementation of pensionary scheme. It is their further case that though the Board unilaterally took a decision to provide pension to its employees but the State Government with a view to limit non-plan expenditure took a conscious decision not to introduce pension scheme in the Board. The opposite party nos.1 and 2 also averred that the State Government does not substantially meet the pension liability of urban local bodies and for that matter of pension liability of the employees of Jagannath Temple Administration. The case of the employees of Jagannath Temple Administration and local bodies are distinguishable from the Board.

6. The petitioner in its rejoinder affidavit to the counter filed by opposite party nos.1 & 2 took the further stand that the Orissa Khadi and Village Industries Board is a State and can come under the category of other instrumentality of the State within the meaning of Article 12 of the Constitution of India. Such Board was created by the State Government, which is also controlled by the State Government. The State cannot absolve itself from its responsibility to pay salary and other benefits including pension to its employees. Financial stringency cannot be a ground to deny such benefits, which will violate the right to life under Article 21 which includes right to livelihood.

7. After hearing the respective counsel for the parties and going though the averments and documents relied upon by the parties, the learned Single Judge allowed the prayer of the petitioner and directed the State Government to amend the Regulation, 1960 for extending pensionary benefits to the employees of the Board and to incorporate the pension scheme for it's employees at par with the employees of the State Government and to complete the said exercise within a period of three months from the date of communication of this order.

8. The learned Government Advocate challenged the order of the learned Single Judge in W.P. (C) No.8438 of 2010 contending that when

Regulation-52 of the Regulation, 1960 specifically provides that the employees of the Board shall not be entitled to any pension except gratuity and contributory provident fund benefits, the learned Single Judge has lost sight of that specific provision as the directions issued cannot stand the judicial scrutiny for a moment and Courts do not have the power to issue a direction to the legislature either to enact the statutory enactments or frame Rules in a particular manner. The power under Article 309 of the Constitution of India to frame Rules is the legislative power and Courts cannot usurp that function assigned to the executive and therefore cannot even indirectly direct or require the executive to exercise its law making power in any manner. Thus, it was very strenuously urged by the learned Government Advocate, Mr. R.K.Mohapatra that the impugned order of the learned Single Judge be quashed and the appeal be allowed. In support of such contention, learned Government Advocate placed reliance on several cases decided by the Apex Court i.e. ***Mallikarjuna Rao and others etc. etc., v. State of Andhra Pradesh and others etc. etc., AIR 1990 S.C. 1251, Bal Ram Bali and another v. Union of India, AIR 2007 S.C. 3074, Transport Manager, Pune Municipal Corporation Transport Undertaking v. Vasant Gopal Bhagwat (dead) by L.Rs., and others, AIR 1998 S.C. 2789, Indore Development Authority v. M/s. Shri Ram Builders and others, AIR 2009 Madhya Pradesh 169.***

9. Mr. Manoranjan Mohanty, learned senior counsel appearing for respondent no.1 while supporting the order of the learned Single Judge contended that the findings of the learned Single Judge cannot be faulted as they are based on sound reasonings. It was also further contended that when the Government of India have decided for payment of pension to the employees of Khadi and Village Industries Commission at par with the employees working under the State Government, demand of pension made by the employees of the Board and when the Board has recommended for such grant of pension to its employees and the State Government also when on principle agreed to introduce such pension scheme, rejecting the same at a later stage on the pretext of financial constraints cannot be said to be a valid one, as pension is no more a bounty especially when the employees working in other organizations like Sri Jagannath Temple Administration, Odisha University of Agriculture Technology are getting pension. It was also contended by Mr. Mohanty that when the Khadi and Village Industries Board of Kerala, Andhra Pradesh, Tamilnadu and Karnataka etc. are getting pension like that of the State Government employees in those States, there is no rhyme or reason to deprive such employees of the Board in Odisha. In support of his contention Mr. Mohanty, learned senior counsel placed reliance on a judgment of the High Court of

Gujarat i.e in the case of ***Gujarat State Khadi Gramodyog Board v. Gujarat State Khadi Gramodyog Pensioners Association,*** which judgment was confirmed by the Apex Court in SLP (Civil) CC No.1321-1482 of 2005. Reliance was also placed in a judgment of the High Court of Judicature at Bombay i.e. in the case of ***Maharashtra State Khadi Gramodyog Mandal Pensioners Association, Mumbai and others v. State of Maharashtra and others***.

10. After hearing learned counsel for the respective parties, we have examined the matter at length. Perusal of the different provisions of the Act, 1955, Rules, 1956 and Regulation, 1960 framed thereunder by the Government leaves no manner of doubt that the real control, authority of the Board rests with the Industries Department of the Government, in other words the Board is under the direct control of the State Government and is totally dependant on the Government for running its administration and in carrying out its activities including finance. Notwithstanding the fact that the Board is a statutory one and right from the commencement, the management, the administration, the appointment, framing regulations, carrying on with its activities, formulations of policy are all controlled by the State Government. Furthermore, the employees of the Board in question are governed and controlled by Rules as are applicable to the State Government servants and the provisions of the Odisha Service Code, which are applicable to the State Government servants, are also applicable to the employees of the Board. The Travelling Allowance Rules and Odisha Leave Rules are also applicable to the employees of the Board. The function of the Board is well defined in Section 17 of the Act, 1955. To discharge such functions, programmes have been drawn by the Board with the sanction of the State Government and therefore, the State Government has all pervasive control over the Board and got power to frame Rules under Section 35 of the Act, 1955. It is true that the Regulation-52 of the Regulation, 1960 provides that the employees of the Board are not entitled to pensionary benefits but to overcome such a hurdle the Board have recommended to the Government for amending Regulation-52 and this Court also directed the Government to consider such demand of pension to the employees of the Board in OJC No.15344 of 1998 and W.P(C) No.14729 of 2007. But the State Government on the ground that it cannot take extra burden of providing pension to the employees of the Board did not comply with the directions of this Court. Admittedly, when all conditions of service of the State Government employees are applicable to the Board employees, refusal to extend the pensionary scheme to such employees of the Board, in our considered view, amounts to discrimination and violative of Articles 14 and 16 of the Constitution of India. The learned Single Judge has

dealt with the important aspect in detail in the impugned judgment. It was brought to our notice that the Board on several occasions moved the State Government through the Industries Department which is the controlling authority of the Board for extending pensionary benefits to the employees of the Board, but the same did not find favour with the Government on the ground that the State Government cannot carry the extra financial burden. In our opinion, the view taken by the learned Single Judge with regard to making provision for providing pension to the employees of the Board is quite justified and calls for no interference, as the same is in conformity with the decisions of Gujarat and Bombay High Courts in the cases referred to supra upon which learned Senior Counsel has rightly placed reliance. For all practical purposes, the Board is an instrumentality of the State and therefore, it is covered under the Article 12 of the Constitution of India and undoubtedly amenable to the writ jurisdiction of this Court. We are quite aware of our limitations under Article 226 of the Constitution. The direction of the learned Single Judge to Opposite Party Nos.1 and 2 to take appropriate steps to incorporate the pension scheme for the employees of the Board at par with the State Government employees is only advisory in nature and the same is in the welfare of the employees of the Board. The State Government shall honour such advisory note keeping in view that the interest of the retired employees shall be taken care of by the State Government as mandated under Article 41 of the directive principles of the State policy by discharging its constitutional obligations towards aged persons who have served the State through Board, as the State has decentralized its power and functions through its instrumentalities such as the Board and other statutory Corporation for good governance of the people under the Constitution of India.

11. In the result, after making a threadbare analysis and appraisal of factual and legal profile and proposition highlighted before us, we find no merit in this writ appeal and the impugned order of the learned Single Judge does not call for any interference in any manner. Accordingly, the writ appeal stands dismissed.

Writ appeal dismissed.

2013 (I) ILR - CUT- 840

M. M. DAS, J.

W.P.(C) NO. 140 OF 2012 (Dt.20.06.2012)

SATYABHAMA PATTNAIK ……..Petitioner

.Vrs.

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BIJENDRA MOHAPATRA & ORS. … …..Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-41, R-1.

Appeal filed in time with the certified copy of the impugned judgment – Appeal cannot be dismissed on the ground that the copy of the decree filed subsequently – Held, the learned lower appellate Court is not correct in dismissing the appeal on the ground that there was no proper presentation of the appeal as certified copy of the decree was not filed along with the memo of appeal.

(Para 19)

Case laws Referred to:-

1.(1998)9 SCC 191 : (State of Maharashtra & Ors.-V- Nazmunnisa & Ors.)
2.AIR 1986 P & H 84 : (Puran Singh-V- Jagtar Singh)
3.AIR 2006 SC 269 : (Uday Shankar Triyar-V- Ram Kaleswar Prasad Singh & Anr.)
4.AIR 2007 A.P. 339 : (Charminar Co-operative Urban Bank Ltd.-V-State Bank of Hyderabad & Anr.)
5.AIR 1968 SC 488 : (M/s. Lakshmiratan Engineering Works Ltd.-V-Asst. Commissioner (Judicial) I, Sales Tax, Kanpur).
6.1993 Supp.(4) SCC 595 : (S. Nagaraj & Ors.-V- State of Karnataka & Anr.)

For Petitioner - M/s. S.P. Mishra, Sr. Advocate, S. Nanda, Miss. S. Mishra, B. Mohanty, A.K. Dash, S.K. Mohanty & B.S. Pangari.

For Opp.Parties - M/s. Rama Chandra Sarangi, M.K. Patnaik & S.S.Mohanty.

M. M. DAS, J. This writ application has been filed by the petitioner, who was the defendant in the suit registered as T.S. No.382 of 1996 before the learned Civil Judge (Senior Division), Bhubaneswar.

2. The suit was instituted by the opposite party No.1 for a decree for declaration of his right, title, interest and confirmation of possession over the suit land along with a decree for permanent injunction wherein the present petitioner and the opposite parties 2 and 3 were arrayed as defendants.

3. Bereft of unnecessary details, it would suffice to say that after trial, the learned trial court decreed the suit filed by the plaintiff – opposite party No.1 by its judgment and decree dated 01.11.2007 and 15.11.2007 respectively. The petitioner, who was the defendant No.1 being aggrieved by the said judgment, filed R.F.A. No.80 of 2007 before the learned District Judge, Khurda at Bhubaneswar. The appeal was filed on 27.11.2007 being accompanied by the certified copy of the impugned judgment.

4. It is the case of the petitioner that as there was cease work by the Lawyers at Bhubaneswar from 12.11.2007 to 18.12.2007, the memorandum of appeal filed by the petitioner was accompanied with the certified copy of the judgment only. The registry of the District Judge made office note and on placing the appeal before the learned District Judge for admission, the appeal was admitted. During hearing of the appeal on 20.10.2011, it was pointed out by the learned counsel for the plaintiff-respondent in the said appeal that the certified copy of the decree, having not been filed along with the appeal memo, the appeal is incomplete. After coming to know of such bona fide mistake, the petitioner – appellant applied for a 2 certified copy of the decree, which was received by her on 28.11.2011. After obtaining the same, she filed a petition for amendment of the memo of appeal by inserting the word “decree dated 15.11.2007” in the first page of the memo of appeal as well as in the last page. The petitioner also filed a petition under Section 5 of the Limitation Act explaining the delay in filing the certified copy of the decree. Objections were filed to those applications by the opposite party No. 1-plaintiff, stating therein that the proposed amendment touches the very route of the defence argument already advanced before the court and, in fact, if the petitions are allowed, the respondent shall be highly prejudiced.

5. The learned lower appellate court heard the parties on the said applications and by its order dated 25.12.2011, rejected both the applications. Being aggrieved by the said orders of rejection of the application for amendment of the memo of appeal as well as for condonation of delay, the petitioner has preferred the present writ application.

6. Miss S. Mishra, learned counsel for the petitioner urged that on the date of filing of the appeal, as per the provisions of Order – 41, Rule – 1 C.P.C., the appellant having filed the certified copy of the judgment and the

appeal having been admitted by the learned lower appellate court, after which notice was issued to the respondents therein, the learned lower appellate court was denuded of his power to dismiss the appeal on the ground that the certified copy of the decree was not filed along with the memo of appeal. She further contended that the impugned order has been passed on a hyper-technical ground giving a go-by to do substantial justice between the parties. She also contended that procedures being handmade of justice, justice should not be denied to a party on the ground of technicalities and that too on the ground of a defect, which is curable in nature. According to Miss Mishra, the learned lower appellate court, on coming to know that the certified copy of the decree has not been filed along with the memo of appeal, which has already been admitted, should have given an opportunity to the petitioner to file the said certified copy and should have heard and disposed of the appeal on merit. In support of her submissions, she relied upon the decisions in the case of ***State of Maharashtra and others v. Nazmunnisa and others***, (1998)9 SCC 191 and the judgment of the Punjab and Haryana High Court in the case of ***Puran Singh v. Jagtar Singh***, AIR 1986 Punjab and Haryana, 84 as well as the judgment in the case of ***Uday Shankar Triyar v. Ram Kalewar Prasad Singh and another***, AIR 2006 SC 269.

7. Mr. R.C. Sarangi, learned counsel appearing for the opposite party No.1 – plaintiff, on the contrary, contended that as per the amended provisions of Order – 41, Rule – 1 C.P.C., requirement of filing of copy of the judgment and decree along with the memo of appeal, is not necessary and this position is accepted. There was no requirement on behalf of the petitioner to file applications for amendment and condonation of delay for accepting the certified copy of the decree, which was filed in 2011. He further contended that even though Order – 41, Rule – 1 C.P.C. has been amended providing that every appeal shall be preferred in the form of memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the judgment, nevertheless, Section – 96 C.P.C., which is the substantive provision in the Code for preferring an appeal before the first appellate court, provides: “Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court”. He also further drew the attention of this Court to the provision of Order – 20, Rule – 6A, which provides for “preparation of decree” and, more particularly, he drew the attention of this Court to Order – 20, Rule – 6A, sub-rule – (2), which states that an appeal preferred against

the decree without filing a copy of the decree and in such a case, the copy made available to the party by Court shall for the purposes of Rule 1 of Order – XLI be treated as the decree. But as soon as the decree is drawn, the judgment shall cease to have the effect of the decree for the purposes of execution or for any other purpose. ***(Emphasis supplied)***

8. Relying upon the above provision, Mr. Sarangi vehemently argued that once the decree is drawn up, it is incumbent upon the appellant to file the certified copy of the decree along with the memo of appeal, if the same has already been drawn up by the date of filing the appeal or at a later stage, when it is drawn up. Under the provisions of Order – 20, Rule – 6A, sub-rule (2), the certified copy of the judgment filed along with the memo of appeal shall cease to have the effect of a decree both for the purpose of execution as well as for any other purpose. The words "any other purpose" have a wide amplitude and would include filing of an appeal. In support of his contention, he relied upon the decision of the Andhra Pradesh High Court in the case of ***Charminar Co-operative Urban Bank Ltd. v. State Bank of Hyderabad and another***, AIR 2007 A.P. 339.

9. Considering the question raised in the present writ application, it would be apt to first refer to the decision of the Andhra Pradesh High Court in the case of Charminar Cooperative Urban Bank Ltd. (supra). In the said case, it appears that the Chairman, Co-operative Urban Bank Ltd., Hyderabad, who preferred an appeal before the High Court, filed an application under Section 151 C.P.C. in the said appeal assigning several reasons and making a prayer to dispense with filing of the certified copy of the judgment and decree including typed copy of the decree rendered by the Additional Chief Judge, City Civil Court, Secunderabad in O.S. No.11 of 2002 dated 10.11.2003 and also filed another application under Section 5 of the Limitation Act praying for condonation of delay of 1189 days in filing the appeal as against the decree and judgment in the said O.S.

10. The Andhra Pradesh High Court referred to the provisions of Order – 20, Rule – I C.P.C. dealing with "judgment when pronounced" and Order – 20, Rule – 6-A dealing with "preparation of decree" as well as Order – 20, Rule 6-B, which deals with "copies of judgments when to be made available". It also referred to the provision of Order – XLI, Rule 1 of the Code, which has undergone an amendment providing that the memorandum of appeal shall be accompanied by a copy of the judgment. In the said decision, the Andhra Pradesh High Court observed as follows:-

> "It is true that normally in practice the Courts would be liberal in dealing with dispense with applications. However, liberty cannot be

stretched too far. It is needless to say that dispense with applications also can be permitted only where the law permits the same or at least in the interest of justice, provided there is urgency involved in the matter. Otherwise, discretion cannot be exercised in ordering such applications for dispensing with certified copies of the judgments and decrees." The Andhra Pradesh High Court also relied upon the decision of the Supreme Court in the case of ***M/s. Lakshmiratan Engineering Works Ltd. v. Assistant Commissioner (Judicial) I, Sales Tax, Kanpur***, AIR 1968 SC 488, in paragraph– 10 whereof, the Supreme Court held as follows :-

"In our opinion these cases have taken a correct view of the word 'entertain' which according to dictionary also means 'admit to consideration'. It would therefore appear that the direction to the Court in the proviso to S. 9 is that the Court shall not proceed to admit to consideration an appeal which is not accompanied by satisfactory proof of the payment of the admitted tax. This will be when the case is taken up by the Court for the first time. In the decision on which the Assistant Commissioner relied, the learned Chief Justice (Desai C.J.) holds that the words "accompanied by" showed that something tangible had to accompany the memorandum of appeal. If the memorandum of appeal had to be accompanied by satisfactory proof, it had to be in the shape of something tangible, because no intangible thing can accompany a document like the memorandum of appeal. In our opinion, making 'an appeal' the equivalent of the memorandum of appeal is not sound. Even under O. 41 of the Code of Civil Procedure, the expressions "appeal" and "memorandum of appeal" are used to denote two distinct things. In Wharton's Law Lexicon, the word "appeal" is defined as the judicial examination of the decision by a higher Court of the decision of an inferior Court. The appeal is the judicial examination; the memorandum of appeal contains the grounds on which the judicial examination is invited. For purposes of limitation and for purposes of the rules of the Court, it is required that a written memorandum of appeal shall be filed. When the proviso speaks of the entertainment of the appeal, it means that the appeal such as was filed will not be admitted to consideration unless there is satisfactory proof available of the making of the deposit of admitted tax." ***(Emphasis supplied)***

The said High Court also relying upon some earlier decisions of the said Court, came to the conclusion that on a careful reading of the language of Order – XLI, Rule 1 along with Section 96 of the Code and also sub-section

(2) of Order – 20, Rule – 6-A of the Code, the Court is empowered to order dispensing with the filing of the decree copy, while presenting an appeal. Moreover, it is an enabling provision and it is within the discretion of the Court either to dispense with the filing of the decree copy or to direct the party to present the appeal along with the decree copy depending upon the facts and circumstances of a given case.

11. The Andhra Pradesh High Court, on interpreting the above provisions, further came to the conclusion that no hard and fast rule of general applicability can be laid down for dealing with appeals defectively filed under Order 41, Rule 1. Appropriate orders will have to be passed having regard to the circumstances of each case, but the most important step to take in cases of defective presentation of appeals is that they should be carefully scrutinized at the initial stage soon after they are filed and the appellant is required to remedy the defects. ***(Emphasis supplied)***

12. On coming to the decision of the Supreme Court in the case of State of Maharashtra and others (supra) cited by Miss Mishra, learned counsel for the petitioner, it will be seen that in the said decision, while dealing with the question of condonation of delay in filing the appeal by the State of Maharashtra, which was rejected by the High Court, observed that the appeal was filed with a copy of the judgment in time. However, copy of the decree was filed later on. That is the cause of delay as mentioned in the SLP, which stated that under the amended change of law the judgment and decree bears the same date and when the judgment is filed in time along with the appeal in time, the non-filing of a decree being a technical flaw ought to have been regularized by formal condonation of delay.

13. In the case of Uday Shankar Triyar (supra), the Supreme Court was considering the requirement of the appeal memo being signed by the appellant or his pleader (duly authorized by a Vakalatnama executed by the appellant) and held that such requirement is no doubt mandatory, but it does not mean that non-compliance should result in automatic rejection of the appeal without an opportunity to the appellant to rectify the defect. If and when a defect is noticed or pointed out, the Court should, either on an application by the appellant or suo motu, permit the appellant to rectify the defect by either signing the memorandum of appeal or by furnishing the Vakalatnama. ***(Emphasis supplied)***

14. The Supreme Court, in the said case, further held that procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use. The Supreme Court

further laid down the well recognized exceptions to this principle, which are as follows:-

> "(i) Where the statute prescribing the procedure, also prescribes specifically the consequence of non-compliance; (ii) Where the procedural defect is not rectified, even after it is pointed out and due opportunity is given for rectifying it; (iii) Where the non compliance or violation is proved to be deliberate or mischievous; (iv) Where the rectification of defect would affect the case on merits or will affect the jurisdiction of the Court; (v) In case of Memorandum of Appeal, there is complete absence of authority and the appeal is presented without the knowledge, consent and authority of the appellant."

15. At this juncture, it would be apt to take note of the provision under Order – 41 C.P.C. with regard to entertaining an appeal under Section 96 C.P.C. filed under Order – 41, Rule – 1 C.P.C.

16. As already stated, Order – 41, Rule – 1 C.P.C. has been amended by introducing the word "judgment" in place of the word "decree". The appellate Court, under Order – 41, Rule – 11 C.P.C., is required to fix the date of hearing of the appeal on the question of admission and, if at that stage, it appears to the Court that the appeal should be dismissed, and the court is a court not being the High Court dismisses such an appeal, it is required to deliver a judgment recording in brief its grounds for doing so and a decree shall be drawn up in accordance with the judgment.

17. Order – 41, Rule – 12 C.P.C. provides that if the appeal is not dismissed under Rule – 11 C.P.C., the appellate Court is to fix a date for hearing the appeal. Rule – 14 of the said Order – 41 provides that when a Court fixes a date for hearing the appeal, notice of the said date of hearing is required to be affixed in the appellate Court House and a like notice is required to be sent by the appellate Court, to the court, from whose decree, the appeal is preferred and is also required to be served on the respondent or on his pleader in the appellate Court in the manner provided, for the service on a defendant, of a summons to appear and answer and all the provisions applicable to such summons and to proceedings with reference to the service thereof, shall apply to the service of such notice.

18. It is, therefore, clear from the provisions of Order – 41 C.P.C. that once an appeal is not dismissed under the provisions of Rule – 11 thereof, the appeal is to be admitted and a date of hearing is to be fixed and notice of such date of hearing is to be served on the respondent. The only provision,

which authorizes the appellate Court to dismiss the appeal thereafter is under Rule – 17 of Order – 41 C.P.C., which provides in sub-rule (1) thereof that where on the day fixed, or on any other day, to which the hearing of an appeal is adjourned, the appellant does not appear when the appeal is called on for hearing, the court may make an order that the appeal is dismissed. In the explanation to this rule, it has been provided that nothing in the said sub-rule shall be construed as empowering the court to dismiss the appeal on merit. When an appeal is dismissed under sub-rule (1) of Rule – 17 the provision for restoration of the appeal commonly called as readmission of the appeal dismissed for default is prescribed under Rule –19.

19. In the facts of the present case, the appeal being admitted by the learned lower appellate court and summons having been issued to the respondent, the learned lower appellate court was not authorized under law to dismiss the appeal on the ground that there was no proper presentation of the appeal, as the certified copy of the decree was not filed along with the memo of appeal.

20. Summing up the facts and law, this Court is of the clear view that the learned lower appellate court has adverted to an extremely technical approach in rejecting the appeal on the ground that it was not presented in accordance with Rule – 1 of Order – 41 C.P.C., when the appeal was, in fact, accompanied by a certified copy of a judgment.

21. The appeal involves substantial rights of the parties to be determined and should not have been thrown out of the precinct of the court on technical ground thereby causing hardship and prejudice to the petitioner, who was the appellant before the learned court below.

22. Justice is a virtue, which transcends all barriers. Neither the rules of procedure nor the technicalities of law can stand in its way. The order of the court should not be prejudicial to anyone. It is said even the law bends before justice. (See ***S. Nagaraj and others v. State of Karnataka and another*** and other SLP (C)s, 1993 Supp. (4) SCC 595).

23. In view of the above, this Court finds that the impugned order is unsustainable and accordingly quashes the same. The matter is remitted back to the learned lower appellate court, who is directed to accept the certified copy of the decree filed by the petitioner – appellant before it and hear and dispose of the appeal on merit by affording opportunity of hearing to all concerned. The appeal being of the year 2007, the learned lower

appellate court, i.e., the learned District Judge, Khurda at Bhubaneswar shall do well to dispose of the said appeal by the end of December, 2012.

24. The writ application is accordingly allowed.

Writ petition allowed.

2013 (I) ILR - CUT- 848

M. M. DAS, J.

W.P.(C) NO.19212 OF 2010 (Dt.22.08.2012)

GAYADHAR MALIK & ANR. .....Petitioners

.Vrs.

HRUSHIKESHA MALIK & ORS. .....Opp.Parties

CIVIL PROCEDURE CODE, 1908 – O-8, R-1

Filing of written statement – Limitation – It shall not be later than 90 days from the date of service of summons – Purpose of providing the time schedule is to expedite hearing but not to scuttle the same – The provision being procedural in nature it has to be held directory but not mandatory – This Court is satisfied on documents that there was sufficient reason that it was beyond the control of the defendants to file written statement within 90 days and grave injustice would be occasioned if time is not extended – Held, the impugned order not entertaining written statement is set aside – Direction issued to the learned trial Court to accept written statement subject to payment of cost of Rs.500/- to the plaintiff. (Para 10)

Case laws Referred to:-

1.2005 (1) OLR (SC) 718 : (Kailash-V- Nanhku & Ors.)
2.(1975)1 SCC 774 : (Sushil Kumar Sen-V- State of Bihar).

For Petitioners - M/s. S.K.Dash, A.K.Dutta, A.Dhalsamanta & B.P.Dhal.
For Opp.Parties - None

M. M. DAS, J. Even though notice has been validly served on the opp. party – plaintiff, none appears for the said opposite party.

2. The petitioners are the defendants 1 and 2 in C.S. No. 4 of 2009. After their appearance in the suit, they sought for adjournment to file their written statement. Lastly on 20.4.2009, the petitioners when again prayed for an adjournment seeking time to file their written statement, the learned trial court recorded that the said date being the 90th day from the date of service of summons on them, no further time can be granted to the petitioners to file the written statement and rejected the said application. On 9.7.2010, the petitioners filed another application along with the written statement to recall the order dated 20.4.2009 and accept the written statement. The learned trial court hearing the said petition, by the impugned order, finding that the petitioners have not filed any document to substantiate their stand explaining the cause for not filing the written statement within the time prescribed under Order VIII, Rule 1 C.P.C. came to the conclusion that there is no reasonable ground to recall the order dated 20.4.2009 and accept the written statement filed by them. Being aggrieved, the petitioners have preferred the present writ petition.

3. It is submitted by the learned counsel for the petitioners that the defendant no. 1, who was looking after the case, being ill, sought for time on 20.4.2009 which prayer was rejected by the learned trial court and in the subsequent petition, the petitioner no. 1 on affidavit stated that he was ill on 20.4.2009 for which the petitioners could not file their written statement. He further submits that no objection on affidavit was filed to the said petition for acceptance of the written statement by recalling the order dated 20.4.2009. The learned trial court, therefore, has committed an error of law in disbelieving the plea of the petitioners that the petitioner No. 1 was ill on 20.4.2009 for which he could not file the written statement. According to him, the learned trial court should have accepted the written statement as it is well settled in law that for just cause, the court has the power to extend the period for filing of written statement as prescribed under Order VIII, Rule 1 C.P.C.

4. Order VIII, Rule 1 C.P.C. underwent an amendment by Act 22 of 2002 and prescribed that the defendant shall present his written statement of his defence within 30 days from the date ofservice of summons on him. In the proviso to Order VIII, Rule 1 C.P.C., it is prescribed that where defendant fails to file the written statement within thirty days, he shall be allowed to file the same on such other day as may be specified by the court, for reasons to berecorded in writing, but shall not be later than 90 days from the date of

service of summons.

5. The question, therefore, arises as to whether the provision of Order VIII, Rule 1C.P.C. is of such nature that it cannot be contended that the said provision has absolutely no elasticity in it and is mandatory in nature and that the court is denuded of its power to grant time beyond ninety days to the defendant to present his written statement of defence even when there is sufficient reason to do so.

6. After the amendment of the above provision in the Code, the matter has been dealt with exhaustively in various judgments of the apex Court. In the case of ***Kailash v. Nanhku and others,*** 2005 (I) OLR (SC) 718, the Supreme Court, while dealing with an election dispute under the Representation of Peoples Act, 1951, had the occasion to deal with the provision of Order VIII, Rule 1 C.P.C. Referring to various earlier judgments, the Supreme Court empathetically laid down that the purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of C.P.C. is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court to extend the time. Though the language of the proviso to Rule 1 of Order VIII of CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away. The Supreme Court further held that though Order VIII, Rule 1 of the C.P.C. is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes, which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure there-from would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case.

(Emphasis supplied)

7. The proposition that Rules of Procedure are handmaid of justice and cannot take away the residuary power in Judges to act *ex debito justitiae*, where otherwise it would be wholly inequitable, is by now well founded.

8. In this context, the words of Hon'ble Justice Krishna Iyer in the case of ***Sushil Kumar Sen v. State of Bihar*** (1975) 1 SCC 774 can be considered to be immortal which are as follows:

> "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.
>
> The Processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act *ex debito justitiae* where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence – processual, as such as substantive".

9. Procedural law is always designed to facilitate the dispensation of justice and too technical constructions of such provisions in the procedural law will not leave any room for reasonable elasticity if treated to be mandatory and will prevent the furtherance of justice by frustrating the same.

10. Keeping in view the above well settled principles of interpretation, this Court is of the opinion that the learned trial court should have believed the stand taken by the petitioners for not filing their written statement within 90 days from the date of service of summons on them and should have accepted the written statement filed by them along with the application seeking acceptance of the same, without rejecting the said prayer as has been done in the impugned order, since this Court finds that there was sufficient reasons for the petitioners for not filing their written statement of defence earlier and the learned trial court should have accepted the written statement filed by them, as otherwise, the defendants will be denied the opportunity of participating in the process of justice dispensation in an adversial system and advancement of the cause of justice would be throttled. Thereafter, the learned trial court shall frame issues and proceed to hear and dispose of the suit in accordance with law. The above order is subject to the petitioners – defendants paying a cost of Rs. 500/- (Rupees five hundred only) to the plaintiff before the court below.

11. With the aforesaid observations and direction, the writ petition is disposed of. All pending Misc. Cases also stand disposed of. The interim order passed earlier stands vacated.

Writ petition disposed of.

2013 (I) ILR - CUT- 852

M. M. DAS, J.

W.P.(C) NO. 1690 OF 2011 (Dt.10.08.2012)

TANTRA ENTERTAINMENT PVT. LTD. .....Petitioner

.Vrs.

MS. IPSITA PATI & ANR. .....Opp.Parties

ODISHA STATE COMMISSION FOR WOMEN ACT, 1993 – S.10(1)(d)

Complaint Case – Jurisdiction of the State Commission for women – Address of the complainant as given in the complaint petition is at Visakapatnam – The alleged event took place at Mumbai and no portion of the cause of action arose within the State of Odisha – Nature of complaint does not come under any of the Clauses U/s.10 (1)(d) – Held, the Opp. Party No.2 - Commission lacked inherent jurisdiction to entertain the complaint petition – Complaint case as well as the impugned order Dt.15.11.2010 are quashed. (Paras 8,9,10)

For Petitioner - M/s. Goutam Mishra, D.K. Patra.
For Opp.Parties - M/s. Ch. Prasanta Ku. Mishra, A.K. Jena, B. Swain, Ch. P.K.Mishra & M.K. Acharya, (for O.P.No.1).

M. M. DAS, J. This writ petition has been filed by the petitioner-Company to quash the proceeding pending before the Orissa State Commission for Women-opposite party no.2 vide Complaint No. 71/10 – 11116 dated 5.10.2010 and further to set aside the order dated 15.11.2010 passed by the opposite party no.2 under Anneuxre-6.

2. The petitioner is an event Management Company, which has exclusive licence from the Miss Universe Organization LP, LLP for holding a pageant called “I am she 2010”. The said pageant was the Indian preliminary to the 2010 Miss Universe and the winner of the said pageant was to represent India at the 2010 Miss Universe pageant. The present opposite party no.1 participated in the said pageant along with 29 other girls. In the said process, the opposite party no.1 entered into an agreement with the petitioner on 24.04.2010. The comprehensive agreement signed between the petitioner and the opposite party no.1, which has been annexed to this writ petition discloses that the contestants agreed to the manner and method of conducting the pageant. Under Clause - 5(f) & (o), it is stated as follows:

> "5(f) The Contestant understands and agrees that while her parents or guardian may travel to venue locations to attend the pageant at their own expense, they cannot and shall not influence in any way or seek to control her activities during the Pageant.
>
> 5(o) The Contestant agrees that during the Pageant events finale and the sub-event she shall not have any access to mobile or other communication devices and all communications during such time shall be made by her through the point of contact as consented to by TEPL."

Anneuxre-2 is the contestant handbook, which according to the petitioner was handed over to each of the contestants on the date of Check-in. The said handbook provided the mode and format of participation. Parents/Family and relatives, who came with the Contestants at the time of check-in at Westin Hotel on 24th April, 2010, were given the contact number of the petitioner's representative, who could be contacted at any time for any query. It is asserted by the petitioner that their representative was in touch with opposite party no.1's parents as well as all other contestant's parents/relatives and family members, right through the pageant. Ultimately in the preliminary contest called, I am she 2010" one Ms. Ushoshi Sengupta was declared as the winner and the opposite party no.1 did not qualify to be in the final 20 at the pre judging stage. After the contest was over, the opposite party no.1 made allegation, inter alia, that undue favour was shown to some of the participants, the contest was not held in a fair manner and her parents were not informed about her illness. It may be noted here that in the course of the pageant, opposite party no.1 was unwell on a few occasions and the petitioner claims to have provided medical assistance and her parents were also informed about her health condition whenever she was unwell.

3. Thereafter, the opposite party no.1 filed a complaint before the opposite party no.2, which is quoted hereunder:

"To

The Chairperson,
State Commission for Women.

Subject:-Non-transparency, unfair practice, irresponsibility & improper conduct of Miss Universe India 2010 pageant (I AM SHE)

Respected Madam,

I Ipsita Pati, D/o. Byomakesh Pati (AGM) working in Visakhapatnam Steel Plant, present address Qr. No.201-A Sector-3 Steel Plant township Visakhapatnam-32, & permanent address-flat no.506, Waltair heights Apts, kirlumpdi layout, opp. A.V. out gate, Cishakhapatnam-17, A.P. have the following allegations against Tantra Entertainment Pct. Ltd. (TEPL) with their registered office at Palatial building, second floor, 21st road, Bandra (w), Mumbai 400050.

They have never informed my parents out programs, whereabouts details. They have not been fair.

They have inducted a contestant, Pooja Hegde who was not in top 30 till the last week on the main contest which is against the basic principle of fair play.

Thus TEPL has violated fair play & has caused damaged to the dreams of dozen of girls.

They have not been responsible as so far as they have not even informed my parents about my illness, before giving me medication & injections.

I was not allowed to any access to mobile or any communication devices but TEPL agreed all communications during such time (even) shall be made by her (contestant) through the point of contact as consented to by TEPL (above lines are mentioned in the agreement)

But I was never allowed to make any call from any unknown assigned numbers.

When I entered the pageant in top 30 my weight was 53 Kgs and when I left on the last day, my weight was 45 Kgs.

Every individual is different.

They have not handled their responsibilities of ensuring maintenance of weight to height ratio of each individual contestant.

They also manipulated in the voting section favouring Pooja Hegde.

Schedule of I AM SHE Training Program Started on 24th April until 28th May.

Our stay was in Westin Hotel, Goregaon Mumbai.

Then we travelled to Goa from Mumbai in bus & are Dhaba food. Then from Goa we travelled to Delhi in flight (Spice Jet) & I was not given food till midnight 2 & ate Dhaba food again & we are the same dhaba food when we returned back to Delhi from Chandigarh. Grand finale was on 28th May, Venue NCPM, Mumbai.

On that day my mother has intimated about the above-mentioned facts to commissioner of police who was present during the occasion (finale) at about 9pm 10pm

I hope you take necessary action.

Yours faithfully,
Sd/-Ipsita Pati
D/O. yomakash Pati, (AGM, VSP)
10.06.2010
Cell-9849084917 -
9885370022/9642896866 B.
Pati-9989325037"

4. On receiving the complaint as aforesaid, the opposite party no.2 issued a notice to Miss Sushmita Sen and the petitioner to file their show cause. The petitioner-Company through its Director, MS. Rebecca Pereira filed its reply to the said complaint, inter alia, stating that the complaint is totally misconceived, untenable and the complainant is guilty of *suppresio-veri and suggestion-falsi* and further stating that the opposite party no.2-Commission, which has been constituted under the provisions of Orissa State Commission for Women Act, 1993 (hereinafter referred to as "the Act") has no jurisdiction to take cognizance of the allegations made in the complaint petition of the opp. party no. 1 nor can investigate/enquire into such allegations, which is regarding allegations and an incident which occurred beyond the territory of the State of Odisha. It was further stated in the reply that the complainant admittedly resides at Visakapatnam. The petitioner-Company is situated at Mumbai, as well as Miss Sushmita Sen resides at Mumbai, inasmuch as the pageant was conducted at Mumbai, Goa, Delhi and Chandigarh. Specifically, the petitioner averred in the reply that Miss Sushmita Sen has been wrongly impleaded as she was merely the brand ambassador and the national Director for the brand " I AM SHE" she

was no way connected with the management of the Company or the pageant or the pageant called "I am she 2010" Further, there is absolutely no allegation against Miss Sushmita Sen and as per Clause-17 of the agreement executed between the complaint-opposite party no.1 herein and the petitioner-company provides that in case of any dispute or differences arising out of or in connection with the said agreement, the same shall be settled through arbitration. Since remedy of arbitration was provided under the said agreement in the event of any disputes or differences, the complainant was bound to invoke the said arbitration clause to redress her purported complaints. The present complaint filed before the Hon'ble Commission is thus filed mala fide to cause harassment to the respondent. The said Clause-17 of the agreement further provides that the parties submit to the exclusive jurisdiction of the Courts at Mumbai. Thus the complaint has bound herself under the said agreement to seek legal recourse in the Courts/forums at Mumbai alone. The complainant is aware of the said clause, but nevertheless filed the present complaint with ulterior motives. The complaint, therefore, deserves to be dismissed.

5. The moot question, therefore, which requires consideration of this Court in the present writ application, is as to whether opposite party no.2-Orissa State Commission for Women as contended by Mr. Mishra, learned counsel for the petitioner, lacks inherent jurisdiction to entertain the complaint filed before it in which notice was issued to the present petitioner to file its show cause.

6. It appears from the complaint filed before the opposite party no.2 that the complainant-Miss Ipsita Pati has basically alleged violation of the agreement executed between her and the petitioner-Company on 24.04.2010. The nature of allegations made in the complaint petition clearly comes under Clause - 17 of the agreement, which is as follows:

> "In case of any dispute or difference arising out of or in connection with this Agreement, the parties shall make good faith efforts to resolve such disputes or differences amicably. If the disputes or differences are not resolved, the same shall be settled through arbitration by one arbitrator mutually appointed, failing which by three arbitrators, i.e., one each appointed bythe Contestant and TEPL and the third appointed by the two arbitrators so appointed by the parties. The arbitral proceedings shall be governed by the provisions of the Indian Arbitration and Conciliation Act, 1996 and anystatutory modification or re-enactment thereof for the time being in force. The venue of arbitration shall be Mumbai and shall be conducted in

English language. The award of the arbitration proceedings will be final and binding on both the parties to this Agreement. The parties submit to the exclusive jurisdiction of the Courts at Mumbai and this Agreement shall be governed by the laws of India."

7. Mr.Mishra, leaned counsel for the petitioner submitted that the address of the complainant as given by her in the complaint petition is at Visakapatnam. The event took place at Mumbai and no portion of the cause of action, as alleged in the complaint petition, arose within the State of Odisha. 8. The Orissa State Commission for Women Act, 1993 provides that the State Commission for Women shall be constituted by the State Government to perform the functions assigned to it under the Act. The functions of the Commission have been provided in Chapter-III of the said Act. Under the said Chapter in Section 10 (1) (d), it has been provided that the Commission shall receive complaints. The said sb-section is as follows:

"10. Function of Commission- (1) The Commission shall perform all or any of the following functions, namely:

(a)	xxx	xxx	xxx
(b)	xxx	xxx	xxx
(c)	xxx	xxx	xxx

(d) receive complains on –

(i) atrocities on women and offense against women.

(ii) deprivation of women of their rights relating to minimum wages basic health and maternity rights.

(iii) non-compliance of policy decisions of the Government relating to women,

(iv) rehabilitation of deserted and destitute women and woken forced into prostitution,

(v) atrocities on women in custody.

(e) to (g) xxx xxx xxx"

9. The nature of complaint lodged in the instant case does not come under any of the clauses quoted above. The opposite party no.2-Commission being a statutory authority under the Orissa State Commission

for Women Act, 1993, which is a State Act, therefore, inevitably cannot exercise jurisdiction on a cause of action which arose beyond the territory of the State of Odisha.

10. In view of the above, this Court finds that the opposite party no.2-Comission lacked inherent jurisdiction to entertain the complaint lodged by the opposite party no.1-Miss Ipsita Pati. This Court, therefore, has no hesitation to quash the entire complaint registered as Complaint No.71/2010 and the order dated 15.11.2010 passed by the opposite party no.2 under Annexure-6. Ordered accordingly.

11. The writ petition is allowed, but in the circumstances without cost. However, the opposite party no.1 is at liberty to take recourse to Clause-17 of the Agreement, strictly in accordance with law. All pending Misc. Cases stand disposed of.

Writ petition allowed.

2013 (I) ILR - CUT- 858

M. M. DAS, J. & S. C. PARIJA, J.

W.P.(C) NO.175 OF 2007 (Dt.12.03.2013)

PRAKASH PATTNAIK ……. Petitioner

.Vrs.

THE CHAIRMAN, P.N.B. & ANR. …….Opp.Parties

SERVICE LAW - Compassionate appointment – Object of the scheme is to help the family of the employee dying in harness and leaving his family in penury without any means of livelihood – Held, it is important to assess the financial condition of the family of the deceased employee to determine the eligibility for compassionate appointment which cannot be claimed as a matter of right.

In this case the family of the petitioner received Rs.6.20 lakhs as terminal dues and Rs.3.57 lakhs on account of other investments and the family has owned a residential house besides a piece of land and as such the dependant of the deceased employee are not in penury, without any means of livelihood – Held, the Bank has rightly rejected the application of the petitioner for compassionate appointment. (Paras 10,11)

Case laws Referred to :-

1.2007(2) Supreme 336 : (State Bank of India & Anr.-V- Somvir Singh)
2.(1994)4 SCC 138 : (Umesh Kumar Nagpal-V- State of Haryana)
3.(2006)7 SCC 350 : (Union Bank of India & Ors.-V- M.T. Latheesh)
4.AIR 2012 sc 3281 : (State of Gujarat & Ors.-V- Arvindkumar T.Tiwari & Anr.)
5.AIR 2012 SC 2294 : (Union of India & Ors.-V- Shashank Goswami & Anr.).

For Petitioner - M/s. Manoj Ku. Mishra, P.K. Das & J.Panda.
For Opp.Parties- M/s. S.D.Das, S. Satpathy, D.R. Bhokta, D.R.Samantaray, A.N. Sahu, M. Panda, N. Bisoi, P. Rath & D. Mohanty.

S.C. PARIJA, J. This writ petition has been filed challenging the inaction of the opposite parties in not considering the application of the petitioner for appointment on compassionate ground inspite of several representations.

2. The case of the petitioner, as detailed in the writ petition, is that his father, namely, Prafulla Ch.Pattnaik, while working as Junior Manager Scale-I, under the opposite parties-Bank, died on 25.09.2000, due to chronic renal failure, after prolonged treatment. As the father of the petitioner was the only bread-earner of the family and the family had no other source of income, the petitioner submitted application dated 01.12.2000 in the prescribed format, for employment on compassionate ground, as per Annexure-3 to the writ petition. The grievance of the petitioner is that inspite of repeated representations, the opposite parties-Bank, have not provided employment to him on compassionate ground. It is the further case of the petitioner that in the case of a similarly situated employee of the Bank, namely, Mahesh Mallick, who also died in the year 2000, the Bank has provided appointment to his wife on compassionate ground since 27.02.2004. Accordingly, a prayer has been made to direct the opposite parties-Bank to provide compassionate appointment to the petitioner within a stipulated period.

3. The opposite parties-Bank have filed a counter affidavit stating therein that the Government of India, Ministry of Finance, Banking Division, has formulated a Scheme for employment on compassionate ground, as contained in letter No.18/139/95-IR, dated 7th August, 1996, which is applicable to all the public sector Banks. The object of the said Scheme is to consider compassionate employment to the dependants of an employee dying in harness, leaving his family without any means of livelihood. The Scheme, inter alia, provides that in making assessment of the financial condition of the family, which is an important criterion for determining the eligibility to compassionate appointment, the following factors are required to be taken into consideration:

(a) Family pension,

(b) Gratuity amount received,

(c) Employee's/Employer's contribution to Provident Fund.

(d) Any compensation paid by the Bank or its Welfare Fund,

(e) Proceeds of LIC policy and other investments of the deceased employees.

(f) Income for family from other sources

(g) Income of other family members from employment or otherwise

(h) Size of the family and liabilities, if any.

4. It is stated in the counter affidavit that the Bank authorities considered the application of the petitioner dated 01.12.2000 for compassionate appointment, as per the provisions of the Scheme and as the family of the deceased employee had received Rs.6.20 lakhs as terminal dues after adjustment of Bank loans and the family also has received an amount of Rs.3.57 lakhs on account of other investments and the family owns residential accommodation besides the piece of land, the application of the petitioner for appointment on compassionate ground was declined, which was duly intimated to the petitioner vide letter of the Bank dated 23.07.2001, as per Annexure A/1 to the counter affidavit. It is stated that suppressing the said fact, the present writ petition has been filed after lapse of more than six years.

As regard the compassionate appointment given to the wife of the other deceased employee, namely, Mahesh Mallick, it is stated that the same stands on a completely different footing and as the said case came within the criterion prescribed under the Scheme, employment on

compassionate ground was given to the wife of the said deceased employee.

5. Learned counsel for the opposite parties-Bank submits that compassionate employment to the dependants of an employee dying in harness can only be considered in accordance with the Scheme framed and no discretion is left with the Bank authorities to make any such compassionate appointment de hors the Scheme. In this regard, he has relied has relied upon a decision of the apex Court in the case of **State Bank of India & Anr. Vs. Somvit Singh, 2007(2) Supreme 336,** wherein the Hon'ble Court held as under:

> "There is no dispute whatsoever that the appellant-Bank is required to consider the request for compassionate appointment only in accordance with the scheme framed by it and no discretion as such left with any of the authorities to make compassionate appointment de hors the scheme. In our considered opinion the claim for compassionate appointment and the right, if any, is traceable only to the scheme, executive instructions, rules etc. framed by the employer in the matter of providing employment on compassionate grounds. There is no right of whatsoever nature to claim compassionate appointment on any ground other than the one, if any, conferred by the employer by way of scheme or instructions as the case may be."

6. From the records, it reveals that the father of the petitioner, who was working as Assistant Manager in Bhubaneswar Branch, expired on 25.09.2000 at the age of 52 years, after rendering 27 years of service in the Bank. Pursuant to his death, the family of the deceased employee has received 6.20 lakhs as terminal dues after adjustment of Bank loans. The family has also received an amount of 3.57 lakhs on account of other investments. Further, the family of the deceased employee owns a residential accommodation, besides a piece of land. The Scheme for employment on compassionate ground framed by the Government of India, Ministry of Finance, Banking Division, dated 7.8.1996, which is applicable to the opposite parties-Bank, provides that the Bank will consider compassionate employment only in such cases, where it is satisfied that the financial condition of the family of the deceased employee is such that but for the provision of employment to his dependant, the family will not be able to meet the crisis it faces at the time of the death of the said employee. Applying the provisions of the Scheme and considering the financial

condition of the family, the Bank has proceeded to reject the application of the petitioner for compassionate appointment.

7. In **Umesh Kumar Nagpal Vs. State of Haryana, (1994)4 SCC 138**, the apex Court held :

> "As a rule, appointment in the public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of the dependants of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependants of the deceased who may be eligible for such employment. The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post held by the deceased."

8. In **Union Bank of India & Ors. Vs. M.T.Latheesh, (2006)7 SCC 350**, the apex Court while dealing with similar question observed that indiscriminate grant of employment on compassionate grounds would shut the door for employment to the ever-growing population of unemployed youth.

9. In a near recent judgment of the apex Court in the case of **State of Gujarat and Ors. Vs. Arvindkumar T.Tiwari and Anr., AIR 2012 Supreme Court, 3281**, the apex Court came to hold as under:

> "It is a settled legal proposition that compassionate appointment cannot be claimed as a matter of right. It is not simply another method of recruitment. A claim to be appointed on such a ground, has to be considered in accordance with the rules, regulations or administrative instructions governing the subject,

> taking into consideration the financial condition of the family of the deceased. Such a category of employment itself, is an exception to the constitutional provisions contained in Articles 14 and 16, which provide that there can be no discrimination in public employment. The object of compassionate employment is to enable the family of the deceased to overcome the sudden financial crisis it finds itself facing, and not to confer any status upon it."

10. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touch-stone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to tide over the sudden financial crisis and not to confer a status on the family. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. (See- **Union of India & Ors. V. Shashank Goswamni & Anr., AIR 2012 SC 2294**).

11. Applying the principles of law, as discussed above, to the facts of the present case, it is seen that the Bank authorities while considering the application of the petitioner for compassionate appointment have taken into consideration the factors enumerated in the Scheme for assessing the financial condition of the family of the deceased employee, which is an important criterion for determining the eligibility to compassionate appointment. As the family of the petitioner had received an amount of Rs.6.20 lakhs as terminal dues, after adjustment of Bank loans and also received an amount of Rs.3.57 lakhs on account of other investments and the family owned residential accommodation besides a piece of land, the Bank authorities came to hold that the dependant of the deceased employee, who died in harness, are not in penury and without any means of livelihood. Accordingly, the Bank has proceeded to reject the application of the petitioner for compassionate appointment.

12. In our considered view, as the application of the petitioner for compassionate appointment has been rejected, keeping in view the financial condition of the family of the deceased employee, as per the provisions of the Scheme, we do not find any impropriety or illegality in the said decision of the Bank authorities, so as to warrant any interference in this writ petition.

Writ petition dismissed.

2013 (I) ILR - CUT- 864

INDRAJIT MAHANTY, J & RAGHUBIR DASH, J.

W.P.(C) NO.14166 OF 2008 (Dt.18.02.2013)

MAMITA CHOUDHURY ……. Petitioner

.Vrs.

STATE OF ORISSA & ORS. …….Opp.Parties

ODISHA EXCISE RULES, 1965 – RULE 34 (1) (d).

Opening of IMFL 'ON' shop (Bar) in the hotel of O.P.5 – License granted by the Government – Action challenged on the ground that the hotel is located within 30 meters from a school.

Local MLA and Chairperson of the NAC recommended the 'ON' shop and Principal of the above school submitted no objection for the same – State undertakes liquor trade in order to generate revenue in spite of the mandate under Article 47 of the Constitution of India and choose to relax the restrictions under Rule 34 (1) (d) – Held, since State has made appropriate consideration on the fact situation of the case there is no lawful justification for this Court to interfere in the matter, hence dismissed the writ petition. (Paras 10,11)

Case laws Referred to:-

1.2006(8) Supreme 214 : (Kendriya Vidyalaya Sangathan & Ors.-V- Sajal Ku.Roy & Ors.)

2.2006(5) Supreme 877 : (State of Maharashtra & Ors.-V-Nagpur Distillers, Nagpur & Anr.)

For Petitioner - M/s. P.K.Rath, P.K.Satpathy, R.N. Parija, A.K. Rout & S.K. Pattnaik.
For Opp.Party - Addl. Govt. Advocate. Nos.1 to 4
For Opp.Party - M/s. A.K. Biswal, S.S. Ray & A.P.Rath.

I. MAHANTY, J. In this writ application, the petitioner-Mamita Choudhury has sought for quashing of the order dated 15.01.2008 passed by the Government of Orissa in the Excise Department, granting sanction for opening up of a IMFL Hotel 'ON' shop in favour of Smt. Hemalata Pattnaik (opposite party No.5) in Hotel Le Sancy at Rairangpur in the district of Mayurbhanj and the consequential grant of license in favour of opposite party No.5.

2. Mr. P.K. Rath, learned counsel for the petitioner has submitted that the sanction of the State Government under Annexure-1 granting license to opposite party No.5 for opening of IMFL 'ON' shop in her hotel is illegal and relaxation of the restrictions under the provisions as contained under Rule 34(1)(d) of Orissa Excise Rules, 1965 is wholly without jurisdiction and/or is colourable exercise of authority. It is pleaded on behalf of the petitioner that the hotel where the IMFL ON shop is located is situated within 30 meters distance from the Government Boys' High School, closely located to Little Flower Nursery School and a temple is located within the close vicinity of the hotel. Therefore, the grant of sanction of license in favour of opposite party No.5 for opening of a IMFL ON shop by relaxing the requirements and by resorting the Proviso to Rule-34(1)(d) of the Orissa Excise Rules ought to be unlawful, illegal and liable to be quashed.

Mr. Rath, learned counsel for the petitioner placed reliance on the judgment of the Hon'ble Supreme Court in the case of Kendriya Vidyalaya Sangathan & others v. Sajal Kumar Roy & others, 2006(8) Supreme 214, inter alia, to plead that where the power of relaxation is provided, the proviso to the aforesaid power ought not to be used so as to distort the legislative intent. He further submits that such power of relaxation cannot be exercised in a manner which renders the original restriction totally meaningless or odious.

Further reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of State of Maharashtra & others v. Nagpur Distillers, Nagpur & another, 2006(5) Supreme 877.

3. Mr. Panda, learned Additional Government Advocate for the State on behalf of opposite party Nos.1 to 4 placing reliance on the counter affidavit filed by one Soumyendra Kumar Das, Superintendent of Excise, Mayurbhanj-Baripada, submitted that the license has been granted in favour of opposite party No.5-Hotel by the State by following due procedure and norms prescribed under the Bihar & Orissa Excise Rules, 1965 and the complaint of non-compliance of any of the provisions of the said Rules is misconceived. He has further submitted that the petitioner had approached this Court on two earlier occasions i.e. in W.P.(C) No.14738 of 2005 and W.P.(C) No.8680 of 2007 which came to be disposed of by this Court vide orders dated 20.12.2005 & 24.09.2007 respectively. He further submitted that on receipt of the aforesaid orders of this Court, the Superintendent of Excise submitted his report for consideration by the Commissioner of Excise, Orissa. The Commissioner of Excise on consideration of the reports of the Range Inspector, Superintendent of Excise, the Sub-Collector and also taking into consideration the objections made (including that of the petitioner) and the recommendations of the local M.L.A., the Chairperson of Rairangpur N.A.C., rejected the objections raised and placed the matter before the Government for consideration and sanction of IMFL 'ON' shop license in favour of opposite party No.5 vide letter dated 17.10.2007. The Government considered the matter and after perusing all the aforesaid materials as well as the objections raised, granted sanction for issue of IMFL Hotel 'ON' shop license in favour of opposite party No.5, by relaxing the restrictions imposed under Rule-34(1)(d) of Orissa Excise Rules, 1965. It has further submitted that while the license was issued in favour of opposite party No.5, pursuant to the order of sanction granted by the State for the year 2007-08, since then, till today the licensee is operating the shop in question and the license has been renewed from time to time. It has further submitted on behalf of the State that, the proximity of the Boys' High School and the Little Flower Nursery School was taken into consideration by the decision making authorities, who are vested with necessary powers of relaxation under the Proviso to Rule-34.

04. Mr. A.K. Biswal, learned counsel for opposite party No.5 submitted that the opposite party No.5-Hotel is located in the heart of the Rairangpur town and has lodging and boarding facilities with VIP suites. The hotel project has been approved by the Government of Orissa in the Department of Tourism and Culture. Apart from the local M.L.A., the Chairperson of the Rairangpur N.A.C. has recommended the case of the opposite party No.5, the Principal of Little Flower Nursery School has also given their no objection in favour of opposite party No.5 and the State after enquiry, concluded that, the opening of IMFL 'ON' shop within the premises of the

hotel would in no manner affect the peace and tranquility of the locality. Therefore, the petitioner has no cause of action nor is the petitioner justified in continuously litigating against the license issued to opposite party No.5.

05. Learned counsel for the State submitted that in a similar circumstances, this Court in W.P.(C) No.2900 of 2007 considering the objections to grant of IMFL 'ON' shop (Bar) license to a hotel premises was pleased to reject the same vide its order dated 22.03.2007, copy of which has been appended as Annexure-E/4 to the counter affidavit.

06. On consideration of the submissions made, as recorded hereinabove, this Court finds it necessary to extract Rule-34 of the Orissa Excise Rules, 1965 herein below:

"34. Licensees for shops for consumption of liquor on vendor's premises not to be granted at certain places: - [(1) No new shop shall be licensed for the consumption of liquor on the vendor's premises;

(a) in a market place: or

(b) at the entrance to a market place, or

(c) in the close proximity to a bathing ghat; or

(d) within at lease 500 meters from a place worship, recognized educational institution, established habitat especially of persons belonging to Scheduled Caste and labour colony, mills and factories, petrol pumps, railway Stations/yard, bus stands agricultural farms or other places of public resort, or

(e) within at least one kilometer from industrial, irrigation and other development project areas; or

(f) in the congested portion of a village;

Provided that the restriction on the minimum distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances.]

(2) So far as practicable, an established liquor shop licensed for the consumption of liquor on the premises shall not be allowed to remain on a site which would not under Sub-rule(1) be permissible for the local of a new shop.

(3) In areas inhabited by Scheduled Tribes, country spirit shop shall not be licensed to be placed immediately on the side of a main road

or in any other prominent position that is likely to place temptation in their way."

07. Sale of intoxicants is covered under Chapter-III of the Orissa Excise Rules, 1965 and in Part-1 thereof, the Duration and number of licenses, Principles for grant of license and location for shop have been stipulated, whereas Rule-31 stipulates the requirement of license for sale of intoxicants. Rule-32 requires, the number of licenses which may be granted for any local area to be regulated by the needs of the people of that area and it further stipulates that no license for the sale of any intoxicants in any local areas shall be granted "unless it is required either to meet an ascertained demand for such article or to counteract supply through illicit sources". Under Rule-34, as extracted hereinabove and amended vide OGE published in Orissa Gazette dated 28.05.2005, which was stipulated that no shop licenses for consumption of liquor on the vendor's premises in the place noted hereinabove. Yet, the proviso to Sub-Rule-1 of Rule 34 clearly vests in the State Government the power to relax the minimum distance as mentioned in Clause-d & e in special circumstances.

08 In the case at hand, the opposite party No.5 operates an hotel and the said hotel is in the heart of the Rairangpur town having lodging facilities for boarders with VIP suites. The said project has been duly approved by the State Government of Orissa in the Department of Tourism and Culture. The sanction and/or grant of 'ON' shop license (Bar) to opposite party No.5 obviously amounts to permitting the opposite party No.5 to open a bar inside the hotel premises obviously restricting the rights of the entry into the hotel premises itself. Apart from the above, the State have also stipulated the minimum age of a person who may be served with intoxicants as well as the minimum age of a person who may be working at such 'ON shop(Bar). It is equally important to note that while the local M.L.A. and the Chairperson of the N.A.C. have recommended for setting up of a bar within the premises of opposite party No.5-Hotel, the Principal of the Little Flower Nursery School has also submitted no objection to the same. Apart from the above, it would be evident from the counter affidavit that, objection to the opening of the said shop were duly invited, received and duly enquired into, first by the Range Inspector of Excise, Inspector of Excise, Superintendent of Excise, Commissioner of Excise and Sub-Collector and laterally decision was taken by the State Government to relax the restriction under Rule-34(1)(d) of the Orissa Excise Rules, 1965. In a similar situated place this Court in W.P.(C) No.2900 of 2007 has came to be dismissed the petition vide its order dated 22.03.2007 to the following effect:

"Heard learned counsel for the parties.

This writ petition by way of public interest litigation has been filed, challenging the license for opening of IMFL ON shop at Hotel 'Shanti'. Since the IMFL On shop is going to be opened inside the hotel premises, we do not see any reason on the objection made by the public.

Therefore, the writ petition is accordingly dismissed."

09. Insofar as reliance being placed by the petitioner on the case of Kendriya Vidyalaya Sangathan & others (supra) is concerned, on a reading of the aforesaid judgment, it would be clear that the said judgment was rendered in the context of Service Law Jurisprudence and related to the power of relaxation of age of candidates, whereas in the case at hand the issue relates to power of relaxation of the citing criteria of IMFL 'ON' shop.

10. Insofar as the case of State of Maharashtra & others (supra) is concerned, the said case involves the issue of transport pass for transport of rectified spirit from distillery to factory of user subject to payment of fee prescribed under the Rule. In this context, the Hon'ble Supreme Court came to hold in paragraph-10 which is as follows:

"10. It is pointed out by learned counsel for the appellants that even in the conditions attached to the license, there is an undertaking by the licensee to pay the fees as demanded. It is his submission that there was no reason to water down that obligation by way of an interim order when an attempt is made to challenge the very imposition of the fee which a license had agreed to pay in the first instance. We see some force in the submission, but have to balance it with the plea that the State has no power to impose such a levy. We have also to take note of the fact that after all, any amount paid to the State, could be adjusted either towards future liability or directed to be refunded by the State in case the challenge of the licensee succeeds in the Writ Petition when it is finally heard and decided. The only purpose for which the State undertakes liquor trade, notwithstanding the mandate of Article 47 of the Constitution of India, is the revenue that it generates. This aspect also cannot be lost sight of while considering the balance of convenience in cases where a liquor licensee seeks an interim order staying the fulfillment of his obligation to pay all the fees or other charges demanded from him as such a licensee. There is also merit in the submission that in

> view of the long years it takes for a Writ Petition to be decided finally, the licensee himself would find it an onerous burden to pay the fees for years together in case his challenge to the levy is ultimately rejected. We are therefore satisfied that the High Court was not justified in passing in practical terms, an unconditional interim order of stay as sought for by the respondents. The High Court should have paid a little more attention to the interests of the State and the consequences arising out of its order staying the payment of the fee merely on an undertaking by the licensee to pay it in case at a future point of time he is found liable to pay the same. It is trite that Government cannot run on undertakings. It has, therefore, become necessary to interfere with the order of the High Court, though normally, this Court would be reluctant, in exercise of its jurisdiction under Article 136 of the Constitution of India, to interfere with interim orders made in pending writ petitions."

The only purpose for which the State undertakes liquor trade, notwithstanding the mandate of Article 47 of the Constitution of India i.e. generation of the revenue supports the case of the opposite party as the said reason is the chief reason as to why the State choose to relax the restriction and exercise its prerogative under Rule 34(1)(d) of Orissa Excise Rules, 1965.

11. Considering the facts and circumstances of the case at hand, this Court is of the considered view that the State has exercised its direction of relaxation of the citing criteria by taking into consideration the ground realities of the facts/situation that arose for its consideration. Since the State has made appropriate consideration on the fact situation of the case at hand, no justification exists for any interference with such action.

12. In consideration of the aforesaid provisions of law and the facts as enumerated hereinabove, we find no lawful justification to interfere in the matter and, therefore direct dismissal of the writ application but in the circumstances no costs.

Writ petition dismissed.

2013 (I) ILR - CUT- 871

SANJU PANDA, J.

CRLA NO. 228 OF 2009 (Dt.27.02.2013)

RAJENDRA PATEL … …..Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 – S.376.

Rape – Rape is not merely a physical assault, it is often destructive of the whole personality of the victim and degrade the very soul of the helpless female – In this type of offence a conviction can be founded on the testimony of the prosecutrix alone and it is the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was committed – Held, finding of the trial Court is confirmed except the age of the victim girl and the sentence is modified to the extent that the accused-appellant is sentenced to undergo imprisonment for the period already undergone by him and to pay a fine of Rs.50,000/- which is to be paid to the victim.

(Paras 9,11,16)

Case laws Referred to:-

1.103 (2007) CLT 93 : (State of Orissa-V-Meleka Luku).
2.AIR 1995 SC 2169 : (Shyam & Anr.-V- State of Maharashtra)
3.AIR 2003 SC 2081 : (Jinish Lal Sha-V- State of Bihar).
4.77 (1994) CLT 711 : (Sribatcha Khamari-V- State of Orissa)
5.AIR 1982 SC 1297 : (Jaya Mala-V- Home Department, Govt. of Jammu & Ors.)
6.(2000) 5 SCC 30 : (State of Rajasthan-V- N.K.).
7.(2005) 30 OCR(SC)412 : (Adu Ram-V- Mukna & Ors.).

For Appellant - Mr. Prasanta Kumar Das.
For Respondent - Standing Counsel.

S. PANDA, J. The appellant has filed this criminal appeal challenging the order of conviction and sentence dated 7.4.2009 passed by the learned Ad hoc Additional Sessions Judge, Fast Track Court Padampur in Criminal Trial No.195/53 of 2008 convicting him for commission of offence under Sections 366/376 IPC and sentencing him to undergo R.I for five years and to pay a fine of Rs.5000/- and in default to undergo simple imprisonment for

six months for commission of offence under Section 366 IPC and to undergo R.I for ten years and to pay a fine of Rs.5000/- and in default to undergo simple imprisonment for six months for commission of offence under Section 376 IPC. The trial court directed that the sentences shall be run concurrently and further directed that in the event of fine amount is realized, the same shall be given to the victim on proper identification.

2. The facts narrated briefly are as follows; on 20.6.2008 the informant, who is the father of the victim, lodged an FIR before the Melchhamunda Police Station alleging that on the pretext of imparting nourishment to the elder mother of the accused, the victim girl had gone with the accused to his house. The accused kept the victim at his house for some days and raped her. The father of the victim on getting information that the victim was at the house of the accused, informed the police. The police rescued her, examined the witnesses and recorded their statements. Police sent the victim and the accused for medical examination. Police seized the school admission register to ascertain the age of the victim and gave the same to the zima of the school teacher. The investigating agency submitted the charge sheet before the learned J.M.F.C., Sohela for commission of offence under Section 366/376 IPC. The learned Magistrate after taking cognizance committed the matter to the Court of Session.

3. The plea of the accused is complete denial and false implication.

4. The trial court found the incident, as alleged, is proved. In the opinion of the trial court, the testimony of the prosecutrix has inspired confidence. Though there was delay in lodging the FIR, it was satisfactorily explained. Accordingly, the accused was found guilty of the aforesaid offences and sentenced as above.

5. Learned counsel for the appellant submitted that the age of the prosecutrix, as per the medical report furnished by the doctors (P.Ws.5 and 6), was aged about 16 years at the time of occurrence. In case two years is added to that, in that event she will be 18 years and it cannot be held that she was a minor. Moreover, the evidence of prosecutrix who was examined as P.W.11 clearly reveals that she was a consenting party. Therefore, the order of conviction and sentence passed by the trial court is liable to be set aside. In support of his contention, he has cited a decision of this Court in the case of State of Orissa of Orissa v. Meleka Luku reported in **103 (2007) CLT 93** and the decisions of the apex Court in the case of Shyam and another v. State of Maharashtra reported in **AIR 1995 SC 2169** and Jinish Lal Sha v. State of Bihar reported in **AIR 2003 SC 2081**.

6. Learned Standing Counsel for the State while supporting the order of conviction and sentence submitted that the prosecutrix was a minor on the date of occurrence and in the given facts and circumstances, there is no doubt in the prosecution case. Hence, a lenient view may not be taken in the present case. Therefore, the order of conviction and sentence deserves to be confirmed.

7. From the rival submissions of the learned counsel for the parties and after going through the records, it appears that the occurrence took place on 6.3.2008. The father of the victim lodged the FIR on 20.6.2008. The victim is the cousin sister of the appellant (daughter of maternal uncle). From the statement of the prosecutrix, it transpires that on a deceptive way, i.e. to serve the ailing elder mother of the appellant, the accused took her and threatening with dire consequence committed the offence and consoled her giving assurance of marriage. She did not agree for that as she was below the marriageable age. Her father searched her as she did not return from her sister's house. After thorough search, her father rescued her. On being rescued, she narrated the incident in detail immediately to her father who thereafter lodged the FIR. The informant who was examined as P.W.8 has also corroborated the testimony of the prosecutrix. The prosecution has also explained the delay in lodging the FIR. Soon after the victim was rescued, she was sent for medical examination and it was found that she was carrying 14 weeks of pregnancy.

8. Learned counsel for the appellant has filed an affidavit of one Kunja Patel, uncle of the appellant, on 9.12.2012 wherein it is stated that the father of the appellant and other gentlemen of the village has taken a decision regarding acceptance of the victim girl as the daughter-in-law of the house and the appellant has also given his consent for marriage and agreed to such proposal. Accordingly, a report was called for from the Presiding Officer, Lok Adalat, Bargarh District where the prosecutrix was present on 28th January, 2013 and the inquiry was conducted out of sight and audition of the police personnel who produced the victim for inquiry. From the report dated 30.1.2013, it appears that the victim is not willing to marry the appellant.

9. From the evidence on record, it transpires that the prosecution has successfully proved its case beyond all reasonable doubt.

Rape is not merely a physical assault. It is often destructive of the whole personality of the victim and degrade the very soul of the helpless female.

10. In Shyam's case (supra), the apex Court has held that as the prosecutrix was a willing party to go with the accused on her own, the culpability of the accused is not established. Therefore, the decision cited by the learned counsel for the appellant is not applicable to the facts of the present case.

11. The apex Court in Jinish Lal Sha's case (supra), taking into consideration the fact that the father of the victim was examined as a witness and he himself stated in the FIR that the prosecutrix went away by taking clothes, gold chain and some cash showing that there was no threat or inducement, has held that there was consent of the prosecutrix. Law is well settled that the testimony of the prosecutrix must be appreciated in the background of the entire case. The trial court must be alive of its responsibility and be sensitive while dealing with cases involving sexual molestation. In this type of offence, a conviction can be founded on the testimony of the prosecutrix alone and evidence of the prosecutrix is more reliable than that of an injured witness.

12. This Court in the case of Sribatcha Khamari v. State of Orissa reported in **77 (1994) CLT 711** has held that the variation of age according to Modi's Medical Jurisprudence is upto three years on this way or that way. The ossification test is not a surer test for ascertainment of age. In the case of criminal charges, benefits should always go to the accused.

13. In the case of Jaya Mala v. Home Department, Government of Jammu & Kashmir and others reported in **AIR 1982 SC 1297**, the apex Court has held that it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.

In view of the above position, in the present case the age of the victim was beyond 16 years.

14. The apex Court in the case of State of Rajasthan v. N.K The accused reported in **(2000) 5 SCC 30** has taken into consideration that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject-matter being a criminal charge. However, if the court of facts may find it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend

assurance to her testimony. The statement of the father of the prosecutrix is admissible in evidence and relevant under Section 157 as her former statement corroborating her testimony as also under Section 8 of the Evidence Act as evidence of her conduct. The testimony of the father of the prosecutrix was trustworthy and unembellished. The prosecutrix and her father had both been subjected to lengthy cross-examination. The trial court found both the witnesses reliable. There is no reason to disbelieve their testimony. ……No person should be allowed to escape unpunished once guilt against him is proved. Assessment of, made by a doctor on the basis of X-ray of left elbow and arm of a rape victim and no evidence available, merely on the basis of X-ray plates it cannot be positively stated that the girl was aged below 16 years. Delay in filing the FIR itself is not fatal to the prosecution case, if the delay is explained to the satisfaction of the Court. The apex Court, taking into consideration the above facts, has held that the period of remission for which he would have been entitled and the time which has elapsed from the date of commission of the offence, the accused-respondent need not now be sent to jail and modified the sentence to the period already undergone by him and to a fine of Rs.2000/- with further simple imprisonment of one year and nine months in default of payment of fine as passed by the trial court.

15. In the case of **Adu Ram v. Mukna and others** reported in **(2005) 30 OCR (SC) 412,** the apex Court has held that in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances were relevant facts which would enter into the area of consideration. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every Court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case.

16. In view of the above settled position of law and the reasons given in the above paragraphs, the finding of the trial court is confirmed except the age of the victim girl and the sentence is modified to the extent that accused-appellant is sentenced to undergo imprisonment for the period already undergone by him and to pay a fine of Rs.50,000/- (rupees fifty thousand), which is to be paid to the victim on proper identification. The accused-appellant is allowed time to deposit the fine amount by the end of March, 2013, in default, to undergo simple imprisonment for six months The Criminal Appeal is partly allowed.

Appeal allowed in part.

2013 (I) ILR - CUT- 876

SANJU PANDA, J & B. N. MAHAPATRA, J.

JCLA NO. 68 OF 2001 (Dt.18.01.2013)

URDHABA GOUDA …….Appellant

.Vrs.

STATE OF ORISSA ……..Respondent

PENAL CODE, 1860 - S.304, PART-I

Accused and deceased had a fight two hours prior to the incident in which accused had given slaps to the deceased – Due to intervention of other people both left the place – However deceased again came near the house of the accused and instigated him to assault by saying "A GOUDA MOTE MARIBU PARA AA AA MARE" – Hearing this the accused became enraged and on heat of passion picked up a knife and stabbed the deceased.

Held, appellant had no pre-meditation to assault the deceased rather on a heat of passion he inflicted such bodily injury which is

likely to cause death – Offence is coming U/s. 304, Part-I I.P.C. but not U/s.302 I.P.C. (Para 7)

Case laws Referred to:-

1.1984 (1) OLR 665 : (Sania Dora @ Badnaik-V- State)
2.1985 (1) OLR 271 : (Mandangi Samburu-V- State).

For Appellant - Mr. L. Samantaray.
For Respondent - Mr. Sk. Jafarwalla,
Addl. Standing Counsel.

On 18.1.2013, the appeal was heard and judgment dictated in Court. Appeal was allowed in part converting the offence under Section 302,I.P.C. to one under Section 304 Part-I, I.P.C. and modify the sentence. Release order communicated. The reasons of the judgment follow:

2. The appellant having been convicted for commission of offence under Section 302 of I.P.C and sentenced to imprisonment for life and to pay a fine of Rs.2000/-, in default to undergo rigorous imprisonment for a further period of one year and the period undergone as U.T.P. be set off against the substantive sentence under Section 428 of the Cr.P.C. by the learned Additional Sessions Judge, Jeypore, in Sessions Case No.21 of 1999 (Sessions Case No.259 of 1998 on the file of the Sessions Judge, Koraput-Jeypore) has preferred this appeal against the said order of conviction and sentence.

3. The prosecution case in nut-shell is that the accused Urdhaba and deceased Madhaba Prasad Nayak were in inimical terms. On 1.6.1998 at 7 P.M. while the accused was present near the shop of one Balya Krishna Nayak, the deceased came there and abused him. For that reason, the accused gave two slaps to the deceased. The persons present there intervened in the matter and separated them. Later that night, at 8 P.M. the deceased came towards the house of the accused and shouted “A GOUDA MOTE MARIBU PARA AA AA MARE”. Hearing this, the accused became enraged, picked up a knife from his Tea Stall and then stabbed the deceased on the back of his neck, as a result of which the deceased sustained bleeding injury on his neck and fell down. Then the accused gave 3 to 4 blows by means of the said knife on the back of the deceased. Seeing this incident, wife, brother, borther-in-law of the deceased rushed to the spot and seeing them the accused fled away from the spot taking the knife with him. The deceased before breathing his last, stated that he had

been assaulted by the accused Urdhaba. That night itself, the elder brother of the deceased lodged F.I.R. before the O.I.C., Boriguma Police Station, who registered P.S. Case No.62 of 1998 and took up investigation. In course of investigation, the Investigating Officer examined the witnesses, recorded their statements, visited the spot, prepared spot map, held inquest, arrested the accused, made arrangements for shifting the dead body for post mortem examination and also sent the seized articles for chemical examination. While in custody, the accused disclosed about the concealment of the weapon of offence before the I.O. and led to discovery of the weapon of offence which was seized. After completion of investigation, the I.O. submitted charge sheet against the accused under Section 302 of I.P.C.

4. The plea of the defence is one of denial and false implication in this case.

5. In order to bring home the charge, the prosecution examined as many as 12 witnesses, of whom P.W.1, P.W.2 Padma Poroja, widow of the deceased, P.W.3 Sanomatu Poroja, brother-in-law of the deceased and P.W.11 who are the eye witnesses to the occurrence P.W.4 and P.W.5 speak about the incident that took place prior to the murder of assault near the shop of Balya Krushna. P.W.5 also speak about the seizure of sample earth, blood stained earth from the spot. P.W.10 Sarat Chandra Nayak is a witness to the discovery of the weapon of offence at the instance of the accused. Rest of the witnesses are official witnesses. P.W.7 Dr.Kedar Nath Choudhury is the Medical Officer, who conducted post mortem examination and examined the weapon of offence. P.W.9 Baikunthanath Goudo is a Constable, who escorted the dead body of the deceased to the S.D Hospital, Jeypore for post mortem examination and produced the wearing apparels of the deceased before the I.O. P.W.12 Radhanath Nayak and P.W.8, Pramod Kumar Bagh are two I.Os of the case. The former have done most of the investigation and the latter had placed charge sheet against the accused. In addition to the oral testimony of these witnesses, the prosecution also relied upon a material object i.e. M.O (knife) and exhibited 14 different documents which are marked as Ext.1 to Ext.14.

6. The defence, on the other hand, has examined one witness, namely, Railu Goudo as D.W 1 to prove its version.

7. Learned counsel for the appellant submitted that P.Ws.1,2 and 3 are eye witnesses to the occurrence and from the evidence of P.W.1 it is clear that the deceased and accused had a fight with each other two hours prior

to the incident and the accused had given slaps to the deceased. At that time, on the intervention of some people, both accused and deceased left the place. However, the deceased has again came to the front of the house of accused and instigated him to assault and as such on heat of passion the appellant came out from his house and gave successive blows. The statement of P.W.1 as to the assault part was also corroborated by P.Ws.2 and 3 so also regarding instigation of the deceased to the accused to assault him. The appellant had no pre-meditation to assault the deceased rather the accused on heat of passion inflicted such bodily injury, which likely to cause death. Therefore, the offence is coming under Section 304, Part-I of I.P.C. but not under Section 302 of I.P.C.

8. Mr. Sk Jafarwalla, learned Additional Standing Counsel submitted that the present case is not coming under exception 4 of Section 300 of the Indian Penal Code, as there was no sudden quarrel and he supported the findings of the trial court.

9. Considering the above rival submissions of the learned counsel for the appellant and the learned counsel for the State and after going through the records, it appears that P.Ws.1, 2 and 3 are the eye witnesses to the occurrence. P.W.7 is the doctor, who conducted post mortem, stated that death was caused because of hemorrhage and shock due to injuries. Hence, the death is homicidal in nature. P.W. 1 has stated that there was exchange of hot words between deceased and accused and suddenly accused brought out a knife and gave successive blows to the deceased as a result of which deceased fell down and succumbed to the injuries at the spot. P.W. 1 also categorically stated that the deceased had gone to the house of the appellant and instigated him to assault. P.W.2 and P.W.3 (wife and brother-in-law of the deceased) who were residing with deceased also stated that there was a quarrel between the deceased and accused two hours prior to the occurrence and the deceased left the house disclosing before them that there was a quarrel between him and accused and he will go to the accused for further altercation. On such instigation successive blows were given by the accused on heat of passion and caused such bodily injuries which caused death.

10. This Court in the decision reported in 1984 (1) OLR 665, **Sania Dora alias Badnaik v. State** considered the facts and circumstances of the case and held that where there had been a sudden quarrel and on the spur of moment, without any premeditation and being incensed, the appellant-accused who belonging to an aboriginal tribe dealt a blow which landed on the head of the deceased as a result of which the deceased succumbed to

the injury. In those circumstances, the order of conviction and sentence passed against the appellant was converted from Section 302, I.P.C to one under Section 304, Part-II, I.P.C.

11. Similar view has also been taken by another Division Bench of this Court in a Jail Criminal Appeal in the case of **Mandangi Samburu v. State**, 1985 (1) OLR-271 wherein the appellant, who belonged to Scheduled Tribe Community was convicted for the offence under Section 302, I.P.C. was converted to one under Section 302, Part-II.

12. In another unreported Jail Criminal Appeal No.52 of 1997 disposed of on 11.10.2007, this Court also took a similar view as the accused was a resident of Nabarangpur, an interior part of the State and inhabitants of that area are tribal. It was held that such people are of different mindset and they committed offences on the spur of moment. The order of conviction under Section 302, I.P.C and the sentence of rigorous imprisonment for life passed against the appellant was set aside and as the offence committed by the accused was not murder but culpable homicide not amounting to murder and he was convicted under Section 304, Part-I of the I.P.C.

13. Therefore, the ratio decided in the aforementioned cases is squarely applicable to the facts and circumstances of the case at hand, the appellant being a resident of Koraput, an interior part of the State and being an aboriginal, on sudden provocation committed the offence on heat of passion without premeditation.

14. Accordingly, the order of conviction under Section 302 I.P.C. and the sentence of rigorous imprisonment for life passed by learned Additional Sessions Judge, Jeypore is set aside and instead the appellant is convicted under Section 304 Part-I of I.P.C. and sentenced to suffer rigorous imprisonment accordingly. While modifying the order of sentence this Court has taken note of the fact that the appellant has remained in jail since the date of his arrest and is continuous since then. The appellant is, therefore, directed to be set at liberty forthwith, if his detention in connection with any other cases is not required.

Appeal allowed in part.

2013 (I) ILR - CUT- 881

SANJU PANDA, J.

W.P.(C) NO.12635 OF 2012 (Dt.19.12.2012)

DAKSHIN DINAJPUR B. ED. COLLEGE ……Petitioner

.Vrs.

REGIONAL DIRECTOR, EASTERN REGIONAL COMMITTEE NATIONAL COUNCIL FOR TEACHER EDUCATION & ANR. …….Opp.Parties

EDUCATION – Sections 14 & 15 of the NCTE Act, 1993 – Petitioner-institution applied for grant of recognition – Eligibility – Prayer refused as the Principal of the College has secured 54.88% of marks in B.Ed. as against the requirement of 55% of marks – Action challenged.

Held, since 54.88% of marks is almost equivalent to 55% of marks and only one mark is short and no other persons are available in the field to be aggrieved or prejudiced and this is not a case to eliminate other candidates on the basis of the mark, this Court directs the Opp.Parties to consider the application of the petitioner-institution for grant of recognition to the petitioner- institution as it has fulfilled all other criteria as prescribed by NCTE. (Para 9,10)

Case laws Referred to:-

1.89(2000) CLT 73 : (Lokesh Chandra Pradhan-V- State of Orissa & Ors.)
2.(2011)3 SCC 436 : (St.Hohn's Teacher Training Institute (for Women), Madurai Etc. etc.-V- State of Tamil Nadu & Ors.)
3.AIR 1997 SC 2071 : (State of Orissa & Anr.-V- Damodar Nayak & Anr.).

For Petitioner - M/s. Sandeep Parida, R. Mohanty, A.R. Naik.
For Opp.Parties - M/s. S.S. Das, S.R.Das.

S. PANDA, J. The petitioner, Dakshin Dinajpur B.Ed College represented through its Secretary, has filed this writ petition challenging the

action of the Regional Director, Eastern Regional Committee, National Council for Teacher Education, Bhubaneswar, opposite party no.1 in not granting recognition as per the Regulation of the National Council for Teacher Education (in short, 'NCTE') and praying for granting of recognition as per the said NCTE Regulation for the session 2012-2013.

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

The petitioner, a private educational institution, was established in the year 2009 in the name and style "Dakshin Dinajpur B.Ed College" situated in the village Fulbari of Dakshin Dinajpur in the State of West Bengal. The petitioner-institution has been imparting Bachelor of Education (B.Ed) Programme. In terms of Sections 14 and 15 of the NCTE Act, 1993, the petitioner-institution submitted an application to the Eastern Regional Committee of NCTE on 30.10.2009 for grant of recognition. On the basis of scrutiny of the documents submitted by the petitioner-institution and the report of the visiting team, the Eastern Regional Committee in its 115th meeting decided that the petitioner-institution has adequate financial resources, accommodation, library and laboratory as prescribed under the norms and standards of the Act. The petitioner-institution has also fulfilled all other conditions relating to infrastructural facilities required for proper functioning of a teacher education course.

While the matter stood thus, opposite party no.1 issued a letter of intent on 17.3.2011 vide letter No.F.ERC/ NCTE/ 2010/ERCAPP333/B.Ed. requesting the petitioner-institution to form a Selection Committee for selection of Faculty/Staff in order to satisfy Clause 7(9) of the NCTE (Regulation Norms and Procedure) Regulation, 2009 so that recognition could be granted under Section 7(11) of the said Regulation. Accordingly, the petitioner-institution had given its reply on 27.6.2011 fulfilling all the requirements as directed and also sent a similar letter to the Registrar of Gour Banga (Affiliating) University to nominate Experts Committee for recruitment of faculty in English and Mathematics subjects. Opposite party no.1 issued a letter on 18.8.2011 asking the petitioner-institution to submit the documents relating to the appointment of faculty in English and Mathematics subjects along with the documents pertaining to qualification, percentage of marks, teaching experience, etc. countersigned by Registrar of Affiliating University. Accordingly, the petitioner-institution on 8.9.2011 apprised opposite party no.1 regarding fulfillment of the requirements of NCTE and submitted all the pertinent documents. Again, opposite party no.1 on 5.10.2011 asked the petitioner-institution to submit the list of the qualified faculty duly appointed as per the provision of NCTE Regulation. The petitioner-institution immediately complied with the same on 15.10.2011 and

submitted a detailed list of faculty staff as per the prescribed format indicating qualification, percentage of marks and teaching experience etc. In the 129th meeting of NCTE held on 20-21/12/2011, it was observed that the Government of West Bengal be requested to submit a report in connection with the selection of staff of the petitioner-institution. In furtherance of the said observation, the petitioner-institution intimated opposite party no.1 that it has fulfilled the requirements as prescribed and accordingly NOC was granted in its favour. On 13.9.2010, opposite party no.1, while considering all the documents submitted by the petitioner-institution, in its 135th meeting observed that the Principal of the petitioner-institution was required to have 55% in both B.Ed. and M.Ed. Education as per the NCTE Regulation, 2009. Thus, the Principal was not qualified as the marks obtained in B.Ed Degree are 494 out of 900 which is less than the required 55% marks. The Principal of the petitioner-institution is only one mark short of the required qualification which is 54.88% and is marginally less than required 55% of marks. Therefore, the decision of opposite party no.1 disqualifying the petitioner-institution is unreasonable and illegal. The Principal of the petitioner-institution was having all the requisite qualification and had obtained B.Ed. Degree having 54.88% of marks that is almost equivalent to 55% which is the qualifying percentage to be appointed as Principal. The said rounding up marks to 55% will not cause prejudice to the claims and rights of any person. Therefore, the petitioner-institution is entitled to get recognition as per the NCTE Regulation.

3. Learned counsel for the petitioner submitted that the petitioner-institution has fulfilled all the requisite eligibility criteria for getting recognition from NCTE which was arbitrarily denied. Therefore, interference of this Court is warranted in exercise of its jurisdiction under Article 226 of the Constitution of India.

4. Opposite parties have field their counter affidavit taking a stand that in their 135th meeting, they sought clarification from the institutions as to whether the appointment of the Principal is justified as per the norms prescribed under the Regulation and if so, then the petitioner-institution shall give the reply within 30 days. Instead of submitting the reply, the petitioner-institution should not have approached this Court for redressal of its grievance. They have further taken a stand that opposite party no.1 has issued a letter on 20.7.2012 to the petitioner-institution seeking the above clarification within the aforesaid period and thereafter the Regional Committee shall take a decision in the matter. Therefore, the writ petition is premature and is liable to be dismissed.

5. Learned counsel for the opposite parties submitted that the application of the petitioner-institution is pending consideration. The aforesaid Regulation prescribes the qualification of the Principal and as per the said Regulation, the petitioner-institution is required to appoint the Principal having 55% of marks in both B.Ed. with M.A (Education). Since the petitioner-institution has not appointed the Principal having the said requisite qualification, the rounding up theory is not applicable. In support of his contention, he has cited the decision of this Court in the case of Lokesh Chandra Pradhan v. State of Orissa and others reported in 89 (2000) CLT 73 and the decisions of the apex Court in the case of St. John's Teacher Training Institute (for Women), Madurai, etc. etc. v. State of Tamil Nadu and others, etc. etc. reported in AIR 1994 SC 43 and State of Orissa and another v. Mamata Mohanty reported in (2011) 3 SCC 436 wherein the apex Court, emphasizing on the appointment and recruitment of the teaching staff, has held that necessity of possession of prescribed qualifications by teachers for the purpose of grant-in-aid to private educational institutions is necessary unless the teachers themselves possess a good academic record/minimum qualifications prescribed as an eligibility, standard of education cannot be maintained/enhanced. Person possessing Master's degree with less than 54% marks will not be eligible for the said post. In the absence of an enabling provision in the statute or rules concerned, requisite qualification could not be relaxed, much less in disregard of object of statute and after initiation of selection process. He further submitted that opposite party no.1 has rightly issued the said letter dated 20th July, 2012 to the petitioner-institution and in view of the said settled position of law as decided by the apex Court, the writ petition is liable to be dismissed.

6. Per contra, learned counsel for the petitioner cited a decision of the apex Court in the case of State of Orissa and another v. Damodar Nayak and another reported in AIR 1997 SC 2071 wherein the apex Court taking into account the Resolution dated September 13, 1985 which prescribes the qualification for recruitment of Lecturers of affiliated Colleges which indicates that "candidate not holding an M.Phil degree should possess a high second class Master's degree, i.e., 54% marks and a second class Honours/Pass in the B.A./B.Com./B.Sc. examination" has held that securing 53.9% marks which is almost equivalent to 54% of marks, the respondent therein is eligible to get the benefit as he was possessing the requisite qualification. Applying the same principle, in the present case, since the Principal of the petitioner-institution has obtained 54.88% of marks which is almost equivalent to 55% of marks and only one mark is short, the same should be treated as 55% of marks.

7. This Court considered the above rival submissions of the parties and the decision of the apex Court in the case of St. John's Teacher Training Institute (for Women), Maduri (supra) wherein the apex Court considered the action of the State Government in not granting recognition to the institution on the ground that it has failed to satisfy the conditions for grant of recognition as provided under the Tamil Nadu Minority Schools (Recognition and Payment of Grants) Rules, 1977 as amended thereunder. Keeping in view the National Policy of Education, the Government of Tamil Nadu has published, a revised syllabus for the diploma in teacher education course, in the Government Gazette of August 15, 1990. The aims and objectives of the said syllabus and curriculum as given by the State of Tamil Nadu are as under:

> "A sound Programme of Elementary Teacher Education is inevitable for the qualitative improvement of Education. Education must become an effective instrument of social change and the part played by the teacher should be suitable and significant for this purpose. The gap between the Teacher Education curriculum and the school curriculum has to be minimized for enabling the teachers to act as agents of social change which necessitates that the education imparted in schools has relevant to the personal as well as social life of individuals and to "the needs and aspirations of the people. In order to be a catalyst in the process of developing a citizen who is productive and who believes in social justice and national integration, the teacher himself needs to become such a citizen, through appropriate learning experience."

The apex Court taking into consideration the above has held that the Court cannot go into the question as to whether a Teachers Training Institute should be set up on a campus consisting of 10 acres or 5 acres. It is also not for this Court to lay down the sizes of the class rooms, laboratories, number of toilets or the number of books to be kept in the library. It is entirely for the State Government to law down the requirements of a teachers training institute-campus. The policy is based on the guidelines issued by the Central Government from time to time and upheld the decision of the High Court regarding need for maintaining very high standards of Education, Sports, administration and maintenance of the Teachers Training Institutes. These Institutions are established with the avowed object of training teachers and educationists who have to shoulder the responsibility of moulding the nation. The Teachers Training Institutes are meant to teach children of impressionable age and we cannot let loose on the innocent and unwary children, teachers who have not received proper and adequate training. True they will be required to pass the examination but that may not be enough.

Training for a certain minimum period in a properly organized and equipped Training Institute is probably essential before a teacher may be duly launched. The apex Court further held that the institutions shall have to comply with the Recognition Rules to enable them to earn recognition.

8. In the case of State of Orissa and another v. Mamata Mohanty (supra), the apex Court considered regarding recruitment of the teaching staff and held that possessing the below prescribed standards is not entitled to grant-in-aid. Therefore, ratio decided in those two aforesaid decisions are not applicable to the facts of the present case.

9. In the present case, the question is whether one mark short from the prescribed qualification to possess 55% of the mark in B.Ed. and M.Ed. Education is a disqualification or it will be considered almost the same prescribed qualification of 55% of marks which is not amounting to relax the prescribed qualification.

The apex Court in the case of State of Orissa and another v. Damodar Nayak and another (supra) has held that 53.9% of marks are almost equivalent to 54% of marks.

Therefore, the ratio decided in State of Orissa and another v. Damodar Nayak and another (supra) is applicable to the facts of the present case.

In the present case, the plea of the petitioner-institution is that the Principal has secured 54.88% of marks which is almost equivalent to 55% of marks. Therefore, one mark short is almost equivalent to 55% of marks and the same is not amounting to relax the prescribed qualification.

10. Considering the above and since 54.88% of marks is almost equivalent to 55% of marks and only one mark is short and no other persons are available in the field to be aggrieved or prejudiced and this is not a case to eliminate other candidates on the basis of the mark, this Court directs the opposite parties to consider the application of the petitioner-institution for grant of recognition to the petitioner-institution as it has fulfilled all other criteria as prescribed by NCTE. The above exercise shall be completed within a period of four months from the date of pronouncement of the judgment. The writ petition is accordingly allowed.

Writ petition allowed.

2013 (I) ILR - CUT- 887

B. N. MAHAPATRA, J.

W.P.(C) NOS. 6338 & 6386 OF 2012 (Dt.23.11.2012)

ASSESSING OFFICER-CUM-EXECUTIVE ENGINEER (ELECT.), NESCO, BARIPADA ……Petitioner

.*Vrs.*

APPELLATE AUTHORITY-CUM-DY.ELECTRICALINSPECTOR (T & D) BALASORE & ANR. …….Opp.Parties

A. ELECTRICITY ACT, 2003 – Ss.127 (2).

Electricity charges – Provisional assessment order challenged in appeal U/s.127 (2) of the Act – Appellate authority has power to grant interim order which is incidental and ancillary to its appellate jurisdiction – Held, the impugned order directing the licensee to reconnect power supply to the premises of the consumer and not to take action against the consumer for non-payment of the balance 50% of the assessed amount till disposal of the appeal is valid and warrants no interference of this Court. (Para 16,19)

B. ELECTRICITY ACT, 2003 – S.135 (1-A).

Where the consumer does not want to challenge the assessment order in appeal, in that case only 3rd proviso to Section 135 (1-A) has full application and unless the consumer pays the entire assessed amount with reconnection charges, power supply cannot be restored to his/her premises. (Para 17)

C. ELECTRICITY – Provisional assessment order – Challenged in appeal U/s.127 (2) of the Electricity Act, 2003 – Appellate authority has power to direct restoration of power supply without insisting for payment of balance 50% of the assessed amount till disposal of the appeal. (Para 16,19)

Case laws Referred to:-

1.AIR 2011 (NOC)124 (CAL) : (Kuban Sk.-V- State of West Bengal & Ors.)
2.AIR 2011 (NOC)126 (CAL) : (Amit Sasmal-V- West Bengal State Electricity Distribution Co. Ltd. & Anr.)
3.AIR 1956 SC 44 : (Matajog Dobey-V- H.C. Bhari)

4.AIR 1962 SC 486 : (Bidi, Bidi Leaves & Tobacco Merchants' Association-V- State of Bombay)
5.(2008)2 SCC 409 : (Sikri Vasu-V-State of U.P. & Ors.)
6.(1996)103 STC 333 (Ori.) : (Harendra Prasad Sahu-V- Orissa Sales Tax Tribunal & Ors.)
7.(1973)75 CLT 24 : (Smt. Aruna Kar-V- Dr. Sarat Dash & Nachhi)

For Petitioner- : Mr. S.C. Dash
For Opp. Parties - : M/s. F.R. Mohapatra, M.K. Panda, R.K. Nayak & A.K. Moharana

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B.N. MAHAPATRA, J. Writ petition bearing W.P.(C) No.6338 of 2012 has been filed by the licensee-Assessing Officer-cum-Executive Engineer (Elect.) with a prayer to quash the order dated 23.03.2012 passed by the Appellate Authority-cum-D.E.I. (T&D), Balasore in Case No.AAC 01/2012 (Annexure-9) directing for reconnection of power supply to the premises of the consumer-petitioner within 48 hours without any cost. Further prayer is for a clarification that 50% statutory deposit as required under Section 127 (2) of the Electricity Act, 2003 for the purpose of maintaining the appeal neither confers any right on the consumer to demand for restoration of power supply nor does it empower the Appellate Authority to direct the licensee by an interim order for reconnection of power supply to the consumer's premises. In the writ petition, though prayer has been made to quash order dated 23.03.2012 passed in Case No.AAC 01 of 2012 under Annexure-9, no such order has been attached to the writ petition as Annexure-9. Annexure-8 is the last Annexure attached to the writ petition, which is a petition dated 26.03.2012. However, it is found that the order dated 23.03.2012 has been annexed to the writ petition as Annexure-7. From the various arguments advanced by Mr. Das, learned counsel for the petitioner, it appears that the petitioner licensee has filed this writ petition to quash the order dated 23.03.2012 passed in Case No.AAC 01 of 2012 under Annexure-7 and not Annexure-9.

2. Writ petition bearing W.P.(C) No.6386 of 2012 has been filed by the consumer with a prayer to direct opposite party No.1-Executive Engineer (Electrical), NESCO to restore power supply to the premises of the petitioner and to dispose of the appeal within a stipulated period.

3. Since both the writ petitions are interconnected, they are disposed of by this common judgment.

4. Petitioner's case in W.P.(C) No.6338 of 2012 in a nut-shell is that the petitioner is one of the electrical supply Engineers of the Distribution-Licensee i.e. NESCO engaged in the business of retail supply of electricity to various categories of consumers within the area of supply. Opposite party No.2 Samiran

Singha @ Singha, son of late Dayanidhi Singha is a consumer of electricity unde r the petitioner-company for a contract demand of 5KW under general purpose commercial tariff to run lethe work/fabricating unit for installation of welding machine upon execution of the agreement to that effect on 15.11.2010. Under the said agreement, the petitioner has undertaken to abide rules and regulations as contemplated under OERC Distribution (Condition of Supply) Code, 2004. During spot verification conducted by the squad of NESCO on 04.02.2012, it was found that the said consumer has committed theft of power supply unauthorizedly by way of direct 3 phase hooking from the nearby L.T. Line through 2.5 mm sqr. Current wires of red, blue and yellow colours for the purpose of running his fabricating industry. The said hooking wires were seized on the spot after taking photographs and power supply was disconnected as per Clauses-34 and 46 of OERC Supply Code, 2004 read with Section 135 of the Electricity Act, 2003 and subsequently, on 07.02.2012, FIR was lodged against the consumer for his availing power supply in such an authorized manner. On the basis of spot verification report dated 04.02.2012, the present petitioner as Assessing Officer proceeded under Section 126 of the Electricity Act, 2003 and assessed an amount of Rs.1,69,928/- towards the provisional assessment vide his office letter No.348 dated 08.02.2012 and served on the consumer inviting objection fixing 16.02.2012 as the date for personal hearing in the matter. In response to the said letter of provisional assessment the consumer filed objection on 14.02.2012 admitting the actual fact of availing power supply unauthorizedly in the manner as detected by the squad of the licensee (NESCO). The Assessing Officer upon consideration of the reply of the consumer-opposite party no.2 has passed the final assessment order No.869 dated 06.03.2012 for an amount of Rs.1,56,474/-. Against the said final assessment order dated 06.03.2012, the consumer approached the present petitioner to allow him to deposit 50% of the finally assessed amount towards the statutory deposit to prefer appeal under Section 127 of the Electricity Act, 2003 to the Appellate Authority and accordingly, he was allowed to deposit 50% of the finally assessed amount for the purpose of preferring Appeal as provided under the Statute. On 24.03.2012, the petitioner received interim order dated 23.03.2012 passed by the appellate authority in Case No.AAC 01 of 2012, wherein the petitioner has been directed to revive power supply to the premises of the consumer without any cost. On receipt of the said interim order, the petitioner filed a petition on 26.03.2012 for vacation of the said interim order as the same being without authority. The appellate authority rejected the said petition of the petitioner vide order dated 28.03.2012. Hence, the present writ petition.

5. Mr. S.C. Dash, learned counsel for the petitioner submitted that the interim order was passed by the appellate authority without serving any notice

of the appeal petition on the petitioner. Deposit of 50% of the finally assessed amount is only made for the purpose of preferring and maintaining the appeal and in absence of any provision for restoration of power supply by the appellate authority, it cannot direct for restoration of power supply. Only remedy available for restoration of power supply is to deposit the entire assessed amount as required under 3rd proviso to Section 135(1A) of the Electricity Act, 2003. The appellate authority has exceeded its jurisdiction by passing an ex parte order for reconnection of power supply to the premises of the consumer while exercising power under Section 127 of the Electricity Act, 2003 without appreciating the meaning of Section 127(2) of the Act, 2003, which provides that 50% deposit out of the finally assessed amount is required for the purpose of maintaining the appeal but it does not confer any right on the consumer to get restoration of power supply. The appellate authority is not authorised under any law to pass any interim order directing restoration of power supply. Therefore, the interim order dated 23.03.2012 passed by the appellate authority is liable to be set aside. The appellate authority has passed the impugned order without hearing the petitioner which is violative of the principles of natural justice. The appellate authority on 28.3.2012 in utter disregard to the citations filed by the petitioner rejected the petition dated 26.03.2012 filed by the petitioner for vacation of interim order dated 23.03.2012. In support of his contention that the appellate authority has no power to pass interim order, Mr.Dash, relied upon the decisions of the Calcutta High Court in the cases of *Kuban Sk. vs. State of West Bengal and others, AIR 2011 (NOC) 124 (CAL)* and *Amit Sasmal vs. West Bengal State Electricity Distribution Co. Ltd. & Anr., AIR 2011 (NOC) 126 (CAL).* Concluding his argument, Mr. Dash prays to allow the writ petition.

6. On the contrary, Mr. F.R. Mohapatra, learned counsel appearing for opposite party No.2-Samiran Singha in W.P.(C) No.6338 of 2012 and the petitioner in W.P.(C) No.6386 of 2012 submitted that the authority has power to grant interim order as incidentally or ancillary to its appellate jurisdiction. In support of his contention, relying upon the judgment of the Hon'ble Supreme Court in the case of *Income Tax Officer, Cannanore vs. M.K. Mohammed Kunhi,* AIR 1969 SC 430, Mr. Mohapatra submitted that there is no infirmity or illegality in the order passed by the appellate authority.

7. The only question that falls for consideration by this Court is as to whether the appellate authority has incidental and ancillary powers which it can exercise to make fully effective the express power granted under Section 127 of the Act, 2003 and therefore the impugned order dated 23.3.2012 passed by the appellate authority in Case No.AAC 01/2012 directing the licensee-petitioner to reconnect power supply to the consumer's premises is justified.

8. Undisputed facts are that opposite party No.2 has been finally assessed under Section 126 of the Electricity Act, 2003. Section 127 of the Act, 2003 provides that any person aggrieved by a final order made under Section 126 may, within thirty days of the said order, prefer an appeal. Section 127(2) of the Act, 2003 provides that no appeal against an order of assessment under sub-section (1) shall be entertained unless an amount equal to [half of the assessed amount] is deposited in cash or by way of bank draft with the licensee and documentary evidence of such deposit has been enclosed along with the appeal.

9. In the instant case, opposite party no.2 has filed an appeal under Section 127 of the Act, 2003 and to maintain his appeal he has deposited 50% of the assessed amount. The appellate authority has passed the impugned order dated 23.03.2012 directing the licensee-petitioner to reconnect power supply to the premises of the consumer-opposite party No.2 within 48 hours without cost with a further direction not to initiate any action against the consumer-opposite party no.2 for non-payment of balance 50% of the assessed amount till disposal of the appeal by the appellate forum. Licensee-petitioner's case is that under Section 127 of the Act, 2003 no power is vested with the appellate authority to pass any interim order, but despite the same, the appellate authority has passed the impugned interim order. Therefore, interim order directing restoration of power supply is illegal. The remedy available to the consumer-opposite party No.2 is under 3rd proviso of sub-section (1-A) of Section 135 which provides that on deposit or payment of the assessed amount or electricity charges in accordance with the provisions of this Act, without prejudice to the obligation to lodge the complaint as referred to in the second proviso to that clause, the licensee shall restore the supply line of electricity within forty-eight hours of such deposit or payment. Mr. Dash, learned counsel for the licensee-petitioner submitted that only remedy available to the consumer-opposite party No.2 in case of disconnection of power supply under 3rd proviso to Section 135(1-A) of the Act, 2003 is to deposit the payment of the assessment amount of the electricity charges. Therefore, the interim order passed by the appellate authority is contrary to law.

10. The consumer-petitioner's case in W.P.(C) No.6386 of 2012 is that power supply to the premises of the petitioner has been disconnected by exercising power under Section 135 of the Act, 2003 on the very same day of verification i.e. on 04.02.2012 much prior to passing of the final assessment order. It is further submitted that on the date of disconnection of power supply i.e. the date of verification no demand has been raised by the petitioner-licensee. In any event, the provision contained in 3rd proviso to sub-section (1-A) of Section 135 is not adequate remedy available to the consumer-petitioner as the said provision provides for payment of entire assessed amount, even if the

correctness of such assessment is challenged in the appeal. Therefore, it was submitted that since there is no adequate remedy available under the Act, 2003 for restoration of power, except making payment of the entire assessed amount which was challenged before the appellate authority, the said authority has power to grant the interim order as incidentally or ancillary to its appellate jurisdiction.

11. At this juncture, it is necessary to refer some of the decisions of the Hon'ble Supreme Court which is relevant for our purpose. The Hon'ble Supreme Court in the case of ***Matajog Dobey vs. H.C. Bhari,*** *AIR 1956 SC 44,*

> "**23.** Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution……"

12. The Hon'ble Supreme Court in the case of ***Bidi, Bidi Leaves & Tobacco Merchants' Association v. State of Bombay,*** *AIR 1962 SC 486,* held as under:

> **"20.** "One of the first principles of law with regard to the effect of an enabling act", observes Craies, "is that if a Legislature enables something to be done, it gives power at the same time by necessary implication to do everything which is indispensable for the purpose of carrying out the purposes in view[5]". The principle on which this doctrine is based is contained in the legal maxim "*Quando lex aliquid concedit concedere videtur et illud sine quo res ipsa ease non potest*". This maxim has been thus translated by Broom thus: "whoever grants a thing is deemed also to grant that without which the grant itself would be of no effect". Dealing with this doctrine Pollock, C.B., observed in *Michael Fenton and James Fraser* v. *John Stephen Hampton*[6] "it becomes therefore all important to consider the true import of this maxim, and the extent to which it has been applied. After the fullest research which I have been able to bestow, I take the matter to stand thus: Whenever anything is authorised, and especially if, as matter of duty, required to be done by law, and it is found impossible to do that thing unless something else not authorised in express terms be also done, then that something will be supplied by necessary intendment". This doctrine can be invoked in cases "where an Act confers a jurisdiction it also confers by

implication the power of doing all such acts, or employing such means, as are essentially necessary to its execution." In other words, the doctrine of implied powers can be legitimately invoked when it is found that a duty has been imposed or a power conferred on an authority by a statute and it is further found that the duty cannot be discharged or the power cannot be exercised at all unless some auxiliary or incidental power is assumed to exist. In such a case, in the absence of an implied power the statute itself would become impossible of compliance. The impossibility in question must be of a general nature so that the performance of duty or the exercise of power is rendered impossible in all cases. It really means that the statutory provision would become a dead-letter and cannot be enforced unless a subsidiary power is implied. This position in regard to the scope and effect of the doctrine of implied powers is not seriously in dispute before us. The parties are at issue, however, on the question as to whether the doctrine of implied powers can help to validate the impugned clauses in the notification."

13. The Hon'ble Supreme Court in the case of *M.K. Mohammed Kunhi (supra),* held that the power to stay is a necessary corollary to the power to entertain an appeal or revision. That even without an express conferment, the appellate authority has the power to stay the proceedings and the collection pending appeal, as incidental or ancillary to its appellate jurisdiction.

14. The Hon'ble Supreme Court in the case of ***Sikri Vasu vs. State of U.P. and others, (2008) 2 SCC 409,*** held as under:

"18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is impliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution."

"19. The reason for the rule (doctrine of implied power) is quite apparent. Many matters of minor details are omitted from legislation. As Crawford observes in his *Statutory Construction* (3rd Edn., p. 267):

> "… If these details could not be inserted by implication, the drafting of legislation would be an interminable process and the legislative intent would likely be defeated by a most insignificant omission."

15. This Court in the case of ***Harendra Prasad Sahu vs. Orissa Sales Tax Tribunal and others,*** *(1996) 103 STC 333 (Ori),* held as under:

> "4……. Tribunal has all the powers conferred expressly by the statute. Furthermore, being a judicial body, it has all those incidental and ancillary powers which are necessary to make fully effective the express grant of statutory powers. Certain powers are recognized as incidental and ancillary not because they are inherent in the Tribunal, nor because its jurisdiction is plenary, but because it is the legislative intent that the power which is expressly granted in the assigned field of jurisdiction is efficaciously and meangingfully exercised. The implied grant is of course limited by the express grant and therefore, it can only be such powers as are truly incidental and ancillary for doing all such acts or employing all such means as are reasonably necessary to make the grant effective. (See Maxwell on Interpretation of Statutes, Eleventh Edition). A Division Bench of this Court in *Smt. Aruna Kar v. Dr. Sarat Dash and Nachhi,* (1973) 75 CLT 24 also dealt with these aspects."

16. In view of the above settled legal proposition, this Court is of the view that the appellate authority while exercising power under Section 127 of the Act, 2003 carries with it by necessary implication, the authority to use or reasonable means to make such power effective by way of passing any interim order. Such power is incidental and ancillary to make the power granted under Section 127 of the Act, 2003 effective.

17. The issue involved in this case can be looked at from a different angle. In a case, where exorbitant amount is raised by an illegal, arbitrary assessment and pursuant to such assessment, power supply is disconnected for non-payment of the assessed amount but in appeal, the said demand is substantially reduced or annuled, in that case till the appeal is disposed of or entire assessed amount is paid no power supply would be restored to consumer's premises even though the consumer is not liable to pay such illegal demand. This is certainly not the intention of legislature. Only in cases where the consumer does not want to challenge the demand assessed before any higher forum, in that case only 3rd proviso to Section 135 (1-A) has full application and unless the consumer pays the entire assessed amount with reconnection charges, power supply cannot be restored to his/her premises.

18. For the reasons stated above, the decision of the Calcutta High Court in the case of ***Kuban Sk.*** *(supra)* and in the case of ***Pradip Haldar vs. The CESU Ltd. & Ors****., AIR 2011 (NOC) 127 (CAL.)* are of no help to the petitioner. In the said cases the learned Single Judge of Calcutta High Court has not taken note of the judgment of the Hon'ble Supreme Court hereinbefore referred to. Moreover, there is no detailed discussion of the issue involved in the present case.

19. Therefore, the impugned order dated 23.03.2012 (Annexure-7) passed by the Appellate Authority-cum-D.E.I. (T & D), Balasore in Case No.AAC 01/2012 directing the licensee-petitioner to reconnect power supply to the premises of opposite party No.2-Samiran Singha and not to take any action against the said opposite party No.2 for non-payment of the balance 50% of the assessed amount till disposal of the appeal is legal/valid and warrants no interference of this Court. The interim order dated 09.04.2012 passed by this Court stands vacated. The licensee-petitioner is directed to restore power supply to the premises of opposite party No.2 forthwith without insisting any payment towards the balance 50% of the assessed amount. The appellate authority is directed to dispose of the appeal pending before it within a period of three months from the date of receipt of a copy of this judgment after affording opportunity of hearing to the parties concerned.

20. In the result, W.P.(C) No.6338 of 2012 filed by the Assessing Officer-cum-Executive Engineer (Elect), NESCO is dismissed with the aforesaid observations and direction. Consequentially, W.P.(C) No.6386 of 2012 is allowed to the extent indicated above. No order as to costs.

W.P. (C) No. 6338/2012 dismissed
W.P. (C) No. 6336/2012 allowed.

2013 (I) ILR - CUT- 896

B. N. MAHAPATRA, J.

W.P.(C) NO.10405 OF 2012 (Dt.04.12.2012)

EXECUTIVE ENGINEER
(ELECTRICAL) NESCO ……. ..Petitioner

.Vrs.

OMBUDSMAN-II, (ELECTRICITY),
BBSR & ANR. ……..Opp.Parties

ELECTRICITY – OERC Supply Code 2004 and Regulation 80 (5) (ii) – Whether "hatchery" comes under "Poultry" farming which is covered under Regulation 80 (5) (ii) i.e. allied agricultural activities ? – Held, Yes.

In this case O.P.2 is a hatchery unit whose job is to hatch the eggs to produce chicks and as such the activities of the hatchery unit comes within the purview of poultry – Held, poultry includes hatchery and is covered under Regulation 80 (5) (ii) i.e. allied agricultural activities – Direction issued to the petitioner to implement the order of the OMBUDSMAN.

Case law Relied on:-

(1999) 3 SCC 632 : (Commissioner of Income Tax, Bangalore -V- Venkateswara Hatcheries (P) Ltd.).

For Petitioner - Mr. S.C.Dash.
For Opp.Parties - M/s. Falguni Rajguru Mohapatra, M.K. Panda & R.K. Nayak.

B.N. MAHAPATRA, J. This writ petition has been filed with a prayer to quash the order dated 12.03.2012 passed under Annexure-8 in C.R. Case No.70 of 2011 by the OMBUDSMAN-II holding that the "Hatchery" Unit "M/s Bharasa Hatchery" is coming under Allied Agricultural Activities under Regulation 80(5)(ii) of OERC Supply Code and directing the petitioner-licensee to revise the agreement and bills from February, 2011 till the date on the basis of the applicable tariff and not in General Purpose Tariff (in short, 'G.P. Tariff') within 30 days from the date of issue of the order, with further direction to the opposite party-consumer to resolve the dispute in complaint handling procedure under the licensee to avail benefits under Own Your Transformer (OYT) Scheme on the ground that the said order is illegal, contrary to law and without jurisdiction.

2. Petitioner's case in a nutshell is that the respondent-opp. Party no.1 in the forum below is one of the supply Engineers of NESCO (Licensee). The petitioner-company (NESCO) is one of the distribution companies, which is granted with the licence by OERC under Section 14(b) of the Electricity Act, 2003 (for short, 'Act, 2003') to distribute electricity as a distribution licensee within the Northern Zone of Orissa. Thus, the petitioner is engaged in business of retail supply of electricity to various consumers within its area of supply. The petitioner as a supply Engineer of NESCO is in charge of the Electrical Division, Baripada in the district of Mayurbhanj. One Bhabani Shankar Jena, Proprietor of M/s. Bharasa Hatchery-opposite party No.2 has executed an agreement on 18.12.2010 for supply of power for a load of 15.00 KW to his Hatchery unit. In terms of such agreement the charges to be paid by the consumer as mentioned in Clause-6 of the agreement is 'General Purpose Tariff' which is otherwise known as 'Commercial Tariff'. As the business activities of the consumer is purely commercial in nature, commercial tariff is applicable to him. The consumer is liable to pay the charges in accordance with the provisions of OERC Distribution (Conditions of Supply) Code, 2004 (in short, "Code, 2004") as notified in the Tariff Notification from time to time. Opp. Party no.2 while running his Hatchery unit as commercial purpose for profit motive continued to pay the charges demanded on G.P. (Commercial Tariff) as stipulated in agreement. While doing so, opp. Party no.2 raised a complaint before the Grievance Redressal Forum (in short, 'GRF') of the licensee-NESCO in GRFCC No.321/2011 praying for revision of the bills from February, 2011 to June, 2011 on the basis of Tariff applicable for the categories of consumers covered under "Allied Agricultural Activities" introduced by OERC in its Retail Supply Tariff order for 2008-2009. Opp. Party no.2-petitioner filed its counter reply objecting applicability of the Allied Agricultural tariff to the complainant-consumer's Hatchery unit. The GRF, Balasore upon hearing the parties and after analyzing the factual as well as legal aspects disposed of C.C. No. 231 of 2011 vide its order dated 29.10.2011 observing that classification of Hatchery unit of opp. Party no.2 under the G.P.S. (commercial) Tariff is legally correct and justified. Opposite Party No.2 being aggrieved by the said order of GRF dated 29.10.2011 approached the OMBUDSMAN-II (Electricity), Bhubaneswar on 29.11.2011 by filing a representation which was registered as C.R. Case No. 70 of 2011. Before the OMBUDSMAN, the present petitioner filed his objection along with the written notes of argument. After hearing both the parties, the OMBUDSMAN passed the impugned order dated 12.3.2012. Hence, the present writ petition.

3. Mr. S.C. Dash, learned counsel appearing for the petitioner submitted that the order dated 12.3.2012 passed by the OMBUDSMAN under

Annexure-8 is without jurisdiction as the same has been passed in violation of Regulation 7(4) of OERC (Grievances Redressal Forum and Ombudsman) Regulations, 2004 being passed after statutory time limit of two months without recording any reason for such inordinate delay in disposing of the case. OMBUDSMAN-II (opp. Party no.1) has erroneously classified the consumer (O.P.No.2) under "Allied Agricultural Activities" as provided under Regulation 80(5) (ii) of OERC Code, 2004. The OMBUDSMAN should not have compared the hatching unit of the consumer with that of the 'Poultry' farm and held that hatchery is coming under 'Allied Agricultural Activities' tariff category for the purpose of billing. Mr. Dash further submitted that in the amendment notified on 19.10.2009, the OERC clarified the types of units to be covered under any of the aforesaid categories. Hatchery cannot be said as 'poultry farming which comes under Regulation 80(5)(ii). Hatching and poultry farming are completely separate activities. Therefore, similar tariff cannot be made applicable. The OMBUDSMAN has not taken into consideration the meaning of the word 'activities' while deciding the case. Activity like lighting, sprinkling water, lifting water for drinking by the live birds, cattle and cleaning from shade would qualify tariff as applicable to other allied agricultural activities. So, the aforesaid activities are absent in a hatchery unit and that cannot be covered under Animal Husbandry and poultry but it is a separate commercial unit. The OMBUDSMAN has wrongly held that hatching unit is a part of the poultry farm. The OMBUDSMAN has not discussed about the physical verification report dated 28.10.2011. In the power supply agreement executed between the parties, it has been agreed under clause -6 that the tariff applicable is general purpose (commercial) and hence the consumer being a commercial and profit motive Unit, the activities never come under Allied Agricultural activities.

4. Mr. Falguni Rajguru Mohapatra, learned counsel appearing on behalf of opp. Party No.2 submitted that opposite party No.2 is a hatchery unit which comes under the poultry activity. The basic aim and objective vis-à-vis purpose as well as the function of the unit is to provide hatching (hatch the eggs to produce chicks). Without chicks poultry activities could not be happened. The OERC introduced a new category of consumer namely, "agro-industrial consumer" vide OERC Distribution (Conditions of Supply) (4th Amendment) Code, 2007. As per Regulation 80(5)(1) of OERC Distribution (Conditions of Supply) Code which defines that "this category relates to supply of power to Pisciculture, Horticulture, Floriculture and other allied agricultural activities including animal husbandry, poultry and cold storage (i.e. a temperature controlled storage where flowers, fruits, vegetables, meat , fish and food etc. can be kept fresh or frozen until it is

needed)''. The OERC while determining the annual revenue and retail supply tariff for the Financial Year 2008-09, in paragraph 276 of the tariff order dated 2.3.2008 decided to allow tariff equal to irrigation and pumping category at HT/LT for rapid development of Agro-Industrial Consumer and it was made statutorily effective with effect from 11.9.2007 granting certain tariff benefit to the said category of consumers. By virtue of such amended enactment and the expansion in Regulation 80 of the Code this unit became entitled to be treated as an agro-industrial consumer. The OERC further brought an amendment to the OERC Code as 5th Amendment, 2009 which was published on 9th October, 2009. The Amendment to Regulation 80(5), Chapter-VIII classifies different categories of consumers. Opp. Party no.2-unit is coming under 80(5)(ii). Since opp. Party no.2-unit comes under allied agricultural category, the petitioner should have issued bills according to this category. Without considering the request of opp. Party no.2, the petitioner issued bills applying tariff for G.P. category. Referring to the order dated 27.1.2010 passed by the OERC in Case No.127 of 2009 it is submitted that the hatchery unit comes within the purview of poultry. The OMBUDSMAN after carefully observing the materials has passed the impugned order. The petitioner being a statutory body under the Act, 2003 and OERC Code, 2004 is duty bound to implement the OERC tariff order in letter and spirit.

5. On the rival contentions of the parties, the only question that falls for consideration by this Court is as to whether the "hatchery" comes under "poultry" farming which is covered under Regulation 80(5) (ii) i.e. allied agricultural activities.

6. Undisputedly, opp. Party no.2 is a hatchery unit. The activities carried on by the unit is to provide hatching i.e. "hatching the eggs to produce chicks". As per amendment to Regulation 80(5) Chapter-VIII, the categories of consumers are classified as follows:

"80(5)(i)	:	Irrigation Pumping and Agriculture
80(5)(ii)	:	Allied Agricultural Activities and,
80(5)(iii)	:	Allied Agro Industrial Activities

7. Claim of opposite party No.2 is that it is coming under 80(5)(ii) i.e. Allied Agricultural Activities. This category relates to supply of power for aquaculture (which includes pisciculture/prawn culture), Horticulture, floriculture, seri-culture, animal husbandry and poultry. Activities such as Ice Factories, Chilling Plants, Cold Plants, cattle/poultry/fish feed units and food agri-products processing units are excluded. Therefore, poultry is covered under the Regulation 80(5)(ii) i.e. allied agricultural activities.

8. From the order of the OMBUDSMAN, it appears that it has referred to Clauses 9 and 13 of the order dated 27.1.2010 passed in Case No. 127 of 2009 of OERC to come to a conclusion that the activity of hatchery unit comes within the purview of poultry. For better appreciation, the relevant portion of order of the OMBUDSMAN under Annexure-8 is quoted below:

> "3. The meaning of word "Poultry" includes hen, roster, pullet, capon and chick, which means a living bird, as per Clause 9 of the Order dated 27.01.2010 under Case No. 127 of 2009 of OERC. With reference to Clause -13 of the above order, supply of power for "Allied Agricultural Activities" includes poultry and for rearing of poultry (many things are needed for the purpose of lightening, sprinkling water, lifting water for drinking by the live birds and cleaning farm shade) as applicable for other Allied Agricultural Activities. Only manufacture of poultry feed is not covered under Poultry. The meaning of "hatching" is to produce young birds (chicks) from eggs. From the above, it is understood that the hatching unit where the young birds (chicks) are produced from eggs, is a part of the poultry firm, otherwise the poultry firm will not survive. Hence, it will be more appropriate to consider the activities of "hatchery unit" be within the purview of poultry."

It is nobody's case that the order of OERC dated 27.01.2010 passed in Case No.127 of 2009 has been challenged and varied by any superior authority.

9. At this juncture, it would be relevant to refer to the judgment of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax, Bangalore vs. Venkateswara Hatcheries (P) Ltd.,*** (1999) 3 SCC 632, wherein the Hon'ble Supreme Court held that the purpose of enacting Section 10(27) of the Income Tax Act, 1961 was to provide incentive to poultry farming, which includes the business of hatchery, by way of giving exemption from income tax on income from such business.

10. In view of the above, this Court is of the opinion that poultry includes hatchery and is covered under Regulation 80(5)(ii) i.e. allied agricultural activities.

Thus, this Court does not find any infirmity or illegality in the order dated 12.3.2012 passed by the OMBUDSMAN under Annexure-8 holding that activities of "hatchery unit" come within the purview of "poultry"

warranting any interference. The petitioner is directed to implement the order of the OMBUDSMAN immediately.

11. For the reasons stated above, this writ petition is devoid of any merit and liable to be dismissed, and the same is accordingly dismissed.

Writ petition dismissed.

2013 (I) ILR – CUT -901

B. K. NAYAK, J.

CRLMC. NO. 2069 OF 2006 (Dt.06.11.2012)

AKHAYA KUMAR SAHU ……Petitioner

.Vrs.

SITARANI SAHU @ SARAMA DAS ……..Opp.Party

CRIMINAL PROCEDURE CODE, 1973 – S.482.

There is no absolute rule that merely because there is concurrent finding of the Courts below, a petition U/s.482 Cr.P.C. would not be entertained – Even concurrent findings can be interfered with, where they are based on no evidence or are contrary to the evidence or they are absolutely perverse. (Para 8)

Case laws Referred to:-

1.CLT (2011) Supp. CRL. 411(SC) : (Chanmuniya-V- Virendra Kumar Singh Kushwaha & Anr.)
2.(1998) 15 OCR 199 : (Gullab Jan & Sakir Khan-V- Zabir Khan)
3.(2012)52 OCR 13 : (Kabita Sahoo-V- Dhirendra Beje).

For Petitioner - M/s. Anirudha Das, G.P.Panda, Amarendra Das, Abarindra Das & D.Ku. Samal.
For Opp.Parties - M/s. Sisir Ku. Purohit, P.Mohapatra, A.K.Das.

B.K.NAYAK, J. This criminal misc. case has been filed challenging the judgment dated 29.10.2005 passed by the learned Additional Sessions Judge, Dhenkanal in Criminal Revision No.5 of 2004/8 of 2005 dismissing the revision and thereby confirming the judgment dated 19.01.2004 passed by the learned J.M.F.C., Dhenkanal in Misc. Case No.85 of 1998 granting maintenance of Rs.400/- per month in favour of the present opposite party under Section 125, Cr.P.C.

2. The present opposite party filed the petition under Section 125, Cr.P.C. before the learned J.M.F.C. alleging that she is the legally married wife of the petitioner and their marriage was solemnized on 28.4.1990. The parties led a happy conjugal life for a month whereafter the present petitioner demanded further dowry of Rs.20,000/- or else he would not allow the opposite party to stay with him. So the opposite party approached her father, who expressed his inability to meet the dowry demand. Thereafter the petitioner started torturing the opposite party mentally and physically and continued to demand such dowry. Once the matter was settled by the village gentlemen and as per his promise the petitioner maintained good marital relationship with the opposite party for a few days and thereafter again started torturing her and lastly drove her away from the matrimonial home in the month of Feburary,1997 by which time her father had already died. She claimed that she has no source of income of her own and that the present petitioner was serving as a Peon under Paradeep Port Trust and earning a monthly salary of Rs.4,000/-. Accordingly, the present opposite party claimed monthly maintenance of Rs.500/-.

3. The present petitioner filed his objection in the proceeding denying his marriage with the present opposite party Sitarani Sahoo @ Sarama Das and even denied to have ever stayed or resided with her. He has also denied all averments in the petition. His specific plea is that he had married one Anusaya Sahu, who died, whereafter he has married one Mamata Sahu as his second wife.

4. The opposite party examined two witnesses including herself and also relied on a large number of documents marked Exts.1 to 9 whereas the present petitioner examined three witnesses including himself and relied on some documentary evidence. On consideration of the evidence on record, the learned J.M.F.C. came to hold that the present opposite party was the wife of the petitioner, and that the petitioner neglected and refused to maintain her and accordingly granted a monthly maintenance of Rs.400/- in her favour.

5. The petitioner challenged the judgment of the learned J.M.F.C by filing Criminal Revision No.5 of 2004/8 of 2005, which was heard and disposed by the learned Additional Sessions Judge, Dhenkanal, who confirmed the findings recorded by the learned J.M.F.C. and dismissed the revision.

6. The only contention in this application under Section 482, Cr.P.C. raised by the learned counsel for the petitioner is that there is no adequate and acceptable proof of marriage between the parties and, therefore, the courts below could not have granted maintenance in favour of the opposite party. In this respect he has relied upon a decision rendered by the apex Court in the case of ***Chanmuniya v. Virendra Kumar Singh Kushwaha and another*** CLT (2011) Supp. CRL 411 (SC) where a division bench after taking note of a large number of earlier decisions, where it has been held that for the purpose of Section 125, Cr.P.C. strict proof of marriage is not necessary and that a strong presumption arises in favour of wedlock where the parties lived together for long spell as husband and wife, doubted the said proposition and referred the matter to a larger bench to consider whether the strict proof of marriage is essential for claiming maintenance under Section 125, Cr.P.C. This decision however has not laid down an acceptable proposition that strict proof of marriage like the requisite under Section 7 (1) of the Hindu Marriage Act or customary rites or any other personal law evidencing marriage is necessary for entitling a women to claim maintenance under Section 125, Cr.P.C.

7. He also placed reliance on the decision of this court reported in (1998) 15 OCR 199; ***Gullab Jan and Sakir Khan v. Zabir Khan*** and also (2012) 52 OCR 13; ***Kabita Sahoo v. Dhirendra Beje*** where it has been said that the petitioner having failed to prove that she was the married wife of the opposite party she was not entitled to maintenance.

The learned counsel appearing for opposite party, on the other hand, contends that the question of marriage being a question of fact and both the courts below having decided concurrently and that the opposite party is the wife of the petitioner, this application under Section 482, Cr.P.C. in the guise of a second revision is not maintainable. He has submitted that apart from the evidence of the opposite party herself and her witness, there are large number of documentary evidence including voter lists where the opposite party has been described as the wife of the petitioner and a host of letters sent by the petitioner to the opposite party where he has described himself as her husband.

8. There is no absolute rule that merely because there is concurrent finding of the courts below, a petition under Section 482, Cr.P.C. would not be entertained. Even concurrent findings can be interfered with where they are based on no evidence or are contrary to the evidence or they are absolutely perverse.

Now coming to the question of marriage, it is found from the evidence that the opposite party, who examined herself as O.P.W.1. stated that on 28.04.1990 the parties solemnized their marriage in Kali Mandir at Calcutta by exchange of garlands and performance of Homa and that relations of both the parties were present. At the time of marriage, the present petitioner was serving at Calcutta. She has described also how for a month they lived happily and she has also proved Exts.1 to 6, which are letters written by the petitioner to the opposite party in Bengali language as she belonged to Bengali community. She has proved the handwriting or signature of her husband, the present petitioner on the letters. She has also proved her joint photograph with the petitioner and its negative as Exts.7 and 8. She filed voter list of the year 1999, which being not certified copy was marked as 'X', which shows that the opposite party has been described as the wife of petitioner. The court below has also taken into account a voter identity card of opposite party wherein the petitioner has been described as the husband of the opposite party. P.W.2 stated that though he was not a witness to the marriage ceremony of the petitioner and the opposite party, he has the knowledge that the parties are husband and wife.

As against these evidences, the present petitioner examined himself and two other witnesses who merely denied the marriage between the parties. Some documents have been filed by the petitioner to show that he married one Mamata Sahu in the year 1997 which by itself will not disprove the marriage between the petitioner and opposite party.

Both the courts below have properly appreciated the evidence on record and have come to the right conclusion that the opposite party is the wife of the petitioner and I find no infirmity in the orders of the courts below. The Criminal Misc. Case is, therefore, dismissed.

Application dismissed.

2013 (I) ILR - CUT-905

B. K. NAYAK, J.

CRLMC NO. 4792 OF 2011 (Dt.30.11.2012)

LALIT BERIWALA ……..Petitioner

.Vrs.

STATE OF ORISSA & ANR. ……Opp.Parties

NEGOTIABLE INSTRUMENTS ACT, 1881 – Ss. 138, 141

Commission of offence by company – When the company can be prosecuted then the Director or any other person in charge of the management of the company can also be prosecuted being vicariously liable for the offence committed by the company – It is also necessary that there must be clear averments and proof that the company committed the offence otherwise the individuals issuing the cheque can be personally held liable U/s.138 N.I. Act.

In this case the petitioner did not enter into the transaction and entrusted the work to the complainant in his individual capacity but as the authorized agent of the company – Although there is no specific allegation in the complaint petition that the complainant entered into the transaction with the company, the combined effect of all the averments make it clear that he transacted with the company through its authorized agent (Petitioner) for company's work and received the company cheque which was bounced – Held, offence must be said to have been committed by the company – Since the company has not been made an accused, the complaint case filed against the petitioner describing him in his official capacity is bad hence the order taking cognizance against the petitioner as well as the complaint case are quashed. (Paras 6,7,8)

Case law Referred to:-

AIR 2012 SC 2795 : (Aneeta Hada -V- M/s. Godfather Travels & Tours Pvt. Ltd.)

For Petitioner - M/s. A.P. Bose, R.K. Mohanta, N. Hota & M. Pradhan.

For Opp.Parties - Standing Counsel (O.P.No.1)
M/s. R.K. Rath, Sr. Advocate, (for O.P. No.2).

B.K.NAYAK, J. The petitioner in this application under Section 482, Cr.P.C. prays for quashing the order of cognizance dated 25.10.2011 passed by the learned S.D.J.M., Bhubaneswar in I.C.C. Case No.2730 of 2011 and also for quashing the proceeding in the said Complaint case.

2. The petitioner is the sole accused in the complaint case bearing I.C.C. Case No.2730 of 2011 for commission of offence under section 138 of Negotiable Instruments Act filed by the present opposite party No.2. It is submitted by the learned counsel for the petitioner that the allegations in the complaint petition filed by opposite party No.2 clearly make out a case of commission of offence by the Company M/s. Beekay Steel and Power Ltd. and the present petitioner was the whole time Director of M/s. Shyam Steel Industries Ltd., and also the Authorized Signatory of M/s. Beekay Steel and Power Ltd., which is an associate company of M/s. Shyam Steel Industries Ltd., and that the petitioner asked the complainant to take up work of Public Consultation meeting (public hearing) of M/s. Beekay Steel and Power Ltd at Barbil at village level, Panchayat level and District Level and to make the public hearing a success, and the petitioner allegedly promised to pay to the complainant incentive of Rs.5,00,000/- for successful conduct of the public hearing and after completion of the work the petitioner issued a cheque of the Company for Rs.4,90,000/- to the complainant drawn on H.D.F.C. Bank but the cheque bounced, and that it being clear from the allegations that the company committed an offence, the petitioner who is the Authorized Signatory of the company can not be prosecuted to the exclusion of the company i.e., the company having not been made an accused in the complaint case.

3. Learned counsel for the opposite party No.2-complainant on the other hand submits that the allegations made in the complaint petition do not disclose that the company has committed an offence but, on the other hand, allegations made against the petitioner relate to the act done by him in his individual capacity and therefore the complaint is maintainable against the petitioner in the absence of the company being made an accused. It is further his submission that only during the trial it can be ascertained whether company has committed an offence or not and not at the cognizance stage.

Section 141 of the Negotiable Instrument Act which is relevant for the purpose, is extracted hereunder:

> "**141. Offences by companies. (1)** If the person committing an offence under Section 138 is a company, every person who, at the

time the offence was committed, was in-charge-of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly;

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

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

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

4. Interpreting the provision of Section 141 of the Negotiable Instruments Act, the apex court in the case of **Aneeta Hada v. M/s. Godfather Travels & Tours Pvt. Ltd;** AIR 2012 SC 2795 held as follows:

"43. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the dragnet on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parkh, (AIR 1971 SC 447) (supra) which is a three judges Bench decision. Thus, the view ex-pressed in Sheoratan Agarwal, (AIR 1984 SC 1824) (supra) does not correctly lay down the law and, accordingly is hereby overruled. The decision in Anil Hada, (AIR 2000 SC 145 : 1999 AIR SCW 4228) (supra) s overruled with the

qualifier as stated in paragraph-37. The decision in Modi Distilleries, (AIR 1988 SC 1128) (supra) has to be treated to be restricted to its own facts as has been explained by us hereinabove."

5. Since the Director or any other person in charge of the Management of the Company can also be prosecuted as being vicariously liable for the offence committed by the Company, it is necessary that there must be clear averments and proof that the Company committed the offence; otherwise the individuals issuing the cheque can be personally held liable under section 138 of Negotiable Instrument Act. In this context, the apex court in the aforesaid decision also observed as follows:

"42. … …. …. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words as well as the company appearing in the Section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof."

6. In the light of the principles lay down by the Supreme Court it is to be seen whether the relevant averments in the complaint petition and the other circumstances described therein make out a case about commission of offence by the company.

The relevant averments made in the complaint filed by opposite party No.2 as described in paragraph (B) of the complaint petition are quoted hereunder:

"(B). That M/s. Shyam Steel Industries Limited having its head office at EN-32, Sector-V, Salt Lake, Kolkata and its Branch office at N/4-18, IRC Village, Nayapalli, Bhubaneswar. The accused Mr. Lalit Beriwal is the whole time Director of M/s. Shyam Steel Industries Limited and Authorized Signatory of M/s. Beekay Steels and Power Ltd. M/s. Beekay Steels and Power Ltd is the associate company of M/s. Shyam Steel Industries Limited. The complainant was asked by the accused Mr. Lalit Beriwal to take over the entire responsibility from starting to completion of entire formalities of Public Consultation meeting (public hearing) of M/s. Beekay Steels and Power Ltd based at Ulibur, Barbil in related to Government offices, at village level, Panchayat level and District Level by interacting with local villagers,

> key persons, NGO's, SHG's etc to make the hearing success one. At that time the accused Mr. Lalit Bariwal gave the assurance/commitment to the complainant to give incentive of Rs.5 lakhs if the public hearing gets success."

The aforesaid averments make it clear that the petitioner was an Authorized Signatory of the Company, M/S. Beekay Steel and Power Ltd., which was an associate company of M/S. Shyam Steel Industries Ltd., of which he was also a whole time Director. The work which was entrusted to the complainant related to the Company M/s. Beekay Steel of which the petitioner was the Authorized Signatory and it was not the personal work of the petitioner. The petitioner did not enter into the transaction and entrusted the work to complainant in his individual capacity but as the Authorized agent of the company. The cheque, copy whereof has been produced at the time of hearing, belongs to the company. The petitioner has only signed the cheque as the Authorized Signatory of the company, M/s.Beekay Steel and Power Ltd. Although there is no specific allegation in the complaint petition that the petitioner entered into the transaction with the company, the combined effect of all the averments make it clear that he transacted with the company through its authorized agent (petitioner) for company's work and received the company cheque which bounced and as such the offence must be said to have been committed by the company.

7. Admittedly, the company, M/s. Beekay Steel and Power Ltd., has not been made an accused in the complaint case which is filed only against the petitioner describing him in his official capacity. Applying the principle laid down by the Apex Court in the case of Aneeta Hada (supra) it must be held that the cognizance taken against the petitioner for the offence under 138 of Negotiable Instruments Act is bad and the complaint against him alone cannot be maintained, in the absence of the company.

8. Accordingly, the order of taking cognizance as well as I.C.C. Case No.2730 of 2011 pending in the court of learned S.D.J.M., Bhubaneswar is hereby quashed. The CRLMC is accordingly disposed of.

Application disposed of.

2013 (I) ILR - CUT-910

B. K. PATEL, J.

CRLREV NO.1407 OF 2008 (Dt.08.02.2013)

SUKANTI CHOUDHURY ……..Petitioner

.Vrs.

STATE OF ORISSA ……..Opp.Party

PENAL CODE, 1860 – Ss. 420, 468, 471.

Offence of cheating and forgery – To establish the offence, fraudulent or dishonest intention of the accused is required to be proved.

In this case prosecution alleged that the petitioner used forged High School Certificate issued by the Board of Secondary Education Orissa – No material that the petitioner had any role to forge and procure the certificate – No inference also can be made on the basis of surmises and conjectures in a Criminal Proceeding – In the absence of any material to indicate existence of essential ingredient of required knowledge or intention, continuance of Criminal proceeding against the petitioner will amount to an abuse of process of Court – Held, impugned order taking cognizance is set aside and the Criminal Proceeding is dropped. (Para 22)

Case laws Referred to:-

1.AIR 2008 S.C. 251 : (Inder Mohan Goswami & Anr.-V- State of Uttaranchal & Ors.)
2.2007 (I) OLR 611 : (Muralidhar Satpathy-V- State of Orissa)

For Petitioner - Mr. Shyamananda Mohapatra, S.K.Dash, S.P.Dash, P.C. Mohanty.
M/s. G.Tripathy, B. Jalli.
For Opp.Party - Mr. Debasis Panda, (Addl. Govt. Advocate).

B.K. PATEL, J. Petitioner has assailed, in this revision, legality of order dated 29.4.2008 passed by learned S.D.J.M, Sadar, Cuttack in G.R. Case No. 1126 of 2007 taking cognizance of commission of offences under

Sections 420, 468 and 471 of the Indian Penal Code (for short the 'I.P.C.') and issuing process against her for appearance as accused in court.

2. G.R. Case No. 1126 of 2007 arises out of C.I.D. CB, P.S. Case No. 35 of 2007 and Lalbag P.S. Case No. 140 of 2007. Initially, Lalbag P.S. Case No. 140 of 2007 was registered on 20.9.2007 against the petitioner on receipt of First Information Report (for short the 'F.I.R.') from the Additional District Magistrate, Cuttack alleging commission of offences under Sections 420, 468 and 471 of the I.P.C.

The F.I.R. reads as follows:

" OFFICE OF THE COLLECTOR:CUTTACK
No. 3606/Esttt. Dt. 14.09.07

To

The Superintendent of Police,
C U T T A C K.

Sub: F.I.R. against Smt. Sukanty Choudhury,
Addl. Tahasildar (LR), Cuttack under Section
417, 468 and 471 IPC.

Sir,

It is to intimate you that, as per communication received from Govt. in Revenue & D.M Department vide their letter No. 2095/R(CS) Dt.4.9.2007, Smt. Sukanty Choudhury, (LR) Addl. Tahasildar, Sadar, Cuttack has entered into Govt. service through a forged matriculation certificate. Smt. Choudhury has changed her surname from Khuntia to Choudhury through an affidavit before the Court of Executive Magistrate, Jagatsinghpur after her marriage to Sri Debiprasad Choudhury. She has not passed Matriculation Examination in 1972 and thereby committed offence under Section 417, 468 and 471 IPC and is liable thereunder. So Govt. in Revenue & D.M. Department has instructed to file F.I.R. against her.

Attaching herewith, (i) Copy of the age certificate No. 2968 issued by B.S.E. Orissa, Cuttack, (ii) Copy of the mark sheet issued by B.S.E. Orissa, Cuttack and (iii) Affidavit of Smt. Choudhury changing her surname from Khuntia to Choudhury, I am to request you to start criminal case immediately against Smt. Sukanty

Choudhury, Addl. Tahasildar, (LR), Cuttack treating this as F.I.R. against her.

An early confirmation in this regard is requested.

Yours faithfully,

ADDL. DISTRICT MAGISTRATE,
CUTTACK

Memo No. _____ /Estt.Dt.

Copy forwarded to the Inspector-in-Charge, Lalbag Police Station, Cuttack for information and immediate necessary action.

ADDL. DIST.MAGISTRATE:CTC."

Subsequently, investigation of the case was taken over by the C.I.D., Crime Branch and C.I.D. CB, P.S. Case No. 35 of 2007 on 10.12.2007 was registered. On completion of investigation, charge sheet, on receipt of which the impugned order was passed, was submitted against the petitioner in which brief facts of the case were narrated as follows:

"The F.I.R. in gist reveals that Sukanti Chowdhury (LR) Addl. Tahasildar, Sadar, Cuttack has entered into Govt. service through a forged matriculation certificate. Being directed by Revenue land Disaster Management, Department, ADM, Cuttack lodged F.I.R. against Sukanti Choudhury by attaching the copy of age certificate, mark sheet and affidavit reg. change of surname of Sukanty Khuntia to Sukanty Choudhury.

The case was investigated by ASI A.K. Pradhan of Lalbag P.S. initially, then consequent upon office order No. 248/CID, dated 10.12.07 and Cuttack district order No. 3090 dated 13.12.07, the investigation of the case was entrusted to me.

During investigation witnesses were examined, the Tabulation Register of BSE, Orissa and Mark Register of Bajrabudhi Girls High School, Gopinathpur Sasan, Patkura, the Admission Register of St.Joseph's Girls High School and Bajrabudhi Girls High School, the HSC certificate, Employment exchange card, Appointment order of accd., the HSC certificates of two other girl students of Bajrabudhi Girls High School, Service Book of accd., Proceeding file containing correspondence with Govt. against accd.

were seized, opinion of Govt. examiner in respect of forged HSC certificate of accd. was obtained.

As there is prima facie evidence against accused Sukanty Khuntia @ Sukanti Chowdhury of using as genuine a forged High School Certificate issued by Board of Secondary Education, Orissa which is known to be forged, for appearing I.A. Exam under Utkal University, for getting admission into B.A., S.V.M. College, Jagatsinghpur, for registering her name through Employment Exchange thereby inducing Govt. to provide her a job and finally for entering into a Govt job i.e. Lady Social Organizer on 7.1.80 and continuing in service till date as Addl. Tahasildar (LR) Cuttack Sadar, pretending herself as a genuinely qualified person, thereby cheating her authority by forgery, so placed Lalbag PS Charge Sheet No. 38 dated 28.4.08 (CID, PS Charge Sheet No. 6 dated 28.4.08) u/s 420/468/471 IPC against her to face the trial in the Court of law. ”

3. On receipt of charge-sheet in court cognizance of commission of offences as alleged therein was taken and summons was issued to the petitioner for her appearance in court. As is apparent from the F.I.R. and charge-sheet, allegations in the case relate to use of forged High School Certificate by the petitioner as genuine. In the said document purported to have been issued by the Board of Secondary Education, Orissa it has been certified that the petitioner who was born on 26th December, 1956 has passed the HSC Examination held in the month of March, 1972 in Second Division from Bajrabudhi Girls' High School, Gopinathpur Sasan.

4. In support of the revision, it was contended by the learned counsel for the petitioner that on a bare perusal neither the F.I.R. nor the charge-sheet contains allegation of commission of any of the alleged offences by the petitioner. It has simply been alleged that the petitioner used a forged High School Certificate for the purpose of securing higher education and employment. In the charge-sheet it has been alleged that said forged High School Certificate was issued by the Board of Secondary Education, Orissa. It has not been alleged that either the petitioner herself committed forgery of the certificate or she had knowledge that the High School Certificate was not genuine. Referring to statutory provisions under the I.P.C. and judicial pronouncements it was submitted that fraudulent or dishonest intention being the most essential ingredient to constitute offences of cheating and forgery, it is incumbent upon the prosecution to place materials before the court to *prima facie* satisfy that it is the petitioner who committed such offences with the requisite intention or *mens rea*. It was strenuously argued

that no material has been placed in court by the investigating agency to remotely suggest that the petitioner used forged High School Certificate as genuine intentionally with the knowledge that the Certificate is not genuine. It was further submitted that it is not disputed that the petitioner was born in the year 1956. Therefore, in the year 1972 when the disputed High School Certificate was issued the petitioner was a minor girl of less than sixteen years. In absence of any material on record that the petitioner had any role in forging the certificate, criminal proceeding against her for alleged commission of offences of cheating, forgery and use of forged document as genuine would amount to acting on the basis of presumptions not available in law. Even if for the sake of argument it is assumed that High School Certificate of the petitioner is a forged document, materials on record do not justify subjecting the petitioner to a criminal proceeding. Even if F.I.R., charge-sheet and entire materials on record are taken on their face value, no case is made out against the petitioner to have committed any of the alleged offences. Therefore, criminal proceeding against the petitioner is liable to be set aside.

5. In reply, learned counsel for the State submitted that it is evident from the statements of the witnesses including the teachers of the school from which the petitioner is stated in the certificate to have appeared the High School Certificate Examination, persons who appeared in the Annual High School Certificate Examination in the year 1972 in which examination the petitioner has been certified to have been passed and the employees of Board of Secondary Education, Orissa as well as report of the Examiner of Questioned Document that High School Certificate Examination on the basis of which the petitioner secured admission for higher education and employment is a forged certificate. Placing specific reliance on the police statements of Giridhari Rout, Prasanna Kumar Dash, Pradipta Kumar Mohapatra, Fakir Charan Swain, Govinda Nayak, Prativa Rani Mohapatra, Niranjan Basantia, and Swarnanjali Rath, it was contended that though there is no positive material on record to conclude that it was the petitioner who forged the certificate, undisputedly, the petitioner is found to have used the forged certificate. Therefore, commission of offences under Sections 420, 468 and 471 of the I.P.C. are well made out against the petitioner for facing the trial.

6. In order to appreciate the rival submissions it is necessary to examine the nature of offences alleged against the petitioner. In the charge-sheet it has been alleged that the petitioner used as genuine a forged High School Certificate issued by Board of Secondary Education, Orissa which is known to be forged, for appearing I.A. examination under Utkal University,

for getting admission into B.A., S.V.M. College, Jagatsinghpur, for registering her name through Employment Exchange and thereby inducing Government to provide her a job and finally for entering into a Government job, i.e., Lady Social Organizer on 7.1.1980 and continuing in service till date as Additional Tahasildar (LR), Cuttack Sadar, pretending herself as a genuinely qualified person, thereby cheating her authority by forgery, and committed offences under Sections 420, 468 and 471 of the I.P.C.

7. Section 420 of the I.P.C. provides:

> "**Cheating and dishonestly inducing delivery of property.-** Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

8. Thus, offence under Section 420 of I.P.C. constitutes of the following ingredients:-

(1) Deception of any person,

(2) Fraudulently or dishonestly inducing such person-

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property,

(3)(i) Intentionally inducing the person to do or omit to do anything which he would not do or omit, if he were not so deceived; and

(ii) Such act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

In order to bring a case within the four corners of Section 420 of the I.P.C., prosecution is required to *prima facie* satisfy commission of offence of 'cheating' as defined in Section 415 of the I.P.C.

9. Section 468 of the I.P.C. provides:

"**Forgery for purpose of cheating**-Whoever commits forgery, intending that the document or electronic record forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to sever years, and shall also be liable to fine."

10. The following ingredients constitute offence under Section 468 of the I.P.C.:-

(1) The document in question is forged,

(2) Accused forged the document, and

(3) Accused forged the document intending that the forged document would be used for purpose of cheating.

Thus, offence under Section 468 of the I.P.C. is an aggravated form of forgery for the purpose of cheating a person.

11. Offence of cheating has been defined under Section 415 of the I.P.C. which reads:

"**Cheating**.- Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat"."

12. Thus, the essential ingredients for offence of cheating are:-

(1) Deception of any person, and

(2) Fraudulently or dishonestly inducing that person-

(a) to deliver any property to any person, or

(b) to consent that any person shall retain any property or intentionally inducing that person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property.

13. Section 471 of the I.P.C. provides:

"**Using as genuine a forged document or electronic record.**- Whoever fraudulently or dishonestly uses as genuine any document or electronic record which he knows or has reason to believe to be a forged document or electronic record, shall be punished in the same manner as if he had forged such document or electronic record."

14. Offence under Section 471 of the I.P.C. constitutes of the following ingredients:-

(1) The document is a forged one,

(2) Accused used the document as genuine,

(3) Accused knew or had reason to believe that it was a forged document, and

(4) Accused used it fraudulently or dishonestly, knowing or having reason to believe that it was a forged document.

15. Offence of forgery has been defines under Section 463 of the I.P.C. which reads:

"**Forgery**. – Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery."

16. The expression 'making a false document' has been defined under Section 464 of the I.P.C. It reads:

"**Making a false document**.-A person is said to make a false document or false electronic record-

First- Who dishonestly or fraudulently –

(a) makes, signs, seals or executes a document or part of a document;

(b) makes a transmits any electronic record or part of any electronic record;

(c) affixes any digital signature on any electronic record;

(d) makes any mark denoting the execution of a document or the authenticity of the digital signature,

with the intention of causing it to be believed that such document or part of document, electronic record or digital signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, executed or affixed; or

Secondly- Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with digital signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly- Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his digital signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him, he does not know the contents of the document or electronic record or the nature of the alteration."

Thus, fraudulent or dishonest intention is an essential ingredient for commission of offences of cheating and forgery.

17. Section 24 of the I.P.C. defines the expression 'dishonestly' as follows:

"**Dishonestly**".- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly"."

18. Section 25 of the I.P.C. defines the expression 'fraudulently' as follows:

"**Fraudulently**".- A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

19. In the present case, gravamen of allegations is forgery of High School Certificate purported to have been issued to the petitioner by the Board of Secondary Education, Orissa for the purpose of cheating. Therefore, under the facts, in order to attract implication of the petitioner for commission of offence under section 468 of the I.P.C. it has to be prima facie shown that it was the petitioner who forged the High School Certificate

intending that the forged document would be used for the purpose of cheating. Prosecution has to place materials to indicate that the petitioner forged the document with intention to cheat. Offence of cheating as defined under section 415 of the I.P.C. requires essential element of deception as well as fraudulent or dishonest inducement by the accused. While analyzing the provisions under sections 420 and 415 of the I.P.C. it has been pointed by the Supreme Court in **Inder Mohan Goswami & Anr. –vs- State of Uttaranchal & Ors**.: AIR 2008 Supreme Court 251 that it is the intention which is gist of offence of cheating. Similarly, it has been pointed out by this Court in **Muralidhar Satpathy –vs- State of Orissa**: 2007(I) OLR 611 that guilty intention is an essential ingredient of the offence of cheating. In order to constitute offence punishable under section 420 of the I.P.C., intention to deceive should be in existence at the time when inducement was offered. Forgery as defined under section 463 of the I.P.C. requires that making of any false document must be with intent to cause damage or injury or with intent to commit fraud. As provided under section 464 of the I.P.C. making of a false document for the purpose of forgery must be with dishonest or fraudulent intention. Section 471 of the I.P.C., providing for punishment for the offence of using of forged document as genuine, postulates that the accused knew or had reason to believe that it was a forged document and also that accused used it fraudulently or dishonestly. User of a forged document dishonestly or fraudulently shall arise only when accused uses the document with intention of causing wrongful gain or wrongful loss or to defraud.

20. In the present case, even in the charge sheet it has not been alleged that it was the petitioner who forged the High School Certificate. In fact, in course of argument, learned counsel for the State fairly submitted that there is no positive material on record to implicate the petitioner with the offence of commission of forgery for the purpose of cheating inasmuch as it has not been alleged by any of the witnesses that the petitioner made the forged document. However, it was contended that the petitioner used a forged certificate purported to have been issued by the Board of Secondary Education, Orissa, which was in fact not issued by the Board of Secondary Education, Orissa, as genuine for the purpose of securing admission into I.A. course and further higher education and for securing and continuing with employment. It was argued that as the petitioner derived benefits out of the forged certificate, she is guilty of cheating under section 420 of the I.P.C., for forgery for the purpose of cheating under section 468 of the I.P.C. and for using as genuine forged document under section 471 of the I.P.C. In this connection, learned counsel for the State placed reliance of police statements of eight witnesses referred to above.

21. Among the eight witnesses Giridhari Rout and Niranjan Basantia were teachers of Bajrabudhi Girls High School. Giridhari Rout who claims to be a teacher of the school from 1970 to 1973 has stated before the police that he does not know the petitioner personally and vaguely stated that he does not remember that the petitioner was regularly attending classes. However, it is in the evidence that the petitioner was admitted to the school in the year 1969 and was promoted to Class-XI in the same year. Niranjan Basantia stated that he was working as teacher in the said school in the year 1973. He also stated that the petitioner got admitted in the school in the year 1969 and appeared in the Annual High School Certificate Examination in the year 1972. Prasana Kumar Dash and Fakir Charan Swain were employees of Board of Secondary Education, Orissa. Prasana Kumar Dash stated before police that nobody would believe that High School Certificate issued to the petitioner is a forged document. However, he pointed out certain discrepancies in the certificate to conclude that said certificate is not similar to certificates issued to other students. Fakir Charan Swain stated to have issued marks sheet of the petitioner on being directed by the S.P., CID, Crime Branch on the basis of Marksheet Tabulation Register which indicated that the petitioner had failed in the year 1972. This witness stated before police that High School Certificate of the petitioner was not issued from the Certificate Issue Section of the Board of Secondary Education, Orissa. Pradipta Kumar Mohapatra was working as Under Secretary to the Government of Orissa in the Revenue Department. He stated that allegation against the petitioner was received by him from one Govinda Nayak, an Advocate. Upon enquiry in the office of the Board of Secondary Education, Orissa, it was found that the petitioner had failed in the Annual High School Certificate Examination in the year 1972. Govinda Nayak stated to have learnt regarding the forgery from the petitioner herself. Police has examined Prativa Rani Mohapatra and Swarnajali Rath who stated that they were students in Brajabudhi Girls High School. Both of them stated that the petitioner was not student in Brajabudhi Girls High School in the year 1972. However, as has been pointed out earlier it is not disputed that the petitioner got admitted in the school in the year 1969 and appeared Annual High School Certificate Examination in the year 1972. It is stated by Prativa Rani Mohapatra that School Leaving Certificate is required to be produced by a student while taking admission into the I.A. course in the college. School Leaving Certificate of the petitioner produced at the time of admission to the I.A. course does not appear to have been seized by the Investigating Agency.

22. On perusal of statements of all the above witnesses it is found that none of them has alleged that it was the petitioner who forged the High

School Certificate purported to have been issued by the Board of Secondary Education, Orissa in her favour. Allegations in the case cannot be appreciated in isolation. It has to be borne in mind that the petitioner was a girl child of less than 16 years of age in 1972 when the alleged forgery of the High School Certificate, for the purpose of cheating, was made. The Investigating Agency has filed age certificate of the petitioner obtained from the Board of Secondary Education,Orissa indicating that the petitioner was born on 26.12.1956. Not only none of the witnesses has alleged that the petitioner made a false document and thereby committed offence of forgery but also there is no material to indicate that the petitioner had herself procured the forged High School Certificate. In such view of the matter, no inference can be made on the basis of surmises and conjectures in a criminal proceeding that the petitioner did anything with dishonest or fraudulent intention as defined under sections 24 and 25 of the Indian Penal Code. In absence of any material indicating the required intention or knowledge on the part of the petitioner in making a forged document or using the same with the required knowledge, criminal proceeding against the petitioner will amount to an abuse of process of court. Materials on record placed by the Investigating Agency, even if taken at their face value and accepted in entirety do not, *prima facie*, implicate the petitioner with commission of any of the alleged offences in view of absence of any material to indicate existence of the essential ingredient of required knowledge or intention. Therefore, criminal proceeding against the petitioner is liable to be dropped.

23. Accordingly, the revision is allowed. The impugned order dated 29.4.2008 in G.R.Case No.1126 of 2007 pending in the court of learned S.D.J.M., Sadar, Cuttack is set aside. The criminal proceeding against the petitioner is dropped.

Revision allowed.