V.GOPALA GOWDA, CJ & INDRAJIT MAHANTY, J

W.P.(C) NO.15602 OF 2010 (With Batch) (Decided on 12.8.2010)

M/S. VISA STEEL LTD. & ORS. ……….. Petitioners.

.Vrs.

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

ORISSA VAT ACT, 2004 (ACT NO.4 OF2005) – SEC.20(8) CLAUSE (m).

Notification of State Government denying "input tax credit" on certain goods except for resale – Vires challenged – Clause (m) is limited to the type of circumstances spelt out in preceding clauses (a) to (l) of the said Sub-section - Principle of *ejusdem generis* applies to clause (m) of Sub-section (8) of Section 20 – Notification Dt.27.01.2009 issued by finance Department invoking Section 20(8) (m) is bad and quashed – Held, power under Clause (m) of sub-section (8) of Section 20 does not suffer from vice of excessive delegation of legislative power. (Para 20)

<u>Case laws Referred to:-</u>

1.(2008) 015 VST 0228 : (Orissa) : (M/s. Reliance Industristies Ltd.-V- Assistant Commissioner of Sales Tax & Ors.)
2.(2002) 7 SCC 444 : (Collector of Central Excise, Bombay -V- Maharashtra Fur Fabric Ltd.)
3.(1998) 6 SCC 103 : (State of Karnataka & Ors.-V-Kempaiah)
4.AIR 2000 SC 843 : (Special Officer & Competent Authority Urban land Ceiling Hyderabad -V-P.S.Rao)
5.AIR 1960 SC 971 : (Vanguard Fire & General Insurance Co.Ltd. -V- Fraser Ross)

For Petitioners - Mr. N.Venkatraman, Sr.Adv.
M/s.Satyajit Mohanty, S.Mohanty, R.P.Swain & S.Patnaik, R.P.Kar, D.K.Mohanty.
For Opp.Parties - Advocate General.
For Petitioners - Mr.A.K.Ganguly, Sr.Adv.
M/s.A.K.parija, B.C.Mohanty, P.P.Mohanty, D.K.Das, R.K.Dash, A.Patnaik, B.P.Das & S.P.Patnaik
For Opp.Parties - A.G.

V.GOPALA GOWDA, C.J. In these matters hearing was closed on 12.8.2010 and the following order was passed:-

"We are of the considered view that the impugned notification SRO No.34/2009 dated 27.1.2009 in all the writ petitions declaring 'coal' and 'furnace oil' as goods is illegal and therefore the impugned

notification is liable to be quashed to the aforesaid extent and is accordingly quashed.
Reasons to follow."

2. Accordingly, we note the reasons in support of the aforesaid order as hereunder:

3. The petitioners herein have filed the present batch of writ petitions seeking to challenge the legality and validity of the Notification S.R.O. No.34/2009 dated 27.1.2009 issued by the State of Orissa in the Finance Department published in the Orissa Gazette dated 27.1.2009 in terms of which the petitioners, who are registered dealers under the Orissa Value Added Tax Act, 2004 have been disallowed from claiming any 'input tax credit' in respect of VAT paid by them on their purchase of 'Coal' and 'Furnace Oil', on the basis of the impugned notification issued under Section 20(8), clause(m) of the Orissa Value Added Tax Act, 2004 (here-in-after referred to as "OVAT Act") on the ground that the OVAT Act does not vest in the Finance Department of the Government of Orissa with the necessary authority in law for issue of such a notification and a further prayer has been made seeking a writ declaring clause(m) of sub-Section 8 of the Section 20 of the OVAT Act as ultra virus the Constitution of India as it suffers from the vice of excessive delegation.

4. For the purpose of convenience the impugned notification is extracted herein, which runs thus:-

"**The Orissa Gazette**

EXTRAORDINARY
PUBLISHED BY AUTHORITY

No. 96, CUTTACK, TUESDAY, JANUARY 27, 2009/ MAGHA 7, 1930

FINANCE DEPARTMENT
NOTIFICATION
The 27th January 2009

S.R.O. No.34/2009-In exercise of the powers conferred by clause (m) of sub-section (8) of section 20 of the Orissa Value Added Tax Act, 2004 (Orissa Act 4 of 2005), the State Government, having been satisfied that it is necessary so to do, hereby specify that no input tax credit shall be allowed to the registered dealers in respect of the goods description of which is given in the Schedule below.

SCHEDULE

Sl. No.	Description of goods
(1)	(2)
1.	Coal except when purchased for resale
2.	Furnace oil except when purchased for resale
3.	Kerosene except when purchased for resale
4.	All automobiles including commercial vehicle/two wheelers/three wheelers required to be registered under the Motor Vehicles Act 1988 and including tyres and tubes, spare parts and accessories for the repair and maintenance thereof; except when purchased for resale.
5.	Air conditioning units other than those used in plant and laboratory except when purchased for resale
6.	Earth moving equipment such as dozers, loaders and excavators; and poclain, dumpers and tippers etc. except when purchased for resale.
7.	Machinery and equipments including accessories and component parts thereof purchased for use in mining.
8.	Machinery and equipments including accessories and component parts thereof purchased for use in construction activities such as mixer, road roller, paver, vibrator etc.

[No.4762/CTA-63/08-F]
By order of the Governor
P.K.ROUT
Under-Secretary to Government"

5. Mr. A. K.Ganguly, learned Senior Advocate appearing for the petitioner-M/s Tata Refractories Limited submitted that the impugned notification purportedly issued by taking recourse to Section 20(8)(m) is ultra virus Section 20(3) (b) read with Section 2(25) of the OVAT Act. It was submitted that while the OVAT Act declares that "input tax credit" should be allowed on purchases made within the State from a registered dealer holding a valid registration certificate in respect of goods intended for the purpose of "use as input" which includes (consumables directly used) in

respect of manufacture of finished products. The impugned notification is clearly contrary to the said legislative mandate since it purports to declare that, no input tax credit is to be allowed on 'coal' and 'furnace oil', even though they are either raw materials or consumables directly used in the processing and manufacturing of finished goods, i.e., refractory bricks. It is further submitted on behalf of the petitioner that the impugned notification is also ultra virus of clause(m) of sub-section(8) of Section 20 as the same exceeds the limits of the power conferred on the State Government to specify only a circumstance or eventuality similar to those spelt out in clauses (a) to (l) of sub-section 8 of Section 20 and purports to altogether deny input tax credit for the raw materials/consumables like Coal and Furnace Oil and that too, without specifying any circumstance/eventuality similar to those contained in Section 20(8)(a-l) of the OVAT Act, under which such credit could be denied.

6. The petitioners further submits that the impugned notification is a 'colorable device' since in effect it seeks to nullify the judgments rendered by this Court in the case of **M/s Reliance Industries Limited v. Assistant Commissioner of Sales Tax and others**, reported in (2008) 015 VST 0228 (Orissa). By way of an alternative arguments it was further submitted by the petitioners that, if the impugned notification is held to be within the ambit of clause (m) of sub-section (8) of Section 20 of the OVAT Act, then the said provision, i.e., Section 20(8)(m) of the OVAT Act would be liable to be quashed and declared unconstitutional for suffering from the vice of excessive delegation of legislative power.

7. Mr. N.Venkat Raman, Senior Advocate appearing for the petitioner-M/s Visa Steel Limited submitted that his client was essentially in the business of manufacture of Sponge iron. It is further submitted by him that in the process of manufacture of sponge iron, 'coal' is a raw material since sponge iron cannot be manufactured without use of coal in the process of its manufacture. While adopting the arguments addressed by Mr. A.K. Ganguly, Senior Advocate as noted hereinabove, learned counsel submitted that, the legislative mandate of Section 20(8) of the OVAT Act there are various circumstances or situations in which a register ed dealer could not claim or would not be allowed input tax credit in each of the situations/circumstances narrated in clauses- (a) to (l) contained therein. If an analysis is made of all the circumstances covered under Section 20(8), it would be clear that each of such situation resulted in a circumstance when there was no question of any accretion or additional VAT payable/collectable in the circumstances contemplated therein. The impugned notification and the denial of claim of input tax credit for specific items such as coal and furnace oil in the circumstances that the petitioners are in, i.e., manufacture, the manufactured product itself was in the present

circumstances subject to levy of VAT and therefore, there was no situation in which such raw material on which input tax credit is sought for escaping from VAT, since the final product produced by the petitioners, i.e., sponge iron would be also liable for VAT. In other words, learned counsel submitted that the notification issued by the Finance Department purportedly in exercise of its power under clause (m) of sub-Section (8) of Section 20 of the VAT Act is clearly beyond the authority and/or competence of the executive i.e. Finance Department. Learned counsel further submitted that in the present case the impugned notification is clearly an attempt by the executive to overreach the legislative mandate contained in the OVAT Act which specifically permits a registered dealer under Section 20(3) to claim for input tax credit in terms thereof.

7.1 Learned counsel further submitted that the principle of *ejusdem generis* rule has to be applied to the scope of Clause(m) of sub-Section (8) of Section 20 and, therefore, submitted that it is well established principle that where general terms have been used following particular expression, the said general term would take that colour and meaning as that of preceding expression and in support of the aforesaid proposition he placed reliance on a judgment of the Hon'ble Supreme Court in the case of **Collector of Central Excise, Bombay v. Maharashtra Fur Fabric Ltd.,** reported in (2002) 7 SCC 444. Reliance is also placed on the principle of *ejusdem generis* on a judgment of the Hon'ble Supreme Court in the case of **State of Karnataka and others –V- Kempaiah,** reported in (1998) 6 SCC 103, wherein the expression "in any other manner" takes in it fold the last-mentioned categories of administrative actions. In the said judgment it was held that the expression "in any other manner" contained general words which construed literally, should receive their full and natural meaning but when they follow the specific and particular words of the same genus, it will be presumed that the legislature has used the general words in a limited sense to convey the meaning implied by the specific and particular words used.

8. Mr. A.K. Mohanty, learned Advocate General appearing for the State relied upon the averments made on behalf of opposite party as contained in the counter affidavit filed through Mr.Sudhansu Mohan Das, Assistant Commissioner of Commercial Taxes (Law). Learned Advocate General submitted that the power under Section 20 (8) (m) of the OVAT Act, 2004 is neither conditional upon framing of rules nor is there any excessive delegation of power to the Government which can be either be termed as wide unchanelised or unguided. It is further submitted that the allegation that the opposite party was trying to overcome the judgment in the case of M/s Reliance Industries Ltd. versus Assistant Commissioner of Sales Tax in which it was held that "furnace oil" is an "input" under Section 20 of the

OVAT Act is totally misconceived and in-appropriate in the present circumstances. It was contended that the words and phrases contained in the definition clauses of the OVAT Act cannot override the provisions of the statute and the definition of the term "input" under section 2(25) of the OVAT Act ought not to be read independent of the context in which it appears.

8.1 Learned Advocate General submitted that no absolute right to award 'input tax credit' can flow from an independent reading of section 2(25) of the OVAT Act and also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Special Officer and Competent Authority Urban land Ceiling Hyderabad -Vs- P.S. Rao**, AIR 2000 SC 843 as well as in the case of **Vanguard Fire and General Insurance Co. Limited v. Fraser & Ross,** AIR 1960 SC 971. In order to canvass the State's contention that, it is well settled law that, when the application of the definition to a term in a provision makes it unworkable and otiose, it can be said that the definition is not applicable to that provision because of the context being contrary to the main statutory provision. Accordingly, he submitted that Section 2(25) of the OVAT Act cannot form the fountain head of an absolute right being claimed for by a petitioner for availing input tax credit.

9. It was further submitted that notwithstanding the provision of sub-section (3) of Section 20 which allow a registered dealer to avail input credit on the goods used as input, the same was subject to the rider contained in sub-section (8) of Section 20. Since clause-(m) of sub-section (8) of Section 20 of the OVAT Act empowers the State Government to issue necessary notifications disallowing input tax credit in certain cases, such power is a "plenary power" and cannot be limited to the type of circumstances similar to the other spelt out in clauses (a) to (l) of sub-section (8) of Section 20. It was urged on behalf of the State Government that the impugned notification was issued by exercise of power under Section 20(8)(m) of the OVAT Act and since there was no element of sale in respect of these commodities when the registered dealer uses the same coal and furnace oil as input for manufacturing finished product, the Government of Orissa in Finance Department after a thorough deliberation has thought it fit to place restriction by 'disallowing input tax credit' in such circumstances. It was further submitted that in the matter of taxation it is the prerogative of the State, to pick and choose objects, persons, methods and rates for taxation and that the petitioners are not entitled to challenge the notification, since it is based on rational consideration and it was decided to disallow input tax credit in respect of 'coal' and 'furnace oil' and other items covered in the notification to the registered dealer, who use and consume the same for manufacturing of finished products and such input tax credit was allowable only when such items, i.e. coal and furnace oil were resold. It was also submitted that the

contention raised by the petitioners that the impugned notification dated 27.1.2009 of the Finance Department seeks to over reach and nullify the judgment of this Court in the case of **M/s Reliance Industries Limited (supra)** in which it was held that furnace oil was an input under Section 2(25) of the OVAT Act is incorrect. It was submitted that the same was misconceived since the definition of 'input' given under Section 2(25) of the OVAT Act is altogether different from the definition of 'input tax credit' under Section 2(27) of the Act and in terms of said sub-section, the same was subject to Section 20 of the OVAT Act. Therefore, since this Court in the case of M/s Reliance Industries dealt with Section 2(25), the said case has no applicability to a case under Section 2(27) of the OVAT Act and that two definitions are mutually exclusive.

10. In the light of contentions advanced by the learned counsel for the rival parties as noted herein above it becomes imperative at this stage to take note of various relevant provisions in sub-Sections 2(25), 2(26), 2(27) and 2(28) and Sections 12 and 20 of the OVAT Act, 2004 and Rule 11 of the OVAT Rules, 2005. Those are quoted below:-

2. Definitions- In this Act, unless the context otherwise requires. (1) to (24) xx xx xx xx xx

(25) "**input**" means **any goods purchased by a dealer in the course of his business** for resale or for use in the execution of works contract, **in processing or manufacturing, where such goods directly goes into composition of finished products** or packing of goods for sale, **and includes consumables** directly used in such processing or manufacturing;

(26) "**input tax**" in relation to any registered dealer means the tax collected and payable under this Act in respect of sale to him of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a commission agent purchasing such goods on behalf of such dealer.

(27) "**input tax credit**" in relation to any tax period means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16;

(28) "**Manufacture**" means **any activity that brings out a change in an article or articles as result of some process,** treatment, labour and result in transformation into a new and different article so understood in commercial parlance having a

distinct name, character and use, **but does not include such activity of manufacture as may be notified**."

12. Levy of tax on purchase – Every dealer who, in the course of his business, purchase or receives any goods –

(i) from a registered dealer, in the circumstances in which no tax under Section 11 is payable by that registered dealer on such goods, or

(ii) from any person other than a registered dealer.

shall be liable to pay tax on the purchase price or prevailing market price of such goods, if after such purchase or, as the case may be, receipt, the goods are not sold within the State or in the course of inter-State trade or commerce or in the course of expert out of the territory of India, but are-

(a) sold or disposed of otherwise; or

(b) consumed or used in the manufacture of goods declared to be exempted from tax under this Act; or

(c) after their use or consumption in the manufacture of goods, such manufactured goods are disposed of otherwise than by way of sale in the State or in the course of inter-State trade or commerce or export out of the territory of India; or

(d) used or consumed otherwise,

and such tax shall be levied at the same rate, at which tax under Section 11 would have been levied, on the sale of such goods within the State on the date of such purchase or receipt.

20. Input tax credit – (1) Subject to the provisions of this Act, for the purpose of calculating the net tax payable by a registered dealer for any tax period, an input tax credit as determined under this section shall be allowed to such registered dealer against the tax paid or payable in respect of all sales or purchase taxable under this Act, other than sales or purchase of goods specified in Schedule C and Schedule D.

(2) The input tax credit to which a registered dealer is entitled under Sub-section (1) shall be the amount of tax paid by the registered dealer to the seller on his turnover of purchase of goods during the tax period, calculated, subject to the provisions contained in Sub-sections (3), (4) and (5), in such manner as may be prescribed.

(3) **Input tax credit shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose of** –

(a) sale or resale by him in the State;

(b) **use as inputs** or as capital goods **in the manufacturing or processing of goods, other than those specified in Schedule A and Schedule C and Schedule D for sale;**

(c) sale of goods subject to levy of tax at zero rate under Section 18;
(d) for use as containers for packing of goods, other than those exempt from tax under this Act, for sale or resale; or
(e) transfer of stock of taxable goods other than by way of sale, to any place outside the State :

Provided that –
(a) the input tax credit on purchases for the purpose of Clause (e) shall only be allowed in respect of the amount of tax paid or payable in excess of tax at the rate of four per centum;
(b) if goods purchased are used partially for the purpose specified in this sub-section, input tax credit shall be allowed proportionately to the extent they are used for such purposes; and
(c) where a registered dealer sells or dispatches goods, both taxable and exempt under this Act, the input tax credit shall be allowed proportionately only in relation to the goods which are not so exempt.

(4) Notwithstanding anything contained in this section or elsewhere in this act, and subject to such conditions and restrictions and in such manner, as may be prescribed, input tax credit may be allowed partially or in phased manner, in respect of such goods or such class of dealers or in such cases, as may be prescribed.
(5)(a) Input tax credit on capital goods shall be allowed from the date of first sale of taxable goods produced or manufactured after the commencement of such production and shall be adjusted against the output tax over a period not exceeding three years :

Provided that no input tax credit shall be allowed on such capital goods used for the purpose and in the circumstances as specified in Schedule 'D'.

(b) Input tax credit under Clause (a) of this sub-section shall be allowed in lump sum provided the value of such capital goods is rupees one lakh or less.
(c) Input tax credit on capital goods shall be allowed only on purchases of such good made on or after the appointed day.
(d) In case of closure of business before the commencement of commercial production, on input tax credit on capital goods shall be allowed and input tax credit carried forward, if any, shall be forfeited.
(e) In case where there is production of both taxable goods and goods exempt from tax, the input tax credit admissible on capital goods shall be determined in the manner prescribed.
(f) Where the used capital goods are sold, the same shall be subject to tax under this Act.

(4) Input tax credit shall not be claimed by the dealer for any tax period until the dealer receives the tax invoice in original evidencing the amount of input tax :

Provided that for good and sufficient reasons to be recorded in writing, the Commissioner may, in the prescribed manner, allow such credit subject to such conditions and restrictions as may be specified in the order allowing the credit.

(5) A registered dealer who intends to claim input tax credit shall, for the purpose of determining the amount of input tax credit, maintain accounts and such other records as may be prescribed in respect of the purchases and sales made by him and stock in trade held.

(6) No input tax credit be claimed by or be allowed to a registered dealer–

(a) in respect of any taxable goods purchased by him from another registered dealer for resale but given away by way of free sample of gift;
(b) who makes payment of turnover tax as provided in Section 16;
(c) in respect of capital goods used for the purpose and in the circumstances as specified in Schedule 'D' ;
(d) in respect of goods brought from outside the State against the tax paid in any other State;
(e) in respect of stock of goods remaining unsold at the time closure of business;
(f) in respect of goods purchased on payment of tax, if such goods are not sold because of any theft, damage and destruction;
(g) where the tax invoice is not available with the dealer or there is evidence that the same has not been issued by the selling registered dealer from whom the goods are purported to have been purchased;
(h) in respect of goods purchased from a dealer whose certificate of registration has been suspended;
(i) in respect of sale of goods specified in Schedule A;
(j) in respect of sale of goods specified in Schedule C;
(k) in respect of raw materials used in manufacture or processing of goods, where the finished products are exempt from tax; and
(l) executing works contract, in relation to works contracts executed by him, where he has exercised option under Sub-section(3) of Section 11 to pay tax by way of composition; and
(m) in any other case as the Government may, by notification, specify.

Rule-11. Calculation of Input Tax Credit-

(1) where a dealer effects sales of goods both, subject to tax and exempt from tax, under the Act, the following calculation for claiming input tax credit shall apply –

(a) where all the sales effected by a dealer in a tax period are subject to tax under the Act, the whole of the input tax may be claimed as credit.

(b) where all the sales effected by the dealer for a tax period are exempt from tax under the Act, no input tax may be claimed as credit.

(c) Where a part of the sales effected by a dealer in a tax period are subject to tax and the remaining part of the sale are exempt from tax under the Act, the amount that can be claimed as input tax credit shall be calculated from the following formula:

$$\frac{P \times Q}{R}$$

Where –

"P" is the total amount of input tax;

"Q" is the taxable turnover of sales including zero-rated sales; and

"R" is the total amount of all sales including exempt sales:

During the tax period.

(d) where the fraction Q/R, is less than 0.05, the dealer may not claim any input tax credit for that period.

(e) where the fraction Q/R is more than 0.95, the dealer may claim the entire input tax as credit for that period.

(2) Input tax credit on capital goods under Clause (e) of Sub-section (5) of Section 20 shall be allowed in the following manner:

(a) the total input tax eligible for credit on capital goods for each tax period shall be equally apportioned over a period of thirty six months and –

(i) in case of a start up or new business, input tax credit shall be allowed as apportioned for each tax period, beginning from the first sale after commencement of commercial production;

(ii) in case of a continuing business, input tax credit shall be allowed as apportioned for each tax period following the tax period during which such input tax credit accrued.

(b) the input tax credit, admissible under Clause (a), where there is sale of both taxable and tax exempt finished products, shall be

determined on application of the principles as provided under Sub-rule (1) in respect of each tax period.

Explanation – For the purpose of this sub-rule, the expression "total input tax" referred to in Sub-rule (1) shall be the input tax as apportioned in respect of a tax period:

Provided that for the purpose of calculating input tax credit under this sub-rule, if the value of the capital goods is within rupees one lakh in a tax period, the input tax credit claimed on such amount shall be allowed in one installment."

11. It is clear from the pleadings of the parties that this Court had the occasion to deal with the definition of 'input' in Section 2(25) of the OVAT Act, 2004 in the case of **M/s Reliance Industries Limited (supra)** and came to a conclusion that the definition of the term 'input' in Section 2(25) of the OVAT Act was an 'inclusive' definition by which legislature clearly covered the following:-

i) goods purchase by a dealer in course of his business for resale;
ii) for use in the execution of works contract;
iii) in processing or manufacturing, where such goods directly go into composition of the finished products or packing of goods for sale; and
iv) includes consumable directly used in such processing or manufacturing.

11.1. Accordingly, the Court came to a conclusion in terms of the 'input' definition that, the only requirement is that the consumables are directly used in such processing and/or manufacturing and the term of 'consumable' was not limited to those goods which directly go in composition of the finished products alone. The term 'consumable' postulates that such articles may be destroyed or completely used in course of the processing or manufacturing of such goods and for such reason since the term 'consumable' was used by the legislature, the said definition was held to be an 'inclusive definition'. Therefore, after referring to various judgments in the said case, the Court came to a conclusion that input comprises of two types of commodities, i.e. (i) those commodities which directly go into the composition of finished product and (ii) the consumables used in the manufacturing process for production of finished product and concluded that for 'consumable' to qualify as an 'input' it is not at all necessary that in order for consumable to qualify as 'input' should directly go into the composition of the finished product. What is required is that consumable should be directly used in the manufacturing process for production of the finished product. In that view of the matter Court concluded that 'furnace oil' used by the petitioner in the process of manufacturing of PSF was to be treated as

'input' as defined under Section 2(25) of the OVAT Act and the credit for input tax which has been paid by the dealer on the purchase of furnace oil can be claimed under Section 2(27) of the OVAT Act against the tax payable on finished product, i.e. PSF.

12. In the present case, we are required to deal with the issue of impugned notification and in particular relating to 'coal' and 'furnace oil'. In the case at hand, clearly such items i.e., coal and furnace oil are clearly covered under sub-sections (25), (26), and (27) of Section 20 of the OVAT Act. Apart from the above, in terms of Section 12 of the OVACT Act, 2004 petitioners are liable to pay the OVAT on their purchase as stipulated under Section 12 at the rate prescribed under Section 14 of the OVAT Act. At this juncture it become important to note herein that in term of Section 20(1), there is no dispute in the present case that the petitioners are entitled there under to claim input tax credit since neither coal nor furnace oil has been specified neither in Schedule-C nor Schedule-D of the Act. In terms of sub-Section 2 of Section 20 the input tax credit is to be limited to the amount tax paid by the petitioner dealer on the purchase of the 'input' as stipulated under sub-section (2) and most importantly under Section 20(3) the legislative mandate is that input tax credit shall be allowed when purchase is made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose stipulated in terms thereof. It is also an admitted fact that although power is vested in the State Government under sub-Section (4) of Section 20 of the OVAT Act to prescribe condition and restriction where input tax credit may be allowed partially or in a phased manner in respect of such goods for such classes of dealer as may be prescribed, admittedly no such rule under sub-section (4) of Section 20 has been enacted by the State Government.

13. Further more importantly none of the circumstances described under sub-section (8) of the Section 20 and clauses (a) to (l) thereof are attracted in the present case. Therefore, the State having relied on clause- (m) of sub-section (8) of Section 20 to issue the impugned notification, the only remaining issue that arises for our consideration is as to whether the State Government was competent to issue notification of a nature impugned herein in terms of the said provision.

14. The scope of our enquiry and determination herein revolves round the question of adjudicating as to the scope and power vested in State Government under clause-(m) of sub-section-(8) of Section 20 of the OVAT Act. In terms thereof it is clear that the Government is authorized to notify "any other case" as may be deemed appropriate in terms of sub-section (8) of Section 20 of the OVAT Act.

14.1 At the outset on an analysis of the circumstances contained in sub-section (8) of Section 20 it is clear that whereas clause-(a) deals with the

situation where the taxable goods purchased by the registered dealers is not re-sold in course of his business but given away as a free sample or gift. In other words the case in which there is no further resale of the purchased goods consequently there is no scope of giving a right to the situation for any further levy thereon. Since no levy of VAT is permissible in the event of a free sample or a gift, the benefit of input tax credit for inter State purchase by such a dealer ought not to be claimed.

14.2 So far as clause (b) of sub-Section (8) of Section 20 is concerned, since the registered dealer contemplated therein had opted for payment of 'turnover tax' under Section 16(composite tax), obviously thereby no question of claiming of credit input tax can arise. Under clause-(c) where a registered dealer purchases capital goods, input tax credit thereon is permissible under sub-section (5) of Section 20 to the extent and in the manner stipulated therein. In so far as clause-(d) is concerned, the same refers to purchases by a registered dealer from out side the State against the tax paid in any other State and obviously thereby since no tax was paid within the State of Orissa, no question of claim for input tax credit for such tax can obviously be permitted. So far as clause-(e) is concerned, if a registered dealer has stock of goods remaining unsold at the time of closure of his business, clearly thereby since the event of further sale has not taken place, no question of input tax credit can arise. So far as clause-(f) is concerned, if goods are purchased by a registered dealer and the same is stolen, damaged or destroyed, obviously such goods are not more available for resale and in absence of such goods no claim of input tax credit could be permissible. In so far as clause-(g) is concerned, where a registered dealer is not in a position to provide the tax invoice, no question of grant of input tax credit is also permissible. So far as clause- (h) is concerned, a registered dealer, who may have purchased goods from a registered dealer, but if such selling dealer registration certificate has been suspended the purchasing dealer can have no right to claim input tax credit. In so far as clauses- (i) & (j) are concerned, the goods which we are presently concerned, i.e., Coal and Furnace oil are admittedly not specified in the Schedule- A or C. In so far clause-(k) is concerned, where the finished products of the registered dealer is exempted from tax either in whole or in part under the Act, no question of input tax credit on inputs or capital goods other than those covered under Schedules- A, C or D would obviously available in view of the exemption of tax of the final products either whole or in part. In so far as clause- (l) is concerned, if a registered dealer executes works contract and has exercised his option under sub-section (3) of Section-11 to pay tax by way of composition as prescribed under section 11(c) in view of exercise of such option no question of availing input tax credit would arise. We now come to clause-(m) of sub-section-(8) which

contemplates and vests power in Government to make notification specifying any other goods, this is the power which the State has resorted to in passing the impugned notification.

15. In the case at hand, we are clearly of the considered view that both the judgments cited by the petitioners in the case of **Collector of Central Excise Bombay v. Maharashtra Fur Fabric Ltd.** as well as in the case of **State of Karnataka and others –V- Kempaiah (supra)** clearly cover the field. The principle of *ejusdem generis* shall apply to the scope and ambit of clause-(m) of sub-section (8) of Section 20 of the OVAT Act, 2004. Clearly clauses- (a) to (l) of sub-section (8) of Section 20 are circumstances specified by the legislature under which no input tax credit can be claimed nor allowed to a registered dealer. Only such additional circumstance may be specified by a notification of the State Government, but the nature of such notification has to satisfy the requirement of sub-section (8) of Section 20 of the OVAT Act.

16. We are afraid that we cannot accept the contention raised by the State that under section 20(8) (m) the State is vested with "plenary power" and not limited to the type of circumstances similar to those spelt out under clauses– (a) to (l) of sub-section (8) of Section 20 of the OVAT Act.

17. The principle of *ejusdem generis* has been well settled by the Hon'ble Supreme Court of India in various judgments, including the judgments referred by us hereinabove and for this purpose we cannot do better than what has been said by the Hon'ble Supreme Court in the case of **State of Karnataka and others v. Kempaiah (supra),** particularly in para-8 thereof and in the case of **Collector of Central Excise Bombay v. Maharashtra Fur Fabric Ltd.(supra)** particularly in para-6 thereof. Paragraph-8 of the judgment of the Honble Supreme Court in the case of **State of Karnataka and others –V- Kempaiah** reads as follows:-

> "8. The definition of the word "action" in Section 2(1) read as under:-
>
> "2. (1) 'action' means administrative action taken by way of decision, recommendation or finding or in any other manner and includes willful failure or omission to act and all other expressions [relating to] such action shall be construed accordingly."
>
> A perusal of the definition indicates that it encompasses administrative action taken in any form whether by way of recommendation or finding or "in any other manner", e.g., granting licences or privileges, awarding contract, distributing government land under statutory rules or otherwise or withholding decision on any matter etc. The expression "in any other manner" takes it in fold the last-mentioned categories of administrative actions. Mr. Nagaraja has argued that the expression "in any other manner" will have to be

given a wider meaning so as to include other actions of the public servants such as the action of the respondent in amassing wealth, otherwise the very purpose of the Act will be frustrated. We are afraid we cannot accede to the contention of the learned counsel as it would not only be contrary to the principle of construction of statutes but will also be repugnant to the object of the Act, pointed out above. The expression "in any other manner" contains general words which construed literally, should receive their full and natural meaning but when they follow specific and particular words of the same genus, it will be presumed that the legislature has used the general words in a limited sense to convey the meaning implied by specific and particular words. This follows from application of the rule of *ejusdem generis*. That rule which is an exception to the rule of construction that general words should be given their full and natural meaning, was enunciated by Lord Campbell in R. v. Edmundson "1… where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified". (Craies on Statute Law, 6th Edn., p.179.) These rules of interpretation are so well settled that they hardly need any authority to support our conclusion. Now in the definition of action, the expression "in any other manner" follows "decision", "recommendation" or "finding". So it connotes other categories of administrative action; it cannot be interpreted to mean actions which have no nexus to any administrative action."

Paragraph-6 of the judgment of the Hon'ble Supreme Court in the case of **Collector of Central Excise Bombay v. Maharashtra Fur Fabric Ltd.(supra)** reads as follows:-

"6. A careful reading of the proviso to the notification would show that by resorting not only to the process of bleaching, dyeing, printing, shrink-proofing,, tentering, heat-setting, crease-resistant processing, but also to "any other process or any two or more of these processes", the respondent would lose the benefit of the exemption. It is well-established principle that general terms following particular expressions take their colour and meaning as that of the preceding expression, applying the principle of *ejusdem generis* rule, therefore, in construing the words "or any other process", the import of the specific expressions will have to be kept in mind. It follows that the words "or any other process" would have to be understood in the same sense in which the process, including tentering, would be understood. Thus understood, a process akin to stentering/tentering would fall within the meaning of the proviso and,

consequently, the benefit of the notification cannot be availed by the respondent."

18. In view of the aforesaid law laid down by the Hon'ble Supreme court we apply the principle of *ejusdem generis* to clause (m) of sub-section (8) of Section 20 and are of the considered view that the present notification impugned hereinabove cannot stand the test of application of the principle of *ejusdem generis*. Accordingly, we are of the considered view that the impugned notification vide S.R.O. No.34/2009 dated 27.1.2009, limited to declaring 'coal and 'furnace oil' as goods at serial 1 and 2 thereof is illegal and therefore declare that the said notification would not have any application and will stand quashed to the aforesaid extent, since the impugned notification is ultra virus Section 20(3) (b) read with Section 2(25) and 2(27) of the OVAT Act. 2004 and consequently purchase made by the petitioner manufacturers of the aforesaid item, i.e., coal and furnace oil within the State from a registered dealer holding a valid registration certificate in respect of goods intended for the purpose of use as input and/or consumable directly used in respect of manufacture of finished product is clearly contrary to the legislative mandate.

19. Accordingly, the impugned notification S.R.O. No. 34/2009 dated 27.1.2009, to the extent noted hereinabove, stands quashed.

20. Insofar as the alternative prayer made by the petitioners seeking to challenge the provision of Section-20(8) (m) of the OVAT Act, 2004 is unconstitutional. We are of the considered view that such power does not suffer from the vice of excessive delegation of the legislative power, since sub-section (8) itself as well as the OVAT Act, 2004 contains the necessary guidelines and limits under which power under clause (m) thereof can be exercised by the State. Therefore such prayer of the petitioners fails and the said provision cannot be held to be excessive or unguided.

21. In view of the conclusion reached by us in Paragraph-18 as noted hereinabove, we are of the considered view that the other contentions raised by the parties are merely academic and therefore, need not be answered in the present case. Writ application is allowed in terms of the direction noted hereinabove.

Writ petition allowed.

2010 (II) ILR – CUT- 847

V.GOPAL GOWDA, CJ & I.MAHANTY, J.

W.P.(C) NO.6068 OF 2010 (With Batch) (Decided on 6.9.2010)

M/S. BAJRANG STEEL &
ALLOYS LTD. & ORS. ………… Petitioners.

.Vrs.

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

ORISSA VAT ACT, 2004 (ACT NO.4 OF 2005) – SEC. 20(3) PROVISO (d) r/w Rule 11(3) OVAT Rules.

Writ petition filed to declare Sub-Rule (3) of Rule 11 OVAT Rules as Ultravires the provision of Section 20 of OVAT Act read with the definitions of "Inpur Tax" and "Input Tax Credit" as defined in Sub-Sections (26) & (27) of Section 2 of the Act.

Restriction of claiming "Input Tax Creadit" – "Input Tax Credit" is allowed to the extent of CST payable under the CST Act, 1956 if goods are sold in the course of inter-state trade and commerce – The validity of proviso(d) of Sub-Section (3) of Section 20 of the Act having not been challenged, Rule 11(3) as inserted by virtue of the OVAT (Amendment) Rules, 2009 is sustained - Held, writ petitions are devoid of merit and are dismissed. (Para 11)

For Petitioner - Mr. Jagannath Patnaik, Sr.Adv. &
M/s. B.Mohanty, T.K.Patnaik, S.Patnaik, A.Patnaik, B.S.Rayguru, R.P.Roy & M.S.Rizvi with him
Mr. S.C.Lal, Sr.Counsel & Mr. Sunit Lal, Sujit Lal & M.R.Samal With him.
M/s. Damodar Pati, S.K.Mishra & S.N.Sharma.

For Opp.Partioes – Addl. Govt. Advocate &
Standing Counsel, Commercial Taxes.

V. GOPALA GOWDA,C.J. This batch of writ petitions have been filed by the registered dealers urging common facts and grounds praying to grant certain reliefs which will be extracted in the later part of the judgment. By consent of learned counsel for parties, we have heard these matters together and pass the common order.

2. Certain relevant facts are stated for the purpose of examining the rival legal contentions urged in these writ petitions with a view to find out as to whether the petitioners are entitled for the reliefs sought for by them. They have prayed to hold that the conferment of power upon the State Government under section 94 of the Orissa Value Added Tax Act, 2004 (hereinafter called as 'the OVAT Act') be declared as excessive, unfettered

and, therefore, unconstitutional and ultravires. A further prayer has been made seeking for a declaration that sub-rule (3) of rule 11 of the OVAT Rules is ultra vires the provision of section 20 of the OVAT Act read with the definition of "input tax" and "input tax credit" as defined in sub-sections (26) and (27) of section 2 of the Act. The petitioners have further sought for an injunctive order against opposite party nos. 1 and 2 and their officers restraining them not to enforce collection of tax in terms of sub-rule (3) of Rule 11 of OVAT Rules and statutory prescription in column no.21(II) in VAT Form 201 and Annexure-II to VAT Form 201 urging various facts and legal contentions.

3. The petitioners are all registered dealers under the OVAT Act. They have been allotted with Tax Identification Numbers and they are submitting their returns in compliance with the provisions of the OVAT Act and the Rules. All the petitioners are claiming input tax credit facility in conformity with the provisions of Section 20 of the OVAT Act. They purchase the required raw materials, consumables and other allied items required for their business activities both from inside as well as outside the State and while they sell some of the manufactured goods inside the State, most of their sales are made on inter-State basis. Raw materials, consumables and other allied materials including names of finished products are specified in the registration certificates issued under the OVAT Act. It is their case that they charge tax at 2% on inter-State sales effected by them subject to submission of Central Sales Tax declaration forms submitted by the buyer. This is done in compliance with the tax rate notified by the opposite party no.2 in terms of Section 8(5) of the Central Sales Tax Act, 1956 as the said provisions empowers the opposite party no.2 to issue notification in the public interest prescribing certain conditions. The registered dealers charge the tax on their sales bills and pay the balance tax after making proper calculation as provided under the OVAT Act. It is stated that the OVAT Act, 2004 was brought into operation with effect from 1.4.2005 and since then they have been submitting returns and making claims in accordance with the provisions of the OVAT Act. The State Legislature amended the provisions of the law by inserting proviso (d) to sub-section (3) of Section 20 of the OVAT Act with effect from 1.6.2008.

4. It is the case of the petitioners that input tax credit is to be regulated and determined under the provisions of section 20 of the Act. A bare reading of section 20 of the OVAT Act would reveal that "input tax credit" is to be computed in accordance with the provisions. The opening sentence of Section 20 states "subject to other provisions of this Act" and mandates about the method of calculation of payment of net input tax credit and further it mandates that the determination of the input tax credit is to be made in accordance with the provisions as laid down in the said section, in respect of

all sales or purchases taxable under the OVAT Act, other than sales or purchases of goods specified in Schedule B and Schedule C. It is the further case of the petitioners that sub-section (2) of Section 20 envisages that input tax credit to which registered dealers are entitled under sub-section (1) shall be the amount of tax payable by a registered dealer for any tax period, an input tax paid by the registered dealer to the seller on his turnover of purchase of goods during the tax period, calculated, subject to the provisions contained in sub-sections (3), (4) and (5) in such manner as may be prescribed. It is further stated that a bare reading of section 20 would reveal about the method of calculation for entitlement of input tax credit. Rule 11 is the statutory prescription framed by opposite party no.2 which speaks about the calculation of input tax credit. The sub- rule (3) has been inserted to the Rules by way of amendment which came into force with effect from 25.2.2009 through the OVAT (Amendment) Rules, 2009. It is further stated that a careful reading of the proviso (d) of sub-section (3) of section 20 would reveal that "input tax credit" on purchases when sold in course of inter-State trade and commerce shall be allowed only to the extent of the Central Sales Tax payable under the Central Sales Tax Act, 1956. It is their further case that the said proviso is attracted for input tax credit for purchase when sold in inter-State trade and commerce. In other words, the said provision is applicable to the registered dealers only when there is resale of their goods. "Resale" has been defined under section 2 (4) of the OVAT Act which means a sale of goods in the same form in which they were purchased. Framing of the rules by the State Government is to carry out the purposes specified in the proviso (d) appended to sub-section (3) of Section 20 of the OVAT Act. It is stated that a plain reading of the provisions contained in sub-rule (3) of Rule 11 would go to establish that the said provisions are applicable for resale or trading purposes. In other words, the provisions contained in sub-rule (3) of rule 11 is not applicable to the manufacturing units.

5. From a plain reading of proviso (d) of sub-section (3) of section 20, it is evident that input tax credit on purchases when sold in course of inter-State trade and commerce shall be allowed only to the extent of Central Sales Tax payable under the Central Sales Tax Act. A bare reading of the provisions envisaged in clauses (a) to (f) of sub-rule (3) of rule 11 of the Rules would reveal that creditable input tax shall be calculated limiting to the extent of CST payment where the dealer effects sale of goods in course of inter-State trade and commerce. Clause (b) of sub-rule (3) of Rule 11 prescribes that if the sale is made which falls under clause (a), the registered dealer making such sale, shall furnish the particulars of sales corresponding purchase of goods made from registered dealer inside the State while submitting return under the Act. The said clause requires that where a dealer effects sales in the inter-State trade and commerce, he shall file the return

and furnish the particulars of such sales and corresponding purchase of goods made from the registered dealer inside the State complying to the requirements as laid down in Annexure-II of Form VAT 201. Sub-clause (c) of sub-rule (3) of Rule 11 provides that if the sale of the goods falls within the scope of clause (a), results in CST payable less than the corresponding input tax on the corresponding purchase of goods, the input tax creditable for the tax period shall be reversed by the amount calculated in box provided in sl.No.5 of Annexure-II in the return. The aforesaid sub-clause (c) postulates that when the sales of goods falls under clause (a), the registered dealer who has sold the goods during the tax period 1.6.2008 till the introduction of sub-rule (3) shall be required to file the return disclosing the required information conforming to the requirements of Annexure-II-A of VAT 201. Clause (f) of sub-rule (3) of rule 11 enjoins that when the sale of goods falls under clause (a) during the tax period 1.6.2008 to 27.2.2009 results in CST payable, less than the corresponding input tax on the corresponding purchase of goods, input tax creditable for the tax period shall be reversed by the amount as calculated in Annexure-II-A of Form VAT 201. It is stated that while framing sub-rule (3) of rule 11 of the Rules, the State Government exceeded its power conferred upon it in framing the VAT Form 201. Opposite party no.2 prescribed certain information and requirements which are contrary to the express provision laid down under section 20(3) of OVAT Act. The opposite parties specified that the manufacturer of goods sold in inter-State trade and commerce is required to calculate the purchase value of those inputs as well as the input tax. In order to give effect to Form 201, opposite party no.2 inserted a new column 21(ii) which mandates about the reduction of input tax credit in excess of the CST payable as per proviso (d) to sub-section (3) of Section 20.

6. A combined reading of the provisions laid down under the proviso (d) to sub-section (3) of Section 20 leaves no manner of doubt that the benefits of the provision are available only for traders because the proviso and the rules clearly speak about the sale and purchase. Calculation of input tax credit for determination shall be made in terms of the proviso (d) of sub-section (3) of Section 20 read with rule 11(3) of the OVAT Rules, when the goods are purchased and sold in the course of inter-State trade and commerce. The same cannot be made applicable for the manufacturers which is not in consonance with the scheme of the Act. The sale made in course of inter-State trade and commerce falls under the scope of section 8. Therefore, it is contended that the framing of the rule 11(3)(b) and Form 201 Part-II of Column 21(ii) of VAT Form 201 while a manufacturer shall be liable to pay tax on the goods at the time of purchase and yet shall be entitled for adjustment as "input tax credit" only to the extent of the Central Sales Tax payable. Such limitation of credit is unauthorized, illegal and violative of

Articles 14 and 265 of the Constitution. In the guise of exercise of power under section 94 of the OVAT Act, framing of the rule is beyond the conferment of power in relation to matters provided under section 94. Therefore, they have prayed to grant the reliefs sought for in the writ petitions.

7. Counter statement is filed in W.P.(C) No.11772 of 2009. The same is adopted in all these petitions justifying the framing of the impugned rule and the Form traversing the petition averments contending that framing of the rule is in conformity with Section 94 of the OVAT Act. It is contended by them that the legal contentions urged in the writ petitions by the registered dealers is on account of misreading of the Section 20 , 18 and also the definition provisions of ‘input tax’ and ‘input tax credit’ as given under section 2(26) and 2(27) of OVAT Act. The framing of sub-rule (3) of rule 11 of the Rules is in conformity with the proviso (d) of sub-section (3) of Section 20 of the Act as it has got application to all manufacturers. From a careful reading of Section 20(3) of the Act, it is clear that “input tax credit” shall be allowed for purchases made within the State from a registered dealer holding a valid certificate of registration in respect of goods intended for the purpose, inter alia, sale or resale by him in the State or use as inputs. The petitioners have stated in their petitions that they purchase goods which are used by them as “raw material/ inputs” for the purpose of manufacture of various goods related to iron and steel. The statute does not restrict claiming set off of input tax against output tax. The said input tax credit in respect of inter-state sale has been restricted upto the extent of CST payable under the CST Act.

8. It is further stated that clause (a) of sub-rule (3) of Rule 11 is a mere repetition of proviso (d) of sub-section (3) of Section 20 and other clauses of the said sub-rule are providing the manner and modalities to claim input tax credit in respect of inter-State transactions. Clause (b) of sub-rule (3) of Rule 11 refers to Annexure-II of Form VAT 201 wherein the convenient mode to claim input tax credit against CST payable has been prescribed. Under the said form the manufacturer is required to calculate the proportionate inputs (goods) used in the manufacture of goods sold in inter-State trade and calculate the purchase value of those input (goods) as well as the input tax. Form VAT 201 at sl.no.21 it is stated as reduction of ITC in excess of CST payable, as per proviso (d) to sub-section (3) of Section 20 as at sl.no.5 of Annexure-II or serial no.8 of Annexure-IIA. Once the said columns are filled up, the assessee would be in an advantageous position since he is not required to be noticed for regular assessment which is not contemplated under the Statute. Further placing reliance upon sub-section (2) of Section 20 of the Act which provides that input tax credit to which the registered dealer is entitled under sub-section (1) shall be the amount of tax paid by the

registered dealer to the seller on his turnover of purchase of goods during the tax period. The same is subject to the provisions contained in sub-sections (3), (4) and (5) of Section 20 of OVAT Act. For this purpose rule 11(3) is prescribed. The same is in consonance with sub-section (1) read with sub-section (2) of Section 20. The power of prescription of rule by way of subordinate legislation by the State Government is derived from the power conferred under section 94 of the Act. The same has been framed to give effect to the provisions of section 20(3) Proviso (d). Therefore, the same cannot be said as unguided, unfettered or ultra vires section 20 of the Act or Articles 14 and 265 of the Constitution of India. Therefore, they have requested for dismissal of all the writ petitions as the same are without any merit.

9. We have heard learned Senior Counsel Mr.J.Patnaik, Mr.S.C.Lal and Mr.Pati on behalf of the registered dealer-petitioners extensively. We have also heard learned Standing Counsel Mr.Patnaik on behalf of the opposite parties with reference to the above said legal contentions urged in their petitions and the counter statement in support of their respective claim and counter claim. On the basis of the aforesaid rival legal contentions urged by the learned Senior Counsel and by the Government Advocate and the Standing Counsel on behalf of the Commercial Taxes Department, the following points would arise for our consideration: (i) whether the framing of rule 11(3) is ultra vires section 20 of OVAT Act, (ii) whether rule 11(3) framed by the State Government in exercise of its power under section 94 is unguided, unfettered upon the State Government and whether prescription of the said rule is for the purpose of carrying out the object of the Act.

10. The aforesaid points are answered against the petitioners/registered dealers and in favour of the State Government by assigning the following reasons.

For the aforesaid purpose, it is necessary for us to extract the provisions of the OVAT Act, namely, the definitions of 'input tax' and 'input tax credit' as in section 2(26), 2(27) and also the definition of 'business' as in section 2(7) and proviso to clause (d) of sub-section (3) of Section 20 which read thus:

> "2 (26) 'input tax' in relation to any registered dealer means the tax collected and payable under this Act in respect of sale to him of any taxable goods for use in the course of his business, but does not include tax collected on the sale of goods made to a commission agent purchasing such goods on behalf of such dealer.
>
> (27) 'input tax credit' in relation to any tax period means the setting off of the amount of input tax or part thereof under Section 20 against the output tax, by a registered dealer other than a registered dealer paying turnover tax under Section 16;

(7) 'business' includes-

(a) any trade, commerce or manufacture;
(b) any adventure or concern in the nature of trade commerce or manufacture;
(c) any transaction in connection with, or incidental or ancillary to such trade, commerce, manufacture, adventure or concern;
(d) any transaction in connection with, or incidental or ancillary to, the commencement or closure of such trade, commerce, manufacture, adventure or concern;
(e) any occasional transaction, whether or not there is volume, frequency, continuity or regularity of such transaction, in the nature of such trade, commerce, manufacture, adventure or concern;

Whether or not such trade, commerce, manufacture, adventure, concern or transaction is effected with a motive to gain or profit or whether or not any gain or profit accrues from such trade, commerce, manufacture, adventure, concern or transaction.

Explanation- For the purpose of this clause-

(i) the activity of raising of man-made forest or rearing of seedlings or plants shall be deemed to be a business,
(ii) transaction of sale or purchase of capital goods pertaining to any trade commerce, manufacture, adventure, concern or transaction shall be deemed to be a transaction comprised in business,
(iii) purchase of any goods, the price of which is debited to the business and sale of any goods, the proceeds of which are credited to the business shall be deemed to be transactions comprised in business."

Proviso (d) of sub-section (3) of Section 20 reads as under:

(d) the input tax credit on purchase when sold in course of inter state trade or commerce shall be allowed only to the extent of central sales tax payable under the Central Sales Tax Act, 1956 (74 of 1956)".

11. The definition of 'business' as in clause 2(7) is an inclusive definition and brings within its ambit any trade, commerce or manufacture. It is an undisputed fact that the petitioners who are registered dealers are manufacturers. It is also an undisputed fact that on the goods/raw materials purchased by them to use as input to manufacture a new goods, they are

required to be paid purchase tax. The definition of 'input' is very clear that any goods purchased by a dealer in the course of his business for using the same as raw material for manufacturing is called as 'input' for which input tax is payable under the provisions of the Act in respect of the sale to him of any taxable goods for use in the course of his business is permissible to avail the said facility. In view of section 2 (27) definition which provision is extracted above input tax credit facility in relation to any tax period means the setting off of the amount of input tax or part thereof under Section 20 against the output tax by a registered dealer other than a registered dealer paying turnover tax under section 16. Section 18 provides for zero rated tax when the goods are sold by a registered dealer in course of inter-State trade or commerce they are not liable to pay tax. Section 20 deals with input tax credit which provides for determination under the aforesaid provision. We are concerned here with proviso (d) of sub-section (3) of Section 20. Proviso (d) states that input tax credit on purchase when sold in course of inter-State trade or commerce shall be allowed only to the extent of the CST payable under the CST Act. Constitutional validity of the aforesaid proviso in the OVAT Act has not been questioned by the petitioners. The said proviso was inserted with effect from 1.6.2008. In the absence of challenge to the said provision, the framing of rule 11(3) by the State Government in exercise of statutory power to frame subordinate legislation cannot be found fault with. Rule 11 provides the procedure regarding collection of input tax credit. The same has been framed in 2009 and has come into force with effect from 25.02.2009.The contention urged by the petitioners that the said rule cannot be applied to a manufacture is wholly untenable in law in view of the definition of 'business' in Section 2(7). If that is read along with the definition of "input" and "input tax credit" under section 2 (26) and (27) along with Section 20(3) proviso (d) would make it abundantly clear that a manufacturer also comes within the definition of 'business' and 'the goods/input' is raw material used for the manufacturing process by the petitioner as registered dealer is not in dispute. Therefore, they are all claiming input tax credit facility as provided under section 20 of the Act. When they are claiming the said benefits, framing of the rules by the State Government in exercise of statutory power under section 94 for execution of the provisions of the Act cannot be said at any rate as excessive, unguided and unfettered exercise of power by the State Government. When section 20(3) Proviso (d) makes it explicitly clear as to what is the extent of statutory right given to the dealer for grant of input tax credit. Further the particulars required to be furnished in Annexure-IIA of Form VAT 201 also cannot be termed as arbitrary. The said particulars/information are required to be furnished by the traders for the purpose of availing input tax credit while selling the manufactured goods in the course of inter-State sale. That is what is provided in clauses (a) to (e) of

sub-rule (3) of rule 11. The strong reliance placed upon the clause (f) of sub-rule (3) of rule 11 and the particulars provided in Annexure-IIA Form VAT201 cannot be made use of for the purpose of justification of getting more benefit that what is not provided under the proviso (d) of sub-section (3) of section 20. Clause (f) of sub-rule (3) is not required to be provided for the purpose of determination of input tax credit in view of the clear provision in proviso (d) of sub-section (3) of Section 20. Therefore, for the aforesaid reasons, we do not find any merit whatsoever on any one of the legal contentions urged on behalf of the petitioners. The writ petitions are devoid of merit and are accordingly dismissed.

Writ petitions dismissed.

2010 (II) ILR – CUT- 856

V.GOPALA GOWDA, CJ & A.S.NAIDU, J.

WRIT APPEAL (CIVIL) NOS.127, 129 & 130 OF 2009 (Decided on 19.05.2010).

GOLI LAXMINARAYAN ……….. Appellant.

.Vrs.

YELETI VEERBHADRA RAO ……….. Respondent.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5OF 1908) – ORDER 9, RULE 13.

Exparte decree – Application Under Order 9 Rule 13 is maintainable after execution of a decree – In a case where irregularity in service of summons, fraud or impersonation etc are alleged and the Court after perusing the materials is satisfied that there was sufficient cause, it has the power to set aside the exparte decree – Once a decree is set aside, the parties are relegated to the position where the defendant was set exparte and the suit has to be tried de novo from that position.

In the present case it is alleged by Venkayamma that the address furnished in the plaint was not her address and there is no evidence to reveal that she was residing in the said address – She also alleged fraud and impersonation – The Court below after discussing the evidence rightly arrived at a conclusion that there was sufficient cause for non-appearance and set aside the exparte decree and directed de novo trial of T.S.No.1 of 1994. (Para 33& 34)

Case laws Referred to:-

1.AIR 1985 Orissa 215 : (Sambhunath Das -V- Sirish Ch.Mohapatra).
2.95(2003) CLT 324 (SC) : (Basant Singh & Anr.-V-Roman Catholic Mission)
3.96(2003) CLT 725 : (Bidyadhar Behera -V- Smt.Kanakalata Nayak).
4.1987 (1) OLR 88 : (Smt. Usha Jagani -V- Shri Bharat Kumar Jagani)
5.1949 PC 278 : (Kumbhan Lakshmanna & Ors.-V-Tangirala Venkataswarlu & Ors.)
6.AIR 1962 SC 361 : (Ramlal & Ors.-V- Rewa Coalfields Ltd.)
7. AIR 1959 pb 232 : (Banarasi Das -V- Dalmia Dadri Cement Co.Ltd.)
8.AIR 1964 SC 993 : (Arjun Singh -V- Mohindra Kumar).
9.(2005)13 SCC 95 : (Srei International Finance Ltd.-V-Fair Growth Financial Services Ltd.).
10.AIR 1996 SC 1005 : (Uma Shankar (dead) & Ors.-V-Sarabjeet

(dead) by L.Rs & Ors.)
11.AIR 1989 SC 1589 : (Custodian of Branches of BANCO National Ultramarino-V- Nalini Bai Naique).

For Appellant - M/s. S.S.Rao, B.K.Mohanty.
For Respondent – M/s. A.K.nanda, G.N.Sahu & G.B.Parida.

A.S.NAIDU,J. All these three Letters Patent Appeals have been filed assailing the common judgment dated 07.07.2009 passed by the Hon'ble Single Judge of this Court in W.P.(C) Nos. 14954 of 2005, 15692 & 12631 of 2005. The controversy in all the three writ petitions was with regard to the orders passed by learned Civil Judge (Senior Division), Rayagada in Title Suit Nos.1 of 1994 and 19 of 2001. The facts and the parties being one and the same, and the point of law being intricately connected with each other, the appeals are heard together on the request of the learned counsel for the parties and are disposed of by this common judgment.

2. This Court does not intend to delve into the facts in detail as the same have been discussed in extenso by the Hon'ble Single Judge in his judgment as well as by the learned Civil Judge (Senior Division), Rayagada and also by the Addl. District Judge, Rayagada. This Court however, intends to deal with only those facts, which are necessary for appreciating the inter se disputes.

3. It appears that one Smt. Palasa Venkayamma (hereinafter to be referred to as 'Venkayamma') was the exclusive owner of land appertaining to plot No. 279/332/1 under Khata No. 52/3 and lands appertaining to plot nos. 279/332/2 and plot no.279/331 under Khata No.25 in village Barijolla in Rayagada. According to learned counsel for the appellant, the said Venkayamma on 2.10.1990 had executed an agreement undertaking to alienate the aforesaid properties in favour of the appellant for a consideration of Rs.1,30,000/-. On the said date, it is averred, a sum of Rs.1,20,000/- was paid and possession was handed over. It was agreed that the balance of Rs.10,000/- shall be paid at the time of registration. The said Venkayamma, it is alleged, did not execute and register the sale deed. Consequently, the appellant filed Title Suit No.1 of 1994 seeking a direction to the vendor for specific performance of the agreement and the sale deed. In the said suit a petition was also filed under Order 39, Rules 1 and 2, C.P.C. being M.J.C.No.3 of 1994 to injunct Venkayamma from interfering with the possession of the plaintiff-appellant and the said prayer was allowed. The notice of the suit issued to Venkayamma, as would be evident from the records, was served upon her personally on 24.2.1994 along with the notice of M.J.C.No.3 of 1994. However, Venkayamma did not appear in the suit

and an ex parte decree was passed. Thereafter, the appellant filed execution petition to execute the decree passed in Title Suit No.1 of 1994 and the same was registered as Execution Petition No.17 of 1994. The said Venkayamma also did not appear in the execution case, consequently, the decree was executed.

4. In the year 2000, to be more specific on 24.10.2000 a petition was filed by Venkayamma under Order 9, Rule 13, C.P.C with a prayer to set aside the ex parte decree. The same was registered as M.J.C. No. 17 of 2000. In the said petition, it was alleged that she had absolutely no knowledge with regard to filing of the suit and/or passing of the ex parte decree and only on 10.10.2000 in course of mutation proceeding, it was brought to her notice that the appellant had filed T.S.No.1 of 1994 and an ex parte decree has been passed. The specific case of Venkayamma in the said petition was that the address given in the suit was a fictitious one, inasmuch as, she never resided in Rayagada and she was a permanent resident of Paralakhemundi. Several other allegations with regard to the fraud practiced by the appellant were also alleged.

5. The petition filed under Order 9, Rule 13, C.P.C. was resisted by the appellant, mainly on the ground that the same is grossly barred by time and that there is no decree available to be set aside inasmuch as the decree passed in Title Suit No.1 of 1994 had already been executed.

6. After hearing learned counsel for the parties, the trial court allowed the petition filed under Order 9, Rule 13, C.P.C., (M.J.C.No. 7 of 2000) inter alia holding that the notice issued to Venkayamma, the sole defendant in the suit, was not duly served upon her inasmuch as the address given in the plaint was not correct. From the evidence produced before the court, it was concluded that in fact Venkayamma was residing permanently at Paralakhemundi and the address furnished in the suit was that of Rayagada. A suspicion also arose with regard to impersonation and receipt of notice by some other person. The entire materials available before the trial court threw a cloud of suspicion on the way notice was served upon the sole defendant, i.e., Venkayamma and the court below being satisfied that the notice was not properly served and there are allegations of fraud and impersonation, set aside the decree and restored the suit to file. The said order was assailed by the appellant before learned Addl. District Judge, Rayagada in Civil Revision No. 3 of 2005. The revisional court though admitted the revision declined to grant any interim order. Being aggrieved, the appellant filed W.P.(C) No.12210 of 2005 before this Court. Thereafter, it appears, learned Addl. District Judge, Rayagada dismissed the revision filed by the appellant. The

said order as well as the order dated 20.7.2005 passed by learned Civil Judge (Senior Division), Rayagada in MJC No. 17 of 2000 is assailed in W.P.(C) No.14954 of 2005.

7. It appears that during pendency of the said proceeding Venkayamma, the sole defendant expired. On 30.7.2004 a petition was filed under Order 22, Rule 3, C.P.C. by Y. Veerabhadra Rao to substitute him in the suit. It is averred that the said Venkayamma had executed a 'Wilnama' in his favour bequeathing the entire disputed properties and as such, he should be substituted in place of the deceased Venkayamma and should be permitted to prosecute the lis. The trial court also allowed the said petition by a reasoned order.

8. The appellant also filed W.P.(C) No. 15692 of 2005 assailing the order passed by learned Civil Judge (Senior Division), Rayagada allowing the respondent to be substituted in place of the sole respondent under Order 22, Rule 4, C.P.C.

9. In course of hearing it further appears that Y.Veerabhadra Rao, the respondent had also filed a suit bearing Title Suit No.19 of 2001 impleading the appellant and Venkayamma as defendants and prayed to declare his right, title and interest in respect of the disputed lands on the plea that by virtue of 'Wilnama' he had succeeded to the properties.

10. After restoration of Title Suit No.1 of 1994, an application, it appears, was filed under Section 10, C.P.C. contending that Title Suit No.1 of 1994 having been restored and the said suit being an earlier suit and involves the same disputed property, the latter suit i.e. Title Suit No.19 of 2001 should be stayed. The said petition was rejected on 12.8.2005 holding that the application for impletion of parties in the said suit is still pending and unless and until the written statements are filed, it was not possible to hold that the said matter in both the suits was one and the same. Challenging the aforesaid order dated 12.8.2005, the appellant had filed W.P.(C) No.10256 of 2005. The said writ petition was disposed of by this Court holding that Title Suit No. 19 of 2001 as well as Title Suit No.1 of 1994 should be taken up analogously so as to avoid conflicting judgments. It further appears that the defendant filed another petition under Order 6, Rule 17, C.P.C. The said petition was resisted by the appellant. The petition being allowed by order dated 25.8.2005, the appellant assailed the same in W.P.(C) No.12631 of 2005.

11. The facts narrated above would indicate that the dispute in all the aforesaid cases is intermingled with each other. Therefore, the Hon'ble Single Judge heard all the three writ petitions, i.e., W.P.(C) Nos. 14954 of 2005, 15692 & 12631 of 2005 and disposed of the same by a common judgment. The Hon'ble Single Judge on the basis of the pleadings and arguments advanced noted the following facts.

i. On 21.1.1994, T.S.No.1 of 1994 was filed by the petitioner-plaintiff before the Sub-Judge, Rayagada.

ii. On 25.1.1994 on a petition filed by the petitioner under Order 39, Rules 1 and 2 seeking injunction against the defendant, was granted in M.J.C.No.3 of 1994, i.e., within a period of one day of filing of the suit.

iii. Thereafter, the matter appears to be listed on 11.2.1994 in which the trial court recorded that S.R. of summons not back and the registered cover was received back without service with a report that "addressee not known".

iv. On 24.2.1994 the trial court recorded that the notice issued against the opposite party back after personal service.

v. On 27.3.1994 due to the alleged absence of the defendant the suit was decreed.

12. After discussing the facts and circumstances, the Hon'ble Single Judge held as follows:

> "……… the present batch of writ petitions merits no further consideration whatsoever, since the earlier directions of this Court are binding on all the parties and accordingly, all the writ petitions are dismissed by reiterating the earlier direction passed by this Court dated 5.9.2005 in W.P.(C) No.10256 of 2005 and direct the Civil Judge (Sr. Division), Rayagada to take up T.S.Nos.190 of 2001 and 1 of 1994 analogously and dispose of the same within a period of six months from the date of receipt of this order and the lower court order. No necessary adjournment shall be granted and expeditious steps may be taken for disposal of the same."

The said judgment is assailed in these writ appeals.

13. In course of hearing, in reply to the preliminary objection raised with regard to the maintainability of the writ petition (WPC No. 14954 of 2005) in which the order passed by the learned Addl. District Judge in Civil Revision No.3 of 2005 is assailed, in view of the provisions of Section 115, C.P.C., Mr.Rao submitted that the writ jurisdiction being supervisory, any error committed by any of the subordinate courts, if brought to the notice of the High Court, it should exercise its jurisdiction and correct the same, and as such, the writ petition is maintainable.

14. Heard Mr.Rao, learned counsel for the appellant and Mr.Nanda, learned counsel appearing for the respondent.

15. The controversy in these writ appeals being intermingled with each other and several other orders passed in course of hearing of the suits are assailed and each order is connected to the other, this Court refrains from dealing with the preliminary objection with regard to maintainability so as to put an end to the controversy.

16. The main thrust of argument advanced by Mr.Rao, learned counsel for the appellant is that the trial court has completely lost sight of the cardinal principles of law, i.e., the burden to show that service of notice had not been duly made, rests upon the defendant and not upon the plaintiff. It is submitted that the records of the case would clearly reveal that notice issued by the court was received by the sole defendant. The report of the process server was duly accepted and thereafter, the court proceeded with the hearing of the suit and as the defendant did not appear in the court, passed the ex parte decree. After lapse of considerable length of time, a petition was filed under Order 9, Rule 13, C.P.C. by the defendant taking the stand that the notice was never served upon her. Thus, according to Mr.Rao, the burden was upon the defendant to prove that notice was not served. The trial court however, basing upon the statement made by the defendant to the effect that she had no house at Rayagada and resides permanently at Paralakhemundi and that the address given in the plaint was an intentional act, accepted the said statement and arrived at a conclusion that there was sufficient reason to believe that the notice was not duly served. Such a conclusion, it is stated, is not in accordance with law.

17. The submissions made are stoutly repudiated by learned counsel for the respondent. According to the learned counsel, the court below has examined the witness and found that the address of the defendant given in the plaint was not correct. The trial court also arrived at a conclusion that the plaintiff by practicing fraud and suppressing the notice, obtained the exparte

decree. Thus, the order passed under Order 9, Rule 13, C.P.C. suffers from no infirmity and requires no interference.

18. To appreciate the inter se submissions, this Court perused the evidence of P.W.1, the sole defendant. She has clearly stated that she has no house at Rayagada and is a permanent resident of Paralakhemundi. In view of the said statement, it was incumbent upon the plaintiff to establish the fact that respondent has a house at Rayagada and she resided in the address given in the plaint. It appears that the plaintiff totally failed to establish the fact that the address given in the plaint to which notice was issued was the place where the defendant permanently or usually resides. In absence of such proof, the trial court rightly arrived at a conclusion that there were sufficient reasons to throw a cloud of suspicion in the mind of the court with regard to service of summons on the defendant. That apart, there are also allegations of fraud, suppression of summons as well as impersonation.

19. Mr.S.S.Rao, learned counsel appearing for the appellant relied upon number of judgments being AIR 1985 Orissa 215 (**Sambhunath Das v. Sirish Ch. Mohapatra**), 95(2003) CLT, 324 (SC) (**Basant Singh and another v. Roman Catholic Mission**), 96(2003) CLT, 725 (**Bidyadhar Behera v. Smt.Kanakalata Nayak**), 1987(1) OLR, 88 (**Smt.Usha Jagani v. Shri Bharat Kumar Jagani**) and 1949 PC, 278 (**Kumbhan Lakshmanna and others v. Tangirala Venkataswarlu and others**). Though there is no quarrel with regard to the legal proposition enunciated in the said judgments, but the facts and circumstances in the case in hand are completely different. As has been stated earlier, the court entertained a doubt with regard to the address of defendant given in the plaint and the plaintiff totally failed to establish that address furnished by him is the place where the defendant used to reside at the relevant time or the same is her permanent address. In absence of any materials to reach the said conclusion and added to it there are allegations with regard to fraud and impersonation, the court below has rightly come to the conclusion that there are sufficient reasons for setting aside the ex parte decree against the defendant and she was prevented from appearing in the suit.

20. In the case of **Ramlal and others v. Rewa Coalfields Ltd.**, AIR 1962 SC 361, the Supreme court dealing with the words "**sufficient cause**" observed as follows:

> "**Sufficient Cause** is an expression which is used in large number of Statutes. In ordinary dictionary meaning is 'adequate' or 'enough', 'any justifiable reason' for which the party could not act. It

> means the party should not be negligent or want of bona fide cannot be imputed in view of the facts and circumstances of a case or party cannot be alleged 'not acting diligently' or 'remaining inactive'. Facts and circumstances of each case must afford sufficient ground to enable the court to exercise discretion for the reason that when court exercises discretion, it has to be exercised judiciously."(emphasis supplied)

21. In the case of **Banarasi Das v. Dalmia Dadri Cement Co. Ltd.,** AiR 1959 Pb, 232, the Supreme Court observed as follows:

> "the word 'sufficient' means: 'adequate', 'enough', as much as may be necessary to answer the purposes intended. It embraces no more than that which provides a platitude which when done suffice to accomplish the purpose intended in the light of the existing circumstances and when viewed from reasonable standard of practical and cautious-men."

22. In the case of **Arjun Singh v. Mohindra Kumar,** AIR 1964 SC 993, the Supreme Court explained the difference between the good cause and the sufficient cause and observed that every sufficient cause must be a good cause and must afford an explanation for non-appearance, nor conversely of a sufficient cause, which is not a good one.

23. A cumulative reading of the decisions leads to a conclusion that the expression "**sufficient cause**" should be given a liberal interpretation to ensure that substantial justice is done, so long as negligence, inaction or lack of bona fides are not imputed to the party concerned. The question as to whether sufficient cause has been furnished or not has to be decided on the facts of a particular case, no strait-jacket formula can be stipulated in that regard. The application should be allowed after being fully satisfied that there was sufficient cause for non-appearance. {See: **Srei International Finance Ltd. v. Fair Growth Financial Services Ltd.**, (2005) 13 SCC 95}.

24. In the case in hand, after going through the records as well as the evidence of P.W.1., this Court finds that the court below has not committed any error and the decision to set aside the ex parte order was just and proper. The Hon'ble Single Judge has also elaborately dealt with the said aspect of the case and has confirmed the conclusions arrived at by the court below. This Court finds no error apparent and therefore, not inclined to interfere with the aforesaid findings.

25. The further contention of Mr.Rao is that on the ground of fraud or suppression of summons, a petition under Order 9, Rule 13, C.P.C. is not maintainable and under the said contingencies, the person has to file a separate suit for setting aside the ex parte decree. Even otherwise, it is submitted by Mr.Rao that the decree having been executed, the petition under Order 9, Rule 13, C.P.C. is not maintainable inasmuch as there being no decree existing in the eye of law, the petition to set aside the same under Order 9, Rule 13, C.P.C., does not arise.

26. We failed to appreciate the argument advanced by Mr.Rao. If a suit can be filed for setting aside the ex parte decree on the ground of fraud, impersonation or suppression of summons and in the said suit an ex parte decree can be set aside, we find no reason as to why the ex parte decree cannot be set aside under Order 9, Rule 13, C.P.C.. The said provision gives a right to the defendant to apply to the court, who has passed the decree to set aside the ex parte decree and stipulates that if the court is satisfied that summons were not duly served or that the defendant was prevented by any sufficient cause from appearing when the suit was called on for hearing, make an order to set aside the decree. Thus, in a case where irregularity of the service of summons, fraud or impersonation etc. are alleged and the court after perusing the materials is satisfied that there was sufficient cause, it has the power to set aside the ex parte decree. It is well settled that once a decree is set aside all other consequential events/ orders/ action taken thereafter stands automatically annulled.

27. In view of the aforesaid clear proposition, the submission that in all cases to set aside an ex parte decree where fraud is alleged, a separate suit has to be filed, has no legs to stand.

28. The second contention that an application under Order 9, Rule 13, C.P.C., is not maintainable after the decree is executed, also cannot be accepted more so because once the decree is set aside by exercising the power under Order 9, Rule 13, C.P.C., the parties are relegated to the position where the defendant was set ex parte. In other words, if the decree is set aside, the suit has to be tried de novo from the same position where the defendant was set ex parte or ex parte decree was passed. The facts of the decision in **Uma Shanker (dead) and others v. Sarabjeet (dead) by L.Rs. and others**, AIR 1996 SC 1005 is distinctly separate and does not apply to the facts of the case in hand. The court below as well as the Hon'ble Single Judge has elaborately dealt with the matter and this Court finds no infirmity or illegality in the conclusions arrived at.

29. Admittedly, after the death of Venkayamma, the sole defendant, a petition was filed by Y.Veerabhadra Rao under Order 22, Rule 4, C.P.C. with a prayer to substitute him. It alleged that a 'Wilnama' has been executed by Venkayamma in favour of Y.Veerabhadra Rao. According to him, after the death of Venkayamma, he succeeds to the entire property and as such, under Order 22, Rule 4, C.P.C. his right to prosecute the lis after the death of the sole defendant exists as the cause of action survives as far as he is concerned.

30. The properties are situated in the district of Ganjam where a will need not be probated. Thus, by virtue of a 'Wilnama', it is open for a defendant to put-forth his claim over the property. In the case of **Custodian of Branches of BANCO National Ultramarino v.Nalini Bai Naique**, AIR 1989 SC 1589, the Supreme Court observed that even for the purpose of prosecuting a lis, the person claiming interest in the property can be added as a party. In the case in hand, as stated earlier, defendant no.1 put-forth his right over the disputed property by virtue of a 'Wilnama'. The genuineness of the 'Wilnama' has to be gone into in the suit itself, which is pending. Thus, this Court finds no infirmity or illegality in the order passed by the trial court allowing the petition filed by the respondent under Order 22, Rule 4 and permitting him to be substituted in place of the sole deceased defendant.

31. The proposition advanced by Mr.Rao that as and when a dispute arises with regard to the legal heir ship, there must be an enquiry under Order 22, Rule 5, C.P.C. is not applicable to the case in hand. Admittedly, Venkayamma is the sole owner of the properties. She had no progeny. On the basis of a 'Wilnama' said to have been executed by her, Y.Veerabhadra Rao put-forth his right over the properties. Whether the respondent has acquired right, title or interest in respect of the properties bequeathed in his favour is a question, which has to be determined in the suit itself, thus, not permitting the said respondent to prosecute the suit would be unjust and improper. This aspect has also been dealt with by the court below as well as the Hon'ble Single Judge and the conclusions arrived at requires no interference.

32. Admittedly, Venkayamma was the absolute owner of the properties in dispute. According to the appellant, Venkayamma had agreed to alienate the properties in his favour and had entered into an agreement. She had also received part payment. But then, as she adopted dilly dally tactics, the appellant had to file a suit for specific performance of contract and the suit was decreed ex parte.

33. Venkayamma admittedly filed a petition under Order 9, Rule 13, C.P.C. with a prayer to set aside the ex parte decree. Such a petition was filed during her life time. It was resisted on the ground of delay and also on merits. According to Venkayamma, the address furnished in the plaint was not her address and that there is no evidence to reveal that she was residing in the said address. She also alleged fraud and impersonation. The court below after discussing the evidence rightly arrived at a conclusion that there was sufficient cause for non-appearance, set aside the ex parte decree and directed de novo trial of Title Suit No.1 of 1994.

34. During pendency of the said trial, admittedly Venkayamma died and Y.Veerabhadra Rao who has filed another suit bearing Title Suit No.19 of 2001 for declaration of right, title and interest, filed a petition under Order 22, Rule 4, C.P.C. to get himself impleaded in Title Suit No.1 of 1994. The said petition has been allowed. That apart, this Court in W.P.(C) No.10256 of 2005 directed to try both the suits analogously one after the other. The revisional court as well as this Court after vivid discussion of the materials available had arrived at a conclusion that there are sufficient reasons to set aside the ex parte decree and to permit the defendant to contest the suit in place of the deceased defendant. The Hon'ble Single Judge has confirmed the orders passed in his judgment impugned. After going through the orders, we find no reason to interfere with the same as the said orders do not suffer from any infirmity and the conclusions arrived at by the Hon'ble Single Judge are just and proper. That apart, no error apparent could be brought to our notice. Consequently, all the writ appeals stand dismissed. Parties to bear their own costs.

Writ appeals dismissed.

2010 (II) ILR – CUT- 867

V.GOPALA GOWDA, CJ & INDRAJIT MAHANTY, J.

W.P.(C) NO.13623 OF 2010 (Decided on 15.09.2010)

BIBHUTI BHUSAN JENA …….. Petitioner.

.Vrs.

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

CINEMATOGRAPH ACT, 1952(ACT NO. 37OF 1912) – SEC.5-B.

The Film "Swayamsidhha" duly certified by the Central Board of Film Certification for Public exhibition – Writ petition filed to ban its screening as it glorifies the Maoists/Naxalities ideology and the youths are likely to be influenced – As per the direction of this Court the Commissioner of Police Bhubaneswar– Cuttack along with the counsel, appearing in the case witnessed the movie and submitted a report – Report shows at the end of the movie the lady naxal Commander surrendered and her appeal to forsake violence has lot of impact on the minds of the viewers – So it is not the elements of Maoists/Naxalities which should attract the censor's scissors but how the theme is handled by the producer - It is also to be remembered that the cinematograph is a powerful medium and its appeal is different- Held, the prayer made by the petitioner can not be allowed.

(Para 12 to 1)

Case law Relied on:-

(1970) 2 SCC 780 : (K.A.Abbas -V- Union of India).

Case laws Referred to:-

1.AIR 1988 SC 1245 : (Moorthy -V- State of Tamil Nadu)
2.AIR 1988 SC 775 : (Ramesh s/o Chotala Dalal -V- Union of India & Ors.)
3.1996 (37)DRJ 352 : (Amitabh Bachhan Corporation Ltd. -V-Om Pal Singh Hoon).
4.AIR 1952 SC 329 : (State of Bihar -V- Shailabala Devi Mahajan)
5.(1996)4 SCC 1 : (Bobby Art International & Ors.-V-Om Pal Singh Hoon & Ors.).
6.AIR 1947 Nagpur 1 : (B.C.Shukla -V-Provincial Government).

For Petitioner - M/s. M.R.Mohanty, P.K.Roy, S.Panigrahi, B.C.Ghadai & B.K.Routray.
For Opp.Parties 1&3 –Mr. S.D.Das, Sr.Advocate (Asst.Solicitor General)
For Opp.party No.2 - Govt. Advocate.
For Opp.Party No.4 - Mr. S.K.padhi, Sr.Advocate M/s. G.N.Mishra, S.C.Saho,Md.Habibur

Raheman & B.Priyadarshi.

I.MAHANTY, J. This writ application has been filed by one Bibhuti Bhusan Jena asserting that he is a social activist engaging in the socio-economic development of the State of Orissa through social and political movements through democratic process and is the President of the Bharatiya Janata Yuva Morcha (BJYM), the youth wing of Bharatiya Janata Party.

2. In this writ application, the petitioner has sought for appropriate direction for re-examination of the movie by a high level committee and for imposition of ban on the screening and exhibition of the Oriya Movie by the title "Swayamsidhha" which was proposed to be released on 12.8.2010 on the ground that the said movie glorifies the Maoists/Naxalities' ideology and the youths of the State who are likely to be influenced by such movies and thereby attracted to the ideology of violence as spread by the Maoists/Naxalities and thereby, worsen the law and order situation in the State.

3. Upon hearing the learned counsel for the parties, by way of an interim order dated 10.8.2010 (modified by order dated 11.8.2010), in view of the power conferred under Section 13 of the Cinematograph Act, 1952 (in short 'the Act, 1952'), the Commissioner of Police, Bhubaneswar-Cuttack as well as the Deputy Commissioner of Police, Cuttack were directed to witness the movie in its premier show which was scheduled to be screened on Thursday (12.8.2010) in presence of the learned counsel for the petitioner, Sri S.K.Padhi, learned Senior Counsel appearing for the Producer of the movie (O.P. No.4), the learned Government Advocate and Mr. G.Mishra, learned Additional Standing Counsel. Further direction was issued to the Commissioner of Police, Bhubaneswar-Cuttack to submit his report in consonance with the provision of Section 5(b) of the Act, 1952 in a sealed cover on 16.8.2010 for perusal of the Court.

4. Pursuant to the aforesaid direction, a report has been submitted by the Commissioner of Police, Bhubaneswar-Cuttack in a sealed cover along with covering of its letter dated 15.8.2010. The same was opened and perused and also permitted to the petitioner's counsel to peruse the said report and to make submissions thereto. The matter was then adjourned for two days on the request made by the learned counsel for the petitioner and was heard on 18.8.2010. Learned counsel representing the parties were heard and the petitioner filed an additional affidavit containing his further averments, the relevant paragraphs of which are quoted hereinbelow:

"That the film glorifies the Maoist ideology. The film also put several critical questions about the sanctity of the system, at large. In several occasion it has been uttered in the film that the prevailing system in the country has failed in all account, especially "60 years after Independence".

That in the end of the film the Maoist Commander, who is in a negative role believe in violence has addressed his troop and said that "Individual like SWAYAMSHIDDHA (name of the heroine) may come or left the organization but our ideology will remain for ever, when there will be injustice, exploitation or torture by the system, Maoism is there to react, LAL SALAM".

Unfortunately the above dialogue has picturised in such a manner, it seems to be the message of the entire film.

That the film tries to portrait the system as corrupt and every person working in the system as corrupt one. The song title "AME MATIRA MANISHA" provoke the listener to declare war against the system.

That in the film, unnecessarily the flag, Banner, Slogan of Maoist has been extensively displayed. The Director can symbolically use above thing but he has not done so. In every Maoist affected area the common people have a fear psychosis of the above article and through the film it appears as the flag & banners are advertised by the filmmaker.

That now-a-days youth of our country are very much fund of cricket, film and politics and their role model are the Film Star, Cricketer and Politicians. If any weak minded youth watch this movie (which is full of violence and has declares war against the system) having dissatisfaction on the system may inspire to become a Maoist."

5. In course of argument, Sri K.P.Mishra, learned counsel appearing for the petitioner relied on the following judgments:

(i) **Moorthy v. State of Tamil Nadu,** AIR 1988 SC 1245

(ii) **Ramesh s/o. Chotala Dalal v. Union of India and others**, AIR 1988 SC 775

(iii) **Amitabh Bachhan Corporation Ltd. v. Om Pal Singh Hoon**, 1996 (37) DRJ 352.

6. Learned counsel for the petitioner sought to highlight the fact that the film 'Swayamsidha' may attract the youth of the State and likely to be attracted the ideology of violence as spread by the Mioists/Nuxalities. Accordingly, in Paragraph-5 of the additional affidavit, it is asserted that if any weak minded youth watch this movie (which is full of violence and has

declared war against the system) having dissatisfaction on the system may be inspired to become a Maoist.

7. Sri S.K.Padhi, learned Senior Counsel appearing for the Producer (O.P. No.4) submitted that the film "Swayamshiddha" had been duly certified by the Central Board of Film Certification under Section 4 of the Cinematograph Act, 1952 and further since the film had been also issued with certificate under Section 5-A of the Act, 1952, he submitted that, the film in question has been duly examined and duly certified by the Board of Film Certification, there was no justification for entertaining the present writ petition.

7.1. Apart from the above, he submitted that the petitioner has an alternative efficacious remedy by way of an appeal under Section 5(C) of the Act, 1952, under which "any person", who may be aggrieved by any order of the Board either refusing to grant certificate or in the grant of certificate may, within thirty days of such certification or order, prefer an appeal to the Tribunal under the Cinematograph Act, 1952. The petitioner claiming to be a person aggrieved, not having resorted to the alternative efficacious mode of redressal of his grievance, ought not to be permitted to pursue the present writ petition.

7.2. Learned counsel further submitted that the object behind the writ petition was purely to try and gain political mileage and the petitioner himself claims to be a political activists and the President of the BJYM, the youth wing of Bharatiya Janata Party, therefore, such writ petition ought to be dismissed in limine.

7.3. He also places reliance on the report of the Commissioner of Police, Bhubaneswar-Cuttack pursuant to the interim directions of this Court which clearly supports the film 'Swayamshiddha' since it is noted therein that there has been no infraction of Section 5-B of the Act, 1952.

7.4. Mr. Padhi submitted that, the objections raised by the learned counsel for the petitioner in his additional affidavit are merely misinterpretation on the actual film and the message, the film has tried to portray. He asserted that the intent of the film was to bring back the persons who are attracted by the Maoists/Nuxalities' ideology into the main stream of the society. In this respect, reliance was placed by Mr. Padhi on the judgment of the Hon'ble Supreme Court in the case of **State of Bihar v. Shailabala Devi Mahajan**, reported in AIR 1952 S.C. 329 in which **Hon'ble Justice Mahajan** had stated that:

> *"A writing had to be considered as a whole and in a fair and free and liberal spirit, not dwelling too much upon isolated passages or upon*

a strong word here and there, and an endeavour had to be made to gather the general effect which the whole composition would have on the mind of the public."

7.5. Hon'ble Justice Mukherjea, concurring with **Hon'ble Justice Mahajan**, observed that:

"The writing had to be looked at as a whole without laying stress on isolated passages or particular expressions used here and there and that the Court had to take into consideration what effect the writing was likely to produce on the minds of the readers for whom the publication was intended. Account had also to be taken of the place, circumstances and occasion of the publication, as a clear appreciation of the background in which the words were used was of very great assistance in enabling the Court to view them in their proper perspective."

7.6. Relying on the aforesaid passage, Mr. Padhi, submitted that, the attempt made by the learned counsel for the petitioner to highlight isolated portions of the film and the court should take no cognizance on such assertion. The film deals with Maoism/Naxalism which while being an extremely a complex issue has been dealt with by the Director with the intent of, trying to bring back the disillusioned persons from Maoism/Naxalism and attract them back into the main stream of society and to strengthen their believe in the democratic process.

8. Learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Bobby Art International and others v. Om Pal Singh Hoon and others,** (1996) 4 SCC 1. In the said judgment, the Hon'ble Supreme Court while dealing with the film "Bandit Queen" which is the story of a village child exposed from an early age to the brutality and lust of man while she has been married off to a man old enough to be her father, she was beaten and raped and the village boys made advances against her which she repulsed but, the village panchayat found her guilty of enticement of a village boy because he belonged to a high caste and she was directed to leave the village. She was arrested by the police and abused in the police station. Those who stood bail for her did so to satisfy their lust. She was kidnapped and raped. During an act of brutality the rapist was shot dead and she found an ally in her rescuer. With his assistance she gave beatings to her husband, violently. Her rescuer was shot dead by one whose advances she had spurned. She was gang raped by the rescuer's assailant and his accomplices and they humiliated her in the sight of the village; a hundred men standing in a circle around the village well and watching her being stripped naked and walked around the circle and made to draw water,

but no one came to her rescue. To avenge herself upon her persecutors, she joined a dacoit's gang and killed twenty Thakurs of the village. Ultimately she surrendered and remained in jail for a number of years.

9. In the background of the aforesaid story in the film "Bandit Queen", the Hon'ble Supreme Court came to hold that, while the said film was not a pretty story, it was the serious and sad story of a village-born female child becoming a dreaded dacoit. An innocent who turns into a vicious criminal because of lust and brutality affected her psyche so. The film levels an accusing finger at members of society who had tormented the victim and driven her to become a dreaded dacoit filled with the desire to revenge. In this background, observation of the Hon'ble Supreme Court is as follows:

> *"**the court should recognize the message of a serious film and apply this test to the individual scenes thereof: do they advance the message? If they do they should be left alone**, with only the caution of an 'A' certificate. Adult Indian citizens as a whole may be relied upon to comprehend intelligently the message and react to it, not to the possible titillation of some particular scene."*

10. Applying the aforesaid principles of the present case, Mr. Padhi, learned counsel for O.P. No.4 (Producer) submitted that, the objections raised by the learned counsel for the petitioner to the specific isolated aspects of the film, ought not to be considered as objectionable since the same should be viewed in the background of the main message to the disillusioned youth who may have joined the Maoists/Naxalities, to came back into the mainstream of the society and to have faith in the democracy. It is asserted by Mr. Padhi that in the film in the name of 'Swayamshiddha', is the name of the main female protagonist, who due to various unjustified troubles faced in her life, had joined the Maoists/Naxalities. The film is the story of how "Swayamshiddha" leaves the company of the Maoists/Naxalities and decides to return to civil society. In this background, it is asserted that the film is ineffect, a reassertion of democratic values, but in course of dealing with such a subject, necessarily, issues relating the Maoism and Naxalism and the causes of such political thought both in the economic and social context had to be addressed. Therefore, no objection whatsoever ought to be entertained by this Court on the ground of isolated disjointed examples cited by the petitioner through the additional affidavit filed in the Court.

11. In the light of the aforesaid facts/submissions and contentions, it now becomes imperative to deal with the issues raised.

11.1. Section 5-B of the Act, 1952 states that the film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of the security of the State, friendly relations with foreign States, public order, decency or morality. Under the provisions of Sub-Section (2) of Section 5-B of the Act, it is stated that the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates in sanctioning films for public exhibition.

11.2. In terms of the authority vested in the Central Government by Section 5-B of the Act, as noted hereinabove, the Ministry of Information and Broadcasting No. S.O 9(E), dated the 7th January, 1978 stipulating the guidelines for certification of film for public exhibition. In the said guidelines, it is important to take note of Clause-3 which is quoted hereinbelow:

> *"(3) The Board of Film Certification shall also ensure that the film-*
> *(i) is judged in its entirety from the point of view of its overall impacts; and*
> *(ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience."*

12. We had, by way of an interim order dated 10.8.2010, directed the Commissioner of Police, Bhubaneswar-Cuttack to witness the movie on the date of its release and the report submitted by him is quoted hereunder:

> *"In pursuance of Order No.2 dated 10.8.10 and Order No.3 dated 11.08.10 of the Hon'ble High Court in W.P.(C) No.13623/10, the undersigned witnessed the Oriya Movie "Swayamsidhha" in its premiere show on 12.8.10 at Brindaban Talkies, Cuttack in presence of Sri A.N.Sinha, DCP/Cuttack, Sri K.P.Mishra, learned counsel for the petitioner, Sri S.K.Padhi, learned Senior Counsel for O.P. No.4, Sri R.K.Mohanty, learned Govt. Advocate and Sri Gautam Mishra, learned Addl. Standing Counsel.*
>
> *The Hon'ble Court vide their order dated 10.8.10 had directed the undersigned to submit a report in a sealed cover about the Oriya Movie "Swayamsidhha", after considering the provisions of Section 5(b) of Cinematograph Act, 1952. Section 5(b) of Cinematograph Act, 1952 provides that "A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it is against the interests of*

sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or involves defamation or contempt of court or is likely to incite the commission of any offence".

The Hon'ble Court vide their order also referred to the powers conferred on the undersigned u/s 13 of the Cinematograph Act, 1952 which provides that public exhibition of a film can be suspended if it is likely to cause a breach of the peace.

In this connection, the undersigned most humbly submits that out of the principles enumerated in Section 5(b) and Section 13 of Cinematograph Act, 1952, determining certification and exhibition of a film, the following criteria are relevant for the purpose of considering the contents of Oriya Movie "Swayamsidhha".

1. *Sovereignty and integrity of India*
2. *Security of the State*
3. *Public order and peace*
4. *Decency or morality*
5. *Incitement to commission of any offence*

My opinion about the relevance of the aforesaid five criteria, as far as contents of Oriya Movie "Swayamsidhha" is concerned, are as follows:

1. ***The film does not depict any scene or convey any message which threatens the sovereignty and integrity of India****.*

2. Even though naxalism is a big internal security challenge, ***the film has not depicted anything which undermines the security of the State****. In fact, the security forces have been shown to be launching frequent attacks and assaults on the naxalities, by using sophisticated weapons and even helicopters.*

3. The film does contain some scenes of violence which have a bearing on public order and peace. Attack on a police station, killing of police men and looting of weapons by the naxal cadre have been depicted in one scene. However, a solitary or a few scenes of attack cannot be said to have paralysed public order and peace, as equally powerful counter attacks by security forces, resulting in retreat and casualty of naxal cadre have also been depicted. ***The surrender of the lady naxal commander and her appeal to forsake violence, depicted at the end of the movie, convey shunning of***

bloodshed and triumph of love which would have a more lasting appeal on the minds of the viewers.

4. *The movie does not exhibit any nudity, indecency, abuse, obscenity and immorality.*

5. As far as incitement to commission of offence is concerned, the guiding principles for determining such a criteria would inter alia include glorification or extenuation of crime, depicting the modus operandi of criminals, enlisting admiration or sympathy for criminals, undermining the sanctity of the criminal justice system etc. ***Even though in some scenes, the naxal commander has glorified and depicted killings and violence, the film, as a whole, does not incite commission of any offence***.

Submitted for perusal please.

Sd/-
(B.K.Sharma)
Commissioner of Police,
Bhubaneswar-Cuttack."

13. We now deal with the judgment cited by the learned counsel for the petitioner in course of his argument.

13.1. Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of **Moorthy v. State of Tamil Nadu** (supra). This judgment rendered by Hon'ble Supreme Court was in a Criminal Appeal, arising out of an order of conviction passed by the trial court for a double murder. The appellant therein was convicted of murder of a woman, namely, Jayasambal and her son Vijay Anand and was sentenced to death. The appellant was also convicted under Section 302 I.P.C. for attempting to kill Vijay Anand's sister Kavitha Priyadarsini. His appeal before the High Court having been dismissed, the sentence of death was confirmed. A petition was filed against the said judgment. The Hon'ble Supreme Court while confirming the order of conviction against the accused-appellant come to the conclusion that the sentence of death passed against the appellant under Section 302 I.P.C. should be converted to imprisonment for life. While coming to the aforesaid conclusion in relation to the sentence, the Hon'ble Supreme Court also took into account that the convict's mental agitation (as an accentuating factor) and found the appellant to have been fuelled by a movie, showing murder after murder and also commented upon the vicious effect of films picturizing violence in detail on impressionable minds which made a young man who was vulnerably disturbed get upset and therefore, the society could not be completely absolved from sharing the responsibility of the resulting tragedy.

13.2. We are afraid that this judgment is of no assistance to the petitioner in the present case. The aforementioned criminal appeal and the observation made therein that the film can have vulnerably disturbed the Appellant, has been considered only for the purpose of converting the sentence form a sentence of death to life imprisonment. While such a fact may be an essential consideration, while considering the criminal appeal as an accentuating factor, the same standard cannot be applied to the present case. We are of the view that the aforesaid judgment does not assist the petitioner in any manner.

14. Learned counsel for the petitioner also placed reliance on the judgment of **Ramesh s/o. Chotala Dalal v. Union of India and others** (supra). In this case, the Hon'ble Supreme Court while dealing with a challenge against an order of the Bombay High Court, came to hold that, the finding of the learned Judges of Bombay High Court is that, the picture viewed in its entirety, was capable of creating a lasting impression of the message of peace and coexistence and that people are not likely to be obsessed, overwhelmed or carried away by the scenes of violence or fanaticism shown in the film. The Hon'ble Supreme Court found no reason to differ from this conclusion of Bombay High Court and, therefore, dismissed the same. In view of the aforesaid reasons, this judgment is also of no assistance to the petitioner in the present case.

15. The next judgment that has been cited by the petitioner was rendered by the Delhi High Court in the case of **Amitabh Bachhan Corporation Ltd. v. Om Pal Singh Hoon** (supra). This very judgment of the Delhi High Court dated 1st May, 1996 came to be "reversed" by the Hon'ble Supreme Court of India in the case of **Bobby Art International and others v. Om Pal Singh Hoon and others** (supra) and, therefore, no reliance could be placed on the same.

16. It has been well settled law that while judging the likely effect of the exhibition of a film or of reading a book, Justice Vivian Bose in the case of **B.C. Shukla Vs. Provincial Government** (AIR 1947 Nagpur 1), that the standard must be of reasonable, strong-minded, firm and courageous men or as has been said in English Law, "the man on the top of a Clapham omnibus", and not those of weak and vacillating minds nor of those who scent danger in every hostile point of view.

17. At this juncture, it became imperative to refer to the judgment of the Hon'ble Supreme Court in the matters at issue delivered by the Constitution of India in the case of **K.A.Abbas v. Union of India,** (1970) 2 SCC 780. In the said judgment, the Hon'ble Supreme Court laid down the following standards for evaluation of art and literature such impugned films.

Hidayatullah, Hon'ble the then Chief Justice of India speaking for the Court in the aforesaid case at Paragraphs 49 and 50 thereof, is stated as follows:

> *"49. We may now illustrate our meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value overweighing their offending character. The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and forever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censor's scissors. Thus audiences in India can be expected to view with equanimity the story of Oedipus son of Laius who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly, scenes*

depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Elwyn's Phulmat of the Hills or the same episode in Henryson's Testament of Cressaid (from where Verrier Elwyn borrowed the idea) would never see the light of day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the Sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgothas of skulls, must we leave them out of the story because people must be made to view a historical theme without true history ? Rape in all its nakedness may be objectionable but Voltair's Candide would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen.

50. Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer. It must, however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etchings of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement, would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the Kamasutra but a documentary from them as a practical sexual guide would be abhorrent."

18. In the present circumstances of the case, it has also became importance for us to take note of the "standards" laid down by the Hon'ble Supreme Court in the case of **Bobby Art International** (supra) and in particular, Paragraph-31 thereof is quoted hereinbelow:

"A film that illustrates the consequences of a social evil necessarily must show that social evil. The guidelines must be interpreted in that light. No film that extols the social evil or encourages it is permissible, but a film that carries the message that the social evil is evil cannot be made impermissible on the ground that it depicts the social evil. At the same time, the depiction must be just sufficient for the purpose of the film. The drawing of the line is best left to the sensibilities of the expert Tribunal. The Tribunal is a multi-member body. It is comprised of persons who gauge public reactions to films and, except in cases of stark breach of guidelines, should be permitted to go about its task."

19. Considering the facts as noted hereinabove and various case laws discussed hereinabove, we are of the considered view that the prayer made by the petitioner cannot be allowed. In view of the principles laid down by

the Hon'ble Supreme Court in the aforesaid case and the report filed by the Commissioner of Police, Bhubaneswar-Cuttack as noted hereinabove, the writ petition is dismissed but in the circumstances no costs.

Writ petition dismissed.

2010 (II) ILR – CUT- 880

B.P.DAS, J & S.PANDA, J.

W.P.(C) NO.11478 OF 2010 (Decided on28.9.2010)

BHARATI MOHAPATRA ……….. Petitioner.

.Vrs.

COLLECTOR & DISTRICT MAGISTRATE, BALASORE & ORS. ……….. Opp.Parties.

CONSTITUTION OF INDIA, 1950 – ART.226.

Tender – Transportation of food stuffs under mid-day-meal programme – Rates quoted by O.P.3 is more than the petitioner – Appointment of O.P.3 challenged.

Non-consideration of the workability of the rates quoted by the tenderers – Transportation of food stuffs from Blocks to the school points – Uniform policy should be evolved for fixation of rates through out the State – Held, this Court directed the R.D.C. (C.D) Cuttack to constitute a committee to lay down uniform policy for fixation of workable rate for transportation of food stuffs and the same shall be incorporated in the tender notice and the Committee headed by the R.D.C. (C.D) Cuttack is to examine the case of the petitioner as to wheather the rate offered by the petitioner is workable.

(Para 14 & 15)

For Petitioner - M/s. Dipak Kumar Dey, C.K.Dey, A.K.Das.
For Opp.Parties – Addl. Govt. Advocate (for O.Ps. 1 & 2)
M/s.Bikram Pratap Das, S.R.Pati & S.K.Mishra. (for O.P.3)

B. P. DAS J. The petitioner has come up before this Court challenging the legality of the decision of O.P.1-Collector and District Magistrate, Balasore in appointing opposite party no.3 as Transporting Agent under Mid-Day-Meal Programme in respect of Soro Block under Balasore District for the financial year 2010-11 pursuant to Tender Call Notice under Annexure-1, communicated by O.P.2-District Social Welfare Officer, Balasore in his letter No.1541 (6)/SW dated 22.06.2010 vide Annexure-3.

2. According to the petitioner, pursuant to the Tender Call Notice dated 28.5.2010 issued by the Collector for engagement of transporting agent in Block Level for transportation of food stuffs under the Mid-Day-Meal Programme for different Blocks in Balasore District for the year 2010-11, vide Annexure-1, the petitioner submitted her tender with all required

documents for Soro Block quoting the rate of transportation a Rs.10.00 per quintal.

3. It is an admitted fact that the rate quoted by the petitioner was the lowest rate and the rate quoted by opposite party no.3, which was Rs.13.30 more than the rate quoted by the petitioner, was accepted by opposite parties 1 and 2.

4. In response to the allegations made in this writ petition by the petitioner and the ground on which the challenge has been made to the decision taken by the Collector in awarding the transporting agency in favour of opposite party no.3, a preliminary counter affidavit has been filed on behalf of opposite party no.1.

5. In Paragraph-4 of the said Counter Affidavit, opposite party no.1 referring to the order passed in W.P.(C) No. 9286 of 2010 has stated thus:-

> "It is respectfully submitted that this Hon'ble Court while deciding W.P.(C) No. 9286/2010 vide order dated 22.5.2010 have directed that the Collector while examining the tenders shall find out the workability of the rates quoted by the tenders and preference will be given who have quoted workable rate in their tender form. Pursuant to the order passed by this Hon'ble Court a committee was constituted under the Chairmanship of Additional District Magistrate, Balasore and the District Social Welfare Officer, Balasore, Civil Supplies Officer, Balasore, Chief District Medical Officer, Balasore were the members of the Committee."

6. This Court, while deciding W.P.(C) No. 9286 of 2010, on 22.5.2010 has passed the following order:-

> "Heard Shri A.A. Das, learned counsel for the petitioner and the learned Government Advocate for the State.
>
> Prayer in the writ petition is for a direction to the Collector-opposite party no.2 to take a decision on the tenders submitted pursuant to the Tender Call Notice Annexure-1. This Court in W.P.(C) No. 8154 of 2010 has already directed the Collector and District Magistrate, Balasore to take a decision as expeditiously as possible. Therefore, there is no need in giving similar direction in this case. It goes without saying that the Collector while examining the tenders shall find out the workability of the rates quoted by the tenders. This order be carried out if no decision has been taken in the meantime."

7. The petitioner has also filed a rejoinder to the counter affidavit filed by opposite party no.1. It is stated in the rejoinder affidavit and as contended by learned counsel for the petitioner, the order passed by this Court on 22.5.2010 has not been complied with in regard to the direction for finding out a workable rate inasmuch as the rate which has been accepted, i.e. Rs.13.30, is not the workable rate and the said rate is higher than the prevailing rate. On the garb of taking the decision in the light of the direction issued by this Court, opposite parties 1 and 2 have shown favour to certain transporting agents by accepting their tenders at a rate, which is much higher than the workable rate, and have given them undue benefit.

8. Learned counsel for the petitioner draws our attention to the fact that the Mid Day Meal Programme is continuing throughout the State, but tender notices floated for engagement of transporting agents in different districts are different and in this regard, the petitioner has cited the tender notice issued in respect of Gajapati district.

9. As to the stand taken by the State that if the lowest rate offered by the petitioner is approved/ accepted, it will lead to corruption and pilferage of food stuffs that are to be transported by the petitioner, learned counsel for the petitioner submits that the said stand is not tenable as the petitioner has given high security to the tune of Rs.5.00 lakhs as required under the tender notice and the opposite parties can make good the loss if any made by the petitioner by forfeiting the amount deposited by the petitioner.

10. In the order of this Court dated 22.5.2010, as quoted above, it has been clearly directed to find out the workability of the rates quoted by the tenderers, but in this case, we find that the opposite parties have come up absolutely with a new rate, which was not quoted by anyone.

11. 'Workable' as per 'Stroud's Dictionary' means fairly workable and not at a dead loss or high profit out of it; that means the work in most proper and effective manner.

12. Learned counsel for the petitioner submits that this problem has not only been cropped up in Balasore district, but similar disputes have also been raised in other districts of the State as no uniformity has been maintained in the rate of transportation of food stuffs from Blocks to the school points.

13. In our considered opinion, a uniform policy should be evolved for fixation of rates of transportation charges by the opposite parties so that a uniform rate shall prevail throughout the State.

14. Accordingly we direct the Revenue Divisional Commissioner (Central Division), Cuttack to constitute a committee consisting of persons/officials having expertise and knowledge in the field to lay down uniform policy for fixation of workable rate for transportation of the food stuffs under the Mid-Day-Meal Programme, which shall be adhered to by all the Collectors in the State and shall be incorporated in the tender notice floated for the purpose.

15. The Committee headed by the Revenue Divisional Commissioner (Central Division) is given liberty to examine the case of the petitioner and whether the rate offered by the petitioner is workable.

16. The Report of the Committee shall be binding on all the Collectors in the State. The Committee shall take the decision by end of November, 2010.

The writ petition is accordingly disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT- 884

B.P.DAS, J & B.P.RAY, J.

W.P.(C) NO.10004 OF 2004 (Decided on 17.09.2010)

K.RAJENDRAMANY ………. Petitioner.

.Vrs.

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

CONSTITUTION OF INDIA, 1950 – ART.311 (2).

Disciplinary proceeding – Punishment imposed is reduction in rank – Out of six charges petitioner was found guilty in respect of charge Nos.1,2,5 & 6 – Disciplinary Authority while passing the impugned order of punishment has come to the conclusion that charge No.1 & 2 taken in isolation were not grave and it appears comparatively serious when read with charge Nos.5 &6.

Disciplinary Authority imposed punishment of reduction in rank considering the finding in charge Nos.5 & 6 read with the findings in respect of charge Nos. 1 & 2 - This Court held that finding recorded in respect of charge Nos.5 & 6 are unsustainable – Held Order imposing punishment is liable to be quashed.

(Para 6 & 7)

For Petitioner - Mr. U.K.Nanda.
For Opp.Parties – Senior Standing Counsel
(Central Government)(for O.P.No.1)
Mr. B.Das Mohapatra (for O.P.No.2)

B.P. RAY, J. This writ application has been filed under Articles 226 & 227 of the Constitution of India assailing the order dated 9.7.2004 passed by the Commerce Secretary & Appellate Authority, Government of India, Ministry of Commerce & Industr6y confirming the order of punishment dated 27.8.2003 passed by the Disciplinary Authority in a disciplinary proceeding initiated the petitioner.

2. The case of the petitioner in brief is that while petitioner was working as Assistant Director in Marine Products Export Development Authority, a disciplinary proceeding was initiated against the petitioner by issuing a memorandum of charges dated 24.9.1999. Though the memorandum of charges contained six charges, the petitioner was found guilty in respect of four charges. On the basis of such finding recorded by the Enquiry Officer the petitioner was found guilty in respect of charge Nos. 1,2,5 and 6. The Disciplinary Authority-opp.party No.2 by the impugned order under Annexure-1 dated 27.8.2003 imposed punishment of reduction in rank. Thus, the petitioner was imposed punishment of reduction in rank from the

grade of Assistant Director to the grade of Junior Technical Officer (Export Promotion) until he was found fit after a period of three years from the date on which the said order takes effect. However, it is directed that the impugned punishment of reduction in rank will come into force with effect from 1.10.2003 and this was so done so as to enable the petitioner to file an appeal before the appellate authority. Challenging the punishment so imposed by the Disciplinary Authority, the petitioner has preferred an appeal which came to be rejected by order dated 9.7.2004 under Annexure-2. Since the order of punishment dated 27.8.2003 was kept in abeyance, the said order was given effect to after disposal of the appeal. These orders passed by the Disciplinary Authority as well as the appellate authority are impugned in this writ petition.

3. The Disciplinary Authority has filed a counter affidavit justifying the punishment imposed. It is stated in the counter affidavit that out of six charges, charge Nos. 3 and 4 could not be proved and for the residual charges, namely, charge nos. 1,2,5 and 6, the Disciplinary Authority had imposed the punishment of reduction in rank. It is further stated in the counter affidavit that the punishment so imposed was commensurate with keeping in view the nature and the extent of misconduct proved in course of the enquiry. It is also stated in the counter affidavit that the enquiry having been conducted in consonance with the principle of natural justice and there being no procedural lapses or violation, the impugned order of punishment should not be interfered with.

4. The petitioner has filed an affidavit in reply to the counter affidavit filed by the Disciplinary Authority. In the said reply affidavit, the petitioner has brought on record the report of enquiry officer apart from some order documents. We have heard learned counsel for the petitioner, learned counsel appearing for opposite parties. We have also perused the pleading of the parties and the materials available on record. It appears from the record that the order of punishment of reduction in rank was given effect to on 20.8.2004 and after completion of three years, i.e. in the month of March, 2008, the petitioner was restored to the former post.

5. The following charges were framed against the petitioner :-

> "1. Shri K.Rajendramany, while working as Extension Officer, SRO, Tuticorin, was permitted in June 1992 to leave the country to visit Singapore "to see his ailing cousin brother". But after spending three days in Singapore he visited Bangkok for 2 days and Hongkong for 3 days without permission from the Authority or without even informing the Authority.

(2) Shri Rajendramany, Asst. Director, Tuticorin visited Hongkong and Singapore in February 1994 and Singapore again in June 1996 without seeking and obtaining the permission of the Competent Authority (Chairman,MPEDA) although he was well aware that such permission was necessary.

(3) For the visit the Hongkong and Singapore in February 1994, he had applied for Casual Leave for 5 days from 3.2.1994. This was also granted. But he left the country on 1.2.1994 itself. He was thus unauthorisedly absent on the 1st and 2nd February 1994.

(4) For the purchase of his car, he took a personal loan (Rs.50,000/-) from one Shri C. P Azaria Samuel Raj, Mg. Director, Packer Seafoods(P) ltd., with whom he had official dealings. For this, he did not obtain the approval of the competent Authority, This conduct is also unbecoming of an officer of the Authority.

5. For the visit to Hongkong in February 1994, the Indian Rupees equivalent of US $ 1000 and the air f are were advanced by Shri Samuel Raj, Managing Director of M/s. Packer Seafoord (P) ltd. It has also been admitted that these amounts were repaid later. Shri Rajendramany has thus had financial transaction with a person with whom he had official dealings, without obtaining necessary approval of the Competent Authority.

(6) That he proceeded to Hongkong along with the Seafood Processor with whom he had official dealings. He took the same fight. Both of them drew Travellers Cheque USD 1000/- each from the same Bank on the same day. This conduct is unbecoming of an officer of the Authority."

On conclusion of the enquiry, the Enquiry Officer held that charge nos. 3 and 4 were not proved. Thus, the Enquiry Officer while exonerating the petitioner from charge Nos. 3 and 4 has held the petitioner guilty in respect of charge Nos. 1,2,5 and 6. A copy of the enquiry report was supplied to the petitioner where after the impugned order of punishment under Annexure-1 was passed imposing punishment of reduction in rank. The Disciplinary Authority while passing the impugned order of punishment has come to the conclusion that charge nos.1 and 2 taken in isolation were not grave charges, but it appears comparatively serious when read with charge Nos. 5 and 6.

6. The Disciplinary Authority appears to have passed into service the finding with regard to charge nos. 5 & 6. As such, it has become necessary to have a cursory look to the finding recorded by the Enquiry Officer in his report under Annexure-4. The substratum of the allegations in charge no.5 is that the petitioner had financial transaction with a person with whom there

were official dealings and such financial transaction was without obtaining necessary of the competent authority. The Enquiry Officer in his report has held that although the petitioner and P.W.3 went to Hung Kong together in February, 1994 and P.W.3 advanced Air Ticket as well as foreign exchange for the petitioner has not been proved. The Enquiry Officer has also held that the Department has failed to prove that the petitioner was demanding money from P.W.3 The Enquiry Officer in his report has also further held that P.W.3 paid the foreign exchange for the petitioner and further the petitioner paid for the ticket of P.W.3 was not convincing. The Enquiry Officer having held thus, the finding that the petitioner did not obtain sanction of the competent authority for about transaction is contrary to the materials on record. Consequently, the finding reached in the enquiry report that charge no 5 was proved is unsustainable in view of the finding arrived at by the Enquiry Officer which we have noticed. Reverting to the allegation in charge no6, the Enquiry Officer has held that allegation in charge no.6 is linked with allegation in charge no.5. We have carefully perused the finding of the Enquiry Officer who has come to an abrupt conclusion that charge no.6 was proved which is linked to charge no.5. The same analogy also applies to charge no.6 and consequently charge no.6 was held to be proved. We have already held that the finding of the Enquiry Officer with regard to the charge no.5 is perverse and contrary to the materials on record. On the own showing of the department that charge nos.5 & 6 are interlinked and once charge no.5 is proved, the allegation in charge no.6 is automatically proved. Since we have already held that finding in charge no.5 is unsustainable, the same being interlinked to charge no.6, we are also of the considered opinion that the finding in regard to charge no.6 is also equally unsustainable since both the charges are interlinked, inasmuch as, in the event one charge fails, the other charge automatically fails. This conclusion has been arrived at by us on perusal of the findings recorded by the Enquiry Officer himself and we have not pressed into service any other material to arrive at such conclusion. It may be indicated here that we have not re-appreciated or re-evaluated the evidence on record, since we are conscious of the limitation of a writ court while exercising its power under Articles 226 & 227 of the Constitution of India. Law is well settled that High Court while exercising its power under Articles 226 & 227 of the Constitution of India can not act like an appellate authority so as to appreciate or re-evaluate the materials on record. However, a High Court can examine the propriety of the order passed by the Domestic Tribunal, if the findings are perverse and based upon no material on record and the finding has been reached in utter violation of principles of nature justice.

7. On an analysis of the enquiry report, we have come to the conclusion that the finding reached in the enquiry report holding the petitioner guilty in

respect of charge nos.5 & 6 are perverse and unsustainable. The residual question remains as to whether on the basis of findings reached in respect of charge nos.1 & 2, the impugned punishment of reduction in rank could be imposed. It is not necessary to examine the correctness of the findings with regard to charge nows.1 & 2, in view of the fact that the Disciplinary Authority himself has recorded the finding in the order under Annexure-1 that the allegations in charge nos.1 & 2 were not serious, Obviously, therefore, the Disciplinary Authority did not consider the findings in respect of charge nos.1 & 2 to be so grave warranting imposition of punishment of reduction in rank. The Disciplinary Authority appears to be tempted to impose punishment of reduction in rank considering the finding in charge nos.5 & 6 read with the findings in respect of charge nos.1 & 2. Since we have held that the finding recorded in respect of charge nos.5 & 6 are unsustainable, in our considered view, the order imposing punishment of reduction in rank is also unsustainable and is liable to quashed, which we accordingly direct.

8. For the foregoing reasons, the impugned order of punishment imposing punishment of reduction in rank under Annexure-1 is quashed and the petitioner is entitled to all consequential benefits.

The writ petition is accordingly allowed,

Writ petition allowed.

2010 (II) ILR – CUT- 889

L.MOHAPATRA, J & C.R.DASH, J.

JCRLA NO.139 OF 2000 (Decided on 18.08.2010)

HANTALA ENDAYA ………. Appellant.

.Vrs.

STATE OF ORISSA ……….Respondent.

PENAL CODE, 1860 (ACT NO. 45 OF 1860) – SEC.302, 323.

Conviction of appellant U/s. 302 I.P.C. – Conviction challenged – Consistent evidence of the eye witnesses that the appellant dealt two fist blows, one on the chest and the other on the belly of the deceased – Doctor who conducted post mortem did not find any internal or external injury – In view of the evidence of the doctor it can not be said that the death of the deceased was the proximate result of the fist blows given by the appellant.

Held, conviction of the appellant U/s.302 I.P.C. is set aside and the appellant can be convicted for commission of offence U/s.323 I.P.C.

(Para 5 & 6)

For Appellant- M/s. P.K.Bhuyan, B.K.Mohanty & Smt. R.Mohanty.
For Respondent- Addl. Govt. Advocate.

This appeal is directed against the judgment and order of the learned Sessions Judge, Koraput at Jeypore dated 11.1.2000 in Sessions Case No.145 of 1996 convicting the appellant for commission of offence under Section 302 of the Indian Penal Code (in short ' IPC') for causing death of one Parapi Parbati on 7.2.1996 at about 4 P.M. at village Ekagoluru.

2. The case of the prosecution is that the deceased had given birth to a child eleven days prior to the incident. On the date of occurrence, the deceased and her mother along with some others namely, P.Ws.2, 3 and 4 were sitting and the mother of the deceased was nourishing the child. At that time the appellant came in drunken state and started abusing the father of the deceased. It is also alleged that the appellant assaulted the father of the deceased, threw a stone to the house of the deceased and thereafter dealt two fist blows to the deceased, one on the chest and the other on the belly and as a result of such assault, the deceased died at the spot. P.W.1 before whom the incident was narrated lodged the F.I.R. on the basis of which, investigation was taken up and charge sheet was filed for commission of offence under Section 302 IPC.

3. The prosecution in order to bring home the charge, examined 9 witnesses whereas the defence examined none. Out of the 9 witnesses examined on behalf of the prosecution, P.W.1 is the informant, P.Ws.2, 3 and 4 are eye-witnesses to the occurrence, P.W.5 is the Constable, who had taken the dead body for postmortem examination, P.W.6 is a witness to the inquest, P.Ws.7 and 9 are Investigating Officers and P.W.8 is the doctor, who conducted postmortem examination.

The defence plea is complete denial and false implication.

The trial court on the basis of the evidence of the eye-witnesses coupled with the evidence of P.W.8, who conducted postmortem examination found the appellant guilty of the charge and convicted him thereunder.

4. The learned counsel for the appellant assails the impugned judgment on the ground that even if the evidence of P.Ws.3,4 and 5 is accepted, considering the fact that P.W.8 while conducting the postmortem examination did not find any internal or external injury and could not also say about the cause of death, the offence can only be under Section 323 IPC and the appellant could not have been convicted for commission of offence under Section 302 IPC. The learned counsel for the State with reference to the evidence of P.Ws.3,4,5 and 8 supported the impugned judgment.

5. Undisputedly P.W.1 is the informant, but he is not an eye-witness to the occurrence. Much reliance is placed on the evidence of P.Ws. 2, 3 and 4, who are eye-witnesses to the occurrence. All the three witnesses are consistent in their evidence to the effect that on the date of occurrence when the deceased was sitting with her child, mother and P.Ws.2, 3 and 4, the appellant came, abused and assaulted the father of the deceased and thereafter dealt two fist blows to the deceased, one on the chest and the other on the belly. Immediately thereafter, the deceased died. Though these three witnesses have stated about such assault on the deceased, P.W.8, the doctor, who conducted postmortem examination did not find any internal or external injury. The doctor also could not say the exact cause of death. On the other hand, in cross-examination the doctor has specifically stated that in case of natural death, the findings would have been same as what he had given in Ext.4. Ext.4 is the postmortem report. Considering the allegations of the prosecution that the appellant had dealt fist blows, in view of evidence of the doctor, P.W.8, it cannot be said that the death of the deceased was the proximate result of the fist blows given by the appellant.

Under these circumstances, the learned counsel for the appellant is justified in making a submission that the appellant can only be convicted for commission of offence under Section 323 IPC.

6. In view of the discussions made above, we allow the appeal in part, set aside the impugned judgment and order passed by the learned Sessions Judge, Koraput at Jeypore in Sessions Case No.145 of 1996 under Section 302 IPC and find the appellant guilty for commission of offence under section 323 IPC and accordingly convict him thereunder. The appellant is sentenced to imprisonment for a period of one year. It is stated at the Bar that the appellant is in custody since the date of his arrest and in the meantime more than eleven years have passed. In view of the above, the appellant Hantala Endaya be set at liberty forthwith, unless his detention is required in any other case.

Appeal allowed in part.

2010 (II) ILR – CUT- 892

L.MOHAPATRA, J & C.R.DASH, J.

W.P.(C) NOS.3204 & 5173 OF 2002 (Decided on 5.8.2010)

PARADIP PORT & DOCK MAZDOOR UNION & ORS. ……….. Petitioners.

.Vrs.

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

MAJOR PORT TRUSTS ACT, 1963 (ACT NO. 38 OF 1963) – SEC.3.

Constitution of Board of Trustees – Two of the trustees will be workers representatives – Workers paid from out of the funds of the Paradip Port Trust are entitled to Cast Vote in the election process – Petitioners are 1994 scheme workers and they are not paid from out of the paradip Port Trust funds – Held, petitioners can not claim participation in the election process to the Board of Trustees of Paradip Port Trust. (Para 5)

Case law Referred to:-

AIR 1964 SC. 737 : (M/s. J.K.Cotton Spinning & Weaving Mills Col. Ltd.-V-The Labour Appellate Tribunal of India).

For Petitioner - M/s. Jagannath Patnaik, Banjit Mohanty, D.Mohanta.
For Opp.Parties – Mr.Sailesh Chandra Samantaray (Central Govt. Advocate)
M/s.S.K.padhi, Miss. D.Mohapatra, S.K.Mohapatra, B.K.Sahoo, D.Das, Gautam Mishra.

L.MOHAPATRA, J. W.P.(C) No.3204 of 2002 has been filed by Paradip Port & Duck Mazdoor Union and W.P.(C) No.5173 of 2002 has been filed by 74 petitioners who are working as Clearing, Forwarding and Handling Workers in the Paradip Port Trust. Prayer in both the writ petitions is to allow the workers governed under the Paradip Port Clearing, Forwarding and Handling Workers (Regulation and Employment) Scheme, 1994 in the Election Process to the Board of Trustees of Paradip Port Trust. Therefore, both the writ petitions were taken up together for hearing and disposal.

2. The case of the petitioners is that representation of the workers representative to the Board of Trustees and Committees of Paradip Port Trust is being made by Voting right of the workers represented by their respective Unions. There are four categories of workers, namely, Departmental Workers, 1979 Scheme Workers, 1994 Scheme Workers and

Female Cleaning Gang Workers. The writ petitions relate to the workers governed under 1994 Scheme. The 1994 Scheme was formulated on the basis of reports submitted by a Committee headed by Justice H.R. Khanna in pursuance of the judgment of the Hon'ble Supreme Court, reported in AIR 1990 SC 1125. The Committee constituted under the orders of the Hon'ble Supreme Court headed by Justice H.R. Khanna submitted the report in July, 1993 and the relevant recommendations for the purpose of the case contained in the report of the Committee are as follows:

> "15.23 As a result of the above, we direct that even though the 1979 Scheme would not apply to the workers who would be enlisted for C & F work, the same Scheme can operate as some kind of a model Scheme for working the Scheme for C & F work. The financial liability of working the proposed Scheme shall however be borne by the C & F agents and not by the Port Trust. For the smooth and effective working of the Scheme it is essential that it should be operated by a Management Committee consisting of three representatives of Employers and three representatives of workers. The Committee should be headed by a whole time Chairman who shall also have the right to vote. In addition to this, the Committee shall have also a whole time Secretary. Both the Chairman and the Secretary shall be officers of Paradeep Port Trust and shall draw their pay and allowance from Paradeep Port Trust. All decisions in regard to the administration of proposed Scheme shall be taken by the Management Committee. The Management Committee should frame scheme on the lines of Paradeep Port Cargo Handling Workers (Regulation and Employment) Scheme of 1979 looking to the requirement of C & F work. The Committee will collect wages levy or administrative charges and welfare charges as determined in the Management Committee from time to time for the supervisors and Mazdoors supplied to the C & F agents. The Scheme should be a self-financing scheme and the entire financial liabilities on account of these workers shall have to be borne by the C, F & H agents. Suitable provisions for listing of C, F & H workers, appropriate qualifications, medical examination, age restriction and selection for Mazdoors and Supervisors will be incorporated in the Scheme. Such of the Mazdoors and Supervisors, who do not fulfill the qualifications or conditions prescribed for listing will be retrenched by the present pool management after following necessary procedure and payment of terminal benefits as contemplated by law. The proposed Scheme should provide for obligations of workers disciplinary procedure,

appeal provision, retirement, age etc. has been done in the Scheme of 1979."

In terms of the recommendation of the said Committee, the Paradip Port Trust framed a Scheme known as Paradip Port Clearing, Forwarding and Handling Workers (Regulation and Employment) Scheme, 1994.

It is the further case of the petitioners that the Board of Trustees in Paradip Port is being constituted in terms of the Major Port Trust Act, 1963 and as provided therein the Board must include two elected representatives by the workers to protect the interest of the workers. For the purpose of election of the representatives of the workers, voters are to be identified and accordingly a procedure has to be adopted for identifying the voters. The grievance of the petitioners is that though workers covered under the 1979 Scheme and Female Cleaning Gang Workers are entitled to exercise their franchise in election of the workers representative to the Trust Board of Paradip Port Trust, about 1700 workers covered under the 1994 Scheme are debarred from exercising voting rights.

It is also the case of the petitioners that to regulate and determine the strength of respective Unions in different Ports and their participation in respective Unions, the Ministry in its letter dated 26.3.1998 informed all the Major Port Trusts and Dock Labour Boards for introduction of the Scheme known as "Check-Off-System". The Scheme provides for appointment of Labour Trustees in the Board of Major Port Trusts, appointment of members representing labour on the dock Labour Board, appointment of Labour representatives in Dock Workers Advisory Committee and appointment of Labour representatives in the bipartite wage Negotiation Committee. The workers who are eligible to participate in the process are all Class-III and Class-IV employees and workers of Major Port Trust and Dock Labour Boards who are paid out of the funds of Port Trust/Dock Labour Boards and also the workers mentioned in the subsidiary list maintained by the Paradip Port and the lists of casual employees maintained by Kandla Port. After introduction of the aforesaid "Check-off System", the workers working under 1994 Scheme were not allowed to avail such benefits and representations were made to different authorities including the Ministry. As per the check-off system, the respective employees are to intimate the Port Trusts about their membership in their respective Unions and are also required to give authorization to that effect on the basis of which the strength of the respective Unions shall be ascertained and they would be asked to furnish the names of two persons to whom they propose to be nominated as workers representatives in the Board of Trustees. When this procedure was

being adopted for the purpose of workers representatives to the Board of Trustees, the Ministry introduced the system of 'Secret Ballot' for nomination of the workers representatives. In view of the above, the Paradip Port Trust sought for clarification from the Ministry as to whether the "Check-off System" is to continue any further in view of the introduction of the "Secret Ballot". Even after introduction of the Secret Ballot system, representations were being made by the Unions to allow 1994 Scheme workers to participate in the election process on the ground that the workers governed under the 1979 Scheme and 1994 Scheme are treated equally in respect of all aspects except participation in the election process. However, their repeated demands having not been considered, these two writ petitions have been filed for a direction to the opposite parties to allow the workers governed under the 1994 Scheme to participate in the election process in the matter of representations of two workers representatives in the Board of Trustees of Paradip Port Trust.

3. The Paradip Port Trust has filed a counter affidavit. It is stated in the said counter affidavit that the workers covered under the 1994 Scheme are the workers under the Management Committee and not the workers of Paradip Port Trust. There is no master and servant relationship between such workers and the Paradip Port Trust and the workers covered under the 1994 Scheme do not receive any remuneration from the Paradip Port Trust. It is also stated in the counter affidavit that the eligibility of workers who are to be included in the "Check-off System" has been clarified by the Government of India and it has been specifically indicated that all Class-III and Class-IV employees and workers of the Major Port Trusts/Dock Labour Boards, who are directly paid by the Port Trust/Dock Labour Boards shall only be eligible to participate in the election process. It is also stated that all the workers mentioned in the subsidiary list maintained by the Paradip Port Trust and list of casuals maintained by Kandala Port Trust will also be eligible to participate in the election process. It is disclosed in the counter affidavit of the Paradip Port Trust that the petitioner in W.P.(C) No.3204 of 2002 had submitted a representation to the Ministry to allow the Cargo Handling Workers to participate in the Secret Ballot system. The matter was brought to this Court in O.J.C. No.2657 of 2002 and the Court directed to take steps expeditiously for holding the election adopting Secret Ballot system. On 11.9.2002, the Government of India appointed the Regional Labour Commissioner (Central) as the Returning Officer for verification of membership of Unions operating in the Paradip Port Trust and on 18.10.2002, the election schedule was notified. The final voters list had been prepared and nominations have been submitted and therefore, there

was no cause of action on the part of the petitioners to file these writ petitions.

4. Shri Jagannath Patnaik, the learned Senior Counsel appearing for the petitioners in both the writ petitions referred to the High Power Committee report and submitted that the High Power Committee was of the opinion that the workers in the standby list have more weighty claim compared to the claims of other workers and in considering the claims of various categories of workers, their claims should be considered on merit and not on the basis of their affiliation or membership of a particular Union. At the same time if these workers in the standby list want to be included in the list of workers who are being enlisted for C & F work, they shall have to give up their claim as constituents of standby list. The Committee, therefore, suggested that all the mazdoors in the standby list should be given an option to indicate their unequivocal willingness in writing to give up any entitlement present or future as constituent of standby list for work under 1979 Scheme and agree to work as C & F workers under the proposed Scheme on the terms and conditions that will be stipulated by the concerned authorities. Such of the standby list workers, who give such an option can be considered for meeting the additional requirement of C & F workers. If the number of workers opting to come over to the C & F Section is more than the requirement, selection should be made on the basis of their inter se seniority among the standby list workers. In absence of record of seniority, the authorities concerned may select from out of the willing mazdoors in the standby list on the basis of test and interview to adjudge their suitability for the jobs to be entrusted to them. In pursuance of such recommendation, several mazdoors in the standby list opted to work as C & F workers and they have been engaged as such. According to Shri Patnaik, the learned Senior Counsel appearing for the petitioners, there is no difference between the 1979 Scheme and the 1994 Scheme prepared on the basis of the High Power Committee report and therefore, both the Schemes having been prepared in the same line, the standby workers who had a right to participate in the election process under the 1979 Scheme are also entitled to participate in the same election process under 1994 Scheme.

The learned counsel appearing for the Paradip Port Trust submitted that only those workers be it C & F or otherwise who are paid from the funds of the Paradip Port Trust are entitled to participate in the election process as envisaged under the 1994 Scheme and such decision has been taken in terms of the provisions contained in the Major Port Trust Act. The petitioners who are in the standby list under the 1979 Scheme and have opted to work as C & F workers are not paid by the Paradip Port Trust and therefore,

under the 1994 Scheme, they are not entitled to participate in the election process.

5. The sole question that requires consideration is as to whether the petitioners and the members of one of the petitioner Union who are now working as C & F workers having opted for the same in terms of the High Power Committee recommendation, can have a right to participate in the election process. It is not in dispute that these workers while continuing in the standby list under the 1979 Scheme had a right to participate in the election process. The High Power Committee recommended that such standby workers have to opt for working as C & F workers and once they exercise their option, they have to give up their claim as constituents of the standby list. Therefore, having opted to work as C & F workers, the petitioners have given upon their claim as constituents of standby list and are automatically governed under the 1994 Scheme. Admittedly the 1994 Scheme provides that those workers who are paid out of the funds of Paradip Port Trust are to be taken into consideration for the purpose of participating in the election process. There is nothing on record to show that any of the petitioners is being paid from the funds of the Paradip Port Trust. Shri Patnaik, the learned Senior Counsel appearing for the petitioners submitted that all these petitioners are doing the same work as that of others who are being directly paid from the funds of the Paradip Port Trust and their work is incidental to all types of work undertaken in the Port Trust area. On the above basis, it is submitted that there cannot be any discrimination between the same category of workers who are involved in discharging the same type of duties merely because some of them are paid from out of the funds of the Port Trust and some of them are paid by the C & F agents. The decision relied upon by the learned counsel for the petitioners is the case of ***M/s. J.K. Cotton Spinning and Weaving Mills Col. Ltd. v. The Labour Appellate Tribunal of India, reported in AIR 1964 Supreme Court 737***. While considering the definition of the term "Employed in any industry", the Hon'ble Supreme Court held that the expression cannot be construed literally and it shall include persons employed in operations incidental to main industry. The facts in the said reported case are completely different than the present case. The contention before the Hon'ble Supreme Court was that the worker involved in the case was working as gardener and accordingly is not workman within the meaning of the definition of 'workman' under the Industrial Disputes Act. There was no dispute that the said gardener was the employee of the Company. Considering the nature of job, the Hon'ble Supreme Court held that the work discharged by such employees being incidental to the work of the main industry, they are to be construed to have been employed in the industry.

The distinguishing feature is that the gardener therein had been directly employed by the employer and was being paid by the employer.

The dispute in this case is as to whether the petitioners who are working as C & F workers and whose salaries, wages are not paid from out of the funds of the Paradip Port Trust are entitled to participate in the election process of election of two worker Representatives to the Board of Trustees of Paradip Port Trust. Section 3 of the Major Port Trusts Act, 1963 provides for Constitution of Board of Trustees. The Board of Trustees shall consist of a Chairman to be appointed by the Central Government, one Deputy Chairman or more, as the Central Government may deem fit to appoint and except in Bombay, Calcutta and Madras not more than seventeen persons. Proviso to the Section prescribes that two of the Trustees will be workers representatives. These two Trustees representing the workers are to be elected by the workers. There is no dispute that those workers who are paid from out of the funds of the Paradip Port Trust are entitled to cast vote in the election process and the dispute only relates to the present petitioners who are not paid from out of the Paradip Port Trust funds. The said Section provides that labour employed in the Port are entitled to participate in the election process and also can be elected as a Trustee representing the workers. If the decision of the Hon'ble Supreme Court in the case of J.K. Cotton Spinning & Weaving Mills Co. Ltd. (supra) is taken into consideration, the petitioners who are discharging work incidental to the work undertaken by the Paradip Port Trust, may come within the meaning of "employed in the Port". But the 1994 Scheme has specifically excluded those who are not paid out of the funds of the Paradip Port Trust. Since the petitioners opted to work as C & F workers and accepted the terms and conditions of the 1994 Scheme, it shall not be open for them now to turn back and say that the benefits availed by them under the 1979 Scheme has to continue merely because most of the benefits granted under the 1979 Scheme are more or less similar to 1994 Scheme. Having accepted the terms and conditions of the 1994 Scheme, the petitioners cannot claim participation in the election process considering the fact that the 1994 Scheme excludes those from participating in the election process who are not paid from out of the funds of the Paradip Port Trust.

6. Both the writ petitions being devoid of merit are dismissed.

Writ petition dismissed.

2010 (II) ILR – CUT- 899

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

JCRLA. NO.27 OF 2001 (Decided on 29.09.2010)

SINU @ SUSHIL NAG ……….. Appellant.

.Vrs.

STATE OF ORISSA ……….. Respondent.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – 300, 304, PART-I.

Conviction U/s.302 I.P.C. is under challenge – On the date of occurrence the deceased went to the house of the accused and told him that unless he maintains peace he would be driven out from the colony for which there was exchange of hot words and the appellant being enraged brought out a Dauli from his house and gave a blow on the neck of the deceased – From this it can be safely concluded that the act was committed in the heat of passion upon sudden provocation at the spur of the moment without any premeditation – Held, in this case exception 4 of Section 300 I.P.C. is attracted and the act of the appellant comes within the ambit of Section 304, Part-I I.P.C. – Conviction U/s.302 I.P.C. is converted to one U/s.304-Part-I. I.P.C.

(Para 9)

Case law Referred to:-

AIR 1982 SC 1185 : (Ram Karan & Ors.-V-State of Utter Pradesh).

For Appellant - M/s. B.L.Tripathy(A), B.Tripathy & Nandini Tripathy.

For Respondent - Mr. Soubhagya Ketan Nayak (Additional Government Advocate)

PRADIP MOHANTY, J. The appellant, having been convicted under Section 302 I.P.C. and sentenced to undergo imprisonment for life, has preferred this appeal from jail.

2. The case of the prosecution is that on 07.06.1997 evening, the wife of the appellant picked-up quarrel with one Sukarmani Singh. Deceased Amar Singh went near the house of the appellant and advised them to stop unnecessary quarrelling with others or else they would drive them out of the hutting. At this, the appellant got annoyed, went inside his house and came out holding a Dauli. He dealt a blow on the neck of the deceased by means of the said Dauli, as a result of which the deceased fell down with severe bleeding injury on his neck and succumbed to it. Thereafter, the appellant

left the spot throwing the Dauli there. On the same day, informant Jyotilal Singh orally reported the matter to the OIC of Koida Police Station, who reduced the same to writing and treated it as F.I.R., proceeded with the investigation and ultimately filed charge-sheet against the appellant under Section 302, IPC.

3. The plea of the appellant is one of complete denial of the allegations.

4. In order to prove its case, the prosecution has examined as many as nine witnesses including the doctor and the I.O. and has exhibited thirteen documents. The defence has examined none.

5. Mrs.Tripathy, learned counsel for the appellant assails the judgment on the following grounds:

(i) P.Ws.2, 3, 4 and 5, who are stated to be the eye witnesses, are relations of the deceased and all are interested witness;

(ii) some injuries were found on the person of the accused and he was examined by the doctor, but no explanation has been given by the prosecution for which adverse inference can be drawn against the prosecution; and

(iii) the assault took place due to sudden provocation which caused one injury and the subsequent conduct of the accused showed that he had no intention to kill the deceased and, therefore, the case is one coming under the purview of Section 304-II, IPC and not under Section 302, IPC.

6. Mr.Nayak, learned Additional Government Advocate, on the other hand, contended that there is no material to disbelieve the evidence of P.Ws.2, 3, 4 and 5. These witnesses have categorically stated that they were present near the place of occurrence and they saw the accused-appellant coming out of his house holding a Dauli and dealing a blow by means of the same on the neck of the deceased, as a result of which the deceased fell down and died. The evidence of the doctor (P.W.9) also corroborates the oral evidence. Merely because P.Ws.2, 3, 4 and 5 are relations of the deceased, their version cannot be thrown over board. P.Ws.3 and 5 have also disclosed that after the assault, the appellant fled away from the spot. P.W.7, who is a post occurrence witness, also corroborates the same. As per the report of the chemical examiner, blood stains were found on the full pant of the appellant. Therefore, it is a fit case

for conviction under Section 302, IPC and there is no infirmity or illegality in the impugned judgment and order of conviction passed by the learned Sessions Judge.

7. On careful perusal of the evidence of the witnesses, it is seen that P.Ws.1 to 5 are witnesses to the occurrence. P.W.1, who is the informant, deposed that about a year back from the date of his examination on a Saturday at about 5.00 p.m. the incident took place near the hutting of the accused. On that day he had been to the house of his father-in-law Chhutu Nag, who was having his hutting at a distance of about 100 feet from the house of the accused. Hearing the hullah when he looked to the side of the house of the accused, he found the accused assaulting the deceased by means of a Dauli. He specifically deposed that he had seen only one blow being given by the accused on the neck of the deceased. Soon after the blow, the deceased fell down and the accused fled away. He also deposed that at the time of occurrence Kirsan Munda, Sadar Munda, Lakhin Munda (P.W.7) and Braja Munda were present. He proved the FIR (Ext.1). In cross-examination nothing material has been elicited except that the deceased was his uncle-in-law, Chamaru Singh (P.W.2) is the nephew of the deceased and Sukrumani (P.W.3) is the wife of Chamaru Singh. P.W.2, in his evidence, has specifically deposed that the wife of the accused quarrelled with his wife, for which his deceased-uncle went to the house of the accused and asked him calmly as to why he was creating trouble in the locality when he is new to the same. The accused went inside his house, came out with a Dauli and abruptly gave a blow on his neck, as a result of which his uncle fell down and succumbed to the injury whereafter the accused fled away from the spot. Nothing has been elicited in cross-examination to discard his evidence. P.W.3 deposed that the wife of the accused came to her house with a crow-bar and threatened to kill her over missing of her soap in the river. At that time, P.W.3's husband was also there in her house. Few minutes later, the accused also arrived in her house and quarreled with them. At that time, Amar Singh (deceased) and Joytilal reached there and intervened. They asked the accused and his wife as to why they were creating problems in the colony. Thereafter, the accused went to his house, came back with a Douli and dealt a blow on the neck of the deceased. There was cut injury on the neck of the deceased. Nothing has been elicited in cross-examination to discard the evidence of this witness. Rather, in cross-examination, she has stated that she had stated before the police that the deceased had approached the accused and told him that he must try to have a peaceful co-existence in the colony or else he would be driven out. She further admitted in the cross-examination that being questioned by the deceased, there was exchange of hot words

between him and the accused. P.W.4, the other ocular witness, also corroborated the evidence of P.W.2 and specifically stated that she saw the accused giving a Dauli blow on the neck of the deceased and fleeing away from the spot. This witness was declared hostile and leading questions were put him by the learned Public Prosecutor. P.W.5 is another ocular witness who corroborated the evidence of P.Ws.2, 3 and 4 with regard to the assault given by the accused.

P.W.6 is a witness to the inquest and he proved Ext.2, the inquest report. P.W.7 is a post occurrence witness, who specifically deposed that on the date of occurrence while he was returning from Hat along with Kisan Munda, Braja Munda and Sadhu Munda (since dead), they heard hullah at a little distance from his house as “DHAR DHAR” made by some women. At that time, they found the accused running with a Dauli and thereafter they chased him and having caught hold of him brought him near the place where the deceased was killed. Near the dead body of the deceased, they kept the accused under detention by roping. Nothing has been elicited in cross-examination. P.W.8 is the investigation officer, who registered the case, took up investigation and after its closure filed charge-sheet.

P.W.9 is the doctor, who conducted autopsy over the dead body of the deceased, and found the following injuries.

External injury

“One incised wound on the left laterals side of the neck of size 6” X 2” X 2”.”

Internal injury

“Left external carotid artery, left internal carotid artery and left jugular vain are cut. Muscles of left side neck are incised. Rest of the organs are intact and pale.”

He opined that the cause of death was due to haemorrhage and shock caused by a cut injury on the left side neck cutting external carotid artery, internal carotid artery and jugular vain. He further opined that the injuries were ante mortem in nature and were sufficient to cause death in ordinary course. P.W.9 further deposed that on 07.06.1997 on police requisition he examined the accused and found as many as four injuries. All the injuries were simple in nature and might have been caused by hard and blunt weapon.

8. On a careful scrutiny of the evidence of P.Ws.1 to 5, it is found that their evidence inspires confidence. Merely because they are related to the deceased, that by itself cannot be a ground to discard their evidence

outright. It has been proved through the evidence of P.W.7 and the investigating officer (P.W.8) that after assaulting the deceased while the appellant was running away he was chased and in course of such chasing he fell down and received injuries. So, it cannot be said that the prosecution has failed to explain the injuries on the person of the appellant. That apart, the appellant having sustained simple injuries, as is evident from the evidence of the doctor (P.W.9), the onus is not on the prosecution to explain the same. Ext.12, the chemical examination report, reveals that human blood of 'B' group was found in the sample blood stained earth and the full pant seized from the possession of the appellant. From the ocular testimony of P.Ws.1 to 5 coupled with the evidence of the doctor (P.W.9) and other materials available on record it is established beyond any shadow of doubt that the appellant assaulted the deceased with the Dauli (M.O.I) and on account of such assault the latter died.

9. Now, it is to be seen whether the act committed by the appellant falls within the purview of any of the exceptions provided under Section 300, IPC. P.W.3, in cross-examination, has admitted that the deceased went to the house of the accused and told him that earlier there was no quarrel in the colony, that he had come to the colony since last two months only and was quarrelling with others and that he must try to have a peaceful co-existence in the colony or else he would be driven out, which culminated in exchange of hot words between the deceased and the appellant, as a result of which the appellant got enraged, brought out a Dauli from his house and gave a blow on the neck of the deceased. From this, it can be safely concluded that the act was committed in the heat of passion upon sudden provocation at the spur of the moment without any premeditation. Taking an overall view of the facts situation and keeping in mind the principles laid down by the apex Court in ***Ram Karan and others v. State of Utter Pradesh***, AIR 1982 SC 1185, this Court is satisfied that Exception 4 of Section 300 I.P.C. is attracted in this case and, therefore, the act of the appellant comes within the ambit of Section 304 Part-I, IPC.

10. For the reasons stated above, the conviction of the appellant under Section 302, I.P.C. is converted to one under Section 304 Part-I, I.P.C. and the appellant is sentenced to undergo rigorous imprisonment for ten years.

11. The Jail Criminal Appeal is disposed of accordingly.

Appeal partly allowed.

2010 (II) ILR – CUT- 904

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

DSREF NO.2 OF 2010 & JCRLA NO.14 OF 2010 (Decided on 05.10.2010)

STATE OF ORISSA ………. Complainant.

.Vrs.

ARDHU CHENDREYA ……….. Accused.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC. 354 (3),366.

Rape and murder of a minor girl – Conviction U/s. 302 & 376(2) (f) I.P.C. – Trial Court found it to be a rarest of rare case and imposed Death Penalty directing to hang the convict by neck till his death – Hence this reference.

Conviction based on circumstantial evidence but this Court found the allegations have been brought home substantially except one flaw in the investigation i.e. the omission to compare the hairs collected from the private part of the victim with the sample pubic hair collected from the accused –Held, since the convict has no Criminal background and during his detention no adverse report has been submitted by the jail authorities and he has a family to support and there appears to be no premeditation or previous planning, this Court comes to a conclusion that the severest of the punishment i.e. death penalty is not proper and inclined to impose life imprisonment with further condition that in this case remission of sentence should not be considered before completion of 25 years of incarceration – Reference made is discharged and appeal filed by the appellant is partly allowed.

(Para 40,41)

<u>Case law Relied on:-</u>

2008 Crl. L.J.3911 : (Swamy Shraddananda @ Murali Manohar Mishra -V- State of Karnataka).

<u>Case laws Referred to:-</u>

1.AIR 1952 SC 343 : (Hanumant Govind Nargundhar & Anr. -V- State of M.P.)
2.AIR 1984 SC 1622 : (Sharad Birdhichand Sarda -V- State of Maharashtra).
3.(1991) 4 OCR (SC) 278 : (Jaharlal Das -V- State of Orissa).
4.(2005) 3 SCC 114 : (State of Utter Pradesh -V- Satish).
5.(2006) 10 SCC 172 : (Ramreddy Rajesh Khana Reddy & Anr.-V-State of A.P.).

6.(2002) 8 SCC 45 : (Bodhraj @ Bodha & Ors.-V- State of Jammu & Kashmir).
7.(1994) 2 SCC 220 : (Dhananjoy Chatterjee @ Dhana -V- State of W.B.)
8.AIR 1980 SC 898 : (Bachan Singh -V- State of Punjab).
9.AIR 1983 SC 957 : (Machi Singh & Ors.-V-State of Punjab).
10.2002 (5) SCC 234 : (Devendra Pal Singh -V- State of NCT of Delhi).
11.AIR 2009 SC 56 : (Shivaji@Dadya Shankar Alhat -V-State of Maharashtra).
12.2003(9) SCC 310 : (Dayanidhi Bisoi -V- State of Orissa).
13.2006(13) SCALE 467 : (Aloke Nath Dutta & Ors.-V-State of West Bengal).
14.AIR 2007 SC 2531 : (Swamy Shraddananda @ Murali Manohar Mishra -V-State of Karnataka).

For Complainant - Mr. Saubhagya Ketan Nayak, Addl.Govt. Advocate.
For Accused - Mr. Janmejaya Katikia, Advocate.

S.K.MISHRA, J. Human depravity has no limits. But howsoever gruesome the offence may be, every individual has a right of a fair trial. Even in cases of most heinous offence, which shakes human conscience, a person cannot be convicted or condemned without a regular trial as per the procedure established by law. Only after a regular trial, in which the accused is given enough opportunity of defending himself, can an individual be convicted of any felony. This is a case where on the face of it, the court is very concerned about the crime and the way it was perpetuated. However, the court has to take a perspicacious view of the matter and see if the conviction recorded by the learned Sessions Judge and the order of sentence i.e. death penalty, which has been referred to this Court under Section 366 of the Code of Criminal Procedure, 1973, hereinafter referred as "the Code," for brevity, are correct or not.

2. The condemned prisoner-appellant, hereinafter referred as the 'accused' for brevity, was charged for the offences under section 302, 376 (2) (f) of the Indian Penal Code, 1860, hereinafter referred as "I.P.C.", for brevity, and under section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. It is alleged by the prosecution that on 24.12.2007 at about 10.30 P.M., K.Chenneye, K.Benga and K.Manoj and the present accused came to the house of the informant Duryadhan Das to call him to attend the funeral feast that was being given on the death of one K.Appeya. On such information, the informant's brother Kamadeba Das and his children left for the feast. K. Chenneya, K.Benga and K.Manoj

also went back. The accused remained there. In the meantime, the informant's daughter, i.e. the deceased, aged about 8, woke up and expressed her desire to attend the feast. The informant was not willing to let her go, but the accused proposed that he would take her with him. The informant agreed and allowed the victim to go with the accused. At about 11.30 P.M. Kamadeba, the informant's brother returned home along with his children. The victim was not with him. So the informant enquired from Kamadeba about the victim and was informed that he had not seen the victim at the feast. Thereafter, the informant and others went in search of the victim. In course of such search, they came across the accused near "Mati Khana Chhaka". On being asked regarding the victim, the accused told that he left her near the school premises.

3. Search continued but the victim was not traced out. Some of the villagers went towards the thrashing floor of the accused. They found the dead body of the deceased lying on the thrashing floor with multiple injuries. The informant and others getting that information went there. Near the thrashing floor, the deceased's CHADI and LUNGI, (with which she used to wrap herself) were lying on the backside of the 'Pinda' of the accused's cow-shed. There was also stone stained with blood lying near Chadi and Lungi. A trail of blood found leading upto the cow dung pit within the thrashing floor belonging to the accused, where the dead body of the deceased was lying with injuries over her neck face and other parts of the body. A blood-stained yoke (Juali) was lying near the dead body. The villagers then searched for the accused but he had fled.

4. Suspecting that the accused had committed the murder of the child after ravishing her, the informant lodged a report before the O.I.C. Hinjili Police Station. Then the police took up investigation. The dead body was sent for postmortem examination. The accused was apprehended and was sent for medical examination. The postmortem revealed, *inter alia*, that there was sign of recent forcible sexual intercourse with the deceased. Injuries on the body of the deceased were found to be *ante mortem* in nature and the death was caused as a result of the complications of the injuries. On medical examination, the accused was found to be capable of sexual intercourse. The doctor also found that there was sign of recent sexual intercourse on his private parts.

5. The defence took the plea of complete denial the allegations. Additionally, the defence pleaded that the accused usually stays at Bombay. There are two rival groups in the village. The Bauries of the village had forcibly dispossessed the father of the accused from their landed property

and have created compelling circumstances for which the accused's father had left the village. The accused also pleaded that on getting the information that the Bauries had forcibly cultivated their land and occupied the thrashing floor, the accused came to the village and threatened that he would lodge complain against them. The accused, therefore, pleads that he has been falsely implicated in this case.

6. To bring home the charges, prosecution examined 24 witnesses. P.W. 1-Duryodhan Das is the informant and P.W. 2 Baguli alias Draupadi Das is his wife. P.W. 10 Kapal Benga, P.W. 11-Kapil Cheneya and P.W. 18-K. Manoj Kumar had gone to the informant's house to invite him to the feast. P.W. 5-Kamadeba Das is the brother of the informant. P.W. 6-Prakash Das searched for the deceased and found her dead body on the thrashing floor. P.W. 3 Gadadhar Sethy, husband of the local Sarpanch had informed the police over telephone about the killing of the child. P.W. 4-Bangali Das had searched for the deceased. He was also a witness to the inquest. P.W. 7-E.Narayan is the scribe of the F.I.R. P.W. 8 Aruna Das is a witness to the seizure. P.W. 9, Hiranya Das has gone to the thrashing floor and saw the dead body of the deceased. The rest of the witnesses are official witnesses.

The defence has neither examined any witness nor led any documentary evidence in support of its case.

7. After a detailed examination of the materials on record, the learned Sessions Judge has come to the conclusion that the prosecution has established its case beyond all reasonable doubt on the circumstantial evidence led in this case. Accordingly, the learned Sessions Judge has come to the finding that the accused is guilty of the offence under section 302 and Section 376 (2)(f) of the I.P.C. However, the Sessions Judge has found that the accused is not guilty of the offence under section 3 (2) (v) of the SC & ST (PA) Act and acquitted him of that charge. After considering the question of sentence at length, the learned Sessions Judge has sentenced the accused to undergo imprisonment for life and to pay a fine of Rs.10,000/- (Rupees ten thousand), in default, to undergo rigorous imprisonment for two years for the offence under section 376 (2)(f) of the I.P.C. He further sentenced the prisoner to death for the offence punishable under section 302 of the I.P.C. and directed in terms of Section 354 (5) of the Code to hang the convict by neck till his death. Thereafter, the learned Sessions Judge has submitted the records of the Sessions Case for a reference under section 366 of the Code. The condemned prisoner also submitted an appeal through the Jail Authorities. Both the cases are taken up for hearing together. Initially, a counsel was appointed by the High Court

Legal Services Committee to argue the case on behalf of the accused. However, Sri J. Katakia filed Vakalatnama for the accused and argued the case extensively.

8. In a case of murder, the first duty of the prosecution is to prove that the death of the deceased was homicidal in nature. In this case, to prove the nature of the death of the deceased, the prosecution relies on the evidence of P.W. 19 Dr. Sudeepa Das, Asst. Professor, Department of Forensic Medicine and Toxicology, M.K.C.G. Medical College and Hospital, Berhampur. He has stated on oath that on 25.12.2007, he was Assistant Professor and on that date at 4 P.M. on police requisition, he conducted postmortem over the dead body of the victim, daughter of Duryadhana Das of village Dayapalli, P.S. Hinjili. The dead body was identified to him by C/648-Lokanath Patra, Grama Rakhi-Dinabandhu Das, father and uncle of the deceased. In course of postmortem examination, he found

> *(1) Contused abrasion on entire left side of face starting from above frontal hair margin extending upto mandible down below and laterally from the tragus of left ear and going up to the bridge of nose medially over which 3 lacerated wounds were found present. (a) The lacerated wound of size 2 cm x 2 cm x bone deep present obliquely over left eye brow. (b) Another lacerated wound of size 5 cm x 2 cm x bone deep with fracture of underlying maxilla. (c) Lacerated wound of size 5 cm x 2 cm x mouth cavity deep present over the left cheek 2 cm below and 1 cm anterior to external injury no.(b).*
>
> *(2) Inner surface of both upper and lower lips at its middle found contused, lacerated with fracture of underlying mandible with traumatic dislocation of lower jaw-teeth.*
>
> *(3) Contused abrasion of size 12 cm x 6 cm present over the right side face starting above from the forehead and extending below up to the cheek.*
>
> *(4) Multiple abrasions and abraded contusions of various shapes and sizes present extensively and almost transversely involving the lower neck and upper chest and going upwards to shoulders on either side and covering an area of 19 cm x 8 cm.*
>
> *(5) Abraded contusion of size 5 cm x 4 cm present over the antero medial surface of right upper arm.*

(6) Abraded contusion of size 5 cm x 4 cm is present over the outer surface of the left side mid arm.

(7) Two numbers of small contused abrasions each of size 2 cm x 1 cm present 2 cm apart from each other lying 1 cm posterior to right mastoid process.

(8) Extensive contusion present over left scapular area of size 14 cm x 8 cm.

(9) A contused abrasion present obliquely over the left lateral chest of size 8 cm x 3 cm lying 7 cm below the armpit.

(10) Linear scratch abrasion (nail marks) are present almost vertically of length 7 cm over the posterior- medial aspect of left thigh extending from above downwards.

The Doctor has further stated on oath that on dissection he found

(1) Patchy contusions of scalp at left forehead, right temporal area and entire occipital area.

(2) Thin layer subdural haemorrhage on either side of cerebral hemisphere and also at the base present.

(3) Extensive chest contusions and extravessation of blood underneath external injury no.4 with fracture of 1st and 2nd ribs on mid clavicular line on left side.

On examination of the genital of the deceased, the doctor found the following:

2nd decree perineal tear involving the posterior surface of introitus, extending upto the anal verge with surrounding extravasation, inflammation and contusions. Some foreign heirs found sticking to the external genitalia which have been collected preserved and handed over to the accompanying police escort.

It is further found from the evidence of this witness that the team of doctors examined a stone and a Juali. The doctor has opined that the external injuries, which they found on the person of the deceased, were all ante mortem and homicidal in nature. In the opinion of the doctors, the death of the deceased had occurred because of internal injury no.2,

corresponding to external injury no.1 and complications arising thereon. They have fixed the time of the death from the autopsy to be 12 to 18 hours. The doctor has further opined that except external injury no.10 and genital injury could have been caused by forceful thrust by either of the exhibits M.O.I and II (by Stone and Juali). He further opined that external injury no.10 is consistent with the nail marks, with all possibility due to forceful separation of the thighs. The injuries found on the genital could have been produced due to attempted penetration/penetration by hard and blunt object/erect male genitalia. The doctor has further opined on oath that the vaginal smear has been preserved for studying in the Department. On examination presence of intact spermatozoa suggested forceful recent sexual intercourse.

Thus, from the above evidence, the prosecution has amply proved that the death of the deceased was homicidal in nature and that the deceased/victim was subjected to forcible sexual intercourse. These findings of the learned Sessions Judge are unassailable.

9. Both P.Ws. 1 and 2 parents of the deceased have stated that the deceased was then aged about 8 years. This aspect was not challenged by the defence in course of the trial nor has it been raised in this appeal/reference. Thus, from the above, a clear charge under section 302 and Section 376 (2)(f) of the I.P.C. has been made out. The other important aspect is that the case is whether the prosecution has established its case beyond all reasonable doubt that the accused has committed the offences of rape of a minor girl and has murdered her. The prosecution undisputedly has not led any direct evidence in this case and has relied upon various circumstances to bring home the charges against the accused.

10. While dealing with the circumstantial evidence, the court has to be very careful and circumspect so that an innocent person is not convicted. The Supreme Court way back in 1952 in ***Hanumant Govind Nargundkar and another v. State of Madhya Pradesh***, AIR 1952 SC 343 has warned about entering into conjectures and surmises in such cases. Justice Mahajan has before quoting Barron Alderson's address to the jury in Reg. V. Hodge (1838) 2 Lewin 227 has observed that in dealing with circumstantial evidence, the rule especially applicable to such evidence must be borne in mind. In such cases, there is always the danger that conjecture or suspicion may take the place of legal proof. Thereafter, Justice Mahajan quoted Barron Alderson's address. We find it apt to reproduce the exact words.

> *"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."*

The Supreme Court further held that it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. It was further observed that the circumstances should be of a conclusive nature and tendency should be such as to exclude every hypothesis but the one proposed to be proved. There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

The principles guiding cases based only on circumstantial evidence also came up for consideration before the Supreme Court in ***Sharad Birdhichand Sarda v. State of Maharashtra****,* AIR 1984 SC 1622. Justice Fazal Ali very pithily summarized the law of the land in this respect. The Supreme Court in that case laid down five golden principles or the Panchasheela to prove a case based on circumstantial evidence; they are :-

> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.*
>
> *(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*
>
> *(3) The circumstances should be of a conclusive nature and tendency.*
>
> *(4) They should exclude every possible hypothesis except the one to be proved, and*

(5) *There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

11. In ***Jaharlal Das v. State of Orissa,*** (1991) 4 OCR (SC) 278, the Supreme Court has held that it is well settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions; (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

12. It may not be necessary to refer to other authoritative pronouncements of the Supreme Court except to keep in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture and suspicion may take place of legal proof and such suspicion, however strong cannot be allowed to take place of legal proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of a legal proof. The court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood that the accused may not be the author of the crime. Thus, having reminded ourselves of the law governing the field, the evidence led in this case has to be carefully examined to see if the learned Sessions Judge has come to a correct conclusion or not.

13. The evidence of P.Ws. 1 and 2 reveals that in the fateful night at about 10 P.M. Kapula Benga (P.W. 10), Kapula Cheneya (P.W. 11) and Kapula Manoj (P.W. 18) along with the accused came to their house and called Duryodhan Das (P.W. 1) to attend the funeral feast of K.Apeya of that village. P.W. 1 declined to attend the feast and advised them to invite his brother Kamadeba (P.W. 5) to the feast. It is further found in the evidence that Kamadeba left for the feast with his children in the company of P.Ws. 10, 11 and 18. At that time, the deceased who was asleep woke up and requested that she would go to attend the feast. The informant asked her not to attend the feast, but at that time the accused told the informant that he would take the deceased to the feast and leave her with Kamadeba. It is

further found from the evidence of these two witnesses that believing the accused the parents of the deceased had allowed her to proceed to attend the funeral feast in the company of the accused.

14. At about 11 P.M., when Kamadeba returned along with his children, parents of the deceased asked regarding their daughter as she did not return home with her uncle. Kamadeba informed the informant that he has not seen the deceased/victim at the feast. Thereafter, they went in search for the deceased and when they asked the accused as to what has happened to the daughter of the informant, he told that he has left the deceased near the school. The villagers searched for the deceased not only in the house of the Apeya where the feast was being given but also in the school where the accused has stated to have left the victim, but they could not get any trace of the victim. Thereafter, Prakash, Abhi and Aruna proceeded towards the 'Khala' of the accused, where they found the wearing apparels of the deceased as well as the dead body.

15. Examination of the evidence of P.Ws. 10, 11 and 18 reveals that in December, 2007 on the date of incident they have been to invite Duryodhan Das, the informant. Duryodhan Das refused to attend the funeral feast but his brother Kamadeba and his two children went with them to participate in the funeral feast. They also invited the accused, who was in their Sahi. The accused did not go with them and remained in the house of Duryodhan Das. P.W. 11 says that the accused was following them when they were going to the house of Duryodhan Das for invitation. But he has stated in the cross-examination that he has not seen the accused going to the house of Duryodhan Das or any other house. Such statement does not mean that he did not go near the house of the informant. It is further evident from the statement of the witnesses that the informant was sleeping in the front varendah of their house. So, P.W. 11 actually stated that the accused did not enter inside the rooms of the house of the informant. P.W. 18 has also stated in his evidence that they proceeded to the house of Duryodhan Das. At that time, they saw the accused in the Sahi. P.W. 18 states that when they arrived at the house of Duryodhan Das, he and his family members were asleep on the verandah of the house. On their call, Duryodhan Das woke up. The accused was standing there three to four houses apart from them. This witness has clarified that the house of Kamadeba was just in front of the house of Duryodhan Das. Kamadeba was also invited to the feast.

16. Learned counsel for the appellant has very emphatically submitted that the evidence of P.Ws. 10, 11 and 18 are not supporting the case of the

prosecution. It is also contended that the evidence of P.W. 18 has not been confronted to the accused. Hence, it is submitted that the accused is prejudiced. The learned counsel for the appellant also submitted that the accused's presence there is not free from doubt. Hence, there is no chance of his taking the girl to the feast. It is also submitted that the deceased was asleep when the witnesses invited the informant to attend the feast, then how could she know that a feast was going on after she woke up ?

The learned Addl. Government Advocate, on the other hand, submitted that the prosecution has proved its case and the argument of the appellant is hypothetical.

17. On careful examination of the impugned judgment it reveals that the learned Sessions Judge has carefully examined the evidence on record and has come to the conclusion that the prosecution has proved its case beyond all reasonable doubt to establish its case successfully that the accused was present and he took the girl along with him. P.Ws. 1 and 2's evidence in this respect is very clear. Only because they are relations of the deceased, their evidence cannot be thrown away, especially when they have withstood rigorous cross-examination and not a single contradiction has been brought out by the defence with this aspect of their testimony. The evidence of P.Ws. 10, 11 and 18 also supports the sworn testimony of the informant and his wife in the sense that the accused was present there when they invited the informant. It is true that these three witnesses have not stated that the accused was also accompanying them for inviting the informant. But such a small difference in perception of P.Ws. 1 and 2 shall not falsify the case of the prosecution.

18. The accused has been examined under section 313 of the Code. It is true that the learned Sessions Judge has not specifically questioned the accused of the evidence of P.W. 18 but questions No. 20, 21, and 22 reveal that the effect of the evidence of P.W. 18 has also been put to the accused as he has stated almost the same opinion as that of P.Ws. 10 and 11. Moreover, the accused has taken the plea that the statement made by P.Ws. 10 and 11 are false. The learned Sessions Judge has proceeded with the presumption that the accused has also denied the evidence of P.W. 18 to be false, though he has not specifically mentioned about any such presumption, such presumption is flowing out of the judgment rendered by the learned Sessions Judge. So we are of the considered view that no prejudice has been caused to the accused for such omission of putting a question to him in this respect.

19. P.W. 4, the maternal uncle of the deceased, states that on 24.12.2007 around 11.30 in the night while he was asleep in his house, he heard a hue and cry and heard his sister Baguli Das crying and shouting that her daughter was missing from the village. On hearing that, he woke up and came out of the house. They all went in search of the deceased towards the pond side and found the accused standing near the pond. Then on being asked, the accused disclosed that he left the deceased near the school. They went in search of the girl but were informed that her dead body was lying in Khata Khana of the thrashing floor of the father of the accused.

P.W. 5 is the uncle of the deceased, who has stated on oath that after his return from the feast, his brother Duryodhan asked him about his daughter i.e. the deceased but the witness expressed his ignorance and stated that he had not seen her in the feast. Thereafter Duryodhan disclosed that she had gone to attend the feast in the company of the accused. They searched for the deceased and met the accused at Mati Khana Chhaka. On being asked the accused told that he had left the girl near the school but as the witness and others searched the daughter near the school, they could not get any trace of her. On their search they found a Chadi and Lungi of the victim with blood stains lying on the threshing floor of the father of the accused. There were also blood stains upto the Khata Khana (cow dung pit). When they proceeded to the Khata Khana, they found the dead body of the deceased with bleeding injuries on her private parts and other parts. Blood-stained stone and 'Juali' were also lying at the spot. Such statements of P.W. 5 receives corroboration from P.W. 6, P.W. 7 and P.W. 9, who speak about the finding of the dead body in the cow dung pit on the threshing floor belonging to the father of the accused. Thereafter, a report was lodged before the O.I.C., Hinjili P.S.

20. From the aforesaid evidence it appears that the prosecution has proved that the accused was present when P.Ws. 10, 11 and 18 had gone to the house of Duryodhan Das for invitation to attend the funeral feast. After their departure from that place, he volunteered to take the deceased/victim girl with him to the feast to leave her with her paternal uncle. Accordingly, the deceased was last-seen in the company of the accused. Further, it is evident from the materials on record that the victim never reached the funeral feast. The accused also did not leave her in the custody of her uncle. About one hour thereafter, the accused was found alone. It is also evident from the materials on record that he was found about 250 feet away from the spot near the pond i.e. Mati Khana Chaka about an hour after their departure from the house of Duryodhan Das. About half an hour thereafter, the deceased was found ravished and murdered.

21. The learned counsel for the accused has submitted that in this case the prosecution has failed to prove its case and relied mainly on such circumstance, which is known as "last-seen theory". It is submitted by the learned counsel for the accused that the last-seen theory alone is not sufficient to convict the accused. It is worthwhile to note some of the important decisions of the Supreme Court on this issue. In ***State of Utter Pradesh v. Satish*****,** (2005) 3 SCC 114; the apex Court has ruled as follows:

> "The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

In this case there is positive evidence that the deceased and the accused were seen together by the witnesses P.Ws. 1 and 2.

In the case of ***Ramreddy Rajesh Khana Reddy and another v. State of A.P.****,* (2006) 10 SCC 172; the Supreme Court has held that the last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration.

In ***Bodhraj alias Bodha and others v. State of Jammu and Kashmir****,* (2002) 8 SCC 45; the Supreme Court further held that the last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. The Supreme Court further held that it would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous

to come to a conclusion of guilt in those cases. But keeping in mind such observation, on an analysis of evidence in this case, this Court comes to the conclusion that after one hour of their departure from the house of the informant, the accused was found standing alone and stated that he has left the girl in the school premises. However, half an hour thereafter, the dead body of the deceased was found, the time gap between the departure of the accused and the deceased, the accused standing alone at Matikhana Chhaka and the discovery of the dead body of the deceased from the cow-dung pit of the thrashing floor of the father of the accused is so small that there appears to be hardly any substantial apprehension that some other person might have come and taken the deceased from the custody of the accused.

22. The trial court has also relied upon the circumstances that when the accused was found he gave a misleading answer that he has left the deceased in the school premises. Learned counsel for the appellant says that this is not an incriminating circumstance and the court cannot come to the conclusion that the answer given by the accused is misleading. However, the evidence on record reveals that the deceased was to be left in the company of her uncle which was not done by the accused. It is also seen that the witnesses searched the school premises and they could not find any trace of the victim girl, which shows that the accused neither left the girl in the company of the uncle as promised by him nor in the school premises. Moreover, he was found standing about 250 feet away from the spot where the dead body of the deceased was found lying.

23. P.W.4 Bangali Das stated on oath that they searched for the accused and found that he had absconded from the village. P.W. 21 has also stated that in the night of occurrence, he searched for the accused but could not get him as he has absconded from the village. He was apprehended by P.W. 21 (Investigating Officer) near Kukudakhandi hospital on the next day. This is a fact which has been admitted by the appellant in his examination under Section 313 of the Code. He admitted in the accused statement that he was waiting to catch a Bus. He was apprehended on 25.12.2007 at 5.30 P.M. Thus, the prosecution has also established that immediately after finding of the dead body, the accused was absent from the village i.e. he had absconded and was arrested on the next date in a different village while he was waiting to catch a Bus.

24. After his apprehension, he was examined by Dr. K.K.Patnaik (P.W. 13) on 26.12.2007, who was Assistant Professor, Department of F.M.T., M.K.C.G. Medical College and Hospital, Berhampur. He has stated on oath

that on examination of the private part of the accused, he found no erectile dysfunction and there was nothing to suggest that the accused was incapable of performing sexual intercourse. He found the frenum was loose and elastic with a haemorrhagic abrasion of size 0.5 cm x 0.5 cm close to its attachment with the shaft. On examination of the glans of the penis, he found tip of glans cornified with oedema and inflammation. Four to five small haemorrhagic abrasions were found close to the base of the glans around corona glandis. He also found two loose hairs sticking to the glans-surface, which were collected and preserved separately. There he did not find any mechanical injuries anywhere on the body of the accused except his private parts. The doctor has very positively opined that the presence of injuries, as described above, on the private parts of the accused are consistent with forcible penetration of the erected penis and therefore, there was medical evidence of recent sexual intercourse. In the cross-examination, he has stated that he has not mentioned the age of the injuries on the private part of the accused. The learned counsel for the accused argued that such injuries are possible as he is a married man. Though the witness has been cross-examined, not a single suggestion has been given that the injuries were possible for having sexual intercourse with his own wife. It is admitted that the accused is a married man having children. So argument advanced by the learned counsel for the appellant is that he has explained that he has sustained such injuries while cohabiting with his wife, is also not proper. In order to advance such an argument, the witness i.e. P.W. 13 should have been asked pointed question regarding possibility of injuries on his private part while cohabiting with his wife with consent. Moreover, the accused has not stated in his Section 313 of the Code statement that he sustained injuries on his penis while cohabiting with his wife.

25. Mr. J. Katikia, learned counsel appearing for the accused-appellant very emphatically submitted that there was previous enmity between the informant and the family of the accused relating to land and, therefore, the evidence of the witnesses especially P.Ws. 1 and 2 should be taken with a pinch of salt. On the other hand, Mr. Nayak, learned Addl. Government Advocate argued that there is no evidence on record that there is any personal enmity between the informant and the accused. The attention of the Court was drawn to paragraph 4 of the evidence of P.W. 2, wherein in cross-examination she has stated that they belong to Bauri caste and the accused is Ellama by caste. The accused belongs to general caste category. She has stated that they have dispute with the general caste people in their village. But she has denied the suggestion that the Bauries have forcibly occupied the lands of the father of the accused including his thrashing floor and the accused on hearing that, came and protested, they

(the informant and others) foisted the case in connivance with the Sarpanch. It is also in evidence that the Sarpanch belongs to the scheduled caste category. What is evident from this paragraph is that there may be a general ill-feeling between the general caste people and the persons belonging to the scheduled caste. It cannot be said that there was a personal enmity between the informant and his family in one hand and the accused and his family members on the other. The ill-feeling due to the caste difference may howsoever be grave, the parents of the victim cannot be expected to implicate an innocent person by sparing the guilty. Evidence of P.Ws. 1 and 2 is only with respect to the fact that the accused taking the victim girl to the feast. The evidence on record cannot be held to be tainted only because of such caste difference between the parties. Thus, the contention raised by the learned counsel for the appellant is not acceptable.

26. The learned counsel also submitted that there has been delay in lodging the F.I.R. The F.I.R. has been marked as Ext.1. The F.I.R. has been lodged at 2 A.M. in the night. Evidence of P.W. 21 Deepak Kumar Misra reveals that on that day at 1.15 O' clock in the night, he received a telephonic call from Gadadhar Sethi about the offence. He entered this fact in the Station Diary Book and rushed to the spot along with other staff. It is evident from the statement of P.W. 20 that at 3 A.M. he received the F.I.R. (submitted by P.W. 1) from Raghunath Sadangi and registered P.S. Case No.206. P.W. 1 has stated that he submitted the F.I.R. that night. It was scribed by one Narayan. P.W. 7 in cross-examination has stated that he has scribed the F.I.R. at 7 A.M. on the next day as per the direction of Duryadhan Das. However, the F.I.R. itself shows that the same was received at the spot at 2 A.M. on 25.12.2007 and to that effect, there has been endorsement by the Officer In-charge, Hinjili Police Station. There is also an endorsement on it "at 3 A.M." it was received by the In-charge officer at the Police Station. Thus, we are of the opinion that the statement of P.W. 7 that he has scribed the F.I.R. on the next date, cannot be given much weight to and we do not take that evidence into consideration and ignore the same.

It cannot be disputed that there has been a promptitude in lodging of the F.I.R., which foreclose any chance of concoction and deliberation. The learned counsel argues that the telephonic message received by the officer In-charge is the F.I.R. and hence the written F.I.R. Ext.1 is hit by Section 161 of the Code. In ***Dhananjoy Chatterjee alias Dhana v. State of W.B.,*** (1994) 2 SCC 220, the Supreme Court held that a telephonic message making the investigating agency only to rush to the spot does not constitute an F.I.R. In this case also, though information was given the same cannot

be construed to be a complete description of the occurrence and hence, the written F.I.R. is not hit by Sections 161 and 162 of the Code.

27. The Investigating Officer in this case requisitioned the assistance of a Scientific Officer, who has been examined as P.W. 14. It is seen that this witness, who was working at that time as a Scientific Officer of the District Forensic Science Laboratory, Chhatrapur proceeded to the said village and at 10. A.M. he arrived at the thrashing floor (Dhanakhala) of the accused Ardhu Chandreya at "Matikhana Gorji" of Dayapalli. In course of spot visit, he detected pool of blood on the verandah of the cow-shed of the accused Ardhu Chandreya, which was at a distance of 110 feet from the dead body. From the spot, he collected the blood-stained earth, sample earth, straw stained with blood, a half pant and printed lungi of the deceased. These material objects were sent for chemical examination. The chemical examination further reveals that the sample earth and the blood stained earth taken from the spot are similar with respect to their physical characteristics. Further human blood was found on the blood-stained earth, the blood-stained straw, the wooden Juali and Stone among other articles. These scientific findings very objectively determine the spot of occurrence.

28. Learned counsel for the appellant, in course of argument submitted that the chemical and serologist's report shows that there was no foreign hair in the hair collected from the vagina of the deceased. It is not disputed and also we have already come to the conclusion that the victim was an 8 years old girl and it is well known that among the human pubic hair starts growing around the puberty. So, it is accepted that the victim girl was not having pubic hair. At paragraph 3 of his examination, P.W. 19, the Doctor, who has conducted the postmortem examination on the dead body of the deceased, has stated that some foreign hairs were found sticking to the external genitals, which were collected by him. Learned counsel for the appellant very emphatically submitted that since no foreign hair was found in serial no.16, the accused cannot be held to be guilty. The Forwarding Report of material objects, marked as Ext.18, reveals that the hairs collected from the vagina of the victim have been marked as 'N' for identification. In course of investigation, sample pubic hairs the accused was also collected and it is marked as 'O' in the Forwarding Report. At paragraph 8 of the last page of the Forwarding Report, the S.D.J.M., Chhatrapur has directed the examiner to examine the Ext 'N' and opine if the foreign hair found there tallies with the pubic hair on Ext. O. This examination has not been conducted by the chemical examiner. Thus, this is a flaw in the investigation. Hence, the finding that there was no foreign hair in Ext. 'N' cannot rule out the complicity of the accused in the commission of the crime.

This flaw in investigation will not throw out the prosecution case. Investigation is not the solitary area for judicial scrutiny in a criminal trial. It is well neigh settled that even in cases of flawed investigation, the rest of the evidence must be scrutinized independently of the impact of it. Otherwise criminal trials will plummet to the level of the investigating agency ruling the roost. The courts must have predominance and preeminence in criminal trials over the actions taken by the investigating officers. Criminal justice cannot be made casualty for the wrongs committed by the investigating officer in the case. (***State of Karnataka v. K.Yarappa Reddy*****;** 2000 SAR (Cri) 37) = (1999) 8 SCC 715 = AIR 2000 SC 185.

29. Thus, from the above evidence, the learned Sessions Judge has cited five different circumstances, but we are of the considered opinion that the circumstances have been grouped together and some important circumstances though have been considered while discussing the evidence have not been specifically spelt out in the judgment impugned. In our considered view, prosecution has established its case by proving the following circumstances.

1) *The accused was present near the house of the informant, after the departure of P.Ws. 10, 11 and 18 and volunteered to take the deceased to the feast and to leave her in the company of her uncle;*

2) The accused and the deceased were last-seen together at about 10 P.M. when they left for the feast;

3) The accused did not leave her in the company of her uncle.

4) The victim was not seen at the feast.

5) One hour after such departure, the accused was found alone at the Matikhana Chhaka, which is about 250 feet away from the spot.

6) On enquiry he gave misleading answers by stating that she has left the girl in the school premises.

7) The victim was not found in the school premises.

8) About half an hour after the accused gave misleading answer, the dead body of the deceased was found in the cow-dung pit and having bleeding injuries on her private parts and body etc.

9) *On search, they found blood-stained Chadi and Lungi (which was used by her to wrap herself) of the deceased on the threshing floor belonging to the father of the accused.*

10) *P.W. 14 found a pool of blood on the veranda of the cowshed. Blood trail was leading towards cow dung pit.*

11) *The postmortem examination reveals that all the injuries found on the dead body of the deceased were ante mortem in nature and the death of the deceased was homicide.*

12) *The doctor has conclusively opined that there was forceful penetration of erected penis/hard object inside the vagina of the victim girl.*

13) *The presence of intact spermatozoa leads to the conclusion that she was forcibly ravished.*

14) *The injuries found on the penis of the accused are consistent with the forceful penetration of the erected penis. There is clear medical proof of recent sexual intercourse.*

15) *The accused absconded from the village that night and was arrested on the next date from a different village.*

30. From the aforesaid circumstances, this Court comes to the conclusion that the Sessions Judge has not erred in holding that the accused is the author of the crime. The residual question that remains to be adjudicated in the Death Reference/Criminal Appeal is, whether the death penalty is the appropriate punishment in the case?

31. The learned Sessions Judge held the case to be rarest of the rare when all other options but the severest sentence is foreclosed and accordingly proceeded to sentence the accused to be hanged by neck till death. The learned counsel for the appellant has argued that this is not a rarest of the rare case. It is submitted by the learned counsel that the convict has no criminal background, during his detention in the jail no adverse report has been submitted by the Jail Authority/Probation Officer, the case rests on circumstantial evidence and his wife and children are dependent upon him. The learned counsel, therefore, submits that the death sentence should be commuted to imprisonment for life. In course of hearing, the learned Addl. Government Advocate, however, submitted that there is a plethora of cases, where the Supreme Court has upheld punishment of

death in case of rape and murder of a minor girl, as the offence speaks of the extreme depravity of the accused.

32. Sentencing is the cutting edge of the criminal justice administration. An appropriate sentence is as important as the just conclusion regarding establishment of charges. It is the duty of the Court not only to hold an accused guilty when the offence has been proved beyond all reasonable doubt and to acquit a person who is proved to be not guilty, it is also the sacrosanct duty of the court to impose appropriate punishment. While deciding the punishment, the court is confronted with the crucial task of striking a balance between the protection of the Society on one hand and the correction of the offender on the other. Penologists agree that the quantum of punishment largely depends on five considerations, those are; retribution, deterrence, denunciation, incapacitation and rehabilitation. The most important considerations are deterrence and rehabilitation. The punishment should be such that it should deter others from committing the offence but at the same time in appropriate cases, there should be proper opportunity for the offender to correct himself and rehabilitate in the mainstream.

33. Sub-Section (3) of Section 354 of the Code provides that whenever the Court awards death sentence for the offence which has alternative punishment for imprisonment for life or death sentence, the special reasons for such sentence are to be stated. Such provision was considered by the Constitutional Bench of the Supreme Court in ***Bachan Singh v. State of Punjab**,* AIR 1980 SC 898 and it was held that such provision makes a significant shift in the legislative policy underlying the Code of Criminal Procedure, 1898, according to which both alternative sentence of death or imprisonment for life provide for murder and for certain other capital offences under the Penal Code were normal sentence. Now, according to this changed legislative policy, which is patent on the face of Section 354 (3)of the Code, the normal punishment for murder and six other capital offences under the Penal Code is imprisonment for life (or imprisonment for a term of years) and a death penalty is an exception. While considering the question if sections 302, I.P.C. and 354 (3) of the Code are *ultra vires* of the Constitution of India, the Supreme Court in the aforesaid case has held that death penalty is not unconstitutional. However, it should be inflicted only in the rarest of rare cases. However, the Hon'ble Supreme Court has pointed out that no standardization can be made in which such severest of punishment can be imposed, the reasons being;

Firstly, there is little agreement amongst the penologist and jurist as to what opinion about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for a person convicted for a particular offence;

Secondly, criminal cases do not fall into set-behavioristic patterns. Even within a single category of offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical.

Thirdly, standardization of a sentence process which leaves little room for judicial discretion to take account of variations in culpability within a single offence category ceases to be judicial. It tends to sacrifice justice at the altar of blind uniformity;

Fourthly, standardization or sentencing discretion is a policy matter which belongs to the sphere of the legislation. When the Parliament has a matter of sound legislation already did not deliberately restrict, control or standardise, the sentence discretion any further than that is encompassed by the board contours delineated in section 354(3) of the Code, the Court would not by overleaping its bounds rush to do what the Parliament in its wisdom warily did not do.

34. In ***Machi Singh and others v. State of Punjab***, AIR 1983 SC 957, the Hon'ble Supreme Court has laid down that in order to decide, whether the extreme penalty should be imposed, the following questions may be asked and answered;

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

The learned Sessions Judge has taken into consideration the following aggravated circumstances;

(i) The convict was 34 years at the time of incident. He is a married man having his own children. He is neither a bachelor nor too young to control his sexual urge.

(ii) He usually resides in Mumbai, therefore, he is not a rustic villager and he belongs to the higher socio-economic plane than the victim.

(iii) Having committed the offence of rape, he brutally killed an innocent child using a heavy stone by giving repeated blows by the stone on her face, head and chest and thereby killed her. This is a diabolic act.

(iv) The parents of the child by act or omission have never created any such circumstance favourable to the accused to arouse sexual desire in him. It was on the suggestion of the convict they had left the child to be taken to a feast.

(v)The brutal act is suggestive of the extent of convict's perversity and depravity of mind.

(vi) There is nothing to suggest that the convict was mentally defective or heavily intoxicated which impaired his capacity to appreciate his own criminal conduct.

(vii) The offences were committed not under the influence of extreme mental or emotional disturbances.

(viii) This is not a case where the accused presume that he believes that he is morally justified in committing the crime.

35. The mitigating circumstance, which was taken into consideration by the learned Sessions Judge are as follows:

(i) The convict has no criminal background;
(ii) During his detention, no adverse report has been submitted by the Jail Authorities.

(iii) The case rests on circumstantial evidence.

On the top of it we add that the accused has a family to support and the children born to him shall also suffer the punishment, albeit indirectly,

inflicted on the accused. There is also no evidence that the accused had made any previous planning or premeditated the commission of the crime.

36. The learned Sessions Judge has relied upon the case of **Devendra Pal Singh vs. State of NCT of Delhi** *:* 2002 (5) SCC 234; wherein the Hon'ble Supreme Court has held that when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regard desirability or otherwise of retaining death penalty, the same can be awarded. The learned Sessions Judge also took note of ***Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra*** *:* AIR 2009 SC 56, wherein the Hon'ble apex Court has held that the offence of rape of a girl aged below 10 years and her murder thereafter is a case of rarest of the rare category and has upheld the death sentence.

37. The Hon'ble Supreme Court in ***Dayanidhi Bisoi v. State of Orissa,*** 2003 (9) SCC 310` has taken into consideration the cold blooded and premeditated approach of the conviction in committing the multiple murder and held that such case falls into the category of rarest of rare cases. The Hon'ble Supreme Court in ***Aloke Nath Dutta and others v. State of West Bengal****,* 2006 (13) SCALE 467, at paragraph 173 has observed as follows:

> *"173. We must remind ourselves that there has been a growing demand in the international fora that death penalty should be abolished. [See Second Optional Protocol to the international Convenants on Civil and Political Rights and the protocol to the American Constitution on Human Rights to abolish death penalty]. Pursuant to or in furtherance of the pressure exhorted by various international NGOs, several countries have abolished death penalty. The superior courts of several countries have been considering the said demand keeping in view the international covenants, conventions and protocol."*

Keeping such observations in mind and the various judicial pronouncements of the Hon'ble Supreme Court, the death sentence awarded to Aloke Nath was commuted to imprisonment for life.

38. The propriety of inflicting death penalty again came for consideration before the Hon'ble Supreme Court in ***Swamy Shraddananda alias Murali Manohar Mishra v. State of Karnataka,*** AIR 2007 SC 2531; wherein Hon'ble Justice S.B.Sinha took the view that the person accused of rape and murder of a minor girl, keeping in facts of the case in view, is to be

punished with imprisonment for life instead of the death penalty. The main reason behind such an opinion, in a case it is based only on circumstantial evidence, is reflected in paragraph 89 which we consider appropriate to quote.

> *"89. It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter source of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder."*

Further, in the said case, the Hon'ble Justice Markandey Katju did not agree with the conclusions reached by Hon'ble Justice Sinha. The matter was then referred to a Larger Bench. A Bench consisting of three Hon'ble Judges of the Supreme Court in ***Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka,*** reported in 2008 Crl. Law Journal 3911 endorsed the view taken by Hon'ble Shri Justice Sinha and the sentence of death was commuted to imprisonment for life.

39. In the reference case of *Swamy Shraddananda,* the Larger Bench of the Hon'ble Supreme Court has held that the death sentence should be substituted by the life imprisonment or by term in excess of 14 years and further directed that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be. Hence, the order was accordingly passed. The reason behind such conclusion is that when an appellant comes to the Supreme Court carrying a death sentence awarded by the trial court and confirmed by the High Court, the Supreme Court may find as in the present appeal that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the court may strongly feel that a sentence of life imprisonment which, subject to remission, normally works out to a term of 14 years would be grossly disproportionate and inadequate. If in such cases the Court's option is limited only to two punishments, one a sentence of

imprisonment, for all intents and purposes of not more than 14 years and the other death, the court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. It is further laid down that a far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e. the vast hiatus between 14 years' imprisonment and death.

40. From the foregoing discussions, we are of the considered opinion that the case is definitely a very serious one and the allegations have been brought home substantially. However, keeping in view the mitigating circumstances, namely; the convict has no criminal background, during his detention no adverse report has been submitted by the Jail Authority, there is one flaw in the investigation i.e. the omission to compare the hairs collected from the private part of the victim with the sample pubic hair collected from the accused, the accused has a family to support and has small children and there appears to be no premeditation or previous planning to commit the offence and giving maximum weightage to the mitigating circumstance, this Court comes to the conclusion that the severest of the punishment, i.e. the death penalty is not proper in this case. At the same time, this Court is also not inclined to impose the life imprisonment as generally administered, which entails release of the convict after incarceration for about fourteen years. This Court, therefore, comes to the conclusion that the accused/convict should be imprisoned for at least 25 (twenty-five) years, in terms of the ratio decided in ***Swamy Shraddananda****'s* case (*supra*) for the offence under section 302, I.P.C.

41. In the result, we uphold the conviction of the accused under Sections 302 and 376 (2) (f) of the I.P.C. but set aside the punishment of death imposed on him and modify the sentence to punishment of imprisonment for life, with the further condition that in this case remission of sentence should not be considered before completion of 25 (twenty-five) years of incarceration. The reference made by the learned Sessions Judge is accordingly discharged and the Criminal Appeal filed by the appellant is partly allowed.

The Death Reference and the Criminal Appeal are accordingly disposed of.

Death reference & Appeal disposed of.

2010 (II) ILR – CUT- 929

M.M.DAS, J.

W.P.(C) NO.4072 OF 2002 (Decided on 3.8.2010)

M/S. BABA BAIJNATH ROLLER &
FLOUR MILL PVT. LTD. ……… Petitioners**.**

.Vrs.

WESTERN ELECTRICITY SUPPLY
COMPANY OF ORISSA LTD.&ORS. ……….. Opp.Parties.

EECTRICTY – Tampering with meter – Representation filed - Non Consideration of the representation of the petitioner- violation of the principles of natural justice – Held, even if alternative remedy is available writ petition under Art. 226 is maintainable for redressal of the grievance of the petitioner. (Para 6)

Case laws Referred to:-

1.95(2003) CLT 65 : (Sri Harisankar Giri & Anr.-V-Central Electricity Supply Company of Orissa Ltd.&Ors).
2.AIR 1997 SC 2793 : (Belwal Spinning Mills Ltd.-V-U.P.State Electricity Board & Anr.).

For Petitioner - M/s. P.K.Mishra & S.K.Dash.
For Opp.Parties- M/s. B.K.Patnaik, P.Sinha, P.Choudhury, M.Samantaray, Smt.S.Pattnaik & B.K.Nayak.

M.M. DAS, J. The petitioner is a company carrying on its business in the name and style of M/s. Baba Baijnath Roller and Flour Mills Pvt. Ltd. having its mill in the district of Jharsuguda. In the present writ petition, the petitioner has challenged the imposition of penalty on it by the opp. parties on the allegation of tampering with the meter and wire and has prayed for quashing Annexures-4 and 6 series. Under Annexure-4 dated 9.9.2002, the petitioner was intimated that its premises/unit was inspected by the Executive Engineer (Electrical) WESCO, Jharsuguda Electrical Division and the following facts are noticed:-

> "(1) H.T. Meter, T.P. Box's inner door and meter terminal cover quick seals, plastic seals and paper seals are found tampered.
>
> (2) L.T. T.P. Box inner door quick seals, plastic seals and paper seals are found tampered.

The B-Phase P.T. wire found cut as such the meter is not getting B-Phase potential.

xx xx xx"

In the said letter, it was further alleged that the above interference with the metering arrangement was made by the petitioner – company in order to prevent the meter from recording actual consumption which attract Regulation-64 of OERC Distribution Code. The petitioner – company was, therefore, intimated that penal charges as per rules on account of the above mentioned act will be intimated separately and the petitioner was given liberty to submit its representation, if any, within seven days against the facts pointed out in the inventory report. It was cautioned that on the petitioner – company's failure to deposit the charges within seven days from the date of receipt of the final bill, the power supply to the premises will be disconnected without any further notice. Annexure-6 series is the forwarding letter with the penal bill sent to the petitioner – company requiring it to pay the same within seven days. The penal bill is for an amount of Rs.5,10,930/-. On 5.10.2002, the electricity supply was disconnected to the petitioner – company's unit after which the petitioner has approached this Court in the present writ petition for appropriate relief.

2. On 10.10.2002, this Court passed an interim order directing that on the petitioner – company depositing a sum of Rs.30,000/- without prejudice to its rights and contentions, power supply shall be restored.

3. It was contended by Mr. Mishra, learned counsel for the petitioner that though by the interim order, there was a direction to stay realization of the penal bill, the opp. parties went on charging delayed payment surcharge on the penal charges in monthly bills raised subsequently on account of delayed payment surcharge on old arrears, on current arrear and miscellaneous DR/CR. The petitioner further contended that as it was not aware of the above fact, it went on paying the electricity charges including the above charges and when it detected, it filed Misc. Case No. 8496 of 2003. This Court by order dated 6.2.2004 directed that the said matter shall be considered at the time of final disposal of the writ petition. Accordingly, the petitioner – company has claimed refund of the entire amount collected on the above heads, as in the meantime, the petitioner – company's unit is already closed and there is no scope for adjustment.

4. It was further urged on behalf of the petitioner that the allegation of tampering with the seals cannot be sustained as there is no allegation that the outer seal of the T.P. was broken or tampered and, therefore, one cannot have access to tamper an inner seal. The B-Phase wire also is located inside the T.P. Box and hence, the same cannot be tampered or cut

without breaking the outer seal. Therefore, the allegation appears to be improbable. Mr. Mishra further contended that the meter reading in comparison with the previous meter reading of 6 months itself falsifies the allegation that the B-Phase wire was cut thereby disrupting the power supply to the meter and in every month, the meter was being inspected by the officers/staff of WESCO and even on 31.8.2002the S.D.O. had inspected the meter, who has never reported regarding any tampering or breaking of seal. Pursuant to Annexure-4, the petitioner submitted a representation as at Annexure-5. But from Annexure-6, nothing is revealed regarding consideration of the said representation nor was the petitioner ever called upon to be heard. Penal charges are to be calculated as per Clause - 105 of the OERC Distribution (Conditions of Supply) Code, 1998, which is as follows:-

> "105. (1). On detection of unauthorized use in any manner by a consumer, the load connected in excess of the authorized load shall be treated as unauthorized load. The quantum of unauthorized consumption shall be determined in the same ratio as the unauthorized load stands to the authorized load.
> (2) The period of unauthorized use shall be determined by the engineer as one year prior to the date of detection or from the date of initial supply if the initial date of supply is less than one year from the date of detection. If the consumer provides evidence to the contrary, the period may be varied according to such evidence……………….."

5. A counter affidavit has been filed by WESCO, inter alia, stating that alternative remedy is available to the petitioner under Clause - 110 of the OERC Distribution(Condition of Supply) Code 1998 as well as under sections 33 and 37 (1) of the Orissa Electricity Reforms Act. Clause – 110 (1) prescribes that a consumer aggrieved by any action or lack of action by the engineer under this Code may file a representation within one year of such action or lack of action to the designated authority of the licensee above the rank of engineer, who shall pass final orders on such a representation within thirty days of receipt of the representation. A consumer aggrieved by the decision or lack of decision of the designated authority of the licensee may file a representation within forty five days to the chief executive officer of the licensee who shall pass final order on such representation within forty five days of receipt of the same. In respect of orders or lack of orders of the chief executive officer of the licensee on matters provided under section 33 of the Act, the consumer may make a reference to the Commission under section 37 (1) of the Act. It has been further contended in the counter affidavit that besides the above, the opp.

parties have framed grievance handling procedure with approval of the Orissa Electricity Regulatory Commission giving right to the consumer to make representation before the grievance cell and have set up Bijuli Adalat in every circle for redressal of the grievance of the consumers and the petitioner having not availed such statutory remedy, the writ petition is liable to be dismissed on account of availability of efficacious alternative remedy. The other allegations made in the writ petition have been denied by the opp. parties in the counter affidavit.

6. With regard to the availability of alternative remedy, it is a well known principle of law that in case of violation of principle of natural justice, even if alternative remedy is available, a Writ Court under Article 226 of the Constitution can interfere for redressal of the grievance of the petitioner. Learned counsel for the petitioner further brought to the notice of the Court section 26 (6) of the Indian Electricity Act, 1910, which stipulates that even if dispute arises as to whether any meter referred to in sub-section (1) thereof, is or is not correct, the matter shall be decided upon application of either party, by an Electrical Inspector and where the meter has, in the opinion of such Inspector ceased to be correct, such Inspector shall estimate the amount of the energy supplied to the consumer or the electrical quantity contained in the supply, during such time, not exceeding six months, as the meter shall not in the opinion of such Inspector have been correct.

Mr. Mishra, learned counsel for the petitioner placed reliance on the decision of this Court in the case of ***Sri Harisankar Giri and another v. Central Electricity Supply Company of Orissa Ltd. and others,*** 95 (2003) CLT 65, wherein it was held that if there is any anomaly between the Central Act and the State legislation, the provisions of the Central Act will prevail and since the Principal Act says that the Electrical Inspector has to calculate and that he cannot impose penalty for a period beyond six months, the provision of section 26 will prevail , but not Clause 105 of the Code. It has also been held in the said decision that if the principle of natural justice has not been followed, the imposition of penalty has to be struck down. In the instant case, the matter has not been referred to the Electrical Inspector, but the penal bill has been prepared by the Executive Engineer calculating the penal charges for twelve months which is not in consonance with section 26 (6) of the Indian Electricity Act, 1910.

7. In the case of *Sri Harisankar Giri and another* (supra), the Division Bench of this Court referring to the ratio laid down by the Supreme Court in the case of ***Belwal Spinning Mills Ltd. v. U.P. State Electricity Board and another,*** AIR 1997 SC 2793 held that on a harmonious construction of Clause 105 of the Code and the provisions of section 26 (6) of the Indian Electricity Act, it was found that that the licensee is not empowered to impose penalty beyond six months inasmuch as legislature did not permit

them to realize any amount for unauthorized abstraction beyond six months, unless proof of fraud is established preceding statutory period of six months and in no uncertain term also laid down that Clause 105 (2) of the Code, which prescribes that the Engineer shall levy penal charges in addition to the normal charges for a period of one year preceding to unauthorized use, is contrary to the provisions of section 26 (6) of the Indian Electricity Act and, therefore, such clause is unenforceable . On a hypothetical case, this Court also considered that even assuming that such clause is attracted, if from evidence, it is established that unauthorized use was only for a limited period, i.e., for three years, the opp. parties could not have levied penal charges from the consumer for one year. In the instant case, it is seen that the representation filed by the petitioner was never considered before imposition of penalty, far less, giving an opportunity of hearing to the petitioner. This action of the opp. parties is, therefore, in clear violation of the principles of natural justice.

8. In view of the above, the bill under Annexure-6 imposing penalty charges on the petitioner can neither be sustained nor can it be said that the defects found during inspection in the meter in the petitioner-company's unit recorded gospel truth. Further, the inspection was never done in presence of either the authorized person of the petitioner-company or any of its agents, which ex-facie appears to be an unilateral conclusion. The said inspection report is, therefore, also quashed.

9. With regard to refund of the excess amount, representation said to have been filed by the petitioner on delayed payment surcharge on old arrear and on current arrear along with miscellaneous DR/CR, as it is found that the penalty is unsustainable, the opp. parties were not entitled to levy such delayed payment surcharge on the penal charges treating them to be old arrear/current arrear. Such delayed payment surcharge which has already been levied from the petitioner, as stated by the petitioner, is liable to be refunded to the petitioner. Ordered accordingly. Such refund should be made within a period of three moths from the date of communication of this order.

10. The writ petition is accordingly allowed, but in the circumstances, there shall be no order as to cost.

Writ petition allowed.

2010 (II) ILR – CUT- 934

M.M.DAS, J.

W.P.(C) NO.19608 OF 2008 (Decided on 27.07.2010)

ASHOK KUMAR JAGADEV ……….. Petitioner

.Vrs.

SIBANARAYAN JENA ……….. Opp.Party.

CIVIL PROCEUDRE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 22.

Petitioner was the elected Sarpanch – His election was challenged – Tribunal found him disqualified, set aside his election and declared the election petitioner as duly elected – Petitioner challenged the said judgment in Election Appeal – Election petitioner who was respondent No.1 expired during pendency of appeal – Petitioner filed petition saying that the proceeding has abated – Learned District Judge directed deletion of the name of Respondent No.1 and heard the appeal and reserved the same for judgment – Hence this writ petition.

Held, Order 22 C.P.C. has no application in an election petition Under the Grama Panchayat Act and the question of abatement of the appeal shall not arise. (Para 6)

For Petitioner - M/s. A.K.Mohapatra, S.K.padhi, N.C.Rout, S.K.Mishra, A.R.Swain & M.R.Mohanty.
For Opp.Party - M/s. S.P.Dash & N.M.Swarnakar.

M.M. DAS, J. The petitioner in this writ petition was declared elected as Sarpanch of Gopamathura Grama Panchayat under Baramba Block in the election held on 21.2.2007. One Prafulla Kumar Nayak filed Election Misc. Case No. 4 of 2007 seeking declaration of the election of the petitioner as illegal and void and to declare him as the legally elected Sarpanch of the said Grama Panchayat. Though allegations of corrupt practice, arrangement of fraudulent voters and utilization of official vehicle in election campaigning were made in the election petition, but only a single point was urged before the learned Election Tribunal by the election petitioner which was with regard to the allegation that the petitioner was holding an office of profit on the date of filing of the nomination. The learned Election Tribunal after framing the issues, recorded evidence and upon hearing the learned counsel for the parties allowed the said Election Misc. Case by judgment dated 23.7.2008 holding that the nomination and election of the petitioner as Sarpanch was illegal being contrary to section 25(h) of the Orissa Grama Panchayat Act, 1964 (for short, ' the Act') as he was

disqualified to file the nomination. It was further directed by the learned Election Tribunal that the election petitioner having obtained the second highest number of votes, is declared as duly elected Sarpanch of the said Grama Panchayat. The petitioner challenged the said order/judgment passed by the learned Election Tribunal in Election Appeal No. 28 of 2008 before the learned District Judge, Cuttack. During pendency of the said appeal, the election petitioner expired. An application was filed by the petitioner before the learned appellate court bringing the fact of death of the election petitioner, who was respondent no. 1 in the said appeal and died on 13.11.2008 and making a prayer that after death of the said election petitioner, the proceeding is vitiated inasmuch as there is no scope to perpetuate the election proceeding. The learned District Judge on 24.12.2008 considering the said application filed by the petitioner and the death certificate produced before him, recorded as follows:-

> "…………….. Heard. Prayer is allowed. The name of respondent no. 1 - Prafulla Kumar Nayak be deleted from the appeal memo. Office to correct the appeal memo and cause title accordingly."

After recording the above order, the learned District Judge heard the appeal on merit on the same day and posted the appeal for delivery of judgment to 2.1.2009. Being aggrieved by the said order, the petitioner has approached this Court in the present writ petition for appropriate relief.

2. This Court passed an interim order on 30.12.2008 staying delivery of the judgment by the appellate court.

3. Mr. A.K. Mohapatra, learned counsel for the petitioner contended that the learned District Judge without considering the law and effect of death of respondent no. 1 in the appeal, who was the election petitioner and without applying his judicial mind, directed deletion of the name of the said election petitioner and without hearing the appeal reserved the appeal for judgment. According to Mr. Mohapatra, the learned District Judge has failed to exercise jurisdiction vested in him by not hearing the petition filed by the petitioner on 24.12.2008 on merit and by not inviting objection to the said petition inasmuch as not assigning any reason as to why it shall not be held that the entire election petition abates on the death of the election petitioner. The other contention raised by Mr. Mohapatra is that when the election petitioner expired, the learned District Judge should have decided the question as to whether the election petition as a whole abated from its inception or not, instead of directing deletion of the name of the deceased. He vehemently urged that the election proceeding is neither a proceeding under the common law nor a proceeding in equity, but is one under a special statute and should be governed by the said statute. The provisions

of the Code of Civil Procedure will apply to such a proceeding as per sections 35 and 37 of the Act. Right to be elected is a personal right, which does not perpetuate to the successors, as in case of civil proceeding, where right over properties is concerned. Hence, question of substitution does not arise in an election petition.

4. The opp. party, who was another candidate in the election and was opp. party no. 2 in the election petition, has appeared in the present writ petition. Learned counsel for the opp. party submitted that the learned Election Tribunal having found that the petitioner was disqualified from filing nomination to contest the election to the post of Sarpanch on the ground that he was holding an office of profit on the date of filing of the nomination paper and such finding having been challenged in the appeal, even on the death of the election petitioner, the election petition will not abate from its inception as otherwise, a disqualified candidate like the petitioner, who is not legally entitled to hold the post of Sarpanch, will continue to function as Sarpanch of the Grama Panchayat. He further submitted that disqualification under section 25 (h) of the Act being a statutory disqualification, the provision regarding abatement of the appeal can only be limited to the appeal itself and cannot nullify the findings arrived at by the learned Election Tribunal. Hence, in any event, the correctness of the findings of the learned Election Tribunal with regard to disqualification of the petitioner to contest the election to the post of Sarpanch can be adjudicated in the appeal. The other limb of the argument of the learned counsel for the opp. party is that since the petitioner has already suffered a judgment declaring him disqualified to hold the post of Sarpanch, the said finding cannot be cured on account of the death of the election petitioner nor can be treated to have been waived or nullified by such death of the election petitioner.

5. Section 35 of the Act prescribes that subject to the provisions of the Act and the rules made thereunder every election petition shall be tried by the Civil Judge (Jr. Division) as nearly as may be, in accordance with the procedure applicable under the Code of Civil Procedure to the trial of suits. Section 37 of the Act specifies that the Civil Judge (Junior Division) has the powers which are vested in a court under the Code of Civil Procedure when trying a suit in respect of the matters enumerated therein. Though in section 37 of the Act, there is no mention that Order 22 of the Code of Civil Procedure can be made applicable to an election petition, but nevertheless, section 35 prescribes that every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure. No doubt, in an election petition, if the election petitioner expires, the right to sue does not survive with the legal heirs of such election petitioner as right to be elected undoubtedly is a personal right. Nevertheless, after final adjudication of an election petition, as in the instant

case, where facts reveal that the election of the petitioner was declared as illegal and void on the ground that he was disqualified to file nomination paper for contesting the election as per section 25 (h) of the Act, the correctness of such finding is open to be adjudicated in an appeal preferred by the elected candidate (petitioner). Unless such finding is reversed by the appellate court, the petitioner cannot be held to be qualified to file the nomination paper and the finding arrived at by the learned Election Tribunal will be binding on the petitioner as well as on all concerned.

6. This Court, therefore, finds that Order 22 C.P.C. has no application in an election petition under the Act, and, therefore, the question of abatement of the appeal shall not arise. However, the portion of the order of the learned Election Tribunal declaring the election petitioner to be elected as Sarpanch cannot be worked out in view of his demise and a bi-election is bound to be held for the post of Sarpanch. However, if the petitioner does not pursue the appeal any further, the finding of the learned Election Tribunal with regard to disqualification of the petitioner becomes final. This Court, therefore, though does not find any illegality in the impugned order, but since it is alleged that the petitioner has not been heard on the merit of the appeal, it is directed that the learned District Judge, Cuttack shall hear arguments in Election Appeal No. 28 of 2008 afresh and decide the correctness of the findings arrived at by the learned Election Tribunal with regard to disqualification of the petitioner. In case, he confirms the said finding, the learned District Judge shall direct holding of by-election to the post of Sarpanch of the said Grama Panchayat. But, in the event, the said finding is set aside and it is held that the petitioner was not disqualified as per section 25 (h) of the Act, the petitioner shall be allowed to continue as the Sarpanch of the said Grama Panchayat.

7. With the aforesaid observation and direction, the writ petition is disposed of. There shall be no order as to costs.

Writ petition disposed of.

2010 (II) ILR – CUT- 938

M.M.DAS, J.

W.P.(C) NO.12570 OF 2010 (Decided on 26.7.2010)

BANSIDHAR PRADHAN …….. Petitioner.

.Vrs.

KALINGA INSTITUTE OF MINING ENGINEERING & TECHNOLOGY (KIMET TRUST) & ORS. …….. Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – SEC.10.

Stay of suit – Where further Proceeding of the suit has been stayed U/s10 C.P.C., the trial Court can not proceed with any interim application filed by any party.

In this case C.S. No.69 of 2002 was filed between the parties out of which two Second Appeals are pending before this Court – The O.P 2 & 3 filed the present suit being C.S. No.278/10 praying for a decree of permanent injunction against the petitioner – Petitioner filed application U/s.10 C.P.C. for stay of suit – Learned trial Court stayed the suit but did not stay the hearing of the interim application for interim injunction – Hence this writ petition.

Held, impugned order refusing to stay further proceedings in the interim application is quashed and the learned trial Court is directed not to proceed with the said interim application till disposal of the Second Appeals before this Court. (Para 13)

Case laws Referred to:-

1.AIR 1998 SC 1952 : (Indian Bank -V- Maharashtra State Co-operative Marketing Federation Ltd.).
2.64(1987) CLT 540 : (Bijay Kumar Agarwalla & anr.-V-Ramakanta Das).

For Petitioner - M/s.B.Routray, S.K.Pattnaik, U.C.Mohanty, S.K.Jena, S.K.Biswal & T.Sahu.
For Opp.Parties – M/s. S.Mishra.

M.M.DAS, J. A consent memo has been filed in favour of Mr. B. Routray, learned senior counsel to appear on behalf of the petitioner in Court today. The same be kept on record.

Mr. S. Mishra, learned counsel has entered as a Caveator on behalf of the contesting opp. Parties.

2. The petitioner in this writ petition has challenged the order dated 20.7.2010 passed in I.A. No. 84 of 2010 arising out of C.S. No. 278 of 2010

by the learned Civil Judge (Senior Division), Angul. The opp. party no. 1 -institution is a technical educational institution, which has been formed by virtue of registered deed of trust of 1989. Due to dissension amongst the parties, earlier C.S. No. 69 of 2002 was filed before the learned Civil Judge (Sr. Division), Angul, which was ultimately disposed of by judgment dated 21.3.2006. The learned Civil Judge in the said suit refused to grant permanent injunction against the defendants therein and declared that there were only three new trustees, namely, Bansidhar Pradhan, the petitioner herein, and the opp. parties 2 and 3 to this writ petition. Against the aforesaid judgment, RFA No. 5 of 2006 was filed before the learned Additional District Judge, Angul, which was disposed of by judgment dated 10.1.2007. The learned Additional District Judge by the aforesaid judgment confirmed the judgment of the learned trial court with respect to the trusteeship of the present petitioner and the present opp. party no. 3, whereas the trusteeship of opp. party no. 2 as declared by the learned trial court was set aside. Against the aforesaid judgment in the appeal, RSA No. 47 of 2007 has been filed by one Lambodhar Pradhan, wherein the present petitioner as well as the opp. parties and others have been made respondents. Similarly, the present opp. parties 2 and 3 along with proforma opp. party no. 4 have jointly filed RSA No. 152 of 2007 before this Court. Both the appeals are pending and the question of trusteeship of the present opp. party no. 2 is yet to be decided. Another writ petition, being W.P.(C) No. 3881 of 2007 was filed by the present opp. party no. 3 challenging the order dated 25.2.2007 passed by the Commissioner-cum-D.T.E. & T, Orissa holding that certain documents alleged to have been created by the opp. party no. 3 in connivance with one Kishore Ch. Nath, who was not a trustee are illegal and null and void. A Division Bench of this Court by order dated 11.4.2007 observing that the Court wanted to pass a detailed order on merit holding that the impugned letter under Annexure-4 (order of the Commissioner-cum-D.T.E.& T) dated 2.3.2007 is perfectly right, allowed the petitioners therein to withdraw the writ petition (W.P.(C) No. 3881 of 2007) by recording that the writ petition is dismissed as withdrawn. Several other litigations are also pending and in Criminal Revision No. 1483 of 2007 filed by one Bira Kishore Patel claiming himself to be the Principal wherein the present petitioner is an intervenor – opp. party, this Court in the order dated 13.12.2007 has passed an order to maintain status quo in respect of the possession of the institution.

3. It appears that thereafter, the opp. parties 2 and 3 have filed the present suit being C.S. No. 278 of 2010 praying for a decree of permanent injunction and an interim application being I.A. No. 84 of 2010 was filed praying for interim injunction against the petitioner, who is the defendant no.1 in the suit from interfering with the affairs of the institution.

4. Mr. Routray learned counsel submits that the suit itself has been filed by the opp. parties 2 and 3 relying upon the self-same fabricated documents which were dealt with by this Court in the aforesaid W.P. (C) No. 3881 of 2007 and, as such, the entire suit is vexatious amounting to abuse of the process of law. The petitioner filed application under the provision of section 10 read with section 151 C.P.C. for stay of further proceedings in the suit as well as in the interim application. The learned Civil Judge (Sr. Division), Angul on considering the pleadings allowed the petition filed by the petitioner and stayed further proceedings of the Civil Suit since the previous suit being C.S. No. 69 of 2010 is now pending before this Court in the aforesaid two Second Appeals. However, the learned trial court did not stay the hearing of the interim application filed by the plaintiffs for grant of interim injunction.

5. Mr. Mishra, learned counsel for the opp. parties strenuously urges that it is well settled in law that stay of a suit under section 10 of the C.P.C. does not mean for interim application for injunction, receiver or any other appropriate order like attachment before judgment, cannot be entertained by the court in which the suit is pending.

6. Mr. Routray, on the contrary, submits that the decisions relied upon by the learned court below do not apply to the facts of the present case.

7. The moot question, therefore, which arises in this writ petition is, as to whether, there can be a general principle of law that when further proceeding in a suit is stayed by exercise of jurisdiction under section 10 C.P.C., the same would not amount to stay of interim application wherein prayer for interim injunction or appointment of receiver or for attachment before judgment is made.

8. Mr. Mishra, relied upon the decision in the case of ***Indian Bank v. Maharashtra State Co-operative Marketing Federation Ltd.***, AIR 1998 SC 1952 and the decision of this Court in the case of ***Bijay Kumar Agarwalla and another v. Ramakanta Das***, 64(1987) CLT 540, in support of his contention that further proceedings in the interim application, where a prayer for interim injunction has been made as in the present case, should not be stayed. It should be noted at this juncture that further proceeding in C.S. No. 278 of 2010 has been stayed by the learned court below on the application made by the petitioner under section 10 of the C.P.C. and that, said suit has been filed with a prayer for passing a decree of permanent injunction restraining the present petitioner who is defendant no.1 in the suit and his henchman from entering into the institution and interfering with any matter relating to the institution. The prayer in the interim application is also to injunct the petitioner, from interfering with the affairs of the institution till disposal of the suit. It may be further noted that since further proceedings in the suit has been stayed under section 10 of the C.P.C. by

the learned trial court, passing an interim injunction in favour of the plaintiffs would practically amount to passing a permanent order of injunction as the said suit, which has been stayed, cannot be proceeded with and further proceeding of which depends on the result of the Second Appeals pending before this Court. It, therefore, would mean that if an order of interim injunction is passed on the interim application by the learned trial court in favour of the plaintiffs, the said order will continue and will not come to an end even if the plaintiffs might be having no merit in the suit.

9. The Supreme Court in the case of *Indian Bank* (supra) was considering the question as to whether the bar to proceed with the trial subsequently instituted suit contained in section 10 of the C.P.C. is applicable to summary suit filed under Order 37 of the Code. While dealing with the aforesaid question, the Supreme Court held that the word "trial" in section 10 of the C.P.C. will have to be interpreted and construed keeping in mind the object and nature of that provision and the prohibition to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit. The Supreme Court observed that the object of the prohibition contained in section 10 of the C.P.C. is to prevent the Courts concurrent jurisdiction from simultaneously trying two parallel suits and also to avoid inconsistent findings on the matters in issue. While holding thus, the Supreme Court has made observation in the said decision that it has been construed by the Court as not a bar of the passing of interlocutory orders such as an order for consolidation of the later suit with the earlier suit or appointment of receiver or an injunction or attachment before judgment.

10. The Supreme Court laid down that the course of action, which the Court has to follow according to section 10 is not to proceed with the 'trial' of the suit but that does not mean that it cannot deal with the subsequent suit any more or for any other purpose. In view of the object and nature of the provision and the fairly settled legal position with respect to passing of interlocutory orders it has to be stated that the word 'trial' in section 10 is not used in its widest sense.

11. In the case of *Bijay Kumar Agrawalla and another* (supra) , this Court was dealing with an order of stay passed by this Court in a revision petition and during subsistence of order of stay, whether the trial court had jurisdiction to entertain an application under Order 38, Rule 5 C.P.C. for attachment before the judgment. The matter arose out of a money claim. While considering the aforesaid question, this Court interpreting the meaning and import an order of stay of further proceedings in the suit passed by the revisional court, referring to decisions of various High Courts held that when the trial of the suit is stayed, the trial court retains its

jurisdiction to pass interlocutory order for the purpose of keeping the proceeding alive or for preserving that subject matter in dispute for protecting the interest of the parties to the suit during pendency of the stay order passed by the appellate court or revisional court. Agreeing with the view of the Madras, Mysore, Madhya Pradesh and Bombay High Courts, this Court held that the lower court retains its jurisdiction to consider and pass interlocutory orders in matters which are collateral or which may be protective or which would be for the purpose of keeping the lis alive even during subsistence of the order of the superior court directing stay of further proceedings in the suit. However, this Court in the said case categorically held that the Court should take care to ascertain that the subject matter in the petition does not touch the trial of the suit which has been stayed by the superior Court and to hold otherwise may in many cases work out injustice inasmuch as for every collateral matter, the parties will be compelled to approach the appellate or revisional Court though such a matter may not be within the ambit and scope of appeal or revision pending before the superior Court.

12. It, therefore, transpires that the decision of the Supreme Court in the case of Indian Bank (supra) is squarely distinguishable on facts from the present case. More so, even applying the principles laid down therein, interpreting the word "trial" in section 10 of the C.P.C. keeping in mind the object and nature of that provision, it would be seen that since both the prayers of the suit as well as the interim application are to injunct the present petitioner from interfering with the affairs of the institution and at this juncture, applying the ratio of the decision in the case of *Bijay Kumar Agarwalla* (supra) as it would be seen that if the interim application is taken up for hearing, it would attach the merit of the suit, further proceeding of which has been stayed under section 10 of the C.P.C. this court is of the view that In the present case, the learned trial court is required to stay its hands from deciding the interim application wherein a similar prayer as that made in the suit has been made for grant of injunction against the present petitioner.

13 .Answering the question framed in paragraph -7 above, this Court, therefore, finds it cannot, as a general principal of law, be laid down that where-ever further proceeding of a suit has been under section 10 of the Code of Civil Procedure , the trial court can proceed with any interim application filed by any of the parties in spite of such stay order. It is to be examined in the facts of each case as to whether proceeding with any interim application, where interim prayer is made by any of the parities to the suit, would touch the merit of the suit/the issue raised in the suit in any manner. If that be so , the trial court should not proceed with interim application.

14. In the result, therefore, the order impugned in this writ petition passed on 20.7.2010 refusing to stay further proceedings in the interim application No. 84 of 2010 at Annexure-9 is quashed and the learned trial court is directed not to proceed with the said interim application No. 84 of 2010 till disposal of the Second Appeals pending before this Court.

15. In the result, the writ petition is allowed. There shall be no order as to costs.

Writ petition allowed.

2010 (II) ILR – CUT- 944

R.N.BISWAL, J.

W.P.(C) NO.6508 OF 2010 (Decided on 03.08.2010)

MAMI ROUT ………… Petitioner.

.Vrs.

SRIMATI ROUT & ORS. …… … Opp.Parties.

(A) EVIDENCE ACT, 1872 (ACT NO. 1 OF 1872) – SEC.35.

Entry of date of birth in school admission Register – People often give false age or reduce the age of their son/daughter at the time of admission in a school with a hope to get advantage in public service.

In the present case election petitioner challenged the election of the returned Candidate on the ground of under age and called for the school Admission Registers of Badalo Primary school and Badalo Ghodadian U.P. School where the returned candidate was studying to prove her date of birth as dt.05.07.1986 – The Head Master Badalo Primary School proved Admission Register as Ext.C.I and stated the date of birth as reflected there in was dt.05.07.1986 but in Cross-examination he said he did not enter the date of birth of the petitioner in Ext.C-I - He also failed to say as to who entered the same much less at whose instance the same entry was made – Same thing also happened in case the Head Master Badalo Ghodadian U.P. School who proved the admission Register as Ext.C.,-II but failed to prove as to who has made such entry – Held, the date of birth in Ext.C,-I and Ext.C,-II have no much evidentiary value.

(para-8)

(B) EVIDENCE A CT, 1872 (ACT NO. 1 OF 1872) – SEC.35.

Voter Identity Card issued by the Election Commission of India (Ext.B) relied on by the returned Candidate which shows her age was 18 years as on 1.1.2002 and as such on the date of filing of nomination papers her age was more than 21 years – This fact not been rebutted by the election petitioner in any manner – Held, Ext.B can be relied upon and the same is admissible in evidence. (para-9)

(C) ORISSA G.P. ACT, 1964 (ACT NO. 1OF1965) – SEC.11(b).

Election Petitioner challenged election of the returned candidate on the ground of under age – Burden lies with the election petitioner to

prove that the returned candidate was below 21 years of age on the date of filing of the nomination. (para-10)

(**D) CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF1908) – ORDER 20, RULE 1**.

When a petition is filed before a Court, order in either way must be passed – The Court can not deny for passing any order on a petition. (para-4)

Case laws Referred to:-

1.AIR 1964 Orissa (V51 C72) : (Moti Dei -V- Cuttack Bank Ltd, & Ors.).
2.AIR 2006 S.C.2157 : (Ravinder Singh Gorkhi -V- State of U.P.)
3.AIR 1988 SC 1796 : (Birad Mal Singhvi -V- Anand Purohit.)
4.AIR 1965 (sc) 282 : (Brij Mohan Singh -V-Priya Brat Narain Sinha & Ors.).
5.AIR 2002 Himachal Pradesh 59 : (Chitru Devi -V-Smt.Ram Dei & Ors.

For Petitioner - M/s. Dayanidhi Mishra.
For Opp.Parties - M/s. H.S.Mishra, T.K.Sahoo & A.K.Mishra.

R.N.BISWAL,J. In this writ petition, the petitioner challenges the judgment dated 27.3.2010 passed by learned District Judge, Dhenkanal in F.A.O.No.33 of 2007 reversing the judgment passed by learned Civil Judge (Jr.Division,) Dhenkanal, in Election Petition No.11 of 2007 and declaring the election of the petitioner to the office of Sarpanch of Badalo Grama Panchayat as null and void and further declaring that a casual vacancy has been occurred in respect of the said office of Sarpanch and directing the concerned authority to take necessary steps to fill up the vacancy as per law.

2. The petitioner and three others, namely, Alakamanjari Rout, Mamatamayee Sahu and Srimati Rout filed their respective nominations to contest for the office of Sarpanch of Badalo Gram Panchayat, which was scheduled to be held on 15.2.2007.On scrutiny of the nomination papers, all the four candidates were found suitable to contest for the election. Accordingly, they contested the election which was held on the scheduled date i.e. on 15.2.2007.The petitioner, having secured highest number of votes, was declared elected on 22.2.2007 as Sarpanch of Badalo Grama Panchayat. Alakamanjari Rout, a defeated candidate, filed Election Petition No.10 of 2007 challenging the election of the present petitioner before the Civil Judge (Jr.Division) Dhenkanal. Similarly Srimati Rout, another defeated candidate, filed Election Petition No.11 of 2007 challenging the same election before the same court. Both of them took the grounds that the petitioner (returned candidate) adopted corrupt practice in the election; votes were cast by fictitious persons in the name of absentee and dead

voters; the returned candidate influenced the voters to cast their votes by arranging religious feasts in village i.e. Siridiha and Handifuta and also forced some voters to cast their votes in her favour by showing muscle power. In Election Petition No.11 of 2007, an extra ground was also taken that the returned candidate having taken birth on 5.7.1986 had not completed 21 years of age, as required under Section 11 (b) of the Orissa Grama Panchayat Act by the time of filing nomination paper.

3. The stand of the returned candidate was that the allegations made in the election petitions were false, frivolous and baseless and the election was conducted in accordance with law and there was no bogus voting or any voting in the name of dead voters. She had not adopted any unfair means nor did she try to influence any voter to cast vote in her favour by arranging religious feasts. Moreover, she did not utilize muscle power to influence the voters to cast votes in her favour. It was her further pleading in Election Petition No.11 of 2007 that her date of birth was 5.4.1985 and not 5.7.1986 and as such she had already attained the age of 21 years on the date of filing the nomination i.e. on 9.1.2007.Since the F.A.O.No.32 of 2007 arising out of Election Petition no.10 of 2007 was dismissed, the present petitioner had not challenge the same. So, it is not required to discuss about Election Petition No.10 of 2007.On the basis of the pleadings of the parties in Election Petition No.11/2007, the trial court framed four issues. In order to establish her case, in Election Petition no.11 of 2007 the election petitioner examined herself alone as P.W.1.The returned candidate examined 3 witnesses including herself as O.P.W.no.2.The Trial Court examined two witnesses as C.W.No.1 and C.W.no.2. Besides the oral evidence, election petitioner proved three documents,(Exts.1 to 3). Similarly, opp.party(returned candidate)proved six documents(Exts.A to F)and the court proved six documents. (Exts.C-1,C-II,C-III,C-IV,C-V and C-VI)on its behalf. After assessing the evidence on record the trial court dismissed the Election Petition no.11 of 2007 holding that the petitioner failed to prove that the returned candidate adopted corrupt practice that the petitioner in Election Petition No.10 of 2007 (opposite party No.2 in Election Petition No.11 of 2007) admitted that the date of birth of the returned candidate was 1.1.1984 and that Ext.-B, the voter identity card and Ext. D, the certificate issued by the Principal of Intelligent Technical Institute, Dhenkanal show that age of the returned candidate was more than 21 years on the date of filing her nomination. As stated earlier, the trial court also dismissed the Election petition no.10 of 2007. Being aggrieved with the said judgments the election petitioners preferred two separate appeals before learned District Judge, Dhenkanal. The appeal arising out of Election Petition no.11 of 2007 was registered as F.A.O.no.33 of 2007 and the other appeal as F.A.O.no.32 of 2007.

After hearing the counsel for the parties, the appellate court concurred the finding of the trial court that the election petitioner failed to prove the adoption of corrupt practice by the returned candidate and accordingly dismissed F.A.O no.32 of 2007. With regard to the allegation of underage of the returned candidate, in F.A.O no.33 of 2007, it held that in her show cause, she (returned candidate) specifically mentioned that according to her horoscope, her date of birth was 5.4.1985 and as such the learned trial court should not have allowed her to lead evidence to prove her date of birth as 1.1.1984; that the trial court ought not have relied on the evidence of Alakamanjari Rout given in Election Petition No.10 of 2007 stating that the date of birth of the election petitioner was 1.1.1984 as the same was not legally proved in Election Petition No.11 of 2007 that it should not have placed reliance on Exts A to D, particularly when the same were not proved in accordance with law; that though the returned candidate in her show cause stated that her date of birth was 1.1.1984 according to the School Admission Register of Laxmipriya High School, the said Register was not produced by her; that though she claimed her date of birth to be 5.4.1985, she did not adduce any evidence in support of the same and relying on Exts C-1 and C-II, held that the date of birth of the returned candidate was 5.7.1986 and as such she was below 21 years of age on the date of filing the nomination paper i.e. on 9.1.2007 and accordingly allowed the appeal and set aside the judgment and orders passed by the trial court in Election Petition No.11 of 2007. Being aggrieved with the said judgment the returned candidate (hereinafter referred as petitioner) has filed the present writ petition.

4. Learned counsel for the petitioner submitted that the petitioner filed a petition for amendment of her show cause before the trial court seeking correction of her date of birth from 5.4.1985 to 1.1.1984, but no order was passed thereon. When a petition is filed before a court, order in either way must be passed. The court cannot deny passing any order on a petition. So, the impugned order deserved to be quashed. In support of his submission, he relied on the decision **Moti Dei** vs. **Cuttack Bank Ltd and others**, AIR 1964 Orissa(V 51 C 72)where this court held that:

> "Once a party files an application alleging therein certain matters for consideration, the Court is bound to hear the party. It is open to the Court to reject the party's contention, but it is not open to the court to say that the party is not entitled to hearing as the identical matter had been decided by a previous order."

But in the case at hand, the trial court did not refuse to hear the amendment petition. As it appears, it was not brought to its notice. The

petitioner also did not bring it to the notice of the appellate court. So the decision cited above is not applicable to the present case.

5. In Election Petition no.10 of 2007, Alakamanjari Rout (the election petitioner therein) first deposed that the date of birth of the petitioner was 1.1.1984, but immediately she corrected the same and stated that her date of birth was 5.7.1986.The trial court relying upon such prevaricating statement held in Election PetitionNo.11 of 2007 that according to the evidence of that witness, the date of birth of the petitioner was 1.1.1984 which was rightly discarded by the appellate court.

6. On perusal of show cause of the petitioner filed before the trial court, it is found that she has stated therein that according to her horoscope (Jataka Patrika), her date of birth was 5.4.1985, but, in fact, the horoscope (Jataka Patrika) shows that her date of birth was 1.1.1984. An amendment petition was filed on behalf of the petitioner to correct it, but as stated above, no order was passed therein. Under such circumstances, it is held that the trial court did not commit illegality in allowing the petitioner to lead evidence to prove that her date of birth was 1.1.1984.

7. In fact the trial court has not relied on Ext.A, the Jatak Patrika and Ext.C. the Medical Certificate showing the date of birth of the petitioner as 1.1.1984, and that she appeared to be aged 23 years as on 11.6.2007 respectively, since the maker of the Jatak Patrika and the doctor granting the Medical Certificate were not examined. So, the finding of the appellate court, that the trial court relied on Ext.A and Ext.C, was not correct. It relied on Ext.B, the voter's identity card and Ext D, the certificate issued by the Principal, Intelligent Technical Institute, Dhenkanal showing that the petitioner was 18 years old on 1.1.2002 and that her date of birth was 1.1.1984 respectively.

8. In an election petition challenging the election of the returned candidate on the ground of underage, the initial burden lies with the petitioner to prove the same, as held in the case of ***Ravinder Singh Gorkhi v. State of U.P.***, AIR 2006 Supreme Court, 2157. In the present case, opp.party no.1 (election petitioner) has not proved a single document showing that the present petitioner was underage at the time of filing her nomination. As appears from record,opp.party no.1(election petitioner) called for the School Admission Registers of Badalo Primary School and Badalo Ghodadian U.P.School, where the petitioner was studying, to prove her (petitioner) date of birth as 5.7.1986. The Registers were brought, but she did not take any step to prove the same. So, the trial court summoned the Headmasters of both the Schools to prove the same. Purna Chandra Naik, (C.W.no.1)the Headmaster of Badalo Primary School proved the Admission Register of his school, which was marked as Ext C-1 and stated that the date of birth of the present petitioner as reflected therein was

5.7.1986 (C-1/1).In cross examination, he admitted that he did not enter the date of birth of the petitioner in Ext C-1 (the School Admission Register). He also failed to say as to who entered the same, much less at whose instance the same entry was made. Similarly, C.W.no.2, the Headmaster of Badalo Ghodadian U.P.School proved the Admission Register of his school marked as Ext-C-11 and deposed that the date of birth of the petitioner was 5.7.1986 (Ext C-11/1). There is no evidence to show as to who entered the said date of birth and at whose instance it was entered. In the decision **Birad Mal Singhvi vs. Anand Purohit, AIR 1988 SC 1796,** the apex court held that:

"To render a document admissible under Section 35 (of the Indian Evidence Act), three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act, but the entry relating to the age of a person in a school register is of no much evidentiary value to prove the age of the person in the absence of the material on which the age was recorded." (emphasis supplied)

In the present case, since there is no evidence on record to show on what material the entry of the age of the present petitioner was made, Exts.C-1/1 and C-11/1 have no much evidentiary value. Moreover, as held by the apex Court in the case of **Brij Mohan Singh** Vs, **Priya Brat Narain Sinha and others**, AIR 1965(S.C.) 282 in actual life it often happens that persons give false age of the son at the time of admission to a school, so that later in life he would have an advantage when seeking public service for which a minimum age for eligibility is often prescribed.At times they reduce the age of the boy/girl also.

9. The petitioner relied Ext.B, the identity card issued by the Election Commission of India, which shows that her age was 18 years as on 1.1.2002. So, on the date of filing the nomination papers, her age was more than 21 years. This fact has not been rebutted by the opp.party in any manner. Therefore, Ext. B can be relied upon as held in the case of **Chitru Devi** Vs. **Smt.Ram Dei and others**, AIR 2002 Himanchal Pradesh 59. Ext.D is the certificate granted by Principal Intelligence Technical Institute, Dhenkanal on 8.8.2000 showing the date of birth of the petitioner as 1.1.1984. The appellate court did not rely on this document holding that the petitioner in her show cause did not mention about Ext.D. She did not also mention about passing of I.T.I. examination and grant of Ext.D in her

affidavit filed before the election officer. Even if Ext.D is not taken into consideration, since the evidence contained under Ext.B has not been rebutted, the same can safely be relied upon.

10. As already held earlier, the initial burden lies with the opp. party No.1 (election petitioner) to prove the underage of the returned candidate but when it was not discharged, non-production of the school admission register of Laxmipriya High School by the petitioner would not have adverse effect on her case.

11. Under such circumstance, the writ petition is allowed, the judgment of the appellate court is set aside and the judgment of the trial court is hereby confirmed. No cost.

Writ petition allowed.

2010 (II) ILR – CUT- 951

R.N.BISWAL, J.

W.P.(C) NO.19065 OF 2009 (Decided on .08.07.2010)

MUKTAMANJARI SAHOO ……….. Petitioner.

.Vrs.

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

ORISSA GRAM PANCHAYAT ACT, 1964 - (ACT NO 1 OF 1965)SEC. 24(2).

Meeting of no confidence – Can not be convened except on a requisition signed by at least 1/3rd of the total membership of the Gram Panchayat along with a copy of the resolution proposed to be moved at the meeting is sent to the Sub-Collector – Purpose is there shall be discussion on the proposed resolution before casting of votes – Unless such a resolution is sent to the Sub-Collector, there is no scope for holding such meeting.

Held, in the present case copy of the proposed resolution having not been sent to the Sub-Collector, the notice for holding no confidence motion deserves to be quashed.

(Para 7)

Case laws Referred to:-

12001(II) OLR 69 : (Smt. Susila Sahani -V- State of Orissa & Ors.).
2.77 (1994) CLT. 677 : (Subash Ch.Sethy & Ors.-V-State of Orissa & Ors.).
3.91 (2001) CLT. 159 : (Smt.Kamala Tiria -V-State of Orissa & Ors.).
4.1987 (I) OLR.335 : (Jagadish Pradhan & Ors.-V-Kapileswar Pradhan & Ors.).

For Petitioner - M/s.S.K.Mishra, K.K.Mohanty, J.Pradhan & P.Prusty.
For Opp.Parties – M/s.D.R.Pattanayak, N.Biswal, N.S.Panda, N.Biswal & Miss.L.Pattanayak(Caveator)
M/s.Benudhar Patra (O.P.Nos.4 & 5)
Addl.Govt.Advocate (O.P.1 to 3)

R.N.BISWAL, J. The petitioner, who is the Sarpanch of Chhanagiri Grama Panchayat has filed this writ petition challenging the notice No.4950 dated 3.12.2009 issued by the learned Sub-Collector, Khurda, fixing No Confidence Motion initiated against her to 21.12.2009, as well as the resolution dated 21.11.2009.

2. Election to the office of Sarpanch of Chhanagiri Grama Panchayat was held on 23.2.2007, wherein the petitioner was elected as the Sarpanch and opp.party nos.4, 5, and 6 were elected as ward members of ward Nos.4,6,and 7 respectively. There are 15 ward members in the aforesaid Grama Panchayat, out of whom 10 Ward Members passed a resolution on 21.11.2009 to bring No Confidence Motion against the petitioner on several grounds and sent the resolution along with a requisition to the Sub-Collector, Khurda. On receipt of the requisition, the learned Sub-Collector, Khurda vide notice No.4950 dated 3.12.2009 fixed the meeting of No Confidence Motion to 21.12.2009.

3. According to the petitioner, some of the inhabitants of Chhanagiri G.P. had moved this Court in W.P.(C) No.10825 of 2008 challenging the election of opp. party No.6 as ward member, on the ground that he was an agent of Life Insurance Company of India as well as Sahara India. This Court, vide order dated 4.8.2009, was pleased to direct the learned Collector, Khurda to dispose of the representation made by the writ petitioners in accordance with law as expeditiously as possible, still then, it is pending disposal. Opp.parties 4 and 5 are also disqualified to continue as ward members of Chhanagiri G.P., since they had more than two children and the 3rd child of each of them, was born after the cut off date. The petitioner filed a petition vide G.P. election Misc.case No.6 of 2009 before learned Collector, Khurda to disqualify opp.party No.4 to continue as ward member of Chhanagiri Grama Panchayat. Similarly the petitioner filed a petition before learned Collector, Khurda to disqualify opp.party No.5 to continue as ward member.

4. Learned counsel appearing for the petitioner submitted that when this Court in W.P.(c) No.10825 of 2008 directed the learned Collector to dispose of the representation of the petitioners therein as expeditiously as possible, he ought not to have sit over the matter. He further submitted that before disposal of G.P. Election Misc.case No.6 of 2009 and the representation of the petitioners in W.P. (C) No.10825 of 2008, the learned sub-Collector ought not to have issued the notice of No Confidence Motion. In support of his submission, he relied on the decisions in the case of ***Smt. Susila Sahani v. State of Orissa and others*** 2001 (II) OLR-69 and ***Subash Ch. Sethy & others v. State of Orissa and others*** 77 (1994) C.L.T. 677. Learned Addl. Govt. Advocate, on the other hand, submitted that there was no illegality or impropriety in issuing notice of No Confidence Motion.

5. As per Section 26(3) of Orissa Grama Panchayat Act, where the Collector decides that the Sarpanch, Naib-Sarpanch or any other member has become disqualified, such decision shall be forthwith published by him in his notice board and with effect from the date of such publication, the Sarpanch, Naib-Sarpanch or such other member as the case may be, shall

be deemed to have vacated office and till the date of such publication he shall be entitled to act as if he was not disqualified .Whatever may be the reason, in the present case, opp.party nos.4,5 and 6 have not yet been declared disqualified to hold their office. Hence, they are competent to sign in the resolution and requisition.

6. Moreover**,** there are 15 ward members under Chhanagiri Grama Panchayat. Out of them, 10 have signed on the requisition and the resolution including opp.party Nos.4,5 and 6. As per Section 24 (2) (a) of the Orissa Grama Panchayat Act, minimum one third members are required to sign the requisition as well as the resolution to initiate No Confidence Motion against a Sarpanch. In the present case, out of 10 ward members, even if the signatures of three of them are not taking into consideration, still then, the remaining seven members being more than one third of the total members of the Grama Panchayat, it cannot be said that the requisition and the resolution were not made by one third of the ward members of the Grama Panchayat. Went through the decisions cited above. None of those decisions would be applicable to the present case.

7. Learned counsel for the petitioner further submitted that as required under Section 24(2)(a) of the Orissa Grama Panchayat Act, no meeting of want of confidence on the Sarpanch or Naib-sarpanch can be convened except on a requisition signed by at least 1/3rd of the total numbers of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting is sent to the Sub-Collector concerned. In the case at hand, since no resolution proposed to be moved in the meeting of No Confidence Motion was sent along with the requisition, the order under challenge deserves to be quashed. In support of his submission, he relied on the decision **Smt.Kamala Tiria** Vs. **State of orissa and Others** 91(2001) C.L.T.151. As against this, learned Addl. Govt. Advocate contended that in the resolution passed for initiating no confidence motion, it is clear that the signatories intended to initiate No Confidence Motion against the petitioner. Only because the resolution to be moved at the time of holding the meeting of want of confidence on the petitioner was not sent to the Sub-Collector, the impugned orders cannot be rendered nugatory. In support of his submission, he relied on a decision of this Court in **Jagadish Pradhan and others** vs. **Kapileswar Pradhan and others**,1987(I)OLR-335.

In the decision Kamala Tiria(supra), a Division Bench of this Court, while dealing with Section 39(2)of the Zilla Parishad Act, 1991 which is pari-materia with Section 24 (2) of the G.P.Act, held that a copy of the resolution proposed to be moved in the No Confidence Motion must be sent to the Revenue Divisional Commissioner concerned. Since no such resolution had been sent, the declaration of want of confidence on the President was held to be illegal. In the decision Jagadish Pradhan and others(supra) a Division

Bench of This Court while dealing with Section 46-B(2) of the Orissa Panchayat Samiti Act , which is pari-materia with Section 24 of the G.P. Act held that:-

> "True it is that Sec.46-B(2)requires a copy of the resolution proposed to be moved at the meeting to be along with the requisition. In the resolution dated 24-3-1985 the proposal was clearly mentioned to be the absence of confidence of the signatories on the Chairman. Merely because the proposal is not in a separate document, it cannot be said that the action thereupon becomes illegal."

As per Section 24 (2) of the Orissa Grama Panchayat Act, meeting of No Confidence cannot be convened except on a requisition signed by at least 1/3rd of the total membership of the Grama Panchayat along with a copy of the resolution proposed to be moved at the meeting is sent to the Sub-Collector. The purpose being, there shall be discussion on the proposed resolution before casting of votes. Unless such a resolution is sent to the Sub-Collector, there is no scope for holding meeting. In the present case, no such resolution having been sent to the Sub-Collector, in view of the decision rendered in the case of Smt. Kamala Tiria (supra), the notice for holding No Confidence Motion deserves to be quashed.

8. Therefore, the writ petition is allowed and the notice No.4950 dated 3.12.2009 issued by the learned Sub-Collector, Khurda fixing No Confidence Motion against the petitioner to 21.12.2009 is hereby quashed.

Writ petition allowed.

2010 (II) ILR – CUT- 955

R.N.BISWAL, J.

W.P. (C) NO.16160 OF 2008 (Decided on 16.09.2010)

PRAVA SINHA ……….. Petitioner.

.Vrs.

BHABATOSH SINHA & ORS. ……….. Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 15 RULE 1 & 2.

Disposal of the suit – Petitioner as plaintiff filed suit for declaration of her title and interest over the suit property – Defendant Nos. 2 to 5 and 7 have filed written statement that they have no objection if the suit is decreed in favour of the plaintiff – Plaintiff filed petition under Order 15 Rules 1 & 2 with Section 151 C.P.C, praying the trial Court to pronounce judgment against defendant Nos.2 to 5 & 7 – Application rejected – Hence the writ petition.

Held, impugned order is set aside – Suit shall be decreed as against defendant-.Opp.Parties 2 to 5 and 7 and it shall proceed against the remaining defendants. (Para 10,11)

Case law Referred to:-

AIR 1977 SC 1516 : (Shri Rangaswami, The Textile Commissioner & Ors.-V-The SagarTextile Mills (P) Ltd. & Anr.).

For Petitioner - M/s. Biplab Mohanty, A.Pattnaik, P.K.Mahali.
For Opp.Parties – M/s. P.K.Patnaik, S.K.Patnaik, M.K.Mishra, G.M.Rath (for O.P.No.1)

R.N.BISWAL, J. In this writ petition, the petitioner calls in question the order dated 26.9.2008 passed by the learned Civil Judge (Senior Division) Ist Court, Cuttack in C.S.No.375/2002 rejecting the petition filed by the petitioner under Order XV, Rules 1 and 2 read with Section 151 of C.P.C.

2. Shorn of unnecessary details the facts leading to filing of this writ petition is that the petitioner as plaintiff filed C.S.No.375/2002 before learned Civil Judge (Senior Division) Ist Court, Cuttack for declaration of her title and interest over the suit property as described in the plaint, wherein Opp.Parties 3 to 7 were arraigned as proforma defendants. On being noticed, all the defendants appeared before the court below and filed their respective written statements. Except defendant nos.1 and 6, all the defendants pleaded that they had no objection for passing a decree in favour of the plaintiff-petitioner Though defendant no.2 raised a counter claim in his written statement, he did not press the same.

3. On 10.12.2004, the plaintiff-petitioner filed a petition under Order XV, Rules 1 and 2 read with Section 151 of C.P.C. with prayer to pronounce the judgment against defendant nos.2 to 5 and 7, since they admitted her case in their written statements and further stated that they had no objection if a decree is passed in her favour.

4. Defendants – opp. Parties 1 and 2 contested the said petition. The trial court held that the question to be decided was whether the disputed property belonged to late R.N.Sinha, the father of the defendants – Opp.Parties. Plaintiff-petitioner is the wife of opp. Party no.4, one of the sons of late R.N.Sinha. She has filed the suit mainly on the basis of adverse possession. Even though the averments made in the written statements filed by defendants 2 to 5 and 7 did not disclose apparently a denial pleading with regard to the nature of claim and the property involved, presence of all the defendants appear to be reasonable and proper for just decision of the suit and accordingly, rejected the petition.

5. Learned counsel for the petitioner submitted that the words 'may' and 'at once' deployed in rule 2(1), Order XV of C.P.C. imply that the court must pronounce the judgment for or against any defendant, who is not at issue with the plaintiff and continue the suit against other defendants, as per the decision in the case of Shri Rangaswami, The Textile Commissioner and others, Vs. The Sagar Textile Mills (P) Ltd. And another reported in AIR 1977 Supreme Court 1516.

6. Learned counsel for the petitioner drawing attention of the court to the relevant portions of the written statements of opp.parties 2 to 5 and 7, further contended that those defendants in clear terms have stated in their written statements that they have no objection if the decree is passed in favour of the plaintiff-petitioner.

7. Learned counsel for the petitioner, further submitted that the observation of the learned court below that as per the pleadings of the parties, the moot question is as to whether the disputed property belonged to the father of the defendants – opp.parties, requires adjudication is erroneous, since except defendants 1 and 6 no other defendants raised the dispute to the effect that it was the property of late R.N.Sinha, their father. Such dispute between the plaintiff and defendant nos.1 and 6 would be adjudicated during trial of the suit, which has nothing to do with other defendants-opp.parties, who are not at issue. Learned counsel for the opp.party supported the decision rendered by the trial court.

8. In the decision Shri Rangaswami (supra) the question for determination betore the apex Court was, whether the Textile Commissioner, who decided to issue appropriate direction to any manufacturer or class of manufactures was obliged to specify therein the period for which the direction would remain in operation in view of the provision contained under

Clause 20 of the Cotton Textiles (Control) Order, 1948, which reads as follows:-

> " xx xx xx
>
> 20 (1) The Textile Commissioner may from time to time issue directions in writing to any manufacturer or class of manufacturers or the manufacturers generally regarding the classes or specifications of cloth or yarn, and the maximum or the minimum quantities thereof, which they shall or shall not produce during such periods as may be specified in the directions, and they shall comply with such directions.
>
> 20(2) In the exercise of the powers conferred upon him by sub-clause (1) the Textile Commissioner shall have regard to the capacity of the producer to produce cloth or yarn of different descriptions or specifications and to the needs of the general public."
>
> The apex Court held:-
>
> " xxx it is well settled that the word "may" is capable of meaning "must" or "shall" in the light of the context and that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion should be construed to mean a command. Considering the purpose of the relevant empowerment and its impact on those who are likely to be affected by the exercise of the power, we are clear that the power conferred on the textile Commissioner to issue directions is coupled with the duty to specify the particular period for which the directions shall be operative. Directions of the kind envisaged by Cl.20 are influenced and justified by exigencies which render it imperative that the directions be reviewed from time to time. That becomes feasible only if the directions are limited expressly to a determinate period of time at the end of which a fresh review of facts and circumstances becomes obligatory."

As per this decision, once the Textile Commissioner issued direction to anhy manufacturer regarding the class or specifications of cloth or yarn and the maximum or the minimum quantities thereof, which he shall or shall not produce, must prescribe the period for doing or forbearing from doing so. Because the discretion to issue such notice is coupled with the obligation to specify the period for which the notice would be operative. In my considered opinion the said decision can not be applicable to the present case. The word 'may' employed in Rule 2 (1) order xv of C.P.C. indicates that the power is discretionary, but it must be judicious.

9. On perusal of the written statements of the defendant nos. 2 to 5 and 7, it is found that defendant no.2 in paragraph 9 has stated :-

Written Statement of Defdt. No.-2

Paragraph-9:- " xx xxx xxx

The Plaintiff has prescribed and perfected her absolute title over the entire suit land and the building constructed by her and as such this Defdt. No.2 has no challenge if the suit is decreed in favour of the plaintiff."

Written Statement of Defdt. No.3

Paragraph – 6 :- " xx xx xx

That this Defendant has no claim over the schedule land and the building constructed by the Plaintiff through her own endeavor and has no objection if the suit is decided in his presence as proforma Defendant granting relief to the Plaintiff."

Written Statement of Defdt. No.4

Paragraph – 1:- " xx xx xx

This Defendant has no objection if the decree is passed in favour of the Plaintiff."

Joint Written Statement of Defdt. Nos.5 & 7

Paragraph-1:- " xx xx xx

That these defendants while not disputing the plaint allegations xxxxx."

Paragraph-2:- " xx xx xx

That these Defendants have no objection if the relief is granted in favour of the Plaintiff to which she is very much legally entitled to."

Paragraph-4:- " xx xx xx

That these Defendants being unnecessarily impleaded, they may be deleted from the suit."

10. So, it is clear from the written statements of defedant nos.2 to 5 and 7 that they have no objection if the suit is decreed in favour of the plaintiff-petitioner. As it appears, it weighed the mind of the trial court that when the defendants, who are govered by Dayabhag Schools of law are sons and daughters of late R.N.Sinha, they are to inherit their father equally and if the suit would be decreed as against defendant nos.2 to 5 and 7, then the contesting defendants would automatically be defeated, which is not correct. If the impugned order is allowed to stand, it would lead to miscarriage of justice.

11. Under the facts and circumstances of the case, the writ petition is allowed and the impugned order dated 26.9.2008 passed by learned civil Judge (Sr.Division) 1st Court, Cuttack is set aside. The suit shall be decreed as against defendant-opp.parties 2 to 5 and 7 and it shall proceed against the remaining defendants. Since it is a suit of the year 2002, the trial court is directed to dispose of the same as expeditiously as possible preferably within a period of five months from the date of receipt of this order. No cost.

Writ petition allow.

2010 (II) ILR – CUT- 960

INDRAJIT MAHANTY, J.

CRLMC. NO.2048 OF 2007 (Decided on 17.09.2010)

DURGA NAIK @ DAROGA NAIK & ANR. ………… Petitioners.

.Vrs.

STATE OF ORISSA ………… Opp.Party.

CRIMINAL PROCEDURE CODE, 1973(ACT NO.2 OF 1974) – SEC.319.

Power U/s. 319 Cr.P.C. – There must be substantive evidence against a person that he has committed an offence, then only the concerned Court can issue summons to him to face trial.

In the present case, except the statement of the informant made during examination-in-chief that the present petitioners were present along with the main accused persons, there exists no evidence of any complicity of the petitioner with the crime – So it would not be proper to subject the petitioners to trial by invoking jurisdiction U/s.319 Cr.P.C. – Held, impugned order relating to the present petitioners is quashed. (Para 12)

Case laws Referred to:-

1.2000 SCC (Cri) 609 : (Michael Machado & Anr.-V-Central Bureau of Investigation & Anr.).
2.(1983) 1 SCC 1 : (Municipal Corpn. Of Delhi -V- Ram Kishan Rohtagi)
3.(2009)1 SCC (Cri) 844 : (Lal Suraj @ Suraj Singh & Anr.-V-State of Jharkhand).
4.(2009) 2 SCC (Cri) 79 : (Brindaban Das & Ors.-V-State of West Bengal).

For Petitioner - M/s. Anirudha Das, G.P.Panda, D.K.Samal, A.Das & Abanindra Das.
For Opp.Party - Additional Government Advocate.

I. MAHANTY, J. The present application under Section 482 Cr.P.C. has been filed by the petitioner-Durga Naik @ Daroga Naik and Ramesh Naik, who have sought to challenge the order dated 4.7.2007 passed by the learned Sessions Judge, Dhenkanal at Angul-Dhenkanal in C.T. Case No.175 of 2006 (corresponding to G.R. Case No.158 of 2005 arising out of Dhenkanal Town P.S. Case No.41 of 2005) whereby, the learned Sessions Judge, Dhenkanal has been pleased to allow an application under Section 319 Cr.P.C. seeking impletion of the present petitioners, as well as, two

others as accused persons and further directed issuance of N.B.W. against the newly added accused persons for facing trial along with the original accused persons, namely, Ranjan Naik and Raju Naik.

2. Shorn of unnecessary details, it would be suffice to note herein that one Ranjan Naik and another Raju Naik have been implicated by the informant as accused persons for the alleged murder of his minor daughter-Jyotirmayee Bej. While the original two accused persons are facing trial, P.W.13-Alekha Bej (father of the deceased-Jyotirmayee Bej) was examined and based on the evidence of the said witness; the Public Prosecutor filed an application under Section 319 Cr.P.C. for impletion of four other persons as co-accused persons i.e. Kalia, Antaryami, Ramesh and Daroga Naik. The present application under Section 482 Cr.P.C. is by Ramesh Naik and Durga Naik @ Daroga Naik.

3. The learned Sessions Judge, in the impugned order took into consideration the evidence of Alekha Bej (P.W.13) recorded in course of the trial and impleaded the present two petitioners, apart from two others. The statement of the said P.W.13 was to the effect that, on 16.2.2005, he had gone to Kamalanagar and returned home around 5.00 P.M. and learnt from his wife that his daughter-Jyotirmayee Bej had not returned from school and some of her friends had brought back her school bag containing her books to the mother of the deceased on being instructed by the teachers of the school. He further states that his wife had extensively searched for their daughter but was not successful. Thereafter on the return of P.W.13 to the village, he along with his wife, further searched to try and locate their missing daughter, but did not succeed. At 7.00 P.M., P.W.13 reported the matter at the local Police Station and, thereafter, continued search for his missing daughter. He further stated that one Ranjan Naik (Prime accused) had a love affair with his (deceased) daughter-Jyotirmayee and his co-villagers on finding the said Ranjan Naik at 7.30 P.M. in the village, and on interrogating him in presence of the informant-P.W.13, disclosed that Kalia Naik of the same village had told him that the other accused Raju Naik had taken the informant's daughter Jyotirmayee to Ranibania. Therefore, the informant went to Ranibania along with the police, but not finding her there returned home at midnight.

The informant-P.W.13 further stated, that while returning home that night, on the way near the house of accused Raju Naik, he saw Rashmi Naik, Sumitra Sahu @ Navi, Sabitri Rout, Tarini Naik and Basanti Biswal were talking amongst themselves and while crossing them from a little distance, he heard them stating that the informant was unnecessarily searching for his daughter and that she would not be found or traced. He informed his wife on his return home of this fact and his wife came out of the house and went to the said ladies, accompanied by the informant. When his

wife asked the ladies about the whereabouts of their missing daughter-Jyotirmayee, they told her that accused Raju Naik, Ramesh Naik and Sumitra Sahu had brought their daughter-Jyotirmayee and had kept her in the house of Basanti Biswal, the aunt of accused Raju Naik, after the School recess. The ladies further informed that the accused Ranjan Naik, Raju Naik, Kalia Naik, Antara Naik, Ramesh Naik and Durga Naik had forcibly taken her daughter from that house. On learning of the same, the informant and his wife went to the location where the informant's daughter was alleged to have been kept, but did not find her.

4. At about 2 A.M. while they were still searching for their missing daughter by the side of the School, P.W.13 heard certain voices and while focusing torch towards the Railway line, he saw Raju Naik coming towards them holding a "Bhujali" and Ranjan Naik coming towards them holding "Katuri". Seeing the informant and others, It is alleged that those persons, Raju Naik and Ranjan Naik turned back and ran away being followed by the informant and others. He further stated that they followed the accused persons for a distance of about 150 meters and the said accused Raju Naik and Ranjan Naik shouted "ARE TA BAPA MAA ASILENI PALAI ASA" (The father and mother of Jyotirmayee are coming, let us leave the place). After proceeding for a little distance, the informant claimed to have seen the trunk of the body of the Jyotirmayee lying on the Railway line and nearby he saw Antara Naik, Kalia Naik, Ramesh Naik and Durga Naik @ Daroga Naik, who it is alleged that on seeing the informant, ran away and accused Ranjan Naik and Raju Naik also fled away from the spot.

5. It is important to note herein that the present application under Section 482 Cr.P.C. has been filed by one Durga Naik @ Daroga Naik and Ramesh Naik. From the evidence of the informant as noted hereinabove, it is clear that apart from the allegation that Durga Naik @ Daroga Naik and Ramesh Naik were seen in the company of the other two main accused persons at the spot, where a part of the body of the deceased-daughter Jyotirmayee was found on the Railway track, no other specific allegation is made against the petitioners.

6. Learned counsel for the petitioners contended that the principle of law relating to Section 319 Cr.P.C. has been well settled by a catena of decisions of the Hon'ble Supreme Court. In the case of Michael Machado and another Versus Central Bureau of Investigation and another, 2000 Supreme Court Cases (Cri) 609, it has been held as follows:

> *"11. The basic requirements for invoking the above section is that it should appear to the Court from the evidence collected during trial that some other persons, who is not arraigned as an accused in that case, has committed an offence for which that person could be tried together with the accused already arraigned. It is not enough*

> *that the court entertained some doubt, from the evidence, about the involvement of another person in the offence. In other words, the court must have reasonable satisfaction from the evidence already collected regarding two aspects. First is that the other persons could as well as be tried along with the already arraigned accused.*
>
> *12. But even then, what is conferred on the court only a discretion as could be discerned from the words "the court may proceed against such persons". The discretionary power so conferred should be exercised only to achieve criminal justice. It is not that the court should turn against another person whenever it comes across evidence connecting that other person also with the offence. A judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has proceeded already and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. It must be remembered that there is compelling duty on the court to proceed against other persons."*

7. It is further well settled by the Supreme Court while considering whether the prosecution has produced adequate evidence to satisfy the Court that the other accused against those who have not been arrayed as an accused have also committed an offence in order to enable the court to take cognizance against them, in the case of Municipal Corpn. Of Delhi V. Ram Kishan Rohtagi, (1983) 1 SCC 1 the Hon'ble Supreme Court added a "caution", which is quoted hereinbelow:-

"But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

8. Reliance was also placed by the learned counsel for the petitioner on a judgment of Hon'ble Supreme Court in the case of Lal Suraj @ Suraj Singh and another V. State of Jharkhand, (2009) 1 Supreme Court Cases (Cri) 844. In the said judgment, the Hon'ble Supreme Court considered the scope of Section 319 Cr.P.C.. The Division Bench presided by Hon'ble Justice S.B. Sinha came to hold as follows:

> *"Section 319 Cr.P.C. is a special provision. It seeks to meet an extraordinary situation. It although confers a power of wide amplitude but is required to be exercised very sparingly."*

While saying so, the Hon'ble Court has also referred to its earlier judgment in the case of Kailash V. State of Rajasthan which judgment was delivered

by Hon'ble Justice Sirpurkar. Paragraph-9 of the said judgment is quoted herein below:

> *"9. …. A glance at these provisions would suggest that during the trial it has to appear from the evidence that a person not being an accused has committed any offence for which such person could be tried together with the accused who are also being tried. The key words in this section are 'it appears from the evidence' …. 'any persons' …. 'has committed any offence'. It is not, therefore, that merely because some witnesses have mentioned the name of such person or that there is some material against that person, the discretion under Section 319 Cr.P.C. would be used by the court. This is apart from the fact that such person against whom such discretion is used, should be a person who could be tried together with the accused against whom the trial is already going on. This Court has, time and again, declared that the discretion under Section 319 Cr.P.C. has to be exercised very sparingly and with caution and only when the court concerned is satisfied that some offence has been committed by such person. This power has to be essentially exercised only on the basis of the evidence. It could, therefore, be used only after the legal evidence comes on record and from that evidence it appears that the persons concerned has committed an offence. The words 'it appears' are not to be read lightly, on that the court would have to be circumspect while exercising this power and would have to apply the caution which the language of the section demands."*

Reliance was also placed on a judgment of the Hon'ble Supreme Court in the case of Brindaban Das and others Versus State of West Bengal, (2009) 2 Supreme Court Cases (Cri) 79 in which a Division Bench of the Hon'ble Supreme Court presided by Hon'ble Justice Altamas Kabir, came to hold as follows:

> *"29. Section 319 Cr.P.C. contemplates a situation where the evidence adduced by the prosecution not only implicates a person other than the named accused but is sufficient for the purpose of convicting the person to whom summons is issued. The law in this regard was explained in Ram Kishan Rohtagi case and as pointed out by Mr. Ghosh, consistently followed thereafter, except for the note of discord struck in Rajendra Singh case. It is only logical that there must be substantive evidence against a person in order to summon him for trial, although, he is not named in the charge-sheet*

or he has been discharged from the case, which would warrant his prosecution thereafter with a good chance of his conviction."

9. In the light of the principles of law as noted hereinabove, I have proceeded to peruse the evidence of all prosecution witnesses examined in course of the trial. None of the witnesses examined have whispered a word against the present petitioners i.e. Durga Naik @ Daroga Naik and Ramesh Naik.

P.W.6, Pratap Chandra Rout, Councilor of Ward No.18 has given his evidence in which he has stated that the informant, Alekha Bej had come and reported him that his daughter had gone to School but she had not returned back after attending the School. The said Pratap Chandra Rout (P.W.6) along with the informant searched for the girl within the village. But since they failed to trace her out, a report was lodged with the police and P.W.6 had scribed the F.I.R. as per narration of the informant-Alekha Bej. He further stated that he read over the contents of the F.I.R. to the informant-Alekha Bej, who signed it finding the same to be correct and the said F.I.R. was marked as Ext.4. He further stated that the informant-Alekha Bej was a fruit vendor having his shop at Dhenkanal Bus Stand and Raju Naik was working as Trolley puller and that he had a good relationship with the family of Alekha Bej. He further stated that Ranjan Naik & Raju Naik (main accused persons facing trial) are friends and while Raju Naik was a Christian by religion, Alekha Bej was a Hindu. He further stated that Raju Naik was having love affairs with deceased Jyotirmayee and that on 16.2.2005 the informant-Alekha Bej called Ranjan Naik and handed him over to the custody of P.W.6-Pratap Chandra Rout, who took him to the Police Station and handed him over to the Police in the same night. Although accused Ranjan Naik denied having any knowledge regarding the whereabouts of the deceased- Jyotirmayee, he had stated before P.W.6 that one Kalia Naik told them that the girl was at village Ranibania. Therefore, the police and the informant went to the said village Ranibania but could not trace her. He further stated that on 17.2.2005 the dead body of the deceased was discovered on the Railway line of Rameswarpur. Neither P.w.6 nor any other witness apart from P.W.13 (informant) stated a word relating to the present petitioners.

10. From the impugned order it appears that the Trial Court considered the fact that the informant had earlier moved the High Court in WP(CRL) No.174 of 2005, with a prayer to hand over of the investigation of the case to the C.B.I. or any other independent investigating agency for proper investigation in the case and the fact that such an application was disposed by directing that, if in course of trial any evidence is adduced from the side of the prosecution alleging involvement of other persons, apart from those who have been charge sheeted, the Court may consider it invoking its

power under Section 319 Cr.P.C. and the informant was also granted liberty to move an application under section 319 Cr.P.C. after examination of material witnesses.

11. It appears that the Trial Court was clearly swayed by the observations made by this Court in WP(CRL) 175 of 2005 and clearly failed to exercise its judicial discretion as required under Section 319 of the Cr.P.C. in terms of the judgments referred to hereinabove. From the above, it is clear that the evidence of P.W.13-informant is limited to the extent of alleging that the petitioners Durga Naik @ Daroga Naik and Ramesh Naik were present at the spot, where the dead body of the deceased-Jyotirmayee was found at night. This assertion can at best be treated to be a "suspicious circumstance". But such suspicion by itself is not sufficient or adequate to hold that there is any reasonable prospect of convicting the present petitioners for an offence under Section 302 I.P.C.

12. In the present case, except the statement of the informant made during his examination-in-chief that the present petitioners were present along with the main accused persons, there exists no evidence of any complicity of the petitioners with the crime and, therefore, I am of the considered view that it would not be proper to subject the petitioners to trial by invoking the jurisdiction under Section 319 Cr.P.C..

13. Accordingly, the application under section 482 Cr.P.C. filed by the present petitioners Durga Naik @ Daroga Naik and Ramesh Naik is allowed and the order dated 4.7.2007 impugned herein passed by the learned Sessions Judge, Dhenkanal in C.T. (SS) Case No.175 of 2005, in so far as it relates to the present petitioners is quashed.

Application allowed.

2010 (II) ILR – CUT- 967

SANJU PANDA, J.

W.P.(C) NO.6482 OF 2006 (Decided on .29.09.2010)

BIDHU BHUSAN NAYAK & ORS. ……… Petitioners.

.Vrs.

SAROJINI NAYAK & ORS. ……… Opp.Parties.

CIVIL PROCEDURE CODE, 1908 (ACT NO. 5 OF1908) – SEC.47.

Execution Proceeding – Plea that judgment-debtors not represented properly and were not parties to the decree – They can not raise such objection by filing an application U/s.47 C.P.C. – Matter to be decided by a separate suit.

In the present case the petitioners filed an application U/s.47 C.P.C. raising a question that the deities who are minors and other minors were not properly represented – Held, petitioners can not raise those questions by filing a petition U/s.47 C.P.C. and it is open to the parties to raise such question independently.

(Para 7,8)

Case law Referred to:-

53 (1982) CLT 509 : (Bhagabat Sahu -V- Parbati Samal & Ors.)

For Petitioners - M/s.Dayananda Mohapatra, D.K.Sahoo, M.Mohapatra, S.K.Swain & G.R.Mohapatra.

For Opp.Party No.1 - M/s. Surya Prasad Mishra, S.Mishra, S.Das, S.Nanda, Miss.S.Mishra, S.S.Satpathy, B.Mohanty, S.K.Mohanty, A.K.Das & S.S.Kashyap

---

S. PANDA, J. This writ petition is directed against the order dated 24.2.2006 passed by the learned Addl. District Judge, Bhadrak in Civil Revision Petition No.13 of 2005 dismissing the revision which was filed challenging the order dated 8.11.2005 passed by the learned Civil Judge (Senior Division), Bhadrak in Misc. Case No.93 of 1996 rejecting an application filed under Section 47 of the Civil Procedure Code.

2. The brief facts of the case are as follows:

The judgment debtor nos.1, 3 and 4 who are the sons of defendant no.1 in Title Suit No.136 of 1976 filed an application under Section 47 read with Section 151 and Order 32 Rules-3, 3(A), 4, 7(2) read with Sections 10 and 15 of the Civil Procedure Code raising a question that defendant nos.16 to 19 who are judgment-debtor nos.21 to 24 are family deities of the parties.

From the order dated 26.7.1985 of the final decree proceeding, it appears that the deities refused to receive the summons. In the suit, 'Ga' Schedule properties were allotted to the parties but there was no instruction in the decree as to how worship and management of those deities should be done. The trial court though described the case of the deities who had been installed by the ancestor of the parties, the elder branch of the family generationwise enjoyed the said schedule properties and managed the day-to-day affairs of the deities. The plaintiff and defendant no.3 were the employees of South Railways Department. Without making any arrangement for the deities, they included the suit properties for their mutual benefits. Defendant no.15 was a minor. The trial court engaged an advocate for her guardian. However, he did not represent the said minor at the time of hearing. As she was set ex parte, her interest had been relinquished in favour of defendant no.3. Defendant No.1(Ka) was declared dead vide order dated 14.12.1981. Accordingly, the said branch could not contest the case properly. Subsequently, some person filed an objection under Section 47 of the Civil Procedure Code as judgment-debtor 1(ka) to declare the judgment and decree passed in the suit as a nullity, void and the same was not capable of execution. The decree-holders filed their objection to the said application stating that the executing court could not go behind the decree and the allegations made by the judgment-debtors were false and baseless. The executing court, after hearing the parties and analyzing the facts and circumstances of the case, held that the present petitioners are sons of Niranjan Nayak-defendant no.1 and the plaintiff is the brother of defendant no.1. Defendant nos.2,4 and 5 are other brothers and sisters of the plaintiff. The parties admitted that defendant nos.16 to 19 (JDr 21 to 24) are represented by defendant no.1 to 15 who are co-sharers. Therefore, there was no necessity for appointment of guardian when they had been properly represented. So far as defendant no.15 and other so-called persons are concerned, none of the parties challenged the preliminary decree. Hence, the final decree was drawn according to the preliminary decree and after long lapse of several years the present petitioners challenged the preliminary decree only to linger the process by way of dilatory tactics. Therefore, the trial court rejected the said misc. case.

3. Challenging the said order, the petitioners filed civil revision. The revisional court on scrutiny noticed that the deities are represented by their Marfatdars. The Marfatdari rights with respect to the deities' properties have been apportioned between the parties and the Seva Puja of the deities has been managed by the joint efforts apportioning the cost. The preliminary decree was passed in the year 1984. The final decree passed in the year 1987 had not been challenged. The allotments made by the Commissioner had also not been challenged by the parties. In the meantime the parties had

already dealt with the properties separately by selling the same. Therefore, it can be held that the application under Section 47 of the Civil Procedure Code was filed only to delay the matter and the decree could not be held as a nullity. Therefore, there is nothing to be interfered with the impugned order. Accordingly, the revisional court dismissed the revision.

4. Learned counsel for the petitioners submitted that the suit was filed for partition of the joint family properties of the deities, defendant nos.16 to 19, and they were set ex parte. As they were set ex parte their interest was not protected properly. They being perpetual minors, the court should have protected their interest by engaging a guardian. As the minors were not properly represented, the judgment and decree passed by the trial court was a nullity. Both the executing court as well as the revisional court failed to appreciate the same and rejected the application of the petitioners. Therefore, the impugned order is liable to be set aside. He further submitted that though the present petitioners are very much alive, they were shown as dead leaving behind no legal heirs vide order dated 25.8.1980. The other legal heirs of defendant no.1 were substituted and the suit was disposed of in the absence of the petitioners. The trial court allotted one-half share in favour of defendants 3,6 and 15 and allotted one-half share to the plaintiff, D-1/ Ka to D-1/Ta, D-2,D-4 and D-5. Plaintiff got 21/150 interest in the suit properties which is a part of the aforesaid half interest. In support of his contention, he cited a decision reported in **53 (1982) CLT 509** (Bhagabat Sahu v. Parbati Samal and others) wherein this Court has held that when a decree is challenged as nullity because judgment-debtors were not duly represented, the matter is to be agitated in an independent action and not to be within the ambit of Section 47 of the Civil Procedure Code. Accordingly, the executing court as well as the revisional court should have held that the petitioners may raise that question independently in respect of rejecting their application in the execution case.

5. Learned counsel for the opposite party no.1 submitted that the deities were duly represented and the suit being a partition suit, the preliminary decree having been confirmed in the final decree and the same not having been challenged in any manner, the petitioners should not raise this question at a belated stage when the parties have already dealt with the properties independently. He further submitted that the only intention of the petitioners is to drag the matter. As there is no error apparent on the face of the record, this Court should not interfere with the same in exercise of the jurisdiction under Article 227 of the Constitution of India.

6. The fact that the deities are family deities and the suit was filed for partition. The preliminary decree was passed in the year 1984 and the same was confirmed in the final decree in the year 1987. Allotment of share by the Commissioner had not been objected, the deities are represented by

Marfatdars and the Marfatdary right with respect to the deities' properties had been apportioned between the parties. Therefore, the properties under 'Ga' Schedule are enjoyed by the family and all these properties are partiable. According to their claim, the trial court considered the case of the parties and passed a preliminary decree which was not challenged at all. The question now raised by the petitioners is that the deities being perpetual minors were not properly represented and defendant no.15 being a minor was also not properly represented and hence the decree is to be declared as a nullity. The said question was raised by filing an application under Section 47 of the Civil Procedure Code. Under Section 47 of the Civil Procedure Code the Court has to decide all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree.

7. From the above it is crystal clear that whether the decree was obtained validly or not is within the scope of Section 47 of the Civil Procedure Code which is only to consider the discharge or satisfaction of the decree by the executing court. This Court in the case of Bhagabat Sahu's case (supra) has held that if the judgment-debtors contend that they were not properly represented and were not thus parties to the decree, they cannot come under Section 47 of the Civil Procedure Code as if they were parties to the suit. This is a matter, therefore, which has to be decided by a separate suit.

8. Therefore, considering the above principle and law and the fact that the present petitioners are raising a question that the deities who are minors and other minors were not properly represented, this Court is of the view that they cannot raise those questions by filing a petition under Section 47 of the Civil Procedure Code. It is open to the parties to raise that question independently.

9. As there is no error apparent on the face of the impugned order, this Court is not inclined to interfere with the same.

With the aforesaid observation, this writ petition is disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT- 971

B.N.MAHAPATRA, J.

W.P.(C) NO.20659 OF 2009 (Decided on 26.10.2010)

ASIAN SCHOOL OF BUSINESS MANAGEMENT, TRUST, BBSR. ……… Petitioner.

.Vrs.

ORISSA POWER TRANSMISSION CORPORATION LTD.(OPTCL) BBSR & ORS. ………. Opp.Parties.

Electricity (Supply) Act, 1948 (ACT NO. 54 OF1948) – SEC.29.

Construction of transmission line over the land in question – Scheme was publicized in 1996 inviting objections from any person interested regarding execution of the scheme – Petitioner purchased the said land on 30.12.2005 and raised objection – However petitioner's vendor did not raise any objection– The Vendee can not assert better right than the vendor – Held, the petitioner can not stop the transmission net work involving larger public interest - Moreover the petitioner can not get any benefit out of its own wrong and at best he can claim for compensation.

(Para 15, 17)

Case laws Referred to:-

1.(1995) 1 SCC 642 : (Bombay Metriopolitan Region Development Authority Bombay -V- Gokak Patel Volkart Ltd. & Ors.)
2.AIR 1977 SC 898 : (Jai Singh -V- Union of India & Ors.).
3.AIR 1954 SC 207 : (K.S.Rashid & Son -V- Income Tax Investigation Commission & Ors.)
4.AIR 1970 SC 898 : (Tilokchand Motichand & Ors.-V-H.B.,Munshi, Commissioner of Sales Tax, Bombay & Anr.)
5.AIR 1967 SC 1 : Naresh Shridhar Mirajkar -V-State of Maharashtra & Anr.)
6.AIR 1988 SC 1531 : (A.R. Antulay -V- R.S.Nayak & Anr.)
7.(2006) 4 SCC 683 : (State of Karnataka & Anr.-V-All India Manufacturers Organization & Ors.).
8.(1990) 2 SCC 715 : (Direct Recruit Class-II Engineering Officers' Association -V- State of Maharashtra & Ors.)
9.AIR 1986 SC 391 : (Forward Construction Co. & Ors.-V-Prabhat Mandal (Regd.) Andheri & Ors.).

10. (2003) 6 SCC 675 : (Surya Dev Rai -V- Ram Chander Rai & Ors.).

For Petitioner - M/s. L.Panigrahi, S,R.Pani, A.K.Das, S.K.Mishra & B.Jena.
For Opp.Parties – Mr. N.C.Panigrahi, Sr. Advocate
M/s. S.R.Panigrahi, N.K.Tripathy, D.Dhal
(for O.Ps.1 to 3)
M/s. S.Mohanty, H.N.Parida, P.R.Sutar
(for intervenor)

B.N.MAHAPATRA, J. This writ petition has been filed seeking directions to O.P. No.1-Orissa Power Transmission Corporation Ltd., represented through its Managing Director, O.P. No.2-Superintending Engineer [E.H.T.(C) Circle] and O.P. No.3-Asst. General Manager, EHT (C) Division of Orissa Power Transmission Corporation Ltd., not to make any construction of transmission tower/line within the premises of the petitioner and to take a final decision regarding re-routing/re-alignment of the 220/132 KV Mendhasaal-Bidanasi over-head line within a stipulated time after completion of the profile survey by the petitioner.

2. Bereft of unnecessary details, the short facts leading to the present writ petition are that on 30.01.1996 the Orissa State Electricity Board prepared and notified a Scheme for strengthening the transmission network in and around Chandaka (Bhubaneswar) command area and Bidanasi (Cuttack) command area. The Scheme was publicized and gazetted in terms of Section 29 of the Electricity (Supply) Act, 1948 (for short, 'the Act, 1948') inviting objections from any person interested regarding execution of the Scheme within two months from the date of publication. The Scheme was duly concurred by CEA under Section 31 of the Act, 1948. Petitioner purchased the land in question by a sale deed dated 30.12.2005. Thereafter, the petitioner filed Civil Suit No.72/06 before the Civil Judge (Junior Division), Bhubaneswar and got an order of injunction on 26.04.2006 restraining O.P.No.1-the Orissa Power Transmission Corporation Limited (for short, 'OPTCL') from making any construction in its premises. In F.A.O. No.40/23 of 2006, the learned Ad hoc Addl. District Judge (FTC) No.3, Bhubaneswar allowed the appeal filed by the OPTCL and set-aside the order of injunction against which the present petitioner had filed writ petition bearing W.P.(C) No.14806 of 2008. In the said writ petition, this Court vide its order dated 21.11.2008 confirmed the aforesaid order of Ad hoc Addl. District Judge (FTC) No.3, Bhubaneswar. Thereafter, the present writ petition has been filed by the petitioner with aforesaid prayers. In Misc. Case No.17732 of 2009, this Court by an ex-parte interim order dated 31.12.2009 restrained the OPTCL from constructing over-head line on the relevant

portion of the suit land. Further, this Court on 04.01.2010 directed that the order of status quo dated 31.12.2009 would remain operative till appearance of the opp. parties.

The intervention petition filed by Orissa Electricity Regulatory Commission (for short, 'OERC') was allowed and the intervenor-petitioner has been added as opp. party No.6 vide this Court's order dated 04.10.2010.

3. At the outset, Mr.N.C.Panigrahi, learned Senior Advocate appearing for opp. parties 1 to 3 and Mr. S.Mohanty, learned counsel appearing for the intervenor-petitioner raised preliminary objection regarding maintainability of the writ petition. It is submitted that the present writ petition is not maintainable on the ground that Civil Suit No.72/06 filed before the Civil Judge (Junior Division), Bhubaneswar seeking self-same relief is pending, and the petitioner cannot take recourse to the present position. Further, this Court has already considered the issue relating to petitioner's right to oppose construction of transmission line in W.P.(C) No.14806 of 2008, which was dismissed on 21.11.2008. Therefore, the petitioner cannot agitate the same issue in the present writ petition. It was also submitted that the petitioner cannot acquire a better right than that of its vendor possessed at the time of transfer of ownership of the land in question. It cannot be said that while purchasing the land in question, the petitioner was not aware of the Scheme and OPTCL's right. The OPTCL has completed almost whole of the work under the Scheme by 26.04.2006 except for two towers and over-head lines to be laid on a small portion of the land in question. OPTCL has already invested rupees nine crores. If it is prevented from making the aforesaid remaining construction of the transmission line, the power supply to entire Bhubaneswar, Khurda, Puri, Nimapara, Fulnakhara and Jagatsinghpur will be in jeopardy since such supply is now managed through one Circuit resulting not only low voltage but also precarious dependence on one Circuit. Mr. Panigrahi emphatically submitted that though after delivery of the judgment on 21.11.2008 there were no further negotiation/efforts between the parties to reach any settlement, yet the petitioner has filed the present writ petition with the very same prayer which was claimed in the earlier writ petition and obtained interim injunction on 31.12.2009 in Misc. Case No.17732 of 2009. The petitioner relies on a joint verification of the parties made on 10.11.2008 (Annexure-11) which could not be fruitful and after that joint verification this Court dismissed the writ petition on 21.11.2008. After the order dated 21.11.2008, there is not a single scrap of paper to show that the opp. parties have ever taken any step for resolution beyond the order. Relying on the decisions of this Court rendered in Rabindra Bhoi vs. Chief Executive Officer, Central Electricity Supply Utility and another, 2010 (1) O.J.R. 478, Sanwarmal Ram @ Agarwal vs. Executive Engineer, E.H.T., GRIDCO, Berhampur, W.P.(C) No.1000 of 2002 disposed of on 10.10.2002,

Sanghamitra Biswal vs. Orissa Power Transmission Corporation Ltd. & Others, W.P.(C) No.11408 of 2007 disposed of on 12.11.2007, Sri R. Ramudu Reddy vs. State of Orissa & Another, OJC No.12732 of 2000 disposed of on 28.01.2002, Bairagi Charan Nayak vs. State of Orissa & Others, OJC No.2868 of 1998 disposed of on 29.08.2000, Mr. Panigrahi vehemently argued that when a transmission line is to be drawn up under a Scheme and no objection has been filed by the concerned owner of the land at the appropriate time opposing the Scheme, the same cannot be stopped and at the most petitioner is entitled to compensation as payable under the law.

4. Per contra, Mr. L.Pangari, learned counsel appearing for the petitioner submitted that the earlier writ petition was filed against the order of the District Judge vacating the injunction granted by the Civil Judge (Jr. Division), Bhubaneswar whereas the present writ petition has been filed on a different cause of action and in the interest of parties. The dispute can be resolved only by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution which power is much wider. The pending civil suit shall be subject to the order to be passed in the present writ petition and the same shall ultimately become infructuous. The earlier writ petition was dismissed on account of false representation made by the opp. parties. Pursuant to orders dated 15.10.2008 and 27.10.2008 of this Court in earlier writ petition, the parties with a view to work out a solution, made a joint verification. Several correspondences have also been made between the petitioner and the officers of the opp. parties to find out solution. The petitioner negotiated consultants who have made detailed survey and submitted their report to the effect that re-routing / re-alignment is possible only by addition of one transmission tower. The petitioner has forwarded to the opp. parties a detailed profile survey report, topo map indicating that rerouting realignment is possible in two ways just by adding one extra tower. The petitioner is ready and willing to bear the cost of extra tower and for re-routing the tower line by addition of one extra tower. After dismissal of the earlier writ petition, the opp. parties falsely represented to the Police and the Collector, Khurda to provide them police force to break the boundary wall for entering into the campus of the petitioner. In these circumstances, the petitioner constrained to file the writ petition. Mr.Pangari further submitted that since the opp. parties have not filed any document to indicate that construction of the 220 KV Mendhasal - Bidanasi tower line is part of any sanctioned Scheme, Section 12 of the Electricity Act, 2003 (for short, Act 2003) is applicable. It is further submitted that in the case of the petitioner no order in terms of Sub-section (3) of Section 12 of the Act 2003 has been submitted indicating that compensation has been fixed. Even if it is decided to make payment of any compensation no amount of compensation will help the petitioner as it will be impossible to break the campus having five fully

residential postgraduate programmes with 488 students (3 years duration) and eight hostels without affecting the career of more than twelve hundred students. To meet such situation, second proviso to Section 12(2) provides that the tower location can be removed or altered by the authorities. Opp. parties are not able to show any document indicating that the petitioner has at any time cause any obstruction to the construction work. On the other hand, opp. parties realized that it will be impossible to break upon the campus forcibly where more than twelve hundred students are studying and about eight hundred students are residing in eight hostels. If the opposite parties are permitted to forcefully enter into the campus for installation of the tower line there may be serious law and order problem as there are 800 students residing in the campus including 500 girls' students. None of the judgments cited by the opp. parties goes to show that any High Court has passed orders directing joint survey to explore the possibility of rerouting / realignment of the line in better interest of the parties. In all the judgments cited by the opp. parties, the Court has dealt with the case / interest of private individuals and not the case of a premier established educational institution where more than twelve hundred students are prosecuting their studies and residing in eight hostels inside the campus. Concluding the argument Mr. Pangari submitted that the opp. parties should be directed to divert the proposed 220 KV Mendhasal-Bidanasi tower line as indicated in Annexure-21 to the rejoinder.

5. On the rival contentions, the following questions fall for consideration.

(i) Whether the writ petition is maintainable?

(ii) Whether correspondence of the petitioner with the Officers of the opp. parties gives any right to the petitioner?

(iii) Whether the subsequent purchaser of a land can oppose construction of a transmission line over his land which was approved and notified under a Scheme particularly when no objection was raised by the original owner ?

(iv) Whether public interest has preference over the petitioner's interest ?

6. Question no.1 is with regard to maintainability of the writ petition.

According to the opposite parties, the writ petition is not maintainable on the following grounds :

(i) The petitioner having resorted to the alternative remedy by filing Civil Suit No. 72/2006 before the Civil Judge (Jr. Divn.), Bhubaneswar seeking self-same relief, which is now pending, cannot invoke extraordinary jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

(ii) Since this Court has already considered the issues as to the petitioner's right to oppose the construction of transmission line over its land while disposing of W.P.(C) No.14806 of 2008 on 21.11.2008 and the same having attained finality the petitioner is estopped from raising the same issue again in the present writ petition.

7. It is not in dispute that the petitioner filed C.S. No.72/2006 in the Court of the Civil Judge (Jr. Divn.), Bhubaneswar seeking permanent injunction against opposite parties 1 to 3 restraining them from entering upon the land in question and erecting/constructing any transmission tower/line over the same. The present writ petition has been filed virtually for self-same relief.

Law is well settled that Writ Court should not interfere in the matter where suit or any other proceeding is pending before the lower forum seeking self-same relief. The apex Court in ***Bombay Metropolitan Region Development Authority, Bombay Vs. Gokak Patel Volkart Ltd. & Ors.***, (1995) 1 SCC 642, held as follows :

> "We are of the view that the point taken by the appellant is of substance. This is a case, where there is not only the existence of an alternative remedy but the writ petitioner actually had availed of that remedy. The writ petitioner's appeal before the statutory authority was pending. In that view of the matter this writ petition should not have been entertained."

In ***Jai Singh v. Union of India and others***, AIR 1977 SC 898, the apex held that the appellant cannot pursue two parallel remedies in respect of the same matter at the same time.

The apex Court in ***K.S. Rashid and Son v. Income Tax Investigation Commission and others***, *AIR. 1954 SC 207*, held as follows:

> "For the purpose of this case it is enough to state that the remedy provided for in Article 226 of the Constitution is a discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. So far as the present case is concerned, it has been brought to our notice that the appellants before us have already availed themselves of the remedy provided for in section 8(5) of the Investigation Commission Act and that a reference has been made to the High Court of Allahabad in terms of that provision which is awaiting decision. In these circumstances, we think that it would not be proper to allow the appellants to invoke the discretionary jurisdiction under Article 226 of the Constitution at the present stage, and on this ground alone, we would refuse to interfere with the orders made by the High Court.

The apex Court in ***Tilokchand Motichand & Ors. V. H.B. Munshi, Commissioner of Sales Tax, Bombay & Anr.***, *AIR* 1970 SC 898, held this Court refrains from acting under Article 32 if the party has already moved the High Court under Article 226 with a similar complaint and for the same relief and failed. This Court insists on an appeal to it and does not allow fresh proceeding. In this case the principle of res judicata is applied although the expression is some of the inapt and unfortunate. The rule is based on public policy but the motivating factor is the existence of another parallel jurisdiction in another court.

8. In the case at hand, since Civil Suit is pending in the Court of Civil Judge (Jr. Division), Bhubaneswar the present writ petition seeking self-same relief, is not maintainable.

9. Challenging the second contention of the opposite parties that the issue involved in the present writ petition having been decided in the earlier writ petition, the present writ petition is not maintainable, Mr Pangari, learned counsel appearing on behalf of the petitioner submitted that the earlier writ petition No.14806 of 2008 was disposed of by this Court exercising jurisdiction under Article 227 of the Constitution of India and the present writ petition has been filed invoking extraordinary jurisdiction of this Court under Article 226 of the Constitution which power is much wider.

Repudiating such stand of Mr Pangari, Mr Panigrahi, learned Senior Advocate for the opposite parties submitted that the earlier writ petition and the present writ petition both are filed by the petitioner under Articles 226 and 227 of the Constitution. The earlier writ petition was dismissed and the same having not been challenged in Appeal that attained finality. Even assuming the previous writ petition was one under Article 227, it makes no difference because the relief claimed in both the writ petitions is one and the same and the cause of action is also the same.

10. Undisputedly the relief claimed in the earlier writ petition, i.e., W.P.(C) No.14806 of 2008 and in the present writ petition is one and the same and the cause of action is also the same. The earlier writ petition W.P.(C) No.14806 of 2008 was filed praying *inter alia* for a direction to restrain opposite parties from entering upon the suit schedule land of the petitioner and from erecting/constructing any transmission tower on the same. This Court dismissed the said writ petition vide its order dated 21.11.2008 and that order was not challenged in Appeal. Thus, the said order attained finality. During pendency of the said writ petition there was negotiation and even possibility of alternative solution was explored but failed.

11. Law is well settled that correctness of the judicial order which has attained finality cannot be examined in writ jurisdiction.

In ***Naresh Shridhar Mirajkar vs. State of Maharashtra & Anr.,*** *AIR 1967 SC 1,* nine Judges' Bench held that the judicial order is not liable to be questioned in a writ petition. The same view was reiterated by another Seven Judges' Bench in ***A.R. Antulay v. R.S. Nayak & Anr.,*** *AIR 1988 SC 1531.*

12. Maintainability of the present writ petition can be looked at on the ground of res judicata. The apex Court in ***State of Karnataka & Anr. Vs. All India Manufacturers Organization & Ors.,*** *(2006) 4 SCC 683,* held as under:-

> "Res Judicata is a doctrine based on the larger public interest and is founded on two grounds: one being the maxim nemo debet bis vexari pro una et eadem causa (no one ought to be twice vexed for one and the same cause) and second, public policy that there ought to be an end to the same litigation. It is well settled that Section 11 of the Civil Procedure Code, 1908 (hereinafter "CPC") is not the foundation of the principle of res judicata, but merely statutory recognition thereof and hence, the section is not to be considered exhaustive of the general principle of law. The main purpose of the doctrine is that once a matter has been determined in a former proceeding, it should not be open to parties to reagitate the matter again and again. Section 11 CPC recognizes this principle and forbids a court from trying any suit or issue, which is res judicata, recognizing both "cause of action estoppel" and "issue estoppel".

The Constitution bench of the apex Court in ***Direct Recruit Class-II Engineering Officers' Association Vs. State of Maharashtra & Ors.,*** *(1990) 2 SCC 715* held as under:-

> "……. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata"

In ***Forward Construction Co. & Ors Vs. Prabhat Mandal (Regd.), Andheri & Ors,*** *AIR 1986 SC 391*, the apex Court held that in view of Section 11, Expln. IV it could not be said that the earlier judgment would not operate as res judicata as one of the grounds taken in the subsequent petition was conspicuous by its absence in the earlier petition. An adjudication is conclusive and final not only as to the actual matter determined but as to every other matter

which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of litigation and every matter coming within the legitimate purview of the original action both in respect of the matter of claim or defence.

13. Mr. Pangari has tried to make a distinction between the earlier writ petition and the present writ petition by saying that the earlier writ petition was disposed of by exercising jurisdiction under Article 227 whereas the present writ petition has been filed invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution which is much wider. This submission of Mr Pangari is not factually correct. Both the earlier and the present writ petitions are filed under Articles 226 and 227 of the Constitution. Moreover, the apex Court in ***Surya Dev Rai v. Ram Chander Rai & Ors.***, *(2003) 6 SCC 675*, held that it is well settled that the power of superintendence conferred on the High Court under Article 227 is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised *suo motu*. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.

Moreover, in both the writ petitions the cause of action as well as relief claimed by the petitioner being one and the same, it makes no difference even if the earlier writ petition was disposed of exercising jurisdiction under Article 227 as contended and the present writ petition is filed under Article 226 of the Constitution. It needs no reiteration that the earlier writ petition and the present writ petition are filed both under Articles 226 and 227 of the Constitution.

14. The second question is as to whether correspondence of the petitioner with officers of the opposite parties gives any right to the petitioner. The third question is whether a subsequent purchaser of a land can oppose construction of the transmission line over the land of the petitioner which was approved and notified under a Scheme prior to his purchase and when no objection was raised by the original owner. These questions have also been adjudicated by this Court in the previous writ petition, i.e., W.P.(C). No.14806 of 2008 and this Court held as follows:

> "Further when once no objection was raised within the statutory period, the subsequent belated correspondence by any officer of Respondent may not act as an estoppel against them because such officer is not entitled to forego the statutory period prescribed for receiving objections or to extend it or even to waive it.

> Moreover, after having purchased the land in December 2005, the building was constructed below the power line by petitioner only in July 2006, after knowing fully well that negotiation with officers of Respondent failed."

15. Law is no more *res integra* that purchaser of a land cannot acquire better title and right than that of his vendor. In the instant case, the scheme for construction of 220 KV high tension transmission line from Mendhasal-Bidanasi was sanctioned and published in the year 1996. The petitioner's vendor did not raise any objection to the same. The petitioner purchased the said land on 30.12.2005. Thus, the vendee cannot assert better right than the vendor. It cannot claim to stop transmission network. At the best, the petitioner can claim for compensation as payable under law.

16. The fourth question is whether the public interest has preference over the petitioner's interest.

In the present case, pursuant to the Scheme, the opposite parties have erected 115 towers on both sides of the petitioner's land except two towers and over-head lines are to be constructed on the petitioner's land. The OPTCL has invested a substantial amount to implement the scheme. Because of non completion of the work undertaken as per the Scheme, power supply to Bhubaneswar, Khurda and many other towns is in jeopardy.

17. The paramount public interest in this case cannot be lost sight of. On one hand, the larger interest of the State involving lakhs of electricity consumers spreading over several districts of Orissa and on the other hand the purported inconvenience of a few hundred of students. Time and again, the apex Court has deprecated the practice of the educational institutions acting in violation of law and committing irregular and illegal acts and thereafter, taking plea of career of the students. I am shocked that in the case at hand even the threat of law and order situation by the students has been argued. Plight of the students is apparently due to improper action of the petitioner. If the career of the students is at stake, the petitioner is solely and wholly responsible for it.

18. In the above premises, the petitioner is not entitled to any equitable relief as with eyes open and being fully conscious that its vendor has not filed any objection to the scheme, it has constructed the boundary walls and buildings. Thus, the petitioner cannot get any benefit out of its own wrong.

19. The inevitable conclusion is that the writ petition deserves dismissal which I direct.

Writ petition dismissed.

2010 (II) ILR – CUT- 981

B.P.RAY, J.

OJC. NO.18039 OF 1997 (Decided on 16.07.2010)

HEMA SETHY ……….. Petitioner.

.Vrs.

EXECUTIVE ENGINEER,
ELECTRICALDIVN.(GRIDCO), **……….** Opp.Parties**.**
JOBRA, CUTTACK & ANR.

Electrocution death – Falling of a dead Chakunda branch on live electric wire which ultimately fell on the deceased – F.I.R. and Post Mortem report supports the case – Held, husband of the petitioner died in electrocution – Deceased was 35 years at the time of accident – Appropriate multiplier is 17 as per the schedule given in the M.V.Act – Minimum wage of the deceased was Rs.60/- per day and as such Rs.2,00,000/- would be just and proper compensation.

(Para 4)

Case laws Referred to:-

1.2005(II) OLR 389 : (Nirmala Nayak & Ors.-V-Chairman-cum-Managing Director,Grid Corporation of Orissa Ltd. & Anr.).
2.(2001) 8 SCC 197 : (Lata Wadhwa -V- State of Bihar).

For Petitioner - M/s. T.C.Mohanty.
For Opp.Parties- Mr.B.K.Nayak.

B.P.RAY, J. The petitioner has filed this writ petition praying therein to award compensation together with interest for the death of her husband late Niranjan Sethy, who died on 13.9.1007 at about 11.00 A.M. in electrocution near village Sanackosti under Tangi P.S. while he was going to take his bath in the river due to falling of a dead Chakunda branch on live electric wire which ultimately fell on the deceased. After the death of Niranjan Sethy, a U.D. case has been registered by Tangi P.S. being U.D.Case No.07/97 U.D.G.R. No.786/97 vide Annexure-1. The F.I.R. lodged with the Tangi P.S. clearly corroborates the above fact of electrocution and on inquiry the Investigating Officer came to the conclusion that the husband of the petitioner died in electrocution due to negligence on the part of the electricity officials. Therefore, there is no doubt that the husband of the petitioner died in electrocution. The post mortem examination No.830/97, dated 14.9.97 also indicates to that extent.

2. Moreover, the opp.parties in their counter affidavit I n Para 4 have stated. "In fact unfortunately due to falling of a piece of wooden branch on the live electric line, one of the conductors detached from the electric pole and fell on deceased Niranjan Sethy, who was passing under the line at that time and the deceased died on the spot", which proves the case of the petitioner.

3. A division Bench of this Court in a case of ***Nirmala Nayak and others V. Chairman-cum-Managing Director, Grid Corporation of Orissa Ltd. and another*** reported in 2005 (II) OLR 389 has followed the decision of the Apex Court and held that:

> " The Apex Court has observed that while determining the question of compensation and awarding compensation to children the guiding factor enunciated in the case of ***Lata Wadhwa V. State of Bihar*** (2001) 8 SCC 107 should be followed and in such case 2nd Schedule to Motor Vehicles Act can be considered to be proper guide."

4. In the present case, the petitioner's claim is that her husband was working as a daily labourer in P.W.D. of Govt. of Orissa and was working in Tangi section and earning Rs.1,200/- per month. But no document has been filed in this regard. The deceased was aged about 35 years at the time of accident. The claimants are the wife, minor son, namely, Ganeswar Sethy and minor daughter, namely Gitanjali Sethy. The appropriate multiplier in this case shall be 17 as per M.V. Schedule and taking the minimum wage of Rs.60/- per day in my considered view Rs.2,000,00/- would be just and proper compensation. The authorities are directed to deposit the entire awarded amount in this Court by account payee Bank Draft in favour of the petitioner by end of August, 2010 together with simple interest @ 6% per annum from the date of presentation of writ petition till payment. On deposit of the aforesaid amount, the same shall be disbursed to the petitioner by the Registrar (Judicial) on proper identification.

The writ petition is accordingly disposed of.

Writ petition disposed of.

2010 (II) ILR – CUT- 983

B.K.PATEL, J.

O.J.C. NO.6153 OF 1998 (Decided on 31.8.2010)

MANAGEMENT OF GANJAM NORTH ELECTRICAL DIVN.GRIDCO-BERHAMPUR ……… Petitioner.

.Vrs.

P.O., LABOUR COURT, JEYPORE & ORS. ……… Opp.Parties**.**

INDUSTRIAL DISPUTES ACT, 1947 (ACT NO.14 OF 1947) – SEC.2 (oo) (bb), 11,12, 25-B & 25-F.

Termination of workmen w.e.f. 01.10.1989 – Reference made to Labour Court in 1995 – Employer says workmen engaged in construction work and there is inordinate delay in approaching the Labour Court – Labour Court held the termination not legal and justified and they were entitled to be reinstated with full back wages.

In this case workmen approached different authorities for their re-employment – No delay on their part – Each workman deposed for their continuous work – No challenge by the employer to such assertion even by putting a suggestion – Moreover services of the workmen terminated without complying Section 25-F – Held, no scope to interfere with the findings of fact recorded by the Labour Court in exercise of writ jurisdiction. (Para 9,10 & 11)

Case laws Referred to:-

1.(2009) 2 SCC (L&S) 64 : (Krishna Bhagya Jala Nigam Ltd. -V-Mohammed Rafi)
2.(2007) 2 SCC (L&S) 225 : (Haryana Urban Development Authority -V- Om Pal).
3.(2008) 2 SCC (L&S) 128 : (Bhogpur Cooperative Sugar Mills Ltd.-V- Harmesh Kumar)

For Petitioner - M/s. Ramanath Acharya & B.Barik.
For Opp.Parties - M/s. Rajendra Kumar Bose & Rajendra Kumar Bhol. (for O.Ps. 2 to 7

B.K. PATEL, J. In this writ application filed under Articles 226 and 227 of the Constitution of India the employer has assailed the legality of the award dated 27.9.1997 passed by the learned Presiding Officer, Labour Court, Jeypore (for short, 'Labour Court') in I.D.Case No.96 of 1995 holding the termination of services of the opposite parties 2 to 7-workmento be illegaland unjustified, and directing the employer to re-engage the workmen

with 50% of back wages within six months from the date of receipt of copy of the award.

2. The impugned award was passed in adjudicating the following reference under section 10(1) read with section 12(5) of the Industrial Disputes Act,1947 (for short, 'the Act'):-

> "Whether the action of the management of Ganjam North Electrical Division,OSEB, Berhampur in terminating the service of S/S Satrughan Nayak, Bali Dakhua, Simanchal Nahak, Basanta Das, Yogendra Bhola and Rama Chandra Sahu, N.M.R. workers of Polasara Electrical Section with effect from 1.10.1989 is legal and/or justified ? if not, what relief these workmen are entitled?"

3. The case of the workmen, in brief, is that they were engaged as N.M.Rs. in Polasara Electrical Section by the employer with effect from 1.1.1984, 1.8.1984, 1.2.1984, 1.9.1984, 1.8.1984 and 2.1.1984 respectively on daily rated monthly wage basis. They continuously worked under the employer till 30.9.1989 and were disengaged with effect from 1.10.1989. It has been pleaded that a settlement had been arrived at on 1.10.1986 between the employer and their workmen represented through several Unions to the effect that N.M.R. workmen who had completed 400 days of work as on 30.1.1986 would be absorbed in regular post. On being disengaged in violation of such settlement the workmen approached the Junior Engineer, Polasara Electrical Section for reengagement. They also made representations to the management. However, the workmen were not reengaged though several workmen who were junior to them were retained in service by the employer. In such circumstances, the workmen approached the District Labour Court, Berhampur who initiated conciliation proceeding which failed. It has been averred before the learned Labour Court that disengagement of the workmen amounts to retrenchment without compliance of provisions under section 25-F, 25-N and 25-G of the Act and that the workmen were entitled to be reinstated in service with full back wages.

In the written statement it was pleaded by the employer that the workmen were engaged for construction work during the periods from March,1984 to December,1987, December,1985 to December,1988, March,1986 to September,1989, April,1988 to July,1989, June,1984 to September,1989 and January,1984 to September,1989 respectively with breaks. According to the employer, opposite party no.2 had worked for 97 days in 1984, 46 days in 1985, 121 days in 1986, 155 days in 1987; opposite party no.3 had worked for 199 days in 1986, 144 days in 1987, 234 days in 1988 and 139 days in 1989; opposite party no.4 had worked for 47 days in 1986, 144 days in 1987, 234 days in 1988 and 139 days in 1989; opposite party no.5 had worked for 160 days in 1988 and 130 days in 1989;

opposite party no.6 had worked for 39 days in 1984, 26 days in 1985, 121 days in 1986, 136 days in 1987, 234 days in 1988 and 139 days in 1989 whereas opposite party no.7 had worked for 124 days in 1984, 46 days in 1985, 117 days in 1986, 65 days in 1987, 234 days in 1988 and 139 days in 1989. None of them had rendered one year of continuous service prior to his disengagement. Therefore, none of the workmen was entitled to protection under section 25-F of the Act. It was also averred by the employer that no one junior to the workmen was allowed to continue in service.

On the basis of rival pleadings learned Labour Court framed the following issues for adjudication:-

(i) Is the reference maintainable in law ?

(ii) Whether the second party-workmen are in continuous employment for one year under the first party-management as per section 25-B of the I.D. Act ?

(iii) Whether the refusal of employment to the second party-workmen by the first party-management w.e.f. 1.10.1989 amounts to retrenchment as defined under section 2(oo) of the I.D.Act.

(iv) Whether the first party-management has followed the principles of 'last come, first go' while refusing employment to the second party-workman w.e.f. 1.10.1989 ?

(v) Whether the first party-management is required to comply section 25-F of the I.D. Act before refusing engagement to the second party-workmen ?

(vi) Whether the action of the management of G.N.E.D.,O.S.E.B.,Berhampur in terminating the services of S/S Satrughan Nayak, Bali Dakhua, Simanchal Nahak, Basanta Das, Yogendra Bhola and Rama Chandra Sahu, N.M.R. workers of Polasara Electrical Section with effect from 1.10.1989 is legal and/or justified ?

(vii) Whether the second party workmen are entitled to reinstatement with back wages ?

(viii) To what relief the workmen are entitled ?

In order to substantiate their claim the workmen examined hemselves as W.W.Nos. 1 to 6 respectively and also relied upon documents marked Exts. A to C. No witness was examined on behalf of the workmen. However, muster rolls marked Exts.1 to 6 were admitted into evidence on behalf of the employer.

In adjudicating issue no.(i) it was held by the learned Labour Court that there was no inordinate delay in raising the dispute. In answering issue no.(ii) it was held that each of the workmen having been engaged for more

than 240 days during the period of 12 calendar months preceding the date of disengagement, were in continuous engagement for a period of one year as provided under section 25-B of the Act. In answering issue no.(iii) it was held by the learned Labour Court that the employer had failed to prove that employment of any of the workman was contractual and that disengagement of the workmen amounted to retrenchment as defined under section 2(oo) of the Act. In answering issue no.(iv) it was observed by the learned Labour Court that materials did not indicate that the employer had violated principles of "last come first go" while refusing employment to the workmen. In the back ground of such findings, in answering issue nos.(v) and (vi), it was held that while refusing employment to the workman, employer had violated provision under section 25-F of the Act for which they were entitled to be reinstated with 50% of back wages.

4. In assailing the impugned award it was contended by the learned counsel for the petitioner that dispute having been raised before the learned Labour Court in the year 1996 only on the assertion that the workmen were refused employment w.e.f. 1.10.1989, the learned Labour Court should not have entertained the dispute on the ground of inordinate and unexplained delay. In this context, reliance was placed on the decision of this Court in **Ajit Narayan Bhanja Deo –vrs.- Union of India and others**: 2002–I-LLJ 226. It was further submitted that materials on record including admission made by the workmen indicate that the workmen were engaged in construction work. It was argued that such admission on the part of the workmen goes to show that the engagement of the workmen was contractual in nature. On completion of construction work, contracts for employment with the workmen automatically expired. Moreover, there was no basis for the learned Labour Court to arrive at the finding that any of the workmen had completed 240 days of service prior to their disengagement. Learned Labour Court has acted upon unsubstantiated and vague statements of the workmen ignoring documentary evidence Exts.1 to 6 produced on behalf of the employer. In support of his contentions reliance was placed by the learned counsel for the petitioner on the decisions in **Krishna Bhagya Jala Nigam Limited –vrs.- Mohammed Rafi**: (2009) 2 SCC (L&S) 646, **Yellatti R.M. –vrs.- Assistant Executive Engineer**:2006-I-LLJ 194, **Range Forest Officer –vrs.- S.T. Hadimani**:2002-I-LLJ 211, **Haryana Urban Development Authority –vrs.- Om Pal**: (2007)2 SCC (L&S)255, **District Red Cross Society –vrs.- Babita Arora and others**: (2007) 2 SCC (L&S) 631, **Kishore Chandra Samal –vrs.- Orissa State Cashew Development Corporation Ltd., Dhenkanal**: 2006 SCC (L&S) 241, **Morinda Co. Op. Sugar Mill Ltd. –vrs. Ram Kishan and others etc.**: 1996-I-LLJ 970, **Bhogpur Cooperative Sugar Mills Ltd. –vrs.- Harmesh Kumar**: (2008) 2 SCC (L&S) 128, **Rajastan Lalit Kala Academy –vrs.-**

Radhey Shyam: (2009) 1 SCC (L&S) 287, **Project Director, IDCWD Project, Jeypore –vrs.- Sri Kailash Chandra Jena**: 2008 (Supp.-I) OLR-405, **Dredging Corporation of India Ltd. –vrs.- Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Bhubaneswar and another**: 2008 (Supp.-I) OLR-695, **Batala Co-operative Sugar Mills Ltd. –vrs.- Sowaran Singh**: 2006-I-LLJ 60, **Municipal Council, Samrala –vrs.- Raj Kumar**: 2006 SCC (L&S) 473 and **Anil Bapurao Kanase –vrs.- Krishna Sahakari Sakhar Karkhana Ltd. & another**: 1998-I- LLJ 343.

5. In reply, it was contended by the learned counsel for the workmen that the workmen kept on approaching the authorities for their reengagement till submission of complaint before the District Labour Officer in the year 1992. The failure report submitted by the District Labour Officer goes to show that demand for reinstatement of the workmen was made by the Workers' Union as early as in the year 1990. In such circumstances, there is no scope to hold that delay in raising the dispute was either inordinate or unexplained. It was further contended that the employer has placed no material on record to indicate that the employment of the workmen was contractual in nature. No doubt, the workmen were engaged in construction works. That does not at all mean that employment was contractual in nature. All the workmen had been engaged for years together as N.M.R. on daily wage basis. Their assertion to have worked for more than 240 days has not been controverted by the employer. All the six workmen deposed before the learned Labour Court that they had worked for more than 240 days in a year. In such circumstances, it was for the employer to prove by adducing cogent evidence that the workmen did not complete 240 days service during the requisite period to constitute continuous service. It was strenuously contended that the employer produced Exts.1 to 6 which are muster rolls for the periods from 1.11.1988 to 30.4.1989 only. Not only the employer has suppressed muster rolls for remaining periods during which the workmen claimed to have worked but also muster rolls produced by the employer contradict the averments made in the written statement to the effect that workman Satrughna Nayak was not engaged during the years 1989 and 1990. Learned counsel for the workmen placed reliance on the decision in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda**: 2010 AIR SCW 542.

6. No period of limitation has been prescribed for reference of dispute by the Government for adjudication. However, delay in raising the dispute should not be inordinate and unexplained. Admittedly, workmen were disengaged from employment with effect from 1.10.1989 and the dispute was referred for reference to the Labour Court in the year 1995. However, it is evident from the pleadings in the statement of claim and the contents of

failure report submitted by District Labour Officer that workmen had approached the Junior Engineer and submitted representations to the Executive Engineer, Superintending Engineer and the Member (Administration) Secretary of OSEB for reemployment and, thereafter, Charter of demands were submitted by their union on 17.12.90 and 17.8.1991. Conciliation proceeding appears to have been initiated on 13.9.1993. Therefore, there is no scope to hold that there was any delay or laches on the part of the workmen so as to render their claim stale. Under the facts and circumstances of the case delay stands well explained..

7. All the workmen deposed before the Labour Court that they worked through out the year except on holidays. Admittedly, they were engaged in construction works. Muster rolls Exts. 1 to 6 indicate that all the six workmen rendered continuous services from 1.11.88 to 30.4.1989. It appears from the Exts. 6, 5 and 4 that the workmen worked for 30 days each in the months from November 1988, December 1988 and January 1989. No document has been filed to show that any contract of employment had been entered into between the employer and the workmen. Employer has also not chosen to adduce oral evidence. Therefore, none of the circumstances comes to the aid of the employer to take resort to provision under Section 2 (oo)(bb) of the Act for denial of retrenchment benefits to the workmen on the ground that termination of their services occurred as a result of non-renewal of the contract of employment on its expiry or termination of contract in accordance with stipulation contained therein.

8. Positive assertion of the workmen before the Labour Court was that they were working through out the year except on holidays. Employer refuted the assertion by taking the stand that none of the workmen worked for more than 240 days in a year so as to claim that they were in continuous services within the meaning of Section 25-B of the Act. Placing reliance on decisions of the Hon'ble Supreme Court referred to above, it was contended by the learned counsel for the petitioner that onus lies on the aggrieved workmen to discharge the burden of proof as to completion of 240 days of continuous work in a year. However, learned counsel for the workmen has rightly placed reliance on the decision of the Hon'ble Supreme Court in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra)* to urge that in cases of termination of services of daily-waged workmen it is for the employer to rebut assertion of continuous service made by the workman in court. Applying the principles laid down in **R.M.Yellatty v. Assistant Executive Engineer(supra),** it was observed in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra):*

"the evidence produced by the appellants has not been consistent. The appellants claim that the respondent did not work for 240 days. The respondent was a workman hired on a daily wage basis. So it is obvious, as this court pointed out in the above case that he would have difficulty in having access to all the official documents, muster rolls etc. in connection with his service. He has come forward and deposed, so in our opinion the burden of proof shifts to the employer/appellants to prove that he did not complete 240 days of service in the requisite period to constitute continuous service. It is the contention of the appellant that the services of the respondent were terminated in 1988. The witness produced by the appellant stated that the respondent stopped coming to work from February, 1988. The documentary evidence produced by the appellant is contradictory to this fact as it shows that the respondent was working during February, 1989 also. It has also been observed by the High Court that the muster roll for 1986-87 was not completely produced. The appellants have inexplicably failed to produce the complete records and muster rolls from 1985 to 1991, in spite of the direction issued by the Labour Court to produce the same. In fact there has been practically no challenge to the deposition of the respondent during cross-examination."

9. In the present case also the workmen are daily-wage earners. No letter was issued for their appointment or termination. Pay slips were also not issued to them. Employer has pleaded that opposite party no. 2 was engaged during different periods between 1984 and December 1987; opposite party no. 3 was engaged during different periods between 1985 and December, 1988; opposite party no. 4 was engaged during different periods between 1986 and September, 1989; opposite party no. 5 was engaged during different periods between 1988 and July, 1989; opposite party no. 6 was engaged during different periods between 1984 and September, 1989; and opposite party no. 7 was engaged during different periods between 1984 and September, 1989. However, employer has chosen to produce in court muster rolls for the periods from November, 1988 to April, 1989 only. Though it was pleaded that opposite party no. 2 was working till December 1987, it appears from Exts. 1 to 6 that Satrughan Nayak had continuously worked during the periods from 1.11.1988 to 30.4.1989. Therefore, on the face of it employer's assertion made in the written statement is contrary to the entries made in the muster rolls. As was in **Director, Fisheries Terminal Division –vrs. Bhikubhai Meghajibhai Chavda** *(supra),* the employer has inexplicably failed to produce the complete records and muster rolls. Though each of the workmen deposed

that he was working continuously through out the year, there was practically no challenge to such assertion in course of cross- examination. Not even any suggestion was made that they did not render continuous service. It is not disputed that workmen's services were terminated without complying with the provision under Section 25-F of the Act. Therefore, there is absolutely no scope to interfere with the finding of the learned Labour Court that termination of services of the workmen was not legal and justified.

10. While exercising supervisory jurisdiction, this Court is not to act as an appellate Court. This limitation necessarily means that finding of fact reached by the tribunal after appreciation of evidence cannot be reopened or questioned in the writ proceedings and only an error of law which is apparent on the face of the record can be corrected by a writ Court, but not an error of fact, however grave it may appear to be. The finding of fact recorded by the Tribunal can be interfered with by a writ Court only if the High Court is satisfied that the Labour Court had erroneously not considered or refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error or law which could be corrected by a writ of Certiorari as has been held by the Supreme Court in the Case of ***Syed Yakoob v. K.S. Radhakrishnan and others :*** AIR 1964 Supreme Court 477. In this connection decisions in ***Sri Saroj Kumar Mohapatra -vs.- Presiding Officer Labour Court, Jeypore and another*** : 2006 (Supp-II) OLR 740 and ***Mohammed Yusuf –vs.- Faij Mohammad and others*** : (2009) 3 SCC 513 may also be referred to.

11. On analysis of the impugned award keeping in view the facts and circumstances of the case, and the scope and ambit of power of the court to interfere with the finding of facts recorded by the Labour Court in exercise of writ jurisdiction, there appears no infirmity in the impugned award warranting interference.

Therefore, the writ application is dismissed.

Writ petition dismissed.

2010 (II) ILR – CUT- 991

B.K.PATEL, J.

CRLA. NO.367 OF 2004 (Decided on 3.9.2010)

GOVINDA CHANDRA PANIGRAHI ………….. Appellant.

.Vrs.

STATE OF ORISSA ………….. Respondent.

PREVENTION OF CORRUPTION ACT, 1988 (ACT NO. 49 OF 1988) – SEC.5(2) & SEC.5 (1) (d).

Mere recovery of money divorced from the circumstances under which it was paid is not sufficient to convict the accused when substantive evidence in the Case is not reliable.

In this case positive evidence adduced by the prosecution in Court does not support the allegation of demand of Rs.100/- made by the appellant from P.W.1 – Evidence of P.W.1 is prevaricating – P.W.2 supports the defence plea that loan of Rs.30/- was advanced by the appellant to P.W.1 – No other witness including P.W.6 deposed regarding demand of bribe made by the appellant – Held, there is no basis to sustain the conviction of the petitioner either U/s.161 of I.P.C. or U/s.5(2) read with Section 5(1) (d) of the P.C.Act.

(Para 8)

Case law Referred to:-

1.(2009) 42 OCR 34 : (Arakhita Nath -V- The State of Orissa)

For Appellant - M/s. Saswata Patnaik, L.Mishra, S.K.Singh, S.Das.

For Respondent – M/s. R.N.Biswal & S.K.Mohanty.

B.K.PATEL, J. This appeal is directed against the judgment and order dated 23.11.2004 passed by the learned Special Judge (Vigilance), Bhubaneswar in T.R.Case No.36 of 1991 convicting the appellant under Section 161 of the I.P.C. and Section 5(2) read with Section 5(1)(d) of the Prevention of Corruption Act, 1947 (for short 'the P.C.Act') and sentencing him to undergo R.I. for six months and to pay fine of Rs.1000/-, in default to undergo R.I. for one month, on each count.

2. The appellant was working as Medical Officer of Adaspur Primary Health Centre during the period of occurrence. On 21.4.1987 P.W.1 the informant-decoy had admitted his wife in the Health Centre and in the same night she delivered a child.

The prosecution case is that the appellant demanded bribe of Rs.200/- to relieve P.W.1's wife from the hosptal. As P.W.1 expressed inability to pay Rs.200/-, the appellant finally agreed to accept Rs.100/- from him. P.W.1 paid Rs.70/- and promised to pay Rs.30/- later on at the time of discharge. P.W.1 lodged written report Ext.1 on 23.4.1987 before Superintendent of Police (Vigilance), Cuttack Division, Cuttack stating therein that he was required to pay the balance bribe amount to the appellant on the following day. P.W.8 Inspector, Vigilance Cell Cuttack was directed to take up investigation. In course of investigation, P.W.8 laid a trap stated to have been prepared with the assistance and in presence of P.W.4 Executive Magistrate, P.W.5 another Inspector of Vigilance Cell, Cuttack and P.W.6 a Senior Assistant working in the Cuttack Collectorate. The appellant was caught red handed after accepting the tainted currency notes from P.W.1 towards illegal gratification as a motive for treatment and discharge of P.W.1's wife. The tainted notes recovered from the appellant were seized . Hand wash of the appellant sent for chemical examination to the State Forensic Laboratory was examined by P.W.3 Scientific Officer. On 29.8.1987 P.W.8 made over charge of investigation to P.W.9. On completion of investigation P.W.9 submitted charge-sheet for commission of offences under which the appellant stands convicted and accordingly charge was framed.

3. The appellant pleaded not guilty to the charge. He took the stand that cash of Rs.30/- recovered from him was received by him towards repayment of loan availed by P.W.1.

4. In order to substantiate the charge, prosecution examined nine witnesses and, also relied upon documents marked Exts.1 to 15 and material exhibits M.Os. 1 to VII. P.Ws.1, 3, 4, 5, 6, 8 and 9 have already been introduced. P.W.2 was working as a staff nurse in Adaspur Primary Health Centre and P.W.7 was examined to prove sanction for prosecution. No defence evidence was adduced.

5. It is evident from the defence plea that the appellant does not dispute recovery of tainted money from his possession. However, it was contended by the learned counsel for the appellant that there is no evidence on record to show that the appellant ever made any demand for money from P.W.1 as motive for treatment and discharge of his wife. Appellant's plea to have accepted Rs.30/- from P.W.1 towards refund of loan amount finds support from the evidence of P.W.2. Evidence of P.W.6, stated to have accompanied P.W.1 to overhear the conversation between the decoy and the appellant, also does not support the allegation that the appellant accepted the amount as bribe. The learned court below has arrived at the findings on the basis of surmises and conjectures. In support of his contentions learned counsel for

the appellant relied upon the decision of this Court in ***Arakhita Nath vs. The State of Orissa*** : (2009) 42 OCR 34.

In reply, it was argued by the learned counsel for the Vigilance Department that P.W.1 having substantially supported the allegations made against the appellant in course of his examination-in-chief, the learned court below rightly discarded his assertion made in course of cross-examination to the effect that he paid Rs.30/- to the appellant towards refund of loan amount.

6. Specific case of the prosecution is that the appellant demanded bribe of Rs.200/- from P.W.1 in connection with his wife's treatment in the Primary Health Centre. P.W.1 having expressed his inability to pay Rs.200/- the appellant agreed to accept Rs.100/-. P.W.1 paid Rs.70/- and promised to pay balance amount of Rs.30/- at the time of discharge. At the time of discharge appellant demanded and accepted Rs.30/- in the shape of the tainted currency notes.

7. Informant P.W.1 did not support the prosecution case during trial and, therefore, he was permitted to be cross-examined by the prosecution. P.W.1 vaguely alleged in the examination-in-chief that the appellant demanded Rs.200/- concerning expenses for delivery. He was altogether silent regarding demand of Rs.100/- and part payment of Rs.70/-. In course of cross-examination by prosecution P.W.1 disowned the allegations made in the F.I.R. in that connection. He denied that P.W.6 was deputed by the investigating officer to overhear conversation between him and the appellant. In course of cross-examination by defence, P.W.1 suarely supported the defence plea. He deposed that he purchased medicine by taking Rs.30/- from the appellant as he had no money to pay for the cost of medicine amounting to Rs.26/-. P.W.2 was present when he took money from the appellant. He categorically testified that money which was detected in course of trap was the money which he had returned to the appellant and that the appellant never demanded any money for his wife's delivery till date of her discharge. P.W.2 the staff nurse deposed in her cross-examination that the appellant had given a prescription to P.W.1 to purchase medicines. As P.W.1 had no money he requested the appellant for money on loan basis. As per the request the appellant brought Rs.30/- from his house and gave to P.W.1. P.W.6, who was deputed by the Investigating Officer to overhear the conversation between the appellant and P.W.1, simply deposed to have seen P.W.1 handing over money to the appellant after discharging P.W.1's wife.

8. Thus, positive evidence adduced by the prosecution in court does not support the allegation of demand of Rs.100/- made by the appellant from P.W.1. Evidence of P.W.1 is prevaricating. Evidence of P.W.2 supports the defence plea that loan of Rs.30/- was advanced by the appellant to P.W.1.

No other witness including P.W.6 deposed regarding demand of bribe made by the appellant. As has been observed by this Court in ***Arakhita Nath vs. The State of Orissa (supra)*** mere recovery of money divorced from the circumstances under which it was paid is not sufficient to convict the accused when substantive evidence in the case is not reliable. In absence of proof of demand, there is no basis to sustain the conviction of the petitioner either under section 161 of the I.P.C. or under section 5(2) read with section 5(1)(d) of the P.C.Act.

9. In the result, the appeal is allowed. The impugned judgment and order are set aside.

Appeal allowed.

2010 (II) ILR – CUT- 995

B.K.NAYAK, J.

CRL. MC. NO.1944 OF 2010 (Decided on 05.08.2010).

PRADYUMNA KUMAR ACHARYA …….. Petitioner.

.Vrs.

STATE OF ORISSA ………. Opp.Party.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.457 r/w Sec.66(2) of Bihar and Orissa Excise Act, 1915.

Petitioner is the registered owner of the Mini Truck – Vehicle seized as it was involved in transportation of Mahua flower without any authority – Admittedly petitioner has not been implicated as an accused in the police case and as such the vehicle is not liable for confiscation U/s.66(2) of the Act.

Held, direction issued for release of the Mini Truck in favour of the petitioner with certain conditions.

Case laws Referred to:-

1.(2003) 24 OCR (SC) 444 : (Sunderbhai Ambala Desai -V- State of Gujarat).
2.(2003)25 OCR 840 : (Soubhagya Kumar Panda -V- State of Orissa).
3.2004 (II) OLR 556 : (Nabakishore Sahoo -V- State of Orissa).

For Petitioner - H.S. Mishra, A. K. Mishra, A.S.Behera T.K.Sahoo

---

Heard learned counsel for the petitioner and learned Standing Counsel for the State. Perused the impugned orders.

The petitioner has been aggrieved by the order dated 17.5.2010 passed by learned S.D.J.M., Deogarh in C.M.C. No.30 of 2010 (arising out of C. T. Case No.247 of 2010) rejecting the petitioner's application under Section 457, Cr.P.C. for interim release of his Mini Truck bearing Registration No.OR-15-G-7255 which order has been confirmed by the learned Additional Sessions Judge, Deogarh in Criminal Revision No.5 of 2010.

The Mini Truck in question was seized by the police in Reamal P.S.Case No.60 of 2010 for alleged involvement in transportation of Mahua flower without any authority or license which is an offence under Bihar & Orissa Excise Act. The petitioner, who is undisputedly the registered owner of the Mini Truck in question filed application under Section 457, Cr.P.C. for release of the said truck, which has been rejected mainly on the ground that since investigation is going on it would not be proper to release the vehicle

and that the petitioner may move the Collector and District Magistrate who has the power to make confiscation of the vehicle in terms of Sections 66 and 67 of the Bihar and Orissa Excise Act,1915. The petitioner challenged the said order in Criminal Revision No.5 of 2010 which has been dismissed by the learned Additional Sessions Judge, Deogarh on similar grounds and further holding that the revision was not maintainable.

The learned counsel for the petitioner submits that since the petitioner, who is the registered owner of the vehicle in question, is not an accused in the aforesaid P.S.Case, it is not liable for confiscation by the Collector and District Magistrate and, therefore, the learned S.D.J.M., should not have rejected the petition, in view of the ratio laid down by the Apex Court in the case of **Sunderbhai Ambala Desai v. State of Gujarat;** (2003) 24 OCR (SC) 444**.** He further submits that the value and utility of the vehicle is deteriorating day by day as the vehicle is lying exposed to sun and rain.

The learned Standing Counsel fairly submits that the petitioner is not an accused in the aforesaid P.S.Case.

Under Sub-section (1) of Section 66 of the Bihar and Orissa Excise Act (hereinafter referred to as 'the Act') whenever any offence under the Act has been committed the excisable articles, the materials, still, utensil, implement and apparatus by means of which the offence has been committed shall be liable to confiscation. Sub section (2) of Section 66 makes the animals, carts, vessels, rafts or other conveyances used in carrying the excisable article etc. also liable to confiscation. However, the proviso appended under Sub-section (2) makes an exception stating that animal, cart or conveyance shall not be liable to confiscation unless the owner thereof has been implicated in the commission of offence.

In the instant case, since the petitioner, who is undisputedly the registered owner of the Mini Truck in question, has admittedly not been implicated as an accused in the police case the Mini Truck is not liable for confiscation under Section 66 (2) of the Act. Therefore, neither, the S.D.J.M., Deogarh nor the Additional Sessions Judge, Deogarh was justified in refusing to pass order for release of the Mini Truck in question.

The aforesaid view of mine also gets support from the decision of this Court in the case of **Soubhagya Kumar Panda v. State of Orissa** reported in (2003) 25 OCR 840 where it was observed that petition under Section 457, Cr.P.C. is maintainable before the Magistrate sitting on trial of the case, if the owner of the vehicle in question is not implicated in the offences alleged.

In the case of **Sunderbhai** (supra) the Hon'ble Apex Court while dealing with the petition under Section 457, Cr.P.C. observed thus :

> "In our view, whatever be the situation, it is of no use to keep such seized vehicles at the police stations for a long period. It is for

> the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for return of the said vehicles, if required at any point of time. This can be done pending hearing of applications for return of such vehicles."

Relying upon the ratio laid down in the case of **Sunderbhai** (supra), this Court in the case of **Nabakishore Sahoo v. State of Orissa**: 2004 (II) OLR 556 has passed order for release of the vehicle in a case involving offence under Section 47 (a) of the Act where even the owner of the vehicle was implicated as an accused in the commission of offence.

Keeping in view the principles laid down in the cases of **Sunderbhai** and **Soubhagya** (supra) and having regard to the undisputed fact that the petitioner is not implicated for the commission of the offence under the Act, I direct that the Mini Truck in question shall be released in favour of the petitioner subject to fulfilling the following conditions (1) the petitioner shall furnish property security worth Rs.1,60,000/- (2) Three photographs of the Mini Truck taken from different angles of the vehicle shall be obtained and kept on record (3) the petitioner shall furnish undertaking to the effect that he shall not change the nature and character of the Mini Truck and shall not tamper with its chasis and engine number and shall produce the same as and when called upon by the court.

The CRLMC is accordingly allowed.

Application allowed.

2010 (II) ILR – CUT- 998

S.K.MISHRA, J.

W.P.(C) NO.4799 OF 2010 (Decided on 24.9.2010)

MANORAMA MOHANTA .... Petitioner.

.Vrs.

ORISSA STATE FINANCIAL CORPORATION & ORS. .... Opp.Parties.

(A) LIMITATION ACT, 1963 (ACT NO.36 OF 1963) – SEC.5.

Application under Order 9 Rule 9 C.P.C. – If the application itself reveals the ground on which the petitioner was prevented from filing application in time, the Court can take cognizance of the said fact and condone the delay.

Procedure is the handmade of the substantial justice – The Courts exist for doing substantive justice and not to hide behind technicalities.

Held, this Court comes to the conclusion that in this case even in the absence of a separate application for condonation of delay, the same had to be condoned. (Para 6,7)

(B) CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 14, RULE 1.

Suit posted for filing of draft issues – Suit dismissed for non prosecution – Application under order 9 Rule 9 C.P.C. filed – Application dismissed – Order confirmed in appeal – Hence the writ petition.

A suit should not be posted for filing of draft issues - There is no provision in the code for posting of a case for filing of draft issues – Held, such a practice is not proper. (Para 5).

For Petitioner - M/s. P.K.Nanda, B.R.Pati, G.N.Rana & Lala B.M.Chand.
For Opp.Parties - M/s. P.K.Routray, N.K.Deo, B.G.Mishra & A.Routray (for Opp.Parties 1 and 2).

S.K.MISHRA, J. The petitioner assails the order passed by the Additional District Judge, Baripada in F.A.O. No. 54/20 of 2009 confirming the order of dismissal passed by the learned Civil Judge (Senior Division), Baripada in C.M.A. No.7 of 2007.

2. The undisputed facts leading to file this writ petition are as follows:

The present petitioner has filed a Civil Suit bearing No. 73 of 2004 in the court of the Civil Judge (Senior Division), Baripada with a prayer of perpetual injunction. The suit was posted to 24.10.2006 for filing of draft issues. On that day owing to the absence of the plaintiff due to his illness, the suit was dismissed for non-prosecution. The plaintiff-petitioner submits that on 18.01.2007 he filed an application for restoration of the suit. The opposite party no.3 appeared but did not file any written counter to the petition. The petitioner examined himself as P.W. 1. None was examined on behalf of the opposite party. However, the learned Civil Judge (Senior Division) dismissed his application for restoration of the suit under Order IX, Rule 9 of the Code of Civil Procedure, 1908, hereinafter called as "the Code", for brevity, mainly on the ground of non-examination of the Doctor, who treated the petitioner for the ailment.

3. Thereafter, the petitioner filed an appeal under Order XLIII, Rule 1 of the Code before the learned District Judge, which was transferred to the court of Addl. District Judge, Baripada. While considering the appeal, the learned Addl. District Judge has dismissed the appeal mainly on the ground that the petition for restoration was filed after a considerable delay and no petition for condonation of delay was filed. Such orders passed by the learned Civil Judge (Senior Division) and the learned Addl. District Judge are called in question in this writ application.

4. In course of hearing, learned counsel for the petitioner submits that unless the petitioner's suit is restored to file, he will suffer irreparable loss. It is further contended that his absence in the court on the date of posting was unintentional and he was prevented by sufficient cause i.e. the illness, as has been proved by him. It is further contended that the case was not posted for hearing on that date. Hence, the learned Civil Judge (Senior Division) should not have dismissed the suit. Learned counsel for the opposite parties, on the other hand, contended that the orders passed by the learned trial and appellate court are correct, which require no interference.

5. At this stage, it is undisputed that the suit was posted for filing of draft issues on 24.10.2006. A suit should not be posted for filing of draft issues, rather a suit, after the pleadings are complete, should be posted for hearing under Order X, Rule 1 of the Code for ascertaining whether the allegations made in the pleadings are admitted or denied and for settlement of issues. There is no provision in the Code for posting of case for filing of the draft

issues. Such a practice is not proper. Nevertheless, if the suit is posted for filing of draft issues, it cannot be held to be posted for hearing. Rule 8 of Order IX of the Code provides that when the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit would be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against such defendant upon such admission, and, where part of the claim has been admitted, in such case, the court shall dismiss the suit as far as it relates to the reminder. A plain reading of this provision makes it abundantly clear that a suit should be dismissed under Rule 8 of Order IX of the Code, only when the suit is posted for hearing and not for other purpose. The court can dismiss the suit for other purpose like, non-taking of steps against the defendants or failure to pay cost or where neither party appears as provided in Rule 2 and Rule 3 of Order IX of the Code. This case also does not come under Rule 2 or 3 of Order IX of the Code and hence, the learned Civil Judge (Senior Division) should not have dismissed the suit on the date it was posted for filing of draft issues.

6. The residual question which remains to be determined is whether, in this case, there is delay and, if so, what should be the consequence of the petitioner not filing of application under Section 5 of the Limitation Act, 1963. This Court feels it apposite to quote the provision which reads as follows :

> *"5.* ***Extension of prescribed period of certain cases****.- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure,1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."*

A reading of the provision shows that the statute does not require that a separate petition under Section 5 of the Limitation Act should be filed. It is necessary for satisfaction of the court that the applicant was prevented by sufficient cause in preferring the application in the time prescribed. In a case of this nature, where the petition under Order IX, Rule 9 of the Code itself reveals the ground on which the petitioner was prevented from filing the application in time, the Court can take cognizance of the said fact and condone the delay. It must be remembered that the provisions like Order IX, Rule 9 of the Code and Section 5 of the Limitation Act are benevolent provisions aimed at for providing appropriate relieves to the litigant, who are prevented by sufficient cause in coming to the court in time. Procedure is the handmaid of the substantial justice. The courts exist for doing substantive justice and not to hide behind technicalities. So, the learned

Addl. District Judge should have taken a boarder conspectus of the view and should have allowed the appeal.

7. It is pertinent to note that the opposite party has not taken the plea that the petition for restoration has been filed after the period of limitation. The learned Civil Judge (Senior Division) has also not considered this aspect. There is no material to show that this aspect was pointed out in the office check conducted by the Chief Ministerial office. Hence, this Court comes to the conclusion that in this case even in the absence of a separate application for condonation of delay, the same had to be condoned. The delay in filing the restoration application, is therefore, condoned.

8. It is not disputed by the opposite parties that the petitioner was ill during the period from 20.10.2006 to 17.1.2007 as he was suffering from Rheumatic Arthritics. The averment made by the petitioner goes uncontroversial. The petitioner has examined himself as a witness and has proved the medical certificate issued by the doctor. In such view of the matter, it is not necessary to examine the doctor especially when the medical certificate has been marked as exhibit without any objection. The opposite parties have also not raised any objection at the time of proving of the said Medical Certificate.

9. In view of the aforesaid facts, this Court is inclined to quash the order passed by the learned Civil Judge (Senior Division) on 04.04.2009 in C.M.A. No.7 of 2007 (Annexure-1) and the order passed by the learned Addl. District Judge in F.A.O. No.54/20 of 2003 on 11.01.2010. It is further ordered that the application under Order IX, Rule 9 of the Code filed by the petitioner is allowed, subject to payment of cost of Rs.200/- (Rupees two hundred) to be paid on or before 30.11.2010 to the opposite parties-Corporation in the trial court. The writ petition is accordingly disposed of.

10. Civil Suit No. 73 of 2004 of the court of Civil Judge, (Senior Division), Baripada be restored to file. The parties are directed to appear before the learned Civil Judge (Senior Division), Baripada on 30.11.2010.

Writ petition disposed of.

2010 (II) ILR – CUT- 1002

C.R.DASH, J.

CRL. REVN. NO.500 OF 2004 (Decided on 30.09.2010)

BINAYA KUMAR JENA …………. Petitioner.

.Vrs.

STATE OF ORISSA …………. Opp.Party.

PENAL CODE, 1860 (ACT NO.45 OF1860) – SEC.376.

Rape – Testimony of the victim – Allegation of complete sexual intercourse by the petitioner – Victim though armed with a sickle, did not use the same against the petitioner when he ravished her – P.W.3 is the immediate post occurrence witness who did not corroborate the evidence of the victim – Although the victim was medically examined immediately after the occurrence doctor found there was no tenderness, blood stain or seminal stain on the genital of the victim.

Held, learned Courts below failed to address "probability factors" in the prosecution evidence – Judgments impugned are held to be perverse and vulnerable – Conviction and sentence are set aside.

(Para 10 to 14)

Case law Referred to:-

AIR 1983 SC 753 : (Bharwada Bhoginbhai Hirjibhai -V-State of Gujurat).

For Petitioner - Mr.A.K.Nayak, Advocate
For Opp.Party - Addl. Standing Counsel

---

1. This revision arises out of appellate judgment passed by learned Additional Session Judge, Cuttack in Criminal Appeal No. 8 of 1998 confirming the conviction of the petitioner under Section 376, I.P.C. and consequent sentence recorded there under sentencing him to suffer R.I. for 5 years and to pay a fine of Rs.2,000/- (two thousand), in default to suffer further R.I. for six months.

2. Both petitioner and the victim P.W.8 are residents of village Jaymangal under Narginghpur Police Station. The victim (P.W.8) is a married lady. The occurrence happened at 7.00 a.m. on 23.09.1996. The victim (P.W.8) before the aforesaid time of occurrence went to weed the sugarcane field. She was alone there engaged in so weeding the sugarcane field. The present petitioner came there. He forcibly caught hold of the

victim, pressed her neck, pinned her down on the ground and committed rape on her. The victim (P.W.8) shouted. One Sebati Dei @ Nayak (P.W.3), an old lady was engaged in harvesting 'sesame' ('rasi') crop in a nearby field. She came near the spot and questioned the present petitioner as to what he is doing. The petitioner fled away leaving the victim there. The victim narrated the incident before Sebati Dei (P.W.3). Her husband (P.W.2), husband's elder brother (P.W.6), husband's cousin brother (not examined) along with one Gaja Panda (not examined) also rushed to the spot hearing the victim's shout/cry and they brought her (victim) to Narsinghpur Police Station. At the P.S. victim's husband (P.W.2) got the report scribed by one Anju Behera (not examined) and lodged the F.I.R. P.W.9 took up the investigation. In course of the investigation he got the victim examined medically on the same day by the Medical Officer (P.W.1), examined the witnesses, made the incriminating seizures and after substantial progress in the investigation, handed over charge of investigation to P.W.5, who only submitted the charge-sheet.

3. Prosecution examined nine witnesses to bring home the guilt to the petitioner.

The defence plea is one of complete denial and false implication owing to continuous litigations between the petitioner and his cousin brothers Nidhi, Sada and Bhagi, who have used the victim (P.W.8) to falsely implicate him. The petitioner has examined himself as D.W.1.

4. Learned trial court returned the finding of guilt against the petitioner on the basis of evidence of the victim (P.W.8) and the corroborative evidence of P.Ws.2, 3 and 1. In the appeal preferred by the petitioner the contradictions in the evidence of the prosecution witnesses was pressed in impugning the trial court's judgment. Learned appellate court however, eschewed the contentions raised by the petitioner there and dismissed the appeal.

5. Learned counsel for the petitioner, with all the vehemence at his command, submits that the findings arrived at by both the courts below is perverse, inasmuch as learned courts below have reached their conclusion regarding guilt of the petitioner on the basis of evidence at its face value and not on the bssis of the proper appreciation of such evidence.

Learned Addl. Govt. Advocate for the State on the other hand supports the impugned judgments.

6. Admittedly, for arriving at the conclusion regarding guilt of the petitioner, learned courts below have solely relied on the evidence of P.W.8

(victim) and the so called corroborative evidence of P.W.3 (Sebati Dei). Admittedly the victim (P.W.8) is a married lady. It is well settled in law that corroboration is not a sine-qua-non for a conviction in rape case. But, in the case of **Bharwada Bhoginbhai Hirjibhai *vrs.* State of Gujarat,** AIR 1983 SC 753, the Hon'ble Supreme Court held thus –

> "……..if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities father' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having leveled such an accusation on account of the instinct of self preservation. Or when the 'probabilities factor' is found to be out of tune."

7. For better appreciation, relevant portion of the evidence of the victim (P.W.8) is extracted below.

> "……… I left the sugarcane field for my home. On my way to home the accused embraced me from my back, squeezed my breast, made me lie on the ground and committed rape ('Atyachara'). I resisted the acts of the accused. I sustained injuries on my right hand, tongue, breast, left cheek. On my shout as the wife of Gouranga Nayak came and shouted 'KIAE, KIAERE PILE, KAN KARUCHHA' the accused got up from me, after which I caught hold of the wife of Gourang Nayak, who nursed me and cleaned my oozing blood. On her question I told the incident to her. On my cry, my husband, my elder brother-in-law and Maharaga ('Dewar') came near me and asked me about the incident, before whom I narrated the incident. Then I was taken to Narsinghpur P.S., from where I was sent to Narsinghpur Hospital for medical examination…"

In her cross-examination, P.W.8 has testified that she was holding a sickle at the time of sexual intercourse and she did not assault the accused by that sickle.

8. P.W.3 is the immediate post-occurrence witness. She in her evidence has testified that she was going to the stream to take bath; on her way to the stream at the spot hearing shout she went near the spot and questioned as to what is being done; the victim lady came and embraced her. On her question to the victim, she replied that accused Binay

committed “Kharap Kam” on her; the victim lady told her that the accused committed sexual offence on her on the sugarcane field. She has further testified that the husband and elder brother-in-law of the victim reached near the victim at that time and she (P.W.3) went away when all of them were there. In her cross-examination she (P.W.3) has testified that she did not hear the shout of Laxmi, the victim. P.W.6, who is the elder brother-in-law of the victim, turned hostile. He is testified to have reached the spot on hearing the shout of his younger brother (P.W.2), who is the husband of the victim.

9. P.W.2, who is the husband of the victim, has testified about the entire occurrence in a parrot-like manner, which he had not even seen; but from his cross-examination it is found that he ran to the spot, as everyone ran towards the spot. He has further testified that when he reached, Sebati (P.W.3) was on her ‘sesame’ field.

10. From the aforesaid evidence it is clear that none of the witnesses, i.e., P.W.3 or P.W.2 or P.W.6 came to the spot on being attracted by the shout/cry of the victim. The victim (P.W.8) though was armed with a sickle, did not use the same against the petitioner when he ravished her. When she (P.W.8) has specifically testified that she resisted the acts of the accused, it is expected as a normal human conduct from her that she would have used the sickle against the accused as during intercourse she was holding the same. P.W.3, who has been examined as immediate post-occurrence witness, did not see the petitioner at the spot though she saw him later on near the stream. P.W.2 in his cross-examination has testified that by the time he reached at the spot, the accused had already left. Contradicting him P.W.6 though turned hostile, has testified that he rushed near his brother on hearing his shout, but on their sight the accused went away. If evidence of P.W.8 is taken into consideration, P.W.3 happened to pass across the spot when the petitioner was ravishing the victim and, P.W.3 on being attracted by the shout of the victim intervened and shouted “KIAE, KIAERE PILE, KANA KARUCHHA’. On intervention of P.W.3, the petitioner got up, after which the victim embraced P.W.3, who nursed her and cleaned her oozing blood. But P.W.3 having not seen the petitioner at the spot and she having testified that she did not hear the shout of the victim, evidence of P.W.8 cannot be said to have been corroborated by P.W.3. Evidence of P.W.2 and P.W.6 cannot be held to have corroborated the evidence of P.W.8 in material particular on the point of the actual transaction, though what P.W.2 heard from the victim (P.W.8) is a piece of corroboration under Section 11 of the Evidence Act. But in view of evidence of P.W.3, such evidence of P.W.2, which assumes relevance under Section 11 of the Evidence Act loses all its

value. There is further materials to show that P.Ws. 8, 3 and 2 are not consistent about the spot.

11. The Medical Officer (P.W.1) has found some injuries on the person of the victim. Those injuries, if evidence of P.W.2 and the victim (P.W.8) are taken into consideration, might have been caused while working in the sugarcane field, inasmuch as P.W.2 has specifically testified that while uprooting grass from the sugarcane field usually a shirt is put on for protection from scratch and his wife also took a shirt to the sugarcane field. The Medical Officer has further testified that injury no.3, which is a laceration of ½" x linear just below the tongue can also be possible by eating hard substance like betel-nut or sugarcane. In view of such evidence it can be held that the victim (P.W.8) might have eaten sugarcane, as she was working in the sugarcane field and might have sustained such injuries and such injuries cannot be held to be the injury sustained only during the commission of the alleged offence. The victim in her evidence has specifically testified that she got ejaculation from her vagina three to four times at the time of intercourse by the accused and after committing sexual intercourse the accused slept over her. Such fact shows that there was completed sexual intercourse by the petitioner and immediately on the same day the victim has been examined medically, as she proceeded straight to the P.S. from the spot and from the P.S. she was sent for medical examination. But the Medical Officer (P.W.1) has found that there was no tenderness blood stain or seminal stain on the genital of the victim.

12. If the evidence of P.Ws.8, 3, 2, 6 and 1, as discussed supra, is considered in their entirety in proper perspective, the conclusion would be irresistible that either the petitioner has been falsely implicated or the victim being influenced by the instinct of her self-preservation has leveled the allegation on being sighted by P.W.3 being engaged with the petitioner in sexual act. P.W.8 is not at all corroborated by P.Ws.3, 2 or 6 in material particulars. Though there is some corroboration from the medical evidence on the point of injuries sustained by the victim, the defence has successfully brought out the alternative cause that might have been responsible for such injuries sustained by the victim. So far as the sexual act is concerned, there is also no corroboration of the evidence of P.W.8 even from the Medical Officer (P.W.1).

13. Learned courts below having not at all addressed the "probability factors" in the prosecution evidence, which render the same unworthy of credence and having not appreciated the evidence properly, the judgments

impugned are held to be perverse and vulnerable under revisional jurisdiction.

14. In view of the above, the conviction of the appellant under Section 376, I.P.C. and consequent sentence recorded thereunder are set aside. As the petitioner is stated to be on bail, he be discharged of the bail bond.

The Criminal Revision is accordingly allowed.

Revision allowed.